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## Fundamental Issues in Housing Discrimination Litigation

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## Fundamental Issues in Housing Discrimination Litigation

### INTRODUCTION

Discrimination in housing is pervasive throughout American housing markets.<sup>1</sup> The Kerner Commission named segregation in housing as an ingredient of the explosive mixture accumulating in cities since World War II.<sup>2</sup> Until very recently, housing discrimination has been openly practiced by landlords, builders, developers, realtors, lenders, and government.<sup>3</sup> However, it is now "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."<sup>4</sup> Despite a host of laws prohibiting housing related discrimination, housing markets have remained closed to minority groups.<sup>5</sup> Widespread discrimination persists, both public and private, and residential segregation has remained a fact of life.<sup>6</sup>

The thirteenth amendment of the United States Constitution is the primary constitutional basis for legislation designed to prohibit racial discrimination in housing.<sup>7</sup> The fourteenth amendment of the United States Constitution guarantees equal protection of the laws, and has been applied in order to prohibit discrimination in housing.<sup>8</sup> The Civil Rights Act of 1866<sup>9</sup> guarantees equal contract rights<sup>10</sup> and equal property rights.<sup>11</sup> More recent legislative responses to housing discrimina-

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1. R. MONTGOMERY & D. MANDELKER, *HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES* 355 (2d ed. 1979).

2. REPORT, NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

3. UNITED STATES COMMISSION ON CIVIL RIGHTS: TWENTY YEARS AFTER BROWN 99 (1975).

4. 42 U.S.C. § 3601 (1976); e.g., *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982).

5. D. BELL, *RACE, RACISM AND AMERICAN LAW* § 8.1 (1980).

6. D. MANDELKER, C. DAYE, O. HETZEL, J. KUSHNER, H. MCGEE & R. WASHBURN, *HOUSING AND COMMUNITY DEVELOPMENT* 559-62 (1981).

7. *Jones v. Mayer Co.*, 392 U.S. 409 (1968); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976); *United States v. Hunter*, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972); *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd without opinion*, 547 F.2d 1168 (6th Cir. 1977).

8. E.g., *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *United Farmworkers of Fla. Hous. Project v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974); *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

9. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981-1982 (1976 & Supp. V 1981)).

10. 42 U.S.C. § 1981 (1976).

11. *Id.* § 1982.

tion problems are Executive Order 11063,<sup>12</sup> Title VI of the Civil Rights Act of 1964,<sup>13</sup> Title VIII of the Civil Rights Act of 1968,<sup>14</sup> the Equal Credit Opportunity Act,<sup>15</sup> and the Housing and Community Development Act of 1974.<sup>16</sup> However, even with such an arsenal of laws designed to prohibit housing related discrimination, housing discrimination continues to flourish and nonenforcement of the housing laws remains a paramount obstacle to the elimination of discrimination in housing and housing related services.<sup>17</sup>

Important preliminary issues faced by housing litigants are procedure, standing, and standard of proof. Problems of procedure and standing often baffle housing litigants and serve as major preliminary obstacles which must be overcome prior to having the case heard on its merits. Problems concerning the requisite standard of proof also serve as significant obstacles, since it is necessary to determine what standard of proof is to be applied in order to properly investigate and develop a housing discrimination case. While the Supreme Court has announced the appropriate standard of proof for constitutional claims<sup>18</sup> and for claims brought under 42 U.S.C. section 1981,<sup>19</sup> it has yet to provide such guidance for claims brought under the Fair Housing Act. The circuit courts are generally in accord that some forms of discriminatory effect are sufficient to prove a violation of the Fair Housing Act.<sup>20</sup>

This Comment will focus on issues of procedure, standing, and stan-

12. 3 C.F.R. 652 (1959-63 compilation), *reprinted in* 42 U.S.C. § 1982 (1976).

13. 42 U.S.C. §§ 2000d-2000d-6 (1976 & Supp. V 1981).

14. *Id.* §§ 3601-3619.

15. 15 U.S.C. §§ 1691-1691f (1976).

16. 42 U.S.C. §§ 5301-5317 (1976 & Supp. V 1981).

17. *See generally* Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159 (1973); Comment, *The Fair Housing Act of 1968: Its Success and Failure*, 9 SUFFOLK U.L. REV. 1312 (1975).

18. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

19. *General Bldg. Contractors Ass'n v. Pennsylvania*, 102 S. Ct. 3141 (1982). Since 42 U.S.C. §§ 1981 and 1982 have been interpreted to be companion statutes, the Court will probably require proof of intent or purpose to prove a violation of § 1982. *See Jones v. Mayer*, 392 U.S. 409 (1968). *But see City of Memphis v. Greene*, 451 U.S. 100 (1981), where the Court declined to require proof of intent under § 1982.

20. *See Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982); *Robinson v. 12 Lofts Realty*, 610 F.2d 1032 (2d Cir. 1979); *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 558 F.2d 1283 (7th Cir. 1977) [*Arlington Heights II*]; *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *cert. denied*, 422 U.S. 1042 (1975); *United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). *But see Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975). *See generally* Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. 199 (1978); Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 U.C.L.A. L. REV. 398 (1978); Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 127 (1976).

dard of proof with emphasis placed primarily on the Fair Housing Act, 42 U.S.C. section 1982, and the fourteenth amendment. Part I will present a brief overview of some early housing discrimination cases and will outline the coverage of the major housing discrimination laws. Part II will analyze the various procedural avenues available and will assess the alternative enforcement mechanisms. Part III traces the issue of standing, including the constitutional requirements. Part IV analyzes standard of proof issues, with an emphasis on the developing models of the "effects test" under the Fair Housing Act.

## I. OVERVIEW OF HOUSING DISCRIMINATION LAWS

### A. *Early History*

As early as 1917, the Supreme Court in *Buchanan v. Warley*<sup>21</sup> unanimously held that a municipal ordinance which denied blacks the right to occupy houses on predominantly white blocks violated the due process clause of the fourteenth amendment. In *Harmon v. Tyler*,<sup>22</sup> the Court unanimously invalidated an ordinance which prevented the establishment of any home in a community without the written consent of a majority of the persons of the other race inhabiting the community. In *Shelley v. Kraemer*,<sup>23</sup> the Court held that state judicial enforcement of racially restrictive covenants was state action violative of the fourteenth amendment. In *Hurd v. Hodge*,<sup>24</sup> a companion case to *Shelley*, the Court held that a racially restrictive covenant violated 42 U.S.C. section 1982. In *Barrows v. Jackson*,<sup>25</sup> the court held that damages could not be awarded by a state court for breach of a racially restrictive covenant. Much later, in *Mayers v. Ridley*,<sup>26</sup> the District of Columbia Circuit Court of Appeals held that racially restrictive covenants violated the Fair Housing Act.<sup>27</sup>

Many recent cases have held that, upon a finding of intentional discrimination, the denial of housing and housing related services is violative of the equal protection clause of the fourteenth amendment where state action is present.<sup>28</sup> In *Reitman v. Mulkey*,<sup>29</sup> the Court held unconstitutional as a violation of equal protection a state constitutional amendment giving individuals discretion to discriminate in the sale or

21. 245 U.S. 60 (1917).

22. 273 U.S. 668 (1927).

23. 334 U.S. 1 (1948).

24. 334 U.S. 24 (1948).

25. 346 U.S. 249 (1953).

26. 465 F.2d 630 (D.C. Cir. 1972) (en banc).

27. 42 U.S.C. §§ 3601-3619 (1976 & Supp. V 1981).

28. See cases cited *supra* note 8. But see *James v. Valtierra*, 402 U.S. 137 (1971); *Citizens Comm. for Faraday Wood v. Lindsey*, 507 F.2d 1065 (2d Cir.), *cert. denied*, 421 U.S. 948 (1974).

29. 387 U.S. 369 (1967).

rental of property. In *Hunter v. Erickson*,<sup>30</sup> the Court held that a municipal ordinance requiring referendum approval of any city council action that involves racial, religious, or ancestral discrimination in housing violated the fourteenth amendment's equal protection clause. However, with the enactment of the Fair Housing Act in 1968, the fourteenth amendment is no longer the primary means of attacking housing discrimination.

## B. *The Fair Housing Act*

The Fair Housing Act is a "broad legislative plan to eliminate all traces of discrimination within the housing field."<sup>31</sup> The Fair Housing Act represents the most important, comprehensive and far-reaching measure to combat housing discrimination to date.<sup>32</sup> Through the Fair Housing Act, Congress declared fair housing to be a national policy<sup>33</sup> which it considered "to be of the highest priority."<sup>34</sup> Fair housing has been defined as "the achievement of a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, national origin or sex."<sup>35</sup> "[E]ven the most conservative definition of fair housing will necessarily involve the eradication of discrimination."<sup>36</sup>

Seeking to produce "truly integrated and balanced living patterns,"<sup>37</sup> the Fair Housing Act prohibits a wide range of discriminatory housing practices. It prohibits a refusal to sell, rent, negotiate, or otherwise make unavailable or deny a dwelling on the grounds of race, color, sex, or national origin.<sup>38</sup> The Fair Housing Act proscribes discrimination in the terms, conditions, or privileges in the sale or rental of a dwelling, or in the provisions of services or facilities in connection therewith.<sup>39</sup> It prohibits discriminatory advertising,<sup>40</sup> misrepresenting the availability

30. 393 U.S. 385 (1969).

31. *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974).

32. Chandler, *supra* note 17, at 174; Note, *Is the United States Committed to Fair Housing?* 29 CATH. U.L. REV. 641, 643 (1980). See *Jones v. Mayer*, 392 U.S. 409, 413 (1968).

33. 42 U.S.C. § 3601 (1976).

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

35. Spencer, *Enforcement of Federal Fair Housing Law*, 9 URB. LAW. 514 n.3 (1977)(citing Statement by President Richard M. Nixon on Federal Policies Relative to Equal Housing Opportunity, News Release, June 11, 1971).

36. Chandler, *supra* note 17, at 164 n.36.

37. 114 CONG. REV. 3422 (1968) (Statement by Senator Walter Mondale).

38. 42 U.S.C. § 3604(a) (1976). *E.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975).

