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ARTICLES

THE FUTURE OF FAIR HOUSING LITIGATION

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I. INTRODUCTION

This article is a revised version of the keynote address I gave at a conference entitled "Where is Fair Housing Headed in This Decade?" sponsored by The John Marshall Law School in the Fall of 1992. As its title implies, the conference focused on the future of fair housing, and my address dealt with certain developments that I felt were not only observable in the early years of the 1990s, but were also likely to be important in the remaining years of this decade.

Many of these developments — such as the growing role of the federal government in fair housing enforcement and the evolution of the United States Department of Housing and Urban Development's (HUD's) system for handling fair housing complaints — are directly traceable to the 1988 Fair Housing Amendments Act (FHAA).[1] The FHAA amended the original Fair Housing Act (Title VIII of the Civil Rights Act of 1968)[2] in a number of significant ways, most notably by adding handicap and familial status to the types of discrimination outlawed by the statute and by creating a new enforcement mechanism for handling administrative complaints to HUD. It is already clear that implementation of the changes wrought by the FHAA will occupy a major part of the fair housing agenda throughout the 1990s.

It is also clear, however, that many of the key developments in fair housing law in this decade will involve provisions of Title VIII that were not changed by the FHAA, including the basic prohibitions against racial and national origin discrimination that have been in place since 1968. Courts are still struggling with a number of important issues under the 1968 Act, such as whether it covers

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1. Pub. L. No. 100-430, 102 Stat. 1619 (1988).

2. Pub. L. No. 90-284, 82 Stat. 73 (1968). The Fair Housing Act, as amended, is codified at 42 U.S.C. §§ 3601-3619 (1988).

racial discrimination by home insurers,[3] how far it goes in barring the use of only white models in housing ads,[4] and what constitutes a proper damage award in a Title VIII case.[5] Meanwhile, studies published in the early 1990s show that black and Hispanic homeseekers continue to encounter high levels of discriminatory treatment in their efforts to buy, rent, and finance housing,[6] levels that may well be as high as they were in the 1970s.[7] The highly segregated nature of America's housing is a fact known to virtually every citizen, from the casual observer of the Rodney King trial to the professional demographer intent upon dissecting the results of the 1990 census.[8] Obviously, much work remains to be done if Title VIII's original goals of eradicating racial discrimination in housing and replacing the ghettos with "truly integrated and balanced living patterns"[9] are to be fulfilled.

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3. *E.g.*, NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993).

4. See *infra* notes 106-107 and accompanying text for a discussion of the discriminatory use of models in housing advertising.

5. See *infra* notes 92-103 and accompanying text for a discussion of damage awards in Title VIII cases.

6. With respect to sales and rentals, see, e.g., MARGERY A. TURNER ET AL., HOUSING DISCRIMINATION STUDY: SYNTHESIS vi-vii (U.S. DEPT. OF HOUS. AND URBAN DEV. 1991) (estimating that the overall national incidence of housing discrimination is 53% for black renters, 46% for Hispanic renters, 59% for black homebuyers, and 56% for Hispanic homebuyers). With respect to financial discrimination, see, e.g., Glenn B. Canner & Delores S. Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RESERVE BULL. 859 (1991) (1990 data collected pursuant to the Home Mortgage Disclosure Act show that the home loan rejection rates for black and Hispanic applicants are significantly higher than for white and Asian applicants); ALICIA H. MUNNELL ET AL., MORTGAGE LENDING IN BOSTON: INTERPRETING HMDA DATA, (Fed. Reserve Bank of Boston Working Paper No. 92-7, 1992) (showing that the home loan rejection rate for blacks and Hispanics is 56% higher than for whites even when all other significant variables, such as income and credit history, are taken into account).

7. In comparing the results of the 1991 *Housing Discrimination Study* to HUD's last national audit of housing discrimination published in 1979 (RONALD E. WIENK ET AL., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS (U.S. DEPT. OF HOUS. AND URBAN DEV. 1979)), the 1991 study determined that there was "no solid basis for concluding that the incidence of unfavorable treatment experienced by black homeseekers had either risen or declined since the late 1970s." TURNER ET AL., *supra* note 6, at vii. The 1979 study led HUD to estimate that there were some 2,000,000 instances of racial discrimination in housing occurring every year in the United States. *See, e.g.*, testimony of John J. Knapp, General Counsel, U.S. Department of Housing and Urban Development, in ISSUES IN HOUSING DISCRIMINATION, Vol. 2, at 107 (U.S. Commission on Civil Rights, Nov. 13, 1985).

8. *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

9. 114 CONG. REC. 3422 (1968) (remarks of Sen. Mondale). This comment by Title VIII's chief sponsor in the Senate has been cited repeatedly by courts in concluding that the statute was intended to achieve the result of an integrated society. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972); Otero v. New York Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

This article attempts to provide a rough sketch of what the fair housing landscape will look like for the rest of this century. Part II reviews the changes in fair housing law made by the FHAA five years ago. Part III then surveys the major substantive issues that have engaged and are likely to continue to engage the courts in this decade, both under Title VIII and the FHAA. The discussion of these issues leads to a description in Part IV of how the federal government's role in enforcing fair housing is becoming increasingly important. Part V focuses particular attention on the new HUD complaint process established by the FHAA and raises questions about whether this process can live up to the expectations of those who created it. Finally, Part VI raises a broader issue regarding the role that litigation plays in helping to achieve the goal of fair housing.

II. THE FAIR HOUSING AMENDMENTS ACT OF 1988

The origins of the 1988 FHAA can be traced back to the early 1970s, when congressional hearings began to call attention to the inadequacies of Title VIII's enforcement scheme.[10] Title VIII provided for three methods of enforcement — private lawsuits, administrative complaints to HUD, and civil actions by the Attorney General — but Congress placed significant restrictions on the latter two methods.[11] In particular, HUD was given no real enforcement power, but could only attempt to resolve complaints by using "informal methods of conference, conciliation, and persuasion."[12] This meant that the primary responsibility for enforcing Title VIII fell on the shoulders of private litigants, although even their suits were somewhat restricted by the statute (e.g., by its $1,000 cap on punitive damages and its limiting attorney's fees awards to those plaintiffs who were not financially able to assume them).[13]

By 1978, bills giving HUD greater enforcement power were the subject of committee hearings in both the House and the Senate.[14] For the next ten years, Congress considered a variety of proposals to amend Title VIII, all of which had as their principal feature the

10. *See Federal Government's Role in the Achievement of Equal Opportunity in Housing: Hearings before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

11. *See* Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POLICY REV. 375, 375-78 (1988).

12. 42 U.S.C. § 3610(a) (1982 and Supp. 1987) (amended 1988).

13. *See* 42 U.S.C. § 3612(a), (c) (1982 and Supp. 1987) (amended 1988).

14. *See Fair Housing Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary on H.R. 3504 and H.R. 7787*, 95th Cong., 2d Sess. (1978); *HUD Attorney's Fees: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S. 571*, 95th Cong., 2d Sess. (1978).

strengthening of the HUD enforcement process.[15] During this time, the need to make the administrative process more effective was underscored by the fact that, despite its shortcomings, thousands of persons who claimed to have been victimized by housing discrimination used this process every year, far more than the number who filed private lawsuits under Title VIII.[16] Meanwhile, studies showed that racial discrimination in housing was continuing at alarmingly high levels,[17] suggesting to Congress that Title VIII was unable "to fulfill the promise made to the American people 20 years ago."[18] The purpose of the FHAA's new enforcement scheme was to "put real teeth into the fair housing laws by giving HUD real enforcement authority."[19]

This new scheme provides for the prompt determination of fair housing disputes and for serious sanctions and remedies when a violation is shown. The administrative system created by the FHAA is somewhat complicated, but its essential features are as follows: Complaints to HUD may be filed by any person who claims to have been aggrieved by a discriminatory housing practice.[20] HUD, itself, is also authorized to file complaints.[21] Complaints that come from a state or locality with a fair housing law that is "substantially equivalent" to the FHAA must be referred to the appropriate state or local agency for handling.[22]

Complaints that are not referred to state or local agencies remain the responsibility of HUD, which has 100 days to conduct an investigation and to determine whether "reasonable cause" exists to believe that a discriminatory housing practice has occurred.[23] Also during this 100-day period, HUD is directed to engage in conciliation efforts with the respondent and the complainant "to the extent feasible."[24] In addition, if HUD determines that a particular case requires prompt judicial action, HUD may refer that case to the Justice Department, which is then required to file a lawsuit seeking appropriate temporary or preliminary relief.[25] Furthermore, if the

15. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 5.3(2), at nn.50, 52-55 (1992).

16. Schwemm, *supra* note 11, at 377.

17. *See, e.g.*, studies cited in HOUSE COMM. ON THE JUDICIARY, THE FAIR HOUSING AMENDMENTS ACT OF 1988, H.R. DOC. NO. 711, 100th Cong., 2d Sess. 15 nn.10-13 (1988) [hereinafter *House Report*].

18. *Id.* at 13.

19. 134 CONG. REC. S10455 (1988) (remarks of Senator Kennedy). *See generally* SCHWEMM, *supra* note 15, § 24.2 (discussing the purpose of the FHAA's enforcement scheme).

