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Examination of State Laws Prohibiting Sex and Marital Status Discrimination in Housing and Home Finance

KETRON, Inc, Wayne, PA

Prepared for

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AN EXAMINATION OF STATE LAWS PROHIBITING SEX AND MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE

KETRON, INC.

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Results of an intensive examination of laws prohibiting discrimination based on sex and / or marital status in housing and home finance are reported for a sample of States administering such laws. Research was conducted in 11 States over a period of 18 months in 1976 and 1977 using the following methods for gathering data: administration of a set of detailed, interrelated survey instruments to State agency enforcement staff; interviews with spokespersons for various advocacy and interest groups in 6 of the 11 States; a case review of all sex and marital status housing complaints handled by the 11 agencies between January 1975 and June 1976; and the application of a variety of data manipulation techniques to the information gathered. The basic question asked of each statute and implementation procedure was whether victims of sex or marital status discrimination in housing can obtain just and expeditious relief for their injuries. Study findings are presented under the following subjects: (1) scope of statutory coverage for sex and marital status discrimination in h,...

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AN EXAMINATION OF STATE LAWS PROHIBITING SEX AND MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE

Final Report

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EXECUTIVE SUMMARY

At the time of this study, 36 states and the District of Columbia had enacted a variety of laws prohibiting sex discrimination in housing. With two exceptions, these laws had been enacted since 1970. Title VIII of the Civil Rights Act of 1968, generally known as the Federal Fair Housing Act, was amended to prohibit sex discrimination in 1974 -- the same year that Congress passed the Equal Credit Opportunity Act. Clearly, then, public concern over sex and marital status discrimination in housing, as reflected in the law, is a relatively recent phenomenon. Even so, many states have a longer history of enforcing laws prohibiting sex and/or marital status discrimination in housing than has the Federal Government, and HUD considered that the experience of these states would be instructive for Federal enforcement efforts.

Accordingly, KETRON, INC., was chosen to conduct an intensive examination of laws prohibiting discrimination based on sex and/or marital status in a sample of states administering such laws. This research was conducted in 11 states over a period of 18 months.[1] In 10 of these states, the laws prohibiting sex discrimination had been enacted before the Federal Fair Housing Act was amended.

Implementation systems adopted by state enforcement agencies are as important as legal coverage in determining the extent to which cases involving sex and/or marital status discrimination in housing can be satisfactorily resolved. Accordingly, this study included not only the development of a legislation typology but also research assigned to gauge the effectiveness

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[1] With one exception, the states selected for this study presented the best combination of a strong anti-discrimination law, an experienced civil rights agency, and a case load sufficiently large enough to allow for meaningful analysis of the relationship between enforcement powers and procedures and complaint resolution. The states included in the study were: California, Connecticut, Delaware, Kansas, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania and Washington.

of implementation procedures. This research included administration of a set of detailed, interrelated survey instruments to state agency enforcement staff, interviews with spokespersons for various advocacy and interest groups in six of the 11 states, a case review of all sex and marital status housing complaints handled by the 11 agencies between January 1975 and June 1976, and the application of a variety of data manipulation techniques to the information gathered. Despite the variety and complexity of the rigorous investigative methods employed, the ultimate touchstone of this analysis was profoundly simple. The basic question asked of each statute and each implementation procedure was whether victims of sex or marital status discrimination in housing can obtain just and expeditious relief for their injuries. The major study findings are summarized below, together with recommendations and suggestions for some promising alternatives to case processing as a means of combatting discrimination.

SCOPE OF STATUTORY COVERAGE FOR SEX AND MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE

Currently, neither Federal nor State laws provide adequate legal protection for victims of sex or marital status discrimination in housing. Federal law lacks proscriptions against marital status discrimination. In contrast, 23 of the 36 states that prohibit sex discrimination also prohibit marital status discrimination. Eight of the eleven states included in this study prohibit both sex and marital status discrimination. Significantly, 77 percent of all sex-related complaints in the 8 states studied also involved allegations of marital status discrimination. The high incidence of complaints alleging both sex and marital status discrimination suggests that including victims of "marital status" among the protected classes of a fair housing law is perhaps the most important supplement to sex discrimination prohibitions.

Few states have directly faced the problem of discrimination in the housing market on the basis of presence of children. Explicit prohibitions

of discrimination based on age have been added with some frequency to fair housing laws in recent years, but the thrust of these enactments is generally felt to be towards protecting the elderly rather than protecting children. Moreover, only one state included in this study prohibits discrimination based on the applicant's receipt of public assistance or public housing subsidy. Yet it is generally felt that discrimination in these areas -- marital status, presence of children and source of income -- have a disproportionate impact on women as a class, and therefore, constitute a form of sex discrimination. In fact, some states have interpreted their state laws imaginatively using the "disparate impact" test to extend the reach of existing statutes prohibiting only sex discrimination.

Discrimination based on sexual preference is not addressed in any existing state statutes and, while several state agencies expressed the opinion that their legislatures should cover this form of discrimination, others felt that sexual preference discrimination is a phenomenon distinct from other forms of sex discrimination, and therefore requires new legislation. In any case, we found no state that attempted to extend the reach of existing law to cover such discrimination.

RELATIONSHIP TO FEDERAL LAW

Under Section 810 of the Federal Fair Housing Law, HUD is required to refer complaints of discrimination to state or local agencies "wherever a state or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title, ..." At present, HUD determines substantial equivalency of state or local laws without regard to whether not the law prohibits sex discrimination. In fact, the HUD regulation (24 CRF, Part 115) specifically provides that HUD may recognize a law as substantially equivalent even if a law "does not contain adequate

prohibitions with respect to one or more of the acts based on discrimination because of sex, ..."

The Federal Fair Housing Act was amended in 1974 to cover sex discrimination. HUD reissued Part 115 in 1975 but failed to correct this significant error. Since this study was conducted, at least one state has been recognized as substantially equivalent although it does not currently prohibit sex discrimination and has proposed no such amendments to its law.

PUBLICITY AND INTAKE

Many women are unaware that sex or marital status discrimination in housing is illegal. This is clearly supported in testimony received by the National Council of Negro Women during the preparation of their report, "Women and Housing", the result of workshops held in five cities under contract to HUD. Traditionally, fair housing groups publicize discrimination in housing, but most give little attention to housing. Fewer than 10 percent of the feminist groups contacted during this study were actively studying or working to eliminate discrimination in housing.

In most states, the human rights agencies are by default, the only source of public information on the content of fair housing laws as well as on the availability of the agencies to receive complaints for violations of these laws. The three most commonly employed publicity methods found in this study were: providing speakers for community and interest group meetings and workshops, printing and distributing fair housing posters, and issuing press releases to publicize significant case resolutions or public hearings. While all these methods are potentially useful, in practice they are not very effective in alerting women to their fair housing rights and remedies. For example, the agencies in this study reported that they seldom receive requests for speakers familiar with issues of sex or marital status discrimination

in housing. Furthermore, in at least two of the states, fair housing posters were printed before the law had been revised to include prohibitions on sex or marital status discrimination. Finally, the current scarcity of cases involving sex or marital status discrimination which reach public hearing or result in large monetary awards dictates that press releases will not be an effective method for publicizing sex discrimination.

Budgetary constraints on human rights agencies severely restrict the services of these agencies, particularly in the area of adequate intake. While this study recognizes that staffing priorities in state agencies cannot always reflect the needs of all the groups they serve, it appeared that training and specialized services in women's issues, particularly in housing, were provided even less frequently than for other client groups. Thus, while all 11 agencies retained bilingual staff to assist Spanish-speaking and other minority groups in filing their complaints, only three agencies had hired any staff or specialists for women's issues, and only four agencies provided any training in this area. The remaining four agencies retained no specialists in women's rights and provided no special staff training in this area. The danger women face in this situation is that jurisdiction may be refused in cases where a prima facie case might otherwise have been established, thereby depriving them of such protection as the law provides. Nor can state agencies rely on HUD to assist them in their publicity efforts. Although the Federal Fair Housing Law was amended in 1974, the Department has only very recently begun to inform the public of prohibitions against sex discrimination in housing, and even these efforts have primarily involved a somewhat haphazard distribution of fair housing posters and brochures. Indeed, many of the states in this study reported that HUD sends them outdated materials.

ADMINISTRATIVE INVESTIGATION

The resolution of complaints and the remedies obtained are heavily dependent on effective case investigation. The states included in this study have in common a considerable battery of investigative powers. The laws differ in terms of the sequence in which these powers may be exercised. For example, while all 11 states have express statutory authority to subpoena witnesses and documents for a public hearing, some cannot use this power until a public hearing is scheduled. In one case, a subpoena can be issued only after a finding of probable cause. The effect of these limitations on the conduct of a complaint is that records or witnesses can often be sought only after the contents of testimony are irrevocably lost.

Investigative methods employed by the 11 state agencies differed significantly. The initiation of investigation by one agency, for example, is the summoning of both complainant and respondent to an investigative conference. In another actual investigation is always preceded by a series of attempts to conciliate.

The type and quality of evidence obtained by the agency also bears heavily on the eventual remedy. The agencies surveyed generally concurred in identifying evidence from testing, statistical evidence from respondent business records, respondent testimony or admission and witness testimony as the most important and reliable evidence for proving particular instances of discrimination. Agencies were constrained in gathering evidence by considerations of practicality and economy, and the evidence collected for a given case was often some compromise between the ideal and the most easily available evidence.

Finally, most agencies are seriously underfunded. As a consequence, investigators have inefficiently high caseloads and the overall strategies they develop are necessarily limited. This funding limitation also affects the ability of the agencies to train both intake and investigative staff in recognizing and investigating the issues involved in sex discrimination

which are often different in context from complaints based on race or ethnic considerations.

The combination of statutory limitations and administrative decisions required by limited funding, lengthens the time between complaint filing and resolution. The main processing time for cases in this study was about three and a half months. The changes of satisfactory resolution falls off rapidly within the first week following occurrence of the discriminatory act and changes of a hopeful outcome for cases taking 6 months to process are dim.

ADMINISTRATIVE REMEDIES

The battery of administrative remedies at the disposal of state enforcement agencies are not presently being deployed in such a way that they achieve either satisfactory complaint resolution for the individual victims of sex or marital status discrimination in housing or long range deterrent effects on respondents or potential respondents in these cases. Agencies appear to place a high premium on rapid resolution -- either through informal conciliation in which the complainant is likely to secure little more than the disputed unit or through formal conciliation on terms attractive to the respondent. Monetary, damage, and pain and suffering awards are seldom made in housing cases involving sex and marital status and when awarded, the amounts are generally well below the maximums stipulated by statutes.

An agency which adopts a policy of invoking strong remedies and a willingness to take cases to public hearing may actually make future case processing easier by reducing the actual incidence of discrimination, through indicating to respondents that remedies will be applied in such a way that sex and marital status discrimination in housing is a less appealing option than adherence to fair housing law. Further, by demonstrating that it is willing to back up investigative findings -- by recourse to public

hearing if necessary -- agencies may reduce the time required for conciliation as well as gaining leverage in exacting terms of agreement favorable to the complainant. Finally, and most importantly, the victims of sex and marital status discrimination would receive compensation on a scale more closely approximating the hurt they have endured as a result of discrimination.

ALTERNATIVES TO ADMINISTRATIVE CASE PROCESSING BY STATE ENFORCEMENT AGENCIES

Although very few victims of sex and marital status discrimination in housing are likely to achieve satisfactory case resolution through state enforcement agencies, most of these victims have few viable alternatives to agency case processing. Federal laws are frequently less comprehensive in scope tha state laws and administrative relief through HUD is seldom satisfactory due to the lack of coercive powers and also because many cases will simply be deferred to agencies in "substantially equivalent" states. Cases deferred to state agencies stand an even worse chance of satisfactory resolution than cases initiated directly with the state agency, both because HUD deferral files are often considerably delayed and incomplete and also because agencies are less than enthusiastic about processing cases for which they feel they have limited responsibility and for which they receive no funding or assistance.

In addition, the victims of sex and marital status discrimination in housing often cannot secure private legal assistance except in rare cases. Very few attorneys specialize in housing discrimination based on sex or marital status under either Federal or state laws. Further, the cost of sustaining such litigation is frequently beyond the financial means of complainants, and court awarded attorney's fees are uncertain. The development of a private bar specializing in sex and marital status discrimination is needed as an alternative to case processing by state agencies or as a resource on which agencies might draw in this unfamiliar area of enforcement.

State agencies do not generally develop alternative means of combatting discrimination. Agencies which can scarcely keep abreast of their growing caseloads are often loath to diversify their enforcement efforts to include attempts to combat systemic discrimination. In the face of budgetary cuts, most agencies have elected to protect the strength of their case processing efforts to the virtual exclusion of techniques aimed at preventing discrimination. This conservatism is reinforced by legislative funding procedures which apportion state budgets according to agency caseload size which, by providing them with unreasonably small budgets, at the same time prevents them from attracting the additional cases needed to increase the budget.

Despite all these limitations, some states have developed promising alternative methods for combatting discrimination. Some conduct research into the effects of urban planning projects on civil rights generally and some of these studies include research on, for example, the effects of building practices and zoning laws on the availability of housing for female headed families. Other states participate fully in revenue sharing and A-95 review, and are prepared to litigate to choke off funds to projects unfavorably reviewed. Another state has adopted a multiple dwelling reporting rule and is currently performing computer processing on these forms to detect patterns of discrimination among operators of large dwellings. (These forms do not currently require information on the sex and marital status of occupants but could be extended to do so.)

Based on the findings of this report, the following sets of recommendations are proposed:

RECOMMENDATIONS FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

1. HUD should immediately cease granting "substantial equivalency" under Title VIII to states which do not prohibit sex discrimination in housing and home finance.

2. HUD should strongly recommend to Congress that financial incentives be provided to state agencies for processing housing discrimination cases deferred to them.

3. HUD could provide extremely useful assistance and direction to state enforcement agencies through training in recognizing and processing cases of more recently prohibited forms of discrimination. State agencies frequently process so few cases of sex and marital status discrimination in housing that they lack the experience to develop appropriate guidelines and methods of investigation for such cases. Through training and/or handbooks, HUD could enable the agencies to increase their expertise. HUD might also assist the agencies in sharing and refining some of the techniques already developed by enterprising agencies, such as model forms for conducting cases, forms for interrogatories, or reporting forms for multiple dwellings.

4. HUD should recommend to Congress that Federal fair housing legislation be extended to prohibit the full range of practices comprising sex and marital status discrimination in housing and home finance, including discrimination based on source of income, presence of children, and age.

