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Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing

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COMMENTS

Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing

Clifton R. Gruhn*

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I. INTRODUCTION

This paper examines immigrants' rights under federal law. In doing so, this paper will not use the traditional terms "illegal immigrants" or "illegal aliens," but instead will use the term "undocumented immigrants." The difference between the two groups being that documented immigrants have followed the procedures set out by the federal government to obtain documentation evidencing their legal status in the United States, while undocumented immigrants have not obtained such documentation.

This author deems it inaccurate to refer to a group of people

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as “illegal” simply because they have committed a criminal act by entering the United States without obtaining permission from the government. The same adjective is not used to describe American citizens who have committed crimes such as murder or rape, even though in these circumstances such a description would seem more fitting. The term is even avoided when describing those who are involved in continuing crimes, such as repeated tax evasion. A person may commit a crime, such as immigrating to America in contravention of federal law, but that does not make them illegal, just as one who does not pay his taxes has committed a crime but they are not referred to as “illegal.” Thus, it is more accurate to describe them as undocumented immigrants. Elie Wiesel, a prolific novelist, Nobel Laureate and Holocaust survivor, proposed this idea when he wrote: “You who are so-called illegal aliens must know that no human being is ‘illegal.’ That is a contradiction in terms. Human beings can be beautiful or more beautiful, can be right or wrong, but illegal? How can a human being be illegal?”¹

Immigration has been a controversial topic since time immemorial.² Recently, immigration has been the subject of intense moral and political debate.³ Much of this discourse is born out of the mass influx of immigrants from Latin American countries, many of whom are believed to be undocumented.⁴

1. Elie Wiesel, *The Refugee, in* SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE (Gary MacEoin ed., 1985).

2. See *Industrial Relations Counselors, Inc.*, <http://ircounselors.org/irconcepts/1999fall.html> (describing immigration legislation and trends in America since the Founding); see also U.S. immigration history, <http://www.visa2003.com/world-immigration/us-history.htm> (tracing immigration patterns since America's inception and the debate that followed each pattern).

3. Immigration debate has been the centerpiece of the recent presidential campaigns with candidates stressing the moral aspects involved. See Leslie Wayne, *In New Ad, Romney Attacks Huckabee on Immigration*, N.Y. TIMES, Dec. 11, 2007, available at <http://www.nytimes.com/2007/12/11/us/politics/11huckabee.html> (describing a typical immigration debate between politicians); see also Stephen Steinlight, *Immigration, Mainstream Media, and the 2008 Election*, Center for Immigration Studies (2008), available at <http://www.cis.org/articles/2007/back1107.html> (detailing the role played by the immigration debate in the 2008 presidential election).

4. As of March 2005, there were an estimated 35.2 million documented and undocumented immigrants in the United States. Steven A. Camarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, Center for Immigration Studies (2005), available at <http://www.cis.org/articles/2005/back1405.html>. Between January 2000 and March 2005, 7.9 million new immigrants entered the United States, which is the highest volume of new immigration in America's history. *Id.* Of that 35.2 million, 58% arrived from Latin-American Countries. *Id.* The number of undocumented immigrants contained in the 35.2 million

This has led many individuals, including several politicians, to clamor for immigration reform.⁵ In 2006, President Bush advocated a complete overhaul of federal immigration legislation.⁶ Yet, Congress was unable to agree on the best course of action to quell the volume of undocumented immigrants crossing America's borders.⁷ It currently appears that Congress has all but abandoned the search for a workable federal solution to the problems that many citizens claim follow the settling of undocumented immigrants in America's cities and towns.⁸

Many local officials have passed, or are in the process of enacting, their own immigration laws in the face of what they perceive to be a wholesale failure of the federal government to control immigration.⁹ The majority of such legislation focuses on regulating employers who hire undocumented immigrants and landlords who provide housing to undocumented immigrants. While both attempts at regulation warrant discussion and analysis, this paper will focus solely on the affects such ordinances have on the housing prospects of Latin American immigrants.

The trend of local government ventures into immigration regulation began in San Bernardino, California, where a group of citizens calling themselves "Save our State," submitted legislation that would have imposed fines on employers who hired undocu-

estimate is difficult to ascertain but is estimated to be around 11 million. *Id.* The percentage of undocumented immigrants coming to America from Latin-American countries is difficult to estimate but there is no reason to believe that it is lower than the general statistics on immigration. In fact, there is good reason to believe that it is higher than the general estimate given the relatively easy access to America's borders available to citizens of Latin-American countries. DAVID W. HAINES & KAREN E. ROSENBLUM, *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 28 (Greenwood Press 1999) (stating that in 1995 Mexican immigrants accounted for 54% of undocumented immigrants and Central American immigrants accounted for 15% of the undocumented immigrant population).

5. Kate Phillips, *The Immigration Debate*, N.Y. TIMES, May 18, 2007, available at <http://thecaucus.blogs.nytimes.com/2007/05/18/the-immigration-debate/> (outlining the arguments made for immigration reform by many citizens, politicians and political pundits).

6. President George W. Bush, Address to the Nation on Immigration Reform (May 15, 2006), available at <http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html>.

7. See Jonathan Weisman, *Immigration Overhaul Bill Stalls in Senate*, WASH. POST, June 8, 2007, at A1.

8. Carl Hulse & Rachael L. Swarns, *G.O.P. Sets Aside Work in Immigration*, N.Y. TIMES, Sep. 5, 2006, available at <http://www.nytimes.com/2006/09/05/us/05cong.html?pagewanted=print>.

9. Database of Local Immigration Ordinances, <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/database-of-ordinances.html> (listing local ordinances from 111 cities in 26 states and the status of each law).

mented immigrants and fined landlords who rented to undocumented immigrants.¹⁰ The purpose of the proposed ordinance was to rid the city of undocumented immigrants.¹¹ Save our State believed that the influx of undocumented immigrants had resulted in, among other things, an increased crime rate and a decline in the school system.¹² The ordinance was turned down by the city council¹³ and eventually defeated in court for failure to obtain enough signatures to be placed on a ballot.¹⁴

Although the San Bernardino ordinance was never enacted, it served as a model for a wave of similar ordinances that swept across the country like wildfire.¹⁵ Soon after the San Bernardino initiative was laid to rest, Hazleton, Pennsylvania, attempted to enact an ordinance aimed at ousting undocumented immigrants.¹⁶ Once again, the stated purpose for the ordinance was to combat increased crime, declining property values and to provide for the general health and safety of the city's residents.¹⁷

The Hazleton ordinance was nearly identical to the law that the San Bernardino City Council refused to enact and which subsequently failed to receive enough signatures to be placed on a ballot.¹⁸ The Hazleton ordinance allowed for any citizen or official to file a complaint asserting that a landlord was renting to an undocumented immigrant.¹⁹ Under the ordinance, the complaint would be deemed valid as long as it was in writing, gave enough detail for the city to determine when, where and who was violat-

10. The text of the initiative is available at <http://www.campaignsitebuilder.com/templates/displayfiles/tmpl68.asp?SiteID=843&PageID=12139&Trial=false>.

11. *Id.* at § 2.

12. *Id.*

13. Cindy Chang, *California City Council Rejects Anti-Immigration Legislation*, N.Y. TIMES, May 16, 2006, available at <http://www.nytimes.com/2006/05/16/us/16bernardino.html>.

14. *Judge Rules Against San Bernardino Illegal Immigrant Petition*, IMMIGRATION WATCHDOG, June 26, 2006, available at <http://www.immigrationwatchdog.com/?p=1409> (stating that Judge A. Rex Victor ruled that the initiative did not receive enough votes to qualify for a public vote).

15. See David Fried, *Local Illegal Immigration Laws Draw a Diverse Group of Cities*, NORTH COUNTY TIMES, Sep. 2, 2006, available at http://www.nctimes.com/articles/2006/09/03/news/top_stories/21_40_499_2_06.txt.

