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MEMORANDUM

To: All Interested Persons

Re: Fair Housing Issues Affecting Noncitizens in Privately-Owned,
Nonsubsidized Housing (updated)

Date: March 7, 2002

This memo addresses the following:

1. What types of fair housing complaints affect noncitizen residents;
2. What legal theories might be used to address these problems, and what defenses might be employed in rebuttal;
3. What are some of the practical problems in litigating cases on behalf of noncitizens; and
4. What information-gathering and legislative strategies might be helpful in combating the fair housing problems of noncitizens.

The good news is that undocumented tenants and homeseekers have the right to be free of housing discrimination under the federal and state fair housing laws.⁽¹⁾ This memo addresses the issues arising from the actual application of these laws to specific situations and the issues related to legal representation of undocumented persons.

I. FAIR HOUSING COMPLAINTS BY NONCITIZENS

A. Who are Noncitizens?

Immigration law recognizes several types of legal immigration status in addition to citizenship. Most people are familiar with the "green-card" status, which means that a person has the right to remain in the United States as a lawful permanent resident ("LPR").⁽²⁾ Noncitizens may be roughly divided into three categories: (1) lawful permanent residents (LPRs); (2) Non-LPRs legally within the United States; and (3) persons illegally present within the United States. Categories (2) and (3) are not easy to determine without specific expertise in the immigration laws and thorough knowledge of the person's factual situation relevant to those laws.

Many undocumented people have substantial claims to legal status, but are uninformed about their claims or are afraid to approach the INS to obtain documentation. Also, some people who were born outside the U.S. and believe that they are illegally in the U.S. actually are U.S. citizens, because they unknowingly inherited citizenship at birth from U.S. citizen parents or grandparents.

In addition to LPR, there are a number of other recognized bases for being in the United States lawfully. These include:

- eligibility for a particular program based on country of nationality;⁽³⁾
- having a pending claim for a variety of other immigration relief such as asylum, withholding of deportation, adjustment of status,⁽⁴⁾ registry, cancellation of removal, or relief for certain victims of domestic violence, victims of other violent crime, or victims of alien trafficking;
- having obtained an order of "withholding of deportation" from the INS or an immigration court;
- having status as a refugee or asylee;
- having status under the Family Unity program; or
- possessing an unexpired visa for tourism, education or work in the United States.

Determining whether a person is lawfully or unlawfully present in the United States is not a simple matter. Such a matter involves both knowledge of the immigration laws and determination of the relevant facts and is best left to an immigration attorney or certified immigration paralegal.⁽⁵⁾ As a general matter, housing providers have no competence to assess whether a person is legally present in the United States.

B. What Types of Fair Housing Problems Are Noncitizens Encountering?

According to anecdotal evidence from fair housing groups, noncitizens are encountering two types of problems: (1) barriers to tenancy in rental housing; and (2) retaliatory threats that are specific to immigration status. This section briefly describes some of the problems encountered by noncitizens in the private rental market.⁽⁶⁾ Further study is needed to collect systematic information about the nature and extent of these problems.

1. Barriers to Admission

During the 1990s, in most metropolitan areas of California, rental housing vacancy rates were low and rents were high and escalating. At the same time, under the "leadership" of the former Wilson administration, anti-immigrant sentiment peaked, resulting in measures such as the infamous Proposition 187, that purported to bar noncitizens from access to health care, public education, public benefits and other services, and to require state and local officials to act as agents of the INS. Even though key aspects of Proposition 187 were found unlawful and enjoined, the anti-immigrant message of Proposition 187 has made itself felt in the private rental housing market.

Some California housing providers have taken advantage of the plentiful supply of tenants to develop new criteria for tenancy that are based on immigration status or that have an exclusive effect on noncitizens. Some providers are requiring proof of lawful immigration status. Others simply require a valid social security number, a practice that may exclude: (1) noncitizens who are lawfully in the U.S. but do not have a social security number; (2) citizens who have chosen not to register with the Social Security Administration; and (3) undocumented immigrants.⁽⁷⁾ Few providers have any alternative procedures in place to obtain credit reports for persons who do not have a valid social security number, or who do not want to disclose their social security number, even though a credit report may be obtained by providing other identifying information, such as name and prior addresses or date of birth.

Some providers apply these barriers to all tenant applicants equally, while others are more inconsistent or target specific racial, national origin or ethnic groups, or persons who have difficulty speaking English. Some providers are even requiring an applicant to provide a valid ID in the early stages of the application process, such as prior to showing an available apartment unit to a prospective tenant. Some providers are also threatening to report or reporting to the INS any applicant who gives the provider a social security number that is not confirmed as valid by the Social Security Administration or by a credit reporting agency.⁽⁸⁾

2. Coercion of Tenants

Noncitizens also complain about housing providers who threaten their in-place tenants with reportage to the INS if the provider learns that the tenant has complained to a public agency, a fair housing group, or a landlord-tenant counseling group about discrimination or lack of tenantable conditions. Housing providers have also threatened to use and have used immigration status issues against tenants in eviction litigation.