39. 42 U.S.C. § 3604(b) (1976).

40. *Id.* § 3604(c). *E.g.*, *United States v. Hunter*, 459 F.2d 204 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972). See Annot., 22 A.L.R. Fed. 359 (1972).

of a dwelling,<sup>41</sup> and the inducement or attempted inducement of sales by representations of the present or future racial composition of the area.<sup>42</sup> The Fair Housing Act also proscribes discrimination in the financing of housing<sup>43</sup> and in the provision of brokerage services.<sup>44</sup> It prohibits interference, intimidation, or coercion of any person exercising rights granted by the Act.<sup>45</sup> Section 3631 of the Act provides criminal sanctions for anyone who uses force or the threat of force to willfully injure, intimidate, or interfere with someone exercising rights under the Act. The Act also prohibits racial steering, which is the process whereby buyers or renters are directed to different areas according to their race.<sup>46</sup> Section 3608 places certain administrative responsibilities on the United States Department of Housing and Urban Development (HUD) and further provides that HUD shall administer housing programs in an affirmative manner to further the policies of the Act.

The Fair Housing Act covers all dwellings,<sup>47</sup> both public and private, but the Act provides for certain exemptions.<sup>48</sup> These exemptions are: (1) any single-family house sold or rented by its owner,<sup>49</sup> (2) owner-occupied dwellings occupied by no more than four families,<sup>50</sup> (3) non-commercial housing operated by a religious organization,<sup>51</sup> and (4) noncommercial lodgings operated by private clubs.<sup>52</sup>

It is worth noting that the Court in *Trafficante v. Metropolitan Life Insurance Co.*<sup>53</sup> pointed out that the language of the Fair Housing Act is "broad and inclusive" and that the Act is to be generously construed. Numerous lower courts have given the Fair Housing Act the broadest possible construction.<sup>54</sup>

41. 42 U.S.C. § 3604(d) (1976). *E.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

42. 42 U.S.C. § 3604(e). This is commonly known as blockbusting. *E.g.*, *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd without opinion*, 547 F.2d 1168 (6th Cir. 1977).

43. 42 U.S.C. § 3605 (1976). *E.g.*, *Dunn v. Mid-western Indemnity Ins. Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979); *Laufman v. Oakley Bldg. and Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

44. 42 U.S.C. § 3606 (1976).

45. *Id.* § 3617. *E.g.*, *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1976), *aff'd in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1972 (1982); *Smith v. Stechel*, 510 F.2d 1162 (9th Cir. 1975); *Atkins v. Robinson*, 545 F. Supp. 852 (E.D. Va. 1982).

46. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 n.1 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 94 (1979); Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 809 (1976).

47. 42 U.S.C. § 3602(b) (1976).

48. *Id.* § 3603(b)(1).

49. *Id.*

50. *Id.* § 3603(b)(2).

51. *Id.* § 3607.

52. *Id.*

53. 409 U.S. 205 (1972).

54. *Id.* at 209. *E.g.*, *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033 (8th Cir.

## C. 42 U.S.C. § 1982

Under the Civil Rights Act of 1866, all United States citizens are guaranteed the same rights as are enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property.<sup>55</sup> As compared with the Fair Housing Act, section 1982 provides a broader coverage of transactions, but it prohibits discrimination only as to race.<sup>56</sup> In *Jones v. Mayer*,<sup>57</sup> the Court breathed new life into section 1982 by holding that it barred all racial discrimination, private as well as public, in the sale or rental of property. In *Jones*, the Court noted that Title VIII and section 1982 provide separate and independent coverage.<sup>58</sup> Section 1982 has been used successfully to attack increasingly complex housing discriminating problems. In *Clark v. Universal Builders, Inc.*,<sup>59</sup> the court held that section 1982 was violated where the defendant exploited minority housing markets. In *Sullivan v. Little Hunting Park, Inc.*,<sup>60</sup> the Court held that both a white homeowner and a black tenant stated a claim under section 1982 where a neighborhood park blocked the assignment of the park membership to the tenant on racial grounds.

## D. Title VI

Title VI of the Civil Rights Act of 1964<sup>61</sup> prohibits discrimination in any program receiving federal financial assistance. Title VI has been held to prohibit discrimination in housing where the requisite federal financial assistance is present.<sup>62</sup> Title VI exempts programs where the only federal assistance is insurance or guaranty;<sup>63</sup> therefore, Title VI does not cover a significant portion of housing.

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1979), *cert. denied*, 445 U.S. 905 (1980); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc).

55. 42 U.S.C. § 1982 (1976 & Supp. V 1981).

56. *E.g.*, *Jones v. Mayer*, 392 U.S. 409 (1968); *Tillman v. Wheaton Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1974); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

57. 392 U.S. 409 (1968).

58. *Id.* at 415-17. *See generally* Smedley, *A Comparative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 459 (1969); Note, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289 (1973). *See also* *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

59. 501 F.2d 324 (7th Cir. 1974).

60. 396 U.S. 229 (1969). *See also* *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969).

61. 42 U.S.C. §§ 2000d-2000d-6 (1976 & Supp. V 1981).

62. *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970).

63. 42 U.S.C. § 2000d-4 (1976 & Supp. V. 1981).

## II. PROCEDURE: ADMINISTRATIVE, JUDICIAL, OR BOTH

Issues of procedure often baffle housing litigants at an early stage, since there is such a wide range of procedural avenues available. If one proceeds under the fourteenth amendment, or under 42 U.S.C. section 1981 or section 1982, he may only seek redress through private litigation.<sup>64</sup> Under the Fair Housing Act, Title VI, or Executive Order 11063, discriminatory housing practices may be attacked through administrative complaints. However, one may pursue concurrent judicial and administrative proceedings. This section of the Comment will focus on the alternative enforcement procedures of the Fair Housing Act. The Fair Housing Act provides for three avenues of relief: (1) section 3610 provides for administrative complaints to HUD and subsequent court action if necessary, (2) section 3612 provides for private civil actions, and (3) section 3613 provides for a civil action by the United States Attorney General.

### A. 42 U.S.C. § 3610: *Administrative Complaint*

Under section 3610(a), any "aggrieved person," defined as any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur, may file a written complaint with HUD.<sup>65</sup> The complaint must be filed within 180 days of the alleged discriminatory housing practice. HUD must conduct an investigation within thirty days of the receipt of the complaint and must give written notice to the complainant concerning whether it intends to attempt to resolve the complaint.<sup>66</sup> If HUD decides to attempt resolution of the complaint, it may only utilize "informal methods of conference, conciliation and persuasion."<sup>67</sup> In other words, HUD has no enforcement authority.<sup>68</sup>

Whenever a state or local fair housing law provides rights and remedies which are substantially equivalent to those provided by the Fair Housing Act, HUD must contact the appropriate state or local agency and inform it of the complaint.<sup>69</sup> HUD shall take no further action on the complaint if the state or local agency has commenced proceed-

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64. Congress has granted original jurisdiction to the United States District Courts to hear civil actions to recover damages or secure equitable or other relief for the protection of civil rights. See 28 U.S.C. § 1343(4) (1976).

65. 24 C.F.R. §§ 105.1-36 (1983) provides HUD's regulations governing administrative complaint processing under 42 U.S.C. § 3610 (1976).

66. 42 U.S.C. § 3610(a) (1976).

67. *Id.*

68. See 24 C.F.R. § 105.31 (1983); Spencer, *supra* note 35.

69. 42 U.S.C. § 3610(c) (1976).



ings.<sup>70</sup> If the conciliation efforts fail, the complainant may proceed to federal court to enforce his rights.<sup>71</sup> The administrative complaint procedure is a jurisdictional prerequisite to the maintenance of a civil action brought under section 3610.<sup>72</sup>

The lower courts are divided on the issue of when the thirty-day period in section 3610(d) for filing a complaint begins to run. Some courts have held that the complainant must file his court action within sixty days of the filing of his administrative complaint.<sup>73</sup> Other courts have held that the complainant's thirty-day period commences upon the complainant's receipt of HUD's notice of failure to conciliate the case.<sup>74</sup> HUD regulations<sup>75</sup> are consistent with the latter. The wise litigant should certainly file his court action within sixty days of filing his administrative complaint since it often takes HUD more than sixty days to investigate a complaint.<sup>76</sup>

The section 3610 administrative process is generally regarded as inadequate as a meaningful measure to combat housing discrimination.<sup>77</sup> However, section 3610 does afford some advantages worth noting.<sup>78</sup> An attorney need not be retained to commence the administrative process. Cost is relatively low and the filing process is simple. Even though the administrative process often encompasses months, it is often quicker than obtaining resolution through litigation under section 3612.

#### B. 42 U.S.C. § 3612: *Direct Private Litigation*

Under section 3612, a complainant may file suit directly in federal or state court without exhausting any administrative remedies.<sup>79</sup> The Supreme Court noted in *Trafficante v. Metropolitan Life Insurance Co.*<sup>80</sup> that the private suit is the "main generating force" of the Fair Housing Act. The statute of limitations under section 3612 is 180

70. *Id.*, 24 C.F.R. § 105.19 (1983).

71. 42 U.S.C. § 3610(d) (1976).

72. *Smith v. Woodhollow Apartments*, 463 F. Supp. 16 (W.D. Okla. 1978); *Fair Hous. Council, Inc. v. Eastern Berghin County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D.N.J. 1976).

73. *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978); *Sumlin v. Brown*, 420 F. Supp. 78 (N.D. Fla. 1976); *Young v. AAA Realty Co.*, 350 F. Supp. 1382 (M.D.N.C. 1972).

74. *Logan v. Richard E. Cormack & Assoc.*, 368 F. Supp. 121 (E.D. Tenn. 1973); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971).

75. 24 C.F.R. § 150.16(a) (1983).

76. UNITED STATES CIVIL RIGHTS COMMISSION: THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 29 (1979). This report notes that it takes HUD an average of 118 days to complete its investigation and notify the complainant.

77. *Id.* at 26-31. See generally Comment, *supra* note 17.