5. There is a great need for publicizing the fact that Federal, and in some cases state fair housing laws now prohibit sex discrimination. HUD should itself publicize and where appropriate, should help states publicize these laws in such a way that the full range of prohibited practices and the available kinds of administrative relief provided under the laws are made known.

6. HUD should initiate training for attorneys in litigation involving sex and marital status discrimination in housing, either through workshops or through funding to law schools. Such training would serve to attract attorneys to this field of litigation and would ensure that informed legal assistance is available to assist complainants who wish to pursue private litigation.

7. Strong support should be given to the Edwards-Drinan legislation which extends HUD's powers and would establish a revolving fund for litigating housing cases based on sex and marital status discrimination in housing, to provide relief for all victims of these forms of discrimination regardless of their income.

RECOMMENDATIONS FOR STATE AGENCIES

1. State enforcement agencies should give equal attention to all client groups -- to victims of sex and/or marital status discrimination as well as to victims of race or ethnic discrimination. Staffing constraints may practically limit the number of cases that can be expeditiously handled, but these constraints should not be allowed to exclude or severely limit any client group.

2. Some state agencies are currently interpreting existing laws covering sex and marital status discrimination very restrictively, thus artificially limiting their client population. In addition to broader interpretations of existing laws, agencies should also seek to apply the better known Federal principles of construction, such as the "disparate impact" test.

3. State agencies should broadly publicize their state fair housing laws prohibiting sex discrimination. This should be done in such a way that the full range of prohibited practices and the available kinds of administrative relief provided under the laws are made known.

4. Where possible, state agencies should develop effective working relationships with appropriate advocacy groups, working cooperatively with them to document and publicize sex and marital status discrimination in housing. Advocacy groups could be helpful in the following areas:

   - Advocacy groups could assist in case investigations, by providing "testers" where such data would be useful. Where agencies are prevented from doing so by statutory or budgetary constraints this would be helpful.

   - Advocacy groups could function as a publicity channel -- making the provisions and administrative relief available under state laws more widely known.

   - Advocacy groups could help monitor compliance with conciliation agreements.

   - Advocacy groups could help clarify and/or enforce existing laws, for example, by bringing "pattern and practice" suits against large housing suppliers.

5. Where such powers are not already granted, state agencies should propose legislation to acquire the following investigatory powers:

- permission to post dwellings under investigation, particularly in states where injunctions or subpoenas are difficult or time consuming to obtain is crucially important to secure desired housing units for complainants.

- Agencies should obtain the power to subpoena witnesses, and take depositions, to compel respondents to complete interrogatories quickly and to comply with default provisions.

- Agencies should be able to require records of housing transactions be retained for at least 120 days.

6. Agency administrative procedures could be improved in many cases. Some of the more important areas are:

- detailed records should be kept of all cases (even those informally conciliated, and those dismissed for lack of jurisdiction) so agencies can detect patterns of complaints and identify habitual discriminators. These records should be summarized and reviewed periodically.

- Adoption of record-keeping procedures similar to those employed under the New Jersey Multiple Dwelling Reporting Rule could greatly assist agency enforcement and investigative efforts. Although the cost of initiating such a project may be substantial, computer monitoring and statistical compilations should result in later investigative and enforcement economies. All multiple dwelling reporting forms currently in use should be revised to include information on the sex and marital status of occupants.

- Uniform investigative forms with written guidelines should be developed to assist investigators in gathering evidence in housing cases involving sex and marital status discrimination. Training in the use of such forms should be provided for all involved staff.

- Complainants alleging housing discrimination based on sex and marital status discrimination should always be informed when the processing of their case may be lengthy in order that complainants who are able to do so may obtain private legal assistance before legal deadlines expire.

- Informal conciliation should be recommended only advisedly. Complainants in these cases should always be informed that they may be exchanging stronger remedies for quick resolution. Terms and outcomes of conciliation agreements should be monitored by agencies more frequently and consistently.

- Where agencies are authorized to assess damages, the full amount of damages incurred as a result of the discrimination should always be awarded to the complainant. Pain and humiliation should be presumed to have occurred in cases where an applicant is informed that she is considered an undesirable tenant, particularly where witnesses are present or where her moral character is impugned. Maximum pain and humiliation awards should be sought where warranted and they should be assumed to be warranted more often.

7. Where their laws and financing permit, state agencies should initiate pattern and practice suits against large respondents in cases where important legal issues are involved. They should also attempt to litigate in order to block funds for projects with discriminatory impact.

Chapter 1

SEX AND MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE: A COMPENDIUM OF SAMPLE CASES

1. SEX AND MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE: A COMPENDIUM OF SAMPLE CASES

State and federal administrative experience with enforcement of fair housing laws prohibiting discrimination based on sex and marital status has been limited not only in duration, but also in the number of cases resolved. As a result, there has been little administrative or judicial elucidation of these laws of the kind seen in other areas of civil rights litigation over the past two decades. This lack of interpretive elaboration is particularly critical since discrimination based on sex or marital status often raises complicated facades and may be more difficult both to identify and to prove than is, for example, discrimination based on race or national origin. Although it is generally easy to tell whether someone is female, other shared characteristics of the victims of sex and marital status discrimination are frequently complex sets of social and economic features that are, in legal contexts, inadequately recognized and less adequately understood. This is not to imply that all cases involving race discrimination are simple to recognize and to prosecute; it is only to recognize that the greater maturity and enforcement effort behind provisions outlawing race discrimination, as well as the heightened societal perception of this discrimination, make these cases better understood. Judicial decisions on race discrimination, taken together, provide a record of increasing sophistication, both in recognizing the discriminatory nature of certain acts and in recognizing the inadmissable character of certain defenses of these acts. But comparable sophistication is only now developing for cases involving sex or marital status discrimination.

Neither do we mean to imply that race discrimination and sex and marital status discrimination are in all regards distinct. All too often they occur together and the same individuals are victims of several kinds of discrimination at once. As long as sex and marital status discrimination

are poorly understood, women, and especially minority women, will continue to be barred from equal access to housing, since those who control the housing market are masters at cloaking the currently unacceptable in the guise of the as yet unidentified or misunderstood. Similarly, the National Council of Negro Women has suggested, "as the industry's knowledge of the new prohibitions on sex discrimination increases, we can expect overt bias in some quarters to be replaced by subterfuge."[1]

Because fair housing laws prohibiting sex and marital status discrimination in housing are relatively recent, and their interpretation as yet meager, this report will begin with a compendium of sample cases. We have adopted this sequence of discussion for two reasons. First, the presentation of actual cases provides a dramatic means of presenting the range of forms such discrimination can assume. Secondly, at this point in history, it seems more appropriate to appraise the adequacy of present laws according to the potential range of unfair treatment which should be covered therein, rather than to limit our definitions of sex discrimination according to the rather conservative interpretations presently available under existing statutory language.

The compendium begins with relatively straightforward prima facie[2] cases of discrimination and progresses to more subtle and covert practices. With some elaboration, these cases are drawn from the sample of complainant files in the state agencies visited.

Admission or Indication of Intent

The most easily recognized examples of sex or marital status discrimination are those which involve either an outright admission of

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1 National Council of Negro Women, Women and Housing: A Report on Sex Discrimination in Five American Cities, (Washington, 1975) p. 83.

2 A prima facie case is one in which the facts themselves raise a presumption of merit and place the responsibility of rebuttal on the respondent.

intent by the respondent, or some clear circumstantial indication of that intent. The following is an example of the latter sort of case:[1]

Case 1

> Juanita S. is a young law student on educational leave from her job as an airline ticket agent. Juanita receives a small stipend and is also anticipating payment of $20,000 from the sale of her home. She applied for an apartment in a small garden complex and was informed that in order to rent she would either need to obtain a co-signer for her lease or to provide one year's rent in advance, despite the fact that her credit references were impeccable. Investigation revealed that this requirement was imposed on female tenants without exception and was never imposed on male tenants.

The following case involves admission of discrimination on the basis of both sex and marital status:

Case 2

> Andrea J. and Barbard T. are single women in their late forties. Since they both have moderate incomes, they decided to pool their resources in order to obtain a better apartment. When the rental agent accepted their deposit she told them that although their credit and references were acceptable, single women were required to pass a housekeeping test which consisted, essentially, of refurbishing the apartment in question. The two women spent about 20 hours cleaning and painting the apartment and purchased supplies for these purposes with their own funds. When the women had completed their test, the rental agent informed them that she preferred to rent to married tenants and that in the interium, she had secured a married couple as tenants.

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1 Only fictitious names are used in these case descriptions.

The duplicity and expolitation involved in this case are its unusual features; the allegations that single women are untidy and are poor housekeepers are very commonplace indeed. Further, single women are often denied housing on the grounds that they are unable to maintain a property, carry out simple repairs or even mow the lawn. Speculations that a single woman is domestically irresponsible are often conjoined with the speculation that she is immoral. While allegations of immorality are also, at times, made against single men, this occurs with less frequency and perhaps with more toleration. Single people are also widely believed to have voracious social appetites. In addition to the expectation of noisy, destructive parties and a virtually unending succession of overnight guests, when individuals of the same sex elect to share accommodations it may be implied that their relationship is based on more than simple friendship and economy. In the great majority of almost all these cases, the assumptions are based on nothing more than stereotypical generalizations associated with the sex or marital status of the applicant.[1]

Either because they are considered less responsible, or in some sense less deserving, single tenants may also face systematic exclusion from participation in government sponsored programs and projects, as in the following case.

Case 3

> Bob H., a young security guard with good financial standing and references applied for a "sweat equity" loan. He was denied this loan on the grounds that HUD regulations restrict such loans to families.

Several cases where never married, divorced or separated women with children were denied public housing were also encounted in agency case files. At times this involved exclusion from a housing project in which the woman had previously lived with her husband. Of course, simply

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1 For further discussion, see National Council of Negro Women, "Myths Widely Current About Women in America", op. cit.,p. 110 et seq.

being married does not make a woman immune from sex or marital status discrimination in housing, as exemplified in the following case:

Case 4

> Carlos and Marie F., a yound couple with a three year old child, applied for an apartment in a large complex. The apartment cost $210 per month and with their combined monthly income of nearly $1000 the family met the requirement that rental cost net exceed 25 percent of the monthly income. They were denied the apartment however, on the grounds that Maria's income could not be counted since she might become pregnant again.

At first glance, this might seem like a reasonable response, one aimed not at discriminating against Maria, but at projecting an experienced guess about the financial stability of young couples within childbearing age. On closer scrutiny, however, a number of questions arise about the validity of the rental agent's arbitrary generalizations. For one, there is no indication that Carlos and Maria have any intentions of having more children, at least not during the term of this particular lease. They may plan to have more children, but not until their economic situation improves or they can buy a house. Alternatively, they may plan to have a child, but anticipate no change in financial well-being. After all, Maria may plan to continue work until her child is born and resume work shortly thereafter. Indeed, her pregnancy-related expenses may be entirely provided by medical and disability insurance through her employer or union.

Discrimination Resulting from Application of an Apparently Sex-Neutral Policy

Rental policies which prohibit rentals to families in which there is only one parent are fairly common. These policies are generally defended by the contention that supervision of children is more lax in a one-parent family. While a policy of not renting to single-parent families might appear to be sex-neutral, over 90 percent of all single parent families

are headed by women.[1] Even if this policy does not explicitly penalize female family heads, it is statistically certain to have a disparate impact on them. The following case is an example of discrimination against a female headed family.

Case 5

> Joan R., a working mother with children in elementary school, applied for an apartment in a large building. She was denied the apartment on the grounds that since she worked, her children would be unattended. Patiently she explained her child care arrangements to the rental agent who told her that regardless of her arrangements, he would rather leave the apartment vacant than rent it to her.

Rules which do not fully value alimony, child support, public assistance or various other forms of social insurance in assessing credit-worthiness or financial stability have a similarly unfair impact on women, since women are far more likely to rely on these and other forms of "unearned" income in seeking housing accommodations.

Even a woman who elects to remain at home with her children is not immune from allegations that she will neglect them, as in the following case.

Case 6

> Anne B. is a young mother with two children, one and three years old. Anne receives public assistance, to help her care for her children until they are old enought to attend school and she is free to seek training or employment outside the home. She placed a deposit on an apartment well within her means, and prepared

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1 According to the U. S. Bureau of the Census 1970 Current Population Series, approximately 91 percent of all children under 18 living with only one parent lived with their mothers. (U. S. Bureau of the Census, Current Population Reports, Series P-20, No. 212, Marital Status and Family Status: March 1970, p. 20).

to move in. Subsequently, the rental agent informed her that she could not move in because the owner was afraid that, since she did not work, she was a "party girl who wouldn't take care of her kids". Anne has never met the owner.

We have seen that sex alone, or marital status alone were sufficient to prevent individuals from securing the housing they wanted. When certain other characteristics such as presence of children, or presence of children combined with non-wage income are known to landlords and realtors, the applicant is in double or even triple jeopardy in her search for decent housing. And if, in addition, the applicants are poor or black or Spanish speaking or considered too young or too old or are handicapped, they may well have reason to despair of finding decent housing.[1] All these individuals should have an equal right to the housing they are seeking. In the next chapter we will consider the extent to which these rights are recognized under existing fair housing legislation.

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1 For further discussion see National Council of Negro Women, "Women with Sex-Plus Disabilities op. cit. page 83 et seq.

Chapter 2

SCOPE OF STATE STATUTES PROHIBITING SEX AND MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE

2. SCOPE OF STATE STATUTES PROHIBITING SEX AND MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE

2.1 Background

Where ten years ago only one state in the nation had any provision for guaranteeing sex equality in the housing market, today a majority of states -- 36 in all -- include sex among the prohibited bases of discrimination in their fair housing or credit laws, and 23 prohibit discrimination based on marital status as well. In 1959, Colorado was the first state to prohibit sex discrimination in housing and Pennsylvania enacted a similar provision in 1969. New Jersey's 1970 amendment made it the first state in the country to include marital status as a protected class in its fair housing law. Within the brief period of time since those initial steps were taken, however, there has been a spate of similar amendments to state fair housing laws.

All of the eleven states in our study enacted sex discrimination components of their fair housing laws within the past eight years years and eight states have added marital status provisions as well -- some in just the past year. Figure 1 is a chronology of state and federal housing legislation prohibiting sex or marital status discrimination. Figure 2 is a summary of legislative typology for all states, and Figures 3 and 4 display this information graphically.

The eleven states included in this study were selected to represent a variety of configurations of statutory coverage and administrative mechanisms, combined with an experienced agency and a substantial caseload.[1] Conditions in the states selected are generally among the most favorable in the nation for ensuring fair treatment for the victims of sex and marital status discrimination. It is discouraging that even in these states, justice for these victims is far from assured.

