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Utah's New Extermination Orders

“And thy servant is in the midst of thy people which thou hast chosen, a great people, that cannot be numbered nor counted for multitude. Give therefore thy servant an understanding heart to judge thy people, that I may discern between good and bad: for who is able to judge this thy so great a people?”

—1 Kings 3:8-9

I. INTRODUCTION

On October 27, 1838, Governor Lilburn Boggs of Missouri issued Executive Order 44. This order—subsequently referred to as the “extermination order” by members of The Church of Jesus Christ of Latter-day Saints (“LDS Church”)—accused “the Mormons [of being] in the attitude of an open and avowed defiance of the laws and of having made war upon the people of this State.”¹ In the order, Governor Boggs instructs the state militia that “[t]he Mormons must be treated as enemies and must be exterminated or driven from the State if necessary, for the public peace—their outrages are beyond all description.”² True to their instructions, the Missouri militia engaged Mormons throughout the state, arrested church leaders, and eventually succeeded in driving most Mormons from the state.³

While Boggs’ use of the word “exterminated” in his order seems to suggest the authorization of lethal force, LDS Church historian and Brigham Young University professor Alexander Baugh notes that Webster’s 1828 dictionary defined “exterminate” as “to drive from within the limits or borders.”⁴ Baugh argues that “everybody thinks this Extermination Order is [to] ‘go kill everybody.’ But Boggs doesn’t have that mindset. He’s not trying to kill people, he wants them removed. He wants them out of the state, and he wants someone else to deal with them.”⁵

1. Mo. Exec. Order No. 44 <http://www.sos.mo.gov/archives/resources/findingaids/miscMormonRecords.asp?rec=eo> (last visited Oct. 3, 2011).

2. *Id.*

3. See Dale Whitman, *Extermination Order*, *ENCYCLOPEDIA OF MORMONISM*, available at http://com.byu.edu/index.php/Extermination_Order (last visited Oct. 14, 2011).

4. See Heather M. Seferovich, *Extermination Order Not Believed to Be ‘Death Sentence,’* *DESERET NEWS*, Sept. 16, 2008, <http://desne.ws/npBP1O>.

5. *Id.*

In 1847, after being driven out of both Missouri and Illinois, Mormon pioneers—led by church president Brigham Young—began settling in the Salt Lake Valley.⁶ After establishing a permanent settlement, church leaders began to “fervently [seek] statehood and self-government.”⁷ Finally, after persistent lobbying and an official prohibition of plural marriage within the LDS church, Utah was declared the forty-fifth state by President Grover Cleveland in 1896.⁸ The Utah Constitution declares the people of Utah to be “[g]rateful to Almighty God for life and liberty”⁹ and proclaims

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.¹⁰

After more than one hundred years of statehood, Utah is still predominantly Mormon¹¹ and is now enthusiastically adopting its own, more subtle variety of extermination order directed at a certain class of people. Like Boggs’ order, Utah’s new extermination orders are not intended to kill people; rather, like Boggs’ order, they are intended to drive people from the limits and borders of its cities. The proponents of these extermination orders have wisely chosen not to label them as such; instead, they are innocuously described as “good landlord programs.”¹²

In essence, Utah’s good landlord programs amount to state-sponsored banishment of people with past criminal convictions. These programs are adopted in various forms by various municipalities, but almost all of them share this common characteristic: they prohibit landlords from renting their properties to individuals who have been convicted of a wide variety of crimes in a given range of years. The programs are described as “voluntary” or as simply providing “incentives,” but they are effectuated through the use of coercive taxes mandated by state legislation.¹³ The popularity of these programs is quickly growing, and, as a result of this trend, individuals with criminal

6. See *Soc’y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 (Utah 1993).

7. Edward Lyman, *Utah Statehood*, *ENCYCLOPEDIA OF MORMONISM*, available at http://com.byu.edu/index.php/Utah_Statehood (last visited April 10, 2011).

8. *Id.*

9. UTAH CONST. pmbl.

10. UTAH CONST. art. I, § 1.

11. PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 99 (Feb. 2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> (last visited Oct. 3, 2011) (reporting Utah’s population to be 58% Mormon).

12. See, e.g., UTAH CODE ANN. § 10-1-203(5)(e)(i)(C) (LexisNexis 2011).

13. See *infra* Part II.B.

convictions in Utah are finding their housing options increasingly limited. The logical conclusion to this process is either the “extermination” of thousands of people from Utah’s borders, or widespread encampments of people living “like post-apocalyptic trolls beneath a bridge.”¹⁴

These programs are ostensibly intended to reduce municipal crime levels, and this superficial intention may certainly be appealing to people living in high crime areas. Below the surface, however, these programs seriously threaten the inherent and inalienable rights of the people of Utah, rights that were so enthusiastically endorsed in the Utah Constitution by Mormons who had just been forced out of two states themselves. The programs also reflect a dangerous misunderstanding, or perhaps a deliberate disregard, of the realities of criminal recidivism and homelessness.

This Article examines Utah’s good landlord programs through the kaleidoscopic lens of positionality. Positionality, as described by Katherine Bartlett, “conceives of truth as situated and partial. Truth is situated in that it emerges from particular involvements and relationships.”¹⁵ Because these programs affect many separate involvements and relationships, this Article’s analysis of their effects attempts to follow Bartlett’s suggestion that “the key to increasing knowledge lies in the effort to extend one’s limited perspective. . . . [We] can improve [our] perspective[s] by stretching [our] imagination[s] to identify and understand the perspectives of others.”¹⁶

This Article proceeds by first examining the enabling structure, history, and mechanisms of the programs in Part II. Part III analyzes the constitutional and other legal concerns raised by the programs through the perspectives of landlords, families, victims of domestic violence, racial minorities, and the general public. Based on the concerns discussed in Part III, this Article concludes with proposed amendments to the Utah Code in Part IV and Appendix A.

II. ENABLING STRUCTURE

Utah’s statutory code perpetuates good landlord programs through two basic mechanisms. First, the code allows municipalities to collect additional revenue from businesses that incur “disproportionate costs of municipal services.”¹⁷ The “disproportionate” use of police and fire

14. See Fred Grimm, *Woman Joins Sex-Offender Group Living Under Julia Tuttle Causeway*, MIAMI HERALD, March 23, 2009; *infra* Part III.C.1.

15. Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880 (1990).

16. *Id.* at 881–82.

17. UTAH CODE ANN. § 10-1-203(5)(a)(i) (LexisNexis 2011).

services by rental businesses is accordingly used as the rationale for imposing the costs of this use on those businesses, rather than to the general municipal population. Under the code, these disproportionate costs must be determined through a municipal services study, conducted by the municipality prior to imposing a disproportionate tax.¹⁸ Second, the code instructs municipalities to allow a reduction in the “disproportionate rental fee” for business owners who comply with the requirements of a good landlord program.¹⁹ When all is said and done, landlords avoid paying an often exorbitant tax by allowing the municipality to dictate the terms and conditions of their rental operations.

Part II.A analyzes the history of the enabling legislation in the Utah Code, including the viewpoints and arguments expressed by the legislators, in an effort to identify and understand their perspectives. Part II.B examines the coercive effect of the disproportionate taxes directed at landlords, and Part II.C discusses the terms and workings of the various programs adopted by municipalities.

A. Legislative History: The Carrot and the Stick

In 1997, the Utah legislature introduced House Bill 98 (H.B. 98), which proposed substantial changes to the local taxing authority of municipalities.²⁰ H.B. 98 was intended to “modify[] the business license fee and taxing authority of a municipality.”²¹ The section of the bill pertinent to the future of Utah’s good landlord programs specified the following:

The governing body of a municipality may by ordinance raise revenue by levying and collecting a license fee or tax on . . . a business that causes disproportionate costs of municipal services or for which the municipality provides an enhanced level of municipal services in an amount that is reasonably related to the costs of the municipal services provided by the municipality.²²

The bill also instructed that

Before the governing body of a municipality imposes a license fee or tax on a business for which it provides an enhanced level of municipal services . . . the governing body of the municipality shall adopt an ordinance defining for purposes of the tax . . . what constitutes the basic level of municipal services in the municipality and what amounts are reasonably related to the costs of providing an enhanced level of

18. *Id.* §10-1-203(5)(c)(i)(D), (c)(ii).

19. *Id.* §10-1-203(5)(c)(i)(B).

