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THE FAIR HOUSING ACT: STANDING FOR THE PRIVATE ATTORNEY GENERAL

The racial barrier in the area of housing has been aptly labeled the "cornerstone of segregation."\(^1\) Congress, aware that segregated housing retards progress in the entire field of civil rights,\(^2\) hoped that the Fair Housing Act of 1968\(^3\) would undermine the "cornerstone." For years the federal government itself pursued policies which contributed in large measure to the concentration of racial minorities in segregated neighborhoods.\(^4\) However during the last decade all branches of national government acted to reverse past practices.\(^5\) These efforts culminated in a statute which states that it is now the policy of the United States to provide fair housing throughout the entire country.\(^6\)

However, mere enactment of any statute does not guarantee desired results. Unfortunately large-scale voluntary compliance with Title VIII\(^7\) has not materialized.\(^8\) It is apparent that desegregated housing will not come about until landowners and developers face vigorous enforcement of the Act. Central to enforcement is the issue of standing. To date, the right of private individuals to bring suit under Title VIII has been restricted to the "direct victim" of a discriminatory act.\(^9\) It is possible that this narrow interpretation is unnecessary under the terms of the statute. Once standing is established, the concept of private attorney general may permit a private-party plaintiff to correct past discriminatory acts as well as prevent such acts in the future.

\(^{1}\) REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER 475 (New York Times ed. 1968) [hereinafter cited as REPORT ON CIV. DISORDERS].

\(^{2}\) E.g., 114 CONG. REC. 2697 (1968) (remarks of Senator Mondale): "[T]hose closest to the problem regard the fair housing issue of fundamental and substantial significance in the solution of social problems . . . ."


\(^{4}\) Until 1949 the official policy of the Federal Housing Authority was to refuse insurance to desegregated housing. Nondiscrimination pledges have been required from loan applicants only since 1962. REPORT ON CIV. DISORDERS, supra note 1, at 474. It was not until 1968 that the 1866 Civil Rights Act [42 U.S.C. § 1982 (1970)] was held to apply to private discriminatory acts. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). See also 114 CONG. REC. 2526 (1968) (remarks of Senator Griffin).

\(^{5}\) See e.g., Executive order 11,063, 3 C.F.R. 208 (1971).


\(^{7}\) Id. §§ 3601-3619 [hereinafter noted in the text as Title VIII].

\(^{8}\) See A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT (1971) [hereinafter cited as CIVIL RIGHTS REPORT].

Title VIII is a major effort to deal meaningfully with the social and economic evils of discrimination by providing a means whereby racial minorities can obtain access to privately owned as well as publicly owned housing units. To effectuate the proclaimed integration policy, Title VIII makes discrimination against any individual on racial grounds in housing rentals, sales, financing, and brokerage services unlawful. Certain specified sales are excepted, but the Act encompasses approximately 80% of the housing resources of the country.

Local fair housing laws providing comparable or broader coverage and remedies are not preempted. Title VIII establishes a national minimum standard of open housing and is an additional legal weapon in the attack on racially discriminatory housing practices which perpetuate segregated neighborhoods and the attendant repercussions in other aspects of American life.

In addition to affording individual racial minority group members an opportunity to obtain decent housing, the proponents of Title VIII expected it would further many other goals. From a broad societal viewpoint, the need to decelerate the breakdown of the nation into two separate and hostile societies seemed urgent. Although under Congressional consideration previously, the serious racial disorders during the summer of 1967 dramatically demonstrated the need for a fair housing act. The elimination of segregated neighborhoods was viewed as essential to the desegregation of schools. Few individuals would consider cross-town and cross-county busing the preferable method of integrating public schools. Housing patterns also have a direct effect in the area of employ-
The movement of industry from cities to suburban areas has been substantial since World War II. Racial minorities, confined to inner-city ghettos because suburban housing is closed to them, have difficulty obtaining and keeping employment.

The Act permits private parties who claim injury as a result of a violation or who claim they will be irrevocably injured by an imminent violation to file a complaint with the Department of Housing and Urban Development (hereinafter HUD). HUD, although entrusted with the administration of the Act, has limited enforcement powers. The agency’s enforcement capabilities are restricted to the more informal methods of conference, conciliation, and persuasion. HUD lacks power to compel compliance through the issuance of cease and desist orders or injunctions. If HUD is unable to obtain voluntary compliance, the complainant may institute suit in the appropriate federal district court. Alternatively, the complainant may bypass HUD and commence action directly in federal or state court. Additionally, the Attorney General is empowered to bring suit in federal district court to correct a “pattern or practice” of discrimination. The enforcement aspects of Title VIII will be developed more fully below.