With regard to these retaliation issues, the discrimination problem can exist on more than one level. First, some providers are only threatening persons of a particular racial, ethnic or national origin group with retaliation. Second, reportage to the INS might itself be unlawful coercion or retaliation of a tenant who is attempting to exercise federal and state statutory rights.⁽⁹⁾

II. RELEVANT LEGAL THEORIES AND DEFENSES

A. Intentional Discrimination

The intentional unlawful discrimination theory will likely be applicable in cases only where it can be shown that a policy or practice of exclusion based on citizenship or lawful immigration status is actually a pretext for exclusion based on race, color, national origin or ancestry. To attack barriers to admissions for noncitizens which are applied even-handedly to all applicants, advocates should look to disparate impact theory or privacy theory.

A threat of reportage to the INS is intentional unlawful housing discrimination when it functions to coerce, intimidate or interfere with a person attempting to exercise rights protected by the FHA or the FEHA. Whether a housing provider will be able to deflect such claims based on a defense under the federal First Amendment is an open question.

1. Identity of Protected Class and Intentional Discrimination Claims

Intentional discrimination theory is applicable to combat housing access barriers to noncitizens when the practice at issue targets applicants on the basis of race, color, national origin or ancestry. The FHA prohibits housing discrimination based on national origin, color, and race.⁽¹⁰⁾ The California Fair Employment and Housing Act ("FEHA") additionally prohibits discrimination based on ancestry.⁽¹¹⁾ Noncitizens have the right to file an administrative complaint or a civil suit against housing discrimination under both the FHA and the FEHA. Neither statute limits its protection to "citizens."⁽¹²⁾

A provision of the federal Civil Right Act of 1866, 42 U.S.C. §1981 ("Section 1981"), has been construed to prohibit discrimination based on citizenship in the making of private contracts, or in the terms of a contractual relationship.⁽¹³⁾ Section 1981 applies to residential rental contracts as well as other types of contracts.⁽¹⁴⁾ However, advocates should not assume that Section 1981's ban on discrimination based on alienage would be construed to prohibit discrimination based on lawful immigration status. Alienage discrimination is whether a person is a citizen or not. The protected class of "alienage" groups noncitizens with lawful immigration status together with noncitizens lacking lawful immigration.

There is no published appellate court decision under the FHA determining whether discrimination targeting immigration status can be discrimination based on "national origin."⁽¹⁵⁾ One can argue that restrictions which target immigrants are discrimination based on national origin because they target persons not born in the United States, and therefore, only persons with a non-U.S. national origin.⁽¹⁶⁾ However, the courts have favored the following counter arguments:

(1) national origin is not the same as "alienage;"(status as a noncitizen)⁽¹⁷⁾

(2) national origin and "alienage" are not the proper category for restrictions which target persons based on their legal right to reside in this country. Instead, the provider is using the category "lawful residence in the U.S.", which would admit some persons of non-U.S. origin and some noncitizens.

Based on the existing Title VII cases and the District Court decision in *Espinosa v. Hillwood Square Mutual Association*, 522 F. Supp. 559 (E.D.Va. 1981)(FHA's protection against national origin discrimination did not protect against intentional discrimination based on citizenship), it is likely that courts will construe the FHA's national origin protection not to prohibit under an intentional discrimination theory any discrimination based on citizenship or lawful immigration status. The FEHA's national origin and ancestry provisions will also likely be construed in this manner.⁽¹⁸⁾

The Unruh Civil Rights Act also prohibits discrimination based on national origin, race, color or ancestry. Civil Code Section 51. The Unruh Act applies to the business of renting housing.⁽¹⁹⁾ The Unruh Act provides a right to recover only for intentional discrimination.⁽²⁰⁾

The California Supreme Court reaffirmed in the *Harris* case that the Unruh Act also prohibits arbitrary discrimination on the basis of personal characteristics other than those specifically listed in Civil Code §51. However, the Court also held that the "other arbitrary discrimination" prohibition does not include financial or economic characteristics.⁽²¹⁾ There may be an argument that a noncitizen's lawful immigration status is a personal, nonfinancial characteristic within the meaning of the Unruh Act. As used in housing, immigration status may be an arbitrary criteria because housing providers are not capable of assessing the legality of a person's presence in the United States, except for the relatively simple statuses of citizen or LPR.⁽²²⁾ However, there are strong counter-arguments and advocates would be ill-advised to rely on the Unruh Act's "other arbitrary discrimination" doctrine as a primary means of attacking exclusion based on immigration status.

In sum, the intentional unlawful discrimination theory will likely be applicable in cases only where it can be shown that a policy or practice of exclusion based on citizenship or lawful immigration status is actually a pretext for exclusion based on race, color, national origin or ancestry. To attack barriers to admissions for noncitizens which are applied even-handedly to all applicants, advocates should look to disparate impact theory or privacy theory.

2. Intentional Discrimination and Barriers to Admission

Even though barriers to admission based on immigration status are not "per se" national origin, race, color or ancestry discrimination, any private housing rule to exclude noncitizens should be viewed with suspicion and investigated. Even the courts that distinguish between national origin discrimination and rules excluding noncitizens have acknowledged that such exclusionary rules are often a pretext for "a wider scheme" of national origin discrimination.⁽²³⁾ A housing provider commits intentional discrimination when inquiries about immigration status target persons of a particular color or ethnicity, or national origin, or persons of color generally. Testing of these practices should be carefully designed to show the policy and practice, and to eliminate other variables which might explain the practice as based on characteristics or considerations other than national origin, race, color or ancestry.⁽²⁴⁾