20. H.B. 98, 52d Leg., Gen. Sess. (Utah 1997).

21. *Id.*

22. *Id.* §(5)(a).

municipal services in the municipality.²³

The legislature passed the bill after limited amendments and floor debate. According to the floor debates, the bill was intended to modify the “blank check” given to cities in the Utah Code to pass revenue-gathering measures.²⁴ A statement of legislative intent accompanying the bill declares that “[i]t is the intent of this bill . . . to allow a municipality to impose license fees only to the extent necessary to defray the costs of regulation of the businesses being licensed.”²⁵

Passage of Senate Bill 152, in 2005, resulted in substantial changes to the law.²⁶ S.B. 152 required “municipalities imposing a disproportionate fee or tax on rental housing to conduct a study of municipal services provided to rental housing” and prohibited “under certain circumstances, municipalities from levying and collecting a disproportionate fee or tax on rental housing that exceeds the cost of providing municipal services for the rental housing.”²⁷ According to the sponsor, Utah State Senator Michael Waddoups, the bill was a “compromise . . . made between the Utah League of Cities and Towns and the [Utah] Apartment Association, placing a cap at \$17 per unit per year that can be imposed without having done the study requiring all costs affecting apartments to be included in the study.”²⁸ The bill defined the “municipal services study” as “a study conducted by a municipality of the cost of all municipal services that the municipality provides to the applicable rental housing.” The bill also defined “rental housing cost” as “the municipality’s cost . . . of providing municipal services to the rental housing . . . that is reasonably attributable to the rental housing . . . and that would not have occurred in the absence of the rental housing.”²⁹ Additionally, the legislative history for S.B. 152 indicated that members of the Utah Association of Realtors and the Utah Apartment Association were heavily involved in the drafting of the bill.³⁰ As discussed below, the Utah Apartment Association provides landlord “training” classes for the Good Landlord programs and has been one of the programs’ most

23. *Id.* §(5)(d).

24. Audio tape: House Floor Debate on H.B. 98, Utah State Legislature (Feb. 25, 1997), <http://le.utah.gov/asp/audio/index.asp?Sess=1997GS&Day=0&Bill=HB0098S02&House=H>.

25. LEGISLATIVE INTENT UNDERLYING H.B. 98, 2d SUBSTITUTE (on file with author, also available through the electronic archives of the Utah Legislature at www.le.utah.gov).

26. S.B. 152, 56th Leg., Gen. Sess. (Utah 2005).

27. *Id.*

28. Audio tape: Senate Floor Debate on S.B. 152, Utah State Legislature statement of Sen. Michael Waddoups (Feb. 10, 2005), <http://le.utah.gov/asp/audio/index.asp?Sess=2005GS&Day=0&Bill=SB0152&House=S>.

29. S.B. 152, 56th Leg., Gen. Sess. (Utah 2005).

30. Legislative history and correspondence available at <http://image.le.utah.gov/imaging/bill.asp> (search “SB152” and “2005,” then follow link for “Correspondence”) (last visited Nov. 3, 2011).

influential and outspoken proponents.³¹

The municipal study requirement was presumably intended to assure that any disproportionate tax imposed on rental businesses was actually related to some measurably higher level of municipal costs caused by rental properties, perhaps in anticipation of a legal challenge to the exercise of the disproportionate taxes imposed under the municipality's taxing authority.³² The study requirement's ability to actually restrain the municipality's taxing authority is questionable, however. S.B. 152 imposed no requirement that the study be conducted by an independent body; rather, the municipality is instructed to conduct the study itself, giving rise to an obvious conflict of interest. In addition, it is difficult to conceive how a municipal study could measure costs that "would not have occurred in the absence of the rental housing," as it is likely that the municipality itself would not exist in the absence of rental housing.

The most important change to the law came in 2009 when the Utah legislature passed House Bill 342.³³ This bill required "municipalities imposing a disproportionate rental fee for the first time to establish a good landlord program allowing the landlord to qualify for a reduction in the disproportionate rental fee if complying with certain requirements."³⁴ Thus, with H.B. 342, "Good Landlord programs" became officially mandated by the state:

A municipality may impose and collect a disproportionate rental fee if . . . the municipality . . . conducts a municipal services study . . . before increasing the amount of the disproportionate rental fee[] and . . . before decreasing the amount of the disproportionate rental fee reduction . . . establishes a good landlord program . . . and the disproportionate rental fee does not exceed the rental housing cost, as determined by the municipal services study.³⁵

H.B. 342 defined a "Good Landlord program" as

A program established by a municipality that provides a reduction in a disproportionate rental fee for a landlord who . . . completes a landlord training program approved by the municipality[], . . . implements measures to reduce crime in rental housing as specified in municipal

31. For a list of the training classes offered by the Utah Apartment Association, see the flyers at *Good Landlord Program*, UTAH APARTMENT ASSOCIATION, <http://www.uaahq.org/good-landlord-program.php> (last visited Oct. 3, 2011).

32. As of this writing, there have been no direct challenges to the provisions of Utah Code §10-1-203 dealing with the imposition of disproportionate taxes on rental businesses. There have been, however, numerous challenges to the exercise of a municipality's taxing power under Utah Code §10-1-203. See, e.g., *Cont'l Bank and Trust Co. v. Farmington City*, 599 P.2d 1242, 1246 (Utah 1979) (noting that "[w]henever a class is singled out for taxation, the amount of which is unduly burdensome, the question of abuse of taxing power is raised").

33. H.B. 342, 58th Leg., Gen. Sess. (Utah 2009).

34. *Id.*

35. *Id.*

ordinances[,] and . . . operates and manages rental housing in accordance with applicable municipal ordinances.³⁶

During the floor debate on H.B. 342, bill sponsor Representative Gage Froerer disclosed the “potential conflict of interest” that he owns and manages rental property within the state and that his wife is an officer in the Utah Apartment Association.³⁷ Representative Froerer noted as well that the bill “does mandate that the municipalities implement a program that we are referring to as a good landlord program.”³⁸ During the debate, Representative Jackie Biskupski asked Representative Froerer if the language “good landlord program” was referring to “a specific program, or could it be any landlord program that exists in a county or city or municipality of sorts?”³⁹ Representative Froerer replied:

The good landlord program is actually a term that was used in and is currently used by the cities utilizing a program. Good landlord program is not trademarked, is not registered, this is a term that allows the cities to basically say “you can be a good landlord if you complete this program.” The good landlord program could be offered by any number of housing providers out there, this is not, to my knowledge, limited by any current city or municipality in the program. I’m sure they would welcome any additional providers. And the cities have the authorization to really set the program so there could be any number of providers—any number of issues could be actually taught under this program. So, that decision for who provides the classes taught is really a decision made by the municipality.⁴⁰

The only organization that currently provides landlord training programs (at the landlord’s expense) is the Utah Apartment Association, which was the only organization providing such classes at the time H.B. 342 was debated and passed.

Representative Steve Clark also spoke in support of the bill, saying it has been a “tremendous help in the city of Provo.”⁴¹ Representative Clark explained:

As you know, we are a university town. We have students from UVU and BYU and so we have a lot of apartment dwellers, a lot of people renting. And we got to a point where there were many many projects that were run down, that were getting to become slums, they were under disrepair and we had a hard time regulating and trying to force landowners and apartment owners to clean ‘em up. But as soon as we

36. *Id.*

37. Audio Tape: House Floor Debate on H.B. 342, statement of Rep. Gage Froerer, (Mar. 3, 2009), <http://lc.utah.gov/asp/audio/index.asp?Scss=2009GS&Day=0&Bill=HB0342&House=H>.

38. *Id.*

39. *Id.* (statement of Rep. Jackie Biskupski).

40. *Id.* (statement of Rep. Gage Froerer).

41. *Id.* (statement of Rep. Steve Clark).

put an incentive on it, it was like night and day. As soon as we gave them an incentive to clean up their properties, to obey the zoning laws, we saw a tremendous improvement. We would hate, in Provo, to see this bill not pass. We think it's going to help us in a great way in protecting our property and protecting the property of the landowners and apartment dwellers.⁴²

Representative Froerer said in summation:

[House Bill 342] forges and continues to implement the private/public partnerships that we so sorely need in this state. It has been proven time and time again for those cities that utilize this program to see a reduction in crime, properties cleaned up, neighborhoods improved, and there is no reason not to vote yes on this bill.⁴³

After being passed in the House and moved to the Senate, the bill was described by Senator Bramble as:

an important bill for those cities, Provo being one of them, I think Ogden, cities that have a concentration of rental units and the increased cost of municipal services, particularly in the law enforcement arena, provides both a carrot and a stick: the stick being the increased fees, and the carrot being establish a good landlord program and you can avoid it.⁴⁴

In addition to mandating good landlord programs for municipalities wishing to impose a disproportionate tax on rental businesses, H.B. 342 deleted many instances of the word "tax" from section 10-1-203 and replaced it with "fee."⁴⁵

B. The Stick: Coercing Compliance

As mentioned above, the label applied to the disproportionate exactions directed at rental businesses has gradually been altered from a "tax" to a "fee." This change may not be crucially important, as it is "not now open to question that in [Utah] a city may impose and collect a license fee on business operated therein, both for the purpose of regulation and of raising revenue for general municipal purposes."⁴⁶ The coercive effect of these "carrot and stick" measures however, is entirely clear and substantial. If a landlord wishes to benefit from a "discounted" business licensing fee, she must comply with the terms of the municipal ordinance authorizing a "good landlord" program. This "discount" is not

42. *Id.*

43. *Id.* (statement of Rep. Gage Froerer).

44. Audio tape: Senate Floor Debate on H.B. 342, statement of Sen. Bramble (Mar. 11, 2009), <http://le.utah.gov/asp/audio/index.asp?Sess=2009GS&Bill=&Day=44&House=S>.