20. 42 U.S.C. § 3610(a)(1)(A)(i) (1988).

21. *Id.*

22. *Id.* § 3610(f).

23. *Id.* § 3610(a)(1)(B)(iv), (b)(5)(A), (f), (g)(1).

24. *Id.* § 3610(b)(1).

25. *Id.* § 3610(e)(1).

case involves a challenge to a local land-use law, it must be referred to the Justice Department for prosecution.[26]

If the case is not conciliated and if a "reasonable cause" determination is made, HUD will issue a formal charge on behalf of the complainant.[27] At this stage, either party may elect to have the case decided in a federal district court, where the complainant will be represented by the Justice Department and may receive actual and punitive damages and appropriate equitable relief.[28] (This election procedure was inserted late in the legislative process to protect the parties' constitutional right to trial by jury.[29])

If the case is not elected to court, it will be prosecuted by a HUD lawyer and tried before a HUD-appointed administrative law judge (ALJ) not later than 120 days after the charge has been filed.[30] The ALJ is required to decide the case within 60 days after the hearing and may award actual damages to the complainant, civil penalties of up to $50,000 to the government, injunctive relief, and attorney's fees.[31] These ALJ decisions are subject to review by the Secretary of HUD and ultimately by the federal courts of appeal.[32]

The FHAA, like the original Fair Housing Act, gives private complainants the option of by-passing this entire administrative procedure and going directly to court.[33] Indeed, the new law makes this option easier to use and more attractive by extending the statute of limitations for private litigants from 180 days to two years,[34] and by eliminating the $1,000 cap on punitive damages[35] and the "financial inability" limitation on the award of attorney's fees.[36]

The FHAA also authorizes the Justice Department to intervene in private cases if the Attorney General certifies that the case is "of general public importance."[37] Conversely, an aggrieved person may intervene in a "pattern or practice" suit brought by the Justice Department and may obtain any relief in such a case that

26. *Id.* § 3610(g)(2)(C).

27. *Id.* § 3612(g)(2)(A).

28. *Id.* § 3610(a), (o).

29. *See* SCHWEMM, *supra* note 15, § 24.8(1) (discussing the election process).

30. 42 U.S.C. § 3612(b), (d), (g)(1) (1988).

31. *Id.* § 3612(g)(2)-(3), (p).

32. *Id.* § 3612(h)-(i).

33. 42 U.S.C. § 3613. A complainant may also file *both* a HUD complaint and a private lawsuit. *Id.* § 3613(a)(2). In these circumstances, the first one to reach a hearing will control. *Id.* §§ 3612(f), 3613(a)(3).

34. 42 U.S.C. § 3613(a)(1)(A). *Compare* 42 U.S.C. § 3612(a) (1982 and Supp. 1987) (setting the statute of limitations at 180 days).

35. 42 U.S.C. § 3613(c)(1). *Compare* 42 U.S.C. § 3612(c) (1982 and Supp. 1987) (setting a $1000 cap on punitive damages).

36. 42 U.S.C. § 3613(c)(2). *Compare* 42 U.S.C. § 3612(c) (1982 and Supp. 1987) (placing a "financial inability" requirement on the award of attorney's fees).

37. 42 U.S.C. § 3613(e).

would be available in a private suit.[38] Even without such intervention, the FHAA authorizes the Justice Department to seek monetary damages for aggrieved persons and civil penalties of up to $100,000 for the government in "pattern or practice" cases, along with the equitable relief that Title VIII has always authorized in such cases.[39]

In addition to these enforcement provisions, the FHAA made a number of substantive changes to Title VIII. The most important of these was to add families with children and handicapped persons to the classes protected by the statute. Generally, these additions were accomplished simply by adding "familial status" and "handicap" to all of Title VIII's substantive prohibitions,[40] thereby making illegal the same discriminatory practices with respect to these newly protected classes that had long been outlawed with respect to race, color, religion, sex, and national origin.[41]

Congress also added some special provisions dealing specifically with these two new protected classes. For example, handicap discrimination was defined to include three situations that go beyond the prohibitions applicable to the other illegal bases of discrimination: (1) a refusal to permit reasonable modifications of existing premises so that handicapped occupants may fully enjoy the premises;[42] (2) a refusal to make reasonable accommodations in rules and policies so as to afford handicapped persons equal opportunity to use and enjoy dwellings;[43] and (3) a failure to design and construct new multifamily housing in certain ways that would make it accessible to and usable by handicapped persons.[44] On the other hand, the prohibitions against familial status discrimination were made narrower than those involving other protected classes because they were not made applicable to "housing for older persons."[45] Another exemption made clear that the handicap prohibitions do not require making housing available to anyone whose tenancy "would constitute a direct threat to the health or safety of other individuals or would result in substantial physical

38. *Id.* § 3614(e).

39. 42 U.S.C. § 3614(d)(1). *Compare* 42 U.S.C. § 3613 (1982 and Supp. 1987) (providing for no civil penalties in government cases).

40. SCHWEMM, *supra* note 15, §§ 11.5(3)(a), 11.6(2)(a). The substantive provisions of the Fair Housing Act are contained in 42 U.S.C. §§ 3604, 3605, 3606, 3617, 3631.

41. The HUD regulations make clear that the FHAA's protections afforded to families with children and to handicapped persons should be interpreted "in the same manner as the protections provided to others under the Fair Housing Act." 54 Fed. Reg. 3236 (1989).

42. 42 U.S.C. § 3604(f)(3)(A) (1988).

43. *Id.* § 3604(f)(3)(B).

44. *Id.* § 3604(f)(3)(C).

45. *Id.* § 3607(b)(1).

damage to the property of others."[46] And a third exemption provided that reasonable restrictions on the maximum number of occupants permitted in a dwelling ("reasonable occupancy standards") were not unlawful.[47]

The FHAA also made a number of other significant changes in Title VIII. Among the more important of these were broadening the ban on discrimination in residential financing to cover a wide range of "real estate-related transactions;"[48] expanding the definition of "discriminatory housing practice" to include interference and intimidation claims, thus allowing these claims to be brought pursuant to the same procedural and remedial provisions as traditional complaints;[49] requiring that HUD make annual reports to Congress on the nature and extent of housing discrimination in the United States and on the demographic makeup of people residing in federally assisted housing;[50] and requiring that HUD promptly issue regulations to implement and interpret the Fair Housing Act, as amended.[51]

The House and Senate passed the FHAA by overwhelming margins during the summer of 1988, and President Reagan signed the bill into law on September 13, 1988.[52] The statute specified an effective date of 180 days after enactment,[53] which meant that its new provisions generally took effect on March 12, 1989. Also on that date, HUD made effective some 86 pages of regulations and commentary interpreting the new law,[54] as the FHAA had mandated.[55]

These events were the most important developments in housing discrimination law since the passage of Title VIII two decades before. They are likely to shape much of the fair housing agenda for the 1990s. The discussion in the next three parts details the future of fair housing litigation in the 1990s.

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46. *Id.* § 3604(f)(9).

47. *Id.* § 3607(b)(1).

48. *Id.* § 3605.

49. *Id.* §§ 3602(f), 3610(a)(1)(A)(i), 3613(a)(1)(A), 3617.

50. *Id.* § 3608(e)(2), (6).

51. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1636, *noted in* 42 U.S.C. § 3601 (1988).

52. *See* SCHWEMM, *supra* note 15, § 5.3(2) nn.61, 64 & 66 and accompanying text.

53. *See* § 13(a) of the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1363, noted in 42 U.S.C. § 3601 (1988).

54. *See* 54 Fed. Reg. 3232-3317 (1989).

55. *See supra* note 51 and accompanying text (discussing the FHAA's significant changes to Title VIII).

III. LITIGATION DEVELOPMENTS IN THE 1990S

A. Litigation Under the FHAA's New Provisions

It was predictable that there would be a flurry of litigation in the early years of the FHAA dealing with its new provisions, particularly those governing the HUD enforcement process and those prohibiting familial status and handicap discrimination. This section reviews some of the more important of these cases and attempts to predict which areas will continue to produce substantial litigation. Section B provides a similar review and look at the future with respect to Title VIII issues that were not altered by the FHAA.

The FHAA's new enforcement procedures have prompted a good deal of litigation, most of it dealing with the HUD administrative process. A few decisions have also dealt with issues relating to the new relief provisions governing private suits and Justice Department actions, such as whether these provisions should be applied retroactively[56] and what types of monetary relief are called for in individual suits.[57] The FHAA's provisions authorizing civil penalties — both in Justice Department actions and in HUD complaints — are a new feature of relief in fair housing litigation, and the appropriateness and size of such penalties in particular situations are issues that are likely to command a good deal of judicial attention in the 1990s.[58]

Unfortunately, this may also prove to be true of issues raised when HUD's handling of administrative complaints does not meet the standards set by the FHAA. Already, two appellate courts have chastised HUD for such deficiencies as its weak conciliation efforts and its failure to serve the respondent with important documents in a timely manner.[59] HUD's most egregious failing, however, seems

56. *E.g.*, Littlefield v. McGuffey, 954 F.2d 1337, 1345 (7th Cir. 1992); Cabrera v. Fischler, 814 F. Supp. 269, 285-87 (E.D.N.Y. 1993); United States v. Rent Am. Corp., 734 F. Supp. 474, 478-81 (S.D. Fla. 1990).

