Pioneering Approaches to Confront Sex Bias in Housing

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NOTES

Pioneering Approaches to Confront Sex Bias in Housing*

Of all the services, facilities and other amenities a community provides, few matter more to the individual and his family than the kind of housing he lives in. . . . Through the ages, men have fought to defend their homes; they have struggled, and often dared the wilderness, in order to secure better homes.1

This feeling underscores the impetus behind the federal government's efforts to provide equal housing opportunities "for all Americans."2 It is generally accepted that equal housing opportunity has wide repercussions, affecting both educational and employment opportunities.3 Undoubtedly the most important fair housing legislation is Title VIII of the Civil Rights Act of 1968 (hereinafter the Fair Housing Act), the federal housing statute that prohibits discrimination in most private real estate transactions.4 Now at long last prohibitions against sex bias in housing are included under the Fair Housing Act,5 along with other discrimination prohibitions based upon race, color, religion or national origin. With the inclusion of sex, the congressional declaration in the Act "to provide, within

* Editor's note: The textual portion of this article has been read into the Congressional Record and appears reprinted at 121 Cong. Rec. S757 (1975).


2 Id. at 5121.

3 See Milliken v. Bradley, U.S., 94 S. Ct. 3112 (July 25, 1974) (Stewart, J., concurring opinion); Gautreaux v. Chicago Housing Authority, Nos. 74-1048 & 74-1049 (7th Cir. Aug. 26, 1974).


constitutional limitations, for fair housing throughout the United States can finally have some valid meaning, as women, comprising over half the country's population, are frequent victims of housing discrimination. Congress has finally acknowledged the ignored, but pervasive fact that females are arbitrarily being denied housing opportunities. It is an important step — and a long awaited one.

With an ever-growing number of working women, now constituting 40% of the labor force, along with a substantial increase in the number of female-headed families, from 4.2 million in 1955 to 6.6 million in 1973 (with half of the increase in the 1970's), this area of the law will become increasingly active and increasingly important. This Note will be a national review of the past experiences with and potential action in the area of sex discrimination in residential real estate transactions. Emphasis will be on sex discrimination in the rental of real property, with a brief review of the more commonly acknowledged problem of credit discrimination in home sale financing. The present suitability of available state remedies will be discussed, with an analysis of the charges filed. And, the emergence of Fair Housing Act racial litigation will be explored, with a view towards its application in sex discrimination housing cases.

Scope of the Problem

Discrimination in housing is not a new subject. Indeed, since 1962 the federal government has become increasingly involved in eradicating such discrimination based on race, color, religion or national origin. Sex discrimination in housing is by no means new,

7 UNITED STATES DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 219 (94th ed. 173).
8 UNITED STATES DEPT OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-23, No. 50, FEMALE FAMILY HEADS AS PROPORTION OF ALL FAMILIES BY RACE AND SPANISH ORIGIN: 1955 TO 1973, Table 1 (July, 1974). These figures do not include the 8.9 million women who head households, but have no family living with them. Id. Table 19.
9 In 1962, the President issued an Executive Order (Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963) ) stating that discriminatory Housing policies and practices were inconsistent with the public policy of the United States and deprived Americans of equal opportunity, and he thereby directed all federal departments and agencies to take action to prevent discrimination in the rental, sale or other disposition of residential property in federally assisted housing and related projects and in residential property loans insured by the federal government. The order had little effect, except to stress a fair housing policy position of the Executive Branch of the government. Several years later Congress passed Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), providing for a cutoff of federal funds in any federally assisted program that discriminated on the basis of race, color or national origin. Then came the most important fair housing legislation, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq. (1970). The Fair Housing Act, which covers virtually all private real estate transactions, was an amendment tagged to a civil rights bill to give the federal government more control over the pressing problem of violent interference with a person's exercise of his civil rights. The main bill was specifically a result of the furious racial turmoil of the 1960's, and it is highly unlikely that Congress thought much beyond the racial situation. Hence the seemingly obvious exclusion of the category of sex in the original version of the Fair Housing Act evolved.
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but recognition of the problem is recent. A survey of the foremost women's research centers reveals that no group has undertaken or formulated immediate plans to approach the problem; such groups are too immersed in what they believe to be the more obvious areas of sex discrimination in employment, education and credit. The logical agency to conduct such research, the United States Commission on Civil Rights, has just completed a comprehensive study on sex discrimination in home mortgage lending, but has so far by-passed the problem of sex discrimination in the rental of residential property. It is encouraging to note, however, that the American Bar Association, recognizing that “[w]omen and their families are frequently denied access to housing of their choice by a number of discriminatory practices . . . ,” recently passed a resolution in support of legislation prohibiting sex discrimination in the sale and rental of housing and in related services.

Discrimination in housing specifically refers to the refusal to sell or rent to an individual, discrimination in the terms and conditions of the sale or rental, bias in advertising the property, disparate treatment in home financing or any conduct that otherwise interferes with equal opportunity on account of one's sex. Such discrimination is overwhelmingly against the female sex, although there is an occasional charge of so-called reverse discrimination against a male.

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11 Such emphasis is pointedly seen in a recently published law school casebook on sex discrimination, K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION (1974), which includes no mention of sex discrimination in housing. As this paper will show, there is virtually no case law in this area.

12 The United States Commission on Civil Rights was established by Congress in 1957 to research areas involving a denial of equal protection of the laws under the Constitution because of color, race, national origin, religion, or sex.


14 There are possibilities that the Commission will study the situation in 1975. Interview with Diane Graham, Office of Federal Civil Rights Enforcement, United States Comm'n on Civil Rights, July 23, 1974.


16 Since the state law prohibiting sex discrimination in housing became effective (Dec., 1973 — June, 1974), the Ohio Civil Rights Commission has received one charge claiming the apartment owner refused to rent to males. The respondent's argument was the males make "too much noise." During the investigation, the respondent came into compliance by renting to two males, so the issue is now moot, insofar as the Commission is concerned. In the past several years, the Colorado Civil Rights Commission has received five cases dealing with the refusal to rent to males with long hair. COLORADO CIVIL RIGHTS COM'-MAR REPORT ON SEX DISCRIMINATION CASES FILED UNDER THE FAIR HOUSING LAW (Aug. 14, 1972 — May 23, 1974).
Home Financing Bias

In contrast to the relatively inactive and ignored field of sex discrimination in home rentals, bias against women in home financing currently is the area which is receiving the most attention regarding lack of equal opportunity in housing. Credit discrimination is inextricably tied to discrimination in the sale of real property. There are two categories of financing bias: first, a real estate broker discriminates in his dealings with a woman because of his assumption that she will be unable to assume a mortgage; second, a mortgage company directly refuses to give a woman a mortgage. Perhaps the most credible research in this area is the study recently completed by the United States Commission on Civil Rights on mortgage lending discrimination in Hartford, Connecticut. The Commission found that blatant discrimination by real estate brokers and mortgage lenders is to a great extent responsible for the fact that in 1970, 68% of all families headed by men owned homes as contrasted to 48% of all families headed by women.

