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Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendments Act of 1983 Would Eliminate

WILLY E. RICE*

INTRODUCTION

Although the National Committee Against Discrimination in Housing's 1979 study¹ could not determine the "true" incidence of racial discrimination, it did produce some startling results. For example, if a black person were to visit three private apartment complexes, the probability of his encountering racial discrimination would be sixty-one percent.² Moreover, an increase in the number of visits dramatically increased the probability of discrimination. The probability of discrimination would be ninety percent if the black prospective renter were to visit seven complexes.³ The likelihood of discrimination in the sale of housing was also found to be high. For example, if a prospective black buyer were to visit three or five brokers, the probability of discrimination would be forty percent and fifty-six percent, respectively.⁴

Many factors contribute to the persistently high incidence of

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1. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY. Washington, D.C. (1979) [hereinafter cited as HOUSING MARKET SURVEY].

2. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. GUIDE TO FAIR HOUSING LAW ENFORCEMENT. Washington, D.C. (1979) [hereinafter cited as GUIDE TO FAIR HOUSING].

3. *Id.* at 55.

4. *Id.*

private housing discrimination; however, the behavior of real estate brokers⁵ and the poor enforcement of both federal⁶ and state⁷ fair housing laws have been cited as very important contributing factors.

This article reviews federal, state, and local laws and the history of judicial enforcement of these laws. In addition, the article compares and contrasts two competing Senate bills that would amend the enforcement provisions of the 1968 Civil Rights Act. Reference is made to the proposed Fair Housing Amendment Act of 1983 and the Equal Access to Housing Act of 1983. The primary purpose of the article, however, is to show that judicial enforcement of fair housing laws is only minimally effective.⁸ There are both obvious and unexamined problems associated with private litigation which undermine the effectiveness of judicial enforcement. After considering the relevant data in two hundred and one private discrimination in housing suits,⁹ this article calls for the enactment of the Fair Housing Amendment Act rather than the Equal Access to Housing Act. The latter act would increase the likelihood of private litigation and would, thus, make only a minor contribution to the reduc-

5. For a thorough discussion of the role real estate brokers play in housing discrimination, see Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808 (1976) [hereinafter cited as Note, *Racial Steering*]; S. Palmer, *The Role of the Real Estate Agent in the Structuring of Residential Areas: A Study in Social Control* 56-57 (1955) (unpublished Ph.D. thesis, available in Yale University).

6. See D. Falk & H.M. Franklin, *EQUAL HOUSING OPPORTUNITY: THE UNFINISHED FEDERAL AGENDA* 60-61 (1976) [hereinafter cited as *EQUAL HOUSING OPPORTUNITY*]. These authors argue that "the continuation of racially-discriminatory practices in the private housing market is explainable in part by the ineffective implementation of the existing civil rights acts." The problem is not the acts per se; instead, the problem can be attributed "to an understaffed agency (HUD) that cannot process complaints with sufficient speed and, more importantly, to a cumbersome conciliation process that lacks enforcement teeth, [s]ince HUD cannot issue cease and desist orders."

7. It has been observed that the majority of state agencies are underfunded, understaffed and incompetent. Vigorous enforcement action by state agencies tends to be the exception rather than the rule. See *supra* note 2, at 6.

8. This conclusion parallels that proffered by HUD which investigated the overall enforcement record of suits initiated under Pub. L. No. 90-284, 82 Stat. 73 (codified at 42 U.S.C. §§ 3601-3631 (1976)). (The terms "Title VIII" and "Fair Housing Act of 1968" will be used interchangeably throughout this article). See *GUIDE TO FAIR HOUSING* at 7. For a discussion of federal enforcement efforts, see 2 U.S. COMMISSION ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT* 52-70 (1974) [hereinafter cited as *CIVIL RIGHTS ENFORCEMENT*]. The Commission found that out of a sample of 1,601 complaints handled by HUD during a nine-month period, approximately four-fifths (1,339) were dropped without giving plaintiffs any relief.

9. See *infra* notes 157-59.

tion of the persistently high incidence of discrimination in private housing.

I. OVERVIEW OF FEDERAL FAIR HOUSING LAWS

An individual who believes that he is a victim of housing discrimination may initiate civil action under the Civil Rights Act of 1866,¹⁰ the Civil Rights Act of 1968,¹¹ or the equal protection clause of the fourteenth amendment. Moreover, the alleged victim may initiate his action simultaneously under all three, for federal courts have ruled that civil action under any one of the above is independent of and not limited by another.¹² For example, a proper section 1982 suit can proceed even if the facts would not support a Title VIII claim.¹³

Among many factors, the following six are most likely to determine the probability of complainants' success when suits are initiated under one or more federal laws: (1) the types of discrimination prohibited by each statute; (2) the proof needed to establish a prima facie case of housing discrimination; (3) the types of property covered by each statute; (4) the types of defendants subject to punishment; (5) the types and number of remedies successful complainants may receive; and (6) the types of plaintiffs who may initiate an enforcement suit.¹⁴ A brief discussion of these factors appears in the sections below.

10. 42 U.S.C. § 1982 (1976). Its coverage of housing discrimination is discussed in depth in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

11. See *infra* notes 46-48.

12. The Court held in *Jones* that an alleged victim of housing discrimination could sue under § 1982 even though the same action may have been brought under the previously enacted Title VIII. The rationale for this is simple. *Jones*, 392 U.S. at 416, 417. Many instances of discrimination in the sale and rental of housing might invoke suits that are appropriate under either statute, but not both. See also *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

13. See generally *Phiffer v. Proud Partot Motor Hotel*, 648 F.2d 548 (9th Cir. 1980). See also LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, GUIDE TO PRACTICE OPEN HOUSING LAW 19 (1974) [hereinafter cited as OPEN HOUSING LAW].

14. This article presents only a cursory review of the differences and similarities among the statutes. For a more detailed analysis and review, see *Aguilar, Developments in the Law*, 15 HARV. C.R.-C.L.L. REV. 29 (1980). See also OPEN HOUSING LAW, *supra* note 13, at 18.

A. *Prohibitive Discriminatory Practices under section 1982, Title VIII and the Equal Protection Clause*

The Supreme Court held in *Jones* that section 1982 bars *all* racial discrimination, private as well as public, in the selling or renting of property and that the statute¹⁵ is a valid exercise of the power of Congress to enforce the thirteenth amendment.¹⁶ The Court interpreted the language in section 1982 to include every racially-motivated refusal to sell or rent housing, whether among private parties or under official sanctions.¹⁷

Although the Court used sweeping language when interpreting the meaning of section 1982, it was careful to note the limitations of the statute. Specifically, the Civil Rights Act of 1866 deals only with discrimination on the basis of race, not on the basis of religion, sexual preference, national origin, or sex.¹⁸ Additionally, it does not prohibit discrimination in financing or brokers' discriminatory practices—"blockbusting" and "racial steering."¹⁹ Although section 1982 does not explicitly cover discriminatory misrepresentations of non-availability or discriminatory terms and conditions, it is argued by some that this "section would be practically nullified if it were not construed to prohibit these practices."²⁰

Unlike the language in section 1982, the language in Title VIII as amended by The Community Development and Housing Act²¹ is specific. On the basis of race, color, national origin or sex, it is unlawful (1) to refuse to sell or rent to, or refuse to negotiate or deal

15. 42 U.S.C. § 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

16. *Jones*, 392 U.S. at 413.

17. EQUAL HOUSING OPPORTUNITY, *supra* note 6, at 58.

18. *Id.* at 59.

19. The Court's decision in *Jones* seems to leave open the possibility that § 1982 could be applied to brokerage services; however, no liability has been found under § 1982 in several instances where brokers have discriminated. See Note, *Racial Steering*. But see, Note, *Housing and Section 1982: The Advisability of Extending the Statutory Mandate Beyond Acts of Traditional Discrimination*, 1975 DUKE L.J. 781, 799-800 (1975) for the view that § 1982 applies to brokers, in light of the holding in *Jones* that "[§ 1982] does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling." (footnote omitted).

20. See Morris & Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1, 83 (1968).

21. Pub. L. No. 90-284, 42 U.S.C. §§ 3601-3619 (1968).

with any person;²² (2) to discriminate in the terms or conditions for buying or renting housing;²³ (3) to advertise that persons of certain races are preferred over persons of another race;²⁴ (4) to deny that housing is available when, in fact, it is (misrepresentation);²⁵ (5) to engage in "blockbusting";²⁶ and (6) to deny or make different terms on home loans or other financial assistance.²⁷ Obviously, Title VIII coverage is broad. It is estimated, however, that only eighty percent of America's private housing is covered. Sections 803b²⁸ and 807²⁹ permit some private dwellings³⁰ to be exempted from the coverage as outlined in Section 804 of the 1974 Act.

Complainants who initiate a housing discrimination suit under the equal protection clause of the fourteenth amendment necessarily implicate the state in their allegations. Presumably, this clause outlaws all types of discrimination if federal, state or local officials fail to establish some minimum rational basis for discriminating against a particular class of housing complainants.³¹ Although the number of cases are few, complainants have initiated housing discrimination suits with varying degrees of success pursuant to the equal protection clause. These cases, however, typically concern discrimination in

22. 42 U.S.C. § 3604(a) (1976) (42 U.S.C. § 3604a) (1976).

23. 42 U.S.C. § 3604(b) (1976) (42 U.S.C. § 3604b).

24. 42 U.S.C. § 3604(c) (1976).

25. 42 U.S.C. § 3604(d) (1976).

26. 42 U.S.C. § 3604(e) (1976).

27. 42 U.S.C. § 3605 (1976).

28. Single family houses owned by private individuals and purchased without the use of real estate brokers or discriminatory advertising are exempted. If an individual owns one or two other single family houses, only the sale of the house in which he lives within any two-year period, is exempted provided that he does not employ a broker or discriminatory advertising. Additionally, multifamily housing of four or fewer units is exempted if one is occupied by the owner and discriminatory advertising is not used to sell it. Title VIII at § 3603(b) (1976).

29. Housing rented or sold by religious groups to their members, other than for commercial purposes, is exempted if the membership in the religious group is not restricted on account of race, color, or national origin. Title VIII at § 3607 (1976).

30. "Dwelling" as used in 42 U.S.C. § 3604 is defined in 42 U.S.C. § 3602(b) as: "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof."

31. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) (a discussion of equal protection); *Montgomery County v. Fields Road Corporation*, 386 A.2d 344 (1978) (a challenge to Montgomery County regulations requiring landlords with twenty-five or more rental units to make quarterly reports on minority tenants and homeseekers).

public rather than in private housing.³²

B. Proving Discrimination under section 1982, Title VIII and the Equal Protection Clause

Complainants who allege they are victims of housing discrimination have the burden of proving victimization and defendants' involvement. The proof required under section 1982 or Title VIII differs substantially from that required when initiating an action under the equal protection clause of the fourteenth amendment.

Under section 1982, a complainant has to establish a prima facie case of discrimination.³³ Among other things, this requires the individual to show (1) that a private owner placed his property on the open market for sale; (2) that plaintiff was willing and able to purchase the property on terms specified by the owner; (3) that the owner had notice of plaintiff's intention to buy; (4) that the owner refused to sell the property to plaintiff; and (5) that no apparent reason other than plaintiff's race exists to explain defendant's refusal to sell the property.³⁴

To prove a case of racial discrimination under Title VIII, a complainant must show that the private defendant's behavior had a discriminatory effect. Once more, only a prima facie case is re-

32. See *Clark v. Universal Builders*, 501 F.2d 324 (7th Cir. 1974) (discrimination in terms and conditions of a sale is prohibited); *Metropolitan Housing Development Corporation v. Arlington Heights*, 517 F.2d 409 (1975) (exclusionary zoning against low-income minority homeseekers is not unconstitutional); *Warth v. Seldin*, 422 U.S. 490 (1975) (exclusionary zoning against lower income homeseekers is not unconstitutional); *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972) (county official violated the fourteenth amendment when they refused to issue building permits for low-rent public housing); *Male v. Crossroads Associates*, 469 F.2d 616 (2d Cir. 1972) (equal protection clause was not violated when welfare recipients were refused consideration for apartments even though state action was involved); *Citizens Committee for Faraday Wood v. Lindsay*, 507 F.2d 1065 (2d Cir. 1974) (no violation found when New York City decided not to proceed with a middle to low-income housing project).

33. The definition of prima facie case is not identical across all circuits. See *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980). However, in many circuits the element of proof in § 1982 actions are deduced from elements of proof under Title VII. Under this analysis, a plaintiff must prove: (1) that she/he is a member of a racial minority; (2) that she/he applied for and was qualified to rent or purchase certain private property or housing; (3) that she/he was rejected; and (4) that the housing or rental opportunity remained available thereafter. See *Wharton v. Knofel*, 562 F.2d 550, 553-54 (8th Cir. 1977); *Smith v. Anchor Building Corp.*, 536 F.2d 231, 233 (8th Cir. 1976); *Harper v. Hutton*, 594 F.2d 1091 (6th Cir. 1979); cf. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979).

34. See *Duckett v. Silberman*, 568 F.2d 1020 (2d Cir. 1978); *Bush v. Kaim*, 297 F. Supp. 151 (N.D. Ohio 1969).

quired.³⁵ "A plaintiff . . . need no longer prove that the defendant had no possible legal reason for not dealing with him, but only that his race or national origin played some part in the refusal."³⁶ Thus, in any real estate transaction, consideration of race is an impermissible factor and "it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination."³⁷ [emphasis in the original]. It is worth reiterating here that the provisions of Title VIII do not require a plaintiff to prove that defendant acted with the specific intent of violating fair housing laws; a discriminatory effect is only required.³⁸

Unlike the requirement under section 1982 and Title VIII, plaintiffs who initiate an equal protection suit must establish proof of intentional racial discrimination under the constitutional standard of proof as described in *Arlington Heights v. Metropolitan Housing Development Corp.*³⁹ This obviously increases the plaintiff's burden, for racial motivation per se is difficult to prove and to identify.

C. *Extensiveness of Judicial Remedies under section 1982, Title VIII and the Equal Protection Clause*

The Civil Rights Act of 1866 specifically authorizes courts to grant injunctive⁴⁰ and/or declaratory⁴¹ relief. It is silent with regard

35. Several courts of appeals have looked only at effects to establish a prima facie case of discrimination under Title VIII, in cases of private discrimination and of local government actions. See *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir. 1974) and *United States v. City of Black Jack*, 508 F.2d 1179, 1183-84 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); see also *infra* note 134-38.

36. See *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1971).

37. *Id.* at, 349-50.