57. *E.g.*, United States v. Balistrieri, 981 F.2d 916, 934-37 (7th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3742 (U.S. Apr. 19, 1993) (No. 92-1690); United States v. City of Hayward, 805 F. Supp. 810, 815-16 (N.D. Cal. 1992); United States v. City of Taylor, 798 F. Supp. 442, 450 (E.D. Mich. 1992).

58. *See, e.g.*, Morgan v. HUD, 985 F.2d 1451, 1460-61 (10th Cir. 1993) (setting forth factors to be considered in determining the size of a civil penalty); Baumgardner v. HUD, 960 F.2d 572, 583 (6th Cir. 1992) (refusing to award punitive damage and reducing the civil penalty to the allowed compensatory damages); United States v. Southern Management Corp., 955 F.2d 914, 916, 923 (4th Cir. 1992) (considering the relief warranted by a violation of the FHAA); HUD v. Blackwell, 908 F.2d 864, 873-74 (11th Cir. 1990) (affirming the ALJ's imposition of the maximum civil penalty and granting injunctive relief); United States v. Borough of Audubon, 797 F. Supp. 353, 363 (D.N.J. 1991), *aff'd without opinion*, 968 F.2d 14 (3d Cir. 1992) (granting injunctive relief and awarding the maximum civil penalty for intentional discrimination on the basis of a handicap).

59. *Morgan*, 985 F.2d at 1456-57; *Baumgardner*, 960 F.2d at 576-80.

to be its inability to complete investigations and issue reasonable cause determinations within the 100-day period mandated by the FHAA, lapses which occurred in well over half of HUD's cases in 1990 and 1991.[60] This type of delay, though not jurisdictional in the sense that it automatically results in dismissal of the case,[61] may nevertheless lead to dismissal or at least reduced relief in particular situations.[62] Delays also undercut HUD's ability to process administrative complaints expeditiously, a key goal of the FHAA.[63]

With respect to the newly protected classes, a handful of defendants have challenged the constitutional authority of Congress to ban familial status and handicap discrimination in housing, generally without success. The Tenth and Eleventh Circuits have now upheld the familial status prohibitions as a legitimate exercise of congressional power under the Commerce Clause,[64] decisions that seem eminently reasonable given the Supreme Court's current views in this area.[65] On the other hand, a 1992 decision by a district court judge in Michigan ruled that the Commerce Clause power did not justify applying the handicap prohibitions in a neighborhood dispute.[66] While this ruling seems likely to be overturned on appeal, it may encourage defendants in other cases to continue to raise the constitutional issue. Still, this seems like a matter that the

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60. *See* U.S. DEPT. OF HOUS. AND URBAN DEV., THE STATE OF FAIR HOUSING 1991: A REPORT TO CONGRESS PURSUANT TO SECTION 808(E)(2) OF THE FAIR HOUSING ACT 6 (1993) [hereinafter THE STATE OF FAIR HOUSING 1991] (reporting that the "number of cases in 1991 reaching over 100 days totaled 4,791," a year in which the number of HUD-filed complaints was 5,657); U.S. DEPT. OF HOUS. AND URBAN DEV., THE STATE OF FAIR HOUSING 1990: A REPORT TO CONGRESS PURSUANT TO SECTION 808(E)(2) OF THE FAIR HOUSING ACT 6 (1991) [hereinafter THE STATE OF FAIR HOUSING 1990] (reporting that "64 percent of HUD's complaint load was over 100 days old in 1990").

61. *E.g.*, *Baumgardner*, 960 F.2d at 578; United States v. Curlee, 792 F. Supp. 699, 700-01 (C.D. Cal. 1992); United States v. Scott, 788 F. Supp. 1555, 1557-59 (D. Kan. 1992); *but see* United States v. Aspen Square Management Co., 817 F. Supp. 707 (N.D. Ill. 1993).

62. *E.g.*, United States v. Cannon, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 15,743, at 16,861 (D.S.C. 1992) (resulting in dismissal); Baumgardner v. HUD, 960 F.2d at 580, 583 (resulting in reduced relief).

63. *See, e.g.*, *Baumgardner*, 960 F.2d at 580 (noting the importance of promptness in the FHAA's administrative scheme); *House Report*, *supra* note 17, at 33 (expressing congressional intent that all but "exceptional cases" must be investigated within 100 days after the charge).

64. Morgan v. HUD, 985 F.2d 1451, 1455-56 (10th Cir. 1993); Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1034 (11th Cir. 1992).

65. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990) (holding that a court reviewing congressional legislation under the Commerce Clause must defer to Congress' finding that an activity affects interstate commerce if there is "any rational basis" for that finding and if "the means selected by Congress are reasonably adapted to the end permitted by the Constitution").

66. Michigan Protection & Advocacy Serv. v. Babin, 799 F. Supp. 695, 727-42 (E.D. Mich. 1992), *appeal filed*, No. 92-2073 (6th Cir. 1993).

courts of appeal will soon resolve in favor of the FHAA's constitutionality.

Similarly, the FHAA's definitions of "handicap" and "familial status" have occasioned some litigation, but early decisions and the HUD regulations seem to have settled most of the difficulties surrounding these matters. For example, in 1992 in *United States v. Southern Management Corp.*,[67] the Fourth Circuit held that recovering drug addicts and recovering alcoholics are handicapped persons within the protection of the FHAA. A number of cases have made clear that the statute also covers persons suffering from Acquired Immunodeficiency Syndrome (AIDS) and those who are HIV-positive.[68] With respect to familial status, the Seventh Circuit in *Gorski v. Troy*[69] held that foster parents, and even would-be foster parents who have not yet been assigned any children, may sue to challenge a landlord's discrimination against them.

Familial status claims have accounted for much of the litigation under the FHAA thus far. Indeed, through early 1993, more HUD ALJ decisions have been prompted by family cases than by all of the other forms of prohibited discrimination combined.[70] Most of these familial status cases involved direct evidence of discrimination (e.g., advertising or statements by housing providers that, on their face, indicated discrimination against children).[71] It was almost as if the providers — many of whom owned mobile home parks — could not believe that the FHAA meant what it said when it banned familial status discrimination.

In my judgment, the number of cases involving this kind of flagrant discrimination will taper off fairly quickly, much the way most blatant forms of racial discrimination died away within a few years of Title VIII's enactment. As more subtle forms of rejection become the norm, familial status cases will — like modern race

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67. 955 F.2d 914, 917-23 (4th Cir. 1992).

68. *E.g.*, Stewart B. McKinney Found., Inc. v. Town of Fairfield, 790 F. Supp. 1197, 1209-10 (D. Conn. 1992); A.F.A.P.S. v. Regulations & Permits Admin., 740 F. Supp. 95, 103 (D.P.R. 1990); Baxter v. City of Belleville, 720 F. Supp. 720, 729-30 (S.D. Ill. 1989).

69. 929 F.2d 1183, 1187-90 (7th Cir. 1991).

70. The HUD ALJ decisions are reported in volume 2 of Prentice-Hall's Fair Housing—Fair Lending Rep. ¶ 25,001 *et seq.* Through April 1993, HUD ALJs had rendered some 42 decisions in 34 separate cases, 21 of which involved claims of familial status discrimination.

71. *See, e.g.*, Morgan v. HUD, 985 F.2d 1451, 1457-58 (10th Cir. 1993) (finding that a housing provider's "adults only" policy discriminated on the basis of familial status); Paradise Gardens, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,037, at 25,391-92 (Oct. 15, 1992) (finding that housing providers' written "age limitation on permanent residents" violated the FHAA on its face); Leiner, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,021, at 25,264-65 (A.L.J. 1992) (determining defendant's written and oral statements regarding the creditworthiness of single mothers to be direct evidence of discrimination).

cases — become harder to prove, and plaintiffs will increasingly have to rely on evidence-gathering techniques such as "testing" to produce persuasive evidence of unlawful discrimination.[72] In addition, as housing providers come to realize that blatant discrimination is indefensible, they are likely to rely more on occupancy standards and other "neutral" restrictions as ways of blocking or at least limiting the number of children in their units. This means that litigation over what constitutes "reasonable" occupancy standards is likely to increase.[73]

The other area of familial status litigation that is likely to be quite active for some time deals with the exemption for "housing for older persons."[74] There are three categories of housing that qualify for this exemption, two of which — publicly assisted housing designed for elderly persons and housing that is occupied solely by persons 62 years of age or older[75] — involve limited and clearly defined situations. By contrast, the third category — housing intended for persons age 55 or older that has "significant facilities and services specifically designed to meet the physical or social needs of older persons"[76] — may apply to a much broader range of situations but is defined in vague terms that invite litigation.[77] HUD's 1989 regulations offer some help in identifying the types of housing that will qualify for this exemption,[78] but there is a need for further clarification,[79] and this means more judicial decisions.

Conversely, the number of handicap discrimination cases has been relatively small, apart from litigation challenging governmental restrictions on communal housing opportunities for handicapped persons ("group home" cases).[80] Only a handful of handicap deci-

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72. *See, e.g.*, Soules v. HUD, 967 F.2d 817, 820, 823 (2d Cir. 1992) (finding the information provided by "tester" applicants to be probative evidence of whether a discriminatory denial of housing occurred).