78. Chandler, *supra* note 17, at 189.

79. *Oliver v. Foster*, 524 F. Supp. 927 (S.D. Tex. 1981); *Stingley v. City of Lincoln Park*, 429 F. Supp. 1379 (E.D. Mich. 1977).

80. 409 U.S. 205, 211 (1972).

days<sup>81</sup> and is not tolled while the complainant pursues administrative remedies under section 3610.<sup>82</sup> An attorney may be appointed for a plaintiff,<sup>83</sup> and attorney fees may be awarded to a prevailing plaintiff.<sup>84</sup> Sections 3610 and 3612 create separate, independent, and alternative enforcement mechanisms.<sup>85</sup> Congress intended for HUD's conciliation efforts under 3610 to occur concurrently with the pre-trial action under 3612.<sup>86</sup> An election of remedies is not necessary<sup>87</sup> and an adverse finding by HUD does not have a res judicata effect upon a section 3612 action.<sup>88</sup> In most cases, it would seem prudent to proceed concurrently under both sections 3610 and 3612.<sup>89</sup>

### C. 42 U.S.C. Section 3613: Action by Attorney General

Pursuant to 42 U.S.C. section 3613, the United States Attorney General may file a civil action whenever he has reasonable cause to believe that any person or group is engaged in a pattern or practice of discrimination, or that there has been a denial of fair housing rights which raises an issue of general public importance. To satisfy the pattern or practice requirement, the discrimination must result from more than a single isolated incident.<sup>90</sup> The Attorney General is given wide discretion as to whether an issue of public importance is raised.<sup>91</sup> Actions by the Attorney General under section 3613 have been successful in recent years in enjoining housing discrimination,<sup>92</sup> but section 3613 is only used at the Attorney General's discretion. It is probably worthwhile to inform the Attorney General of alleged housing discrimination since it may possibly lead to a civil action under section 3613. Even if the Attorney General fails to file an action, the investigatory activities will likely bring added pressure on the defendant.

## III. STANDING

The concept of standing has been recognized as among "the most

81. 42 U.S.C. § 3612(a) (1976).

82. *Smith v. Woodhollow Apartments*, 463 F. Supp. 16 (W.D. Okla. 1978).

83. 42 U.S.C. § 3612(b) (1976).

84. *Id.* § 3612(c).

85. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 104-08 (1979).

86. *Young v. AAA Realty Co., Inc.*, 350 F. Supp. 1382, 1386 (M.D.N.C. 1972); *Johnson v. Decker*, 333 F. Supp. 88, 91 (N.D. Cal. 1971). See 24 C.F.R. § 105.31 (1983).

87. *Johnson v. Decker*, 333 F. Supp. 88, 90-91 (N.D. Cal. 1971).

88. *Miller v. Poretsky*, 409 F. Supp. 837 (D. Col. 1976).

89. Comment, *supra* note 17, at 1319.

90. *United States v. Hunter*, 459 F.2d 205, 216-18 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

91. *United States v. Northside Realty Assoc., Inc.*, 474 F.2d 1164, 1168 (5th Cir. 1973).

92. *E.g.*, *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981); *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *United States v. City of Birmingham*, 538 F. Supp. 819 (E.D. Mich. 1982).

amorphous in the entire domain of public law.”<sup>93</sup> Although the Supreme Court has noted that “[g]eneralizations about standing to sue are largely worthless as such,”<sup>94</sup> it is necessary to outline the basic contours of the standing doctrine in order to place the doctrine in perspective prior to specifically addressing standing in housing discrimination cases. It is generally acknowledged that the doctrine of standing is confusing and uncertain.<sup>95</sup> One commentator noted that standing “lacks a rational conceptional framework. It is little more than a set of disjointed rules dealing with a common subject.”<sup>96</sup> In housing discrimination cases, the Supreme Court has quite actively addressed standing problems.<sup>97</sup> Several of these housing cases serve as leading cases developing the doctrine of standing.<sup>98</sup>

Simply stated, the question of standing concerns who may litigate. Standing determines who is the proper party to present a claim in court.<sup>99</sup> “[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute. . . .”<sup>100</sup> The standing issue is the “threshold question in every federal case, determining the power of the court to entertain the suit.”<sup>101</sup> Standing involves “a blend of constitutional requirements and prudential considerations.”<sup>102</sup>

#### A. Constitutional Requirements

The standing doctrine has its jurisprudential roots in Article III, section two of the United States Constitution, which limits the judicial power of federal courts to the adjudication of “cases and controversies.”<sup>103</sup> The Supreme Court in *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*<sup>104</sup> concisely outlined the minimum standing requirements:

93. *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

94. *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 151 (1970).

95. *Marshall and Ilsley Corp. v. Heimann*, 652 F.2d 685, 690 (7th Cir. 1981); *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 218 (D.C. Cir. 1976). See generally 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24.1 (2d ed. 1983); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

96. Tushnet, *supra* note 95, at 663.

97. Schwemm, *supra* note 20.

98. *E.g.*, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Warth v. Seldin*, 422 U.S. 490 (1975).

99. *E.g.*, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). See generally 13 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3531 (1975).

100. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

101. *Id.*

102. *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

103. U.S. CONST. art. III, § 2; *Valley Forge*, 454 U.S. at 471; *Simon v. Eastern Kentucky Welfare Rights Org. (EKWRO)*, 426 U.S. 26, 37 (1976).

104. 454 U.S. at 472.

[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' [citation omitted] and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed, by a favorable decision,' [citation omitted].

In order to satisfy the "case or controversy" requirement, the Court has required the plaintiff to allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction."<sup>105</sup> In *Baker v. Carr*,<sup>106</sup> the Court announced the personal stake requirement and reasoned that a personal stake in the outcome of the controversy is necessary to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends. . . ."<sup>107</sup> The Court identified this as the "gist" of the question of standing.

The personal stake requirement consists of three elements: 1) injury in fact, 2) causal connection between the injury and the defendant's conduct, and 3) likelihood that the relief requested will redress the injury.<sup>108</sup> Injury in fact requires that "the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."<sup>109</sup> The injury must be "distinct and palpable."<sup>110</sup> The injury may be economic or otherwise.<sup>111</sup> Perhaps the most liberal standing case involving non-economic interests is *United States v. SCRAP*<sup>112</sup> where the Court noted that "an identifiable trifle is enough for standing."<sup>113</sup> The plaintiff's injury in fact must be caused by the defendant's conduct. A "fairly traceable" causal connection between the claimed injury and the challenged conduct must exist<sup>114</sup> as well as a likelihood that the relief requested will redress or prevent the injury.<sup>115</sup>

105. *Warth v. Seldin*, 422 U.S. 490, 498 (1975)(quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

106. 369 U.S. 186, 204 (1962).

107. *Id.*

108. See generally *Valley Forge*, 454 U.S. 464 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Warth v. Seldin*, 422 U.S. 490 (1975); Broderick, *The Warth Optional Standing Doctrine: Return to Judicial Supremacy?*, 25 CATH. U.L. REV. 467, 469 (1975); K. DAVIS, *supra* note 95.

109. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (citations omitted).

110. *Id.* at 100; *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

111. *Valley Forge*, 454 U.S. 464, 486 (1982); *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978); *United States v. SCRAP*, 412 U.S. 669, 686-88 (1973); Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152 (1970).

112. 412 U.S. 669 (1973).

113. *Id.* at 689 n.14.

114. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Arlington I*, 429 U.S. 252, 261 (1977).

115. *Arlington I*, 429 U.S. 252, 262 (1977); *Simon v. EKWRO*, 426 U.S. 26, 38 (1976).

B. *Prudential Limitations*

In addition to the constitutional requirements, standing involves prudential limitations on the exercise of federal jurisdiction.<sup>116</sup> These prudential limitations are "principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to federal courts to those litigants best suited to assert a particular claim."<sup>117</sup> These prudential limitations are derived from the notion that it is imprudent for courts to hear certain cases, even though the plaintiff has established a case or controversy.<sup>118</sup> The prudential limitations are founded on a concern for the proper role of courts in a democratic society.<sup>119</sup> These prudential rules are rules of judicial self-restraint and stand apart from the constitutional requirement of standing. Courts are free to disregard the prudential rules when appropriate.<sup>120</sup>

In *Valley Forge*,<sup>121</sup> the Court concisely outlined the prudential rules. First, a plaintiff generally must assert his own legal rights rather than the rights of third parties.<sup>122</sup> However, in major housing related cases, the Court has allowed whites to assert the rights of black third parties. In *Barrows v. Jackson*,<sup>123</sup> a suit for damages for breach of a racially restrictive covenant, whites were allowed to assert the constitutional rights of blacks. The *Barrows* court reasoned that whites were the only effective adversaries to combat the use of restrictive covenants. In *Buchanan v. Warley*,<sup>124</sup> a white brought suit for specific performance of a contract to sell real property to a black. The white seller was allowed to challenge the validity of an ordinance barring black persons from living on predominantly white blocks.

The second of the prudential rules requires that courts refrain from hearing abstract questions of wide public significance which amount to a "generalized grievance."<sup>125</sup> In *United States v. Richardson*<sup>126</sup> and *Schlesinger v. Reservists Committee to Stop the War*,<sup>127</sup> the Court held

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116. Warth v. Seldin, 422 U.S. 490, 498 (1975).

117. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

118. South East Lake View Neighbors v. HUD, 685 F.2d 1027, 1034 (1982).

119. Warth v. Seldin, 422 U.S. 490, 498 (1975).

120. C. WRIGHT, THE LAW OF FEDERAL COURTS § 13, at 74 (4th ed. 1983).

121. 454 U.S. 464, 474-75 (1982).

122. *Arlington I*, 429 U.S. 252, 263 (1977); Warth v. Seldin, 422 U.S. 490, 499 (1975). But see discussion *infra*, concerning third party standing which has often been allowed in housing related cases. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Barrows v. Jackson*, 346 U.S. 249 (1953). Technically, the *Barrows* line of cases does not directly relate to standing. See Broderick, *supra* note 108, at 472.

123. 346 U.S. 249 (1953).

124. 245 U.S. 60 (1917).

125. Warth v. Seldin, 422 U.S. 490, 499 (1975).

126. 418 U.S. 166 (1974).