3. Retaliation

Reporting a noncitizen to the INS for a noncitizen's attempt to exercise rights protected by the fair housing laws appears to violate the FHA and the FEHA. Coercion, intimidation, threats or retaliation related to the exercise of fair housing rights are prohibited by the FHA and the FEHA.⁽²⁵⁾ Reporting a tenant to the INS who complains of violations of landlord-tenant laws

may also be illegal under Civil Code §1942.5.⁽²⁶⁾ A housing provider's threats of reportage to discourage complaints should also be illegal. However, in the wake of *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), a housing provider may have a federal First Amendment defense to liability for such reportage.⁽²⁷⁾ The legal theory of this defense is that the housing provider is exercising the right to communicate with government agencies, which would be subsumed under the constitutional right to petition the government for redress of wrongs. Nor is it clear under *White v. Lee* whether a mere threat of reportage would be illegal. An argument can be made that a threat of reportage, as opposed to an actual report to the INS, is not entitled to First Amendment protection because there was no actual communication with the government and no actual exercise of the right to petition government.

A recent federal court case specifically found that an employer was engaging in unlawful retaliation when the employer reported a person to the INS who had complained about violations of the Fair Labor Standards Act.⁽²⁸⁾ The undocumented plaintiff was entitled to compensatory and punitive damages and attorneys fees and costs of suit.⁽²⁹⁾

4. The Federal Crime of Harboring.

Housing providers may assert that they are compelled to inquire into applicants' immigration status because providing housing to persons without legal status would subject the housing provider to liability under the federal criminal statute which prohibits harboring an illegal alien. This is an incorrect statement of the law. Housing providers should be advised that:

(1) their inquiries into immigration status actually expose them to prosecution for "harboring"; and (2) they would insulate themselves from "harboring" if they ceased to inquire into an applicant's immigration status.

8 U.S.C. §1324(a)(1)(A)(iii) makes the following conduct a federal crime:

"Any person who...

knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor or shield from detection, such alien in any place, including any building or any means of transportation."

This crime has two elements: (1) the act of "harboring" (the "conduct element") with (2) the knowledge that, or reckless disregard of the fact that a noncitizen has come to, entered or remained in the U.S. in violation of the immigration laws (the "state of mind" element). The provision of housing can meet the conduct element of harboring.⁽³⁰⁾ However, a housing provider who never inquires into the immigration status of applicants would almost never meet the standard for intent required to violated the harboring statute. A housing provider who has a policy not to inquire into the immigration status of applicants is unlikely to learn any facts about the legal basis for an applicant to enter or remain in the U.S. This approach would also make it unlikely that such a provider would be in reckless disregard of facts about the immigration status of applicants.⁽³¹⁾

The harboring crime statute demonstrates that a housing provider has sound reasons for adopting a policy **not** to inquire into immigration status. First, as indicated, asking about

immigration status provides the housing provider with information that could expose the housing provider to prosecution for harboring if the housing provider mistakenly fails to exclude a person not legally present in the U.S., or if a manager decides to make an exception in a "no illegals" policy in return for money or sex. Second, determining whether a person has a lawful status is a complicated matter in which housing providers have no expertise or competence by virtue of providing housing.

B. Disparate Impact Discrimination

1. Elements of a Disparate Impact Claim.

Both the FHA and the FEHA prohibit policies or practices which have a disparate adverse effect or impact on a protected class.⁽³²⁾ While the FHA's disparate impact claim rules are found in judicial decisions, the disparate impact claim and defense is set forth in the language of the FEHA itself.

Under the FHA, plaintiffs' prima facie showing of disparate impact has two elements:

1. The occurrence of an outwardly neutral practice, rule or action; and
2. A significantly adverse or disproportionate impact on persons of a particular type [who are members of a protected class] produced by the defendant's facially neutral acts or practices.⁽³³⁾

Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir. 1997). It is likely that a plaintiff's required showing under the FEHA would be construed similarly.⁽³⁴⁾

Once the plaintiff has shown the disparate impact, the housing provider has the opportunity to rebut the illegality of the practice. Under federal law, the nature of what a defendant must show is not clearly established in the Ninth Circuit. Federal law may require merely a showing that the challenged rule or action is "reasonable," or a showing of "compelling business necessity." See Pfaff v. U.S. Dept. HUD, 88 F.3d 739, 747 (9th Cir. 1996). Because of this federal law muddle, any disparate impact case should include a claim under the California Fair Employment and Housing Act, which sets forth the applicable defense burden for disparate impact cases against private defendants as follows:

"A business establishment whose action or inaction has an unintended discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of this part if the business establishment can establish that the action or inaction is necessary to the operation of the business and effectively carries out the business need it it alleged to serve. ...

(1) Any determination of a violation pursuant to this subdivision shall consider whether or not there are feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect.

(2) For purposes of this subdivision, the term "business establishment" shall have the same meaning as in Section 51 of the Civil Code."

California Govt. Code §12955.8(b).

2. Disparate Impact and Barriers to Access

Disparate impact theory allows a noncitizen complainant to challenge the legality of a policy to screen tenants based on legal residence in the United States. Here is an example.

A housing provider in Concord, California requires all applicants to prove that they are either a U.S. citizen, or have a green card. This requirement is applied carefully to every single applicant. Noncitizen tenant applicants from El Salvador, Bosnia and Canada are rejected because they don't have green cards.

However, the demographic reality of the housing market in Concord is that an overwhelming number of persons without green cards are latino. Assuming that "latino" or "hispanic" is a category of "race," Fred Fair Housing Attorney decides to bring a race discrimination disparate impact case against the housing provider.

