THE USE OF RACIAL STATISTICS IN FAIR HOUSING CASES

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Two housing markets exist in most parts of the United States. One is black and one is white.[1] Many factors contribute to this result—wealth,[2] associational preference,[3] fear of social

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1. The overwhelming majority of black households live in black neighborhoods. It has been estimated that only slightly less than 800,000 of the approximately 5,600,000 black households, or less than 15% of all black households, live in integrated areas. See, N. BRADBURN, INTEGRATED NEIGHBORHOODS IN AMERICA (1971). Other measures of segregation are discussed in K. TAEUBER & A. TAEUBER, NEGROES IN CITIES (1965) [hereinafter cited as K. TAEUBER & A. TAEUBER]. The most interesting is the author's "segregation index" which roughly measures the number of persons out of each 100 such persons who would have to be moved in order to reach a result such that each residential block in an area would be racially statistically identical to all others. An index of 0 reflects total integration, and an index of 100 total segregation. Using census data, the Taeubers computed segregation indexes of 85 in 1940, 87 in 1950 and 86 in 1960, figures which statistically establish the visually obvious: American cities have been, continue to be, and, unless something is done, will always be very rigidly segregated.

2. The disparity in income of white families and black families is well documented. As of 1970, for example, 64% of all white families earned more than $8,000 per year while only 34% of all nonwhite families had incomes of more than $8,000. Median income for white families was $9,961 compared to a median income of $6,067 for black families. U.S. BUREAU OF CENSUS, CENSUS OF POPULATION, 1970, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS (Final Report PC (1)-C1, United States Summary, U.S. G.P.O. 1972). Obviously, all low income groups are disproportionately under represented in the class of purchasers of new homes and since up to 90% of all new homes in most metropolitan areas are built in suburban areas, the exclusionary factor of wealth, alone, would lead us to expect a disproportionately white ownership of suburban homes coupled with disproportionate black occupancy of central city dwellings vacated by the whites purchasing suburban housing. That is, the fact of black poverty coupled with the pattern of new housing construction would lead us to expect some disproportionate amount of black occupancy of "filtered down" housing located in central cities. *See* G. STERNLIEB, THE TENEMENT LANDLORD (1966). Whatever the level of expectation, however, wealth disparity is not enough alone to explain the grossly disproportionate amount of racial segregation that exists in the housing market. "Economic factors, however, cannot account for more from a small portion of observed levels of racial residential segregation. Regardless of their economic status, Negroes rarely live in 'white' residential areas, while whites, no matter how poor, rarely live in 'Negro' residential areas." K. TAEUBER & A. TAEUBER, *supra* note 1, at 2-3.

3. To some extent some racial segregation in residence is due to associational preferences of the members of the segregated minority group. The extent to which such preferences are the primary cause of residential segregation is unclear, although it is often offered as the chief cause by many persons. "I just get the feeling that colored people want to live in colored neighborhoods." U.S. COMM'N CIVIL RIGHTS, HOME OWNERSHIP FOR LOWER INCOME FAMILIES 48 (1971) (Little Rock broker interview). This "freedom of choice" explanation hardly suffices as an account of the startlingly high level of black segregation.

ostracism or physical harm[4]—but much of it is attributable to racial discrimination.[5] There are a variety of federal laws prohibiting racial discrimination in housing, but they have not eliminated the practice.[6] Individual suits to remedy particular acts are inherently impotent to end this societal problem. The Attorney General must act to end widespread discrimination. Effective action by his office will depend on the utilization and acceptance of racial statistics. This article will first discuss the reasons why individual suits are inadequate and will then analyze the pro-

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In fact, the level of black segregation exceeds that of any other ethnic or minority group. "Negro residential segregation is high even in comparison to that of Puerto Ricans and Mexicans, groups that on economic measures are less well off than Negroes." K. TAEUBER AND A. TAEUBER, *supra* note 1 at 65. "[N]egroes and immigrant groups have moved in opposite directions, *i.e.*, declining segregation for immigrants and increasing segregation for Negroes. In terms of sheer magnitude, the Negroes are far more highly segregated than are immigrant groups." S. LIEBERSON, ETHNIC PATTERNS IN AMERICAN CITIES 132 (1963) [hereinafter cited as LIEBERSON]. As noted in Lieberson's study a multiplicity of factors, not simply choice, effect segregation, but, even to the extent that choice is operative in all racial or ethnic segregation, the significantly greater black segregation suggests that black associational preferences is a factor in only a small amount of the actual segregation of blacks that exists.

4. Fear of ostracism or physical harm is undoubtedly a factor in some decisions not to attempt moving to white or predominantly white neighborhoods. Given the history of public, *e.g.*, Cooper v. Aaron 358 U.S. 1 (1958), and private, *e.g.*, United States v. Guest 383 U.S. 745 (1966), resistance to racial integration, it would be surprising, indeed, if such fear were totally absent. The extent to which such fear is a contributing factor in racial segregation is difficult, if not impossible, to ascertain. Obviously, however, such fear would not exist but for racial discrimination and it does not offer an explanation of segregation which is independent of such discrimination.

5. Despite attempts to find "neutral" explanations for the high level of racial residential segregation, *supra* notes 2-4, any such attempt ultimately must fail. Discrimination against blacks, because they are black, is widespread, at all levels and in all areas, *e.g.*, employment, schooling. The effects of such discrimination are self-reinforcing to some great extent. Thus, inferior education in segregated schools leads to inferior employment which leads to inability to purchase newer homes which results in segregated neighborhoods in which segregated schools begin their work of attrition on the new generation of blacks. Discriminatory behavior of any one particular group or agency is never solely responsible for segregation, but the diffusion of responsibility does not suggest lack of responsibility. This is no less true for housing than it is for any other area. *See* U.S. COMM'N ON CIVIL RIGHTS, HOUSING (1961) for recommendations recognizing the diverse nature of such discriminatory acts.

6. Compare U.S. COMM'N ON CIVIL RIGHTS, HOUSING (1959) *with* U.S. COMM'N ON CIVIL RIGHTS, HOME OWNERSHIP FOR LOWER INCOME FAMILIES (1971). As the latter report discloses, little, if any, change in the pattern of residential segregation has been achieved.

There are a variety of state and local laws also which prohibit discrimination. Their content, if any, varies from city to city, county to county, and state to state. Generally, however, they are subject to the same deficiencies as the federal legislation, compounded frequently with lower funding and lesser power. See discussion of Maryland's law in Comment, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289, 314-19 (1973). Thus, despite city, state and federal laws against it, housing discrimination persists.

priety of using statistics to prove discrimination in housing cases.

THE FAILURE OF INDIVIDUAL SUITS

The various federal fair housing statutes grant to black individuals the right to enjoin, or to collect damages for, the isolated individual act of a defendant who has treated him unfavorably in connection with the purchase or rental of housing because he is black.[7] The discrimination, however, may be so subtle or disguised that the victim never perceives it. Even if the prospective purchaser of housing thinks he has been treated in a discriminatory manner, he will have problems of proof, since he must show not only how he was treated but also how others unknown to him were treated. Finally, the delays involved in such suits make it unprofitable for an individual to pursue legal remedies even where the discrimination is provable. Therefore, the individual suit is completely inadequate to deal with the problems of widespread discrimination in our society.

Difficulty of Discovery

Most discriminating acts are hardly so blatant, when taken individually, that they are easily redressible in an individual suit. Here the ingenuity of the private individual who wishes to keep neighborhoods homogeneous comes into play. He can be blatantly discriminatory ("I don't sell to blacks."), or he can achieve the same results more subtly by various marketing strategems.