127. 418 U.S. 208 (1974).

that parties who allege a grievance shared generally with the public lack Article III standing. In *O'Shea v. Littleton*,<sup>128</sup> the Court stressed that "[a]bstract injury is not enough."

The third of the prudential rules requires that the plaintiff's complaint must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>129</sup> The "zone of interests" test is often employed in cases brought under the Administrative Procedure Act;<sup>130</sup> however, it is not limited to application in administrative cases.<sup>131</sup>

Congress may expand standing to the full extent permitted by Article III.<sup>132</sup> If Congress chooses to grant an express right of action, then courts "lack authority to create prudential barriers to standing in suits brought under" the statute.<sup>133</sup> "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."<sup>134</sup> However, even if Congress grants a statutory right of action to persons who would otherwise be barred by prudential standing rules, the Article III minima remains. Congress may not abrogate the Article III minima.<sup>135</sup> In *Gladstone Realtors v. Village of Bellwood*,<sup>136</sup> the Court held that Congress intended standing under the Fair Housing Act to extend to the full limits of Article III; therefore, courts lack authority to apply prudential barriers in cases brought under the Fair Housing Act. In *Havens Realty Corp. v. Coleman*,<sup>137</sup> the Court reaffirmed the principle that courts may not create prudential barriers in suits under the Fair Housing Act.

### C. Standing to Assert Third Party Rights

Separate from the general standing doctrine is the issue of standing to assert the rights of third parties.<sup>138</sup> Of course, the general rule mandates that the plaintiff may only assert his own legal rights, not the rights of third parties.<sup>139</sup> However, exceptions to the general rule have been recognized where there are "weighty countervailing policies."<sup>140</sup>

128. 414 U.S. 488, 494 (1972).

129. See *Association of Data Processing Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

130. 5 U.S.C. § 702 (1982).

131. Broderick, *supra* note 108, at 498.

132. *Gladstone*, 441 U.S. 91 (1979).

133. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

134. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

135. *Gladstone*, 441 U.S. 91, 100 (1979).

136. *Id.* at 100, 103 n.9.

137. 455 U.S. 363, 372 (1982).

138. See Broderick, *supra* note 108, at 471-73; Note, *Standing To Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

139. *Valley Forge*, 454 U.S. at 474-75; *Warth*, 422 U.S. at 499; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972).

140. *United States v. Raines*, 362 U.S. 17, 22 (1960). The Court has recognized exceptions to

Indeed, the Court has limited the circumstances under which one will be allowed to assert third party rights.<sup>141</sup>

Generally, there must be some specific reason for considering the rights of third parties.<sup>142</sup> One basis for allowing a litigant to assert third party rights is where a beneficial relationship between the litigant and the third party exists.<sup>143</sup> The allegedly unlawful conduct must "preclude or otherwise adversely affect a relationship existing between [the litigant] and the persons whose rights assertedly are violated."<sup>144</sup> Such a situation involving a relationship between the litigant and the third party will likely arise in the developer line of housing cases. Developers often have a relationship with the prospective tenants of the housing; they share a common interest in constructing the housing project.

Another basis for asserting third party rights occurs when the litigant is the only effective adversary to assert the third party's rights.<sup>145</sup> *Barrows v. Jackson*<sup>146</sup> is perhaps the leading case recognizing the assertion of third party rights. In *Barrows*, the Court reasoned that whites were the only effective adversaries to combat the use of racially restrictive covenants. The *Barrows* Court noted that the rule against asserting third party rights "is only a rule of practice [which may be] outweighed by the need to protect the fundamental rights which would be denied. . . ."<sup>147</sup> This exception to the rule against asserting third party rights, where the litigant would be the only effective adversary, is particularly suited for complex housing discrimination cases. In those cases, the third parties whose interests need protecting are the low-income prospective tenants. Low-income prospective tenants are rarely in a position to institute the necessary complicated litigation.

#### D. *The Fair Housing Act*

The Supreme Court addressed the issue of standing to sue under the Fair Housing Act in three major cases.<sup>148</sup> In *Trafficante v. Metropolitan*

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the general rule on several occasions. See *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958); *Buchanan v. Warley*, 245 U.S. 60, 72-73 (1917).

141. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

142. 13 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 3531, at 205.

143. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

144. *Warth*, 422 U.S. at 510.

145. *Barrows v. Jackson*, 346 U.S. 249, 259 (1953).

146. *Id.*

147. *Id.* at 257.

148. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Ins.Co.*, 409 U.S. 205 (1972). See generally Schwemm, *supra* note 20, at 213-25.

*Life Insurance Co.*,<sup>149</sup> a black and a white tenant sued under section 810 of the Fair Housing Act, alleging that the defendants were committing discriminatory rental practices in violation of section 804 of the Act. However, the plaintiffs did not claim to be the direct objects of the discrimination. Their claimed injuries were: lost social benefits of living in an integrated community; lost business and professional advantages; and embarrassment and economic damage in social, business, and professional activities from being stigmatized as residents of a white ghetto.<sup>150</sup> The Court granted standing to the *Trafficante* plaintiffs, noting that section 810 can be given vitality "only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination."<sup>151</sup> The *Trafficante* plaintiffs were asserting their interests in interracial association, and those interests were held sufficient to confer standing. They alleged that they were injured by the discrimination directed against others which resulted in their loss of the benefits of interracial associations.

In granting standing, the *Trafficante* Court relied on the legislative history of the Fair Housing Act. The Court noted that "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices."<sup>152</sup> In supporting the Fair Housing Act, Senator Javits stated that the Act would reach "the whole community."<sup>153</sup> *Trafficante* was the first case brought under the Fair Housing Act to reach the Supreme Court and was the first case to recognize that standing under the Act is as broad as permitted by Article III.

It is most important to note that the basis for granting standing in *Trafficante* derived from the Fair Housing Act. In enacting the Fair Housing Act, Congress created legal rights. The invasion of those rights confers standing. Therefore, *Trafficante* indicates the notion of statutory standing under the Fair Housing Act.

In *Gladstone Realtors v. Village of Bellwood*,<sup>154</sup> the Court granted standing to various plaintiffs who alleged racial steering in an action under section 812 of the Act. The *Gladstone* plaintiffs were the municipality of Bellwood, one black and four white residents of Bellwood, and one black resident of the neighboring community of Maywood. One of the plaintiffs living in Bellwood resided outside the affected area<sup>155</sup> allegedly affected by the racial steering.<sup>156</sup> The plaintiff outside

149. 409 U.S. 205 (1972).

150. *Id.* at 208.

151. *Id.* at 212.

152. *Id.* at 211.

153. *Id.* (quoting Senator Javits' speech in support of the Fair Housing Act, 114 CONG. REC. 2706 (1968)). The reach of the Act in this respect was later limited in *Gladstone* and *Havens*.

154. 441 U.S. 91 (1979).

155. This affected area is known as the target area, which was identified as a 12-13 block area.

156. 441 U.S. 91, 95 n.3 (1979).



the affected area and the plaintiff living outside Bellwood were denied standing.

The *Gladstone* Court granted standing to the Village of Bellwood. Bellwood had alleged that the defendant manipulated the city's racial makeup through racial steering.<sup>157</sup> The Court noted that steering practices may reduce the number of homebuyers in the Bellwood housing market. This may result in an exodus of white residents which may reduce property values thereby diminishing the tax base and threatening the municipality's ability to bear the cost of local government.<sup>158</sup> The Court concluded that the municipality's interest in promoting integrated housing was sufficient to satisfy Article III. The loss of Bellwood's racial balance and stability was held to be sufficient injury to confer standing on Bellwood.<sup>159</sup>

Extending *Trafficante*, the *Gladstone* Court held that residents in a neighborhood have standing to sue where racial steering affects the neighborhood's racial composition, thereby depriving the plaintiffs of the professional and social advantages of living in an integrated area.<sup>160</sup> The defendants contended that resident standing should be limited only to those residing in a particular apartment complex, as in *Trafficante*. However, *Gladstone* rejected that notion and held that residents in the affected twelve-by-thirteen block residential neighborhood had standing to sue. There is "no categorical distinction between injury from racial steering suffered by occupants of a large apartment complex and that imposed upon residents of a relatively compact neighborhood such as Bellwood."<sup>161</sup> The "relatively compact neighborhood" area for standing was later reaffirmed in *Havens Realty Corp. v. Coleman*.<sup>162</sup>

The *Gladstone* case serves to both reaffirm and extend the reach of *Trafficante*. Although *Trafficante* relied on the legislative history of the Act, suggesting that the Act was to reach the "whole community," the decision was limited to conferring standing on residents in the same apartment complex. *Gladstone* extended this to include residents of a relatively compact neighborhood.

*Gladstone* is also significant in that the Court noted that section 812 of the Act contains no restrictions on potential plaintiffs.<sup>163</sup> The Court went on to note that one is entitled to seek redress under section 812 if the plaintiff is "genuinely injured by conduct that violates *someone's*

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157. *Id.* at 109-10.

158. *Id.* at 110-11.

159. *Id.* at 111.

160. *Id.* at 115.

161. *Id.* at 114.

162. 455 U.S. 363 (1982).

163. 441 U.S. 91, 103 (1979).

§ 804 rights . . . .”<sup>164</sup>

In *Havens Realty Corp. v. Coleman*,<sup>165</sup> the Court further broadened the scope of standing under the Fair Housing Act. *Havens* opened a clear avenue of redress for fair housing litigants by holding that testers<sup>166</sup> have standing to sue under the Act. In *Havens*, the Court also granted standing to the fair housing organization HOME to bring an action on its own behalf.