As with the other forms of sex discrimination in housing, sex bias in home financing is now prohibited by the federal Fair Housing Act. There is also other legislation pending before Congress that would bar related home financing discrimination. In addition, there

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17 MORTGAGE MONEY: WHO GETS IT?, supra note 13.
18 MORTGAGE MONEY: WHO GETS IT?, supra note 13 at 1. In addition to families headed by women, single persons and families in which both the husband and wife work receive disparate treatment by mortgage lenders.
19 42 U.S.C. § 3605 (1970), as amended Housing and Community Development Act of 1974, tit. VIII, § 808 (b) (2), Pub. L. No. 93-383 (Aug. 22, 1974). Also included in the Housing and Community Development Act of 1974 is an amendment to Title V of the National Housing Act to prohibit sex discrimination in the granting of federally related mortgage loans. Lenders of mortgage loans for residential real property are now required to consider the combined income of husband and wife. Housing and Community Development Act of 1974, tit. VIII, § 808 (a). Because of the complexity of the mortgage loan business, it is difficult to prove discrimination in particular cases. In this regard, an important federal pilot program was instituted in eighteen metropolitan areas in June, 1974, whereby federally regulated banks and savings and loan associations will assemble data on the sex, marital status, race and geographic location of residential mortgage loan applications. Such information is essential for effectively eliminating such discriminatory practices. Memorandum from William Taylor, Director, The Center for National Policy Review, The Catholic University of America, School of Law, Washington, D.C., June 28, 1974. This program is a result of a petition filed by the Center several years ago on behalf of various public interest and human rights groups.
20 A federal insurance deposit bill (H.R. 11221, 93d Cong., 1st Sess. (1973) ) with an amendment (Brock Amendment No. 1438) prohibiting discrimination in credit transactions on the basis of sex or marital status was recently signed into law, effective October 28, 1975. Pub. L. No. 93-495 (Oct. 28, 1974). (Senator Brock of Tennessee has been a guiding force in women's rights legislation, being also a co-sponsor of the sex discrimination amendment to the Fair Housing Act.) Also, presently before Congress is the Equal Credit Opportunity Act (H.R. 14856, 93d Cong., 2d Sess. (1974) ), which would prohibit discrimination in the granting of credit, including home financing credit, on the basis of sex and marital status, among others. Such legislation is important as it was revealed in the Hartford study that in spite of the prohibitions against racial discrimination in mortgage lending under the Fair Housing Act, discrimination was still rampant. This does not (Continued on next page)
is at this time a remedy for home financing discrimination in a number of state statutes, but as the Hartford study reveals, women "by their very status as women, nevertheless are openly considered questionable risks."

A more detailed discussion of credit discrimination is not within the scope of this Note. Instead, the less considered, but pervasive sexual bias in the rental of residential housing will be investigated. It is significant that in Ohio, which has a fair housing statute, only 14% of the total charges received by the Ohio Civil Rights Commission concerning sex discrimination in housing involved credit discrimination. A similar condition exists in other states having fair housing statutes. While the overwhelming number of cases concern rental, this certainly does not negate the existence of a credit discrimination problem — the Hartford study alone is enough evidence to show the extensiveness of the problem. But it does show that women are not apprised of their rights and their available remedies. More importantly, it supports the thesis that sex bias in the rental of housing is comparatively more prevalent than home finance discrimination.

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in itself negate the potential effect of the Fair Housing Act, but rather shows that Fair Housing Act litigation, still in its infancy, has concentrated on the areas of sale and rental, "steering" and "blockbusting," terms and conditions and newspaper advertising. Only now is attention being paid to the question of racial discrimination in home financing. See Laufman v. Oakley Bldg. & Loan Co., Civil No. C174-153 (S.D. Ohio, filed April 29, 1974).

Nineteen states have specific home financing provisions in their fair housing laws. See note 27 infra. Other states have general credit statutes that would cover home financing. See Gates, Credit Discrimination Against Women: Causes and Solutions, 27 VAND. L. REV. 409 (1974).

MORTGAGE MONEY: WHO GETS IT?, supra note 13, at 69.

For further information on female credit discrimination, See Women and Credit: An Annotated Bibliography, a resource list of newspaper, newsletter and magazine articles, special credit reports and surveys, government regulations, statements and testimony, published research and unpublished papers, published under sponsorship of the Ford Foundation by the Center for Women Policy Studies, Washington, D.C.

Even President Gerald Ford, in his statement heralding the passage of the Housing and Community Development Act of 1974, only mentioned the new sex prohibitions in home financing, ostensibly ignoring the other provisions relating to sale and rental discrimination. Statement by the President, Press Release, The White House, Aug. 22, 1974.

OHIO CIVIL RIGHTS COMM'N, REPORT ON SEX RELATED HOUSING CHARGES (Dec. 18, 1973 — June 30, 1974).

The Pennsylvania Human Relations Commission reports that in the five year period since the enactment of prohibitions against sex bias in housing only 1.9% of the cases involved financing. PENNSYLVANIA HUMAN RELATIONS COMM'N, CASE STATUS-SEX DISCRIMINATION (July, 1969 — June 31, 1974). In New York, just 11% of the sex-related housing discrimination charges filed during the first seven months of 1974 related to home financing. NEW YORK DIV. OF HUMAN RIGHTS, COMPLAINANTS ALLEGING SEX DISCRIMINATION IN HOUSING (Jan. 1 — July 29, 1974). The Colorado Civil Rights Commission reported 18% of its sex discrimination cases filed under the fair housing law in the two year period from mid-1972 to mid-1974 related to credit discrimination. COLORADO CIVIL RIGHTS COMM'N, REPORT ON SEX DISCRIMINATION CASES FILED UNDER THE FAIR HOUSING LAW (Aug. 14, 1972 — May 23, 1974).
In addition to the recent amendment to the Fair Housing Act, statutes in twenty-five states provide women with legislative protection against discrimination in the rental of housing. It is important to examine experiences with sex discrimination in housing at the state level, there being no federal history in this area. Since many of the state statutes have only been enacted within the last several years, it is difficult to assess the total impact of such legislation, but enough time has passed to examine the general categories of the complaints. It should be emphasized that the limited experience of the state administrative agencies which enforce these laws should be viewed in comparative terms to gauge with proper perspective the extent of sex-biased housing discrimination. The more pervasive discrimination is found in the rental of housing, as opposed to discrimination in home financing.


28 Colorado has prohibited sex discrimination with its fair housing law since 1959. Most of the other states passed such legislation in the 1970's, a good many in 1973 and 1974.
Pennsylvania, which has had more experience in sex-bias housing cases than most other states, is a prime example of this. In the five years that the Human Relations Commission has had sex discrimination statutes in its jurisdiction, over 90% of the 154 sex-bias housing cases have involved rental — specifically refusals, evictions or conditions. As the Director of the Housing Division observed:

[T]he overwhelming problem brought to our attention is rental... I intentionally made that 'brought to our attention' because in my experience in lecturing to real estate groups, community groups and the Graduate Realtor Institute, the preponderance of questions have related to financing problems, but to date [August 8, 1974] only 3 instances have resulted in formal complaints...29

Likewise, in Ohio, from the time of the addition of the sex category to its housing statute in December, 1973, through June, 1974, of the 21 total charges received, an overwhelming 86% concerned rental or the terms and condition thereof.30 In the first seven-month period of 1974, the Division of Human Rights of the State of New York received a total of 18 complaints alleging sex discrimination in housing. Of these, the great majority concerned the rental of housing or terms and conditions thereof, specifically 82% of the charges.31 In Colorado, which has had the sex prohibition in its fair housing law since 1959, of the 22 housing sex-bias cases filed from mid-1972 to mid-1974, 73% dealt with rental.32 The experiences of these major commissions may well be reflective of the experiences of the other state agencies.