73. Early examples of such litigation include United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992); United States v. Lepore, 816 F. Supp. 1011 (M.D. Pa. 1991).

74. *See supra* note 45 and accompanying text.

75. 42 U.S.C. § 3607(b)(2)(A)-(B) (1988).

76. *Id.* § 3607(b)(2)(C).

77. Early examples of such litigation include Rogers v. Windmill Pointe Village Club Ass'n, 967 F.2d 525, 527-28 (11th Cir. 1992); Park Place Home Brokers v. P-K Mobile Home Park, 773 F. Supp. 46, 50-53 (N.D. Ohio 1991); Lanier v. Fairfield Communities Inc., 776 F. Supp. 1533, 1535-37 (M.D. Fla. 1990).

78. *See* 24 C.F.R. § 100.304 (1992) and HUD's commentary thereon at 54 Fed. Reg. 3256 (1989).

79. In the Housing and Community Development Act of 1992, Congress directed HUD to "make rules defining what are 'significant facilities and services especially designed to meet the physical or social needs of older persons' " for purposes of the FHAA's "housing for older persons" exemption within 180 days after the enactment of the Act, which occurred on October 28, 1992. *See* Pub. L. No. 102-550, § 919, 106 Stat. 3883 (1992).

80. See *infra* notes 83, 84, 86, and 87 for examples of "group home" cases.

sions involving traditional refusals to sell or rent have been reported.[81] Even fewer decisions have involved the FHAA's mandates to housing providers to permit reasonable modifications of existing premises and to construct new multifamily housing with accessibility-enhancing features,[82] although the latter's delayed effective date of March 13, 1991, may mean that it will eventually produce some litigation. Alternatively, these provisions may not result in a large number of cases, with landlords and architects generally accepting these requirements without the need for court enforcement.

Clearly the same cannot be said about local zoning officials and others whose efforts to restrict the location of "group home" facilities has prompted most of the handicap litigation under the FHAA. Already, five appellate courts have dealt with FHAA-based challenges to such restrictions,[83] and a sixth case is currently pending in the Ninth Circuit.[84] These cases raise a variety of difficult issues, some new under the FHAA and some that courts have previously struggled with in the context of race cases involving exclusionary zoning under Title VIII.[85] Examples of the latter include abstention, exhaustion of administrative remedies, the applicability of the Anti-Injunction statute and, perhaps most importantly, the degree to which the Fair Housing Act prohibits practices that have the effect of discriminating against a protected class.[86] Examples of newer issues include whether the FHAA's "reasonable accommodation" requirement should be applied to municipal land-use regulations and whether the FHAA's "reasonable occupancy standard" defense can justify restrictions on the number of unrelated individ-

81. *See, e.g.*, United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992); Cason v. Rochester Hous. Auth., 748 F. Supp. 1002 (W.D.N.Y. 1990); Dedham Hous. Auth., 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,015 (A.L.J. 1991), *additional relief awarded*, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,023 (A.L.J. 1992).

82. For a discussion of these handicap provisions of the FHAA, see *supra* notes 42 and 44 and accompanying text.

83. Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993); Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992); United States v. Borough of Audubon, 968 F.2d 14 (3d Cir. 1992), *aff'g without opinion* 797 F. Supp. 353 (D.N.J. 1991); Elliott v. City of Athens, 960 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992); Familystyle of St. Paul v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991).

84. City of Edmonds v. Washington State Bldg. Code Council, Nos 92-36640 and 92-26735 (9th Cir. 1993), *reviewing* 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 15,771 (W.D. Wash. 1992).

85. *See* SCHWEMM, *supra* note 15, at § 11.5(3)(c) and § 13.4(3).

86. *See, e.g.*, Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 258 (1st Cir. 1993) (discussing abstention and the Anti-Injunction statute); Marbrunak, Inc. v. City of Stow, 974 F.2d 43, 45 (6th Cir. 1992) (questioning exhaustion of administrative remedies); Stewart B. McKinney Found., Inc. v. Town of Fairfield, 790 F. Supp. 1197, 1216-21 (D. Conn. 1992) (illustrating discriminatory effect).

uals who are permitted to reside in a home in a "single-family" neighborhood.[87]

At least two predictions seem safe to make in this area. First, "group home" cases will not go away for the handicap advocates and the defenders of traditional zoning values are both highly motivated and will press their positions from town to town throughout the United States. Second, the Supreme Court will probably have to take one of these cases eventually, for the issues are complex and the appellate decisions already show a fair degree of inconsistency. However, even a Supreme Court decision or two may not be enough to resolve all of the questions in this area. "Group homes" may well produce an on-going stream of litigation and ultimately even require refining amendments to the FHAA.

One final issue relating to familial status and handicap cases is whether they will be seen to involve the same degree of public importance as cases based on racial and other forms of discrimination condemned by Title VIII. In theory, the answer should be "Yes," because the FHAA added familial status and handicap to the statute in ways that generally do not distinguish between them and other types of illegal discrimination.[88] Still, legitimate issues do remain about how this question will be answered in practice, such as: whether damage awards for intangible injuries and civil penalties should be as high in cases involving the newly protected classes as they are in the more traditional forms of discrimination;[89] whether

87. *See, e.g.*, United States v. Village of Marshall, 787 F. Supp. 872, 876-79 (W.D. Wis. 1991) (applying the "reasonable accommodation" requirement of the FHAA); Elliott v. City of Athens, 960 F.2d 975, 984 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 376 (1992) (upholding the "reasonable occupancy standard" defense).

88. See *supra* notes 40-41 and accompanying text for a discussion of how the FHAA's familial and handicap prohibitions relate to the other prohibitions of the Fair Housing Act.

89. Although the relief in each case may turn to a large degree on the particular facts involved, the HUD ALJ decisions, considered as a group, do reflect a pattern of awarding lesser damages for intangible injuries as well as lower civil penalties in familial status cases than in race cases. *See, e.g.*, Cabusora, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,026, at 25,291-93 (A.L.J. 1992) (awarding $25,000 for intangible injuries to single complainant and maximum civil penalty of $10,000 each against two respondents in race case by ALJ Cregar); Murphy, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,002, at 25,055-60 (A.L.J. 1990) (awarding between $150 and $5,000 for intangible injuries to various complainants and a civil penalty of $2,000 against the respondent in familial status case by same ALJ). All of the large HUD ALJ awards for intangible injuries have been made in race cases. *See* Cabusora, *supra*; Tucker, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,033, at 25,351 (A.L.J. 1992) (awarding $100,000 to a couple); Blackwell, Fair Housing—Fair Lending Rep. (P-H) ¶ 25,001, at 25,017 (A.L.J. 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990) (awarding $40,000 and $20,000 to two couples). With respect to judicial attitudes toward civil penalties, compare HUD v. Blackwell, 908 F.2d 864, 873 (11th Cir. 1990) (affirming ALJ's award of maximum civil penalty of $10,000 in race case) with Morgan v. HUD, 985 F.2d 1451, 1460-61 (10th Cir. 1993) (reducing ALJ's award of maximum civil penalty of $10,000 in familial status case to $500). For the

discretionary governmental enforcement resources (e.g., Justice Department pattern or practice suits) should be deployed even-handedly among the various illegal bases of discrimination;[90] and, ultimately, whether eradicating housing discrimination based on race and national origin is simply not a higher national priority than dealing with other forms of illegal housing discrimination.

These issues seem particularly difficult with respect to familial status for a number of reasons, including the following: that the FHAA's ban on familial status discrimination is unprecedented among the Nation's anti-discrimination laws; that the FHAA, itself, recognizes in its exemption for housing for older persons that this form of discrimination may be appropriate in certain circumstances; and that the discrimination prohibited is based on a status over which individuals may exercise some control, unlike the immutable characteristics of race and sex that have historically defined traditional forms of invidious discrimination.[91] In raising this question, I do not mean to suggest how it should be answered, but only to indicate that it is a serious one and that the process of answering it will likely extend at least throughout this decade.

B. Contemporary Issues Under Title VIII

1. Higher Damages Awards

The upper level of damage awards in fair housing cases has increased dramatically in recent years. Four cases in a thirteen-month period from 1991 to 1993 illustrate this phenomenon. First, in December of 1991, a Los Angeles case involving rental discrimination against blacks and Hispanics was settled for $1,100,000,[92] the first time a Title VIII case had exceeded the one million dollar figure. In May of 1992, a jury in Washington, D.C., awarded $850,000 to a black homeseeker and two fair housing groups against a condominium complex that had used only white models in its advertise-

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exception that proves the rule, see case cited in note 94 *infra* (jury verdict of $415,000 in compensatory damages and $2,000,000 in punitive damages in familial status case).

90. Thus far, the Justice Department has not focused its pattern or practice litigation under the FHAA on any particular type of discrimination. *See* THE STATE OF FAIR HOUSING 1991, *supra* note 60, at 17 (reporting that of the 11 pattern or practice cases filed in 1991, five were based on race, four were based on handicap, and two were based on familial status); THE STATE OF FAIR HOUSING 1990, *supra* note 60, at 16 (reporting that of the 14 pattern or practices cases filed in 1990, four were based on race, one was based on sex, five were based on handicap, and four were based on familial status).