The plaintiffs in *Havens* were HOME,<sup>167</sup> a black actually seeking to rent, and both a black and a white tester. The individual plaintiffs claimed a *Trafficante*-type injury by alleging that they were deprived of “important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices.”<sup>168</sup> The black renter alleged that he had been deprived of the right to rent real property in Henrico County.<sup>169</sup> The black tester claimed that the false information given her that apartments were unavailable caused her specific injury in violation of Section 804(d).<sup>170</sup> HOME alleged that the defendant’s steering practices “had frustrated the organization’s counseling and referral services, with a consequent drain on resources.”<sup>171</sup>

The *Havens* Court held that section 804(d) of the Fair Housing Act confers “a legal right to truthful information about available housing.”<sup>172</sup> A tester given false information concerning the availability of housing has standing to sue since he “has suffered injury in precisely the form the statute was intended to guard against.”<sup>173</sup> In *Havens*, the white tester had been given truthful information and therefore had no standing to sue as a tester. *Havens* reaffirms the *Trafficante* concept of statutory standing. In enacting section 804(d), Congress conferred statutory standing to secure the right to truthful information about available housing.

*Havens* also addressed the neighborhood standing issue, noting that the injuries to neighborhood residents were similar to those in *Glad-*

164. *Id.* at 103 n.9.

165. 455 U.S. 363 (1982).

166. Testers are “individuals who, without an intent to rent or purchase a home or apartment pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

167. Housing Opportunities Made Equal (HOME) was a non-profit corporation whose purpose was to make equal opportunity in housing a reality in the Richmond Metropolitan area. *Id.* at 368.

168. *Id.* at 369.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 373.

173. *Id.*

stone.<sup>174</sup> However, the plaintiffs did not identify the particular neighborhoods where they lived, and the complaint failed to demonstrate how the defendant's steering practices had affected the plaintiff's neighborhood.<sup>175</sup> Therefore, the Court remanded the case to allow the plaintiffs to make the complaint more definite.

The *Havens* Court reaffirmed *Gladstone* by noting that standing had been granted based on the effects of discrimination only within a relatively compact neighborhood. The *Havens* Court pointed out that it had not suggested that "discrimination within a single housing complex might give rise to a 'distinct and palpable injury' . . . throughout a metropolitan area."<sup>176</sup> Therefore, the Court clearly indicated its reluctance to extend neighborhood standing beyond that of a "relatively compact neighborhood."<sup>177</sup>

*Trafficante*, *Gladstone*, and *Havens* outline the basic contours of standing under the Fair Housing Act. Some of the numerous lower court decisions involving standing under the Act are noteworthy and will be discussed. Several cases considered whether neighborhood residents have standing to challenge various types of housing projects. In *Shannon v. HUD*,<sup>178</sup> the Third Circuit granted standing to black and white residents and businessmen of a neighborhood to challenge federal funding of a housing project which they alleged would increase the concentration of low income blacks in the neighborhood. The *Shannon* Court reasoned that the housing project may adversely affect "their [the plaintiffs'] investments in homes and businesses, . . . [and] the very quality of their daily lives."<sup>179</sup> The *Shannon* plaintiffs alleged that the failure of HUD to consider the racial concentration in its funding decision was in violation of section 3608 of the Fair Housing Act. Other cases have afforded standing to neighborhood residents to challenge housing projects which may affect the racial balance of the community.<sup>180</sup> The Seventh Circuit in *Alschuler v. HUD*<sup>181</sup> recently granted standing to neighborhood residents to challenge HUD's approval of federal financial assistance to a housing project. However, in a similar

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174. *Id.* at 376.

175. *Id.* at 377.

176. *Id.*

177. In an interesting lower court case, the court in *Bond v. Regal*, 530 F. Supp. 707 (E.D. Wis. 1982), denied standing to various plaintiffs who did not reside within the target area. The residents were not close enough to the apartment complex allegedly discriminating to be affected by the discriminatory practices.

178. 436 F.2d 809 (3d Cir. 1970).

179. *Id.* at 818.

180. See *Jorman v. Veterans Admin.*, 500 F. Supp. 460, 463-65 (N.D. Ill. 1980); *Marin City Council v. Marin County Redevelopment Agency*, 416 F. Supp. 700 (N.D. Cal. 1975); *East Chicago Community v. HUD*, 343 F. Supp. 62, 66-67 (N.D. Ill. 1972); *aff'd*, 488 F.2d 1119 (7th Cir. 1973). See also *Brookhaven Hous. Coalition v. Solomon*, 583 F.2d 584 (2d Cir. 1978).

181. 686 F.2d 472 (7th Cir. 1982).

case, the Seventh Circuit in *South East Lake View Neighbors v. HUD*<sup>182</sup> denied standing to residents to challenge HUD's decision to fund a housing project since the construction of the project was virtually completed and the project was soon to be occupied. The court reasoned that no form of judicial relief would redress the plaintiff's alleged injuries of congestion and noise.

Several interesting lower court cases explore the scope of standing of various types of housing developers to challenge adverse decisions. Some of the developer cases have been brought pursuant to 42 U.S.C. sections 1981 and 1982 and are discussed in that section of this Comment. In *Park View Heights Corp. v. City of Black Jack*,<sup>183</sup> the Eighth Circuit granted standing to housing developers to assert their own rights because they had suffered direct economic injury. The court reasoned that "[i]t is as important to protect the rights of sponsors and developers to be free from unconstitutional interferences in planning, developing, and building an integrated housing project, as it is to protect the rights of potential tenants of such projects."<sup>184</sup> The *Park View* court also granted the developer plaintiffs standing to assert the rights of prospective tenants of the proposed project under both the Fair Housing Act and 42 U.S.C. sections 1981 and 1982.

In *United States General v. City of Joliet*,<sup>185</sup> the court granted standing to the plaintiff, a corporation engaged in the construction of low income housing, to challenge the denial of building permits. The plaintiff alleged that it had been interfered with in violation of 42 U.S.C. section 3617 as it attempted to aid others in the exercise of their fair housing rights. The plaintiff clearly had standing to assert its own rights due to the economic loss incurred as a result of its pre-construction expenditures. The court followed *Park View* and held that the plaintiff had standing to assert the rights of prospective minority tenants under the Fair Housing Act. However, the court noted that if the plaintiff were to prevail, it would only recover for its own injury and not for the injury to the third parties.<sup>186</sup> "[D]evelopers are essential participants in the growth of integrated public housing, and it is consistent with the broad sweep of the Act to permit them to enforce its prohibitions."<sup>187</sup>

Section 3617 is a potentially powerful provision because it creates a legal right not to be interfered with in the exercise of fair housing rights. Section 3617 appears to be the strongest weapon for developers

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182. 685 F.2d 1027 (7th Cir. 1982).

183. 467 F.2d 1208 (8th Cir. 1972).

184. *Id.* at 1212.

185. 432 F. Supp. 346 (N.D. Ill. 1977), *aff'd*, 598 F.2d 1050 (7th Cir. 1979).

186. *Id.* at 353.

187. *Id.* at 354.

to combat interference from municipalities or others. Section 3617 also contains a jurisdictional provision sufficient to confer federal jurisdiction if the provisions of sections 3610 or 3612 cannot be met.

In *West Zion Highlands v. City of Zion*,<sup>188</sup> a case brought under the Fair Housing Act, 42 U.S.C. sections 1981 and 1982, and the equal protection clause, the court granted standing to a low income housing developer. The plaintiff alleged that the defendants were maintaining a discriminatory zoning ordinance that precluded the approval of a proposed housing project. The defendants argued that the plaintiff lacked standing to sue since the Fair Housing Act did not seek to protect developers. The court rejected that notion and held that the plaintiff had standing since it had suffered the requisite distinct and palpable injury. "[A] person has an implied *right of action* against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites."<sup>189</sup>

In a case which has the potential to be a major breakthrough to developer plaintiffs, the Second Circuit in *Huntington Branch NAACP v. Town of Huntington*<sup>190</sup> granted standing to a developer seeking to challenge the town's zoning ordinance. The district court had denied standing on the basis that the virtual absence of federal funding for housing construction rendered the requested relief meaningless. The Second Circuit reversed and held that the plaintiff had standing since it was diligently seeking funding and that the possibility that funds would become available in the future could not be excluded. The court pointed out that "all that is required is a showing that such relief be reasonably designed to improve the opportunities [for funding] of a plaintiff. . . ."<sup>191</sup> To require the plaintiff to show more than that the court's intervention would benefit him in a tangible way would be to "close our eyes to the uncertainties which shroud human affairs."<sup>192</sup> By allowing a developer to attack an exclusionary zoning ordinance, without a showing that the project financing is secured, may open a new avenue of relief for developers.

#### E. *Standing Under Sections 1981 & 1982*<sup>193</sup>

The Supreme Court has addressed the issue of standing under sec-

188. 549 F. Supp. 673 (N.D. Ill. 1982).

189. *Id.* at 676.

190. 689 F.2d 391 (2d Cir. 1982). See *Scott v. Greenville County*, 716 F.2d 1409, 1416 n.7 (4th Cir. 1983). *Scott* held that the many uncertainties which often surround the proposed construction of large-scale housing projects will not preclude the standing of developers.

191. *Id.* at 394.

192. *Id.*

193. Sections 1981 and 1982 are given a common interpretation. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973). Since § 1981 is not limited to any particular type of contract, it applies to property contracts covered under section 1982.

tion 1982 in *Sullivan v. Little Hunting Park, Inc.*<sup>194</sup> and in *Warth v. Seldin*.<sup>195</sup> In *Sullivan*, the Court granted standing to both a white homeowner and a black tenant where a recreational park blocked the assignment of a membership share due to the tenant's race. The Court held that the defendant's action in blocking the assignment violated section 1982 since it interfered with the right to lease.<sup>196</sup> The white lessor plaintiff had been expelled for attempting to lease his house to the black tenant and was granted standing since his attempt to rent to a black was interfered with by the defendant. In granting standing to the white lessor, the Court reasoned that whites are sometimes the "only effective adversary"<sup>197</sup> in such a case. *Sullivan* stands for the proposition that whites have standing under section 1982 where a defendant interferes with his efforts to rent or sell housing to blacks.<sup>198</sup> Whites may also have standing under section 1981.<sup>199</sup>

In *Tillman v. Wheaton-Haven Recreation Association*,<sup>200</sup> the Court granted standing to whites under sections 1981 and 1982. The *Tillman* plaintiffs suffered no direct injury as did the plaintiff in *Sullivan*. In *Tillman*, the plaintiffs belonged to a club which refused to admit their black guests. Perhaps the most deadly blow to litigants seeking standing under sections 1981 and 1982 came in *Warth v. Seldin*.<sup>201</sup> Of the six Supreme Court housing discrimination cases which considered standing, *Warth* is the only case in which standing was denied. Housing litigants proceeding under sections 1981 and 1982 should carefully consider the *Warth* analysis in order to avoid its many pitfalls.

