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

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INTRODUCTION

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

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

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


2. See Peter W. Salsich, Jr., Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome, 21 REAL PROP. PROB. & TR. J. 413, 416 (1986) (explaining that goal of deinstitutionalization is "to shift the focus of treatment" to
policy has been to provide care and treatment in the community for people with mental disabilities. President Kennedy declared in 1963 that “[w]e must act . . . to retain in and return to the community the mentally ill and mentally retarded [in order] to restore and revitalize their lives.”

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

This Article explores our nation’s tradition of housing discrimination against people with mental disabilities and the strategies used to overcome such discrimination. Part I briefly reviews the history of access to housing by people with mental disabilities. Part II discusses the legislative antecedents to the Fair Housing Amendments Act of
1988 (FHAA), including Executive Order 11,063, the Fair Housing Act of 1968, the Civil Rights Act of 1866, and section 504 of the Rehabilitation Act of 1974. Part III discusses the FHAA, which represents the boldest action by the Federal Government to prohibit discrimination against people with disabilities. The FHAA marks the first federal initiative to explicitly prohibit discrimination, in private as well as public housing, against people with disabilities, including people labeled mentally ill or people with developmental disabilities.

Part III compares the FHAA with section 504 of the Rehabilitation Act, which also prohibits discrimination in housing, but only by programs receiving federal financial assistance.

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

I. A Brief History of Housing for People with Mental Disabilities

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

For people with mental illness, mental retardation, or developmental disabilities, the choice of housing has been severely limited, often regardless of the individual's financial resources. In many states,
people with mental disabilities have been, and continue to be, restricted to the least attractive parts of a community—to neighborhoods where housing is relatively inexpensive and often unsafe.\(^{14}\)

People with mental disabilities have a history of inadequate housing. Until the middle part of this century, they were often locked away in large facilities in remote areas.\(^{15}\) Since the 1960s, this nation has increasingly accepted the notion that training, treatment, and habilitation of people with mental disabilities is generally more effective when provided in small, community-based programs rather than in large, isolated institutions. For example, in 1961 the Joint Commission on Mental Illness and Health\(^ {16}\) recommended that action be taken to both improve conditions in state hospitals\(^ {17}\) and develop community alternatives to state hospitals.\(^ {18}\) Furthermore, Congress, courts, and states called for deinstitutionalization and the development of community programs for people with mental illness and developmental disabilities.\(^ {19}\) As a result, the number of people with mental disabilities in institutions has dwindled during the past two decades.\(^ {20}\)

But the community mental health and deinstitutionalization movements of the 1960s and 1970s\(^ {21}\) have not yet realized their potential. Although most people labeled mentally disabled may no

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

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

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

\(^{17}\) JOINT COMM'N ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH xvi (1961).

\(^{18}\) Id. at xiv.

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

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

\(^{21}\) See Rhoden, supra note 5, at 402 (highlighting increase in “pace of deinstitutionalization” in 1960s and 1970s); Leslie H. Powers, Note, Less Equal than Others: Persons with Mental Retardation, Equal Protection and Deinstitutionalization, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 81, 83 (1989) (noting that “1960’s and 1970’s brought a renewed interest in the fate of the mentally retarded population”).
longer be subjected to the egregious mistreatment and abuse that characterized earlier decades, they still suffer from stigmatization and discrimination.\textsuperscript{22} They are viewed as unwelcome intruders in most communities, as evidenced by the large number of court cases brought to keep group homes for people with mental disabilities out of single-family neighborhoods.\textsuperscript{23}

Certainly, the civil rights revolution of the 1960s had a marked effect on the rights of people with disabilities in general\textsuperscript{24} and people with mental disabilities in particular.\textsuperscript{25} A national policy of deinstitutionalization has allowed many individuals to leave state mental hospitals and training centers.\textsuperscript{26} Yet, despite years of this national policy, people with mental disabilities have not been truly integrated into our communities.\textsuperscript{27}

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

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

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

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

\textsuperscript{25} See Margulies, supra note 15, at 361.

\textsuperscript{26} See supra note 20.

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


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

The Federal Government eventually made some efforts to provide leadership and the resources needed to integrate people with mental disabilities into residential neighborhoods. Congress attempted to create an alternative to institutionalization, for example, by amending the Medicaid program to reimburse states for certain home- or community-based services for people with mental disabilities. Federal agencies also have begun to fund demonstration projects to promote successful models for housing for people with special needs. Further, twenty years after the passage of the first Fair Housing Act, Congress finally passed the Fair Housing Amendments Act of 1988 to prohibit housing discrimination against people with disabilities.

A second explanation for the continued segregation of people with mental disabilities is the complacency, and even complicity, of state and local governments in regard to discrimination against people with mental disabilities. Most state and local governments have failed to
fund innovative quality housing adequately and have succumbed to the prejudices and fears of potential neighbors by enacting and enforcing exclusionary zoning ordinances and restrictive covenants.

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

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

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

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

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

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


42. See Crowley v. Knapp, 288 N.W.2d 815, 821 (Wis. 1980) (explaining that purpose of group home for "retarded citizens") is to provide "residential living environment").
"community living arrangements," and "community care facilities." Noticeably absent in these varied descriptions is the simple word "home."

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

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

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

On September 12, 1988, Congress passed the Fair Housing Amendments Act of 1988, which amended the Fair Housing Act of 1968 to prohibit discrimination against people with disabilities in public as well as private housing. The FHAA represents the
Federal Government's most important step forward in removing barriers faced by people with disabilities in their effort to live as equal members of society. Prior to its enactment, no federal law specifically prohibited discrimination against people with disabilities in private and public housing. Before discussing the FHAA, however, it is important to understand the historical context in which it arose. The following section therefore reviews the federal antidiscrimination laws that preceded the enactment of the FHAA.

A. Executive Order 11,063

The first major federal initiative prohibiting housing discrimination was Executive Order 11,063, which President Kennedy signed in 1962. This Executive order prohibited discrimination in federally operated or assisted housing on the basis of race with respect to the sale, lease, rental, or other disposition of residential property and related facilities owned, operated, or financially assisted by the Federal Government. Noticeably absent from the protection of the Executive order were people with disabilities.

The Attorney General was authorized to bring civil or criminal actions to remedy violations of rules, regulations, and procedures issued pursuant to the Executive order upon the recommendation of an executive department or federal agency. The scope of the order, however, was extremely limited. It covered less than one percent of the nation's housing because most housing was financed by private lending institutions that were not covered by the Executive order. In 1968, two events dramatically affected the prohibition against discrimination in housing: the passage of the Fair Housing Act of 1968 and the Supreme Court's decision in Jones v. Alfred H. Mayer Co., which held that § 1982 of the Civil Rights Act of 1866

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50. Cf. infra Part II.A-D (discussing federal attempts before FHAA to prevent housing discrimination against people with disabilities).
52. Id.
56. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 23 (1983) (noting that "order had no application to housing that was conventionally financed"); Robert F. Drinan, Untying the White Noose, 94 Yale L.J. 435, 437 (1984) (book review) (describing Executive Order 11,063 as "pathetically weak" because it covered few housing units).
protected racial minorities from discrimination in private as well as public housing. 59


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

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

61. See Pub. L. No. 90-284, § 810, 82 Stat. 73, 85 (1968) (repealed 1988) (creating procedure by which Secretary of Housing and Urban Development was to consider claims of housing discrimination, including mandatory deferral to state and local agencies that provide "substantially equivalent" rights and remedies).
66. Id. §§ 3604-3606.
67. Id. § 3603(a)(1)(B)-(D).
68. Id. § 3603(a)(1)(A), (D).
69. Id. § 3605.
70. Id. § 3604(c).
71. Id. § 3604(c).
Fair Housing Act also prohibited practices such as "blockbusting," the practice of convincing owners to sell property on the grounds that minorities are about to move into the neighborhood, and "steering," the practice of directing prospective home buyers into neighborhoods in which members of their racial, ethnic, or religious group already live.

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

72. *Id.* § 3604(e); see United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 117 (5th Cir. 1973) (describing § 3604(e) as "anti-blockbusting provision of the Fair Housing Act").
74. One could argue that the Act was, and continues to be, too selective in its coverage. The Act, which fails to protect low-income people in general, fails to benefit a large number of people in need of "fair housing" protection because they are homeless or forced to live in substandard housing. According to the Department of Housing and Urban Development's (HUD) own figures, one in five poor people are forced to live in substandard housing. E.J. Dionne, Jr., *Poor Paying More for Their Shelter*, N.Y. Times, Apr. 18, 1989, at A18. Yet, the Supreme Court has held that the Constitution does not create a right to housing, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), and that discrimination against poor people does not violate the Equal Protection Clause, *Maher v. Roe*, 432 U.S. 464, 471 (1977).
75. See Robert G. Schwemm, *The Limits of Litigation Under the Fair Housing Act of 1968*, in THE FAIR HOUSING ACT AFTER TWENTY YEARS, supra note 28, at 45, 44 (describing "Dirksen Compromise," which eliminated ability of HUD to issue cease and desist orders and "result[ed] in an agency procedure that provides for absolutely no sanctions against a recalcitrant defendant").
78. *Id.* (requiring "informal methods" of dispute resolution).
79. See Schwemm, supra note 75, at 44-45. In the original bill that later became the Fair Housing Act, HUD had the power to order property owners to "cease and desist" discriminatory practices. *Id.* This power was eliminated in the final version of the Act in an effort to garner more support for the Act's passage. *Id.*
had suffered discrimination. Although the Department of Justice was authorized to bring suits against offending landowners, its hands were tied as well. Under the original law, the Department of Justice could bring suit only to remedy an established pattern or practice of discrimination.

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

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

81. Id. Under the original Fair Housing Act, plaintiffs could bring suits for equitable relief or damages. Id. § 810(d), 82 Stat. at 86. Overall administration of the Act, however, was and remains the responsibility of HUD, which has authority to investigate and conciliate complaints of housing discrimination. 42 U.S.C. §§ 3608a, 3608c (1988). Both the original Act and current law authorize the Attorney General to litigate on behalf of private persons where there is an established pattern or practice of housing discrimination and to obtain actual and punitive damages and injunctive relief. 42 U.S.C. § 3614(b) (1988).
82. See Kushner, supra note 28, at 48-52.
84. See Kushner, supra note 28, at 48 (stating that “[c]ritiques of the federal fair housing enforcement effort invariably focus on the incredibly low numbers of cases and complaints handled” by HUD and Department of Justice); Schwemm, supra note 75, at 44 (criticizing Fair Housing Act for restricting HUD’s enforcement powers).
86. See Schwemm, supra note 75, at 46 (arguing that punitive damages cap “serves to protect the most egregious violators from feeling the full force of an appropriate judgment”).
87. See Schwemm, supra note 75, at 45-47 (discussing “serious drawbacks” of reliance on private enforcement including lack of citizen knowledge about rights protected by Fair Housing Act and lack of economic incentive to pursue private litigation). See generally ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION 1-1 to 26-30 (1993) (discussing litigation under Fair Housing Act). A further limitation in the original version of the law provided that “aggrieved persons” who decided to bring suit themselves were denied court costs and attorneys fees unless a court concluded that the petitioner was financially unable to assume payment of the attorneys fees. Fair Housing Act of 1968, Pub. L. No. 90-284, § 812(c), 82 Stat. 73, 88 (repealed 1988).
89. Id. § 3607(a).
religious groups, and owner-occupied rental housing containing four or fewer units. These exemptions remain in effect under the amended Act.