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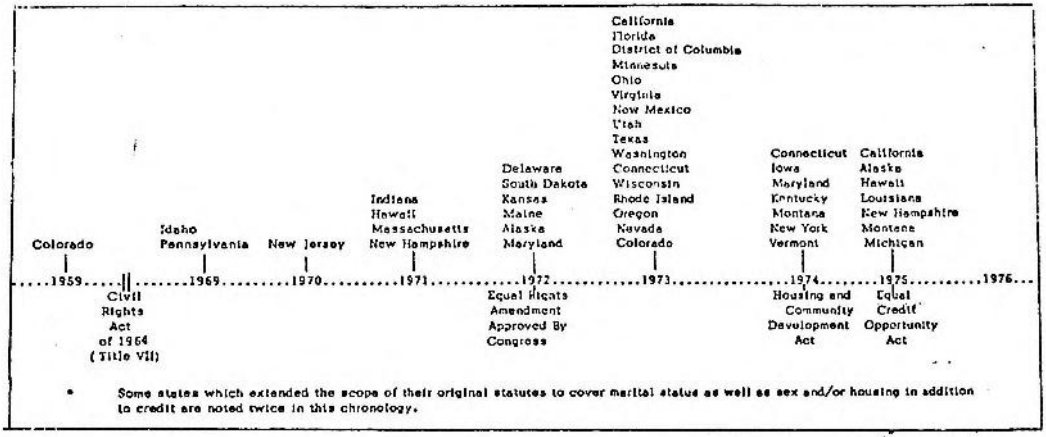
1 The site selection methodology employed in this study is described in the appendix.

Figure 1

Chronology of State and Federal Legislation
Prohibiting Sex or Marital Status
Discrimination in Housing and Home Finance



* Some states which extended the scope of their original statutes to cover marital status as well as sex and/or housing in addition to credit are noted twice in this chronology.

Figure 2

Legislative Typology Summary

Housing and Finance

Sex and Marital Status	Sex Only	Housing-Sex Only	Financing-Sex Only
Alaska	Idaho	Iowa	Hawaii
California	Kansas	Montana	
Colorado	Maine	Washington	
Connecticut	New Mexico		
Delaware	Ohio		
District of Columbia	Pennsylvania		
Maryland	South Dakota		
Massachusetts	Virginia		
Michigan			
Minnesota			
New Jersey			
New York			
Oregon			

Housing Only

Sex and Marital Status	Sex Only
New Hampshire	Indiana
	Nevada

Finance Only

Sex and Marital Status	Sex Only
Florida	Kentucky
Louisiana	Texas
Rhode Island	Utah
Vermont	
Wisconsin	

Figure 3

Typology of States Prohibiting Sex Discrimination in Housing

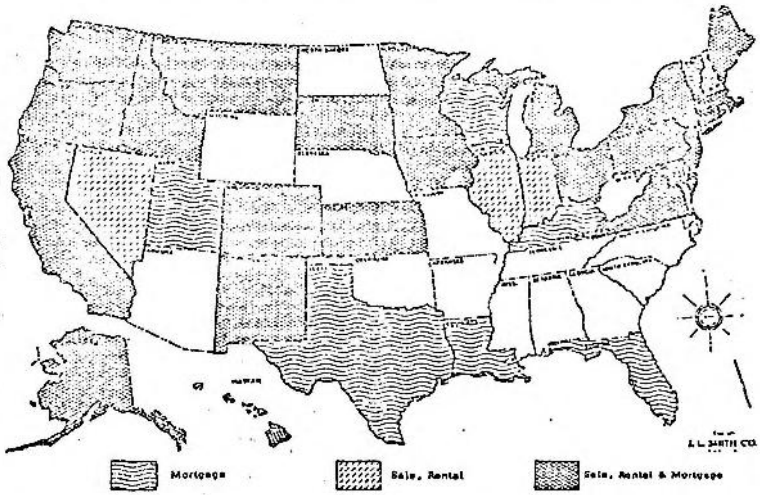
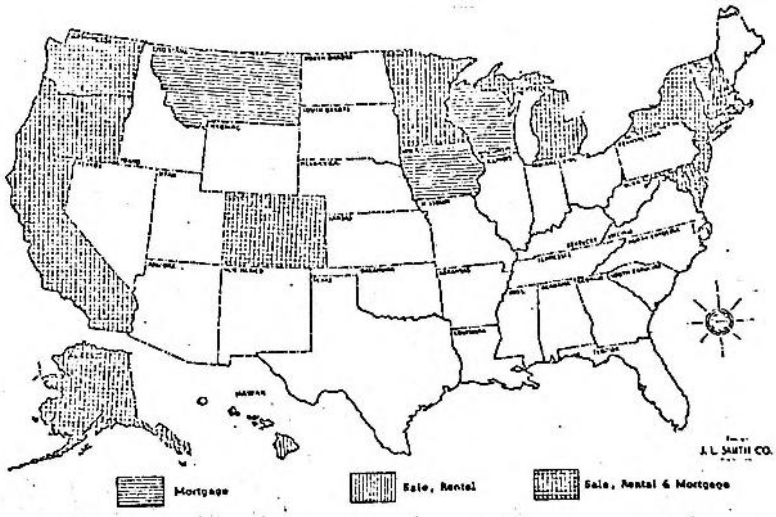


Figure 4

Typology of States Prohibiting Marital Status Discrimination in Housing



2.2 Relationship Between State and Federal Legislation

Most state laws prohibiting housing discrimination based on sex and marital status are patterned on the Federal Civil Rights Act of 1968, which originally prohibited racial discrimination in a broad range of real estate practices. With few exceptions, the state laws track the federal Act in its basic guarantee of freedom from discrimination in the sale or rental of a residential unit or undeveloped land, or in the terms, conditions, and privileges of services or facilities. Also, most contain the other prohibitions found in the federal law: advertisements which indicate discriminatory practices, failure to negotiate or transmit bona fide offers in good faith, representation that dwellings are not available when in fact they are, use of applications or inquiries which indicate a discriminatory intent, and exclusion of persons from access to multiple listing services or real estate brokers' organizations. Blockbusting and restrictive covenants are also prohibited by a number of state statutes, although these are more directly applicable in cases of race rather than cases of sex or marital status discrimination.

The federal law also covers discrimination in the financing of real estate transactions. Many state housing laws cover financing in a provision similar to that found in the federal law, which prohibits the denial of financing or the imposition of different terms and conditions on financial assistance in connection with the purchase, repair, or construction of a dwelling on the basis of sex. Most statutes also prohibit inquiries in connection with financing which indicate directly or indirectly an intention to discriminate. More recently, a number of states have adopted special provisions regarding equal credit opportunity in general, in addition to, or instead of, home financing clauses under their fair housing laws. These new credit laws, which normally cover a broad range of consumer credit transactions, as well as home financing, are often modeled after the Federal Equal Credit Opportunity Act passed by Congress in 1974. As will be discussed at more length in Section 2.7, these new credit acts

frequently enumerate an array of prohibited behavior more detailed than that in a typical home financing clause enacted as part of a state fair housing law. In addition, these credit laws may provide complainants whose fair housing disputes involve lending practices with more remedies than are available in other types of housing complaints.

2.3 The Judicial Experience Under Federal Law

Because both federal and state laws banning sex discrimination in housing are relatively recent and only sporadically enforced, there has been little judicial interpretation of these provisions to date. However, although there are important differences between the two sorts of cases, the results of federal fair housing cases involving race discrimination can be instructive in determining the kinds of proof required to sustain a sex discrimination complaint and the forms of remedial powers available to fair housing agencies and the courts.

For the most part, the Federal Fair Housing Act of 1968, known as Title VIII, has been liberally construed by the federal courts as a broad mandate for remedying discrimination and achieving equal housing opportunity. It is currently accepted that Title VIII prohibits conduct which is consciously motivated by discriminatory intentions or is explicitly discriminatory. However, it is equally important that discrimination be recognized in those instances when a seemingly neutral policy results in a "disparate impact" on the opportunities of a particular race or sex.

The "disparate impact" test of measuring discrimination was originally developed in racial discrimination cases in employment.[1] Through the application of sociological and statistical data, it enables victims of discrimination to get behind the facade of "neutral rules" by proving the discriminatory consequences, rather than the discriminatory motives, of a particular practice. Although neither state nor federal fair housing doctrine is as thoroughly developed as federal fair employment law,

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1 Griggs v. Duke Power Company, 401 U.S. 424 (1971).

a "disparate impact" theory has at times been applied in racial housing cases under Title VIII.[1] While the exact status of such an "effects" test for measuring discrimination has recently been thrown into some doubt by the U. S. Supreme Court,[2] there is as yet no clear indication that "disparate impact" is not an appropriate standard of proof under Title VIII,[3] or under state fair housing laws.

As will be illustrated at a number of points throughout this report, the availability of a "disparate impact" test is often critical in proving more subtle forms of sex discrimination -- such as discrimination against single-parent families -- particularly since federal law and many state fair housing laws do not contain provisions expressly prohibiting discrimination based on marital status. Thus, it is interesting to note that one[4] of the first cases under Title VIII's new sex discrimination provision involved a refusal to rent to a divorced woman and her son because there was no man in the household. Although the critical factors might be described as marital status or single parenthood, rather than sex, a consent decress was issued by which the complainant was permitted to live rent-free for a period of

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1 See for example, U.S. v City of Black Jack, P.H.E.O.H., Section 13,693 (8th Cir. 1974) and Kennedy Park Homes v City of Lackawanna, 318 F. Supp. 669 (W.D. N.Y. 1970), affirmed 436 P. 2d 108, (2d Circuit 1970), certiorari denied, 401 U.S. 1010 (1971).

2 See for example, Washington v. Davis, 12 FEP Cases 1415 (June 7, 1976), upholding an employment test against a Federal constitutional challenge, despite its disparate impact on minority police applicants.

3 In Residents' Advisory Board et al. v. Frank L. Rizzo, Civ No. 71-1575 (E.D. Pa. Nov. 5, 1976), the Court expressly rejected Washington v. Davis as a standard for Title VIII. But see, Village of Arlington Heights v. Metropolitan Housing Development Corp., 45 U.S.L.W. 4073 (Jan. 11, 1977), remanded by the U. S. Supreme Court in light of the Washington case.

4 Voloshen v. Jordan, et al., No. C74-788 (N.D. Ohio, filed Aug. 30, 1974), reported in P.H.E.O.H. Rptr. Bulletin Section 9.2.

time, have her security deposit returned, and be paid an additional amount in damages.[1]

In addition to not having to prove a discriminatory motive, Title VIII does not require that discrimination based on race or sex be shown to the sole factor involved in a less than even-handed housing transaction. So long as the prohibited behavior plays a part in an unfavorable transaction, a Title VIII complaint can be maintained.[2] This interpretation has been followed almost across-the-board in the enforcement of state fair housing laws.

2.4 Primary Coverage of State Statutes: Sex and Marital Status

Of the eleven states included in the present study, California, Connecticut, Delaware, Massachusetts, Michigan, New Jersey, New York, and Washington prohibit bot sex and marital status discrimination in home sales, rentals and finance; Kansas, Ohio and Pennsylvania prohibt housing and home finance discrimination based on sex, and Ohio has a separate credit law prohibiting marital status discrimination in mortage lending. Figure 5 summarizes the scope of primary and supplementary coverage for state fair housing and credit laws prohibiting sex or marital status discrimination for these eleven states. It is important to point our that in states which prohibit both sex and marital status discrimination, nearly 77 percent of all complaints received involve allegations of marital status

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1 The U. S. Justice Department docket currently includes a number of pending actions, as well as negotiated consent decrees, some of which involve issues of "disparate impact" policies. See e.g., (U.S. v Mueller, et. al. (N.D. Ill., memorandum opinion filed Dec. 20, 1976) and U. S. v. Prudential Fed. S & L Assoc., et al. (D. Utah, filed April 15, 1976), involving refusal to count alimony and child support as income; U. S. v. Samson Mgt. Corp. et al. (N.D.ga., consent decree and oral ruling, Oct. 25, 1975) U.S. v. Builder's Institute of Westchester and Putnam Counties (S.D.N.Y., parital consent decree Sept. 24, 1976), and U. S. v. T & L Gardens (D.N.J., consent decree Nov. 16, 1976), involving refusal to rent to single and working mothers.

2 See for example, Smith v. Sol Adler Realty Co., 436 F.2d 344 (7th Cir. 1971).

Figure 5

State Housing Laws Prohibiting Sex and/or Marital Status Discrimination

Primary Coverage

	California	Connecticut	Delaware	Kansas	Massa-chusetts	Michigan	New Jersey	New York	Ohio	Pennsylvania	Washington
Sex: Rental/Sale	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Finance	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Marital Status: Rental/Sale	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes
Finance	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Yes

Supplementary Coverage

Presence of Children			Rental Only	Housing Rental Only	Housing and Credit (Age Used)	Rental Only					
Source of Income			Rental Only					Credit Only	Credit Only		Credit Only
Age		Housing (Excludes Minors) / Credit (Over 18)									
Sexual Preference			By Agency Interpreta-tion								

discrimination. In states which do not prohibit marital status discrimination, such cases can be accepted only if the policy involved is recognized as having a disproportionate impact one one sex or is found to be a pretext for sex discrimination.

While state laws themselves exhibit considerable variety in terms of the primary categories explicitly covered, agency and court interpretations of statutory coverage play an equally significant role in determining the actual reach of state civil rights laws. Within the category of sex discrimination, for example, there are few differences in statutory definition of coverage among the state laws we studied, yet agency interpretations of the general ban against sex discrimination in housing is widely varied. Results of our study showed that a state agency strongly committed to sex equality in housing can use imaginative interpretations to extend even a limited state law to encompass a wide variety of situations involving discrimination. By contrast, even a state law with broader statutory coverage may fail to reach as far if implemented by a conservative agency with a cautious approach to interpretation and implementation of the law.

The most critical variation found in the field was whether a particular state utilizes a "disparate impact" theory of sex discrimination, rather than always requiring explicitly sex-based treatment. One state agency, for example, although limited in its statutory mandate to prohibiting discrimination based on sex, has adopted an interpretive policy to accept complaints stemming from a refusal to rent to single-parent families. While some states would refrain from accepting such complaints unless expressly mandated by the legislature to prevent marital status discrimination, this agency has wisely recognized that such policies have an extremely disproportionate impact on women as a class, and therefore, constitute a form of sex discrimination.

