

## Comment on Martin D. Abravanel's "Public Knowledge of Fair Housing Law: Does It Protect against Housing Discrimination?"

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### *Abstract*

There is a direct relationship between awareness of fair housing law and fair housing enforcement, as Abravanel shows in his article on the Urban Institute study. It confirms many of the impressions that advocates have about public knowledge of fair housing law and provides a powerful tool to advance the cause of fair housing. However, it is disturbing because it shows that most people who perceive a violation are unwilling to file a complaint, thus substantially diminishing the effectiveness of the law.

The study confirms that people who know the most are the most likely to file complaints. This conclusion shows the need for more fair housing education, but further information is needed about why people do not think that filing a complaint is worthwhile. If the reason is that the remedies are perceived to be ineffective, more effective remedies must be provided and the public must be educated about them.

**Keywords:** Affordability; Enforcement; Fair housing

### **Introduction: Reflections on the relationship between education and enforcement**

It is often said that knowledge is power. The study described by Martin D. Abravanel supports this adage. The study gives fair housing advocates knowledge and, therefore, power. It tells them that the public is generally aware of fair housing law and that public acceptance of the law is growing. It also tells them that public knowledge does not necessarily mean that those who suspect discrimination will file complaints. This is very useful knowledge that confirms many of the impressions shared by those working in the field. This is knowledge that can be transformed into action.

The study shows that laws can be effective in changing people's attitudes. It undermines the notion put forward by the Supreme Court over a hundred years ago in *Plessy v. Ferguson*,<sup>1</sup> which established the now discredited doctrine of "separate but equal," that legislation cannot change social norms based on race. Instead, the study supports the

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<sup>1</sup> 163 U.S. 537, 551 (1896).

thesis that the law can shape people's thinking about what is right and wrong. It is significant that the more people know about fair housing law, the more likely they are to support it. However, the study does not show whether they will act in accordance with the law if they perceive that it is not in their interest to do so.

The study will help those who are working to provide fair housing to everyone in the United States by telling us where we should put our efforts, financial and otherwise. The study can be used to support more education and more enforcement.

It is self-evident, and the study confirms it, that education about fair housing must be accompanied by vigorous enforcement. But despite some views to the contrary, enforcement alone, without a strong public education program, will not be effective. The two must go hand in hand. Each depends on the other. An emphasis on one at the expense of the other will not eliminate housing discrimination in the United States and establish strong and healthy integrated communities.<sup>2</sup> The current federal agenda of funding both education and enforcement is correct—only it must be more rather than less in both areas. The study tells us that we are on the right track but that we need more resources to accomplish our goal. Although the study itself points to areas that need further examination, it offers an immediate blueprint on where we must go.

### **How the study supports enhanced fair housing education and enforcement**

Social scientists may debate the methodology and the implications for further research, but the study as it stands is important and gives us useful knowledge that can be used in setting an agenda to further the cause of fair housing.

First, the study is useful for political advocacy. It shows that a majority of Americans support fair housing, especially when discrimination is based on race, national origin, or religion. Policy makers, particularly elected ones, are influenced by public opinion. That a majority of the public believes that landlords, home sellers, real estate agents, and mortgage lenders should not engage in discriminatory acts shows that there is support for policies to eliminate discrimination. It means that when money is being apportioned each year, fair housing should be high on the agenda. It also means that citizens can petition state and

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<sup>2</sup> See *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 211 (1972).

local governments that do not have fair housing laws and ordinances and cite public support for their enactment.

Second, the study is useful for advocacy groups and those engaged in education. Despite the impressive number of people familiar with the law, there are still a disturbing number who are not and who need to be educated. Also, the study shows that those who know the law are more likely to support it. This provides an incentive to promote education.

The study shows where educational efforts should be focused. The public is more aware that the law prohibits discrimination based on race, national origin, and religion, but less aware of the protections afforded to families with children and those with disabilities. Therefore, it is not surprising that the public showed sympathy for landlords who limit families with children to a particular building in a rental complex. Assuming that there is a correlation between public disapproval of discriminatory acts and compliance with fair housing law, advocacy groups must convince the public that it is good policy that families with children have equal housing opportunities and not be segregated in their own little ghettos.

The study also shows misconceptions that must be corrected or else support for the law will erode, both among those who may think it is silly and those who believe it is being flouted. The public should know that fair housing law is common-sense law. Surprisingly, the study shows that a majority of respondents do not know that it is in fact legal under federal law for a landlord to deny a rental unit to a person who "does not have the best housekeeping habits." Forty-two percent erroneously believed it to be illegal, and another 37 percent were not certain. Housing providers clearly will not support and will find ways to evade the law if they believe that they cannot prevent their property from being trashed. This kind of ignorance also sends the wrong message to irresponsible tenants who may think that they do not have to maintain good housekeeping practices or that they are being illegally punished because they do not have good housekeeping habits.