45. See H.B. 342, 58th Leg., Gen. Sess. (Utah 2009).

46. Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866, 868 (Utah 1971).

insignificant; it could consist of a 90% reduction of a “disproportionate costs” fee that could otherwise be several thousand dollars.⁴⁷ As the United States Supreme Court has held, in the context of the Commerce Clause, “[t]he discriminatory economic effect” of “disallowing a tax credit rather than . . . imposing a higher tax . . . [is] identical.”⁴⁸ Thus, the *effects* of these state-mandated exactions raise far more obvious legal concerns than their names, and, as the Utah Supreme Court has declared, “whether it be regarded as a license fee, or as a tax, or as a mixture of the two, it cannot be imposed in any such manner as to violate constitutional principles, which include equal and nondiscriminatory treatment and protection under the law.”⁴⁹

C. Municipal “Good Landlord” Programs

Acting under the auspices of this enabling structure, many Utah municipalities have enacted their own “good landlord” program. As discussed above, the structures of these individual programs vary from city to city, but most of them share the common characteristic of drastically limiting the ability of people with past criminal convictions to find housing within the city limits. Ogden City, one of Utah’s largest cities with a population of roughly 84,000 people, has been one of the most active municipalities in adopting and enforcing their program. Ogden’s ordinances instruct that:

In conjunction with the landlord training program, the city shall establish a good landlord incentive program that provides discounts toward the payment of certain business licensing fees to landlords who actively implement those aspects of the landlord training program determined by the mayor to be related to the control and prevention of illegal activity on rental properties . . .⁵⁰

The “discounts toward the payment of certain business licensing fees” amount to reductions of more than 90% in the business licensing fees landlord must pay, reducing an \$830 annual fee to \$80, for a landlord who owns a rental property with ten single-unit buildings.⁵¹

In order to receive this discount, an Ogden landlord, or her agents, must pay for and complete the “landlord training program” (again, currently offered only by the Utah Apartment Association) and must abide by the following requirements:

47. See *infra* note 54 and accompanying text.

48. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 404 (1984).

49. *Weber Basin*, 487 P.2d at 868.

50. OGDEN CITY, UTAH, CITY CODE §12-16-2 (2007).

51. See *Id.*; OGDEN CITY, UTAH, CITY CODE §5-1B-2 (2010).

The landlord must require complete rental applications and background checks on all prospective adult tenants, in the manner suggested in the landlord training program. These minimum requirements are as follows:

a. The rental application shall require of each applicant:

- (1) Full name, including middle initial.
- (2) Date of birth.
- (3) Driver's license number or state identification card number.
- (4) Social security number.
- (5) Names, dates of birth, and relationship to tenant of all people who will occupy the premises.
- (6) Name, address and phone number of two (2) previous landlords.
- (7) Income and employment history for the past two (2) years.
- (8) Asks the applicant whether he or she has ever been convicted of an offense involving the sale or manufacturing of illegal drugs.
- (9) The landlord requires a complete application as described above on all adults occupying the premises.
- (1) The application provides that any false information provided on the application will be grounds for denial or eviction.

b. The following background checks are done on all adults occupying the premises:

- (1) The landlord contacts previous landlords listed on the application, and enquires about any lease violations or damage to property.
- (2) A criminal history check is received from a law enforcement agency or a reputable agency providing the service.
- (3) Valid picture ID is presented to verify the identity of the applicant.
- (4) A credit report is obtained from a valid provider.

The landlord does not knowingly rent to any person who has been convicted of any crime involving any threat or damage to property or person, nor for any crime which had it been committed on the landlord's premises would have disturbed the peaceful enjoyment of other tenants, this shall include the sale, manufacture or distribution of any controlled substance. (Program compliance is based on whether the conviction, or release from probation or parole, occurred within 4 years of the date of a rental application.)⁵²

Authority is given to the Ogden Police Department to enforce these requirements, and violations are to be ascertained through a search of "the records of the city's various code enforcement officers or through

52. OGDEN CITY GOOD LANDLORD INCENTIVE PROGRAM § 1745-4, http://www.ogdencity.com/en/doing_business/business_licensing/good_landlord.aspx (click on the bolded words "Good Landlord Program" to download the pdf version) (last visited Oct. 3, 2011).

available court records.”⁵³ When the Ogden Police Department “acting through the community policing division, identifies a potential disqualification for a landlord’s failure to comply with the program requirements,” they are instructed to report the landlord to the director for the good landlord program who is in turn empowered to revoke the “discounted” licensing fee.⁵⁴

Most of the other municipalities that have enacted programs use similar requirements, although there are some significant differences. The program for the city of West Jordan prohibits landlords from renting to anybody who “[w]ithin the past 3 years has been convicted of any drug or alcohol related crime, any crime related to theft or property damage, prostitution, lewdness, violence of any kind, assault, or crimes that involve weaponry of any kind” as well as anybody who “[a]ppear[s] on the Utah sex offender registry.”⁵⁵ The program for South Salt Lake City is a notable exception in that it does not categorically exclude individuals with a criminal conviction; although the program requires background checks, it leaves the decision of whom to select as tenants to the landlord.⁵⁶ The South Salt Lake City program does mandate, however, that the landlord or responsible party will “serve notice of eviction upon a tenant within five days of receiving substantial evidence that a tenant or tenant’s guest has been involved in criminal or nuisance activity on the premises.”⁵⁷ West Valley City puts landlords on notice that if they rent to undesirable tenants” or “[a]llow any criminal activity on the premises,” they will be

[I]mmediately terminated from the Good Landlord Program and shall be subject to the FULL AMOUNT OF THE DISPROPORTIONATE SERVICE FEES AS WELL AS ANY FINES ASSOCIATED WITH THE VIOLATION OF THIS AGREEMENT, WHICH SHALL BE DUE AND PAYABLE UPON TERMINATION FROM THE PROGRAM [sic]. FURTHER, IN SOME INSTANCES, VIOLATIONS OF THIS AGREEMENT AND TERMINATION FROM THE PROGRAM MAY RESULT IN SUSPENSION OR REVOCATION OF THE LANDLORD’S BUSINESS LICENSE.⁵⁸

Aside from the various tenant screening procedures, most of the programs contain certain maintenance guidelines, stipulating that

53. *Id.* §1745-6.

54. *Id.*

55. See the description of program requirements for the city of West Jordan, *Good Landlord Program*, OFFICIAL SITE OF WEST JORDAN, <http://www.wjordan.com/Business.aspx?pgID=30.1> (last visited Oct. 3, 2011).

56. SOUTH SALT LAKE CITY, UTAH, MUN. CODE § 5.46.040 (2007).

57. *Id.*

58. See *West Valley City Good Landlord Program Agreement*, WEST VALLEY CITY, §1(e), <http://www.wvc-ut.gov/DocumentView.aspx?DID=1119> (last visited Oct. 3, 2011).

properties must be “maintained in compliance with city ordinances affecting the use, care or maintenance of real property (zoning ordinances, property maintenance regulations, fit premise regulations, property maintenance code, housing codes, health codes, etc.)” and “kept free of any public nuisance as defined by city ordinance or state law.”⁵⁹

III. THE PERSPECTIVES OF OTHERS

The perspectives of the proponents of good landlord programs have generally been expressed through statements made in legislative floor debates and media interviews. The general view is summed up in Representative Gage Froerer’s argument discussed in Part II.A: “[i]t has been proven time and time again for those cities that utilize this program to see a reduction in crime, properties cleaned up, [and] neighborhoods improved.”⁶⁰ Proponents of these programs have been clear about their discriminatory intent. Detective Denise Colson of the Clearfield Police emphasized that “[y]ou can discriminate against a criminal They’re not a protected class.”⁶¹ This sentiment was echoed by Utah Apartment Association Executive Director Paul Smith, who has said that the programs are “[a]bsolutely . . . designed to discriminate against criminals. . . . Criminals are not a protected class. There’s no law that says I can’t discriminate against criminals. The whole purpose of these programs is to reduce crime, and we reduce crime by not renting to criminals in the first place.”⁶² Ogden officials have claimed at intervals that the program has resulted in “reduced crime and calls to police” because “[l]andlords are paying more attention to who they rent to.”⁶³ After the first year of having enacted the program, Ogden reported “a 26 percent drop in the number of police and fire calls to rental dwellings”⁶⁴ and a “12 percent decline in property and violent crimes.”⁶⁵

While this dubious correlation between good landlord programs and

59. See OGDEN CITY GOOD LANDLORD INCENTIVE PROGRAM, *supra* note 53, §1745-4(B).

60. *Supra* note 43 and accompanying text.

61. Ben Winslow, “Good Landlord” Programs Popular, DESERET NEWS, (May 5, 2006), <http://desne.ws/qKeeJi>.

62. Ace Stryker, *Cleanup or Shakedown: Provo Rental Ordinance Under Microscope*, HERALD EXTRA.COM (June 28, 2008, 11:00 PM), www.heraldextra.com/news/local/article_19c26e84-3dc9-5714-a320-03f07e3e1f8c.html.

63. Nate Carlisle, *To Fight Crime, Ogden Tells Ex-Cons to Move Out*, THE SALT LAKE TRIBUNE, (Aug. 14, 2010), <http://webcache.googleusercontent.com/search?q=cache:PvpIouoc2PAJ:www.sltrib.com/home/50103538-76/sambrano-avenue-ogden-park.html.csp%3Fpage%3D1+nate+Carlisle+salt+lake+tribune+%22To+Fight+Crime%22&cd=2&hl=en&ct=clnk&gl=us>.