16. HAZLETON, PA., Ordinance 2006-18 (2006), passed Sep. 8, 2006, available at http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf

17. *Id.*

18. Compare HAZLETON, PA., Ordinance 2006-18 (2006), *supra* note 16 with the San Bernardino Ordinance available at <http://www.campaignsitebuilder.com/templates/displayfiles/tmpl68.asp?SiteID=843&PageID=12139&Trial=false>

19. HAZLETON, PA., Ordinance 2006-18, passed Sep. 8, 2006, available at http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf.

ing the law and it did not rely solely on race or national origin as grounds for the belief that a violation had occurred.²⁰

The Hazleton law was challenged in federal court and in July 2007, Judge Munley ruled that the ordinance was unenforceable, writing that the law violated several constitutional rights, as well as the Supremacy Clause.²¹ Prior to Judge Munley's decision, numerous other localities enacted similar ordinances. The most representative and noteworthy of these local ordinances are those passed in Riverside, New Jersey, Farmers Branch, Texas, Valley Park, Missouri and Escondido, California.²² Each city's stated goal is to protect the health, safety and welfare of their communities.²³ Each follows a nearly identical path to achieve that objective by attempting to regulate employers who hire undocumented immigrants, as well as landlords who rent to undocumented immigrants.²⁴

Along the way it appears that all of these laws run afoul of federal legislation by encroaching on Congress' constitutionally prescribed power to regulate immigration.²⁵ The vast majority of immigrants, both documented and undocumented, come to America from Latin-American countries.²⁶ In particular, the towns and cities where the abovementioned ordinances were, or are, in effect have relatively large Latin immigrant population.²⁷

20. The ordinance was amended in 2007 during trial proceedings to eliminate the language that would deem a complaint adequate as long as the sole basis was not race or national origin. HAZLETON, PA., Ordinance 2007-06 (2007).

21. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 555 (2007) (holding that federal law preempted the ordinance, that the ordinance violated due process protections, infringed on plaintiffs' rights under 42 U.S.C. § 1981 and violated several state provided rights).

22. RIVERSIDE, N.J., Ordinance 2006-26 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO., Ordinance 1736 (2006); ESCONDIDO, CAL., Ordinance 2006-38 (2006).

23. RIVERSIDE, N.J., Ordinance 2006-26, §166-2 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1736, §2(c) & (d) (2006); ESCONDIDO, CAL., Ordinance 2006-38, §1(5) (2006).

24. *See* RIVERSIDE, N.J., Ordinance 2006-26 (2006); *see also* FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1715 (2006); ESCONDIDO, CAL., Resolution 2007-16 (2007).

25. Congress shall have the power to "establish a uniform rule of naturalization . . ." U.S. CONST. art. I, § 8, cl. 4; *see also* *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.").

26. HAINES & ROSENBLUM, *supra* note 4.

27. The United States Census Bureau provides statistics on immigrant populations for the majority of America's cities. *See* <http://factfinder.census.gov>. In Hazleton, 4.9% of the community reported themselves as Latino or Hispanic, while 94.7% reported themselves as white. *See* <http://factfinder.census.gov/servlet/>

Thus, it is all but inevitable that these local ordinances will affect both documented and undocumented Latin-American immigrants on a disproportionate basis.

The ordinances discussed in this paper are merely a fraction of those currently enacted or being considered by city councils and state legislatures across the country.²⁸ In addition, many of those who support ordinances affecting immigrants' access to rental housing do so with unparalleled zeal.²⁹ Therefore, even though many of the ordinances explained throughout this paper have been struck down by courts or revised in an attempt to withstand

SAFFFacts?_event=ChangeGeoContext&geo_id=16000US4233408&_geoContext=&_street&_county=hazleton&_cityTown=Hazleton. In Riverside, 4.1% reported themselves as Latino or Hispanic, while 90% reported themselves as white. See http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US2975472&_geoContext=01000US%7C04000US29%7C16000US2975472&_street=&_county=riverside&_cityTown=riverside. In Escondido, 38.7% reported themselves as Latino or Hispanic. See http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=06000US3400563510&_geoContext=01000US%7C04000US34%7C05000US34005%7C06000US3400563510&_street=&_county=escondido&_cityTown=escondido. In Farmers' Branch, 37.2% reported themselves as Latino or Hispanic. http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US0622804&_geoContext=01000US%7C04000U06%7C16000US0622804&_street=&_county=farmers+ranch&_cityTown=farmers+ranch. In Valley Park, 2.3% reported themselves as Latino or Hispanic, while 90% reported themselves as white, while 89% reported themselves as white. See http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=16000US4233408&_geoContext=01000US%7C04000US42%7C16000US4233408&_street=&_county=valley+park&_cityTown=valley+park. The number of undocumented immigrants in these localities is difficult to discern because undocumented immigrants do not report census information. As of 1994, the census bureau has estimates by state of the amount of undocumented immigrants. Edward W. Fernandez & J. Gregory Robinson, *Illustrative Ranges of the Distribution of Undocumented Immigrants by State*, (Census Bureau Working Paper #8, 1994), available at <http://www.census.gov/population/www/documentation/twps0008/table01.txt>. These estimates show that in California the undocumented immigrant population is between 1.784 and 1.321 million. *Id.* In Pennsylvania the population is estimated between 15,000 and 51,000. *Id.* New Jersey's estimated undocumented immigrant population is estimated between 168,000 and 98,000. *Id.* Texas has an estimated undocumented immigrant population between 427,000 and 300,000. *Id.* Finally, Missouri's undocumented immigrant population is estimated to be between 13,000 and 3,000. *Id.*

28. <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/database-of-ordinances.html> (listing local ordinances from 111 cities from 26 states and each laws status).

29. During a discussion regarding the use of local ordinances Walter Tejada, Vice Chair of the Arlington County Board in Virginia stated that the Federal Government's failure to reform immigration laws has unofficially given the "green light" to "those who are hateful and who are angry" to manipulate local officials into excluding people from their communities with the use of misinformation to indulge their own xenophobia. Center for American Progress, *Local Immigration Ordinances: The result of Federal Inaction on Comprehensive Reform*, available at <http://www.americanprogress.org/events/2007/08/immtranscript.pdf>.

judicial review, it is important to understand the arguments that can be used to combat them. It seems that it is only a matter of time before the next wave of ordinances will crash down on America's cities. And while Judge Munley's decision in *Lozano* struck down the offending ordinance that catalyzed several of the other ordinances discussed in this paper, it did so primarily on the grounds that federal law preempted the ordinance. Consequently, it is still imperative to explore other possible violations that the ordinances already enacted and those to come will manifest.

This paper will examine how local ordinances aimed at affecting undocumented immigrants' ability to rent housing is at odds with federal law and how the ordinances affect not only undocumented immigrants, but also documented immigrants. Part II of this paper will discuss the ordinances' affects on immigrants' rights under the Fair Housing Act. Part III will explore how the local ordinances affect immigrants' rights under 42 U.S.C. § 1981, 42 U.S.C. § 1982 and 42 U.S.C. § 1983. Part IV will examine how the ordinances affect immigrants' Fourteenth Amendment rights. Finally, this paper concludes that, regardless of the ordinances' stated purposes, they conflict with the rights granted to documented and undocumented immigrants by the federal government.

II. THE LOCAL ORDINANCES APPEAR TO AFFECT IMMIGRANTS' RIGHTS UNDER THE FAIR HOUSING ACT

Although the ordinances' stated goals are to prohibit the rental of housing to undocumented immigrants, the laws also appear to affect documented immigrants' ability to obtain housing.³⁰ This occurs because the ordinances put landlords in the respective localities in the untenable position of determining whether a prospective tenant possesses the proper immigration status to qualify them as someone who is not an "illegal alien" under the ordinances.³¹

Unless, as is very unlikely, a landlord has training in deter-

30. See HAZLETON, PA., Ordinance 2006-18 (2006); RIVERSIDE, N.J., Ordinance 2006-26 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1715 (2006); ESCONDIDO, CAL., Resolution 2007-16 (2007).