38. *Id.*

39. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-66 (1977). The Court noted that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. (*Id.* citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). . . . 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' Proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 264-66. The Court goes on to note that "the impact of the official action . . . may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.* at 266.

40. EQUAL HOUSING OPPORTUNITY, *supra* note 6, at 60.

41. *Jones*, 392 U.S. at 414.

to awarding damages. However, courts may fashion appropriate relief for successful plaintiffs in a section 1982 suit.⁴² Thus, plaintiffs may receive both compensatory and punitive damages⁴³ as well as attorney's fees.⁴⁴ In addition to its allowance of monetary relief and orders, a finding of discrimination in violation of section 1982 permits courts to order defendants to adopt and implement prospective affirmative programs to correct the effects of their discriminatory practices.⁴⁵

In a suit brought pursuant to 42 U.S.C. § 3612(c), courts have authority to award complainants actual damages and punitive damages not exceeding \$1,000. Additionally, they may grant successful plaintiffs all other remedies that a successful section 1982 plaintiff might receive.⁴⁶ However, Title VIII and section 1982 can be distinguished in one major respect. A Title VIII plaintiff who chooses first to file a complaint with HUD and pursue administrative remedies before initiating a private suit under section 3610(a)⁴⁷ may be limited to equitable relief. Punitive damages cannot be awarded.⁴⁸ Finally, under Title VIII courts may force an unsuccessful defendant to adopt some affirmative action program to eliminate vestiges of

42. *Id.*

43. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); see also *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970).

44. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).

45. See *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 229-31 (5th Cir. 1971).

46. 42 U.S.C. § 3612(c) (1976). The precise language is:

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, that the said plaintiff in the opinion of the Court is not financially able to assume said attorney's fees.

47. 42 U.S.C. § 3610(a) (1976) provides in part:

Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . . may file a complaint with the Secretary. . . . Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. . . . If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion

48. At least one court has ruled that the congressional intent was not to include damages as a remedy under 42 U.S.C. § 3610(a). *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971). Thus a plaintiff who alleges discrimination under Title VIII should proceed under both 42 U.S.C. § 3610 and 42 U.S.C. § 3612.

housing discrimination.⁴⁹

A successful plaintiff who initiates a suit under the equal protection clause is limited to declaratory and injunctive relief,⁵⁰ although under appropriate conditions the court may order the state to implement some affirmative action.⁵¹

II. OVERVIEW OF STATE AND LOCAL FAIR HOUSING LAWS

Thirty-four states, the District of Columbia, and hundreds of municipalities and counties have adopted fair housing statutes or ordinances.⁵² As of 1979, HUD recognized only twenty-two states that provided rights and remedies "substantially equivalent"⁵³ to those provided under Title VIII.⁵⁴ Thirteen states⁵⁵ have fair housing laws which are not rated "substantially equivalent." And presently, the District of Columbia fair housing ordinance is the single local ordinance listed as "substantially equivalent."⁵⁶

The few states whose laws are equivalent to those of Title VIII allow successful plaintiffs to receive remedies identical to those pro-

49. *West Peachtree*, 437 F.2d at 229.

50. 42 U.S.C. § 1983 (1964).

51. *See* *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972).

52. GUIDE TO FAIR HOUSING, *supra* note 2, at 57.

53. 24 C.F.R. § 115.3 (1979). "Substantial equivalency" is based upon the following criteria: (1) the state or local law must provide for an administrative enforcement body to receive and process complaints; (2) the administrative enforcement body must have authority to investigate allegations of complaints and have the power to conciliate complaint matters; (3) the state or local law may not place any excessive burdens on the complainant which might discourage the filing of complaints; (4) the state or local law must be sufficiently comprehensive in its prohibitions so as to be an effective instrument in carrying out the purposes and intent of Title VIII; and (5) the state or local law must not contain exemptions that are substantially less than the coverage of Title VIII.

54. *See* 24 C.F.R. § 115.11 (1979). *See also* ALASKA STAT. § 18; COLO. REV. STAT. § 24-34-502; CONN. GEN. STAT. § 53-35; IND. CODE § 22-9-1; KAN. STAT. ANN. § 44-1015; KY. REV. STAT. § 344.010; ME. REV. STAT. ANN. tit. 5, § 4551; MASS. ANN. LAWS ch. 6, § 56 (Mickie/Law, Co-op); MICH. STAT. ANN. § 101; MINN. STAT. § 363; NEB. REV. STAT. § 20-114; NEV. REV. STAT. § 118.010; N.H. REV. STAT. ANN. § 354-A; N.J. STAT. ANN. § 10:5-1 (West); N.M. STAT. ANN. § 4-33-1; N.Y. EXEC. LAW § 298 (McKinney); OR. REV. STAT. § 659-045; 43 PA. CONS. STAT. ANN. § 951 (Purdon); R.I. GEN. LAWS, § 34-37-5; VA. CODE § 36-95; W. VA. CODE § 5-11-1; WIS. STAT. ANN. § 101 (West).

55. *See* CAL. CIV. CODE § 51 (West); DEL. CODE ANN. tit. 6, § 4601; GA. CODE ANN. § 1-13; HAWAII REV. STAT. § 515-1; IDAHO CODE § 67-5906; IOWA CODE ANN. § 601A; MD. ANN. CODE art. 49B, § 1-28; MO. REV. STAT. § 213.105; MONT. REV. CODES ANN. § 49-2-305; OHIO REV. CODE ANN. § 4112 (Page); S.D. COMP. LAWS ANN. § 20-13-20; VT. STAT. ANN. tit. 13, § 1467; WASH. REV. CODE § 49.60.222.

56. *See* D.C. CODE ANN. § 321.

vided by Title VIII.⁵⁷ These jurisdictions, however, are divided over whether plaintiffs should receive damages for mental anguish and humiliation.⁵⁸ Federal courts, on the other hand, have awarded plaintiffs damages for mental anguish and humiliation when suits were initiated under section 1982 and/or Title VIII.⁵⁹

The types of coverage and relief provided by jurisdictions whose laws are not "substantially equivalent" to Title VIII vary greatly and space will not permit a thorough review of them. However, a review of California's, Maryland's, and Ohio's fair housing laws clearly illustrates the types of discrimination prohibited and the types of remedies awarded in "non-equivalent" states.

In California, discriminatory practices are outlawed under the Health and Safety Code⁶⁰ and the Unruh Civil Rights Act.⁶¹ Under the former, discrimination in housing because of race is prohibited.⁶² The Act outlaws racial discrimination in commercial establishments.⁶³ The Supreme Court of California has held that "the commission, on a finding of discrimination, may fashion remedies both to correct unique cases of such practice as well as to curb its general

57. See *supra* note 46.

58. Jurisdictions which permit such damages are: West Virginia, Oregon, and New Jersey. See West Virginia Human Rights Commission v. Pauley, 212 S.E.2d 77 (W. Va. 1975); Williams v. Joyce, 4 Or. App. 482, 479 P.2d 513 (1970); Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969); Zaharian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973). The following jurisdictions do not allow plaintiffs to receive damages for mental anguish and humiliation: See Murphy v. Industrial Commission, 37 Wis. 2d 704, 155 N.W.2d 545, 157 N.W.2d 568 (1968); Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758 (1971); Pennsylvania Human Relations Commission v. Zamantakis, 387 A.2d 75 (1978).

59. See Adams v. Hempstead Heath, 426 F. Supp. 1141 (E.D.N.Y. 1977); Branch v. Deaver, P-H Eq. Opp. Hous. § 13,689 (N.D. Calif. 1974); Crumble v. Blumthal, 549 F.2d 462 (7th Cir. 1977); Franklin v. Agostinelli, P-H Eq. Opp. Hous. § 13,555 (W.D. Wash. 1971); Burris v. Wilkins, 544 F.2d 891 (5th Cir. 1977); Phiffer v. Proud Parrot Motor Hotel, Inc., 643 F.2d at 553.

60. See CAL. HEALTH & SAFETY CODE § 35700 (West).

61. See CAL. CIV. CODE § 51 (West).

62. See CAL. HEALTH & SAFETY CODE, *supra* note 60, provides in relevant part: "The practice of discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in housing accommodations is declared to be against public policy." See also *Id.* § 35720: "It shall be unlawful: (1) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such person."

63. See CAL. CIVIL CODE § 51 *supra* note 61, provides in pertinent part: "All persons within the jurisdiction of this state are free and equal, and, no matter what their . . . race, . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

incidence."⁶⁴ In addition reasonable attorney's fees may be awarded to the successful plaintiff.⁶⁵

Maryland's fair housing statute is similar to California's in that a complainant must commence his action with a state agency.⁶⁶ The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if petitioner's rights have been prejudiced.⁶⁷ Unlike California's, Maryland's law explicitly prohibits, on the basis of race, the refusal to sell or rent, the refusal to negotiate, and misrepresentation in the sale or rental of housing.⁶⁸ In addition, Maryland's "blockbusting" statute declares it a misdemeanor "for any person, firm, corporation or association . . . to induce or attempt to induce another person to transfer an interest in real property . . . by representations regarding the existing or potential proximity or real property owned, used or occupied by persons of any particular race"⁶⁹

The general rule in Maryland is that if a statute provides a special form of remedy, the plaintiff must use that form rather than any other.⁷⁰ Therefore, if Maryland's Human Relation Commission finds the defendant guilty of discrimination, it may issue a "cease and desist" order and take affirmative action to effectuate the purposes of the particular statute involved.⁷¹

The Ohio Civil Rights Commission has broad remedial authority to enforce the state law against discrimination and to keep

64. See *Stearns v. Fair Employment Practice Commission*, 6 Cal. 3d 205, 490 P.2d 1155 (1971).

65. See *People v. McKale*, 83 Cal.3d 23, 148 Cal. Rptr. 181 (1978).

66. See MD. ANN. CODE art. 49B, § 1-28 (1981).

67. Md. Admin. Proc. Act, art. 41, § 255(g) (1978).

68. MD. ANN. CODE art. 49B, § 22, provides in relevant part:

It shall be an unlawful discriminatory housing practice, because of race . . . for any person having the right to sell, rent, lease, control, construct, or manage any dwelling constructed or to be constructed, or any agent or employee of such person: (1) To refuse to sell or rent after making a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling. . . .

(4) To represent to any person, for reasons of discrimination, that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

69. MD. ANN. CODE art. 56, § 203A.

70. See *Hartman v. Price George's Co.*, 264 Md. 320, 323, 286 A.2d 88 (1972); *Soley v. Maryland Commission on Human Relations*, P-H Eq. Opp. Hous. § 16,501 (1976).

71. See *Bulluck v. Pelham Woods Apartments*, 283 Md. App. 505, 390 A.2d 1119 (1978).

records indicating race.⁷² If the Commission finds any unlawful discriminatory behavior, it has authority to issue a "cease and desist" order and to take further affirmative action.⁷³ Unlike California's and Maryland's laws, Ohio's statute⁷⁴ explicitly prohibits discriminatory housing practice in many areas, for it is modeled after Title VIII coverage.⁷⁵ Although Ohio's law permits the Commission to issue "cease and desist" orders, to award back pay, and to take affirmative action,⁷⁶ Ohio Supreme Court has held that the Commission is not authorized to award humiliation, compensatory, and punitive damages to victims of discrimination.⁷⁷

As mentioned at the outset, the District of Columbia has the single ordinance rated "substantially equivalent" by HUD.⁷⁸ Among other things, this means that the District's fair housing code is "sufficiently comprehensive in its prohibitions . . . as to be an effective instrument in carrying out the purposes and intent of Title VIII."⁷⁹ Courts have adopted this view and awarded the successful plaintiff remedies in accord with 42 U.S.C. § 3612(c).⁸⁰

In contrast, Pittsburgh's ordinance⁸¹ is an example of a "non-equivalent" fair housing ordinance. An aggrieved individual is required to file his complaint with the local commission. Upon a finding of discrimination, the commission can issue a "cease and desist" order and take affirmative action to end housing discrimination.⁸²

72. See *Miller Properties, Inc. v. Ohio Civil Rights Commission*, P-H Eq. Opp. Hous. § 15,016 (1972).

73. See OHIO REV. CODE ANN. § 4112 (Page).

74. *Id.* § 4112.06(B).

75. See *supra* notes 22-27.

76. OHIO REV. CODE ANN. § 4112.05(G).

77. See *Ohio Civil Rights Commission v. Lysyi*, 38 Ohio St.2d 217, 313 N.E.2d 3 (1974). Note that Illinois, a "non-equivalent" sister state, allows plaintiffs to receive damages for mental anguish and humiliation. See *A.P. Green Services Division of Bigelow-Liptak Corp. v. State of Illinois Fair Employment Practices Comm'n*, 19 Ill. App. 3d 875, 312 N.E.2d 314 (1974).

78. See *supra* note 56.

79. See *supra* note 53.

80. See *supra* note 46; See also *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (awarding injunctive relief); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968) (awarding injunctive relief).

81. Pittsburgh, Pa., sections 13(i) (1967).

82. *Id.* The ordinance provides in pertinent part:

If upon all the evidence presented, the Commission finds that the respondent has engaged in an unlawful practice, it shall state its findings of fact in writing and shall issue (an) order in writing Such order may require the respondent to cease and

Pennsylvania Supreme Court has ruled, however, that the Commission is not authorized to award compensatory and punitive damages, attorney's fees, and damages for humiliation and mental anguish.⁸³

III. ENFORCEMENT PROVISIONS OF FEDERAL, STATE AND LOCAL FAIR HOUSING LAWS

The enforcement provisions of respective jurisdictions' fair housing statutes and ordinances vary substantially. Some permit private persons (private attorney generals)⁸⁴ as well as state and federal attorney generals to initiate a civil suit. Others only permit the private attorney general to commence civil action. Moreover some permit class action suits. This section examines who has standing⁸⁵ to sue under federal and state civil rights statutes and under local ordinances.

desist from such unlawful practice and to take such affirmative action, including, but not limited to . . . the selling, renting or leasing of a housing accommodation or housing accommodations upon equal terms and conditions and with such equal facilities, services and privileges, the tendering of money . . . for the acquisition . . . of any housing accommodations

83. See *City of Pittsburgh Commission on Human Relations v. MacBeth*, 37 Pa. Commw. Ct. 636, 391 A.2d 1109 n.2 (1978) (Attorney fees cannot be awarded by the Commission). The "language of Section 13(i) of the Pittsburgh Ordinance is nearly identical to § 959 of the Pennsylvania Human Relations Act." See, e.g., *Pennsylvania Human Relations Commission v. Straw*, 387 A.2d 75 (1978) (commission has no authority to award compensatory damages for mental anguish); *Pennsylvania Human Relations Commission v. Zamantakis*, 387 A.2d 70 (1978) (commission cannot award compensatory damages for mental anguish and humiliation).

84. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). The Court noted that "the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal. (T)he main generating force must be private suits in which, the Solicitor General says, the complainants act not only on their own behalf but also 'as private attorney general in vindicating a policy that Congress considered to be of the highest priority.'" See also *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). The awarding of attorney's fees is viewed as proper to insure that individual litigants act as "private attorney generals."

85. EQUAL HOUSING OPPORTUNITY, *supra* note 6, at 79. Generally, standing requires that the individual [sic] bringing the case must be injured in some degree by the action of which he is complaining, so that he will have a personal stake in the outcome as evidenced by some personal benefit to him from a favorable decision. And standing . . . also requires that the situation surrounding the claimed injury . . . be sufficiently concrete to enable the courts to determine and evaluate the relevant facts and frame appropriate relief.

See also *Warth v. Seldin*, 422 U.S. 490 (1975) for a discussion of "prudential standing rules."

A. *Enforcement Roles under Federal Statutes and the Equal Protection Clause*

The Civil Rights Act of 1968 gives certain authority and power to HUD, to the Attorney General and to private persons for effectuating the purpose of the Act. HUD has primary responsibility for enforcing the law through affirmative action and programs of education and conciliation.⁸⁶ If the Secretary of HUD finds discriminatory practices and is unable to get the defendant to cease voluntarily, the Attorney General may be asked to commence legal action and/or commence other appropriate action.⁸⁷

Title VIII authorizes the Attorney General to initiate an independent housing discrimination suit. This authority is given whenever "the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice"⁸⁸ of housing discrimination. Remedies are limited to preventive relief, permanent or temporary injunction, restraining orders or other orders.⁸⁹

A victim of housing discrimination in violation of Title VIII may commence legal action pursuant to either of two enforcement sections. One section⁹⁰ requires a complaint to be filed with and processed by the Secretary of HUD. Another section⁹¹ authorizes a civil action independently of HUD's or the Attorney General's involvement. Courts have held that these actions create independent causes as well as provide for separate remedies.⁹²

Any black or white victim of discrimination has standing to sue

86. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, TITLE VIII LEGAL PROCEDURE MANUAL, WASHINGTON, D.C. 7 (1978) [hereinafter cited as PROCEDURE MANUAL]. See also *supra* note 47.

87. *Id.* at 8.

88. Title VIII 42 U.S.C. §§ 3601-3631 (1976).

89. *Id.* See also *U.S. v. Long*, 537 F.2d 1151 (4th Cir. 1975) (re-affirming the awarding of preventive relief and other equitable remedies when the Attorney General initiates a suit but barring the recovery of monetary damages for victims of discrimination).

90. See *supra* note 88.

91. *Id.*

92. See *Crim v. Glover*, 338 F. Supp. 823, 825 (S.D. Ohio 1972). "Plaintiffs have the right to bring a suit in federal district court alleging racial discrimination in the rental of housing under Section 812, before exhausting or attempting to exhaust the remedies provided for in Section 810" *Id.*; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (exhaustion of administrative remedies is not a necessary prerequisite for bringing a lawsuit under 42 U.S.C. § 3612).

under these enforcement provisions.⁹³ For example, the right of a white victim to sue has been upheld when a white landlord blocked his attempt to sublease an apartment to a prospective black tenant.⁹⁴ Additionally, whites have been granted the right to sue when discriminatory policies exclude blacks and other minorities from condominiums, cooperatives, and other dwellings.⁹⁵

In addition to initiating a suit under Title VIII, an individual may commence an independent civil action pursuant to section 1982.⁹⁶ The same authority is not granted to federal administrative agencies nor to the Attorney General.⁹⁷ The 1866 Civil Rights Act permits only private victims of discrimination to commence legal action. Any person seeking relief must present facts showing that challenged practices harmed him and that he personally would benefit from the court's intervention.⁹⁸ The same requirement applies to persons initiating a housing discrimination suit under the equal protection clause of the fourteenth amendment.⁹⁹

B. *Enforcement Provisions Under State Fair Housing Laws*

The enforcement provisions of states' fair housing laws vary widely from state to state.¹⁰⁰ Private persons may have the sole authority to enforce the law or the provision may be enforced by the state and by private victims of discrimination. Typically, states—whose laws are either “substantially equivalent” to Title VIII or less equivalent—empower administrative agencies to receive complaints, conduct investigations, and attempt to resolve the conflicts through

93. See OPEN HOUSING LAW, *supra* note 13 at 20. See also *supra* note 85.

94. See *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1971).

95. See *Trafficante*, *supra* note 83; see also *Wheatley Heights Neighborhood Coalition v. Jenna Rosales*, 429 F. Supp. 486 (E.D.N.Y. 1977) (coalition of homeowners had standing to contest alleged acts of racial steering by realtors).

96. See *supra* note 12.

97. See EQUAL HOUSING OPPORTUNITY, *supra* note 6, at 59.

98. See *Warth v. Seldin*, *supra* note 85. The Court ruled that organizations, low income minorities, and taxpayers who were not directly affected by an alleged discriminatory zoning law did not have standing to challenge the law. See also *Evans v. Lynn*, 537 F.2d 571, 589, 612 (2d Cir. 1976). A divided court sitting en banc reversed its earlier decision in an exclusionary zoning suit and denied standing to a non-resident plaintiff who had not personally suffered any injury from the alleged discriminatory actions.

99. See generally, *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977).

100. GUIDE TO FAIR HOUSING, *supra* note 2, at 6.

conciliation.¹⁰¹ Some states permit agencies, after a finding of probable cause, to enjoin the respondent from selling or renting a dwelling which is the subject of dispute.¹⁰²

California's fair housing law,¹⁰³ for example, "specially empowers the Fair Employment Practice Commission to prevent discrimination in housing."¹⁰⁴ The district attorney, however, can also initiate an action pursuant to the code.¹⁰⁵ Similar arrangements are found in other states.¹⁰⁶

IV. JUDICIAL ENFORCEMENT OF TITLE VIII AND PROPOSALS TO STRENGTHEN ITS ENFORCEMENT PROVISIONS

The ruling in *Jones v. Alfred H. Mayer* and the Civil Rights Act of 1968 has been the law for fifteen years yet housing discrimination is still rampant. The opinion of many legal scholars and practitioners is that Title VIII enforcement provisions are not effective enough to end discrimination in housing.¹⁰⁷ Similarly, vigorous enforcement of state and local fair housing laws tends to be the exception rather than the rule.¹⁰⁸ Among other reasons, enforcement under Title VIII has not been successful because (1) HUD cannot issue "cease and desist" orders or institute civil action on its own behalf; and (2) the statute of limitation for initiating a suit is too short—180 days.¹⁰⁹ Enforcement efforts at the state and local levels are poor because the majority of agencies are underfunded and understaffed.¹¹⁰ Moreover, state agencies are typically legally incompetent.¹¹¹ As of this writing two competing bills have been introduced in the Senate.

101. *Id.*

102. *Id.*

103. *See supra* note 60.

104. *See Stearnes v. Fair Employment Practice Commission, supra* note 64, at n.3.

105. *See People v. McKale, supra* note 65.

106. *See supra* note 54.

107. *See* EQUAL HOUSING OPPORTUNITY, *supra* note 6, at 60; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. AN ANALYSIS OF REMEDIES OBTAINED THROUGH LITIGATION OF FAIR HOUSING CASES Title VIII and the Civil Rights Act of 1866, 49 (1979) [hereinafter cited as REMEDIES]; *see supra* note 2, at 4; *see also* Note, *Is the U.S. Committed to Fair Housing? Enforcement of the Fair Housing Act Remains a Crucial Problem*, 29 CATH. U. L. REV. 641, 661 (1980).

108. *See supra* note 2, at 6.

109. REMEDIES, *supra* note 107, at 49.

110. *See supra* note 108.

111. *Id.*

These bills would revise the enforcement provisions of Title VIII. The most relevant sections of each bill are discussed below.

A. *The Fair Housing Amendment Act of 1983*

A congressional bipartisan coalition has proposed the Fair Housing Amendment Act of 1983—Senate bill S. 1220.¹¹² The purpose of the bill is to provide a speedy, fair, and inexpensive adjudication process for the person alleging denial of housing as well as for the person charged.¹¹³

Among its other purposes, S. 1220 would attempt to enforce Title VIII as follows: (1) victims of discrimination or aggrieved persons¹¹⁴ would continue to choose between filing an administrative complaint with HUD¹¹⁵ and initiating a private suit in federal or state courts;¹¹⁶ (2) hearings would be held before administrative law judges,¹¹⁷ those selected by a Presidentially appointed Fair Housing Review Commission;¹¹⁸ (3) HUD would have to refer suits, however, to state and local administrative agencies if the discrimination arose in areas where fair housing laws are “substantially equivalent”¹¹⁹ to federal law;¹²⁰ (4) the Department of Justice would continue to be responsible for discriminatory “pattern or practice” suits and for cases that pose an issue of general public importance or novel questions of law;¹²¹ (5) administrative law judges would assess and award damages and civil penalties;¹²² and (6) HUD would have powers to

112. S. 1220, 98th Cong., 1st Sess. (1983). This bill is very similar to bills S. 570, 97th Cong., 1st Sess. (1981); H.R. 1973, 97th Cong., 1st Sess. (1981); S. 506, 96th Cong., 2d Sess. (1980) and H.R. 5200, 96th Cong., 2d Sess. (1980) which narrowly missed passage in the waning days of the 96th Congress.

113. S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6153 (1983).

114. S. 1220, § 802(i), 98th Cong., 1st Sess., 129 CONG. REC. 6155 (1983). “‘Aggrieved person’ is defined as those both directly and indirectly affected. This . . . includes so-called ‘testers’ who as the Supreme Court has recently held, have the same Title VIII right as others in the community to receive truthful information about the availability of housing.” *Id.* at 6158.

115. *Id.* § 810(a)(1).

116. *Id.* § 812(a)(1).

117. *Id.* § 808(2)(D).

118. *Id.* § 808(2)(A).

119. *See supra* note 53.

120. S. 1220, § 810(a)(3), 98th Cong., 1st Sess., 129 CONG. REC. 6157 (1983).

121. *Id.* § 813(a).

122. *Id.* § 811(a). It is important to note that judicial review of final administrative orders

investigate fair housing violations.¹²³

A very important feature of S. 1220 concerns the standard of proof required to establish a *prima facie* case of racial discrimination. During the introduction of the bill, supporters stated unequivocally that "the standard of proof necessary to establish illegal discrimination [would] remain the same as current case law."¹²⁴ This means that the "effects" or "disparate impact" standard¹²⁵ would be used to establish a *prima facie* case of discrimination in private housing, and the "intent" standard¹²⁶ would be used to establish a *prima facie* case of racially-motivated zoning involving local government officials.¹²⁷

B. *The Equal Access to Housing Act of 1983*

A careful review of the Equal Access to Housing Act of 1983—Senate bill S. 140¹²⁸—reveals that its purpose and enforcement provisions differ significantly from those of the Fair Housing Amendment Act. Although one purpose of Senate bill S. 140 is to "enhance the ability of the Federal Government to enforce Title VIII of the Civil Rights Act of 1968,"¹²⁹ which parallels the intent of Senate bill S. 1220, the Equal Access Act—unlike S. 1220—is also designed to prevent HUD from using Title VIII as an "instrument of social engi-

is possible. Judicial review of the Fair Housing Review Commission may proceed in the appropriate court of appeals. *Id.* § 811(c).

123. *Id.* § 810(a)(1).

124. *See supra* note 113, at 6162 (statement of Sen. Kennedy).

125. This simply means using "statistical or other evidence of objective fact which, if established, warrants an inference that discrimination exists." *See Note, Is the U.S. Committed to Fair Housing? Enforcement of the Fair Housing Act Remains a Crucial Problem*, 29 CATH. U. L. REV. 641, 656 n.103 (1980). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1970).

126. *See supra* note 39.

127. *See, e.g.*, Village of Bellwood v. Gladstone Realtors, 569 F.2d 1013 (7th Cir. 1978) (official conduct and exclusionary zoning on the basis of race); El Cortez Heights Residents and Property Owner's Association v. Tucson Housing Authority, 457 F.2d 294 (9th Cir. 1969) (public officials encouraging discriminatory site selection for public housing on the basis of race); and Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970) (discriminatory tenant selection based on race); S. 1220 would also require landlords to allow reasonable modifications in housing in order to make it substantially equal in its access by handicapped persons. Additionally, it would prevent landlords from discriminating on the basis of familial status. *See supra* note 120, at 6158.

128. S. 140, 98th Cong., 1st Sess. (1983).

129. S. 140, 98th Cong., 1st Sess., 129 CONG. REC. 625 (1983).

neering."¹³⁰ To achieve both goals, Senate bill S. 140 would transfer all administrative responsibility from the Department of Housing and Urban Development to the Department of Justice.¹³¹ A new conciliation process would be established in the Justice Department which would resolve controversies informally.¹³²

The Equal Access to Housing Act differs from the Fair Housing Amendment Act in another major respect. It places considerably more emphasis on private litigation and on judicial enforcement of fair housing laws, a feature that provides no significant improvement in the enforcement provisions outlined in the Civil Rights Act of 1968.¹³³ First, the Attorney General must attempt to resolve complaints by a process of conciliation; however, if conciliation fails, the Department of Justice may initiate a civil action¹³⁴ in federal court on behalf of an aggrieved person¹³⁵ or an alleged victim of racial discrimination. Secondly, if prompt judicial action is necessary, the Attorney General may seek appropriate temporary or preliminary relief in federal court pending final disposition of the case.¹³⁶ Finally, the Attorney General may bring a civil action in an appropriate federal district court if there is reasonable cause to believe that persons are engaged in a pattern or practice of discrimination or if the case represents an issue of general public importance.¹³⁷

That more judicial action is likely to occur under the Equal Ac-

130. When introducing S. 140, Senator Hatch stated:

The experience of HUD in enforcing the act (Title VIII) over a period of years has demonstrated a fundamental conflict between its obligation to fairly administer the law and its *primary mission to set national housing policy*. Enforcement of Title VIII is, first and foremost, a matter of insuring compliance with the law; *too often it has been used by HUD as an instrument of social engineering policy.*" (emphasis added).

Id.

131. S. 140, § 810 (a), 98th Cong., 1st Sess., 129 CONG. REC. 627 (1983).

132. *Id.* § 812(b).

