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Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act

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DESEGREGATION THROUGH PRIVATE LITIGATION:
USING EQUITABLE REMEDIES TO ACHIEVE THE
PURPOSES OF THE FAIR HOUSING ACT

Margalynne Armstrong*

INTRODUCTION

In a national housing discrimination study, the Department of Housing and Urban Development ("HUD") concluded that African-American homeseekers who visit four real estate agents can expect to encounter discrimination seventy-two percent of the time when attempting to rent and forty-eight percent of the time when seeking to purchase housing.1 In one urban area of the United States, there is at best a nine percent chance that an African-American homebuyer who visits seven realtors will not encounter discrimination.2

The impact of such widespread housing discrimination goes beyond depriving access to individual units of housing. The discriminator's refusal to consider the personal merit of the housing applicant denigrates the homeseeker's individual identity.3 Housing discrimination also denies African-Americans access to the mainstream of American society and to the rewards of the American work ethic. Americans are supposed to be free to live wherever they can afford to live. By depriving free choice of housing, discrimination prevents individuals from reaping the rewards of their labor. In the words of one victim: "I don't think I should have to go through that in this day and age. We work hard every day. We figure we should be able to live anywhere we want."4

Housing discrimination results in residential segregation and ultimately sustains segregated public education. Private residential segregation may undo the results of years of school desegregation efforts, particularly after the United

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2. LEGISLATIVE HISTORY, supra note 1, at 15, reprinted in 1988 U.S.C.C.A.N. at 2176 (citing Boston, Mass. study reporting 91-98% probability that black homebuyers visiting seven realtors would encounter discrimination).

3. See infra notes 40-51 and accompanying text for a discussion of how individual discriminatory acts often result in group injuries.

States Supreme Court’s decision in Board of Education v. Dowell. As the federal courts consider requests to dismantle longstanding school desegregation decrees, school districts may now successfully cite residential segregation as the culprit currently responsible for one-race schools. Formerly segregated dual school systems may revert once again to one-race schools because of residential patterns.

Housing discrimination is prevalent across the United States in spite of Congress’s longstanding prohibition against such conduct. More than twenty years ago, Congress enacted the Fair Housing Provisions (Title VIII) of the Civil Rights Act of 1968 to bar racial discrimination in the sale or rental of real property. The Fair Housing Act’s (“FHA”) goals included fostering housing integration and the eradication of residential segregation in addition to outlawing discrimination. Title VIII is enforced primarily through lawsuits initiated by individual victims of discrimination or by fair housing organizations. The original Act limited punitive damages awards and the availability of attorney’s fees. Commentators frequently cited these limitations as the primary reasons that Title VIII was not effective in eradicating housing discrimination. Two decades later, Congress responded by passing the Fair Housing Amendments Act of 1988 (“1988 Amendments”). These Amendments eliminated the re-

5. 111 S. Ct. 630 (1991). Dowell involved a school district’s proposed student assignment plan that, due to residential segregation, resulted in a number of one-race schools. The Dowell Court wrote,

Dissolving a school desegregation decree after the local school authorities have operated in compliance with it for a reasonable period of time recognizes that “necessary concern for the important values of local control of public school systems dictates that a federal court’s regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.”

Id. at 637 (citations omitted).


7. See infra notes 35-36 and accompanying text for a discussion of the goals of the Fair Housing Act and its amendments.

8. Although Title VIII provides for federal enforcement when the defendant has engaged in a pattern or practice of housing discrimination, federal enforcement of Title VIII is “severely limited.” LEGISLATIVE HISTORY, supra note 1, at 16, reprinted in 1988 U.S.C.C.A.N. at 2177. During the 1980s, the Justice Department prosecuted only a handful of Title VIII cases, including a challenge to a consent decree entered in a case opposing an integration maintenance program. James A. Kushner, An Unfinished Agenda: The Federal Fair Housing Enforcement Effort, 6 YALE L. & POL’Y REV. 348 (1988). See infra note 23 and accompanying text for a discussion of federal enforcement of “pattern and practice” cases.

9. 42 U.S.C. § 3612(c) (before amendment).

10. See LEGISLATIVE HISTORY, supra note 1, at 16, reprinted in 1988 U.S.C.C.A.N. at 2177. Although weak remedies were part of Title VIII’s ineffectiveness, this article will examine other aspects of the Act that thwart its ability to achieve desegregation. See infra notes 54-57 and accompanying text for a discussion of the limitations inherent in executing federal policy primarily through individual enforcement efforts.

strictions on attorney's fees and punitive damages and provided an administrative adjudication option for housing discrimination complainants. Although the 1988 Amendments were designed to increase Title VIII's effectiveness in combating individual acts of housing discrimination, Congress failed to address the inherent limitations in using private litigation as a means of correcting the public problem of housing discrimination. The 1988 Amendments failed to address the fact that individual causes of action have had little impact on residential segregation during Title VIII's twenty-two year history.

The Civil Rights Act of 1968 and the Fair Housing Amendments Act of 1988 probably can never completely eradicate the national problem of housing segregation, but has often been seen as just the way it happens to be, as just facts, not as discrimination. When discrimination in one area of society creates inequality in other areas, that segregation within either (the black or white) racial community is about the same, and is half as great as the requirements necessary to obtain housing in currently segregated neighborhoods have played a major part in stemming any substantial shifts in minority residential patterns. However, "[b]lack segregation . . . [remains] high across all levels of socioeconomic status whether measured in terms of education, income or occupation." The fair housing movement has focused primarily on the process of transferring individual units of housing from whites to blacks, but has often neglected the larger issue of how integrated neighborhoods are created and maintained . . . If integration resulted from the simple transfer of housing units from blacks to whites, segregation would have substantially diminished during the 1970's . . . . But in the large majority of cases integration did not persist because of resegregation. Id.; see also Richard Sander, Comment, Individual Rights and Demographic Realities: The Problem of Fair Housing, 82 NW. U. L. REV. 874, 894 (1988) (footnote omitted).

Of course, societal factors other than housing discrimination are also instrumental in perpetuating the residential segregation of African-Americans. For example, employment status and income requirements necessary to obtain housing in currently segregated neighborhoods have played a major role in any substantial shifts in minority residential patterns. However, "[b]lack segregation . . . [remains] high across all levels of socioeconomic status whether measured in terms of education, income or occupation." LEGISLATIVE HISTORY, supra note 1, at 16, reprinted in 1988 U.S.C.C.A.N. at 2177 (footnote omitted). Furthermore, "the amount of occupational segregation within either (the black or white) racial community is about the same, and is half as great as the segregation between blacks and whites for any occupational group. D. Garth Taylor, Housing, Neighborhoods and Race Relations: Recent Survey Evidence, 441 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 36-37 (1979). Courts tend to apply a circular approach to cases involving racial and ethnic discrimination. "When discrimination in one area of society creates inequality in other areas, that has often been seen as just the way it happens to be, as just facts, not as discrimination." CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 64 (1987).
segregation because they fail to attack the evil in a systematic manner. Using private litigation to address residential segregation results in treating the problem as one of individual access rather than as illegal activity aimed at a segment of society. However, racial discrimination in housing access affects not only the individual who has been denied a specific housing unit, but creates and maintains segregated neighborhoods, areas, and schools. Too often, an individual action against a fair housing violation ignores the larger dynamics and consequences of racial discrimination.16 Although a particular act of discrimination falls most directly upon the individual victim, the discrimination is aimed at, and impacts, the entire minority group to which the individual belongs.17

Nevertheless, Congress relied on private litigation as the principal tool for dismantling residential segregation.18 This article discusses private fair housing litigation initiated by individual plaintiffs and examines why the relief awarded is often incapable of remedying residential segregation. The article then proposes that all individual litigants who bring Title VIII cases should obtain equitable relief that will help achieve desegregation more rapidly. The article suggests that group-oriented relief can be granted in individual cases in a manner that can be reconciled with prevailing conceptions of statutory and constitutional civil rights. Finally, it concludes that remedies for violations of Title VIII should recognize the impact of the individual discriminatory act on the entire minority community as well as the harm done to the individual victim. If expansive equitable relief is awarded regularly, even individual lawsuits could work to increase the pace of housing desegregation.

I. GOALS AND WEAKNESSES OF TITLE VIII

Title VIII prohibits discrimination on the basis of race, color, or national origin in most housing sales and rentals. From the outset, however, Title VIII was riddled with deficiencies. First, about twenty percent of the country's housing transactions were not affected by the 1968 law.19 Second, the political compromises necessary to pass the 1968 Act resulted in ineffective and inefficient enforcement provisions.20 Victims of discrimination could file administrative

16. The relationship between housing discrimination and segregated schools, neighborhoods, and areas is noted in A COMMON DESTINY, BLACKS AND AMERICAN SOCIETY 225 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter COMMON DESTINY].
17. See infra notes 40-51 and accompanying text for a discussion of the intended and collateral effects of housing discrimination on minorities as a group.
18. Trafficante v. Metropolitan Life Ins., 409 U.S. 205, 211 (1972). "The main generating force [of Title VIII enforcement] must be private suits in which... the complainants act not only in their own behalf, but also as private attorney generals in vindicating a policy that Congress considered to be of the highest priority." Id.
19. Metcalf, supra note 15, at 3. Owner conducted sales of single family houses were exempt if the seller owned no more than three such houses and did not use any printed or published advertisements to sell the property. 42 U.S.C. § 3603(b)(1). Also exempt were rentals in dwellings that contained no more than four separate units. Id. § 3603(b)(2).
21. See Robert W. Lake, The Fair Housing Act in a Discriminatory Market, 47 AM. PLANNING
complaints with HUD, but HUD’s authority was limited to providing non-bind-
ing mediation only. Government-initiated enforcement of Title VIII was pos-
sible, but was limited to “pattern and practice” lawsuits prosecuted by the
Justice Department.