31. All the laws mandate that landlords verify a suspected "illegal immigrants" citizenship status by reviewing documents such as driver's licenses, green cards and other paperwork regarding an individual's status in the United States before renting to them or renewing a lease. See sources cited *supra* note 30.

mining an individual's immigration status, it is difficult for them to determine one's legal status under federal immigration laws with any degree of accuracy.³² Thus, landlords are placed in a position where they must either attempt to ascertain the legal status of prospective tenants they believe might be an "illegal alien" under the ordinances³³ and face draconian penalties if they are wrong,³⁴ or simply refuse to rent to anyone they believe to be an "illegal alien" under the ordinances.³⁵ This latter option might also subject landlords to lawsuits under the Fair Housing Act ("FHA").³⁶

In addition, many of the ordinances seek to define "illegal alien" by referencing the Immigration and Naturalization Act ("INA").³⁷ Yet, the INA does not define "illegal alien." Further, it is up to the federal government to determine whether an undocumented immigrant will be removed from the United States, which is determined through formal procedures laid out in the INA that include judicial review.³⁸ Additionally, Supreme Court Justices

32. Not only are landlords ill equipped to determine the authenticity of documents produced by tenants and prospective tenants, but there are also several instances where an individual is allowed to stay and work in the United States under federal law and not provided with any documentation to show their legality in the country. The Code of Federal Regulations lists several classes of aliens that do not have documentation that would classify them as legal under the ordinances but will nonetheless not be deported by the federal government. See 8 C.F.R. §274a. 12(c) (2007). Among the categories listed are aliens who have submitted an application for asylum, permanent residence and suspension of deportation proceedings. *Id.* For a complete list see *Id.*

33. HAZLETON, PA., Ordinance 2006-18 (2006) (defines "illegal alien" as any person who entered the United States through "illegal" means and "whose current status is also illegal" or anyone who has overstayed their visa); RIVERSIDE, N.J., Ordinance 2006-26, §166-3(A)(4) (2006) (defines "illegal alien" by referring to federal law and stating that officials will seek residency status from federal government officials); FARMERS BRANCH, TEX., Ordinance 2892, §2(B)(1) (2007) (states that a noncitizen under the ordinance is a person who is "neither a citizen nor national of the United States"); VALLEY PARK, MO. Ordinance 1715, §2(d) (2006) (defines "illegal alien" by referring to federal law and stating that officials will seek residency status from federal government officials); *also* ESCONDIDO, CAL., Resolution 2007-16, §1(1) (2007) (defines "illegal alien" by referring to federal law and stating that officials will seek residency status from federal government officials).

34. The ordinances referenced at *id* impose fines ranging from \$250 to \$1,000 per violation, with each day that a landlord rents to an individual deemed to be an "illegal alien" constituting a new violation. See sources cited *supra* note 33.

35. *Id.*

36. 42 U.S.C. § 3601 *et seq.*

37. RIVERSIDE, N.J., Ordinance 2006-26, §166-3(A)(4) (2006); VALLEY PARK, MO. Ordinance 1715, §2(d) (2006); ESCONDIDO, CAL., Resolution 2007-16, §1(1) (2007).

38. See 8 C.F.R. § 240 (2008).

have recognized the complexity inherent in the federal system constructed to deal with immigration.³⁹

The FHA was enacted to combat housing discrimination based on several protected classifications.⁴⁰ Race and national origin are among the characteristics protected under the FHA.⁴¹ The FHA is based on the stated policy of providing "fair housing throughout the United States."⁴² The law achieves this end by prohibiting the refusal to rent housing or discriminating in the terms, conditions or privileges thereof on the basis of, among other things, race or national origin.⁴³

The local ordinances place landlords in a position where they must make decisions on whether to rent property to certain individuals based almost exclusively on race and national origin. Landlords generally are not trained immigration authorities. Consequently, they do not possess the skills or the resources to determine the legal status of individuals they suspect as being an "illegal alien" under the ordinances. Therefore, in order to avoid the fines, landlords are forced to make judgments based on easily ascertainable indicators of nationality. This will almost inevitably lead to landlords denying rental properties to prospective clients based on race and national origin.

Many of the ordinances also affect existing leases by subjecting extensions or renewals to confirmation of one's citizenship status.⁴⁴ This again calls into focus the landlords' inability to determine an individual's citizenship status under federal law. Thus, landlords are in the same precarious position as discussed above because the ordinances all but force them to make a decision on the terms, conditions and privileges of the tenants lease based on far less than perfect information.⁴⁵ As a result, race and national origin are likely to be the factors landlords consider when

39. In Justice Blackmun's concurrence in *Plyer* he stated that it would be impossible for a State to determine an immigrant's status under the federal regulations. *Plyer v. Doe*, 457 U.S. 202, 236 (1982) (Blackmun concurring).

40. 42 U.S.C. § 3604 (a) (2008) (stating that it is unlawful to discriminate on the basis of race, color, national origin, religion, sex or familial status).

41. *Id.*

42. 42 U.S.C. § 3601 (2008).

43. 42 U.S.C. § 3604(a) & (b) (2008).

44. RIVERSIDE, N.J., Ordinance No. 2006-26, §166-5(A)(1) (2006); FARMERS BRANCH, TEX., Ordinance 2892, §2(B)(2) (2007); ESCONDIDO, CAL., Resolution 2007-16, §16E-1(a) (2007).

45. 42 U.S.C. 3604(b) (2008), prohibits discrimination in regards to the terms, conditions or privileges of a lease.

determining whether to extend or renew the lease of one they suspect may be an "illegal alien."

It is also a violation of the FHA to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin . . ." ⁴⁶ In this instance, the ordinances are essentially a notice that those of Latin-American origin will be discriminated against when attempting to obtain housing. Even though the laws are facially neutral regarding documented immigrants and natural citizens, they will inevitably affect immigrants from Latin American countries on a disproportionate basis due to the percentage of Latin immigrants generally in the United States ⁴⁷ and specifically in the localities where the ordinances were enacted. ⁴⁸

Further, the FHA makes it unlawful to "coerce, intimidate, threaten or interfere with any person" in the enjoyment of their rights granted by section 3604 of the FHA or anyone who "aided or encouraged any other person" to exercise or enjoy such rights. ⁴⁹ The ordinances seem to coerce, intimidate, threaten and interfere with Latin immigrants' right to rent property free of invidious discrimination. ⁵⁰ This is accomplished by making it known to Latin immigrants that they will likely be subjected to stringent checks into personal information before being able to rent housing ⁵¹ and possibly being denied rental property by a landlord based on their race and/or national origin.

The ordinances seem to carry with them an implicit threat that all immigrants will be treated unfairly and are not welcome in the cities that have passed such laws. The ordinances' vagueness in describing what constitutes an "illegal alien" ⁵² and their

46. 42 U.S.C. § 3604(c) (2008).

47. See HAINES & ROSENBLUM, *supra* note 4 (discussing percentage of immigrants in the United States from Latin American countries).

48. Census Bureau, *supra* note 27.

49. 42 U.S.C. § 3617 (2008).

50. *Nevels v. Western World Ins. Co., Inc.*, 359 F. Supp. 2d 1110 (W.D. Wash. 2004) (holding FHA proscribes all practices that interfere with exercise of rights under the FHA).

51. All the ordinances mandate a check into the residency status of a prospective tenant whom the landlord believes to be an "illegal alien." See HAZLETON, PA., 2006-18 (2006); see also RIVERSIDE, N.J., Ordinance 2006-26 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1715 (2006); ESCONDIDO, CAL., Resolution 2007-16 (2007).

52. HAZLETON, PA., Ordinance 2006-18 (2006) (defines "illegal alien" as any person who entered the United States through "illegal" means and "whose current

stated purposes⁵³ bolster the threatening nature of the laws because they allow for almost unfettered discretion in their enforcement.