64. Stryker, *supra* note 62.

65. Winslow, *supra* note 61.

reduced crime is often trumpeted by municipalities with enacted programs, little or no attention is paid to how the program affects the inherent and inalienable rights of Utah residents who are being denied housing or property owners who are being denied their property rights. The Salt Lake Tribune brought to light the story of Joseph Sambrano, a parolee who was turned out of his apartment in Ogden because of his prior drug conviction, despite the fact that he had been vigorously enforcing peace and order as a security guard for his apartment complex.⁶⁶ Sambrano would “ensure that visitors to [the complex] had escorts, told tenants to turn down loud music and helped police when they visited the building.”⁶⁷ Another tenant told the Tribune that she felt Ogden’s good landlord program discriminated against the disabled, saying “I have yet to meet an addict who has not been diagnosed with a disability.”⁶⁸

The Utah Constitution states in unequivocal terms that “[a]ll political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.”⁶⁹ The “public welfare” necessarily includes *all* members of the public, not only those who are in positions of power, such as state lawmakers and members of wealthy and influential organizations. Thus, in order to understand what the public welfare may require with regard to the spreading popularity of “good landlord” programs one cannot and should not ignore the adverse effects of the programs on substantial percentages of the population. This view is reflected in the tenets of positionality, which require that “other perspectives be sought out and examined” in order to “check[] the characteristic tendency of all individuals . . . to want to stamp their own point of view on the world.”⁷⁰ While positionality requires that “[we] must consider other points of view from the positional stance,” we “need not accept their truths as [our] own.”⁷¹ As with other controversial issues in Utah, it may not be possible to arrive at a consensus about the social value of “good landlord” programs, but with a positional analysis, “any resolutions that emerge are the products of human struggles about what social realities are better than others. Realities are deemed better not by comparison to some external, ‘discovered’ moral truths or ‘essential’ human characteristics, but by internal truths that make the most sense of

66. Carlisle, *supra* note 63.

67. *Id.*

68. *Id.*

69. UTAH CONST. art. I, §2.

70. Bartlett, *supra* note 15, at 882.

71. *Id.* at 883.

experienced, social existence.”⁷²

This Part proceeds with this aim in mind by discussing the effects of good landlord programs on the following—sometimes discrete, sometimes overlapping—categories of people in Utah: landlords, families, victims of domestic violence, racial minorities, and the public in general.

A. Landlords

When Ogden introduced its program, local landlords told Ogden Mayor Matthew Godfrey that “they hated the idea” and “flooded Ogden City Council meetings to complain about government intrusion.”⁷³ According to Mayor Godfrey, this process resulted in landlords “learning a lot that they didn’t know.”⁷⁴ Mayor Godfrey did not clarify what exactly he taught these landlords, but landlords throughout Utah should know they have good reason to resent governmental intrusion in this context.

The intrusive provisions of these programs are often justified by the popular sentiment that “you can discriminate against a criminal.”⁷⁵ The statement of Utah Apartment Association Executive Director Paul Smith that “[c]riminals are not a protected class”⁷⁶ refers to the judicial review doctrine stemming from the famous “footnote four” in the Supreme Court’s *United States v. Carolene Products* decision.⁷⁷ *Carolene Products* held that some subjects of legislation are “subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”⁷⁸ These subjects were suggested to include “discrete and insular minorities” such as “particular religious . . . or racial minorities.”⁷⁹ Smith is correct that legislation targeting “criminals,” as a class of people, has not been subjected to more exacting, or strict, scrutiny from courts applying the Equal Protection Clause of the Fourteenth Amendment.⁸⁰ Setting aside

72. *Id.* at 884.

73. Winslow, *supra* note 61.

74. *Id.*

75. *Id.*

76. Stryker, *supra* note 62.

77. 304 U.S. 144, 152 n.4. (1938).

78. *Id.*

79. *Id.*

80. See generally *Richardson v. Ramirez*, 418 U.S. 24 (1974) (discussing the original understanding of the Fourteenth Amendment and holding that felons were not contemplated to fall within its protection). For an argument that laws targeting individuals with criminal records should be reviewed under strict scrutiny see Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. R. 1191 (2006). For an argument that criminal tenant screening procedures may implicate the Fair Housing Act, due to their disparate effect on certain races see Rebecca Oyama, *Do*

the questionable semantics of referring to people with past criminal convictions as “criminals,” Smith seems to assume that there is no difference between legislation that is inherently discriminatory in itself and legislation that forces other people to discriminate, but at least one difference is obvious. The former involves the rights of only one group of people, while the latter involves the rights of at least two: the people being coerced to discriminate and the people being discriminated against.

By forcing landlords to reject tenants they would otherwise accept, these programs transfer the property rights of individual property owners to the municipality without just compensation. The Utah Constitution specifies that “[p]rivate property shall not be taken or damaged for public use without just compensation.”⁸¹ To succeed on a takings claim in Utah, a “claimant must possess some protectible interest in property before that interest is entitled to recover under this provision.”⁸² If a claimant does possess a “protectible interest,” then the claimant must demonstrate that “the interest has been ‘taken or damaged’ by government action.”⁸³ This is accomplished by showing “substantial interference with private property which destroys or materially lessens its value, or by which the owner’s right to its use and enjoyment is in any substantial degree abridged or destroyed.”⁸⁴ The question then becomes whether the programs deprive Utah landlords of a protectable property interest. In order to have a property interest, a person “must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”⁸⁵ As discussed below, it is quite clear that a duly licensed landlord operating a lawful rental business has a “legitimate claim of entitlement” to the operation of her business.

The Fourteenth Amendment protects a landlord’s right to pursue a lawful business, which necessarily includes the right to individually solicit and select his or her tenants. Early decisions from the United States Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to give broad protection to economic liberties,⁸⁶

Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act, 15 MICH. J. RACE & L. 181 (2009).

81. UTAH CONST. art. I, §22.

82. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 625 (Utah 1990).

83. *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 877 (Utah 1996) (quoting *Colman*, 795 P.2d at 626).

84. *Id.*

85. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

86. See, e.g., *Lochner v. New York*, 198 U.S. 45, 57–58 (1905) (“It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must

but post-New Deal decisions were more willing to allow the inherent police power of the state to trump individual economic liberties.⁸⁷ There are, however, indications of growing support for the constitutional rights of business owners from more current case law. In *U.S. v. Tropiano*, the Second Circuit emphasized that “[t]he right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution.”⁸⁸ In *Scheidler v. National Organization for Women*, Justice Stevens reemphasized that “[t]he right to serve customers or to solicit new business is . . . a protected property right.”⁸⁹ Justice Stevens also pointed out that the property right to pursue a lawful business recognized in *Tropiano* “has been cited with approval by federal courts in virtually every circuit in the country,” and that even though the interpretation was made with regard to the Hobbs Act,⁹⁰ that definition of property accords “with pre-Hobbs decisions of [the Supreme Court].”⁹¹ Thus, the right of a landlord to individually solicit and select his or her tenants without unreasonable governmental interference should not be seen as a controversial proposition.

have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.”); *Loan Ass’n v. Topeka*, 87 U.S. 655, 663 (1874) (“There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.”).

87. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (“So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.”)

88. *U.S. v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969).

89. *Scheidler v. Nat’l Org. for Women*, 537 U.S. 393, 412 (2003) (Stevens, J., dissenting).

90. The Hobbs Act “prohibits actual or attempted robbery or extortion affecting interstate or foreign commerce.” See UNITED STATES ATTORNEYS MANUAL, Chapter 9-131.000, http://www.justice.gov/usao/cousa/foia_reading_room/usam/title9/131mcm.htm (last visited Nov. 3, 2011).

91. *Id.* at 414-15 (Stevens, J., dissenting) (citing *United States v. Hathaway*, 534 F.2d 386, 396 (1st Cir. 1976); *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999); *Northeast Women’s Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973); *United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991); *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980)).

The Supreme Court has also recognized that while it is generally true that “no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage,” the proper power of the State does *not* extend to “arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property.”⁹² Further, “[t]he fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere ‘economic regulation,’ which can disproportionately burden particular individuals.”⁹³ As discussed in Part II.A, legislators represented the programs as an overall benefit to the general public. Thus, even if Utah’s more heavy-handed “good landlord” programs do not consist of “unlawful interference” with the business interests of landlords, forcing landlords “alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole” consists of a taking of the property of landlords in violation of the Fourteenth Amendment.⁹⁴

B. Tenants

1. Families

The Bill of Rights protects two aspects of the right to association. The first aspect relates to “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”⁹⁵ The second aspect relates to the notion that “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”⁹⁶ Utah’s good landlord programs have the potential to violate both aspects of the right to association.

To understand how, picture the following hypothetical situation. A married couple and their children are living in a house in the city of Ogden. The father commits a crime and is sentenced to prison. After the

92. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 510, 536 (1925).

93. *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part, dissenting in part).