Marketing a house is like marketing any other product. One must achieve "product identification" and "product desire" in the mind of the consumers to whom one wishes to sell.[8] Obviously, if a seller wanted to sell to an integrated group, the first step he must take is to familiarize the buying public, black and white alike, with his home or homes. If a seller wishes not to sell to a particular group, a simple device that assures his goal is to keep

7. 42 U.S.C. §§ 1981, 1982, 3601 *et. seq.* (1970).

8. The need to "sell" housing, *i.e.*, to "recruit" black buyers is obvious but, to some extent, underrated and little emphasized in the literature or case law in the area of housing discrimination. In the employment discrimination context, the need for "recruitment" of black employees is well accepted. *See, e.g.*, Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968). The same problem exists with respect to housing. A startling example of the integrating effect of "marketing" or information programs is described in D. BAUM, TOWARD A FREE HOUSING MARKET (1971). The project volunteers showed FHA acquired properties in Indianapolis, Indiana to families being relocated through urban renewal programs. Integration was not pressed, but well over half of the relocated families chose homes in neighborhoods not predominantly black.

unaware the members of the particular group to whom he wishes to avoid selling.

Blacks are often excluded from white housing areas because they lack information concerning housing availability in those markets. The usual source of information about properties for sale or rent is through signs posted by the owner, newspaper advertisements, or real estate agents.[9] The black buyer or renter usually lives in a black neighborhood and has friends in black neighborhoods, and he is less likely to discover the for sale or rent signs in white neighborhoods. In addition, he may not be in a position to evaluate housing in such neighborhoods because he has no friends there who can inform him about the availability of such local public services as schools, pools, and libraries, and he cannot determine whether the residents of the neighborhood are compatible with him.

Furthermore, the white landlord or seller who does not want to sell to blacks is not likely to consider advertising in papers which specialize in reaching potential black purchasers. Similarly, he is unlikely to list his house with a broker in the black community.[10] Even if the property is multiple-listed, the listing will commonly be among members of the City Real Estate Board,[11] and that Board may have very few black members.[12] Moreover, when a broker services both black and white customers, he will probably show houses in largely black neighborhoods first and try to persuade the black customer to accept them before considering dwellings in white areas. Thus, a black is less likely than a white to learn that specific property in white suburban areas is available.

Aside from the failure to provide listing information, the variety of acts leading to effective exclusion are not only numerous but can also be quite subtle. A seller or broker may discourage the sale by merely "negative" acts, *e.g.*: by failing to point out the best features of the home; by refusing to bargain on the price; by engaging in a "soft" rather than a "hard" sell; by failing to

9. L.K. NORTHWOOD & E.A.T. BARTH, URBAN DESEGREGATION: NEGRO PIONEERS AND THEIR WHITE NEIGHBORS 31 (1965). See also note 65 *infra*.

10. See R. HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS (1969) for a discussion of the ideology of real estate brokers. This ideology is likely to be widespread among the general population as it reflects and interacts with that population. Thus, sellers are concerned about not harming their neighbors by integrating neighborhoods.

11. For example, see the practices of Chicago Real Estate Board discussed in HELPER, *supra* note 10, at 188.

12. *Id.* at 287. This conclusion is based on a survey made in 1962.

expose adequately the saleable features and values of the particular neighborhood; by failing to point out the positive rather than the negative features of the home, neighborhood, and local public facilities; by failing to set reasonable hours for inspection of the premises; by setting and breaking a number of different appointments; or by failure to ease the buyer's path to a lending institution. Similar examples would arise in acts of the lending institution which might simply take an inordinately long time to appraise a house, or to run a credit check, or otherwise to approve the loan in a timely fashion.[13]

In short, acts which have a discriminating effect often consist of nothing more than doing less for this particular buyer than a seller, broker, or lender would do if the buyer were some other person of some other race. The failure to do as much may be an intentional failure in order to discourage this buyer from buying or may be unintentional in the sense that it simply arises due to a lack of enthusiasm over the prospect of selling a home in this neighborhood to a person of this race. In addition to such negative acts of a subtle character, there are also a host of discriminatory acts of slightly less subtlety but which are also difficult to prove.

For example, the failure to show a particular home to a particular buyer when that buyer is unaware of that home's existence, or a claim that a particular house is no longer believed to be available when in fact no contract for the house exists, although less subtle than the other acts listed above, is not so obvious to the would-be buyer as to carry on its face convincing proof of intent to discriminate. Finally, there are acts which are undeniably and blatantly discriminatory, including the simple refusal to consider taking a person to a particular house or the simple refusal of a lender to consider a loan application where sufficient funds are available. In all of these cases, the effect is similar. The prospective purchaser learns neither of the existence of other houses or of the availability of funds, so even blatant discrimination may not be apparent to the victim. At some point, the black buyer gives up, and the neighborhood remains white.

Problems of Proof in Individual Suits

When a black person discovers that there is available housing

13. *See* NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, JOBS AND HOUSING, 80-81 (1970); *Hearings on DeFacto Segregation and Housing Discrimination Before the Select Committee on Equal Educational Opportunity of the Senate*, 91st Cong., 2nd Sess., pt. 5, at 2948 (1970). See also the acts described in United States v. Youritan Constr. Co., 370 F. Supp. 643, at 647 (N.D. Cal. 1973).

which he desires in a white area, he may make an offer for the house and attempt to get financing. The fact that his offer may be refused or his application for a loan rejected, however, does not mean that he will be able to prove:

> (1) That the owner (or responsible party) placed the property on the open market for sale or rental; (2) That the plaintiff was willing to rent or purchase the property on the terms specified by the owners; (3) That the plaintiff communicated his willingness to the owner at a time when the property was available for sale or rent; (4) That the owner refused to rent or sell the property to the plaintiff on terms which the owner indicated would otherwise be satisfactory; and (5) There is no apparent reason for the refusal of the defendant to rent the property to the plaintiff other than the plaintiff's race.[14]

Given all the possible discriminatory acts that might be done by the seller and given the rules of proof suggested above, the only way in which the discrimination could be proved would be for the rejected buyer to compare, step by step, the treatment given a black with the treatment given a white by the same individual seller. In the housing market, the only way to achieve such a comparison is to use a tester. That is, the buyer must locate a white person in approximately the same financial and family situation who will take the time and trouble to apply for a house or apartment which he does not want and then testify to the owner's willingness to deal with him. It is difficult to imagine any other way to prove the elements listed above unless the seller is so foolhardy as to admit the real basis of his refusal, which is an unlikely occurrence given growing sophistication about the possibility of achieving the results in a less overt manner.

Unfortunately, employment of a tester has severe shortcomings. First, many blacks, especially those who most need the aid of open housing legislation, are unlikely to be on good enough terms with any white who would be willing to serve this function. The buyer must therefore turn to private or public agencies which attempt to combat housing segregation. Therein lies a second major impediment to the use of testers. The buyer may simply be unaware of their existence, or the agency to which he turns for help may be unwilling to use testers.[15]

There exist several reasons to explain the reluctance of agen-

14. Bush v. Kaim, 297 F. Supp. 151, 162 (N.D. Ohio 1969).

15. *See, e.g.*, L. MAYHEW, LAW AND EQUAL OPPORTUNITY (1967).

cies to use testers—aside from the obvious expense in doing so. The use of testers is an awful waste of time. In order to be effective, the tester must lead the broker or seller on to a point which is close to the point of actual sale. This practice, if resorted to in the bulk of cases in which discrimination is suspected, would rightfully distress most brokers, whether or not they discriminate, because, by enticing them with hopes of a commission which will never materialize, it would take considerable amounts of their time. In addition, there smacks about the use of testers a sense of entrapment which is distasteful to most. Finally, the fact of timing, which is crucial in most cases involving a home purchase or rental, effectively militates against the use of testers in most cases save those involving large sales organizations with a repeating system of sales.

