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THE LAST THING WE DO, LET'S SCARE ALL THE LAWYERS: HOW FAIR HOUSING VIOLATORS ARE INTIMIDATING FAIR HOUSING ADVOCATES INSTEAD OF DEFENDING CASES AND WHY IT IS ILLEGAL

KELLI DUDLEY

INTRODUCTION

This article explores a trend among defendants accused of violating the Fair Housing Act (FHA): attacking the advocate who brings the case forward. These attacks take several forms, among them filing retaliatory lawsuits against advocates and passing legislation to limit the actions advocates, including state civil rights enforcement authorities, can take and the recovery available to successful fair housing plaintiffs and their advocates, including attorneys.

The FHA's unusual history is discussed in Section I. It was passed against a backdrop of protest. To a limited degree, it was redundant of rights that were embodied in legislation that preceded it by 102 years but were not recognized by the judiciary until after the FHA passed. It relies upon advocates and allies of those it aims to protect, in particular by granting standing to fair housing organizations, neighbors and testers. In fact, the FHA relies upon the latter group to give it feet to go into communities and discover, using recognized testing methods, where violations are taking place.

It is this reliance on advocates, discussed in Section II, which makes the FHA challenging to enforce consistently. A FHA complaint is often brought only because an advocate is willing to

bring it forward. Therefore, it can be effectively repealed if no one is willing or able to give it feet to visit a landlord who may be discriminating, to document the landlord's practices, or to give it a voice by preparing and filing a complaint with a governmental agency or court.

Section III discusses the current threat to equitable access to housing. Although the FHA has been described as a broad, remedial act that should be liberally interpreted to further fair housing, advocates are increasingly bound by efforts to silence them. Complaints to the U.S. Department of Housing and Urban Development (HUD) based on retaliation are on the rise. Legislative efforts are underway to limit enforcement activities and to remove attorney-fee incentives. Attorneys helping those who experience discrimination are taken out of the courtroom and placed at the center of the story, defending their integrity, law licenses and very right to speak with their own clients.

The FHA contains an anti-retaliation, intimidation and interference provision. Section IV describes this provision and how it is underutilized by advocates who are targeted by fair housing defendants, argues that that it should be used more widely, and discusses strategy for defending fair housing advocates from the counter-attacks that seek to deprive the FHA of its intended broad, remedial purpose. Advocates must ensure that the words of Professor F. Willis Caruso, co-director of The John Marshall Law School's fair housing clinic and an attorney who has long advanced successful fair housing cases, continue to ring true: "The broad interpretation [of the FHA] means that, for the most part, attempts to circumvent the law by sophisticated and simple minded efforts have failed."[1]

[1] F. Willis Caruso, Cases and Materials on Fair Housing and Fair Lending Laws 16–17 (4th ed. 2001).

I. Mobs, Customary Practice and the Limits of Liberalism: Passage of the Fair Housing Act

The Fair Housing Act, 42 U.S.C. § 3604 *et seq.*, was passed in 1968 and amended in 1988. It protects people from discrimination related to housing in the areas of race, color, national origin and religion. Gender was added as a protected class in 1974. The 1988 amendments added disability and familial status as protected classes.[2]

When Congress passed the FHA, they were aware of the intimidation tactics, including violence, directed toward African-Americans who moved into predominantly white neighborhoods. The FHA addressed a long-standing problem: attempts to curb mob violence had been introduced, with limited success, as early as 1905. An Illinois statute passed that year provided:

> "That any collection of individuals, five or more in number, assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of correctional powers or regulative powers over any person by violence, and without lawful authority, shall be regarded and designated as a 'mob.' . . ."[3]

The Illinois statue was amended in 1931 to impose liability on the municipality where mob action took place, presumably recognizing the acquiescence of local governments in race-based violence.[4] In fact, Professor Johnson recognized that some states simultaneously enacted legislation restricting segregation as well as prohibiting it. Where laws were enacted prohibiting segregation, they often were insufficient to overcome custom. As Professor Johnson observed in 1943: "Such situations are often

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[2] *Id.*

[3] Charles S. Johnson, Patterns of Negro Segregation 189 (1943) (Citing Law of Illinois 190 (1905)).