An examination of several administrative cases, all substantiated by a finding of probable cause, add meaning to the bare statistics. For example, at the Washington State Human Rights Commission a female complainant charged a refusal to rent a house on the basis of her sex.33 The respondent stated she had doubts about the "com-

30 OHIO CIVIL RIGHTS COMM'N, REPORT ON SEX RELATED HOUSING CHARGES, supra note 25.
31 NEW YORK DIV. OF HUMAN RIGHTS, COMPLAINANTS ALLEGING SEX DISCRIMINATION IN HOUSING, supra note 26.
32 COLORADO CIVIL RIGHTS COMM'N, REPORT ON SEX DISCRIMINATION CASES FILED UNDER THE FAIR HOUSING LAW, supra note 26.
33 Washington State Human Rights Comm'n, Case No. Y-34-74 (March 18, 1974). Discrimination on the basis of marital status, also prohibited under Washington law, was a factor in this case. Eight states have marital status discrimination prohibitions in their fair housing laws (Colo., Del., Md., Mass., Minn., N.J., Ore., Wash.). There is a lack of authority in the few cases that exist, but the better view seems to be that marital status is arguably a type of sex discrimination. It is usually the single female in sale, rental and credit cases or the married woman in credit cases that receives disparate treatment. Thus the specific provision for marital status may not be necessary.
plaintiff’s ability to handle a large old house, her being the sole family supporter, in addition to her role as mother.” The Commission found that the plaintiff’s sex (not a man who could supposedly do home repairs) was a factor in the refusal to rent, and by a conciliation agreement the plaintiff was awarded $400 damages.

In New Jersey, the Division on Civil Rights found probable cause in the respondent’s refusal to rent an apartment to two single females. The respondent argued that the discrimination was not on account of sex and marital status, but rather on the combination of the plaintiff with her friend, and that as such there was no violation of the law. The commission, and subsequently the Supreme Court of New Jersey in Zahorian v. Russell Fitt Real Estate Agency, held that the statute intended to insure the rights of two persons of the same sex who constituted themselves into a housekeeping unit and furthermore, that such an arrangement is entirely unexceptional. It is a common practice for young unmarried working girls to make that kind of living arrangement.

The plaintiff was awarded $180 for economic loss and $750 for pain and suffering.

The Ohio Civil Rights Commission is presently exploring the possible sex discrimination in refusing to rent to a single parent with a child, a very common situation. The Commission’s hypothesis is that “though the policy of not renting to single parents is applicable to males and females alike, the policy does have a disparate effect upon females” because a greater number of women in divorce actions receive custody and because of an increase in the number of unwed mothers retaining child custody, all leading to an increase in the number of female-headed families. This study, and subsequent rulings, will have important repercussions in the sex-bias housing field.

A further interesting area of housing bias concerns discriminatory housing regulations, advantages or privileges at universities.

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34 Washington State Human Rights Comm’n, Case No. Y-34-74, Findings of Investigator (March 26, 1974).
36 Id. at 405, 301 A.2d at 757.
38 A different aspect of sex bias in housing concerns discrimination against homosexuals. Upon receiving several such complaints, the Colorado Civil Rights Commission has begun a survey on the extent of such discrimination. Letter from Eleanor G. Crow, Colorado Civil Rights Comm’n Aug. 6, 1974. A statute was recently passed by the District of Columbia Council which specifically covers the situation by prohibiting discrimination because of “sexual orientation.” DIST. OF CO., RULES AND REGS. tit. 34 ch. 13, § 13.1 (sale, rental, terms and conditions, financing and advertising) P.H. EQUAL OPP. IN HOUSING ¶ 7051.9, at 7055, (1974).
and colleges. In 1972, the Pennsylvania Human Relations Commission requested and received voluntary compliance from the institutions of higher education in the state for uniform housing regulations. This action abolished a major source of housing complaints.

It is apparent from the statistics given that the sex discrimination prohibitions of the state fair housing statutes have not been greatly used. A common theory advanced by the commissions is that the main problem is educational — the public simply does not know that such discrimination is illegal. This is glaringly seen in a report from Hawaii that since 1971, when their fair housing law was amended to include sex, there has not been one complaint. Similarly in Oregon, since October, 1973, when their law was enacted, no cases relating to sex discrimination in housing have been filed. The Oregon commission concedes the lack of knowledge of the law and is attempting to disseminate the information to the public.

The Housing Director of the Pennsylvania Human Relations Commission, noting that "my information suggests a serious problem, but our docket book does not reflect it," offers several explanations for the relatively small number of cases, in addition to the educational problem: staff resistance, especially male staff; reluctance to file in that "a whole psychological spectrum of conditioning has prepared many Americans to accept their rejection without a word"; and that the discrimination is going underground.

The Ohio Civil Rights Commission, aware of the public educational void, instituted a broadcast public service announcement program soon after the sex-bias law was enacted. The effect of such announcements is doubtful, however, as public service announcements are notorious for being aired during periods of minimal viewing or listening.

The state commissions seem to be cognizant of the crucial educational problem, but the state legislatures are perhaps not always so understanding. For example, in Ohio under the present law, the Civil Rights Commission is mandated to prepare an educational pro-

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41 Letter from Edwin H. Honda, Director, Hawaii Dep't of Regulatory Agencies, June 24, 1974.

42 Letter from Patricia Haggin, Technical Assistance Coordinator, Oregon Civil Rights Div., Bureau of Labor, June 13, 1974. In Indiana, only three cases were filed in an eight month period from September, 1973 to May, 1974. INDIANA CIVIL RIGHTS COMM'N, HOUSING COMPLAINTS (Sept. 23, 1973 — April 24, 1974).

43 Id.

44 Id.

gram for the public schools and all residents of the state. However, when the legislature added sex discrimination to the Commission's jurisdiction, it failed to add the sex category to the educational program provision. Legislation to amend this has been introduced in the House, but passage is uncertain.46

Looking at the comparative experiences and statistics of various state commissions, one conclusion that can be drawn is that the preponderance of attention given to sex discrimination in home finance by women's rights and other organizations may be somewhat misguided. While not minimizing the totality of discrimination in home finance, the administrative complaints show more attention and relief must be directed to the area of sex discrimination in the rental of residential housing.

State Responses to Sex-Biased Discrimination in Housing

Provisions of the Law

Twenty-five states have fair housing legislation.47 In all but a few of these states, the applicable statute establishes an administrative agency to effectuate the purposes of the statute. The various state statutes all read somewhat similarly, with variation in the extent of coverage, the exemptions and the degree of authority given to the commissions.

Somewhat typical is the Ohio statute. Under the Ohio civil rights legislation, it is an unlawful discriminatory practice to "refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold housing accommodation from any person because of the ... sex ... of any prospective owner, occupant, or user of such housing";48 to indicate there is no housing when it is available; to fail to lend money for financing for home purchase or repair on account of sex, if the individual or corporation is in the business of lending money; to discriminate in the terms or conditions of the sale or rental or in providing services or privileges; to discriminate in the terms and conditions of a home financing loan; to print or circulate a discriminatory statement indicating a preference or limitation as relates to housing; to make an inquiry or keep a record concerning the sex of the applicant; to include in the rental or transfer of housing any restrictive covenant; or to attempt to induce a housing sale by making representations as to the future composition of a neighborhood.49 Ohio specifically exempts religious and private or fraternal organizations.50

47 Supra note 27.
48 OHIO REV. CODE ANN. § 4112.02 (H) (1) (Page 1973).
49 OHIO REV. CODE ANN. §§ 4112.02(H) (1)-(9) (Page 1973).
50 OHIO REV. CODE ANN. § 4112.02(K) (Page 1973).
Other states have had more initial foresight and have gone much further in their exemptions pertaining to sex. For example, Connecticut legislators have hedged obvious problems with sex discrimination in housing statutes by exempting organizations that rent sleeping accommodations for the exclusive use of one sex. As the statute now reads in Ohio, a dormitory in a state university housing only females would be in violation of the law. A similar provision, exempting dwellings designed exclusively for one sex, is now before the Ohio Legislature.