Title VIII’s final weakness was its remedial provisions. Although compen-
satory damages were available, these damages were often inadequate. Punitive
damages were also available, but limited by a ceiling of $1,000. Moreover,
attorney’s fees were available only when the plaintiff was not “financially able to
assume attorney’s fees.” Thus, the Fair Housing Act thwarted the incentive to
bring housing discrimination actions by requiring the victims, rather than the
government or the violators, to bear the costs of Title VIII’s enforcement.

When the victim’s uncompensated costs of time and emotional involvement are
factored in, it is easy to understand why Title VIII’s remedies were widely con-
sidered to be inadequate.

Congress had considered several proposals to amend Title VIII in the late
1970s and early 1980s, but abandoned these proposals prior to vote. In some

Ass’n J. 48, 50 (1981). “[Title VIII] moves to reduce discrimination through application of negative
sanctions in individual cases. This case-by-case approach is not cumulative, in that favorable resolu-
tion of one case has no direct impact on other instances of discrimination.” Id. See also Metcalf,
supra note 15, at 86; Deborah Kemp, The 1968 Fair Housing Act: Have Its Goals Been Accom-

22. 42 U.S.C. § 3610(a) (before amendment).

23. “Pattern and practice” cases are authorized
whenever the Attorney General has reasonable cause to believe that a person or group of
persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the
rights granted by this subchapter, or that any group of persons has been denied any of the
rights granted by this subchapter and such denial raises an issue of general public impor-
tance ....

Id. § 3613.

Pattern and practice lawsuits are based on repeated violations of Title VIII and, therefore,
require compilation and verification of victims and illegal acts of discrimination. The targets of
pattern and practice litigation are generally developers, owners, or managers of large housing com-
plexes. Although individual owners or corporations may own hundreds of units, the provision of
housing tends to be decentralized. Thus, pattern and practice litigation is directed at only a small
segment of housing providers. See Robert G. Schwemm, Housing Discrimination Law 282-
300 (1983) and cases discussed therein.

ney’s Fees for Violations of the Civil Rights Act of 1866 and the Fair Housing Act of 1968, 10 SUFFOLK
compensatory damages cannot cover the full range of losses incurred when housing is denied.

25. 42 U.S.C. § 3612(c) (before amendment).

26. Id. “The court may grant as relief . . . 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.” Id.

27. Lake, supra note 21, at 50. In considering the 1988 Amendments Act, the House Judiciary
Committee believed that “the limit on punitive damages served as a major impediment to imposing
an effective deterrent on violators and a disincentive for private persons to bring suits under the

28. See, e.g., James Kushner, The Fair Housing Amendments Act of 1988: The Second Genera-

29. In 1979, Representatives Drinen and Edwards introduced legislation to amend the Fair
instances, the proposed amendments were too ineffectual to garner the support of fair housing advocates.\(^3\)\(^0\) In other instances, it was apparent that the proposed amendments lacked the support of a congressional majority.\(^3\)\(^1\) By the late 1980s, however, both major political parties had decried the inadequacies of Title VIII.\(^3\)\(^2\) Even then-President Reagan called for some sort of reform of the 1968 Act.\(^3\)\(^3\)

Finally, in 1988, Congress amended Title VIII after reviewing extensive evidence of continued housing discrimination in the United States.\(^3\)\(^4\) Congress identified the elimination of both individual acts of discrimination and residential segregation in general as goals of the amended Act, thereby reaffirming congressional recognition of the dual nature of housing discrimination.\(^3\)\(^5\) Despite Congress's understanding of the larger problem of residential segregation, how-

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30. Metcalf, supra note 15, at 17; see also Kushner, supra note 29, § 10.04. (discussing early proposals to amend 1968 Fair Housing Act).
32. See Legislative History, supra note 1, at 16, reprinted in 1988 U.S.C.C.A.N. at 2177 ("There is bipartisan agreement that a change needs to be made to the Fair Housing Act.").
33. President Reagan stated that "the Fair Housing Act has delivered short of its promise because of a gap in its enforcement mechanism . . . . Reform of the fair housing act is a necessity that is acknowledged by all." Legislative History, supra note 1, at 16-17, reprinted in 1988 U.S.C.C.A.N. at 2177-78 (footnote omitted). President Reagan's proposals to amend Title VIII were criticized as "rhetorical." Metcalf, supra note 15, at 17. Nonetheless, the Reagan Justice Department opposed the final version of the FHA. William B. Reynolds, The Fair Housing Act of 1987, 67 Cong. Dig. 171 (June-July, 1988). The Reagan administration opposed enacting the FHA Amendments Act because it disapproved of the provisions for administrative adjudication and the addition of familial status as a protected classification. The Department of Justice asserted that administrative proceedings would not provide speedy resolution of disputes and would unconstitutionally limit the right to a jury trial. The Department contended also that discrimination on the basis of family status was not "wholly arbitrary." Id. at 175. See also Hearings on S.588 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 761-75 (1988) [hereinafter Subcommittee Hearings] (statement of William Bradford Reynolds). Given the administration's lack of support and a political climate that generally seemed disinterested in, or actively hostile towards, civil rights, it is remarkable that the Fair Housing Amendments Act was passed. The legislation may have been helped by the fact that the vote occurred during a presidential election year at a time when the race appeared close. See House Backs Move to Strengthen Enforcement of Housing Rights, N.Y. Times, June 30, 1988, at A10 (legislative and political background of Fair Housing Reform).
34. See, e.g., Subcommittee Hearings, supra note 33 (discussing defects of 1968 Fair Housing Act).
35. In its discussion of why Title VIII needed to be amended, the House Judiciary Committee noted that blacks continue to experience very high levels of residential segregation. Legislative History, supra note 1, at 16, reprinted in 1988 U.S.C.C.A.N. at 2177. The U.S. Supreme Court recognized the desegregation purposes of Title VIII: "Senator Mondale who drafted Sec. 810(a) said, the reach of the proposed law was to replace the ghettos by truly integrated and balanced living patterns." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972). Other Fair Housing Act cases also have cited integration as a goal of the Act. See, e.g., Smith v. Town of Clarkson, N.C., 682 F.2d 1055, 1068 (4th Cir. 1982) ("One purpose of the Fair Housing Act is to encourage fair housing practices throughout the United States and to replace 'the ghettos . . . by truly integrated
ever, the 1988 Amendments retained the individual cause of action as the primary means of correcting the evils caused by Title VIII violations. The individual cause of action has been used primarily to combat only individual acts of housing discrimination. As discussed below, however, private enforcement may also be used to remedy patterns of residential segregation, if the courts can be persuaded to take a more expansive view of the role of equitable remedies in Title VIII litigation.

A. The Individual Action Approach in Fair Housing Enforcement

The case method of dispute resolution traditionally invokes the court's authority over only the individuals or companies named as parties. In Title VIII actions, while case law provides a few exceptions, the courts too often extend relief only to the specific parties to the individual litigation. The individual cause of action addresses neither the conditions that may have generated, or be generated by, the dispute nor the societal repercussions of the illegal act. Individual litigation focuses only on adjusting the interaction between the litigants. Because Congress recognized residential segregation as a national problem and provided Title VIII as a tool to combat that problem, fair housing litigation must expand its focus to recognize and remedy segregated conditions. Title VIII actions should seek to remedy segregation, even when the plaintiffs who brought the suit would not be the direct beneficiaries of orders to integrate.

The individual cause of action may, at first glance, seem an appropriate means of addressing racial discrimination in the provision of housing because


36. Robin West has described this approach, which focuses on the legal rights and protection of the individual, in terms of traditional "liberal legal theory." Under liberal legal theory the law inhibits autonomy only to the extent that an individual's acts of autonomy interfere with the right that another individual has to her own autonomy. Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 2 (1988). Standing requirements focus on the injury to the individual and require such individualized impact as a means of controlling the floodgates of litigation. "Distinct and palpable injury remains the minimal constitutional requirement for standing in a federal court." Havens Realty Corp. v. Coleman, 455 U.S. 363, 382 (1982) (Powell, J., concurring). Standing requirements, however, do not mandate limiting the remedy of injunction to orders that benefit only the named plaintiffs. For example, in McHaney v. Spears, 526 F. Supp. 566, 574-75 (W.D. Tenn. 1981), the court recommended a final decree that would order the defendant to convey the parcel that was the subject of the litigation to the plaintiff and enjoin discrimination against other prospective purchasers.