[4] *Id.*

aided and abetted by judges who refuse to accept the priority of law over customary practice."[5]

Because of the primacy of "customary practice" and the violence that statutes like the one cited above attempted to prevent, the "priority of law" failed to bring about housing integration. In a limited sense, fair housing was part of American law since 1866. Freedom to buy and sell property was part of the first section of the Civil Rights Act of 1866 (1866 Act) and, by the time of the 1968 passage of the FHA, was embodied in the Civil Rights Act of 1866:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The 1866 Act should have been enough to guarantee fair housing to every person, regardless of race. However, its fair housing mandate was not recognized by the courts until after the FHA was passed. In *Jones v. Mayer,* decided 102 years after

[5] *Id.*

the 1866 Act became law and in the same year the FHA was passed, the Supreme Court finally recognized that the 1866 Act covered private real estate transactions.[6]

Until 1968, fair housing advocacy took place largely outside of the legal realm, using persuasion and economic arguments. For example, efforts were made to improve "slum" conditions using code enforcement, urban renewal and open occupancy.[7] As Professor Beryl Satter illustrates in her thorough historical exploration of segregation and the legal fight for fair housing when discussing a real estate mogul who espoused open housing but would not lend in racially "changing" neighborhoods, "There were limits to his liberalism."[8]

After 1968, fair housing no longer depended on appeals to moral or business sensitivities. It was the law. Aware of the long-time resistance to integration, Congress extended coverage under the FHA to those who exercised their fair housing rights and those who protected them from violence and retaliation:

> "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title."[9]

With the FHA in place and advocates protected, it seemed that the limits of liberalism no longer mattered. Fair housing was a guaranteed right, not a hope. However, those willing to risk moving into neighborhoods where they might not be welcome

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

7 BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE AND THE EXPLOITATION OF BLACK URBAN AMERICA 134 (2009).

8 *Id.* at 137.

9 42 U.S.C. 3617.

needed a battery of advocates, including lawyers, to support them.

II. Moving In: Giving the Fair Housing Act Feet in the Community and Voices in Court

The FHA's seeming guarantee would be empty without people willing to act on its promise. Cognizant of the violence historically associated with the integration of housing, Congress provided for the FHA to apply broadly, to protect those who exercised fair housing rights or assisted others to do so, and to contain a variety of enforcement mechanisms.

As part of the effort to include advocates in its enforcement scheme, the FHA overcomes traditional prudential limitations on standing. Ordinarily, the concept of standing is a limit on jurisdiction that allows only those with relatively concrete injuries access to the courts. The Supreme Court recently reiterated the requirements of standing:

> "To establish Article III standing, a plaintiff must show, inter alia, an 'injury in fact', which must be 'concrete and particularized' and 'actual or imminent, not 'conjectural' or 'hypothetical.'"[10]

The FHA reaches the outer limits of standing. For example, black and white tenants each have the right to sue where blacks are excluded from housing. They can allege loss of the benefit of interracial associations.[11] This allows people who are not members of a protected class to enforce the FHA even if no member of the protected class comes forward. This a powerful way that allies can make the promises of the Act a reality. Although standing is still required, it is granted as liberally as Article III will allow.[12]

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[10] *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992); *Anthony List v. Driehaus,* 134 S.Ct. 2334, 2341 (2014).
[11] *Trafficante v. Metropolitan Life*, 409 U.S. 205, 209 (1972).
[12] *Id.*

The United States can sue to enforce the FHA. 42 U.S.C. § 3613 – 3614 allows the Attorney General of the United States to sue if there is a "pattern or practice" of denying fair housing rights and that the denial raises an issue of public importance. The United States government has imparted some of this authority to state governmental units able to conduct investigations just as HUD would.[13] Standing is extended to the government.[14]