133. See Part III of this article.

134. S. 140, § 812(c), 98th Cong., 1st Sess., 129 CONG. REC. 628 (1983).

135. *Id.* § 802(i). Section 802(i) provides in pertinent part:

'Aggrieved person' includes any person whose bona fide attempt or bona fide offer to purchase, sell, lease, or rent, or whose bona fide attempt to obtain financing for a dwelling has been denied on the basis of race, color, religion, sex, handicap, or natural origin, or made subject to terms of purchase, sale, lease, rental

Unlike the Fair Housing Amendment Act, this bill does not include all "testers" under its definition of an "aggrieved person." Senate bill S. 140 "would limit the use of testers to those instances in which such a practice was necessary to confirm an alleged violation of the act." *Id.* at 626 (statement of Senator Hatch).

136. *Id.* § 812(a).

137. *Id.* § 814(a).

cess Act is reflected in the provision outlining private enforcement. An aggrieved person may commence a civil action in an appropriate federal district court or state court.¹³⁸ In addition, the Department of Justice may give the victims of discrimination not more than one thousand dollars for legal fees and other expenses of initiating a civil action.¹³⁹

Unlike the Fair Housing Act, the Equal Access Act places a substantial burden on complainants by requiring them to prove a *prima facie* case of invidious discrimination in private dwellings. Specifically, "the standard of proof in identifying discrimination under Title VIII (would be) an intent standard."¹⁴⁰ The sponsor of Senate bill S. 140 stressed that the intent standard is more appropriate than the effects standard¹⁴¹ for several reasons: (1) the "use of the effects test . . . carries with it tremendous potential for involving the Federal Government in zoning and land-use affairs that have always been the prerogative of state and local governments"; (2) the "use of the effects test by HUD and the Civil Rights Division of the Justice Department has been the basis by which they have sought to impose their own notions of proper racial balance upon communities which have had no intent or purpose of discriminating against protected groups"; and (3) "the intent test . . . allows courts to consider the totality of circumstances, including evidence of racially disparate effects."¹⁴²

Although more will be said about requiring aggrieved persons to prove the fourteenth amendment's *prima facie* case of racial discrimination¹⁴³ in private housing, an important point should be

138. *Id.* § 813(a) (1).

139. *Id.* § 812(b).

140. *Id.* at 626.

141. *See supra* note 125.

142. *See supra* note 131, at 626.

143. *See, e.g., Arlington Heights*, 429 U.S. 252, 254 (1977). The City of Arlington Heights refused to rezone a tract of land from a single-family to a multiple-family classification, after discovering that a proposed project would be racially integrated. Plaintiffs filed a private suit, alleging that the denial was based on race. The Supreme Court ruled that the "rezoning denial was motivated not by racial discrimination but by a desire to protect property values and maintain the Village's zoning plan." The Court noted that official behavior (state action) will not be held unconstitutional solely because it results in a racially disproportionate impact. Suits initiated under the equal protection clause require plaintiffs to prove that public officials intended to discriminate on the basis of race. Failure to overcome the burden requires lower courts to rule in favor of community officials, for municipalities are given considerable discretion under their police powers.

made at this juncture. Supporters of Senate bill S. 140 suggest that the "Equal Access Act would *reaffirm more strongly than ever . . .* this Nation's commitment to the elimination of discriminatory (private) housing policies."¹⁴⁴ (emphasis added). Yet, some would require alleged victims of private housing discrimination to prove that racial discrimination was intentional—a task whose difficulty has been repeatedly demonstrated.¹⁴⁵ The ostensible rationale for this requirement that complainants prove purposeful racial discrimination is that the effect standard would increase the likelihood of the Attorney General initiating exclusionary zoning and land-use suits.¹⁴⁶ Such an argument, however, is flaccid for two important reasons.

First, the Fair Housing Amendment Act—S. 1220—as well as the Equal Access to Housing Act would allow the Attorney General to pursue cases which pose issues of "general public importance" or "novel questions of law."¹⁴⁷ These phrases are very broad and they permit the Attorney General to exercise a considerable amount of discretion. Therefore, under either act, the Attorney General could conceivably initiate discriminatory zoning and land-use suits which involve state and local governments. Second, a careful examination of alleged racially-motivated exclusionary zoning suits shows that (1) federal and state courts are currently requiring the overwhelming majority of plaintiffs to prove intentional discriminatory zoning and (2) local communities are overwhelmingly successful in defending their zoning policies.¹⁴⁸ Thus, requiring aggrieved persons to prove

144. See *supra* note 131, at 625 (statement of Sen. Hatch).

145. See *infra* note 148.

146. See *supra* note 131.

147. See *supra* notes 121 and 137.

148. The author tried to find every exclusionary zoning case based on race between 1970 and 1981. Twenty-one suits were found. Given that zoning includes state action, complainants are required to prove purposeful discrimination pursuant to the Fourteenth Amendment. Surprisingly, local communities are very successful in defending the zoning policies in sixty-seven per cent of the cases. On appeal, they are even more successful. See *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 429 U.S. 252 (1976); *Park View Heights Corporation v. City of Blackjack*, 605 F.2d 1033 (8th Cir. 1979); *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978); *Evans v. Lynn*, 537 F.2d 571 (2nd Cir. 1975); *United Farmworkers of Florida Housing Project v. City of Delray Beach, Florida*, 493 F.2d 799 (5th Cir. 1974); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Warth v. Seldin*, 495 F.2d 1187 (2nd Cir. 1974); *Dailey v. City of Lawton, Oklahoma*, 425 F.2d 1037 (10th Cir. 1970); *Kennedy Park Home Assn. v. City of Lackawanna*, 436 F.2d 108 (2nd Cir. 1970); *Southern Alameda Spanish Speaking Org. v. City of Union City, California*, 424 F.2d 291 (9th Cir. 1970); *United States v. City of Parma, Ohio*, 494 F. Supp. 1049 (N.D. Ohio

intentional racial discrimination in *private* housing suits causes one to question whether supporters of Senate bill S. 140 are truly committed to eliminating racial discrimination in private housing.

V. AN EXAMINATION OF SOME UNEXAMINED PITFALLS ASSOCIATED WITH PRIVATE LITIGATION

In Part III, it was reported that current enforcement procedures under Title VIII allow an aggrieved person to either file a complaint with HUD or initiate a civil action in an appropriate federal district or state court. Supporters of both Senate bill S. 1220 and S. 140 agree that the conciliation process in the Department of Housing and Urban Development is an inadequate enforcement method. However, supporters of Senate bill S. 140 would continue to encourage victims of private discrimination to use the courts.¹⁴⁹

Supporters of the Fair Housing Amendment Act—Senate bill S. 1220—suggest that the initiation of private suits should not be the major feature of Title VIII enforcement provisions. Some assert that “it is costly and time-consuming to go to federal district court, and delays of up to two years are not uncommon.”¹⁵⁰ More important, “once in court, *there is no guarantee of success.*”¹⁵¹ (emphasis added.)

In this section we will attempt to show why alleged victims of private discrimination should not be encouraged to use the courts. A review of private suits revealed that the likelihood of an aggrieved person receiving remedial action is contingent on factors which have little to do with the merits of his case and on variables¹⁵² over which

1980); *Irby v. Easttown Township*, P-H Eq. Opp. Hous. § 15, 231 (E.D. Pa. 1977); *Johnson v. County of Chester*, 413 F. Supp. 1299 (E.D. Pa. 1976); *Cornelius v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio 1974); *Yarbrough v. City of Warren*, 383 F. Supp. 676 (E.D. Mich. 1974); *Ybarra v. Town of Los Altos Hills*, 370 F. Supp. 742 (N.D. Cal. 1973); *Morales v. Haines*, P-H Eq. Opp. Hous. § 13543 (N.D. Ill. 1972); *Planning for People Coalition v. The County of DuPage, Illinois*, P-H Eq. Opp. Hous. § 13,753 (N.D. Ill. 1971); *Sisters of Providence of St. Mary of the Woods v. City of Evanston*, P-H Eq. Opp. Hous. § 13,531 (N.D. Ill. 1971); *UAW v. Township of Mahwah*, 1972 E. Q. Hous. (P-H) ¶ 16,204 (Super. Ct. N.J. 1972); *Urban League of Greater New Brunswick v. Mayor and Council of Carteret*, 1976 E.Q. Hous. (P-H) ¶ 16,502 (Super. Ct. N.J. 1976).

149. *See supra* notes 134-38.

150. *Supra* note 113, at 6164 (statement of Sen. Glenn).

151. *Id.*

152. *See, e.g.*, 339 F. Supp. 1146 (N.D. Ill. 1972) (Race: whites have standing to sue as well as blacks); 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974) (Types of defendants: realtors' behaviors qualify as a pattern or practice of discrimination); 537 F.2d 1151 (4th Cir. 1975) (Types of plaintiffs: The Attorney General can initiate a suit); 417 F. Supp. 282 (E.D.

he has little control. These problems would be solved with the enactment of the Fair Housing Amendment Act of 1983—Senate bill S. 1220.

A. *Methodology and Data Collection*

Several sources¹⁵³ were consulted in an effort to find every litigated case of racial discrimination in private housing.¹⁵⁴ Two-hundred and one cases were found: forty-seven state cases,¹⁵⁵ eighty-

Ky. 1976) (Types of property: certain properties are exempted from coverage under Title VIII); 648 F.2d 548 (9th Cir. 1980) (Types of commercial transactions: § 1982 insures that all citizens can purchase, sell, lease, hold or convey all property, including rental of office space); 501 F.2d 324 (7th Cir. 1974) (Types of discrimination: No difference exists between the traditional form of discrimination and the exploitation of a discriminatory situation); 499 F.2d 1197 (6th Cir. 1974) (Types of legal action: class certification is not awarded simply because it is pleaded); 350 F. Supp. 1382 (M.D. N.C. 1972) (Legal bases of suits: 42 U.S.C. §§ 1982, 810, and 812 may be pursued concurrently).

153. Cases were selected from the U.S. Supreme Court Reporter, Federal Reporter, Federal Supplement; state reporters (both official and West reports); Prentice-Hall Equal Opportunity in Housing Reporter; and Mead Data Central Lexis Retrieval System.

154. Cases dealing with the alleged discriminatory conduct of real estate appraisers, redlining, and discrimination by financial institutions are not included here. These forms of discrimination will be the topic of a forthcoming paper, for they involve more complex issues such as tax and banking laws. See *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977) (discriminatory practices by property appraisers); *Harrison v. Heinzeroth Mortgage Co.*, P-H Eq. Opp. Hous. § 15,202 (N.D. Ohio 1977) (discrimination in "terms or conditions" of a loan); *Harper v. Union Savings Association*, P-H Eq. Opp. Hous. § 15,203 (N.D. Ohio 1977) (discrimination in "terms or conditions" of a loan); and *Laufman v. Oakley Building and Loan Company*, P-H Eq. Opp. Hous. § 13,780 (S.D. Ohio 1976) ("redlining").

155. See *Burks v. Poppy Construction Company*, 57 Cal. 2d 463, 370 P.2d 313 (1962); *Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P.2d 825 (1967); *People v. McKale*, 83 Cal. App. 3d 623, 148 Cal. Rptr. 181 (1978); *Stearns v. Fair Employment Practice Commission*, 6 Cal. 3d 205, 490 P.2d 1155 (1971); *Wilson Builders v. Superior Court*, 220 Cal. 2d 77, 33 Cal. Rptr. 621 (1963); *Winchell v. English*, 62 Cal. App. 3d 125, 133 Cal. Rptr. 20 (1976); *Connecticut Commission on Human Rights v. Evergreen, Corporation*, 1975 E. Q. Hous. (P-H) § 15,046 (C.P. 1975); *Filippo v. Real Estate Commission of D.C.*, 223 A.2d 268 (D.C. 1966); *Georgia Real Estate Commission v. Horne*, 141 Ga. App. 226, 233 S.E.2d 16 (1972); *Bell Realty and Insurance Agency v. Chicago Commission of Human Relations*, 130 Ill. App. 2d 1072, 266 N.E.2d 769 (1971); *Indiana Civil Rights Commission v. Holman*, 380 N.E.2d 1281 (1978); *Bulluck v. Pelham Woods Apts.* 283 Md. App. 505, 390 A.2d 1119 (1978); *Maryland Commission on Human Relations v. Malakoff*, 273 Md. 214, 329 A.2d 8 (1974); *Katz v. Massachusetts Commission Against Discrimination*, 365 Mass. 357, 312 N.E.2d 182 (1974); *Massachusetts Commission Against Discrimination v. Franzaroli*, 357 Mass. 112, 256 N.E.2d 311 (1970); *McKibbin v. Michigan Corporation and Securities Commission*, 369 Mich. 69, 119 N.W.2d 557 (1963); *State of Minnesota v. Bergeron*, 290 Minn. 351, 187 N.W.2d 680 (1971); *Gray v. Serrato Builders, Inc.*, 110 N.J. Super. 297, 265 A.2d 404 (1970); *David v. Vesta Company*, 45 N.J. Super. 301, 212 A.2d 345 (1965); *Hughes v. Cypress Gardens Apartments, Inc.*, 118 N.J. Super. 374, 288 A.2d 31 (1970); *Cook v. Mangum*, 38 A.D.2d 848, 330 N.Y.S.2d 101 (1972); *Italiano v. New York State Executive Department of Human Rights*, 36 A.D.2d 1009, 321 N.Y.S.2d 422 (1971); *Kramarsky v. Stahl Management & Macon Estates*, 92 Misc. 2d 1030, 401 N.Y.S.2d 943 (1977); *Merrill v. State Division of Human Rights*, 37 N.Y.2d 844, 340

nine federal district cases,¹⁵⁶ and sixty-five appellate and Supreme

N.E.2d 470 (1975); *Peninsula Apartment, Inc. v. New York State Division of Human Rights*, 35 A.D.2d 673, 316 N.Y.S.2d 152 (1970); *State Division of Human Rights v. AOS Realty Corp.*, 36 A.D.2d 970, 321 N.Y.S.2d 475 (1971); *State Division of Human Rights v. Ganley*, 327 N.Y.S.2d 37 A.D.2d 983, 327 N.Y.S.2d 402 (1971); *State Division of Human Rights v. Glick*, 35 A.D.2d 738, 316 N.Y.S.2d 431 (1970); *State Division of Human Rights v. Luppino*, 35 A.D.2d 107, 313 N.Y.S.2d 28 (1970); *State Division of Human Rights v. Ruiz*, 327 N.Y.S.2d 37 A.D.2d 861, 327 N.Y.S.2d 565 (1971); *State Division of Human Rights v. Wagner*, 39 N.Y.2d 865, 352 N.E.2d 134 (1976); 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 179, 379 N.E.2d 1183 (1978); *City of New York v. Camp Construction Co.*, 51 Misc. 2d 50, 272 N.Y.S.2d 631 (1966); *Commission on Human Rights v. Hardenbrook Realty Corp.*, 57 Misc. 2d 430, 292 N.Y.S.2d 775 (1968); *Commission on Human Rights v. Knox Realty Corporation*, 56 Misc. 2d 806, 240 N.Y.S.2d 633 (1968); *Homes v. Board of Adjustment*, 23 Ohio Misc. 211 (1970); *Williams v. Joyce*, 4 Or. App. 482, 479 P.2d 513 (1971); *City of Pittsburgh Commission on Human Relations v. Macbeth*, 37 Pa. Commw. Ct. 636, 391 A.2d 1109 (1978); *Midland Heights Homes v. Commonwealth of Pennsylvania*, 17 Pa. Commw. Ct. 563, 333 A.2d 516 (1975); *Pennsylvania Human Relations Commission v. Elgart*, 4 Pa. Commw. 616, 287 A.2d 887 (1972); *Pennsylvania Human Relations Commission v. Straw*, 478 Pa. 463, 387 A.2d 75 (1978); *Pennsylvania Human Relations Commission v. Zamtakis*, 478 Pa. 454, 387 A.2d 70 (1978); *Speare & Van Buren Homes, Inc. v. Commonwealth of Pennsylvania*, 16 Pa. Commw. Ct. 502; 328 A.2d 570 (1974); *Hollis v. Rody*, 81 Wash. 2d 88, 500 P.2d 97 (1972); *West Virginia Human Rights Commission v. Pauley*, 212 S.E.2d 77 (1973); *Ford v. Wisconsin Real Estate Examining Board*, 48 Wis. 2d 91, 179 N.W.2d 786 (1970).