91. *See generally* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (noting sex as an immutable characteristic in considering women as a suspect class).

92. Mould v. Palmdale 112 Ltd., 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 19,375 (Cal. Super. 1991).

ments.[93] A few months later, another Washington jury awarded $2,000,000 in punitive damages and $415,000 in compensatory damages to an individual and two fair housing groups in a rental case involving familial status discrimination.[94] Finally, in January of 1993, a Detroit jury awarded a black couple $200,000 in compensatory damages and $250,000 in punitive damages against an apartment complex that had refused to rent to them.[95] The results in these cases reflect a general trend toward much higher awards that make the size of earlier fair housing verdicts seem paltry by comparison.[96]

Why is this happening now? One reason is the fact that the FHAA eliminated Title VIII's $1,000 cap on punitive damages,[97] allowing awards for this type of relief to rise virtually without limit. When all is said and done, this small provision may be the most important in the FHAA with respect to enforcement. Another reason is that fair housing organizations, acting alone or as co-plaintiffs with more directly affected victims, are just now beginning to reap the monetary benefits implicit in the Supreme Court's 1982 decision in *Havens Realty Corp. v. Coleman*,[98] which recognized that such organizations and their "testers" might be injured by fair housing violations.[99] Perhaps most importantly, it appears that juries,

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93. Spann v. Colonial Village, No. 86 Civ. 2917 (D.D.C. 1992), *reported in* 1 Fair Housing—Fair Lending Rep. (P-H) ¶ 12.1 (June 1, 1992). *See also* Ragin v. Harry Macklowe Real Estate, Inc., 801 F. Supp. 1213, 1218, 1233-34 (S.D.N.Y. 1992) (New York City advisory jury's $200,000 award for actual damages and $62,500 in punitive damages in human models advertising case reduced by trial judge to $30,000).

94. Timus v. William J. Davis, Inc., No. 91 Civ. 0882 (D.D.C. 1992), *reported in* 1 Fair Housing—Fair Lending Rep. (P-H) ¶ 3.1 (Sept. 1, 1992).

95. Darby v. Heather Ridge, No. Civ. 91-CV-76897-DT (E.D. Mich. 1993), *reported in* 1 Fair Housing—Fair Lending Rep. (P-H) ¶ 9.2 (Mar. 1, 1993).

96. In the first decade after Title VIII was enacted, few compensatory damage awards exceeded $5,000. Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83, 123-27 (1981). In the 1980s, awards in the $5,000—$25,000 range became quite common, with occasional judgments going even higher. SCHWEMM, *supra* note 15, § 25.3(2), nn.84 & 103.

97. *See supra* note 35 and accompanying text.

98. 455 U.S. 363 (1982).

99. *Id.* at 373-74, 378-79. *See, e.g.*, cases cited *supra* in notes 93 and 94; *see also* United States v. Balistrieri, 981 F.2d 916, 926, 930-33 (7th Cir. 1992) (upholding jury verdict of $2,000 each to various testers for emotional distress, and of $5,000 to fair housing organization for deflection of its time and money to legal efforts). *Compare* City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1099-1100 (7th Cir. 1992) (affirming a portion of actual damages award to a fair housing organization for expenses, but reversing that portion awarded for "frustration of purpose"); Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 J. MARSHALL L. REV. 3, 14-17 (1992) (noting that fair housing organizations may receive damages for "diversion of resources," but arguing that a separate award for "frustration of purpose" is not justified).

which generally reflect community values, are finally beginning to feel a moral aversion towards housing discrimination and are also more inclined than judges to express their aversion in large verdicts.[100] Of course, the fact patterns presented in some of these cases cry out for large awards, particularly in those cases involving harassment, a type of violation that seems to have occurred with increasing frequency in recent years.[101]

This trend toward higher damage awards seems likely to continue, unless it is short-circuited by restrictive decisions of the courts of appeal. The last year or two have witnessed a number of appellate decisions that have been unfriendly toward substantial fair housing awards, particularly those not based on tangible economic injuries.[102] A growing rift may be developing between what the average person (speaking through jurors) feels is a proper response to intentional housing discrimination and what the more conservative federal appellate judiciary is willing to allow. Whatever the explanation, it seems likely that the fight over the appropriate level of damage awards in fair housing cases will continue to be a major battleground throughout the 1990s.[103]

2. *Substantive Issues*

Title VIII prohibits a variety of different discriminatory practices. Some of these practices constantly give rise to judicial claims, while others ebb and flow in importance over time. For example, misrepresentations of availability and steering claims have been a basic staple of Title VIII litigation since enactment of the statute. On the other hand, challenges to racially discriminatory municipal land-use decisions, popular in the 1970s and 1980s, occur less fre-

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100. *See, e.g.*, cases cited *supra* in notes 93-95. This is not to say that some judges have not also participated in the trend toward higher damage awards. *See supra* note 89 (describing judicial awards in race cases).

101. *See, e.g.*, Littlefield v. McGuffey, 954 F.2d 1337, 1348-49 (7th Cir. 1992) (upholding jury award of $50,000 in actual and $100,000 in punitive damages against a defendant who directed racial epithets and death threats against a white woman because of her association with a black man); Tucker, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,033, at 25,351 (A.L.J. 1992) (awarding $100,000 to mixed race couple who were harassed by respondent).

102. *E.g.*, Morgan v. HUD, 985 F.2d 1451, 1459-60 (10th Cir. 1993) (reversing awards for complainant's inconvenience and emotional distress); *Matchmaker*, 982 F.2d at 1099 (reversing fair housing organization's $16,500 award for "frustration of purpose"); *Balistrieri*, 981 F.2d at 933 (describing the evidence supporting $2,000 awards for black testers' emotional distress as "minimal," but upholding those awards based on deference owed to jury's fact finding); Baumgardner v. HUD, 960 F.2d 572, 580-83 (6th Cir. 1992) (reducing complainant's awards for economic losses and inconvenience from $2,000 to $1,000, grudgingly affirming $500 award for emotional distress, and reversing $2,500 award for loss of civil rights).

103. See Heifetz & Heinz, *supra* note 99, for a revealing contribution to the debate over this issue by two of HUD's administrative law judges.

quently today. Discriminatory advertising cases were important in the early years of Title VIII, then virtually disappeared until the mid-1980s when they reemerged in the form of challenges to the exclusive use of white models in housing advertisements.

Predicting what issues will and will not continue to be important is a chancy business at best. Only a few years ago, the legality of race-conscious methods of promoting and maintaining residential integration was thought to be the hottest topic in fair housing law, prompting any number of law review articles and panel discussions.[104] Then, two major appellate decisions were handed down — one by the Second Circuit in 1988 and one by the Seventh Circuit in 1991[105] — and litigation on this subject has now virtually ceased.

The same may happen with the human models advertising cases. Again, two appellate decisions have now provided substantial guidance on what Title VIII does and does not allow in this area.[106] Other decisions have made clear that a violation of the statute can have serious monetary consequences for recalcitrant defendants.[107] It is hard to believe that newspapers, housing providers, and advertising agencies will continue to expose themselves to these types of judgments over the long term by insisting upon using only white models in racially diverse markets. Thus, while these cases have been extremely important, their success may result in this type of litigation tapering off during the 1990s, with the face of American real estate advertising having been changed forever thereby.

One area that is just beginning to come into its own is mortgage lending discrimination. As noted above,[108] recent data produced pursuant to the Home Mortgage Disclosure Act show large discrepancies in financial institutions' rejection rates of white and black applicants for home loans. This fact alone, however, does not prove illegal discrimination, because the percentage of white applicants who are creditworthy may be higher than the comparable percentage for black applicants. The additional evidence-gathering and statistical analysis needed to prove that a particular institution's

104. *See, e.g.*, sources cited in SCHWEMM, *supra* note 15, § 11.2(2), nn.20, 22, & 23.

105. United States v. Starrett City Assoc., 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 971 (1992).

106. HOME v. The Cincinnati Enquirer, Inc., 943 F.2d 644 (6th Cir. 1991); Ragin v. the New York Times Co., 923 F.2d 995 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

107. *See, e.g.*, cases cited *supra* note 93 for examples of damage awards in such cases.

108. See *supra* note 6 for studies on discriminatory lending patterns.

lending practices violate Title VIII can be a daunting task.[109] One of the few successful examples of this work is the Justice Department's 1992 suit against Decatur Federal in Atlanta,[110] which may become a prototype for future financial discrimination cases. In addition, it seems likely that private groups and perhaps even government agencies will increasingly use "testing" to gather evidence of illegal mortgage discrimination.[111] In any event, with the HMDA reports coming out on a yearly basis and with increasing pressure on federal regulators to take more aggressive action in this area, mortgage lending discrimination will be a major area of fair housing concern for years to come.

