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Civil Rights--Housing--Relief Under Section 1982 for Blacks Exploited in Segregated Housing Markets--Clark v. Universal Builders, Inc.

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CASE NOTES

Civil Rights — HOUSING — RELIEF UNDER SECTION 1982 FOR BLACKS EXPLOITED IN SEGREGATED HOUSING MARKETS — *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 95 S. Ct. 657 (1974).

Between 1958 and 1968 Universal Builders, Inc., under joint venture agreements with seven land companies, constructed and sold new houses in and adjacent to black areas on Chicago's southside.[1] On January 20, 1969, a class action was instituted against these joint venturers on behalf of blacks who had entered into installment contracts to purchase 1,090 of these new homes.[2] The complaint alleged that racial discrimination and the resulting residential segregation in Chicago had created an acute shortage of housing among blacks.[3] The defendants were sued for taking advantage of that shortage by selling new homes in black areas at higher markups[4] and on more onerous terms[5] than equivalent homes in white

[1]Under these agreements Universal Builders, Inc. constructed homes on lots owned by Larchmont Home Development Co., Rosewood Corp., Independence Homes, Inc., Hamilton Corp., Lawson Corp., Jarvis Homes, Inc., and Chatham Town Homes, Inc., and subsequently sold the homes to plaintiffs. 501 F.2d at 327 n.1.

[2]Brief for Appellants at 7,9.

[3]501 F.2d at 334, 335 n.10. For a detailed analysis of residential segregation in Chicago and other cities in the United States see N. BRADBURN, INTEGRATED NEIGHBORHOODS IN AMERICA (1971); K. TAEUBER & A. TAEUBER, NEGROES IN CITIES (1965). See H. MOLOTCH, MANAGED INTEGRATION 15-37 (1972) for a description of the characteristics and operation of the dual housing market in Chicago, and K. Dam, *The Economics and Law of Price Discrimination: Herein of Three Regulatory Schemes*, 31 U. CHI. L. REV. 1, 4-9 (1963) for an economic discussion of dual markets in general.

[4]Estimates by plaintiffs' five expert witnesses indicated that the average contract price exceeded the fair market value of the homes by $3,729 to $6,508 (16.6 percent to 34.5 percent above the fair market value). 501 F.2d at 335 & n.11. Other evidence suggested that over the contract period each plaintiff would pay approximately $18,300 to $24,500 in excess of the amount due on the same contract if a reasonable price had been charged. Brief for Appellants at 62-63. Thus the total amount at stake in *Clark* may be between $19,947,000 and $26,705,000.

A companion suit, now progressing as Wells v. F & F Investment, No. 69 C 15 (N.D. Ill. filed Jan. 6, 1969) (formerly titled Baker v. F & F Investment), seeks relief under section 1982 for nearly 3,000 other blacks who paid exorbitant prices for used homes to several dozen defendants who participated in blockbusting on Chicago's westside. The amount at issue in *Wells* is at least as great as that in *Clark*.

[5]

> [E]vidence at trial indicated that defendants refused to sell other than on land contract to plaintiffs. . . . [and]refused to participate in any sales through a deed and mortgage arrangement despite the prospective buyer's ability to obtain mortgage financing. The evidence indicates that plaintiffs were of the equivalent economic status as many whites who routinely obtained mortgages to finance the purchase of houses . . . . [S]ome plaintiffs made down payments of up to forty-five percent of the contract price — well above the amount needed to qualify for mortgages — and yet defendants refused to deal on terms other than contract.

501 F.2d at 335-36 (footnotes omitted).

> The average contract term was 28 years; some terms ranged upwards to 40 or more years. The contracts prohibited installation of improvements such as storm windows, fences,

areas. Plaintiffs claimed that the reaping of such profits denied them the same right to purchase real property as is enjoyed by whites, in contravention of 42 U.S.C. §1982.

Ruling on defendants' motion to dismiss, District Judge Hubert L. Will of the Northern District of Illinois approved the "exploitation theory" of liability under section 1982.[6] When the case was later tried before District Judge Joseph S. Perry, however, he rejected the exploitation theory and granted a directed verdict for the defendants at the conclusion of the plaintiffs' case, declaring that "absolutely no positive evidence of discrimination" had been proffered.[7] The Seventh Circuit Court of Appeals reversed, holding that exploitation of a shortage of housing triggered by racial discrimination violates section 1982.

I. Background

The statutory provision applied in *Clark,* 42 U.S.C. § 1982, was originally enacted as part of section 1 of the Civil Rights Act of 1866[8] and provides that

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Section 1982 is a civil statute protecting blacks, other noncaucasians,[9] and in certain instances white citizens[10] from racially motivated deprivations

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patios, and garages, unless prior permission was obtained from the land company. Title to the real estate was retained by the land company until the entire amount of the deferred balance was satisfied. Upon default and repossession the land companies were permitted to retain the entire amount which the contract purchaser had paid on the property and any improvements.

Id. at 335 n.12.

[6]For Judge Will's reasons for sustaining plaintiffs' claim under section 1982, see his decision denying a motion to dismiss a companion case, Contract Buyers League v. F & F Investment, 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd on other grounds, sub nom.* Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970). For a brief discussion of this companion case see note 4 *supra.*

[7]A portion of Judge Perry's oral opinion is quoted by the court. 501 F.2d at 327-28. The sharp contrast between the reactions of Judge Will and Judge Perry to the plaintiffs' exploitation theory may demonstrate the diversity of judicial response to such an application of section 1982. The numerous procedural and substantive rulings which disadvantaged the plaintiffs' case, the directed verdict, and the threats of retribution if an appeal was taken leave no doubt as to Judge Perry's animosity. *See* note 29 *infra.* Compare this with Judge Will's opinion denying the defendants' motion to dismiss. Contract Buyers League v. F & F Investment, 300 F. Supp. 210 (N.D. Ill. 1969).

[8]Act of April 9, 1866, ch. 31, 14 Stat. 27.

[9]Oyama v. California, 332 U.S. 633 (1948).