Iowa has an exemption with a similar effect, though less broad in coverage, excluding housing accommodations where residents of both sexes must use a common bathroom. In addition, many of the states exempt housing accommodations of no more than two families, if the owner or his family resides in one accommodation.

In Ohio, as with other state commissions, there are two avenues of enforcement. First, there is administrative enforcement through the Ohio Civil Rights Commission. Second, and only for the housing provision, there is a private cause of action whereby a person may file a civil action in a court of common pleas. By allowing the private suit, the legislature recognizes the necessity of quick action in housing cases. Due to the transient nature of housing, for effective relief for the aggrieved, immediate enforcement is an absolute necessity.

The Administrative Process

Specifically, in Ohio, a complainant may file a charge with the Commission alleging a discriminatory action. The Commission is empowered to investigate the charge, and if probable cause is found, attempt to abolish such practices by "informal methods of conference, conciliation, and persuasion." If this fails, the Commission may hold a public hearing, after which, and only then, the Commission may issue a cease and desist order. The Commission lacks any power to obtain or impose emergency injunctive relief. As it often takes months to investigate a complaint, the housing is frequently unavailable by the time of the order or the complainant has found other housing.

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56 Ohio Rev. Code Ann. § 4112.05 (B) (Page 1973).
57 Ohio Rev. Code Ann. § 4112.05 (B), (G) (Page 1973).
Thus the only power of the Commission in housing cases is to stop further discriminatory actions and, if it is still available and desired, obtain the housing for the complainant.

A good many of the states have unsatisfactory injunctive provisions like Ohio. To be effective in the housing area the commissions need the authority to seek a temporary restraining order. The Alaska statute has such a provision:

At any time after a complaint is filed . . . the commission may file a petition in the superior court . . . seeking appropriate temporary relief against the respondent . . . including an order . . . restraining him from doing or procuring any act tending to render ineffectual any order the commission may enter with respect to the complaint. 59

New York has a similar provision. 59 This authority is an absolute necessity for effective dispositions of housing complaints. Until Ohio receives such authority, its fair housing law will remain only a token effort to achieve fair housing in the state. Every session three or four bills are submitted to the Ohio legislature to add powers to the Commission, but few are enacted. At the present time, there is a bill in the Ohio House that would give the Ohio Civil Rights Commission power to seek temporary and preliminary relief as in the Alaska statute. 60

In addition, state administrative agencies must have the power to award damages to be truly effective in providing appropriate compensation for the aggrieved. The majority of the commissions have no express statutory provision for damage awards in housing cases. But it is axiomatic that fair housing statutes are to be construed liberally. 61 In this regard, some enlightened state courts have correctly interpreted their civil rights statutes by sustaining the power of the state commission to award compensatory damages. Obviously the deterrent effect of paying damages would also further the purposes of a fair housing statute.

Unusually sensitive, the Supreme Court of New Jersey broadly applied the Division of Civil Rights' remedial powers and upheld the Division's award of compensatory economic 62 and pain and suffering damages. 63 Though there was no specific statutory language authoriz-
ing such power, the court held that "it was fairly to be implied in the
light of the 'broad language of the section' and the 'overall design of
the act.' "64 The court disagreed with the appellate division's feeling
that such authority to grant minor pain and suffering awards would
lead to much more substantial claims. In Zahorian v. Russell Fitt Real
Estate Agency,65 one of the two reported cases dealing with sex dis-
crimination in housing, the complainant was awarded $180 for eco-
nomic loss and $750 for pain and suffering.

Similarly, the Massachusetts Supreme Court found nothing im-
proper in the Commission Against Discrimination awarding the com-
plainant $250 for mental suffering for being refused an apartment on
account of race.66 The court implied such authority from a section of
the statute empowering the commission to award damages that "shall
include, but shall not be limited to, the expense incurred by the
petitioner. . . ."67 The court found such humiliation and frustration
supported by substantial evidence and noted the general recognition
of mental suffering damages.

The Washington State Human Rights Commission has granted
monetary awards in several sex-bias housing cases, the largest amount
being $400 for "any and all claims for compensation or damages."68
The Commission has awarded damages both for loss of rights and for
humiliation and suffering.69

In New York, the court of appeals reaffirmed its holding that
the civil rights statute did empower the division of human rights to
award compensatory damages for mental suffering.70 The court, in
stressing the high priority of the state's policy in eliminating discrim-
ination, stated:

What we do hold is that due to the strong anti-discrimination
policy spelled out by the legislature of this state, an aggrieved
individual need not produce the quantum and quality of ev-

dence to prove compensatory damages he would have had to
produce under an analogous provision. . . . particularly so
where . . . the discriminatory act is intentionally committed.71

64 Id. at 411, 301 A.2d at 761.
65 Id.
66 Massachusetts Comm'n Against Discrimination v. Franzaroli, 357 Mass. 112, 256 N.E.2d
68 Washington State Human Rights Comm'n, Case No. Y-34-74, Conciliation Agreement
(March 27, 1974).
69 For the establishment of such damages, see Rody v. Hollis, 81 Wash. 2d 88, 500 P.2d
97 (1972).
70 Batavia Lodge #196, Loyal Order of Moose v. New York State Div. of Human Rights,
71 Id. at 146-7, 316 N.E.2d at 320, 359 N.Y.S.2d at 28.

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In direct contrast, the courts of Pennsylvania and Ohio failed to so interpret their civil rights statutes. In Pennsylvania, where the matter is presently before the state supreme court, the Human Relations Commission still continues to award damages, though the Commonwealth Court ruled the Commission does not have such power.\textsuperscript{72} In \textit{Zamantakis v. Human Relations Commission},\textsuperscript{73} where the complainants were denied an apartment because of race and sex, the court, pointing out the absence of statutory language authorizing compensatory damages and the absence of legislative intent, stressed that a regulatory agency as the Commission cannot exceed the powers given by the legislature. The court rejected the Commission’s argument that statutory language authorizing the Commission to take “affirmative action”\textsuperscript{74} included the awarding of damages, but rather interpreted the section to mean the Commission could only order the respondent to take affirmative action. In a companion case, \textit{Straw v. Human Relations Commission},\textsuperscript{75} the court acknowledged the similarity of the Pennsylvania statute to the New Jersey statute where such authority was approved, but felt the Pennsylvania case seeking \$3,500 damages for suffering disproved the New Jersey Supreme Court which doubted such awards could ever become substantial. In addition, the court stressed the informality of administrative proceedings conducted by persons not necessarily knowledgeable of the law, and as such ruled damage awards must be left to the courts.