94. *Id.* at 19 (Scalia, J., concurring in part, dissenting in part) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

95. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

96. *Id.* at 617–18.

father is sent to prison, the mother, struggling to pay her husband's attorney's fees and take care of their children on her income alone, sells their home and moves into an apartment, owned by an individual who is participating in Ogden's good landlord program. After several years, the father is released from prison on parole and is united with his family, now living in the Ogden apartment. The Ogden Police Department discover, through a search of parole records, that the parolee is now residing within the apartment, in violation of the terms of the good landlord program. The police inform the landlord, who, in order to preserve the 91% discount on his "disproportionate cost" fees (the discount amounts to \$1500 annually for his 20-unit complex),⁹⁷ tells the family that either the father has to leave or the entire family will be evicted. Facing the prospect of a homeless family, the man leaves and stays with a friend in Salt Lake City.

Now, imagine that this man, like most people in Utah, is a member of the LDS Church, and the family has hanging on their wall (like many other families in Utah) a copy of the Church's official statement "The Family: A Proclamation to the World:"

We, the First Presidency and the Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, solemnly proclaim that marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children. . . . Husband and wife have a solemn responsibility to love and care for each other and for their children. . . . Parents have a sacred duty to rear their children in love and righteousness, to provide for their physical and spiritual needs, to teach them to love and serve one another, [to] observe the commandments of God and [to] be law-abiding citizens wherever they live. Husbands and wives—mothers and fathers—will be held accountable before God for the discharge of these obligations. . . . By divine design, fathers are to preside over their families in love and righteousness and are responsible to provide the necessities of life and protection for their families.⁹⁸

It is not difficult to see how the religious beliefs of an LDS father—who fervently believes that this directive was issued by the official representative of God and Jesus Christ on earth—would be directly burdened by his inability to share the same home as the rest of his family. If the father challenges Ogden's program, the municipality will then face the "daunting task of establishing that the requirement was narrowly tailored to advance a compelling governmental interest"

97. See *supra* note 51 and accompanying text.

98. THE FIRST PRESIDENCY & COUNCIL OF THE TWELVE APOSTLES, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *THE FAMILY: A PROCLAMATION TO THE WORLD* (1995), available at <http://lds.org/family/proclamation?lang=eng>.

because the Ogden good landlord program targets only certain individuals and is therefore not a “neutral rule[] of general applicability.”⁹⁹ This concern is certainly not isolated to members of the LDS faith, as Catholics, Muslims, Jews, Evangelicals, and most other major religions assuredly attribute a similar divine importance to family life.¹⁰⁰

Aside from religious beliefs, the Bill of Rights also “afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”¹⁰¹ The relationships that “exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend [to] the creation and sustenance of a family—marriage, . . . the raising and education of children, and cohabitation with one’s relatives.”¹⁰² These relationships, according to the Supreme Court, are intrinsically related to personal liberty because they “involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”¹⁰³

In the hypothetical described above, these constitutionally protected attachments and commitments have been subjected to substantial, unjustified interference by the state. The state has no strong justification to believe that the recently paroled father poses such a risk to his community that the risk warrants separating him from his family. The “right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men” may not be interfered with by the state “under the guise of protecting the public interest, by legislative action which is arbitrary or without

99. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004).

100. See, e.g., U.S. CONFERENCE OF CATHOLIC BISHOPS, *The Vocation of Marriage*, FOR YOUR MARRIAGE, <http://foryourmarriage.org/the-vocation-of-marriage/> (last visited Oct. 3, 2011) (“When the Catholic Church teaches that marriage is a Christian vocation it is saying that the couple’s relationship is more than simply their choice to enter a union which is a social and legal institution. In addition to these things, marriage involves a call from God and a response from two people who promise to build, with the help of divine grace, a lifelong, intimate and sacramental partnership of love and life.”); THE HOLY QUR’AN, 30:21 (Sahih International), available at <http://quran.com/30> (“And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought.”).

101. *Jaycees*, 468 U.S. at 618.

102. *Id.* at 619 (citations omitted) (citing *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978); *Smith v. Org. of Foster Families*, 421 U.S. 816, 844 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 503–04 (1977)).

103. *Id.* at 619–20.

reasonable relation to some purpose within the competency of the State to effect.”¹⁰⁴

2. *Victims of domestic violence*

Several municipalities in Utah have good landlord programs that disqualify landlords from the applicable discount if there are “[m]ore than two calls for service per door.”¹⁰⁵ The program for Brigham City has this requirement and stipulates that the “[q]ualifying items” include “drug or alcohol related crimes . . . any crime related [to] property damage, prostitution, violence of any kind, assault or crimes that involve weaponry of any kind.”¹⁰⁶ Notably, there is no exemption for calls relating to incidents of domestic violence, which is problematic given that “[d]omestic violence-related police calls have been found to constitute the single largest category of calls received by police, accounting for [up] to more than 50 percent of all calls.”¹⁰⁷ Thus, in order for a Brigham City landlord to ensure she is not disqualified from the program, she must instruct tenants not to make more than two calls for police service relating to any of these categories. In turn, a tenant may be reluctant to defy her landlord and call the police, even if she is being victimized by a domestic partner.

This quandary is certainly troubling, considering that there is on average one domestic violence-related homicide each month in Utah and that one out of every three adult homicides in Utah are domestic violence homicides.¹⁰⁸ Over fourteen percent of Utah’s females aged eighteen or older have reported being hit, slapped, pushed, kicked, or hurt in another way by intimate partners.¹⁰⁹ The Utah Domestic Violence Council continually reports that “[d]omestic violence takes a tragic toll in Utah every year,” providing examples such as the death of Brittany Nichols in January 2009: “Brittany Nichols’ boyfriend, angered at her attempts to end their relationship, fatally stabbed Brittany multiple times, possibly in the presence of her three-year old daughter. By mid-year there were ten

104. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

105. See, e.g., *Brigham City Good Landlord Program Agreement*, BRIGHAMCITY.UTAH.GOV 2, http://www.brighamcity.utah.gov/Community_Development/Good%20Landlord%20Program/GLProgram%20Agreement_06-04-09.pdf (last updated June 16, 2009).

106. *Id.*

107. National Institute of Justice, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, <http://nij.gov/nij/topics/crime/intimate-partner-violence/practical-implications-research/ch1/calls.htm> (last visited Nov. 3, 2011).

108. UTAH DEP’T OF HEALTH VIOLENCE & INJURY PREVENTION PROGRAM, DOMESTIC VIOLENCE FATALITIES IN UTAH 2003-2008, 2 (2010), available at <http://health.utah.gov/vipp/pdf/DomesticViolence/2003-2008Report.pdf>.

109. *Id.* at 10.

such deaths, and by year's end there are twenty-seven."¹¹⁰ The Council's "Safety Plan for Leaving Abuse Behind" features "Police: 911," as the first emergency number for domestic violence victims to call.¹¹¹ Notably, the federal Violence Against Women Reauthorization Act of 2005 amended HUD guidelines to ensure that

Criminal activity directly relating to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control shall not be cause for termination of assistance, tenancy, or occupancy rights if the tenant or an immediate member of the tenant's family is the victim or threatened victim of that domestic violence, dating violence, or stalking.¹¹²

Utah Domestic Violence Council Executive Director Judy Kasten Bell explains that "good landlord programs present such a problem for tenants who are victims of domestic violence It is an absolute safety necessity for people who are feeling that they are unsafe to be able to freely call for police help."¹¹³ Director Kasten Bell recounts the following example of the effect of a good landlord program on a victim of domestic violence living in northern Utah:

A woman came into the domestic violence shelter seeking help. She had a domestic violence incident with her boyfriend in the apartment they lived in together. The boyfriend was taken to jail. The next morning she obtained a protective order and sought additional safety planning help from the shelter. She then went home to find an eviction notice on her door stating that she had to be out in seven days, and the eviction notice was due to the police responding at the apartment and that a weapon was involved. [An advocate for victims of domestic violence noted] that this was an interesting dilemma because the offender was housed at the jail and the victim was summarily told she would have no place to live.¹¹⁴

In addition, an advocate at a separate domestic violence shelter program in northern Utah told Director Kasten Bell that:

We are fortunate that we do not have an extensive good landlord policy in our area. It would be very difficult for our DV shelter residents, including those in transitional housing units. We recently had two

110. Press Release, Utah Domestic Violence Council, Domestic Violence Continues to Take a Tragic Toll in Utah (Jan. 7, 2010), www.udvac.org/pressrelease_dvdeaths2009.pdf.

111. UTAH DOMESTIC VIOLENCE COUNCIL, SAFETY PLAN FOR LEAVING ABUSE BEHIND, available at www.udvac.org/brochure_safetyplan_english.pdf (last visited Oct. 4, 2011).

112. 42 U.S.C. § 1437f(c)(9)(C)(i) (2011).