[10]Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431, 439-40 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969); Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969); Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd on other grounds,* 450 F.2d 1227 (8th Cir. 1971) (affirmed on basis of jurisdiction under 42 U.S.C. § 1985(3)); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969).

of property rights. The first lower court cases interpreted section 1982 as proscribing both private and official acts of discrimination.[11] Then, in 1883, the Supreme Court narrowed the scope of the statute by declaring that it prohibited only discriminatory *state* action.[12] As a result, section 1982 lay virtually dormant for almost a century. In 1968, the Supreme Court revitalized section 1982 in *Jones v. Alfred H. Mayer Co.*,[13] ruling that it prevented a purely private refusal to sell to a black because of his race.

Jones came only months after passage of the Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968),[14] a comprehensive open housing law, which provided federal authority to eliminate a broad range of discriminatory practices. In contrast to the breadth of that Act, section 1982 may only be enforced by a private action and does not prohibit discrimination based on religion or national origin.[15] Under certain circumstances, however, an action brought pursuant to section 1982 will have significant advantages. First, certain types of housing units and transactions which are specifically exempted from the coverage of the Fair Housing Act are within the purview of section 1982.[16] Second, the 180-day statute of limitations in the 1968 Act does not bar suits under section 1982.[17] Third, the property interests protected by section 1982 are not limited to those enumerated in Title VIII, but include an expanding assortment of interests that have been judicially determined.[18] Fourth,

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[11]*See* Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1031 (1972).

[12]Civil Rights Cases, 109 U.S. 3 (1883).

[13]392 U.S. 409 (1968).

[14]42 U.S.C. §§ 3601 *et seq.* (1970).

[15]Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968); Arnold v. Tiffany, 359 F. Supp. 1034 (D.C. Cal.), *aff'd on other grounds*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); Schetter v. Heim, 300 F. Supp. 1070, 1073 (E.D. Wis. 1969).

[16]Jones v. Alfred H. Mayer Co., 392 U.S. 409, 415 (1968); Crim v. Glover, 338 F. Supp. 823 (S.D. Ohio 1972). In general, the 1968 Act does not prohibit discrimination in the sale or rental of (1) a single-family house if the owner owns fewer than three such houses and does not utilize the services of a real estate broker or advertise in a newspaper, and (2) rooms or units in dwellings occupied by less than four families if the owner is a resident therein. 42 U.S.C. §§ 3603(b)(1)-(2) (1970).

[17]Brown v. Dallas, 331 F. Supp. 1033, 1035-37 (N.D. Tex. 1971).

[18]Courts have determined that protected real and personal property interests include traditional fee and leasehold estates [*e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970)], memberships in community recreational corporations [Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)], life insurance contracts [Sims v. Order of United Commercial Travelers of America, 343 F. Supp. 112 (D. Mass. 1972)], public accommodations [*see* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969); Johnson v. Cincinnati, 450 F.2d 796, 797 (6th Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); Crim v. Glover, 338 F. Supp. 823, 826 (S.D. Ohio 1972). *Contra*, Selden v. Topaz 1-2-3 Lounge, Inc., 447 F.2d 165 (5th Cir. 1971)], cemetery lots [Terry v. Elmwood Cemetery, 307 F. Supp. 369 (N.D. Ala. 1969)], and implied easements of ingress and egress at a friend's apartment [Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969)].

the 1968 Act prohibits only specified types of conduct, whereas section 1982 is unrestricted as to the manner in which the property rights guaranteed therein may be infringed.[19]

II. INSTANT CASE

Section 1982 has been used extensively since *Jones* to redress private discrimination, but *Clark* is the first circuit court decision granting relief against a seller on an exploitation rather than a discrimination rationale. The only other circuit court which has ruled on the issue — the Fifth Circuit in *Love v. DeCarlo Homes, Inc.*[20] — refused to extend the coverage of section 1982 to nondiscriminating exploiters.[21]

The defendants in *Clark* advanced three arguments against the exploitation theory. First, section 1982 prohibits only the traditional forms of discrimination — refusing to sell to blacks because of their race or selling the same or similar houses to whites at lower prices or on more favorable terms — and thus is inapplicable in this instance where the

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[19]A prohibited deprivation under section 1982 may result from an eviction [*e.g.*, Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969)], blockbusting [Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969)], lying about the availability of apartments [Martin v. John C. Bowers & Co., 334 F. Supp. 5 (N.D. Ill. 1971)], fencing across a public street to prevent access to particular homes [Jennings v. Patterson, 460 F.2d 1021 (5th Cir. 1972)], disrupting a church service to make racially oriented demands [Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd on other grounds,* 450 F.2d 1227 (8th Cir. 1971) (affirmed on basis of jurisdiction under 42 U.S.C. § 1985(3)); Cent. Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969)], or a refusal to sell [*e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)], lease [Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969); Harris v. Jones, 296 F. Supp. 1082 (D. Mass. 1969)], or assign [Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)].

Recent decisions have further increased the effectiveness of section 1982 by holding that: (1) both whites and blacks are protected from an eviction motivated by the race of their visitors [Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969)] or a refusal to lease commercial property due to the race of a business' clientele [*see* Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972)]; (2) the infringement of a protected right need not be based solely on race [Haythe v. Decker Realty Co., 468 F.2d 336 (7th Cir. 1972); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970); Williamson v. Hampton Management Co., 339 F. Supp. 1146 (N.D. Ill. 1972)]; and (3) remedies for breach of section 1982 include an injunction [*e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)], compensatory damages [Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Brown v. Ballas, 331 F. Supp. 1033 (N.D. Tex. 1971)], punitive damages [*see* Lee v. Southern Home Sites Corp., 444 F.2d 143, 147 (5th Cir. 1971); Brown v. Ballas, 331 F. Supp. 1033 (N.D. Tex. 1971)] and attorney's fees [Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Brown v. Ballas, 331 F. Supp. 1033 (N.D. Tex. 1971)].

[20]482 F.2d 613 (5th Cir.), *cert. denied,* 414 U.S. 1115 (1973), *noted in* 5 TOL. L. REV. 353 (1974).