Delay and Defective Remedies

Assuming that a prospective plaintiff discovers that he has been discriminated against and can prove it, he may still be unwilling to litigate the matter because of the delays and difficulties incident to bringing an action with a small incentive. While the victim of discrimination may file a complaint under 42 U.S.C. § 3610 with the Secretary of HUD, that procedure has a short statute of limitations (180 days),[16] and it automatically delays the filing of any suit at least thirty days[17] and possibly longer if the state must be notified.[18] This delay is critical since a bona fide purchaser without actual notice of the filing of the complaint or civil action cannot be affected by the court.[19]

If the victim seeks to file suit immediately pursuant to 42 U.S.C. § 3612, unless he can get a court appointed attorney,[20] he must first find an attorney willing to take the chance that a fee will not be awarded.[21] He still faces the short statute of limitations (180 days)[22] and the possibility that the house will be sold to a bona fide purchaser before a court order is issued.

If the plaintiff chooses instead to file under 42 U.S.C. § 1982, which has a broader scope of coverage, he still faces the difficulties of obtaining an attorney and the possibility of the sale of the

16. 42 U.S.C. § 3610(b) (1970).
17. 42 U.S.C. § 3610(d)(1970).
18. 42 U.S.C. § 3610(c) (1970).
19. 42 U.S.C. § 3612(a) (1970).
20. 42 U.S.C. § 3612(b) (1970).
21. *See* 42 U.S.C. § 3612(c) (1970).
22. 42 U.S.C. § 3612(a) (1970).

home to a bona fide purchaser[23] and the additional chance that some courts may delay action in their equitable discretion to force plaintiff to pursue title VIII remedies.[24]

Finally, having gone through this travail, the plaintiff may find little reward.[25] Attorneys fees merely put him back to where he was before he attempted any action. Compensatory damages are hard to prove, since other housing for a similar price is probably available elsewhere or, if a higher price must be paid elsewhere, establishing the comparability of the two houses would often be impossible. In fact, any one in need of a new home would likely obtain it rather than await the outcome of a suit. Having obtained another home, it will be hard to show monetary damages despite the destructive effect which such discrimination may have on society in general. Furthermore, punitive damages in suits under section 3612 are limited by statute to $1,000. While this limitation does not exist on section 1982 actions, at least one court has stated "the limitation in section 3612(c) will naturally be a consideration in determining the amount of any award which may be called for."[26]

In the face of these obstacles,[27] only the hardy soul, able to discover and to prove discrimination and willing to sacrifice his time and energy with little or no tangible reward in order to maintain a principle, will bring suit. This is far from adequate to deal with a widespread problem in society. Of course, individual actions are important. Persons who are wronged should know that society agrees and that they may prevail in a suit. Little can approach the damage done to the feeling of social cohesiveness by the destructive creation of feelings of alienation.[28] Our point is

23. While the authors are unaware of any case specifically holding that a plaintiff cannot purchase from defendant a specific house after it has been sold to a bona fide purchaser, it is assumed that such recovery is not permitted. A contrary result would have a serious impact on all land transactions and the security of title, since purchasers can never know whether a predecessor in title may have committed a discriminatory act.

24. *Cf.* Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971) where the court stated that, in employment discrimination cases under 42 U.S.C. § 1981, courts may encourage resort to the Equal Employment Opportunity Commission during the pendency of the suit.

25. Highly speculative damages are, of course, often allowed in civil actions. *See* Smith & Wilson, *Reciprocity and the Private Plaintiff*, 32 MD. L. REV. 91, 106-08 (1972) (antitrust). But the willingness of courts or juries to accept a speculative theory of damages is not something which can be counted on.

26. Wright v. Kaine Realty, 352 F. Supp. 222, 223 (N.D. Ill. 1972).

27. For fuller discussion of procedures involved in individual suits, see Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159 (1973) and Comment, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289 (1973).

28. This intangible result is, by its nature, impossible to quantify. As predicted in

different, however. Despite the value which such suits may have in the context of the individual and as an educative matter to express symbolically the national goal of equality of treatment, individual suits are likely to be too sporadic, too unreliable, and too limited in focus to end practices of discrimination.

SUITS BY THE ATTORNEY GENERAL

Congress has recognized that housing discrimination cannot be successfully remedied by individual suits and has provided a mechanism for that problem. It empowered the Attorney General to bring suit under 42 U.S.C. § 3613 whenever he "has reasonable cause to believe that any person or group of persons is engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights granted by this subchapter," or where any particular denial of such rights raises an *"issue of public importance"* (emphases supplied).

It is clear from the statute that the Attorney General may bring suit when he discovers a number of discrete acts of discrimination by a single seller or broker; such discovery, however, will be difficult. Since a single act of discrimination which is not a part of a "pattern or practice" does not give the Attorney General a right to bring suit, the individual is unlikely to bring his complaint to that office. The Attorney General's office is more likely to discover a "pattern or practice" from information provided by the Secretary of Housing and Urban Development who sometimes refers complaints to the Department of Justice (although there is no statutory requirement compelling such referrals) or by searching the court docket for suits filed by private complainants. Nevertheless, individual suits and complaints with HUD are sporadic for the reasons given earlier, and thus are unlikely to provide the Department of Justice with the raw data with which it could effectively attack the problem.

Thus, as might be expected, the activity of the Attorney General has primarily been in anti-blockbusting suits. Such a case arises where a single company contacts numerous individuals in a single geographic area, all of whom would seem to have an interest in reporting such acts to preserve the value of their homes.[29] Suits have also been brought to prevent discrimination

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the U.S. NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, REPORT (1968), this might well be the most important aspect of segregation. Thus, many blacks feel estranged from the general society. *See* Colm Legum, "America's Time Bomb", London Observer, March 24, 1968.

29. United States v. Bob Lawrence Realty Inc., 327 F. Supp. 487 (N.D. Ga. 1971),

in advertising[30] and in apartment rental.[31] On the other hand, the Attorney General's office is an unlikely plaintiff for discrimination in the sale of houses if several discrete acts sufficient to make out a "pattern or practice" of discrimination must be shown.

The courts have held, however, that a single discriminatory act may be part of a "pattern or practice" if several sellers or brokers engaged in such acts. In *United States v. Bob Lawrence Realty, inc.*, a district court had held that three blockbusting representations made on the same afternoon by agents of a realty company did not constitute a "pattern or practice" in the absence of other acts by that same company.[32] The Fifth Circuit reversed on the grounds that the individual acts were part of a group pattern of all agents in the area and that there is no need to show a conspiracy of concerted action to prove "pattern or practice." The court said:

> Section 3613 authorizes the Attorney General to bring an action in District Court whenever he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter . . . ." Unless we are to construe the phrase "group of persons" as totally superfluous, there is no need for each member of the "group of persons" to be engaged in an "individual pattern or practice" of violating the Act before the Attorney General has standing to sue. The statute was thus intended to reach the

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rev'd, 474 F.2d 115, 123 (5th Cir. 1973); United States v. Mitchell, 327 F. Supp. 476 (N.D. Ga. 1971); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969). The court in *Mintzes* even suggested that blockbusting may be the only appropriate suit for the Attorney General.