Finally, the study will be useful for trial attorneys. That a majority of the public supports and knows about fair housing law can be helpful in presenting issues to either a judge or a jury. Juries are known to award higher damages than judges. Therefore, it is useful for trial attorneys to understand that many people know about and accept fair housing law. It is also useful to know that an attorney may have to be more persuasive if the case before the jury involves a family with children.

The amount of damages, whether awarded by a judge or a jury, is based on the harm caused to the plaintiff by the defendant and whether the

defendant knew or should have known that the conduct was illegal. The study indicates that a jury may not be impressed with a defense based on the defendant's lack of knowledge about the legality of the conduct. In awarding compensatory damages, the egregiousness of the defendant's conduct may indicate the degree of mental suffering inflicted on the complainant and, therefore, directly affect the amount of damages.<sup>3</sup> To award punitive damages, it must be found that the defendant acted with knowledge that the action violated the law or with reckless indifference to the plaintiff's rights.<sup>4</sup> The study indicates that a significant number of people know what the law says and that juries will be amenable to making these findings.

### **What the study does not tell us about fair housing education and enforcement**

The study leaves open a number of questions that do not touch on its effectiveness, but rather raise issues for further research.

#### *The knowledge and attitude of housing providers*

The study does not tell us anything about the respondents. The survey apparently used a totally random sample and therefore tells us what a random sampling of the population thinks about fair housing law. However, it would be useful to know how many of those in the sample are housing providers or providers of services and facilities relating to housing, as opposed to those who are housing consumers. One would assume that housing providers know more about the law than housing consumers because the law directly affects their work.

Clearly some groups like the National Association of Realtors have excellent training programs for real estate brokers, and most of them seem knowledgeable about the requirements of the law. How they feel individually as a matter of policy is another question. A number of brokers have brought fair housing complaints when they have been unable to make a sale or obtain a commission because of violations of fair housing law. It would also be useful to know what percentage of brokers would be willing to file a complaint if they saw the law violated.

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<sup>3</sup> See *Krueger v. Cuomo*, 115 F. 3d 487, 492 (7th Cir. 1977).

<sup>4</sup> See *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) and *Badami v. Terry W. Flood*, 214 F. 3d 994 (8th Cir. 2000).

When we get down to Mom and Pop housing providers, knowledge of and acceptance of fair housing law are likely to be very much lower. Yet these are the people who are responsible for managing a large number of the rental units in most communities. One would assume that knowledge of the law has increased among mortgage lenders and insurance agents as a result of the high-profile suits filed in these areas during the past decade, but again the survey gives us no answer. This information would be useful in deciding which groups to target for training.

A major concern in recent years is the number of architects, developers, and builders who are constructing new multifamily (four units or more) housing that does not meet the accessibility standards of the Fair Housing Act. The Department of Housing and Urban Development (HUD) has undertaken a number of initiatives to educate architects, developers, and builders about the accessibility requirements of the act. HUD is also attempting to persuade municipalities to adopt these accessibility standards as part of their local housing codes, something the act does not require. How much the failure to comply with the act is the result of ignorance rather than passive resistance is subject to conjecture. The survey did not raise any questions about the accessibility standards of the act, so it provides no data about the knowledge of these requirements among either housing providers or housing consumers.

*Some of the complex problems raised by the handicap provisions of the law*

Questions involving the handicap provisions of the Fair Housing Act continue to vex enforcement agencies. The questions asked in the survey indicate some public knowledge that persons with mental disabilities cannot be denied conventional housing if they do not pose a danger to anyone and that housing providers must allow tenants who use wheelchairs to build a ramp at their own expense so they can access their unit. But these are the easy questions. No question about a reasonable accommodation, which is the responsibility of the housing provider, was asked. Also, as stated earlier, there is widespread disregard for the new multifamily construction accessibility requirements. How much of this is due to ignorance is questionable.

*The knowledge of different provisions in state and local ordinances*

The survey is limited to knowledge of the classes protected under federal law. State and local laws and ordinances often contain additional

protected classes beyond the federal minimum. Protection may be based on characteristics such as marital or veteran's status, sexual orientation, age, or source of income (which may or may not protect recipients of Section 8 assistance, depending on the particular provision). Whether the public is more or less aware of these provisions is not addressed and may depend on the individual community.