156. See *Concerned Tenants Association v. Indian Trail Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980); *Dreher v. Rare Management, Inc.*, 493 F. Supp. 930 (E.D.N.Y. 1980); *Sherman Park Community Association v. Wanwatusa Realty Company*, 486 F. Supp. 838 (E.D. Wis. 1980); *Braunstein v. Dwelling Manager, Inc.*, 476 F. Supp. 1323 (S.D.N.Y. 1979); *Patel v. Holley House Motels*, 483 F. Supp. 374 (S.D. Ala. 1979); *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321 (N.D. Ill. 1979); *Bradley v. John M. Brabham Agency*, 463 F. Supp. 27 (D.S.C. 1978); *Normal v. St. Louis Concrete Pipe Co.*, 447 F. Supp. 624 (E.D. Mo. 1978); *Smith v. Woodhollow Apartments*, 463 F. Supp. 16 (W.D. Okla. 1978); *United States v. Reece*, 457 F. Supp. 43 (D. Mont. 1978); *Wainwright v. Allen*, 461 F. Supp. 293 (N.W.N.D. 1978); *Young v. Parkland Village*, 460 F. Supp. 67 (D. Md. 1978); *Domingo v. New England Fish Co.*, 445 F. Supp. 421 (W.D. Wash. 1977); *Dyer v. Schecter*, 1977 E. O. Hous. (P-H) § 15,233 (N.D. Ohio 1977); *Hughes v. Repko*, 429 F. Supp. 928 (W.D. Pa. 1977); *Johnson v. Albritton*, 424 F. Supp. 456 (M.D. La. 1977); *Morehead v. Lewis*, 132 F. Supp. 674 (N.D. Ill. 1977); *United States v. Real Estate One*, 433 F. Supp. 1140 (E.D. Mich. 1977); *Wheatley Heights Neighborhood Coalition v. Jenna Rosales Co.*, 429 F. Supp. 486 (E.D.N.Y. 1977); *Bishop v. Pecsok*, 431 F. Supp. 34 (N.D. Ohio 1976); *Carpenter v. Bakir*, 1976 E. O. Hous. (P-H) § 13,767 (E.D. Va. 1976); *Elazer v. Wright*, 1976 E. O. Hous. (P-H) § 15,197 (S.D. Ohio 1976); *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing*, 422 F. Supp. 1071 (D. N.J. 1976); *Lamb v. Sallee*, 417 F. Supp. 282 (E.D. Ky. 1976); *Lee v. Minnock*, 417 F. Supp. 436 (W.D. Pa. 1976); *Parker v. Shonfeld*, 409 F. Supp. 576 (N.D. Cal. 1976); *Sumlin v. Brown*, 420 F. Supp. 78 (N.D. Fla. 1976); *Todd v. Lutz*, 1976 E. O. Hous. (P-H) § 13,787 (W.D. Pa. 1976); *United States v. Alexander & Cloutier Realty Co.*, 1976 E. O. Hous. (P-H) § 13,570 (S.D. Fla. 1976); *United States v. Berg Enterprises*, 1976 E. O. Hous. (P-H) § 13,773 (S.D. Fla. 1976); *United States v. L & H Land Corp.*, 407 F. Supp. 576 (S.D. Fla. 1976); *Wharton v. Knefel*, 415 F. Supp. 633 (E.D. Mo. 1976); *Clemons v. Punck*, 402 F. Supp. 863 (S.D. Ohio 1975); *Howard v. W.P. Bill Atkinson Enterprise*, 412 F. Supp. 610 (W.D. Okla. 1975); *Huffine v. Dean*, 1975 E. O. Hous. (P-H) § 13,728 (S.D. Ohio, 1975); *Lyles v. Hampton*, 1975 E. O. Hous. (P-H) § 13,738 (S.D. Ohio 1975); *Smith v. Anchor Building Corp.*, 397 F. Supp. 256 (E.D. Mo. 1975); *United States v. Dittmar Company*, 1975 E. O. Hous. (P-H) § 13,570 (E.D. Va. 1975); *United States v. Hilton-Sykes Rental Agency*, 1975 E. O. Hous.

Court decisions.¹⁵⁷

(P-H) § 13,727 (M.D. Ill. 1975); Walker v. Fox, 395 F. Supp. 1303 (S.D. Ohio 1975); Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975); Branch v. Denver, 1974 E. O. Hous. (P-H) § 13,689 (N.D. Calif. 1974); Collins v. Spasojevic, 1974 E. O. Hous. (P-H) § 13,654 (N.D. Ill. 1974); Fort v. White, 383 F. Supp. 949 (D. Conn. 1974); Hughes v. Dyer, 378 F. Supp. 1305 (W.D. Mo. 1974); Mason v. Ward, 1974 E. O. Hous. (P-H) § 13,688 (S.D. Ohio 1974); Matthews v. Mayne, 1974 E. O. Hous. (P-H) § 13,660 (D. Md. 1974); United States v. Henshaw Brothers, Inc., 401 F. Supp. 389 (E.D. Va. 1974); United States v. Saroff, 377 F. Supp. 352 (E.D. Tenn. 1974); Flowers v. Santefort Real Estate, 1973 E. O. Hous. (P-H) § 13,622 (N.D. Ill. 1974); Hollins v. Kraas, 369 F. Supp. 1355 (N.D. Ill. 1973); Johnson v. Zaremba, 381 F. Supp. 165 (N.D. Ill. 1973); Logan v. Carmack, 368 F. Supp. 121 (E.D. Tenn. 1973); Marshall v. Pendley, 1973 E. O. Hous. (P-H) § 13,615 (N.D. Ga. 1973); McNeil v. P-N & S, Inc., 372 F. Supp. 658 (N.D. Ga. 1973); Riddick v. Hill, 1973 E. O. Hous. (P-H) § 13,628 (N.D. Calif. 1973); Sanborn v. Wagner, 354 F. Supp. 291 (D. Md. 1973); United States v. Westside Building Co., 382 F. Supp. 148 (C.D. Cal. 1973); United States v. Youritan Construction Co., 370 F. Supp. 643 (N.D. Calif. 1973); Adams v. Hempstead Heath Co., 426 F. Supp. 1141 (E.D.N.Y. 1972); Cowan v. Smart & Gabe, Inc., 1972 E. O. Hous. (P-H) § 13,562 (N.D. Ill. 1972); Crim v. Glover, 338 F. Supp. 823 (S.D. Ohio 1972); Fred v. Kokinokos, 347 F. Supp. 942 (E.D.N.Y. 1972); Hall v. Freitas, 343 F. Supp. 1099 (N.D. Cal. 1972); Kelly v. Armbrust, 351 F. Supp. 867 (D.N.D. 1972); Steger v. Ognio, 1972 E. O. Hous. (P-H) § 13,558 (M.D. Tenn. 1972); United States v. Gilman, 341 F. Supp. 891 (S.D.N.Y. 1972); United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972); United States v. Real Estate Development Corp., 347 F. Supp. 776 (N.D. Miss. 1972); Williamson v. Hampton Management Company, 339 F. Supp. 1146 (N.D. Ill. 1972); Wright v. Kaine Realty, 352 F. Supp. 222 (N.D. Ill. 1972); Young v. AAA Realty Company of Greensboro, 350 F. Supp. 1382 (M.D. N.C. 1972); Brown v. Ballas, 331 F. Supp. 1033 (N.D. Tex. 1971); Brown v. Blake & Bane, Inc., 409 F. Supp. 1246 (E.D. Va. 1971); Franklin v. Agnostinelli, 1971 E. O. Hous. (P-H) § 13,555 (N.D. Wash. 1971); United States v. Bob Lawrence Realty, Inc., 327 F. Supp. 487 (N.D. Ga. 1971); James v. Hafler, 320 F. Supp. 397 (N.D. Ga. 1970); McLaurin v. Brusturis, 320 F. Supp. 190 (E.D. Wis. 1970); Brown v. LaDuca, 307 F. Supp. 102 (E.D. Wis. 1969); Brown v. State Realty Company, 304 F. Supp. 1236 (N.D. Ga. 1969); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969); Contract Buyers League v. F & F Investment, 300 F. Supp. 210 (N.D. Ill. 1969); Harris v. Jones, 296 F. Supp. 1082 (D. Mass. 1969); Jones v. Sciacia, 297 F. Supp. 165 (E.D. Mo. 1969); United States v. Knippan and Day Real Estate, Inc., 298 F. Supp. 551 (E.D. La. 1969); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969); Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969); Colon v. Tompkins Square Neighbors, 289 F. Supp. 104 (S.D.N.Y. 1968); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407 (S.D. Ohio 1968).

157. See Jones v. Mayer, 392 U.S. 409, (1968); Houston v. Benttree, Ltd. 637 F.2d 739 (10th Cir. 1981); Johnson v. Snyder, 639 F.2d 316 (6th Cir. 1981); Marable v. H. Walker Associates, 644 F.2d 390 (5th Cir. 1981); Blockman v. Sandalwood Apartments, 613 F.2d 169 (7th Cir. 1980); Coles v. Havens Realty Co., 633 F.2d 384 (4th Cir. 1980); McDonald v. Verble, 622 F.2d 1227 (6th Cir. 1980); Phiffen v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548 (9th Cir. 1980); Dillion v. AFBIC Development Corp., 597 F.2d 556 (5th Cir. 1979); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979); Taylor v. Fletcher Properties, Inc., 592 F.2d 244 (5th Cir. 1979); United States v. Rent-a-Homes Systems of Illinois, Inc., 602 F.2d 795 (7th Cir. 1979); Duckett v. Silberman, 568 F.2d 1020 (2d Cir. 1978); Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978); Green v. Ten Eyck, 572 F.2d 1233 (8th Cir. 1978); Miller v. Poretzky, 595 F.2d 780 (D.C. Cir. 1978); Payne v. Bracher, 582 F.2d 17 (5th Cir. 1978); Samuel v. Benedict, 573 F.2d 580 (9th Cir. 1978); Sandford v. R.L. Coleman Realty Co., Inc., 573 F.2d 173 (4th Cir. 1978); United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); Warner v. Perrino, 585 F.2d 171 (6th Cir. 1978); Burris v. Wilkins, 544 F.2d 891 (5th Cir. 1977); Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977); Gore v. Turner, 563 F.2d 159 (5th Cir. 1977); Hobbs v. Turner, 563 F.2d 158 (5th Cir. 1977); Hodge v. Seiler, 558 F.2d 284 (5th Cir. 1977); United States v. James-ton Center-In-The-Grove Apartments, 557 F.2d 1079 (5th Cir. 1977); United States v. War-

The primary objective of this review is to show how a few selected independent variables¹⁵⁸ affect the disposition of private discrimination in housing suits, the dependent variable.¹⁵⁹ Obviously, aggrieved persons do not or should not expect to win every suit simply because they complain of alleged racial discrimination in private housing. Many persons are unsuccessful and will continue to be unsuccessful because of procedural problems and failure to establish a *prima facie* case of racial discrimination.¹⁶⁰ The central hypothe-

wick Mobile Homes Estates, 558 F.2d 194 (4th Cir. 1977); Singleton v. Gendason, 545 F.2d 1224 (9th Cir. 1976); Sorenson v. Raymond, 532 F.2d 496 (5th Cir. 1976); Topic v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976); United States v. Pelzer Realty Co., Inc., 537 F.2d 841 (5th Cir. 1976); Wang v. Lake Maxinhall Estates, Inc., 531 F.2d 832 (7th Cir. 1976); Boyd v. Lefrak Organization & Life Realty, Inc., 509 F.2d 1110 (2d Cir. 1975); Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975); Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975); Smith v. Stechel, 510 F.2d 1162 (9th Cir. 1975); United States v. Long, 537 F.2d 1151 (4th Cir. 1975); Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975); Clark v. Universal Builders, 501 F.2d 324 (7th Cir. 1974); Jeanty v. McKay & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974); Marr v. Rife, 503 F.2d 735 (6th Cir. 1974); Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974); Seaton v. Sky Realty Co., Inc., 491 F.2d 634 (7th Cir. 1974); Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir., 1974); Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974); Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973); Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973); Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973); Love v. De Carlo Homes, Inc., 482 F.2d 613 (5th Cir. 1973); Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973); Stevens v. Dobs, Inc., 483 F.2d 82 (4th Cir. 1973); Allen v. Gifford, 462 F.2d 615 (4th Cir. 1972); Harper v. Hutton, P-H Eq. Opp. Hous. § 15,281 (6th Cir. 1972); Haythe v. Decker Realty Co., 468 F.2d 336 (7th Cir. 1972); Male v. Crossroads Assoc., 469 F.2d 616 (2d Cir. 1972); Pughsley v. 3750 Lake Shore Drive Cooperative Building, 463 F.2d 1055 (7th Cir. 1972); United States v. Hunter, 459 F.2d 205 (4th Cir. 1972); United States v. Reddock, 467 F.2d 897 (5th Cir. 1972); Lee v. Southern Home Site Corp., 444 F.2d 143 (5th Cir. 1971); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1971); United States v. West Peachtree Tenth Corporation, 437 F.2d 221 (5th Cir. 1971); McGuane v. Chennago Court, Inc., 431 F.2d 1189 (2d Cir. 1970); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).