In *Warth*, a variety of plaintiffs sought to challenge the Town of Penfield's zoning ordinance. The complaint alleged that the zoning ordinance had the purpose and effect of excluding low and moderate income persons from the town in violation of 42 U.S.C. sections 1981, 1982, and 1983, and the first, ninth, and fourteenth amendments. *Warth* involved four groups of plaintiffs: low and moderate income minority persons who alleged that the defendant's exclusionary zoning practices excluded them from Penfield; Rochester municipal taxpayers who alleged that Penfield's exclusionary practices forced higher tax rates on Rochester; developer and homebuilder associational plaintiffs who alleged that they were blocked from building low and moderate

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194. 396 U.S. 229 (1969).

195. 422 U.S. 490 (1975).

196. 396 U.S. 229, 237 (1969).

197. *Id.* (citing *Barrows v. Jackson*, 346 U.S. 249, 251 (1953)).

198. See *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1971); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146 (N.D. Ill. (1972)). See also *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969).

199. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

200. 410 U.S. 431 (1973).

201. 422 U.S. 490 (1975).

income housing in Penfield; and Metro-Act, a fair housing organization which sought to promote low and moderate income housing. None of the individual plaintiffs resided in Penfield.

All the *Warth* plaintiffs were denied standing. The primary issue before the Court was whether the plaintiffs' inability to find housing in Penfield reasonably could be said to have resulted from the defendant's alleged infractions. The Court held that "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him* and that he personally would benefit in a tangible way from the court's intervention."<sup>202</sup> The low and moderate income minority plaintiffs alleged that they were unable to find housing in Penfield. However, they were unable to establish an actionable causal relationship between Penfield's zoning practices and their alleged injury.<sup>203</sup> Justice Powell's opinion in *Warth* stressed that there was no particular housing project at stake, and the opinion distinguished *Warth* from similar cases which had granted standing where a specific project was involved.<sup>204</sup>

It is most important to consider the critical distinction between *Warth* and *Trafficante*. As discussed in *Warth*,<sup>205</sup> *Trafficante* was successfully brought under the Fair Housing Act, while *Warth* was unsuccessfully brought under 42 U.S.C. sections 1981, 1982, and 1983 and several constitutional provisions. Consequently, fair housing plaintiffs should file under the Fair Housing Act if standing is likely to be an issue. A careful reading of *Warth* and *Trafficante* suggests that standing under sections 1981 and 1982 is more limited than under the Fair Housing Act.

Another noteworthy point is that *Warth* required a more direct and non-remote injury.<sup>206</sup> *Warth* also required detailed factual allegations.<sup>207</sup> Since some of the *Warth* plaintiffs were denied standing by the exercise of prudential limitations, it is clear that courts may exercise the prudential rules under sections 1981 and 1982. However, under the Fair Housing Act, prudential rules may not be applied.<sup>208</sup>

Several courts have recognized standing under sections 1981 and 1982 for loss of association.<sup>209</sup> In *Walker v. Pointer*,<sup>210</sup> the court held

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202. *Id.* at 508 (emphasis in original).

203. *Id.* at 507.

204. *See id.* at 507 n.17, 516.

205. *Id.* at 513-14.

206. *See Broderick, supra* note 108, at 509.

207. *Id.*; *see Warth*, 422 U.S. at 501.

208. *See Gladstone*, 441 U.S. 91 (1979).

209. *See Johnson v. Brace*, 472 F. Supp. 1056 (E.D. Ark. 1979). *See generally* Comment, *Standing Under 42 U.S.C. §§ 1981 and 1982: Direct, Indirect, And A New "Loss of Association" Standing*, 13 CONN. L. REV. 87 (1980).

210. 304 F. Supp. 56 (N.D. Tex. 1969).

that whites had standing under section 1982 where they were evicted due to their association with blacks. Since the white plaintiffs' leasehold was interfered with because of their association with blacks, "they should be as entitled to relief under section 1982 as if their skin was black."<sup>211</sup> In *Woods-Drake v. Lundy*,<sup>212</sup> the Fifth Circuit held that whites had standing under section 1982 where their landlord evicted them because they had entertained black guests in their apartment. The court also noted that when a landlord imposes on white tenants the condition that they may not have black guests, the landlord has discriminated against the tenants in the terms, conditions, and privileges of rental; this is a violation of the Fair Housing Act.<sup>213</sup> Several other lower courts have followed *Walker* and granted standing to whites who were denied housing or evicted because of their association with blacks.<sup>214</sup>

There are several recent cases of interest involving developer standing under sections 1981 and 1982. In *Des Vergnes v. Seekonk Water District*,<sup>215</sup> the First Circuit granted standing to the developer plaintiff to challenge the denial of a water permit for a low income housing project. The plaintiff alleged that the defendant denied the water permit because the plaintiff had contracted with blacks for the sale of housing. In *Des Vergnes*, the First Circuit recognized that the plaintiff had statutory standing to sue under section 1981. *Des Vergnes* was not seeking to assert third party rights, rather he was seeking redress for injuries to himself because he contracted with non-whites. In *Gordon v. City of Cartersville*,<sup>216</sup> the developer plaintiff alleged that the defendant had interfered with his proposed housing project by denying building permits and water line access to the project. The court granted standing and noted that "developers are often the only effective adversaries" in this type of case.<sup>217</sup> In *Bendetson v. Payson*,<sup>218</sup> the court granted standing to a developer who alleged that private individuals were interfering with the plaintiff's efforts to provide low income housing.

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211. *Id.* at 58.

212. 667 F.2d 1198 (5th Cir. 1982).

213. *Id.* at 1201.

214. *Evans v. Tubbe*, 657 F.2d 661 (5th Cir. 1981); *Bills v. Hodges*, 628 F.2d 844 (4th Cir. 1980); *Oliver v. Foster*, 538 F. Supp. 600 (S.D. Tex. 1982); *Bishop v. Pecsok*, 431 F. Supp. 34 (N.D. Ohio 1976); *Lamb v. Sallee*, 417 F. Supp. 282 (E.D. Ky. 1976). See also *Jones v. Mayer*, 392 U.S. 409 (1968) (where the Court granted standing to both Mr. and Mrs. Jones; Mr. Jones was black, but Mrs. Jones was white).

215. 601 F.2d 9 (1st Cir. 1979).

216. 522 F. Supp. 753 (N. D. Ga. 1981).

217. *Id.* at 757.

218. 534 F. Supp. 539 (D. Mass. 1982).



## IV. STANDARD OF PROOF

A. *Constitutional Standard*

In order to establish a violation of the fourteenth amendment's equal protection clause, one must prove that the actions complained of had a discriminatory intent or purpose.<sup>219</sup> *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>220</sup> was an exclusionary zoning case where a virtually all-white Chicago suburb refused to rezone a proposed housing site to accommodate low income housing. In *Arlington I*, the Court identified several factors to be considered to determine whether or not a discriminatory intent or purpose is present.<sup>221</sup> Those factors are: (1) the discriminatory impact of the action, (2) the historical background of the decision, particularly if it reveals a series of actions taken for invidious purposes, (3) the specific sequence of events leading up to the challenged decision, (4) departures from normal procedure, (5) departures from normal substantive criteria, and (6) the legislative or administrative history of the decision, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."<sup>222</sup> A finding of intent is not limited to instances where decisionmakers articulate some discriminatory purpose. "If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the fourteenth amendment offers little solace to those seeking its protection."<sup>223</sup> In *Smith v. Town of Clarkton*,<sup>224</sup> the Fourth Circuit recognized that officials seldom, if ever, make statements revealing their discriminatory intent, and it is rare when such statements can be captured for purposes of proving racial discrimination. However, as noted in *Arlington I*,<sup>225</sup> persuasive evidence of intent may be found in statements by decisionmakers or their agents. But, "as overtly bigoted behavior has become unfashionable, evidence of intent has become harder to find."<sup>226</sup> Statements indicating discriminatory purpose need not directly indicate prejudice. "Camouflaged" racial ex-

219. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) [*Arlington I*]; *Washington v. Davis*, 426 U.S. 229 (1976).

220. 429 U.S. 252 (1977).

221. *Id.* at 266-68. See *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 143 (3d Cir. 1977); *Atkins v. Robinson*, 545 F. Supp. 852, 870-71 (E.D. Va. 1982).

222. 429 U.S. at 266. See *Rogers v. Lodge*, 102 S. Ct. 3272, 3276 (1982).

223. *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970).

224. 682 F.2d 1055, 1064 (4th Cir. 1982).

225. 429 U.S. at 268.

226. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) [*Arlington II*].

pressions have often been relied upon in finding a discriminatory purpose.<sup>227</sup>

"[A]n invidious discriminatory intent may often be inferred from the totality of the relevant facts."<sup>228</sup> A court should carefully analyze circumstantial evidence to determine if a racially discriminatory intent may be inferred.<sup>229</sup> In cases in which discriminatory intent may be inferred from the sequence of events, courts have generally viewed subjective explanations with considerable skepticism.<sup>230</sup>

The Court in *Arlington I*<sup>231</sup> noted that discriminatory impact may be an important starting point in determining whether discriminatory intent or purpose is present. In *Washington v. Davis*,<sup>232</sup> the Court pointed out that discriminatory impact "may demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." In *Columbus Board of Education v. Pennick*,<sup>233</sup> the Court noted that actions having foreseeable and anticipated disparate impact are relevant evidence of discriminatory purpose. Therefore, in addition to the more traditional forms of finding intent, a court should consider whether the defendant has adhered to a policy with knowledge of its predictable segregative effects.<sup>234</sup> In *Personnel Administrator v. Feeney*,<sup>235</sup> the Court in dictum noted that inevitable adverse consequences of an official decision upon a minority lead to a strong inference that the adverse effects were desired. "Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences [here], a strong inference that the adverse effects were desired can reasonably be drawn."<sup>236</sup> In fact, the Court in *Palmer v. Thompson*<sup>237</sup> strongly warned against finding an action unconstitutional merely because of some illicit motive of those who voted for it. Although *Palmer* was decided before *Washington v. Davis*, the basic *Palmer* principle remains valid. Discriminatory intent may also be shown by a series of decisions which have a segregative effect and result in a cumulation of disadvantages inexplicable on grounds other than an invidious basis.<sup>238</sup>

227. *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982); *Atkins v. Robinson*, 545 F. Supp. 852, 872-74 (E.D. Va. 1982).