The realization that integrated housing is necessary to the resolution of problems in related areas spurred Congress to enact Title VIII. Racial discrimination in housing is not only a matter of general public importance, however. Segregated neighborhoods affect the daily life of individuals of all races in many respects. When segregated neighborhoods are created or maintained through the unlawful acts of landowners those suffering from the deprivation of an integrated environment arguably have standing to enforce Title VIII.

20 See REPORT ON CIV. DISORDERS, supra note 1, at 392.
21 Id.
23 Id. § 3608.
24 Id. § 3610.
25 It has been strongly urged that Title VIII be amended to permit HUD to issue cease and desist orders. This would facilitate the elimination of discriminatory housing practices through administrative action. CIVIL RIGHTS REPORT, supra note 8, at 359.
27 Id. § 3612.
28 Id. at § 3613. The phrase “pattern or practice” is not defined in the statute. However other civil-rights statutes employ the phrase. The discriminatory conduct must be more than an isolated incident yet no set number of acts is necessary. United States v. Mintzes, 304 F. Supp. 1305, 1313-14 (D. Md. 1969). In United States v. Medical Soc'y of South Carolina, 298 F. Supp. 145 (D.S.C. 1969), the court applied an objective test and maintained that conduct which predictably results in the virtual exclusion of minorities constitutes a pattern or practice.
29 See text accompanying notes 97-126, infra.
PRIVATE ATTORNEY GENERAL

THE ISSUE OF STANDING

Association of Data Processing Service Organizations v. Camp80 sets forth two tests for standing. The first, which satisfies the art. III limitations,81 is a claim by the plaintiff that the challenged conduct has "caused him injury in fact, economic or otherwise."82 The second requirement is that the plaintiff seek to protect an interest that "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."83 Further, the Court emphasized that the interest need not be economic but rather runs the gamut from the economic to the aesthetic.84 Indeed, the question whether a specific complainant has a legal interest that is protected against violation by the statute is one that goes to the merits as surely as does the question whether the defendant violated the statute.85 Although no statutory provision is necessary to confer standing when an interest is protected by statute,86 Title VIII expressly bestows standing on anyone aggrieved by a violation of the Act.87

Title VIII says that those who are providing housing accommodations not excepted from the Act as well as specified related services may not engage in the proscribed discriminatory conduct. The right of private individuals to bring suit when the Act is violated is set forth in two sections. Section 361088 provides that a "person aggrieved" may file a complaint with HUD. An aggrieved person is defined as one who "claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur."89 Section 3602 defines a discriminatory housing practice as an act that is unlawful under other sections of the Act.40 Section 3612 provides for enforcement of the "rights granted" by civil action. Since the statute does not state the rights granted in

81 The judicial power of the United States is limited to cases or controversies. U.S. Const. art. III, § 2, cl. 1.
82 397 U.S. at 152.
83 Id. at 153. Some authorities feel the "zone of interest" test will prove unworkable and that injury in fact will become the only test for standing. Id. at 167 (Brennan & White, J.J., concurring in the result). See also Davis, The Liberalized Law of Standing, 37 U. Cm. L. Rev. 450 (1970).
84 397 U.S. at 154.
85 Id. at 153.
88 Id. § 3610.
89 Id.
40 Id. §§ 3604-06.
specific terms they will have to be inferred from the statute itself, the legislative history, and the goals to be obtained.

Inasmuch as statutes can create new interests and rights, the courts are not limited to previously established legal rights or interests in their interpretation of Title VIII. Unquestionably, Congress intended Title VIII to serve as a means of ensuring that racial minorities obtain housing they can afford in any area they choose. However, it does not necessarily follow that those directly discriminated against are the only individuals entitled to enforce the Act. The author feels that Congress by enacting a broadly worded "person aggrieved" statute created a cause of action in favor of any person who can demonstrate injury resulting from a discriminatory act.

In Trafficante v. Metropolitan Life Insurance Co., the court had an opportunity to expound the interests protected by Title VIII. White and black tenants challenged the racially discriminatory practices of their landlord. The plaintiffs claimed they were denied the benefits of living in an integrated community because of the purposeful and illegal exclusion of minority group members from the housing facilities controlled by the defendant. Neither the sufficiency of the injury nor the other merits were reached. The action was dismissed on the grounds that the plaintiffs lacked standing because they were not the "direct victims" of an unlawful act. The plaintiffs did not allege any specific act of discrimination committed against any specific person. The court maintained that the complaint was based on the maintenance of a "white ghetto" by the defendant. The court said the suit was to correct a "pattern or practice" of discrimination which only the Attorney General may rectify. The holding that only the direct victim of a discriminatory housing practice has standing to sue sharply and unnecessarily limits private enforcement powers under Title VIII.