113. Telephone interview with Judy Kasten Bell, Exec. Dir., Utah Domestic Violence Council, (Feb. 25, 2011).

114. E-mail from Judy Kasten Bell, Exec. Dir., Utah Domestic Violence Council, to author (March 3, 2011, 11:22:00 MST) (on file with author).

residents of the transitional housing program whose abusers located them and each had to call the police more than once. One family had to leave the state to remain safe, but fortunately, no one was punished or at risk of losing their housing for calling law enforcement.¹¹⁵

These implications of good landlord programs for victims of domestic violence are so obviously egregious that legislation addressing the issue was passed and signed into law by Governor Gary Herbert during Utah's 2011 legislative general session. House Bill 403, sponsored by Representative Jennifer Seelig, "prohibits an owner from taking action against a renter for requesting assistance from a public safety agency; and prohibits municipalities with a good landlord program from limiting owner participation in or benefits from the program under certain circumstances."¹¹⁶ The bill adds the following amendment to existing law: "[a]n owner may not . . . impose a restriction on a renter's ability to request assistance from a public safety agency; or penalize or evict a renter because the renter makes reasonable requests for assistance from a public safety agency."¹¹⁷ The bill enforces this provision by requiring that "[a] municipality with a good landlord program . . . may not limit an owner's participation in the program or reduce program benefits to the owner because of renter or crime victim action that the owner is prohibited . . . from restricting or penalizing."¹¹⁸ While H.B. 403 is a welcome and sorely needed refinement of the existing law, it falls short of fully protecting victims of domestic violence. Under the changes wrought by H.B. 403, a municipality may not penalize calls for police assistance, but it may presumably continue to require landlords to serve "notice of eviction within 5 days of receiving substantial evidence that a tenant or tenant's guest has been involved in criminal or nuisance activity on the premises,"¹¹⁹ regardless of whether those tenants are victims of domestic violence, in contrast to the specific prohibition of this contemptible practice in the federal Violence Against Women Act guidelines discussed above.¹²⁰

3. *Racial minorities*

Racial minorities compose a third category of people that are put at risk by these programs. No version of the current good landlord programs makes explicit reference to race, but many of the programs

115. *Id.*

116. H.B. 403, 59th Leg., Gen. Sess. (Utah 2011).

117. *Id.*

118. *Id.*

119. See *supra* note 58 and accompanying text.

120. See *supra* note 113 and accompanying text.

have the potential to disparately impact racial minorities.

In the Tenth Circuit, a claim of disparate impact “does not require a finding of intentional discrimination.”¹²¹ Rather, “the necessary premise of the disparate impact approach is that some [housing] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”¹²² A plaintiff’s *prima facie* showing in a disparate impact action must “show that a specific policy caused a significant disparate effect on a protected group.”¹²³ This showing is usually accomplished through statistical analysis.¹²⁴ The Tenth Circuit will consider three factors “in determining whether a plaintiff’s *prima facie* case of disparate impact makes out a violation of Title VIII []: (1) the strength of the plaintiff’s showing of discriminatory effect; (2) the defendant’s interest in taking the action complained of; and (3) whether the plaintiff seeks to compel the defendant affirmatively to provide housing for members of a protected class or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.”¹²⁵ If all of these factors are weighed in the favor of the plaintiff, “the burden shifts to the defendant to produce evidence of a ‘genuine business need’ for the challenged practice.”¹²⁶

According to the recently released 2010 U.S. Census statistics, the population of the city of Ogden is 30% Latino.¹²⁷ This percentage is much higher than the overall Latino percentage of Utah’s population, which is 13%.¹²⁸ It is also possible, through the 2000 Census Summary File 3 data,¹²⁹ to estimate the overall percentage of Latino/non-Latino renters in Ogden, as reflected in the table below:¹³⁰

121. *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1250 (10th Cir. 1995).

122. *Id.* at 1250–51 (alteration in original) (internal citation marks omitted) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)).

123. *Id.* at 1251 (citing *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10th Cir. 1991)).

124. *See id.* at 1253.

125. *Id.* at 1252.

126. *Id.* at 1254 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

127. U.S. Census Bureau, 2010 Interactive Population Search, <http://2010.census.gov/2010census/popmap/> (last visited October 14, 2011).

128. *Id.*

129. 2010 Summary File 3 data had not yet been released at the time of this writing.

130. U. S. Census Bureau, American Fact Finder, Summary File 3 Table H12, http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&-context=dt&-ds name=DI:C_2000_SF3_U&-mt name=DEC_2000_SF3_U_H012&-tree_id=403&-redoLog=true&-all_geo_types=N&-_caller=gcoselect&-geo id=16000US4955980&-search_results=01000US&-format=&- lang=en (last visited October 14, 2011).

ETHNICITY	UTAH	OGDEN
LATINO HOUSEHOLDERS	Owner Occupied Units: 23,284 (50.4%)	Owner Occupied Units: 2,175 (48%)
	Renter Occupied Units: 22,888 (49.6%)	Renter Occupied Units: 2,322 (52%)
WHITE, NON-LATINO HOUSEHOLDERS	Owner Occupied Units: 460,833 (74%)	Owner Occupied Units: 13,858 (65%)
	Renter Occupied Units: 161,215 (26%)	Renter Occupied Units: 7,409 (35%)

This data demonstrates that Latinos living in Ogden are significantly more likely to be renting (52% chance) than non-Latinos (35% chance), and that the disparity is even greater in the general Utah population (49.6% Latinos renting vs. 26% non-Latinos renting). Thus, it is likely the Ogden program disparately impacts Latinos and is susceptible to a disparate impact challenge under Title VIII of the Fair Housing Act. The same theory would likely hold true for other Utah municipalities as well.

A successful challenge, of course, would have to rebut a municipality's showing of a legitimate reason for the regulation provided by the programs.¹³¹ In *Talley v. Lane*, the Seventh Circuit (in a non-disparate impact case) considered the situation of a legally blind plaintiff who had been diagnosed as disabled due to drug and alcohol addictions alleged "discriminatory tenant selection practices" after he was refused housing because, due to an extensive criminal record, he did not meet a housing authority's "standards of desirability."¹³² The court held that "[t]he Fair Housing Act does not require that a dwelling be rented to an individual who would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."¹³³ The court further held that "it is within the [housing authority's] discretion to find that individuals with a history of convictions for property and assaultive crimes would be a direct threat to other tenants and to deny their applications."¹³⁴

It is important to note, however, that unlike the situation in *Talley*, "good landlord" programs do not allow for the individual discretion of landlords. When considered in conjunction with the right of property owners to manage their own properties, it is quite possible that a disparate impact challenge to the programs would be upheld.

Subsequent case law from within the Tenth Circuit has also

131. *Mountain Side*, 56 F.3d at 1252.

132. *Talley v. Lane*, 13 F.3d 1031, 1032-33 (7th Cir. 1994).

133. *Id.* at 1034.

134. *Id.*

distinguished *Talley*. In *Roe v. Housing Authority of City of Boulder*, the United States District Court for the District of Colorado explained that the plaintiff in *Talley* “failed to ‘allege discrimination based on his handicap’ contending ‘only that his application to the [] disabled housing program was denied because of his past criminal conduct. Talley’s failure to link his disability to the reason why the housing authority denied him housing was fatal to his claim.’”¹³⁵ This explanation accords with the rationale behind a disparate impact challenge to good landlord programs: a tenant refused because of the program’s requirements would be challenging the discrimination based on *her race*, not her *criminal conduct*. *City of Boulder* noted that “if [the plaintiff] is found to be disabled or handicapped, then there is at least a genuine dispute that his alleged disabilities or handicaps . . . are linked directly to the behavior which forms the basis for BHA’s eviction action.”¹³⁶ Because a disparate impact is “functionally equivalent to intentional discrimination,”¹³⁷ a showing of disparate impact similarly creates a “genuine dispute” that the racial impact makes the program unconstitutional.

In addition to the fact that racial minorities are more likely to be renting housing in Utah than members of Utah’s white majority, there is a stark racial imbalance in Utah’s incarceration practices. In 2005, for example, the incarceration rate of Latinos was double that of white non-Latinos, and African-Americans were over nine times more likely to be imprisoned in Utah than white non-Latinos.¹³⁸ This staggering disparity further increases the likelihood that racial minorities in Utah are being “exterminated” from the state through the operation of municipal good landlord programs. As “racial minorities are already disproportionately underprivileged,” these programs are “yet another substantial burden [that] exacerbates the harsh odds minority ex-offenders face in making a legal, satisfying living.”¹³⁹

C. *The Public*

Because positionality “insist[s] upon [identifying] mutual relatedness

135. *Roe v. Hous. Auth. of Boulder*, 909 F. Supp. 814, 823 (D. Colo. 1995) (citation omitted) (quoting *Talley*, 13 F.3d at 1034).

136. *Id.*

137. *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1251 (10th Cir. 1995).

138. MARC MAUER & RYAN KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 6 (2007), available at http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf (last visited Oct. 3, 2011).

139. Geiger, *supra* note 80, at 1196.

and common humanity,”¹⁴⁰ a positional analysis of good landlord programs must necessarily include the viewpoints of those who, for example, may find themselves living next door to a convicted child rapist or drug dealer. Unfortunately, little evidence of their viewpoints is publicly available. The existence and effects of good landlord programs are not widely advertised, aside from a handful of newspaper articles, and while these articles report the perspectives of affected parties, they fail to include the perspectives of the many who likely declaim “not in my backyard.”

What evidence there is suggests a division of opinion. Candice Taurone, a property manager in Clearfield City, suggests that tenants “absolutely love [good landlord programs] . . . the ones that don’t have criminal records. It gives them a sense of community and knowing that we are doing our job.”¹⁴¹ Comments posted to an online news article about the programs, however, suggests greater variance in public opinion:

The majority of ex-cons want to go straight and change their lives. All they want is a second chance a job and a descent place to live to get away from the people and places that helped them make bad decisions. By denying these people a place to live forces many of these people to go back to their former life of crime. I think they should do a person by person interview because people make mistakes and sometimes they are bad ones. This doesn't mean that all ex-cons want to hurt you. They want to get back into society and don't need the extra bull s@\$. Especially when they have paid their debt to society.