Other common real estate practices which fall far more heavily on women than on men, and could thus be considered sex discrimination,

involve refusal to consider income from such sources as spousal maintenance, child support and public assistance. Popular stereotypes concerning the unreliability of such income or the character of persons who receive it often lead to an automatic refusal to rent, sell, or lend money to persons relying on support of a former spouse or on Aid to Dependent Children -- nearly all of whom happen to be women. Despite the severely disproportionate impact upon women of such practices, it does not appear that any of the states in our study have as yet taken a firm position on their illegality under sex discrimination laws. A proscription against marital status discrimination would attack these practices more directly. However, because of the close association between type of income received, marital status, and sex, states whose laws do not extend beyond sex discrimination could use the "disparate impact" test to begin to alleviate this common but subtle form of sex discrimination. Hopefully, the "disparate impact" test will become more widely used as expertise in the field develops.

The effect of variation among agencies in interpreting the scope of sex discrimination provisions can be illustrated by the probable reception various complainants in the compendium of sample cases would be likely to receive in different agencies whose laws prohibit sex, but not marital status discrimination. Because of the prima facie nature of the discrimination in Case 1, Juanita S. should experience no difficulty in pursuing her case, so long as the agency carries out an initial investigation revealing the express nature of the sex differential. Other complainants will not have such an easy time, however. In Case 5, for example, Joan R. met with the common practice of refusal to rent based on the combined factors of being divorced and having children. Neither of these bases seems to fall squarely into the category of sex discrimination, as long as the landlord would refuse to rent to single male parents as well. In an agency unsophisticated in the various housing problems faced by women, this

complaint would probably be screened out immediately, or dismissed early for lack of probable cause, on the grounds that the practice involved discrimination because of marital status -- not forbidden under state law -- rather than discrimination because of sex. However, in a more sophisitcated agency, discrimination against single parent families would be considered sex discrimination, based on the fact that the overwhelming majority of single parent families are headed by women. Thus, Case 5 would very likely receive significantly different treatment, depending on the jurisdiction in which Joan R. lived. Similarly, Case 6 might well be screened out or less fully investigated, depending on the relevant agency's sophistication in recognizing the disparate and unfair impact on women such as Anne B. of the "welfare drone" stereotype.

Even in a jurisdiction which liberally applies a "disparate impact" theory of sex discrimination, however, some of these complainants would experience difficulty in securing legal redress. In Case 2, for example, where marital status was the proferred reason for refusal to rent, Andrea J. and Barbara T. might be barred from vindicating their claim unless it can be shown that single males are accepted as tenants under similar circumstances. Statistics, alone, may not be sufficient to show a "disparate impact" on the two women, in the absence of any other sex differential in the realtor's policies. Bob H. in Case 3 has even less chance of legal protection under a purely "sex discrimination" rationale, since the HUD regulation is not only sex neutral on its face, but probably does not result in a disparate impact on single men under any other statistical rationale either.

Case 4 is in many ways the most difficult to assess. Clearly, Carlos and Maria F. are being held to a different economic standard because Maria is a woman of childbearing age, and thus her income is presumed to be unreliable.[1] In many ways, this is the clearest example

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1 For a discussion of the stability of a women's income and the likelihood of income decline see KETRON's Women in the Mortgage Market (Washington, 1976).

of pure sex discrimination of all the cases in the Compendium, since childbearing capacity is uniquely and inherently related to Maria's sex. Such policies, however, are among the most unrecognized and unremedied forms of discrimination against women today. In December, 1976, the U. S. Supreme Court held that an employer's differential treatment of pregnancy in terms of employee disability benefits did not constitute gender-based discrimination.[1]

The full impact of this decision on other discriminatory policies of employers -- as well as related policies of others subject to sex discrimination laws, such as realtors -- remains to be seen, though the spectre has certainly been raised that a variety of unfair policies stemming from a woman's ability or choice to bear children will go unchallenged. One encouraging sign, however, is that a number of state human rights agencies, responsible for enforcing equal employment and housing laws, have already repudiated the U. S. Supreme Court's reasoning for purposes of enforcing their own state civil rights laws. Two of these states, Pennsylvania and Michigan, are among those studied in this report.[2] Hopefully, this state-level trend represents what will become a nationwide commitment to eliminating such practices under sex discrimination laws. Of course, for the time being, the success of Carlos and Maria F. may well depend on the farsightedness and courage of the civil rights agency in their jurisdiction to buck both Federal law setbacks in this area and the negative pressures from industries which have traditionally relied on pregnancy and maternity factors in their policymaking.

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1 General Electric Co. v Gilbert, 13 FEP Cases 1657 (Sup. Court December 7, 1976).

2 Michigan Dept. of Civil Rights ex rel. Jones, Butler & Peake v. Michigan Dept. of Civil Service, Nos. 18726-S2, 20944-S2, 23631-S2 (Michigan Civil Rights Commission, Jan 25, 1977); Anderson, et al. v. Upper Bucks County Area Vocational Technical School, No. 727 C.D. 1976 (Pa. Commonwealth Court, May 5, 1977).

States which have both marital status and sex discrimination provisions in their fair housing laws clearly have more leeway in handling several of the sample complaints found in the Compendium. It it interesting to note that in those states studied which prohibit both sex and marital status discrimination, nearly 77 percent of all sex-related complaints involve allegations of marital status discrimination.

While there is still a paucity of thoughtful agency or judicial interpretation as to what constitutes marital status discrimination, at least one reported opinion has defined this form of discrimination to proscribe a refusal to rent to two single women living together, where the landlord would have rented to a married couple.[1] Such an interpretation would certainly protect the two women in Case 2. Similarly, states with marital status provisions can invalidate landlord policies which stem from stereotypes about the financial unreliability or social immorality of single tenants.[2] For example, a Delaware Attorney General's opinion takes the position that a landlord's requirement that single tenants agree not to have overnight guests of the opposite sex violates that state's fair housing law.

Another important problem covered by marital status discrimination is the common practice by public housing authorities, including HUD, of reserving public housing units or other forms of housing programs and subsidies for families. New York's Division of Human Rights has taken the position that such an eligibility criterion constitutes marital status discrimination in violation of the Human Rights Act, and apparently has dissuaded state housing authorities from this practice. The policies discussed in Case 3 would fall under such a provision.

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1 Zahorian v. Russel Fitt Real Estate Agency, 62 New Jersey 399, 301 A-2D 754 (1973).

2 Connecticut's Marital Status provision expressly denies protection to unmarried couples, however.

Finally, the complainants in Cases 5 and 6 would fare better in "marital status" jurisdictions. As shown above, sex discrimination provisions in fair housing laws can be interpreted to alleviate some of the burden upon women with children. Marital status discrimination provisions go farther, however, by directly addressing the problem of landlords who rent to two-parent families but not to single persons with children.

2.5 Supplementary Coverage: Presence of Children, Age, Source of Income and Sexual Preference

While the inclusion of "marital status" among the protected classes of a fair housing law is certainly the most important supplement to sex discrmination prohibitions, other forms of supplementary statutory coverage may also be important to reach all of the various forms in which women's equal housing opportunity may be thwarted. Of particular importance are express statutory protections against discrimination based on presence of children, age, source of income, and sexual preference. At present, nearly half of the states included in our study -- California, Kansas, New York, Pennsylvania and Washington -- have none of these supplementary provisions, and only Massachusetts and Delaware have more than one supplementary provision.

Few states have directly faced the problem of discrimination on the basis of presence of children in the housing market. Massachusetts is the only one to include presence of children expressly as a protected category in its fair housing law. Explicit prohibitions of discrimination based on age have been added with some frequency to fair housing laws in recent years, but the thrust of these enactments is generally felt to be towards protection of the elderly, not children. Of the states in our sample, only Michigan's Civil Rights Commission interprets their 'age' provision to forbid refusal to rent because of the presence of children in the household. In fact, Connecticut's age provision specifically excepts children under fourteen from coverage. The other two state agencies studied which have age discrimination provisions in their fair housing laws -- New Jersey and Delaware -- have not needed to decide whether refusal to rent to children

constitutes age discrimination, since both states have statutes outside the civil rights acts which make it unlawful to refuse to rent to a family with children.[1] However, for other states which presently have, or in the future may acquire, age discrimination provisions in their fair housing laws, Michigan's use of a similar clause offers an inventive way to combat discrimination against families with children.

At this time, Massachusetts is the only state studied which expressly prohibits discrimination based on the applicant's receipt of public assistance or public housing subsidy. One other state, Maine, also prohibits discrimination based on receipt of public assistance. These provisions would clearly help Anne B., the complainant in Case 6.

Several state agencies expressed the feeling that their state legislatures should adopt prosciptions against discrimination on the basis of sexual preference, as such practices present a frequently occurring problem which the agencies find themselves unable to solve. Delaware's agency has taken a public stand on the issue, holding that discrimination on the basis of sexual preference is sex discrimination. The opinion of most other agencies interviewed, however, is that sexual preference discrimination is a distinct phenomenon which requires new legislation. No state presently has statutory provisions expressly preventing housing discrimination based on sexual preference.

2.6 Inroads on Coverage: Unit Exemptions and Statutes of Limitation

State fair housing laws vary only slightly from each other and from Title VIII in the types of market behavior prohibited. As already described in Section 2.2 of this report, typical statutes prohibit discrimination by landlords, sellers and realtors in selection of applicants, as well as in

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1 For further discussion of these statutes, see Section 2.6, Other State Laws Affecting Equal Housing Opportunity, below.

the terms and conditions of any transaction involving developed or undeveloped real estate destined for residential use.[1] Use of advertising or application forms suggesting an intent to discriminate is often prohibited, as are failures by realtors to transmit bona fide offers for discriminatory reasons and the common practice of "steering" protected classes to one area or building.

Greater variation exists in the legislative designations of housing units to be covered or exempted by the law, however. Most of the state laws in this study (Connecticut, Massachusetts, Michigan, New Jersey, New York and Pennsylvania) contain almost identical exemptions from coverage for dwellings of two units where the owner or member of the owner's family occupies one of the units, as well as for rental of rooms within an owner-occupied housing accommodation. Although less restrictive than parallel provisions in Delaware and Kansas which mirror Federal law by extending the exemption to owner-occupied buildings up to four units, even two-unit exemptions can significantly limit housing opportunities for protected classes in urban areas where older two-unit homes form a large segment of the rental market. Most severe in its potential impact is the exemption in California law for all buildings of four or less units, regardless of owner occupancy, which may include over half of all available dwellings.[2] The laws of Washington and Ohio have the broadest sweep, with no exemptions for small buildings at all.

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1 Some state statutes, such as New York's apply solely to housing accommodations, not real estate in general. The term "housing accommodations" is typically defined as "any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings." New York Executive Law, Sec. 292 (10) (McKinney 1972). Others such as New Jersey, include commercial property within the scope of fair housing law coverage, in addition to residential property.

2 Based on figures obtained from U. S. Department of Commerce, 1970 Census of Housing (Washington, 1972)

Other exemptions from coverage found in the various state laws include California's exemption for sale of private single-family homes not conducted through a realtor, Michigan's exemption for non-owner occupied buildings of two or less units where the sale or rental is not publically advertised or listed, and rental of rooms in religious organizations or private clubs whose rental to members only does not form the primary purpose of the organization -- a provision found in Kansas and Ohio. An exception is also frequently made for housing accommodations where all rooms or units are reserved for members of one sex only (Connecticut, New Jersey, New York). Occasionally, the latter type of exemption is limited to college dormitories, as in Washington and California.

In addition to exemptions of certain kinds of units, the fair housing laws in all eleven states studied contained statutes of limitation which restrict the filing of discrimination complaints to a set period of time after the date the alleged discrimination occurred. After a specified number of calendar days, agencies may no longer accept jurisdiction over a complaint. The statutes of limitation for filing fair housing complaints in the eleven states included in the present study are shown below.

State	Statute of Limitations
California	60 days
Connecticut	180 days
Delaware	45 days
Kansas	180 days
Massachusetts	180 days
Michigan	90 days
New Jersey	180 days
New York	365 days
Ohio	180 days
Pennsylvania	90 days
Washington	180 days

Statutes of limitation were shortest in Delaware (45 days) and in California (60 days). Not surprisingly, agency staff in these states felt that the time for filing should be lengthened since complainants may delay filing in an initial attempt to resolve their complaints privately or simply through unfamiliarity with state laws or filing procedures.

Some staff in agencies with longer statutes of limitations felt that the period of timely filing should be shorter, in recognition of the difficulty in investigating cases very long after they occur. But while investigatory expediency is an important consideration, there are other means for encouraging prompt filing than shortened statutes of limitations. In particular, victims of little publicized forms of discrimination should not be penalized for their lack of information.[1]

2.7 Other State Laws Affecting Equal Housing Opportunity

The scope and enforcement of fair housing laws for women cannot be comprehensively analyzed without considering other state laws which may bear on the same or related issues. At times, other state statutes or common law doctrines may serve to enhance equal opportunity for women. Often, however, other sources of state law or policy may serve either directly or indirectly to limit opportunities which are ostensibly opened by fair housing provisions. It is important that the operation of these other laws is understood by potential parties to a housing transaction -- consumers, real estate sellers and managers, lawyers, advocacy groups, and administrative agencies -- since their impact may be critical to judging the ultimate legality of a given transaction.

2.7.1 Complementary Laws

The most common state law which may complement both the jurisdictional scope and the remedies of general fair housing provisions relates

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1 Publicity, or lack of publicity, concerning state laws is discussed more fully in the next chapter.

to home finance. Most states which prohibit sex discrimination in housing also have equal credit opportunity laws. Even more of these provisions will probably be enacted in the near future, in response to the comprehensive Federal Equal Opportunity Act which became effective in late 1975.

Many of these equal credit provisions simply track a state's fair housing provisions, and thus offer in their overlapping of home financing no additional scope of coverage or range of enforcement mechanisms or remedies. In a few states, however, the equal credit provisions provide women who have suffered discrimination in the home mortgage market with additional legal protection not available through the general fair housing laws. Thus, a number of states prohibit discrimination in credit based on either sex or marital status, while protecting only against sex discrimination in their general housing provisions. Similarly, many of the new credit provisions are more explicit in spelling out the array of prohibited acts than their housing counterparts, and many also provide additional remedies to a complainant.

In Ohio, for example, the special provisions regarding discriminatory practices by credit institutions cover both sex and marital status discrimination, while housing transactions in general are protected only with regard to sex. The credit provisions also specify a number of common forms of discriminatory treatment faced by women in the credit market, such as requiring co-signors, discounting or disregarding certain sources of income, failing to inform an applicant of the reason for denial, refusing a separate account or separate credit records and denying a woman the right to get credit in her own name. Moreover, the credit statute specifies the availability of attorney's fees and court costs, for complainants who elect to file a private civil action, as well as the availability of both actual and punitive damages of not less than $100. By contrast, the private right of action set out in the housing provisions does not expressly provide for attorneys fees, punitive damages, or any minimum amount of actual damages. Similarly, Massachusetts permits direct access to court in credit cases, but requires that agency remedies be exhausted first for other general

housing complaints. Connecticut also authorizes private actions in credit but not in housing. In Michigan, the fair credit provisions specifically provide for criminal, as well as civil remedies, allowing for a misdemeanor fine of up to $1000 for discrimination in the extension of credit based on the applicant's sex or marital status. No parallel remedy is available in Michigan's fair housing section.