A recent survey based on random testing done for the Lawyers' Committee for Better Housing (LCBH) in Chicago and dealing with discrimination on the basis of source of income is discouraging (*Locked Out* 2002). The City of Chicago Fair Housing Ordinance lists "source of income" as a protected class, and the city's Commission on Human Relations has held that Section 8 subsidies are a source of income.<sup>5</sup> This protection is particularly important because the city is engaged in the massive demolition of its public housing projects. Residents of those projects are given Section 8 vouchers so they can seek units in the private sector. The success of this program and whether the relocation of public housing residents results in greater or lesser urban segregation is in question.

The LCBH study shows that voucher holders in Chicago routinely face source-of-income discrimination despite the provisions of the city's Fair Housing Ordinance.<sup>6</sup> This discrimination increases in the Chicago Housing Authority's targeted areas, which are designated areas determined to be optimal for the relocation and integration of public housing families. The study also shows that the chances of rejection increase on the basis of the race or ethnicity of the voucher holder. The study does not indicate whether the landlords who intentionally denied voucher recipients housing did so out of ignorance or whether they knew the law and intentionally decided to flout it. In either event, the study demonstrates that simply passing a fair housing ordinance without massive public education and the threat of vigorous enforcement and sanctions does not result in compliance.

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<sup>5</sup> In *Smith v. Wilmette Real Estate & Mgt. Co.*, Chicago Commission on Human Relations Nos. 95-H-159, 98-H-44, and 98-H63 (April 13, 1999), the commission found that Section 8 is a lawful source of income and rejected the argument that the ordinance was preempted by federal law. More recently, the Circuit Court of Cook County rejected the commission's interpretation of the ordinance and held that the city did not intend to define Section 8 as "income." *Godinez v. Sullivan*, 01-CH-19272 (June 17, 2002). The case is on appeal in the Illinois Appellate Court.

<sup>6</sup> At the time the study was conducted, the ordinance had been interpreted to cover Section 8 vouchers.

### *Where people learned about the law*

The study focuses on a limited number of basic questions that involve the application of fair housing law. What we do not know is where respondents received their knowledge. Was it through the media or in books or newspapers? Did any of them learn about the law in school or in training or conferences? The answers to these questions could provide clues about how to better publicize the law.

### *The extent to which NIMBYism colors people's actions*

The survey also does not tell us whether people will comply with the law when they perceive a threat to their area or neighborhood, although they know about the law and may even generally support it. A large number of fair housing complaints involve the NIMBY (“not in my back yard”) factor. People who may be educated and perceive themselves as fair and open on public policy issues may recoil when they find their personal interests threatened. Complaints involving neighborhood opposition to group homes and halfway houses are routine, and opposition by community residents to affordable housing developments is common.

The U.S. Supreme Court has agreed to hear, during its 2002 term, a case involving the demand of community residents for a public referendum after city planning officials and the city council itself approved the construction of a multifamily project in a substantially all-white municipality.<sup>7</sup> Land use planning issues are complex, and whether or not community residents support fair housing in general may not directly affect how they will react when the issue moves into their own neighborhood in a way that makes them feel personally threatened.

### **Knowledge about enforcement and remedies**

The most disturbing information contained in the survey is something we all know but find painful to admit: Some 83 percent of those who thought they had been discriminated against said they had done nothing about it. Their reasons are equally disturbing. A plurality concluded that taking action was not worthwhile. The largest percentage did not think that any action would have helped them, and another

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<sup>7</sup> *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F. 3d 627 (6th Cir. 2001), cert. granted, 122 U.S. 2618 (June 24, 2002).

block simply did not want to have any more dealings with the person who was discriminating. About 14 percent of those who thought they had been discriminated against did not know what to do about it; another 17 percent did take some action, but for approximately one-third of them, the action consisted only of complaining to the person involved. Another third took direct action by filing a complaint with a court or administrative agency or by seeking help from a fair housing organization. The final third did something else, but did not specify what it was.

This information confirms the difficulty of enforcing the Fair Housing Act. All the education in the world will not help if victims of discrimination are not willing to take action. The survey does, however, give some solace in that there is a correlation between knowledge and the willingness to complain. Those with more knowledge are over two-and-one-half times more likely than those with less knowledge to do something. This finding clearly supports more education, and education would certainly have helped the 14 percent who did not complain because they did not know what to do.

