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## The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing

James A. Kushner

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# The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing

*James A. Kushner\**

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## I. INTRODUCTION

A generation has passed since the legislative victories of the 1960s extending civil rights protection: twenty-five years since the passage of the historic Civil Rights Act of 1964,<sup>1</sup> twenty-four years since the passage of the Voting Rights Act,<sup>2</sup> and twenty-one years since the passage of the Fair Housing Act of 1968.<sup>3</sup> As we enter the second generation of civil rights enforcement under new Presidential leadership it is important to assess the state of civil rights, to examine the experience of first generation enforcement and the promises of the second generation.

The state of civil rights in the area of housing is a mixture of both frustration and hope. Unlike the extraordinary advances in integrating public accommodations, the workplace, and the political system, the Nation's housing has been largely ignored. Although an increasing number of blacks are present in America's suburbs and predominantly white neighborhoods, the stark pattern of racial residential segregation has worsened. America is more segregated—physically separated by race—today than at any time in its history. While Americans are aware of fair housing laws and are a great deal more accepting of a nondiscrimination ethic, the incidence of racial discrimination—bias against racial minority group members—in the sale and rental of housing is extraordinarily high. Of all the civil rights battles fought during the last three decades, only housing discrimination appears to remain totally unabated, entrenched, and impervious to public policy and civil rights enforcement.<sup>4</sup> The inability to abate widespread discriminatory practices within the real estate industry is attributable to the weak enforcement tools and efforts of the past, as well as to the national preference for segregated lifestyles. Thus, while cultural apartheid,<sup>5</sup> the legacy of

1. 42 U.S.C. §§ 2000a to 2000h-6 (1982 & Supp. IV 1986).

2. *Id.* §§ 1971-1974e.

3. *Id.* §§ 3601-3619, 3631, as amended by Pub. L. No. 100-430, 102 Stat. 1619 (1988).

4. Lamb, *Equal Housing Opportunity*, in IMPLEMENTATION OF CIVIL RIGHTS POLICY 148 (C. Bullock & C. Lamb eds. 1984) (describing housing as "the last frontier in civil rights" and the area of "least success").

5. Apartheid is defined as separation of the races. WEBSTER'S NEW INTERNATIONAL DICTIONARY 98 (3d ed. 1981). The traditional use of the term relates to the policy of segregation in South

legal apartheid, remains the reality in America, housing remains the most segregated aspect of American life and the greatest failure of the civil rights revolution.

The Fair Housing Amendments Act of 1988<sup>6</sup> dramatically strengthens the arsenal available to combat housing discrimination and neighborhood segregation. More generous damages and attorney's fees, plus an increased federal enforcement role, may generate public and private enforcement at a level that can begin to make an impact on housing. This appraisal of civil rights in the area of housing explores the extent, trends, and causes of persistently high levels of discrimination and racial isolation. The experience of the fair housing enforcement effort, both private and public, is analyzed and the impact of the Fair Housing Amendments Act of 1988 and other current initiatives is assessed.

Despite the hopefulness generated by effective congressional enforcement tools, this appraisal of the state of civil rights in housing presents a rather guarded prognosis of change. Following the Reagan years, eight years of policy generally antagonistic to civil rights, change can occur only with Presidential leadership and a sustained combination of federal, state, local, and private enforcement initiatives. State and local government, as well as the federal government, must examine successful local enforcement strategies and attempt to replicate them. The nonprofit, private component in fair housing, perhaps the most important force in the first generation of the fair housing effort, may have to undergo the most significant change in role and direction if nondiscrimination law in housing is to achieve its goals.

Arguably the greatest impediment to achieving the promise of the second generation of fair housing is the connection between discrimination and segregation. The enforcement of antidiscrimination laws alone may not abate the entrenched pattern of racial segregation. Indeed, enforcement alone can generate increased levels of segregation. Those involved in fair housing enforcement must face the relationship between discriminatory practices and neighborhood segregation. Affirmative action, a concept encountering widespread hostility, must be employed aggressively, or the enhanced efforts to combat housing discrimination will themselves exacerbate apartheid in America.

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Africa. While a definition of "policy" begs the questions of intent, foreseeability, and effect, nonetheless the results of governmental policy will be scrutinized, not merely the policy's articulation. Malcolm X stressed that the United States differed from South Africa only in that the latter practiced what it preached, while we preach integration and deceitfully practice segregation. MALCOLM X SPEAKS 75 (G. Breitman ed. 1965). By implementing private sector prejudice, government legitimizes, encourages, facilitates, and endorses that prejudice. See J. KUSHNER, APARTHEID IN AMERICA (1980), also printed in Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 *How. L.J.* 547 (1979).

6. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (amending 42 U.S.C. §§ 3601-3619 (1982)).

## II. HOUSING DISCRIMINATION

The 1979 national study on housing discrimination funded by The United States Department of Housing and Urban Development (HUD) disclosed that two million acts of housing discrimination were perpetrated annually.<sup>7</sup> The study also disclosed that a black prospective renter faced a seventy-five percent chance of being a victim and that black home buyers experienced discrimination rates just short of that startling level.<sup>8</sup>

Advances in public accommodations, employment, and voting are impressive, although vestiges of employment bias and job segregation remain. School segregation, largely dismantled in the South, remains nearly the universal experience in the North, Midwest, and West,<sup>9</sup> not so much because of continuing school board discrimination, but because of: Supreme Court rulings refusing to desegregate suburbs<sup>10</sup> and allowing premature findings of effective desegregation or unitary district achievement;<sup>11</sup> and the failure of government and private agencies to address the desegregation of housing patterns.

Although local discrimination-in-housing audits disclose varying levels of bias,<sup>12</sup> the level of discrimination does not appear to be abating significantly. Indeed, in certain areas of the Nation, rates of discrimination may be on the rise.<sup>13</sup> A sad indication of racial discrimination in

7. R. WIENK, C. REID, J. SIMONSON & F. EGGERS, MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS 64 (1979) [hereinafter HUD AUDIT] (rental bias by region: 59% in Northeast, 80% in North Central states, 73% in South, and 79% in West).

8. *Id.*

9. See G. ORFIELD & F. MONFORT, CHANGE AND DESEGREGATION IN LARGE SCHOOL DISTRICTS (1988), reported in *Segregation in Large Schools Seen Widening*, L.A. Times, June 23, 1988, pt. I, at 26, col. 1 (stating that from 1967 to 1986 in the 60 largest public school systems white enrollment declined 16%, black increased 5%, and Latino increased 103%, with significant retention of white students only where the most radical desegregation techniques were employed). Although the number of blacks attending schools with 80% to 100% black population was reduced from 68% in 1966 to 49.4% in 1970, in the 32 Northern and Western states the 1966 figure of 57.4% rose to 57.5% in 1970. U.S. Dep't of Health, Education & Welfare, News Release, at Table 2-A (June 18, 1971).

10. *Milliken v. Bradley*, 418 U.S. 717 (1974). See generally J. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION §§ 9.01-9.06 (1988) (school desegregation law).

11. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

12. See *infra* notes 13-19 and accompanying text.

13. Cf. Gibbs, *Young, Black, in Critical Condition*, L.A. Times, May 29, 1988, pt. V, at 1, col. 1. Gibbs reported that high school dropout rates over the past 25 years for black males increased to 40-50% in recent years, with 20% being unable to read at a fourth grade level. Unemployment has risen to a level three times worse than in 1960, with only 42% of blacks employed in 1980, and with half of the blacks ages 16 to 24 never having held a job. In addition, black youths, one-fifth of teenagers, constituted one-third of all juvenile felony arrests. One of 21 black youths are murdered before reaching the age of 21, with suicide the third leading cause of death, triple the 1960 rate for whites. *Id.*; cf. Sectar, *A New Bigotry Ripples Across U.S. Campuses*, L.A. Times, May 8, 1988, pt.

housing is the rising trend of "move-in" violence against blacks seeking homes in predominantly white communities.<sup>14</sup> In addition, local studies performed after the 1979 HUD audit indicated even higher levels of discrimination. A study of the Dallas rental market demonstrated that Latinos were exposed to high rates of bias, and that dark-skinned Mexicans experienced nearly universal discrimination in their attempts to rent homes.<sup>15</sup> Studies of lending patterns in New York and California also demonstrated that Latinos typically were subjected to disparate treatment.<sup>16</sup> A recent study in the Washington, D.C. area disclosed high rates of bias, not only in the suburbs of Maryland and Virginia, but also in the predominantly black District of Columbia.<sup>17</sup> HUD plans to fund

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I, at 1, col. 2, at 21, col. 2 (final ed.) (reporting rising racial harassment and declining minority success in higher education, with a 50% decline between 1975 and 1985 in number of bachelor's degrees earned by education majors, and a 41% decline in master's degrees in that discipline, resulting in a shrinking pool of qualified minority teachers).

14. KLANWATCH PROJECT, "MOVE-IN" VIOLENCE: WHITE RESISTANCE TO NEIGHBORHOOD INTEGRATION IN THE 1980'S (1987), reprinted in *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 1031 (1987) [hereinafter *Hearings on S. 558*]; see also J. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* §§ 3.67-3.71 (1983 & Supp. 1988).

15. J. HAKKEN, *DISCRIMINATION AGAINST CHICANOS IN THE DALLAS RENTAL HOUSING MARKET* (1979) (finding that dark-skinned Chicanos faced a 96% probability of encountering discrimination; light-skinned experienced a 65% level); see also ABT ASSOCIATES, *FINAL REPORT ON RACIAL DISCRIMINATION IN THE BOSTON HOUSING MARKET* (1981) (showing significant discrimination); James & Tynan, *Segregation and Discrimination of Hispanic Americans—An Exploratory Analysis*, in *HOUSING DESEGREGATION AND FEDERAL POLICY* 83, 84 (J. Goering ed. 1986) (finding significant rates in Denver, Houston, and Phoenix); Bernstein, *Black Renters Met Bias in San Diego Apartment Survey*, L.A. Times, Jan. 13, 1989, pt. I, at 26, col. 3 (encountered bias in 40% of tests); deVise, *Housing Discrimination in the Chicago Metropolitan Area: The Legacy of the Brown Decision*, 34 DE PAUL L. REV. 491 (1985) (showing extensive discrimination); Smith, *An Analysis of Black Occupancy of Mobile Homes*, 42 J. AM. INST. PLANNERS 410 (1976) (underrepresentation from 4% to 45%). See generally H.R. REP. NO. 711, 100th Cong., 2d Sess. 15 (1988) [hereinafter H.R. REP. NO. 711]; P. DOWNING, *SEGREGATION AND DISCRIMINATION IN RENTAL HOUSING: A REVIEW OF SELECTED STUDIES, LEGAL CASES AND LEGISLATION* (Cong. Res. Serv. Rep. No. 86-677 G 1986), reprinted in *Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 773 (1987) [hereinafter *Hearings on H.R. 1158*].

16. See R. SCHAFER & H. LADD, *DISCRIMINATION IN MORTGAGE LENDING* (1981); HUD Study *Finds Evidence of Mortgage Discrimination in California*, New York, 7 [Current Developments] Hous. & Dev. Rep. (BNA) 1064 (1980) (in addition, according to the MIT and Harvard Joint Center for Urban Studies, black loan applicants experience 1.58 to 7.82 times the loan denials experienced by whites); *Study Says Race a Factor in NYC Mortgage Lending*, 4 Fair Hous.-Fair Lending Rep. (P-H) ¶ 8.5 (1989) (black census tract of identical income range on white tract received 14 loans per 1000 units as compared to 42 loans with race the only variable).

17. See REGIONAL FAIR HOUSING CONSORTIUM, *RACE DISCRIMINATION IN THE RENTAL HOUSING MARKET: A STUDY OF THE GREATER WASHINGTON AREA* (1986); *Study Reveals Discrimination in Washington Area Apartment Rental Market*, 3 Fair Hous.-Fair Lending Rep. (P-H) ¶ 10.3 (1988) [hereinafter *Washington Apartment Study*] (discussing the Fair Housing Council of Greater Washington test of 111 properties that disclosed bias in 57% of the tested properties: 43% in D.C., 70% in Maryland, and 62% in Virginia).

another two-year study to audit the level of housing discrimination in twenty-five metropolitan areas.<sup>18</sup>

The most promising sign of a trend toward a reduction of housing discrimination was a study in Kentucky indicating that the incidence of housing discrimination dropped by half in the ten-year period since the HUD audit.<sup>19</sup> The Kentucky study suggests that the rate of housing discrimination may be a function of measurement techniques, regional housing market variance, or local civil rights strategies.

Most of the above studies suggest that a high level of bias persists in rentals, sales, marketing, and financing of housing, although one study suggests a decline in levels of bias. Several possible, yet unverified explanations exist for these disparate levels of discrimination. Local audits that indicate decreased rates of discrimination may reflect the enforcement level, because aggressive fair housing enforcement reduces the level of bias. Lowered rates of discrimination may also be a by-product of school desegregation, under the theory that school diversity reduces discriminatory attitudes or the motive to maintain existing segregated housing patterns. Similarly, housing bias may be lower in communities already marked by residential integration. Attitudes on racial integration and race relations generally may dominate housing market behavior. Rates of discrimination may also vary according to local housing market characteristics. For example, low vacancy rates and a tight housing market may encourage discrimination, while soft markets with high vacancy rates may discourage bias by profit-oriented housing providers. Measurement methodology, moreover, may have a significant impact on a study's results; testing techniques vary and may not be effective in uncovering newer, more sophisticated, and covert forms of housing discrimination.

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18. *Two-Year, 25-City Study of Housing Discrimination to be Funded by HUD*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 936 (1988).

19. *Apartment Discrimination Declines in Louisville*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 6.5 (1985) (testing demonstrated an 84% decline in the frequency of discrimination from 1977 to 1985; the 7.4% rate of discrimination in 1985 was down from 46.2% in 1977 and 24.3% in 1980); see also KENTUCKY COMM'N ON HUMAN RIGHTS, *DESEGREGATION IMPROVES AT HOUSING AUTHORITIES WITH PLANS, WORSENS AT AUTHORITIES WITHOUT PLANS* (1986) (noting small reductions at projects with affirmative action plans); *Kentucky Commission on Human Rights Reports Increasing Desegregation*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 1.9 (1988); *Kentucky Study Finds Housing Bias Almost Halved Since '77*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 8.6 (1988) (citing E. GEORGE, *RACE DISCRIMINATION IN HOUSING ALMOST HALVED IN LOUISVILLE AND LEXINGTON BUT DISCRIMINATION PERSISTS, 1977-1988* (1987) (42.4% decline to 33.4% rate of bias per test, down from 57.9% in 1977)) (noting a further reduction of public housing segregation where affirmative action plans were in place, although statewide desegregation pattern has slowed); *Kentucky Rental Discrimination Drops to 10.5 Percent*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 9.9 (1986) (discussing a statewide reduction in rental discrimination, and stressing the impact of landlord reporting and enforcement).

The studies of discrimination in the urbanized counties of Kentucky may suggest that aggressive fair housing enforcement significantly reduces discriminatory housing practices. Kentucky has been a national leader in adopting laws requiring public reporting of minority participation by housing providers and has enjoyed an image of aggressive public enforcement. Kentucky is also the site of organized non-profit fair housing council activity, including testing and enforcement. The District of Columbia, by comparison, is far more integrated, with a substantial black population, and is a center of effective enforcement activities; yet a recent study of the Washington area demonstrates a continued pattern of high levels of racial discrimination in housing.<sup>20</sup> A market theory suggests that the cost to the discriminator imposed by enforcement should discourage bias and that aggressive enforcement remains the principal strategy to reduce the incidence of housing discrimination. The hypothesis may be accurate, but targeting of scarce enforcement resources toward a few large operators may not have achieved the desired market result because the costs of enforcement may have been insignificant to the perpetrator when compared to the overall housing operation profit. Targeting the smaller operator and increasing publicity of large awards against large housing providers may yet prove that the enforcement strategy is the most effective route to fair housing. Statistics demonstrating the resistance of discrimination to enforcement may simply reflect the relative lack of national and local resources targeted to fight the pervasive pattern of housing discrimination.

The Kentucky studies might alternatively suggest the existence of a nexus between school desegregation and the level of housing discrimination. The Kentucky counties were also the site of effective metropolitan school desegregation. Diana Pearce studied fourteen metropolitan areas, including suburbs, that had experienced school desegregation programs and found that residential housing segregation declined, particularly as more minority families moved to the desegregated suburbs.<sup>21</sup> These studies suggest that school desegregation is a prerequisite to fair housing. They also present a conundrum, as frustrated school desegregation litigators hope fair housing enforcement will generate

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20. See REGIONAL FAIR HOUSING CONSORTIUM, *supra* note 17; *Washington Apartment Study*, *supra* note 17.

21. D. PEARCE, *BREAKING DOWN BARRIERS* 40 (1980); see also G. ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* (1978) [hereinafter G. ORFIELD, *MUST WE BUS?*]; G. ORFIELD, *TOWARD A STRATEGY OF URBAN INTEGRATION: LESSONS IN SCHOOL AND HOUSING POLICY FROM 12 CITIES* (1982) [hereinafter G. ORFIELD, *URBAN INTEGRATION*] (arguing that only through desegregated neighborhoods will home seekers choose integration, and only through such residential integration will the need for school desegregation remedies be reduced or eliminated).



school integration in the face of ineffective school desegregation litigation.

The Pearce study strongly supports the hypothesis that American housing discrimination is a function of American apartheid. Separate societies tend to discourage integration. Fear of the unknown breeds racial stereotypes and fear of being an urban pioneer.<sup>22</sup> Segregated housing patterns, long the status quo, are threatened by integrative moves; such moves, therefore, encourage discrimination by housing providers. The willingness to perpetuate residential segregation in this way may be reduced significantly through effective fair housing enforcement.<sup>23</sup>

Levels of housing discrimination may be a function of the marketplace. Economists would suggest that higher levels of discrimination may be anticipated in markets marked by low vacancy rates and that such discrimination is less likely in soft markets. Housing providers simply are not likely to be willing to pay a premium to maintain segregation or avoid integration. A market theory suggests the existence of a production-integration nexus in which segregation, as a function of the lack of housing mobility, and discrimination, as a function of competition for scarce resources, are best avoided through expansion of the housing supply.

It is unfortunate that the 1979 HUD national housing discrimination audit<sup>24</sup> was not analyzed in light of local vacancy rate statistics to determine whether housing discrimination was responsive to housing supply. The market model would suggest that with greater demand for a short supply of units, landlords could discriminate more without fear of cost or disclosure. In a very tight, rent-controlled rental market, landlords may be successful in renting solely through word of mouth advertising and referrals by current tenants or relatives—a scheme that carries extreme discriminatory impact.<sup>25</sup> With waiting lists, it is a sim-

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22. See J. KUSHNER, *supra* note 5, at 3 n.1. In *Apartheid in America* the Author referred to this phenomenon as the "UFO Syndrome." *Id.*

23. Galster, *More Than Skin Deep—The Effect of Housing Discrimination on the Extent and Pattern of Racial Residential Segregation in the United States*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 15, at 119, 134.

24. HUD AUDIT, *supra* note 7.

25. See, e.g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) (membership in community swimming pool limited to residents within three-quarters of a mile, and sales to relatives only); *Bunn v. Central Realty*, 592 F.2d 891 (5th Cir. 1979) (per curiam) (rental based on recommendation of former tenants); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974) (holding that friends or relatives rule violated § 1982); *Huertas v. East River Hous. Corp.*, 674 F. Supp. 440 (S.D.N.Y. 1987) (children of residents); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 2 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,775 (E.D. Pa. July 16, 1976), *aff'd in part, rev'd in part*, 559 F.2d 894 (3d Cir. 1977) (finding that priority to current residents and their relatives had resulted in only one cooperative transferred outside of the community since 1964);

ple matter to inform the minority applicant of the ostensible truth that no units are available. Multiple applications also permit screening for the "best applicant," a criterion which may often be defined not only by reference and credit report, but by subjective evaluations of compatibility with the existing tenant population or the landlord's conscious or subconscious standards.<sup>26</sup>

High vacancy rates in communities suffering economic decline and dislocation, according to the economic model, might suggest declining levels of housing bias. Studies do not exist, however, to support this proposition. Perhaps scape-goating by those losing jobs and home equity in economically depressed communities accounts for heightened racism and irrational discrimination practices. Nevertheless, aggressive enforcement might have dramatic effects in such communities where enforcement remedies carry greater economic significance and where bias may be easily disclosed by tests that reveal continued vacancies even after minority group members are turned away.

Despite the Reagan Administration's defense of its decision to curtail the production of housing for those of low and moderate income and its claim that the problem was affordability<sup>27</sup> rather than a housing shortage, the homeless stand as a symbol of shortage. A rising level of racial and ethnic discrimination may be another symbol of a passive

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United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972) (recommendation of current tenants).

26. See, e.g., Gresham v. Windrush Partners, 730 F.2d 1417, 1419-20 (11th Cir.) (preferring "nice people" with the most favorable rental histories), *cert. denied*, 469 U.S. 882 (1984); Jordan v. Dellway Villa of Tenn., Ltd., 661 F.2d 588, 589 (6th Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982) (preferring the "best available" applicant); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1035 (2d Cir. 1979) (arguing that prospective tenant "would not fit into the personality of this family"); Harper v. Hutton, 594 F.2d 1091, 1092 (6th Cir. 1979) (claiming that applicant would not make good tenant); Wharton v. Knefel, 562 F.2d 550, 556 (8th Cir. 1977) (renting on the basis of how the manager "feels"); United States v. Reddoch, 467 F.2d 897, 899 (5th Cir. 1972) (*per curiam*) (fearing white backlash if blacks became tenants); *Huertas*, 674 F. Supp. at 445 (applying the subjective criterion of who would be "most effective within the community"); Murphy v. 253 Garth Tenants Corp., 579 F. Supp. 1150, 1156 (S.D.N.Y. 1983) (holding that cooperative housing corporation may seek out "good neighbor," but may not base decision on subjective discomfort with applicant); Shaw v. Cassar, 558 F. Supp. 303, 313-14 (E.D. Mich. 1983) (defining "good tenant" without objective criteria); United States v. Youritan Constr. Co., 370 F. Supp. 643, 650 (N.D. Cal. 1973), *aff'd in part per curiam*, 509 F.2d 623 (9th Cir. 1975) (arguing prospective incompatibility); United States v. Grooms, 348 F. Supp. 1130, 1133 (M.D. Fla. 1972) (arguing noncongeniality); *cf.* Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975) (focusing on employment), *vacated*, 433 U.S. 903 (1977).

27. CBO Study Says Affordability Predominant Housing Problem, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 807 (1989) (noting "current housing problem and possible federal response"); *Low-Cost Housing, A Concern for Bush Administration, Aide Says*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 643, 644 (1988) (statement of HUD official John Rosso); *Affordability Top Housing Problem in Philadelphia, According to Study*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 122 (1988) (claiming shortage is not the top problem); *Major Housing Problem is Affordability, Not Quality, CBO Says in New Report*, 10 [Current Developments] Hous. & Dev. Rep. (BNA) 19 (1982) (reporting on Federal Housing Assistance).

national policy that permits lower income housing stock to be removed from the market through abandonment, gentrification, inflation, or conversion of units for occupancy by the more affluent. Yet, while increasing income may generate an expanding housing supply for some, racial discrimination has not been found to be a class phenomenon.<sup>28</sup> Cases suggest that discrimination is not simply a function of wealth.<sup>29</sup> Unfortunately, studies fail to distinguish rates of discrimination according to income status. The achievement of fair housing may be dependent on the rediscovery of government policy keyed to expanding the lower income housing supply along with the middle and upper income supply to assure a healthy housing market that permits filtration,<sup>30</sup> the process by which older housing becomes progressively less expensive as the wealthy move to more newly constructed units and the older stock filters down to house the poor. Currently, conversion, demolition, and new household formation generate reverse filtration and homelessness.<sup>31</sup>

Regional, community, and even neighborhood attitudes toward issues of race, integration, and discrimination may play a significant role in the level of racial discrimination. Although no studies have been performed to correlate testing audits with these attitudes, one can hypothesize that community or national leadership, together with community education programs in race relations, might have a significant impact on such community attitudes. It is likely, however, that white suburban or urban white segregated enclaves established or maintained partly to resist school integration, particularly busing remedies, may exhibit higher levels of racial bias and fear and be less receptive to constructive

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28. See J. KUSHNER, *supra* note 5, at 18-19 n.43; OFFICE OF ECON. OPPORTUNITY, DEP'T OF HOUS. & URBAN DEV., *BLACKS PAY MORE FOR LESS* (1972) (finding that blacks pay higher rent for housing of lesser quality than that available to whites); A. PINKNEY, *THE MYTH OF BLACK PROGRESS* 81-86 (1984) (noting that socioeconomic factors alone fail to account for the persistence of segregation); accord Bianchi, Farley & Spain, *Racial Inequalities in Housing: An Examination of Recent Trends*, in *RACE, ETHNICITY, AND MINORITY HOUSING IN THE UNITED STATES* 19, 35-36 (J. Momeni ed. 1986) [hereinafter *RACE, ETHNICITY*]; Farley, *Residential Segregation in Urbanized Areas of the United States in 1970: An Analysis of Social Class and Racial Differences*, 14 *DEMOGRAPHY* 497, 514 (1977); Kain, *The Influence of Race and Income on Racial Segregation and Housing Policy*, in *HOUSING DESEGREGATION AND FEDERAL POLICY*, *supra* note 15, at 99, 100.

29. *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979).

30. See generally W. GRIGSBY & L. ROSENBERG, *URBAN HOUSING POLICY* (1975); W. SMITH, *FILTERING AND NEIGHBORHOOD CHANGE* (1964); Edel, *Filtering in a Private Housing Market*, in *READINGS IN URBAN ECONOMICS* 204-15 (M. Edel & J. Rothenberg eds. 1972). For a contrary perspective, see generally A. SCHORR, *SLUMS AND SOCIAL INSECURITY* (1974), which argued racial segregation, price inflation, a supply unresponsive to excessive demand, and extraordinary need throw into question the filtration model.

31. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 *UCLA J. ENVTL. L. & POL'Y* 209, 239-40 (1982) (arguing that "reverse filtration," the accurate model as driven by gentrification, condominium conversion, and massive new family formation, reduced movement to new suburbs and propelled back-to-the-city movement).

leadership or community education programs.

Studies of the incidence of discrimination are premised on testing, also referred to as auditing or checking. Such tests are most traditionally used in cases involving admission or access denial, or in cases of steering, in which applicants are shown available housing located only in areas traditionally inhabited by members of the prospect's race.<sup>32</sup> In access cases, a minority tester inquires about the availability of a unit for rent or sale. Shortly thereafter a white tester makes a similar inquiry; the comparison demonstrates equal or disparate treatment. In steering cases, the comparison would seek to determine whether white and minority testers were referred to identical housing markets, neighborhoods, projects, or sections of projects.

There is a great deal of controversy over the appropriate methodology of testing. Some advocate what is called a three tester sandwich, in which a white tester, then a minority tester, and again a white tester make inquiries within minutes of each other. Typically, the white tester is shown units, the minority is told of no vacancies, and the following white inquiry discloses the continued availability of a unit. Although such a "sandwich" test, if successful, is the most dramatic evidence of discrimination, it suffers in several regards. First, housing providers may be put on notice by the similarity and frequency of inquiries in such a brief period of time. Second, the greater number of tests increases the danger that the testers will give different information or fail to recall with precision the conversation that occurred. Often reports filed by testers are incomplete and conclusory, making experience comparison difficult. Utilization of two testers, or one tester following a rejected minority applicant, is ideal. Testing for some forms of discrimination also may be carried out entirely by a single tester, even over the telephone. For example, the City of San Francisco telephones discriminatory advertisements to newspapers to determine willingness to carry such offers. Courts universally accept tester testimony<sup>33</sup> and, while in some cases numerous testers have been utilized,<sup>34</sup> courts rou-

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32. See, e.g., *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978) (rentals); *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973) (per curiam) (sales); *Fair Hous. Council v. Eastern Bergen County Multiple Listing Serv.*, 422 F. Supp. 1071 (D.N.J. 1976) (sales).

33. *Havens v. Coleman*, 455 U.S. 363, 368 (1982) (finding minority and neighborhood testers aggrieved, here using two testers who made several inquiries following victim housing denial); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 94, 111 (1979) (using several testers); *Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D. Wis. 1980) (holding testers had standing); *United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975) (holding state prohibition of testing invalid); J. KUSHNER, *supra* note 14, § 3.08.