In addition to equal credit opportunity laws, a few states have enacted special provisions prohibiting sex discrimination in the extension of insurance. These provisions may indirectly enhance housing opportunity for women, particularly for those who wish to purchase a home, since the availability and cost of various forms of insurance -- for example, mortgage, life, fire and theft insurance, and title insurance -- may affect one's ability to successfully complete a desired home purchase. Of the states studied for this report, Massachusetts prohibits sex discrimination in insurance, while New York, Pennsylvania, and Washington prohibit discrimination in insurance based on either sex or marital status.

The scope of a state's fair housing law jurisdiction may also be expanded by other state or local laws relating to housing transactions concerning one particular class of women and their families. For example, in both Delaware and New Jersey, protection against discrimination in rentals based on presence of children is found not in the fair housing laws themselves, but elsewhere in the state code. In New Jersey, protection of children is located in the Criminal Code, while in Delaware, it is part of the Landlord-Tenant Code. In California, residents of San Francisco are protected by local ordinances against discrimination in housing based on presence of children or sexual preference.

Another provision common to three of the states studied, which may generally enhance the equal housing opportunity of women and provide them with additional remedies, is a state equal rights amendment. Massachusetts, Pennsylvania, and Washington have all adopted ERAs to their state constitutions. The ratification of an ERA represents a strong commitment on the part of the state to a goal of sex equality for its citizens,

and this mandate should filter into all areas of public policy, including fair housing practices. More directly, an ERA provides a private constitutional cause of action, beyond the jurisdiction of the fair housing law, in those cases where "state action" is substantially involved in the discriminatory housing transaction. Thus, public housing applicants and tenants, as well as persons applying for or receiving some form of governmental housing subsidy, should be able to avail themselves of the ERA's absolute protection against sex discrimination.

One final variety of complementary law found in a number of states gives additional remedial powers when a fair housing violation has occurred. Usually enforced by the state Real Estate Commission, these laws provide sanctions against realtors who have practiced a prohibited form of discrimination. Provisions in Massachusetts, Ohio and Pennsylvania law specifically include discriminatory conduct as a grounds for limiting or revoking a real estate license. In Delaware, Kansas and New York, the license revocation provisions do not speak specifically in terms of "discrimination", but do allow for revocations when a realtor has committed some form of wrongdoing, such as misrepresentation. These provisions could be interpreted to encompass prohibited discrimination.

2.7.2 Laws Restricting Equal Opportunity

While many of the state laws complement equal opportunity goals, as illustrated above, there are still laws on the books in many states which tend to restrict equal opportunity for women and thereby conflict with fair housing laws. The most common forms of these restrictive laws arise from traditional state marital property doctrines. These vestiges of the common law often cause widespead confusion about their applicability and impact not only among the public at large, but also within both the legal and real estate communities. As a result, such laws frequently present barriers to equal housing opportunities for women, not because of their inherent restrictiveness, but because of either the conscious or unconscious misapplication of their principles.

The most common impact of such misunderstandings is the limitation of the ability of married and separated women to purchase or lease property in their own names or to transfer or otherwise deal in real estate. In fact, absolute prohibitions against married women holding property in their own names, commonly found in the past, no longer exist in any jurisdiction. Beginning around the turn of the century, states began adopting Married Women's Property Acts, which granted a legal status to married women commensurate in most aspects with that of single women, including the right to own property.

However, two "common law" marital property doctrines still existing in several jurisdictions -- the concepts of "tenancy by the entireties" and "dower" -- do, to a certain extent, restrict the use and sale of marital property, and often result in the mistaken notion that married and separated women may not own property in their own names.

In over 20 jurisdictions, a husband and wife can own property jointly in a special form known as a "tenancy by the entirety." Of the states studied here, Delaware, Massachusetts, Michigan, New Jersey, New York and Pennsylvania recognize this form of ownership. "Entireties" ownership, restricted to married persons, derives from the common law notion of marriage as an indivisible "unity" of two persons, and means that each spouse has an undivided, one-half interest.

"Entireties" ownership is intended to protect marital property by insulating it from the claims of separate creditors of one spouse or from the mismanagement by either spouse operating alone. Such property may may not be conveyed without the joint signature of both spouses, nor, in most cases, may it be reached to satisfy the claims of separate creditors. Further, in almost all jurisdictions, entireties property is jointly managed and controlled by husband and wife.[1] Because of these protections, tenancy

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1 Only Massachusetts, Michigan and North Carolina retain the common law rule giving husbands exclusive rights to manage entireties property.

by the entireties is a commonly used form of ownership in those jurisdictions recognizing it. Indeed, in many states, there is a legal presumption that property jointly owned by married persons is owned by the entireties, if the deed specifies no other form of ownership. However, in no state are married persons required to own property in this manner.[1]

Married women or men owning property by the entireties with their spouses do in fact face limitations on their ability to convey property, since any such transaction requires consent of each spouse. In addition, they may not individually force a sale or partition of such property during the marriage. However, prevalent use of this form of ownership has resulted in the mistaken belief that married women may only own property by the entireties with their husband. Thus, an all too common occurrence is the refusal to convey property or lend money to a married woman without the signature of her husband to the transactions, even when she may be living separately or is desiring to transact business on her own.

The confusion is exacerbated in several states such as Michigan, New Jersey, Pennsylvania and Ohio, where common law rights of "dower" still exist. "Dower" rights can in some instances result in the legal requirement of one spouse's participation in a transaction involving the other's separate property. In these states, a spouse has a potential to inherit a set percentage of all real property which the other spouse has owned at any time during their marriage. To protect this potential inheritance right, a spouse cannot mortgage or transfer even his or her own separate real estate without the consent of the other spouse. Thus, the incentive for separate ownership is diminished. Realtors may also use this law incorrectly to demand that both spouses sign a deed or mortgage,

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1 "Community property" states utilize a completely distinct system of marital property, in which generally speaking, each spouse automatically acquires on going rights to the separate property of the other, acquired during the marriage. The concept of "tenancy by the entireties" is inapplicable in "community property" states. Of states studied for this report, California and Washington are "community property" jurisdictions.

if only one desires to do so. In fact, separate ownership of real estate by spouses is entirely legal in "dower" states. Indeed, a spouse need only sign a waiver of his or her potential inheritance rights in order for the other spouse to purchase separate real estate without any restrictions whatsoever in states with "dower" laws. While this is the obvious solution for a separated woman seeking to resettle in her own home, for example, many realtors continue to balk at separate ownership by women under these circumstances, using these laws as an excuse. At the very least these laws tend to bring marital status into consideration in housing and credit transactions, allowing for the incidental application of stereotypical assumptions about that status by realtors and creditors.

A secondary area of state law which may serve to inhibit equal housing opportunity are criminal law provisions against fornication. Although most states no longer have such provisions on the books, or no longer enforce existing provisions, fornication laws do have an impact on the rights of unmarried couples to live together in some jurisdictions. The Massachusetts agency processes such cases, despite the fact that a provision in the crimes code against fornication is still on the books. The New Jersey Commission, on the other hand, believes that the state's criminal prohibition against fornication prevents the Commission from pursuing complaints from unmarried couples under its marital status provision. Neither is there a consensus among states with no fornication laws. For example, the California agency expressed uncertainty over the fair housing law's application to unmarried couples, despite the absence of any directly conflicting state criminal law.

2.8 General Recommendations

Legislative action expressly prohibiting discrimination on the basis of sex, marital status, presence of children and source of income is an essential first step toward the goal of creating a fully fair and open housing market. Until federal as well as state laws contain specific provisions to

deal with each of these categories, the goal of equality in housing will continue to suffer from incomplete and often ineffective enforcement.

Legislative amendment of marital status to the list of protected classifications in both state and Federal law is desirable to overcome sex-stereotypical presumptions about persons of a particular marital status. Moreover, analysis of the operation of state laws in our selected states shows that explicit prohibition of marital status is a critical element in the struggle for gender equality in housing, particularly with regard to protection of the female-headed family. While an aggressive agency can use imaginative interpretation to extend a law covering only sex to include a wide range of discriminatory practices, such techniques are at best a roundabout way of attacking these problems. For one thing, creative interpretations of legal provisions invite litigation, and therefore are frequently of little use to a complainant who needs not a lawsuit, but a living unit. Similarly, far reaching agency interpretations are always subject to reversal or limitation from hostile courts. "Disparate impact" theory, for example, is by no means unalterably established in fair housing case law. In addition, even an agency actively committed to such an interpretation will be severely handicapped by the fact that the general public will remain unaware that the practices in question are unlawful. A law specifically prohibiting discriminatory practices has far more deterrent force than creative legal interpretation by an enforcement agency.

Finally, agencies already overextended in their workloads are unlikely to concentrate scarce energy and resources on developing novel and possibly chancy interpretations of sex discrimination in housing. By contrast, express proscription of discrimination in housing because of marital status focuses directly on the single parent family without the necessity of sophisticated interpretation. Marital status provisions can provide a check on possibly hostile courts, a needed nudge to less aggressive civil rights commissions, and clear authority and legitimacy to agencies for the swift and efficient resolution of complaints. In some states, "morality

issues" prevent prohibition of marital status discrimination. An alternative solution would be a legal prohibition on discrimination against female heads of families.

Similar arguments obtain in the case of express legislation against discrimination based on source of income or presence of children. Refusal to even consider applications of persons receiving welfare or spousal support or automatic discounting of such income unquestionably imposes severe hardships upon vast numbers of women in the housing market, and can be seen as a form of sex discrimination or marital status discrimination under the "disparate impact" test. Similarly, discrimination because of presence of children affects women in the most direct manner. However, until such discrimination is clearly and unequivocably made unlawful, effective agency enforcement will be crippled by lack of public awareness of the illegality of such practices, endless litigation where complaints are brought and lack of needed energy and impetus to tackle difficult and untested pathways.

A second needed step is amendment of the standards for determining HUD deferral of housing complaints to the states. At present, HUD determines "substantial equivalency" of state fair housing laws for purposes of complaint deferral without regard to whether the state law prohibits sex discrimination. Clearly, the criteria for "substantial equivalency" should be changed to include a state law provision against sex discrimination, or the wholesale granting of "substantial equivalency" should be stopped. The present policy of ignoring sex discrimination is probably in direct conflict with the relevant section of Title VIII, which provides for deferral "wherever a state or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter...", (42 U.S.C.A. Section 3610 (c)). At the very least, such a policy suggests a lack of concern on the part of HUD for efforts to eradicate gender-based discrimination. A requirement of adequate provision against sex discrimination in the law of any state being considered for substantial equivalency

status is a critical first step which must be taken by HUD in order to lend weight and credibility to its efforts to encourage the active and effective enforcement of sex equality in housing.

Fair housing laws should not be viewed in a vacuum, either by state agencies or by advocacy groups and the real estate and lending industries. Complementary laws such as real estate licensing provisions are potentially powerful weapons to promote change, but have almost never been used effectively to deter unfair practices. Advocacy groups and state agencies could utilize these avenues far more effectively by applying consistent pressure on licensing boards to implement fair housing policy. Similarly, state Equal Rights Amendments can be used by private litigators where governmental action is involved, as for instance in public housing or rent subsidies. Fair housing agencies should significantly broaden their reach through educational efforts among their own personnel and in the community to publicize and explain the availability of these alternative courses of action.

Similarly, state agencies might significantly affect the discriminatory treatment routinely afforded to married women attempting to deal independently in the housing market by attempting to educate the real estate community as to the proper role of marital property laws in their jurisdictions. The director of one state included in the present study retains his realtors license and also instructs classes of realtors. Another agency provides realtors classes with a memorandum from the State Attorney General detailing prohibited practices. Such efforts should be supplemented by increased attention to these laws within the agency itself, so that personnel will recognize discriminatory treatment when it occurs, and make accurate distinctions between legitimate requirements of spousal involvement in property transactions, and those situations where marital property laws are being misapplied to unlawfully discriminate against women.

Specific recommendations are summarized below:

Recommendations to the Department of Housing and Urban Development

- Federal fair housing legislation should be extended to prohibit the full range of practices comprised in sex and marital status discrimination in housing and home finance, including discrimination based on source of income, presence of children, age, and sexual preference.

- 'Substantial equivalency' under Title VIII should be withheld from or qualified in states lacking prohibitions on sex and marital status discrimination in housing and home finance.

- Litigation to clarify, elaborate or extend the interpretation of existing legislation should be initiated and supported.

Recommendations to Agencies Charged with Enforcing State Fair Housing Laws

- State fair housing legislation should prohibit both sex and marital status discrimination, and optimally should also prohibit discrimination based on source of income, presence of children, age and sexual preference. Passage of an equal rights amendment offers victims of sex and marital status discrimination additional protection.

- State agencies should interpret existing state laws prohibiting sex and marital status discrimination less restrictively, and should seek to apply the better known federal principles of construction such as the "disparate impact" test more frequently. Intake workers should be trained to recognize jurisdiction in the more subtle cases of sex and marital status discrimination.

- Efforts should be made to explain marital property laws and other misunderstood areas of legislation to the housing community, and should take full advantage of complementary laws such as real estate licensing practices.

- Litigation to clarify, elaborate or extend the interpretation of existing legislation should be initiated and supported.

- Conflicting state laws, such as marital property or fornication provisions, which restrict or impede fair housing should be tested in court rather than just passively followed.

Recommendations to Advocacy Groups

- Legislation to include the full battery of protection required for victims of sex and marital status discrimination in housing should be supported.

- Enforcement agencies should be assisted in their understanding of the legal issues involved and monitored to see that this understanding is reflected in processing of cases involving sex and marital status discrimination in housing.

- Wherever possible, testing and litigation for broadly significant or interestingly complex cases should be initiated and supported.

- Pressure should be exerted on real estate licensing boards to implement fair housing policy and legislation or professional standards should be adopted whereby real estate firms or their agents who practice sex and marital status discrimination would have their licenses retracted.