> The remedies provided by § 3610 and § 3612 will be effective in certain types of cases, but in such a case as this [blockbusting], conciliation has little or nothing to work on and a private civil action would be prohibitively expensive for the parties to whom the representations were made, who do not stand to gain or lose any money or property by the outcome of such a suit. The case would therefore appear to be an appropriate case for enforcement by the Attorney General as the number of representations made by Defendants is enough to show a pattern or practice."

United States v. Mintzes, 304 F. Supp. at 1314.

30. *See* United States v. Hunter, 327 F. Supp. 529 (D. Md. 1971) (injunction denied, in part, because no "pattern or practice" shown; only isolated instance shown).

31. United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971) (injunction granted on basis that two acts of discrimination after effective date of the Fair Housing Act of 1968 showed continuation of pattern or practice of discrimination which admittedly existed before the act); United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973). Such suits may depend on the desire of existing white tenants to have integrated housing unless the Justice Department uses the techniques described in the remainder of this article.

32. United States v. Bob Lawrence, 327 F. Supp. 487 (N.D. Ga. 1971).

> illegal activities of a group of persons even if the individual members of the group of persons were not engaged in an "individual pattern or practice." We decline to contradict the clear inference of § 3604(e) by adopting appellant's argument.[33]

In addition, a single discriminatory act may be sufficient of itself to be a basis for a suit by the Attorney General. The Attorney General may bring suit where denial of title VIII rights "raises an issue of general public importance." The dimensions of "an issue of general public importance" are for the Attorney General to decide. In a footnote to the *Bob Lawrence* decision, the Fifth Circuit said,

> It is not for the District Court to determine when an issue of public importance justifying the intervention of the Attorney General is raised. . . . [T]he Attorney General must have wide discretion to determine when an issue of public importance justifying his intervention under § 3613 is raised . . . . Once the Attorney General alleged that he had reasonable cause to believe that a violation of § 3604(e) denied rights to a group of persons and that this denial raised an issue of public importance, he had standing to commence an action in District Court and to obtain injunctive relief upon a finding of a violation of the Act.[34]

Thus, the Attorney General may have power to proceed on an individual complaint against a defendant with only a single overt discriminatory act, but either he must relate the act to the practices of others, or he must be satisfied that an issue of general

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33. United States v. Bob Lawrence, 474 F.2d 115, 123 (5th Cir. 1973). It is possible to argue that the phrase "group of persons" was inserted to make clear only the Attorney General's power to sue for a conspiracy among several firms and not to give him power to sue for individual acts of separate firms not coordinated by conscious plan. The Fifth Circuit responded to this by pointing out that the language is open to both interpretations concerning the requirement of conspiracy, but such a requirement would frustrate full and effective enforcement to eliminate the evils dealt with by the Fair Housing Act.

> To interpret § 3612 as requiring proof of a conspiracy before the Attorney General has standing to seek to enjoin a group pattern or practice of blockbusting would be to seriously restrict the congressional intent to stop blockbusting practices and to unjustifiably restrict the power which Congress gave to the Attorney General to proceed against group patterns or practices. We decline to do so. Even though there may be no "individual pattern or practice" of blockbusting, a "group pattern or practice" of blockbusting is established when a number of individuals utilize methods which violate § 3604(e).

Id. at 124.

34. *Id.*, at 125 n.14. *See also* United States v. Northside Realty Associates, 474 F.2d 1164, 1168 (5th Cir. 1973); Cornelius v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1974); United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973).

public importance is raised. These requirements may necessitate an investigation of the seller, broker and others in the neighborhood, beyond an investigation of the alleged discriminatory act.[35]

The Use of Statistics to Trigger an Investigation

The Attorney General's office, however, need not sit back and await complaints of individual mistreatment. Visual observation of apartment houses, new developments, or regions serviced by a broker can provide a starting point for investigation. Racial disproportion may be seen by investigators for the Justice Department[36] or by private groups or individuals notifying the Attorney General. This should cause a search of records to determine exact racial proportions of housing rented or sold by or through such owner, developer, or broker. Where the number of non-whites who purchased or leased housing from or through such persons is much smaller than an adjusted random distribution for the area would lead one to expect, further particularized investigation is warranted. Where disparities are gross, such investigations are likely to uncover particular incidents of discrimination. If sufficiently disproportionate, the statistics alone may warrant a suit although no particular incident of discrimination is known.

The use of statistics to trigger an investigation is merely a refinement of common sense. Common sense dictates that the observation of segregated housing provides a basis for investigating possible discrimination. It may be useful, however, to quantify the factors which would lead to an appearance of segregated housing but which do not indicate that illegal discrimination in providing the housing has in fact occurred. Thus, investigative resources can be channeled into the areas most likely to be productive. For instance, an all-white apartment does not indicate discrimination in rentals if the entire region is virtually all white. A development of $100,000 homes which is all white does not indicate discrimination in sales if no non-whites in the area earn more than $30,000 a year (though the latter fact may indicate discrimination in education or employment or both).

The enforcement agency, having observed apparent segrega-

35. This would contribute to the delays in suit which are so discouraging to potential litigants. Thus, it does not relieve the need for statistical use.

36. The Justice Department has had a special team "studying housing patterns in Baltimore." Apparently, the initial impetus for investigation comes from individual complaints made by private fair housing organizations. This has resulted in consent decrees involving at least two realtors in the Baltimore metropolitan area. Baltimore Sun, Oct. 25, 1972, § C, at 24, col. 7.

tion in an apartment, development, or area could proceed in the following manner. First, it should ascertain the price range of housing offered by the landlord or developer or available in a given area through a broker. Second, it should find out what level of income is necessary in order to purchase or lease such housing. For purchases, this information should be available from local lending institutions. Third, the agency should ascertain the total racial composition of the pool of prospective purchasers with sufficient incomes to purchase or to lease the housing in question. This is the most difficult task and, in turn, requires several steps. The basic question is what persons, regardless of race, could reasonably desire to live in a given area. This in turn will depend on distances from places of employment.

One method of ascertaining the pool of prospective purchasers is to draw a circle (the "residential region") with a radius of three miles from the point of a development or apartment or from the center of an area served by a broker (the circle may be larger depending on the size of the area normally served by the broker). Next, find out the area where the people within the "residential region" go to work, *e.g.* 10% to Town A, 25% to Town B, 30% to Industrial Zone C, and so on. Compute the racial composition of the total work force at each such area earning sufficient income to purchase the housing in question, *e.g.* 40 % non-white in Town A, 10% non-white in Town B.[37] Then multiply the racial composition of the work force with sufficient income in each such area times the percentage of employed persons from the residential region who work in the area, *e.g.* for Town A, it will be 40% x 10% which equals .04. Finally, add the sums for each area together to

37. For another example, assuming that the housing in question sells for $20,000 and that a family income of $8,000 would be sufficient to afford such a house, we can construct a factor for income disproportion for workers in Town B. Approximately 20 per cent of Town B's population is black. But of Town B's population who can afford to buy homes in the $20,000 price range, only a little over ten per cent are black. Thus, the composition of the work force in Town B with sufficient income to buy the housing in question is ten per cent black.