The court is, in effect, maintaining that private parties may enforce Title VIII only if their total injury arises out of one discriminatory act. The Ninth Circuit recognized that Congress envisioned the creation of integrated communities. Narrowly defining an aggrieved person under the Act defeats this Congressional goal. The court points out that dismissal of the Trafficanti tenants'
cause of action does not mean that the matter would not be litigated, inasmuch as black plaintiffs who had been refused housing by the defendant had filed suit. However, if, Title VIII creates an interest in living in an integrated environment, the fact that others also have a cause of action should not preclude judicial redress for injuries suffered by plaintiffs such as those in the *Trafficante* case.

In order to give effect to the goal of eliminating racial discrimination, civil-rights statutes are broadly construed. In *Miller v. Amusement Enterprises, Inc.* the court expressly disagreed with the contention that such acts are to be narrowly construed. Since segregated housing intensifies problems in other areas, this principle of construction should be applied to the housing act. Indeed Congress recognized that many of the nation's other social problems cannot be effectively resolved unless segregated neighborhoods are eliminated and suburban housing made available to racial minorities.

If broadly read, Title VIII can be interpreted as creating an interest in being free from the effects of segregated neighborhoods. This is not to say that there is an absolute statutory right to an integrated environment for Title VIII does not reach the economic conditions that contribute to the perpetuation of ghettos. The Act does prohibit, however, the personal social views of landowners from artificially determining the racial composition of a community through the unlawful denial of housing accommodations to racial minorities. Prior to the enactment of the Fair Housing Act, individuals wishing the benefits of living in a multi-racial community had to actively seek out such a neighborhood. For a multitude of reasons, including the fact that few such middle class neighborhoods existed, this was seldom done. If only the "direct victim" of a discriminatory refusal has standing to sue under Title VIII, the position of those who do not wish to live in either white or black islands has not been substantially bettered. This issue comes into sharper focus when one considers the situation of a "token" minority tenant. He is forced to choose between exercising his right to fair

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45 394 F.2d 342 (5th Cir. 1968).
46 See *e.g.*, *Report on Civ. Disorders*, *supra* note 1.
47 See *e.g.*, 114 CONG. REC. 9559 (1968) (remarks of Representative Celler).
housing and his need to have among his neighbors some members of his racial group.

**Residency In An Area Should Be Sufficient For Standing**

Residency in an area which is affected by a challenged action has been held sufficient for the necessary “personal stake” in the outcome. Standing has been accorded to residents in the vicinity of an urban renewal program on the basis of the impact of the plan in terms of neighborhood racial balance. HUD contended that the plaintiffs did not have any of their property taken for the project and were, therefore, no different from the public at large. The court said “Common sense indicates” that those who “literally must live with the decision” are sufficiently interested in the character of their neighborhood to merit standing to vindicate the values which the statute seeks to further.

Residents who object to discriminatory housing refusals in their neighborhood are not officious interlopers challenging the conduct of an individual with whom they have no relationship and whose activities cannot have any adverse effects in their daily life. Rather they are objecting to unlawful conduct which has real consequences in the personal, business, and social lives of themselves and their families. The most obvious consequence is the interference with the right of their children to an integrated education. Some experience social embarrassment in living in a community which is closed to minority friends and business associates. Others in such fields as education and social work find that their professional credibility with minority persons is undermined. Additionally, they and their children are denied the benefits of neighborhood relationships and contacts with many racial groups. Some genuinely feel that this deprivation is injurious to themselves and their children. Many agree with Justice Douglas’ remarks in his concurring opinion in *Jones v. Alfred H. Mayer & Co.*: “The true curse of slavery is not what it did to the black man but what it has done to the white man.”

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50 Shannon v. HUD, 305 F. Supp. 205, 211 (E.D. Pa. 1969). This action was brought under the Housing Act of 1949, 42 U.S.C. §§ 1441 et seq.

51 Id. Contra, Trafficante v. Metropolitan Life Ins. Co., 446 F.2d 1158 (9th Cir. 1971); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969) which denied standing to a black home owner to protest discriminatory site selection of a low income housing project.


54 392 U.S. 409 (1968).

55 Id. at 445.
In Marable v. Alabama Mental Health Board standing was accorded to patients in the state's mental facilities for the purposes of redressing discriminatory employment practices because of the "secondary effects" on the plaintiffs as patients. Students have been given standing to protest discrimination in the employment and assignment of teachers. Neither the patients nor the students were the "direct victims" of the challenged discriminatory acts in a strict sense. The interest of an individual in a "suitable living environment" for himself and his family is surely as important as an interest in a proper healing or educational environment.