The FHA allows a state or other locality to regulate its housing industry.⁵⁴ There is, however, one caveat. Any law that would require or permit discriminatory housing practices is invalid under the FHA.⁵⁵ Therefore, because the ordinances will almost inevitably put pressure on landlords to use race and national origin as characteristics to screen out and potentially deny immigrants housing, it seems that the laws violate the FHA by permitting landlords to use such characteristics to carry out discriminatory housing practices.

Consequently, anyone aggrieved by the ordinances, and any future ordinances that will be passed, should have access to injunctive relief to put an end to the discriminatory acts.⁵⁶ However, just because the ordinances seem to provide a vehicle with which landlords might act discriminately toward prospective tenants based on race and/or national origin, does not mean that the localities intended such a consequence. Nevertheless, if aggrieved plaintiffs can show that the ordinances permit such discriminatory housing practices they could attack them on such grounds.

The FHA borrows its litigation framework from the employment discrimination arena.⁵⁷ Thus, claims under the FHA operate

status is also illegal" or anyone who has overstayed their visa); RIVERSIDE, N.J., Ordinance 2006-26, §166-3(A)(4) (2006); (defines "illegal alien" by referring to federal law and stating that officials will seek residency status from federal government officials); FARMERS BRANCH, TEX., Ordinance 2892, §2(B)(1) (2007) (states that a noncitizen under the ordinance is a person who is "neither a citizen nor national of the United States"); VALLEY PARK, MO. Ordinance 1715, §2(d) (2006) (defines "illegal alien" by referring to federal law and stating that officials will seek residency status from federal government officials); ESCONDIDO, CAL., Resolution 2007-16, §1(1) (2007) (defines "illegal alien" by referring to federal law and stating that officials will seek residency status from federal government officials).

53. The ordinances stated purposes are to protect the health, safety and general welfare of the citizenry by eliminating the ills that follow "illegal aliens," such as falling property values, increased crime and sub par school systems. HAZLETON, PA., Ordinance 2006-18, §2(c) (2006); RIVERSIDE, N.J., Ordinance 2006-26, §166-2 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1736, §2(c) & (d) (2006); ESCONDIDO, CAL., Ordinance 2006-38, §1(5) (2006).

54. 42 U.S.C. § 3615 (2008).

55. *Id.*

56. 42 U.S.C. 3614(d)(1)(a) (2008), grants court the power to enter injunctive relief for violations of the FHA.

57. *Larkin v. State of Mich. Dept. of Soc. Serv.*, 89 F. 3d 285, 289 (6th Cir. 1996)

in two fashions.⁵⁸ First, an individual plaintiff or group of plaintiffs can claim intentional discrimination and proceed under the McDonnell Douglas/Burdine framework, which is a burden shifting paradigm that raises a rebuttable presumption of discrimination when a plaintiff presents a prima facie case.⁵⁹ A group or class of plaintiffs could also state a claim where there is a law that facially discriminates against them.⁶⁰ Second, a group or class of plaintiffs can attack a facially neutral law on the basis that it has a disparate impact on the group or class.⁶¹

In this instance, the ordinances will almost certainly have a disparate impact on both undocumented and documented immigrants in the respective localities.⁶² Consequently, aggrieved immigrants could attack the laws under the disparate impact theory.⁶³ Aggrieved parties can achieve this by using statistics to show that a particular practice had a disproportionate affect on Latin immigrants.⁶⁴ Here, this could be demonstrated by showing that the percentage of qualified Latin immigrants who were denied rental properties or had their lease renewal refused is significantly larger than that of natural citizens or groups from other national origins.

Once disparate impact is shown, the burden would then shift to the defendant, in this case the localities or perhaps an offending landlord, to produce a "legitimate non-discriminatory reason for the action and that no less discriminatory alternatives were available."⁶⁵ It seems likely that where the locality was defending such an action it would proffer increased crime, overcrowded schools and lowered property values as its legitimate, non-discriminatory

(stating that courts have analogized Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., which prohibits employment discrimination, with the FHA and concluded that plaintiffs can state a claim for intentional discrimination or disparate impact).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. To state a claim of disparate impact the plaintiff must show that a particular practice or policy disproportionately affects a protected class. 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F. 3d 673, 681 (D.C. Cir. 2006).

63. *Id.*

64. For examples of FHA plaintiffs using statistics to show disparate impact see *Allen v. Seidman*, 881 F. 2d 375 (7th Cir. 1989) and *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F. 2d 926 (2nd Cir. 1988).

65. *Dr. Gertrude A. Barber Center, Inc. v. Peters Tp.*, 273 F.Supp.2d 643, 654 (W.D. Pa. 2003).

reason for the ordinance. This certainly seems to meet the criteria stated for the burden.

However, because the localities did not rely on evidence to support their conclusions regarding these alleged justifications, it is difficult to discern just how much weight such assertions will garner. In addition, it may be difficult for a locality to demonstrate that no less discriminatory alternatives existed to the ordinances. For instance, all the alleged ills may be the result of the natural occurrence of population growth, and as a result alternative policing tactics such as generally increased patrols or targeting areas where the increased crime is alleged to take place may be more effective and less discriminatory than the ordinances. Increasing funding to schools or municipal projects aimed at increasing property values may also be effective at eliminating the other complaints claimed to be the result of undocumented immigrants and would also be less likely to have a discriminatory impact. Ultimately it is difficult to know, what practices will be effective at eliminating the alleged ills with the least amount of discriminatory impact without first knowing what definitively causes the problems.

It appears the local ordinances, that the localities claim they enacted to quell rampant undocumented immigration and the ills purported to follow it, are offensive to the FHA. Of course, there are at least two sides to every story. The plaintiffs in the respective localities acted quickly and obtained temporary restraining orders⁶⁶ or the ordinances have been repealed⁶⁷ before they could be enforced. Thus, much of the argument regarding the affects of the ordinances is speculative.

This calls into question the plaintiffs' standing to challenge the ordinances under the FHA. But, standing under the FHA has

66. Valley Park Temporary Restraining Order, Cause No. 06-CC-3802 (granting plaintiffs' motion for temporary restraining order); Escondido Temporary Restraining Order, Case No. 3:06-cv-02434-JAH-NLS (granting plaintiffs' motion for temporary restraining order); Farmers Branch Memorandum Opinion and Order Granting Temporary Restraining Order, Case No. 3:06-cv-02371 (granting plaintiffs' motion for temporary restraining order); Hazleton Temporary Restraining Order, Case No. 3:06-cv-01586-JMM (granting plaintiffs' motion for temporary restraining order).

67. The Riverside, N.J., City Council voted to repeal the ordinance on Sep. 17, 2007 and in July 2007, Valley Park, Missouri, repealed its ordinance. Ken Belson & Jill P. Capuzzo, *Town Rethinks Law Against Illegal Immigrants*, N.Y. TIMES, Sep. 26, 2007, available at http://www.nytimes.com/2007/09/26/nyregion/26riverside.html?_r=1&hp&oref=slogin. Some speculate that the exodus of hundreds or possibly thousands of immigrants who had migrated to the United States from Latin-American Countries may have motivated the repeals. *Id.*

been defined broadly as containing no more than Article III of the Constitution requires.⁶⁸ In addition, the Supreme Court has ruled that courts should construe standing liberally under the FHA.⁶⁹ Thus, although it is true that injury in this instance is somewhat speculative, it certainly appears imminent, due to the fact that if the ordinances are enforced they will place landlords in the position discussed above. As a result, landlords will be left with a Hobson's choice, where they are faced with attempting to abide by the law and risk liability by accidentally or purposefully discriminating against Latin immigrants or they can choose not to enforce the law and subject themselves to fines from the locality. Either way, the ordinances impose liability on landlords whether or not they choose to act according to the ordinances' demands. Further, numerous courts have found that plaintiffs had standing to challenge the ordinances based on the likelihood that the laws violated rights guaranteed by the Constitution and the Federal Government.⁷⁰

Based on the above analysis, it seems likely that immigrants from Latin-American countries have reason to fear that, if enforced, the ordinances will cause them to suffer injury. The injury would be in the form of limiting their housing options on a disproportionate basis due to their race and/or national origin as a direct result of the ordinances' mandates. Therefore, the ordinances, even before one is enforced, seem quite likely to violate the FHA.