Individuals with high incomes are not likely to purchase housing available to those with significantly lower incomes. While the amount people need as income to carry a mortgage is readily determined by consulting the practices of lending institutions, it is much more difficult to ascertain the upper limit on income as a matter of choice of the pool of potential purchasers. So long as the percentage of blacks decreases at higher levels of income, the error in failing to put an upper limit on income in determining potential housing purchasers will not produce an unfair result to a defendant charged with discriminating against blacks. However, it will be important to ascertain such an upper limit in any suit for illegal steering of blacks into black neighborhoods or discrimination against white purchasers.

obtain the racial composition of the pool of prospective purchasers in the residential region.[38]

Note the deviation of the racial composition of the pool of prospective purchasers from the racial composition of the actual purchasers of housing from a broker or developer. If the deviation is great, those brokers or developers with the greatest deviation should be investigated further. The number of brokers or developers pursued and the extent of deviation necessary to trigger investigation would depend on the resources of the Attorney General's staff.

In addition, for brokers, another level of study would be useful. If black customers are purchasing homes in local areas of high black density and white customers are purchasing homes in local areas of high white density, a basis to investigate "steering" may be shown. Again, investigative efforts would be limited to those firms showing the greatest deviation from the racial composition of random apartment rentals or home purchases.

It must be emphasized that refinements on statistical models are unnecessary here because all that is involved is a trigger to further particularized investigation. Since the inevitable limitation on enforcement resources would restrict the investigation to those firms with the grossest deviations, more refined calculations should not be necessary at this point.[39]

The Use of Statistics to Prove Discrimination

The statistical basis for proving discrimination in housing would have to be more refined than that used to trigger investigations. In addition to the factor for income levels,[40] consideration

38. This should reflect commuting habits in a realistic manner, although it may result in some distortion hiding discrimination. For example, if there is discrimination in employment in Town B and discrimination in housing in the region studied, a disproportionate number of residents in the region may work in Town B.

39. See also the discussion of the use of racial statistics to trigger an enforcement agency's investigation in the analogous area of employment in Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 268-70 (1971) [hereinafter cited as Fiss].

40. Ability to purchase a house depends on a number of factors in addition to income level. The size of the mortgage needed depends on the amount of savings the prospective buyer has available for a down payment. The amount of money a bank is willing to lend depends on job stability, family size, existing debt and even family stability. The incorporation of every factor utilized by lending institutions, including the varying weights which differing lending institutions give to such factors, would be a difficult job. For purposes of investigation, looking to income factors alone is surely sufficient. Similarly it should not be essential for proving discrimination since income levels are surely the most important economic factor in obtaining a loan. While the failure to incorporate savings, job stability and family size may leave out some individuals who could purchase housing from

must be given to associational preferences. Unlike education, where the school board fixes the racial composition by school siting and attendance zones, or employment, where the individual obviously wants employment and promotion, in housing the black home buyer has some control over the character of the neighborhood and may not desire to move into the white area. Fixing associational preferences at the degree common for other ethnic groups[41] should be sufficient to allow for this factor.[42] After the appropriate discount for these factors is made, neither the government nor the courts should fear the use of statistics of racial disproportion as a basis for suit.

Statistics Plus Act

If the difference between the racial composition of the pool of prospective purchasers and the racial composition of actual purchasers from or through an individual or company is significant and such individual or company has committed at least one discrete provable discriminatory act, the court should find that the defendant has engaged in a "pattern or practice" of discrimination. A "significant difference" is one where the likelihood of such a disparity occurring in a random distribution is less than

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the computation, the inclusion of persons of a higher level of income who would probably purchase housing of a higher price than that in question adds an error on the high side. These errors may cancel each other out or may be reinforcing, but are not likely to be extraordinarily significant given the overriding importance of income levels.

41. *See* S. LIEBERSON, *supra* note 3, at 44 and K. TAUEBER & A. TAUEBER, *supra* note 1, at 28 for statistical data on the level of ethnic segregation and for explanations of the methodology appropriate for the generating of such data. For example, the mean index of residential segregation of foreign born whites who come from an immigrant group which has been in this country for some time was less than thirty in 1950 for a selected group of ten major cities and much less than forty for all immigrant groups. S. LIEBERSON at 66-67. This means that to attain the same proportion of foreign born whites in each area of the city, forty percent would have to be moved. These figures of course are not exactly preferences in a void but include the difficulties including discrimination facing any foreign born person. But even using these figures, almost sixty percent of the foreign born white population is distributed randomly. Assume a hypothetical ten percent figure as the proportion of blacks in the pool of prospective purchasers able to buy housing in the $20,000 price range computed in the model set forth *supra* notes 37 and 38 and accompanying text; sixty percent of them should desire to buy homes in areas which are not predominantly black. Thus, somewhat over six percent of the population of a new development of $20,000 homes (using averages) would be expected to be black. If the region involved had a heavier concentration of blacks able to buy such housing, for example 20% of the relevant pool, then a correspondingly larger percentage of such housing (12% in the example) should be sold to blacks.

42. There is some evidence that much more than sixty percent of all blacks do not care whether they live in predominantly black areas. See "Fifteen American Cities", in SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) (85%); *Trends in Housing,* August 1969 at 2 (74%).

five per cent.[43] The defendant's act provides evidence of discrimination which colors these statistics of racial disparity and permits the inference to be drawn that the disparity was caused by other acts of discrimination by the defendant.[44]

In addition, depending on the context of the discriminatory act, a single act may affect large numbers of people. A refusal to sell to a black in a black neighborhood presents a discriminatory act, but it does not contribute to the creation of a dual market. Other blacks will surely feel free to look for housing in that area. However, a single refusal to sell to a black in an all white neighborhood will likely reinforce the segregation in that area and have an impact in perpetuating the dual market. Thus, even if no other

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43. This does not mean that there is a ninety-five percent chance that the pattern was deliberately created. It means that, assuming no discrimination, an all-white area would still occur five percent of the time. For example, the chance that a coin will be heads every time when flipped five times is three percent [which is the number of heads divided by the number of sides to a coin (½) multiplied by itself for each of the flips $(½)^5$ or 1/32 which equals .031]. Nevertheless, we would expect such an occurrence to be caused by chance rather than a two-headed or weighted coin. The likelihood it occurred by trickery rather than chance depends on the nature of the person doing the flipping. If we do it ourselves, we may be certain that no matter how unlikely the occurrence, it was a result of chance and not manipulation.

If we know nothing except the probabilities, we should first attempt to discover more. If we can satisfactorily explain why we cannot learn more, we may make a judgment of whether the event occurred by chance or by manipulation, depending on the likelihood. "In the social sciences, it is more or less conventional to reject the null hypothesis [the assumption that the observed difference is due to chance and not to a difference between this group and the general population] when the statistical analysis indicates that the observed difference would not occur more than 5 times out of 100 by chance alone." C. SELLTIZ, M. JAHODA, M. DEUTSCH & S. COOK, RESEARCH METHODS IN SOCIAL RELATIONS 418 (1959). Thus, we have the Fair Employment Practices Commission guidelines requiring that employment tests with an adverse effect on blacks must be shown to be job-related with a 95% probability.

Using the six percent figure (1/16) arrived at in note 41 *supra*, a development of thirty-two houses would be expected to have two black homeowners. But the failure of any particular group of homes to have black homeowners could be due to chance. Each house has 15/16 chance of being owned by a white person. The chance that each home is owned by a white is 15/16 multiplied by itself the number of times there are homes here $(15/16)^{32}$ which is over 12%. Thus, the lack of black home owners would not show discrimination. It would take 46 homes before the lack of any black owners could be shown to have less than 5% chance of occurring in a random distribution, *i.e.* $(15/16)$,[46] which equals 0.048.