158. See *supra* note 152.

159. See D. NACHMIAS AND C. NACHMIAS, RESEARCH METHODS IN THE SOCIAL SCIENCES, 20 (1976) [hereinafter cited as RESEARCH METHODS]. "The variable that the researcher wishes to explain is referred to as the dependent variable; . . . the explanatory variables are termed independent variables. An independent variable is the hypothesized cause of a dependent variable, and the dependent variable is the expected outcome of the independent variable." Another way to view these variables is to perceive independent variables as predictor variables and dependent variables as test variables.

160. See *Marable v. H. Walker and Associates*, 644 F.2d 390 (5th Cir. 1981) (Single status, bad credit rating and plaintiff's "constant harrassment" rather than race caused the discrimination); *Duckett v. Silberman*, 568 F.2d 1020 (2d Cir. 1978); *Evans v. Lynn*, 537 F.2d 571 (2d Cir. 1976) (no standing to sue); *Topic v. Circle Realty*, 532 F.2d 1273 (5th Cir. 1976) (failure to state a claim and no standing to sue at trial); *Sorenson v. Raymond*, 532 F.2d 496 (5th Cir. 1976) (white race is not a significant factor in eviction decision); *Warren v. Norman Realty Co.*, 513 F.2d 730 (8th Cir. 1975) (statute of limitations and failure to state a claim); *Madison v. Jeffers*, 494 F.2d 114 (4th Cir. 1974) (Defendant's failure to sell to plaintiff was influenced by income tax problems rather than race); *Hamilton v. Miller*, 477 F.2d 908 (10th Cir. 1973) (A perceived "troublesome student" rather than race produced the discriminatory behavior);

sis,¹⁶¹ however, is that aggrieved persons are more likely to be successful or unsuccessful based on factors which have little to do with the merits of their case. And it is this phenomenon which contributes to the overall ineffectiveness of judicial enforcement of fair housing laws.

B. *The Effects of Types of Plaintiffs on Disposition*

Consider the data illustrated in Table 1. There, we see the relationship between types of plaintiffs and the disposition of private dis-

Hickman v. Fincher, 485 F.2d 855 (4th Cir. 1973) (statute of limitation); Male v. Crossroad Assoc., 469 F.2d 616 (2d Cir. 1972) (Discrimination was based on wealth rather than race); Haythe v. Decker Realty Co., 468 F.2d 336 (7th Cir. 1972) (no prima facie case based on race); Cole v. Housing Authority of Newport, 435 F.2d 807 (1st Cir. 1970) (Discrimination based on residency rather than on race); McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2d Cir. 1970) (Plaintiff's eviction not cognizable under § 1983), 585 F.2d 171 (6th Cir. 1968) (statute of limitations); Patel v. Holley House Motel, 483 F. Supp. 374 (S.D. Ala. 1979) (failure to state a claim; "motel is not a 'dwelling.'"); Logan v. Richard E. Carmack and Associates, 368 F. Supp. 121 (E.D. Tenn. 1973) (statute of limitations); Fred v. Kokinokos, 347 F. Supp. 942 (E.D.N.Y. 1972) (other valid consideration rather than race caused the discrimination); Hall v. Freitas, 343 F. Supp. 1099 (N.D. Cal. 1972) (Plaintiff lost because he had misrepresented himself); James v. Hafler, 320 F. Supp. 397 (N.D. Ga. 1970) (statute of limitations); Colon v. Tompkins Square Neighbors, Inc., 289 F. Supp. 104 (S.D.N.Y. 1968) (Plaintiff did not first proceed under New York's "substantially equivalent" law); State Division of Human Rights on the Complaint of William Washington v. Ganley, 327 N.Y.S.2d 402 (1971) (no prima facie case based on race); Gray v. Serruto Builders, Inc., 265 A.2d 404 (N.J. 1970) (Plaintiff did not commence action according to New Jersey's "substantially equivalent" law); Ford v. Wisconsin Real Estate Examining Board, 179 N.W.2d 786 (Wis. 1970) (no remedy because examining board has no authority to revoke real estate broker's license).

161. See Braun, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L.J. 59 (1980). It presents an excellent discussion of simple statistical operations and their application when testing legal hypotheses and propositions. See also RESEARCH METHODS, *supra* note 159, at 252-253, 270-285. To understand the simple statistics and findings presented in this article, the reader need be only familiar with the following terms: (1) population; (2) hypothesis testing, and (3) level of significance. First, a population is an aggregate of all cases, units, or persons which conforms to some designated set of specifications. For present purposes, the population is defined by the specification "all federal, state and local housing discrimination cases reported in all federal and private reporters, digests and services between 1960-1981. Secondly, hypothesis testing necessarily means stating two statistical hypotheses—an alternate and a null hypothesis. An example of the former is: A significant relationship exists between types of housing discrimination and ethnicity (H_1). A null hypothesis is: No significant relationship exists between types of housing discrimination and ethnicity (H_0). The null hypothesis (H_0) is always tested and correspondingly, the alternate hypothesis (H_1) is supported when the null hypothesis is rejected. Third, a null hypothesis is rejected if it is not proven at a designated level of significance. Some courts have accepted a level of .05. See, Albermarle Paper Co. v. Moody, 422 U.S. 405, 430, 437 (1975). Note that a .01 level is better than .05 but less better than a .001 or a .0001. A small "p" denotes level of significance.

TABLE 1.
DISPOSITION OF HOUSING DISCRIMINATION CASES BY
TYPES OF PLAINTIFFS (N=201)

DISPOSITION	Plaintiffs		
	Private Litigants	Department of Justice	Civil & Human Rights Organizations & Commissions
Aggrieved Persons	94	21	15
Win	(60.3)	(77.8)	(83.3)
Defendants	62	6	3
Win	(37.9)	(22.2)	(16.7)
TOTAL	156	27	18
	100.0	100.0	100.0

Chi Square = 6.105; df= 2; p = .05

crimination suits. The Chi Square statistic¹⁶² suggests that the rela-

162. One way to explain the use of Chi Square (X²) is by way of a simple illustration. Consider the data in the following table:

Types of Discrimination	Ethnicity		Total
	Jewish	Hispanic	
Racial Steering	1	30	31
Discrimination in Terms of Sale	11	27	38
Total	12	57	69

The null hypothesis is: No significant relationship exists between ethnicity and types of housing discrimination experienced. Let X represent those experiencing racial steering and let Y represent those experiencing discrimination in terms of sale.

$$X = \frac{\text{total number experiencing racial steering}}{\text{total number in sample}} = \frac{31}{69} = .45$$

$$Y = \frac{\text{total number experiencing discrimination in terms of sale}}{\text{total number in sample}} = \frac{38}{69} = .55$$

The number of Hispanics and Jews expected to experience racial steering and discrimination in terms of sale are determined by multiplying X and Y by the number of persons in each group: The number of Jews expected to experience racial steering =

$$(.45) (12) = 5.4$$

The number of Jews expected to experience discrimination in terms of sale =

$$(.55) (12) = 6.6$$

tionship is statistically significant well beyond the .05 level.¹⁶³ Civil and human rights organizations have a higher probability of winning housing discrimination suits than the Department of Justice, whose probability of winning housing discrimination suits is greater than that of single litigants.

Some may argue that these findings are not expected, given that an organization like the National Committee Against Discrimination in Housing "has been devoting its full efforts and resources to the cause of equal housing opportunity for more than three decades."¹⁶⁴ In addition, it may be argued that such organizations have more legal and financial resources than private litigants which would increase their ability to establish a prima facie case of discrimination¹⁶⁵ that is not easily rebutted. Arguments of this sort are valid and not easily dismissed. There is, however, an important and overriding point: If this nation is truly committed to ending discrimination in private housing, the effectiveness of judicial enforcement of fair housing laws should not depend on complainant's experience,

The number of Hispanics expected to experience racial steering =

$$(.45) (57) = 25.6$$

The number of Hispanics expected to experience discrimination in terms of sale =

$$(.55) (57) = 31.4$$

To compute X^2 , the expected values are tested against the respective observed values located in the table:

$$\begin{aligned} X &= \text{the sum of } \frac{(\text{expected values} - \text{observed values})^2}{\text{expected values}} \\ &= \frac{(1 - 5.4)^2}{5.4} + \frac{(11 - 6.6)^2}{6.6} + \frac{(30 - 25.6)^2}{25.6} + \frac{(27 - 25.6)^2}{25.6} \\ &= \frac{19.36}{5.4} + \frac{19.36}{6.6} + \frac{19.36}{25.6} + \frac{19.36}{31.4} \\ &= 3.585 + 2.933 + .756 + .517 = 7.891 \end{aligned}$$

There are two ethnic groups and two categories of discrimination. Thus, the degrees of freedom is computed by multiplying one minus the number of groups by one minus the number of categories, $(2 - 1) \times (2 - 1) =$ degree of freedom. The value needed to reject the null hypothesis at one degree of freedom and at the .05 level of significance is 3.841. This value is obtained from an X^2 distribution table. See Research Methods *supra* note 160 at 314. The present Chi Square value, 7.891 is greater than 3.841 and is statistically at the .05 level of significance. Therefore, the null hypothesis is rejected and the alternate hypothesis is accepted by implication.

163. See *supra* note 161.

164. Letter from Martin E. Sloane to Senator Charles Mathias (April 28, 1983), *reprinted* in S. Rep. No. 60, 98th Cong., 1st Sess. 6160 (1983).

165. The data in the following table illustrate the relationship between types of plaintiffs and the types of housing discrimination about which they complained:

legal expertise, or financial resources. The influence of these factors can be diminished substantially simply by hiring administrative law judges to hear private housing discrimination suits.

More important, if administrative law judges are not employed to hear such complaints and Senate bill S. 140—or a variation of it—is enacted, the likelihood of aggrieved persons winning would decrease substantially. As we have discovered, civil and human rights organizations have the highest rate of success. However, these organizations will not have standing to sue on behalf of alleged victims of discrimination under Senate bill S. 140. The Equal Access to Hous-

TYPES OF HOUSING DISCRIMINATION BY TYPES OF PLAINTIFFS (N=201)

FORMS OF DISCRIMINATION	Plaintiffs		
	Private Litigants	Department of Justice	Civil and Human Rights Organizations and Commissions
Refusal to Sell	30 (19.2)	4 (14.8)	2 (11.1)
Refusal to Rent	71 (45.5)	6 (22.2)	4 (22.2)
Discrimination in Terms, Conditions & Privileges	26 (16.7)	6 (22.2)	4 (22.2)
Misrepresentation by Managers or Real Estate Agents	20 (12.8)	3 (11.1)	3 (16.7)
"Blockbusting" and "Racial Steering"	9 (5.8)	8 (29.6)	5 (27.8)
Total	156 100.0	27 100.0	18 100.0

Chi Square = 23.48; df = 8; p = .01

There is a statistically significant relationship between these two variables. Private litigants are more likely to complain about racial discrimination in rental units (45.5%). The Department of Justice and organizations are more likely to initiate suits involving "block busting" and "racial steering"; the percentages are 29.6 and 27.8 respectively. Overall, there is very little difference between the types of suits initiated by the Attorney General and by civil and human rights organizations.

That private litigants are more likely to lose private suits than organizations or the Department of Justice may reflect the difficulty associated with proving a certain form of discrimination. This, therefore, could explain the greater likelihood of litigants losing than, say, the lack of financial resources or legal expertise. To test this hypothesis, we examined the relationship between the disposition of cases and types of discriminatory practices. The following table illustrates this relationship:

ing Act "would clarify the definition of aggrieved person in such a way to limit standing to individuals who are bona fide renters or purchaser."¹⁶⁶

C. *The Effects of Types of Tribunals on Disposition*

Another important reason to enact the Fair Housing Amendment Act of 1983—Senate bill S. 1220—is reflected in the data illustrated in Table 2. Among black victims,¹⁶⁷ aggrieved persons have a greater likelihood of winning if their suits were initiated in state courts and agencies rather than in federal district courts; the difference is an outstanding twenty-two per cent (21.7). A similar result is found among victims who reside in urban areas.¹⁶⁸ Table 3 shows that aggrieved urban persons are more likely to win a housing discrimination suit if they commence their civil action in state administrative agencies and courts rather than in federal courts.

Once more, it is important to reiterate the following point:

Disposition	Types Of Housing Discrimination				
	Refusal to sell	Refusal to rent	Discrimination in terms, conditions, & privileges	Misrepresentation	"Block-busting" & "Racial steering"
Aggrieved Persons	19	53	21	22	15
Win	(52.8)	(65.4)	(58.3)	(84.6)	(68.2)
Defendants	17	28	15	4	7
Win	(47.2)	(34.6)	(41.7)	(15.4)	(31.8)
TOTAL	36	81	36	26	22
	100.0	100.0	100.0	100.0	100.0

Chi Square = 7.428; df= 4; p < .11 (not statistically significant)

The relationship is statistically *insignificant*. This means that *all* plaintiffs are no more likely to win, say, blockbusting suits than suits involving discrimination in rental units. Plaintiffs won more than 50% of all suits regardless of the form of discrimination involved.

166. *Supra* note 128, at 626.

167. Among non-black victims, there is no significant difference in the success rate of those who initiated their suits in state or federal courts. Victims had exactly a fifty percent chance of winning in each court.

168. Among rural residents, the type of tribunal did not have a significant affect on the outcome of cases. Plaintiffs won 66.7 and 73.8, respectively, of their suits at the federal and state levels.

TABLE 2.
DISPOSITION OF HOUSING DISCRIMINATION SUITS BY
THE TYPES OF TRIBUNALS IN WHICH EACH SUIT
ORIGINATED (BLACK VICTIMS ONLY, N=146)

DISPOSITION	Types of Tribunals	
	Federal District Courts	State Courts and Administrative Agencies
Aggrieved Persons	68	28
Win	(60.7)	(82.4)
Defendants	44	6
Win	(39.2)	(19.6)
TOTAL	112	34
	100.0	100.0

Chi Square = 5.426; df= 1; p = .02

Plaintiffs should not expect to win a private discrimination suit simply because they believe someone has victimized them. A prima facie case of racial discrimination must be proved; thereafter, the burden shifts to respondents to present strong evidence in rebuttal. It is only after respondents fail to present such evidence that the court should and will rule in favor of plaintiffs. But an important question still remains: Why is the probability of success for some persons so dependant on the type of tribunal in which they initiate their action?