As discussed above, it appears that any ordinance causing landlords to evict tenants deemed to be "illegal aliens" or placing

68. *Compare* *Trafficante v. Metropolitan Life Ins., Co.*, 409 U.S. 205, 207 (1972) (stating that all the FHA requires to file a complaint is injury by a discriminatory housing practice or the belief that they will be injured by a discriminatory housing practice that is imminent) *with* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that Article III of the Constitution requires concrete and particularized injury to a legally protected right which is actual or imminent, causal connection between injury and defendant's action and the likelihood that injury will be redressed by favorable decision).

69. *Trafficante*, 209 U.S. at 212 (holding that the FHA's standing requirement can only be given "vitality" through a "generous construction").

70. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 498 (2007); *see also* *Valley Park, Mo., Temporary Restraining Order*, Cause No. 06-CC-3802 (granting plaintiffs' motion for temporary restraining order); *Escondido, Cal., Temporary Restraining Order*, Case No. 3:06-cv-02434-JAH-NLS (granting plaintiffs' motion for temporary restraining order); *Farmers Branch, Tex., Memorandum Opinion and Order Granting Temporary Restraining Order*, Case No. 3:06-cv-02371 (granting plaintiffs' motion for temporary restraining order); *Hazleton Pa., Temporary Restraining Order*, Case No. 3:06-cv-01586-JMM (granting plaintiffs' motion for temporary restraining order).

landlords in a position where they must discriminate on the basis of race or national origin violate the FHA. However, documented immigrants were the subjects of the above analysis, whereas the discussion to follow will revolve around undocumented immigrants.

The first hurdle to cross in this analysis is the issue of standing, which begs the question whether the FHA provides protection to undocumented immigrants as it appears to for documented immigrants. The City of Hazleton argued that undocumented immigrants could not have standing to sue under any law because they entered the country illegally and thus were not afforded the protections provided by American laws.⁷¹

The FHA employs the language "any person" to describe those afforded protection under the statute.⁷² This suggests that Congress intended the protections of the FHA to apply to anyone present in the United States, regardless of their citizenship status. Additional fodder for this position is found in the Fourteenth Amendment to the United States Constitution, which also employs the language of "any person" when describing those afforded due process and equal protection rights.⁷³ This language has been interpreted to mean that all persons present in the United States, regardless of how they entered the country, are afforded protections under federal law.⁷⁴ Further, if undocumented immigrants are provided the same protection under the laws as documented immigrants, the ordinances would have the same affect on undocumented immigrants as it does on documented immigrants.

Judge Munley found that the Hazleton ordinance did not violate the FHA.⁷⁵ His decision was based on the fact that Hazleton changed the language dealing with what constituted a valid com-

71. *Lozano*, 496 U.S. at 500-01.

72. 42 U.S.C. § 3604 (2008) (proscribing discrimination of "any person" in the rental of housing or the terms, privileges or conditions of rental housing to).

73. U.S. Const. amend. XIV § 1 (stating "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

74. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." *Plyer v. Doe*, 457 U.S. 202, 210 (1982). Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.* The *Plyer* Court went on to state that the protections afforded by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment were identical, and thus extended to all persons, regardless of their legal status in the country and regardless if they violated federal law to enter the country. *Id.* at 211-12.

75. *Lozano*, 469 F. Supp. 2d at 545-46.

plaint to exclude complaints based in any part on race or national origin, and consequently the law did not facially violate the FHA.⁷⁶ Further, because the ordinance had not been applied, Judge Munley found that arguments as to its affect under the FHA were too speculative to be given weight.⁷⁷

III. HOW LOCAL ORDINANCES AFFECT IMMIGRANTS' RIGHTS UNDER 42 U.S.C. § 1981, 42 U.S.C. § 1982 & 42 U.S.C. § 1983

A. 42 U.S.C. § 1981

While the FHA seems to be the most applicable federal statute, the ordinances also appear to be in conflict with other federal legislation. For instance, 42 U.S.C. § 1981 ("§ 1981") states that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . 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 . . ." The Supreme Court has interpreted the language of § 1981 to mean that the privileges afforded white citizens at the time the statute was enacted were the high-watermark of legal protections given contracts and that Congress intended to give the full plethora of contractual rights and obligations to all those persons within the United States.⁷⁸

The statute further states "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."⁷⁹ This passage has been interpreted to protect against discrimination based on race and alienage, and therefore applies directly to documented immigrants and their right to contract free from discrimination based on their immigration status.⁸⁰

The ordinances appear to conflict with § 1981 by limiting documented immigrants' right to contract freely for rental property. This is accomplished through similar means as those discussed above. More specifically, the ordinances affect the Mexican and Latin-American immigrant populations by all but forcing landlords to discriminate against those they suspect of being undocu-

76. *Id.* at 546.

77. *Id.*

78. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 (1976).

79. 42 U.S.C. § 1981 (2008).

80. *Takashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948).

mented immigrants in an attempt to avoid liability under the ordinances. If such discrimination takes place it seems quite likely that it violate § 1981 because it will limit documented immigrants' rights to make and enforce contracts by placing landlords in a position where they will discriminatorily choose to not enter leases with individuals they suspect of being undocumented. Consequently, documented immigrants will be stripped of their right to contract for rental property in cities that enact such legislation.

Unlike the discussion above regarding claims under the FHA, there are no disparate impact claims under § 1981.⁸¹ The discrimination complained of must be intentional.⁸² Such intent may be inferred from the totality of the circumstances due to the fact that those making the policies do not generally announce their intent to discriminate.⁸³ Therefore, a successful claim under § 1981 must allege and show that the localities acted intentionally to discriminate against Latin-American immigrants on the basis of their race or alienage. In attacking the ordinances, the fact that the laws have a disparate impact on immigrants from Latin-American countries, may be used as evidence of the localities intent to discriminate against their right to contract.⁸⁴ A successful claim may also be made against landlords by showing that they intentionally discriminated against a documented immigrant on the basis of race or alienage.⁸⁵

By its own terms § 1981, extends the protections it affords under the language "make and enforce contracts" to all privileges inherent in a contractual relationship.⁸⁶ This protection almost

81. Disparate impact claims are utilized to combat facially neutral policies, while 42 U.S.C. § 1981 grants a remedy for acts of intentional racial discrimination. *Goodman v. Lukens Steel Co.*, 580 F. Supp. 1114, 1121 (E.D. Pa. 1984) (holding intent is necessary element of a § 1981 claim because the rights afforded therein do not cover facially neutral policies that when enforced fall more harshly on one race).

82. To state a prima facie claim of discrimination under 42 U.S.C. § 1981, a plaintiff must allege and show that the discrimination was intentional. *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375 (1982); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 (1968) (stating that 42 U.S.C. § 1981, grants a remedy for intentional acts of racial discrimination that impedes one's ability to make and enforce contracts).

83. *Blair v. Philadelphia Housing Authority*, 609 F. Supp. 276, 279 (E.D. Pa. 1985).

84. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

85. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 (1976).