Fred will need to show first:

(1) the existence of the green card policy;

(2) that the policy has a significant disparate impact on latinos. Fred will need to show that latinos are more frequently excluded than other racial groups by the green card policy. Fred will need to select statistics and data carefully to present data only on those persons who could actually be applicants for the housing at issue.

---Fred will need to assess data that defines the geographic scope of the relevant housing market. Where do persons seeking apartments in Concord live? This will define the cities or counties or census tracts from which the population data is drawn.

---Fred would be well advised to limit his data to tenant households with sufficient income to pay the rent on the units, and to eliminate any other variables that could explain the exclusion. For example, if most latinos in the relevant housing market earn less than the rent in monthly income, Fred will have a problem demonstrating the disparate impact.

---Assuming income level is not a problem, Fred will have to show that the latinos seeking housing in the relevant housing market are more likely not to have a green card than, say, white persons. This is complicated and difficult. Fred will need to obtain data on the number of persons who have a lawful immigration status but no green card, sorted by race and county. This data may not exist. Other sources of data may be combined to approximate this data.

Once Fred can show that the data supports the conclusion that the green card policy has a disparate effect of excluding more latinos, the burden shifts to the housing provider to justify the practice. Under the FEHA, the provider must show that the green card policy is "necessary to the operation of the business," "effectively carries out the purpose it is alleged to serve." If the provider can meet this burden, Fred's client may prevail nonetheless if Fred can show feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect.

C. RIGHT TO PRIVACY

Californians have a substantial legal right to privacy.⁽³⁵⁾ The right to privacy may be violated by unnecessary gathering or required disclosure of personal, confidential information.⁽³⁶⁾ To show a violation of the right to privacy, a plaintiff must show: (1) a legally-protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by the defendant constituting a serious invasion of privacy.⁽³⁷⁾

Unnecessary gathering of personal data by housing providers raises the risk of misuse of that information, including identity theft, an increasingly widespread and serious problem. Social security numbers are confidential, private information, which, in the wrong hands, can expose the SSN holder to identity theft.

"The [identity theft] crime happened, he [the victim] believes, when he was looking for a San Francisco apartment eight months ago. He got a standard rental application from a listing agency, filled in all of his vital information including his Social Security and driver's license numbers, and distributed it [the completed application] widely to landlords and individuals looking for roommates. Either one of these people misused or sold his information--or they simply discarded his application and someone retrieved it from the trash."⁽³⁸⁾

Obtaining an applicant's social security number is not necessary for the business of operating rental property. Other identifying information can be used to obtain tenancy history and credit history information. Although credit reports routinely contain and disclose a social security number, it may be possible to arrange for the credit report printout to exclude the SSN.

Inquiry into immigration status also seeks private, confidential information.⁽³⁹⁾ Particularly in month to month tenancy housing, the disclosure of immigration status is not necessary. Such housing providers routinely require a first and last month's rental deposit, in addition to a security deposit. These deposits should be more than ample to compensate a housing provider for loss due to deportation of a tenant.

III. PRACTICAL PROBLEMS IN LITIGATING CASES ON BEHALF OF NONCITIZENS.

Noncitizens without legal immigration status face serious difficulty in bringing litigation to enforce their statutory rights. Such a complainant can simply be reported to the INS by a housing provider. The threat of reportage to the INS is potent. It carries not only the threat of removal and permanent banishment from the U.S., but detention in INS custody, which can be prolonged and extremely unpleasant,⁽⁴⁰⁾ and the potential for physical or psychological abuse at the hands of INS agents, which is not uncommon.

The INS has the authority to deport a noncitizen regardless of that person's pending civil lawsuit and regardless of the importance of the rights at stake in the lawsuit. It is virtually impossible to pursue a lawsuit if the plaintiff has been deported. If a person reenters the United States without authorization after deportation, even to pursue a legal case, severe criminal penalties in some cases--up to a 20 year sentence in federal prison-- can be applied if the person is picked up again by INS. It is hard to imagine a lawsuit worth the risk of a prison term.

Advocates in the Bay Area and elsewhere have attempted to grapple with litigants' exposure to INS detention and deportation. Housing advocates can benefit from consultation with these advocates.

Some advocates have litigated tenant-landlord and employment cases on behalf of a group of similarly-situated plaintiffs who are comprised of persons both with and without legal basis for their presence. The advocate is then faced with defending against all housing provider attempts to obtain information about immigration status in discovery and by informal means.⁽⁴¹⁾ Each undocumented plaintiff must be counseled thoroughly about the consequences of participating in the litigation or complaint process. This would necessarily involve consultation by the plaintiff and litigation counsel with an immigration attorney. Some undocumented plaintiffs may be willing to take the risk if the problem is bad enough. In some cases, the advocate may be able to obtain a case-specific forbearance from the District Director of the INS, for the time period during which the litigation is pending.

INS currently has had a policy giving regional INS offices the discretion not to pursue reports of illegal presence if the INS determines that the report was made by a party to a labor dispute.⁽⁴²⁾ Employment rights advocates are seeking to have this forbearance policy made mandatory. Housing advocates could seek a similar policy from INS not to pursue reports of illegal presence when the person reporting is party to a housing dispute.