Likewise in Ohio, in \textit{Ohio Civil Rights Commission v. Lysyj},\textsuperscript{76} the state supreme court stripped the Ohio Civil Rights Commission of any power to award compensatory or punitive damages. In doing so, it appears the court disregarded the mandate of the legislature to construe the provisions of the statute liberally “for the accomplishment of the purposes thereof . . . .”\textsuperscript{77} While the Ohio statute is also quite similar to the New Jersey statute, the court followed Pennsylvania’s example and ruled:

The authority to take ‘affirmative action’ may well include extensive powers to effectuate the purpose of the Civil Rights Act, but, under existing statutory language, those powers are to be directed towards ending the unlawful discriminatory practice and securing compliance with the cease and desist

\textsuperscript{73} Id.
\textsuperscript{74} PA. STAT. ANN. tit. 43 § 959 (Supp. 1974).
\textsuperscript{76} 38 Ohio St. 2d 217, 313 N.E.2d 3 (1974).
\textsuperscript{77} OHIO REV. CODE ANN. § 4112.08 (Page 1973).
order. If the General Assembly had intended to authorize the commission to grant compensatory or punitive damages, it would have been a simple matter to explicitly so provide. . . .78

Lacking such power, the Ohio Civil Rights Commission cannot provide proper relief for a victim of housing discrimination.

The state fair housing statutes routinely provide for judicial review of an administrative order. Any respondent or complainant who feels the final order of the commission is unjust may have the administrative proceedings examined by the court. The court may enforce, modify or set aside the order of the commission. In sex-bias housing cases, few cases have been so reviewed,79 with those mainly concerning administrative questions and not discriminatory questions.

It is interesting to follow the disposition of cases under the administrative procedure. Since Pennsylvania has had its sex-bias housing statute for the comparatively long time of five years it would be valuable to examine its experience. From July, 1969 through June, 1974, the Pennsylvania Human Relations Commission received 154 sex-bias housing charges. Of the 77% that were closed, probable cause was found in 66% of the cases, with 12% of the cases being withdrawn by the complainant or administratively. Five per cent of the probable cause cases went to public hearing, with the rest adjusted before a hearing.80 The Commission, recognizing the importance of compensatory damages for adequate relief, has continued to issue orders awarding damages, subject to the final determination of the state supreme court. Despite Pennsylvania's active involvement in the area and its good record of finding probable cause in a majority of the cases, if the Pennsylvania Commission is finally denied the power to award damages, as is presently the case in Ohio, the Commission will not be able to provide satisfactory relief for housing complainants.

A commission lacking authority to award damages, as well as lacking emergency injunctive powers to offset the inevitable delays in the administrative process, is an inadequate forum in which the complainant can receive proper treatment. As reported by the Commission Against Discrimination in Massachusetts:

[I]n every case [sex discrimination in housing] that ended in conciliation, the administrative proceedings took so long

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78 Ohio Civil Rights Comm'n v. Lysyj, 38 Ohio St. 2d 217, 222, 313 N.E.2d 3, 7 (1974). The commission filed a petition for rehearing (No. 73-811, Sup. Ct. of Ohio, June 24, 1974) but it was denied (July 31, 1974). Andrew Ruzicho, Chief, Civil Rights Section, Office of the Attorney General, said he was generally pleased with the Lysyj decision as the court, though it failed to construe the remedies section broadly, did construe the violations power liberally.


80 CASE STATUS—SEX DISCRIMINATION, supra note 26.
that the complainant had found another apartment by the
time the case was closed. Thus, the action had little effect on
the complainant or the respondent except to experience the
bureaucracy of the Commission.81

Private Cause of Action

Under the majority of the state fair housing statutes, a complain-
ant is given an option to file a private cause of action, rather than
go through the administrative process. Looking specifically at the
Ohio statute, a housing complainant may commence a private suit
in a court of common pleas.82 Because of the present inadequacy of
the relief the Ohio Civil Rights Commission can provide, this is the
only effective method for a housing complainant.

Unfortunately many attorneys and many housing complainants
are not aware of this avenue of redress. The Ohio Civil Rights Com-
mission states that it is its policy to inform such complainants of this
alternative form of relief, but this is not always done. Remarkably,
in Ohio, there has been only one such suit initiated in the state courts,
and that one was settled in chambers.83

Under this procedure, the court may grant a temporary or per-
manent injunction, temporary restraining order or other appropriate
order. Under the Ohio statute the court is also authorized to “grant
such relief as it deems appropriate, including . . . actual damages.”84
There is no specific mention of mental anguish or punitive damages,
but the absence of a specific exclusion leaves the way open for the
discretion of the court.

A hindrance to the statute’s effectiveness may be its lack of
specific language authorizing payment of attorney’s fees for those not
financially able to pay. It is unreasonable to suppose the practicing
bar will undertake representation of discrimination victims without
reasonable expectation of compensation for their services. It is like-
wise unreasonable for the housing bias victim to bear the cost of this
serious, and often expensive, litigation. A few states do have a specific
provision for this. No private attorney has ever tried in Ohio to
receive such fees, but the avenue is certainly open. Looking to the
federal example in this area, federal courts have, in the absence of
specific statutory language, awarded attorney’s fees to successful
housing plaintiffs to further the purposes of a statute prohibiting
discrimination. In Lee v. Southern Home Sites,85 the court of appeals

81 Letter from Dorothy T. Parrish, Director of Research Div., Massachusetts Comm’n Against
Discrimination, June 20, 1974.
82 OHIO REV. CODE ANN. § 4112.051(A) (Page 1973).
85 444 F.2d 143 (5th Cir. 1971).
awarded fees for an attorney in a housing discrimination suit brought under the Civil Rights Act of 186686 where the statute was silent on this issue. The court said that “awarding attorney's fees to successful plaintiffs would facilitate the enforcement of that policy [congressional policy against discrimination] through private litigation.” In more explicit terms, the Court of Appeals for the First Circuit, in awarding fees, emphasized:

If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean the chances of a suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.87

With the federal example and with the provision calling for a liberal construction of the Ohio statute,89 it is entirely foreseeable that Ohio attorneys would receive reasonable fees for private housing suits in the state courts. In addition, there is pending legislation to provide for such fees.90

The lack of state law in the housing area is not surprising as the overwhelming majority of private housing cases have been racial cases, these having been brought under the federal Fair Housing Act. Attorneys have generally favored the federal courts:

In the past, test case litigators usually opted for the federal courts on many grounds: the greater sensitivity of the federal bench to novel constitutional claims; the usually higher intellectual calibre of federal judges; the virtual guarantee of a written and reported opinion; the relatively efficient operation of the federal district courts; the accelerated appellate procedure. . . .91

Due to the recent addition of the sex prohibitions to the federal Fair Housing Act, sex-bias housing cases may now be brought in either state92 or federal courts. Because of the apparent lack of case law in

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87 Lee v. Southern Home Sites, 444 F.2d 143, 145 (5th Cir. 1971).
89 OHIO REV. CODE ANN. § 4112.08 (Page 1973).
this area, in litigating a sex-bias housing case, one must look to the development of principles and remedies for racial cases brought under federal fair housing law. 93

Federal Response to Housing Discrimination

"States generally took the lead in the enactment of civil rights legislation and this was true of fair housing legislation." 94 The recent inclusion of sex 95 under the Fair Housing Act, while about half the states have had similar statutes for a number of years, shows Congressional lag in this area. Fortunately, the federal courts have generally taken the lead in the enforcement of fair housing legislation. In the short time since the enactment of the Fair Housing Act in 1968 cases have proliferated. Although the Act previously also prohibited discrimination because of religion and national origin, 96 the important decisions and principles established by these cases involve race and color questions almost exclusively.