[21]In *Love* the Fifth Circuit affirmed a summary judgment for the defendants. Because the opinion was very short and did not clearly articulate either the plaintiffs' theory under section 1982 or the rationale for affirmance, it went relatively unnoticed. On careful analysis, however, the holding is clearly contrary to *Clark* both as to the exploitation theory and the expanded traditional theory (*see* note 29 *infra*) under section 1982. It is regrettable that the Fifth Circuit chose not to address the issues presented more fully.

plaintiffs' homes were available to whites and blacks on the same terms. Second, the discrimination of other sellers caused the housing shortage among blacks, and they, not the defendants, were responsible for the higher prices paid by the plaintiffs. Third, the plaintiffs' theory renders section 1982 unconstitutionally vague, for it would give insufficient warning of the nature of the proscribed conduct.[22]

The court rejected the defendants' arguments. First, the court measured the effects of the defendants' activities on the black purchaser and concluded that they were the same whether caused by traditional discrimination or the defendants' exploitation of a discriminatory situation.[23] In particular, the court noted its concern that inner-city exploitation[24] diminished the resources of blacks and delayed their entry into the mainstream of the economy by forcing them to expend a larger portion of their income for housing than whites similarly situated.[25] The court relied on broad dicta in *Jones* to show that section 1982 may be utilized to eliminate all injuries that result from racial discrimination in the ownership of property.[26] Second, although the discriminatory situation was created by other sellers, it is

> repugnant to the clear language and spirit of the Civil Rights Act . . . [to] claim that he who exploits and preys on the discriminatory hardship of a black man occupies a more protected status than he who created the hardship in the first instance.[27]

Third, because section 1982 is a civil as opposed to a criminal statute, a standard of reasonableness as to the prices and terms for new houses in the black market is sufficiently specific to avoid a claim of unconstitutionality for vagueness.[28]

Accepting the plaintiffs' theory of exploitation, the court held that section 1982 has been violated if

> (1) as a result of racial residential segregation dual housing markets exist, and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to

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[22]501 F.2d at 329.

[23]

> Indeed, there is no difference in results between the traditional type of discrimination and defendants' exploitation of a discriminatory situation. Under the former situation blacks either pay excessive prices or are refused altogether from purchasing housing, while under the latter situation they encounter oppressive terms and exorbitant prices relative to the terms and prices available to white citizens for comparable housing.

Id. at 330.

[24]The term *inner-city exploitation* will be used herein to refer to taking advantage of a pattern of racial residential segregation to sell homes in the black housing market at higher markups than equivalent homes are sold to whites in the local white market.

[25]501 F.2d at 331.

[26]*Id.* at 329-30.

[27]*Id.* at 331.

[28]*Id.* at 333.

white citizens for comparable housing.[29]

The court acknowledged that price differentials between prospective purchasers of equivalent homes in the black and white markets may be justified on numerous grounds, including the quality of the surrounding neighborhood and the buyer's credit background, financial position, or occupational status. The holding prohibits only those differentials which are the result of the buyer's race.[30]

The *Clark* decision may have a significant impact on future civil rights litigation. Because the statute of limitations does not begin to run on long-term installment contracts until payment is complete,[31] the retroactive effect of *Clark* will be substantial as similarly situated plaintiffs who purchased property under such contracts seek relief. Another important ramification of *Clark* will be its effect on litigation brought pur-

[29]*Id.* at 334. Numerous other issues raised on appeal included the following : (1) denial of the plaintiffs' motion made four months before trial to add as parties defendant certain officers, directors, and shareholders of the defendants; (2) requirement that class members affirmatively request inclusion as plaintiffs; (3) dismissal with prejudice of class members who failed to answer interrogatories or to appear for depositions; (4) exclusion of certain appraisal testimony of two expert witnesses in support of the exploitation theory; (5) exclusion of evidence offered to prove traditional discrimination under section 1982 concerning the sales practices of other corporations owned by the defendants' shareholders which sold to white buyers in nearby communities; (6) dismissal of the defendants' counterclaim subject to automatic reinstatement in the event the plaintiffs appealed; and (7) threatening the plaintiffs with assessment of all costs if they appealed which would otherwise be born by the respective parties. *Id.* at 335 n.11, 336, 339. Judge Perry was reversed by a unanimous court on every issue. His attempt to prevent an appeal by threatening plaintiffs with assessment of all costs and automatic reinstatement of the defendants' counterclaim was denoted as "highly improper" and "improper and clearly an abuse of discretion. . . . [that was] unwarranted and cannot be tolerated." *Id.* at 341.

The Seventh Circuit also expanded the protection offered by section 1982 under the traditional theory of discrimination by holding that profit margins in different developments of the same builder may be compared to prove disparate treatment of whites and blacks, even though the developments are varied in location, time of construction, and cost and are aimed at different racial markets. *Id.* at 337. This result is particularly significant because this expanded traditional theory of liability announced in *Clark* provides a cause of action under section 1982 when builders utilize distinct operations and corporate facades to avoid liability for racial discrimination.

In overturning the directed verdict granted at the conclusion of the plaintiffs' evidence, the Seventh Circuit also ruled on the type and sufficiency of evidence necessary to establish a prima facie case under the exploitation and traditional theories of liability under section 1982. *Id.* at 334-39. The case was remanded for a new trial, during which the defendants will have their first opportunity to submit evidence to rebut the plaintiffs' prima facie showing.

[30]501 F.2d at 332. The court explained the standard of liability as follows:

> By demanding prices *far in excess* of a property's fair market value and *far in excess* of prices for comparable housing available to white citizens the seller ventures into the realm of unreasonableness. The statute does not mandate that blacks are to be sold houses at the exact same price and on the exact same terms as are available to white citizens. Reasonable differentials due to a myriad of permissible factors can be expected and are acceptable. But the statute does now [sic] countenance the efforts of those who would exploit a discriminatory situation under the guise of artificial differences.

Id. at 333 (emphasis added).

[31]Contract Buyers League v. F & F Investment, 300 F. Supp. 210, 221 (N.D. Ill. 1969), *aff'd sub nom.* Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970).

suant to a companion statute, 42 U.S.C. § 1981.[32] Also enacted as part of section 1 of the Civil Rights Act of 1866, section 1981 guarantees minorities the same right to make and enforce contracts as is enjoyed by white citizens. Complaints are already being prepared to seek relief from higher food prices, insurance rates, and finance charges exacted in predominantly noncaucasian areas.[33] Cases challenging the lower wages paid by employers who hire only minorities are sure to follow.