86. 42 U.S.C. § 1981(b) (2008) states "[f]or 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."

certainly reaches a tenants option to extend their lease for an additional period. Thus, not only do the ordinances under examination here appear to unlawfully affect documented immigrants' rights to enter contracts for rental property, they also likely interfere with documented immigrants' privileges of exercising the extension options in already existing contracts. Although, the Farmers Branch, Texas, ordinance explicitly applies to lease extension, and thus is subject to a facial challenge,⁸⁷ the other ordinances do not explicitly address the issue, and as a result would only be subject to challenges claiming the ordinances were unlawful as applied.⁸⁸

The City of Hazleton argued that § 1981 did not apply to undocumented immigrants because they were not persons under the law. Judge Munley disagreed, stating:

"The Supreme Court, however, has not yet addressed whether the protections of section 1981 extend to undocumented aliens, i.e. whether an undocumented alien is a "person" under section 1981. The Court has, in the context of the Fourteenth Amendment, held that '[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.' (citation omitted). This reasoning applies equally to a section 1981 analysis as to the Fourteenth Amendment analysis, especially because the language used in section 1981 is based in part on the language of the Fourteenth Amendment. (citation omitted). Accordingly, we find that aliens, regardless of their status under the immigration laws, are persons under section 1981."⁸⁹

B. 42 U.S.C. § 1982

The ordinances may also violate 42 U.S.C. § 1982. Section 1982 states that "All 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." Based on § 1982, immigrants from

87. FARMERS BRANCH, TEX., Ordinance 2892, § 2(B)(4)(i) (2007).

88. See RIVERSIDE, N.J., Ordinance 2006-26 (2006); see also HAZLETON, PA., 2006-18 (2006); see also VALLEY PARK, MO. Ordinance 1715 (2006); ESCONDIDO, CAL., Resolution 2007-16 (2007).

89. *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 547 (M.D. Pa. 2007).

Mexico and Latin-American countries who have attained citizenship through the proper channels are given the gamut of rights afforded any other citizen of the United States when it comes to real property. On its face the statute addresses the right to purchase or lease real property.⁹⁰ Consequently, due to the ordinances proscription against landlords renting to "illegal aliens" and the discriminatory decisions that are likely to follow, there is a distinct possibility that the ordinances as applied will violate § 1982.

C. 42 U.S.C. § 1983

Those affected by the ordinance may also have a claim under 42 U.S.C. § 1983 ("§ 1983"). A § 1983 claim has two prerequisites. First, there must be a deprivation of a constitutional or federal rights.⁹¹ Second, someone acting under the color of state law must have perpetrated that deprivation.⁹² As demonstrated above, and will continue to be demonstrated below, it seems clear that the ordinances under examination here infringe upon several constitutional and federal rights. In addition, there can be no question but that the ordinances are enacted and enforced by the respective localities acting under the color of state law. Therefore, any one affected by the ordinances unconstitutional and federally repugnant mandates will be able to state a claim under § 1983.

IV. LOCAL ORDINANCES APPEAR TO AFFECT IMMIGRANTS' FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

A. *Fourteenth Amendment Due Process*

It also appears that the ordinances do not afford adequate due process to those deemed to be in violation of the laws. In fact, Judge Munley found that the Hazleton ordinance violated tenants' due process rights by failing to provide adequate notice or hearing.⁹³ The Supreme Court has expended a significant amount of

90. 42 U.S.C. § 1982 (2008).

91. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress". 42 U.S.C. § 1983 (2008).

92. *Id.*

93. *Lozano*, 496 F. Supp. 2d at 538.

ink developing America's due process jurisprudence.⁹⁴ From these opinions it can be gleaned that an individual must be afforded both notice and hearing before a deprivation of property will be considered constitutional.⁹⁵

Where due process rights attach to property, courts look to three factors to determine whether the appropriate level of due process was afforded an individual being deprived of property.⁹⁶ First, the courts examine the interest affected by the action.⁹⁷ In this instance, documented and undocumented immigrants, as well as United States citizens, are subject to eviction from their homes, lest their landlords suffer fines for every day they continue to rent to those individuals deemed to be "illegal."

Additionally, the ordinances do not require the localities to sustain any burden of proof that an individual fits the classification of "illegal alien" before the deprivation takes place. If an individual does not provide the appropriate documentation there is a distinct possibility that the locality might deem that individual an "illegal alien," and thus any landlord renting to such an individual would be subject to penalties. For instance, to legally rent housing under the Farmers Branch ordinance "Each family member, regardless of age, must submit the following evidence to the owner and/or property manager," U.S. citizens must submit evidence consisting of a "signed declaration of U.S. citizenship" which "shall be confirmed by requiring presentation of a United States passport or other appropriate documentation . . . as acceptable evidence of citizenship status."⁹⁸ For noncitizens, "the evidence consists of: a. a signed declaration of eligible immigration status; b. a form designated by the Immigration and Customs Enforcement Department . . . as acceptable evidence of immigration status; and c. a signed verification consent form."⁹⁹ If an individual does not provide the documentation called for in their respective classification then a landlord has to either turn them away or rent to them and face the possibility of stiff penalties if the locality

94. Examples of Supreme Court cases dealing with due process include, *Lochner v. New York*, 198 U.S. 45 (1905), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) and *Mathews v. Eldridge*, 424 U.S. 319 (1976), among numerous others.

95. *Fuentes*, 407 U.S. at 97 (holding that notice and hearing that is calculated to establish the validity of the underlying claims must be given before deprivation of property will be considered constitutional, except in extraordinary circumstances).

96. *Mathews*, 424 U.S. at 335.

97. *Id.*

98. FARMERS BRANCH, TEX., Ordinance 2892, § 2(f)(3)(i) (2007).

99. FARMERS BRANCH, TEX., Ordinance 2892, § 2(f)(3)(ii) (2007).

deems the individual to be an "illegal alien."¹⁰⁰

The second prong of the three-part analysis requires the courts to examine the risk of wrongful deprivation posed by the procedures employed and the benefit of additional or different procedures.¹⁰¹ It appears that, if enforced, the ordinances will almost certainly result in the wrongful deprivation of property from those deemed "illegal aliens." As discussed above, the definitions used to determine an individual's status under the ordinances make it difficult to discern who classifies as an "illegal alien" under the ordinances. Moreover, the conclusory nature of the procedures used in the ordinances result in deprivation of property before the individual who is being deprived of property is allowed to challenge the action because they do not call for any form of pre-deprivation hearing.¹⁰²

The effectiveness of additional or substitute safeguards is questionable. The localities could more accurately define an individual who would be considered an "illegal alien" in terms that landlords could easily understand. Or, the cities could provide immigration training to every landlord in the area that would aid them in determining which prospective tenants would violate the ordinance. Nevertheless, these options are probably not financially feasible for the localities that enacted the ordinances. Another option is to allow for a hearing before the deprivation takes place. This option seems the most likely to survive a due process challenge because due process generally calls for notice and hearing before the deprivation takes place.¹⁰³

The third prong analyzed under this framework is the government's interest, which includes financial concerns and administrative difficulties, that may follow from any substitute or additional procedures implemented to safeguard wrongful deprivation.¹⁰⁴ In this instance, the localities' interests, as stated in the ordinances themselves, are to eradicate the evils perceived to follow undocumented immigrants.¹⁰⁵ Yet, the ordinances fail to provide informa-

100. FARMERS BRANCH, TEX., Ordinance 2892, § 4 (2007).

101. *Id.*

102. See HAZLETON, PA., 2006-18 (2006); see also RIVERSIDE, N.J., Ordinance 2006-26 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1715 (2006); ESCONDIDO, CAL., Resolution 2007-16 (2007).

103. *Logan*, 455 U.S. at 436 (holding that post-deprivation hearing is inadequate to satisfy the constitutional requirement of due process unless there is a specific need for fast action, especially when the only hearing allowed is an independent action after the deprivation).

104. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

105. HAZLETON, PA., Ordinance 2006-18, §2(c) (2006); RIVERSIDE, N.J.,

tion supporting the conclusion that the presence of undocumented immigrants results in increased crime, diminished property values or overburdened schools. In fact, Mr. Barletta, Hazleton's mayor, admitted that he had no statistics to support the assertion that undocumented immigrants played a role in the city's alleged escalation in crime, nor did he have any idea as to how many undocumented immigrants were in the city.¹⁰⁶ Further, statistics show a general decline in Hazleton's crime rate.¹⁰⁷ As a result, it seems that the localities' interests are not adequate, or at least not adequately supported to override an individual's due process rights under the Fourteenth Amendment.