34. E.g., *Havens*, 455 U.S. at 368 (two testers making several inquiries following victim housing denial); *Gladstone*, 441 U.S. at 94, 111 (several testers); *Watts v. Boyd Properties, Inc.*, 758 F.2d 1482, 1483-84 (11th Cir. 1985) (two testers, one the plaintiff); *Gresham v. Windrush Partners*, 730 F.2d 1417, 1420-21 (11th Cir.) (several sets of testers), *cert. denied*, 469 U.S. 882 (1984); Kin-

tinely accept testimony of one tester as sufficient evidence that false information was given to a complaining victim.<sup>35</sup>

One of the problems with studies based on audits is that conscientious researchers are likely to exclude tests premised on incomplete reports, tests in which the testers dealt with different sales or rental agents, or tests exhibiting other factors that might skew the results of a study. More problematic is the increasing sophistication of discrimination techniques. To test lending policy, for example, it may be necessary for the tester to provide accurate financial data and to pay loan application fees before a loan decision is made. Sales or rental agents may use this same type of policy to mask discriminatory practices by requiring detailed applications, credit checks, and perhaps deposits prior to rental or sales decisions in times of high demand and short supply or waiting lists.

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ney v. Rothchild, 678 F.2d 658, 659 (6th Cir. 1982) (per curiam) (several testers); Grant v. Smith, 574 F.2d 252, 254 (5th Cir. 1978) (conducting several tests); Connell v. Shoemaker, 555 F.2d 483, 485 (5th Cir. 1977) (two testers followed victim); United States v. Warwick Mobile Home Estates, Inc., 537 F.2d 1148, 1149 (4th Cir. 1975) (several testers); Marr v. Rife, 503 F.2d 735, 737 (6th Cir. 1974) (several testers followed victim).

35. Tolliver v. Amici, 800 F.2d 149, 150 (7th Cir. 1986) (single tester followed victim); Hamilton v. Svatik, 779 F.2d 383, 386 (7th Cir. 1985) (single tester followed victim); Richardson v. Howard, 712 F.2d 319, 320 (7th Cir. 1983) (single tester followed victim); Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1085 (7th Cir. 1982) (single tester followed victim); Price v. Pelka, 690 F.2d 98, 99 (6th Cir. 1982) (single tester followed victim); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 550, 552 (9th Cir. 1980) (single tester followed victim); McDonald v. Verble, 622 F.2d 1227, 1229-30 (6th Cir. 1980) (single tester followed victim); Fountila v. Carter, 571 F.2d 487, 489 (9th Cir. 1978) (single tester followed victim); Wharton v. Knefel, 562 F.2d 550, 553-54 (8th Cir. 1977) (single tester followed victim); Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 897-98 (3d Cir. 1977) (case brought by single tester); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 234 n.2 (8th Cir. 1976) (single tester followed victim); Hamilton v. Miller, 477 F.2d 908, 909 (10th Cir. 1973) (single tester followed victim); Wainwright v. Allen, 461 F. Supp. 293, 295-96 (D.N.D. 1978) (single tester followed victim), *aff'd mem.*, 605 F.2d 1209 (8th Cir. 1979); Williamson v. Hampton Management Co., 339 F. Supp. 1146, 1148 (N.D. Ill. 1972) (single tester followed victim); Martin v. John C. Bowers & Co., 334 F. Supp. 5, 6-7 (N.D. Ill. 1971) (single tester followed victim); Bush v. Kaim, 297 F. Supp. 151, 155 (N.D. Ohio 1969) (single tester followed victim); Harris v. Jones, 296 F. Supp. 1082, 1083 (D. Mass. 1969) (single tester followed victim); LaPierre v. Massachusetts Comm'n Against Discrimination, 354 Mass. 165, 169-70, 236 N.E.2d 192, 195 (1968) (single tester followed victim); Wilson v. Sixty-Six Melmore Gardens, 106 N.J. Super. 182, 184-86, 254 A.2d 545, 546 (App. Div. 1969) (single tester followed victim); *see also* H.R. CONF. REP. No. 426, 100th Cong., 1st Sess. 161, 240, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 3458, 3537 (testing funding guidelines issued by HUD under Fair Housing Initiatives Program were not intended to affect litigation and to be limited solely to funding activities).

## III. HOUSING SEGREGATION

American geography is marked by racial segregation.<sup>36</sup> The prophesy of the Kerner Commission,<sup>37</sup> that America was moving toward two separate societies, one white and one black, has come to pass.<sup>38</sup> Integrated neighborhoods or living experiences are isolated and too often represent a transitory status as the neighborhood moves toward segregation.<sup>39</sup> Communities such as the Village of Bellwood, Illinois, Shaker Heights, Ohio, University City, Missouri, or the Wilshire District in Los Angeles are exceptions. Despite isolated neighborhood integration, schools may, as in the case of Los Angeles, remain racially separate. Experiments in new, large-scale integrated communities such as Star-

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36. See H.R. REP. NO. 711, *supra* note 15, at 16 (summarizing the testimony of Douglas S. Massey); W. COLMAN, *CITIES, SUBURBS AND STATES* 62-68 (1975); P. DOWNING, *supra* note 15, reprinted in *Hearings on H.R. 1158*, *supra* note 15, at 773; REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 222 (1968) [hereinafter KERNER COMMISSION REPORT]; A. SCHNARE, *RESIDENTIAL SEGREGATION BY RACE IN U.S. METROPOLITAN AREAS* (1977); A. SORENSEN, K. TAEUBER & L. HOLLINGSWORTH, *INDEXES OF RACIAL RESIDENTIAL SEGREGATION FOR 109 CITIES IN THE UNITED STATES 1940 TO 1980* (1974); U.S. COMM'N ON CIVIL RIGHTS, *TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING* 124-34 (1975) (discussing massive trend of increased central city segregation); U.S. COMM'N ON CIVIL RIGHTS, *1961 REPORT: HOUSING 1* (1961) [hereinafter 1961 REPORT] (describing suburbs around cities as the "white noose"); see also J. KUSHNER, *supra* note 5 (collecting and analyzing the literature describing and measuring the pervasive pattern of American racial residential segregation); Darden, *Accessibility to Housing: Differential Residential Segregation for Blacks, Hispanics, American Indians, and Asians*, in *RACE, ETHNICITY*, *supra* note 28, at 108, 112 (noting that from 1950-1980 the average segregation between blacks and whites in the Nation's 25 largest cities with 100,000 or more blacks declined only 7%); Jordan, *Still Two Nations—One Black, One White?*, 13 *HUM. RTS.*, Fall 1985, at 21; Massey & Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 *AM. J. SOC.* 592 (1988) (black segregation, greater than Hispanic and Asian, persists in cities and suburbs suggesting a discriminatory origin); Muth, *Residential Segregation and Discrimination*, in *PATTERNS OF RACIAL DISCRIMINATION* 107, 113 (G. Von Furstenberg, B. Harrison & A. Horowitz eds. 1974) (arguing that equal demographic dispersion of whites and blacks would require relocation of 80-90% of all blacks in the nation); Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 *NW. U.L. REV.* 61 (1988); see also *Future for Cities Bleak, Census Director Says*, 7 [Current Developments] *Hous. & Dev. Rep.* (BNA) 800 (1980) (according to Vincent P. Barabba, between 1970 and 1979, the white population of central cities declined by 4 million whereas the number of blacks living in central cities increased by 1.2 million). According to congressional testimony by University of Chicago's Douglas S. Massey, in 60 cities studied, based on 1980 data, over 50% of blacks would have to move to achieve integrated neighborhoods, and above 80% would have to move in Cleveland, Los Angeles, New York, Detroit, St. Louis, and Milwaukee, and 88% in Chicago; segregation typically has remained the same or worsened since the 1970 census. *Residential Segregation Stifling Black Advancement, Professor Testifies*, 15 [Current Developments] *Hous. & Dev. Rep.* (BNA) 695 (1988).

37. KERNER COMMISSION REPORT, *supra* note 36, at 1, 222; see also 1961 REPORT, *supra* note 36, at 1 ("white noose").

38. J. KUSHNER, *supra* note 5, at 1-4.

39. Farley, *Residential Segregation and its Implications for School Segregation*, 39 *LAW & CONTEMP. PROBS.* 164, 167 n.12 (1975) (observing that racial turnover occurs over a period of time and that identifiably integrated communities are merely a transition phase toward segregated neighborhoods).

rett City in New York have been threatened by the Justice Department strategy of challenging integration and integration maintenance quotas as violative of the Fair Housing Act.<sup>40</sup> The large, metropolitan cities are highly segregated in terms of both residential communities and schools. The most notorious recent symbol of America's commitment to racial residential segregation was the short-lived defiance by Yonkers, New York of an order to desegregate housing following a finding of segregation in subsidized housing site selection as well as in the school system.<sup>41</sup> The city council initially voted to defy the ruling, even in the face of imprisonment and fines of up to one million dollars per day that threatened to bankrupt the city.<sup>42</sup> The impact of the contempt order, upheld by the Second Circuit Court of Appeals,<sup>43</sup> resulted in an agreement to abide by the desegregation ruling.<sup>44</sup> The desegregation of Yonkers, however, remains but a dream.<sup>45</sup>

The 1980 census disclosed some increase in minority group presence in traditional white suburbs, but that data is skewed by the growth of segregated black communities within the older urban suburbs and concentrated areas of suburban districts.<sup>46</sup> The halt of both dis-

40. See *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

41. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

42. *Yonkers Again Rejects Housing Plan; Contempt Ruling, Fines Upheld*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 344 (1988); *Yonkers Held in Contempt, Fined for Rejecting Housing Desegregation*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 253 (1988); Tumulty, *Yonkers Officials Defiant Despite Appeals Court Loss*, L.A. Times, Aug. 27, 1988, pt. I, at 1, col. 5.

43. *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *cert. granted sub nom. Spallone v. United States*, 57 U.S.L.W. 3588 (U.S. Mar. 6, 1989) (Nos. 88-854, 88-855, 88-856, 88-870) (consolidated on legislative immunity issue).

44. *Yonkers Council Approves Housing Plan; Contempt Ruling, Fines Lifted*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 389 (1988); *Yonkers Ends Contempt*, 4 Fair Hous.-Fair Lending Rep. (P-H) ¶ 4.2 (1988).

45. *Yonkers Public Housing Delayed Further by Dispute with Court, Council Members Say*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 660 (1988) (site acquisition controversy continues); *Yonkers Seeks Funding, Flexibility from HUD to Build Public Housing Units*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 427 (1988) (compliance still uncertain); cf. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir.), *cert. filed*, 57 U.S.L.W. 3455 (U.S. Dec. 19, 1988) (No. 88-1029) (allowing the city to bypass state procedural eminent domain and environmental standards in condemning land to accommodate the settlement); L.A. Times, Nov. 13, 1988, pt. I, at 2, col. 5 (final ed.) (reporting that 16 Yonkers residents filed a lawsuit seeking \$166 million from the recalcitrant councilmen, charging that defiance of the decree damaged the city's image and financial stability and wasted the taxpayers' money).

46. According to the 1980 census, in 38 metropolitan areas with populations of 1 million or more, the number of blacks living in suburbs grew from 2.3 million in 1970 to 3.7 million in 1980. The percentage of blacks in the total suburban population in those 38 areas increased from 4.7% to 6.5%. More than 14.7 million blacks reside in the central cities while 6 million reside in the suburbs and rural fringe. L.A. Herald Examiner, May 31, 1981, § A, at 6, col. 3. Black presence in the suburbs, however, is often in the older, fringe communities in a segregated pattern. See U.S.

persed subsidized housing development and aggressive affirmative action in the marketing of housing, together with increasing levels of poverty within minority groups,<sup>47</sup> may reveal increased levels of racial segregation as census tracts are studied following the 1990 census.

America was integrated at the turn of the century when Southern whites desired dispersal of blacks as a means of white self-protection and urbanized whites desired black workers to have easy access to the workplace.<sup>48</sup> With the rise of suburban living status after World War I, however, cultural preferences modeled on the living patterns of the rich excluded blacks from the new neighborhoods.<sup>49</sup> Dramatic apartheid appeared under the New Deal housing programs and the public and war worker housing constructed during and following World War II.<sup>50</sup> Those housing projects, built on a purely segregated basis,<sup>51</sup> established racial segregation in numerous cities. The most dramatic cause of segregation, however, was the mortgage insurance and loan programs administered by the Veterans Administration and the Federal Housing Administration,<sup>52</sup> programs which provided the financing for America's suburbs. Regulations required the financed properties to be segregated by conditioning subdivision approval on the inclusion of racial covenants or equitable servitudes.<sup>53</sup>

The living patterns established under this regime have been fol-

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DEP'T OF HOUS. & URBAN DEV., RECENT SUBURBANIZATION OF BLACKS (1979); see also Lake, *Racial Transition and Black Homeownership in American Suburbs*, in AMERICA'S HOUSING: PROSPECTS AND PROBLEMS 419 (G. Sternlieb & J. Hughes eds. 1980); Silver, *Housing Policy and Suburbanization: An Analysis of the Changing Quality and Quantity of Black Housing in Suburbia Since 1950*, in RACE, ETHNICITY, *supra* note 28, at 69, 85 (discussing the trend of black suburbanization in segregated patterns).

47. See U.S. DEP'T OF HOUS. & URBAN DEV., PRESIDENT'S NATIONAL URBAN POLICY REPORT 40-41 (1984) (between 1970 and 1982, the number of persons living in poverty in central cities increased 22%, with a doubling of the number of black female-headed families, nearly half of whom are in poverty); Kushner, *supra* note 31, at 232 n.91.

48. J. KUSHNER, *supra* note 5, at 6-24; W. WILSON, THE DECLINING SIGNIFICANCE OF RACE 38-39 (1978).

49. J. KUSHNER, *supra* note 5, at 15-25.

50. *Id.* at 30-37, 68-70. *Plessy v. Ferguson*, 163 U.S. 537 (1896), which sustained segregated transportation on a "separate but equal" basis, was the universally executed model for public housing, war housing, and later subsidized private housing programs administered by Presidents Franklin Roosevelt, Truman, and Eisenhower.

51. J. KUSHNER, *supra* note 5, at 30-31.

52. *Id.* at 20-22.

53. *Id.* at 16-22. The FHA underwriting manual prior to 1947 contained a specific reference to race. FHA UNDERWRITING MANUAL ¶ 935 (1938) (¶ 980 contained a model racial restrictive covenant). Although the 1947 manual removed the racial provision, restrictive covenants and homogeneity were advocated to protect property values. FHA, UNDERWRITING MANUAL § 1303(b) (1947). J. KUSHNER, *supra* note 5, at 22; R. WEAVER, THE NEGRO GHETTO 70-73, 152-53 (1948); Dean, *None Other than Caucasian: A Study of Race Covenants*, 23 J. LAND & PUB. UTIL. ECON. 428, 430 (1947) (avoidance of "adverse influences" in underwriting manual interpreted by FHA as a reference to integration).



lowed despite changes in the law. Even today HUD's housing programs are marked by racial segregation in site selection and marketing.<sup>54</sup> Currently, segregation is increased by the plight of virtually all rent supplement recipients who manage to locate housing only in neighborhoods where they are in the racial majority.<sup>55</sup> The federal highway program also helped fund the segregated suburban exodus. In addition, state and local highway and urban renewal programs produced massive relocation which resettled white displacees in suburbia and blacks in the increasingly concentrated minority sections of central cities.<sup>56</sup> An audit of current governmental spending, taxation, and other policies would disclose a pattern of programs and policies that carry a segregating impact and would implicate the federal government as the primary contributor to and implementor of segregation.<sup>57</sup> Tragically, every administration since President Eisenhower has failed to seek desegregation aggressively in the public housing program.<sup>58</sup>

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54. J. KUSHNER, *supra* note 5, at 33-37; J. KUSHNER, *supra* note 14, § 7.02; *see also* cases cited *infra* note 135.

55. *E.g.*, D. FALK & H. FRANKLIN, EQUAL HOUSING OPPORTUNITY 22-30 (1976); Bullard, *Does Section 8 Promote an Ethnic and Economic Mix?*, 35 J. HOUSING 364 (1978) (stating that an ethnic and economic mix does not exist in Houston); Kushner & Keating, *The Kansas City Housing Allowance Experience: Subsidies for the Real Estate Industry and Palliatives for the Poor*, 7 URB. LAW. 239 (1975); McGee, *Power(lessness) and Dispersion: Comments on Chester McGuire's The Urban Development Act of 1974, Community Development Funds and Black Economic Problems*, 5 BLACK L.J. 39, 44 (1976); Comment, *Symbolic Gestures and False Hopes: Low-Income Housing Dispersal After Gautreaux and the Housing and Development Act of 1974*, 21 ST. LOUIS U.L.J. 759 (1978); *see also Study Recommends Curbs on In-Place Section 8 Leasing*, 5 [Current Developments] Hous. & Dev. Rep. (BNA) 1002 (1978) (no integration under Cleveland program). In 1987, Congress provided that applicants for subsidized § 8 housing may use their certificates anywhere in the same or contiguous metropolitan statistical area. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 145, 101 Stat. 1815, 1852 (1988) (amending scattered sections of 12 U.S.C. and 44 U.S.C.). *But cf.* Gray & Tursky, *Location and Racial/Ethnic Occupancy Patterns for HUD-Subsidized Family Housing in Ten Metropolitan Areas*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 15, at 235, 248-51 (raising possibility of higher levels of integration under the § 8 existing housing program than that under prior HUD construction programs, albeit based on census tracts, which are acknowledged to be poor indicators of neighborhood). Accord Stucker, *Race and Residential Mobility—The Effects of Housing Assistance Programs on Household Behavior*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 15, at 253.

56. J. KUSHNER, *supra* note 5, at 37-44; Kushner & Werner, *Illusory Promises Revisited: Relocation Planning and Judicial Review*, 8 SW. U.L. REV. 751 (1976). Federal transportation subsidy recipients should be required to coordinate a land use and housing plan to assure accessibility to affordable housing and transit, and to include appropriate affirmative action mechanisms to encourage and assure integrated housing and neighborhood patterns. *See* Freilich & Chinn, *Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques*, 55 U. MO. K.C. L. REV. 153 (1987); Kushner, *supra* note 31; Kushner, *Urban Transportation Planning*, 4 URB. L. & POL'Y 161 (1981).

57. J. KUSHNER, *supra* note 5, at 56-64; Kushner, *supra* note 31.

58. *See, e.g.*, *HUD Plans Cautious Moves Toward Public Housing Integration Knapp Tells NAHRO*, 12 [Current Developments] Hous. & Dev. Rep. (BNA) 381 (1984); *see also Segregation in Public Housing Found Worse Than in Private Complexes*, 3 Fair Hous.-Fair Lending Rep. (P-H) ¶ 3.5 (1987) (two Kentucky counties); *Studies Find Widespread Segregation in Federally Aided*

Ironically, *Brown v. Board of Education*,<sup>59</sup> though invalidating intentionally segregated public schools, encouraged white flight to the suburbs and their new, all-white school districts, while urban districts were taken to court to accomplish the promise of *Brown*.<sup>60</sup> The Supreme Court's ruling in *Milliken v. Bradley*,<sup>61</sup> which limited urban school remedies to the urban district absent a finding of a violation by the suburban districts, insulated the white suburbs from busing and further encouraged the establishment of separate societies. Blacks, long denied home ownership in general, and more particularly ownership in the real estate markets that enjoy the greatest property value appreciation and access to the best schools, failed to participate in the real estate boom that has so separated the wealthy white home-owning population from the relatively impoverished black renter population.<sup>62</sup> Class as well as race has solidified the foundation of separation. The continuing pervasive pattern of discrimination in the marketing of housing prevents any significant reversal of this division.<sup>63</sup>

Although the Supreme Court will look to the purpose behind the passage of a law and will invalidate a provision originally passed for a discriminatory purpose despite the neutral, even nondiscriminatory contemporary impact,<sup>64</sup> the Court has not inquired into the sordid origins of apartheid. The causes are more easily treated as "unknown and . . . unknowable," like some pre-Columbian ritual.<sup>65</sup> Nevertheless, *Milliken v. Bradley* allows an investigation to determine if the state's actions led to segregated schools,<sup>66</sup> if suburban school districts participated in the segregating violation,<sup>67</sup> if district boundaries were gerrymandered to maintain segregated schools,<sup>68</sup> and even if central city

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*Housing*, 3 Fair Hous.-Fair Lending Rep. (P-H) ¶ 2.3 (1987) (Baltimore); Flournoy & Rodrigue, *Separate and Unequal*, Dallas Morning News, Feb. 10-17, 1985.

59. 347 U.S. 483 (1954).

60. J. COLEMAN, S. KELLY & J. MOORE, *TRENDS IN SCHOOL SEGREGATION, 1968-73* (1975); J. KUSHNER, *supra* note 5, at 29 (collecting studies supporting and disputing the significance of "white flight").

61. 418 U.S. 717 (1974). In refusing to equalize district school funding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1983), the Burger Court approved of racially "separate and unequal" schools, and thus neighborhoods, in a cruel and ironic play on the discredited *Plessy* doctrine. *Milliken*, 418 U.S. at 759-61 (Douglas, J., dissenting).

62. Bullard, *Blacks and the American Dream of Housing*, in *RACE, ETHNICITY*, *supra* note 28, at 53, 63 (denial of basic form of wealth accumulation); Kain & Quigley, *Housing Market Discrimination, Homeownership and Savings Behavior*, 62 AM. ECON. REV. 263 (1972).

63. Galster, *supra* note 23, in *HOUSING DESEGREGATION AND FEDERAL POLICY*, *supra* note 15, at 131-34.

64. See *Hunter v. Underwood*, 471 U.S. 222 (1985) (convict disenfranchisement).

65. *Milliken*, 418 U.S. at 756 n.2 (Stewart, J., concurring).

66. *Id.* at 748-51; *id.* at 755 (Stewart, J., concurring).

67. *Id.* at 745.

68. *Id.* at 748-49; *id.* at 755 (Stewart, J., concurring).

school district violations carried a segregative impact in the suburbs.<sup>69</sup> In *United States v. Yonkers Board of Education*,<sup>70</sup> proof centered both on traditional school violations and on the city's segregated site selection for public housing. Although relief has been minimal, the *Yonkers* case has established the principle that publicly caused segregated housing patterns may permit desegregation remedies. *Hills v. Gautreaux*<sup>71</sup> similarly approved a metropolitan-wide remedy following segregated public housing site selection in Chicago; the remedy, however, was totally dependent on congressionally approved housing subsidies—an endangered species during the Reagan years.

Existing segregation in housing patterns discourages prospective residents from choosing integrated housing. Whites seeking predominantly white neighborhoods and school districts pay a premium to live in segregated communities. Interestingly, the desirability of such areas further encourages segregated living patterns because these areas offer the greatest investment opportunity and display the highest equity appreciation. Many blacks understandably fear the role of urban pioneer because they often would be the lone black family in the neighborhood, their children isolated and identifiable in the schools, and their families prey to suspicious neighbors, merchants, and police. However exaggerated such images may be, only those minority group members committed to enjoying the best schools, safest neighborhoods, and the best housing investments—typically those professionals who have experienced integrated living patterns in the workplace or university and who possess the considerable price of admission—are willing to venture from traditional neighborhoods. On the other hand, white demand for housing in traditionally black neighborhoods is even lower than the limited supply of opportunities for integrated living patterns. Thus, any hope for integration through natural market forces, even with the presence of aggressive fair housing enforcement, is simply nonexistent.

Ironically, integration is likely to be facilitated only through affirmative action, ranging from race-conscious affirmative marketing, subsidies, and housing access priority to the classic integration maintenance quota that was utilized at Starrett City, New York.<sup>72</sup> The integration conundrum is that integration can become a reality only through the implementation of discrimination. Integration levels may be increased only slightly by eliminating discrimination through fair housing

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69. *Id.* at 745.

70. 801 F.2d 593 (2d Cir. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

71. 425 U.S. 284 (1976).

72. *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988); *see also infra* Part VIII, subpart C.

enforcement.<sup>73</sup>

Affordable housing shortages, occurring in many American cities because of the decline in lower income housing starts and the depletion of the existing housing stock through abandonment, demolition, and conversion to condominiums or other such properties, have increased dramatically the competition for housing. Shortages have escalated rents, facilitated landlord discrimination, and spawned the tragedy of homelessness. Renewed housing production and a housing subsidy program is needed simultaneously to house the Nation and to reduce levels of discrimination. Production, however, presents alternative dilemmas. First, the subsidy and tax incentives for rental housing in existence for the past two decades may have generated new households: the elderly, gays, separated families, and singles, all of whom proliferated in the past generation and further tightened a housing stock with few vacancies. In short, more production may generate more households. Second, production has not generated integration. Projects built in the suburbs are virtually all-white in occupancy, while urban projects, because they have tended to be sited in minority neighborhoods, have been destined to become all-minority occupied. The effort to dismantle suburban exclusionary zoning actually extended segregated living patterns by often housing lower income whites who otherwise may have remained in the city and its school district. The production-integration nexus may require affirmative action programs to assure that housing production does not continue to be a segregative force.

Even as the Nation moved toward healing its racial problems during the civil rights movement of the 1960s and commenced the needed war on poverty, the forces of segregation were at full steam, generating the seas of suburban subdivisions that surrounded the remains of a depopulating central city. The extraordinary advances of racial minorities in education and employment have been short lived.<sup>74</sup> The green of fiscal support has followed the white affluent population to the suburbs. Better schools and housing, together with the plants and offices of major employers, are now typically located outside the city. Segregated

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73. Galster, *supra* note 23, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 15, at 134.

74. Johnston, *Family Income Climbs, But Not Among Blacks*, L.A. Times, Sept. 1, 1988, pt. I, at 21, col. 1 (reporting that family income increased overall in 1987 by 1%, per capita by 1.6%, but declined for blacks and Latinos; poverty rate for blacks increased from 31.1% to 33.3%, while the rate was 13.5% for the Nation overall); Kushner, *supra* note 31, at 232 n.91; May, *Blacks Look Back with Anger at Reagan Years*, L.A. Times, Jan. 20, 1989, pt. I, at 1, col. 5 (poverty rate rose to 33.1% with drastic program reductions); *Black Male College Enrollment Declines*, L.A. Times, Jan. 16, 1989, pt. I, at 2, col. 3 (despite growth in total enrollment, over last decade from 11 to 12.5 million, black male enrollment fell from 470,000 to 436,000, or from 4.3 to 3.5%, with black women rising from 5.1 to 5.2%).

neighborhoods generate racial stereotyping and fear of the unknown; that fear breeds dislike, if not hatred. Employment decisions are affected by the conscious or subconscious discomfort of whites or minorities when interviewing for jobs. Some hope that a separate black community might foster strengthened economic networks and opportunities. If that dream is not fulfilled, separate societies will further widen the class gap between the races. Urban unrest, failure, and violence is a direction from which this Nation must turn. Society is moving toward either heightened segregation or integration. Few would dispute which course is the more dangerous and tragic.

#### IV. PRE-1988 PRIVATE FAIR HOUSING ENFORCEMENT

Private parties had two basic alternatives for enforcing federal fair housing laws prior to passage of the Fair Housing Amendments Act of 1988: (1) the administrative conciliation complaint procedure created by section 810 of Title VIII;<sup>75</sup> and (2) judicial action in either federal or state court. The federal court option is a direct judicial action under the former section 812 of Title VIII,<sup>76</sup> which was typically joined in cases involving racial and ethnic-based bias with a claim under section 1982.<sup>77</sup> In addition, enforcement under state or local fair housing laws could be achieved by either filing directly with the state or local agency, having a section 810 complaint referred to a state or local HUD-certified agency, bringing a direct lawsuit authorized by the state in state court, or attaching the state claim as a pendent claim in a federal fair housing lawsuit.

##### A. Administrative Conciliation

Although HUD has received an increasing number of administrative complaints,<sup>78</sup> its procedures have been largely ineffectual because

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75. 42 U.S.C. § 3610 (1982).

76. *Id.* § 3612 (1982 & Supp. IV 1986).

77. *Id.* § 1982.