Title VIII was referred to as a bill of rights for education for all people because the reality that segregated neighborhoods produced the segregated neighborhood school was beyond dispute. In Lee v. Nyquist the court recognized that racial isolation in schools is a product of local housing patterns. Our courts have, in effect, been maintaining that black people are deprived when they are denied contact with white people. Legal premises have evolved to the point where it is recognized that in many respects white people have been victimized by discrimination against blacks. In Hobson v. Hansen, an action brought by parents of white children, the court held that their children were entitled to the benefit of an integrated education to the extent it could be effectuated. In the first decision on the matter the court said that segregation precludes the social encounter between white and black which is an essential attribute of education.

If courts are able to recognize the damage to the mind and spirit of children of all races when they are subjected to a segregated school system, it is not an unwarranted extension to recog-

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57 Id. at 297.
59 114 Cong. Rec. 9559 (1968) (remarks of Representative Celler). Id. at 2526 (remarks of Senator Brooke).
63 See e.g., Id.
67 Id.
nize that similar damage ensues when segregated play groups of
preschoolers as well as segregated play groups of older children
exist. Socialization and learning are on-going processes which do
not begin and end at the school house door. Congress has the power
to eliminate racial discrimination and may do so by proscribing the
conduct of private individuals. This power was exercised in both
respects in Title VIII. Congress could have limited standing to sue
to the "direct victim," the isolated object of a discriminatory act.
Instead Congress chose to bestow standing on anyone aggrieved by
a violation of the Act. Title VIII was intended as a vehicle to
foster the creation of integrated neighborhoods. When a private
individual inhibits this development, he should be answerable to
anyone his conduct adversely affects.

Other Potentially Aggrieved Parties

Congress articulated several interests which Title VIII should
further. Included among these is the competitive interest of those
involved in the development, construction, sale, and rental of resi-
dential property. The real estate interests informed Congress that
they require a uniform standard of conduct which imposes on
everyone in the industry the same duty not to discriminate. Some
members of the housing industry feel obligated either morally or
legally to obey the law. Others will be under the coercion of judicial
process. Absent standing to seek compliance on the part of their
competitors, these individuals are in an uncomfortable position.
Compliant businessmen are certainly more exposed to economic
pressure from the consumer market if recalcitrant businessmen are
permitted to compete uncontrolled in the same consumer market.

An inability to find housing within reasonable proximity of
employment precludes many racial minorities from obtaining or ac-
cepting available jobs. Consider the situation of an employer
whose offer of employment to an uniquely qualified black man is
rejected because desegregated local housing is not available. A
broad construction of the phrase "person aggrieved" would permit

72 See e.g., 114 Cong. Rec. 9560 (1968) (remarks of Representative Celler).
73 See e.g., 114 Cong. Rec. 2529 (1968) (remarks of Senator Tydings).
74 Id.
75 See e.g., 114 Cong. Rec. 9554 (1968) (remarks of Representative Madden).
76 This hypothetical situation is not a figment of the author's imagination. The
author was peripherally involved in just such a situation some 15 years ago.
employers to take action to protect their interest in obtaining workers. Equal employment opportunity at all job levels is being vigorously pursued by minority group members. By Executive Order No. 11512\textsuperscript{77} the availability of low and moderate income housing is a criteria in the selection of sites for federal installations. It is conceivable that the day may come when private businesses will not be able to relocate in areas where housing is not, in fact, open to all social and ethnic groups.

The causal connection between segregated neighborhoods and \textit{de facto} segregated schools is well known.\textsuperscript{78} This leaves school districts in a difficult predicament. Desegregated schools are viewed as a necessary component of a public-school education.\textsuperscript{79} To achieve racial balance within their systems, school districts frequently must expend substantial sums of money. When unlawful discriminatory conduct by a landowner or a developer contributes to the problem, school boards should be able to compel compliance with Title VIII.\textsuperscript{80}

\textit{The Need to Expand Standing under Title VIII}

The private enforcement of Title VIII has, to date, been left largely to the individual minority group member who has suffered discrimination at the hands of the offending landowner. This means that many in the housing industry are permitted to continue their discriminatory conduct. The realities of the situation should be recognized. The "direct victim" of a discriminatory refusal may not be certain the rejection was for racial reasons, particularly if an offender engages in the practice of "tokenism." Further, landowners are not as candid in their reasons for refusal as they might have been prior to the Fair Housing Act. Those in regular contact with an offending landowner may be in the best position to know the motives for refusing an applicant.