Some obvious reasons are: (1) plaintiff failed to establish a prima facie case of discrimination in a federal district court;¹⁶⁹ (2) the case was thrown out of federal court because plaintiff failed to proceed first under a state's "substantially equivalent" law;¹⁷⁰ (3) victims failed to state a cognizable claim in federal court;¹⁷¹

169. *Haythe v. Decker Realty*, 468 F.2d 336 (7th Cir. 1972).

170. *Colon v. Thompkins Square Neighbors, Inc.*, 289 F. Supp. 104 (S.D. N.Y. 1968).

171. *Warren v. Norman Realty Co.*, 513 F.2d 730 (8th Cir. 1975).

TABLE 3.
DISPOSITION OF HOUSING DISCRIMINATION SUITS BY
THE TYPES OF TRIBUNALS IN WHICH EACH SUIT
ORIGINATED (URBAN RESIDENTS ONLY, N=150)

Types of Tribunals		
DISPOSITION	Federal District Courts	State Courts and Administrative Agencies
Aggrieved Persons	67	26
Win	(57.8)	(76.5)
Defendants	49	8
Win	(42.2)	(23.5)
TOTAL	116	34
	100.0	100.0

Chi Square = 3.908; df= 1; p = .05

(4) persons did not have standing to sue in federal court,¹⁷² and (5) the statute of limitations ran against plaintiffs in federal court.¹⁷³ Among other things, these procedural problems represent the inability of some victims to afford effective assistance of legal counsel.

Another important, though less apparent, explanation of plaintiff's greater likelihood of success at the state level is found in the number of cases resolved in state administrative agencies. Of the thirty-four cases, seventy-six per cent (76.5%) were decided by administrative law judges and personnel.¹⁷⁴ This is a very important finding, for it lends credence to the view of those who support Senate bill S. 1220. In their view, "the advantage of . . . administrative enforcement . . . is that the law judges are specialists in the field of housing administration, hearing, as they do, only those types of cases. Thus, *decisions will be more predictable and uniform* as would the setting of penalties because of the law judge's greater experience in a specialized area . . . [T]he law judge's authority to issue cease and desist orders, award relief, compensatory damages and civil pen-

172. Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974).

173. Logan v. Richard E. Carmack and Associates, 368 F. Supp. 121 (E.D. Tenn. 1973).

174. See *supra* note 155.

alties provides the 'teeth' to enforce [T]itle VIII"¹⁷⁵ (emphasis added).

D. *The Effects of Race and Ethnicity on Disposition*

Earlier, we stated that persons indirectly affected by racial discrimination would not have standing to initiate a private suit under the Equal Access to Housing Act;¹⁷⁶ they would also be barred from participating in the Department of Justice's conciliation process.¹⁷⁷ The Fair Housing Amendment Act, S. 1220, however, would allow those both directly and indirectly affected by racial discrimination to receive administrative relief.¹⁷⁸ More important, the Supreme Court has ruled on two separate occasions that those directly and indirectly affected by private discrimination have standing to sue under both the Civil Rights Act of 1968 (42 U.S.C. § 3612)¹⁷⁹ and the Civil Rights Act of 1866 (42 U.S.C. § 1982).¹⁸⁰ Among other things, this means that both black and white victims may initiate a suit under either section 1982 or sections 3610 and 3612.¹⁸¹ This is true, if they are affected directly or indirectly by private racial discrimination.

The data in Table 4, however, illustrates a very interesting and serious problem associated with judicial enforcement of fair housing laws. Thirty-four states¹⁸² have some type of fair housing laws. And if we only consider litigants (N= 109) who reside in these states, we find the following: Black victims have a substantially higher probability of winning a private discrimination suit than white vic-

175. *Supra* note 113, at 6153-6154. (statement of Sen. Mathias).

176. *See supra* note 166.

177. *Id.* *See also supra* note 132.

178. *Supra* note 113, at 6154.

179. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). In *Trafficante*, the Court construed section 3612 to define standing as broadly as is constitutionally permissible. This section provides that the "rights granted by [§§ 3603-3606] of the Act may be enforced by civil action in appropriate United States district courts" Thus, § 3612 as well as § 3610 of the Act grants standing to sue to those affected directly and indirectly by private racial discrimination.

180. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). In *Sullivan*, the Court ruled that a white who leased his home to a black had standing to sue under § 1982, although the black lessee was the direct victim of racial discrimination.

181. *Wheatley Heights Neighborhood Coalition v. Jenna Rosales Co.*, 429 F. Supp. 486, 490 (E.D.N.Y. 1977).

182. *See supra* notes 53-55.

tims.¹⁸³ The percentages are 73.1% and 37.5%, respectively. The most compelling question is: Why are white victims so unsuccessful, given they, too, are protected by section 1982 and by section 3610-3612?

TABLE 4.
DISPOSITION OF HOUSING DISCRIMINATION CASES BY
RACE OF VICTIMS (SUITS ORIGINATING IN STATES
THAT HAVE SOME FAIR HOUSING LAWS, N=109)

DISPOSITION	Victims' Race	
	Black*	White
Aggrieved Persons	68	2
Win	(73.1)	(37.5)
Defendants	25	10
Win	(26.9)	(62.5)
* This category includes four suits initiated by Hispanics		
Total	93	16
	100.0	100.0

Chi Square = 7.964; df= 1; p = .01

One may argue that black victims are better situated to establish a stronger prima facie case of private racial discrimination than white victims although there is very little evidence in the present data to support this point of view.¹⁸⁴ Earlier we discovered that some alleged victims of discrimination have a higher likelihood of winning a private suit if their cases were: 1) litigated by civil and human rights organizations and 2) initiated in state administrative

183. This relationship was not statistically significant among litigants who resided in states that did not have any type of fair housing laws.

184. In addition, there is no statistically significant difference between the legal theories used to decide cases involving black and white victims, respectively:

agencies and courts.¹⁸⁵ Is it possible that black victims are more successful than whites because a higher percentage of their cases are initiated in state proceedings and litigated by civil rights organizations? Our examination of the data reveals no significant differences between the two groups. Blacks are no more likely to initiate their action in state proceedings than whites.¹⁸⁶ In addition, civil rights organizations are no more likely to represent Blacks than whites.¹⁸⁷

Additional hypotheses may be formulated and tested in order to explain why tribunals are responding more favorably to Blacks than to whites, although both groups are victims of private racial discrimination. The central point, however, is that imbalance should not be occurring in such proceedings. Regardless of the "correct" explana-

Legal Theories	Race of Victims	
	Black	White
42 U.S.C.A. § 1982	18 (19.4)	3 (18.8)
42 U.S.C.A. §§ 3610 & 3612	11 (11.8)	3 (18.8)
State Statutes	32 (34.4)	5 (31.3)
Combination of Theories	32 (34.4)	5 (31.3)
TOTAL	93 100.0	16 100.0

Chi Square = .5921; df= 3; p = .89 (statistically insignificant)

185. See Tables 1, 2 and 3.

186. The following table illustrates that the relationship between the race of victims and types of tribunals is statistically insignificant:

Types of Tribunals	Race of Victims	
	Black	White
Federal District Courts	60 (64.5)	12 (75.0)
State Administrative Agencies and Courts	33 (35.5)	4 (25.0)
TOTAL	93 100.0	16 100.0

Chi Square = .6691; df= 1; p = .41 (statistically insignificant)

187. The following table illustrates the relationship between the race of victims and types of plaintiffs; the relationship is statistically insignificant.

tion, Senate bill S. 1220 can remove, or is more likely to significantly reduce, the effects of this phenomenon.¹⁸⁸ In contrast, Senate bill S. 140 is more likely to perpetuate it, for S. 140 places considerably more emphasis on judicial enforcement of fair housing laws.

E. *The Effects of "Testers" on Disposition*

It has been estimated by HUD that "more than 2 million instances of housing discrimination occur each year."¹⁸⁹ More important, "discrimination may be and often is artfully cloaked and concealed in sophisticated language so that its true nature does not become obvious."¹⁹⁰ Thus, "testers"¹⁹¹ have been recognized by the courts to be an important part of the fight against racial discrimination.¹⁹² In addition, testers are useful because they contribute to the "accomplishment of the principal objective of Congress in passing

Types of Plaintiffs	Race of Victims	
	Black	White
Private Litigants	85 (91.4)	15 (93.8)
Civil & Human Rights Organizations	8 (8.6)	9 (6.2)
TOTAL	93 100.0	16 100.0

Chi Square = .2811; df = 1; p = .86 (statistically insignificant)

188. During the introduction of Senate bill S. 1220, Senator Metzenbaum stated:

The bill . . . provide[s] the effective remedies we need. It establishes a streamlined administrative procedure within the Department of Housing and Urban Development to process individuals' complaints of housing discrimination. *Administrative law judges experienced in fair housing issues* would be available to aggrieved persons. Cases would be heard by *specialists in the field* rather than by judges dealing with a *multitude of different topics*. (emphasis added).

Supra note 113, at 6162-63.

189. *Id.*, at 6152.

190. *See supra* note 169.

191. Persons who posed as potential homebuyers or apartment dwellers are called "testers." Testing is a technique used to determine whether discriminatory practices are being used by comparing the experiences of blacks and whites in seeking to rent or buy the same apartments or houses." *See Note, Is the U.S. Committed to Fair Housing? Enforcement of the Fair Housing Act Remains a Crucial Problem*, 29 CATH. U. L. REV. 641, 655 n. 95 (1980). *See also Wheatley Heights*, 429 F. Supp. 486 (E.D.N.Y. 1977) (Testers have standing to sue under § 3612 of the 1968 Civil Rights Act).

192. *See United States v. Pelzer Realty Co.*, 484 F.2d 438, 441 (5th Cir. 1973); *United States v. Youritan Construction Co.*, 370 F. Supp. 645, 647 n.3, 650 (N.D. Cal. 1973), *modified on other grounds*, 509 F.2d 623 (9th Cir. 1974).

the Fair Housing Act."¹⁹³

At the outset, we mentioned that supporters of both the Fair Housing Amendment Act—S. 1220 and the Equal Access to Housing Act—stress the importance of ending private discrimination in housing. However, the Equal Access Act would “*limit* the use of testers” to instances in which testing is only “*necessary* to confirm an alleged violation” of the law.¹⁹⁴ (emphasis added). In contrast, the Fair Housing Amendment Act would allow testing unconditionally. “‘Aggrieved’ persons . . . would include testers and auditors who, as the Supreme Court has . . . held, have the same [T]itle VIII right as others . . . to receive truthful information about the availability of housing.”¹⁹⁵

If proponents of the Equal Access to Housing Act are truly serious about ending or significantly reducing the incidence of racial discrimination, they should give careful consideration to the data illustrated in Table 5. Of two-hundred and one suits, forty-two—20.8 per cent—were initiated by testers. However, testers won an

TABLE 5.
DISPOSITION OF PRIVATE HOUSING DISCRIMINATION SUITS BY TYPES OF “AGGRIEVED” PERSONS (N=201)

DISPOSITION	Aggrieved Persons	
	Testers	Non-Testers
Aggrieved Person Win	35 (83.3)	95 (59.7)
Defendants Win	7 (16.7)	64 (40.3)
Total	42 100.0	159 100.0

Chi Square = 7.089; df= 1; p = .01

193. See *United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975).

194. See *supra* note 129, at 626.

195. See *supra* note 113, at 6154.

outstanding eighty-three per cent (83.3) of the forty-two suits initiated by them. Non-testers, presumably, the single private litigants, won sixty per cent (59.7) of their suits.

Although the purpose of this article is to stress the importance of reducing the incidence of private litigation, there will be instances in which alleged victims of discrimination will ask the courts to enforce fair housing laws. This might occur following unproductive administrative hearings. Given that testers have a history of providing relevant and credible evidence,¹⁹⁶ it would be *counterproductive* to limit their role in the fight to end racial discrimination in private housing. Under any proposal to strengthen the enforcement procedures of Title VIII, testers should receive an unqualified right to sue on their own behalf and on behalf of other victims of discrimination. It is very clear that the likelihood of winning a discrimination suit is influenced considerably by whether plaintiffs are testers or not. Stated differently, the risk of losing a private suit is greater if aggrieved persons *are not testers*.

F. *The Influence of "Substantially Equivalent" Fair Housing Laws on Disposition*

Another important feature of the proposed Fair Housing Amendment Act (S. 1220) is the required referral of cases filed with HUD to state and local agencies which protect rights and provide remedies substantially equivalent to those provided in the Act.¹⁹⁷ The proposed Equal Access to Housing Act would also require referrals. It would require the Department of Justice "to refer all charges of Title VIII violations to certified state housing discrimination agencies where they are in existence."¹⁹⁸ And, unlike the proposed Fair Housing Act, the Equal Access Act would permit such referrals if certified agencies provide rights and remedies which are only "reasonably equivalent" to the rights and remedies provided by Title VIII.¹⁹⁹

Although Senate bill S. 140 fails to give a precise definition of "reasonable equivalency," one may infer that this term is not synon-

196. See *supra* note 192. See also *Wheatley Heights*, 429 F. Supp. at 487-88 (1977).

197. *Supra* note 113, at 6154.

198. *Supra* note 129, at 626.

199. *Id.*

ymous with "substantial equivalency."²⁰⁰ Among other things, a substantially equivalent law means that a "state or local law may not place any excessive burdens on the complainant which might discourage the filing of complaints."²⁰¹ The Equal Access to Housing Act, itself, would place considerably greater burden on plaintiffs by requiring them to prove intentional racial discrimination.²⁰² And as we have discovered, the most recent evidence shows conclusively that this requirement is a difficult burden to overcome.²⁰³ One may infer, therefore, that "reasonably equivalent" laws would *decrease* the likelihood of aggrieved persons receiving redress at the state and local levels.

The view proffered here is that any proposal to strengthen the current enforcement provisions of Title VIII should *not* adopt a "reasonable equivalency" standard to certify state and local agencies; the "substantial equivalency" standard should remain for a very important reason. Consider the data illustrated in Table 6, in which the relationship between the disposition of private suits and the presence of "substantially equivalent" laws in states²⁰⁴ where the cause of action arose is presented. Among alleged black victims, the presence or absence of "substantially equivalent" laws significantly influences whether victims are successful in court.²⁰⁵ Aggrieved persons are more likely to win a private discrimination in housing suit if "substantially equivalent" laws are present within their state. Only fifty-five suits originated in states whose fair housing laws are "substantially equivalent" to federal law; however, black victims won an impressive seventy-eight per cent (78.2) of these suits in judicial proceedings and hearings.