78. HUD received 4658 complaints during fiscal year 1988, referring 3308 cases to state and local agencies; HUD successfully conciliated 214 complaints and state and local agencies 908 complaints. *HUD Releases FY 1988 Complaint Statistics*, 4 Fair Hous.-Fair Lending Rep. (P-H) ¶ 8.11 (1989). HUD received 4699 § 810 fair housing complaints in 1987, with referral of 2770 to certified state and local agencies. 134 CONG. REC. S10,456 (daily ed. Aug. 1, 1988) (statement of Sen. Kennedy); see also *Residential Segregation Stifling Black Advancement, Professor Testifies*, 15 [Current Development] Hous. & Dev. Rep. (BNA) 695 (1988). In 1977, by comparison, about 3391 complaints were filed with HUD. Of these, 277 were successfully conciliated, and of those, in only about one-fourth of the cases was the contested housing obtained by the victim of discrimination. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 29, 32 (1979); see also GENERAL ACCOUNTING OFFICE, STRONGER FEDERAL ENFORCEMENT NEEDED TO UPHOLD FAIR HOUSING LAWS 27 (1978); *Administration Ready to Propose Own Broadened Fair Housing Legislation*, 10 [Current Developments] Hous. & Dev. Rep. (BNA) 1126 (1983) [hereinafter *Administra-*

few of these complaints were referred to the Justice Department for pattern and practice litigation<sup>79</sup> and only a small number were resolved through the voluntary conciliation proceeding authorized under section 810 of Title VIII.<sup>80</sup> If a jurisdiction has a fair housing law certified by HUD as being the substantial equivalent of Title VIII, HUD has referred the complaints in that jurisdiction to state or local agencies for conciliation or other proceedings.<sup>81</sup>

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*tion Ready to Propose*] (reporting that in 1982, of 5112 complaints, about 1300 were chosen for conciliation and 1070 cases were actually resolved by conciliation). For a discussion on limited enforcement, see *The Fair Housing Amendments Act of 1979: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) [hereinafter *Senate Hearings*]; *Fair Housing Amendments Act of 1979: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1979); and Effron, *Fair Housing Rises in Importance as Civil Rights Issue*, L.A. Daily J., May 9, 1983, at 1, col. 6, at 14, col. 3 (reporting that only six new cases had been filed since President Reagan took office). See *Fair Housing Experts Back Stronger Enforcement of Anti-Bias Laws*, 11 [Current Developments] Hous. & Dev. Rep. (BNA) 390 (1983) (testimony before United States Civil Rights Commission); Kemp, *The 1968 Housing Act: Have Its Goals Been Accomplished?*, 14 REAL ESTATE L.J. 327, 331 (1986) (no viable HUD agreement authority); Waldrop, *Enforcement of the Fair Housing Act: What Role Should the Federal Government Play?*, 74 Ky. L.J. 201 (1985-86); cf. CITIZENS COMM'N ON CIVIL RIGHTS, A DECENT HOME: A REPORT ON THE CONTINUING FAILURE OF THE FEDERAL GOVERNMENT TO PROVIDE EQUAL HOUSING OPPORTUNITY (1983); *Civil Rights Enforcement in General Revenue Sharing Program Criticized in Report*, 11 [Current Developments] Hous. & Dev. Rep. (BNA) 792 (1984) (House Judiciary Committee study citing interoffice feuds and sloppy investigation); McGrew, Collier & Forrest, *Fair Housing: An Agenda for the Washington Lawyers' Committee for Civil Rights*, 27 How. L.J. 1291 (1984); *Organizations Blame HUD, Congress for Increase in Housing Segregation*, 13 [Current Developments] Hous. & Dev. Rep. (BNA) 747 (1986) (site selection, tenant assignment, and poor fair housing enforcement); Rice, *Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendments Act of 1983 Would Eliminate*, 27 How. L.J. 226 (1984); Flournoy & Rodrigue, *Separate and Unequal*, Dallas Morning News, Feb. 10-17, 1985.

79. Between the passage of Title VIII in 1968 and 1980, the Justice Department brought about 300 lawsuits. See *Fair Housing Amendments Act of 1980*, H.R. REP. NO. 865, 96th Cong., 2d Sess. 4 (1980); G. METCALF, *FAIR HOUSING COMES OF AGE 17* (1988) (reporting 300 total cases following passage or 32 cases per year, 66 cases or 16 per year under the Carter Administration, while under the Reagan Administration no cases in 1981, 2 in 1982, and 5 cases initiated in 1983); G. ORFIELD, *MUST WE BUS?*, *supra* note 21, at 90 (indicating only 23 complaints per year processed by the Justice Department with no complaints ever having been processed from "a number of" states); U.S. COMM'N ON CIVIL RIGHTS, *THE STATE OF CIVIL RIGHTS 1979* (1980) (indicating that the Justice Department handles about 32 cases per year); see also *DOJ Civil Rights Division Sums Up FY '87*, 3 Fair Hous.-Fair Lending Rep. (P-H) ¶ 9.6 (1988) (filing of 25 lawsuits in 11 states, 17 of which were brought under Title VIII; investigations in 200 cases, victories in two cases, one of which was the invalidation of integration maintenance policies in Starrett City, and 25 consent decrees obtained, 10 of which involved rental housing bias); *Justice Department, Massachusetts Agency Form Fact on Housing Discrimination Cases*, 12 [Current Developments] Hous. & Dev. Rep. (BNA) 185 (1984) (Justice Department to prosecute several state-prepared cases); *infra* note 82 (noting when Title VIII's criminal punishment alternative applies).

80. See *supra* note 79.

81. Thirty-eight states and eighty-four units of local government have been certified as having laws substantially equivalent to Title VIII; another fourteen units of local government have applications pending. 24 C.F.R. § 115.6(e)(1) (1987), amended by 53 Fed. Reg. 260, 23,757, 26,318, 41,630 (1988), and 52 Fed. Reg. 15,304, 29,038, 41,410 (1987); see *Residential Segregation Stifling*

### B. Judicial Action

There are three techniques for private judicial enforcement of fair housing laws: (1) citizen lawsuits under section 812 of Title VIII, (2) alternative claims under section 1982, and (3) suits commenced under state or local laws.<sup>82</sup> Although judicial enforcement occasionally has been effective in securing access to denied dwellings, halting segregative zoning practices, and providing substantial damages and attorney's fees in well-litigated cases, the impact of judicial enforcement has been significant only in creating a body of precedent favorable to litigation and in rewarding the rare litigant. Very few lawyers are interested and versed in fair housing litigation, and few victims of discrimination are both aware of their victimization and willing to press their claims to litigation. The results of litigation, while often dramatic in individual cases, have appeared too sporadically to deter housing providers from engaging in widespread discriminatory behavior. Moreover, most reported decisions and settlements come from a small number of metropolitan areas marked by the presence of competent attorneys dedicated to litigating fair housing cases.

#### 1. Standing

The United States Supreme Court has given standing under Title VIII the broadest possible definition consistent with article III.<sup>83</sup> Anyone aggrieved may bring suit, not simply the victim of a denial of housing. Testers,<sup>84</sup> community residents,<sup>85</sup> fair housing organizations,<sup>86</sup> real

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*Black Advancement, Professor Testifies*, 15 [Current Developments] *Hous. & Dev. Rep.* (BNA) 695 (1988). Should HUD's proposed Title VIII regulations be made final, 88 states and localities would enjoy certification. 53 *Fed. Reg.* 44,992, 45,019-20 (1988).

82. The Justice Department may also bring civil suits on pattern and practice grounds, or criminal charges. Title VIII's criminal punishment alternative applies in cases involving force or the threat of force and the willful threat or actual injury, intimidation, or interference with fair housing rights. See 42 U.S.C. § 3631 (1982); see also *United States v. Gilbert*, 813 F.2d 1523 (9th Cir.), *cert. denied*, 108 S. Ct. 173 (1987); *United States v. White*, 788 F.2d 390 (6th Cir. 1986); *United States v. Redwine*, 715 F.2d 315 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984); *United States v. Johns*, 615 F.2d 672 (5th Cir.), *cert. denied*, 449 U.S. 829 (1980); *United States v. Anzalone*, 555 F.2d 317 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); J. KUSHNER, *supra* note 14, at §§ 3.67-3.71.

83. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 96-97 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972).

84. See *Havens*, 455 U.S. at 363; *Gladstone*, 441 U.S. at 91. *But cf. Nur v. Blake Dev. Corp.*, 655 F. Supp. 158 (N.D. Ind. 1987) (finding neither Title VIII nor § 1982 standing for nonminority, nonneighborhood, local commission-employed testers).

85. See *Heights Community Congress v. Hilltop Realty*, 774 F.2d 135 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *Smith v. City of Cleveland Heights*, 760 F.2d 720 (6th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); *Broadmoor Improvement Ass'n v. Stan Weber & Assocs.*, 597 F.2d 568 (5th Cir. 1979) (*per curiam*); *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (*en banc*).

estate professionals,<sup>87</sup> and units of local government<sup>88</sup> are permitted to bring suit and obtain relief. Standing under section 1982 is likely to be limited to plaintiffs who can satisfy the Supreme Court's prudential standing requirement by showing<sup>89</sup> that they have suffered a specific injury at the hands of the defendant and that the injury is one for which the court can provide redress.<sup>90</sup> This issue has not been reached

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(standing in white property owner to challenge filing of racially restrictive deeds); *Project Basic Tenants Union v. Rhode Island Hous. & Mortgage Fin. Corp.*, 636 F. Supp. 1453 (D.R.I. 1986); *NAACP v. Harris*, 567 F. Supp. 637 (D. Mass. 1983), *remanded sub nom. NAACP v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987); *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980); *Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D. Wis. 1980) *Heights Community Congress v. Rosenblatt Realty*, 73 F.R.D. 1 (N.D. Ohio 1975); *see also Residents of Cincinnati Public Housing Have Standing To Challenge HUD, CMHA's Policies*, 11 [Current Developments] *Hous. & Dev. Rep. (BNA)* 285 (1983) (discussing *Hutchins v. Cincinnati Metro. Hous. Auth.*, No. C-1-79-131 (S.D. Ohio Aug. 15, 1983)). *But see Turner v. A.B. Carter, Inc.*, 85 F.R.D. 360 (E.D. Va. 1980); *cf. Coalition of Bedford-Stuyvesant Block Ass'n v. Cuomo*, 651 F. Supp. 1202 (E.D.N.Y. 1987) (holding no standing in resident to challenge siting of shelters for the homeless absent pattern of segregation, discriminatory impact, or housing denial); *National Urban League v. Office of the Comptroller of the Currency*, 78 F.R.D. 543 (D.D.C. 1978) (no general standing in national organization).

86. *See Saunders v. General Servs. Corp.*, 659 F. Supp. 1042 (E.D. Va. 1986) (disruption of group activities); *Mealing v. Liu*, *Fair Hous.-Fair Lending Rep. (P-H)* ¶ 15,538 (E.D.N.Y. 1986); *Education/Instruction, Inc. v. Copley Management & Dev. Corp.*, *Fair Hous.-Fair Lending Rep. (P-H)* ¶ 15,530 (D. Mass. 1984); *Housing Council v. Eastern Bergen County Multiple Listing Serv.*, 422 F. Supp. 1071 (D.N.J. 1976). *But see Anderson v. City of Alpharetta*, 770 F.2d 1575 (11th Cir. 1985) (holding 265 square mile county too extensive to allow *Havens* neighborhood standing); *South Suburban Hous. Center v. Santefort Real Estate*, 658 F. Supp. 1450 (N.D. Ill. 1987) (unclear if distinguishing Title VIII from constitutional standard); *Williams v. Adams*, 625 F. Supp. 256 (N.D. Ill. 1985) (holding that aggrieved party must allege injury to organization or members, not simply frustration of group's activities).

87. *See Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977) (intervention); *Smith v. Stechel*, 510 F.2d 1162 (9th Cir. 1975); *Wilkey v. Pyramid Constr. Co.*, 619 F. Supp. 1453 (D. Conn. 1985); *Williams v. Miller*, 460 F. Supp. 761 (N.D. Ill. 1978), *aff'd mem.*, 614 F.2d 775 (7th Cir. 1979); *Tokaji v. Toth*, 1 *Eq. Opportunity Hous. Rep. (P-H)* ¶ 13,679 (N.D. Ohio 1974); *Riddick v. Hill*, 1 *Eq. Opportunity Hous. Rep. (P-H)* ¶ 13,628 (N.D. Cal. Oct. 28, 1973).

88. *See Heights Community Congress v. Hilltop Realty*, 774 F.2d 135 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *Village of Bellwood v. Gladstone, Realtors*, 569 F.2d 1013 (7th Cir. 1978), *modified*, 441 U.S. 91 (1979); *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321 (N.D. Ill. 1979); *Village of Park Forest v. Fairfax Realty*, 1 *Eq. Opportunity Hous. Rep. (P-H)* ¶ 13,699 (N.D. Ill. Jan. 28, 1975), *subsequent proceedings*, 1 *Eq. Opportunity Hous. Rep. (P-H)* ¶ 13,784 (N.D. Ill. Aug. 9, 1976); *cf. City of New York v. Fillmore Real Estate, Ltd.*, 665 F. Supp. 178 (E.D.N.Y. 1987) (holding that city suffering segregation and loss of tax revenues enjoys § 1982 standing to challenge real estate steering).

89. *Allen v. Wright*, 468 U.S. 737 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975).

90. *Gladstone*, 441 U.S. at 116 n.33, 120 (Rehnquist, J., dissenting) (although specific issue was not reached by the Court, only Justice Rehnquist argued that § 1982 is governed by constitutional test under *Warth*, 422 U.S. at 490); *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042 (E.D. Va. 1986); *Davis v. The Mansards*, 597 F. Supp. 334, 347 (N.D. Ind. 1984) (no tester standing); *Malone v. City of Fenton*, 592 F. Supp. 1135, 1154, 1156 n.12 (E.D. Mo. 1984), *aff'd mem.*, 794 F.2d 680 (8th Cir. 1986). Many courts, however, have applied the Title VIII standard in § 1982 cases. *See Watts v. Boyd Properties, Inc.*, 758 F.2d 1482 (11th Cir. 1985); *Fillmore Real Estate*, 665 F. Supp. at 178; *Village of Bellwood v. Gorey & Assocs.*, 664 F. Supp. 320 (N.D. Ill. 1987); *Old*



because typically the plaintiff simultaneously brings the case under Title VIII.

The breadth of the standing rulings suggests various innovative strategies for fair housing enforcement in its second generation.<sup>91</sup> The Supreme Court appointment of Justice Kennedy, however, whose vote has enabled the Court to reconsider the extent to which the early civil rights statutes may reach private conduct,<sup>92</sup> suggests that the Rehnquist Court may, as a revisionist forum, reverse many civil rights advances of the past generation. Justice Kennedy may urge reconsideration of broad standing in fair housing cases both to advance what appears to be his own conservative civil rights agenda<sup>93</sup> and to

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West End Ass'n v. Buckeye Fed. Sav. & Loan Ass'n, Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,548 (N.D. Ohio Mar. 25, 1986); see also Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894 (3d Cir. 1977).

91. See *infra* notes 245-56 and accompanying text (suggesting, for example, litigation by private nonprofit organizations in small claims court to reach a broader target).

92. Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987) (No. 87-107), *reargument docketed*, 108 S. Ct. 1419 (1988) (No. 87-107) (*per curiam*) (restoration to docket for oral argument) (holding that a racial workplace harassment rule is not covered by § 1981); Reidinger, Runyon *Under the Gun*, 74 A.B.A. J., Nov. 1988, at 78; Savage, *Split Court Reopens '76 Rights Case*, L.A. Times, Apr. 26, 1988, pt. I, at 1, col. 1 (Kennedy casting deciding vote on Court's own initiative to reconsider Runyon v. McCrary, 427 U.S. 160 (1976)). The Court has heard oral argument. *McLean*, 57 U.S.L.W. 3292 (U.S. Oct. 12, 1988) (No. 87-107).

93. See American Fed'n of State, County & Mun. Employees v. Washington, 770 F.2d 1401, 1407-08 (9th Cir. 1985) (refusing to apply Title VII employment disparate impact analysis except as to specific employer practice, thus refusing to apply to sex-based comparable worth policies in cases such as those in which specific job descriptions are paid according to market rates reflecting sex-segregated job classification); Mountain View-Los Altos Union High School Dist. v. Sharron, 709 F.2d 28 (9th Cir. 1983) (narrow construction of Education for All Handicapped Children Act, refusing to allow parents to transfer their handicapped child and then seek reimbursement from school district while an administrative proceeding was pending, an interpretation unanimously rejected in *School Comm. v. Department of Educ.*, 471 U.S. 359 (1985)); *Gerdom v. Continental Airlines*, 692 F.2d 602, 610 (9th Cir. 1982) (*en banc*) (joining dissent from invalidation of rule imposing strict weight requirements on female flight hostesses), *cert. dismissed*, 460 U.S. 1074 (1983); *Aranda v. Van Sickle*, 600 F.2d 1267, 1275 (9th Cir. 1979) (Kennedy, J., concurring) (interpreting facts as failing extraordinarily difficult test to permit challenges to at-large elections, resulting in minority vote dilution), *cert. denied*, 446 U.S. 951 (1980); *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring) (restrictive view of continued jurisdiction in school desegregation cases). *But cf.* *New York State Club Ass'n Inc. v. City of New York*, 108 S. Ct. 2225 (1988) (Justice Kennedy joining opinion that held large private clubs subject to local public accommodations nondiscrimination obligations). Justice Kennedy may be characterized as "mainstream" based upon his several equal protection opinions that tended to follow in lock step with Supreme Court precedent. See *Sullivan v. Immigration & Naturalization Serv.*, 772 F.2d 609 (9th Cir. 1985) (upholding deportation of gay despite hardship, relying on statutory grounds and not reaching the equal protection issue); *Beller v. Middendorf*, 632 F.2d 788, 801 n.8, 807 (9th Cir. 1980) (examining military discharge for homosexual activities following a three-tier, traditional model, acknowledging that the fifth amendment includes equal protection and that consensual homosexual conduct may be protected as a fundamental right), *cert. denied*, 452 U.S. 905 (1981); *Tsosie v. Califano*, 630 F.2d 1328 (9th Cir. 1980) (upholding denial of Social Security benefits for child adopted by surviving spouse after death of eligible wage earner, despite child in home and supported for 11 years prior to death, applying rational basis test), *cert. denied*,

vindicate the limited standing ruling he authored on the Ninth Circuit<sup>94</sup>—a ruling discredited by a later Burger Court decision.<sup>95</sup>

## 2. Proof of Violations

Although section 1982 probably requires proof of intentional or purposeful discrimination to make the plaintiff's prima facie case,<sup>96</sup>

451 U.S. 940 (1981); *In re Paris Air Crash*, 622 F.2d 1315, 1320 (9th Cir.) (traditional rational basis deference to the denial of punitive damages in wrongful death actions), *cert. denied*, 449 U.S. 976 (1980); *Flores v. Pierce*, 617 F.2d 1386 (9th Cir.) (reviewing discriminatory denial of liquor licences to Mexican-Americans through circumstantial proof of intent), *cert. denied*, 449 U.S. 875 (1980); *James v. Ball*, 613 F.2d 180 (9th Cir. 1979) (applying one person-one vote to large water district), *aff'd*, 451 U.S. 355 (1981); *Fisher v. Reiser*, 610 F.2d 629 (9th Cir. 1979) (sustaining denial of workers' compensation cost-of-living adjustment to nonresidents), *cert. denied*, 447 U.S. 930 (1980); *United States v. Smith*, 574 F.2d 988 (9th Cir.) (applying rational basis test, failing to find male prisoner sodomy statute sex-based, assimilating state law, resulting in higher penalty than federal statute covering male rape of female), *cert. denied*, 439 U.S. 852 (1978).

94. *TOPIC v. Circle Realty Co.*, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976) (neighborhood residents denied standing to challenge discrimination, the court treating claims as those of third parties attempting to raise claims of others).

95. *Gladstone*, 441 U.S. at 115; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

96. *See Vaughner v. Pulito*, 804 F.2d 873, 877 (5th Cir. 1986) (requiring intent under Title VIII as well); *Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982) (assuming intent); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816 (10th Cir. 1981); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Old West End*, 675 F. Supp. at 1100 (proving intent by circumstantial evidence); *Huertas v. East River Hous. Corp.*, 674 F. Supp. 440 (S.D.N.Y. 1987) (proving intent by disparate treatment); *Pollitt v. Bramel*, 669 F. Supp. 172 (S.D. Ohio 1987) (proving intent by disparate treatment); *Huntington Branch, NAACP v. Town of Huntington*, 668 F. Supp. 762 (E.D.N.Y. 1987) (requiring more than effects), *rev'd on other grounds*, 844 F.2d 926 (2d Cir.), *aff'd per curiam on other grounds*, 109 S. Ct. 276 (1988); *Fillmore Real Estate*, 665 F. Supp. at 178 (implying intent); *Nur v. Blake Dev. Corp.*, 655 F. Supp. 158 (N.D. Ind. 1987) (proving intent by disparate treatment); *Coalition of Bedford-Stuyvesant Block Ass'n, Inc. v. Cuomo*, 651 F. Supp. 1202 (E.D.N.Y. 1987) (proving intent by impact); *Givens v. Department of Hous. & Urban Dev., Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,528* (N.D. Tex. 1985); *Rogers v. 66-36 Yellowstone Blvd. Coop. Owners, Inc.*, 599 F. Supp. 79 (E.D.N.Y. 1984); *Malone v. City of Fenton*, 592 F. Supp. 1135 (E.D. Mo. 1984), *aff'd mem.*, 794 F.2d 680 (8th Cir. 1986); *Kaplan v. 442 Wellington Coop. Bldg. Corp.*, 567 F. Supp. 53 (N.D. Ill. 1983); *DeFrank v. Pawlosky*, 480 F. Supp. 115 (W.D. Pa. 1979), *aff'd mem.*, 633 F.2d 209 (3d Cir. 1980); *Fred v. Kokinokos*, 347 F. Supp. 942 (E.D.N.Y. 1972). *But see Evans v. Tubbe*, 657 F.2d 661 (5th Cir. Unit A Sept. 1981) (treating claim as if Title VIII); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980); *Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977); *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); *Thomas v. First Fed. Sav. Bank*, 653 F. Supp. 1330 (N.D. Ind. 1987); *Metro Fair Hous. Servs., Inc. v. Morrowood Garden Apartments Ltd.*, 576 F. Supp. 1090 (N.D. Ga. 1983) (disparate treatment), *rev'd on other grounds sub nom. Watts v. Boyd Properties, Inc.*, 758 F.2d 1482 (11th Cir. 1985); *Harris v. Wissert*, 514 F. Supp. 1153 (E.D. Wis. 1981); *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980); *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *Wainwright v. Allen*, 461 F. Supp. 293 (D.N.D. 1978), *aff'd mem.*, 605 F.2d 1209 (8th Cir. 1979); *cf. General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (requiring intent under § 1981). For a criticism of the Court's rationale, *see J. KUSHNER, supra note 14, at 66. But cf. City of Memphis v. Greene*, 451 U.S. 100, 129-35 (1981) (White, J., concurring). In *Greene* Justice White

claimants in Title VIII actions need merely to demonstrate that an action or practice carries a discriminatory<sup>97</sup> or segregative<sup>98</sup> impact in order to shift the burden to the defendant. Alternatively, when a single plaintiff claims a housing denial without regard to a policy or pattern, the plaintiff establishes a prima facie case by proof of disparate treatment,<sup>99</sup> typically a denial to an eligible minority applicant followed by a subsequent transfer to another party or the continued availability of the dwelling in the market.<sup>100</sup>

In *Town of Huntington v. Huntington Branch, NAACP*,<sup>101</sup> the Supreme Court, in a per curiam opinion, refused to reach the issue of the appropriateness of the above "disparate impact" or "effects" test, but found it satisfied by suburban exclusionary zoning. The record disclosed apartment exclusion from all suburban neighborhoods of a town of two hundred thousand. The case arose from the town's refusal to rezone a parcel for multifamily use. The only section of the virtually all-white town that permitted apartments was a central city urban renewal area located inside the only census tract occupied by a significant number of

rejected street closing claim for lack of racial impact on property values, but Justice White went on to specify the need to prove intent. *Id.* Justices Marshall, Brennan, and Blackmun rejected the White view. *Id.* at 148-49 n.4 (Marshall, J., dissenting).

97. *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (implicit), *aff'g* 618 F. Supp. 1133 (C.D. Cal. 1985); *Huntington*, 844 F.2d at 934-35; *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988); *Hanson v. Veterans Admin.*, 800 F.2d 1381 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982); *City of Parma*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment).

98. *Volpe*, 858 F.2d at 467 (implicit); *Huntington*, 844 F.2d at 937-38; *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988); *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207 (7th Cir. 1984) (insufficient proof of impact); *United States v. City of Birmingham*, 727 F.2d 560 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984); *Hope, Inc. v. County of DuPage*, 717 F.2d 1061 (7th Cir. 1983), *rev'd on rehearing*, 738 F.2d 797 (7th Cir. 1984) (en banc) (vacated for lack of standing); *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *City of Parma*, 661 F.2d at 562; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Suffolk Hous. Servs. v. Town of Islip, Fair Hous.-Fair Lending Rep. (P-H)* ¶ 15,577 (E.D.N.Y. 1987).

99. *Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985); *Houston v. Benttree, Ltd.*, 637 F.2d 739 (10th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979); *Duckett v. Silberman*, 568 F.2d 1020 (2d Cir. 1978); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976); *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); *Old West End Ass'n v. Buckeye Fed. Sav. & Loan Ass'n*, 675 F. Supp. 1100 (N.D. Ohio 1987); *cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (employment).

100. *E.g., Svatik*, 779 F.2d at 383; *12 Lofts Realty*, 610 F.2d at 1032; *Williams*, 499 F.2d at 819.

101. 109 S. Ct. 276 (1988) (per curiam), *aff'g* 844 F.2d 926 (2d Cir. 1988).

minorities. The Court agreed with the Second Circuit that the scheme carried both a discriminatory and segregative impact. Further, the Court found that the desire to encourage developers to invest in the deteriorated and needy section of town was a clearly inadequate justification. Although the Court noted the limited nature of the jurisdictional question presented in light of the parties' stipulation to the applicability of an effects test, *Huntington* presents the Court's most significant tacit endorsement of the Fair Housing Act's prima facie effects test.<sup>102</sup> Congress implicitly endorsed the effects test when it passed the Fair Housing Amendments Act of 1988 and rejected efforts to amend the bill to require an intent test.<sup>103</sup>

After the plaintiff establishes either disparate impact or disparate treatment, the defendant must then justify the action as one taken in pursuit of a bona fide, compelling governmental purpose,<sup>104</sup> with no less discriminatory alternative available to achieve the goal,<sup>105</sup> or in the case of private defendants, one taken pursuant to a rational and necessary business purpose.<sup>106</sup> Should a defendant demonstrate a valid justification, the burden, at least in the private sector, would shift back to the plaintiff to demonstrate that the business necessity was a pretext for engaging in discrimination.<sup>107</sup> The defendant's failure to rebut either the prima facie case<sup>108</sup> or the evidence that the justification was pretextual<sup>109</sup> allows the inferential demonstration of intentional discrimination.<sup>110</sup>

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102. Only Justices White, Marshall, and Stevens joined in a dissent, voting to hear the appeal and set the case for oral argument. *Huntington*, 109 S. Ct. at 277 (White, J., dissenting).

103. H.R. REP. No. 711, *supra* note 15.

104. *Huntington*, 844 F.2d at 939; *Rizzo*, 564 F.2d at 126.

105. *Huntington*, 844 F.2d at 939; *Rizzo*, 564 F.2d at 149; *Burney v. Housing Auth.*, 551 F. Supp. 746 (W.D. Pa. 1982).

106. *Svatik*, 779 F.2d at 383; *12 Lofts Realty, Inc.*, 610 F.2d at 1032 (objective business necessity); *Williams*, 499 F.2d at 826; *Madison v. Jeffers*, 494 F.2d 114 (4th Cir. 1974) (per curiam) (rebutting the inference of purposefulness); *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055 (7th Cir. 1972) (honest basis unrelated to race); *Old West End*, 675 F. Supp. at 1100; *Pollitt v. Bramel*, 669 F. Supp. 172 (S.D. Ohio 1987); *Parks v. Coleman*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,519 (D. Conn. 1985); *Davis v. The Mansards*, 597 F. Supp. 334 (N.D. Ind. 1984); *Darden v. Nebilak*, Eq. Opportunity Hous. Rep. (P-H) ¶ 18,037 (S.D.N.Y. 1982) (lack of objective rebuttal evidence); *Burney v. Housing Auth.*, 551 F. Supp. 746 (W.D. Pa. 1982); *Wainwright v. Allen*, 461 F. Supp. 293 (D.N.D. 1978), *aff'd mem.*, 605 F.2d 1209 (8th Cir. 1979) (legitimate non-discriminatory reasons); *Lamb v. Sallee*, 417 F. Supp. 282 (E.D. Ky. 1976); *Bush v. Kaim*, 297 F. Supp. 151 (N.D. Ohio 1969).

107. *12 Lofts Realty*, 610 F.2d at 1040 n.13; *Dillon v. Bay City Constr. Co.*, 512 F.2d 801 (5th Cir. 1975); *Old West End*, 675 F. Supp. at 1100; *Huntington*, 668 F. Supp. at 762; *Pollitt*, 669 F. Supp. 172.

108. *E.g.*, *Svatik*, 779 F.2d at 383; *12 Lofts Realty*, 610 F.2d at 1032 (objective business necessity); *Williams*, 499 F.2d at 826.

109. *E.g.*, *12 Lofts Realty*, 610 F.2d at 1040 n.13.