Sometimes as part of governmental enforcement and sometimes solely to support private causes of action under the FHA, testing is a recognized and protected activity and testers have standing to sue. In testing, carefully controlled contacts are made with housing providers or others who may be engaging in discrimination. For example, a black tester may visit an apartment complex and be told nothing is available. A similarly-situated white tester may visit half an hour later and be shown several available units. Testers have standing because all people have a right to accurate information about whether housing is available. The FHA makes it illegal to represent to "any" person based on protected status that housing is not available when it is available.[15] Courts have upheld the rights of at least some testers to sue.[16] In addition, regardless of standing, the fact that someone is a "professional tester" does not render her or his testimony inadmissible or reduce the credibility of the testimony.[17]

In addition, fair housing organizations have standing. Discrimination frustrates their organizational missions.[18]

It is clear that the FHA is designed to encourage participation in enforcement by extending standing beyond ordinary boundaries. However, the fact that someone has standing is distinct

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13 *Id.* at 208-09.
14 *Id.* at 209.
15 42 U.S.C. § 3604(d).
16 *See e.g., Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982).
17 *Richardson v. Howard,* 712 F.2d 319 (7th Cir. 1983).
18 *Havens*, 455 U.S. at 363 (1982).

from whether he or she will experience retaliation, harassment or interference for participation in a fair housing case or other advocacy. This is true whether the person is a complainant who experienced discrimination, a representative of a governmental agency, a tester or anyone asserting or helping someone else assert fair housing rights. In 2001, Professor Caruso wrote: "Generally, the tester and the investigator are not at risk if they are well trained and acting professionally . . . . and suing a tester for doing the test may create an interference or intimidation claim under § 3617."[19] Professor Caruso lacked a crystal ball in 2001 and could not have foreseen the full onslaught of attacks that would be increasingly common ten years later.

III. The New Mob Rule: The Rise of Retaliatory Actions Against Fair Housing Advocates

Those seeking to weaken the fair housing act are increasingly striking at its core: its broad enforcement provisions. Broad standing and a remedy do little good if enforcement efforts are met with retaliatory actions that embarrass advocates, expose them to financial and professional risk, and punish the act of speaking out for fair housing. This is an emergent trend with relatively little data and case law available. However, HUD data show a rise in the incidence of retaliation. There were 719 complaints of retaliation filed with HUD in 2010. These rose steadily to 938 in 2013. By the third quarter of 2014, complaints were on track to balloon to over 1,000: 840. Some of the examples in this article come from the Ohio and Indiana, part of HUD's Region 5. Complaints in this region have swelled from 93 in 2010 to 117 in the first three quarters of 2014. This trend bears watching and further analysis, and this article is preliminary and exploratory.

In the 1990s, several HUD investigators began an investigation into three homeowners who publically advocated against a group home for people with disabilities. The homeowners made

[19] Caruso, *supra* note 1, at 157.

bigoted statements against people with disabilities and the possibility of their moving into the neighborhood.[20] The homeowners filed a lawsuit seeking to stop zoning approval of the residence, and lost the lawsuit in 1994.[21]

The HUD investigators acted on a report filed by a fair housing agency.[22] The HUD process was typical: a complaint was sent, the respondents were invited to answer, HUD indicated it would request records and conduct an investigation. In fact, as a result of these efforts, a conciliation (settlement) offer was made.[23] Despite the fact that there was a clear violation of fair housing law, an attempt to block a residential housing unit because of the disability or perceived disability of the people who would occupy it, the HUD investigators were sued personally, not just in their professional capacities. Even though the court acknowledged the HUD investigators were legally bound to accept the fair housing complaint and forward it to the other side, it mischaracterized their investigation as "chilling" free speech and used this grotesquely mistaken finding to deny them qualified immunity.[24] The court made this finding even though the lawsuit to stop the construction concluded with a loss to the homeowners before the HUD investigation was over. The court offered no explanation of how the HUD investigation could have "chilled" the progress of a lawsuit that was already concluded.[25] The court was utterly unconcerned with the "chill" *White* would impose on HUD's ability to investigate allegations of discrimination. In fact, the impact of the lawsuit was known to the court: to avoid outrageous claims like those in *White* going forward, HUD issued a memorandum making it much harder to investigate any case where "free speech" might be at

20 *White v. Lee*, 227 F.3d 1214, 1221 (9th Cir. 2000).