37. Kimberlé Williams Crenshaw has criticized the narrow, individualized focus that the U.S. Supreme Court has applied in recent cases involving racial discrimination. Crenshaw believes that "the search for a particular perpetrator is not as important as seeking to remedy the conditions which render the community in question subordinate to whites." Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 NAT'L BLACK L.J. 1, 11 (1989).

Note that focusing on protecting individual rights, rather than on curing the condition of segregation, has been used in a Justice Department pattern and practice suit to thwart programs designed to maintain integration. United States v. Starrett City Assocs., 660 F. Supp. 668 (E.D.N.Y. 1987), aff'd, 840 F.2d 1096, cert. denied, 488 U.S. 946 (1988). See infra note 51 and accompanying text for a discussion of the conceptual underpinnings of integration maintenance measures.
housing is obtained in individual transactions. Each transfer of housing involves highly personal decisions with important financial ramifications for both the homeseeker and seller or the lessor and lessee.\textsuperscript{38} However, when the dynamics of housing discrimination are more closely examined, the individual harm/individual victim approach is clearly inapposite for two reasons. First, racism and discriminatory behavior are essentially group-oriented. Second, individual acts of discrimination result, in the aggregate, in larger social problems. Individual acts and decisions create and perpetuate the residential segregation of entire areas, not just individual segregated units or buildings within generally integrated areas.\textsuperscript{39}

1. Individual Action; Group Injury

Racial discrimination in housing deprives an individual of access to housing without consideration of her individual attributes.\textsuperscript{40} Notions of group characteristics form the basis for the decision to discriminate.\textsuperscript{41} Each member of the homeseeker's racial group is interchangeable because, in the eyes of the discriminator, the individual victim represents the whole of her race.\textsuperscript{42} The perpetrator connects the object of his bias to his perceptions of people who are completely external to the transaction. However, Congress has prohibited the use of such irrelevant considerations in individual housing transactions.\textsuperscript{43}

The Fair Housing Act recognizes that racial discrimination does not exist in a vacuum. Although a violation of the Fair Housing Act may be directed at

\textsuperscript{38} The lessor generally intends to create a long-term, ongoing relationship with the lessee because high tenant turnover is not usually economically efficient to the landlord. National surveys show that lessors can lose up to three months rental income between the time one tenant moves out and another moves in. Other expenses incurred from tenant turnover include advertising, cleaning, painting, and paperwork. DANIEL GOODWIN & RICHARD RUSDORF, THE LANDLORD'S HANDBOOK—A COMPLETE GUIDE TO MANAGING SMALL RESIDENTIAL PROPERTIES 20 (1989).

\textsuperscript{39} The prevalence and isolation of segregated minority areas is discussed in Douglas S. Massey & Nancy A. Denton, Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions, 26 DEMOGRAPHY 373 passim (Aug. 1989). See also infra note 51 and accompanying text for a discussion of the tendency for integrated neighborhoods to become segregated minority neighborhoods.

\textsuperscript{40} "By definition, discrimination means to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." Walnut Creek Manor v. Fair Employment & Hous. Comm'n, 267 Cal. Rptr. 645, 660 (Cal. App. 1 Dist. 1990), rev'd in part, 284 Cal. Rptr. 718 (Cal. 1991). See also Patricia Williams, Spirit-Murdering the Messenger, 42 U. MIAMI L. REV. 127 (1987) (contemporary view on persuasive nature of racial discrimination).

\textsuperscript{41} "Residential mixing is a particularly salient threat to whites' status and neighborhood values because blacks of the same social status are usually believed to have value characteristics of persons of lower social status." Taylor, supra note 15, at 36 (emphasis in original).

\textsuperscript{42} Both Congress and the United States Supreme Court have recognized the group impact of racial discrimination. In Trafficante v. Metropolitan Life Ins., the Court wrote: "The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill [Title VIII], 'the whole community.' " 409 U.S. 205, 211 (1972).

\textsuperscript{43} Although not all housing transactions are covered by Title VIII, see supra text accompanying note 19, the Civil Rights Act of 1866 provides, in part: "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." 42 U.S.C. § 1982 (1988).
an individual victim or family, the injury tends to have a cumulative impact on other members of the minority group. Because housing discrimination victims are denied equal opportunity to participate in the housing market their housing alternatives are necessarily diminished. The minority homeseeker is forced into a housing market that contains fewer choices. Because other minority members are similarly treated, due to their group affiliation, the competition for the accessible housing increases. When denied the ability to move into majority neighborhoods, minorities are left with only the alternatives of residing within segregated minority neighborhoods or within the relatively scarce integrated neighborhoods. Thus, individual acts of discrimination affect the racial group as a whole.

Because minorities are denied access to housing in majority segregated neighborhoods, there is often a high demand among people of color for residences in integrated neighborhoods. Thus, when Caucasians move out of the area, people of color are likely to purchase or rent the vacated dwellings, because minorities who seek the advantages of integrated neighborhoods are often willing to pay more for the housing than are white consumers. Moreover, minori-

44. Although discrimination injures the entire minority group, there is little reason to bring a class action suit when only an individual is denied housing. The injury experienced by both the complainant and the group could be addressed by equitable relief that corrects residential segregation. Title VIII, however, does not bar class action litigation under appropriate circumstances.


46. The cumulative impact of individual acts of discrimination inhibits the formation of integrated neighborhoods. However, there may be some benefits, primarily of political representation, to the concentration of minorities in a given area. For a discussion opposing integration as an end in and of itself, see Ankur J. Goel, Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing, 22 URB. LAW. 369, 388-95 (1990) (critically discussing different premises underlying integration and non-segregation); see also Francis F. Piven & Richard A. Cloward, The Case Against Urban Desegregation, in HOUSING URBAN AMERICA 100, 105-07 (Py-noos et al., eds., 1973) (discussing educational segregation, concluding that racially heterogeneous schools are probably superior, but equalizing teacher and program quality are more important goals).

47. "Most families who prefer integrated neighborhoods do so on a . . . pragmatic basis—the conviction that white decision makers will channel more real resources, rewards, and recognition to institutions and communities serving significant numbers of influential whites as well as blacks." G. Orfield, The Movement for Housing Integration, in HOUSING DESEGREGATION AND FEDERAL POLICY 26 (1986).

48. See Anthony Downs, An Economic Analysis of Property Values and Race (Laurenti), in HOUSING URBAN AMERICA, supra note 46, at 267-70 (when given area of middle price housing becomes integrated, increased intensity of demand from non-white segment of population tends to raise prices relative to similar housing still in white market segment). See also Sander, supra note 15, at 895 (in 1940s through 1960s, black demand for housing in integrated areas caused purchase prices to increase). Paradoxically, because minorities have incentives to pay more than whites for the housing in integrated areas, the minorities are more likely to successfully compete for these units. However, minorities are excluded from even competing for the housing in majority segregated areas and have fewer total housing options than white homeseekers.
ties tend also to replace other minorities who leave the area. This turnover causes what is known as the “tipping” phenomenon, whereby whites flee integrated neighborhoods when they believe that minorities will soon compose the predominant percentage of the neighborhood’s population. Very often, integrated neighborhoods eventually become segregated minority neighborhoods. Racial discrimination in the provision of housing thus has an inescapable impact on the housing available to minorities.

Because individual acts of racial discrimination target and impact the entire racial group, fair housing legislation should provide a remedial system that addresses the injuries done to the group as a whole, as well as the individual victim. In many cases, the relief that would actually achieve the goal of integration—

49. The vast majority of homes sold by African-Americans are purchased by other African-Americans. African-American homeowners tend to receive less for their property; thus the housing discrimination that discourages whites from purchasing in integrated areas limits the value of the minority homeowners’ equity. Goel, supra note 46, at 402-03.


51. Several federal court decisions and numerous scholarly works have examined housing authority and local government measures that attempt to combat “white flight” and maintain integrated housing by imposing racial quotas on the area or project’s population. See, e.g., United States v. Starrett City Assocs., 840 F.2d 1096, 1103 (2d Cir.), cert. denied, 488 U.S. 946 (1988) (Title VIII prevents indefinite use of racial quotas to maintain integration); United States v. Charlottesville Redev. & Hous. Auth., 718 F. Supp. 461, 471 (W.D. Va. 1986) (racially preferential housing assignments to maintain integration impermissible). See also Bishop, supra note 50, at 1237, 1242-45 (describing quota systems and reviewing legal challenges to them); Goel, supra note 46, at 403-06 (analyzing ceiling quotas used to maintain integration). These measures are designed to stem white flight by assuring white residents of integrated areas or projects that the minority population will never grow beyond a certain percentage. Furthermore, in order to maintain an integrated population, persons that left the area would be replaced by persons of the same race through assigning priority to applications on the basis of race.

Integration maintenance measures, however, are offensive in that they seem to recognize some sort of legitimacy or interest in white majoritarianism. They also raise disturbing questions of entitlement and enforcement of entitlement rights. (Would a white resident have any rights to obtain an order to enforce the program if the percentage of minorities in the project passed the designated integration maintenance number?) These measures set a dangerous precedent, creating and maintaining expectations that the government will protect some interests in remaining the racial majority in particular geographic areas.