110. *Cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (disparate

This burden of proof is far more limited than that required under the equal protection clause, which requires the plaintiff to show both intent<sup>111</sup> and that a purposeful bias was a motivating factor<sup>112</sup> for the defendant's conduct. Title VIII requires only that the improper bias be one factor in the defendant's decision to act.<sup>113</sup> The lenient burden of proof makes Title VIII litigation accessible to plaintiffs and forces defendants to explain housing practices in terms of profit-based, good business policy. Typical fair housing cases are among the easiest to litigate. Often, private fair housing groups will perform a test that demonstrates the nearly undeniable fact of disparate treatment. The lawyer must merely put such a test into evidence and concentrate on demonstrating and dramatizing the plaintiff's injury. Such proof easily satisfies the demands of Title VIII<sup>114</sup> and also satisfies the more onerous constitutional prima facie intent examination.<sup>115</sup>

### 3. Damages

One reason there has been relatively little fair housing litigation is that courts and juries awarded very small damage awards during the

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treatment); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) (motive irrelevant in impact cases).

111. *Hunter v. Underwood*, 471 U.S. 222 (1985); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

112. *Arlington Heights*, 429 U.S. at 252.

113. *United States v. City of Birmingham*, 727 F.2d 560 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984); *Hope, Inc. v. County of DuPage*, 717 F.2d 1064 (7th Cir. 1983), *rev'd on rehearing*, 738 F.2d 797 (7th Cir. 1984) (en banc); *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *12 Lofts Realty*, 610 F.2d at 1032; *Taylor v. Fletcher Properties, Inc.*, 592 F.2d 244 (5th Cir. 1979); *Miller v. Poretsky*, 595 F.2d 780 (D.C. Cir. 1978); *Payne v. Bracher*, 582 F.2d 17 (5th Cir. 1978); *Sorensen v. Raymond*, 532 F.2d 496 (5th Cir. 1976); *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975); *Williams*, 499 F.2d at 819; *Madison v. Jeffers*, 494 F.2d 114 (4th Cir. 1974) (per curiam); *Haythe v. Decker Realty Co.*, 468 F.2d 336 (7th Cir. 1972); *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055 (7th Cir. 1972); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970).

114. *See, e.g., Tolliver v. Amici*, 800 F.2d 149 (7th Cir. 1986); *Svatik*, 779 F.2d at 383; *Watts v. Boyd Properties, Inc.*, 758 F.2d 1482 (11th Cir. 1985); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417 (11th Cir.), *cert. denied*, 469 U.S. 882 (1984); *Richardson v. Howard*, 712 F.2d 319 (7th Cir. 1983); *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081 (7th Cir. 1982); *Price v. Pelka*, 690 F.2d 98 (6th Cir. 1982); *Kinney v. Rothchild*, 678 F.2d 658 (6th Cir. 1982) (per curiam); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980); *McDonald v. Verble*, 622 F.2d 1227 (6th Cir. 1980); *Grant v. Smith*, 574 F.2d 252 (5th Cir. 1978); *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 897-98 (3d Cir. 1977); *Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977); *Connell v. Shoemaker*, 555 F.2d 483 (5th Cir. 1977); *United States v. Warwick Mobile Home Estates, Inc.*, 537 F.2d 1148 (4th Cir. 1976); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 234 n.2 (8th Cir. 1976); *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974); *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634 (7th Cir. 1974); *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973); *Hamilton v. Miller*, 477 F.2d 908 (10th Cir. 1973).

115. *See, e.g., Phiffer*, 648 F.2d at 548; *Grayson v. S. Rotundi & Sons Realty, Fair Hous.-Fair Lending Rep. (P-H)* ¶ 15,516 (E.D.N.Y. Sept. 5, 1984); *cf. Pierson v. Ray*, 386 U.S. 547 (1967) (bus terminals); *Evers v. Dwyer*, 358 U.S. 202 (1958) (bus).

early years of fair housing enforcement.<sup>116</sup> In recent years the public, counsel, juries, and judges have grown hostile to acts of racial discrimination because they have learned more about the pain, suffering, and humiliation inflicted upon the victims of discrimination and the shock of realization that one is a second-class citizen in a racist society. The courts<sup>117</sup> and some state agencies authorized to award general damages<sup>118</sup> have increased awards so that single victim settlements and awards during the past few years have generally exceeded twenty thousand dollars,<sup>119</sup> and commonly approach one hundred thousand dol-

116. J. KUSHNER, *supra* note 14, at app. 9-1.

117. *See id.*

118. *See, e.g.*, CAL. GOV'T CODE §§ 12,900-12,993 (West 1988).

119. *See Tolliver*, 800 F.2d at 149 (\$15,000); *Svatik*, 779 F.2d at 383 (\$20,000 with \$2500 reversed); *Green v. Century 21*, 740 F.2d 460 (6th Cir. 1984) (\$42,200 but \$1200 vacated); *Henry v. Wehermeier*, 738 F.2d 188 (7th Cir. 1984) (consent decree, \$45,000); *Miller v. Apartments & Homes of N.J., Inc.*, 646 F.2d 101 (3d Cir. 1981) (\$36,252); *Murphy v. Monona Shores Assocs.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,366 (W.D. Wis. 1988) (consent decree, \$66,000); *Ward v. Lanuse*, No. C-87-1189-RHS (N.D. Cal. Feb. 11, 1988) (settlement, \$35,000); *Westside Fair Hous. Council v. Woodmere Ltd.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,361 (C.D. Cal. 1988) (consent decree, \$35,000); *Huertas v. East River Hous. Corp.*, 674 F. Supp. 440 (S.D.N.Y. 1987) (\$28,083.63); *Pollitt v. Bramel*, 669 F. Supp. 172 (S.D. Ohio 1987) (\$50,000); *Wrightwood Improvement Ass'n v. Riccardino Realty*, No. 86-C-5627 (N.D. Ill. 1987) (consent decree, \$15,000); *Mealing v. Liu*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,356 (E.D.N.Y. 1986) (consent decree, \$27,500); *Thomas v. MK Properties*, Civ. No. 86-0250 (D.D.C. Dec. 22, 1986) (consent decree, \$30,000); *Bell v. Thomas, Inc.*, 115 F.R.D. 299 (W.D. Va. 1986) (consent decree, \$20,000); *Ferguson v. Zortman*, No. 85-1561 (M.D. Pa. July 2, 1986) (\$25,000); *Baltimore Neighborhoods, Inc. v. Development & Constr. Co.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,353 (D. Md. 1986) (consent decree, confidential but at least \$50,000); *Smith v. Schermerhorn*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,347 (N.D. Ill. 1986) (\$64,000); *Gonzalez v. Damato*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,346 (D. Conn. 1985) (consent decree, \$20,000); *Rogers v. 66-36 Yellowstone Blvd. Coop. Owners, Inc.*, 599 F. Supp. 79 (E.D.N.Y. 1984) (\$26,000); *Davis v. Mansards*, 597 F. Supp. 334 (N.D. Ind. 1984) (\$68,526.50); *Shaw v. Cassar*, 558 F. Supp. 303 (E.D. Mich. 1983) (\$30,000); *Harkness v. Fuchs*, Eq. Opportunity Hous. Rep. (P-H) ¶ 19,341 (N.D. Ohio 1983) (consent decree, \$19,000); *Behul v. Regal*, No. 79-C-960 (E.D. Wis. June 7, 1982) (\$35,000), *aff'd*, 714 F.2d 149 (7th Cir.), *cert. denied*, 464 U.S. 994 (1983); *New York v. Data-Butterfield, Inc.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,337 (E.D.N.Y. 1982) (consent decree, \$43,500); *Jones v. Morgan Builders*, No. 81 Civ. 6984 WK (S.D.N.Y. Mar. 9, 1982) (\$38,000), *aff'd in part, rev'd in part*, 714 F.2d 114 (2d Cir. 1982); *Osinubi v. Wilfert*, No. 74-1851-G (D. Mass. Jan. 19, 1982) (\$46,000); *Brown v. Van Plaza Realty Corp.*, 3 Eq. Opportunity Hous. Rep. (P-H) ¶ 15,409 (E.D.N.Y. 1981) (\$50,001); *12 Lofts Realty, Inc.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,333 (S.D.N.Y. 1981) (consent decree, \$40,000); *Armstrong v. Hertz Homes, Inc.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,326 (D.N.J. 1979) (consent decree, \$26,500); *Dyer v. Schecter*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,321 (N.D. Ohio Apr. 19, 1978) (consent decree, \$41,000); *Sutton v. Bloom*, 5 Hous. & Dev. Rep. (BNA) 1182 (N.D. Ohio 1978), *rev'd*, 710 F.2d 1188 (6th Cir. 1983) (\$63,101 reversed), *cert. denied*, 464 U.S. 1073 (1984); *Stitt v. Puccinelli*, No. C-77-2236 (N.D. Cal. 1978) (\$32,000), *aff'd mem.*, 628 F.2d 1357 (9th Cir. 1980); *Chomicki v. Wittekind*, 128 Wis. 2d 188, 381 N.W.2d 561 (Ct. App. 1985) (\$19,000); *Scanlon*, *A Report on the Committee's Fair Housing Project 1975-1983*, 27 How. L.J. 1458, 1465-68 (1984) (discussing: *Lucas v. Rosenkrantz, Inc.*, No. H83-258 (D. Md. 1983) (\$17,000 settlement); *Tsou v. Crestview Corp.*, No. 82-213-R (E.D. Va. 1982) (\$17,000); *Butler v. Aitcheson*, No. K78-1120 (D. Md. 1978) (\$26,000); *Lucas v. Kay Management Co.*, No. Y-78-2459 (D. Md. 1978) (\$22,500 settlement)).

lars.<sup>120</sup> Nonetheless, some courts lag far behind the national pattern as they continue to make only symbolic awards reminiscent of an earlier era.<sup>121</sup> Section 1982 carries no damage cap,<sup>122</sup> while the original Title VIII law limited punitive damages to one thousand dollars; thus, during the first generation of fair housing action, section 1982 served as a vehicle to circumvent Title VIII.<sup>123</sup> The rise in compensatory damage awards should soon generate the first one million dollar verdict. Such a symbolic award, and the publicity it is likely to spawn, may begin to carry a deterrent effect and, more importantly, open the eyes of the practicing bar to the ease and profit of litigating fair housing cases.

120. See *Douglas v. Metro Rental Servs., Inc.*, 827 F.2d 252 (7th Cir. 1987) (\$128,500 award reduced to \$43,500); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982) (\$221,016); *Willis v. H & M Enters.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 6.5 (D.D.C. 1988) (settlement of \$327,500 for refusal to rent by stating unit already rented); *Bryant v. Kay Bros. Builders*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,367 (D. Md. 1988) (consent decree, \$100,000 including fees in settlement to tester); *Smith v. Crystal Lake Apartments*, No. 87-CV-71971 DT (E.D. Mich. 1988) (\$85,000 jury award); *Betsey v. Turtle Creek Assocs.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,350 (D. Md. 1986) (consent decree, \$125,000); *Westside Fair Hous. Council v. C. & H. Inv. Group, Inc.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,342 (C.D. Cal. 1985) (consent decree, \$80,000); *Grayson*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,516 (\$565,000 verdict reduced to \$360,000 as settlement to avoid appeal); *Spiteri v. Ventura Village Green*, No. 78988 (Cal. Super. Ct. Feb. 17, 1988) (consent decree, \$150,000 settlement for ethnic harassment and illegal eviction); *Ballou v. Aaron*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,351 (Md. Cir. Ct. 1986) (\$137,500); *Paulin v. Sutton*, 724 P.2d 749 (Nev. 1986) (per curiam) (\$100,000 award vacated).

121. See *Wadsworth v. Clindon*, 846 F.2d 265 (4th Cir. 1988) (per curiam) (\$6000 with \$5000 punitive award set aside for retrial); *Tolliver*, 800 F.2d at 149 (\$15,000); *DiFilippo v. Morizio*, 759 F.2d 231 (2d Cir. 1985) (\$2250); *Marable v. Walker*, 704 F.2d 1219 (11th Cir. 1983) (\$1000); *Price v. Pelka*, 690 F.2d 98 (6th Cir. 1982) (\$2000); *Kinney v. Rothchild*, 678 F.2d 658 (6th Cir. 1982) (\$1285); *Pinchback v. Armistead Homes Corp.*, 689 F. Supp. 541 (D. Md. 1988) (\$2500 awarded to prospective cooperative purchaser discouraged from application); *Coel v. Rose Tree Manor Apartments, Inc.*, 15 Hous. & Dev. Rep. (BNA) 516 (E.D. Pa. 1987) (\$650); *Stewart v. Crossen*, No. 2-83-0093 (M.D. Tenn. June 3, 1986) (\$8800); *Parks v. Coleman*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,519 (D. Conn. 1985) (\$8300); *McGraw v. Oliver*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,539 (E.D. Va. 1985) (\$8440); *Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344 (W.D. Tenn. 1982) (\$12,783.55); *Haynes v. Copeland Realty*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,457 (N.D. Ohio 1982) (\$3500); *Espinoza v. Hillwood Square Mut. Ass'n*, 532 F. Supp. 440 (E.D. Va. 1982) (\$1066); *Debose v. Mueller*, 552 F. Supp. 307 (N.D. Ill. 1982) (\$500); *Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc.*, 511 So. 2d 962 (Fla. 1987) (\$7000); *Pleasant E. Assocs. v. Cabrera*, 125 Misc. 2d 877, 480 N.Y.S.2d 693 (Civ. Ct. 1984) (\$1000); *Chomicki v. Wittekind*, 128 Wis. 2d 188, 381 N.W.2d 561 (Ct. App. 1985) (\$19,000); *Scanlon*, *supra* note 118, at 1468 (discussing *Tsou v. Crestview Corp.*, No. 82-213-R (E.D. Va. 1982) (\$17,000)).

122. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Wadsworth*, 846 F.2d at 265; *Tolliver*, 800 F.2d at 149; *Svatik*, 779 F.2d at 383; *Marable*, 704 F.2d at 1219; *Phillips*, 685 F.2d at 184; *Apartments & Homes of N.J.*, 646 F.2d at 101 n.11; *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556 (5th Cir. 1979); *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978).

123. 42 U.S.C. § 3612(c) (1982); see also *Wadsworth*, 846 F.2d at 265; *Phillips*, 685 F.2d at 184 (suggesting limit inapplicable to § 3617 interference, intimidation, and coercion cases); *Fountila*, 571 F.2d at 487; *Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974); *Steele v. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973).

#### 4. Injunctive Relief

Courts have regularly been willing to issue restraining orders to halt the transfer of dwellings denied to victimized home seekers.<sup>124</sup> Unfortunately, the dwelling may already have been sold or rented to an innocent white, making problematic any order to convey or hold the dwelling vacant. Nevertheless, courts could make affirmative relief orders to halt further bias and to attempt to change the status quo.<sup>125</sup> Injunctive orders that seek affirmative action to assure preference for minorities in future sales or rentals are a remedial technique that has not been used to its potential. Rather, the economics of litigation is reflected in remedies that focus on compensating the victim and counsel, but that unfortunately ignore the societal impact of widespread discriminatory practices: Segregation. This narrow focus is exacerbated by victims' lack of enthusiasm to reside in housing marked by bias and by the low profile that the Justice Department has maintained in recent years. Through the use of prospective orders, fair housing litigation could have a significant impact on the advancement of integration while also furthering its obvious aim of decreasing discrimination.

#### 5. Attorney's Fees

Court-awarded attorney's fees are critical in fair housing litigation because large damage awards are speculative and civil rights litigation is always a struggle that potentially will last for years. For this reason, section 1982 has been the centerpiece of fair housing litigation. Success under that provision allows generous court-awarded fees in addition to damages relief.<sup>126</sup> On the other hand, Title VIII, in its original form, limited eligibility for attorney's fees to prevailing plaintiffs unable to finance litigation.<sup>127</sup> The attorney's fee limitation, along with the puni-

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124. See *Johnson v. Snyder*, 639 F.2d 316 (6th Cir. 1981); *McDonald v. Verble*, 622 F.2d 1227 (6th Cir. 1980); *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055 (7th Cir. 1972); *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977); *Collins v. Spasojevic*, 1 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,654 (N.D. Ill. 1974); *Snowden v. Siano*, 1 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,608 (D. Ariz. 1973); *Young v. Netherlands Owners, Inc.*, 306 F. Supp. 1282 (D.D.C. 1969).

125. See *Gresham v. Windrush Partners*, 730 F.2d 1417 (11th Cir.), *cert. denied*, 469 U.S. 882 (1984); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973) (holding that rights of third parties attach under state law, here on lease signing and payment of deposit). *But cf.* *State v. Bergeron*, 290 Minn. 351, 187 N.W.2d 680 (1971) (ordering sham transfer cancelled).

126. See 42 U.S.C. §§ 1982, 1988 (1982); see also *Bunn v. Central Realty*, 592 F.2d 891 (5th Cir. 1979) (*per curiam*); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Fountila*, 571 F.2d at 487; *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977); *Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977).

127. 42 U.S.C. § 3612(c) (1982); see also *Tolliver*, 800 F.2d at 149; *Bunn*, 592 F.2d at 891; *Crumble*, 549 F.2d at 462; *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 236 (8th Cir. 1976); *Fort v. White*, 530 F.2d 1113 (2d Cir. 1976); *Hairston v. R & R Apartments*, 510 F.2d 1090 (7th Cir. 1975); *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119 (7th



tive damage cap, made section 1982 the primary enforcement vehicle during the first generation. Although the provision did not demand indigency,<sup>128</sup> Title VIII was nonetheless a questionable and speculative source for fee awards, and for the plaintiff with any significant assets or sizeable income, no source at all.<sup>129</sup> For those prevailing under section 1982, however, fee awards have been increasingly generous and have kept pace with escalating damages.<sup>130</sup>

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Cir. 1974); *Steele*, 478 F.2d at 380.

128. See *Tolliver*, 800 F.2d at 149 (plaintiff earning \$26,000 with daughter unable to bear \$11,385 in fees); *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975) (fee award to party earning \$28,000 salary in 1975, which would equate to roughly \$60,000 today factoring in inflation); *Hairston*, 510 F.2d 1090 (\$5232 annual income eligible); *Marr*, 503 F.2d at 735 (\$11,000 earnings and uncontested fee award); *Steele*, 478 F.2d at 380 (\$12,000 and \$14,000 incomes sufficient), *aff'd*, 858 F.2d 467 (9th Cir. 1988); *Keith v. Volpe*, 644 F. Supp. 1317 (C.D. Cal. 1986); *Heights Community Congress v. Hilltop Realty, Inc.*, 643 F. Supp. 8 (N.D. Ohio 1985) (finding nonprofit community organization eligible for fees despite annual budget of approximately \$100,000 and despite contingent fee agreement because plaintiff was not a city able to raise budget); *Bishop v. Pecsok*, 431 F. Supp. 34 (N.D. Ohio 1976) (\$9663 annual income eligible); *Lamb v. Sallee*, 417 F. Supp. 282 (E.D. Ky. 1976) (\$6200 annual income eligible); *Elazer v. Wright*, 2 Eq. Opportunity Hous. Rep. (P-H) ¶ 15,197 (S.D. Ohio 1976) (\$10,000 annual income eligible); *Stevens v. Dobs, Inc.*, 373 F. Supp. 618 (E.D.N.C. 1974) (\$10,000 and \$1500 award entitled to fee award); *Sanborn v. Wagner*, 354 F. Supp. 291 (D. Md. 1973) (must not materially endanger plaintiff's status as home seeker or home owner); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972) (\$15,000 income eligible).

129. See *Samuel v. Benedict*, 573 F.2d 580 (9th Cir. 1978) (finding plaintiff able to afford litigation by contingent fee contract and \$2500 damage award); *Crumble*, 549 F.2d at 462 (finding average financial means sufficient to deny fees even where nominal recovery); *Pollitt v. Bramel*, 669 F. Supp. 172 (S.D. Ohio 1987) (finding that plaintiff failed to produce proof of inability, and that \$25,000 punitive award could cover fees); *Clemons v. Runck*, 402 F. Supp. 863 (S.D. Ohio 1975) (denying fees to plaintiff with \$30,200 income, \$4500 award, and \$10,000 in savings).

130. See *Burney v. Housing Auth.*, 735 F.2d 113 (3d Cir. 1984) (\$26,956.90 remanded to increase to market rate); *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881 (2d Cir. 1983) (\$26,000, but \$41,750 agreed in settlement); *Apartments & Homes of N.J.*, 646 F.2d at 101 (\$21,845); *Bryant v. Kay Bros. Builders*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,367 (D. Md. June 8, 1988) (consent decree, \$100,000 including damages in settlement to tester); *Murphy v. Monona Shores Assocs.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,366 (W.D. Wis. 1988) (consent decree, \$44,000); *Huertas v. East River Hous. Corp.*, 674 F. Supp. 440 (S.D.N.Y. 1987) (\$227,418.70); *Thomas v. MK Properties*, Civ. No. 86-0250 (D.D.C. Dec. 22, 1986) (consent decree, \$30,000); *Bell v. Thomas, Inc.*, 115 F.R.D. 299 (W.D. Va. 1986) (consent decree, \$27,500); *Mealing v. Liu*, Fair Hous.-Fair Lending (P-H) ¶ 19,356 (E.D.N.Y. 1986) (consent decree, \$27,500); *Ferguson v. Zortman*, No. 85-1561 (M.D. Pa. July 2, 1986) (\$25,000); *Heights Community Congress*, 643 F. Supp. at 8 (settlement, \$196,306.39); *McGraw v. Oliver*, Wash. Post, Dec. 28, 1985, at A4, col. 1 (E.D. Va. 1985) (\$30,000); *United States v. J.I. Sopher & Co.*, No. 75 Civ. 5366 (CHT) (S.D.N.Y. 1985) (settlement, \$50,000); *Westside Fair Hous. Council v. C. & H. Inv. Group, Inc.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,342 (C.D. Cal. 1985) (consent decree, \$80,000); *Davis v. Mansards*, 597 F. Supp. 334 (N.D. Ind. 1984) (\$42,627); *McKenna v. Peekskill Hous. Auth.*, 573 F. Supp. 976 (S.D.N.Y. 1983) (\$35,450.51); *Espinoza*, 532 F. Supp. at 440 (\$21,906.68); J. KUSHNER, *supra* note 14, at app. 9-2.

## V. PRE-1988 FEDERAL ENFORCEMENT INITIATIVES

Federal fair housing enforcement prior to the Fair Housing Amendments Act of 1988 centered primarily on the receipt of administrative complaints made under section 810 of Title VIII.<sup>131</sup> Of the complaints HUD received, any that arose in a jurisdiction with a fair housing law certified as being substantially equivalent to Title VIII were referred back to that jurisdiction. HUD urged voluntary conciliation of the remaining complaints. The litigation arm of federal enforcement has consisted of those few Title VIII pattern and practice cases that HUD has referred to the Civil Rights Division of the Justice Department.<sup>132</sup> In addition, HUD has distributed the small amounts of funds allotted by Congress for public and private fair housing enforcement<sup>133</sup> and has engaged in extremely limited enforcement of its affirmative obligation to promote fair housing as established in section 608 of Title VIII.<sup>134</sup> Although this obligation has been interpreted to require the imposition of affirmative marketing obligations on HUD-assisted developers<sup>135</sup> and

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131. 42 U.S.C. § 3610 (1982). On the overall historical weakness of the federal fair housing enforcement effort, see Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348 (1988).

132. See 42 U.S.C. § 3613 (1982); see also J. KUSHNER, *supra* note 14, §§ 8.30-8.34. Title VIII's criminal punishment alternative applies in cases involving force or the threat of force and the willful threat or actual injury, intimidation, or interference with fair housing rights. 42 U.S.C. § 3631 (1982). See *United States v. Gilhert*, 813 F.2d 1523 (9th Cir.), *cert. denied*, 108 S. Ct. 173 (1987); *United States v. White*, 788 F.2d 390 (6th Cir. 1986); *United States v. Redwine*, 715 F.2d 315 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984); *United States v. Johns*, 615 F.2d 672 (5th Cir.), *cert. denied*, 449 U.S. 829 (1980); *United States v. Anzalone*, 555 F.2d 317 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); see also J. KUSHNER, *supra* note 14, §§ 3.67-3.71.

133. See 24 C.F.R. § 111 (1988) (providing Fair Housing Assistance Program to public certified agencies). For further discussion, also see The 1987 Housing Act, containing the Fair Housing Initiatives Program (FHIP), which provides some funding for testing and private enforcement. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 561, 101 Stat. 1815, 1942 (1988) (to be codified at 42 U.S.C. § 3616). HUD has issued proposed regulations under FHIP that would limit testing to cases with complaints by victims, thereby excluding random testing and testing in response to underrepresentation statistics, and would require two sets of paired testers, rendering the program helpful but not significant. The rules also preclude program participants from providing compensated education regarding proper fair housing compliance to identified perpetrators, which will discourage participation by some fair housing groups. See 53 Fed. Reg. 25,576 (1988) (to be codified at 24 C.F.R. pt. 125) (proposed July 7, 1988). Groups should apply for training funds to avoid conflict with the restrictive rules.

134. See 42 U.S.C. § 3608(d) (1982). On the failure of the Nixon, Ford, Carter, and Reagan Administrations to recognize and carry out the HUD affirmative obligation to advance fair housing goals contained in Title VIII, see J. KUSHNER, *supra* note 14, §§ 1.04, 7.02; and Exec. Order No. 11,063, 3 C.F.R. §§ 652, 653 (1959-63), *reprinted in* 42 U.S.C. § 1982 app. at 6-8 (1982) (issued by President Kennedy) (barring discrimination in federal housing programs, a requirement largely ignored by the federal government).

135. See, e.g., *Alshuler v. Department of Hous. & Urban Dev.*, 515 F. Supp. 1212 (N.D. Ill. 1981), *aff'd*, 686 F.2d 472 (7th Cir. 1982). Affirmative marketing obligations are irrelevant when projects are located in segregated communities and undercut by widespread discriminatory practices by HUD-regulated landlords. J. KUSHNER, *supra* note 14, § 4.21; see also *HUD Seeks Public*

the establishment of voluntary agreements with housing industry participants to attain fair housing,<sup>136</sup> HUD has typically ignored this obligation in its pattern of funding segregated and segregative housing programs.<sup>137</sup> Curiously, HUD's defense has been that congressional directives make civil rights obligations impossible to implement or under-

*Housing Affirmative Compliance Agreement Program for 1989*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 979 (1988) (race-neutral techniques).

136. See 42 U.S.C. § 3609 (1982); see also J. KUSHNER, *supra* note 14, § 4.21; *Affirmative Fair Housing Agreement: Real Estate License Law Officials*, reprinted in Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,903 (adopted by Georgia Real Estate Commission Jan. 11, 1978); *Memorandum of Understanding Between HUD and NAR [National Ass'n of Realtors] Modifying and Clarifying the VAMA Approved by the Parties on 12-16-75*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,909 (Nov. 17, 1986) (extension to May 19, 1987); *Realtors, Other Industry Groups Sign Fair Housing Commitments with HUD*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 71 (1987); *Voluntary Affirmative Fair Housing Marketing Agreement (Realtors)*, 41 Fed. Reg. 43,211 (1976).