Time and money are required to litigate the matter; the person rejected may feel he cannot afford either. Additionally there is an understandable reluctance to expose oneself to the pangs of a lawsuit in which personal characteristics are put in issue. These factors

\textsuperscript{77} Issued Feb. 27, 1970, 3 C.F.R. 530 (1971).

\textsuperscript{78} See e.g., 114 Cong. Rec. 2276 (1968) (remarks of Senator Mondale). See also Report on Civ. Disorders, supra note 1, at 424-27.

\textsuperscript{79} See e.g., Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970). [Challenging statute banning assignments on the basis of race to achieve racial equality].

\textsuperscript{80} 42 U.S.C. §§ 3601-19 (1970). Title VIII's coverage extends to public housing as well as private housing. Although it is unlikely that school boards would bring suit against small private landowners, owners of multiple housing units would be likely defendants.
probably contribute to the fact that few applicants who have been refused housing pursue the remedies available to them.\textsuperscript{81}

The realization that an individual other than the one directly discriminated against might be the most "effective adversary" to litigate the matter has been an element in the judicial decision to allow standing.\textsuperscript{82} Generally, one may not obtain standing to vindicate the constitutional rights of absent third parties. This, however, is a rule of practice which is not constitutionally mandated and which can be overcome by a need to protect fundamental rights which would otherwise be denied.\textsuperscript{83} Courts, therefore, have permitted legal rights of others to be raised both offensively\textsuperscript{84} and defensively\textsuperscript{85} where federally protected rights have been invaded.

One can understand the reluctance of a court to grant standing to broad classes of plaintiffs, particularly when the defendant is a private party. The author feels that the risk of harassment and groundless lawsuits is not unbearably high. Title VIII requires a private party to file his complaint within 180 days of a proscribed act.\textsuperscript{86} The burden of proof is on the complainant.\textsuperscript{87} Damages are discretionary with the court and are limited to actual damages and a maximum of $1,000 punitive damages.\textsuperscript{88} The expense of prosecuting such a suit would deter groundless suits. However, the risk of multiple lawsuits would serve as an incentive not to discriminate.

Title VIII depends upon litigation for its enforcement. Considering the prevalence of discrimination in housing,\textsuperscript{89} very few complaints are actually filed.\textsuperscript{90} To date, enforcement has been limited to suits brought by the person discriminated against and the

\textsuperscript{81} S. \textsc{Deutsch, Fair Housing In \textsc{Santa Clara County} (1971) (hereinafter cited as \textit{Fair Housing Report}); \textit{Civil Rights Report}, \textit{supra} note 8, at 145-46.  
\textsuperscript{83} Barrows v. Jackson, 346 U.S. 249, 257 (1953).  
\textsuperscript{85} Barrows v. Jackson, 346 U.S. 249 (1953).  
\textsuperscript{86} 42 U.S.C. §§ 3610, 3612 (1970). Whether the complainant proceeds directly in federal court under section 3612 or with HUD, the action must be instituted within 180 days. If the original complaint is filed with HUD under section 3610 and the defendant is cooperating with the conciliation effort, the statute of limitations period for commencing action in district court is tolled. However, the complainant may file suit only against the individual named in his original complaint if the matter is not satisfactorily resolved. James v. Hafer, 320 F. Supp. 397 (N.D. Ga. 1970).  
\textsuperscript{87} 42 U.S.C. § 3610(e) (1970).  
\textsuperscript{88} \textit{Id.} § 3612(c).  
\textsuperscript{89} \textit{See Fair Housing Report, supra} note 81.  
\textsuperscript{90} 342 complaints from California were received by HUD during the period July 1, 1970 to July 31, 1971. \textit{Id.} at 19. Fewer than 1500 complaints were received by HUD nationwide in the two-year period after enactment of Title VIII. \textit{Civil Rights Report, supra} note 8, at 146.
Justice Department. This limitation is a major reason for the ineffectiveness of Title VIII in achieving its goals.