Provisions of the Law

Basically, the Fair Housing Act reads the same as the Ohio statute, prohibiting discrimination on account of race, color, religion, national origin and now sex in the sale, rental, terms and conditions, advertising and financing of housing or in any other conduct which otherwise interferes with equal housing opportunities. 97 The Act also covers "blockbusting" 98 and the provision of brokerage services. 99 The Act covers virtually all private residential real estate transactions except those concerning religious organizations or private clubs, 100 single family homes sold or rented without the use of a broker and

94 UNITED STATES DEP'T OF HOUSING AND URBAN DEV., HISTORICAL OVERVIEW, Equal Opportunity in Housing, P-H EQUAL OPP. IN HOUSING ¶ 2301, at 2304 (1973).
95 Ostensibly this will be inclusive of conventional sex discrimination and marital status discrimination. See note 33 supra.
without advertising,\textsuperscript{101} and multiple dwellings\textsuperscript{102} occupied by no more than four families if the owner lives in one unit.\textsuperscript{103}

There are three methods of enforcement. First, the administrative responsibility for enforcing the Act is with the Secretary of Housing and Urban Development (HUD).\textsuperscript{104} The aggrieved may file a complaint with HUD, subject to deferral to a state agency that has similar fair housing legislation. HUD will investigate the claim and try to correct the discriminatory practice by informal conference. If this fails, the aggrieved party seeking relief must file a civil action in a United States district court.\textsuperscript{105} In this, the federal statute is considerably weaker than the state statutes. State agencies, if conciliation fails, can hold public hearings and issue cease and desist orders and, in some states, award damages. Second, a person may bypass the administrative process and proceed directly to court.\textsuperscript{106} Third, the Attorney General may commence a suit if he feels there is a pattern or practice of discrimination.\textsuperscript{107}

In federal litigation, the right to equal housing opportunity secured by the Fair Housing Act is a "fundamental guarantee."\textsuperscript{108} The Act is the realization of a policy which Congress has accorded the highest national priority.\textsuperscript{109} The broad sweep of the Act is apparent from its preface expressing a congressional intention "to provide, within constitutional limitations, for fair housing throughout the United States."\textsuperscript{110}

\textsuperscript{101} 42 U.S.C. § 3603(2) (b) (1) (1970).
\textsuperscript{102} 42 U.S.C. § 3603(2) (b) (2) (1970).
\textsuperscript{103} It is important to note here that many of the federal fair housing cases have been grounded both on the basis of the Fair Housing Act and the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970). Although the principles we review in terms of relief and in terms of applicability of the law have been established through both, it is important to be conscious of the general holding that the 1866 Act is directed solely to race and color. Section 1982 concerns equal property rights. Its companion, Section 1981, 42 U.S.C. § 1981 (1970), provides relief where discrimination exists in making and enforcing contracts. Effectively used in racial discrimination in employment, 1981 actions in sex discrimination have been explicitly rejected. Olson v. Rembrandt Printing Co., 375 F.Supp. 413 (E.D. Mo. 1974); League of Academic Women v. Regents of Univ. of Cal., 343 F.Supp. 636 (N.D. Cal. 1972). Thus, it is unlikely that coupling the two federal statutes in housing discrimination cases would be permissible in sex-bias housing cases. This is particularly significant for the Fair Housing Act exemptions. Section 1982 of the 1866 Act is not limited by single-family or multiple-unit dwelling exemptions, and in race cases involving these types of dwellings, attorneys have available to them this statute. However, this will probably not be true for sex discrimination cases. Therefore, it would be important to look at the provisions of an applicable state statute, which in many cases is broader in coverage than the Fair Housing Act.
\textsuperscript{108} Williams v. Matthews, 499 F.2d 819 (8th Cir. 1974).
What is also very important in fair housing cases is the direction by the Supreme Court that private lawsuits are the "main generating force" in achieving equal housing opportunity. Due to the inevitable delays of an administrative proceeding and the lack of effective enforcement power in HUD, it may be to the complainant's advantage to immediately seek a private remedy. The real action in fair housing cases has come in private litigation. For litigation of a sex-bias housing case, even in the state courts, one must explore the propositions which have evolved in the federal fair housing cases.\(^{112}\)

**The Sole Factor**

A practical situation which the single woman commonly faces is difficulty in apartment rental admission. Sex need not be the only reason for the refusal to rent, but it must be one factor in the refusal, to find discrimination. This may be difficult to prove as many management companies will use prior residency requirements and credit rating as factors in consideration. Although ostensibly objective, these rental standards will be coupled with a "rating" system which will prefer a married couple over a single male, and a single male over a single female. In analogous race housing cases, even if admission rejections were based on legitimate grounds, such as prior residency or credit, the discrimination is not vitiated if race were merely one of a number of otherwise valid factors.\(^{113}\)

In *Smith v. Sol D. Adler Realty Co.*,\(^ {114}\) the Court of Appeals for the Seventh Circuit rejected the district court's opinion that, though the defendant realty company did not want Negroes in their apartment, an otherwise valid factor, not wishing to rent to a single mother with a child, made such discrimination not total, and thus not unlawful. The court of appeals, in finding race a factor in the refusal, strongly asserted:

Race is an impermissible factor in an apartment rental decision and ... it cannot be brushed aside because it was

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\(^{113}\) Williamson v. Hampton Management Co., 339 F.Supp. 1146 (N.D. Ill. 1972). Here the defendant claimed refusal to rent on inadequacy of income and a policy against renting to two single females. The court found a violation of the Fair Housing Act in that race was a factor in the refusal, though not the sole factor. It is interesting to note that the court stated that a lessor could lawfully adopt a policy of refusing rental to two single females (defendant's reason for this was the possibility one woman would marry and the remaining one would not wish to remain in the apartment alone), as long as race was not a factor. With sex now under the Fair Housing Act, this would be prohibited.

neither the sole reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination.\textsuperscript{115}

Now with sex having become a valid factor under the Fair Housing Act, even the policy of refusing to rent to a single mother with a child may be discriminatory on the basis of sex.

Sex discrimination should be found if a rating system is employed even if the applicant were rejected for reasons inclusive of the objective standards.\textsuperscript{116} In fact, under the Fair Housing Act, the law provides that any conduct that otherwise makes unavailable housing is prohibited.\textsuperscript{117} As one court held:

The foregoing phraseology appears to be as broad as Congress could have made it, and all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful.\textsuperscript{118}

A line of fair housing cases have held that the law prohibits “sophisticated as well as simple-minded modes of discrimination.”\textsuperscript{119} It is apparent, therefore, that housing discrimination statutes are to be treated liberally with close judicial scrutiny of the discriminatory impact of certain conduct.

\textit{The Checkers}

Admittedly it is difficult to prove discrimination. It is not something people talk about. One of the more conventional, and the most effective, methods of proving housing discrimination is through the process of “checking” or “testing,” where a white, in a racial case, similar in situation to the black is sent out soon after a black has been informed that no vacancies exist or, in more blatant circumstances, where a policy of not renting on account of race is stated. Evidence of the experience of checkers has been uniformly admitted


\textsuperscript{116} The same logic of sex not necessarily being the “sole” factor for rejection has been utilized in employment discrimination cases. The Court of Appeals for the Seventh Circuit, for example, in explaining the breadth of Title VII of the Civil Rights Act of 1964, struck down United Air Lines “no-marriage” regulation, holding:

[the Act] is not confined to explicit discriminations based 'solely' on sex. Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.