228. *Washington v. Davis*, 426 U.S. 229, 242 (1976). See *Rogers*, 102 S. Ct. at 3276.

229. *Atkins v. Robinson*, 545 F. Supp. 852, 870 (E.D. Va. 1982).

230. *Robinson v. 12 Lofts Realty*, 610 F.2d 1032, 1040 (2d Cir. 1979).

231. 429 U.S. at 266. See *Crawford v. Board of Educ.* 102 S. Ct. 3211, 3221 (1982).

232. 426 U.S. at 242.

233. 443 U.S. 449, 465 (1979).

234. *United States v. City of Parma*, 494 F. Supp. 1049, 1054 (N.D. Ohio 1980), *aff'd. in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1720 (1982).

235. 442 U.S. 256, 279 n.25 (1979).

236. *Id.*

237. 403 U.S. 217 (1971).

238. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

In establishing discriminatory purpose, it is not necessary to prove that the challenged decision rested solely on a discriminatory purpose.<sup>239</sup> "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."<sup>240</sup> Therefore, a plaintiff need only show that a discriminatory purpose has been one of the motivating factors involved. Proof of discriminatory intent or purpose may also be established by showing that the defendant's actions were taken to effectuate the discriminatory purpose of others.<sup>241</sup> Once a discriminatory purpose has been shown, the burden shifts to the defendant to show a compelling governmental interest. If the defendant fails to prove a compelling governmental interest to justify its action, then the discrimination is established.

### B. *Fair Housing Act Standard*

A violation of the Fair Housing Act may be established under an intent standard, and, under some circumstances, proof of discriminatory effect alone may be sufficient.<sup>242</sup> Courts must use their discretion in deciding when proof of discriminatory effect is sufficient to establish a violation.<sup>243</sup> The traditional method of establishing discrimination is through proof of discriminatory intent, purpose, or motive.<sup>244</sup> Race need only be one of the motivating factors in order to establish a violation of the Fair Housing Act under the intent standard.<sup>245</sup> "Race is an impermissible factor in an apartment rental decision and it cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination."<sup>246</sup> There is "no acceptable place in the law for partial racial discrimination."<sup>247</sup> Consequently, it is not necessary to prove that race was the sole or dominant motive, but race must have been a factor to make out a case under the intent standard.

In housing discrimination cases, courts have used two different meth-

239. 429 U.S. at 265.

240. *Id.*; *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982).

241. *United States v. City of Black Jack*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970). *See also Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982).

242. *E.g.*, *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd as modified*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1720 (1982); *United States v. Northside Realty Ass'n*, 474 F.2d 1164 (5th Cir. 1973); *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971); *See Arlington II*, 558 F.2d 1283 (7th Cir. 1977). *See also supra* note 20.

243. *Arlington II*, 558 F.2d 1283, 1290 (7th Cir. 1977).

244. *See cases cited supra* note 242.

245. *E.g.*, *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982); *Marble v. H. Walker and Ass'n*, 644 F.2d 390 (5th Cir. 1981); *Robinson v. 12 Lofts Realty*, 610 F.2d 1032 (2d Cir. 1979).

246. *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1970).

247. *Id.*

ods to prove the presence of discrimination. First, courts have often analogized to Title VII<sup>248</sup> and have applied a disparate treatment theory.<sup>249</sup> The disparate treatment theory was established in the Title VII case of *McDonnell Douglas Corp. v. Green*.<sup>250</sup> Under the *McDonnell* formula, the plaintiff must initially establish a prime facie case of disparate treatment. A plaintiff may establish a prima facie case by proving: (1) that he belongs to a racial minority, (2) that he applied for and was qualified for the job, (3) that he was rejected, despite his qualifications, and (4) that the position remained open after his rejection and the defendant continued to seek applicants for the position.<sup>251</sup> If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to "articulate some legitimate nondiscriminatory reason for the employee's rejection."<sup>252</sup> If the defendant fails to rebut the plaintiff's prima facie case, then the plaintiff prevails. If the defendant successfully rebuts the prima facie case, then the plaintiff is afforded a chance to establish that the defendant's explanation was merely a pretext for discrimination. The *McDonnell* formula is basically a method of proving intent in an individual case.

Several courts have applied a *McDonnell*-type formula in housing discrimination cases.<sup>253</sup> A housing plaintiff may establish a prima facie case by proving that the plaintiff is a minority, that he applied for and was qualified to rent or purchase the housing, that he was rejected, and that the housing remained available.<sup>254</sup> The application of the *McDonnell*-type formula in housing cases has been limited to situations where an individual is the victim, such as the typical refusal-to-rent case. Cases involving broad class-based discrimination, such as exclusionary zoning or rejection of public housing, entail an application of the *Arlington I* test if an intent standard is being applied. The use of testers,<sup>255</sup> individuals who pose as renters or purchasers for the purpose of collecting evidence of discrimination, may be invaluable in establishing a prima facie case under a disparate treatment theory. In *Smith v. Anchor Building Corp.*,<sup>256</sup> the court noted that where a black applicant meets the objective rental requirements and the rental would likely have been consummated if he were white, then a prima facie inference

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248. 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. V 1981).

249. *Phillips v. Hunter Trails Community Ass'n.*, 685 F.2d 184 (7th Cir. 1982); *Robinson v. 12 Lofts Realty*, 610 F.2d 1032 (2d Cir. 1979); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976).

250. 411 U.S. 792 (1973).

251. *Id.* at 802.

252. *Id.*

253. See cases cited *supra* note 249.

254. *Robinson v. 12 Lofts Realty*, 610 F.2d 1032, 1038 (2d Cir. 1979).

255. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

256. 536 F.2d 231, 233 (8th Cir. 1976).

of discrimination arises as a matter of law. If the inference is not satisfactorily explained away, the discrimination is established.<sup>257</sup> The court reasoned that the rejection of an applicant meeting the objective qualifications establishes a *prima facie* case of discrimination.

The "business necessity" defense from the Title VII cases<sup>258</sup> has also been asserted in housing discrimination cases. In *Williams v. Matthews Co.*,<sup>259</sup> the defendant claimed that his refusal to sell land to a black was due to business necessity since he would only sell to approved builders. The court rejected the business necessity defense in *Williams*, noting that in order for a business necessity defense to prevail, the defendant must "demonstrate the absence of any acceptable alternative that will accomplish the same business goal with less discrimination."<sup>260</sup> Even though the *Williams* court rejected the business necessity defense, it implied that it might be successfully invoked under appropriate circumstances.

The second method of establishing a violation of the Fair Housing Act is through proof of discriminatory effect.<sup>261</sup> There are two primary kinds of discriminatory effects:<sup>262</sup> one where a decision has a greater adverse impact on one racial group than another,<sup>263</sup> the other where a decision perpetuates segregation and thereby prevents interracial association.<sup>264</sup> In addition to the adverse impact theory, a discriminatory effect may be established on a theory of "ultimate effect" or "historical context;"<sup>265</sup> however, this theory was identified in only one case and was not explained. Since there is no distinct test for applying the "ultimate effect" or "historical context" theory, it seems that the theory is merely a method for determining adverse impact.

Numerous paramount considerations suggest that the discriminatory effects test is the most appropriate standard of proof and the one intended under the Fair Housing Act. Although somewhat sketchy, the legislative history of the Fair Housing Act indicates that Congress intended that a showing of discriminatory effect establishes a violation even though the statute itself does not specify a standard.<sup>266</sup> Congress was clearly aware of the proof problems inherent in establishing dis-

257. *Id.*; *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

258. *E.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

259. 499 F.2d 819 (8th Cir. 1974).

260. *Id.* at 828.

261. *See supra* note 20.

262. *Id.*

263. *Id.*

264. *Id.*

265. *See* *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974); Comment, *Title VIII Litigation: The Demise of the Prima Facie Case Doctrine in the Seventh Circuit*, 15 URB. L. ANN. 325, 328 n.18 (1978).

266. 42 U.S.C. § 3604(a) provides that in order to violate Title VIII, a housing practice must be undertaken "because of race, color, religion, sex or national origin."

criminatory intent or purpose. Several Congressmen spoke of the importance of the Fair Housing Act in eliminating the adverse discriminatory effects of past and present discrimination in housing.<sup>267</sup> An even stronger indication that Congress favored a discriminatory effect standard is that the Senate rejected an amendment which would have required proof of discriminatory intent to establish a Title VIII claim.<sup>268</sup> Senator Percy noted that proof of intent "would be impossible to produce."<sup>269</sup>

In addition to the legislative history supporting the discriminatory effect standard, virtually all of the circuit courts have held that discriminatory effect, at least under some circumstances, is the proper standard of proof.<sup>270</sup> The circumstances which justify the effect standard as the appropriate standard of proof vary on a case-by-case basis. As the court noted in *Arlington II*, "[w]e refuse to conclude that every action which produces discriminatory effects is illegal. . . . Rather, the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute."<sup>271</sup> Logic suggests that initially a court would consider whether a case has been established under the intent standard, since it is the traditional method of proving discrimination. If there is insufficient evidence of intent, then the court should determine if the effect standard has been met. The analysis blends together since evidence of a discriminatory effect is an important factor in determining if discriminatory intent is present. Numerous federal district courts have held that discriminatory effect is the proper standard.<sup>272</sup> In *Arlington II*,<sup>273</sup> the court noted that a "strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry." The Fair Housing Act was designed to prohibit "all forms of discrimination, sophisticated as well as simple minded."<sup>274</sup> "Effect, and not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minor-

267. See 114 CONG. REC. 2280 (1968) (remarks of Senator Brooke). See *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147-48 (3d Cir. 1977), *aff'g* 425 F. Supp. 987, 1022-23 (E.D. Pa. 1976).