21 *Id.*

22 *Id.* at 1222.

23 *Id.*

24 *Id.* at 1233-34.

25 *White*, 227 F.3d. at 1233-34.

issue.[26] The memorandum covered both "free speech" and cases where access to the courts or other acts that could be characterized as "petitioning" the government were involved. The Achtenberg memorandum prohibits HUD officials from accepting for filing or investigating any complaint involving public activities that,

> ". . . are directed toward achieving action by a governmental entity or officials' and 'do not involve force, physical harm, or a clear threat of force or physical harm to one or more individuals.' It lists examples of protected speech activity and provides that 'any investigation which may be necessary to obtain information about the extent to which the First Amendment may be applicable should be prompt, narrowly tailored to gather sufficient preliminary data to allow such a decision to be made, and conducted in close consultation with counsel.' It prohibits document requests that seek 'membership lists, fundraising information or financial data of an organization that is or may be engaging in protected speech activities,' and the preparation or transmission of conciliation proposals 'that would circumscribe the First Amendment rights of any party to the complaint.' The Achtenberg memorandum also states that a 'lawsuit which is frivolous can be a violation of the Act.' While it does not define this standard or discuss the First Amendment concerns involved with respect to the filing of non-frivolous suits, the memorandum provides that 'given the sensitivity and complexity of the issues relating to such litigation, all situations involving claims that litigation amounts to a violation of [§ 3617 of the FHA] must be cleared with Headquarters before the

[26] *Id.* at 1242.

> complaint is filed.' More broadly, the memorandum states that where FHA concerns 'intersect with First Amendment protections,' HUD officials must defer to the latter: 'the Department chooses to err on the side of the First Amendment.'"[27]

The court held that the adoption of this memorandum did not moot the claim for relief.[28] HUD essentially bargained away its own investigatory power and did not even gain a litigation advantage by doing so.

It did not satisfy the court to strip HUD of the ability to investigate discrimination without fear of reprisal. The court imposed personal financial liability on the individual investigators. It dismissed, in a flippant manner, the concern that the investigators would become insolvent as a result of doing their jobs in service of promoting civil rights. The court went so far as to attack the fact of the defendants' representation by lawyers of the U.S. Department of Justice—a step outside the normal bounds of civility:

> "The HUD officials — or, to be more specific, their counsel from the U.S. Department of Justice — contend that they will face the specter of 'personal financial ruin' in the event that they are denied qualified immunity. The appropriate amount of damages to be awarded for the injuries sustained by the plaintiffs will be an issue for the jury or judge on remand; we express no opinion on that subject now."[29]

White emboldened far-right efforts to eviscerate the FHA. An immediate and lasting victory for those who read a "right to discriminate" into the Constitution, the case continues to tie the

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[27] *Id.* at 1242-43.

[28] *Id.*

[29] *Id.* at 1239.

hands of HUD employees.[30] The memorandum issued by Rita Achtenberg, adapted and re-issued from time to time, still applies. The current version is available on HUD's website.[31]

The seeming concern for free speech is a reversal of FHA jurisprudence, which has long recognized that some discriminatory speech can be curtailed. In 1972, the Supreme Court denied certiorari in *U.S. v. Hunter.*[32] The court thus recognized that the FHA applies to newspaper advertisement and that free speech is not abridged if a newspaper is sued for running discriminatory housing advertisements.[33] Just like those seeking to avoid home sales to people in protected classes by running discriminatory real estate advertisements, the *White* homeowners were interested in the purely economic interest, as they perceived it, of keeping people with disabilities out of the neighborhood.[34] This is unprotected commercial speech.