The right of the Attorney General to originate suits under Title VIII is an important enforcement tool. However, realistically he should not be expected to do the total job. The vigor with which the Attorney General will pursue the right afforded to him will depend on the Administration's philosophy regarding the goal and the funds and manpower resources available. The Attorney General has a limited staff for civil rights enforcement. The housing section of the Civil Rights Division has but eighteen attorneys to service the entire United States.91

Testimony was offered at the Senate Hearings on the Fair Housing Act which indicated that residential separation of the races is a universal characteristic of American life.92 Considering the national scope of housing discrimination and the limited resources available for the resolution of that problem, it is difficult to see how Congress could reasonably have intended to achieve its goal of nationwide fair housing by relying solely on the Attorney General to correct a "pattern or practice" of discrimination. The Court adopted this rationale in Newman v. Piggie Park Enterprises, Inc.,93 a case involving discrimination in a drive-in restaurant brought under the Civil Rights Act of 1964.94 The Supreme Court noted that when Title II passed "it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."95

Enforcement of Title VIII also depends upon private litigation. Expanding the classes of plaintiffs entitled to enforce the Act obviously increases the possibility that the Act will be effective in achieving its purposes. If standing is allowed on a broad basis, those individuals and groups desirous of living in an integrated community could take effective steps to redress any unlawful public or private interference with this desire. Once standing is present, a broad spectrum of relief is available to correct the effects of past discriminatory acts as well as to prevent future ones.96 Broad cover-

91 Brief for the United States as amicus curiae at 33, Traffante v. Metropolitan Life Ins. Co., 446 F.2d 1158 (9th Cir. 1971) supporting plaintiffs' contention that as tenants they had standing under Title VIII.
93 390 U.S. 400 (1968) (per curiam).
95 390 U.S. at 401.
96 42 U.S.C. § 3612(c) provides: "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order ...." For limits on monetary damages, see text accompanying note 88, supra.
age and remedies not coupled with vigorous enforcement, however, will not eliminate racial discrimination in housing to any significant degree.

**ENFORCEMENT**

*The Powers of the Attorney General*

Section 3613 of Title VIII\(^97\) bestows a discretionary power on the Attorney General to bring suit in federal district court when he believes a person or group is resisting the Act or otherwise engaging in conduct which has the effect of denying any group their rights under any section of Title VIII. Although his belief should be based on reasonable cause, the courts see their function as one of determining if there is a "pattern or practice" of discrimination and not one of inquiring into the basis for the belief.\(^98\) The court makes no preliminary determination concerning the reasonableness of the exercise of discretion by the Attorney General.\(^99\)

Unlike sections 3610 and 3612 which require a specific discriminatory act within the previous 180 days before a private individual may initiate action, section 3613 has no such statute-of-limitations period. If interpretation of the Equal Employment Opportunity Act\(^100\) is to serve as precedent\(^101\) for the interpretation of the Fair Housing Act, it is possible that the "pattern or practice" of discrimination could have its origins in circumstances or conduct predating the passage of Title VIII.\(^102\)

In a government suit against a labor union\(^103\) for racial discrimination in violation of the Equal Employment Opportunity Act,\(^104\) a collective bargaining agreement which set up a system of priorities for work referrals was modified as it affected black members. Work experience obtained by union members during the time the union did not admit blacks to membership was counted in determining the order of priority for work referral. Consequently, newly

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\(^100\) 42 U.S.C. §§ 2000(e) et seq. (1970) [hereinafter noted in the text as Title VII].
\(^101\) The language of section 2000(e)(6) of Title VII is very similar to that of section 3613 of Title VIII. Section 2000(e)(6) requires an element of intent to deny the full exercise of employment rights whereas section 3613 merely requires that housing rights be denied to any group.
\(^102\) See United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir. 1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 139 (8th Cir. 1969).
\(^103\) United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).
admitted black members received the lowest priority. There was no record of union discrimination in admissions after the passage of Title VII. The Court held that the system of priorities preserved the effects of previous discriminatory practices which resulted in present and future discrimination and as such was a violation of Title VII.

Comparable situations need correction in the housing area. In *United States v. West Peachtree Tenth Corp.*, the Attorney General brought suit against the owner of a 96-unit apartment building. The lower court, after finding that the defendant landlord had pursued discriminatory practices prior to the passage of Title VIII, held that the government failed to establish a "pattern or practice" of discrimination after the effective date of the Act. In overruling the lower court, the Fifth Circuit said that where there is a finding of pre-Act discriminatory practices and little or no evidence to show that such conduct has changed, a strong inference that there has been no change arises. Standing alone this will not establish a prima facie case of present discrimination but its probative value is significant. Even though in this case there were two known discriminatory refusals after Title VIII was in effect, the tenor of the court's opinion was such that if there were other evidence that a pre-Act discriminatory practice had not been discontinued, the "pattern or practice" of discrimination could have been established.

The role of the Attorney General in the enforcement of Title VIII is very important. As noted above, however, his ability to make full use of his powers under Title VIII is limited. Aggrieved parties bringing suit as private attorneys general could be extremely effective in eliminating racially discriminatory practices on the part of offending landowners.