137. See *Hills v. Gautreaux*, 425 U.S. 284 (1976); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988); *Alshuler*, 686 F.2d at 472; *Graves v. Romney*, 502 F.2d 1062 (8th Cir. 1974), *cert. denied*, 420 U.S. 963 (1975); *Munoz-Mendoza v. Pierce*, 711 F.2d 421 (1st Cir. 1983) (finding eligibility for urban development action grant in face of segregation); *Taylor v. City of Millington*, 476 F.2d 599 (6th Cir. 1973); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Blackshear Residents Org. v. Romney*, 472 F.2d 1197 (5th Cir. 1973); *Shannon v. Department of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970); *NAACP v. Boston Hous. Auth.*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 60 (D. Mass. 1988) (HUD suing for failure to act to desegregate public housing); *Almonte v. Pierce*, 666 F. Supp. 517 (S.D.N.Y. 1987) (subsidized housing admissions preference to whites); *NAACP v. City of Dunkirk*, No. Civ.-80-360 (W.D.N.Y. Dec. 2, 1983) (fee award); *Hutchins v. Cincinnati Metro. Hous. Auth.*, No. C-1-79-131 (S.D. Ohio Aug. 15, 1983) (standing, settlement); *NAACP v. Harris*, 567 F. Supp. 637 (D. Mass. 1983) (segregated public housing-based challenge to community development eligibility), *vacated sub nom. NAACP v. Secretary of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987); *Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982); *Burney v. Housing Auth.*, 551 F. Supp. 746 (W.D. Pa. 1982) (segregated as of 1971); *Clients' Council v. Pierce*, 532 F. Supp. 563 (W.D. Ark. 1982), *rev'd*, 711 F.2d 1406 (8th Cir. 1983); *Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 450 F. Supp. 602 (S.D.N.Y. 1978); *Hale v. Department of Hous. & Urban Dev.*, 2 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,782 (W.D. Tenn. 1976), *consent decree*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,341 (W.D. Tenn. 1985); *Lewis v. Housing Auth.*, 1 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,567 (N.D. Ala. 1973); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972); *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969); *El Cortez Heights Residents & Property Owners Ass'n v. Tucson Hous. Auth.*, 10 Ariz. App. 132, 457 P.2d 294 (1969); *Greer v. Illinois Hous. Dev. Auth.*, 150 Ill. App. 3d 357, 501 N.E.2d 723 (1986); *Middlesboro Hous. Auth. v. Kentucky Comm'n on Human Rights*, 553 S.W.2d 57 (Ky. Ct. App. 1977); *Pennsylvania Human Relations Comm'n v. Chester Hous. Auth.*, 458 Pa. 67, 327 A.2d 335 (1974), *cert. denied*, 420 U.S. 974 (1975); *Court Orders Black and White Tenants to Swap Apartments in Texas Public Housing*, 11 [Current Developments] Hous. & Dev. Rep. (BNA) 675 (Jan. 2, 1984) (discussing *Young v. Clarksville Hous. Auth.*, No. P-82-37-CA (E.D. Tex. Oct. 11, 1983)); *HUD, Toledo PHA Cited for Discriminatory Practices Against Minorities and Poor*, 11 [Current Developments] Hous. & Dev. Rep. (BNA) 147 (July 18, 1983) (discussing *Jaimes v. Lucas Metro. Hous. Auth.*, No. C 74-68 (N.D. Ohio June 8, 1983), *modified sub nom. Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086 (6th Cir. 1985)); see also *Lawsuit Filed Over Houston PHA's Alleged Discrimination Before Demolition of Project*, 12 [Current Developments] Hous. & Dev. Rep. (BNA) 641 (Jan. 14, 1985) (examining *Penrice & Johnson v. Housing Auth.* (S.D. Tex. filed Aug. 1984) (alleged steering of Vietnamese into building planned for demolition to lessen resident resistance)); *Flournoy & Rodrigue, Separate and Unequal*, Dallas Morning News, Feb. 10-17 (1985).

stand.<sup>138</sup> HUD traditionally has sought voluntary solutions to the fair housing problem, and its ambivalence towards enforcement can be seen in its resistance to testing.<sup>139</sup>

Perhaps the most significant impact of Title VIII has been its certification of state and local programs as substantially equivalent to Title VIII,<sup>140</sup> which has encouraged state and local governments to pass such fair housing legislation. The effect of an equivalency certification is that section 810 administrative complaints are referred to the state or local administrative agency. In addition, the certified state and local agencies are then eligible to receive grants from HUD to support enforcement efforts.<sup>141</sup>

The original section 810 administrative complaint process was less than effective. It was purely voluntary and conciliation was achieved in very few cases. Although agreements reached in conciliation were enforceable,<sup>142</sup> HUD lacked any power to enforce Title VIII, obtain temporary relief for complainants, or coerce recalcitrant respondents.

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138. Goering, *Introduction: Racial Desegregation and Federal Housing Policies*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 15, at 197, 199.

139. HUD has established and funded community housing resource boards to assist in implementing voluntary affirmative marketing agreements with local real estate brokers. *See* 47 Fed. Reg. 18,298 (1982) (funding notice). Although the grants may not be used for testing, *Funding Procedures Outlined for Community Housing Resource Boards*, 9 [Current Developments] Hous. & Dev. Rep. (BNA) 875 (1982), HUD is on record as supporting the use of testing, *Pierce Backs Continued Use of "Testers" to Combat Housing Discrimination*, 10 [Current Developments] Hous. & Dev. Rep. (BNA) 404 (1982). *See* *Community Fair Housing Boards Actively Collaborate with Local Governments*, 11 [Current Developments] Hous. & Dev. Rep. (BNA) 1028 (1984) (HUD-funded community housing resource boards (CHRBs) seek voluntary compliance). HUD's program of fair housing assistance to public enforcement agencies has been criticized for insufficient use of testing. ABT ASSOCIATES, *FAIR HOUSING ASSISTANCE PROGRAM EVALUATION* (1985); *Expanded Use of Testers Recommended in Evaluation of HUD Program*, 13 [Current Developments] Hous. & Dev. Rep. (BNA) 702 (1986); *see also* H.R. 4, 100th Cong., 1st Sess. (1987) (bill, as passed by House, establishing a fair housing initiatives program to fund public and private testing); *Comparison of House, Senate Housing Bills*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 90, 101 (1987); *HUD, Realtors Agree on Guidelines for Federal Funding of Private Testers*, 13 [Current Developments] Hous. & Dev. Rep. (BNA) 1061 (1986) (requires "paired" tests); *Witnesses Say Guidelines Would "Gut" Title VIII Enforcement*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 2.1 (1986) (testimony on the early unsuccessful bill, S. 6478, 99th Cong., 2d Sess. (1986)). The FHIP program was eventually approved in the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 561, 101 Stat. 1815, 1942 (1988) (to be codified at 42 U.S.C. § 3616). *See* *Congress OK's FHIP*, 3 Fair Hous.-Fair Lending Rep. (P-H) ¶ 8.2 (1988) (Congress authorizing HUD to develop guidelines for the grant program, S. 825, signed Jan. 5, 1988); *see also supra* note 132.

140. *See supra* note 81.

141. *See* 42 U.S.C. § 3616 (1982); *see also* 24 C.F.R. §§ 111.101-111.108 (1988); J. KUSHNER, *supra* note 14, § 10.03; *HUD Announces Competition for Funding Under Fair Housing Assistance Program*, 8 [Current Developments] Hous. & Dev. Rep. (BNA) 144 (1980).

142. 24 C.F.R. § 105.32 (1988) (explaining that appropriate action can mean only referral to the Justice Department); J. KUSHNER, *supra* note 14, §§ 8.29, 9.01; *cf.* *United States v. Reece*, 457 F. Supp. 43 (D. Mont. 1978) (suit to compel compliance with HUD conciliation agreement).

The Attorney General was authorized under section 813 of the original Title VIII statute<sup>143</sup> to bring pattern and practice cases that presented novel or important questions of fair housing law or that sought to eliminate discriminatory patterns of violations.<sup>144</sup> Although the courts were split on the issue, the weight of authority did not permit such cases to be used as vehicles to obtain compensatory relief for victims.<sup>145</sup> Although pattern and practice litigation was used in the early years to obtain excellent judicial interpretation of the scope of Title VIII, the Reagan Administration allowed the process to go into relative desuetude. Characteristic of the Administration's policies, the Reagan Justice Department largely ignored the effects-test definition of a prima facie case developed by a predecessor Civil Rights Division.<sup>146</sup> After several years of disregarding Title VIII,<sup>147</sup> the Justice Department commenced its own pattern and practice of utilizing Title VIII to challenge affirmative action in housing.<sup>148</sup> Although the Justice Department

143. 42 U.S.C. § 3613 (1982); J. KUSHNER, *supra* note 14, §§ 8.30-8.34.

144. See *United States v. Northside Realty Assocs.*, 501 F.2d 181 (5th Cir. 1974) (*Northside II*), *cert. denied*, 424 U.S. 977 (1976) (executive branch discretion to define); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); *United States v. University Oaks Civic Club*, 653 F. Supp. 1469 (S.D. Tex. 1987); *United States v. Mitchell*, 327 F. Supp. 476 (N.D. Ga. 1971).

145. *United States v. Rent-A-Homes Sys. of Ill., Inc.*, 602 F.2d 795 (7th Cir. 1979); *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); *United States v. Long*, 537 F.2d 1151 (4th Cir. 1975), *cert. denied*, 429 U.S. 871 (1976); *United States v. Orlofsky*, 538 F. Supp. 450 (S.D.N.Y. 1981); *United States v. Taylor*, 2 Eq. Opportunity Hous. Rep. (P-H) ¶ 15,249 (S.D. Ind. 1978). *But see* *United States v. Berg Enters.*, 2 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,773 (S.D. Fla. 1976); *United States v. Chatham*, 415 F. Supp. 1214 (N.D. Ga. 1975); *United States v. Dittmar Co.*, 1 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,730 (E.D. Va. 1975); *United States v. Hilton-Sykes Rental Agency, Inc.*, 1 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,727 (M.D. Ill. 1975); *United States v. Pelzer Realty Co.*, 377 F. Supp. 121 (M.D. Ala. 1974) (must plead money damages), *aff'd*, 537 F.2d 841 (5th Cir. 1976); *United States v. West Suburban Bd. of Realtors*, 1 Eq. Opportunity Hous. Rep. (P-H) ¶ 13,641 (N.D. Ill. 1974); *cf.* *United States v. Northside Realty Assocs.*, 605 F.2d 1348 (5th Cir. 1979) (*Northside IV*) (no damages in contempt proceedings).

146. Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Enforcement*, 17 U.C. DAVIS L. REV. 445, 486 n.193 (1984) (prohibiting attorneys from arguing effects test in post-trial briefs); Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months*, 8 BLACK L.J. 68 (1983) (highly critical, citing Justice Department opposition to "effects" violation standard). See generally *supra* notes 95-113 and accompanying text.

147. G. METCALF, *supra* note 80, at 17 (no cases initiated in 1981, two in 1982, and five in 1983); Effron, *Fair Housing Rises in Importance as Civil Rights Issue*, L.A. DAILY J., May 9, 1983, at 1, col. 6, at 14, col. 3 (only six new cases filed since President Reagan took office). For data from earlier administrations, see *supra* note 78.

148. See, e.g., *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988); *United States v. Atrium Village Assocs.*, No. 87c-6527 (N.D. Ill. filed July, 1987) (challenging racial quotas in admission to rental housing); *HUD Questions Use of Block Grant Funds for Integration Maintenance in Ohio*, 13 [Current Developments] Hous. & Dev. Rep. (BNA) 296 (1985) (noting also that loans to minorities may not meet 51% community development rule, because few families are to be assisted); *New England PHA Agrees to End Integration Maintenance Quotas*, 13 [Current Developments] Hous. & Dev. Rep. (BNA) 585 (1985) (noting that

has obtained several consent decrees seeking traditional fair housing goals,<sup>149</sup> there have been no officially reported decisions advancing fair housing<sup>150</sup> unless one so characterizes the Department's successful dismantling of integration maintenance programs.<sup>151</sup>

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Holyoke, Massachusetts public housing authority discontinued successful program established under earlier Justice Department consent decree, now attacked by Justice Department); see also *PHA Barred from Placement of Tenants*, 3 Fair Hous.-Fair Lending Rep. (P-H) ¶ 9.2 (1988) (Justice Department-approved consent decree ending discriminatory public housing segregation by tenant assignment through the long-discredited "freedom of choice" policy); cf. *NAACP v. Meese*, 615 F. Supp. 200 (D.D.C. 1985) (granting motion to dismiss in suit to prevent Justice Department from seeking to reopen affirmative action consent decrees in employment cases).

HUD has proposed highly unrealistic policies to achieve integration consistent with the Justice Department ideology, such as: (1) creating magnet projects with enhanced amenities; (2) race-neutral tenant transfers to maximize desegregation; (3) buddy system transfers to projects where the transferee is in the minority; (4) marketing to those least likely to apply; and (5) improved project security. *Race-Neutral Steps Can Help Racial Balance in Public Housing*, Brachman Says, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 434 (1987) (housing authority representative, NAHRO, urging subsidized transfers for integration, waiting list priority for those willing to integrate, improving minority projects, site selection in nonimpacted sites outside of authority jurisdiction, and integration maintenance programs once integration achieved). Guidelines have been proposed. See Washington Council of Lawyers, *supra* note 146; *PHA Guidelines Will Help HUD Curb Housing Discrimination*, Says Brachman, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 800 (1988); *Voluntary Desegregation Options Part of New Compliance Program Offered to PHAs*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 343 (1988) (seeking to avoid race-preferential treatment through policies such as allowing applicants at the top of the waiting list to wait until a unit is available in a project where their race does not predominate, allowing voluntary transfers to such projects, and providing marketing programs and magnet and security funding to attract tenants); see also *BHA, NAACP Stipulation Expands Voluntary Compliance Agreement Coverage*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 512 (1988) (HUD-approved plan to provide priority as remedy for past segregation practices to victimized applicants and those prevailing in an arbitration hearing who alleged they were discouraged from applying in places where their race does not predominate); *HUD Seeks Public Housing Affirmative Compliance Agreement Program for 1989*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 979 (1988) (use of race-neutral techniques); *Justice Responds to Study by Washington Council of Lawyers*, 24 TRENDS, Dec. 1982, at 3. Compare Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785 with Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001 (critique of Selig noticeably silent on fair housing). See generally Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 469 (1984); Greenberg, *Civil Rights Enforcement Activity of the Department of Justice*, 8 BLACK L.J. 60, 61, 63 (1983) (characterizing Reagan civil rights enforcement efforts with less than approval); Wolvovitz & Lobel, *The Enforcement of Civil Rights Statutes: The Reagan Administration's Record*, 9 BLACK L.J. 252 (1986).

149. *DOJ Civil Rights Division Sums Up FY '87*, 3 Fair Hous.-Fair Lending Rep. (P-H) ¶ 9.6 (1988) (25 consent decrees obtained by Civil Rights Division); cf. Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811 (1986) (victims interests not represented by Justice Department).

150. R. SCHWEMM, HOUSING DISCRIMINATION LAW 92 n.184 (Supp. 1986) (stating that "[i]ncredibly, not a single § 3613 case filed by the current Administration has resulted in a reported decision on the merits!").

151. See, e.g., *Starrett City*, 840 F.2d at 1096; *New England PHA Agrees to End Integration Maintenance Quotas*, *supra* note 147. The only ostensible exception is *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988), commenced

Although HUD maintains a small but dedicated staff to administer the fair housing program, the Department traditionally has treated fair housing as an unwanted program. HUD has been sued repeatedly for callously disregarding the unfair housing implications of its perceived primary mission of funnelling community development block grants and serving the development community in pursuit of HUD housing insurance and subsidies.<sup>152</sup> As described above, the Civil Rights Division of the Justice Department has committed its limited fair housing resources to dismantling integration programs while the Civil Division has spent a great deal of time defending HUD for its segregative housing practices.<sup>153</sup> Symptomatic of the failure to establish federal fair housing priorities, President Reagan repealed long-awaited Title VIII substantive regulations promulgated in the last days of the Carter Administration.<sup>154</sup> Likewise, the Reagan Administration's reduction of racial participation reporting rendered enforcement and auditing more difficult.<sup>155</sup> Federal enforcement priorities need to be established if the congressional goals contained in Title VIII are to be realized.

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under the previous Administration, but prosecution of the case has been led by private intervening civil rights attorneys.

152. See cases cited *supra* note 135; see also J. KUSHNER, *supra* note 14, §§ 3.53, 6.01, 7.02. HUD's proposed regulations implementing the Fair Housing Amendments Act of 1988 endorse integrative marketing efforts. 53 Fed. Reg. 44,992 (1988) (to be codified at 24 C.F.R. § 109.16(b)). Other provisions, however, such as 24 C.F.R. § 100.70(d)(2) (prohibiting selective advertising and information), § 100.120(b)(1) (prohibiting preferential loans), and § 100.120(b)(3) (prohibiting discriminatory terms), could be interpreted so as to discourage or prohibit certain affirmative action marketing, affirmative action counseling, and other integration incentives.

153. See cases cited *supra* note 135; see also J. KUSHNER, *supra* note 14, §§ 3.16 (rentals), 3.25 (sales), 3.52 (tenant assignment), 6.01 (community development), 7.02 (site selection).

154. Memorandum from the President, 17 WEEKLY COMP. PRES. DOC. 73 (Jan. 29, 1981) (moratorium on new regulations); see also J. KUSHNER, *supra* note 14, §§ 1.04, 7.02 (failure of the Johnson, Nixon, Ford, Carter, and Reagan Administrations to issue substantive regulations or otherwise enforce Title VI of the 1964 Civil Rights Act, prohibiting discrimination in government programs); *id.* §§ 10.01, 10.04 (failure of the Nixon, Ford, Carter, and Reagan Administrations to promulgate substantive regulations under Title VIII, defining obligations and violations). HUD has proposed rules under the amended statute that provide some examples of violations, yet closely adhere to statutory language. 53 Fed. Reg. 44,992 (1988) (to be codified at 24 C.F.R. § 109.16(b)).

155. J. KUSHNER, *supra* note 14, § 10.01; United States Department of Housing & Urban Development, Notice H 81-12 (Oct. 8, 1981) (repealing the requirement that housing authorities report on minority participation); *cf.* 12 C.F.R. § 338.4 (1988) (Federal Deposit Insurance Corporation elimination of data-keeping on loan applicants by race and sex); *FDIC Cuts Down Fair Housing Reporting Requirements*, 1 Fair Hous.-Fair Lending Rep. (P-H) ¶ 4.3, at 3 (1985) (eliminating log sheets); *Pierce Protests OMB Rejection of Forms to Collect Data on Minorities*, 12 [Current Developments] Hous. & Dev. Rep. (BNA) 923 (1985) (broad halt to equal opportunity reporting). *But cf.* *HUD Seeks to Improve Collection of Racial Data on Subsidized Housing*, 13 [Current Developments] Hous. & Dev. Rep. (BNA) 537 (1985). Congress has now mandated collection of racial data on those eligible and participating in housing and community development programs. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 562, 101 Stat. 1815, 1944 (1988) (to be codified at 42 U.S.C. § 3608a).

## VI. THE FAIR HOUSING AMENDMENTS ACT OF 1988

In almost every year since 1977<sup>156</sup> Congress has attempted to strengthen Title VIII, particularly by establishing a significant federal enforcement arm. Title VIII was written without enforcement teeth.<sup>157</sup> Moreover, severe statutory and judicial limits on damages<sup>158</sup> and attorney's fees<sup>159</sup> discouraged private utilization, and there existed no significant public enforcement to fill the void. The House Report on the earlier version of the Fair Housing Amendments Act of 1988,<sup>160</sup> the proposed Fair Housing Amendments Act of 1980, stated:

The primary weakness in the existing law derives from the almost total dependence upon private efforts to enforce its provisions. For financially capable victims of housing discrimination, the Act has provided litigation remedies. For the vast majority of victims, however, this course of action is not feasible. Alternative enforcement under title VIII is limited to "pattern and practice" cases brought by the Attorney General. While these cases have dealt with virtually every important type of discrimination, and have had a significant impact on the state of the law, relief for individual victims of housing discrimination has not been readily available through this avenue.<sup>161</sup>

The Fair Housing Amendments Act of 1988<sup>162</sup> goes a long way toward

156. The minimally modified 1977 bill was reintroduced by Senator Kennedy as the Fair Housing Amendments Act. S. 558, 100th Cong., 1st Sess., 133 CONG. REC. S2256 (daily ed. Feb. 19, 1987). The original amendments legislation was proposed by Congressmen Drinan and Edwards. H.R. 5200, 96th Cong., 1st Sess. (1979); see H.R. REP. NO. 865, 96th Cong., 2d Sess. (1980); see also *Fair Housing Amendments Act of 1979: Hearings on H.R. 2540 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979). The measure has been reintroduced almost annually. See, e.g., S. 2040, 99th Cong., 2d Sess., 132 CONG. REC. S848 (daily ed. Feb. 3, 1986); S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. S6155 (daily ed. May 5, 1983). On the Senate side, the original bill was reintroduced by Senator Mathias as the Fair Housing Amendments Act of 1981. S. 570, 97th Cong., 1st Sess., 127 CONG. REC. 5028 (1981). A similar version of the bill was offered in the House by Congressmen Railsback and Fish. H.R. 1973, 97th Cong., 1st Sess., 127 CONG. REC. 2516 (1981). Congressman Fish reintroduced the House version. H.R. 1158, 100th Cong., 1st Sess., 133 CONG. REC. H734 (daily ed. Feb. 19, 1987); H.R. 4119, 99th Cong., 2d Sess., 132 CONG. REC. H332 (daily ed. Feb. 4, 1986); H.R. 3482, 98th Cong., 1st Sess., 129 CONG. REC. H4894 (daily ed. June 30, 1983).

157. J. KUSHNER, *supra* note 14, § 10.04; Mathias, *The Fair Housing Amendments Act*, 15 REAL EST. L.J. 353 (1987); Rice, *supra* note 78; Waldrop, *supra* note 78; see also *Senate Subcommittee Approves Bill to Strengthen Fair Housing Enforcement*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 114 (1987).

158. See *supra* notes 116-23 and accompanying text.

159. See *supra* notes 126-30 and accompanying text.

160. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (effective Mar. 12, 1989) (to be codified at 42 U.S.C. §§ 3601-3620, 3631).

161. See H.R. REP. NO. 865, 96th Cong., 2d Sess. 4 (1980); see also H.R. REP. NO. 711, *supra* note 15, at 16, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 2173.

162. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (to be codified at 42 U.S.C. §§ 3601-3620, 3631). See generally J. KUSHNER, *supra* note 14 (Supp. 1989) (forthcoming). For the legislative history, see *Hearings on S. 558*, *supra* note 14; *Hearings on H.R. 1158*, *supra* note 15; H.R. REP. NO. 711, *supra* note 15; 134 CONG. REC. H6491 (daily ed. Aug. 8, 1988) (House acceptance of Senate amendments); 134 CONG. REC. S10,544 (daily ed. Aug. 2, 1988) (Senate passage of amended bill); 134 CONG. REC. S10,532 (daily ed. Aug. 2, 1988); 134 CONG. REC. S10,454 (daily ed. Aug. 1, 1988);



eliminating the basis for this earlier criticism.

### A. *Procedural Changes*

#### 1. Administrative Enforcement

The most significant change in the law is the modification of the administrative process under section 810 of the law. Just as under the prior law, an aggrieved party may file an administrative complaint and the complaint will be referred to a state or local government agency if that agency's program has been certified by HUD as operating under laws substantially equivalent to Title VIII.<sup>163</sup> The state or local certified agency then has thirty days to institute proceedings.<sup>164</sup> Under the prior law, if the locality had no certified agency, then HUD could refer the matter to the Justice Department if a pattern and practice of illegal behavior was presented. The typical complaint, however, could be resolved only by voluntary conciliation between the parties. If the respondent refused to participate or failed to agree to a resolution of the complaint, HUD simply informed the complainant of the right to sue in court.

Under the amended section 810, the complainant or HUD itself may file a complaint. The limitations period is now one year rather than the former 180 days. HUD then has 100 days to complete an investigation. The new law authorizes HUD to issue subpoenas<sup>165</sup> and provides for witness fees.<sup>166</sup> The failure to appear and testify can result in up to one year imprisonment and a fine of up to one hundred thousand dollars.<sup>167</sup> Such penalties also apply to the falsification of documents<sup>168</sup> and the alteration or destruction of evidence.<sup>169</sup> During this time conciliation is to commence, and the process may call for the matter to be submitted to arbitration. If the complaint is not resolved through conciliation, HUD will either dismiss the complaint or file a charge. HUD may not proceed to issue a charge if the complainant has

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134 CONG. REC. H4932 (daily ed. June 29, 1988); 134 CONG. REC. H4912 (daily ed. June 29, 1988) (House passage of bill); 134 CONG. REC. H4898 (daily ed. June 29, 1988); 134 CONG. REC. H4673 (daily ed. June 23, 1988).

163. Pub. L. No. 100-430, § 810(f), 102 Stat. 1619, 1627 (1988) (to be codified at 42 U.S.C. § 3610(f)); *see also supra* note 82.

164. Pub. L. No. 100-430, § 810(f)(2)(A), 102 Stat. at 1627 (to be codified at 42 U.S.C. § 3610(f)(2)(A)).

165. *Id.* § 811(a), 102 Stat. at 1628 (to be codified at 42 U.S.C. § 3611(a)).

166. *Id.* § 811(b), 102 Stat. at 1629 (to be codified at 42 U.S.C. § 3611(b)).

167. *Id.* § 811(c), 102 Stat. at 1629 (to be codified at 42 U.S.C. § 3611(c)).

168. *Id.* § 811(c)(2)(A), (B), 102 Stat. at 1629 (to be codified at 42 U.S.C. § 3611(c)(2)(A), (B)).

169. *Id.* § 811(c)(2)(C), 102 Stat. at 1629 (to be codified at 42 U.S.C. § 3611(c)(2)(C)).

brought federal suit under section 813 and the trial has commenced.<sup>170</sup> Complaints involving zoning disputes are referred to the Justice Department for litigation,<sup>171</sup> and HUD may also order prompt Justice Department litigation in any case in which interim relief, such as an injunction, is called for to protect the rights of the complainant.<sup>172</sup>

Under the amended section 812, which provides for HUD enforcement through litigation, the respondent, complainant, or other aggrieved person on whose behalf the complaint or charge was filed has twenty days to elect to have the matter determined in federal court so as to protect the party's right to a jury trial.<sup>173</sup> If the election is made, HUD authorizes a civil suit that the Attorney General must commence within thirty days of election.<sup>174</sup> Aggrieved parties may intervene in such civil proceedings.<sup>175</sup> If the election is not made, the matter comes before an administrative law judge.<sup>176</sup> The administrative law judge must commence the hearing within 120 days of the filing of the charge<sup>177</sup> and must issue a decision within sixty days of the conclusion of the hearing.<sup>178</sup> The statute provides for discovery,<sup>179</sup> and the administrative hearings are subject to the Federal Rules of Evidence.<sup>180</sup> When trial in a private lawsuit has also been commenced under state law or section 813, the administrative law judge may not proceed to resolve the matter or otherwise progress with administrative proceedings.<sup>181</sup>

Upon finding a violation of the law, the administrative law judge may make an order under section 812(g)(3) awarding actual damages, injunctive and other equitable relief, and may assess a civil penalty against the violator. The statute authorizes penalties of up to ten thousand dollars for the first discriminatory practice finding, twenty-five thousand dollars if the respondent has been adjudged to have committed a violation during the five-year period ending on the date of the charge filing, and up to fifty thousand dollars if there have been two or

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170. *Id.* § 810(b), 102 Stat. at 1626 (to be codified at 42 U.S.C. § 3610(b)); *id.* § 810(g)(4), 102 Stat. at 1628 (to be codified at 42 U.S.C. § 3610(g)(4)).

171. *Id.* § 810(g)(2)(C), 102 Stat. at 1628 (to be codified at 42 U.S.C. § 3610(g)(2)(C)).

172. *Id.* § 810(e), 102 Stat. at 1626 (to be codified at 42 U.S.C. § 3610(e)); *id.* § 810(g)(2)(C), 102 Stat. at 1627-28 (to be codified at 42 U.S.C. § 3610(g)(2)(C)).

173. *Id.* § 812(a), 102 Stat. at 1629 (to be codified at 42 U.S.C. § 3612(a)).

174. *Id.* § 812(o)(1), 102 Stat. at 1632 (to be codified at 42 U.S.C. § 3612(o)(1)) (venue determined according to 28 U.S.C. ch. 87).

175. *Id.* § 812(o)(2), 102 Stat. at 1632 (to be codified at 42 U.S.C. § 3612(o)(2)).

176. *Id.* § 812(b), 102 Stat. at 1629 (to be codified at 42 U.S.C. § 3612(b)).

177. *Id.* § 812(g)(1), 102 Stat. at 1630 (to be codified at 42 U.S.C. § 3612(g)(1)).

178. *Id.* § 812(g)(2), 102 Stat. at 1630 (to be codified at 42 U.S.C. § 3612(g)(2)).

179. *Id.* § 812(d), 102 Stat. at 1629-30 (to be codified at 42 U.S.C. § 3612(d)).

180. *Id.* § 812(c), 102 Stat. at 1629 (to be codified at 42 U.S.C. § 3612(c)).