IV. SUGGESTIONS FOR INFORMATION-GATHERING AND LEGISLATIVE STRATEGIES TO COMBAT THE FAIR HOUSING PROBLEMS OF NONCITIZENS.

1. Need for Systematic Information on Problems.

At this point, the information about the nature and scope of the housing access problems of noncitizens is anecdotal. Information needs to be gathered in a more systematic fashion in order to formulate more effective analysis and strategies, and in order to support legislative and agency reform efforts. Some of the relevant questions to be answered might be:

---What are the actual practices in the rental market which negatively impact noncitizens?

---What are the justifications advanced for those practices?

---Which practices appear to be a pretext for race, color, national origin or ancestry discrimination?

---How are threats of INS reportage being used in the rental market? (To repress complaints; to retaliate against complainants; to gain an advantage in litigation)

---How widespread are these practices?

---Are these practices confined to certain geographic areas?

---What are other barriers to housing access for noncitizens?

A first step might be to design and conduct a survey of the staff of organizations that work with noncitizens, including immigrants rights groups, fair housing groups, tenant-landlord groups,

church-based groups, and ethnic community organizations. There are existing efforts to organize and link many of these groups for other purposes. For example, there is a multi-year grant to work on democratization and political participation among immigrant communities in the Central Valley. A housing survey effort might utilize the networks of communication already set up by the Central Valley democratization grant.

2. Need for Legislative and Regulatory Changes.

In addition to information about the nature and extent of the housing problems of noncitizens, a research effort could also be geared toward identifying the persons and organizations interested in these problems, and a focus for organizing them into a political force capable of making legislative and regulatory changes.

(A) Add Immigration Status to the FEHA Housing Provisions as a Protected Category

The most profound and effective legislative change would be to add immigration status to the California Fair Employment and Housing Act as a protected category, with an exception for federal statutory or regulatory limits imposed on federally-subsidized housing.

This change will not happen soon, nor will it happen without a great deal of compelling information showing that the problem is widespread and serious. We will need to show that even private housing providers who attempt to use immigration status as a criteria of exclusion without targeting recognized protected classes should not have the discretion to do so. Some reasons supporting this view might be the possibility for error in determining immigration status because of the complexity of immigration law, or the risk to housing providers exposing themselves and their employees to "harboring" charges, the invasion of applicants' privacy, etc. The use of immigration status to exclude applicants also creates an atmosphere of fear for recent immigrants who have legal status but don't yet speak English well, are not aware of their legal rights, or who may have members of their family who lack legal immigration status.

There is a need for a great deal of education on this issue. In 1998, Governor Davis vetoed a bill by Assemblymember Cedillo to add "immigration status" as a protected characteristic to the Unruh Act. Governor Davis' veto statement erroneously asserted that the amendment was unnecessary because existing laws already provided protection against such discrimination.

Advocates in Sacramento have indicated that systematic information documenting the problem of discrimination based on immigration status is needed before another legislative campaign can be waged effectively.

(B) Add Immigration Status as a Protected Category for Hate Crime Statutes and the Ralph Act.

The ugly anti-immigrant political atmosphere of the 90s has led to an increase in hate-motivated crimes and violence against immigrants.⁽⁴³⁾ While in some cases, the violence is based on the perpetrator's assumptions about the victim's race, national origin or ancestry, there are cases in which the verbal evidence from the perpetrator is about immigration status. Adding immigration status as a protected category to the hate crimes statutes and to the Ralph Act would effectively eliminate any defense in a hate-crime case that immigration status rather than race, national origin, etc., motivated the perpetrator.

(C) INS Forbearance Policy for Housing Disputes.

Another major change would be to obtain an official forbearance policy from INS with regard to reports of illegal presence by private housing providers. INS and HUD need to be educated about the problem and the solution. Criteria for when the INS should refrain from acting on an illegal presence report need to be developed.

Employment advocates have been successful in making the argument that allowing coercion of and retaliation against undocumented workers harms working conditions and employment rights for all workers:

"Courts have consistently noted that permitting employers to circumvent labor laws with regard to undocumented aliens flies in the face of public policy in two ways. First, in its most basic sense, it permits abusive exploitation of workers.... Second, it creates an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them."

Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 25 F.Supp.2d 1053, 1056 (N.D.Cal. 1998). These arguments may be adapted to the housing context, and other arguments against housing retaliation may be made. Housing is a fundamental need and a critical place for sheltering a person's private life and most important intimate and family relationships. In some circumstances, a threat of retaliation at home may be even more abusive than in the workplace. A housing provider's failure to provide housing which is up to building code standards and which is a non-hostile, nondiscriminatory social environment impacts all tenants, not just noncitizens.

(D) Advocate for More Stringent Privacy Rights in the Rental Housing Market

Concerns about unnecessary gathering or use of personal information and the risk of identity theft have become widespread enough to generate considerable interest in legislative reform in Sacramento and around the nation. The California Senate has just formed a new standing committee to deal with privacy legislation. This may be a good time for housing advocates to develop and propose state or federal legislation which would limit the amount and kinds of personal information which is required to be disclosed to rent an apartment, especially for a month to month tenancy. For example, the required disclosure of social security or credit card numbers ought to be prohibited. Similarly, credit agencies ought to be required to excise the SSN on any credit report provided to a prospective housing provider. Privacy issues deserve further study and consideration as a means to alleviate the housing problems of noncitizens in the private rental housing market.