* * *

Yeah a landlord can do what he wants to his property and rent to he wants to. I think there needs to be some regulation as to how long a persons offense should be held against them. I say if a person committed a crime 20 years ago and has been out of Prison for over five without any new crimes. He should be allowed to rent wherever he wants and can afford. I can see not renting to a parolee or somebody with multiple offenses. Because they are a bad risk. If the City, State, or Feds won't build apartments for the ex-cons. Then this law is cruel and unusual punishment.

* * *

Speaking of demanding from a private citizen: Why does a city need to force a good landlord program on a landlord that background checks, visits the property regularly, maintains the property, promptly responds to tenant issues, and talks with neighbors about tenants.

140. Bartlett, *supra* note 15, at 886.

141. Winslow, *supra* note 61.

Is there some benefit the city is planning to provide me for my \$130 (or a punitive \$372 if I don't take the Utah Apartment Association's \$50 class)? No, they just want to screw the bloody, sweaty common man out of another chunk of change.

Maybe the city could just fine bad landlords who are enrolled in the Bad Landlord Program? Enrollment occurs with every negative incident with the landlord or his property.

* * *

Participation is voluntary. You may continue to do without it for as many years as you like, and be a free rider on other landlords' efforts to clean up the city. Your licensing fees are reduced if you do participate, so I can't imagine how you would be forced to raise the rent on your tenants if you do.

Frankly, I don't see how background checks, or the threat of eviction when crime is committed on the property, could NOT have an effect on crime.¹⁴²

While these experience-based perspectives are undoubtedly invaluable for a positional analysis, they likely do not represent the full range of public opinion on the subject, and additional viewpoints should be sought out and considered. Social policies should be taken into consideration, in addition to personal viewpoints. As discussed below, many of these programs implement policies that have the potential to aggravate social problems such as criminal recidivism and homelessness.

1. Sex offender recidivism

Several of the programs adopted by Utah municipalities prohibit landlords from renting to individuals who appear on the Utah Sex Offender Registry.¹⁴³ Legal scholars have recognized that “[t]he use of class-based residency restrictions for sex offenders is a misguided approach to dealing with sex offender recidivism, one that sacrifices justice and liberty. Social, economic, and physical isolation creates an environment ripe for recidivism.”¹⁴⁴ Thus, while these municipalities may have “the interests of children at heart, the policies they are promoting [may] ultimately do more damage to children and society.”¹⁴⁵

In 2004, the Colorado Department of Safety published a report “on

142. Comments posted on: Cimaron Neugebauer, “Good Landlords” Curbing Crime in South Salt Lake, THE SALT LAKE TRIBUNE (Sep. 24, 2011), http://www.sltrib.com/sltrib/news/52621533-78/program-lake-salt-crime.html.csp#disqus_thread (last visited Nov. 3, 2011).

143. See *supra* note 55 and accompanying text.

144. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 158 (2007).

145. *Id.*

the safety issues raised by living arrangements of sex offenders in the community.”¹⁴⁶ In this research, “probation files were reviewed on both a random sample of sex offenders under probation supervision in the Denver metropolitan area and an all-inclusive sample of sex offenders under probation supervision in the Denver metropolitan area living in a Shared Living Arrangement.”¹⁴⁷ Significantly, this study found that “[p]lacing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.”¹⁴⁸ The study also found that sex offenders who were living with their families or friends rather than in their own houses, apartments, or shared living arrangements, were “more likely to have a criminal and technical violation than those living in other types of residences.”¹⁴⁹

These findings cast significant doubt on the wisdom and social desirability of good landlord programs that categorically prohibit sex offenders from renting residences within certain Utah municipalities. According to Colorado’s report, while sex offenders “may be the single most despised population in the United States,”¹⁵⁰ preventing them from finding housing will likely not reduce recidivism and may actually put children and other common victims of sexual offenses within that municipality at greater risk. In addition, strict residential restrictions on released sex offenders have resulted in both men and women living “like post-apocalyptic trolls beneath a bridge . . . without water or toilets or electric service. They sleep in tents, shacks, the back seats of cars in the last realistic address . . . unaffected by city and county sex-offender residency laws.”¹⁵¹

2. Homelessness and recidivism

Utah’s jails housed over 6,700 inmates as of 2005, and Utah’s prisons housed over 6,800 inmates in 2010; as of the end of 2009, the Department of Corrections “supervised 11,528 probationers and 3,204 parolees using 8 regional offices.”¹⁵² The number of parolees in Utah

146. COLORADO DEPARTMENT OF PUBLIC SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 3, March 15, 2004, available at <http://www.esom.org/pubs/CO%20Residence%20Restrictions%201.pdf>).

147. *Id.*

148. *Id.* at 4.

149. *Id.* at 38.

150. Yung, *supra* note 147.

151. Fred Grimm, *Woman Joins Sex-Offender Group Living Under Julia Tuttle Causeway*, MIAMI HERALD, March 23, 2009.

152. *Utah: Overview of Correctional System*, NATIONAL INSTITUTE OF CORRECTIONS, <http://nicic.gov/StateStats> (select Utah on the map) (last visited Oct. 3, 2011).

parallels the 2008 estimates of Utah's homeless population: "[o]n any given night, 3,316 Utahns are homeless. As many as 16,000 . . . will experience homelessness in a year."¹⁵³ The obvious question posed by the growing popularity of "good landlord" programs is: where will individuals recently released from prison live? When asked a similar question by the Salt Lake Tribune about the Ogden City good landlord program, Ogden Police Chief Jon Greiner replied, "Why is that my responsibility?"¹⁵⁴

The answer to Chief Greiner's question is the direct correlation between homelessness and criminal recidivism. Studies have found that the risk of re-incarceration dramatically increased when recently released individuals were forced to live in homeless shelters¹⁵⁵ and that parolees are three times more likely to abscond from parole supervision when they are released from prison or jail into a homeless shelter.¹⁵⁶ Indeed, "[f]or newly released prisoners entering the long reentry process, finding stable housing presents an early obstacle, one that is so critical it has been referred to as 'the linchpin that holds the reintegration process together.'"¹⁵⁷ Thus, if the mandate from the state legislature that the programs should be designed to "reduce crime in rental housing,"¹⁵⁸ is to be taken seriously, categorically excluding individuals with criminal records from finding stable housing would seem to be a poor means toward that end.

Aside from the recidivism concern, good landlord programs are a blatant contradiction to Utah's stated commitment to "ending chronic homelessness and reducing overall homelessness by 2014."¹⁵⁹ It is difficult to square large-scale banishment of a population proven to be at risk for homelessness¹⁶⁰ with Utah's "vision" of making sure "[e]veryone

153. *Myth Busters: The Facts on Homelessness in Utah*, UTAH DIVISION OF HOUSING & COMMUNITY DEVELOPMENT (Dec. 9, 2009, 10:13 AM), <http://housing.utah.gov/publications/documents/FactsandMyths.pdf>.

154. Carlisle, *supra* note 63.

155. See COUNCIL OF STATE GOV'TS, HOMELESSNESS AND PRISONER RE-ENTRY (2006) (noting that "[m]any people released from prison or jail are at risk for homelessness, which can increase the likelihood that they will commit new crimes and return to prison" and that in New York, "risk of re-incarceration increased 23 percent with pre-release shelter stay, and 17 percent with post-release shelter stay"), *available at* http://reentrypolicy.org/jc_publications/homelessness_prisoner_reentry/Homelessness.pdf (last visited Oct. 4, 2011).

156. MARTA NELSON ET AL., THE VERA INST. OF JUSTICE, THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY, (1999), *available at* [http://www.vera.org/download?file=219/first month out.pdf](http://www.vera.org/download?file=219/first%20month%20out.pdf).

157. Oyama, *supra* note 81, at 183 (quoting JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING CHALLENGES OF PRISONER REENTRY 219 (2005)).

158. UTAH CODE ANN. § 10-1-203(5)(e)(i)(C)(II) (LexisNexis 2011).

159. *State Homelessness Coordinating Committee: Overview*, UTAH DIVISION OF HOUSING & COMMUNITY DEVELOPMENT, <http://housing.utah.gov/shcc/index.html> (last visited Oct. 5, 2011).