268. 114 CONG. REC. 5214-22 (1968). See *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977).

269. 114 CONG. REC. 5216 (1968).

270. See cases cited *supra* note 20.

271. *Arlington II*, 558 F.2d at 1290.

272. *E.g.*, *Atkins v. Robinson*, 545 F. Supp. 852 (E.D. Va. 1982); *United States v. City of Birmingham*, 538 F. Supp. 819 (E.D. Mich. 1982); *McHaney v. Spears*, 526 F. Supp. 566 (W.D. Tenn. 1981); *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988 (D. Mass. 1981); *United States v. Chicksaw Hous. Auth.*, 504 F. Supp. 716 (S.D. Ala. 1980); *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd as modified*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1720 (1982); *United States v. L & H Land Corp.*, 407 F. Supp. 576 (S.D. Fla. 1976); *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776 (N.D. Miss. 1972).

273. 558 F.2d at 1290.

274. *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974). See also *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

ity rights as a willful scheme.”<sup>275</sup> Since “clever men may easily conceal their motivations,” effect is the proper standard of proof.<sup>276</sup>

Many courts<sup>277</sup> applying an effect standard of proof have noted that the “because of race” terminology of the Fair Housing Act is analogous to that in Title VII.<sup>278</sup> In *Griggs v. Duke Power Co.*,<sup>279</sup> the Court adopted an effect standard of proof for Title VII. As Chief Justice Burger noted, Title VII “proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation.”<sup>280</sup> In *United States v. City of Black Jack*,<sup>281</sup> the court noted that artificial, arbitrary, and unnecessary barriers to housing must be removed, just as Congress requires their removal in employment.

Although most courts have held that practices which result in a discriminatory effect are violative of the Fair Housing Act, there is no uniformity as to which of the various effect tests to apply. Also, there is no uniformity as to the standard of justification which the defendant must meet in a case where the prima facie case doctrine is employed. Presently, there are four models of discriminatory effect. In *Arlington II*,<sup>282</sup> the first model, the court held that at least under some circumstances a violation of the Fair Housing Act can be established by a showing of discriminatory effect without a showing of discriminatory intent. However, the court noted that not every action which produces discriminatory effects is illegal. The court in *Arlington II* outlined four critical factors which are to be applied in determining whether evidence of discriminatory effect is sufficient to establish a violation. Those factors are: (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide housing.<sup>283</sup> In *Arlington II*, the court failed to apply the prima facie case doctrine and merely set up a bal-

275. *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976).

276. *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974).

277. *E.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *United States v. City of Parma*, 494 F. Supp. 1094, *aff'd as modified*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1720 (1982); *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir. 1974).

278. *See* 42 U.S.C. § 2000e(2)(a) (1976 & Supp. V 1981).

279. 401 U.S. 424 (1971).

280. *Id.* at 431.

281. 508 F.2d 1179, 1184 (8th Cir. 1974).

282. 558 F.2d at 1290.

283. *Id.*

ancing test involving the four factors.<sup>284</sup> The *Arlington II* test has two major weaknesses: it does not adequately assess the strength of the parties' interests, and it makes the outcome depend upon the number of factors supporting each party rather than on the weight of those factors.<sup>285</sup> Also, the fourth *Arlington II* factor concerning the nature of the relief sought has no relationship to a finding of discriminatory effect. The only other circuit court to explicitly adopt the *Arlington II* test was the Fourth Circuit in *Smith v. Town of Clarkton*.<sup>286</sup> However, in *United States v. Mitchell*,<sup>287</sup> the Fifth Circuit adopted the *Arlington II* language concerning the perpetuation of segregation as a discriminatory effect, but *Mitchell* failed to apply the *Arlington II* four-prong test.

With the exception of the Fourth and Seventh Circuits, which apply the *Arlington II* test, the other circuit courts apply some form of the prima facie case doctrine. In *United States v. City of Black Jack*,<sup>288</sup> the second model, the Eighth Circuit applied the prima facie case doctrine and found a discriminatory effect. Upon a finding of discriminatory effect, the court held that the burden shifted to the defendant "to demonstrate that its conduct was necessary to promote a compelling government interest."<sup>289</sup> The *Black Jack* court characterized the test as an equal protection test even though the case was brought exclusively under the Fair Housing Act. The Court then outlined a three-part test for determining a compelling governmental interest. Those factors are: "(1) whether the ordinance in fact furthers the governmental interest asserted. . . , (2) whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it. . . , and (3) whether less drastic means are available whereby the stated governmental interest may be attained."<sup>290</sup>

In *Resident Advisory Board v. Rizzo*,<sup>291</sup> the third model, the Third Circuit rejected the *Black Jack* compelling interest test, noting that it is too heavy a burden for Title VIII defendants and that the compelling interest test should only be used for equal protection claims.<sup>292</sup> Under the standard enunciated in *Rizzo*, once a discriminatory effect has been

284. See Comment, *supra* note 253, at 332-33.

285. See Comment, *supra* note 20, at 410-14.

286. 682 F.2d 1055 (4th Cir. 1982); for an eloquent application of the *Arlington II* factors in a case following *Smith v. Town of Clarkton*, see *Atkins v. Robinson*, 545 F. Supp. 852 (E.D. Va. 1982).

287. 580 F.2d 789 (5th Cir. 1978).

288. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

289. *Id.* at 1185.

290. *Id.* at 1186-87. See *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969).

291. 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

292. *Id.* at 148.



established, the defendant may rebut the plaintiff's prima facie case by showing that the defendant's conduct serves "in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and that the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."<sup>293</sup> Also, the court noted that the Title VIII standard of proof criteria must emerge on a case by case basis. To complicate matters even further, the *Rizzo* court mentioned without any explanation that the *Arlington II* factors may be relevant.<sup>294</sup>

In *Williams v. Matthews Co.*,<sup>295</sup> the fourth model, the Eighth Circuit noted that once the plaintiff established a prima facie case, "the burden then shifts to the defendant to articulate some legitimate nondiscriminatory reason for the plaintiff's rejection." *Williams* was decided before *Black Jack*; however, *Williams* was later relied on in *Smith v. Anchor Building Corp.*<sup>296</sup> Therefore, it is quite unclear as to which test the Eighth Circuit will apply.

In summary, the circuit courts are in accord that some form of discriminatory effect may establish a violation of the Fair Housing Act. However, the circuit courts are split as to whether to apply the prima facie case doctrine or to apply the *Arlington II* balancing test. Some courts confusingly make reference to both tests. The courts applying the prima facie case doctrine are in considerable disarray as to what is the defendant's burden of justification. The issue is ripe for clarification by the Supreme Court.

### C. Section 1982 Standard

The circuit courts are split on the standard of proof issue under section 1982. In *Phiffer v. Proud Parrot Motor Hotel, Inc.*,<sup>297</sup> the Ninth Circuit squarely held that discriminatory impact is sufficient to establish a prima facie case under section 1982. However, in *Denny v. Hutchinson Sales Corp.*,<sup>298</sup> the Tenth Circuit held that a plaintiff must prove discriminatory purpose to establish a violation of section 1982. While the issue is still open, there are strong indications that proof of intent or purpose will be required under section 1982. In *General Building Contractors Association, Inc. v. Pennsylvania*,<sup>299</sup> the Court held that proof of discriminatory intent or purpose was required to establish a

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293. *Id.* at 149.

294. *Id.* at 149 n.36.

295. 499 F.2d 819, 827 (8th Cir. 1974).

296. 536 F.2d 231 (8th Cir. 1976).

297. 648 F.2d 548, 551 (9th Cir. 1980). See also *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976).

298. 649 F.2d 816, 822 (10th Cir. 1981).

299. 102 S. Ct. 3141, 3150 (1982).

violation of 42 U.S.C. section 1981. Since sections 1981 and 1982 have been interpreted similarly, *General Building Contractors* strongly suggests that proof of intent or purpose will be required under section 1982.

In *City of Memphis v. Greene*,<sup>300</sup> the Court granted certiorari to resolve the standard of proof issue; however, the Court declined to do so. In his concurring opinion, Justice White pointed out that section 1982 requires some showing of discriminatory intent.<sup>301</sup> However, the dissent of four Justices noted that "[t]he plain language does not suggest an intent requirement, because it does not condition a violation of section 1982 on the motivation of any person or persons."<sup>302</sup>

## V. Conclusion

If the national policy of fair housing is to be implemented, private litigants must be prepared to skillfully attack the widespread discriminatory practices. Given the complexity of housing discrimination litigation, there is little room for fundamental mistakes. With a firm grasp of the basic principles of procedure, standing, and standard of proof, housing litigants will be armed with the fundamental tools to begin the attack.

Housing litigants must carefully analyze the various procedural avenues available. Before a case is heard on its merits, the standing and procedural hurdles must be overcome. Many of the common procedural problems may be avoided by careful adherence to the procedural statutes.

The recent standing cases have substantially broadened the class of prospective housing litigants, particularly under the Fair Housing Act. Litigants proceeding under 42 U.S.C. sections 1981, 1982, and 1983, and the constitutional provisions must remain cognizant of the *Warth* problem.

The housing litigant must have a basic knowledge of the standard of proof problems in order to select the most appropriate provisions under which to proceed. Wise litigants will know the ultimate standard of proof prior to instituting and developing litigation. Given the trends requiring proof of intent under 42 U.S.C. sections 1981, 1982, and 1983 and the constitutional provisions, the Fair Housing Act appears to be the most potent weapon and should be used whenever it is available. If proceeding under the Fair Housing Act, litigants must be familiar with the particular effects test model applied in the jurisdiction.

Given the blatant neglect of fair housing enforcement by the present

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300. 451 U.S. 100 (1981).

301. *Id.* at 135.

302. *Id.* at 148 n.14.

federal authorities, private litigants are left with almost the total responsibility of fulfilling the national policy of fair housing. The private litigant must not fail while carrying such a heavy responsibility.

J. MICHAEL MCGUINNESS