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

C. Section 1982 of the Civil Rights Act of 1866

Section 1982 of the Civil Rights Act of 1866 provides that "[a]ll citizens of the United States shall have the same right in every state and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." In 1968, just two months after Congress enacted the original Fair Housing Act, the Supreme Court held in Jones v. Alfred H. Mayer Co. that racial discrimination in real estate transactions violated the Civil Rights Act of 1866.

The Court in Mayer distinguished § 1982 from the Fair Housing Act of 1968. Unlike the Fair Housing Act, § 1982 creates a private
right of action and therefore does not require enforcement action by a federal agency.\textsuperscript{100} Further, punitive damages may be awarded under § 1982,\textsuperscript{101} whereas they were not available under the original Fair Housing Act. Section 1982, however, protects fewer people than the Fair Housing Act does: § 1982 applies only to housing discrimination based on race\textsuperscript{102} and does not cover discrimination based on religion or national origin, which were all covered by the Fair Housing Act.\textsuperscript{103} Like the Fair Housing Act, § 1982 also does not address the rights of people with disabilities.

D. Section 504 of the Rehabilitation Act of 1973

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

\begin{footnotesize}
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\item See Hamilton v. Svatik, 779 F.2d 383, 389 n.4 (7th Cir. 1985) (holding that "there is no limit on the amount of punitive damages that can be awarded under 42 U.S.C. § 1982").
\item See 42 U.S.C. §§ 3604-3606 (1988) (barring discrimination in sale, rental, financing, and brokerage of housing on basis of race, color, religion, national origin, or gender).
\item See Shirkey v. Devine, 670 F.2d 118, 1193 (D.C. Cir. 1982) (describing Rehabilitation Act as "first major federal statute designed to provide assistance to the whole population of handicapped persons").
\item See 29 U.S.C. § 793 (1988) (requiring government contractors to make affirmative attempts to employ individuals with handicaps in carrying out all federal government contracts in excess of 25000); 29 U.S.C. § 794 (barring discrimination on basis of handicap in any federal executive branch or U.S. Postal Service program or in any program receiving federal technical assistance). Section 504 is patterned after title VI of the Civil Rights Act of 1964, as amended, and title IX of the Education Amendments of 1972. S. REP. NO. 1297, 93d Cong., 2d Sess. 39 (1974), reprinted in 1974 U.S.C.C.A.N 6373, 6390. It has been referred to as "a part of the general corpus of discrimination law." U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 142 (1983). As one court has observed: "Recognizing the parallels between the discrimination suffered by the handicapped and other minority groups manifested particularly through their segregation from the rest of society, members of Congress sought to combat the problem through a remedy which had proven successful in the past, civil rights legislation." Garrity v. Gallen, 522 F. Supp. 171, 205 (D.N.H. 1981) (footnote omitted).
\item 124 CONG. REC. 38,552 (1978) (statement of Sen. Cranston). Other proposed titles for the Rehabilitation Act, such as the "Bill of Rights for Handicapped Persons" and the "Civil Rights Act for the Handicapped," indicate the importance of § 504 to the legal protection of persons with handicaps. Id.; see Harold S. Levine, Note, Defining the Rights of Handicapped Under Section 504 of the Rehabilitation Act of 1973: Southeastern Community College v. Davis, 24 ST. LOUIS U. L.J. 159, 159-60 (1979) (discussing importance of Rehabilitation Act to handicapped community).
\end{enumerate}
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proclaimed, "The time has come when we can no longer tolerate the invisibility of the handicapped in America." 108

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

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

109. 29 U.S.C. § 794(a) (1988) ("No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); see also infra note 114 (quoting regulation that determines applicability of § 504). For example, § 501 is an affirmative action program for handicapped applicants in federal jobs or employees working for the Federal Government, 29 U.S.C. § 791 (1988), and § 503 requires federal contractors to take affirmative steps to hire people with handicaps. 29 U.S.C. § 793 (1988).
111. Id. The phrase "individual with handicaps" is defined in 29 U.S.C. § 706(8) (1988).
113. Id.
114. See 24 C.F.R. § 8.3 (1993) (outlining breadth of § 504). HUD's own § 504 regulations define "recipient" as follows:
[A "recipient" is] any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended for any program or activity directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. An entity or person receiving housing assistance payments from a recipient on behalf of eligible families under a housing assistance payments program or a voucher program is not a recipient or subrecipient merely by virtue of receipt of such payments.
Id. Only three categories of recipients are exempt: (1) ultimate beneficiaries of federal assistance programs, such as Social Security recipients, 20 U.S.C. § 1687 note (1988); (2) recipients of government procurement contracts who, in return for supplying goods to the government, receive payments rather than financial assistance, 24 C.F.R. § 8.3 (1993); and (3) recipients of insurance or guaranty contracts. Id.
"Federal financial assistance" is defined as follows:
[A]ny assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement, in the form of:
(a) Funds;
(b) Services of Federal personnel; or
(c) Real or personal property or any interest in or use of such property, including:
(1) Transfers or leases of the property for less than fair market value or for reduced consideration; and
ed to the alleged discriminatory activity. In the housing area, nonprofit organizations that construct or substantially rehabilitate rental housing for people with mental disabilities are common recipients of federal financial assistance for housing development under section 202 of the National Housing Act. In 1982, for example, a federal district court in New Jersey held that plaintiffs with mental illness seeking restitution for alleged housing discrimination under section 202 had a cognizable claim under section 504 of the Rehabilitation Act.

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

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

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


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

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

Although these cases were decided before the effective date of the FHAA, they have now been codified in title VI of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 601-685, 106 Stat. 3672, 3802-32 (codified at scattered sections of 12 and 42 U.S.C.A. (West Supp. 1993)). At first glance, this new law appears to benefit people with disabilities; however, its segregated approach to housing is discriminatory. Title VI of the Housing and Community Development Act of 1992 provides that, in certain circumstances, public and subsidized housing units must be reserved for elderly and disabled residents. 42 U.S.C.A. §§ 13611-13612 (West Supp. 1993). The FHAA seeks to promote the inclusion of people with disabilities into nonsegregated housing, without regard to their disabilities. The effect of title VI is to create segregated disabled-only or disabled and elderly-only housing, which would contravene the very purpose and language of the FHAA. The proposed HUD regulations implementing title VI have not yet been issued, and advocates for people with disabilities are hopeful that the regulations will ameliorate the effect of the law on limiting integrated housing opportunities for people with disabilities. See HOUSING L. BULL., Jan.-Apr. 1993, at 1, 1-6.
housing options; and (2) HUD's assistance to mentally disabled persons in general low-income housing programs. Although both programs provide federal assistance directly to the eligible resident with a disability rather than to the sponsor or manager of the housing project, Grove City College v. Bell supplies the judicial precedent necessary to apply section 504's prohibition.

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

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

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

118. 42 U.S.C. § 1437f (1988) (implementing § 8 lower-income housing assistance generally); id. § 1437f(p) (implementing shared housing for elderly and handicapped).
119. See Samuel J. Brakel et al., The Mentally Disabled and The Law 667 (3d ed. 1985) (discussing courts' use of § 504 to protect mentally disabled persons from discrimination in federally assisted housing projects despite HUD's failure to issue regulations to fully implement statute).
124. See H.R. REP. NO. 711, supra note 95, at 18, 28-29 (1988), 1988 U.S.C.C.A.N. at 2179, 2189-90 (discussing loopholes in original Act's coverage of handicapped and stating that FHAA requirements prohibiting discriminatory housing practices against handicapped persons were based heavily on § 504 case law developed primarily in employment and services context).
III. THE FAIR HOUSING AMENDMENTS ACT OF 1988 AND PEOPLE WITH MENTAL DISABILITIES

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

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

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126. See H.R. Rep. No. 711, supra note 95, at 17-21, 1988 U.S.C.C.A.N. at 2179-82 (discussing rationale for FHAA coverage of handicapped and families with children). This Article only addresses the effect of the FHAA on people with mental disabilities.

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


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


132. One source of dispute was the effective date of the FHAA regulations. According to HUD, the regulations were to apply only to complaints filed after March 12, 1989, and then only
received over 6500 comments in response to the proposed rule, approximately 4000 of which were critical of the regulations. Amid the storm of controversy, HUD published its final FHAA regulations on January 23, 1989, and reiterated the purpose of the Act, stating, "No person shall, on the basis of race, color, religion, sex, handicap, familial status, or national origin, be subjected to discrimination in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions."

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

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

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


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


138. See U.S. CONST. art. I, § 8. In his dissenting opinion in United States v. Guest, Justice Brennan suggests that § 5 of the Fourteenth Amendment could also provide the necessary
broad reach and empowers Congress to regulate any commerce that "concerns more States than one and has a real and substantial relation to the national interest." Discrimination in housing against groups protected by the Fair Housing Amendments Act may burden interstate commerce by making housing unavailable in certain areas, thereby discouraging certain citizens from moving to those areas. Housing discrimination may also burden interstate commerce by restricting the transportation of goods related to housing construction. In short, housing discrimination against people with mental disabilities would likely prevent interstate travel by people protected by the FHAA and thereby adversely affect interstate commerce.140


1. Definition of "handicap"

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

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

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

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

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

Accordingly, the FHAA extends protection to people who are considered “handicapped,” which is defined as broadly in the FHAA as in the Rehabilitation Act of 1973. The regulations implementing the Rehabilitation Act define “handicapped” as “any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.”