If Title VIII were enforced more consistently, the tipping phenomenon that transforms integrated neighborhoods into segregated areas would not occur because there would be few communities to which whites could move to escape integration. Increasing the scarcity of segregated areas should theoretically make the price of housing in such neighborhoods prohibitive to much of the white population fleeing integration. To avoid the need for discriminatory integration maintenance measures, institutional Title VIII enforcement efforts must be directed towards integrating neighborhoods that have served as havens of segregation.

Although the use of racial quotas to maintain integration should be scrutinized warily, the Department of Justice’s “practice and pattern” litigation resources should not be focused on dismantling integration maintenance programs. It is sheer hypocrisy to use the Department of Justice’s limited fair housing enforcement resources in integrated areas when there remain numerous communities that are entirely closed to minorities. See generally Kushner, supra note 28, at 1115-16 (reviewing Justice Department arguments in case challenging ceiling quota).
provision of the denied housing—is of no use to the plaintiff. Frequently, the homeseeker has already found a substitute unit because the need for housing cannot await the litigation's final outcome. Unless the tribunal is permitted to order the defendant to integrate the housing with persons other than the plaintiff, the housing is likely to remain segregated at the conclusion of the proceedings. Because the individual cause of action is Title VIII's primary enforcement mechanism, judges who hear fair housing cases should use their authority to provide effective remedial options. Further, because Title VIII consent decrees can be tailored to provide integrated housing for minority members other than parties to the action, plaintiffs should refuse to settle for only individual relief.

2. Congress's Selection of Individual Enforcement

Relying on individual citizens to enforce federal policies presents a number of barriers to achieving the legislative goal of integration. One problem lies in the slow pace of litigation. A case-by-case approach is, inherently, a gradual process. Another limit to effectiveness is that enforcement must be initiated by victims generally not trained to detect violations. This limitation is crucial because persons who engage in housing discrimination are increasingly unlikely to do so in an overt manner. Furthermore, relying on individual action allows persons who oppose the law to disobey or disregard it until another individual acts to stop them. The lack of concerted governmental enforcement efforts encourages noncompliance with the law. When enforcement is relatively uncertain, violators are more likely to risk that their violations will not be prosecuted or that such prosecutions will be unsuccessful.

There are, of course, many reasons why Congress chose the individual

52. See, e.g., Miller v. Apartments & Homes of New Jersey, 646 F.2d 101, 104 (3d Cir. 1981) (when defendants refused to rent apartment to plaintiff, plaintiffs forced to stay with relatives briefly before they could find housing); Lucas v. Hooper, 381 F. Supp. 1222, 1225 (M.D. Tenn. 1974) (plaintiffs found and purchased another piece of property located in general area), cert. denied, 455 U.S. 942 (1982).

53. It is very important that plaintiffs who opt to settle their litigation demand that the defendant consent to an order to integrate the housing. The 1988 Amendments give plaintiffs more leverage to insist upon such a settlement; if the defendant goes to trial and loses, not only is an order prohibiting discrimination likely but the defendant may also be liable for plaintiff's attorney's fees and punitive damages. Thus, the defendant risks a much higher judgment if she refuses to settle. Moreover, stipulated judgments can subject the defendant to contempt proceedings if she should violate the order in the future. See, e.g., Spallone v. United States, 493 U.S. 265, 280 (1990) (contempt sanctions may be issued against individual city council members if contempt sanctions imposed against city to force compliance with desegregation consent decree fail).


55. Even "pattern and practice" actions pursued by the Department of Justice were of limited effectiveness. By the early 1980s most of the "pattern and practice" cases were settled in pretrial consent agreements where the defendant did not admit guilt. Although the defendants promised future compliance, it was difficult to enforce the consent decrees. Lake, supra note 21, at 50.

56. Not every plaintiff who deserves to prevail does so. Additionally, the defendant, as the owner of housing stock, is more likely to have the financial resources to "out-litigate" the plaintiff. For an example of a guilty defendant prevailing at the trial level, see Marable v. H. Walker & Assoc.,
cause of action as the primary means of enforcing the Fair Housing Act. Congress may have been motivated by fiscal constraints. The individual cause of action is a process that requires only indirect governmental financial support; government expenditures are channeled into the judicial or administrative branches rather than into direct enforcement procedures. Individual litigation also allows the government to divert some of the criticism that accompanies just but unpopular legislation. Whatever the failings of individual actions may be, Congress is not likely to take a more direct approach to solving the problem of residential segregation caused by the actions of private individuals, due to fiscal constraints and to a perception that housing integration is not important to the general majority public.57

Congress's decision to limit the redress of residential segregation primarily to individual action is ironic given the federal government's involvement in the creation and maintenance of segregated private housing prior to the enactment of Title VIII. Federal policy encouraged and sustained residential segregation until the 1960s. For example, federal mortgage insurance underwriters were instructed to give low ratings to, or reject, properties located in neighborhoods that evidenced the "infiltration of inharmonious racial or nationality groups."58 After the Second World War, the FHA and VA routinely denied loan applications for dwellings located in integrated or predominantly minority neighborhoods.59 Furthermore, the FHA encouraged purchasers to include racially restrictive covenants and "appropriate provisions for their enforcement" in deeds for property protected by federal mortgage insurance.60 Although these covenants have not been enforceable since Shelley v. Kraemer,61 lack of legal enforceability has not completely stifled their adverse impact on minority homeseekers.62

Because the federal government long sanctioned and supported housing segregation, Congress's decision to place the burden of correction on individual

644 F.2d 390, 396 (5th Cir. 1981) (defendant won trial in suit that challenged refusal to rent to black person; reversed on appeal because finding of no discrimination was clearly erroneous).

57. Although most white Americans do not object to limited integration, they seem to be uncomfortable with more extensive interracial residential contact. Eighty-six percent of the whites responding to a 1978 survey said that they would not move if black people moved next door, but only 46% indicated that they would not move if large numbers of blacks lived in the neighborhood. COMMON DESTINY, supra note 16, at 124. A more recent poll found that 40% of the black respondents surveyed considered it very important to live in racially mixed neighborhoods, a view expressed by only 21% of the whites questioned. Richard Mofin & Dan Balz, Shifting Racial Climate; Blacks and Whites Have Greater Contact But Sharply Different Views, Poll Finds, WASH. POST, Oct. 25, 1989, at A1, A16.

58. CITIZEN'S COMMISSION ON CIVIL RIGHTS, A DECENT HOME 7 (1983) [hereinafter DECENT HOME].

59. Id. at 14.

60. Id. at 9.


victims without directly accepting the responsibility to correct the harms wrought in part by federal policy is particularly troubling. Past governmental administrative and legislative decisions to discriminate against minorities continue to have adverse effects, including the perpetuation of ingrained attitudes against residential integration. Congress should have implemented more appropriate remedies for the racial discrimination that the federal government was so uninhibited in supporting.

This history of federally authorized segregation provides further justification for an expansive grant of equitable remedies to increase the effectiveness of individual Title VIII actions in achieving residential integration. Individual actions under the amended Fair Housing Act could be more effective in actually dismantling segregation if individual plaintiffs would seek injunctions ordering defendants to integrate the segregated housing regardless of whether the individual plaintiffs still desire the disputed housing. Both the original Fair Housing Act and the 1988 Amendments authorize such relief. Although, under the original version of Title VIII the only remedy available through administrative proceedings was a voluntary conciliation agreement, the 1988 Amendments


64. See supra notes 49-51 and accompanying text for a discussion of the “tipping” phenomenon.

65. The Supreme Court has recognized Congress’s authority to implement such remedies. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress may not only induce voluntary action to assure compliance with existing federal statutory or constitutional anti-discrimination provisions . . ., it may . . . authorize and induce state action to avoid such conduct.

66. See 42 U.S.C. § 3612(g) (as amended) (authorizing administrative law judges to grant injunctive relief); Id. § 3613(c) (court may grant appropriate injunction, including affirmative action); Id. § 3610(d) (original court may order appropriate affirmative action). See also discussion of cases infra note 121.

67. Id. § 3610(a) (secretary may resolve complaint by conference, conciliation, or persuasion). See also Subcommittee Hearings, supra note 33, at 765 (1968 Fair Housing Act did not provide for sanctions to compel compliance) (testimony of Benjamin L. Hooks, C.E.O., NAACP). See generally LEGISLATIVE HISTORY, supra note 1, at 1, 16-17, reprinted in 1988 U.S.C.C.A.N. at 2173, 2177-78 (criticizing limitations of conciliatory measures to address housing discrimination).
extend the availability of injunctive relief to administrative proceedings. The 1988 Amendments provided fair housing administrative law judges with wide ranging equitable powers similar to those possessed by district court judges. The new administrative law judges should be urged to grant integrating injunctive relief in Title VIII hearings in order to effectuate the purposes of the original Act and its amendments. Although individuals remain the primary enforcers of fair housing laws, Congress, through the 1988 Amendments, clearly intended the individual cause of action to be more effective in the future than it has been in the past.