In the long run, deterrence may be the most widespread and beneficial effect of *Clark*. The threat of similar litigation will pressure inner-city merchants to weigh the reasonableness of their prices, not only in light of what the market will bear, but also with respect to the fairness of such prices as judged by what whites pay elsewhere.

III. Analysis

To demonstrate that the *Clark* decision was proper, even though it applied section 1982 in a manner not intended by the 39th Congress, this case note examines first the thirteenth amendment and the text of section 1982. Attention will then be given to the legislative intent which was ignored by the court. Finally, the appropriateness of the decision will be discussed in light of a broader view of the legislative history and relevant policy considerations.

The history of section 1982 is analyzed extensively herein for three reasons: (1) the exploitation issue presented in *Clark* is one of first impression; (2) the amount of case law applicable to the private sector is limited due to the state action requirement that circumscribed the application of section 1982 for nearly a century; and (3) the extensive reevaluation of the legislative history in *Jones* suggests the appropriateness of such an approach.[34]

A. Constitutional Construction

Section 1982 was adopted pursuant to congressional authority granted by the thirteenth amendment,[35] which empowered Congress "to pass all

[32]All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

For an analysis of the origin of section 1981, *see* Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 Geo. Wash. L. Rev. 1024 (1972).

[33]*The Price Can't be Higher for Blacks*, Bus. Week, Sept. 21, 1974, at 72-73.

[34]The not unlikely possibility that the legislative history analysis was merely a smoke screen for judicial activism will not be discussed herein. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449 (1968) (Harlan, J., dissenting). Suffice it to say that if it was, then *Jones* is an excellent precedent for the Seventh Circuit's extension of the scope of section 1982 in *Clark*.

[35]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime

laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[36] This authority is broad enough to deal not only with acts of discrimination, but also to provide blacks with direct relief from nondiscriminatory racial exploitation.[37]

The extent of Congress' authority under the thirteenth amendment is suggested by the textual differences between the thirteenth and fourteenth amendments. The fourteenth clearly restricts actions by the states and defines the classes of acts that are prohibited (abridgements of privileges and immunities, deprivations of life, liberty or property without due process, and denials of equal protection of the laws).[38] The thirteenth amendment, on the other hand, specifies neither restricted actors nor classes of acts, but simply declares that slavery shall not exist.[39] Thus, the only express limitation on enforcement of the thirteenth amendment by Congress is that the legislation's effect must be the elimination of the badges, incidents, disabilities, or burdens of slavery.[40] The thirteenth amendment, therefore, gave the 39th Congress sufficient authority to protect blacks, not only from racial discrimination, but also from those who would exploit a discriminatory setting by imposing a burden of slavery upon black purchasers.

The scope of section 1982 was not narrowed by the subsequent ratification of the fourteenth amendment. Yet the trial court's rationale for granting the directed verdict in *Clark* would have required a showing that defendants had treated blacks differently than whites before the plaintiffs could recover. In light of *Jones,* the argument that this narrow interpretation of section 1982 is somehow constitutionally dictated by the equal protection clause and the concept of disparate treatment em-

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whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

[36]Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

[37]Although the extent of Congress' power under the thirteenth amendment to eliminate the effects of slavery remains relatively undefined, the prohibition of discrimination in its traditional forms is far short of a full exercise of that authority:

> *At the very least,* the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means *at least* this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

Id. at 443 (footnotes omitted) (emphasis added).

[38]U.S. CONST. amend. XIV, § 1.

[39]U.S. CONST. amend. XIII, § 1.

[40]This interpretation of the scope of Congress' power to enforce these amendments is reasonable when one considers that although the authority to legislate as to actors and classes of acts is not narrowed under the thirteenth amendment, the object of such legislation is limited to the eradication of the badges and incidents of slavery. On the other hand, the fourteenth amendment acts only on states to prevent deprivations of due process, denials of equal protection, and abridgements of privileges and immunities. It may, however, reach injustices that do not amount to a burden of slavery.

bodied therein[41] must be rejected for two reasons. First, as declared in *Jones,* the scope of the 1866 Act was not restricted by its reenactment in 1870 after ratification of the fourteenth amendment.[42] Second, the court relied on section 1982 to redress a private act of discrimination. If the fourteenth amendment had been a limitation, such an application would be unconstitutional for lack of state action.[43]

B. Statutory Construction

The text of section 1982[44] is easily construed to encompass the exploitation theory approved in *Clark.* The Supreme Court declared in *Sullivan v. Little Hunting Park, Inc.:*

> A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 . . . .[45]

The language of the statute "[i]n plain and unambiguous terms . . . grants to all citizens, without regard to race or color, 'the same right' to purchase and lease property 'as is enjoyed by white citizens.' "[46] The right is granted to every citizen; whether he is enjoying the full benefit of that right or whether it has been infringed should be viewed from his perspective. The test for traditional discriminatory action, however,

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[41]The Fifth Circuit may have been implying this argument in *Love* when it declared:

> Plaintiffs cannot show disparate treatment as between Whites and Blacks within *equal protection concepts.* In the end, § 1982, although applicable to private persons under *Jones v. Mayer,* . . . nevertheless rests on an *equal protection premise* to the extent that Blacks are being denied something pertaining to property that is available to Whites.

482 F.2d at 616 (emphasis added). The Fifth Circuit correctly recognized that all pre-*Jones* cases applying section 1982 involved disparate treatment of racial groups. This was not, however, the result of a constitutional limitation dictated by the fourteenth amendment, but rather a necessary incident of the state action required in those cases. State action that disadvantages a particular racial group necessarily discriminates in favor of other groups which are subject to the state's jurisdiction. Thus, cases involving nondiscriminatory racial exploitation arise only in the private sector; therefore, it is no surprise that all pre-*Jones* cases can be cast in equal protection terms.

[42]

> Nor was the scope of the 1866 Act altered when it was re-enacted in 1870 some two years after the ratification of the Fourteenth Amendment. . . . [I]t certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to *limit* its application to state action . . . .
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> . . . All Congress said in 1870 was that the 1866 law "is hereby re-enacted". That is all Congress meant.