\textsuperscript{117} 42 U.S.C. § 3604(a) (1970).


to show the existence of a discriminatory policy.\textsuperscript{120} In housing cases, the courts have lauded checkers as serving the public interest in achieving fair housing.\textsuperscript{121}

Admissibility of checking evidence in housing discrimination is a common sense rule, providing one of the few effective means to determine if illegal practices are being engaged in and deprivations of equal housing opportunities are being perpetrated. It is an expeditious evidentiary dimension in race cases and should be simply and effectively employed in sex discrimination matters. It is significant to note that in the New Jersey sex-bias housing case, \textit{Zahorian v. Russell Fitt Real Estate Agency},\textsuperscript{122} a checker was used to prove discrimination on account of sex. A male, similar in situation to the complainant was told there were available apartments, and thus the hearing examiner concluded that "unrelated male roommates were not regarded either by respondents or their principals as \textit{prima facie} objectionable tenants, female roommates were."\textsuperscript{123}

\textbf{The Use of Statistics}

The use of statistics in housing discrimination cases is employed effectively in establishing \textit{prima facie} cases. Typical in the fair housing decisions using statistics is the oft-cited reference to \textit{State of Alabama v. United States}: "In the problem of racial discrimination, statistics often tell much, and Courts listen."\textsuperscript{124} The Alabama language has been commonly used in equal housing law.\textsuperscript{125}

Thus, if an apartment rents to married or single men, the absence of single females may establish a \textit{prima facie} case of sex discrimination, placing on the landlord the burden to come forward with evidence to show a nondiscriminatory policy on the basis of sex.\textsuperscript{126}

\begin{itemize}
    \item \textsuperscript{122} Id. at 403, 301 A.2d at 757.
    \item \textsuperscript{123} 304 F.2d 583, 586 (5th Cir. 1962), \textit{aff'd}, 371 U.S. 37 (1962).
\end{itemize}
Nor will it be legal to limit the number of females in admission requirements. The Fair Housing Act makes no distinctions between the failure to rent to any one class and where several of that class have been previously rented apartments.\footnote{United States v. Youritan Constr. Co., 370 F.Supp. 643 (N.D. Cal. 1973). In Youritan, the court found a \textit{prima facie} case of racial discrimination where only 1.2\% of 1133 apartments were occupied by blacks. The Fair Housing Act provides that any conduct which otherwise interferes with equal housing opportunity is unlawful (42 U.S.C. § 3604 (1970)). This broad provision has been given the most literal interpretation, prohibiting all types of housing discrimination. Justifications in limiting or depriving equal opportunities, even in good faith, have been characterized by one recent federal panel as "pure chimera." Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974).}{127}

\textit{The Pre-Act Policy}

Evidence of discriminatory housing occurring before such conduct was illegal is nevertheless admissible as showing that the policy may still exist. This logical approach has resulted as "most persons will not admit publicly that they entertain any bias or prejudice. . . ."\footnote{Dailey v. City of Lawton, 296 F.Supp. 266, 268 (W.D. Okla. 1969), \textit{aff'd}, 425 F.2d 1037 (10th Cir. 1970).}{128} Such discrimination merely goes underground once it is proclaimed illegal.

The leading case for this principle is \textit{United States v. West Peachtree Tenth Corp.},\footnote{437 F.2d 221 (5th Cir. 1971).}{129} where the court allowed evidence of an admitted policy prior to the effective date of the Fair Housing Act of excluding Negroes.

When there is a finding of a pre-Act pattern or practice of discrimination, and little or no evidence indicates a post-Act change in such pattern or practice up to the time the suit is filed, a strong inference that the pre-Act pattern or practice continued after the effective date of the Act arises. Such evidence alone does not create a \textit{prima facie} case of post-Act pattern or practice, but it is of significant probative value.\footnote{\textit{Id. at} 227.}{130}

If an owner fails to inform his rental agent of a change in policy after passage of the statute forbidding such discrimination, this may be considered discriminatory conduct.\footnote{United States v. Real Estate Development Corp., 347 F.Supp. 776 (N.D. Miss. 1972).}{131} This rule is paramountly significant because of the comparatively recent enactments around the country prohibiting sex discrimination in housing. The use of some of the overt past practices barring single women in apartment rentals is important in proving cases filed under these new laws.

\textit{The Awarding of Damages}

The greatest impact in eradicating housing discrimination has come about through the awards of damages to successful plaintiffs.
One Cleveland area broker characterizes damage awards in fair housing cases as "the sting," perhaps the most significant deterrent to discriminatory practices.

It has been shown that the various states are in conflict over the power of an administrative agency to make damage awards. And, even if one goes directly to a state court, there may still be a question as to allowable damages, as in Ohio, where the statute only mentions the power of the court to grant actual damages, with no specific provision for punitive damages. In contrast, the Fair Housing Act does make specific allowance for the court to award actual damages plus an additional punitive damage award up to $1,000. Its sister statute, the 1866 Act, while having no explicit statutory authorization for damages, like most state housing discrimination statutes, has been used in awards for discrimination for compensatory and punitive damages.

Some courts have justified damages as the rule for the simple impairment of a federal civil right. Other courts couple the obstruction of the civil right with the humiliation and discomfort of the deprivation. It should be pointed out that if a complainant ultimately is offered the property, the damage element does not become moot.

The humiliating outrage of denial of equal housing opportunities, long having been ignored, has been given special scrutiny by the federal courts in recent years. In *Allen v. Gifford,* for example, the plaintiffs were awarded $8,500 in compensatory damages and $5,000 in punitive damages, even though the defendant eventually offered the plaintiffs the desired property. To place housing discrimination in proper legal perspective, one state jury awarded $10,500 in statutory, actual and punitive damages for the refusal to rent to a family on discriminatory grounds. Another court provided for a

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140 P-H EQUAL OPP. IN HOUSING ¶ 47.1 (1973). The award was for statutory, actual and punitive damages. It was reduced by the court from $13,500, which included attorney's fees, due to jurisdictional problems. The suit was brought under California's Unruh Civil Rights Act, Cal. CIVIL CODE §§ 51, 52 (West Supp. 1974), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1966).
total of nearly $7,000 in actual, compensatory and punitive damages against a housing management company for discrimination.\textsuperscript{141} Compare this with the housing-bias damage awards made by the state administrative agencies: $400 for loss of right by the Washington State Human Rights Commission (which the commission reports is the largest monetary award in a sex-bias housing case);\textsuperscript{142} $750 for pain and suffering in a sex-bias housing case by the New Jersey Division on Civil Rights.\textsuperscript{143} Clearly the federal courts have a greater sensitivity for the damage caused by a discriminatory act.

Whatever the legal grounds, it appears that the awards for housing discrimination in the federal courts are becoming more substantial as litigation increases. It is a further sign of increased sensitivity by the bench to curb unlawful housing bias and to make equal housing opportunity a reality. It should be expected that equivalent damage awards will be granted in sex discrimination cases.

\textbf{The Awarding of Attorney's Fees}

A critical dimension of the broad based judicial enforcement of equal housing opportunity depends on lawyers. As the Supreme Court has candidly recognized, the task of enforcing fair housing is enormous.\textsuperscript{144} Under the Fair Housing Act, lawyers can use both the administrative process\textsuperscript{145} and file their cases in federal district court\textsuperscript{146} at the same time. Thus, the often lengthy administrative delays do not obstruct the expeditious manner in which housing discrimination cases are to be treated.\textsuperscript{147}

If the task of fair housing enforcement is as critical as the Supreme Court suggests, implicit in that recognition is the necessity of greater input by the private bar.\textsuperscript{148} Accordingly, one of the most

\textsuperscript{141} Marshall v. Pendley, P-H \textsc{equal opp. in housing} \textsuperscript{\textcopyright} 13,615, at 14,012 (N.D. Ga. 1973). The award was made to a group of five plaintiffs who applied together for an apartment.