B. Damage Awards Alone Cannot Achieve the Purposes of Title VIII

1. Compensatory Damages Under Title VIII

The individual cause of action is an imperfect means of combating residential racial segregation. Title VIII's success in this regard was limited further by the inadequate remedies provided in the original Act. Because the Congress that enacted the 1968 Act was ambivalent about fair housing, Title VIII's remedies were not designed to truly achieve the various goals of a civil rights statute. Under the original Act, it was unlikely that a fair housing suit would fully compensate the victim of discrimination. Although the gamut of common law tort

68. See 42 U.S.C. § 3612(b) (administrative law judge shall preside over hearing on charge filed); id. § 3612(g)(2) (administrative law judge shall make factual findings and legal conclusions); id. § 3612(g)(3) (administrative law judge may issue injunctive relief and assess civil penalties). Congress provided an administrative hearing procedure under the 1988 Amendments specifically to expedite and simplify fair housing litigation. See id. § 3612(d)(1) (discovery shall be as expeditious and inexpensive as possible); id. § 3612(d)(2) (hearing shall be conducted as expeditiously and inexpensively as possible). In its section-by-section analysis of the 1988 Amendments, the House Committee on the Judiciary reported:

Section 812(d) [42 U.S.C. § 3612(d)] requires to the greatest extent possible an expedited and inexpensive discovery and hearing process, consistent with the right of the parties to obtain a fair hearing. The Committee intends for both processes to be as informal and non-adversarial as possible. The level of formality required in civil litigation is neither necessary, nor, in the Committee's view, desirable.


69. See supra note 20 and accompanying text for a discussion of how political compromises diluted the effectiveness of the Fair Housing Act.

70. Remedies under civil rights statutes generally have several functions that simultaneously serve coercive, corrective, and punitive purposes. Because the primary goal of such statutes is to eradicate discriminatory behavior, their remedies' foremost function should be to coerce wrongdoers to comply with the law. However, because another important function of civil rights remedies is to correct the results of illegal discriminatory behavior, corrective remedies include injunctive relief and compensatory damages, including attorney's fees. Corrective remedies are traditionally awarded to compensate the victim of discrimination, restore her to her rightful position, and to deter wrongful behavior. See Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (compensatory damages have dual function of deterrence and compensation for actual injury).

Punitive damages coerce compliance, and often enhance compensatory awards, particularly when attorney's fees are not awarded. Punitive remedies differ from compensatory remedies in that they punish the defendant and go beyond the minimum point necessary to compensate the plaintiff. See Restatement (Second) of Torts § 908 cmt. a (1977) (punitive damages punish defendant for wrongful behavior).
damages (other than uncapped punitive damages) have been available under Title VIII since its enactment. Title VIII judgments have traditionally undercompensated fair housing plaintiffs. The specter of a compensatory money judgment with limited punitive damages and attorney's fees was not likely to compel potential violators to desegregate voluntarily.

Compensatory damages fail to address the full range of losses that arise from denial of equal access to housing. For example, uncompensated losses might include the denial of access to better, or at least better-funded, schools and to superior neighborhood services. It is difficult to measure the social and economic benefits of exposure to mainstream lifestyles and values that are traditionally associated with the majority middle class. The inability to place a precise value on such losses presents an obstacle to recovery. Moreover, it is difficult for plaintiffs to prove the certainty or duration of such losses.

71. 42 U.S.C. § 3612(c) (court may award injunctive relief, actual damages, reasonable attorney’s fees, and punitive damages not in excess of one thousand dollars).


73. In 1989, San Francisco School Superintendent Ramon Cortines reported that some teachers and principals in the San Francisco school system questioned the need to offer advanced college level courses at predominantly black high schools. Furthermore, educators who observed hundreds of California schools reported that predominately minority schools were much farther away from commonly accepted educational standards than other California public schools. Diane Curtis & Nanette Asimov, Dropouts Made, Not Born, Experts Say, SAN FRAN. CHRON., June 29, 1989, at A1, A6.

Justice Thurgood Marshall recently noted the qualitative difference between predominately minority and majority schools: “Because of the relative indifference of school boards towards all-African American schools, many of these schools continue to suffer from high student-faculty ratios, lower quality teachers, inferior facilities and physical conditions, and lower quality course-offerings and extracurricular programs.” Board of Educ. v. Dowell, 111 S. Ct. 630, 643 n.5 (1991) (Marshall, J., dissenting).

74. Regular trash pick-up, well maintained roads, and good police and fire protection have been cited as some of the services that increase due to gentrification and integration of low income neighborhoods. See Daphne Spain, Urban Revitalization or Gentrification and Dislocation, in CRISIS, supra note 45, at 178, 182 (residents of gentrified neighborhoods may demand more city services).

75. The Supreme Court has held that deprivation of the benefits derived from interracial associations is an injury in fact sufficient to confer constitutional standing. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 375-76 (1982) (deprivation of benefits inherent in interracial associations is palpable injury establishing cause of action); accord Nur v. Blake Dev. Corp., 655 F. Supp. 158, 163 (M.D. Ind. 1987) (standing to sue can be established by denial of benefits of interracial associations) (citing Havens, 455 U.S. at 376).

76. Compensatory damages have been denied in cases involving similar intangible benefits such as the deprivation of constitutional rights. See, e.g., Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986) (denial of substantive constitutional rights); Carey v. Piphus, 435 U.S. 247 (1978) (denial of due process procedural rights). Cf. Lichtman, supra, note 72, at 967 (compensatory damages for mental suffering, as result of discrimination not fully realized because no standard for measurement exists).

77. Where rental housing is involved, plaintiffs cannot prove how long they would reside in the unit and thereby reap the benefits of the neighborhood because, in most jurisdictions, lessors or lessees can determine unilaterally not to renew a lease. Although home sales are not subject to such
Dignitary torts, such as slander and libel, have posed similar remedial problems. The law of remedies relies on emotional distress awards and punitive damages to deter conduct that causes legally recognizable losses that are difficult to valuate with any precision. Although the original Title VIII allowed compensatory damages for emotional distress injuries, many jurisdictions required serious injury or medically diagnosable symptoms of emotional distress. Therefore, these damages could not offset the limitations on punitive damages remedies. Thus, before the 1988 Amendments, Title VIII money judgments tended to be low and, as a result, did not have much coercive impact. The original Act's coercive functions were effectuated primarily through the availability of injunctive relief.

2. Remedial Functions of the Amended Fair Housing Act

The 1988 Fair Housing Act Amendments supplemented the coercive, corrective, and punitive functions of the original Act. Congress lifted the limits on an individual plaintiff's punitive damage awards, made recovery of attorneys' fees possible without regard to the plaintiff’s financial status, and instituted civil penalties ranging from $10,000 - $50,000 in cases enforced by the Secretary of Housing or the Attorney-General. Congress's decision to significantly enhance Title VIII's punitive remedies supports future use of the Act's equitable remedies to provide relief beyond merely restoring the individual plaintiff to the position she occupied prior to the discriminatory act. Congress demonstrated its desire to punish discriminators

87 See Restatement, supra note 70, § 903 cmt. a (compensatory damages only roughly correspond to damages suffered). Punitive damages are sometimes used as a means of compensating victims for intangible losses or to compensate victims for prosecuting lawsuits as "private attorney general[s]." DAN B. DOBBS, A HANDBOOK OF THE LAW OF REMEDIES 205 (1973).

88 See generally DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 99-100 (1985) (detailing prerequisites to recover for emotional distress).

89 "Unlike employment discrimination cases, most housing cases have de minimus out-of-pocket damages. Awards for humiliation and other intangible injuries are available, but have rarely exceeded $20,000." Schwemm, supra note 54, at 46.

90 42 U.S.C. § 3613(c)(1) (no cap for punitive damage award in private suit); id. § 3614(d)(1)(b) (no cap for punitive damages in suit brought by Attorney General).

91 Id. § 3613(c)(2) (no financial disability prerequisite to award reasonable attorney’s fees in private suit); id. § 3614(d)(2) (no financial disability prerequisite to award attorney’s fees in suit by Attorney General). The former provision had the unfortunate effect of discouraging litigation by imposing the cost of FHA enforcement upon those most likely to encounter discrimination. Id. § 3612(c) (original Fair Housing Act) (reasonable attorney’s fees available only to plaintiff’s who cannot afford to pay fees themselves). Minority homeseekers who were income eligible for middle class housing, and more likely than poorer minorities to seek housing in white neighborhoods and encounter discrimination, were forced to subsidize enforcement of the law under this provision.

92 See id. § 3612(3) (administrative law judge must impose penalties from $10,000-$50,000, depending on defendant's record of discrimination); id. § 3614(d)(1)(c) (in suit brought by Attorney General, court may assess penalties ranging from $10,000-$50,000 depending on defendant's history of discrimination).

93 Under the 1988 Amendments, the coercive functions of monetary remedies are coequal
by amending the Act to impose fines and punitive damages that are not measured by the actual pecuniary loss to the plaintiff.\textsuperscript{85} In addition, imposing fines that are paid to the government rather than to the victim of housing discrimination further illustrates congressional intention to emphasize the coercive function of the Act. Congress, in the 1988 Amendments, thus adopted a dual perspective in combating housing discrimination: to compensate victims and to punish violators.