181. *Id.* § 812(f), 102 Stat. at 1630 (to be codified at 42 U.S.C. § 3612(f)).

more adjudged violations during the prior seven years.<sup>182</sup> The time limits do not apply, however, if the perpetrator is an individual repeat offender rather than a different employee of the same offending organization. The administrative law judge, just as any federal judge, may award attorney's fees to prevailing parties under section 812(p). Bona fide purchasers, tenants, or encumbrancers without notice of the charge are not subject to injunctive orders interfering with their real estate transactions.<sup>183</sup> The Secretary of HUD has thirty days to review the findings of the administrative law judge,<sup>184</sup> and the final order may, within thirty days, be reviewed<sup>185</sup> or the ruling enforced by the United States Court of Appeals.<sup>186</sup> The administrative law judge's findings are deemed conclusive if no petition for judicial review is filed within forty-five days of the date the order was entered.<sup>187</sup> Such a conclusive finding binds subsequently filed HUD petitions for enforcement. If HUD does not petition to enforce the administrative law judge's order within sixty days, and if no party files a petition to review the order, any person entitled to relief without time limitation may file a petition in the Court of Appeals to enforce the order.<sup>188</sup> Any order dismissing charges must be disclosed publicly.<sup>189</sup> In addition, HUD may seek Justice Department enforcement of conciliation agreement violations.<sup>190</sup> HUD also must notify state licensing agencies when licensed real estate professionals, lenders, or other licensed businesses are found to have engaged in discriminatory practices.<sup>191</sup>

## 2. Private Litigation

Section 813, replacing what was known as section 812 under the prior law, provides for private enforcement in federal court. The amendment provides a two-year statute of limitations rather than the

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182. *Id.* § 812(g)(3), 102 Stat. at 1630 (to be codified at 42 U.S.C. § 3612(g)(3)). Copies of orders against repeat offenders are to be referred to the Attorney General. *Id.* § 812(g)(6), 102 Stat. at 1631 (to be codified at 42 U.S.C. § 3612(g)(6)).

183. *Id.* § 812(g)(4), 102 Stat. at 1631 (to be codified at 42 U.S.C. § 3612(g)(4)).

184. *Id.* § 812(h)(1), 102 Stat. at 1631 (to be codified at 42 U.S.C. § 3612(h)(1)).

185. *Id.* § 812(i)(2), 102 Stat. at 1631 (to be codified at 42 U.S.C. § 3612(i)(2)) (venue in the circuit where the discriminatory housing practice is alleged to have occurred).

186. *Id.* § 812(j), 102 Stat. at 1631 (to be codified at 42 U.S.C. § 3612(j)) (venue for enforcement in the circuit where the practice is alleged to have occurred or where the respondent resides or conducts business; the petition may seek temporary relief).

187. *Id.* § 812(l), 102 Stat. at 1632 (to be codified at 42 U.S.C. § 3612(l)).

188. *Id.* § 812(m), 102 Stat. at 1632 (to be codified at 42 U.S.C. § 3612(m)) (venue in the circuit where the discriminatory housing practice is alleged to have occurred).

189. *Id.* § 812(g)(7), 102 Stat. at 1631 (to be codified at 42 U.S.C. § 3612(g)(7)).

190. *Id.* § 810(c), 102 Stat. at 1626 (to be codified at 42 U.S.C. § 3610(c)).

191. *Id.* § 812(g)(5), 102 Stat. at 1631 (to be codified at 42 U.S.C. § 3612(g)(5)).

former 180 days.<sup>192</sup> In addition, the two years does not include any periods during which administrative proceedings were pending under sections 810 and 812.<sup>193</sup> Just as under the prior law, the section 813 action may be commenced even if a section 810 administrative complaint has been filed with HUD.<sup>194</sup> Section 813 actions are barred, however, once the complainant consents to a section 810 HUD-, state-, or locally obtained conciliation agreement.<sup>195</sup> Section 813 private litigation also is barred once a section 812 hearing before an administrative law judge has commenced on the record.<sup>196</sup> The Attorney General may intervene in section 813 proceedings on timely certification that the case is of general public importance.<sup>197</sup> The federal judge in a section 813 case can appoint an attorney for the complainant<sup>198</sup> and can waive fees, costs, and security if the complainant is financially unable to bear such costs.<sup>199</sup> The judge also may award unlimited actual and punitive damages and grant injunctive relief, including orders for affirmative action.<sup>200</sup> Attorney's fees also are available under section 813.<sup>201</sup> As in administrative proceedings, bona fide purchasers, tenants, or encumbrancers without notice of the administrative complaint or litigation are not subject to injunctive orders interfering with their real estate transactions.<sup>202</sup> This is a dramatic improvement over the original law, which placed a one thousand dollar cap on punitive damages and limited attorney fee awards to those financially unable to afford counsel.<sup>203</sup>

### 3. Federal Litigation

Section 814, which replaces what was known as section 813 under the prior law, allows pattern and practice litigation by the Justice Department as well as the enforcement of conciliation agreements. A pattern and practice action may be filed when the Attorney General

has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted

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192. *Id.* § 813(a)(1)(A), 102 Stat. at 1633 (to be codified at 42 U.S.C. § 3613(a)(1)(A)).

193. *Id.* § 813(a)(1)(B), 102 Stat. at 1633 (to be codified at 42 U.S.C. § 3613(a)(1)(B)) (the tolling does not apply to actions arising from a breach of a conciliation agreement).

194. *Id.* § 813(a)(2), 102 Stat. at 1633 (to be codified at 42 U.S.C. § 3613(a)(2)).

195. *Id.*

196. *Id.* § 813(a)(3), 102 Stat. at 1633 (to be codified at 42 U.S.C. § 3613(a)(3)).

197. *Id.* § 813(e), 102 Stat. at 1634 (to be codified at 42 U.S.C. § 3613(e)).

198. *Id.* § 813(b)(1), 102 Stat. at 1633 (to be codified at 42 U.S.C. § 3613(b)(1)).

199. *Id.* § 813(b)(2), 102 Stat. at 1633 (to be codified at 42 U.S.C. § 3613(b)(2)).

200. *Id.* § 813(c), 102 Stat. at 1633-34 (to be codified at 42 U.S.C. § 3613(c)).

201. *Id.* § 812(p), 102 Stat. at 1633 (to be codified at 42 U.S.C. § 3612(p)); *id.* § 813(c)(2), 102 Stat. at 1633-34 (to be codified at 42 U.S.C. § 3613(c)(2)).

202. *Id.* § 813(d), 102 Stat. at 1634 (to be codified at 42 U.S.C. § 3613(d)); *see* note 183 and accompanying text.

203. *See supra* notes 116-22, 126-30 and accompanying text.

by . . . [Title VIII] . . . or that any group of persons has been denied any of the rights granted by . . . [Title VIII] . . . and such denial raises an issue of general public importance.<sup>204</sup>

Unlike the prior law, the new law may subject pattern and practice cases to a statute of limitations. Actions to enforce HUD referrals of discriminatory housing practices must be brought within eighteen months of the date of the occurrence or termination of the alleged discriminatory practice.<sup>205</sup> Actions for breach of conciliatory agreements must be commenced within ninety days.<sup>206</sup> The Attorney General also is authorized to enforce subpoenas on behalf of HUD.<sup>207</sup> Relief in litigation commenced by the Justice Department under section 814 may include injunctive relief,<sup>208</sup> damages to aggrieved persons,<sup>209</sup> and civil penalties of up to fifty thousand dollars for the first violation, and one hundred thousand dollars for subsequent violations.<sup>210</sup> The court may permit aggrieved parties to intervene in section 814 proceedings.<sup>211</sup> The court also may award attorney's fees to parties other than the Justice Department or other federal agencies.<sup>212</sup>

### B. Changes in Coverage

#### 1. Extension to the Disabled

The Fair Housing Amendments Act of 1988 extends Title VIII coverage to the disabled.<sup>213</sup> The disabled are frequently the victims of housing discrimination.<sup>214</sup> Landlords concerned with image, compatibil-

204. Pub. L. No. 100-430, § 814(a), 102 Stat. at 1634 (to be codified at 42 U.S.C. § 3614(a)).

205. *Id.* § 814(b)(1)(B), 102 Stat. at 1634 (to be codified at 42 U.S.C. § 3614(b)(1)(B)).

206. *Id.* § 814(b)(2)(B), 102 Stat. at 1634 (to be codified at 42 U.S.C. § 3614(b)(2)(B)).

207. *Id.* § 814(c), 102 Stat. at 1634 (to be codified at 42 U.S.C. § 3614(c)).

208. *Id.* § 814(d)(1)(A), 102 Stat. at 1634-35 (to be codified at 42 U.S.C. § 3614(d)(1)(A)).

209. *Id.* § 814(d)(1)(B), 102 Stat. at 1635 (to be codified at 42 U.S.C. § 3614(d)(1)(B)).

210. *Id.* § 814(d)(1)(C), 102 Stat. at 1635 (to be codified at 42 U.S.C. § 3614(d)(1)(C)). The House bill anticipated that the amounts specified would be maximums and that court awards would be based on a consideration of "the nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of that defendant and the goal of deterrence, and other matters as justice may require." H.R. REP. NO. 711, *supra* note 15, at 40.

211. Pub. L. No. 100-430, § 814(e), 102 Stat. at 1635 (to be codified at 42 U.S.C. § 3614(e)).

212. *Id.* § 814(d)(2), 102 Stat. at 1635 (to be codified at 42 U.S.C. § 3614(d)(2)).

213. *Id.* § 804(f), 102 Stat. at 1620-22 (to be codified at 42 U.S.C. § 3604(f)) (reaching discrimination in sales, rentals, or otherwise denying housing or making it unavailable; discrimination in conditions, privileges, services, facilities, or refusal to provide accommodations in rules); *id.* § 805(a), 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3605(a)) (reaching discrimination in residential real estate-related transactions, including lending services); *id.* § 806, 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3606) (reaching discrimination in brokerage services); *id.* § 901, 102 Stat. at 1635 (to be codified at 42 U.S.C. § 3631) (including the disabled in the class of persons protected by the criminal penalty section of the Act).

214. See J. KUSHNER, *supra* note 14, § 2.09; Anderson, *Private Housing for the Disabled: A Suggested Agenda*, 56 NOTRE DAME LAW. 247 (1980); Anderson & Steinhoff, *Housing for Physi-*

ity with other tenants, minimization of architectural access modifications, or simply their own discomfort in confronting the disabled may be quick to refuse accommodations. Ironically, popular compassion was reflected in the nearly universal support for extension of Title VIII to protect the disabled. Concern nevertheless arises regarding the cost of architectural modifications, which the new law places on the disabled tenant.<sup>215</sup>

The new law defines handicap as "a physical or mental impairment which substantially limits one or more of such person's major life activities."<sup>216</sup> The law specifically excludes from protection current illegal use of or addiction to a controlled substance.<sup>217</sup> In addition to the disabled, the law also prohibits discrimination against one associated with a handicapped person.<sup>218</sup> AIDS sufferers and others afflicted with disease won protection under the law through the defeat of an amendment that attempted to exclude those with communicable diseases.<sup>219</sup> Nevertheless, the law does not cover those "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."<sup>220</sup> Disabled persons are also protected under some state and local fair housing laws.<sup>221</sup>

The new law also will have a broad impact on the physical accessibility of housing. Beginning in February 1991, all newly constructed multifamily housing with four or more units and elevators, and all ground floor units of projects with four or more units<sup>222</sup> will have to assure access to common areas and include adaptive design features. Such features include wheelchair passage, accessible light switches, electrical outlets, thermostats and other environmental controls, reinforcements in bathrooms to accommodate future grab bar installation,

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*cally Disabled: A Case Waiting to Happen*, 21 CLEARINGHOUSE REV. 578 (1987); Mandelker, *Housing Issues*, in AIDS AND THE LAW 142 (1987); Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 URB. LAW. 1 (1987).

215. Pub. L. No. 100-430, § 804(f)(3)(A), 102 Stat. at 1620 (to be codified at 42 U.S.C. § 3604(f)(3)(A)) (allowing an agreement by a tenant to restore the interior of the premises to the condition that existed before the modification, excepting reasonable wear and tear).

216. *Id.* § 802(h)(1), 102 Stat. at 1619 (to be codified at 42 U.S.C. § 3602(h)(1)).

217. *Id.* § 802(h)(3), 102 Stat. at 1619 (to be codified at 42 U.S.C. § 3602(h)(3)).

218. *Id.* § 804(f)(2)(C), 102 Stat. at 1620 (to be codified at 42 U.S.C. § 3604(f)(2)(C)).

219. See H.R. 1158, 100th Cong., 2d Sess., 134 CONG. REC. H4929-31 (daily ed. June 29, 1988) (Burton amendment); *House Judiciary Committee Approves Bill with ALJ, Handicapped Provisions*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 958 (1988).

220. Pub. L. No. 100-430, § 804(f)(9), 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3604(f)(9)).

221. J. KUSHNER, *supra* note 14, § 2.09.

222. Pub. L. No. 100-430, § 804(f)(7), 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3604(f)(7)).

and kitchens and bathrooms that allow wheelchair maneuverability.<sup>223</sup>

## 2. Extension to Families with Children

The Fair Housing Amendments Act of 1988 extends coverage both to familial discrimination,<sup>224</sup> defined as discrimination against persons under the age of eighteen who reside with their legal custodian or such person's designee, and to discrimination against those who are pregnant or in the process of securing legal custody of a person under age eighteen.<sup>225</sup> There exists pervasive discrimination in renting to these two groups.<sup>226</sup> Such discrimination is frequently imposed as a marketing scheme to attract singles. All too frequently, however, the scheme is designed to discourage renting to racial minorities. Even when such a racial design is not the motivating factor, the racial effect is dramatic. In many urban metropolitan centers, those renters with children are typically ethnic, national origin, or racial minority group females.<sup>227</sup> By contrast, white women with children tend to rent or own homes in the suburbs. In central urban communities, a no children rule will carry a

223. *Id.* § 804(f)(3)(C), 102 Stat. at 1621 (to be codified at 42 U.S.C. § 3604(f)(3)(C)). The access requirements for new construction are met if the development complies with the American National Standard, *id.* § 804(f)(4), 102 Stat. at 1621 (to be codified at 42 U.S.C. § 3604 (f)(4)), and state or local adoption of the standard results in compliance with Title VIII, *id.* § 804(f)(5)(A), 102 Stat. at 1621 (to be codified at 42 U.S.C. § 3604(f)(5)(A)). Section 804(f)(5)(C) provides that HUD shall encourage state and local governments to review and approve projects for compliance. *Id.* § 804(f)(5)(C), 102 Stat. at 1621 (to be codified at 42 U.S.C. § 3604(f)(5)(C)).

224. *See id.* § 804(a)-(e), 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3604(a)-(e)); *id.* § 805, 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3605); *id.* § 806, 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3606); *id.* § 901, 102 Stat. at 1635 (to be codified at 42 U.S.C. § 3631).

225. *Id.* § 802(k), 102 Stat. at 1620 (to be codified at 42 U.S.C. § 3602(k)).

226. *See Hearings on H.R. 1158, supra* note 15, at 363 (statement of James B. Morales) (collecting and summarizing reports and studies from across the country); *Senate Hearings, supra* note 78, at 63, 199-206 (providing a description of the problem and a collection of state laws prohibiting such bias); H.R. REP. NO. 711, *supra* note 15, at 19-20; D. ASHFORD & P. ESTON, *THE EXTENT AND EFFECTS OF DISCRIMINATION AGAINST CHILDREN IN RENTAL HOUSING: A STUDY OF FIVE CALIFORNIA CITIES* (1979) (finding that 71% of advertised apartments in Los Angeles allow no children); J. GREENE & G. BLAKE, *HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN* (1980); HUMAN RIGHTS/FAIR HOUSING COMM'N OF THE CITY AND COUNTY OF SACRAMENTO, *DISCRIMINATION AGAINST FAMILIES WITH CHILDREN IN THE SACRAMENTO RENTAL MARKET* (1983) (finding that 40% of the sample engaged in child discrimination one year after court ruled it illegal); J. KUSHNER, *supra* note 14, § 2.07; U.S. DEP'T OF HOUS. AND URBAN DEV., *HOUSING OUR FAMILIES* (1981); *see also* R. MARANS, *A REPORT ON MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN* (1980) (finding that 25.5% of all rental units exclude children; another 50% discourage children by policies); Barnett, *Child Exclusion Policies in Housing*, 67 KY. L.J. 967 (1979); Stanley, *Age Restrictions in Housing: The Denial of the Family's Right to Its Integrity*, 19 HARV. C.R.-C.L. L. REV. 61 (1984); Note, *Why Johnny Can't Rent—An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829 (1981) [hereinafter Note, *Why Johnny Can't Rent*]; Note, *Exclusion of Families with Children from Housing*, 18 U. MICH. J.L. REF. 1121 (1985).

227. *See* D. ASHFORD & P. ESTON, *supra* note 226.

dramatic racially discriminatory impact, an impact that has not been successfully defended on business-backed, profit-based rationales.<sup>228</sup> Even under the prior law, several courts found "no child" rules to be a pretext for racial discrimination<sup>229</sup> or a violation of Title VIII that established a disparate impact prima facie case.<sup>230</sup> Child discrimination also is prohibited under some state and local laws.<sup>231</sup>

The new amendments that prohibit child discrimination do, however, exempt from compliance senior citizen housing complexes of two types: (1) those complexes whose residents will all be older than sixty-two years of age;<sup>232</sup> and (2) those that house at least one person fifty-five years of age or older per unit.<sup>233</sup> For housing complexes seeking exemption under the latter scheme, HUD is directed to issue regulations limiting its reach to those in which special senior citizen facilities and services are provided, eighty percent of the units are so occupied, and the senior citizen policy is published as a rule and enforced.<sup>234</sup>

### 3. Additional Extensions

The new amendments extend the express reach of Title VIII to several additional discriminatory practices. Title VIII now expressly covers real estate loans for repairs and improvements<sup>235</sup> as well as secondary lending practices such as bias in loan-based securities and real estate appraisals.<sup>236</sup> Furthermore, the definition of "aggrieved" under

228. See *Tolliver v. Amici*, 800 F.2d 149 (7th Cir. 1986); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982); *Langley v. Monumental Corp.*, 496 F. Supp. 1144 (D. Md. 1980); *Elazer v. Wright*, 2 Eq. Opportunity Hous. Rep. (P-H) ¶ 15,197 (S.D. Ohio 1976); *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, cert. denied, 459 U.S. 858 (1982). But see *Fred v. Kokinokos*, 347 F. Supp. 942 (E.D.N.Y. 1972).

229. *Tolliver*, 800 F.2d at 150; *Betsey*, 736 F.2d at 986-89; *Langley*, 496 F. Supp. at 1144; *Elazer*, 2 Eq. Opportunity Hous. Rep. (P-H) ¶ 15,197; *State Comm'n for Human Rights v. Kennelly*, 30 A.D.2d 310, 291 N.Y.S.2d 686, aff'd, 23 N.Y.2d 722, 244 N.E.2d 58, 296 N.Y.S.2d 367 (1968); see also *Fair Hous. Found. v. Acapulco Apartments*, No. FCR 83-84, B1-0022, FHL 83-84, B1-0137h (Cal. Dep't Fair Employ. & Hous. Aug. 22, 1984) (settlement); cf. *People v. McKale*, 25 Cal. 3d 626, 602 P.2d 731, 159 Cal. Rptr. 811 (1979) (religious discrimination).

230. See, e.g., *Betsey*, 736 F.2d at 988.

231. See, e.g., *Wolfson*, 30 Cal. 3d at 744-45, 640 P.2d at 129, 180 Cal. Rptr. at 511; *Senate Hearings*, supra note 78, at 63, 200-02 (describing problem and collecting state laws prohibiting such bias); J. KUSHNER, supra note 14, § 2.07; Note, *Why Johnny Can't Rent*, supra note 226.

232. Pub. L. No. 100-430, § 807(b)(2)(B), 102 Stat. at 1623 (to be codified at 42 U.S.C. § 3607(b)(2)(B)).

233. *Id.* § 807(b)(2)(C), 102 Stat. at 1623 (to be codified at 42 U.S.C. § 3607(b)(2)(C)).

234. *Id.* § 807(b)(2)(C)(i)-(iii), 102 Stat. at 1623 (to be codified at 42 U.S.C. § 3607(b)(2)(C)(i)-(iii)). Section 807(b)(3) provides that housing will not fail to meet the senior citizen requirements because those residing at the time of passage do not meet the requirements. *Id.* § 807(b)(3), 102 Stat. at 1623 (to be codified at 42 U.S.C. § 3607(b)(3)).

235. *Id.* § 805(b)(1)(A), 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3605(b)(1)(A)).

236. *Id.* § 805(b)(2), 102 Stat. at 1622 (to be codified at 42 U.S.C. § 3605(b)(2)).



Title VIII now reaches persons who believe they "will be injured by a discriminatory housing practice about to occur,"<sup>237</sup> in addition to those already injured.<sup>238</sup> Interference, coercion, or intimidation claims may now be vindicated through HUD administrative proceedings as well as through the previously permitted route of private civil litigation.<sup>239</sup>

### C. *Administrative Modifications*

Administrative modifications include new provisions for the recognition of state and local equivalent fair housing laws. During the forty months following passage of the amendments those agencies with interim referral certification will be considered certified, and each jurisdiction has the forty months, with a possible eight-month extension, in which to amend its laws or regulations to achieve substantial equivalency.<sup>240</sup> Certification is to be reconsidered at least every five years.<sup>241</sup>

The new amendments authorize the Secretary of HUD to issue implementing regulations<sup>242</sup> and require the submission of an annual report to Congress covering complaints, investigations, hearings under the administrative enforcement provisions,<sup>243</sup> and participation of protected minorities in HUD administered programs.<sup>244</sup>

### D. *Potential Impact*

The Fair Housing Amendments Act of 1988 is the most significant civil rights enactment in a generation, providing the mechanisms to enforce the fair housing laws effectively. The generous damages and attorney's fees available should attract competent attorneys willing to take on fair housing cases. The relief provisions, together with the extended statute of limitations, the liberalized standing rules achieved by extending the definition of "aggrieved," and the liberal "effects" prima facie case, make Title VIII the most attractive litigation strategy. All fair housing cases should now be brought under Title VIII.

The administrative law court program has the potential for ex-

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237. *Id.* § 802(i)(2), 102 Stat. at 1620 (to be codified at 42 U.S.C. § 3602(i)(2)).

238. *Id.* § 802(i)(1), 102 Stat. at 1620 (to be codified at 42 U.S.C. § 3602(i)(1)).

239. *Id.* §§ 812-813, 818, 102 Stat. at 1629-34 (to be codified at 42 U.S.C. §§ 3612-3613, 3618).

240. *Id.* § 810(f)(4), 102 Stat. at 1627 (to be codified at 42 U.S.C. § 3610(f)(4)).

241. *Id.* § 810(f)(5), 102 Stat. at 1627 (to be codified at 42 U.S.C. § 3610(f)(5)).

242. *Id.* § 815, 102 Stat. at 1635 (to be codified at 42 U.S.C. § 3614(a)). HUD has issued regulations under the new law which, while providing some examples of violations, follow statutory language closely. 53 Fed. Reg. 44,992 (1988). The rules have since been finalized. 54 Fed. Reg. 3232 (1989).

243. Pub. L. No. 100-430, § 808(e)(2), 102 Stat. at 1624 (to be codified at 42 U.S.C. § 3608(e)(2)).

244. *Id.* § 808(e)(6), 102 Stat. at 1624 (to be codified at 42 U.S.C. § 3608(e)(6)).

tending effective enforcement throughout the Nation; publicity and reported cases should encourage participation by the bar and bring greater awareness to potential victims as well as deterrence to real estate professionals. Whether parties will elect to have HUD charges heard in federal court rather than before an administrative law judge will depend on the performance of the administrative law program. Counsel may prefer administrative law judges regardless of the more generous relief available under section 813 if the administrative law judges display expertise in fair housing law. Aggrieved parties are likely to seek the most sensitive and compassionate tribunal; thus, a perception that the local federal court favors either complainants or respondents likely will influence the forum decision. The article III federal court alternative is likely to be more complex and subject to delay. The court alternative may, therefore, appeal to the respondent with resources to delay proceedings with prolix motions, discovery, and trial practices. Other respondents may, however, prefer the administrative law judge alternative because the shorter proceeding is likely to reduce significantly the cost of defense. Even if the complaint never reaches litigation, the new administrative enforcement provisions will enhance the utility of conciliation because respondents will face costly litigation and sanctions if they do not cooperate.

Despite the new mechanisms, whose effectiveness will depend greatly upon the support of HUD and the Justice Department, and in reality upon leadership from the Bush Administration, the most desirable enforcement strategy will continue to be private litigation, now under section 813 of Title VIII. Only through section 813 can courts award punitive damages and fashion creative affirmative action decrees.

A fundamental problem in resource allocation may be posed by the extension of Title VIII to prohibit discrimination against the disabled and families with children. While child discrimination frequently presents a racial impact, expanding the mission of fair housing enforcement to such family discrimination may dilute the primary, racial equality mission. Child discrimination carries no moral stigma, and landlords frequently advertise "adults only" occupancy standards openly. This form of discrimination is easy to identify and requires no testing because the victim is informed directly of the reason for exclusion. The overt nature of these violations may lead authorities to allocate scarce enforcement resources to such cases rather than the harder to uncover, sophisticated forms of racial and ethnic discrimination. If additional enforcement resources are not allocated to compensate for the diversion of resources from race cases, the primary mission of fair housing laws might be thwarted. The same diversion of resources concern applies to discrimination against the disabled. Despite the obvious

justice in prohibiting these forms of discrimination, this diversion from the effort to dismantle the institution of race discrimination and segregation will further delay the fundamental purpose and promise of the Fair Housing Act.

#### VII. STATE AND LOCAL ENFORCEMENT

The quality and effectiveness of state and local fair housing enforcement is widely mixed. Although some states and cities have agencies committed to ending housing discrimination, most states have had little experience investigating, processing, and resolving fair housing disputes, and some cities are not even aware that their city council once passed fair housing legislation. Nonetheless, state and local fair housing enforcement is the laboratory for experiments in enforcement strategy, and both early and sustained successes in this laboratory may show the direction of future effective fair housing enforcement.<sup>245</sup>

Perhaps the most significant local initiatives are state and local laws requiring housing providers to make regular reports of minority participation in their projects, real estate office services, and applicant pools.<sup>246</sup> Reporting not only deters some discrimination and encourages landlords, brokers, and subdivision home sellers to include minorities, but the reports may also be used to target potential discriminators for testing. Reporting can have the greatest impact when it is used to identify large operators and demonstrate extraordinary underrepresentation of minorities in relation to the community population and the applicant pool.

The typical minority applicant or tester is convinced that he was not treated discourteously or disparately from white applicants. The shock comes when one compares the report submitted by the white tester.<sup>247</sup> More units are available, an application is solicited, and the discrimination is uncovered. Because of the prevalence of housing shortages, most applicants told of long waiting lists or units already leased do not suspect discrimination. HUD's own study has demonstrated that the pervasive scheme of discrimination can be identified only through testing because the victim is seldom made aware of the

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245. Goering, *Minority Housing Needs and Civil Rights Enforcement*, in RACE, ETHNICITY, *supra* note 28, at 205-09 (growth in state and local enforcement efforts).

246. *Montgomery County v. Fields Road Corp.*, 282 Md. 575, 386 A.2d 344 (1978) (finding requirement that landlords with 25 or more units make quarterly reports on minority tenants and applications was an appropriate exercise of the general welfare power, as the provision provides an alert to potential problems and encourages landlords to be sensitive to their responsibilities); *New Jersey Builders, Owners & Managers Ass'n v. Blair*, 60 N.J. 330, 288 A.2d 855 (1972) (sustaining state multiple dwelling reporting rule); *Kentucky Rental Discrimination Drops to 10.5 Percent*, *supra* note 18 (statewide, stressing impact of landlord reporting and enforcement).

247. REGIONAL FAIR HOUSING CONSORTIUM, *supra* note 17, at 12-14.

disparate treatment received.<sup>248</sup> Thus, without comprehensive testing, Title VIII is relegated to a symbolic, minor role in the quest for fair housing. The Fair Housing Initiatives Program (FHIP) contained in the recently passed 1987 Housing Act could make a small start in the right direction, but proposed regulations would limit utilization to cases in which a victim comes forward and demands successive testing.<sup>249</sup> State and local agencies with access to reporting information are not so limited and can maximize resources by targeting possible discrimination. Testing only in response to complaints will identify simply the coincidental or outrageous case; those state and local agencies that are enjoying the greatest success regularly utilize noncomplaint based testing in their administration.

Too many jurisdictions—reflecting an earlier era when housing bias was acceptable to the majority—have limited the reach of, or remedies under, fair housing laws.<sup>250</sup> The states and jurisdictions enjoying enforcement success have various investigatory and remedial tools available. Most significant, and most effective, is the availability of substantial damages for the victim. The small rewards typically awarded by most states and local agencies are an insult to the victim and a joke to the real estate industry.<sup>251</sup> California agency awards have

248. HUD AUDIT, *supra* note 7.

249. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 561, 101 Stat. 1815, 1942 (1988) (to be codified in scattered sections of 12 U.S.C. and 42 U.S.C.). See *supra* note 133; see also *HOME v. Sibcy Cline, Inc.*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,912 (S.D. Ohio 1988) (consent decree) (affirmative action relief settlement in steering case, including two annual funded random tests by the fair housing organization); *HUD, Realtors Agree on Guidelines for Federal Funding of Private Testers*, 13 [Current Developments] Hous. & Dev. Rep. (BNA) 1061 (1986) (requiring "paired" tests); *Witnesses Say Guidelines Would "Gut" Title VIII Enforcement*, *supra* note 139 (testimony on the early unsuccessful bill, S. 6478, 99th Cong., 2d Sess. (1986)).