Footnotes:

1. Though no housing discrimination case has specifically so held under the FHA or the FEHA, several Title VII cases address this issue in detail. The rationale is that failing to apply federal antidiscrimination and labor laws to undocumented workers results in an underground economy where employers can violate these statutes with impunity; undermines the competitiveness of documented workers, because they can enforce expensive rights; and generally undermines the vital public policies and values advanced by these statutes.

2. Even an LPR can lose his or her right to reside in the United States if the INS discovers that the LPR comes within a "deportation ground." For example, a criminal conviction for certain types of crimes at any point in the past can make a person deportable. Whether the criminal conviction can serve as a basis for deportation turns on the application of a complex body of statutory and case law. Advocates should consult an immigration and crimes expert if faced with such an issue in determining whether a person is lawfully within the United States. Other bases for deportation include attempting to help others, even family members, enter the U.S. illegally, falsely claiming to be a U.S. citizen, and other acts. See 8 U.S.C. 1227(a).

3. Examples of such programs are relief under NACARA for certain nationals of Guatemala, El Salvador and the former Soviet Bloc nations; relief under HRIFA for certain nationals of Haiti; relief for certain nationals of Cuba; and Temporary Protected Status for nationals of certain countries experiencing civil war or natural disaster, e.g. Bosnia, Somalia and several others.

4. Grounds for adjustment of status include eligibility for Special Immigrant Juvenile Status for children in foster care, or a proper petition by a relative or by an employer.

5. The Bureau of Immigration Appeals operates a program to certify paralegals employed by nonprofit organizations to carry out certain tasks related to immigration status. Certified paralegals are required by California law to post a bond. Other noncertified paralegals may operate in California by posting the bond.

Though many immigration lawyers and paralegals are both competent to and committed to assist immigrants properly, there is a significant problem in California with immigration consultants and attorneys whose advice is incorrect or who are actually operating a scheme designed and intended to defraud immigrants of money in return for false promises that their immigration status can be legalized. Fair housing organizations and others referring complainants to immigration attorneys or consultants should check the references and qualifications of any such attorneys or consultants prior to such referrals.

6. Specific regulations and rules govern the admission of noncitizen tenants to subsidized housing, and prohibit discrimination in subsidized housing. The issues arising in that context differ from many of the issues discussed in this memo. The National Housing Law Project and the Western Center on Law and Poverty have prepared a manual on access to subsidized housing for noncitizens. The manual will be available on the internet at the NHLP website: "<http://www.nhlp.org>".

7. Housing providers assert that requiring an applicant to provide a social security number enables the provider to obtain the applicant's credit report quickly and easily. However, a credit report may be obtained based on other identifying information, such as the name and the date of birth or prior residence addresses. There is no necessity for disclosure of a social security number.

8. The Social Security Administration is operating a toll-free information line for employers which allows an employer to obtain certain information about a social security number. The SSA information line either confirms that the number is valid, or requests that the number holder call the SSA. The "call us" response can mean either that the number is not shown as valid in the SSA's computer system, or that the number is valid, but the SSA has information

that another unauthorized person is attempting to use the valid number. There are errors in the SSA's computer database and the SSA system can malfunction.

Apparently some housing providers are using this line to check the SSNs not only of their employees but also of tenant applicants, and regarding the "call us" response as evidence of a false number.

9. Any statement threatening violence against a specific person may also be a hate crime and may violate California Civil Code Section 51.7.

10. See generally 42 U.S.C. Section 3604.

11. See generally Cal. Govt. Code 12955.

12. Another portion of the 1866 Civil Rights Act frequently used in the housing discrimination context in race cases, 42 U.S.C. §1982 ("Section 1982"), appears to provide no remedy to a noncitizen. Section 1982 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."

(emphasis added).

In cases construing the meaning of the 1866 Civil Rights Acts, the courts usually attempt to determine the meaning of the words used by Congress as that meaning existed in 1866. It may be possible to argue that the meaning of the word "citizen" in 1866 had a broader meaning than it does today, and should be construed to include some types of persons considered "noncitizens" today, such as LPRs.

13. Anderson v. Conboy, 156 F.3d 167, 178 (2d Cir. 1998), *cert. dismissed*, 527 U.S. 1030(1999)(Post-1990 version of Section 1981 prohibits purely private citizenship discrimination); Duane v. GEICO, 37 F.3d 1036, 1043-1044 (4th Cir. 1994), *cert. dismissed*, 515 U.S. 1101 (1995)(Pre-1990 version of Section 1981 prohibits purely private citizenship discrimination). See also Chacko v. Texas A& M University, 960 F.Supp. 1180, 1191 (S.D. Tex. 1997), *affirmed without opinion*, 149 F.3d 1175 (5th Cir. 1998)(Post-1990 version of Section 1981 prohibits purely private citizenship discrimination); and Cheung v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 913 F.Supp. 248, 251 (S.D.N.Y. 1996)(Post-1990 version of Section 1981 prohibits purely private citizenship discrimination); and Bhandari v. First National Bank of Commerce, 829 F.2d 1343, 1350 (5th Cir. 1987)(en banc)(Pre-1991 version of Section 1981 prohibits discrimination based on citizenship, but protection against alienage discrimination is limited to state action and does not reach purely private conduct), *vacated* (and remanded for consideration in light of Patterson v. McLean Credit Union, 491 U.S. 164 (1989)), 492 U.S. 901 (1989), *reinstated after remand*, 887 F.2d 609 (5th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990).