Although the presence of "substantially equivalent" laws affects outcome, the present investigation also reveals that the presence of *any* fair housing laws at the state or local level will increase plaintiff's chances of winning. This is true, regardless of the victims' race, the types of plaintiffs who initiated the cause of action, or the types of tribunal in which the suit was initiated.

200. See *supra* note 53 for a definition of "substantial equivalency."

201. *Id.*

202. *Id.*

203. See *supra* note 148.

TABLE 6.
DISPOSITION OF HOUSING DISCRIMINATION SUITS BY
THE PRESENCE OR ABSENCE OF "SUBSTANTIALLY
EQUIVALENT" FAIR HOUSING LAWS. (Black victims only,
N=146)

DISPOSITION	"Substantially Equivalent" Laws	
	Present	Absent
Aggrieved		
Persons	43	53
Win	(78.2)	(58.2)
Defendants		
Win	12	38
	(21.8)	(41.8)
Total	55	91
	100.0	100.0

Chi Square = 6.052; df= 1; p = .02

Table 7 presents the statistical relationship between the disposition of suits and the origination of the cause of action in states²⁰⁶ that possess fair housing laws of any kind. The results show that victims of discrimination are more likely to receive a favorable judgment if their states have some type of fair housing law. However, a comparison of Tables 6 and 7 shows that victims have a *greater* likelihood of winning if "substantially equivalent" laws rather than just any fair housing laws are present within their states.

Obviously, one may interpret these findings from several perspectives. But these compelling facts remain: In "substantially equivalent" states, aggrieved persons are required initially to carry their complaints to an administrative board or to a human relations commission. Hearings before these bodies are more likely to be in-

204. See *supra* note 54.

205. Among white victims, the presence or absence of "substantially equivalent" laws did not significantly affect the disposition of housing discrimination suits. The probability of winning with or without the presence of these laws was 58.3 and 41.7 percent, respectively.

206. See *supra* notes 54-55.

TABLE 7.
DISPOSITION OF HOUSING DISCRIMINATION SUITS BY
WHETHER THE STATE HAS ANY FAIR HOUSING LAWS
(N=201)

DISPOSITION	State Fair Housing Laws	
	Present	Absent
Aggrieved Persons	88	42
Win	(69.8)	(56.0)
Defendant	38	33
Win	(30.2)	(44.0)
Total	126	75
	100.0	100.0

Chi Square = 3.942; df= 1; p = .05

formal; thus, procedural problems such as the failure to exhaust state remedies, the failure to state a cognizable claim, and the failure to make a timely demand for a jury trial are absent. The removal of these issues, therefore, allows administrative boards and commissions to decide the merits of each case. If the claims are meritorious, the plaintiffs' win. If there is an unfavorable ruling, the complainants can commence legal action in an appropriate state or federal court. However, by the time the cases reach the appropriate court, many of the "fatal" procedural pitfalls²⁰⁷ would have been removed. This, therefore, would increase the likelihood of a tribunal deciding each case on its merit and the likelihood of the aggrieved persons winning. It is very clear that the presence or absence of "substantially equivalent" laws affects the disposition of private suits. Thus, any attempt to add "teeth" to the enforcement provision of Title VIII should not remove the "substantial equivalency" standard.

G. Disposition of Private Suits and the Wisdom of Requiring Aggrieved Persons to Prove Intentional Discrimination

Earlier, we compared and contrasted the most important fea-

207. See *supra* note 160.

tures of both the proposed Fair Housing Amendment Act and the Equal Access to Housing Act. We observed that the latter act would require aggrieved persons to prove that a landlord or realtor intended to discriminate on the basis of race; the former act would simply require alleged victims to prove a "disparate impact" or the "effects" of racial discrimination.

Supporters of the Equal Access Act advocate the adoption of the intent standard, for in their view the "use of the effects test by HUD and (by) the Civil Rights Division of the Justice Department *has been the basis by which they have sought to impose their own notions of proper racial balance upon communities* which have had no intent or purpose of discriminating against protected groups²⁰⁸ (emphasis added). These supporters also stress that the adoption of the intent standard would give a respondent his or her fair day in court. That is, a respondent "will be assured that, before he is labeled a civil rights violator, there will have been some evidence of a discriminatory intent, . . . not simply *evidence that his apartment building or his subdivision lacked the right proportion* of white, black, yellow, red, and brown races"²⁰⁹ (emphasis added).

A careful review of private discrimination in housing suits²¹⁰ and of racially-motivated exclusionary zoning suits²¹¹ does not support these views or justifications for requiring victims to prove intentional racial discrimination in private dwellings. First, every exclusionary zoning suit necessarily involves state action. Thus, an aggrieved person is required to prove racially-motivated discriminatory state action pursuant to the Equal Protection Clause of the Fourteenth Amendment. And, although a person may choose to advance his cause of action against exclusionary zoning by relying upon the "effects test," the evidence simply does not show that this method has been the basis upon which HUD and the Department of Justice have sought to impose racial balance upon local communities. The intent standard has been used in these cases.²¹²

Secondly, an examination of the present two-hundred and one

208. *See supra* note 129, at 626.

209. *Id.*

210. *Supra* notes 155-157.

211. *Supra* note 148.

212. *Id.*

private suits reveals that the concern about forcing owners of apartment complexes or subdivisions to maintain "the right proportion" of dwellers on the basis of race is unwarranted. When the issue of "proportion" has been before the courts, it has appeared in connection with other issues, namely "blockbusting"²¹³ and "racial steering."²¹⁴ More often, it is real estate brokers who are more likely to be concerned about the proportions of racial minorities entering or leaving a particular neighborhood. Among other purposes, these proportions are used to frighten gullible white homeowners into selling their homes at ridiculously low prices.²¹⁵

Finally, it must be reiterated that there is little evidence to suggest that HUD and the Department of Justice have used the effects test "as an instrument of social engineering . . ."²¹⁶ Certainly, the effects test has been the basis upon which many housing discrimination disputes have been resolved. This is so because, under section 1982 and sections 3601-3619 and some state fair housing laws, a prima facie case of racial discrimination is established when an aggrieved party proves that a "disparate impact" has occurred—which is the essence of the "effects" test. The crucial point, however, is that there is little credible evidence to support the supposition that respondents are unduly harmed by the use of the "effects" test.

Table 8 illustrates the distribution and frequency of laws cited

213. See Note, *Blockbusting*, 59 GEO. L.J. 170 (1970) and Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J.L. & SOC. PROB. 538 (1971) for a discussion of "blockbusting." See also, *Confessions of a Blockbuster*, Saturday Evening Post, July 14, 1962. "Blockbusting" or attempted "blockbusting" can appear in several forms. Courts have found prima facie cases of blockbusting on the basis of the following: Realtor to homeowner: "Blacks are moving in You should sell while you can still get a good price . . . [T]he neighborhood is getting black and would be unsafe to live in" 354 F. Supp. 291, 293 (D. Md. 1973); Plaintiff reports: "(An agent) of State Realty telephoned In the call she stated that the neighborhood 'was going colored and she might as well face it.'" *Sanborn v. Wagner*, 304 F. Supp. 1236 (N.D. Ga. 1969).

214. There is no universal definition of "racial steering." See Fair Housing Amendments Act of 1979: Hearings in H.R. 2540 Before the Subcomm. in the Const. of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 174 (1979) (statement of Robert C. Weaver). "Racial steering" is a practice of real estate brokers who direct buyers, on the basis of race, toward a particular house or neighborhood because of its racial composition; *Zuch v. Hussey*, 394 F. Supp. 1928, 1047 (E.D. Mich. 1975). "Unlawful steering" is "the use of a word or phrase or action by a real estate broker or salesperson which is intended to influence the choice of a prospective property buyer on a racial basis." See also, *United States v. Hernandez*, 580 F.2d 189 (5th Cir. 1978). The Court held that "steering blacks to a particular group of apartments in a complex effectively denies access to equal housing."

215. See generally *Confessions of a Blockbuster*, Saturday Evening Post, July 14, 1962.

216. *Supra* note 129, at 625.

to decide the suits discussed in this presentation. The data indicate that the 201 cases were resolved by reference to laws that require only that complainants prove the effects of racial discrimination. This is an important finding because, of the two-hundred and one litigated cases, aggrieved persons won sixty five per cent and respondents won thirty five per cent at the trial level. More important, respondents' likelihood of success increased on appellate review.

TABLE 8.
TYPES OF LAWS CITED TO RESOLVE PRIVATE
DISCRIMINATION IN HOUSING SUITS (N=201)

LAWS	Frequency	Per Cent
Civil Rights Act of 1866, (§ 1982)	35	17.4
Civil Rights Act of 1968, (§ 3601 et seq.)	61	30.3
Both §§ 1982 & 3601 et seq.	61	30.3
State & Local Fair Housing Laws	44	22.0
Total	201	100.0

In light of these findings, it is very difficult to understand why Congress would want to require victims of discrimination to prove that a realtor's, a homeowner's, or a subdivision developer's behavior was motivated by racial animosity. As we have seen, there are enough extra legal pitfalls associated with private litigation.

CONCLUSION

There is general consensus that racial discrimination in private housing is still rampant in the United States²¹⁷ and that it will persist, unless Congress passes legislation to strengthen the enforcement

217. *Supra* notes 1-4.

provisions of the Civil Rights Act of 1968. As of this writing, two competing bills have been introduced in the Senate which allegedly put "teeth" into the enforcement provisions of Title VIII. Reference is made to the Fair Housing Amendment Act of 1983 and the Equal Access to Housing Act of 1983, Senate bills S. 1220 and S. 140, respectively.

The Fair Housing Amendment Act would attempt to enforce fair housing laws and reduce the incidence of discrimination largely by means of administrative hearings. Independent administrative law judges would provide a speedy, fair, and inexpensive hearing for the person alleging housing discrimination as well as for the person charged. Although alleged victims may "file a private lawsuit up until the time an administrative hearing commences,"²¹⁸ the virtue of Senate bill S. 1220 is its emphasis on expediting private housing disputes administratively rather than judicially. In fact, Senate bill S. 1220 is designed to discourage the use of federal and state courts as forums for settling housing discrimination disputes.

The proposed Equal Access to Housing Act, however, "would encourage the use of Federal magistrates in actions brought under its provisions in an effort to expedite [private discrimination in housing] cases."²¹⁹ And although proponents of the Equal Access Act suggest that "such adversarial litigation will be a last, not a first step in the process of resolving complaints,"²²⁰ evidence suggests otherwise. Senate bill S. 140 would move the "internal" conciliation process from HUD to the Department of Justice, because the bill's proponents assert that "the Justice Department . . . possesses far more expertise in the enforcement of civil rights laws than does HUD."²²¹ But we know that the conciliation process has not worked effectively at HUD,²²² and there is little evidence that it will be more effective, once established in the Department of Justice. Thus, if the Equal Access to Housing Act or any variation of it²²³ is enacted, adver-

218. *Supra* note 113, at 6153.

219. *Supra* note 129.

220. *Id.*

221. *Id.*

222. *Supra* note 113, at 6152. Senator Mathias stated: "Even though the number of discrimination complaints filed with HUD has increased from 2,931 to 5,112 in 1982, the Department's success in conciliating those complaints still remains below 20 per cent."

223. The Reagan Administration has also proposed a bill to strengthen the enforcement provisions of the Civil Rights Act of 1968. Reference is made to Senate bill S. 1612, 98th

sarial litigation will be as prevalent as it is today.

This article has attempted to convey a central point: If we are truly concerned about reducing discrimination in private housing and redressing the problems of victims of discrimination we should not use the courts. Private litigation is expensive and "the already critical overburdening of the courts argues against flooding them with controversies of this type which generally have small precedential significance."²²⁴ More important, there is no guarantee that genuine victims of discrimination will win in court. Procedural problems such as failure to state a cognizable claim, failure to exhaust state remedies, or failure to file a timely claim will prevent some victims from being successful. The employment of competent legal counsel may ameliorate these problems. But there are other problems over which a competent lawyer or a victim has no control.

We discovered that the likelihood of winning or losing was affected significantly by: (1) whether aggrieved persons were Blacks, Hispanics, or whites; (2) whether plaintiffs were individual private litigants, the Attorney General, or civil rights organizations; (3) whether "substantially equivalent" laws were present or absent within a state; (4) whether aggrieved persons were testers or nontesters; (5) whether the suits were decided in federal district courts, in state courts, or in state administrative hearings; and (6) whether states had any fair housing laws.

Cong., 1st Sess., 129 Cong. Rec. 9880 (1983). Unfortunately, the Administration's bill is also entitled the "Fair Housing Amendments Act of 1983." However, it is very unlike Senate bill S. 1220, the Fair Housing Amendments Act of 1983. Instead, the Administration's proposal is more akin to the Equal Access to Housing Act of 1983, Senate bill S.140, for S. 1612 encourages the use of federal and state courts to settle private discrimination in housing disputes. Specifically, S. 1612 would authorize the Justice Department to commence a civil suit in federal court on behalf of aggrieved persons after HUD's investigation-conciliation process has failed. Unlike S. 140, Senate bill S. 1612 would not transfer the conciliation process from HUD to the Department of Justice. Under this bill, the Attorney General would still have the authority to commence a civil action in a federal district court whenever there is 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 their rights under Title VIII. In addition, a private litigant may initiate a housing discrimination suit even though a complaint has been filed with HUD, and without regard to the status of the complaint. Finally, S. 1612 is unlike the Equal Access to Housing Act in two other major respects: (1) it would retain the "substantially equivalent" standard for certifying state and local agencies; and (2) it would allow the courts to assess a civil penalty against the respondent in an amount not exceeding \$50,000. The Equal Access Act would allow courts to award a civil penalty up to \$1,000. Senate bill S. 1220 would permit courts to award civil penalties up to \$10,000. *Id.* at 9884.

224. *Id.* at 6153.

Therefore, given the ineffectiveness of HUD's enforcement of fair housing laws and the inherent problems associated with private litigation, the Fair Housing Amendment Act of 1983—S. 1220—should be enacted. "Experience with . . . comparable state and local agencies repeatedly has shown that the administrative process is quicker and fairer . . . [I]ndividual court suits . . . place a greater burden of expense, time and effort on not only the plaintiff but on all other parties involved, including the seller, broker and mortgage financier, and on the judicial system itself."²²⁵

225. 112 CONG. REC. 18402 (1966). (statement of Rep. Conyers).