250. See *Indiana Civil Rights Comm'n v. Holman*, 177 Ind. App. 648, 380 N.E.2d 1281 (1978) (damages limited to pecuniary loss); *Italiano v. State Div. of Human Rights*, 36 A.D.2d 1009, 321 N.Y.S.2d 422 (1971) (out-of-pocket loss), *aff'd*, 30 N.Y.2d 796, 286 N.E.2d 274, 334 N.Y.S.2d 898 (1972); *Commonwealth Human Relations Comm'n v. Feeser*, 29 Pa. Commw. 437, 371 A.2d 549 (1977) (no awards for humiliation); *Straw v. Commonwealth Human Relations Comm'n*, 10 Pa. Commw. 99, 308 A.2d 619 (1973) (no mental anguish awards), *aff'd*, 478 Pa. 567, 387 A.2d 467 (1978); *Rody v. Hollis*, 81 Wash. 2d 88, 500 P.2d 97 (1972) (\$1000 cap on agency awards); *State Human Rights Comm'n v. Pearlman Realty Agency*, 161 W. Va. 1, 239 S.E.2d 145 (1977) (incidental damages for mental distress); see also CAL. CIV. CODE § 52 (Deering 1988) (\$250 punitive damages cap); CAL. GOV'T CODE §§ 12,900, 12,955, 12,987 (Deering 1988) (\$1000 punitive damages cap); MASS. GEN. LAWS ANN. ch. 151B, § 5 (West 1988) (\$2000 cap); MINN. STAT. ANN. § 363.071(2) (West Supp. 1988) (damages from \$25 to \$500); *Oklahoma Governor Signs State Fair Housing Law*, 13 [Current Developments] Hous. & Dev. Rep. (BNA) 267 (1985) (allowing punitive damages of \$1000 for the first offense, \$2000 for the second violation, and \$5000 for each subsequent violation).

251. In fiscal 1987, HUD received 4699 fair housing complaints and referred 2770 to certified state and local agencies. These referrals resulted in awards of \$375,100, or \$135.41 per complaint. HUD conciliation resulted in awards of \$411,500, or an average of \$213.32, demonstrating administrative proceedings to be the least effective enforcement technique. *Residential Segregation Sti-*

reached one hundred thousand dollars<sup>252</sup> and Michigan has reached three hundred thousand dollars;<sup>253</sup> the impact of such awards is a message to violators that enforcement can wipe out profits, and a message to their lawyers that the settlement price is likely to be a high figure.

Because in most jurisdictions there are no fair housing plaintiff's attorneys, effective fair housing enforcement has depended on aggressive state and local agency enforcement. The strengthened HUD proceedings under the Fair Housing Amendments Act of 1988 should provide a viable remedy and leadership for the modest state enforcement presence. National leadership could have its greatest impact by defining section 810 "substantial equivalency" as the elimination of damage caps in state and local fair housing laws.

In the struggle to identify resources to take on the mammoth task of curtailing housing discrimination, the untapped resource is state and local government. Fair housing activists have been too comfortable with their levels of funding and have failed to lobby effectively for enhanced public enforcement. Indeed, one potentially justified fear is that enhanced public sector enforcement may result in reduced funding for private sector enforcement. Nevertheless, public enforcement, including criminal prosecution of fair housing violators, might have a significant deterrent impact, provide excellent fair housing publicity, and educate the community about the presence and nature of housing discrimination. Such prosecutions, by casting discriminators in their true light—as criminals—may generate larger and more effective damage awards in civil cases.

The federal role in local enforcement has been virtually nonexistent.<sup>254</sup> Instead of providing leadership, training, and direction, HUD's role has been simply to administer a modest grant program to assist enforcing agencies and nominally to administer the equivalency certification process. In the administration of the community development block grant program, HUD has required recipients simply to do something, such as fund local nonprofit fair housing councils or other groups interested in fair housing. HUD, if it desires to be serious about fair housing enforcement, could issue community development block grant regulations describing an acceptable fair housing enforcement pro-

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*fling Black Advancement, Professor Testifies*, 15 [Current Developments] *Hous. & Dev. Rep.* (BNA) 695 (1988).

252. *Department of Fair Employment v. Davis Realty Co.*, [1986-1987] *Cal. Fair Employment & Hous. Comm'n Precedential Dec.* (CEB) 5 (Jan. 23, 1987) (\$97,158) (house rental).

253. *Michigan Comm'n on Civil Rights v. Martin*, 24 *TRENDS*, Dec. 1982, at 2 (\$300,000) (eviction for entertaining minority guest).

254. Kushner, *supra* note 131.

gram.<sup>255</sup> Such a program could provide for the following: (1) local reporting of racial and national origin data for occupants and applicants by landlords, developers who market subdivisions and condominiums, and real estate brokers; (2) a comprehensive program for testing those housing providers with significant minority underrepresentation; and (3) the funding of government litigation programs or private, nonprofit fair housing organizations with the capacity and commitment to provide representation for complainants in fair housing litigation.<sup>256</sup> Although public relations and education is clearly needed, HUD's low enforcement profile projects a largely ceremonial image. HUD is best known for fair housing "road shows"<sup>257</sup> and April "fair housing month" poster contests. The Reagan Administration, despite benign intentions, conveyed the message that federal fair housing enforcement did not exist; national leadership failed to condemn discrimination and segregation.

Despite all the focus on federal, state, and local fair housing enforcement, virtually all fair housing enforcement has relied upon information and evidence gathered by dedicated local fair housing councils and other volunteer nonprofit organizations and referred to lawyers and agencies. Most of the private fair housing litigation and most of the best publicly enforced fair housing proceedings arose from the referrals, testing, counseling, and publicity carried on by the fair housing councils.

Despite the leadership and central role played by the nonprofit councils during the first generation of fair housing, these councils face a dilemma for the second generation. Typically the only enforcement option available to these groups is referral to an overworked and often ineffective public agency. The nonprofit councils are thus left without

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255. The block grant program must be administered affirmatively in conformity with the policies of Title VIII. 24 C.F.R. § 570.307(k)(2), *superseded by*, 53 Fed. Reg. 34,416, 34,450, 44,468 (1988) (to be codified at 24 C.F.R. §§ 530.303(d), 570.904); *see also* The Housing and Community Development Amendments of 1981, § 302(b)(2), 42 U.S.C. § 5306 (1982); *Community Development Briefs*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 68 (1988) (fair housing enforcement activities eligible as public service or program administrative cost, but subject to the funding caps of 15% and 20% respectively, thus competing with other program obligations and needs); *HUD May Seek Legislation to Make Fair Housing a Separate CDBG-Eligible Activity*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 569 (1988).

256. This should be based on the Leadership Council For Metropolitan Open Communities program in Chicago, one of the Nation's best fair housing programs.

257. Spiegel, *A HUD Roadshow Raises Questions of Conflict*, L.A. Times, Dec. 27, 1987, pt. II, at 1, col. 1 (reporting three-year, \$1 million promotional roadshow for fair housing by Secretary Samuel R. Pierce, with funds partially raised through pressure and near extortion on HUD-assisted contractors, developers, and housing managers); *see also* Spiegel, *Inspector Criticizes HUD for Solicitation*, L.A. Times, July 26, 1988, pt. II, at 1, col. 1 (criticism of soliciting private donations; conflict of interest inquiry pending).

essential backup support. Those councils that have had the greatest impact have enjoyed being located in communities where one or more lawyers have dedicated themselves to litigating fair housing cases on a virtually full-time basis. Such communities are few and far between. Although Congress in the 1987 Housing and Community Development Act finally authorized some funding for private fair housing enforcement,<sup>258</sup> no means of enforcement are available. Even if funds are appropriated for the newly passed FHIP program, the program will only support a small amount of testing and may fund only activities previously performed on a volunteer basis or previously funded from other sources in localities already engaged in enforcement. These groups should, however, be funded so that they can have greater outreach and perform more comprehensive testing. A further dilemma is that many of the groups are partially funded through the community development block grant program.<sup>259</sup> This funding poses for the groups a conflict of interest that discourages them from fighting the most important fight: Urging or suing local government, their funding source, to make available greater resources and to establish more effective laws and machinery to pursue fair housing.

It of course remains to be seen whether the structure of the Fair Housing Amendments Act of 1988, with its strengthened conciliation mechanism and enforcement power, including the administrative law judge proceeding, will fill the need for effective enforcement. The mission of the nonprofit councils should be advanced by this addition to their referral resources. Nevertheless, the most effective remedies will continue to be large damage awards and affirmative action remedial decrees that reach a broad class of victims. Both remedies remain a function of section 813 private litigation, which requires private nonprofit councils to engage attorneys or refer to fair housing lawyers. Yet another dilemma is presented by the need to refer section 813 litigation to others, for often only the nonprofit fair housing groups have the commitment to demand integrative affirmative action solutions to disputes—a demand that may conflict with private section 813 litigation strategies. Indeed, many fair housing plaintiff's attorneys are hostile to affirmative action and the prospect of integration, recognizing that both may be inconsistent with short-term nondiscrimination and with maximizing client relief and attorney's fees. Many idealistic attorneys simply feel that widespread hostility toward affirmative action and desegrega-

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258. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 561, 101 Stat. 1815, 1942 (1988) (to be codified in scattered sections of 12 U.S.C. and 42 U.S.C.) (Fair Housing Initiative Program (FHIP)); *see also supra* note 246.

259. 42 U.S.C. §§ 5301-5321 (1982 & Supp. IV 1986), *amended by* Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815 (1988).

tion could result in a backlash that would weaken fair housing antidiscrimination law and policy.

Those communities, and concomitantly those fair housing councils and groups with effective programs, share the common characteristic of available, experienced fair housing attorneys to prosecute claims. Replication of such success would require either a national fair housing litigation program, an unlikely occurrence in light of the demise of the National Committee Against Discrimination in Housing, or the restructuring of local, regional, or statewide fair housing resources to create a litigation capability. NCDH was primarily funded by foundations, and when funds ran out efforts at fund raising proved fruitless. Despite the excellent lobbying, backup, and litigation efforts of NCDH, it never even attempted to provide counsel in individual cases other than to take part in major litigation that presented novel or fundamental fair housing issues. State fair housing coalitions must concentrate on pooling federal fair housing and block grant funds with local individual, corporate, and foundational contributions to establish a legal program capable of funding staff counsel to represent claimants in fair housing litigation.

Most groups are unable to find attorneys to whom referrals can be made. Staff counsel could supervise a program to train paralegals to assist fair housing councils in litigating those fair housing cases in which large damage awards are not at stake—cases brought by testers, councils, or those against modest defendants in state small claims courts. The primary mission of nonprofit councils must continue to be the recruiting and training of attorneys to take fair housing cases, testing to identify discrimination and to support litigation, pressing for integrative solutions as well as victim compensation in fair housing disputes, and local lobbying for effective public enforcement and for support of private enforcement.

Councils could center their strategy on testing of and negotiation with larger defendants; through such programs, councils could hold out to defendants settlement agreements providing for attorney's fees and affirmative action as an alternative to lengthy and costly court proceedings. Chicago's Leadership Council For Metropolitan Open Communities has established a conciliation negotiation process as a prelitigation strategy designed to do just that.<sup>260</sup>

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260. *Alternative Dispute Settlement*, 4 Fair Hous.-Fair Lending Rep. (P-H) ¶ 1.3 (1988); see *Leadership Council For Metro. Open Communities v. M.R. Jenkins Real Estate*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,364 (N.D. Ill. 1988) (No. 88-L-2132) (racial steering conciliation agreement).



## VIII. UNRESOLVED PROBLEMS

A number of fundamental questions touching on fair housing policy remain unresolved and pressing. Questions surrounding the coverage of fair housing laws need to be addressed. For example, there exists extensive discrimination against currently unprotected groups delineated along the lines of wealth, marital status, family size, and sexual preference. Prior to passage of the Fair Housing Amendments Act of 1988, these comments applied to discrimination against the disabled and families with children. A compelling case can be made for extension of fair housing laws and the mission of fair housing organizations to deal with these unprotected groups. However, extension carries with it the conundrum of resource dilution raised earlier.<sup>261</sup> Fair housing also requires a close analysis of those without access to any housing at all. The national tragedy of homelessness is tied to the policies that are aggravating housing discrimination patterns. Reduction of both discrimination and homelessness may require the resolution of the shortage syndrome. Lurking like a dark cloud over the fair housing movement, however, is the newly constituted Rehnquist Court, as reflected in *McLean Credit Union v. Patterson*.<sup>262</sup> Through that case the Court could dismantle the fair housing jurisprudence developed over the past generation. Last and perhaps of greatest importance is the conundrum of nondiscrimination and the goal of integration, a goal that may be attainable only through affirmative action programs. The status of affirmative action, the most controversial issue within the fair housing community, must be addressed.

## A. Statutory Coverage

A compelling case has been presented for extending fair housing protection to a broad group of currently unprotected classifications, just as the Fair Housing Amendments Act of 1988 has extended coverage to the disabled and families with children. Such extension, however, will dilute current fair housing resources and divert the fair housing movement further from its primary and unaccomplished mission—the struggle for racial equality and the dream of an integrated society. It is essential to investigate whether the broadened constituency of fair housing will attract additional resources so as to expand current efforts

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261. See *supra* Part VI, subsec. D.

262. 108 S. Ct. 1419 (1988) (No. 87-107) (per curiam) (racial harassment in the workplace ruled not covered by § 1981) (restoration to docket for oral argument), *appealed from* 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987) (No. 87-107), *argued*, 57 U.S.L.W. 3292 (U.S. Oct. 12, 1988); Savage, *Split Court Reopens '76 Rights Case*, L.A. Times, Apr. 26, 1988, pt. I, at 1, col. 1 (Justice Kennedy casting deciding vote on Court's own initiative to reconsider *Runyon v. McCrary*, 427 U.S. 160 (1976)).

rather than dilute the present minimal fair housing effort.

### 1. Wealth

In housing markets with low vacancy rates, rents become higher and competition for available housing becomes greater. The housing that remains affordable to those of lower income may be marketed in a manner preferring those of higher income, because landlords seek to identify the applicant most likely to be a good, paying tenant and also seek to enhance project status and avoid the stigma perceived to be associated with the poor. Rules requiring minimum income have become more common, and on one occasion such rules were validated by a federal court.<sup>263</sup> The problem with these minimum income tests is two-fold: First, worthy tenants in need of housing may be foreclosed because they lack wealth; and second, the income tests may become a surrogate for excluding those on public assistance, namely racial and ethnic minorities in urban areas.

Under Title VIII, such disparate impact should shift the burden to the landlord to demonstrate a business necessity. But in *Boyd v. Lefrak Organization*,<sup>264</sup> the Second Circuit failed to follow the Title VIII disparate effects formula and validated a rule requiring weekly income to equal ninety percent of monthly rent. This formula operated to exclude welfare families who, in the New York City market, are composed disproportionately of minority groups. The reasoning and holding of *Boyd* has been criticized and undermined by subsequent Second Circuit rulings,<sup>265</sup> but the minimum income rules are proliferating.

The Second Circuit never felt the need to examine the business base for the rule. Although no one can contest the proposition that inability to afford the rent is a basis for rejecting an application, on closer inspection the per se validation of minimum income rules is flawed. Public assistance tenants are arguably the best tenants, enjoying a guaranteed income that is not dependent on job stability and local economics. Yet, because welfare level families typically must pay in excess of fifty percent of their income for housing, they often do not meet artificially constructed affordability formulae. Such formulae, however, are simply not premised on business necessity. The exclusion of welfare recipients is more likely tied to the landlord's desire not to stigmatize the project as "welfare housing."

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263. *Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975).

264. *Id.*

265. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988); *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979).

Many states and local units of government have specifically prohibited rental practices that consider the source of an applicant's income and have particularly proscribed discrimination against welfare recipients.<sup>266</sup> Although courts typically construe Title VIII to prohibit such bias,<sup>267</sup> the prohibition is not obvious from the statutory language; therefore, either Congress should amend Title VIII to cover such bias explicitly or HUD should issue regulations specifying the prohibition.

## 2. Marital Status

Despite Title VIII's coverage of gender discrimination,<sup>268</sup> landlords and lenders frequently engage in marital status bias, often refusing to consider support as income or, alternatively, refusing to rent to unmarried couples.<sup>269</sup> The latter form of marital status discrimination is clearly not covered by Title VIII<sup>270</sup> unless a statistical case can be mounted to demonstrate that such marital status rules carry a disproportionate racial, ethnic, religious, or gender-based impact.<sup>271</sup> In lend-

266. *E.g.*, *Attorney Gen. v. Brown*, 400 Mass. 826, 511 N.E.2d 1103 (1987); D.C. CODE ANN. § 1-2515(a) (1987); WIS. STAT. ANN. § 101.22(1) (West 1973 & Supp. 1982); J. KUSHNER, *supra* note 14, §§ 2.08, 2.16.

267. *Huntington*, 844 F.2d at 934; *Starrett*, 840 F.2d at 1101; *12 Lofts Realty*, 610 F.2d at 1032; *cf.* *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984) (finding that "no child" rule has racial impact); *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982) ("no child" rule impact analysis).

268. *See* 42 U.S.C. §§ 3604-3606 (1982); *see also* *Anderson v. United Fin. Co.*, 666 F.2d 1274 (9th Cir. 1982) (finding it a violation to require spouse's signature if applicant individually qualifies for loan); *Murphy v. 253 Garth Tenants Corp.*, 579 F. Supp. 1150 (S.D.N.Y. 1983) (refusal to transfer cooperative apartment to single woman); *Shellhammer v. Lewallen, Eq. Opportunity Hous. Rep. (P-H) ¶ 15,472* (N.D. Ohio 1983) (sex harassment), *aff'd mem.*, 770 F.2d 167 (6th Cir. 1985); *Braunstein v. Dwelling Managers, Inc.*, 476 F. Supp. 1323 (S.D.N.Y. 1979); *United States v. Gorman Enters.*, 6 [Current Developments] *Hous. & Dev. Rep. (BNA)* 981 (D. Okla. Feb. 28, 1979) (consent decree) (refusal to rent to two single women violative); *United States v. Reece*, 457 F. Supp. 43 (D. Mont. 1978) (holding that rule allowing rentals only to women with cars violated conciliation agreement); *United States v. Citizens Mortgage Corp., Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,324* (E.D. Va. 1978) (consent decree) (refusal to lend to divorced woman violative); *United States v. Jefferson Mortgage Co., Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,320* (D.N.J. 1978) (consent decree) (refusal to lend to woman not using birth control violative); *United States v. Prudential Fed. Sav. & Loan Ass'n, Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,319* (D. Utah 1978) (consent decree) (harsher creditworthiness test for wife's income invalid); *Morehead v. Lewis*, 432 F. Supp. 674 (N.D. Ill. 1977), *aff'd mem.*, 594 F.2d 867 (7th Cir. 1979); *United States v. George F. Mueller & Sons, 2 Eq. Opportunity Hous. Rep. (P-H) ¶ 15,196* (N.D. Ill. 1978) (consent decree) (refusal to consider wife's income violative); *United States v. Builders' Inst., Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,323* (S.D.N.Y. 1976) (consent decree) (refusal to rent to working mothers, single parents, or to consider wife's income violative); J. KUSHNER, *supra* note 14, § 2.05.

269. J. KUSHNER, *supra* note 14, § 2.14.

270. H.R. REP. NO. 711, *supra* note 15, at 23 (Fair Housing Amendments Act of 1988 not intended to reach discrimination on the basis of marital status).

271. *Cf. Marable v. H. Walker & Assocs.*, 644 F.2d 390 (5th Cir. 1981) (marital status pretext for race discrimination).

ing, marital status is covered by federal law.<sup>272</sup> Although the hidden gender-based forms of bias are covered by existing law, the law would benefit from more explicit statutory or regulatory clarification. Bias against unmarried couples, on the other hand, is more problematic. The Supreme Court has endorsed moral-based discrimination,<sup>273</sup> opening the door for courts and legislatures to sanction a landlord's shielding family or tenant sensibilities by finding such restrictions to be rational even if not dictated by business necessity. Title VIII explicitly precludes such a morals defense only if the policy carries disproportionate racial or sexual impact. While numerous state and local laws prohibit marital status bias,<sup>274</sup> no serious effort has been mounted to expand Title VIII coverage.

### 3. Family Size and Composition

Landlords frequently limit occupancy through facially neutral family size rules.<sup>275</sup> However, because minority group families frequently are larger than white families, such rules may meet the Title VIII prima facie case requirement. Landlords should then be required to demonstrate that the proposed occupancy would violate health and safety code requirements. But such local health ordinances themselves may violate Title VIII unless the standards reflect nationally acceptable health criteria based on the number of bedrooms or square footage of the dwelling. It is possible that stringent occupancy standards reflect local motives to exclude rental housing altogether, rental housing for large families generally, or the poor or minority groups specifically.

Other variations on the theme are to restrict occupancy according to the age and sex of children, to require separate bedrooms for chil-

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272. See Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1982); see also *Markham v. Colonial Mortgage Serv. Co.*, 605 F.2d 566 (D.C. Cir. 1979) (must aggregate incomes of unmarried couples); *Anderson*, 666 F.2d at 1274 (violative to require spouse's signature where applicant individually qualifies for loan).

273. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (consensual homosexual sodomy unprotected on purely moral grounds).

274. J. KUSHNER, *supra* note 14, § 2.14.

275. *E.g.*, *Braunstein v. Dwelling Managers, Inc.*, 476 F. Supp. 1323 (S.D.N.Y. 1979) (holding that single parent with child of same sex may be relegated to single bedroom unit while parent with child of different sex allotted two bedroom unit); *Zakaria v. Lincoln Property Co.* No. 415, 185 Cal. App. 3d 500, 229 Cal. Rptr. 669 (1986) (invalidating policy of no more than four persons in three-bedroom unit as applied to federally subsidized tenants); *Smith v. Ring Bros. Management Corp.*, 183 Cal. App. 3d 649, 228 Cal. Rptr. 525 (1986) (invalidating rule limiting two-bedroom occupancy to parents with one child unless second child born postoccupancy, because the rule favors unborn in violation of city ordinance); *Ruling Calls Occupancy Limit Bias Against Children*, L.A. Times, Nov. 27, 1988, pt. I, at 3, col. 1 (final ed.) (State Fair Employment and Housing Commission invalidates limit on number of tenants when effect is to limit access for children).

dren of different sexes, or to prohibit parent and child room-sharing.<sup>276</sup> Such standards, often approved by HUD in the subsidized housing programs, may also be used to deny larger units to families desiring separate bedrooms for children. When HUD and the landlord desire to allocate large bedrooms for larger needy families, the policy is defensible. The policy of excluding rentals on the basis of obscure moral concerns for children sharing rooms, however, is generally a consideration better left to the privacy and parental supervision of the family. The landlord, under Title VIII, should be required to demonstrate business necessity linked to concerns of overcrowding and excessive facilities usage. Housing shortages dictate accommodation of family desires for room-sharing.

#### 4. Sexual Preference

With the epidemic spread of AIDS, homophobia and sexual preference discrimination is widespread. Although some local jurisdictions and state laws prohibit such bias,<sup>277</sup> the law simply does not afford protection, and efforts to expand federal civil rights protection have proved ineffective.<sup>278</sup> One ramification of expanding Title VIII coverage to the disabled under the Fair Housing Amendments Act of 1988 is that Title VIII now protects those afflicted with the AIDS virus.<sup>279</sup> Paradoxically, landlords fearing AIDS may express their bias by engaging in sexual preference discrimination, yet may be estopped if the applicant is in fact afflicted with the disease. In light of the rampant national

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276. *Braunstein*, 476 F. Supp. at 1328.

277. See *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (App. Dep't. Super. Ct. 1982) (protecting homosexual orientation under state law); CAL. HEALTH & SAFETY CODE § 33051 (West Supp. 1987) (barring sexual orientation bias under state redevelopment law); WIS. STAT. ANN. § 101.22(1) (West 1988); J. KUSHNER, *supra* note 14, §§ 2.15, 2.16; see also Fair Hous.-Fair Lending Rep. (P-H) ¶ 10.8 (1986) (New York City banning sexual orientation bias in owner-occupied two-unit buildings).

278. S. 1432, 99th Cong., 1st Sess., 131 CONG. REC. S9493 (daily ed. July 15, 1985) (Civil Rights Act of 1985 prohibited sexual orientation discrimination in housing, employment, and federal programs).

279. 134 CONG. REC. H4929 (daily ed. June 29, 1988) (Burton amendment); *House Judiciary Committee Approves Bill with ALJ, Handicapped Provisions*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 958 (1988) (reviewing unsuccessful Republican efforts to amend pending fair housing legislation to exclude people with communicable diseases under the proposed handicapped coverage of the Title VIII amendments); see also J. KUSHNER, *supra* note 14, § 2.09; Mandelker, *supra* note 214, in AIDS AND THE LAW, *supra* note 214; cf. *School Bd. v. Arline*, 480 U.S. 273 (1987) (noting that contagious disease may be considered a handicap under § 504 of the Rehabilitation Act); *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987) (injunction against exclusion of AIDS children from public school absent proof of threat to school population); *Ray v. School Dist.*, 666 F. Supp. 1524 (M.D. Fla. 1987); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. 1986) (holding that automatic exclusion of AIDS victims from school violates § 504); *Carey & Arthur, The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284 (1987).

homophobia, however, the best strategy may be to press for informed legislative protection at the state and local level.

### 5. Homelessness

Contemporary homelessness is becoming primarily a problem of families and children.<sup>280</sup> Government has halted its commitment to decent homes for all.<sup>281</sup> HUD affirmatively pursues policies allowing local government to approve the destruction or conversion of lower income, subsidized, and single room occupancy housing.<sup>282</sup> Although five million units of affordable housing were available to the four million persons with annual incomes below five thousand dollars in 1970, by 1983 the 5.5 million individuals in that income group were competing for only 3.5

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280. J. KOZOL, *RACHEL AND HER CHILDREN* 4-5 (1988).

281. The Housing Act of 1949 established the national "goal of a decent home and a suitable living environment for every American family." 42 U.S.C. § 1441 (1982); see Moore, *Lost in America: Low Rent Housing*, L.A. Times, June 12, 1988, pt. V, at 3, col. 1 (HUD's \$35.8 billion 1980 budget reduced to \$14.7 billion in 1987).

282. According to a 1988 National Housing Preservation Task Force study, by 1995 as many as 1.5 million privately owned, government subsidized rental units could vanish from the low-cost inventory, with one-third deteriorated and two-thirds converted or defaulted. Moore, *supra* note 281, at 3, col. 1. The 1987 amendments to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 100-17, 101 Stat. 246 (1987) (to be codified at 42 U.S.C. §§ 4601-4655), reach displacement by any activities receiving federal assistance, including the community development block grant program. The legislative modifications create a one-for-one replacement requirement and relocation compensation must be sufficient to assure that for five years following displacement the displacee will not have to pay more than 30% of household income for housing costs. Previously, the Act only allowed assistance for direct displacement. *Anti-Displacement Rule Specifies Aid Required of CDBG, UDAG Grantees*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 238 (1988). It remains to be seen if the new requirements will be implemented to mitigate the effects of redevelopment and gentrification, particularly where displacement and demolition or rehabilitation is undertaken by private developers receiving approval from block grant-funded local government. The Department of Transportation has issued draft regulations implementing the 1987 law which would apply to HUD. 53 Fed. Reg. 27,598 (1988) (to be codified at 49 C.F.R. pt. 24) (proposed July 21, 1988). The Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 509, 101 Stat. 1815, 1927 (1988) (to be codified in scattered sections of 12 U.S.C. & 42 U.S.C.), seeks to conserve low income housing by prohibiting displacement through the requirement of locally prepared antidisplacement and relocation assistance plans. Section 507 requires the block grant Housing Assistance Plan to provide for the minimization of displacement and the preservation of housing for low and moderate income persons, including single room occupancy housing, as well as the expansion of the supply of affordable housing. *Id.* § 507, 101 Stat. at 1926.