Other areas that should be active in the coming years include: (1) home insurance discrimination, in the wake of the Seventh Circuit's 1992 decision in *NAACP v. American Family Mutual Insurance Co.*[112] that Title VIII prohibits insurance "redlining"; (2) sexual harassment, which has become a major part of employment discrimination litigation in the past decade but is just now being recognized as a major problem in the field of housing discrimination;[113] and (3) rental and sales cases that involve later stages of the home-seeking process and more subtle forms of discrimination than simple misrepresentations of availability. The increase in the latter is probable in light of the findings in the 1991 *Housing Discrimination Study* that modern discrimination, while still at very high levels, tends to occur after the initial contact and to take less obvious forms than it did in earlier times.[114]

Discrimination by retirement and nursing homes also seems likely to produce a good deal of litigation in the future, as more and more Americans live in such facilities, which have historically been segregated along racial and religious lines and which may mistakenly believe that their exemption from the FHAA's familial status

109. *See, e.g.*, Cartwright v. American Sav. & Loan Ass'n, 880 F.2d 912 (7th Cir. 1989); Thomas v. First Fed. Sav. Bank of Indiana, 653 F. Supp. 1330 (N.D. Ind. 1987).

110. *See* United States v. Decatur Fed. Sav. & Loan Ass'n, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 19,377 (N.D. Ga. 1992).

111. *See, e.g.*, *infra* note 133 and accompanying text; *Bias Testers Can Make a Difference*, CHI. TRIB., May 15, 1993, § 1, at 18 (endorsing recent announcement by the Controller of the Currency that his agency would begin to use testers to investigate mortgage lending discrimination at the 7,000 nationally chartered banks it oversees).

112. 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993).

113. *See, e.g.*, Fiedler v. Dana Properties, No. Civ. S. 89-1396-LKK (E.D. Cal. 1992) *and* United States v. Dana Properties, No. Civ. S. 90-0254-LKK (E.D. Cal. 1992), *reported in* 1 Fair Hous.—Fair Lending Rep. (P-H) ¶ 9.1 (Mar. 1, 1992) (settling related sexual harassment suits for a total of $1,650,000); Kathleen Butler, Note, *Sexual Harassment in Rental Housing*, 1989 U. ILL. L. REV. 175 (1989); Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061 (1987).

114. TURNER ET AL., *supra* note 6, at iii-vii, 11-20, 30-38.

provisions also allows them to discriminate in violation of Title VIII.[115]

IV. THE GROWING ROLE OF THE FEDERAL GOVERNMENT IN FAIR HOUSING ENFORCEMENT

Prior to enactment of the FHAA in 1988, the federal government played only a modest role in fair housing enforcement. This was partly due to the limitations on that role written into Title VIII[116] and partly due to political considerations during the Reagan Administration, which all but abandoned even the limited fair housing efforts of prior administrations.[117] As a result, the enforcement of Title VIII was left primarily to individual victims, fair housing groups, and other private litigants.

This situation has changed dramatically in recent years, with the federal government now occupying a major role in the fair housing field. The primary cause for this change was the FHAA, which eliminated most of Title VIII's restrictions on federal enforcement efforts and created a number of new powers for HUD and the Justice Department.

The FHAA's most obvious contribution in this regard is its new process for handling administrative complaints. Under this process, the thousands of complaints filed with HUD every year will now be investigated, conciliated, and prosecuted by the federal government or will be referred for similar action to state and local agencies under federally imposed "substantially equivalent" standards.[118]

One result of this system is that a far larger proportion of important fair housing cases will be handled by government lawyers. The new HUD process, along with the Justice Department's heightened authority under the FHAA[119] and its greater willingness under the Bush Administration to participate as *amicus curiae* in significant private cases,[120] has meant that the federal government

115. *See, e.g.*, United States v. Puerto Rico, 764 F. Supp. 220, 223 (D.P.R. 1991) (applying Title VIII in case involving nursing home for elderly residents).

116. See *supra* notes 11-13 and accompanying text for a discussion of the limits on HUD and Justice Department enforcement under Title VIII.

117. *See* Robert G. Schwemm, *Federal Fair Housing Enforcement: A Critique of the Reagan Administration's Record and Recommendations for the Future*, ch. XVII, *in* ONE NATION, INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S (Citizens' Commission on Civil Rights 1989).

118. See *supra* notes 20-32 and accompanying text for a description of the administrative process under the FHAA.

119. *See supra* notes 25-26, 28, and 37-39 and accompanying text.

120. *See, e.g.*, NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 289 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993); Elliott v. City of Athens, 960 F.2d 975, 976 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992); Johnson v. Hale, 940 F.2d 1192, 1193 (9th Cir. 1991); Gorski v. Troy, 929 F.2d 1183, 1184 (7th Cir. 1991); City of Edmonds v. Washington State Bldg. Code Council, *appeal filed*, Nos. 92-

was represented in at least half of the major appellate decisions decided since the FHAA became effective.[121] This representation is likely to continue, or possibly increase, under the Clinton Administration.

Another result of the new HUD process is that the HUD administrative law judges, because of their particular focus and developing expertise, are likely to generate a body of fair housing decisions whose detailed findings and insightful analysis make them particularly valuable as precedent. This has already happened to some extent, particularly concerning issues dealing with the new familial status provisions and with respect to the standards of proof and the types of relief available in FHAA cases.[122]

Another by-product of the FHAA is that HUD, the Justice Department, and state and local agencies may well develop groups of lawyers and other personnel whose training and experience match, if not exceed, those of the most sophisticated private fair housing practitioners in the country. For example, Justice Department lawyers have already become leaders in "group home," mortgage discrimination, and occupancy standard cases[123] and are developing expertise in such staples of the private bar as jury trials, the use of tester evidence, and proof of damages for victims of housing discrimination.[124]

Another way that the FHAA enhanced the federal government's influence over fair housing law was by directing HUD to issue rules to implement the newly amended version of Title VIII.[125] In response, HUD promptly issued a lengthy set of regulations and commentary interpreting both the substantive and remedial provisions of the statute.[126] These regulations, which became effective

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36640 & 92-26735 (9th Cir. 1993); Michigan Protection & Advocacy Serv. v. Babin, *appeal filed*, No. 92-2073 (6th Cir. 1993).

121. *See generally* cases cited *supra* notes 58, 64, 72, & 120; United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992); United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992); White v. Pence, 961 F.2d 776 (8th Cir. 1992).

122. *See, e.g.*, Mountain Side Mobile Estates, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,043 (A.L.J. 1993) (discussing standards of proof under "disparate treatment" and "disparate impact" theories); Denton, 2 Fair Hous.—Fair Lending Rep. (P-H) ¶ 25,024 (A.L.J. 1992) (applying standard of proof in "mixed motive" case); Heifetz & Heinz, *supra* note 99 (addressing compensatory damages and other relief); *see also supra* note 70 and accompanying text (noting large number of A.L.J. familial decisions).

123. *See, e.g.*, cases cited *supra* notes 73 (reviewing the occupancy standards), 110 (describing mortgage discrimination), & 87 (involving group homes); United States v. Borough of Audubon, 797 F. Supp. 353 (D.N.J. 1991), *aff'd without opinion*, 968 F.2d 14 (3d Cir. 1992) (noting discrimination in a group home case).

124. *See, e.g.*, *Balistrieri*, 981 F.2d 916; United States v. Schay, 746 F. Supp. 877 (E.D. Ark. 1990), *rev'd sub nom.* White v. Pence, 961 F.2d 776 (8th Cir. 1992).

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

126. *See supra* note 54 and accompanying text.

along with the FHAA on March 12, 1989,[127] created a tremendous amount of new, authoritative material concerning the meaning of the Fair Housing Act. Courts must defer to these regulations so long as they do not violate the plain meaning of the statute and are a reasonable construction of the law.[128] Already these regulations have proved to be highly influential in resolving a number of important litigation issues.[129] What's more, HUD's authority allows it to add to these regulations from time to time[130] and thereby continue to influence, if not control, the meaning of fair housing law in a wide variety of situations.

The federal government's growing influence over the fair housing agenda has not been limited to the provisions of the FHAA. One way that HUD has exercised power over this agenda in recent years has been through its grants under the Fair Housing Initiatives Program ("FHIP"),[131] which every year results in millions of dollars being awarded to public agencies and private organizations engaged in enforcement and other fair housing activities.[132] Last year, for example, HUD committed $1 million in FHIP funds to "testing" activities directed against mortgage lending institutions in three specific localities.[133] Obviously, this means that there will be a good deal of such testing in those three localities and a good deal less everywhere else, and that the testing will be conducted in ways that HUD deems appropriate.[134]

The potential exists for even greater federal involvement in fair housing activities. For example, the FHAA provides that HUD itself, as well as private complainants, may file administrative complaints challenging discriminatory housing practices.[135] But, thus

127. *See supra* notes 53-54 and accompanying text (citing the effective date of the regulations and the FHAA).

128. *See generally* Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (holding that courts must generally defer to an agency's interpretation that fills in the gaps of an ambiguous or silent statute).

129. *See, e.g.*, NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 300-01 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993); United States v. Badgett, 976 F.2d 1176, 1179 (8th Cir. 1992).

130. *See* 42 U.S.C. § 3614(a) (1988). *See also supra* note 79 (discussing HUD's responsibility to define what facilitates and services are required for "housing for older persons").

131. *See* 42 U.S.C. § 3616(a). FHIP was created by § 561 of the Housing and Community Development Act of 1987, Pub. L. 100-242 (1987), and was substantially expanded by the Housing and Community Development Act of 1992, Pub. L. 102-550 § 905 (1992). HUD's regulations governing FHIP are found at 24 C.F.R. § 125 (1987).