\textsuperscript{142} \textit{Supra} note 33.

\textsuperscript{143} \textit{Supra} note 35.


\textsuperscript{147} In fact, a common defense technique in fair housing practice is to raise the necessity of exhaustion of administrative remedies with HUD. This reasoning, however, has been expressly rejected, with many courts recognizing Congress' intent to provide concurrent remedies. Johnson v. Decker, 333 F.Supp. 88 (N.D. Cal. 1971); Brown v. LoDuca, 307 F.Supp. 102 (E.D. Wis. 1969). Presumably, in the absence of a provision to the contrary, in those states which provide both civil actions and administrative avenues, the same logic should apply.

\textsuperscript{148} Bearing this out, in its recent report, the United States Commission on Civil Rights concluded its findings that governmental measures to enforce equal housing opportunities in America have failed. \textsc{united states comm'n on civil rights, equal opportunity in suburbia}, at 68 (July, 1974) (copy available from U.S. Comm'n on Civil Rights).
effective inducements in its involvement has been the awards of attorney's fees. While the Fair Housing Act has a specific provision for attorney's fees,\textsuperscript{149} the Civil Rights Act of 1866, like many of the state housing discrimination statutes, has no express statutory provision for the award of fees. Yet, the absence of express authorization for attorneys' fees should not deter involvement because of the successful litigation brought under the 1866 Act. Courts have applied the logic of the Supreme Court in awarding fees even in the absence of a statute provision:

If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by involving the injunctive powers of the federal courts.\textsuperscript{150}

The evolution of the so-called "private attorney general" theory has been applied in fair housing.\textsuperscript{151} Impetus for the award of fees has been given because of the Supreme Court's language that fair housing law suits are important "in vindicating a policy that Congress considered to be of the highest priority."\textsuperscript{152} Thus, even without a provision for fees, lawyers should be compensated for vindicating equal housing opportunity violations on the basis of race or sex. With regard to housing bias, one judge explicitly said:

[\textit{P}]ublic policy demands that counsel fees be awarded in housing discrimination cases so that prejudiced individuals will not be hesitant in enforcing their rights.\textsuperscript{153}

The explicit language of the Fair Housing Act limits fee awards to one "not financially able"\textsuperscript{154} to assume the costs of a lawyer. Fortunately courts have recently employed realistic assessments of what "not financially able" really means in equal housing opportunity litigation. One federal judge brought home in clear terms what parameters are not to be employed:

Adoption of indigency as the test would summarily preclude recovery of any fees by persons with the financial ability to own any kind of home or to seriously seek home ownership. Therefore, the Court will consider financial inability within the special context of § 3612(c) to mean a homeowner or

\textsuperscript{149}42 U.S.C. § 3612(c) (1970).


\textsuperscript{154}42 U.S.C. § 3612(c) (1970).
prospective homeowner of limited financial ability who clearly lacks the resources to fight a legal battle . . . without endangering his status as a homeowner or potential homeowner.\textsuperscript{155}

By and large, the most likely plaintiff will be the moderate income black or female who is required to undertake "this important type of litigation"\textsuperscript{156} in order to secure the same rights any white or male has available.

Furthermore, a plaintiff's present ability to pay has been rejected as the only standard of what constitutes "not financially able." His ability to assume such fees must also be considered.\textsuperscript{157} One federal appellate court has held in effect that attorney's fees may be awarded as a matter of course once liability is established.\textsuperscript{158} In adopting the logic of *Newman v. Piggie Park Enterprises, Inc.*,\textsuperscript{159} which recognizes the futility of successful plaintiffs bearing their own fees, another federal appellate court ordered a lower court to reconsider a $400 fee as too low and awarded $1,000 in addition for the appeal.\textsuperscript{160} What has evolved is a recent body of law supporting the principle that it is often the moderate income person against whom discrimination is perpetrated and for whom attorney's fees should be made available.

**Conclusion**

The major problem that women face in housing is the denial of equal rental opportunities. It is an immediate problem. And it is a problem that has clearly been bypassed. Now with the inclusion of sex-bias prohibitions in the Fair Housing Act, the problem can more readily be approached.

But it has been six years since the Fair Housing Act was enacted and HUD is "just getting started in enforcing provisions of the 1968 Civil Rights Act."\textsuperscript{161} It is questionable, in view of its past record, what impact HUD will have on sex discrimination in housing. Likewise, at the state administrative level there has not yet been much progress. In Ohio, "the problem of housing discrimination . . . has not even been tapped. . . ."\textsuperscript{162}

\textsuperscript{156}Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974).
\textsuperscript{157}Steele v. Tide Realty Co., 478 F.2d 380 (10th Cir. 1973). The court of appeals reduced a $2450 fee award to $2000 because the fair housing violation was a simple statutory action involving very little time.
\textsuperscript{158}Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973).
\textsuperscript{159}390 U.S. 400 (1968).
\textsuperscript{160}Jeanry v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974).
\textsuperscript{161}Rasanen, *Antidiscrimination drive at HUD lags after 6 years*, The Plain Dealer (Cleveland), Aug. 18, 1974, at 32A, Col. 3 (remarks by Dr. Gloria E. A. Toote, Assistant Secretary for Equal Opportunity, United States Dept of Housing and Urban Development).
\textsuperscript{162}Comment by Frank Gibb, Compliance Director, Ohio Civil Rights Comm'n, in *OHIO CIVIL RIGHTS COMM'N, QUARTERLY REPORT* Vol. 1, No. 1, at 5 (Winter 1974).
Parties seeking justice under sex discrimination statutes will encounter hazards regardless of the course of action pursued or the remedy sought. The inclusion of sex-bias proscriptions to the Fair Housing Act make it foreseeable that litigation will be focused at the federal level. Yet attorneys should be cognizant that in some jurisdictions the applicable state statute may be more comprehensive. Ineffective administrative relief, dispensed by federal and state agencies, has forced and, in the future, will force parties searching for meaningful relief into the private litigation arena.

At this point, then, the housing attorney is challenged with the task of pioneering new approaches to equal opportunity in housing. But at this time there are few fair-housing attorneys. So it appears that what is needed is a tightening up of the administrative process so that a housing complainant can also find justice in an effective administrative forum. However, a major change in federal and state legislation is not foreseeable. Thus, the enforcement of fair housing opportunity will ultimately depend on the practicing bar.

Betsey Friedman*

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163 As might be expected, upon enactment of the sex amendment to the Fair Housing Act, a Cleveland fair housing attorney voluntarily dismissed a sex-bias housing case pending in the state court and refilled it in United States district court, in what may be the first sex-bias housing case under the Fair Housing Act. Voloshen v. Jordan, Civil No. C74-788 (N.D. Ohio, Sept. 23, 1974). The plaintiff, a divorcee, contended she was being evicted because the defendant landlords felt she could not properly maintain a house without a man. The plaintiff was awarded damages and attorney's fees.

*Editors note: Special acknowledgement should be extended to the civil rights commissions of the different states. Several of them have spent a considerable amount of time in providing information towards the preparation of this article. Miscellaneous materials cited herein are on file at The Cleveland State University, Cleveland-Marshall College of Law Library.