392 U.S. at 436-37 (emphasis in original).

[43]*Id.*

[44]

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

[45]396 U.S. 229, 237 (1969).

[46]Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420 (1968).

focuses on the discriminator and asks whether he has treated blacks less favorably than whites.[47] Thus, individuals who interact only with blacks cannot discriminate in the traditional sense. The text of section 1982, however, suggests that traditional discrimination is but one measuring stick to be used in determining whether the rights guaranteed therein have been infringed. A more appropriate test for violative conduct is to focus on the effect of that conduct on blacks and ask whether it has contributed to a denial of the same experiences and opportunities available to whites. Therefore, before section 1982 has secured the rights promised therein, not only discrimination but all its effects must be eliminated.

Section 1982, like the thirteenth amendment, lacks specificity as to the identity of violators or prohibited types of conduct.[48] The reach of both is expansive. The Supreme Court, in extending the scope of section 1982 in *Jones,* interpreted the lack of specificity as to violators to import that section 1982 secured the right to property "against *interference from any source whatever,* whether governmental or private."[49] Similarly, the failure to specify prohibited acts suggests that section 1982 secures the right to property against *interference of any kind,* whether by discrimination, exploitation, or otherwise.

The right promised in section 1982 to purchase property on an equal basis with whites is divisible into two more specific promises. First, blacks are to have an equal opportunity to purchase whatever property is placed on the market.[50] Second, the dollar they spend for property is to have the same value as a dollar spent by whites.[51] Infringing either of

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[47]Traditional racial discrimination occurs when an individual or government treats "in similar circumstances, a member or members of one race different from the manner in which members of another race are treated." Love v. DeCarlo Homes, Inc., 482 F.2d 613, 615 (5th Cir. 1973).

[48]

> [Section 1982] does not identify who may be a violator nor does it specify the conduct for which one may be held liable. In this sense, it is unlike the 1968 Fair Housing Act, which makes certain acts illegal, such as "[t]o refuse to sell or rent . . . or otherwise make unavailable" housing because of race and "[t]o discriminate against any person in the terms, conditions, or privileges of sale." It is also unlike the Fourteenth Amendment, which makes it unconstitutional for *states* to "deny to any person . . . the equal protection of the laws." As the Court spells out in *Jones v. Mayer,* Section 1982 is closer kin to the Thirteenth Amendment, which simply says "neither slavery nor involuntary servitude . . . shall exist within the United States."

Comment, *Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The Contract Buyers League Case,* 80 YALE L. J. 516, 559 (1971) (footnotes omitted).

[49]392 U.S. at 424 (emphasis added).

[50]

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.

Id. at 443.

[51]

> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom . . . would be left with "a mere paper guarantee" if Congress were powerless [to

these promises violates section 1982.[52] The exploiter's argument that he has not violated the promise of financial equality because he would not have sold for less to whites ignores the existence of dual housing markets where property in black areas is sold at exorbitant prices. Equally fallacious is the argument that a white-market seller should be permitted to sell to blacks at higher prices because they will, in fact, pay more than whites as a result of the black housing shortage. Blacks who must pay nearly twice the markup that whites pay on comparable housing have clearly been denied financial equality in matters involving real property. Further, the exploiter who pockets those exorbitant profits has interfered with that right as effectively as the discriminator who sells to blacks at higher prices.[53] The wording of section 1982, with its broad promise of equality, can reach and redress both types of injury.

C. Legislative Intent Circumvented by Clark

When the Civil Rights Act of 1866 was initially passed by the Senate, section 1 provided in part

> [t]hat *there shall be no discrimination in civil rights or immunities* among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; *but the inhabitants* of every race and color . . . *shall have the same right . . . to inherit, purchase, lease, sell, hold and convey real and personal property . . . .*[54]

The bill's supporters considered the promise of equality in the rights enumerated in the latter part of the section to be merely a restatement of

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enact section 1982] to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.

Id. (footnotes omitted).

[52]Traditional discrimination always violates one of these rights: either the black is refused the right to purchase due to his race or he is permitted to buy but at a higher price. There is no requirement that both promises be violated before a cause of action arises under the traditional application of section 1982 as demonstrated by the recovery permitted when higher prices are exacted from blacks under circumstances where whites could have purchased for less. In such cases blacks are not denied the property on account of race but only financial equality in the purchase.

[53]The same pattern of racial discrimination permits the excessive profits of both the seller, who discriminates in the traditional sense by charging blacks higher prices, and the nondiscriminating racial exploiter. If there had been no racial residential segregation to support the black housing shortage, neither could exact an exorbitant price. Thus, the discriminating seller and the inner-city exploiter take advantage of the same aggregate of discriminatory acts to sell property at a higher price.

Residential segregation, however, is not the sole cause of the economic burden imposed on black purchasers. Although prior discrimination may establish the price at which property *may* be sold, it is not controlling. The predatory determination of the exploiter and the discriminator to extract a profit based on race becomes a separate and distinct force causing the denial of the equal experience promised by section 1982.

[54]CONG. GLOBE, 39th Cong., 1st Sess. 211, 1413 (1866) (emphasis added). For the text of section 1 as enacted see text accompanying note 67 *infra*. For its wording as codified in the United States Code see notes 32 & 44 *supra*.

the phrase forbidding discrimination in civil rights.[55] Thus, the guarantee in section 1982 of "the same right to . . . purchase . . . real and personal property" was intended to mean "that there shall be no discrimination" in the purchase of real and personal property. The "no discrimination" clause was removed by the bill's supporters in the House to obviate the fear of certain congressmen that using the term *civil rights* would also grant the freedmen the right to vote and hold office.[56] Nothing in the legislative history, however, suggests that the bill's supporters believed that removal of the clause altered the meaning of section 1.[57] Apparently

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[55]Senator Trumball, Chairman of the Judiciary Committee and author of the bill, declared that it was

> . . . a bill, the only object of which is to secure equal rights to all the citizens of the country. . . . [T]he very object of the bill is to *break down all discrimination* between black men and white men.