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

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

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143. 24 C.F.R. § 8.3 (1993); see 29 U.S.C. § 706(8) (1988) (amending of “handicapped” provided in original codification). The FHAA definition, which appears at 42 U.S.C. § 3602 (1988), includes essentially the same definition of “handicap” that applies in § 504. 54 Fed. Reg. 3232, 3245 (1989). Section 504 is intended to cover the widest possible range of disabilities that limit activities such as walking, seeing, hearing, speaking, breathing, learning, and working. See 24 C.F.R. § 8.3 (1993). It also includes as many impairments as possible, including a range of physiological disorders and conditions such as mental retardation, organic brain syndrome, emotional and mental illness, orthopedic, visual, speech, and hearing impairments, autism, epilepsy, muscular dystrophy, multiple sclerosis, cerebral palsy, diabetes, cancer, heart disease, drug addiction, and alcoholism. *Id.*
144. See Baxter v. Belleville, 720 F. Supp. 720, 730 (S.D. Ill. 1989) (interpreting FHAA to include HIV carriers as “individuals with handicaps”).
147. School Bd. v. Arline, 480 U.S. 273, 289 (1987). In *Arline*, the Court ruled that a person who poses a significant risk of infecting others in the workplace will not be considered otherwise qualified for the job if reasonable accommodation will not eliminate that risk of infection. See *id.* at 287-88 (discussing factors to use in evaluating risk of contagion).
148. See H.R. REP. NO. 711, supra note 95, at 25, 1988 U.S.C.C.A.N. at 2186 (stating that FHAA “makes it illegal to refuse to make reasonable accommodation in rules, policies, practices, or services if necessary to permit a person with handicaps equal opportunity to use and enjoy a dwelling”).
149. See H.R. REP. NO. 711, supra note 95, at 15-16, 19-21, 1988 U.S.C.C.A.N. at 2176-77, 2180-81 (discussing FHAA coverage of minorities and families with children). In addition to covering persons with handicaps, the FHAA adds familial status to the list of classes protected.
renter who has a disability sue, but the buyer's or renter's family members, roommates, housing providers, or any other person associated with the buyer or renter may also sue under the FHAA.\(^\text{150}\)

In addition, it is unlawful to refuse to rent or sell to a person who has a record of being disabled or who is perceived as being disabled.\(^\text{151}\)

This prohibition is significant for people with mental disabilities because people labeled mentally ill are often regarded by others as "handicapped" because of certain behaviors that result from their conditions.\(^\text{152}\) Such behaviors may lead an observer to conclude that the individual is mentally ill and to treat him or her differently as a result. Such treatment, however, is proscribed by the FHAA, as

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

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

150. 42 U.S.C. § 3602(f)(2) (1988). Such broad standing is provided in the context of race discrimination under the original Fair Housing Act as well. See Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100-09 (1979) (holding that indirect victims of discrimination can sue under Fair Housing Act). In 1982, the Court went even further and held that a tester—a person who poses as a buyer or renter in order to detect housing discrimination—who had been the object of discriminatory misrepresentation could prevail. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-75 (1982). The Court declared that testers enjoy a "legal right to truthful information about available housing," id. at 373, because the law makes it illegal to misrepresent "to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." Id. (citing 42 U.S.C. § 3604(d)(1982)).

White parents of a black child were also allowed to sue for racial discrimination in housing. See Pugh v. 3750 Lake Shore Drive Coop Bldg., 463 F.2d 1055, 1056 (7th Cir. 1972) (stating that African-American child's white parents' claim of discriminatory misrepresentation was not frivolous); see also Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 945 F.2d 644, 646 (6th Cir. 1991) (discussing courts' "broad reading of the FHAA in order to fulfill its remedial purpose"); Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (D.C. Cir.) (stating that Congress "intended standing under [FHAA] to extend to full limits of Article III").

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

1. Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by a recipient as constituting such a limitation;

2. Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others towards such impairment; or

3. Has none of the impairments defined in . . . this section but is treated by a recipient as having such an impairment.

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

152. Cf. H.R. REP. NO. 711, supra note 95, at 22, 1988 U.S.C.C.A.N. at 2183 (stating that people discriminated against by others who perceived them to be drug users, but who were not, were covered by Act).
well as section 504 of the Rehabilitation Act, which prohibits discriminatory actions against people who are perceived as handicapped. Further, the FHAA prohibits a landlord from refusing to rent to someone whom he or she believes to be a former patient in a mental hospital or whom he or she believes has AIDS. Despite the breadth of its coverage, the FHAA does not protect all people with handicaps. For example, the FHAA specifically excludes users of illegal drugs and people addicted to controlled substances from the definition of handicap.

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

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

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

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

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

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

158. Id.
to modify the program to accommodate the handicapped individual would be unreasonable and discriminatory.\textsuperscript{159}

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

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

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

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


\textsuperscript{163} H.R. REP. NO. 711, \textit{supra} note 95, at 18, 1988 U.S.C.C.A.N. at 2179.

\textsuperscript{164} H.R. REP. NO. 711, \textit{supra} note 95, at 18, 1988 U.S.C.C.A.N. at 2179.


\textsuperscript{166} 748 F. Supp. 1002 (W.D.N.Y. 1990).
Rehabilitation Act. The plaintiffs in *Cason* were applicants for low-income housing who had mental and physical disabilities. They claimed that they met all of the eligibility requirements for housing despite their handicaps and that they were denied housing only because of an impermissible evaluation of their disabilities, including an arbitrary and subjective determination of their “ability to live independently.” The court in *Cason* agreed, finding that the Rochester Housing Authority’s rules for tenancy had the effect of treating applicants with disabilities differently from “so-called able-bodied applicants.” Accordingly, the court found that the FHAA prohibited such inquiries into the nature and severity of a renter or buyer’s disabilities. In enacting the FHAA, the court noted, Congress specifically considered the plight of people with mental illness. “In the case of a person with a mental illness . . . there must be objective evidence from the person’s prior behavior that the person has committed overt acts which caused harm or which directly threatened harm.” Yet in this case, all that was presented was “unsubstantiated inferences.”

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168. *Id.* at 1004.
169. *Id.* The “Standards for Tenant Selection Criteria” provided for consideration of the following:

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

*Id.*

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

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

*Id.*

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

170. *Id.* at 1003.
171. *Id.* at 1001.
172. *Id.* at 1007.
3. Reasonable accommodation

The FHAA, like section 504 of the Rehabilitation Act, provides that a person with a handicap is entitled to "reasonable accommodation." The regulations implementing section 504 define "reasonable accommodation" as follows: "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant with handicaps or employee with handicaps, unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." The regulations provide examples of reasonable accommodation, but all of these examples are in the employment context, and none apply to housing. Additionally, none of the examples involve people with mental, as opposed to physical, disabilities.

Although Congress intended the term "reasonable accommodation" to provide equality in all aspects of life for people with disabilities, it has been used primarily in the context of removing architectural barriers for people with physical disabilities.

The FHAA regulations, unlike the section 504 regulations, specifically address the meaning of accommodation in the context of housing. The FHAA regulations provide that "it shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including public and common areas." Yet, none of the examples contained in the FHAA regulations provide guidance for applying the accommodation requirement to people...
with mental disabilities. Accordingly, people with mental disabilities and their advocates will continue to be required to analogize their situations to those of people with physical handicaps in order to prevail on their claims of housing discrimination.

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

The nature of a handicap, however, may

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182. Cf. 42 U.S.C. § 3605(c) (1988) (stating that FHAA does not "prohibit[] a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status"); 42 U.S.C. § 3602(h)(1) (1988) (including in definition of "handicap" "physical or mental impairment which substantially limits one or more of such person's major life activities").
183. See 42 U.S.C. § 3605(c) (providing for consideration of other factors not prohibited by FHAA in appraising prospective real estate transactions).
184. See H.R. REP. No. 711, supra note 95, at 29-30, 1988 U.S.C.C.A.N. at 2190-91 (stating that fact of history of mental illness alone is insufficient for landlord to refuse to rent to prospective tenant).
185. See H.R. REP. No. 711, supra note 95, at 30, 1988 U.S.C.C.A.N. at 2191 (restricting questions landlord may ask to applicant's ability to meet tenancy requirements); see also 24 C.F.R. § 100.202(c) (1993) (discussing permissible inquiries by landlords).
186. 24 C.F.R. § 100.202(c)(1).
187. 24 C.F.R. § 100.202(a).
require assistance of some kind. Applying standard rental leases to all residents without taking into consideration their individual needs may result in a refusal to accept almost all applicants with mental disabilities. In promulgating the regulations, HUD stated that although a landlord does not have to provide fundamentally different housing to disabled applicants, "[t]he test is whether with appropriate modifications, the applicant can live in the housing that the housing provider offers; not whether the applicant could benefit from some other type of housing that the housing provider does not offer." \(^8\)

The apparent purpose of this provision is to allay landlords' fears that the regulations will obligate them to provide additional services to tenants with disabilities that they do not already offer to tenants without disabilities. Neither section 504 nor the FHAA regulations, however, effectively describe the conduct prohibited by these antidiscrimination laws.\(^9\)

Several tenants with mental disabilities have successfully challenged lease provisions that failed to accommodate their needs. In *Majors v. Housing Authority*,\(^9\) for example, a tenant challenged the "no pet" provision of her lease on the ground that reasonable accommodation under section 504 required the landlord to permit her to keep her dog because of her mental disability that required her to rely on the dog's companionship.\(^1\)\(^9\)\(^1\) The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.\(^1\)\(^2\) The appellate court held that except for her "psychological and emotional" dependency on her pet poodle, the plaintiff was "otherwise qualified" and that an exception to the no pet rule would be a "reasonable accommodation" as required by section 504.\(^1\)\(^3\) Thus, like *Southeastern Community College v. Davis*,\(^1\)\(^4\) in which the Supreme Court held that defendants were not required to act affirmatively to accommodate a plaintiff's handicap,\(^1\)\(^5\) the court in *Majors* did not require the landlord to act. Rather, the landlord was required *not to*

\(^{189}\) See 24 C.F.R. § 8.11 (1993); 24 C.F.R. § 100.204.
\(^{190}\) 652 F.2d 454 (5th Cir. 1981).
\(^{191}\) Majors v. Housing Auth., 652 F.2d 454, 455 (5th Cir. 1981).
\(^{192}\) *Id.* at 454.
\(^{193}\) *Id.* at 455.
\(^{194}\) 442 U.S. 397 (1979).
\(^{195}\) See Southeastern Community College v. Davis, 442 U.S. 397, 413-14 (1979) (holding that § 504 did not require nursing school to adapt its teaching program to accommodate deaf student).
Accordingly, accommodating the plaintiff required no undue burden.

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

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

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

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


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

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


203. Id. at 2, 8-9.

204. Id. at 7-9.

205. Id. at 7.
ties were involved in this case" and that "[t]hey cannot be ignored by the court, and anyone inclined to ignore them would do well to remember that tomorrow's accident or disease could leave any of us immobile, in darkness, or in the silent world of Dorothy Jeffries." Accordingly, the court held that Ms. Jeffries could not be evicted until steps were taken to accommodate her handicap. The court then ordered the parties to enter into a stipulation outlining the specific steps that the landlord would take to accommodate the tenant.