Chapter 3

PUBLICITY AND INTAKE: THE LIKELIHOOD OF COMPLAINT AND AGENCY RECOGNITION OF SEX AND MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE

3. PUBLICITY AND INTAKE: THE LIKELIHOOD OF COMPLAINANT AND AGENCY RECOGNITION OF SEX OR MARITAL STATUS DISCRIMINATION IN HOUSING AND HOME FINANCE

3.1 Background

In the preceeding chapter, we saw that existing state housing laws do not, in general, afford complete protection for all victims of sex or marital status discrimination in housing, or do so virtually at the discretion of enforcing agencies. This lack of comprehensive protection is aggravated by inadequate public education and information about those legal rights which are undisputed. As a result, many women are unaware that sex or marital status discrimination in housing is illegal. Moreover, even those who are generally aware of the law are often unaware of the full range of acts proscribed. Of the six cases introduced in Chapter 1, only two were obvious instances of sex or marital status discrimination, whereas recognition of the others as discrimination requires more sophistication. Although Andrea J. and Barbara T. in Case 2 and Bob H. in Case 3 met with explicit refusals based on their marital status, all the other cases of discrimination included in the Compendium were more covert and cited some alternative reason as the basis for refusal; for example, Maria F. in Case 4 might become pregnant, or that Joan R. in Case 5 and Anne B. in Case 6 would not adequately care for their children. Finally, even those victims conscious of sex and marital status discrimination may be unaware of the availability of a free and relatively undemanding administrative complaint process available through their state human rights agency.

Just as victims of sex and marital status discrimination are often not sufficiently aware of current statutory protection, so agency intake personnel -- typically undertrained and overworked -- are not always able to recognize the discriminatory character of actions reported to them. In addition, the desire to reduce their caseloads and limit them to cases which do not involve complex or subtle issues may consciously or un-

consciously influence intake personnel in their treatment of inquires regarding sex or marital status discrimination.

This chapter will examine current levels of agency publicity, the nature of the agency intake procedures, and the overall profile of incoming cases.

3.2 Publicity

The equal employment opportunity and fair housing laws which prohibit discrimination on the basis of race and national origin were enacted during the 1960's. These laws were adopted with considerable fanfare and hope, with passionate support, and in some cases, with equally vehement opposition. But regardless of whether people were gratified or threatened by these laws, they could hardly fail to be aware of them.

Additional provisions to include prohibitions on sex and marital status discrimination often came as afterthoughts, and their passage was seldom attended by the editorials, rallies, press releases and widely quoted political speeches which marked the passage of the earlier legislation. Indeed, the leaders of many women's groups have suggested that the media have deliverately underplayed these and other women's issues. Also, even when women's organizations have had funds for public information and education, their efforts have generally tended to focus on equal employment rights and more recently on equal credit opportunity for women, but only occasionally on fair housing issues. As a result, lack of public understanding and awareness of laws prohibiting sex and marital status discrimination in housing is a major barrier to effective implementation.

3.2.1 Public Information Efforts of HUD and Independent Advocacy and Interest Groups

In most states, the state human rights agencies are, by default, the only source of public information on the content of human rights laws as well as on the availability of agencies to receive complaints for viola-

tions of these laws. Although the federal laws were amended in 1974, HUD has only very recently begun to inform the public of federal prohibitions against sex discrimination in housing and even these efforts have primarily involved a haphazard distribution of fair housing posters and brochures. Indeed, many states report that HUD sends them outdated materials. Clearly, materials printed before sex discrimination was added to the list of acts prohibited under Title VIII fail to inform women of their fair housing rights. Even worse, obsolete HUD materials ma ɔe misleading women by implicitly suggesting that sex discrimination in housing is not prohibited by federal law. Finally, a single terse statement to the effect that sex and marital status discrimination are prohibited may not suggest the wide range of practices covered. For example, although Andrea J. and Barbara T., the complainants in Case 2, and Bob H., the complainant in Case 3, met with refusals which explicitly cited their sex or marital status, these factors were either not cited or were not cited as the sole or most important reason in any other case.

Some private advocacy or public interest groups publicize the laws prohibiting sex and marital status discrimination in housing, but there are far too few of these groups. Moreover, sex discrimination in housing is only rarely viewed as a high priority of private groups. Traditionally, fair housing groups publicize discrimination in housing, but most give little attention to women's rights; women's groups publicize discrimination, but most give little attention to housing. Fewer than ten percent of the feminist groups contacted during the study were actively studying or working to eliminate discrimination in housing.[1]

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1 In a 1975 article entitled, "Pioneering Approaches to Confront Sex Bias in Housing" (Cleveland State Law Review, Vol. 24, No. 1, pp. 79-106), Betsey Friedman wrote that no major women's research organization had immediate plans to tackle this problem. Since that time, several women's groups have begun such work, among them, the Housing Task Force of the Women's National Agenda.

In several states studied, for example, California and New Jersey, fair housing, tenants' rights and women's groups are currently active in conducting public education programs. These may at times include publicity on sex and marital status discrimination in housing, although such issues are seldom emphasized. Given the motivation, however, there is no reason these existing mechanisms for publicity could not be used to promote more effective enforcement of laws prescribing sex and marital status discrimination in housing. This is particularly so, since these groups are already in frequent contact with many of the target individuals for this type of publicity. Housing groups deal regularly with tenants and other victims of housing discrimination, many of whom are women, and women's groups deal with a wide range of women, some of whom are victims of housing discrimination. In one state where advocacy groups and the human rights agency enjoy a good working relationship, these groups are an excellent source of specific publicity on agency hours, locations and filing procedures, as well as general information on the coverage of anti-discrimination laws. In some states, however, their counterparts are disillusioned with, or mistrustful of, the human rights agency and seek to divert potential complainants into other avenues of redress.

3.2.2 Public Relations Efforts of the State Human Rights Agencies

Staff in the eleven human rights agencies in our study frequently stated that they lack the funds required for conducting an effective public education campaign or for adequately advertising agency services. Although staffing arrangement in these agencies cannot be compared with much precision, only two of the agencies studied maintain more than one full-time public relations or public education staff person. About one-fourth of the agencies reported that no staff members were specifically assigned to carry out publicity or public relations efforts. As a result, there is not only a low level of publicity, but also the lack of a coordinated strategy for state-wide advertising and education, resulting in haphazard or ineffective use of the scarce time and resources available.

The three most commonly employed publicity methods found in our study consisted of providing speakers for community and interest group meetings and workshops, printing and distributing fair housing posters, and issuing press releases to publicize significant case resolutions or public hearings. While all these methods are potentially good, in practice they are not relatively effective in alerting women to their fair housing rights and to remedies for discrimination.

The most frequently used publicity method for the eleven states studied was providing speakers to interested groups on request. However, the agencies reported that they seldom receive requests for speakers familiar with issues of sex or marital status discrimination in housing. While speakers could effectively publicize both the laws prohibiting sex and marital status discrimination and agency efforts to enforce them, these speakers will not be requested unless some other method of publicity is employed to generate this interest. By concentrating publicity efforts on a method better suited to familiar types of discrimination, the lack of public awareness of sex and marital status discrimination in housing becomes self perpetuating unless the agency employs alternative methods to generate new areas of concern.

Printing and distributing fair housing posters is also a method frequently employed by state agencies. But, in at least two states, the posters were printed before the law had been revised to include prohibitions on sex or marital status discrimination. This publicity not only fails to inform women of the specificity of their rights, but may mislead them into thinking they do not have legal protection at all. Furthermore, just as groups must reach a certain level of awareness before they will request speakers, public interest must often be kindled before public education can succeed. Materials may lie unclaimed unless the agency takes initial steps to promote interest in their contents.

Finally, publicity of important case resolutions or public hearings, particularly in cases where complainants have secured damage awards, are

an effective and immediate means of publicizing both statutory protection and agency efforts to safeguard this protection. This is not only an incentive for complainant awareness but may also be an effective deterrent influence on potential respondents. However, the current scarcity of cases involving sex or marital status which reach public hearing or result in large monetary awards limits publicity of this nature and thus creates a vicious cycle.

Field interviews with agency staff often revealed a certain ambivalence towards publicity efforts. At times, publicity efforts are seen as diverting needed funds from case processing. Moreover, publicity may simply make case processing more difficult by increasing already swollen caseloads. The irony of this reasoning is that in some states increased caseloads will eventually lead to more generous agency budgets, if the agency will tolerate increased caseloads temporarily. However, even agencies with long histories of both backlongs and small budgets should consider using publicity to decrease caseloads by informing respondents of the law and the consequences of violation. Staff in some agencies viewed publicizing sex or marital status discrimination as a low priority, since they believe it affects only a small portion of their constituency. These assessments are often boased on the number of cases of sex and marital status discrimination actually reported, but this small number may well reflect the need for publicity rather than the absence of discrimination. The majority of landlords, realtors, and bankers or their representatives interviewed in this study were either unacquainted with, or misinformed about, state anti-discrimination law or the operations of civil rights agencies. Some of this confusion may, of course, be disingenuous. But it is significant that, given the present lack of public education, these claims of ignorance are at least plausible.

Some public relations efforts conducted by the agencies can, however, be cited as promising examples. The housing director of one large state agency retains his realtor's license and teaches classes for realtors, and staff in two states hold occasional public meetings for discussion of

civil rights issues. One state agency distributes exhibits to colleges, conferences and interested groups, and the director of another state commission has used media appearances effectively to publicize the agency and this agency also provides educational films to interested groups. One commission staff member conducts a weekly radio show, and another commission runs a daily advertisement in the housing sections of local papers. Many agencies issue newsletters or other publications for their constituency, keeping the interested public abreast of current issues and enforcement efforts.

3.2.3 Efforts to Publicize Agency Availability

None of the state human rights agencies included in this study distributed information stressing that filing a discrimination complaint involves minimal effort or that agency services are performed without charge to the claimant. This would be an attractive feature for working single parents, with little available time, like Joan R., the complainant in Case 5 or for complainants under economic constraints like Anne B., in Case 6. Nor were agencies emphasizing the importance of reporting discrimination immediately, although staff were unanimous in their belief that cases are easiest to investigate and resolve within a few days of the occurrence of the act of discrimination. State agencies which fail to publicize their accessability and convenience will lose potential complainants who are too busy, too skeptical, or too poor to seek redress. Also, low profile agencies will receive fewer referrals from other public or private agencies in daily contact with potential complainants in housing discrimination. Those referrals they do receive will often be reported long after the date for effective investigation or remedial efforts.

Current public education efforts also do little to allay complainant fears. For example, publicity may not reveal that retaliation by a realtor against a complainant is itself a violation of the law. Complainants who feel uncertain about filing a housing complaint while simultaneously seeking a unit in a restricted market can be encouraged to do so, if they

understand the full range of legal protection available to them, including the right in many states to have the desired unit saved for them through a temporary restraining order.

As suggested above, advocacy group cooperation with the agency is a good potential source of publicity as well as referrals. Conversely, ineffective handling of referrals, failure to respond to requests for information or offers of assistance, and agency policies of priority treatment only for specific types of cases have alienated many private interest groups. This indirectly results in detrimental agency publicity which could be avoided if agency staff were more responsive to these groups and to the complainants referred by them.

Publicity efforts of the eleven states are summarized below:

Method	States Using Techniques
Speakers for Community and Group Meetings	10
Press Releases on Important Case Resolutions or Hearings	8
Distribution of Posters	6
TV Ads	6
Press Releases for Realtors and Bankers	4
Radio Ads	4
Agency Newsletter	3
Instruction for Real Estate Classes	2
Public Meetings	2
Daily News Ads	2
Publication Case Report	1
Provide Exhibits for Display	1

3.3 Intake

Budgetary constraints on state human rights agencies can affect intake procedures for housing discrimination cases involving sex and marital status in two major ways. First, funds for training intake staff in the subtleties and complexities of these cases will be scarce. And since housing cases involving sex or marital status discrimination form a small percentage of agency caseloads, staff seldom encounter these cases in their daily experience either.

Secondly, even though underfunded agencies generally protect their case processing strength at the expense of other activities, few agencies feel they have sufficient funds even for this favored activity. Consequently, many agencies must select which cases they will accept for processing or at least select which cases they will process first. As a result, many agencies have adopted screening procedures or priority systems under which cases based on sex and marital status discrimination in housing may be passed over.

3.3.1 Agency Accessability

State human rights agencies cannot, of course, operate myriad neighborhood offices which remain open 24 hours per day. Yet operation of only one or two offices open only during business hours may make in-person filing inconvenient or impossible for many individuals. For example, single parents, like Joan R. in Case 4, with inflexible work hours and child care arrangements, or any of the working complainants in our sample, may have difficulty filing complaints with such offices. A legal services attorney in a large eastern state reported that welfare recipients in smaller cities are unable to finance trips to the state capital to file complaints. These examples are compelling illustrations of the need either for geographically distributed filing locations with convenient office hours, or alternatively, for some form of outreach to areas not directly served. Agencies can always cull cases lacking jurisdiction

and merit, but only through extended outreach can they begin to lessen the number of meitorious cases discouraged from filing.

Several of the agencies studied were able to delegate some intake responsibilities to municipal agencies or to municipal fair housing groups. In other states, local advocacy groups conduct intake interviews and provide filing and investigative information to the state agency. In one state, advocacy groups assist complainants in completing all forms requisite to formally filing a complaint with the state agency. Such forms require careful agency scrutiny, but on the whole save considerable time. However, although intake assistance from advocacy groups may help understaffed agencies, the problem of undertraining recurs. Fair housing groups have acquired sophistication in dealing with cases in housing discrimination, and women's groups have acquired experience in dealing with cases of sex or marital status discrimination, but both groups tend to be unfamiliar with the area in which their interests intersect. Furthermore, many rural areas and very small towns have neither agencies or private groups to perform these liaison services. Obviously, effective use of advocacy groups can only partially alleviate problems of limited agency accessibility.

One state agency has increased its accessibility by conducting lengthy intake interviews in the complainants' home. Several other agencies allow complainants to file initial forms by mail. Both approaches seem promising for geographically centralized or widely dispersed agencies in large states.

3.3.2 Intake Personnel and Procedures

Three state agencies in our study employ no intake specialists; investigative staff do intake by rotation. All but one of the eight remaining agencies studied use at least some investigative staff for intake.

Staffing priorities in state agencies cannot always reflect the needs of all the groups they serve. However, it appears that training and specialized services in women's issues, particularly in the housing area, are

provided even less often than for other client groups. Thus, while all eleven agencies studied retained bilingual staff to assist Spanish-speaking or other minority groups in filing their complaints, only three agencies had hired any staff or specialists for women's issues, and only four agencies provided any training in this area. The remaining four agencies retain no specialists in women's rights and provide no special staff training in this area. Indeed staff in some agencies receive little training in any area of enforcement. All too often jurisdiction is refused in cases where a little imagination might have established a prima facie case of discrimination.