Axiomatic of the trend to punish advocates, a coordinated effort to curtail FHA investigation is underway in Ohio. Bill Seitz, a senator and attorney, is a member of the American Legislative Exchange Counsel (ALEC). He has sponsored legislation that would limit the investigatory powers of the Ohio Civil Rights Commission (OCRC).[35] The bill seeks to exempt small landlords, prohibit fair housing organizations from collecting damages if testers are used to establish a claim, limit damages and make attorney's fees discretionary.

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30 *White*, 227 F.3d at 1214.

31 NOTICE FHEO 2008-01, U.S. DEPT. OF HOUSING AND URBAN DEV. (2008), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=FirstAmLimitationsNotice.pdf.

32 *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972).

33 *Id.*

34 *White*, 227 F.3d at 1214.

35 Marilou Johanek, *Ohio senator makes another profit-over-principle play*, TOLEDO BLADE (July 5, 2014), http://www.toledoblade.com/MarilouJohanek/2014/07/05/Ohio-senator-makes-another-profit-over-principle-play.html.

The Ohio bill seeks to, among other things, limit the use of testers. "Chilling" the exercise of the right to equal housing, in particular by limiting use of testers, has been explicitly held to be invalid since at least 1975. In *U.S. v. State of Wisconsin*, the district court recognized that a state cannot limit the use of testers because this impairs the "general scheme" of the FHA.[36] In that case, Wisconsin had adopted a law that made it illegal for someone without a *bona fide* intention to solicit offers to buy or lease.[37] The court struck down the law, holding:

> "Because it is undisputed that Wis.Stat. § 101.22(4m) chills the exercise of the right to equal housing opportunity, the statute must be viewed as an obstacle to the accomplishment of the principal objective of Congress in passing the Fair Housing Act, that is, to provide fair housing throughout the United States."[38]

Senator Seitz was informed by HUD of shortcomings with the bill, including that it would force HUD to withdraw funding for the OCRC, an effort that brings millions of dollars to Ohio. OCRC would no longer be eligible to investigate cases instead of HUD if the Ohio laws were no longer "substantially equivalent" to the FHA. Sietz has promised to revise the bill.[39] The Senate website did not reflect any amendments.[40]

The landlord Senator Seitz holds up as a "victim" of the FHA has sued the attorney general and OCRC investigators personally. The landlord illegally applied a "no pets" policy to assistance animals for people with disabilities, requiring an

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36 *United States v. State of Wis.*, 395 F.Supp. 732, 734 (W.D. Wis. 1975).
37 *Id.* at 733.
38 42 U.S.C. § 3601; *Wisconsin*, 395 F.Supp. at 734.
39 Jeremy Pelzer, *Ohio Could Lose Millions in Civil Rights Funding if Fair-Housing Bill Becomes Law, Federal Official Warns*, CLEVELAND.COM, http://www.cleveland.com/open/index.ssf/2014/09/ohio_could_lose_millions_in_ci.html.
40 *See* S.B. 349, 131ST GEN. ASSEMB., THE OHIO LEGISLATURE, *available at* http://www.legislature.state.oh.us/bills.cfm?ID=130_SB_349.

additional $100.00 deposit for the assistance animal. They also declined to rent to a tester with a child, stating that children make too much noise. This was discovered by fair housing testers, and the fair housing organization they represented reported the landlord to the OCRC. The OCRC proceeded with an investigation. The landlord claimed this investigation violated her civil rights and filed a complaint pursuant to 42 U.S. C. § 1983 and 42 U.S.C. 1985.[41]

Although the Ohio Supreme Court has held the attorney general's investigators are entitled to immunity from suit, it has ruled the OCRC investigators must face potential individual liability, denying their motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the claim.[42] This case is almost identical to an earlier case, *Transky v. Ohio Civ. Rights Comm.*[43]