Nonetheless, the financial and administrative costs of providing pre-deprivation hearings are not likely to override the necessity of providing such a safeguard before depriving one of their home. The courts, however, have consistently held that post-deprivation hearings are inadequate to satisfy the Fourteenth Amendment's requirement of due process unless there is an exigent circumstance that results in the impracticability of providing a pre-deprivation hearing.¹⁰⁸

B. *Fourteenth Amendment Equal Protection*

The ordinances also appear to be in violation of immigrants' Fourteenth Amendment equal protection rights.¹⁰⁹ The potential violation imposed by the ordinances stems from the fact that they affect similarly situated individuals differently. The ordinances' effects would almost inevitably fall harder on those suspected of being undocumented immigrants than those who are not. Landlords' suspicions regarding an individual's citizenship status is likely to be based on characteristics such as skin color, accent,

Ordinance 2006-26, §166-2 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1736, §2(c) & (d) (2006); ESCONDIDO, CAL., Ordinance 2006-38, §1(5) (2006).

106. *Lozano v. City of Hazleton*, 459 F.Supp.2d 332, 336 (M.D. Pa. 2006), citing Dan Geringer, *Bloomberg: U.S. Can't Stem Immigration Tide*, PHILADELPHIA DAILY NEWS, July 6, 2006 at 7.

107. Ellen Barry, *City Vents Anger at Illegal Immigrants*, L.A. TIMES, July 14, 2006, at A1. ("Statistics compiled by the Pennsylvania State Police Uniform Crime Reporting System show a reduction in the number of total arrests in Hazleton over the last five years, from 1,458 in 2000 to 1,263 in 2005. Whereas the number of thefts and drug related crimes has risen from a low point of 80 in 2001 to 127 in 2005, the total number of reported rapes, robberies, homicides and assaults has decreased since 2000.")

108. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

109. "Nor shall any state deprive any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

dress or a number of other innocuous traits that are associated with one's race or national origin.

As a result of the ordinances' mandates against renting to those the respective localities deem "illegal aliens," landlords are placed in the uncomfortable position of making decisions about a potential tenant's status under the laws based on superficial traits. Thus, because the majority of America's recent immigrants originated from Latin-American countries,¹¹⁰ the ordinances will naturally affect them at a disproportionate rate.

Nevertheless, almost all laws affect a group on a disproportionate basis. This does not necessarily mean that every law that does so is a violation of the equal protection clause. If, however, a law is facially discriminatory against a suspect class, such as race or national origin, it is subject to stringent judicial review known as strict scrutiny.¹¹¹ The ordinances at issue here are facially discriminatory against "illegal aliens," but this is not a classification that warrants strict scrutiny review on its face.

However, when a law that is facially neutral regarding a suspect classification for strict scrutiny purposes, but strict scrutiny does apply to a facially neutral law when it can be shown that it was motivated by a "racial purpose or object" or is "unexplainable on grounds other than race."¹¹² The Supreme Court has stated, "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."¹¹³ Therefore, undocumented immigrants are afforded the full panoply of Fourteenth Amendment protections, and any law that is accused of violating an undocumented immigrant's equal protection rights on the basis of their race and/or national origin is subject to review under strict scrutiny.

Therefore, in order to warrant strict scrutiny review of the ordinances the plaintiffs must show that either the drafters were

110. See *Camarota*, *supra* note 4.

111. Legislative classifications based on race violate the equal protection guarantee of the Fourteenth Amendment unless the government can demonstrate a compelling interest and show that the law is narrowly tailored to reach the desired end. *Cuffeld v. Supreme Court of Pennsylvania*, 936 F.Supp. 266, 280 (E.D. Pa. 1996); *Harris v. McRae*, 448 U.S. 297, 323 (1980) ("Presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, 'suspect,' the principal example of which is a classification based on race."). Classifications based on a suspect class are "presumptively invidious." *Plyer v. Doe*, 457 U.S. 202, 216 (1982).

112. *Hunt v. Cromartie*, 526 U.S. 541, 545 (1999).

113. *Plyer*, 457 U.S. at 211 n.10.

motivated by race and/or national origin, or that there is no other plausible explanation for the ordinances than such prejudice. This analysis requires inquiry into any direct or circumstantial evidence that is available regarding the lawmakers' intent in drafting the ordinances and was the "predominant factor motivating" their drafting of the ordinances.¹¹⁴ This certainly is a difficult burden to bear in order to obtain strict scrutiny review. There is, however, evidence to support an assertion that the ordinances' drafters were motivated by race and/or national origin when creating the laws. As discussed throughout this paper, the ordinances' drafters in the respective localities did not rely on any evidence to support their assertions that undocumented immigrants caused any of the problems that allegedly prompted the laws. Further, in the Hazleton case there is evidence to refute at least one of the alleged reasons proffered for the ordinances.¹¹⁵ However, it is unclear whether this lack of evidence, and at least in one case presence of contrary evidence, is enough to warrant application of strict scrutiny.

In the event that strict scrutiny does apply based on the foregoing analysis, it consists of a two-part inquiry. First, the government enacting the law must show that the law serves a compelling government interest.¹¹⁶ In this instance, the localities have stated what would appear to be a compelling interest:¹¹⁷ the eradication of crime, fixing failing schools and restoring property values, among other things.¹¹⁸ Assuming that such goals are adequate to satisfy the compelling justification standard, there is no evidence given by the localities to support that undocumented immigrants

114. *Hunt*, 526 U.S. at 545.

115. Barry, *supra* note 107.

116. *Plyer*, 457 U.S. at 217.

117. It is difficult to determine what interests are sufficient to meet the compelling interest standard because the Supreme Court has not given a clear definition to the term. The jurisprudence in the area appears to be little more than an "unstructured balancing test." Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 STAN. L. REV. 599, 603-04 (1991). Professor Lino Graglia stated that "compelling, even more than beauty, [may be] in the eyes of the beholder." David Schimmel, *Is Bakke Still Good Law? The Fifth Circuit Says No and Outlaws Affirmative Action Admissions*, 113 ED. LAW REP. 1052, 1064 (1996) (citing Lino Graglia, *Texas Lawyer*, Sep. 25, 1995, p. 25). For an analysis of Supreme Court cases applying strict scrutiny and the compelling justification standard see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L.REV. 793 (2006).

118. HAZLETON, PA., Ordinance 2006-18, §2(c) (2006); RIVERSIDE, N.J., Ordinance 2006-26, §166-2 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1736, §2(c) & (d) (2006); ESCONDIDO, CAL., Ordinance 2006-38, §1(5) (2006).

have any part in creating these ills. Thus, there is no evidence that the ordinances, if effective in eliminating undocumented immigrants from the cities, will cure the problems.

The second-prong requires that the law must be narrowly tailored to achieve the desired end.¹¹⁹ As demonstrated throughout this paper, if the laws are enforced they will almost certainly have an effect on immigrants and citizens originating from Latin-American countries. Therefore, the laws appear to be over-inclusive, and as a result they seem to fail this prong because over-inclusiveness suggests that the ordinances are not narrowly tailored.

In addition, this aspect of the ordinances is questionable because there is no evidence to support the claim that undocumented immigrants cause the evils the localities seek to eradicate. Consequently, there is no way to definitively know if the ordinances are narrowly tailored to accomplish the stated goals unless it is first shown that the traits combated are the cause of the problems. Assuming that undocumented immigrants are the cause of the problems the laws are aimed at eradicating, denying such individuals housing and employment may well be the least restrictive way to go about it. But, that does not save the ordinances from failing the first prong.

The ordinances, if enforced, will also likely affect documented immigrants and American citizens originating from Latin-American countries on a disproportionate basis to white immigrants or citizens. In this instance, it is incumbent on the plaintiffs to show discriminatory intent on the part of the lawmakers.¹²⁰ Intent can be inferred from the "totality of the relevant facts."¹²¹

Although intent is generally a difficult aspect to show, there is evidence that the ordinances were drafted with discriminatory intent. For example, the lawmakers stated that their purpose in drafting the ordinances was to eliminate crime, diminished property values and failing schools,¹²² which may ultimately be the result of population growth nationally and in the respective localities and have nothing to do with the immigration status of the citizenry. They attempted to achieve this by ousting "illegal aliens." From this it can be inferred that the lawmakers viewed

119. *Plyer*, 457 U.S. at 217.