One state, however, provides up to six weeks of orientation and training for incoming investigative staff, and housing discrimination receives some emphasis. This agency also participated in a training workshop conducted by HUD which they considered useful.

Another state uses a lengthy, but thorough, intake form which provides the intake worker with detailed instructions and questions, leaving little to the worker's judgment or understanding of discrimination. This form outlines a model for a non-discriminatory housing transaction and helps both interviewer and complainant determine the extent and the ways in which the act in question deviates from this model and to identify the act(s) of discrimination involved in the complaint. Many agencies would consider the four hours required to administer this intake form prohibitive. However, an intake form structured to help workers identify discrimination could be helpful to agencies who lack funds for extensive training of intake workers.

3.3.3 Complaint Screening and Assignment of Investigative Priorities

Our interviews with agency intake staff and private groups have identified three types of screening or complaint sorting which frequently occur at intake: 1) screening for agency jurisdiction; 2) screening for cases which may be resolved without formal filing; and, 3) screening according to agency priorities which favor certain types of discrimination complaints. Each type of screening can save time and concentrate

agency efforts on the most deserving cases, but each type of screening, if performed by staff unfamiliar with sex and marital status discrimination in housing, can endanger the rights of these victims.

The quality and specific experience of intake staff is particularly important in states which screen for jurisdiction and keep no record of potential complaints discouraged from filing. An intake worker untrained in women's rights or in housing may fail to recognize jurisdiction in cases involving subtle discrimination, disparate impact issues or cases where sex or marital status is only one of several factors. Most agencies maintain no records of cases screened out due to lack of jurisdiction. But even among complaints which have been accepted, both in states which screen and in states which do not, our case review indicated that jurisdiction was often interpreted unimaginatively or more restrictively than necessary, particularly in assessing 'disparate impact' complaints.

Screening for cases which might be resolved informally, a technique practiced by at least five of the eleven agencies studied, involves several problems which raise serious doubts about its use in fair housing cases. Agencies using this approach defer formal complaint filing pending attempts to resolve the complaint informally. One important drawback to this procedure is that filing may inadvertantly be deferred until the statute of limitations has expired, or until the case has become impracticable to pursue because the unit is no longer available or because critical evidence can no longer be obtained. Case records from several agencies revealed that, even among the small proportion of cases sampled, the statutes of limitations expired on several such cases per year. Often the complainants were unaware of the 'informal' status of their complaints.

Although informal complaint resolution may serve the interests of both complainants and agency by obtaining the desired housing with less effort than required by formal filing, informal complaint resolution may also serve the interests of respondents only too well. As pointed out above, victims are often unaware of their status as injured parties;

respondents may therefore believe correctly that only a small percentage of potential complainants will file. Where agencies routinely attempt informal complaint resolution, respondents may feel confident that complainants who do file can be appeased simply by granting them the desired housing. Thus, extensive use of informal resolution procedures will hardly function either as a short-range or long-range deterrent.

Nearly every agency in this study employed some formal or informal methods of ranking cases according to their urgency or priority. Most agencies recognize the particular urgency of housing cases (where a delay of even a few days drastically reduces the chances of obtaining the desired unit) by routinely granting priority to housing cases.[1] In many agencies, however, budgetary and staffing constraints may require that priorities be introduced even among housing cases.

While some selection process may be necessary, it is axiomatic that these priorities should be just and uniform in their application and should not neglect enforcement of legislated equal opportunity for an entire protected class. Unfortunately, private advocacy groups have claimed that many agencies systematically place low priorities on cases which involve sex or marital status. Although no agency has an explicit policy of neglecting sex and marital status cases, staff in some agencies claimed that cases involving race discrimination were always given priority and staff in other agencies stated that sex and marital status discrimination are not 'real' problems. More often, sex and marital status cases are set aside through application of apparently neutral rules which demand that attention be given first to cases with impeccable jurisdiction, strong presumptions of merit and for the imminence of harm to the complainant. To the untrained and often harried investigator, these features may not always be obvious in cases involving sex and marital status discrimination in housing. Thus, it appears that victims of sex

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1 For a more detailed discussion of case processing times, see Chapter 4 below.

and marital status discrimination in housing may suffer from current ordering of agency priorities.

3.4 Profile of Incoming Cases Involving Sex or Marital Status Discrimination in Housing

Study data for complaints alleging sex or marital status discrimination in housing were obtained directly from agency casefiles in all eleven states included. Our sample consisted of all such cases closed between January 1975 and July 1976. Demographic information about complainants and data on case proceedings, obtained from these case files were then coded and tabulated.

3.4.1 Interpretation of the Data

This study includes one of the first attempts to collect, analyze and present data on administrative processing of housing cases involving sex and marital status discrimination.[1] Used with caution, these data can contribute to our understanding of this problem. Several important qualifications, however, must be borne in mind in interpreting these results.

First, as noted above, some of the agencies in our study screen incoming cases for merit and/or agency jurisdiction or attempt to settle them informally. For these agencies, then, complaints for which the agency did not accept jurisdiction or complaints which were settled informally will be under-represented. While it was possible to identify states employing screening procedures, it was not possible to accurately determine the extent to which, or the way in which, the caseload makeup was affected by screening. Second, the total sample of cases based on

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[1] Some data on cases involving sex and marital status discrimination processed by state human rights agencies are discussed in Betsey Friedman, op. cit.

sex and marital status discrimination in housing collected from the eleven states studied is disappointingly small. For this reason, it is difficult to discern statistically significant trends in the data. Finally, contents of agency records for cases varied widely among the states studied and many case records were sadly incomplete. In particular, demographic characteristics such as race, age, sex, source of income and family structure of complainants were often unrecorded. Nor can we assume that those cases for which demographic information was recorded represent an unbiased sample, since characteristics of claimants were frequently -- but not invariably -- recorded only if they were at issue in the case.

3.4.2 Characteristics of Complaints

Not surprisingly, states which prohibit only sex discrimination in housing (Kansas, Ohio and Pennsylvania) receive only cases alleging sex discrimination in housing. In the remaining eight states, marital status is alleged in fully 77 percent of all cases. Alleged bases of discrimination for the complainant case sample are summarized below.

Primary Bases Alleged	Complaints Filed
Sex Discrimination Only	68 23%
Marital Status Discrimination Only	117 40%
Both Sex and Marital Status Discrimination	110 37%
TOTAL	295

Most stage agencies encourage complainants to file under all available bases of discrimination as they believe this strengthens the

case. Most of the complaints in our sample, however, (64.2 percent) involved only sex and/or marital status as bases of discrimination. The majority of cases involving some additional basis of discrimination cited race discrimination (22.1 percent). Since most state laws do not prohibit source of income or presence of children as bases of discrimination, it was seldom possible to ascertain when these features were factors in the complaints. Often case records did not ever indicate whether the complainant was head of a single-parent family or a public assistance recipient. Thus, reliable estimates of the incidence of these sex-related types of discrimination cannot be provided. The available data for alleged additional bases of discrimination are summarized below.

Additional Bases	Eight States With Sex and Marital Status Coverage	Three States With No Marital Status Coverage	Eleven State Total
None	191 64.7%	40 63.5%	230 64.2%
Race	64 21.7%	15 23.8%	79 22.1%
National Origin	5 1.7%	8 12.7%	13 3.6%
Age	20 6.8%	0 0.0%	20 5.6%
Other	21 7.1%	0 0.0%	21 5.9%
Total	295	63	358

The overwhelming majority of cases (94 percent) involved discrimination in rental activity. Discrimination in the sale of housing and home finance together accounted for only 6 percent of all complaints. This may indicate that the current emphasis placed by advocacy and interest groups on credit and home finance discrimination is misplaced.

The area of discrimination for cases in our complainant sample are summarized below:

Area of Discrimination	Number of Cases
Rental	336 94%
Sale	11 3%
Finance	11 3%
Total	358

Most cases were rental complaints, and the discriminatory act was most often a refusal to rent or to renew a lease (78 percent). Cases citing the more subtle types of discriminatory action account for a very small percentage of complaints. Allegations of steering (groups, for example, single tenants or single-parent families), misrepresentation of housing availability and evasion or delay of procedures were identified in only eleven percent of the complaints studied. The kinds of discriminatory acts alleged in cases in our sample are summarized below.

Nature of Discrimination	Number of Cases
Refusal to Rent or to Renew Lease	200 78%
Eviction	46 14%
Discriminatory Terms or Conditions	43 13%
Evasion or Delay	27 8%
Refusal to Show a Unit	27 8%
Mispresentations	10 3%
Advertising	4 1%
Steering	2 1%
Total	335

3.4.3 Characteristics of Complainants

Sixty-eight percent of all complaints were brought by female complainants and 17 percent by male complainants filing alone. Complaints filed by married couples, unmarried couples and by several complainants of the same sex, each accounted for less than 10 percent of the sample. Figure 6 summarizes the sex and/or relationship of complainants in our sample

Figure 6

Sex and/or Relationship of Complainants in Sex and Marital Status Discrimination Cases in Eleven States*

Sex and/or Relationship of Complainants	Eight States Prohibiting Sex and Marital Status Discrimination	Three States Prohibiting Sex Discrimination Only	Eleven State Total
One Female	192 65.1%	48 8.0%	240 68%
One Male	52 17.6%	8 13.3%	60 17%
Two Females	21 7.1%	1 1.7%	22 6%
Two Males	10 3.4%	1 1.7%	11 3%
Married Couple	13 4.4%	1 1.7%	13 4%
Unmarried Couple	8 2.7%	1 1.7%	9 3%
TOTAL	295	60	355

*Three cases where the sex and/or relationship of the complainants was unknown have been excluded from this figure.

Demographic data were only recorded in about half of the case records studied. Since we suspect that data on race, age, income and source of income were usually recorded only if they were at issue, our statistics on demographics in these cases are best regarded as lower bound estimates. At least 22.7 percent of complainants in the sample were members of a minority group; at least 70 percent of all complainants were under 30; one quarter or more were known to be unemployed.

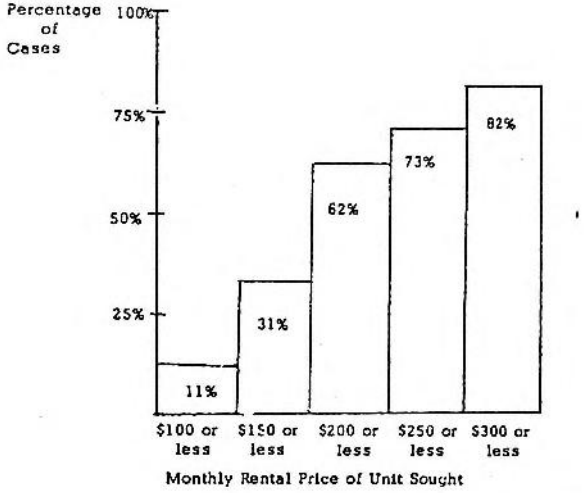
3.4.4 Respondent Characteristics

Nearly half of the complainants studied were seeking an apartment in a building with five or more units (49.4 percent). The remainder were generally seeking a single or row house (23.7 percent) or an apartment in a building with four or less units (19.0 percent). The type of dwelling sought by complainants in our sample are summarized below.

Dwelling Sought	Number of Cases
Apartment in Building with Four or More Units	169 49.4%
Single, Row or Town House	81 23.7%
Apartment in Building with Less Than Four Units	65 19.0%
Mobile Home or Lot	15 4.4%
Other	12 3.5%
Total	342

(Sixteen cases where the dwelling type could not be ascertained have been excluded from this figure.)

The rental price of the dwelling sought was usually less than $200 per month (62 percent of the cases). The rental price of dwellings sought by complainants in our sample is summarized below.



(Percentages are based on the universe of the 267 cases in which rental price of the unit sought was recorded.)

Non-resident owners (43.9 percent) realtors or brokers (23.6 percent) and partnerships (21.8 percent) were most often cited as respondents. The respondents cited in cases in our sample are summarized below.

Respondent Category	Number of Cases
Non-resident Owner	147 43.9%
Realtor or Broker	79 23.6%
Partnership or Corporation	73 21.8%
Building Manager	48 14.3%
Resident Owner	32 9.6%
Public Agency	6 1.8%
Other	12 3.6%
Total	335

(Since more than one respondent may be named per case, percentages sum to more than 100 percent.)

The low incidence in our sample of units sought in dwellings with four units or less probably represents the fact that many of these dwellings are exempt under state laws. In the state of Washington, which exempts very few single or double unit buildings from coverage under fair housing law, a significantly higher proportion of complaints involved single-family dwellings.

3.5 General Recommendations

Federal and state agencies should devote far more publicity to sex and marital status discrimination in housing than they have to date. They should emphasize not only that sex and marital status discrimination is illegal, but should also publicize the various, often subtle, forms this type of discrimination can take. Juanita S. in Case 1, Joan R. in Case 5 and Anne B. in Case 6 are as much victims of sex and marital status discrimination as the complainants in the other cases -- they are just less likely to know that they are. Posters and brochures are probably not a very compelling form of publicity at any time, but outdated posters are worse than useless and should be replaced. Television and media appearances by agency staff are a form of publicity with considerable impact, although public service announcements and programs generally tend to air during off-peak hours and may only reach potential complainants or respondents with insomnia. Also, many state agencies could more effectively enlist the help of advocacy groups in publicizing sex and marital status discrimination in housing. Finally, state agencies should try to advertise their own availability as a cost free enforcement mechanism. None of the complainants in the sample were likely to be able to afford the cost of private litigation.

Intake procedures and personnel in state human rights agencies could also be better attuned to the needs of victims of sex and marital status discrimination in housing. They should either receive more training in this area or should be provided with structured intake forms to assist them in identifying subtle forms of discrimination. Most importantly, many

agencies could profitably re-evaluate their attitudes toward sex and marital status cases and the priority and screening procuedures which institutionalize these attitudes, particularly those apparently neutral presumptions of jurisdiction or meritoriousness under which cases of sex or marital status are dismissed early or are allowed to languish in agency files until it is too late to obtain evidence or satisfactory resolution.

It should be emphasized that many agencies are forced to impose economies by the budgetary constraints under which they are forced to operate. But within the context of these stringencies, scarce resources should be allocated equitably among all cases. Any treatment which arbitrarily favors some groups to the exclusion of others is discrimination.

Specific recommendations are summarized below:

Recommendations to the Department of Housing and Urban Development

- Federal fair housing laws prohibiting sex discrimination should be publicized and publicized in such a way that the full range of practices prohibited under the law are made known.

- All available forms of relief provided under the Federal laws should be publicized, as well as the potential damages which can be awarded and the availability of attorney fee reimbursement from the court.