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

206. Id.
207. Id.
208. Id. at 9. The court also found that although certain of Ms. Jeffries' actions were inappropriate and aggressive, they did not constitute a direct threat to others but rather were the result of her disability. Id. at 7-8. For example, her aggressive gestures were not threats to other tenants but an attempt to indicate that she was endangered by the smell of noxious fumes in her apartment. Id. at 4-5. The court did not specify how to accommodate the tenant, but it did offer several suggestions, such as requiring the landlord to investigate and correct, if necessary, the offensive odor in Ms. Jeffries' apartment and to provide training and interpreters for the security guards and other building personnel to assist them in communicating with Ms. Jeffries. Id. at 8 n.3. The parties' subsequent stipulation heeded the court's suggestions. Stipulated Order, Peabody Properties, Inc. v. Jeffries, No. 88-SP-7613-S (Mass. Trial Ct., Hampden Div., Feb. 13, 1989). The landlord agreed to investigate the presence of any noxious fumes in the tenant's apartment, to train security guards to increase their understanding of and sensitivity to the needs and special problems of the tenant, to provide interpreter services, and to install and maintain visible indicators to alert the tenant of the arrival of guests as well as the event of a fire. Id. at 1-2.
211. Penfield, 564 N.E.2d at 1004-05.
212. Id. at 1005.
213. Id.
214. Id. at 1004.
that she had violated the clause in her lease in which she agreed not to "deface or otherwise damage the dwelling unit." On appeal, the Supreme Judicial Court of Massachusetts held that reasonable accommodation was required under section 504 and that the housing court was correct in proposing as reasonable accommodation that the landlord provide the tenant with an opportunity to pursue counseling. Applying the balancing test of the anticipated benefit to the tenant of continued subsidized housing against the burden on the owner, the appellate court prevented the tenant's eviction. In the court's view, the cost of repair was small in relation to the rent over the course of the tenancy and the benefit of allowing Ms. Penfield the opportunity to continue to live independently.

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

215. Id.
216. Id. at 1005.
217. Id. at 1004-05 (holding that reasonable accommodation was required in light of superficial nature of damage and absence of impact on other tenants).
218. Id.; see also Nelson v. Thornburgh, 567 F. Supp. 369, 382 (E.D. Pa. 1983) (holding that reasonable accommodation includes provision of services to handicapped individual). But see Housing Auth. v. Pappion, 540 So. 2d 567, 569-70 (La. Ct. App. 1989) (holding that tenant considered paranoid schizophrenic was not "otherwise qualified" under § 504 for tenancy where tenant had threatened other residents and exhibited bizarre behavior).
219. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 363 (1977) (allowing state educational institutions to adopt admissions program that explicitly took race into account to improve position of class members who were disadvantaged by past discrimination).
4. *Reasonable modification*

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

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

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

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

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

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

B. Discriminatory Actions Prohibited by the FHAA

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

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

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

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225. While both statutes make it unlawful to discriminate on the basis of race, color, religion, or national origin, the FHAA also adds sex, handicap, and familial status as protected categories. Compare Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 804-806, 82 Stat. 82, 82-84 with Fair Housing Amendments Act, 42 U.S.C. §§ 3604-3606 (1988) (prohibiting discriminatory acts related to real estate transactions specifying actions that discriminate and are proscribed).
227. H.R. REP. NO. 711, supra note 95, at 24, 1988 U.S.C.C.A.N. at 2185. From the language of the House Report, it appears that the zoning ordinance at issue in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448-49 (1985), would be illegal under the FHAA because the Supreme Court found that the ordinance at issue in Cleburne was based on reasons that were either impermissible (e.g., neighbors' fears for safety) or unbelievable (e.g., concern for residents' safety). See infra notes 275-86 and accompanying text (discussing Court's reasoning in Cleburne).
on the number of residents in a home, and dispersal and density limits. Similarly, private restrictions such as restrictive covenants are no longer enforceable if they restrict the ability of people with disabilities to live where they wish. For example, a zoning ordinance that required a special-use permit only for homes for people with mental retardation would be illegal because it would impose a requirement on people with disabilities and not on non-disabled people.

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

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community. Under [this law], land use and zoning cases are to be litigated in court by the Department of Justice. They would not go through the administrative process.
When the Department of Justice determines that a violation of the rights of people with disabilities may have occurred, the Attorney General may sue to challenge local zoning practices. To date, the Department has filed several complaints alleging violations of the FHAA in the enactment and application of restrictive zoning laws.

While the power to zone can be a beneficial regulatory tool, states and localities may exercise that power only pursuant to a permissible governmental purpose. Often, zoning laws affecting the development or use of residences for people with mental disabilities have not withstood this test. Although zoning laws are designed to regulate only how land is used, local zoning authorities have seized upon local zoning laws as a way to regulate who uses the land, thereby excluding from residential communities people considered "different."
Today, federal and state laws reflect the public policy of providing people with disabilities with community care as an alternative to institutionalization. With the advent of deinstitutionalization, new concepts emerged regarding the type of housing best suited for people leaving state mental hospitals and mental retardation facilities. For those who were able to live without constant medical services, group living arrangements or home care provided by family or friends was the desirable alternative to institutional living. Group homes and other community residences housing people with the same disability have been viewed the best way to further the principle of normalization.

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

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

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242. See Community Living for People with Developmental and Psychiatric Disabilities 24 (John W. Jacobson et al. eds., 1992) (noting that studies indicate that community treatment is almost always as, or more, effective than hospital-based treatment).

243. See id. at 219 (discussing studies that measure effects of moving disabled into homelife settings); Bruce L. Baker et al., As Close As Possible: Community Residences for Retarded Adults 39 (1977) (finding that small group homes effectively promote most principles important to normalization). But see Steven J. Taylor et al., The Nonrestrictive Environment: On Community Integration for People with the Most Severe Disabilities 50 (1987) (suggesting that group homes should not put people with similar disabilities together and should be limited to four residents).


245. Id. at 232, 236.
member of society. In fact, studies have proven the efficacy of providing services in the community and have shown that community care reduces hospitalizations. By most accounts, both treatment and quality of life were as good or better for persons receiving community care as for those receiving treatment in mental hospitals. Yet, when community care homes attempted to open in residential areas, neighbors feared that these homes would depress property values and destroy the residential character of their neighborhoods. Accordingly, with the assistance of local authorities, zoning laws were used to prevent people with mental disabilities from having such housing opportunities. Thus, despite the recognized public policies of deinstitutionalization and normalization, the development of community housing opportunities was and continues to be slow and has not kept pace with the demand for such housing.

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

246. Id. at 237.
248. See Charles A. Keisler, Mental Hospitals and Alternative Care: Noninstitutionalization as Potential Public Policy for Mental Patients, 37 Am. Psychol. 349, 349 (1982); Stein & Test, supra note 247, at 394-97.
Community care should not be confused with nursing home care. Nursing homes are institutions, not homes. Indeed, deinstitutionalization may better be described as transinstitutionalization because many people were simply transferred from one institution (such as a state mental hospital) to another (such as a nursing home). See Johnson, supra note 6, at 125-26 (stating that in years of deinstitutionalization, nursing home industry flourished). For example, in just five years, New York state nursing homes received a 450% return on their original investments. Id.
249. See Group Homes Gaining Ground: Despite Opposition, Number of Proposals Expected to Rise, Newspay, Oct. 19, 1993, at 37 (explaining that fear of declining property values caused original opposition to group homes); Viewpoints, Newspay, Oct. 4, 1993, at 40 (stating that neighbors' claim is that group home will bring drug addicts into neighborhood).
250. See Steven A. Adler, Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning, 6 Vt. L. Rev. 509, 509 n.5 (1981) (discussing exclusionary zoning that operates to bar group homes from communities).
251. See 'Family Values' in Wilmette, Chi. Trib., Sept. 14, 1988, at C20 (decrying residents' opposition to change in zoning laws that would allow small group homes); James Feron, N.Y. Times, July 2, 1978, at 3 (discussing opposition to group homes by residents of county with 17 homes for mentally disabled).
authority is required. Some zoning boards, at the instigation of influential neighbors, have attempted to use zoning laws to exclude people with mental disabilities from residential communities. One common method of exclusion is to designate a group home as a boarding home, medical facility, school, or business, thereby restricting the home to operation in areas zoned for commercial and industrial use.

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

253. See id. at 365-77 (reviewing types of land-use regulation).
254. See, e.g., Sylvia Adcock, Group for Mentally Ill Sues Oyster Bay, NEWSDAY, May 12, 1993, at 31 (noting that opposition of neighbors and town officials to group home for mentally disabled preceded lawsuit over zoning interpretation); Brian Cox, Zoning for Group Homes Called Illegal, CH. TRIB., Apr. 26, 1993, at N3 (stating that zoning ordinance, which restricted location of group homes for mentally disabled and was passed because of neighbors' concerns, may be illegal); Peter Geller, Painesville's Zoning Drops Group Homes, CLEV. PLAIN DEALER, Aug. 3, 1993, at B1 (discussing elimination of special category in zoning code for group homes for disabled due to neighbors' fears).
256. See, e.g., Costley v. Caromin House, 313 N.W.2d 21, 28 (Minn. 1981) (ruling that fears of threat to safety or reduction of property value are not sufficient bases for injunction against group home); Township of Washington v. Central Bergen Community Mental Health Ctr., 383 A.2d 1194, 1209 (N.J. Super. Ct. Law Div. 1978) (rejecting claim that group home for former mental patients should be disallowed because it presented threat to general safety as argument founded on unsubstantiated fears); Horizon House Dev. Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992) (noting neighbors' objections to group home as "classic case of 'NIMBY,' not in my backyard" and permitting home to open). Not surprisingly, public zoning board hearings quickly become a public forum to air prejudice against people with mental disabilities. Such prejudice can take the form of hateful remarks and patronizing concerns about the potential residents' welfare.
257. See, e.g., Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 878 (Colo. 1983) (holding that neighboring property owners' rights were not violated by absence of notice and hearing before opening of group home); Clark v. Manuel, 463 So. 2d 1276, 1286 (La. 1985)
opponents of group homes may turn to the courts, state and federal courts alike have been unwilling to legitimate their fears and prejudices. The courts have held consistently that individual property owners have no right to determine who qualifies to be their neighbor or to exercise control over the use of property owned by others.