Section 1981, as amended in 1990, provides as follows.

"1981. Equal Rights under the law.

(a) Statement of Equal Rights.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

(B) Definition

For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(C) Protection Against Impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

14. See, e.g., Selden Apartments v. HUD, 785 F.2d 152 (6th Cir. 1986) and Huertas v. East River Housing Corporation, 674 F.Supp. 440 (S.D.N.Y. 1987).

15. The one published opinion is by a U.S. District Court in Espinoza v. Hillwood Square Mutual Association, 522 F.Supp. 559 (E.D. Va. 1981), which held that the FHA's protection against national origin discrimination in housing did not prohibit a cooperative housing association from requiring a purchaser to be a U.S. citizen, unless that rule was a pretext for national origin discrimination or had the effect of discriminating against purchasers based on national origin.

16. This argument was explicitly rejected by the U.S. Supreme Court in Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), construing Title VII's protection against national origin discrimination in employment.

17. This argument finds support in Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973)(Title VII's protection against intentional national origin discrimination does not prohibit express hiring policy discriminating based on lack of citizenship). The Farah opinion was applied to the Fair Housing Act by the court in Espinoza v. Hillwood Square Mutual Association, 522 F.Supp. 559 (E.D. Va. 1981), which held that the FHA does not prohibit discrimination based on citizenship. However, both Farah and Hillwood explicitly recognized that a practice excluding noncitizens could be part of a wider scheme of national origin discrimination or could have a disparate impact on a specific national origin group, and thus violate Title VII and the Fair Housing Act. Farah, 414 U.S. at 92; Hillwood, 522 F.Supp. at 568.

18. See Broadmoor San Clemente Homeowners Association v. Nelson, 25 Cal.App. 4th 1, 7-8 (1994) (legislative history of 1992 and 1993 amendments to FEHA shows intent to bring FEHA housing discrimination provisions into substantial equivalence to FHA.)

There is one FEHA employment decision construing the national origin discrimination protection to exclude discrimination based on citizenship status. Hanna v. Security Pacific Business Credit, 231 Cal.App.3d 427 (1993), *review denied, opinion depublished*, 1991 Cal. Lexis 3988, 91 Daily Journal D.A.R. 10909 (1991). Though Hanna may not be cited as precedent because the California Supreme Court ordered it depublished, it suggests that the California courts will follow the U.S. Supreme Court's Farah decision in distinguishing between national origin discrimination and citizenship discrimination.

19. See Marina Point v. Wolfson, 30 Cal.3d 721 (1982), *cert denied*, 459 U.S. 858 (1992).

20. Harris v. Capital Growth Investors XIV, 52 Cal.3d 1142, 1175 (1991).

21. Harris, 52 Cal.3d at 1161.

22. Advocates should exercise caution in using this line of argument, however, because of the Harris decision. After Harris, the California appellate courts are not inclined to be expansive with the "arbitrary discrimination" aspect of the Unruh Act.

Also, the Harris court states that new types of discrimination should only be recognized if no "other legislation specifically limited or disclaimed those rights;..." Harris, 52 Cal.3d at 1155. This raises the issue of how a court would view the vast body of immigration law limiting the rights of noncitizens, and of the recent federal rules specifically limiting the housing access of noncitizens in federally-subsidized housing. The counter-argument to this line is that the federal regulations clarify that virtually any immigrant with legal status must be admitted to federally-subsidized housing, implying a federal policy to recognize noncitizens' rights to housing, which might render "arbitrary" a denial of housing to such persons in the private market. This line of argument provides little help for persons without documented legal status in the U.S.

23. See Farah, supra; and Hillwood, supra.

Also, exclusion of noncitizens should be investigated in the context of local political and demographic trends. For example, in one California community, there is pressure and funding from the City government to "revitalize" and "redevelop" certain areas of that city which have a disproportionately latino population. Some housing providers take advantage of such efforts to engage in racial exclusion of latinos from the rehabilitated housing and use immigration status inquiries as a method for discouraging latino applicants.

24. For example, a housing provider might argue that an immigration status inquiry was triggered by a person's inability to speak English fluently. Another justification may be based on the appearance of the applicant and assumptions about social and economic class. If either of these justifications are truly the basis for the immigration status inquiry, it may be difficult to pursue the case as intentional discrimination, but it may be possible to bring a disparate impact discrimination claim, discussed below.

Advocates analyzing cases involving a person's ability to speak English should be aware of the unpublished decision in Veles v. Lindow, 2 Fair Housing-Fair Lending ¶16,474, (9th Cir. 2000) (affirming trial court ruling that discrimination on the basis of language was not intentional national origin discrimination). Even if it had precedential effect, the Veles decision would not

be an obstacle to future disparate impact claims because the Veles court found that the plaintiff failed to submit any evidence to support a disparate impact theory.

25. See 42 U.S.C. §3617 and Govt. Code §12955.7.

26. Violence or a threat of violence based on the victim's national origin, ancestry, race or color is prohibited by Civil Code §51.7.

27. Housing providers may claim that their report to the INS is privileged from legal sanction under the portions of the federal First Amendment which protects speech and the right to petition the government. The First Amendment argument is that the communication to the INS is to a public agency for the purpose of initiating a public proceeding and to carry out the purpose of the federal immigration laws. No reported decision has yet dealt with this issue under the federal Constitution.