The Fair Housing Act is enforced through the filing of complaints by victims of discriminatory practices.<sup>8</sup> The Justice Department has limited authority to file pattern and practice cases.<sup>9</sup> Although the department has a good record in filing and winning these cases, they constitute only a small percentage of the actions attacking discriminatory housing practices. Fair housing law is particularly unsuited to enforcement through traditional class action suits. Most violations involve individual acts of discrimination by countless small housing providers across the country. These types of situations do not lend themselves to class action or pattern and practice relief. Areas such as discriminatory policies and practices relating to mortgage lending and household insurance do lend themselves to correction through class action lawsuits, but most fair housing cases do not involve broad policy and practice violations by larger housing providers.

Creative lawyers might try to develop new and imaginative theories to combat NIMBYism and land use practices that perpetuate segregation, but creating such new causes of action requires sympathetic lawmakers and judges, and it is not clear that they can be found in abundance today. The Supreme Court's review of the *Cuyahoga Falls* case will tell us how vigilant we can expect the courts to be in reviewing land use

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<sup>8</sup> See *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 211 (1972).

<sup>9</sup> 42 U.S.C. section 3614.

decisions that either intentionally or by impact keep protected classes out of particular neighborhoods.<sup>10</sup>

No matter how we rail against the injustice of it, in the immediate future we are probably left with the same tools that we have always had to use to combat housing discrimination—the processing of individual complaints. Therefore, we must find better ways to process them. Surprisingly, this has been an area that has seen little research or creative thought.

The study informs us that most people do not file complaints because they do not think it is worthwhile. Why not? The results of the survey are not sufficiently probative to give us a clear answer to this question.

What do victims of discrimination really want? This might seem an easy question to answer, but it is not. Attorneys and fair housing counselors who interview victims of housing discrimination know how hard it is to counsel them about relief (Seng, Einhorn, and Brown 1992). In fact, it is unusual for victims to know what they want.

Victims who file an immediate claim often still want the unit or at least want to inspect it if that right has been denied them. Frequently that is all they want, at least at that time. Why then do they think that filing a fair housing claim is not worthwhile? We need to know how many of them actually want the unit after they have been discriminated against and how many of them know that HUD or a fair housing agency can file a complaint for prompt judicial relief<sup>11</sup> or that they can go to court to secure a temporary restraining order (TRO) to prevent the unit from being rented or sold to someone else.<sup>12</sup> Do they know that normally once such an order is entered, the defendant will most likely agree to settle the case on terms favorable to the victim? The survey shows that some victims do not want to have anything to do with the perpetrator of the discriminatory acts, but we do not know why they feel this way. Do they know that the Fair Housing Act

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<sup>10</sup> The case involves the use of a referendum to keep affordable housing out of an all-white municipality. The Supreme Court granted certiorari on three issues: (1) Can the plaintiff use statements of community residents to prove intentionally discriminatory actions by city officials? (2) Can disparate impact claims be used consistently with the First Amendment to show that a racially neutral referendum violates the Fair Housing Act? (3) Does the denial of building permits violate substantive due process?

<sup>11</sup> 42 U.S.C. section 3610(e).

<sup>12</sup> 42 U.S.C. section 3613(c).

protects complainants from retaliation?<sup>13</sup> If they do, do they think the law is worthless, and, if so, are they right?

Another question that must be asked is whether victims believe that prompt judicial relief is readily available to them in practice, as well as in theory. It was almost a routine legal practice in the 1970s for attorneys to request a TRO as part of the relief in a fair housing lawsuit. Today, practice is to the contrary. Although HUD can request prompt judicial relief, it is the exception and not the rule. This raises many questions. Why do fair housing enforcers not use prompt judicial remedies for clients? Is the administrative process too cumbersome? Do victims no longer want this relief? Are they taking too long to file complaints? Do they think there is too much danger of retaliation by housing providers if they ask for relief? In the 1970s, civil rights attorneys thought in terms of the civil rights injunction to right wrongs (Fiss 1978; Seng 1982). Today, civil rights attorneys are more likely to think in terms of damages. Does this change in thinking reflect what victims really want?

While victims frequently want the unit immediately after the discrimination occurred, as time passes, the focus often shifts more to damages. Victims of housing discrimination can recover their out-of-pocket expenses. These are usually not substantial, but at times they can be, especially if someone has to commute a greater distance to work or if the family had to move in with relatives or was left without adequate housing for a time. Nonetheless, the largest amount of damages is often for mental suffering and emotional distress. This is one area of fair housing law that has changed positively. In the 1970s, damages were rarely more than several thousand dollars (Schwemm 1981).<sup>14</sup> Today, awards can be a hundred thousand dollars or more.<sup>15</sup>

Damages cannot be scientifically calculated, and there can be great disparities in awards, even in cases that appear to be comparable on their face (Heifetz and Heinz 1992). It is thus easy to see why victims may decide that pursuing a damage award is not worthwhile. However, there are examples where victims have been liberally rewarded for the damages they incurred. But this is clearly not true in all cases, and some victims, who in their own minds see their suffering to be worth a million dollars, come away with only nominal damages.