120. *Washington v. Davis*, 426 U.S. 229, 240-41 (1976).

121. *Id.*

122. HAZLETON, PA., Ordinance 2006-18, §2(c) (2006); RIVERSIDE, N.J., Ordinance 2006-26, §166-2 (2006); FARMERS BRANCH, TEX., Ordinance 2892 (2007); VALLEY PARK, MO. Ordinance 1736, §2(c) & (d) (2006); ESCONDIDO, CAL., Ordinance 2006-38, §1(5) (2006).

immigrants – who are overwhelmingly from Mexico and Latin-American countries – as criminals who do not care for their property and do not value education. In fact, those are almost the exact words used by one of the advocates for the Farmers Branch, Texas, ordinance.¹²³

However, if intent to discriminate based on race or national origin cannot be shown on the part of the lawmakers, then the law would be reviewed under the far more deferential rational basis test.¹²⁴ This would include simply determining if the lawmakers had a legitimate reason for enacting the ordinances and whether the means by which they went about it were appropriate to meet the legitimate end.¹²⁵

In these instances it does appear that fighting crime, increasing property values and mending a broken education system are legitimate ends that lawmakers could address through the ordinances. Further, if there were evidence that undocumented immigrants were responsible for the reported ills then it would seem that the ordinances would be an adequately tailored response to address the problems. But, therein lies the problem. The lawmakers did not rely on any evidence that undocumented immigrants were responsible for increased crime or failing schools. It seems that they acted on impulse alone. Nevertheless, Judge Munley found that strict scrutiny was inapplicable because there was no evidence of intent to discriminate because of race and/or national origin

V. CONCLUSION

The ordinances enacted in cities like Hazleton, Farmers Branch, Riverside, Valley Park and Escondido, have the capability of impacting the lives of every citizen in the respective localities. One must only look at the consequences in the city of Riverside, New Jersey to understand the gravity of the situation. Hundreds,

123. Councilman Tim O'Hare stated that, at least in part, "illegal immigrants" were the cause of lowered property values in the locality, and in turn "less desirable people move into the neighborhoods, people who don't value education, people who don't value taking care of their properties." Stephanie Sandoval, *Farmers Branch Proposal Would Target Illegal Immigrants*, DALLAS MORNING NEWS, August 21, 2006, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/082106dnmetfbimmigration.349844e.html>. In addition, Councilman O'Hare stated that "illegal immigrants" caused the local school rankings to drop and forced retailers to tailor their services to "low-income and Spanish speaking customers," which left those with a good income no place to shop. *Id.*

124. *Kranson v. Valley Crest Nursing Home*, 755 F. 2d 46, 53 (3d Cir. 1985).

125. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

possibly thousands of documented and undocumented immigrants fled the city before the ordinance was even enforced.¹²⁶ This mass exodus severely harmed the city's economy, with little hope for future growth.¹²⁷

Another prime example of the impact that such ordinances have on individuals can be seen from Pedro Lozano's point of view. Mr. Lozano came to the United States from Colombia.¹²⁸ He is a legal resident who settled in Hazleton, Pennsylvania.¹²⁹ He purchased a two-family home with the intention of renting some of the space and using the proceeds from the rental to help pay his mortgage.¹³⁰ Mr. Lozano rented the home until the ordinance was passed in Hazleton, and the tenants he was renting to "ran away" after he told them they would have to obtain a permit to rent from him.¹³¹ He has had difficulty finding other renters.¹³²

An additional example involves another plaintiff from the Hazleton case. He was referred to as John Doe 1.¹³³ He had filed the necessary paperwork with the federal government to obtain legal residency.¹³⁴ Nevertheless, his landlord forced him from his rental property shortly after the ordinance was passed because his landlord did not want to pay the fine.¹³⁵

How courts treat the ordinances discussed above will set the stage for the hundreds of ordinances that are being debated in localities across the United States. Although in this author's opinion Judge Munley's decision is, for the most part, on the right track, it is currently being appealed.¹³⁶

In addition, three recent Federal District Court opinions took contrary positions to several of Judge Munley's rulings.¹³⁷ These decisions are based on laws that impose fines on employers who

126. See Belson & Capuzzo, *supra* note 67.

127. *Id.*

128. *Lozano v. City of Hazleton*, 469 F. Supp. 2d 477, 488 (2007).

129. *Id.* at 489.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 498.

134. *Id.* at 499.

135. *Id.*

136. Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, February 10, 2008, available at http://www.nytimes.com/2008/02/10/us/10immig.html?_r=1&sq=in%20reversal,%20courts%20uphold&st=nyt&adxnml=1&oref=slogin&scp=1&adxnml=1204563709-1/iKQMW/eQiPkUgAclz5Og.

137. See *Gray v. City of Valley Park, Mo.*, WL 294294 (E.D.Mo. 2008); *Arizona Contractors Ass'n, Inc. v. Candelaria*, WL 343082 (D. Ariz. 2008); *National Coalition of Latino Clergy, Inc. v. Henry*, WL 4390650 (N.D. Okla., 2007).

hire undocumented immigrants, which is not the subject discussed in this paper, but many of the issues are the same. In particular, the court in *National Coalition of Latino Clergy, Inc., v. Henry*, held that undocumented immigrants did not possess prudential standing to challenge the ordinance in question because if the plaintiffs complied with federal law and left the country or sought legal immigration status there would be no issue.¹³⁸ In both *Arizona Contractors Assoc. Inc., v. Candelaria* and *Gray v. City of Valley Park, Mo.*, the courts held that the laws were not preempted because the local and federal laws could live in harmony.¹³⁹ Subsequently, the respective courts analyzed due process challenges and found that the procedures offered by the ordinances were sufficient.¹⁴⁰ The *Gray* court went even further to hold that the law in question did not violate Hispanics' equal protection rights under the Fourteenth Amendment because undocumented immigrants did not qualify as a suspect class.¹⁴¹ The court based its decision on the finding that there was insufficient evidence to conclude that the law was racially motivated and the city had provided ample justification under the rational basis test to satisfy the court of its validity.¹⁴²

Although these recent decisions were based on ordinances dealing solely with employment of undocumented immigrants, many of the issues are the same as those discussed throughout this paper, and they demonstrate that the issues presented by such laws are far from settled. Lawmakers will almost certainly continue to craft laws that adversely affect the lives of undocumented immigrants, documented immigrants and American citizens of Mexican and Latin American descent.¹⁴³ Therefore, it is imperative that the courts and practitioners be aware of the legal tools at their disposal so they may more effectively combat such laws, in whatever form they are presented. As Judge Munley

138. *National Coalition of Latino Clergy, Inc.*, WL 4390650 at 28.

139. *Arizona Contractors Ass'n, Inc. v. Candelaria*, WL 343082 at 35; *Gray v. City of Valley Park, Mo.*, WL 294294 at 56.

140. *Arizona Contractors Ass'n, Inc. v. Candelaria*, WL 343082 at 24; *Gray v. City of Valley Park, Mo.*, WL 294294 at 56.

141. *Gray v. City of Valley Park, Mo.*, WL 294294 at 56.

142. *Id.*

143. Shortly after Judge Munley handed down his decision granting a permanent injunction against the Hazleton ordinance, Dan Stein, president of the Federation of American Immigration Reform, stated 'Attorneys have already drafted appeal briefs.' Darryl Fears, *Judge Blocks City's Ordinance Against Illegal Immigration*, WASH. POST, July 27, 2007, at A2. In addition, Louis J. Barletta, Hazleton's Mayor and strong supporter of the ordinance, said "[t]his fight is far from over. I have said it many times before: Hazleton is not going to back down." *Id.*

stated in *Lozano*, "We cannot say clearly enough that persons who enter this country without legal authorization are not stripped immediately of all their rights because of this single illegal act."¹⁴⁴

144. *Lozano v. City of Hazleton*, 469 F. Supp. 2d 477, 498 (2007).