44. The statistics alone were sufficient in conventional social science terms to indicate that the segregated housing was a product of something other than chance. The illegal act by the defendant shows a willingness to discriminate. At the 5% level, even if one black purchased a home [i.e. the provable act had not occurred] the total number of blacks in the neighborhood will still be less than the expected random distribution. In view of the defendant's acts, we can infer he also discouraged other black purchasers. *See* the discussion by Fiss on allocation of burden of proof in employment discrimination cases. Fiss, *supra* note 39, at 270-73. *See also* the discussion of evidentiary problems that make use of racial statistics necessary in allocating burden of proof in housing cases in text accompanying notes 53-54 *infra*.

discriminatory act occurs, it should be viewed as part of a pattern or practice. For example, one well-known instance of refusal to sell will cause other possible housing applicants to look elsewhere without being specifically turned down. If the area is all white, it may also cause people not to look for housing in that area even from other sellers or through other brokers. This preserves the existing pattern of housing segregation.[45] Even if a court is unwilling to view such an act in context as part of a "pattern or practice" of discrimination, it should at least be considered an issue of "general public importance" in view of its impact.[46] Therefore, it should constitute a proper basis for the Attorney General to bring suit under 42 U.S.C. § 3613 either as a "pattern or practice" of discrimination or as presenting an "issue of general public importance."[47]

The Attorney General of course must prove that the defendant has violated the statute. However, he need not prove that in fact such violation is part of a pattern or practice or raises an issue of general public importance. "The only requirement is that the Attorney General have *reasonable cause* to believe that such conditions exist."[48] The "pattern or practice" and "issue of general public importance" are merely triggers to action by the Attorney General, not necessarily substantive elements which he must prove. "Reasonable cause to believe" these conditions exist is necessary before the Attorney General has standing under 42 U.S.C. § 3613, but the conditions themselves are not an essential element of the violation of the statute.

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45. Since the court in United States v. Bob Lawrence, 474 F.2d 115 (5th Cir. 1973), found a pattern by looking to single acts of several brokers, it is not too great a step for a court to recognize that a single act may be part of a pattern of discrimination which includes persons other than brokers or sellers.

46. *See* note 34 *supra* and accompanying text. *See also* United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973); United States v. Northside Realty Associates, 474 F.2d 1164 (5th Cir. 1973).

47. Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

42 U.S.C. § 3613 (1970), emphasis added).

48. United States v. Pelzer Realty Co., 484 F.2d 438, 445 (5th Cir. 1973).

The statute is violated whenever housing discrimination occurs by a covered seller (section 3604), lender (section 3605) or broker (section 3606).[49] The language of § 3613 giving the Attorney General standing to sue appears to be designed to confine intervention to major suits to conserve resources. Although section 3613 has been read to require that the Attorney General prove the existence of a pattern or practice of discrimination or that a group of persons have been denied their rights,[50] it may be possible to read the section as merely conferring standing. Espe-

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49. 42 U.S.C.: § **3604. Discrimination in the sale or rental of housing.**

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

§ 3605. **Discrimination in the financing of housing.**

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of race, color, religion, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided*, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.

§ 3606. **Discrimination in the provision of brokerage services.**

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, or national origin.

50. United States v. Youritan Constr. Co, 370 F. Supp. 643, 650 (N.D. Cal. 1973).

cially in view of the Supreme Court's liberal construction of standing in title VIII suits,[51] it makes sense not to dismiss the suit where violations of the Act are shown to have occurred. Otherwise, there would have to be a relitigation of the same facts in another suit brought by private parties, or the defendant would be able to avoid the consequences of his illegal acts. There is no reason such an unwieldy result should exist, especially in light of the broad remedial language of the statute. Thus, a defendant charged under section 3613 with a violation of another section of the Act must defend against the charge of the particular section. A finding of "pattern or practice" or "general public importance" will be relevant only for how extensive the remedy should be.

Statistics Alone

Overwhelming statistical evidence of discrimination should also be sufficient to make a prima facie case of a pattern or practice of discrimination. For these purposes, we would define "overwhelming" evidence as a disparity which occurs by chance less than 2.5% of the time.[52]

Where no discrete discriminatory acts are found, it might be argued that no violation of the Act has been shown since no individual has claimed a face-to-face racial refusal. After all, the statute defines discriminatory housing practice in terms of acts done "to any person" or "against any person." But the act does not require that the person discriminated against be the one who files suit.[53] Statistical data may be persuasive that specific dis-

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

52. Using the figures arrived at in note 41 *supra*, 56 housing units which are all white would be needed before a figure which would exist in a random distribution less than 2.5% of the time could be obtained: $(15/16)^{56}$. The 2.5% figure is an arbitrary one, intended to be more stringent than the conventional 5% figure mentioned in note 43 *supra* while not so high as to be unattainable if a substantial developer or broker had no black purchasers.

The need for a higher requirement than 5% in housing stems from inaccuracies in the base figure compounded by the likelihood that some discriminatory effects are a result of acts by nondefendants. The inaccuracies of the figures for racial disproportion flow from the inaccuracies and staleness of census data, the difficulties of drawing precisely accurate lines for a region, the problems of a line drawing based upon wealth where houses are shown by a broker for a variety of prices in a variety of locations, and the unknown propriety of the factor for associational preference. These compounded inaccuracies are within tolerable limits if the deviance from the norm is sufficiently great.

53. The section under discussion here, § 3613, of course, provides for the Attorney General rather than the victim of the discrimination to bring suit. In addition, the Court in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), held that tenants in an apartment building could bring suit against their landlord for discriminating against others. The court pointed out that § 3610(a) allows any person aggrieved by a discriminatory act to bring a complaint to HUD even if the discrimination that injured the complain-

criminatory acts have occurred although the individual victims have not come forward. A developer may have an all-white clientele without ever specifically refusing to sell to a black (section 3604(a)) or telling a black that the property was unavailable (section 3604(c)), but on a large scale he probably has violated section 3604 by discriminating in terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection therewith. The individuals discriminated against may never be found. They may never even know they were treated in a discriminatory manner. But they exist, and section 3613 gives the Attorney General power to act whenever any person is engaged in a pattern or practice of resistance to the full enjoyment of such persons' rights.

A second argument against the use of statistics alone as proof of discrimination is that they simply do not in fact prove it. They demonstrate a segregated effect but do not show that the cause is the defendant's discrimination. A large group of segregationists may decide to move together and purchase all the housing of a single developer in one day. Although the statistics may demonstrate convincingly that the racial segregation is not a result of random chance, that does not prove the discriminatory acts were committed by the broker or developer. For example, segregation may be a result of lending institutions' policies or the racial hostility of existing residents.

But requiring the Attorney General to prove that no factor other than defendant's act caused the segregation is too great a burden. The plaintiff cannot prove a negative since the possible causes may be infinite in number. However, if the segregation is caused by other factors, the broker or developer will be in a good position to show them. He will know if deals fell through because lenders failed to lend or if potential purchasers indicated fears about the attitudes of neighbors. He will also know from his clients or customers whether they have been treated badly by other brokers or developers, and he is likely to get the same information at professional meetings. Consequently, it is reasonable

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ant was directed against another. Complainants under section 3610 may bring action within a limited period of time if the Secretary of HUD has been unable to secure compliance with the act, 42 U.S.C. § 3610(d). Under a broad reading of "person aggrieved", as *Trafficante* indicates the Court is willing to give, blacks in a region may be able to bring a class action for such a pattern or practice of discrimintaion although no individual member of the class can show an act directed at them. Thus, the weakness of the small federal litigating staff noted in *Trafficante* may be buttressed by private actions of interested groups doing independent investigations.

to put the burden on the seller or broker to show that he or she was not the cause of segregation where the statistics demonstrate that segregation was almost surely a product of something other than chance. Thus, at least one court has held that statistical evidence may provide at least a prima facie case under title VIII.