CONG. GLOBE, 39th Cong., 1st Sess. 599 (emphasis added). In his view the object of the bill was to be secured by ending racial discrimination. The identity of purpose between the "no discrimination" and "same right" clauses in section 1 is evidenced by the following remarks of one congressman:

> [The first] section enacts that ". . . there shall be *no discrimination in civil rights* or immunities . . . on account of race . . . ."
>
> . . . *What rights* are these? . . . [I]n order to avoid any misapprehension they are *stated in the bill.* The same section goes on to define with greater particularity the civil rights and immunities which are to be protected by the bill.

Id. at 1151 (emphasis added). Thus the rights of contract and property were enumerated to specify those civil rights which were protected by the "no discrimination" clause. This conclusion is also apparent from the following argument made by another congressman:

> [T]he question that remains is simply this: can the Congress of the United States provide that as between citizens of the United States there shall be *no discrimination in civil rights* or immunities, *but* they "*shall have the same right* to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold and convey real and personal property . . . ." Has Congress the power to so enact that there shall be *no discrimination in these things* between the citizens of this Government?
>
> . . . [T]he power is a clear one resting upon the [thirteenth] amendment to the Constitution which has lately been adopted.

Id. at 1124 (emphasis added).

[56]Blacks were denied these "political" rights under most state constitutions. *Id.* at 1291. As expressed by Congressman Bingham of Ohio, these legislators feared that the "no discrimination" phrase was itself obligatory and broader than the promise of the same rights to contract, property, etc.:

> I understand very well, from private conversation that I have had with my learned friend, the chairman of the [House] Judiciary Committee, that he does not look on this clause in the first section as an obligatory requirement.
>
> . . . If it is not obligatory, what objection has the gentleman to striking it out? If it is obligatory, it must be stricken out or the constitutions of the States are to be abolished by your act . . . .

Id. at 1291. This construction was denied repeatedly by Senator Trumball, author of the bill. *E.g., id.* at 474, 475, 606. Opponents of the bill, however, were just as adamant that regardless of the author's intent, the political rights of voting and holding office were "civil rights" under a fair construction of the term. *E.g., id.* at 606, 1122, 1157, 1291.

[57]On the contrary, just before the bill was passed a second time, one representative recalled:

> . . . [Congressman Bingham] placed upon this provision of the bill an interpretation different from the committee who reported it. But for the purpose of obviating his objec-

the 39th Congress intended that section 1982 prohibit only acts of discrimination in the traditional sense, and not acts of exploitation made possible by previous instances of discrimination.

D. Historical Setting of Section 1982

Chief among the problems facing the United States at the end of the Civil War was the future of the former slaves. Numerous military, administrative, and legislative efforts were initiated in search of a solution. An adequate understanding of Congress' intent with respect to racial exploitation requires an inquiry, not only into the history of the Civil Rights Act, but also into the entire legislative period.

On March 3, 1865, Congress passed the first Freedmen's Bureau Act[58] establishing for one year after cessation of hostilities a "Bureau of Refugees, Freedmen and Abandoned Lands" which had full authority in all matters concerning the freedmen. A main objective of the Bureau was to protect the freedmen from exploitation by regulating *every* labor contract to which they were a party.[59] The Bureau's local agents approved contracts only if they were "fair" and protected the freedmen from "avarice and extortion."[60] The fair value of food, clothing, quarters, and other property provided by the employer was included in the determination of a reasonable compensation.[61] Thus, the regulation of labor contracts necessarily protected the freedmen's real and personal property rights. Congress intended, through the Bureau, to protect the former

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tion this clause was stricken out and forms no part of the bill as it finally passed.

Id. at 1837. Then calling on his fellow congressman to override the presidential veto he declared:

> Mr. Speaker, this nation must settle the question whether among her own citizens there may be a *discrimination in the enjoyment of civil rights.* It should not be settled in the spirit of passion or prejudice, but in the light of liberty and justice.

Id. (emphasis added).

[58]Act of March 3, 1865, ch. 90, 13 Stat. 507.

[59]Contracts not approved by the Bureau were voidable at the will of the contracting freedman. 1 W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 331, 333 (1906).

[60]The acceptability of a labor contract was evaluated according to the following criteria:

> No fixed rates of wages will be prescribed for a district, but in order to regulate fair wages in given individual cases the agent should have in mind minimum rates for his own guidance. By careful inquiry as to the hire of an able-bodied man when the pay went to the master, he will have an approximate test of the value of labor. He must of course consider the entire change of circumstances, and be sure that the laborer has due protection against avarice and extortion .... All such agreements will be approved by the nearest agent ....

Id. at 330-31. Note the similarity between the court's method of determining a reasonable price for the plaintiffs' houses and the Bureau's standard for estimating the fair remuneration in labor contracts. Both ask the basic question, "What would be the fair value if race were not a factor?" The court determined a fair cost by considering what whites paid in nonblack neighborhoods for comparable housing, while the Bureau reached a fair value for the freedman labor by determining what the labor had been worth in the prewar white market.

[61]*Id.* at 333.

slaves from exploitation until racial discrimination ceased and they were truly free. In this interim period whites could deal with blacks only at the "usual market rates,"[62] as determined by the value of property and labor in the community at large, and not by what the employer could in fact exact from the freedmen.

By the end of 1865 two facts were apparent to Congress. First, it was imperative that the duration of the Freedmen's Bureau be extended until Southern resistance[63] gave way to the new system of free labor; second, legislation was required to protect the freedmen in the continued exercise of their civil rights once the Freedmen's Bureau and the military occupation ceased operation in the South.[64] In the spring of 1866 Congress passed "An Act to Enlarge the Power of the Freedmen's Bureau"[65] which extended its duration for two years. Turning its attention to the long range objective, Congress enacted the Civil Rights Act[66] on April 9 of the same year, over the veto of President Johnson.[67] Section 1 of the Act declared the freedmen to be citizens and guaranteed them

> the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . .[68]

This section created a civil cause of action against any person infringing

[62]Freedmen, if they so desired, could furnish their own food and clothing and have their wages increased accordingly. An employer who sold or rented supplies to the freedmen was required ". . . in all cases, [to] keep a record book account for each hand, and sell at *usual market rates* . . . ." *Id.* at 334 (emphasis added).