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

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

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

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

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

Id. at 2. The owners of the home and three of the tenants challenged the ordinance on the grounds that it interfered with the right to travel, that the village residents had no right to dictate social homogeneity, that it restricted the lessees' privacy, and that it was of no concern to villagers whether the lessees were married or not. Id. at 7. The Court found each of these arguments unpersuasive and upheld the constitutionality of the local government's attempt to enforce the ordinance, concluding that the ordinance at issue was a legitimate land-use
Yet, under ordinances that define "family" in terms of a housekeeping unit, rather than by relation, courts have regarded groups of people with mental disabilities living together as families.\textsuperscript{261}

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

\textsuperscript{261} See Metropolitan Bd. of Zoning Appeals v. Gunn, 477 N.E.2d 289, 299 (Ind. Ct. App. 1985) (characterizing group home for developmentally disabled as stable and permanent household similar to any other home); West Monroe v. Ouachita Ass'n for Retarded Children, 402 So. 2d 259, 265-66 (La. Ct. App. 1981) (finding that group home for mentally retarded adults was single-family dwelling where residents had common interest and goals and would be supervised by couple residing in home); Township of Washington v. Central Bergen Community Mental Health Ctr., 383 A.2d 1194, 1209 (N.J. Super. Ct. Law Div. 1978) (holding that group home for former mental patients in which residents jointly shared household tasks was sufficiently similar to traditional family to comply with ordinance); Allegheny Valley Sch. v. Zoning Hearing Bd., 517 A.2d 1385, 1388-89 (Pa. Commw. Ct. 1986) (classifying group home for mentally retarded adults as charitable institution lawfully functioning as single household permitted within residential district); Beres v. Hope Homes, Inc., 453 N.E.2d 1119, 1123 (Ohio Ct. App.) (holding that six mentally retarded women living together as housekeeping unit constituted family), cert. denied, 464 U.S. 937 (1982); Philadelphia Ctr. for Developmental Servs., Inc. v. Zoning Hearing Bd., 492 A.2d 1191, 1192-93 (Pa. Commw. Ct. 1985) (holding that three people with mental retardation living together with resident staff member was family "doing their cooking on the premises" in compliance with ordinance); Collins v. City of El Campo, 684 S.W.2d 755, 760-62 (Tex. Ct. App. 1984) (holding that use of home by four men with mental retardation and their supervising parents was "for residential purposes" and therefore complied with ordinance).

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


263. Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977). The majority in \textit{Moore} noted that the Court had "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment." Id. at 499 (citing Cleveland Bd. of Educ. v. Laflur, 414 U.S. 682, 639-40 (1974)). The Court held that when the government intrudes on choices concerning family life, the Court must examine the importance of the stated governmental interests more carefully and the extent to which the regulation advances those interests. Id. (citing Poe v. Ullman, 367
restrictive definition of family, which included only certain, but not all, categories of individuals related by blood or marriage. The City of East Cleveland argued that the Court should uphold the ordinance under its earlier decision of Village of Belle Terre v. Boraas in which the Court upheld an ordinance defining "family" as persons related by blood, adoption, or marriage. The Court rejected this argument and struck down the ordinance after finding that it was only tenuously related to a legitimate governmental purpose.

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

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

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


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

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

268. See, e.g., Linn County v. City of Hiawatha, 311 N.W.2d 95, 99-100 (Iowa 1981) (holding that group foster home for up to six disabled children that was staffed by trained married couple was single-family home rather than boarding house); State v. Baker, 405 A.2d 368, 372 (N.J. 1979) (stating that zoning ordinance that prohibited more than four unrelated individuals from sharing house was improper means of furthering legitimate goal); Township of Washington v. Central Bergen Community Mental Health Ctr., 383 A.2d 1194, 1207-09 (N.J. Super. Ct. Law Div. 1978) (declaring that use of mental health center as transitional facility for former mental patients was permitted use under zoning ordinance); Philadelphia Ctr. for Developmental Servs., Inc. v. Zoning Hearing Bd., 492 A.2d 1191, 1192-93 (Pa. Commw. Ct. 1985) (holding that community living arrangements for mentally retarded citizens fell within definition of "family" in zoning ordinance and did not require special exception to operate); Collins v. City of El Campo, 684 S.W.2d 755, 759-60 (Tex. Ct. App. 1984) (stating that home for four unrelated mentally retarded men and their "houseparents" constituted "family" within zoning ordinance definition).

269. See, e.g., Roundup Found., Inc. v. Board of Adjustment, 626 P.2d 1154, 1156 (Colo. Ct. App. 1981) (holding that group home for mentally disabled did not satisfy ordinance's definition of "family" and was not single-unit dwelling); Zoning Bd. v. T.A.R.C., 510 So. 2d 751, 753 (La. Ct. App. 1987) (upholding injunction against group home that violated ordinance definition of "family" requiring relation between residents); Appeal of Lynch Community Homes, Inc., 554 A.2d 155, 158 (Pa. Commw. Ct. 1989) (stating that group home does not fall
not a group home for people with mental disabilities may be permitted in a particular neighborhood has turned on the language of the particular ordinance and the characteristics of the particular home. In general, courts have limited the discretion of local zoning authorities in land-use decisions affecting people with mental disabilities.270

Most courts now permit group homes to be located in areas zoned for use by single-family dwellings because they have determined that group homes operate like any other homes in which a family resides.271 Other courts have chosen to exempt group homes within zoning ordinance definition of “family” and must obtain special exemption in order to operate).

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

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

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\item (1976) (determining that group home reasonably resembling biological unitary family in size and appearance would not alter character of single-family residential zone); White v. Board of Zoning Appeals, 451 N.E.2d 756, 758-59 (Ohio 1983) (stating that use of family home to house two mentally retarded adults was valid accessory use in residential district); Freedom Township Bd. of Zoning Appeals v. Portage County Bd. of Mental Retardation and Developmental Disabilities, 476 N.E.2d 360, 364 (Ohio Ct. App. 1984) (finding evidence that occupants of group home would function as family unit in general sense in absence of specific definition of "family" in relevant ordinance); Beres v. Hope Homes, Inc., 453 N.E.2d 1119, 1122-23 (Ohio Ct. App.) (allowing group home for mentally retarded persons in area zoned as single-family residential because home was private and occupants would act as family), cert. denied, 464 U.S. 937 (1982); Jackson v. Williams, 714 P.2d 1017, 1022 (Okla. 1985) (holding that occupants of group home constituted "family" even though association establishing home received remuneration); Appeal of Miller, 515 A.2d 904, 906-09 (Pa. 1984) (holding that boarding house that functioned like family unit would be permissible despite local ordinance's requirement of relationship by blood, marriage, or adoption, or maximum of two unrelated residents); JALC Real Estate Corp. v. Zoning Hearing Bd., 522 A.2d 710, 712 (Pa. Commw. Ct. 1987) (ruling that four mentally retarded individuals living together constituted family for purposes of ordinance); Mongony v. Bevilacqua, 432 A.2d 661, 663-64 (R.I. 1981) (holding that residents of group house who shared household chores were family); Collins v. City of El Campo, 684 S.W.2d 756, 760 (Tex. Ct. App. 1984) (stating that retarded residents and their supervisors constituted "family" for purposes of ordinance). \textit{But see Roundup Found.,} 626 P.2d at 1156-57 (rejecting claim that home for mentally retarded children satisfied ordinance requiring familial relationship because residents were not related by blood); City of Kenner v. Normal Life, 483 So. 2d 903, 906-08 (La. 1986) (upholding ordinance defining "single-family dwelling" as residence occupied by four or fewer people and finding that group home for six violated ordinance); \textit{T.A.R.C.} 510 So. 2d at 755 (defining "family" as "number of persons related by blood, marriage, or adoption," and finding that group home for six unrelated adults was not family); Normal Life, Inc. v. Jefferson Parish, 483 So. 2d 1123, 1125-26 (La. Ct. App. 1986) (stating that group home for six residents and two counselors was not family as defined by ordinance); Clark v. Lafayette Ass'n for Retarded Citizens, 461 So. 2d 323, 324-25 (La. Ct. App. 1984) (holding that group home for retarded that would be used for activities such as teaching daily living skills violated building restriction limiting dwellings to single-family use); Carroll v. Washington Township Zoning Comm'n, 408 N.E.2d 191, 193-94 (Ohio 1980) (holding that foster family was not family unit because residents were transient and home was substantially remodeled to accommodate children); Verland C.LA. v. Zoning Hearing Bd., 556 A.2d 4, 6 (Pa. Commw. Ct. 1989) (designating community living arrangement for three mentally handicapped people as group residence rather than single-family dwelling); \textit{Appeal of Lynch Community Homes,} 554 A.2d at 158 (upholding restrictive definition of "family," which excluded group home for three unrelated retarded persons, upon finding that ordinance was closely related to governmental interests); Appeal of Summers, 551 A.2d 1184, 1186-87 (Pa. Commw. Ct. 1988) (rejecting argument that homes that temporarily accepted and housed retarded persons in "respite care" program qualified as "families"); Wengert v. Zoning Bd., 414 A.2d 148, 149 (Pa. Commw. Ct. 1980) (affirming zoning board's decision that foster home of up to six children could not be permitted in single-family zone).

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

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

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

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

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

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

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


278. Id. In resolving challenges brought under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court applies one of three standards of review. The most stringent standard of review, known as "strict scrutiny," is applied in cases involving statutes that classify by race or national origin or that impinge upon a fundamental right protected by the Constitution. Under this test, the Court will uphold a legislative classification only if it is sufficiently narrow to serve compelling state interests. See, e.g., Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (applying "most rigid scrutiny" and finding no overriding legislative concern in deciding miscegenation statute to be unconstitutional). The intermediate level of review, or "heightened scrutiny," is applied to legislative classifications based on gender and illegitimacy. Such classifications will be sustained where they are substantially related to important
declined to apply to "the mentally retarded a more exacting standard of judicial review than is normally accorded economic and social legislation." As the Court explained, "They are thus different, immutably so, in relevant respects, and the State's interest in dealing with and providing for them is plainly a legitimate one." The task of deciding how best to treat people with mental retardation, according to the Court, is "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."

Although the Court refused to apply a heightened level of scrutiny, it nonetheless invalidated the zoning ordinance by using the rational basis test. The city had argued that it denied the permit to protect the home's residents, not because of discriminatory motives. Yet, the Court observed that the city did not seek to protect other groups from the same risks. According to the majority, the city's ostensible justifications for denying the special-use permit were not rationally related to a legitimate governmental purpose; the city's purposes were, therefore, both impermissible and unworthy of belief. The Court found that "mere negative attitudes or fear, unsubstantiated by factors which are properly cognizable in a zoning governmental interests. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (noting that gender-based discrimination is constitutionally permissible only when based on "important governmental objectives" achieved by means that are "substantially related to the achievement of those objectives"). The lowest level of review, the "rational basis test," applies to most economic and social legislation. Under this test, the Court will sustain the statute if the classification is rationally related to a legitimate governmental interest. See, e.g., Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (describing application of rational basis test to areas not impinging on fundamental rights).

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

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

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

\textsuperscript{286} Id. at 448.