160. See COUNCIL OF STATE GOV'TS, *supra* note 156 (noting that "49 percent of homeless

has access to safe, decent, affordable housing with the needed resources and supports for self-sufficiency and well being.”¹⁶¹

IV. CONCLUSION: THE EXTERMINATION HAS BEGUN

In October of 2010, the city of North Ogden—a separate municipality from Ogden—held “three hours of public comments and deliberation” about whether or not the city should adopt a good landlord program.¹⁶² One city council member noted that crime rates in the city had increased by 36% in the past year, and suggested that the reason for this change may be “because renters with criminal records are moving to North Ogden because they can’t live in Ogden, which has a good landlord program.”¹⁶³ A property owner challenged this assumption, noting that he disagreed with the “blanket statement that all crimes are committed by renters.”¹⁶⁴ A second property owner, Richard Brimhall, added that he “has owned property in Ogden and North Ogden for decades and that there have been times he has rented to people with criminal records, but [he] is careful to screen his renters.”¹⁶⁵ Brimhall also expressed his concern about what would happen to people with criminal records if *every* city adopted a good landlord program: “They will be living in tents by the river. They are still people. They have to live somewhere.”¹⁶⁶

Brimhall’s well-founded concern demonstrates the “dual focus” of a positional analysis, an analysis that “seeks knowledge of individual and community, apart and as necessarily interdependent.”¹⁶⁷ In applying this dual focus to good landlord programs, one must see through the superficiality of the loaded term “criminal” and recognize that these popular ordinances negatively affect entire communities by attempting an ill-conceived amputation of undesirable elements. Brimhall’s long-established practice of screening renters while refusing to categorically

adults have reportedly spent five or more days in a city or county jail over their lifetimes, and 18 percent have been incarcerated in a state or federal prison.”) (citing MARTHA R. BURT ET AL., U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE: FINDINGS FROM THE NATIONAL SURVEY OF HOMELESS ASSISTANCE PROVIDERS AND CLIENTS* (1999), available at <http://www.urban.org/UploadedPDF/homelessness.pdf>).

161. *State Homelessness Coordinating Committee: Overview*, UTAH DIVISION OF HOUSING & COMMUNITY DEVELOPMENT, <http://housing.utah.gov/shec/index.html> (last visited Oct. 5, 2011) (emphasis added).

162. Rachel J. Trotter, *North Ogden Business License Fees May Change*, STANDARD-EXAMINER (Oct. 4, 2010), <http://m.standard.net/topics/business/2010/10/04/north-ogden-business-license-fees-may-change>.

163. *Id.*

164. *Id.* (internal quotation marks omitted).

165. *Id.*

166. *Id.* (internal quotation marks omitted).

167. Bartlett, *supra* note 15, at 886.

exclude all individuals with criminal records reflects “experienced, social existence” and “human struggles about what social realities are better than others.”¹⁶⁸

There are signs that cities in Utah are recognizing that some social realities are indeed better than others. Salt Lake City, the state’s capital and largest municipality, has recently adopted its own “good landlord” program that avoids many of the pitfalls discussed above. The Salt Lake City program includes provisions that encourage responsible housing practices without aggravating social problems, and requires agreements between landlords and the city to include provisions that:

1. Require use of lease provisions, approved by the mayor, intended to reduce crime on the premises;
2. Specify measures, approved by the mayor, to be taken at the rental dwelling premises intended to reduce crime;
3. Require compliance with city and other code provisions applicable to the premises, including, but not limited to, building, fire, mechanical, and plumbing codes; snow removal; weed control; and noise;
4. Require nondiscrimination and fair housing as provided in local, state, and federal law;
5. Prohibit retaliation against any tenant as the result of reporting violations of a lease agreement, rental dwelling management agreement, or this code;
6. Require the rental dwelling owner to track annually occupancy denials and evictions, and provide a record thereof to the city on request;
7. Require two (2) semiannual meetings for rental dwelling tenants, initiated by the rental dwelling owner or the owner's agent, to discuss tenant concerns and review rental dwelling licensing rules;
8. Encourage, but not require, tenant background and credit checks; and
9. Require the rental dwelling owner to be excluded from the landlord/tenant initiative program upon noncompliance with the provisions of this chapter or the rental dwelling management agreement.¹⁶⁹

Sonya Martinez, a housing advocate at the Salt Lake Community Action Program, told a reporter for the City Weekly newspaper that while good landlord programs are “usually bad news for her clients—especially . . . programs that require landlords to conduct mandatory background and credit checks, which generally keep many low-income Utahns out of

168. *Id.* at 884.

169. Salt Lake City Landlord/Tenant Initiative, http://www.slegov.com/landlord/landlord_ordinance.pdf (last visited Nov. 3, 2011).

affordable housing,” the Salt Lake City program doesn’t have this requirement and “has the benefit of requiring twice-annual meetings between landlords and their tenants to address concerns.”¹⁷⁰ Martinez also suggested, however, that the program “should spell out renters’ rights and require landlords to agree to uphold those conditions just as renters currently agree to not engage in illegal activities or act as a nuisance.”¹⁷¹

This suggestion fits in well with a comprehensive positional analysis of good landlord programs. Relying on the human discretion and independent business judgment of property owners in Utah will alleviate many of the dangerous social consequences described in Part III above. Deferring to the discretion of landlords in tenant selection will allow for the natural diversity of the marketplace to accommodate the complexity of well-functioning communities and help provide a myriad of tenants with “safe, decent, affordable housing with the needed resources and supports for self-sufficiency and well being.”¹⁷² Allowing landlords to exercise common human judgment when dealing with tenants “involved in criminal activity” will help avoid the atrocious indignity of evicting innocent victims of domestic violence. And, as Martinez suggests, protecting the rights and basic human dignities of tenants, along with those of landlords, will help preserve the noble legacy of individual liberty embodied in the history of the State of Utah and the Utah Constitution.

In 2010, Representative Gage Froerer introduced House Bill 220, which would have added the following language to §10-1-203: “a municipality may not exclude a landlord from participation in a good landlord program on the basis that the landlord accepts tenants with no more than one felony conviction.”¹⁷³ This bill, proposing what would have been a substantial improvement to the good landlord scheme was summarily rejected without discussion or debate.¹⁷⁴

While H.B. 220 would have returned some of the discretion and judgment that this Article suggests is vital to the functional efficacy and legal validity of these programs, it would not have resolved every problem they raise. By way of conclusion, the author submits the model amendments to §10-1-203 set out below in Appendix A of this Article. While the language of these proposed amendments will undoubtedly

170. Eric S. Peterson, *SLC Good Landlord Program, Landlords, Housing Advocates Give Mixed Reviews*, CITY WEEKLY (Oct. 26, 2011), <http://www.cityweekly.net/utah/article-14905-slc-good-landlord-pr.html> (last visited Nov. 3, 2011).

171. *Id.*

172. See *supra* note 160 and accompanying text.

173. H.B. 220, 58th Leg., Gen. Sess. (Utah 2010).

174. See the history of H.B. 220 at <http://le.utah.gov/~2010/status/hbillsta/hb0220.htm> (last visited Oct. 5, 2011).

require additional refinement from experienced legislators, they suggest changes to Utah's system of "good landlord" programs that resolve many of the problems identified in this Article, and help restore the inherent and inalienable rights guaranteed by the Constitutions of both the United States and the State of Utah.

*Patrick B.N. Solomon**

* J.D., Brigham Young University J. Reuben Clark Law School, April 2011. Special thanks to the Utah Domestic Violence Council and the American Civil Liberties Union of Utah.

APPENDIX A: PROPOSED AMENDMENTS TO UTAH CODE ANN. §10-1-203

DISPROPORTIONATE RENTAL FEE AMENDMENTS
2012 GENERAL SESSION
STATE OF UTAH

General Description:

This bill modifies provisions related to municipal disproportionate rental fees.

Highlighted Provisions:

This bill:

Prohibits municipalities from excluding landlords from participation in a good landlord program, under which the landlord qualifies for a disproportionate rental fee reduction, based on the landlord's accepting tenants with criminal convictions.

Prohibits municipalities from excluding landlords from participation in a good landlord program, under which the landlord qualifies for a disproportionate fee reduction, based on the landlord's choosing not to evict a tenant, or an immediate member of a tenant's family, who is a victim of criminal activity directly relating to domestic violence, dating violence, or stalking.¹⁷⁵

Prohibits municipalities from excluding landlords from participation in a good landlord program, under which the landlord qualifies for a disproportionate fee reduction, based on the landlord's accepting tenants who appear on the Utah Sex Offender Registry.

Monies Appropriated in this Bill:

None.

Other Special Clauses:

None.

Utah Code Sections Affected:

AMENDS:

10-1-203, as last amended by Laws of Utah 2011.

Be it enacted by the Legislature of the state of Utah:

175. This language is taken from the codified Violence Against Women Reauthorization Act of 2005, 42 U.S.C. § 14371(c)(9)(C)(i) (2011).

Section 1. Section *10-1-203* is amended to include the follow provision:

10-1-203(5)(e)(vii): a municipality may not exclude a landlord from participation in a good landlord program on the basis that the landlord accepts tenants with criminal convictions, if that landlord is otherwise in compliance with the terms and conditions of the municipality's good landlord program.

Section 2. Section *10-1-203* is amended to include the following provision:

10-1-203(5)(e)(viii): a municipality may not exclude a landlord from participation in a good landlord program on the basis that the landlord accepts tenants who appear on the Utah Sex and Kidnap Offender Registry, if that landlord is otherwise in compliance with the terms and conditions of the municipality's good landlord program.

Section 3. Section *10-1-203* is amended to include the following provision:

10-1-203(5)(e)(ix): a municipality may not exclude a landlord from participation in a good landlord program on the basis that a landlord chooses not to evict a tenant, or an immediate member of a tenant's family, who is a victim of criminal activity directly relating to domestic violence, dating violence, or stalking.¹⁷⁶

176. This language is taken from the Violence Against Women Reauthorization Act of 2005.