In January 2014, a landlord incorporated as "Taurus Libra Cancer" filed suit in Ohio against Fair Housing Contract Services, Inc., a fair housing organization, as well as an individual tester and employees of the OCRC in their professional and individual capacities. The suit (a counterclaim to a fair housing lawsuit) alleges a variety of rather inartfully-drawn claims including conspiracy, fraud, malicious prosecution, extortion and the like. The complaint refers to the ongoing activity of Fair Housing Contract Service's attorney in bringing fair housing suits, but does not go so far as to name her as a defendant.[44]

As a further example of the trend to threaten or punish advocates, fair housing complaints are often met with threats concerning sanctions. Two current Chicago cases are illustrative. In the context of suing attorneys who target people based on na-

[41] *Grybowski v. Ohio Civ. Rights Comm.*, 2011-Ohio-6843, 2-3 (11th Dist. 2011).
[42] *Id.* at 7-8.
[43] Transky et. al. v. Ohio Civ. Rights Comm'n, 193 Ohio App.3d 354 (11th Dist. 2011), *overruled by Grybosky v. Ohio Civ. Rights Comm'n.*, 2012-Ohio-3637 (11th Dist. 2012).
[44] *Ohio Civ. Rights Comm'n. v. Taurus, Libra & Cancer, Inc.*, CV-2012-10-6054 (Summit Cnty., Oh. Jan. 6, 2014).

tional origin or race for sub-standard (or illusory) mortgage foreclosure "defense" services, the United States District Court for the Northern District of Illinois has found that attorneys who engage in this behavior may be liable under the Fair Housing Act.[45] In the same order, the Court denied defendant's motion for sanctions.[46] Three state-law counts were dismissed due to failure to state a jurisdictional basis[47] a flaw that was easily cured with an amended complaint referring to pendant jurisdiction. The case settled.

In a case with similar facts, the defendant has sued the attorneys for the plaintiff.[48] The case against the attorneys was brought in state court, and the fair housing attorneys promptly removed the case to Federal court.[49] However, the defendants went into state court twice after removal and gained relief against the attorneys. The state court judge granting the initial preliminary injunctions knew of the removal.[50] The co-counsel were not allowed to talk to their own client, each other, or a vague swath of businesses and non-profit organizations for nearly a year due to a preliminary injunction obtained in state court after removal.[51] The state court judge, entering the preliminary injunction, acknowledged that the case had been removed.[52] While the Seventh Circuit was troubled by the state court's willingness to enter an injunction without notice and without jurisdiction in a removed case, it declined to recognize Federal jurisdiction.

The state court order that troubled the Seventh Circuit has been vacated.[53] The fair housing attorneys still face a lawsuit

45 *Uriarte v. Koch*, 13-CV-2929 (N.D. IL 2014).
46 *Id.*
47 *Id.*
48 *Fenton v. Dudley*, 716 F.3d 770, 771 (7th Cir. 2014).
49 *Id.* at 772.
50 *Id.* at 772-73.
51 *Id.* at 775.
52 *Id.* at 774.
53 716 F.3d at 774.

seeking a permanent injunction and monetary relief. Most troubling, the case leaves the door open for future fair housing defendants, disliking the ring of "j'accuse" in their ears, to run to state court and obtain injunctive relief preventing prosecution of the Federal Fair Housing Act claim.

IV. Moving Forward to 1968: Remembering the Purpose and Provisions of the Fair Housing Act

The cases cited above may leave the fair housing practitioner, or prospective practitioner, feeling isolated and vulnerable. The seemingly concerted attacks on fair housing advocates seem to be done with disregard for the protections afforded by the FHA. A young attorney might well avoid entering an appearance in a fair housing case alongside an experienced advocate, reasoning, "If they know who I am, they will sue me like they sued you."

However, just as the drafters of the FHA in 1968 knew about lynch mobs and angry neighbors brandishing bricks, they also knew about subtle intimidation and interference. Their foresight protects the lawyer marching into the courthouse in 2014 just as much as the new homeowner moving onto a predominantly-white block in 1969.