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

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

In \textit{J.W. v. City of Tacoma}, 720 F.2d 1126 (9th Cir. 1983), the Ninth Circuit held that people with mental illness are entitled to a higher level of review and that the local zoning authority prohibiting mentally ill individuals from living together in a group home failed such enhanced scrutiny. \textit{Id.} at 1131-32. In People v. 11 Cornwall Co., 695 F.2d 84 (3d Cir. 1982), \textit{vacated on other grounds}, 718 F.2d 22 (2d Cir. 1983), a group of neighbors in a New York City suburb heard that a group home was planned and bought the property on which it was to be located. \textit{Id.} at 37. The state sued the property owners on the grounds that their action violated the civil rights of the prospective residents as well as the New York human rights law. \textit{Id.} The Second Circuit held in favor of the state. \textit{Id.} at 40-42.

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

The Department of Justice has sued both individual homeowners 291 and management companies of large apartment complexes 292 for violating the FHAA. Private parties also have filed FHAA complaints against municipalities and other private parties. 293 While
complaints by private parties alleging discriminatory practices generally have succeeded, some recent decisions have questioned how far the FHAA may reach into the zoning province of local governments.

C. State Zoning Preemption Statutes

Today every state has either enabling legislation or state constitutional provisions granting to its municipalities the power to zone. These provisions normally impose few substantive guidelines. As local zoning laws began to be used to exclude group homes for people with mental disabilities from residential communities, however, state legislatures reacted by passing laws that preempted local zoning laws. These state laws preempt local ordinances by prohibiting inquiries into housing applicants' ability to live independently violated HUD regulation and FHAA).

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

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

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

297. See Salsich, supra note 2, at 424 (noting that over half of states have enacted statutes easing zoning restrictions for group homes).
the application of restrictive zoning laws to group homes for people with mental disabilities. 298

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

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

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

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298. See infra notes 300-11 and accompanying text.
300. See Salsich, supra note 2, at 424.
301. Thirteen states have no state zoning legislation: Alaska, Georgia, Illinois, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, Oregon, Pennsylvania, South Dakota, Washington, and Wyoming. Although these states do not have zoning preemption laws, they may not need such laws to promote the establishment of community living for people with mental disabilities. In Massachusetts and New Hampshire, for example, legislation may be unnecessary because court decisions explicitly protect the right of people with mental disabilities to locate in residential areas. See, e.g., Harbor Sch. v. Board of Appeals, 366 N.E.2d 764, 768-69 (Mass. App. Ct. 1977) (holding that community residences are educational in purpose and therefore immune from local zoning laws); Region 10 Client Management, Inc. v. Town of Hampstead, 424 A.2d 207, 209 (N.H. 1980) (finding that state policy favoring deinstitutionalization overrides local zoning ordinances).

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

302. See MICH. STAT. ANN. § 5.2963(16a) (Callaghan 1989) (declaring group home of six or fewer patients permitted use in all residential zones); N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney 1988) (deeming group home as family unit for purposes of local laws).
303. The state preemption laws also vary with regard to the disabilities they cover. Although virtually every state law covers group homes for people with developmental disabilities, only a portion cover people with mental illness. See, e.g., CONN. GEN. STAT. ANN. § 8-3e (West 1989 & Supp. 1993) (barring different zoning treatment for homes housing fewer than six mentally retarded persons); N.Y. MENTAL HYG. LAW § 41.34(a)(1) (McKinney 1988 & Supp. 1994) (including mentally disabled in definition of community residential facility for disabled); N.C. GEN. STAT. § 168-21 (1992) (defining "handicapped person" for group home purposes as
preempt local zoning laws; others allow a municipality to retain control over the zoning process for such homes. For example, several state statutes permit local authorities to enforce conditions not specified in the state zoning law, but only those conditions related to health and safety regulations necessary to protect residents of the group home. In other states, local authorities are permitted to require that group homes conform to standards regarding safety or even compatibility with surrounding land uses. State statutes may also provide that small state-licensed homes are to be considered a residential use of property and permitted in all residential zones, including those zoned for single-family use. Several state statutes simply designate residents of group homes as families to avoid any problems locating group homes in areas zoned for single-family use. In Rhode Island, for example, small family-like settings may be established for people with mental retardation or mental illness in any community.

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

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304. See, e.g., ARIZ. REV. STAT. ANN. § 36-582.6 (1993); MICH. COMP. LAWS § 125.216a(2) (1992); MINN. STAT. § 245.512(4) (1992 & Supp. 1993); see also City of Livonia v. Department of Social Servs., 378 N.W.2d 402, 418 (Mich. 1985) (upholding state statute prohibiting municipalities from applying local construction and fire codes that effectively excluded group homes from residential neighborhoods); Northwest Residence, Inc. v. City of Brooklyn Ctr., 352 N.W.2d 764, 773-74 (Minn. Ct. App. 1984) (permitting municipalities to impose health and safety standards appropriate to particular group home site).


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

309. In New York, the only legitimate basis for neighborhood objection to homes for people with mental disabilities is overconcentration and the resulting effects on the character of the neighborhood. See N.Y. MENTAL HYG. LAW § 41.34(c) (McKinney 1988 & Supp. 1994) (providing for hearing if community claims site selected would result in overconcentration of group care facilities); see also Town of De Witt v. Surles, 591 N.Y.S.2d 655, 655-56 (App. Div. 1992) (finding no overconcentration and upholding right of 10 former patients of psychiatric hospital to live including mentally retarded).
state zoning preemption laws now require that group homes not be located within a certain distance of one another. These requirements, known as dispersal requirements, vary in their approach. States impose different space requirements, with 300 feet apparently being the smallest distance.

Several state statutes also contain density limits that limit the number of people with mental disabilities that can reside in all group homes within a municipality to a certain number of people or a percentage of the municipality's total population. Unlike dispersal requirements, density limits restrict the number of people with mental disabilities who can live in the group homes rather than the number of homes themselves. Other state statutes prohibit local authorities from applying local zoning laws but include within the state law itself complicated siting and dispersal procedures. Further, some states expressly prohibit unreasonable discrimination in zoning restrictions on group homes. Even in the absence of
such statutes, courts have invalidated zoning restrictions on due process or equal protection grounds.\footnote{316. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (invalidating city ordinance requiring special-use permit for group home); J.W. v. City of Tacoma, 720 F.2d 1126, 1131-32 (11th Cir. 1983) (finding denial of permit for group home for former mental patients to be unreasonably discriminatory).}

In addition to preempting local zoning ordinances, many state statutes also limit or void private restrictions in deeds, land contracts, or leases that would exclude group homes from residential properties or subdivisions.\footnote{317. See, e.g., IOWA CODE ANN. § 355.25-4 (West Supp. 1993); N.C. GEN. STAT. § 168-23 (1992); W. VA. CODE § 27-17-4 (1992); WISC. STAT. ANN. § 46.03(22)(d) (West 1987). Ohio is the only state that specifically permits the exclusion of group homes in political subdivisions. See OHIO REV. CODE ANN. § 5125.19(m) (Anderson 1993).}

In New York, for example, a state law known as the Padavan Law specifically preempts local zoning laws by permitting small group homes in all residential areas, provided certain procedures are followed regarding the selection of the site.\footnote{318. See, e.g., IOWA CODE ANN. § 335.25.4 (West Supp. 1993); N.C. GEN. STAT. § 168-23 (1992); W. VA. CODE § 27-17-4 (1992); WISC. STAT. ANN. § 46.03(22)(d) (West 1987). Ohio is the only state that specifically permits the exclusion of group homes in political subdivisions. See OHIO REV. CODE ANN. § 5125.19(m) (Anderson 1993).}

The New York Court of Appeals rejected an attempt to circumvent this law in \textit{Crane Neck Association v. New York City/Long Island County Services Group}.\footnote{319. See, e.g., City of Los Angeles v. California Dep't of Health, 139 Cal. Rptr. 771, 774-75 (Ct. App. 1976) (holding that state statute mandating that group homes constitute residential uses fostered legitimate state concern that was sufficient to override municipal affairs); Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 876-77 (Colo. 1983) (holding that statutory cities, as opposed to home-rule cities, receive power to zone from state and must abide by state zoning regulations); City of Livonia v. Department of Social Servs., 378 N.W.2d 402, 414-15 (Mich. 1985) (noting that ability to zone is conferred upon localities by state and thus state may}

In \textit{Crane Neck}, a neighborhood association sought to enforce a restrictive covenant, adopted in 1945, limiting the use of property within its boundaries to "single family dwellings" to exclude a group home for eight adults with severe mental retardation.\footnote{320. See, e.g., City of Los Angeles v. California Dep't of Health, 139 Cal. Rptr. 771, 774-75 (Ct. App. 1976) (holding that state statute mandating that group homes constitute residential uses fostered legitimate state concern that was sufficient to override municipal affairs); Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 876-77 (Colo. 1983) (holding that statutory cities, as opposed to home-rule cities, receive power to zone from state and must abide by state zoning regulations); City of Livonia v. Department of Social Servs., 378 N.W.2d 402, 414-15 (Mich. 1985) (noting that ability to zone is conferred upon localities by state and thus state may}

Although the group home violated the restrictive covenant, the court refused to enforce the covenant because "to do so would contravene a long-standing public policy favoring the establishment of such residences for the mentally disabled."\footnote{321. 460 N.E.2d 1336 (N.Y. 1984).}

Thus, the court held that although it explicitly addresses only local laws and ordinances, the Padavan Law also preempts restrictive covenants.\footnote{322. Id. at 1339.}

Surprisingly few state zoning statutes have been challenged in court. Where such challenges were initiated, however, the courts have upheld the laws on the ground that the state preemption statute bears a substantial relation to a legitimate governmental objective and properly overrides local control.\footnote{323. Id. at 1341.}
D. Enforcement Mechanisms Under the FHAA