*The Private Attorney General*

Section 3610(d) and 3612(c) permits a private individual to obtain a broad spectrum of affirmative and other relief including temporary restraining orders, temporary and permanent injunctions, and any other order the court feels is appropriate. Such broad remedies could be effectively used to permit a private party to secure the elimination of all acts of discrimination practiced by the defendant. Such a view would be consistent with the current practice in the enforcement of other civil rights acts. The Fair Housing
Act, as part of the total effort to rid this society of the inequities of racial discrimination, should be liberally construed to effect its goals.

The record in the civil rights area is replete with cases in which the concept of private attorney general is used to control the conduct of private-party defendants as it affects those other than the plaintiff. In *Newman v. Piggie Park Enterprises, Inc.*, the Supreme Court said that a Title II suit is private only in its form and that if the complainant obtains an injunction "he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." The effectiveness of a statute such as the Fair Housing Act depends upon obtaining judicial decrees which compel an offender to comply with its terms. Particularly with respect to remedies, judicial treatment of Title VIII should not be different from that afforded to other civil rights statutes.

**Mootness**

Once an individual files a complaint, the question should not become moot merely because the defendant corrects the act which serves as the basis for the complaint. In *Jenkins v. United Gas Corp.*, a black employee brought suit against his employer for discriminatory promotion policies. Subsequent to the commencement of the action, the plaintiff employee was offered and he accepted the previously denied promotion. The Fifth Circuit held that the suit was not moot either to the employee or to the class he represents. The court, in noting the role private litigation plays in effectuating Congressional policies, said that the plaintiff in such an action "takes on the mantel of the sovereign." There are two elements in the plaintiff's charge, namely, that he has been denied a specific employment opportunity and that the denial was based on discrimination banned by Title VII. The court found that the second element was a matter of "extreme importance with heavy overtones of public interest," and that the suit was therefore comparable to a class action for others similarly situated.

The Fourth Circuit refused to dismiss an action when the specific discriminatory act on which it was based was subsequently

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109 390 U.S. 400 (1968) (per curiam).
110 Id. at 402.
111 400 F.2d 28 (5th Cir. 1968).
112 Id. at 32.
113 Id. at 32-33. The court did not hold that a private attorney general may not dismiss his suit without court approval, but rather that the court may not do so over his objection without reaching the merits.
Even though the plaintiff-doctor was granted active staff privileges, black doctors in the area as well as their patients were considered plaintiffs who were entitled to injunctive relief. The court recognized the unwillingness of minority individuals to subject themselves to the humiliation of a refusal. The court said that the failure of other black physicians to apply for staff privileges at the defendant hospital was due to the realization that such an effort would be useless in light of the well-known discriminatory policies of the defendant.

A victim of housing discrimination generally has an immediate housing need which must be satisfied. Frequently the offer of housing will come long after the victim is settled in new accommodations which he will be reluctant to leave. If a landowner is able to render the matter moot by offering a housing opportunity to the victim of his discriminatory act, the pace of neighborhood desegregation is slowed. Housing discrimination is a matter of great public importance in much the same way as is discrimination in employment and public accommodations. Applying the Title VII interpretation of the Fifth Circuit in *Jenkins v. United Gas Corp.* and the Fourth Circuit's holding on mootness in *Cypress v. Newport News Gen. and Nonsectarian Hospital Ass'n, Inc.* to the Fair Housing Act permits a complainant to insure that the offending landowner will not continue his discriminatory ways.

**Degree of Relief Available**

To date, Title VIII has not produced much case law. However, the growing case law of other civil rights statutes should have

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115 400 F.2d 28 (5th Cir. 1968).

116 375 F.2d 648 (4th Cir. 1967).

117 Most complainants proceed under section 3610 (42 U.S.C.) by filing a complaint with HUD. Section 3610(c) provides that if there is a state or local fair housing law which provides substantially equivalent rights and remedies for discriminatory housing practices, HUD shall refer the complaint to the appropriate state or local agency. In the majority of cases this referral is entirely unproductive. The complaint is returned to HUD without any substantive action on the part of the local agency. 82% of the complaints received by HUD from California were referred to the Fair Employment Practice Commission. 82.3% of these were returned to HUD for further action. Presently, area offices of HUD receive the complaints. These offices cover a large geographical area. For example, the area office in San Francisco receives the complaints from most of northern California including those from the heavily populated Santa Clara County. Consequently, a complainant must frequently make repeated long-distance trips to press his grievance. HUD is further limited in the discharge of its administrative and enforcement responsibilities as provided in sections 3608 and 3610, because it does not have the power to issue cease and desist orders or employ other judicial remedies which would permit HUD to eliminate housing discrimination through administrative action. *Fair Housing Report, supra* note 81, at 19.
precedential value in the interpretation of the Act. Courts have granted relief to redress not only the discriminatory act on which the complaint is based, but also to prevent future acts of discrimination on the part of the defendant.\textsuperscript{118} Under the Equal Employment Opportunity Act,\textsuperscript{110} the courts have held that the effects of pre-Act discrimination can be redressed by an aggrieved party.\textsuperscript{120}