Enhancing the coercive function of the Fair Housing Act by strengthening the monetary remedies is an important step toward making the Act more effective within the context of the individual cause of action. Remedies for fair housing violations must be coercive if they are to have any impact on future discriminatory behavior.\textsuperscript{86} For the Fair Housing Act to be truly effective in dismantling residential segregation, however, equitable remedies must be used in conjunction with monetary remedies.\textsuperscript{87} Successful litigation under the Fair Housing Act should result in integrating the housing that was denied to the plaintiff.\textsuperscript{88} Courts should not hesitate to award integrating relief. Congress has designated the courts as the primary channel through which individual litigants implement the federal policy against residential segregation.\textsuperscript{89} Failure to grant such relief is to ignore the legislative mandate.

II. Remedies That Integrate Housing Stock: Equitable Relief in Fair Housing Actions Brought by Individual Plaintiffs

Even though damage judgments may discourage future violations of Title VIII, money damages do not necessarily integrate housing. Because Congress has decreed that landlords and sellers must comply with the Fair Housing Act as a condition of participating in the housing market, illegal acts of discrimination must be reversed as well as discouraged and punished. Title VIII violators should not have the option of paying fines to avoid the law.\textsuperscript{90} Equitable reme-

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\textsuperscript{85} See statutory sections cited supra note 81.

\textsuperscript{86} \textsc{Legislative History, supra note 1, at 37, reprinted in 1988 U.S.C.C.A.N. at 2198 (administrative law judge should consider goal of deterrence when assessing penalties). With the 1988 Amendments, Congress finally provided deterrence remedies against individual defendants in cases initiated by the Secretary of HUD or the Attorney General.

\textsuperscript{87} It should be noted that if the plaintiff wants a jury trial, she must seek legal (compensatory, nominal, or punitive) damages. Similarly, no right to a jury trial exists if damages are not requested in "pattern and practice" cases enforced by the Attorney General. See United States v. Westbanick, 63 F.R.D. 366, 366-67 (E.D. Wis. 1974) (plaintiffs not entitled to jury trial when only seeking injunctive relief); cf. Curtis v. Loether, 415 U.S. 189, 197-98 (1974) (Title VIII actions seeking only equitable relief unaffected by decision upholding right to jury trial in action for compensatory and punitive damages).

\textsuperscript{88} See 42 U.S.C. § 3604 (detailing proscribed discriminatory practices in housing sales and rentals).


\textsuperscript{90} There is a risk that payment of compensatory damages might prove attractive to an FHA

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dies can be used to eliminate a defendant's ability to avoid the congressional mandate against discrimination.

A. Temporary or Preliminary Relief

Title VIII authorizes temporary injunctive relief in the form of temporary restraining orders and preliminary injunctions in civil actions instituted by private persons or the Attorney General. The law provides that such injunctive relief may be granted as is necessary to "carry out the purposes of this subchapter." Thus, the courts should consider whether preliminary injunctive relief will further the Fair Housing Act's purposes, which includes the accomplishment of residential integration. The courts' discretion will be guided by the Federal Rules of Civil Procedure and common law rules governing the issuance of preliminary injunctions.

To meet the traditional common law standard for obtaining a preliminary injunction, plaintiffs must convince the court that (1) the complainant will prevail on the merits in the Fair Housing Act proceedings and (2) failure to issue temporary relief before a full trial on the merits can be held will result in irreparable injury to the plaintiff. Plaintiffs may also be required to prove that the harm to them outweighs the harm that might result to the defendant if an injunction is granted. Injunctive relief may also be limited by the rights of third

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91. 42 U.S.C. § 3613(c)(1).
92. Id. § 3614(a)(1)(a). Under the amended Act, administrative proceedings can be instituted by the Secretary of HUD. Although Administrative Law Judges are granted wide powers to issue permanent injunctive relief, there is no express grant of the power to issue temporary relief. However, preliminary relief is available through the courts during the pendency of the administrative proceeding. 42 U.S.C. § 3610(e) provides:
If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this subchapter, the Secretary may authorize a civil action for appropriate temporary or permanent relief pending final disposition of the complaint under this section . . . . The commencement of a civil action under this subsection shall not affect the initiation or continuation of administrative proceedings under this section and section 3612 of this title.
93. Id. § 3610(e).
94. Id. § 3610(e)(1) (temporary relief shall be issued in accordance with Federal Rules of Civil Procedure).
96. Kushner, supra note 29, § 9.05, at text accompanying n.239. See, e.g., Snowden v. Siano, 1 Eq. Opp. in Hous. Cas. (P-H) ¶ 16,608 (D. Ariz. 1973), where the court specifically found that Irreparable harm and damage or loss would occur to plaintiffs if the subject house and lot were sold or transferred during the pendency of this action . . . [and that] [n]o special harm, damage, or loss has been shown to occur or likely to result if defendant Siano is
party transferees who obtain property interests from the Title VIII defendant without notice of the charge filed under Title VIII.97

The typical preliminary injunction in private Title VIII litigation has been aimed at preventing owner-defendants from transferring disputed property while the action is pending.98 Such injunctions maintain the "status quo" and help to prevent transfers to purchasers who lack knowledge of the fair housing claim. Complainants who wish to preserve minority access to the disputed housing must act quickly to obtain a preservational preliminary order and record it against the defendant to give prospective transferees actual notice adequate to satisfy the Act's requirements.99 Plaintiffs who have been denied rental housing may find it difficult to preserve access to a specific rental unit, because the unit may be rented before a preliminary injunction can be obtained. Nevertheless, such plaintiffs can at least seek an order to preserve the defendant's next available unit.100

Preliminary orders can be crafted to utilize the court's contempt power to prevent transfers of housing to third party bona fide purchasers.101 A landlord who rents housing in violation of a fair housing preliminary injunction may then be subject to civil or criminal contempt proceedings. Both civil coercive and criminal contempt proceedings can punish injunction violators with imprisonment.102 The possibility of incarceration may strongly deter landlords from at-

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97. 42 U.S.C. § 3613(d) provides that "[r]elief available under this section shall not affect any contract, sale, encumbrance or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter." A similar provision protecting bona fide purchasers appears in the provisions for enforcement by the HUD Secretary at id. § 3612(g)(4). Congress could further strengthen Title VIII remedies by deleting the bona fide purchaser provisions of 42 U.S.C. § 3613(d). If the minority applicant still wants the unit that was discriminatorily denied, the intervening bona fide purchaser could be ordered to move at the defendant's expense. The deterrent effect would certainly be significant. If the plaintiff does not want the unit, the remedy should make available future vacant units to minority homeseekers. Because the wrongful act of renting to another effectuates the discrimination, while simultaneously blocking complete recovery, Congress should consider permitting the court to set aside the wrongful transaction.


99. 42 U.S.C § 3613(d) (availability of preliminary orders in private actions) and § 3612(g)(4) (availability of preliminary orders in Attorney General actions).

100. See, e.g., Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 350 (7th Cir. 1970) (defendant ordered to rent similar accommodation on same conditions originally sought by plaintiff).

101. The preliminary order should be recorded or should require the landlord to post the premises with a copy of the injunction so prospective purchasers or lessees will have notice of the order. Such notice can help prevent a defense to injunctive relief based on a conveyance to a bona fide purchaser.

tempting to limit the availability of permanent injunctive relief by transferring the disputed property to bona fide purchasers. Other uses of preliminary relief might involve court review of the defendant's advertising and rental or sales approval procedures. Preliminary injunctions could also require regular reports to the court concerning applications, rental vacancies, or sales until the litigation concludes in a final decision on the merits.

B. Permanent Injunctions

Permanent injunctive relief is available in administrative and court adjudications under Title VIII, as well as in "pattern and practice actions" initiated by the Attorney General. The 1988 Amendment's authorization to order "such affirmative action as may be appropriate" is carried over and expanded from the original Fair Housing Act. This language specifically grants Title VIII tribunals broad equitable powers by incorporating a traditional equitable standard into the Fair Housing Act. This traditional standard grants courts sitting in equity the power to see that equity is done to all within its jurisdic-