> In the present case, the Valencia and Holiday Apartments have been in operation since 1965 and 1966 respectively, and neither has ever had a black tenant. This evidence constitutes, at least, a prima facie case of racial discrimination, casting a burden upon the defendant to come forward with evidence to the contrary. . . .
>
> In this case, the facts are even more extreme than in Parham, in which the court held that the statistical evidence established discrimination as a matter of law, but, unlike the situation in Parham, the defendant has provided no explanation at all.[54]

As the citations to employment cases in the quote above indicate, denying the use of statistics to prove discrimination in housing would be clearly anomolous in civil rights cases.[55] In employment discrimination cases,[56] a showing of statistical likelihood of discrimination has sufficed to shift the burden and to require the defendant to prove affirmatively that he did not discriminate. In one case, a company employed only three additional black workers although its work force increased by more than four hundred during the two years following adoption of title VII of the Equal Employment Opportunity Act. Taking judicial notice that more than twenty per cent of the state population was black, the

54. United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 782 (1972) citing Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 at 426 (8th Cir. 1970); Jones v. Lee Way Motor Freight Inc., 431 F.2d 245 at 247, 248 (10th Cir. 1970). *See also* United States v. Reddoch, 467 F.2d 897 (5th Cir. 1972); United States v. Youritan Constr. Co., 370 F. Supp. 643, 649 (N.D. Cal. 1973). Note the analogy in the *Real Estate Development Corporation* case to the use of statistics in employment discrimination cases by the court's citing of *Parham* and *Jones*.

55. For example, in school segregation cases where a dual system once existed "the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition," without proof of specific discriminating acts at that school. Swann v. Board of Educ. of Charlotte-Mecklenburg, 402 U.S. 1, 26 (1971).

56. United States v. Wood, Wire & Metal Lathers Int'l Local 46, 471 F.2d 408, 414 (2d Cir. 1973); United States v. Chesapeake & O. Ry., 471 F.2d 582, 586 (4th Cir. 1973); United States v. Hayes Int'l. Corp., 456 F.2d 112, 120 (5th Cir. 1972); United States v. Saint Louis-San Francisco Ry., 464 F.2d 301, 307 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); United States v. Ironworkers Local 86, 443 F.2d 544, 550 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); Jones v. Lee Way Motor Freight Inc., 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

court held that the Company violated the Act.[57]

While the difficulty of showing discrimination by statistics is much greater in housing cases than in employment cases,[58] the social costs of allowing such evidence to prove a prima facie case are not as substantial. If the racial disproportion required to show discrimination is set at a high figure, it may allow some discriminatory acts to go unremedied. But, granted the likelihood that investigation will unearth specific discriminatory acts and the scarcity of prosecutorial resources, it seems sensible to accept that cost in order to concentrate available resources on the more flagrant cases.

On the other hand, if the racial disproportion necessary to prove a prima facie case is at a low level, it may result in findings against innocent parties and provide an incentive for defendants to prefer minorities to be sure there is no racial disproportion and thus no suit against them. In employment, this could result in the unemployment of better qualified white applicants and a possible diminution of the quality or quantity of goods or services produced or an increase in the costs of such goods or services to the consumer. In housing, the result may be to increase purchases by whites in black neighborhoods and blacks in white neighborhoods to a degree higher than associational preferences would otherwise produce. Marginal favoritism in price to induce integration to avoid suits could also occur, so that the price of housing for persons of the prevailing race in the particular area could rise, but this is unlikely to amount to a significant sum since the amount of other-race housing available to eliminate racial disproportion

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57. In cases concerning racial discrimination, "statistics often tell much and courts listen." . . . We hold as a matter of law that these statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a) (1970).

Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970).

It should be noted however that the Court greatly oversimplified the problem in using percentage of blacks in population of entire state as a basis. Consideration should have been given to level of skills and proximity of residence to workplace. *See* Harper v. Mayor & City Council of Baltimore, 359 F. Supp. 1187, 1193 (D. Md., *aff'd sub nom.*, Harper v. Kloster, 489 F.2d 1184 (4th Cir. 1973).

58. This is true because of the uncertainty in the use of the factor for associational preference. Determining the pool of prospective purchasers in terms of who works near enough to the residential region to live there is not much more difficult than determining the pool of prospective employees in terms of who lives near enough to the job to work there. Establishing an appropriate factor for differences in incomes is not much more difficult than ascertaining appropriate labor force in terms of skill or potential ability to obtain skills. But as noted earlier, see notes 40-42, *supra*, and accompanying text, employees may be assumed to desire to work wherever the job opportunity is available whereas house hunters may be more selective.

is small and the seller is always likely to strive for the highest price. Further, in all-white areas, this effect may just offset the historic premiums blacks have been forced to pay to move into such neighborhoods.[59]

Thus, the sale of homes in a development to a substantially disproportionate number of members of one race should provide a basis for suit by the Attorney General. Similarly, analysis of sales through an agent may reveal a pattern of white sales in white neighborhoods and black in black. This should provide a case for an illegal steering suit. The use of probability and racial disproportion does not affect the individual sale by a private owner without use of a broker (which would not usually be covered under the Civil Rights Act of 1968 anyway), but it would reduce the problem of proof and reliance on an informer otherwise required in most cases. Further, by requiring an affirmative showing to disprove the case of discrimination, the court would give the developer and the real estate agent an incentive to broaden the base of their customers and to disseminate information throughout the black community.

Racial statistics can shift the burden of proof to the defendant to show that he has not discriminated. But the defendant may not meet his burden of proof simply by showing that his actions were neutral on their face. Analogizing to fair employment cases, facially neutral acts with discriminatory impact must be justified by business necessity.[60] For example, if an employer has an all-white work force, a hiring practice based on walk-ins, generally of people told of opportunities by existing employees, will have a discriminating effect in new hirings. At least where the original work force was a product of pre-act discrimination, that is a violation of title VII.[61]

Similarly in the housing area, a requirement of securing recommendations from existing tenants of mobile homes which has a discriminatory impact has been held to violate title VIII.[62] If potential buyers go to a broker because of a for sale sign on a particular house, the broker is likely to show them only that house

59. *See* U.S. NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, REPORT, at 468-72 (1968); REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS: BUILDING THE AMERICAN CITY 78-79 (1968) for statistical datum on differential housing costs experienced by whites and blacks. For an excellent theoretical economic model illustrating the effect of artificial restriction in prices of black housing, see Note, *The Contract Buyers League Case*, 80 YALE L.J. 516 (1971).

60. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

61. Parham v. Southwestern Bell Tel. Co., 422 F.2d 421 (8th Cir. 1970).

62. United States v. Grooms, 348 F. Supp. 1130, 1133-34, (M.D. Fla. 1972).

and others in that neighborhood. As stated earlier, this will result in perpetuation of the dual market. The broker should be under an obligation to make his customers aware of all housing in their price range or at least a selection from both black and white neighborhoods. In the context of the dual market, a facially neutral act such as showing only houses in the area surrounding the one which first caught the prospective purchaser's eye will have discriminatory effects. In view of the simplicity of making known the wider variety of choices, there is no business necessity for such a practice. That is, the broker must at least describe for his customer housing in other neighborhoods which might meet the customer's needs.