<sup>13</sup> 42 U.S.C. section 3617.

<sup>14</sup> The range of damages in 1981 was from \$1 to \$20,000.

<sup>15</sup> *Broome v. Biondi*, FH/FL para. 16,240 (S.D.N.Y. 1997) discusses recent cases awarding damages.

Also, there is the time and expense of pursuing a case. Victims who elect to file a private civil suit have to secure a lawyer, go through the discovery process and trial, and sometimes even appeal, with no guaranteed outcome at any stage of the process. Victims who go through the administrative process frequently encounter delays,<sup>16</sup> run the risk of no-cause findings, and when they do get a hearing, often do not get the damage award they feel entitled to. It takes a strong person with lots of patience to see a damage action through to the end. Even if the case is settled or conciliated, the victim often feels that he or she gave into pressure and did not really get what the case was worth.

Often, especially at the early stages of the complaint process, victims say that they really do not want the unit and are not interested in damages, but that what they really want is to see that these discriminatory acts never happen again. Sometimes, these cases can be settled or conciliated for affirmative relief that satisfies the victim and ensures that the perpetrator's practices or policies are changed.

Sometimes, victims simply want to punish the perpetrator. Punitive damages and civil penalties are available, but a victim whose sole purpose is to punish the perpetrator will rarely find satisfaction. The punishment is always too slow or too little. Lawyers rarely want to represent a client whose sole purpose is retribution.

What this all means is that none of us has a clue about what people really want when they file a fair housing complaint. Getting a better handle on this question could lead to better and more effective enforcement. This concern brings us back to the multifaceted approach described earlier as necessary to deal with housing discrimination. Education cannot be limited to which acts may or may not violate the law, but rather must include knowledge about how fair housing law is enforced and what remedies are available. Potential victims must not only be able to spot discriminatory practices, they must know why it is important to complain, where to complain, and what a complaint will accomplish. A victim who does not know the answers to those questions will probably not proceed further.

## Conclusion

We are thus back where we started. Education about fair housing is essential, but education must involve more than simply knowing what

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<sup>16</sup> 42 U.S.C. section 3610(g) requires HUD to investigate a complaint within 100 days. The requirement is not jurisdictional (*Baumgardner v. HUD*, 960 F. 2d 572 [6th Cir. 1992]; *Kelly v. HUD*, 3 F. 3d 951 [6th Cir. 1993]), and HUD rarely meets this timeline.

is lawful and what is not. Education must include knowledge about fair housing enforcement and remedies. Otherwise, victims cannot make an informed decision about whether pursuing a complaint is worthwhile or not.

But education must be followed by effective enforcement. No sane victim is going to pursue a complaint unless he or she sees that it has a real chance of producing a successful result. No housing provider is going to risk violating the law if it is relatively certain that the potential victim is knowledgeable and is likely to file a complaint and, further, that it is relatively likely that the complaint will be competently and expeditiously investigated and resolved and that the penalties imposed for a violation will be substantial.

Both education and enforcement cost money. They cannot be done halfheartedly or intermittently. Education should start with children in the schools; this means that teachers must be educated about fair housing law and that fair housing must be a regular part of the curriculum. Housing consumers and providers also need to be educated. Unfortunately, the study does not show how this can be done most effectively. Nonetheless, every possible channel of communication should be used. Adequate and consistent funding for fair housing agencies and organizations to do community education is essential.

Effective enforcement requires trained counselors and investigators available to advise victims of their rights and to investigate complaints expeditiously. It requires that attorneys be available to go to court promptly to secure the unit when the victim wants this relief. It requires that attorneys, mediators, conciliators, hearing officers, and judges be trained in fair housing law and enforcement. It requires that fair housing agencies and organizations be given adequate and consistent funding so they can do an effective job of enforcing the law.

This study is important because it supports both education and enforcement and shows how knowledge of the law increases support for it. The study is disturbing, however, because it shows that most people who have experienced discrimination do not find it worthwhile to file a complaint. Thus, even though many Americans know about and support fair housing law, they perceive that it is not effectively enforced. If this perception does not reflect reality, more education about enforcement and remedies is needed. If it does reflect reality, enforcement must be improved and an educational campaign must be mounted to inform the public of the improvement. Only then will we be in a position to see that the promise of open, integrated, and healthy communities can be realized.

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