The anti-retaliation and anti-interference provision of the FHA is unequivocal:

> "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title."[54]

[54] 42 U.S.C. §3617.

Lawyers, fair housing organizations, testers, and government investigators are all people who "aid" or "encourage" others in the "exercise or enjoyment" of rights granted under the FHA. Therefore, they come well within the ambit of 42 U.S.C. § 3617.

In the cases above, none of the testers, fair housing organizations, attorneys or advocates pursued claims under 42 U.S.C. § 3617. However, where the anti-retaliation clause has been raised, it has been successful. In 2010, the director of Cincinnati's public housing authority became angry at efforts by civil rights attorney Robert Newman to ensure public housing expanded into neighborhoods that were not predominantly minority areas. The director, Arnold Barnett, retaliated against Newman by stating that they would build public housing next to Newman's home. Newman filed a complaint sounding in retaliation with HUD, and Barnett further retaliated by suing Newman for defamation.[55] Eventually, Newman's HUD complaint resulted in a conciliation (mediation) agreement that Barnett would leave his job, refrain from Federal employment for three years and dismiss his lawsuit against Newman.[56]

The success of the retaliation complaint filed with HUD in the *Newman v. Barnett* case is promising. However, the anti-retaliation provision, like the rest of the FHA, is not self-executing. Practitioners must file complaints on their own behalf and on behalf of others advocating for fair housing each time retaliation occurs.

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[55] Mark Payne, *CMHA Chief Denies Racism Charges,* STREETVIBES, Issue 162 at 1 (Oct. 1-15, 2009), http://streetvibes.files.wordpress.com/2011/06/streetvibes_october_1_2009.pdf (last visited Nov. 2, 2014).

[56] TITLE VIII CONCILIATION AGREEMENT BETWEEN U.S. DEPT. OF HOUSING AND URBAN DEV. AND CINCINNATI METRO. HOUSING AUTH., FHEO Case 05-10-0147-8, *available at* http://www.hud.gov/offices/fheo/library/10-CHMA-Conc-Agree-Executed-08-19-10.pdf.

V. Forewarned but not Fearful: Proactively Applying the FHA's Anti-retaliation Provisions

Practitioners and advocates may learn their lesson from cases like *Newman v. Barnett* and *Fenton v. Dudley* and simply stop demanding fair housing. However, another approach is to remember the promise of fair housing and stand ready to respond to any suggestion of retaliation or interference with a claim under 42 U.S.C. § 3617. The FHA contains parallel enforcement provisions that do not require administrative exhaustion: filing a complaint with HUD (which, in turn, may forward the complaint to a state civil rights agency if the state has a civil rights law that is "substantially equivalent" to the FHA. There is no filing fee associated with filing a complaint with HUD, highly-trained government officials undertake an investigation, the results of which are available to the complainant, and HUD may attempt conciliation between the parties.[57] In rare cases, where cause is found and where a pattern and practice of discrimination is present, the United States may prosecute the case.[58] In addition to, or instead of, this process, an aggrieved party can file a complaint in federal court.[59]

A practitioner or advocate subject to retaliation is clearly an "aggrieved party" for purposes of the FHA: 42 U.S. C. § 3617 refers to "any person." When an advocate is sued for advocacy, there is clearly "interference" and "intimidation."[60] Therefore, each advocate should be prepared to battle to preserve the very right to assist others. Further, it is incumbent upon each fair housing attorney to open his or her doors to this special class of colleagues, those among us who are persecuted toward the end of weakening the Fair Housing Act. The Fair Housing Act stood

57 42 U.S.C. § 3610.
58 42 U.S.C. §§ 3612, 3614.
59 42 U.S.C. § 3613.
60 *Id.*

up to a long history of chants and actions demanding, "We want blood," rising from those angry over new African American neighbors.[61] Today, that same cry is visible between the lines of court pleadings and legislation. It must be answered with the courage of 1968.

[61] SATTER, *supra* note 7, at 93.