A similar argument under California's speech privilege statute, Civil Code §47, was rejected by a U.S. District when it was advanced against the retaliation claim under the federal Fair Labor Standards Act. Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 25 F.Supp.2d 1053, 1058-1059 (N.D.Ca 1998). That decision, however, is of limited value on this issue, because the federal Constitution's Supremacy Clause prevents a California statute from limiting rights under a federal statute. A housing provider's federal First Amendment defense suffers no supremacy clause defect.

The Ninth Circuit recent White v. Lee decision contains very broad First Amendment language restricting the reach of the FHA's anti-retaliation provision, 42 U.S.C. §3617. White holds that the First Amendment limits the reach of Section 3617, protecting statements made to a public entity, even if the statement is urging the public entity to violate the law, as long as the statement does not advocate "imminent violence or physical disorder." See White, 227 F.3d at 1227. White suggests that speech is not unlawful under §3617 unless a recognized exception to First Amendment protection applies.

The viability of a First Amendment defense to a claim of retaliation for threats of, or acts of, reportage to the INS is an open question. A helpful starting point for rebutting such a defense is Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

Civil Code §47 might also be asserted as a defense against California statutory claims attacking the reportage as retaliation.

28. Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 103 F.Supp.2d 1180 (N.D.Ca. 2000)(Granting FLSA complainant summary judgment that reporting undocumented status of complainant to the INS after she filed FLSA claim was unlawful retaliation); Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 25 F.Supp.2d 1053, 1058-1059 (N.D.Ca 1998)(Denying motion to dismiss retaliation claim under the FLSA). See also EEOC v. Tortilleria "La Mejor", 758 F.Supp. 585 (E.D. Cal. 1991)(Undocumented aliens are protected by Title VII); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891-894 (1984)(Undocumented aliens protected by the National Labor Relations Act from unfair labor practices); Patel v. Quality Inn Court, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989)(Fair Labor Standards Act protects undocumented aliens, notwithstanding the employer sanction provisions of the

Immigration Reform Control Act); and Escobar v. Baker, 814 F.Supp. 1491, 1498 (W.D. Wash. 1993).

29. Damages for loss of housing may be limited if the claimant is present in the U.S. without legal basis. See Hoffman Plastic Compounds v. NLRB, 237 F.3d 639(D.C. Cir. 2001), *cert. granted*, ___ U.S. ___ (Discussing limits on backpay award under the National Labor Relations Act to undocumented alien). However, this should not affect the plaintiff's right to recover damages for emotional distress already incurred.

30. The term "harboring" in 8 U.S.C. §1324(a)(1)(A)(ii) means "affording shelter to." United States v. Aguilar et al., 883 F.2d 662, 690 (9th Cir. 1989), *cert denied sub nom Socorro Pardo v. U. S.*, 498 U.S. 1046 (1991).

31. The "reckless disregard" standard in the harboring statute has recently been described as follows:

"The phrase "reckless disregard of the fact" ...means deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States illegally."

U.S. v. Hernandez, 968 F.2d 1042, 1046 (10th Cir. 1992)(Upholding jury instruction defining "reckless disregard of the fact" within the meaning of 8 U.S.C. §1324.)

A housing provider who has a policy not to inquire into immigration status runs little risk of acquiring such information.

32. Neither Section 1981 nor the Unruh Act authorize disparate impact claims for alleged violations.

33. Element 2, the disproportionate effect, is usually shown by statistical analysis establishing that the protected class is substantially more likely to be harmed by the challenged facially neutral action, rule or practice. Merely arguing the effect by inference is not sufficient; a plaintiff must produce admissible evidence of the disparate effect to survive a defense motion for summary judgment. See Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir. 1997)

34. The FEHA provides that "[p]roof of a violation causing a discriminatory effect is shown if an act or failure to act that is otherwise covered by this part, and that has the effect, regardless of intent, of unlawfully discriminating on the basis of race, color,...national origin or ancestry." Govt. Code §12955(a).

35. Hill v. NCAA, 7 Cal.4th 1 (1994) (right to privacy under the California Constitution and common law).

36. Informational privacy is a "core value" of the right to privacy. Pettus v. Cole, 49 Cal.App.4th 402, 441 (1996).

37. Hill, 7 Cal. 4th at 39-40.

38. "Identity Theft Victims Struggle Against Rising Tide of Abuse" San Francisco Chronicle, Sunday, February 11, 2001, pages B1, B4 and B6.

39. See Rivera v. NIBCO, ___ F.R.D. ___, 2001 U.S. Dist. Lexis 8335 (E.D. Cal. 2001) (protective order entered against defendants' discovery requests for disclosure of plaintiffs' immigration status).

40. In many places, INS detainees are held in jails and prisons, often with serious criminal offenders, because INS facilities are grossly inadequate to house the number of detainees in INS custody. Detention can last from a few months to, in some cases, years.

41. See Rivera v. NIBCO, ___ F.R.D. ___, 2001 U.S. Dist. Lexis 8335 (E.D. Cal. 2001) (protective order entered against defendants' discovery requests for disclosure of plaintiffs' immigration status).

42. A copy of the policy is attached as Appendix A to this memo. The attached policy is shown as an "operating instruction" which subsequently was redesignated as a portion of the Special Agent's Field Manual, §33.14(h), but appears to remain in effect.

43. See Hate Unleashed: Los Angeles in the Aftermath of 187, Coalition for Humane Immigrant Rights of Los Angeles (Nov. 1995)