132. *See, e.g.*, 58 Fed. Reg. 13068-71 (1993) (announcing over $7,000,000 in FHIP grants for Fiscal Year 1992).

133. *See* 57 Fed. Reg. 21127-28 (1992).

134. *See id.* at 21129 (noting that FHIP testing activities must conform to HUD's testing guidelines, which are set forth in 24 C.F.R. § 125.405).

135. See *supra* note 21 and accompanying text.

far, HUD has barely used this new authority at all.[136] Similarly, HUD's authority to refer private complaints to the Justice Department for prompt judicial action has been exercised only sparingly.[137] Rarely, if ever, has HUD proceeded against a respondent for violating the affirmative provisions of a decree or consent order, which means that the higher civil penalties that are available for second and third violations have not been invoked yet.[138] The FHAA requires HUD to publish a yearly report analyzing the state of fair housing in the Nation and providing statistics concerning the handling of HUD administrative complaints.[139] To date, these reports have not been issued in a timely manner nor have they candidly addressed the issues on which Congress sought guidance.[140] Meanwhile, the Department of Justice has yet to reverse the policy adhered to by the Reagan and Bush Administrations of not prosecuting discriminatory effect cases.[141] These examples make clear that if the Clinton Administration decides to be more aggressive than its predecessors in enforcing the Fair Housing Act, the role of the federal government in this field could expand even more dramatically.

All of this means that the federal government is in the process of evolving into a major force in fair housing law. While individual litigants, fair housing groups, and other public and private entities will continue to have major roles to play in fair housing enforcement, this responsibility will more and more come to be shared by

136. *See* THE STATE OF FAIR HOUSING 1991, *supra* note 60, at 8 (reporting that only two HUD-initiated complaints were filed in 1991, one of which was referred to the Justice Department). Not a single HUD-initiated complaint has yet resulted in an administrative charge, much less a hearing on the merits.

137. *Id.* at 17 (reporting than only four cases were referred by HUD to the Justice Department for prompt judicial action in 1991).

138. *See* 42 U.S.C. § 3612(g)(3) (1988) (providing for the higher penalties).

139. *See id.* § 3608(e)(2).

140. For example, the report for 1991 did not appear until May of 1993. *See* THE STATE OF FAIR HOUSING 1991, *supra* note 60. In violation of the statutory mandate, this report did not contain tabulations of the number of instances in which HUD investigations and "reasonable cause" determinations were not completed within the 100-day time limit, *compare id.* at 6, and failed to specify either the obstacles remaining to achieving equal housing opportunity or recommendations for further action. Indeed, despite the many problems that have characterized the initial implementation of the FHAA's administrative scheme, see *infra* notes 143-56 and accompanying text, the tone of the 1991 report was unabashedly up-beat, full of self-congratulatory descriptions of HUD's efforts in which every case closing and conciliation was "successfully" done, *e.g.*, *id.* at 6-7, and in which "significant progress" was made in dealing with the administrative case load. *Id.* at i. In short, a "Pollyanna" performance that disserves the Nation and violates the "straight talk" requirements that Congress wrote into the FHAA.

141. *See, e.g.*, Brief for the United States in Huntington Branch, NAACP v. Town of Huntington, 488 U.S. 15 (1988) (arguing that a showing of discriminatory effect does not prove a Title VIII violation); Schwemm, *supra* note 117, at n.117.

the federal government in the 1990s. This was the goal of the Congress that passed the FHAA. Only time will tell whether it proves to be a more effective way of advancing the policy of fair housing in the United States.[142]

V. THE HUD ADMINISTRATIVE PROCESS: PRACTICAL REALITIES

The system established by the FHAA for handling administrative complaints to HUD has now been in place for over four years, long enough to allow at least a preliminary evaluation of how it is working in practice. The reality is that the system has been beset by a myriad of problems, most of which have occurred in the stages before a "reasonable cause" determination is made.

Perhaps the most significant problem has been HUD's inability to conclude its investigation and make a reasonable cause determination within the 100-day period mandated by the FHAA. HUD has failed to meet this statutory deadline in well over half of its cases,[143] some of which have not reached the determination stage for many months or even years after the 100-day period.[144] Apart from defeating the FHAA's goal of prompt resolution of administrative complaints, such delays may lead to dismissal of meritorious complaints or at least to a reduction in the relief available.[145]

HUD's conciliation efforts in the pre-charge phase have also raised some serious questions. According to the courts, the FHAA's mandate that the agency engage in conciliation "to the extent feasible"[146] entitles the parties to an objectively reasonable effort by HUD to bring about a settlement of the charge.[147] HUD has failed to make this effort in some cases.[148] Even in cases that have been conciliated, the results have generally been so modest (an average payment to complainants of $826 in 1990 and of $970 in 1991[149]) that they amount to little more than what might be expected from a

142. *See* 42 U.S.C. § 3601 (1988).

143. *See supra* note 60 (discussing the number of cases in 1990 and 1991 whose investigation and charge phases were not completed within the 100-day time limit).

144. *See, e.g.*, United States v. Aspen Square Management Co., 817 F. Supp. 707, 709 (N.D. Ill. 1993) (HUD's reasonable cause determination occurred over 350 days after the statutory time limit had expired); United States v. Cannon, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 15,743, at 16,861 (D.S.C. 1992) (describing HUD's 700-day investigation as an "unconscionable" delay).

145. *See* cases cited *supra* note 62; *Aspen Square Management Co.*, 817 F. Supp. 707.

146. 42 U.S.C. § 3610(b).

147. *See, e.g.*, Morgan v. HUD, 985 F.2d 1451, 1456-57 (10th Cir. 1993); Baumgardner v. HUD, 960 F.2d 572, 579 (6th Cir. 1992).

148. *See, e.g.*, *Morgan*, 985 F.2d at 1456-57.

149. *See* THE STATE OF FAIR HOUSING 1991, *supra* note 60, at 7.

"strike suit."[150]

Other deficiencies have occurred in individual cases. In *Baumgardner v. HUD*,[151] for example, HUD failed to serve the complaint on the respondent within the statutorily mandated time period and then, due to its "procrastinations and mismanagement," delayed issuance of its final investigative report. The Sixth Circuit found these and other procedural errors "seriously troubling."[152] Though the court held that these errors did not require dismissal of the charge, it did decide that they justified reduction of the relief awarded against the respondent.[153]

It is hard to know whether the types of errors committed in *Baumgardner* are typical of HUD's pre-hearing performance or are aberrational. What is easy to predict, however, is that *Baumgardner* and similar decisions[154] will encourage respondents' attorneys to examine each case for such deficiencies and use those found as an additional basis for defending the case.

Another distressing fact about the HUD process is that only a tiny fraction of the complaints filed are actually ending up as HUD charges. In 1991, for example, HUD processed a total of 6,104 cases, of which 2,023 (or 33%) were conciliated, 1,026 (17%) were dismissed after a "no cause" finding, and only 157 (3%) resulted in a "cause" determination and therefore a charge.[155] The vast majority of the rest — 2,803 (or 46% of the total) — were categorized as "administrative closures" (i.e., dismissals for such reasons as HUD's inability to locate the complainant or to obtain essential information).[156]

For the relatively few cases that do get charged, the system seems to be working fairly well. Virtually all of these cases have been tried and decided within the brief time periods specified in the FHAA.[157] Furthermore, the HUD ALJ decisions — now numbering in the mid-40s[158] — have generally been of a high quality, with detailed findings and usually solid legal analysis. They represent

150. Not since the earliest years of Title VIII litigation have damage awards regularly been in the under-$1,000 range. *See supra* note 96 (discussing the size of compensatory damage awards).

151. 960 F.2d 572, 575-80 (6th Cir. 1992).

152. *Id.* at 579.

153. *Id.* at 579, 583.

154. *See, e.g.*, cases cited *supra* notes 144 & 148 (listing similar cases).

155. *See* THE STATE OF FAIR HOUSING 1991, *supra* note 60, at 7.

156. *Id.*

157. *See, e.g.*, *id.* at 15 (noting that all but one of the 16 hearings held in 1991 were commenced within the statutory time limit of 120 days after the charge, and all decisions were issued within the statutory time limit of 60 days after the hearing).

158. *See supra* note 70 (discussing the number of decisions rendered by A.L.J.s).

conscientious efforts that, though they obviously cannot please everyone, should leave a reasonable party with the feeling of having been given a fair hearing. The handful of judicial appeals resulting from these decisions have all affirmed the ALJs' determinations regarding liability,[159] although two courts have reduced the relief awarded.[160] The only real "institutional" problem to arise in this phase of the HUD process concerned the desire of some complainants to intervene late in the case in order to challenge an adverse ALJ decision more aggressively than their HUD lawyer was willing to do.[161] But even this conflict has generally been resolved without jeopardizing the complainants' ability to assert their rights.

One other disturbing aspect of the post-charge phase is the high rate of "elections" to federal court. Of the 157 charges issued by HUD in 1991, only 60 (or 38%) stayed in the administrative process, while 97 went to court as a result of elections (66 by respondents; 26 by complainants; and 5 by both).[162] This means that almost two-thirds of all HUD-charged cases ended up in court, where the FHAA's time limits for pre-trial work and post-trial decisions do not exist. The result is that a complainant who "survives" the HUD process through the charge phase is likely to end up exactly where he could have started without going through HUD (i.e., in a federal lawsuit), albeit with representation provided by the Justice Department. For complainants who have access to free legal services from another source (such as a fair housing organization), one has to wonder whether the FHAA's administrative process has any advantages.