[63]To thwart the effectiveness of the Freedmen's Bureau, the reconstructed legislatures in six Southern states passed Black Codes which, by the fall of 1865, had effectively reenslaved many freedmen. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474, 516-17, 602-03, 1118-19, 1123-25, 1151-53, 1160, 1759, 1833 (1866). For other sources discussing the substance and operation of the codes, see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426 n.34, 464-67 (1968). In response President Johnson ordered the military forces in the South to suspend enforcement of these discriminatory laws and to free those already reenslaved. CONG. GLOBE, 39th Cong., 1st Sess. 603, 1123 (1866).

[64]CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866).

[65]S. 60, 39th Cong., 1st Sess. (1866). President Johnson vetoed the bill on February 19, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 915-17 (1866). On February 20, the Senate failed to override the veto. *Id.* at 943. An almost identical bill (H.R. 613), however, was enacted later in the same session over another presidential veto. Act of July 16, 1866, ch. 200, 14 Stat. 173.

[66]An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, ch. 31, 14 Stat. 27 (1866). The Act's broad intent was to guarantee equality in the exercise of the fundamental civil rights. CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866). The bill was attacked by its opponents as revolutionary (*Id.* at 570) and heralded by its supporters as one of the most important measures ever considered by Congress. *E.g., id.* at 474, 1115. There was clear apprehension that a failure to make the freedmen free in fact might bring about even greater calamity than the recent years of war. *E.g., id.* at 504, 1837.

[67]CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866).

[68]Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now codified as 42 U.S.C. §§ 1981-82).

the rights enumerated therein.

The intent of the Civil Rights Act was to protect the freedmen from racial exploitation once the Bureau ceased operation by preventing discrimination from setting the stage for those who would take advantage of the freedmen.[69] Proscribing discrimination was the means to the more significant end of barring those who, through overreaching, would reduce the freedmen again to slavery.[70] In Congress' view, the exploitation of a freedman who was forced by discriminatory circumstances to labor for wages far below the fair value of his efforts was an evil equated with slavery itself.[71] That the master's wage was the going market value for freedmen labor clearly did not justify his exploitation.

Thus, the history of this post-Civil War period points out two major purposes of the civil rights legislation of 1866. First, the Civil Rights Act was to prevent racial exploitation by prohibiting all acts of discrimination. Second, for two years, during the economic transition necessitated by the Civil Rights Act, the Freedmen's Bureau was to prevent exploitation by regulating all labor contracts. Unfortunately, the 39th Congress was firmly committed to the naive belief that the deep-rooted system of slavery would be transformed in a relatively short period.[72] In retrospect

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[69]In response to the proposition that the thirteenth amendment merely severed the master-slave relationship and would not support the 1866 Act, one of the Act's proponents argued:

> But if theirs be the true construction, then it is competent for the Legislature of each State . . . to deprive him of a home, to deprive him of all the fruits of his toil and his industry, and finally to reduce him to a condition infinitely worse than that of actual slavery, *by compelling him to labor at such price as the old master may see fit to pay him* . . . .
>
> . . . [S]uch was not the intention of the advocates of this amendment. . . . [but] to make him the opposite of a slave, to make him a freeman.

CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (emphasis added). On another occasion it was argued:

> *Planters combine together to compel them to work for such wages as their former masters may dictate,* and deny them the privilege of hiring to any one without the consent of the master . . . . Do you call that man free who cannot choose his own employer, or name the wages for which he will work?

Id. at 1160 (emphasis added).

[70]This type of treatment was apparently widespread in the South, as demonstrated by the testimony of Major General Alfred A. Terry, military commander in Virginia, before the Reconstruction Committee in March of 1866, as quoted during the debate on the 1866 Act:

> *Answer.* Many persons are treating the freedmen kindly and justly . . . . Many others, on the contrary, treat them with great harshness and injustice, and seek to obtain their service without just compensation, and to reduce them to a condition which will give to the former masters all the benefits of slavery, and throw upon them none of its responsibilities.
>
> *Question.* So far as you can judge, which class is the most numerous?
>
> *Answer.* The latter.

Id. at 1833.

[71]*Id.* at 504.

[72]Senator Trumball exemplified this attitude:

> With this bill passed into a law and efficiently executed *we shall have secured freedom in fact and equality in civil rights* to all persons in the United States.

Id. at 476 (emphasis added). The bill's supporters considered it the last necessary step to secure

this was a gross miscalculation — two years of interim protection were clearly inadequate. Yet those two years are a strong precedent. The 39th Congress intended to protect blacks from racial exploitation until the Civil Rights Act reduced the incidence of racial discrimination to such an extent that dual markets could not be maintained. Although this protection was to be provided by the Freedmen's Bureau and not by the Civil Rights Act, the 39th Congress clearly intended that such protection be given. Therefore, even though the *Clark* decision circumvents the specific legislative intent of section 1982, it does effectuate the belief of the 39th Congress that protection from nondiscriminatory racial exploitation was a responsibility of this nation and the right of the freedmen.

E. Policy Considerations

Two important factors supporting the result in *Clark* were not discussed by the court. The first is the lack of an effective alternative remedy for blacks who purchased in the dual markets either before or after 1968.

Prior to 1968, section 1982 was considered inapplicable to private acts of discrimination. Its revival in *Jones* presented blacks for the first time with a cause of action against those who had refused them homes in white neighborhoods. For many blacks, however, such an action is barred by the statute of limitations.[73] Others never made the futile attempt to purchase in white areas.[74] Of those who can overcome these first two obstacles, many will be unable to identify the specific acts of discrimination which restricted their opportunities or to adduce adequate proof concerning incidents that happened years earlier. The lack of an alternative cause of action against inner-city exploiters is apparent from the dismissal in *Clark* of the plaintiffs' counts relying on federal securities laws, state usury laws, and the doctrines of fraud, unconscionability, and

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this freedom, believing that the threat of civil and criminal prosecution would quickly deter all discrimination. (Section 2 of the 1866 Act provided for criminal prosecution of the limited class of violators who infringe a guaranteed right while enforcing a discriminatory state law or custom.) Senator Trumball also declared:

> I think it will only be necessary to go into the late slaveholding States and subject to fine and imprisonment *one or two* in a State . . . to break up this whole business.