HUD's community development block grant regulations provide coverage for direct acquisition under block grant projects. The regulations also require a strategy that minimizes displacement and mitigates its adverse effects for those affected by private HUD-assisted rehabilitation activities or indirect displacement. See 24 C.F.R. §§ 570.606, 570.305 (1988). The Housing and Community Development Act of 1987 requires payment of relocation expenses and satisfactory relocation in the demolition and disposition of HUD projects. Pub. L. No. 100-242, § 121(b)(3)(F), (G), 101 Stat. 1815, 1838 (1988), seeks to halt the sale and conversion of subsidized housing, *id.* §§ 201-203, 101 Stat. at 1877, provides for a program of public housing home ownership, prohibits eviction, and provides for assistance to nonparticipating families, *id.* § 123, 101 Stat. at 1842, 1846.

million affordable units.<sup>283</sup> At the same time, rather than offering access to housing and protection for children, welfare policy too often encourages homelessness and even child abandonment.<sup>284</sup> Homelessness, a symptom of the vanishing promise of low income housing, also presents the specter of an underclass; there exists a growing poverty class living in shelters and shanty towns, segregating America along class and racial lines in a manner never previously envisioned. Low income housing and welfare reform advocates need to align with fair housing activists to coordinate strategy and combine constituencies in order to resolve this catastrophic problem. Although few specific platforms emerged in the 1988 Presidential race, Governor Dukakis supported an increase in subsidies to pre-Reagan levels, while President Bush's campaign position held generally to the status quo.<sup>285</sup> Expansion of the low income housing supply may indeed be the most fundamental policy initiative required to advance the struggle for reduced housing discrimination.

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283. *Lack of Low-Income Housing Is Main Cause of Homelessness, Panel Says*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 877 (1988) (statements of Cushing Dolbeare); see also W. APGAR & J. BROWN, *THE STATE OF THE NATION'S HOUSING: 1988* (1988) (loss of affordable housing and rising costs causing increasing shortages), summarized in *American Housing Problems Growing in Scope, Says Harvard Study*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 836 (1988); Getlin, *Shortage of Low-Income Apartments Seen With Conversions to Condos*, L.A. Times, July 3, 1988, pt. I, at 24, col. 1 (final ed.) (predicting that up to 1.5 million federally subsidized units, more than half of the 2.9 million in operation, could be lost within 10 years); Moore, *supra* note 281, at 3, col. 1 (reporting that for more than a decade median renter income has declined, while rents increased 25% in West between 1981 and 1986; from 1974 to 1983 more than two million units renting at less than \$250 per month were abandoned or converted into more expensive housing).

284. J. KOZOL, *supra* note 280, at 47-50.

285. See *Bush, Dukakis Discuss Housing Issues in Debate*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 421 (1988) (Bush calling for more vouchers, Dukakis favoring affordable housing production; both supporting home ownership; Bush supporting aid for the homeless and use of certain Army bases for shelters); *Bush, Dukakis Plot Different Courses for Housing, According to Representatives*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 876 (1988); *Democratic Platform Calls for Decent Housing for All Americans*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 196 (1988) (urging end to homelessness); *Dukakis Housing Agenda Includes Detailed Approach; Bush Focuses on Overall Economy*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 155, 156 (1988) (Democratic housing budget between \$16.5 and \$24.5 billion, Bush proposals between \$3 and \$5 billion); *Dukakis Unveils Program to Promote First-Time Homeownership Opportunities*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 469 (1988); *Low-Cost Housing a Concern for Bush Administration, Aide Says*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 643 (1988) (still no specifics from President-elect). *But cf.* Myers, *Housing Looms as a Key Subject at Conventions*, L.A. Times, July 17, 1988, pt. VIII, at 1, col. 4 (amorphous Dukakis call for funding of local rather than federally controlled projects reflecting higher levels of funding than previously existed, yet with emphasis on first-time single family home buyers rather than the poor; Bush position to be announced).

*B. The Cloud and the Symbol of McLean*

*Patterson v. McLean Credit Union*,<sup>286</sup> a seemingly routine employment discrimination case brought under section 1981,<sup>287</sup> inquired whether racial harassment in the workplace was covered by that statute. When the appeal reached the United States Supreme Court, to the surprise of the litigants, the Court on its own initiative converted the case into a vehicle to reconsider whether the 1866 Civil Rights Act, despite landmark interpretations in *Jones v. Alfred H. Mayer Co.*<sup>288</sup> and *Runyon v. McCrary*,<sup>289</sup> reaches private discrimination.<sup>290</sup> *Jones*, decided prior to passage of the Fair Housing Amendments Act of 1988, made section 1982<sup>291</sup> the cornerstone of fair housing litigation and allowed unlimited damages and fee awards against all discriminators.<sup>292</sup> *Runyon* prohibited discrimination by private schools in a ruling on the right to contract.<sup>293</sup> The rulings have also extended into the employment area.<sup>294</sup> Only the new, ultraconservative composition of the Court can explain the Court's motivation to act in this unprecedented way. Particularly in light of *McLean*, the Fair Housing Amendments Act of 1988 represents a significant achievement. Title VIII now, for the first time, provides a litigation vehicle superior to section 1982,<sup>295</sup> as it now provides generous damages and fees as well as more liberal standing, coverage, and burden of proof standards.

The Court's majority has possibly launched the first volley in a skirmish that could escalate into a reversal of the civil rights advances of the last generation. The direction of the Supreme Court is a function of its perception of, and commitment to, its mandate from a conservative society. The Nation and its highest judicial tribunal, having been denied national civil rights leadership since the administration of President Johnson, have wandered from the ideals of the civil rights movement. The history of the Court discloses that its rulings give license to

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286. 805 F.2d 1143 (4th Cir. 1986) (racial harassment in the workplace ruled not covered by § 1981), *cert. granted*, 108 S. Ct. 65 (1987) (No. 87-107); Reidinger, *supra* note 92.

287. 42 U.S.C. § 1981 (1982).

288. 392 U.S. 409 (1968).

289. 427 U.S. 160 (1976).

290. *Patterson v. McLean Credit Union*, 108 S. Ct. 1419 (1988) (*per curiam*) (restoration to docket for oral argument), *argued*, 57 U.S.L.W. 3292 (U.S. Oct. 12, 1988); Savage, *supra* note 262, at 1, col. 1 (Kennedy casting deciding vote).

291. 42 U.S.C. § 1982 (1982).

292. J. KUSHNER, *supra* note 14, §§ 1.02, 9.02, 9.14.

293. 427 U.S. at 160.

294. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); see also Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596 (1988).

295. 42 U.S.C. § 1982 (1982).



practices not invalidated, as has happened in the case of segregation.<sup>296</sup>

Perhaps the Court will withdraw its invitation to disaster in *McLean* if it recognizes that *McLean* is potentially the *Dred Scott*<sup>297</sup> decision of the twentieth century—a decision capable of launching a new civil rights movement and even a civil war. Alternatively, the Court may, in a rush of revisionism, rule that Congress in fact did not intend to reach private behavior. Such a ruling would validate, endorse, and encourage private market discrimination in housing, schools, and employment, while leaving it to Congress to revise the ruling through an extension of current civil rights legislation. Or the Court could take a safe course and rule that subsequent congressional acquiescence in the *Jones* and *Runyon* rulings indicated agreement with the Court's statutory interpretation.<sup>298</sup> The worst case scenario would find the Court ruling not only that Congress never intended the results in *Jones* and *Runyon*, but that the Congress lacks the power to reach private behavior.<sup>299</sup> Such a decision could set in motion a series of rulings that would dramatically curtail congressional power, even to the extent of effectively repealing the 1964 Civil Rights Act and Title VIII as impermissible limitations on discrimination by private landlords, employers, and private owners of public accommodations.<sup>300</sup> Apartheid in America

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296. J. KUSHNER, *supra* note 5, at 68 n.153. The Author's book noted that the Plessy v. Ferguson, 163 U.S. 537 (1896), law segregating Louisiana railroad cars was not passed until after Louisville, New Orleans & Texas Railway Co. v. Mississippi, 133 U.S. 587 (1890), which upheld the conviction of a railroad for not complying with a local segregation law, a decision which did not address the rights of passengers, and Hall v. DuCuir, 95 U.S. 485 (1878), a case ruling that the commerce clause prevented state prohibition of segregation on interstate railroads. J. KUSHNER, *supra* note 5, at 68 n.153.

297. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* ruled that blacks had no constitutional rights and invalidated a federal law prohibiting slavery in the Northwest territories, enacted to provide freedom to a slave transported to free soil, as a violation of property rights. The ruling led to the confrontation that culminated in the Civil War.

298. See Savage, *Court May Let Key Rights Rulings Stand*, L.A. Times, Oct. 13, 1988, pt. I, at 14, col. 1 (comments of Justice Scalia); see also Savage, *Clue to Court's Direction Seen in Rights Case*, L.A. Times, Dec. 25, 1988, pt. I, at 1, col. 3 (no hint to outcome, but case would indicate a new conservative revisionist era). The limited scholarship generated by the Court's call for reargument has centered on whether the Court will follow stare decisis. *Symposium: Patterson v. McLean*, 87 MICH. L. REV. 1 (1988).

299. See *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the fourteenth amendment limits congressional power to legislate against civil rights violations to actions of the state); see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (holding that the thirteenth amendment is limited to peonage and slavery).

300. *E.g.*, *Kush v. Rutledge*, 460 U.S. 719 (1983) (42 U.S.C. § 1985(2) (1982) (interference with federal court litigant); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (Title VIII of the 1968 Fair Housing Act reaching private discrimination); *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (42 U.S.C. § 1985(3) (1982) (conspiracy to interfere with civil rights); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII of 1964 Civil Rights Act reaching private employment practices); *Daniel v. Paul*, 395 U.S. 298 (1969) (extension of public accommodations provision of the 1964 Civil Rights Act to private recreation facility); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (while a

would then no longer be simply a fact, but a legal reality.<sup>301</sup> Loss of prestige or even recognition in the free world would likely follow. That is the choice and the crisis invited by the Court.

### C. Affirmative Action

The most troubling paradox for fair housing is the identification of the movement's goals. Generally, all involved believe that people should not be denied a dwelling because of the color of their skin. However, many set as their goal an integrated society with diverse schools and neighborhoods—a society in which racially concentrated neighborhoods are not ghettos but communities like those of other ethnic minorities where inhabitants live by choice and a desire for the cultural attractions of community.<sup>302</sup> Unfortunately, these goals are incompatible in the short run. In reality, policies carry either an integrative or segregative effect, and current policy is decidedly segregative.<sup>303</sup> Only through affirmative action can integrated projects, neighborhoods, and communities be established and maintained. Bizarre as it may seem, only through discrimination can we get past discrimination. Affirmative action, however, has become a symbol. Whites and blacks favoring segregation as an end in itself have joined with minorities seeking segregation as means to other ends, such as less resistance to new housing, political power through district concentration, and economic development through concentrated minority markets, to demand the dismantlement of integration and techniques to achieve it.

The Supreme Court has attempted a political middle ground, an impossible course, by endorsing both integration<sup>304</sup> and nondiscrimina-

voting rights case, the reasoning extends the reach of congressional power to arguable discriminatory nexus); *United States v. Guest*, 383 U.S. 745, 756 (1966) (42 U.S.C. § 1985(3) (conspiracy to interfere with travel rights and access to public facilities)); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (public accommodations applied to private motel); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurant).

301. The Court would itself be engaged in the advocacy and authorization of racism and discrimination condemned in *Reitman v. Mulkey*, 387 U.S. 369 (1967) (rejecting state constitutional amendment measure which sought to repeal fair housing legislation and permanently disable legislative power to engage in such enactments).

302. Title VIII was designed to replace ghettos with "truly integrated and balanced living patterns." 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale), *quoted in* *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); *accord* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988); *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1106-07 (2d Cir.) (Newman, J., dissenting), *cert. denied*, 109 S. Ct. 376 (1988); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973); Goering, *Preface*, to HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 15, at ix (stating that Mondale's promise has proved to be an "unfulfilled prediction").

303. Kushner, *supra* note 31.

304. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (voluntary affirmative action employment plan to integrate traditionally segregated job classifications); *Brown v. Board of*

tion.<sup>305</sup> It considers affirmative action quotas to be acceptable only as a remedy for past discrimination,<sup>306</sup> temporary relief to achieve the racial composition one would expect absent past bias,<sup>307</sup> or preferences in pursuit of a compelling state interest.<sup>308</sup> An integrated community may not be such a compelling interest in the Court's eye.<sup>309</sup>

Effective fair housing enforcement also requires realistic affirmative marketing plans and programs for existing and proposed housing projects. These programs should include the following: Mandatory minimum quota obligations for showing units to members of racial groups not likely to apply; preferential rents, financing, or other incentives such as tax incentives to attract persons to integrated neighborhoods or neighborhoods where they are in the racial minority; incentives for real estate professionals who facilitate choice and integration; and advertising tours of project areas conducted through outreach agencies or real estate professionals.<sup>310</sup> Affirmative action techniques should be used to assure that integration opportunities exist in section 8 and rental voucher programs. Current rent supplement programs intensify segregation because virtually all rent supplement recipients locate housing in neighborhoods where they are in the racial majority.<sup>311</sup> Congress has

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Educ., 347 U.S. 483 (1954) (school desegregation).

305. See *Starrett City*, 109 S. Ct. at 376; *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984) (court not to amend seniority pacts by modification of consent decree silent on seniority and preferential layoff policy); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (invalidation of floor racial quotas in higher education admissions).

306. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Bakke*, 438 U.S. at 265. *But cf. Johnson*, 480 U.S. at 616 (apparently eliminating finding of past discrimination as prerequisite for voluntary affirmative action, allowing instead a mere finding of significant minority underrepresentation in the workplace to suffice).

307. *Johnson*, 480 U.S. at 616; *United States v. Paradise*, 480 U.S. 149 (1987); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

308. *Bakke*, 438 U.S. at 265.

309. *But cf. Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 95 n.9 (1977) (ban on for sale signs invalid as applied, with potential validation if necessary to maintain integration and avoid panic sales).

310. See generally *South Suburban Hous. Center v. Greater S. Suburban Bd. of Realtors*, Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,602 (N.D. Ill. Dec. 19, 1988) (approving affirmative action "special outreach efforts to promote integration"); Ohio Op. Att'y Gen. No. 87-095, Fair Hous.-Fair Lending Rep. (P-H) ¶ 23,003 (Dec. 14, 1987) (housing finance agency may make single family mortgages available for integrative moves); see also J. KUSHNER, *supra* note 5; G. ORFIELD, URBAN INTEGRATION, *supra* note 21 (suggesting affirmative housing action, including local government as developer, subsidized integrative moves, increased fair housing enforcement, and metropolitan school desegregation); Daye, *The Race, Class and Housing Conundrum: A Rationale and Proposal For a Legislative Policy of Suburban Inclusion*, 9 N.C. CENT. L.J. 37 (1977); Kushner, *supra* note 31, at 252-54; Comment, *supra* note 36, at 928-30; Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377 (1980).

311. E.g., D. FALK & H. FRANKLIN, *supra* note 55, at 22-30; Bullard, *supra* note 55 (stating that an ethnic and economic mix does not exist in Houston); Kushner & Keating, *supra* note 55; McGee, *supra* note 55, at 44; Comment, *supra* note 55; *Study Recommends Curbs on In-Place*

also recognized the importance of affirmative action in the quest for fair housing; in the passage of the Fair Housing Amendments Act of 1988 the House rejected an amendment designed to prohibit affirmative action.<sup>312</sup>

Many in the fair housing community simply ignore the inconsistency of goals; yet to do so may result in use of fair housing as a segregationist tactic. Fair housing may require supporting the opponents of fair housing. The only middle course in pursuit of the integrated society is to endorse affirmative action integration programs that include government-provided subsidies and alternative comparable housing to those minorities or majorities discriminatorily denied housing.

In the first judicial contact with affirmative action in the housing context, the Second Circuit ruled in *Otero v. New York City Housing Authority*<sup>313</sup> that a public housing agency could, in the name of integrated housing and under HUD's affirmative obligation to further fair housing, deny priority to minority residents of the complex previously on the site. The agency instead gave preference in the new complex to white members of an historic neighborhood synagogue because of their safety concerns in having to walk to weekly Sabbath observance, and because such a preference would result in an integrated pattern of occupancy within the project and neighborhood. *Otero* stood for over a decade as a resounding vote for integration maintenance under Title VIII.

Starrett City is the Emerald City of America.<sup>314</sup> Within a segregated metropolis, this community stands as an ideal, completely integrated neighborhood housing nearly seventeen thousand people.<sup>315</sup> The community's buildings, schools, and neighborhood facilities are all integrated. But integration is a fragile, isolated, and temporary condition in America, and the desirability of units in Starrett City to the many minorities in search of decent housing presents a threat to racial balance within the community. The waiting list is long and predominantly minority. Awarding units on a first come-first served basis would surely tip Starrett City to a predominantly minority, and ultimately an all minority, project mirroring the surrounding neighborhoods. Starrett City, however, adhered to the American dream of diversity by implementing

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*Section 8 Leasing*, 5 [Current Developments] Hous. & Dev. Rep. (BNA) 1002 (1978) (no integration under Cleveland program).

312. 134 CONG. REC. H4902-08 (daily ed. June 29, 1988) (rejecting the Hyde amendment).

313. 484 F.2d 1122 (2d Cir. 1973).

314. J. KUSHNER, *supra* note 5, at 1 (referring to Justice Rehnquist's cynical comment in the Cleveland school case that "no equitable decree can fashion the Emerald City where all races, ethnic groups, and persons of various income levels live side by side in a large metropolitan area"); see also 134 CONG. REC. H4907 (daily ed. June 29, 1988) (positive description of Starrett City by Congressman Schumer who represents the district).

315. *Starrett City*, 840 F.2d at 1103 (Newman, J., dissenting).

an integration maintenance program limiting minority participation.<sup>316</sup>

Starrett City, however, represented the evil empire that the Civil Rights Division of the Justice Department under Edwin Meese attacked using the Department's fair housing resources. The tragedy of Starrett City is that it represented the Reagan Administration's commitment to civil rights: The targeting of civil rights enforcement resources to thwart and dismantle racial integration.

The Second Circuit, in *United States v. Starrett City Associates*,<sup>317</sup> accepted the Justice Department's argument that permanent minority ceiling quotas violated Title VIII. The Second Circuit distinguished *Otero* and stressed that Starrett City had employed more than start-up or temporary affirmative action policies.<sup>318</sup> The ruling is strange, in that it does endorse the use of racial discrimination for good faith, albeit temporary, affirmative action. The Second Circuit summarily dismissed the significance of a controversial issue: At what point would the project reach a "tipping point" in minority participation—the point at which whites' exodus or failure to apply transforms the project into a predominantly minority populated city.<sup>319</sup> The question is an important one. The majority's dismissal of the question, which resulted from a dispute between experts over the definition of the precise Starrett City tipping point,<sup>320</sup> is troublesome but not critical in a case in which the natural effect of the disparately composed minority admissions waiting list<sup>321</sup> will continually and swiftly replace white residents with minorities. Curiously, the court simultaneously endorsed a lower court ruling that approved integration quotas where necessary to achieve or maintain integration.<sup>322</sup> The Second Circuit, apparently feeling constrained by the recent Supreme Court ruling in *Johnson v. Transportation Agency*,<sup>323</sup> failed to face the segregative effect of its rul-

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316. Minorities were limited to 35% of the apartments. This resulted in a 45% minority population because of the tendency for minority units to be taken by families, particularly large families. *Id.* at 1104 (Newman, J., dissenting).

317. 840 F.2d 1096 (2d Cir. 1988) (invalidating the quota and emphasizing concern for a ceiling quota on minority admissions, but appearing to premise the ruling on the nontemporary nature of the program); see also *United States v. Atrium Village Assocs.*, No. 87c-6527 (N.D. Ill. filed July, 1987) (challenging racial quotas in admission to rental housing).

318. *Starrett City*, 840 F.2d at 1102-03.

319. Goering, *Neighborhood Tipping and Racial Transition: A Review of Social Science Evidence*, 44 J. AM. INST. PLANNERS 68 (1968); Rubinowitz & Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. U.L. REV. 491, 533-36 (1979); Wolf, *The Tipping-Point in Racially Changing Neighborhoods*, 29 J. AM. INST. PLANNERS 217 (1963).

320. *Starrett City*, 840 F.2d at 1099.

321. *Id.* (minorities almost 72% of 1985 priority waiting list).

322. *Id.* at 1100, 1102 (endorsing *Burney v. Housing Auth.*, 551 F. Supp. 746 (W.D. Pa. 1982)).

323. 480 U.S. 616 (1987).

ing and the obvious need for integration maintenance policies if integration is to survive. Only Judge Newman in his dissent recognized the stark symbol of the majority's segregationist ruling.<sup>324</sup>

*Johnson* is among the most recent in a line of Supreme Court affirmative action decisions.<sup>325</sup> The case arose when a white, passed over in the promotion process by the county transportation agency, challenged the promotion of a woman pursuant to a voluntary hiring and promotion plan. The High Court rejected the Title VII<sup>326</sup> attack, stressing the traditional gender-based job segregation of highway agencies,<sup>327</sup> the extraordinary underrepresentation of women in the agency's work force,<sup>328</sup> and the temporary nature of the voluntary affirmative action program, which was designed to last only until women were appropriately represented on the agency work force.<sup>329</sup>

The Second Circuit in *Starrett City*<sup>330</sup> stressed that controls must be temporary, even though the plan in *Johnson* might continue for a generation or more in light of the low turnover and skilled nature of highway construction and maintenance jobs.<sup>331</sup> In reality, *Starrett City* presented the Second Circuit with a unique problem that temporary controls would not address. Both the Supreme Court and the Second Circuit apparently agree on the appropriateness of the integration maintenance policy goals. But would the Supreme Court say that such an appropriate goal was an impermissible objective if no means other than permanent controls existed for its achievement?<sup>332</sup> Clearly *Starrett City* presents an affirmative action dilemma. The Second Circuit

324. *Starrett City*, 840 F.2d at 1108 (Newman, J., dissenting).

325. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (invalidating a 30% minority public works set-aside program administered by a city governed by a minority-dominated city council in a case lacking a record of past local contractual bias or underparticipation of minority contractors in city contracts); *Paradise*, 480 U.S. at 149 (remedial promotion quota); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (consent decree promotion preference); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (court-ordered union recruitment preference); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that collective bargaining may not permit layoff of nonminorities with more seniority than retained minority teachers); *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984) (court not to amend seniority pacts by modification of consent decree silent on seniority and preferential layoff policy); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (voluntary plan by private employer consistent with Title VII).

326. 42 U.S.C. §§ 2000e to 2000e-17 (1982) (Title VII of the 1964 Civil Rights Act).

327. *Johnson v. Transportation Agency*, 480 U.S. 616, 631-32, 634 (1987).

328. *Id.* at 620-21, 631-34, 640 ("manifest imbalance").

329. The Court also eliminated the earlier requirement that an appropriate legislative or administrative agency make a finding of past discrimination as a prerequisite to the imposition of affirmative action. *Id.* at 633, 639-40 (attain, not maintain).

330. *Starrett City*, 840 F.2d at 1096.

331. *Id.* at 1103 (citing *Johnson*, 480 U.S. at 622-23, 639 n.16).

332. *Burney v. Housing Auth.*, 551 F. Supp. 746 (W.D. Pa. 1982); *Middlesboro Hous. Auth. v. Commonwealth Comm'n on Human Rights*, 553 S.W.2d 57, 65-67 (Ky. Ct. App. 1977).

concluded that the end would never justify the means, while the Supreme Court since *Bakke* has suggested that the means may be tailored to the appropriate end.<sup>333</sup>

The Supreme Court denied certiorari in *Starrett City*.<sup>334</sup> Although such denial carries no precedential value, the refusal to review *Starrett City* stands as a tacit endorsement of the Second Circuit's rejection of affirmative action in the form of integration maintenance ceiling quotas for minorities. It also stands as the most significant endorsement of apartheid in America since *Plessy v. Ferguson*,<sup>335</sup> which upheld the institution of racial segregation.

The Supreme Court's decision in *Town of Huntington v. Huntington Branch, NAACP*,<sup>336</sup> rendered the same day as the *Starrett City* denial of certiorari, upheld a finding of a Title VIII violation in suburban apartment exclusion, and might appear to contradict the segregative label suggested by *Starrett City*. While *Huntington* appears to lend important support to the "effects" prima facie case under Title VIII, the case is not likely to generate integration. The dismantlement of the federal subsidized housing production program has rendered new projects and interested developers a rarity. In addition, suburban subsidized housing development has typically exacerbated metropolitan segregation. This housing is often white-occupied and is likely to make the suburbs accessible to lower income whites—a group previously relegated to the central city housing market and one whose migration may worsen central city school and neighborhood segregation. The most interesting application of *Huntington* will be the generation of a few crea-

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333. See generally J. KUSHNER, *supra* note 14, § 7.17; J. KUSHNER, *supra* note 10, §§ 8.01-8.06; Ackerman, *Integration For Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Gelber, *Race-Conscious Approaches to Ending Segregation in Housing: Some Pitfalls on the Road to Integration*, 37 RUTGERS L. REV. 921 (1985) (endorsement of affirmative marketing and temporary limited quotas); Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case"*, 17 RUTGERS L. REV. 531 (1963); Lamb, *Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response*, 30 CATH. U.L. REV. 363 (1981); Lind, *Maintaining Residential Integration: Municipal Practices and Law*, 31 CLEV. ST. L. REV. 603 (1982); Sinolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's*, 58 S. CAL. L. REV. 947 (1985); Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs That Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891; Comment, *supra* note 36; Note, *The Legality of Race-Conscious Access Quotas Under the Fair Housing Act of 1968*, 9 CARDOZO L. REV. 1053 (1988); Note, *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938 (1980); Note, *The Use of Racial Housing Quotas to Achieve Integrated Communities: The Oak Park Approach*, 6 LOY. U. CHI. L.J. 164 (1975); Note, *The Integration Ordinance: Honi Soit Qui Mal Y Pense*, 17 STAN. L. REV. 280 (1965); Note, *supra* note 310.

334. *Starrett City*, 109 S. Ct. at 376.

335. 163 U.S. 537 (1896). See generally J. KUSHNER, *supra* note 5.

336. 109 S. Ct. 276 (1988) (per curiam), *aff'g* 844 F.2d 926 (2d Cir. 1988).

tive lawsuits challenging municipal housing and land use policies that have had the effect of suburban segregation.

The Court in *Starrett City* failed to endorse the only initiative in the Nation designed to achieve and maintain integration. The message of *Starrett City* is to tailor voluntary affirmative action programs to the achievement of integration, utilizing controls only when trends indicate a loss of balance, and to undertake only those cases that display discrimination when imposing broad temporary affirmative action remedial quota schemes.<sup>337</sup>

### IX. THE FUTURE OF FAIR HOUSING

The Fair Housing Amendments Act of 1988 is the most significant civil rights initiative in a generation. The new law, if aggressively enforced and administered, can generate fees and damage awards to encourage private enforcement and affirmative action in pursuit of neighborhood integration. The administrative enforcement mechanism can provide fair housing to those long without effective remedies. A combination of local legislative efforts, aggressive local programs for monitoring and testing, and creative judicial and administrative remedies seeking affirmatively to advance fair housing and integration may permit Title VIII finally to achieve the promise which eluded it during its first generation.

The fair housing community, together with policymakers, has to face fundamental questions about whether the pervasive level of housing discrimination is to be stemmed and whether America is to be cast permanently in segregation. The Nation is at a crossroads. Despite President Reagan's belated positive leadership in supporting passage of the Fair Housing Amendments Act of 1988,<sup>338</sup> his Administration pursued a predominantly anti-civil rights agenda. That agenda, symbolized by the Reagan Justice Department and led by the Reagan legacy of the Rehnquist Court, has driven the country in the direction of racism and ignorance. The Bush Administration<sup>339</sup> could offer long absent civil rights leadership toward the Kennedy, Johnson, and King legacy, the

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337. See generally J. KUSHNER, *supra* note 10, §§ 8.01-8.06 (devoted exclusively to affirmative action).

338. Statement by the Assistant to the President for Press Relations on the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 842 (June 21, 1988); *Senate Acts to Enforce Housing Law*, Wall St. J., Aug. 3, 1988, at 9, col. 4 (President expressing pleasure with passage); Eaton, *Senate OKs Tough Housing Bias Ban*, L.A. Times, Aug. 3, 1988, pt. I, at 1, col. 5 (reporting support for passage of the Fair Housing Amendments Act of 1988).

339. *The Candidates Respond*, 74 A.B.A. J. 52-53 (Oct. 1988) (stating that President Bush during his campaign endorsed the use of affirmative action, yet eschewed rigid numerical quotas in favor of aggressive recruitment); cf. Nelson & Balzar, *Bush: New Job, Empty Briefcase*, L.A. Times, Nov. 13, 1988, pt. I, at 1, col. 1 (final ed.) (stating that Bush has no agenda).



dream of diversity and equality. The state of fair housing in the firmament of civil rights entering upon the Bush Presidency is more fragile and tentative than ever. New national leadership reflecting a commitment to the aspirations of the Nation's founders and dreamers and to the Fair Housing Amendments Act of 1988 can make a difference in the second generation struggle for fair housing.