The defendant in a case brought under a theory of discrimination shown by statistics alone could defend in two ways. First, he could attempt to show that the segregation resulted from the discriminatory acts of others and that any remaining segregation not attributable to those causes could be a result of chance. For example, if the plaintiff showed that the likelihood existing segregation occurred by chance is less than 2.5%, the defendant may show that lending policies deterred half the potential black pool from obtaining such housing. That substantially reduces the amount of segregation which might be attributable to the defendant and could increase the likelihood that remaining segregation occurred by chance to 5%. If defendant's testimony is believed and no specific act of discrimination is shown, the jury should find in his favor. If there is no contest over the validity of defendant's showing, the judge should direct a verdict in the defendant's favor.

Second, the defendant may show that it advertised in media likely to reach the black community, that it stated its policy of non-discrimination in all its literature, and that its agents engaged in no discriminatory acts. Acceptance of this testimony depends on the credibility of the witnesses. If this testimony is believed, the jury should find for the defendant. In effect, the defendant can show it is already doing all those things which it might be ordered to do in a remedial decree, so any action against it would be futile.

If the defendant fails to meet this burden by countering the statistics or by showing his own affirmative acts, the court would find him guilty of discrimination and enjoin future discrimination. The court should also order the taking of affirmative steps. An example of a decree which has been followed by several

courts[63] is that ordered in *United States v. West Peachtree Tenth Corporation*.[64] In addition to enjoining acts prohibited by title VIII, the Court ordered the apartment owner to post notices clearly visible to applicants for housing stating that apartments will be rented without regard to race, color, religion, or national origin; that such a statement appear in all its advertising; that all employees of the firm be instructed about the decree; that all persons or companies engaged by the defendant to act as a real estate agent referral agency, or otherwise manage or promote rentals of the apartment, be notified that such apartments are to be rented on a non-discriminatory basis; that proposed objective criteria for the rental of apartments be filed with the courts; and that records regarding each person who makes inquiry concerning the apartment in the following two years be kept and filed with the court.[65]

CONCLUSION

The use of racial statistics to prove discrimination presents problems. Setting a specific expected ratio for random distribution is a difficult task to do accurately, harder than in the employment area because of the problem of ascertaining a proper factor for associational preferences. These difficulties caution against its imprudent application in all cases, but, where other techniques for enforcement of non-discrimination are unsuccessful, the court should use such methods rather than surrender to prejudice.

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63. United States v. Reddoch, 467 F.2d 897 (5th Cir. 1972); United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972). *See also* United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).

64. 437 F.2d 221 (7th Cir. 1971).

65. The affirmative action portion of the order reads as follows:

It is further ordered that the defendants shall forthwith adopt and implement the following affirmative program to correct the effects of their past discriminatory practices:

(1) Within ten (10) days of this Order, defendants shall notify the following black applicants for housing at One Tenth Street Apartments, by registered mail with copies to counsel for plaintiff, that each is entitled to reapply for an apartment and that any reapplication will be considered without regard to race or color:

ROBERT PITTS

SANDRA THREADCRAFT

(2) Within ten (10) days of this Order, defendants shall permanently post in a prominent place in the rental office, or immediately outside the rental office, a notice, clearly visible to applicants, stating that the One Tenth Street Apartments will be rented without regard to race, color, religion, or national origin.

(3) All advertising of apartments at One Tenth Street Apartments in newspapers or other media, or in pamphlets, brochures, handouts, or writings of any kind,

shall include a statement to the effect that apartments are rented without regard to race, color, religion, or national origin.

(4) The defendants shall forthwith fully instruct all of their full-time and part-time employees with respect to the provisions of this decree and with respect to their obligations thereunder. Within five (5) days of hiring of any new employees, defendants shall provide each employee with a copy of this decree, explain its contents to him and advise him that he is subject to all the requirements contained therein.

(5) In the event that a firm, association, company, corporation, or other person is engaged by defendants to act as a real estate agent, referral agency, or otherwise manage or promote rentals of apartments for the defendant, such firm, association, company, corporation, or person shall be notified by defendant within five (5) days of its engagement that apartments are rented without regard to race, color, religion, or national origin.

It is further ordered that, no later than fifteen days after the entry of this Order, the defendants shall file with the Court, and serve upon counsel for plaintiff, proposed written objective nonracial standards and criteria (hereinafter referred to as standards or proposed standards) for the processing and approval of applications for apartments at the One Tenth Street Apartments. It is suggested that, in formulating proposed standards, the defendants consider the standards approved by the United States District Court for the Eastern District of Louisiana in United States v. Palmetto Realty Corp., C.A. No. 70-1419 (E.D. La., September 18, 1970) (See paragraph 11 c of decree and Policies and Procedures, Rules and Regulations attached thereto)

The plaintiff shall have ten days after the filing of such proposed written objective nonracial standards and criteria by the defendants to object to the same. In the event plaintiff files such objections, this court will hold a prompt hearing with respect to the adequacy of the defendants' proposed standards, and with respect to the merits of plaintiff's objections thereto, and will order the implementation of objective standards and procedures either as proposed by the defendants or otherwise. Upon the entry of an Order approving or requiring the implementation of objective standards and criteria, the defendants shall forthwith implement such standards and criteria with respect to all applicants for apartments, without regard to race, color, religion, or national origin.

If, following the entry of an order requiring the implementation of objective standards, the defendants should elect to alter such standards for the processing and approval of applications for apartments, by making changes therein which are nonracial both in purpose and in effect, they shall promptly file such proposed changes with the Court, with copies to counsel for plaintiff, and the plaintiff shall have the opportunity to object thereto. Any dispute between the parties arising from such proposed changes may be raised by either party in any subsequent appropriate proceeding in this Court.

It is further ordered that ninety days after the entry of this decree, and at three-month intervals thereafter, for a period of two years following the entry of this decree, the defendants shall file with this Court, and serve on counsel for the plaintiff, a report containing the following information for the One Tenth Street Apartments:

(a) The name, address and race of each person making inquiry about the availability or terms of rental of an apartment during the preceding three-month period, and whether such person:

1. Made inquiry.
2. Was offered an application.
3. Filled out an application.
4. Submitted an application.
5. Was advised with respect to earnest money and security deposit procedures.

6. Made a deposit.
7. Was accepted for a waiting list.
8. Was accepted for occupancy.
9. Was rejected, and if rejected, the reason or reasons therefor, and the specific objective criterion which the applicant failed to meet.

The report shall also state the date on which each of the foregoing actions was taken.

The reports filed pursuant to this Order shall also include a description of all affirmative steps taken during each preceding reporting period in compliance with this decree, including copies of letters to Negro applicants, copies of all signs posted in accordance with this Decree, copies of all advertisements and brochures used by the defendants (or sample copies of advertisements, together with the dates and media in which they were published), and written documentation to the effect that each employee has received a copy of this Order and has been advised of its terms. The parties are directed to attempt to agree on simplified forms and procedures for carrying out this reporting provision to assure minimum inconvenience to all parties and to the Court.

For a period of two years following the entry of this decree, the defendants shall maintain and retain any and all records which are the source of, or contain, any of the information pertinent to defendants' obligation to report to the Court. Representatives of the plaintiff shall be permitted to inspect and copy all pertinent records of the defendants at any and all reasonable times, provided, however, that the plaintiff shall endeavor to minimize any inconvenience to the defendants from the inspection of such records.