104. Reporting requirements are routinely used in "pattern and practice" case permanent injunctions. Kushner, supra note 29, § 19.13. Reporting orders during the pendency of the proceedings should present no unusual problems to the court. Reports should include records of inquiries about the availability of housing and the disposition of such inquiries because providing misinformation about the availability of housing violates 42 U.S.C. § 3604(d) (requiring housing providers to inform consumers of available housing when asked).
105. 42 U.S.C. § 3612(g)(3) authorizes administrative law judges to issue orders "for such relief as may be appropriate, which may include . . . injunctive or other equitable relief." The amended Act, 42 U.S.C. § 3613(c)(1) (relief available to private parties) specifies that, in a United States or state court action, the court may: "award to the plaintiff actual and punitive damages, and . . . may grant as relief, as the court deems appropriate any permanent or temporary injunction, temporary restraining order, . . . (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)."
106. 42 U.S.C. § 3614(d)(1)(A) provides that in "pattern and practice" cases the court "may award such preventive relief, including a permanent or temporary injunction, or restraining order . . . as is necessary to assure the full enjoyment of the rights granted by this subchapter."
107. Under the 1968 Act, after a complaint with the Secretary of HUD failed to result in voluntary compliance with the Act, Title VIII actions could be filed in United States district court. If the court found that a discriminatory housing practice had occurred or was about to occur, the court could "enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate." 42 U.S.C. § 3610(d) (1982), amended by 42 U.S.C. § 3610(d) (1988). The amended Act specifically provides for affirmative action in cases enforced by HUD and by private persons. 42 U.S.C. §§ 3612(b)(3), 3613(c).
108. 42 U.S.C. § 3613. In Smith v. Town of Clarkton, N.C., 682 F.2d 1055 (4th Cir. 1982), the Fourth Circuit upheld parts of a district court order described as "broad [and requiring] affirmative action . . . , [it is] the type of order utilized time and again by other federal courts to heal the wounds caused by violations of a plaintiff's statutory and constitutional rights." Id. at 1069. The Smith court found such orders well within the federal court's "traditionally broad equitable power to fashion remedies for the violation of the plaintiff's civil rights." Id.
Courts sitting in equity are not limited to restoring the plaintiff to her rightful position; relief may extend beyond that point if necessary to effectuate the ends of justice. The 1988 Amendments, therefore, reject the narrow scope of equitable relief applied by the United States Supreme Court in cases involving governmental violations of the Fourteenth Amendment.

There are constitutional limitations on the courts’ power to order injunctive relief, and the Fair Housing Act recognizes these restraints in its statement of purpose. Nonetheless, once the plaintiff establishes that Title VIII has been violated, the Constitution does not restrict the scope of the courts’ equitable powers to orders that merely address the plaintiff’s position. Federal courts hearing fair housing cases are “fully empowered to eliminate the present effects of past discrimination” and may order appropriate affirmative action to achieve this end.

To achieve Title VIII’s goals, courts may need to require a defendant to take affirmative action measures that provide relief for persons other than the specific Title VIII plaintiff. That an individual plaintiff has found substitute housing and is not inclined to seek an order that would place her in the defendant’s housing does not limit the court’s ability to order affirmative action to integrate defendant’s housing stock. Constitutional concerns only require that the plaintiff establish that the defendant has violated Title VIII. Constitutional


111. Congress’s rejection of a narrow scope for equitable relief is codified in 42 U.S.C. § 3613(c). See supra note 105 for the relevant text of this provision. See supra notes 92-104, 105-10 and accompanying text for a discussion of potential applications of preliminary and permanent injunctive relief, respectively. See Milliken I for an illustration of the type of narrow relief granted by the United States Supreme Court in the context of the Fourteenth Amendment. Milliken I limited the scope of equitable relief in school desegregation cases to “restor[ing] the victims of discriminatory conduct to the position they [would have] occupied in the absence of such conduct.” 418 U.S. 717, 746. Further, Fair Housing Act remedies against local government defendants are limited by the constitutional separation of powers doctrine. Relief “should not intrude into the orderly functioning of local government any more than is necessary to remedy the specific ills brought on by the violation of [the] statutory… mandate.” Town of Clarkston, 682 F.2d at 1069. Of course, separation of powers considerations would not limit the remedies available from a private defendant.

112. For example, a court cannot order significant relief against someone who has specifically been found not to have violated any law. General Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 399 (1981). The federal courts’ remedial powers can “be exercised only on the basis of a violation of law and could extend no farther than required by the nature and extent of that violation.” Id. See also Rizzo v. Goode, 423 U.S. 362, 377 (1976) (no injunctive relief allowed where plaintiff cannot make showing of constitutional violation by city officials or police); Schwemm, supra note 23, at 246.

113. 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").
114. United States v. West Peachtree Tenth Corp., 437 F.2d 221, 228 (5th Cir. 1971).
concerns do not prohibit the court from ordering the defendant to comply with the act by filling the disputed housing with persons of the same race as the plaintiff.\textsuperscript{115} Violation of the statute triggers the court's ability to exercise its equitable powers and "[o]nce invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'"\textsuperscript{116}

C. Fashioning Orders That Address the Group Harms of Individual Complaints

The effectiveness of addressing the problem of residential segregation through a case-by-case approach is limited. Unfortunately, because housing is a need that often cannot be deferred, by the time the Title VIII case is heard, the plaintiff has often obtained another dwelling. If this has occurred, an affirmative injunction ordering the defendant to sell or rent the denied housing to the plaintiff could cause the plaintiff to incur additional losses, or, more likely, will be worthless to the plaintiff.\textsuperscript{117}

Failure to address the plaintiff's urgent need for housing is not the only shortcoming of remedial orders that apply only to the plaintiff. A remedial maxim states that a plaintiff cannot recover reasonably avoidable damages.\textsuperscript{118} If reasonable substitute housing becomes available between the time of the violation and the trial, the plaintiff must choose between accepting the alternative housing or risking that he may not be able to recover damages for any losses incurred after the alternative became available. If the plaintiff moves into the alternative housing, injunctive relief becomes less attractive to the plaintiff and the defendant may argue that an injunction is no longer appropriate.\textsuperscript{119} Thus, although the plaintiff may receive a judgment for damages, the defendant's housing stock may remain segregated. Defendants should not escape integration injunctions simply because plaintiffs are required to minimize their damages by accepting available substitute housing. The Act's broad authorization of equita-

\textsuperscript{115} For example, in Bulluck v. Pelham Wood Apartments, 390 A.2d 1119 (Md. 1978), the Court of Appeals of Maryland upheld a state agency's authority under a state housing discrimination statute to order affirmative action (a program of tenant recruitment) in a case where the plaintiff alleged only that he was denied an apartment due to race. Id. at 1127. The court relied on a state law providing that, upon a finding that the respondent has engaged in any discriminatory act, the Human Relations Commission may order the respondent "to cease and desist from the discrimination and to take such affirmative action as will effectuate the purposes of the particular subtitle" involved. Id. (quoting Md. ANN. CODE of 1957 art. 49B, § 14(e)) (emphasis added). This is, of course, language identical to that used in Title VIII.


\textsuperscript{117} Additional losses might arise if a Title VIII plaintiff enters into a lease with someone other than the defendant and then incurs financial liability for breaking that lease to avail himself of an order granting access to defendant's housing stock.

\textsuperscript{118} See Dobbs, supra note 78, at 186. This is often addressed in terms of minimization of damages. A defendant may raise the issue of the plaintiff's failure to minimize damages. The defendant will not be liable for damages that she can prove the plaintiff could have reasonably avoided.

\textsuperscript{119} The defendant could argue that money damages are an adequate remedy because the plaintiff has obtained other accommodations.

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ble relief supports, and certainly does not limit, the courts authority to order the defendant to reserve the housing until it can be filled by a qualified minority. Rather than issuing an order that merely prohibits future discrimination, courts should affirmatively order integration.

A plaintiff's act of mitigation in obtaining substitute housing does not diminish the original harm from the Title VIII violation. Persons other than the plaintiff are harmed by violations of the act. These group harms do not, from a practical point of view, support separate Title VIII or class action litigation, but do impose injury. An order to integrate the defendant's housing would address the group injury imposed by individual acts of housing discrimination. When fair housing litigation terminates in a judgment or settlement that results in or preserves integration of the defendant's housing stock, there is at least one more unit of housing available to a member of the victim's minority group. This provides relief for the group injury by providing a valid substitute for the opportunity that was impermissibly denied on the basis of group membership.

Because the essence of racially discriminatory behavior is that the victim's individual identity is irrelevant to the perpetrator, the victim's individuality should not shelter the discriminator from effective fair housing violation sanctions. Limiting equitable remedies to those that compensate or house only the plaintiff, substantially decreases Title VIII's effectiveness in redressing residential segregation. The recalcitrant defendant may continue to discriminate because even a successful Title VIII enforcement action may not result in integration of his housing stock. Compelling a discriminator to accept minority group members other than the victim removes the incentive to gamble that any individual plaintiff will acquire other housing prior to the judgment.

Wide ranging equitable relief has benefitted minority group members who were not parties to Title VIII litigation against public or large corporate defendants. Courts should not be reluctant to similarly enjoin individual or small

120. See 42 U.S.C. §§ 3612(g)(3), 3613(c). Milliken II also supports broad equitable remedies once a defendant has been proven guilty of discriminatory conduct. 433 U.S. at 281. See supra notes 108-10 and accompanying text for a discussion of traditional equitable principles.

121. Several cases under the original version of Title VIII have recognized that it is appropriate to grant injunctions that benefit others beside the suing plaintiffs. E.g., Rogers v. 66-36 Yellowstone Blvd. Co-Op Owners, 599 F. Supp. 79, 82 (E.D.N.Y. 1984). In Rogers, the court sought to fashion an injunction that would remove any lingering effects of past discrimination as well as prevent future Title VIII violations. The Rogers injunction is drafted in broad terms, without specific reference to the named plaintiff: "Defendant shall not withhold its consent to the sale or transfer ... because of an applicant's race, color or national origin. ... [D]efendant shall then advertise the apartment's availability for four successive Sundays in the New York Times and Amsterdam News. That advertisement shall invite applications from qualified minorities ...." Id. at 86, 87.