This, then, is the ultimate challenge for the HUD process: whether it can be shown to have any significant advantages for a rational, well-informed complainant beyond the fact that it provides for free government lawyers. One of the difficulties in answering this question is the FHAA's mandatory referral procedure to state and local agencies with "substantially equivalent" fair housing laws.[163] By early 1993, about half of HUD's complaints were be-

159. *See* Morgan v. HUD, 985 F.2d 1451, 1457-58 (10th Cir. 1993); Edelstein v. HUD, 978 F.2d 1258 (6th Cir. 1992); Soules v. HUD, 967 F.2d 817 (2d Cir. 1992); Baumgardner v. HUD, 960 F.2d 572, 579 (6th Cir. 1992); HUD v. Blackwell, 908 F.2d 864, 870-72 (11th Cir. 1990).

160. *See Morgan*, 985 F.2d at 1458-61; *Baumgardner*, 960 F.2d at 580-84.

161. *See, e.g., Downs*, 2 Fair Housing—Fair Lending Rep. (P-H) ¶25,017 (A.L.J. 1990), *aff'd sub nom.* Soules v. HUD, 967 F.2d 817 (2d Cir. 1992) (granting intervention to aggrieved person after A.L.J.'s initial decision); Holiday Manor Estates Club, 2 Fair Housing—Fair Lending Rep. (P-H) ¶ 25,027, at 25,297-98 (HUD Secretary 1992).

162. *See* THE STATE OF FAIR HOUSING 1991, *supra* note 60, at 12.

163. *See supra* note 22 and accompanying text.

ing referred to such agencies.[164] This means that potential complainants in these jurisdictions have to compare their prospects in court not to HUD's performance, but to the likely performance of their local agency. For those cases that arise in other locales and therefore remain with HUD, it seems clear that the FHAA's administrative system cannot succeed unless HUD's performance in the pre-charge phase is substantially improved. Even if this were to happen during the Clinton Administration, the parties could only reap the benefits of the FHAA's strict time limits if neither elected to take the case to court. And election to court is the only way the complainant can collect punitive as well as actual damages.

Thus, the question remains: "Even assuming first-rate agency performance, does the HUD process have any real appeal to complainants other than those who simply have no practical alternative?" The information needed to answer this question will be provided by the experiences of thousands of fair housing complainants in the 1990s. If the answer is ultimately determined to be "No," then this process will require additional congressional attention.

VI. CONCLUDING THOUGHTS: THE LIMITS OF FAIR HOUSING LITIGATION

Imagine that this decade becomes a period of tremendous success in fair housing litigation: that is, that the HUD process is made to work as effectively as the proponents of the FHAA envisioned; that in both the administrative and judicial forums, prompt and effective relief is regularly awarded in response to all demonstrated violations of the law; and that housing providers, financial institutions, local governments, and other potential defendants — aware of the commands of the Fair Housing Act and its potential sanctions — virtually cease to engage in any conscious form of discrimination condemned by the Fair Housing Act. What would be the effect on America's housing markets? Would they become as free, open, and racially integrated as Title VIII's proponents anticipated?

Probably not, at least not for some years to come. The housing patterns in the United States and the high degree of racial segrega-

164. As of May 1, 1993, HUD had certified some 23 states and 15 localities as having "substantially equivalent" agencies for purposes of receiving case referrals under the FHAA. Telephone Interview with Sara Pratt, Deputy Assistant General Counsel for Fair Housing, U.S. Department of Housing & Urban Development (May 1, 1993). The 23 states were: Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Massachusetts, Missouri, Montana, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* These states accounted for about half of HUD's complaints in 1991. *See* THE STATE OF FAIR HOUSING 1991, *supra* note 60, at 36.

tion reflected in those patterns are the product of thousands of individual decisions that are made every day not only by housing providers and other "gatekeepers" in the housing market, but also by homeowners (about whether to move) and homeseekers (about where to locate). For most of this century, these decisions have been based on the assumption that race is an appropriate, relevant, and often controlling factor to be considered.[165] The Fair Housing Act sought to change this way of thinking, but the process of change has proved to be excruciatingly slow.

The statute's prohibitions focus on the gatekeepers' practices, not those of housing consumers, and even this focus has achieved only limited success. But while the levels of racial discrimination remain high — as shown by the 1991 *Housing Discrimination Study* and other recent studies[166] — the nature of that discrimination does seem to be changing. Outright refusals and misrepresentations are becoming less common. Problems now tend to take the form of poorer service later in the search process as realtors, rental agents, and loan officers "go the extra mile" for customers of their own race but not for others.[167] Some of this discrimination may not even be conscious. This is not to say that it is not illegal under Title VIII or that it is not a source of real difficulties for minority homeseekers, but only to suggest that counter-acting such discrimination may require strategies that go beyond litigation, such as education, sensitivity training, and affirmative efforts to employ more minorities in gatekeeper jobs.

Even if the gatekeepers cease all discrimination, there is still the problem of housing consumers believing that race should guide their decisions. There are two aspects to this problem. One is that minority homeseekers will continue to believe that they face discrimination and hostility in predominantly white areas even after that belief is no longer warranted, and will therefore impose some

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165. *See, e.g.*, MASSEY & DENTON, *supra* note 8; Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339 (1988).

166. *See supra* note 6 (discussing studies of the overall national incidence of housing discrimination).

167. For example, in the Justice Department's mortgage discrimination case against Decatur Federal, see *supra* note 110, the evidence showed that the defendant's loan officers treated white and black applicants equally if they were either clearly creditworthy or clearly not creditworthy, with the discrimination occurring among the "marginal" applicants (e.g., by a loan officer suggesting to a marginal white applicant that his loan could be approved if he were first to reduce his credit card debt, but not offering this same helpful suggestion to a marginal black applicant). *See* Statement of Acting Assistant Attorney General James P. Turner, Civil Rights Division, U.S. Department of Justice, 8-11, *in Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs Concerning Mortgage Lending Discrimination*, 103d Cong., 1st Sess. (Feb. 24, 1993) (describing the tendency of loan officers to provide greater assistance to marginally qualified borrowers of their own race).

unnecessary limits on their own home searches that, in the aggregate, have the effect of perpetuating racial segregation. The second, and perhaps more important, aspect of the problem is that homeseekers of all races — even in a totally nondiscriminatory market — will prefer to live in neighborhoods where their own race predominates and will be willing to express this preference by paying a premium for homes in such neighborhoods, thereby making stable integration impossible in a free-market system.[168]

The perceptions that drive such behavior depend on a variety of factors, not the least of which is how the media portray the races and race relations in this country. One of the striking features to me of the media's coverage of the unrest following the first Rodney King verdict was their facile use of the terms "black," "Hispanic," and "white" (or "Anglo") to describe various Los Angeles neighborhoods, as if such ethnic divisions were the natural order of things instead of something to be marvelled at twenty-four years after the passage of the Fair Housing Act. Or, to take a more positive example of the media's influence, it may be that one "Bill Cosby Show" can accomplish as much encouragement of residential integration as scores of Title VIII lawsuits.[169]

The point is that effective litigation, though a necessary element in the effort to accomplish Title VIII's goal of making race truly irrelevant in America's housing decisions, is only one piece of the puzzle. Those outside the legal community may have as much to offer as those in law enforcement.

I do not mean to suggest that effective enforcement of the Fair Housing Act is not a worthwhile endeavor. Clearly, it is. Over time, laws and litigation can change behavior and can even influence beliefs. The fact that this process in the fair housing field has proved to be difficult, complex, and very slow only serves to reinforce its importance to the Nation. Recent events in Los Angeles, eastern Europe, and elsewhere around the world bear grim witness

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168. See remarks of Robert Ellickson, discussing, *inter alia*, Thomas Schelling, *Micromotives and Macrobehavior* (1978), *in* ROBERT G. SCHWEMM, ED., THE FAIR HOUSING ACT AFTER TWENTY YEARS: A CONFERENCE AT THE YALE LAW SCHOOL 59-60 (1989).

169. Professor Ellickson has stated that:

> It is possible that someone like Bill Cosby will do more for fair housing than will all the lawyers in this room put together. The Bill Cosby Show is a highly popular television series. And by gosh, Bill Cosby's family is just like every other family, except, of course, that the family members are funnier and have more interesting things happen to them. Because the Cosby family is an ordinary family, a lot of white viewers who might otherwise think, "Gee, we don't want blacks in our neighborhood," might decide, "Hey, the members of the Cosby family would be dynamite neighbors!" This sort of change in household preferences would alter the likelihood of neighborhood tipping.

Id. at 61.

to the fact that ethnically diverse societies may unravel in violence if their peoples cannot learn to live together. This fact was well understood by the proponents of the original Fair Housing Act, although they surely failed to appreciate just how hard it would be for America to replace its ethnic ghettos by truly integrated and balanced living patterns. Whether litigation under the FHAA and non-litigation strategies can accelerate this process, so tentatively begun by Title VIII a quarter century ago, will be the principal fair housing issue of the 1990s.