In addition to expanding the types of transactions prohibited by the original Fair Housing Act by extending its reach to local zoning laws and restrictive covenants, the FHAA strengthens the tools available for enforcement of the federal ban against housing discrimination. Most significant, proof of discriminatory effect, or disparate impact, is sufficient to support a claim under the FHAA.\textsuperscript{224}  Proof of discrimi-

preempt local zoning ordinances; Costley v. Caromin House, Inc., 313 N.W.2d 21, 27-28 (Minn. 1981) (holding that state statute overrode local control over zoning for mentally retarded); Mahrt v. City of Kalispell, 690 P.2d 418, 419 (Mont. 1984) (concluding that group home with eight or fewer residents has unquestionable right to operate in any residually zoned area); State ex rel. Thelen v. City of Missoula, 543 P.2d 173, 176-77 (Mont. 1975) (upholding state statute declaring local zoning ordinance invalid and contrary to state policy of promoting right of people with developmental disabilities to live in community); Mental Health Ass'n v. City of Elizabeth, 484 A.2d 688, 690-91 (N.J. Super. Ct. Law Div. 1981) (ordering city to issue requested building permit to plaintiffs and concluding that city had failed to meet its burden of proving that legislature acted arbitrarily, capriciously, or unreasonably in enacting statute); Mahrt v. City of Kalispell, 690 P.2d 418, 419 (Mont. 1984) (concluding that group home with eight or fewer residents has unquestionable right to operate in any residually zoned area); State ex rel. Thelen v. City of Missoula, 543 P.2d 173, 176-77 (Mont. 1975) (upholding state statute declaring local zoning ordinance invalid and contrary to state policy of promoting right of people with developmental disabilities to live in community); Mental Health Ass'n v. City of Elizabeth, 484 A.2d 688, 690-91 (N.J. Super. Ct. Law Div. 1981) (ordering city to issue requested building permit to plaintiffs and concluding that city had failed to meet its burden of proving that legislature acted arbitrarily, capriciously, or unreasonably in enacting statute); Nichols v. Tullahama Open Door, Inc., 640 S.W.2d 15, 19 (Tenn. Ct. App. 1982) (holding that statute barring commercial use of property was not meant to exclude nonprofit group home). \textit{But see} Clem v. Christole, Inc., 582 N.E.2d 780, 785 (Ind. 1991) (holding that retroactive application of 1988 state preemption statute violated contract clause of state constitution); Garcia v. Siffin Residential Ass'n, 407 N.E.2d 1365, 1367 (Ohio 1980) (holding that state preemption statute unreasonably limited enforcement by municipalities of police powers authorized by state constitution), \textit{cert. denied}, 450 U.S. 911 (1981); Brownfield v. State, 407 N.E.2d 1365, 1367 (Ohio 1980) (rejecting notion that state is automatically exempt from local zoning regulations); \textit{see also} City of E. Cleveland v. Board of County Comm'rs, 430 N.E.2d 456, 459-60 (Ohio 1982) (stating that state was not automatically immune from local zoning laws where neighbors of proposed halfway house for former mental patients sued state that had purchased home but had not applied to court for permit).

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

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

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

Remarks on Signing the Fair Housing Amendments Act of 1988, 1988 PUB. PAPERS 1155, 1156 (Sept. 15, 1988). But the President's attempt to draft legislative history after the fact drew sharp retort by Senator Edward Kennedy, the principal sponsor of the amendments, who made clear the following day that Congress did not contemplate any such intent requirement. Senator Kennedy stated:

Unfortunately, President Reagan . . . announce[d] an interpretation of the act that this [sic] flatly inconsistent with Congress's understanding of the law . . . . As the principal Senate sponsor of the 1988 act, I can state unequivocally that Congress contemplated no such intent requirement. The act did not materially alter the 1968 Fair Housing Act provisions defining what is required to prove a discriminatory housing practice.
natory intent is not now required nor was it required, under the original version of the Act.\footnote{325}

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

\footnote{325. A plaintiff may make out a prima facie case of disparate impact under the Fair Housing Amendments Act by showing that a given practice has a greater impact on handicapped applicants or residents than on non-handicapped applicants or residents. See Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989) (stating that showing of either discriminatory intent or impact is required under FHAA); Oxford House v. Township of Cherry Hill, 799 F. Supp. 450, 461 (D.N.J. 1992) (establishing prima facie case of discrimination by showing disparate impact); People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725, 732 (E.D. Va. 1992) (stating that discriminatory intent is not required, but only that city acted for sole purpose of effectuating desires of private citizens, that improper considerations were motivating factor behind those desires, and that city decision makers were aware of citizens' motivations); Casa Marie, Inc. v. Superior Court of Puerto Rico, 752 F. Supp. 1152, 1168 (D.P.R. 1990) (stating plaintiff need not show discrimination was sole motivating factor for action, but only one motivating factor to prove discriminatory impact); Baxter v. City of Belleville, 720 F. Supp. 720, 732 (S.D. Ill. 1989) (requiring proof of discriminatory "impact" rather than intent); see also Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289 (7th Cir. 1977) (stating that discriminatory intent is not required to make prima facie case of discrimination under FHA), cert. denied, 454 U.S. 1025 (1978); United States v. City of Chicago, 549 F.2d 415, 415 (7th Cir. 1977) (finding that evidence of intention, while required to establish prima facie case under Constitution, is not required under title VIII). Discriminatory effect thus may be shown by proof that all persons negatively affected by an allegedly unlawful practice are handicapped. See, e.g., Familystyle of St. Paul, Inc. v. City of St. Paul, 728 F. Supp. 1396, 1403 (D. Minn.) (stating in FHAA case that "[a] law enacted without discriminatory intent may still be invalid if it has a disparate impact on a protected group"); aff'd, 929 F.2d 91 (8th Cir. 1990); Support Ministries for Persons with AIDS v. Village of Waterford, 808 F. Supp. 120, 133-36 (N.D.N.Y. 1992) (invalidating ordinance preventing opening of boarding home for persons with HIV after establishing that denial of special permit constituted discriminatory intent and effect as proscribed under FHAA); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1529, 1541-42 (D.N.J. 1991) (granting preliminary injunction to plaintiffs in FHAA case challenging local zoning law's definition of "family" as applied to home for recovering alcoholics).}

\footnote{326. The Supreme Court has provided mixed messages regarding the proof required in cases of discrimination in other contexts. In 1985, the Court upheld the effects test under \S 504 of the Rehabilitation Act in Alexander v. Choate, 469 U.S. 287 (1985), by rejecting the state's argument that only intentional discrimination was proscribed by the Rehabilitation Act. Id. at 294-97. As the Court stated, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." Id. at 296-97. The Court noted, however, that although some conduct that has a disparate impact on people with handicaps is forbidden by \S 504, the law does not necessarily reach all such actions. Id. at 298. Two recent decisions in the employment context that reach opposite results provide a distressing hint of what this Court would decide today. In St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993), the Court held that a title VII plaintiff has the ultimate burden of proving that an employer's discriminatory treatment was racially motivated. Id. at 2746-47. Justice Souter filed a strong dissent, arguing that the decision is "unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court," such as post hoc pretextual reasons for an adverse employment decision. Id. at 2761. Similarly, in Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), the Court increased the plaintiff's statistical obligation by requiring a showing of disparity between the number of "qualified" minorities in the job pool and the number actually employed, rather than between the gross number of skilled and unskilled jobs. Id. at 650-55. The Court also required that the plaintiff "prove" disparate impact for each employment practice complained of; previously, the Court had allowed plaintiffs to establish an impact cumulatively for all relevant employment practices. Id.}
ten of the eleven U.S. courts of appeals that have addressed this issue with respect to the original version of the law have held that title VIII of the Civil Rights Act of 1968 covers not only intentional housing discrimination, but also housing practices that have discriminatory effects, even where the plaintiff cannot prove discriminatory motive.\textsuperscript{927} As Senator Kennedy made clear in his support for the FHAA:

\textit{\textsuperscript{927} See Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989) (holding that prima facie case for discrimination under Fair Housing Act requires proof of (1) membership in racial minority, (2) application for and qualification to rent, (3) denial of opportunity to rent or negotiate, and (4) subsequent availability of housing); NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.) (stating that disparate impact is sufficient under Fair Housing Act to make prima facie showing of discrimination); Arthur v. City of Toledo, 782 F.2d 565, 574 (6th Cir. 1986) (declaring that referendum may be set aside because of obvious racial classification without proof of discriminatory intent); Betsey v. Turtle Creek Assocs., 786 F.2d 985, 986 (4th Cir. 1984) (stating that landlord's housing practices may be illegal based upon showing of disproportionate impact); Halet v. Wend Inv. Co., 672 F.2d 1105, 1111 (9th Cir. 1982) (finding possibility of discriminatory effect sufficient to state cause of action under Fair Housing Act); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977) (finding that discriminatory effect alone is sufficient for prima facie case under title VIII); cert. denied, 435 U.S. 908 (1978); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1285, 1290 (7th Cir. 1977) (outlining circumstances under which discriminatory impact without discriminatory intent will suffice to show title VIII violation); cert. denied, 434 U.S. 1025 (1978); United States v. Pelzer Realty Co., Inc., 484 F.2d 438, 444 (5th Cir. 1973) (finding that plaintiffs were victims of "pattern of discrimination," compelling conclusion of racial motivation); cert. denied, 416 U.S. 935 (1974); United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974) (finding discriminatory result sufficient to make prima facie case under title VIII); cert. denied, 422 U.S. 1042 (1975); Smith v. Anchor Bldg. Corp., 556 F.2d 231, 235 (8th Cir. 1976) ("Effect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minorities as a willful scheme."); Bonner v. City of Frichard, 661 F.2d 1206, 1209 (11th Cir. 1982) (adopter Fifth Circuit precedent on discriminatory effect issue and thereby adopting holding of United States v. Pelzer Realty Co.); see also Margaret S. Rubin, Advertising and Title VIII: The Discriminatory Use of Models in Real Estate Advertisements, 98 YALE L.J. 165, 169-80 (1988) (discussing absence of intent requirement in title VIII causes of action). But see Latinos Unidos de Chelsea en Acci6n v. Secretary of HUD, 799 F.2d 774, 791 (1st Cir. 1986) (declining to resolve issue of whether Fair Housing Act requires discriminatory intent). In City of Black Jack, the Eighth Circuit permanently enjoined enforcement of a restrictive
All of the Federal courts of appeals that have considered the question have concluded that title VIII should be construed, at least in some instances, to prohibit acts that have discriminatory effects, and that there is no need to prove discriminatory intent. In enacting the Fair Housing Amendments Act, Congress accepted this consistent judicial interpretation.\textsuperscript{328}

The FHAA also seeks to remedy the problems of the original law by providing several enforcement options to complainants. The FHAA gives HUD the authority to investigate and bring lawsuits when mediation efforts fail and establishes an administrative enforcement mechanism for cases where discriminatory housing practices cannot be resolved informally. An individual or the Secretary of HUD may file a complaint with HUD within one year of the alleged discriminatory housing practice.\textsuperscript{329} The Secretary must investigate the complaint within 100 days of the filing date\textsuperscript{330} and file a final investigative report.\textsuperscript{331} If no conciliation agreement can be reached, the Secretary must then determine whether "reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur."\textsuperscript{332} The Secretary must base the determination of "reasonable cause" only on the facts of each specific case.\textsuperscript{333} If HUD finds zoning ordinance that effectively prohibited the construction of multiracial, federally subsidized moderate- and low-income housing because it violated title VIII. \textit{City of Black Jack}, 508 F.2d at 1188. The city claimed that the motive of the ordinance was not discrimination, but fear that the proposed apartments would destroy the city's residential character, cause traffic problems, and devalue the property. \textit{Id}. at 1186. The court of appeals disagreed. \textit{Id}. It found that the ordinance would "foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack . . . at a time when 40 percent of them were living in substandard or overcrowded units." \textit{Id}. Consequently, the court believed that implementation of the zoning ordinance would "contribute to the perpetuation of segregation in a community which was 99 percent white." \textit{Id}. Convinced that the city had failed to demonstrate a compelling interest for its action, the court permanently enjoined enforcement of the ordinance as violative of title VIII. \textit{Id}. at 1188.