122. See supra notes 40-47 and accompanying text for a discussion of the group injuries resulting from housing discrimination.

123. This would apply to litigation brought under 42 U.S.C. § 3604(a), (b), & (d) (detailing forbidden discriminatory acts in housing sales and rentals).

124. Some defendants may decide that it is economically worthwhile to pay damages, as long as the housing remains segregated. See Schwemm, supra note 54 (damages minimal in housing discrimination suits).

125. Equitable relief prohibiting discrimination against future applicants for housing has been
business defendants in housing discrimination cases when the plaintiff no longer desires the particular housing.126

Courts have traditionally fashioned group relief in other analogous civil rights contexts. For example, minority groups have benefitted from corrective relief in school desegregation cases even though the injunction could not benefit the actual plaintiff.127 Similarly, once a violation has been established in employment discrimination cases, courts can remedy the continuing effects of past illegal behavior without regard to whether persons other than the plaintiff are the primary beneficiaries.128 Litigants under the Fair Housing Act should urge the courts to apply a similar approach in order to desegregate violators' housing stock. Orders to integrate are the only way to completely cure the conditions caused by the illegal action.129

Unequal treatment because of group affiliation should trigger relief that ensures interested group members access to the housing, particularly if the demographics (i.e., a lack of minorities in the building or neighborhood) indicate prior discriminatory behavior. Providing housing for persons of the specific victim's minority group is morally and factually justified. Moral justification stems from the purposes of fair housing legislation and the societal goal of eliminating discrimination in housing transactions. Factual justification may be found in "the apparent intractability of racial segregation" in housing,130 and in the inherent limitations of enforcing the Fair Housing Act primarily through private litigation. Congress's expression of concern about the need for a more effective fair housing law, evidenced in the 1988 Amendments, further justifies broad relief against residential segregation. Title VIII will not achieve the full range of

obtained in fair housing actions against owners of large apartment complexes and real estate developers. See, e.g., United States v. Peachtree Tenth Corp., 437 F.2d 221, 228-29 (5th Cir. 1971) (injunction granted against future discrimination requiring defendant high-rise apartment owner to maintain records so court could monitor compliance with order).

126. Some courts may hesitate, however, to order injunctive relief against defendants who provide small numbers of housing units due to the need for some continuing judicial supervision and monitoring of the operation of an individual's business. But see supra note 121 and cases discussed therein.


130. Cf. JOHN GOERING, HOUSING DESEGREGATION AND FEDERAL POLICY 9 (1986). Goering states:

The desegregation of housing for minorities still appears as one of America's most unsettled civil rights frontiers, despite the passage of civil rights laws in the 1960s . . . . There remain . . . high levels of resistance and uncertainty about housing integration, with confusion, ambivalence and disinterest seemingly as apparent now as they were thirty years ago.

Id.
its purposes until remedies are granted that address residential integration as a whole in addition to redressing individual acts of discrimination.

**D. Other Relief**

Other remedies that promote integration are available in Title VIII actions, particularly in individual actions against discriminatory realtors. Much of the housing discrimination that occurred in the 1970s and 1980s was "embedded in the ordinary marketing tactics of ordinary housing agencies and agents."131 Realtors who violate the Fair Housing Act should be required to engage in "corrective steering" whereby they affirmatively seek and recruit minority purchasers/renters for housing in areas that have traditionally excluded minorities.132 Such orders would help to implement integration more rapidly than the traditional order to "stop violating Title VIII," by requiring the defendant to take positive action, rather than passively waiting for an opportunity to "not discriminate."133

Under "corrective steering" orders, realtors should be required to affirmatively direct minority clients toward the areas that traditionally absorb white flight as well as encourage white clients toward integrated areas. Corrective steering could thereby help eliminate the "tipping" phenomenon. As integrated housing became more prevalent, there would be less of a premium on individual integrated communities, because minorities would have access to a larger pool of housing and, thus, greater choice. Individual integrated areas would become more racially stable as they would not be absorbing the majority of an area's minorities who seek integrated housing.

Realtors may also be in a position to provide substitutionary relief to specific plaintiffs through corrective steering. If housing that was the subject of the discriminatory transaction is unavailable, violators should be ordered to show the plaintiff similar housing in the neighborhood where the violation occurred. Such relief could begin to dismantle segregated neighborhoods, and help to eliminate the economic incentive to discriminate and segregate.


132. Steering is "the direction of potential buyers or renters to specific neighborhoods on the basis of race. Typically blacks are shown housing in all-black or racially integrated neighborhoods while whites are shown listings only in all white neighborhoods." *Kushner*, supra note 29, § 4.06. Discriminatory steering violates 42 U.S.C. § 3604(a) as it makes a dwelling unavailable because of race. United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978). Court ordered steering to eliminate the effects of past discriminatory steering is "corrective" and has been part of affirmative injunctions in fair housing cases. See, e.g., United States v. Real Estate One, Inc., 433 F. Supp. 1140, 1142 (E.D. Mich. 1977) (broker ordered to educate salespersons, advertise in black owned newspapers, and integrate its offices with black sales persons); cf. Steptoe v. Beverly Area Planning Ass'n, 674 F. Supp. 1313, 1315, 1321 (N.D. Ill. 1987) (non-profit group promoting integration and integration maintenance did not violate Title VIII by providing whites with information about housing in integrated neighborhoods and assisting blacks in finding housing in non-integrated areas).

133. The order to desist from violating the law does not undo the wrong that the defendant has previously committed as much as it prevents future wrongdoing. Title VIII actions need to focus upon undoing the harm of past residential segregation.
When a realtor has engaged in steering or other practices that maintain segregated areas, relief should include an order to provide neighborhood education about fair housing laws and the community benefits of desegregation. Real estate agents are in an excellent position to educate the more hostile residents of segregated areas that property values need not be adversely affected by integration. Moreover, education may be necessary to prevent the successful Title VIII plaintiff from suffering harassment from neighbors who, with the assistance of realtors who have steered minority homeseekers away from the locality, had been previously able to resist the integration of their area.

E. Duration of Equitable Relief

One concern that may cause judges to hesitate to order affirmative injunctions is the duration of the ordered relief. Although courts are traditionally reluctant to enter orders that require extensive court supervision, in civil rights cases this reluctance has given way to the need to deal with the intransigence of defendants. The duration of the order may be less of a problem in fair housing cases, due to economic factors. Court orders that require a defendant to fill the vacancies with minorities, and prohibit any new occupancy until the order is complied with, should inspire rapid compliance by causing the defendant economic hardship.

If the defendant is the lessor of a number of units or is a developer or realtor, the court's jurisdiction over the case should remain open until the defendant has integrated several units. Such supervision is necessary to protect the plaintiff (or persons who benefitted from an order to integrate) from the additional injuries that arise from the isolation of being the sole minority in the neighborhood or building. Because Title VIII coverage of rental housing extends only to lessors who own four or more units, the defendants will own other units that, upon vacancy, could be filled with members of the plaintiff's minority group. Any court order should be recorded to give subsequent purchasers notice of the proceedings and to discourage defendants from selling the property to avoid the integration order.

134. Non-white entry alone rarely causes residential property to fall in price, and quite often causes it to rise. Downs, supra note 48, at 267.

135. For examples of the violence and harassment experienced by minorities who move into white areas, see Stigurs v. Benoit, 720 F. Supp. 119, 121 (N.D. Ill. 1989) (house fire-bombed); Pina v. Abington, 1 Eq. Opp. Hous. CAS. (P-H) ¶ 15,257, 15,495 (E.D. Pa. 1978) (terroristic acts). An account of the use of community education and efforts to overcome such hostility appears in Subcommittee Hearings, supra note 33, at 228-33 (statement of Jordan C. Band, Vice Chair, Community Relations Bd. of Cleveland, Ohio).

136. See, e.g., Brown v. Board of Educ., 349 U.S. 294 (1955) (courts will retain jurisdiction for as long as necessary to supervise specific compliance with desegregation order, including monitoring revision of local laws and regulations).

137. Good faith purchasers will not exist if constructive notice is established by recording. See supra notes 92-104 and accompanying text for a discussion of preservational preliminary orders.
Integrating injunctions overcome some of the limitations of the individual cause of action under Title VIII without transgressing the boundaries of traditional equitable litigation. Courts hearing Title VIII cases can, and should, use their equitable powers to order relief that integrates the defendant's housing stock, without regard to whether the order benefits the specific plaintiff who initiated the action.

After a plaintiff has proved a *prima facie* violation of Title VIII, the court should look at the individual defendant's housing stock to determine if it is integrated. If it is not, the court should issue an order that specifically requires the defendant to integrate. Such orders would satisfy the corrective and coercive aspects of Title VIII remedies. Moreover, such integrating orders would recognize the fact that discriminatory behavior in housing access is directed at the plaintiff's minority group as a whole and results in their exclusion from housing without regard to individual qualifications. Finally, such orders would prevent the defendant from circumventing the purposes of Title VIII, by simply "paying her way out."