In \textit{Marquez v. Omaha District Sales Office, Ford Division},\textsuperscript{121} the defendant's existing promotion system denied advancement to individuals solely for lack of ability or experience. The plaintiff, several years prior to the passage of Title VII, had been denied promotions because of his race. Consequently, he was not eligible for advancement to the level he would have attained had the past discriminatory policies not existed. The court held that when a promotion scheme, albeit neutral on its face, serves to perpetuate the effects of past discrimination, "it rejuvenates the past discrimination in both fact and law regardless of present good faith."\textsuperscript{122} Acknowledging that Title VII was intended to have future application only, the court went on the say that relief may nevertheless be granted to remedy "present and continuing effects of past discrimination."\textsuperscript{123} This would be a useful concept in the housing field particularly with respect to desirable apartment complexes with long waiting lists for initial placement or for access to the larger and more desirable units.

In \textit{Newbern v. Lake Lorelei, Inc.},\textsuperscript{124} the black plaintiffs who were unable to purchase a lot for a vacation home brought suit under the Civil Rights Act of 1866.\textsuperscript{125} Upon a finding that the refusal to sell to the plaintiffs as well as to other black people was for racial reasons only, the court issued a general anti-discrimination injunction which banned discrimination in all future lot transactions. The 1866 statute is silent on the relief a plaintiff may obtain. The court, however, did not hesitate to apply the concept of private attorney general and thereby insure that the defendant did not

\textsuperscript{118} See \textit{e.g.}, Newbern v. Lake Lorelei, Inc., 308 F. Supp. 408, 418 (S.D. Ohio 1968). [Discriminatory refusal to sell plaintiff a lot for a vacation home.]


\textsuperscript{121} 440 F.2d 1157 (8th Cir. 1971).

\textsuperscript{122} \textit{Id.} at 1160.

\textsuperscript{123} \textit{Id.}


discriminate on racial grounds in the future. Title VIII, with its full panoply of judicial remedies, should receive a similar judicial construction.

**Conclusions**

Title VIII is a forward step but it has not measured up to the expectations of its proponents.\(^\text{126}\) The goal of integrated neighborhoods has not been materially advanced and racial discrimination in housing presently exists on a broad scale.\(^\text{127}\) Persons aggrieved under the Act should include all who have the racial composition of their neighborhoods, their schools, or their social, business and professional relationships affected by an unlawful discriminatory act. In *Walker v. Pointer*,\(^\text{128}\) a case brought under the Civil Rights Act of 1866\(^\text{129}\) by a white plaintiff, the court said that to hold "that only those suffering from discrimination against black people who happen to be black come within the protection of the statute . . . would . . . be to read in [section] 1982 a racist purpose."\(^\text{130}\)

If the courts will not liberally construe Title VIII as creating a statutory right for all Americans to live in an integrated environment, the Act should be amended to provide this in clear and unequivocal terms. Traditional concepts of private property and rights therein unfortunately lend an emotional overtone to the issue of fair housing. Indeed the debates preceding the enactment of Title VIII reflect the uneasiness with which the abridgement of any aspect of private property rights is viewed.\(^\text{131}\) Nonetheless Congress did choose to prefer the benefits of fair housing over the right of a landowner to dispose of his property if he does so in a racially discriminatory fashion.

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\(^{126}\) See *Civil Rights Report*, supra note 8; *Fair Housing Report*, supra note 81.

\(^{127}\) See *e.g.*, *Fair Housing Report*, supra note 81.

\(^{128}\) 304 F. Supp. 56 (N.D. Tex. 1969). *See also*, Williamson v. Hampton Management Co., 339 F. Supp. 1146, 1147 (N.D. Ill. 1972) in which the court said that a "white plaintiff upon whom a discrimination against black persons has an impact may bring an action" under Title VIII.


\(^{130}\) 304 F. Supp., at 60. [Action for damages against a landlord for an eviction because the plaintiff had black friends visit.] The court, quoting from *Bolling v. Sharpe*, 347 U.S. 497 (1954), further said that classifications based on race are against our traditions and are constitutionally suspect.

\(^{131}\) See *e.g.*, 114 CONG. REC. 9528 (1968) (remarks of Representative Montgomery).