331. \textit{Id}. § 3610(b)(5)(A).

332. \textit{Id}. § 3610(g)(1).

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

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

Unlike the original Fair Housing Act, the FHAA contains a

\textsuperscript{334} Id. § 3610(g)(2)(A).

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


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


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

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

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

E. State Fair Housing Laws

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

1. Persons protected

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

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

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

349. See infra notes 350-81 and accompanying text (discussing state statutes proscribing discrimination based on mental disability).
351. See, e.g., ME. REV. STAT. ANN. tit. 5, § 4553 (West Supp. 1992) (limiting coverage to those with mental conditions diagnosed by medical professional).
352. See, e.g., ARIZ. REV. STAT. ANN. § 36-501(22) (1993) (distinguishing mental disorders from conditions resulting from substance abuse or mental retardation); N.C. GEN. STAT. § 168A-3 (1987) (excluding alcoholism and drug addiction or abuse from definition of “mental impairment”); VT. STAT. ANN. tit. 9, § 4501 (Supp. 1990) (excluding alcohol- or drug-addicted persons who are threats to others from definition of “handicapped individual”).
epilepsy, drug addiction, and alcoholism do not per se constitute mental illness, although persons suffering from these conditions may also be suffering from mental illness.\textsuperscript{355}

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

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

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

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

\textsuperscript{355.} \textit{Alaska Stat.} § 47.30.915 (1990).
\textsuperscript{356.} \textit{Id.}
\textsuperscript{358.} \textit{Id.}
tenant's ability to meet the lease obligations. It is likely, however, that the courts will invalidate such a provision because the FHAA excludes any requirement that a tenant with a disability provide proof of independent living skills prior to securing housing.362

2. Persons prohibited from discriminating

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

3. Prohibited conduct

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

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

363. See, e.g., DEL. CODE ANN. tit. 6, § 4603 (Supp. 1992); IOWA CODE ANN. § 216.8 (West Supp. 1993); MD. ANN. CODE art. 49B § 22(a)(1), (b) (Supp. 1993); MINN. STAT. ANN. § 363.03 subd. 2(1)(a) (West Supp. 1993); MO. ANN. STAT. § 213.040 (Vernon Supp. 1993); MONT. CODE ANN. § 49-2-305(1) (a) (1993); N.H. REV. STAT. ANN. § 354-A:10 (Supp. 1992); N.J. STAT. ANN. § 10:5-12 (West Supp. 1993); N.M. STAT. ANN. § 28-1-7 (Michie 1991); N.Y. EXEC. LAW § 296(2-a) (McKinney 1993); OKLA. STAT. ANN. tit. 25, § 1452 (West Supp. 1993); OR. REV. STAT. § 659.430(4) (1991); W. VA. CODE § 5-11-9 (Supp. 1993);


366. See, e.g., IOWA CODE ANN. § 216.8 (West Supp. 1993); MINN. STAT. ANN. § 363.03 subd. (1)(1)(a) (West Supp. 1993); N.H. REV. STAT. ANN. § 354-A:10 (Supp. 1992); N.J. STAT. ANN. § 10:5-
The statutes that prohibit the most activities include the phrase "or otherwise deny" and make explicit that all transactions relating to real estate are subject to the prohibitions contained in the statute. The language of this statute more closely resembles zoning legislation than fair housing laws. The North Carolina statute, however, does appear to integrate the interests sought to be protected by both zoning and fair housing laws. While this statute does not single out particular real estate transactions, it does establish that people with disabilities have the same right as others to live in residential communities. The effect of the law, then, is the same as other fair housing laws—to prohibit discrimination in real estate transactions involving housing in residential communities. The law does not apply, however, to other types of real estate transactions or commercial property transactions, which are covered by some of the other more detailed state fair housing laws.

4. Other discriminatory acts

   a. Prohibited inquiries

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

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


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

371. MONT. CODE ANN. § 49-2-305 (1993); see also PA. STAT. ANN. tit. 43, § 955(h)(6) (Supp. 1993) (prohibiting inquiries regarding handicap or disability).
evaluated solely on the basis of criteria that are relevant to real estate transactions and that apply to all housing applicants and occupants. In short, it may be illegal under various state fair housing laws for a landlord, real estate agent, or even mortgage officer to ask whether an individual has undergone treatment for mental illness or other disability.

b. Misrepresentations of property values

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

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

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

872. A study of the General Accounting Office reported that "decline in real estate values," the neighbors' common objection prior to the opening of a group home, was seldom mentioned after the home was in operation. U.S. GEN. ACCOUNTING OFFICE, ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED 9 (1983).
873. See supra note 256 and accompanying text (discussing role of fear and prejudice in neighborhood opposition to group homes); see also supra note 22 and accompanying text (discussing widespread fear of people with mental disabilities).
Such provisions may not eliminate the fears and prejudices that prevent people with mental disabilities from acquiring housing, but they do send a message that the state intends for its citizens to provide equal treatment to such people in real estate transactions. Further, expanding the scope of state fair housing laws in this manner is consistent with empirical data that establishes that people with mental disabilities make good neighbors; it also enables the state to address an often more subtle and insidious form of discrimination.

c. Restrictive covenants

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

5. Exemptions to state fair housing laws

Although most state fair housing laws are broad in their scope and coverage, some provide exemptions for certain classes of people or certain transactions. For example, many statutes provide that the state's fair housing law should not be construed to prohibit dwellings or residential facilities that are designed exclusively for and occupied exclusively by individuals of the same gender. Similarly, many state statutes place the sale or rental of dwellings or facilities designed exclusively for elderly persons beyond the reach of the state fair housing laws.
States with fair housing laws that protect persons with mental illness or other mental disabilities are generally careful to allow programs, services, or facilities designed specifically to benefit this population. Some states also provide an exception for owner-occupied housing or housing occupied by the owner's family. In short, the scope and interpretation of each state's fair housing law varies according to the interaction between the prohibited transactions and the definition of the population that is protected by the law. Furthermore, to the extent that a provision of a state's fair housing law is inconsistent with the FHAA, it will be subject to repeal or court challenge. Thus, the new challenge that lawyers, mental health advocates, and legislators face is to ensure that state fair housing laws are consistent with the federal law and to encourage states to provide additional measures of protection where the federal law may be inadequate to facilitate the integration of people with mental disabilities into our residential neighborhoods.

CONCLUSION

The Fair Housing Amendments Act of 1988 represents the boldest
action by the Federal Government to curb discrimination in housing against people with mental disabilities. It provides a clear message to state and local governments as well as private property owners that discrimination against people with mental illness, developmental disabilities, or people who are perceived as mentally disabled will not be permitted. No longer will localities and individuals be free to discriminate against people with mental disabilities with impunity. The existence of the law itself, however, will not eradicate discrimination.

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

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

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


384. Minow, supra note 24, at 116-17 (citing Justice Marshall for proposition that separation that exaggerates differences is root of prejudice).
of the community, conveys the message that the residents of such housing are different and should be avoided. As long as people with mental disabilities are rejected in this way, and as long as such actions go unchallenged, people with mental disabilities will remain segregated, wherever they live. Accordingly, we must now begin to abandon the term "integration" and work toward inclusive or nonsegregated housing—housing that is equally available to all. In short, the quality of life available to all must, in a very real sense, also become available to people with disabilities.

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

Not only is there a shortage of adequate affordable housing, but a poor person must spend a greater proportion of his or her income on housing. Consequently, many people become homeless. For people with

385. See O'Connor & Racino, supra note 38, at 137-60.
386. See James A. Kushner, The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing, 42 VAND. L. REV. 1049, 1105-06 (1989). According to Professor Kushner, title VIII should be amended to prevent landlords from denying housing to recipients of public assistance. Id. In Kushner’s view, welfare recipients are arguably the best tenants because they have income that is not dependent on job stability and local economies. Id. Yet, they are often excluded not on economic grounds, but because of the landlord’s desire not to stigmatize the housing as “welfare housing.” Id. at 1106. Professor Kushner notes that many state and localities have enacted legislation specifically prohibiting discrimination against welfare recipients. Id. (citing D.C. CODE ANN. § 1-2515(a) (1987); Wis. STAT. ANN. § 101.22(1) (West 1973 & Supp. 1982)). Kushner also observes that most courts typically construe title VIII to prohibit such discrimination. Id. (citing NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.), aff’d, 109 S. Ct. 276 (1988) (per curiam)); United States v. Starrett City Assocs., 840 F.2d 1096, 1101 (2d Cir.), cert. denied, 109 S. Ct. 376 (1988); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038-40 (2d Cir. 1979)). Given these practices, Kushner argues persuasively that either Congress should amend the FHAA to cover such bias explicitly or HUD should issue regulations specifying such prohibitions. Id.
387. See Dionne, supra note 74, at A18.
388. Dionne, supra note 74, at A18.
389. Dionne, supra note 74, at A18.
mental disabilities, homelessness can be particularly devastating.\footnote{390}{See Arlene S. Kanter, Homeless But Not Helpless: Legal Issues in the Care of Homeless People with Mental Illness, 45 J. SOC. ISSUES 91, 101-03 (1989) (concluding that recent efforts to institutionalize mentally ill homeless people are misdirected solutions to solving problems of mentally ill homeless people); Kanter, supra note 31, at 351-57 (concluding that institutionalizing efforts will not solve problems of homelessness for mentally ill); see also Heard v. Cuomo, 567 N.Y.S.2d 594, 599 (Sup. Ct. 1991) (ordering city to provide appropriate housing for people discharged from mental hospitals, but due to shortage of adequate housing, delaying implementation of judgment "over a period of time").}

The Housing Act of 1949 declared the national goal of providing "a decent home and a suitable living environment for every American family."\footnote{391}{42 U.S.C. § 1441 (1988).} Even the Universal Declaration of Human Rights declares that everyone has a right to a standard of living sufficient to enable him and his family to have housing.\footnote{392}{Universal Declaration of Human Rights, art. 25(1), G.A. Res. 217(III) (Dec. 10, 1948), reprinted in UNITED NATIONS RESOLUTIONS 135, 140 (Dusan J. Djonovich ed., 1973).} The Supreme Court, however, has never recognized a constitutionally protected right to housing under federal law. Accordingly, decent housing remains unavailable for many Americans, and the FHAA will not remedy this situation. To ensure housing for all, the Supreme Court must hold that there is a fundamental right to housing. Alternatively, Congress can recognize the right to housing. Until then, the right of people with mental disabilities to be free of discrimination will be the law, while in practice, decent, affordable housing will remain unavailable.