Id. at 475 (emphasis added).

[73]The statute of limitations does not begin to run on the sale of a home in the black housing market until the final payment is made under the installment contract. Thus, a cause of action against an exploiter will be permitted throughout the duration of the contract and thereafter, while the applicable limitation period is running. On a refusal to sell, however, the statute of limitations begins to run immediately. Thus, an action against a white-market discriminator for such a refusal will be barred in a much shorter period of time. Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970).

[74]The court in *Clark* required no showing that the plaintiffs had ever attempted to purchase in white areas. Thus, many blacks, who have no action against the white-market discriminators, may still recover for higher prices paid in the black real estate market.

breach of implied warranty.[75] This inability to state an alternative claim against the inner-city exploiter, coupled with the improbability of a successful action against the white-market discriminators, leaves the exploitation theory under section 1982 as the only reasonable avenue of relief for those who purchased homes in black areas before 1968.

The Fair Housing Act and section 1982 have been no panacea for black home buyers since 1968. There are numerous difficulties incident to private actions under either statute, including: (1) the initial problem of discovering acts of discrimination which may be both subtle and disguised; (2) the difficulty of obtaining adequate evidence to sustain a complex cause of action; (3) the necessity of finding an attorney willing to take the risk that a fee will not be awarded; (4) the delays in litigation during which the home may be sold to a bona fide purchaser; (5) the difficulty of proving actual damages; (6) the restrictions on punitive damages; and (7) the resulting small financial incentive to bring such a suit.[76] As a result of these obstacles only the most determined, who are willing to sacrifice time, energy, and money, will initiate a private suit.

The alternative to a private action is filing a complaint with the Department of Housing and Urban Development, which is charged with enforcement of the Fair Housing Act. The lack of adequate sanctions, however, coupled with delays caused by understaffing, referral of complaints to other agencies, the necessity of lengthy investigations, and protracted periods of negotiation, severely limit the effectiveness of this remedy.[77] HUD came under heavy fire in a recent government study for failing in numerous ways to make maximum use of its powers to eliminate housing discrimination.[78] Of the 1,214 complaints closed by HUD between July 1972 and March 1973, only a few brought relief to the complainant.[79] As a result, most black buyers become discouraged and re-

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[75]Contract Buyers League v. F & F Investment, 300 F. Supp. 210 (N.D. Ill. 1969). The plaintiffs did succeed in stating a claim under federal and state antitrust laws. *Id.* The eventual disposition of those counts, however, is not mentioned in the *Clark* decision or the appellate briefs.

[76]For an extensive analysis of these factors and others not mentioned herein see Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases,* 34 MD. L. REV. 59, 60-67 (1974) [hereinafter cited as *Racial Statistics*].

[77]Each of these factors is dealt with in depth in a 361-page study by the U.S. Commission on Civil Rights, released in December 1974, lamenting the failure of this administrative avenue of relief and recommending strong legislative and administrative measures to remedy this dismal state of affairs. 2 U.S. COMM'N CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT — 1974 [hereinafter cited by its subtitle, TO PROVIDE . . . FOR FAIR HOUSING]. *See also* Comment, *Racial Discrimination in the Private Housing Sector: Five Years After,* 33 MD. L. REV. 289, 300-02 (1973).

[78]TO PROVIDE . . . FOR FAIR HOUSING, *supra* note 77, at 329-33.

[79]*Id.* at 39. Under certain circumstances the Department of Justice may institute an action to force compliance with HUD regulations, but by that time it may be months, perhaps years, since the complaint was filed. For an excellent analysis of the role of the Department of Justice in enforcing the Fair Housing Act of 1968, see *Racial Statistics, supra* note 76, at 67-85.

turn to black neighborhoods to live. Due to the inadequacies of these remedies, those who are thus forced to purchase in the black market at higher prices are unable to recover from the discriminators who sustain that market. Thus, recovery under section 1982 from inner-city sellers who exploit this situation is an attractive alternative.

The second factor supporting the court's decision is the extended period of time that may be necessary to finally provide black citizens with the same right as others to purchase real property. The past century of residential segregation demonstrates that accomplishment of racial equality in housing is an elusive and difficult task. It has been seven years since enactment of the Fair Housing Act of 1968 and the revival of section 1982 in *Jones;* yet they, in combination with all other federal, state, and private efforts, have not initiated a substantial trend toward residential integration in America.[80] The U.S. Commission on Civil Rights reported in 1973 that "[n]one of these developments . . . has yet had a significant impact in altering the patterns of segregated racial residence."[81] As a result, millions of blacks may be subject to racial exploitation for many years to come. By deterring certain exploiters and by granting recovery from others, section 1982, as interpreted in *Clark,* may substantially minimize this ongoing injury.

IV. Conclusion

Interpreting section 1982 as a prohibition of nondiscriminatory racial exploitation in the purchase of housing is: (1) constitutional; (2) permitted by the text of the statute; (3) suggested by the legislative history as a proper method of granting relief from such exploitation until dual housing markets are abated; and (4) appropriate in light of the policies discussed by the court, the lack of an alternative remedy, and the continuing failure to end racial discrimination in housing.

Section 1982 promised a result — equality in housing — and it remains the particular responsibility of the courts to apply it in a manner which will protect that right and promote the fulfillment of that promise in the future. The interim relief granted in *Clark* is an appropriate exercise of that responsibility.

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[80]For a discussion which concludes, after an analysis of the other factors that contribute to residential segregation, that such segregation is largely the result of discrimination in housing, see *Racial Statistics, supra* note 76, at 59-60.

[81]U.S. Comm'n Civil Rights, Understanding Fair Housing 18 (1973).

> The Department of Housing and Urban Development, the Veterans Administration, the General Services Administration, and the Federal financial regulatory agencies — the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve System — have taken some positive steps, but the steps have not gone nearly far enough to have a major impact on racial, ethnic, and sex discrimination. *The positive actions they have taken have generally been either superficial or incomplete and have had little impact on the country's serious housing discrimination problem.*

To Provide . . . For Fair Housing, *supra* note 77, at 328 (emphasis added).