- Much needed funds should be provided to state agencies to enable them to publicize state fair housing laws prohibiting sex and marital status discrimination on the stipulation that these funds be used specifically for these types of discrimination, and that the methods employed be imaginative and suitable.

- Workshops should be conducted to acquaint lawyers and fair housing investigators with the unique features of litigating cases based on sex or marital status discrimination in housing, and to indicate applications for principles developed in related areas, for example, in fair housing cases involving race discrimination, or in employment cases involving sex discrimination.

Recommendations to Agencies Charged with Enforcing State Fair Housing Laws

- State fair housing laws prohibiting sex and marital status discrimination as well as any pertinent supplementary coverage such as presence of children or souce of income should be publicized and publicized in such a way that the full range of practices prohibited under the law are made known.

- The available kinds of relief provided by the agency and the fact that these services are performed gratis, with little inconvenience to the complainant and with little chance of retaliation, should be publicized.

- The methods appropriate for publicizing the illegality of race discrimination may not be the most appropriate method for publicizing sex and marital status discrimination, and some departure from conventional methods of publicity may be indicated; for example, advertising in the women's media or at places where women congregate, such as day care centers, or shopping areas, may be more effective. Outdated posters should be replaced.

- Current caseload levels for complaints involving sex and marital status discrimination should not be taken as any index of the actual incidence of such discrimination -- the low number of cases filed can be construed with greater plausibility as an indication of scant or ineffective publicity for these types of discrimination. Although increased publicity may lead to a temporary increase in caseloads, and temporarily, to more work for the agency, caseload increases may lead to larger appropriations for case processing in the ensuing year.

- Publicity directed to respondents, particularly to realtors' groups could lead to a reduction in case loads since better understanding of the law -- and the penalties for infringing that law -- may lead to a lower incidence of this type of discrimination. Poorly understood areas such as the marital property laws seem particularly in need of such elucidation.

- States should develop effective relationships with advocacy groups and work cooperatively with them to test for and publicize sex and marital status discrimination in housing.

- Intake staff should be trained to recognize and to accept jurisidction for cases involving sex and marital status discrimination in housing, or alternatively, a detailed standard intake form should be developed to enable them to do so. Wherever possible, experts in women's rights should be hired. Intake decisions should be as carefully reviewed as determination decisions.

- Assistance of advocacy groups in intake and intial case preparation should be sought.

- Screening procedures or policies which explicitly or implicitly ensure that cases involving sex and marital status discrimination receive less timely or less thorough treatment should be corrected.

- Some provision should be made so that working complainants, complainants with difficult schedules or geographically remote complainants are not effectively prevented from filing.

- Records of informally resolved or informally rejected cases should be maintained. Complainant case record data should also be more carefully recorded.

Recommendations to Advocacy Groups

- Publicity for cases involving sex and marital status discrimination in housing should be awarded a higher priority.

- Greater emphasis should be placed on researching, publicizing and combatting discrimination in rentals, rather than on discrimination in sales and financing.

- Agencies should be assisted in developing publicity methods and intake procedures adequate for cases involving sex and marital status discrimination, and implementation of these methods should be monitored and assisted.

Chapter 4

ADMINISTRATIVE INVESTIGATION

4. ADMINISTRATIVE INVESTIGATION

4.1 Background

Most of the eleven states included in our sample have a full complement of investigative techniques at their disposal and are in general agreement about the types of evidence most useful for influencing respondents and most likely to be upheld in court. States differ markedly, however, in the frequency and vigor with which they employ these techniques, as well as in the interpretation they confer on the evidence yielded by investigation.

Previous chapters have suggested that victims of sex and marital status discrimination in housing who are adequately protected by state laws, who are aware of the full range of this protection, who are aware of the availability of the state human rights agency to enforce this protection, and who can evade agency screening criteria, are, at present, a rather select group. But even when a case has been accepted for processing by a state human rights agency, the victim of discrimination may still be a long way from securing justice.

Although some state agencies process cases expeditiously, in other agencies six months may elapse between complaint filing and the agency determination of jurisdiction or "probable cause." And, since agencies very seldom employ injunctions or subpoenas, it is often impossible to secure the desired housing unit or to obtain reliable evidence, after the passage of so much time.

In the eleven states we studied, only one case in four is found meritorious enough to meet a standard of "probable cause" to believe discrimination has occurred. Only about one-third of these decisions are influenced by statistical evidence of any kind and this evidence is frequently

unreliable and often misinterpreted. Only about ten percent of these decisions will be influenced by evidence from 'testing', one of the surest methods of documenting discrimination. Ironically, nearly half the findings of "no probable cause" cited lack of sufficient evidence as the basis for the finding.

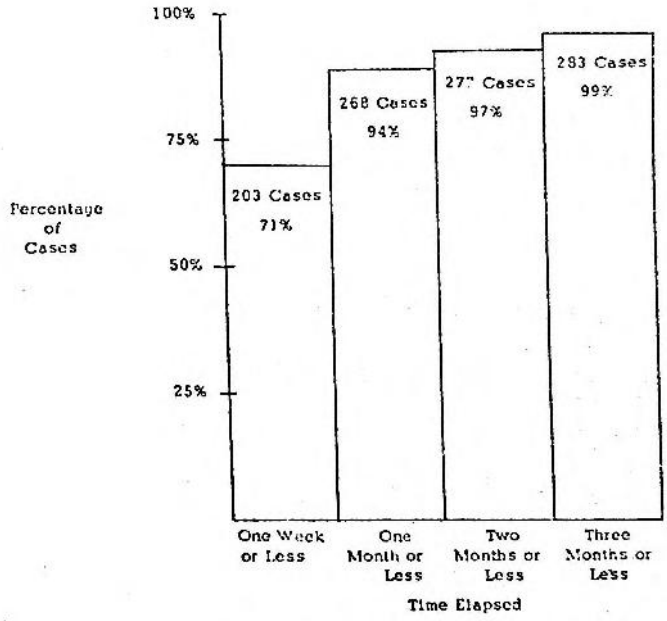
Independent determination of the meritoriousness of the complaints in our sample or comparison data for findings in other types of cases -- for example, cases involving race discrimination in housing or race or sex discrimination in employment -- would allow us to say with more confidence whether the cases in our sample were less thoroughly investigated or sympathetically resolved than other types of discrimination complaints. But given present agency budgets, allocations for training, case loads for investigative staff and so on, it is probably true that very few cases of any sort currently receive top-notch investigation and that favored cases receive such treatment only at the expense of other cases.

4.2 Assignment of Investigators and Investigative Supervisors

A brief review of the typical sequence of steps in the processing of housing discrimination cases is perhaps in order here. This sequence may be summarized as follows:

- A formal complaint is filed with the enforcement agency.
- The case is added to a roster pending assignment to an investigator.
- The case is assigned to an investigator and evidence is gathered and assessed.
- An investigative finding is determined and approved.
- Cases where 'no jurisdiction' or 'no probable cause' is found are dismissed; conciliation is attempted in cases where 'probable cause' is found.
- Cases not successfully conciliated go to public hearing.

After a formal complaint is signed and docketed, the complainant loses control of the case and administrative procedures generally determine subsequent action taken. Formal complaints are first added to the current roster or backlog of cases to await further action. All eleven of the states studied recognize the need to pursue housing cases with dispatch and give them priority in assignment to an investigator as well as in the subsequent investigation itself. Agency statistics suggest that backlogs in housing cases are somewhat shorter than backlogs for other types of cases. Even so, backlogs are serious problems in several states, and in some agencies even housing cases are backlogged at all stages of processing. Cases in our sample were assigned fairly quickly, however; 71 percent were assigned within one week. Elapsed time for assignment in the eleven states studied are summarized below.



[1] This table is based on 285 cases where the elapsed time could be ascertained.

Actual case investigation begins with assignment. In every agency studied, investigators (sometimes called field representatives, consultants or even human relations representatives) contact the respondent, collect evidence and document the results of investigation. Investigators in some agencies carry caseloads of 80 at all times although caseloads of 20 are considered optimal. Workers in one agency are assigned cases as they are filed and are expected to complete investigation of five cases per month, regardless of the actual number of cases assigned to them.

Only three of the agencies studied employ specialists in housing. Only four agencies have hired specialists in sex discrimination, and several of these investigative specialists were lost in recent staffing cutbacks, although all agencies in areas of minority concentration have retained bilingual investigators. Only four of these agencies provide any substantial staff training.[1] Given that housing complaints are a small percentage of any agency's total caseload (usually about 6 percent in the states where this information could be obtained, and cases which involve sex or marital status discrimination in housing, constitute are even smaller percentage, it is unlikely that investigators will encounter a sufficient number of these cases in their day to day experience to enable them to become familiar with the unique features of these cases.[2] Further, few states permit investigators to specialize by type of case; cases are generally assigned by rotation. When specialization is permitted, it is often by type of respondent rather than by type of complainant. The end result, then, is that the great majority of case investigators are unlikely to have previous expertise in sex discrimination, unlikely to receive any training in this area, and unlikely to acquire much day to day experience in dealing with the subtle and complex issues involved.

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1 Staff in one agency spoke enthusiastically of a HUD intensive training program in housing enforcement conducted during the past year.

2 In the six states where caseload breakdown was available, estimates varied between two percent and eleven percent and averaged around six percent.

Each of the eleven agencies included in this study has developed its own administrative system for supervising investigative activities, but the systems used fall into two general categories. In six states, one or more commissioners take responsibility for each case under investigation. In theory, the commissioners oversee case investigation and make preliminary findings or determinations of merit. Alternatively, in five states, investigative supervision is imposed through hierarchial approval levels. Six or seven investigators are commonly assigned to each supervisor, who approves all preliminary investigative findings. In some agencies, findings must also be approved by office directors and branch managers as well.

While some means of investigatory supervision is essential, supervision should never act as a means of reinforcing agency hesitancy or caution or as an impediment to timely case processing. Commissioners in most states are appointed part-time volunteers who receive little training from the agency. While their background, experience and status in the community are often an asset to the agency, commissioners cannot always be sensitive or sympathetic to all types of discrimination. Very few state commissioners are women. Most have other full-time responsibilities and may not be able to keep abreast of caseload work at all times, or may not be easily accessible to the investigators they supervise. Agencies employing internal supervision and hierarchical approval levels do not always fare better. These procedures can be cumbersome and time-consuming and can create or aggrevate backlogs at every step of investigation. Neither supervisory approach can itself ensure consistent and sensitive handling of cases, and agencies must still rely on the quality of the investigators themselves. At best, these procedures enable the investigator to receive helpful advice and act as a check on improper decisions while helping the agency maintain a standard of consistency and fairness in its findings. At worst, supervisory procedures encumber and delay investigators in the exercise of pressing duties and impose a stifling conservatism on their results.

4.3 Investigative Methods

The states included in this study have in common a considerable battery of investigative techniques. These techniques are summarized in Figure 7. However, the specific investigative procedures employed, the sequence in which they are executed, and the general investigative priorities which provide the rationale and justification for these methods vary significantly among the agencies studied. Subtle differences in aggressiveness, timing and attitude are also reflected in these procedures.

One agency begins investigation by summoning both complainant and respondent to an investigative conference.[1] In another agency, actual investigation is always preceded by a series of attempts to conciliate. Most agencies, however, begin by dispatching an investigator to serve the complaint and to interview the respondent. Collection of evidence for the case usually begins during this initial interview. However, some agencies reportedly provide the respondent with a copy of the complaint several days before actual investigation begins. Advocacy groups have criticized this practice. They feel it serves chiefly to allow the respondent time to destroy or falsify incriminating records, to invent alibis, and to dispose of the disputed unit through sale or lease. Moreover, at this stage of investigation, few agencies can secure an injunction or subpoena to prevent such action. Of the eleven agencies studied, only two -- Michigan and Pennsylvania -- are expressly empowered to seek injunctive relief immediately. Connecticut, Delaware, New Jersey and New York may only seek injunctive relief after finding 'probable cause', and California, Kansas, Ohio and Washington cannot seek injunctive relief at all during administrative complaint handling. The New York City Human Rights agency has adopted an interesting solution to this problem by posting

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1 Of the eleven agencies studied, this agency resolved the highest percentage of complaints within one week of the filing date.

Figure 7

Investigative Power

	California	Connecticut	Delaware	Kansas	Massa-chusetts	Michigan	New Jersey	New York	Ohio	Pennsylvania	Washington
Oaths	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Subpoena Witnesses and/or Documents	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Compel Interrogatories or Written Answer to Complaint		Yes		Yes	Not Express	Yes	Yes	Yes	Yes		Yes
Seek Court Enforcement of Investigative Powers		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Hold Hearings	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Initiate Own Complaints		Yes	Yes	Yes	Yes	Yes	Initiate Investiga-tions	Yes	?	Yes	Yes

notices of ongoing investigation on units involved in complaints. While posting cannot legally prevent a respondent from renting or selling the unit before investigation is completed, it does serve to deter other applicants from seeking the housing in question.

4.4 Favored Evidence

An agency which gears its investigative efforts towards securing evidence most likely to withstand rebuttal is obviously taking the strongest stance toward proving violations of its law. It may also be taking the most economical route toward complainant satisfaction as well, since attempts at quick, voluntary resolution of the complaint are most likely to be successful if the respondent is aware of strong evidence against him/her.

Most of the agencies surveyed rely on some formal or informal hierarchy of favored evidence. Although agencies generally concurred in identifying evidence from testing, statistical evidence from respondent business records, respondent testimony or admission and witness testimony as the most important and reliable evidence for proving particular instances of discrimination, there was no similar consensus on the relative weights to be assigned them. Six agencies favored statistical evidence over other forms. Three agencies preferred respondent testimony or admission, while two of their counterparts avoided relying on this type of evidence. Testimony of testers was often regarded as strong evidence, but was, for some agencies, either forbidden or impractical to obtain. Furthermore, in gathering evidence, considerations of efficacy must often be mitigated by considerations of practicality and economy, and the evidence collected for a given case will often be some compromise between the ideal evidence and the most easily available evidence.

It is instructive here to consider the methods which might be appropriate for investigation of one of the cases included in our compendium sample. For Juanita S. in Case 1, statistical evidence from respondent records should reveal the consistent application of a discriminatory practice. Evidence from male testers who were not required to meet the

stringent financial requirements placed on Juanita should also be compelling. Cases, 2, 3, 4, 5 and 6 all involved respondent admissions of intent to discriminate.

The overall strategy for investigating a particular discrimination case is generally devised by the individual investigator. Staff are required to obtain prior supervisory approval for investigative strategies in only three of the states studied. A few agencies train investigators to recognize circumstances under which specific types of evidence should be sought. One large agency trains investigators to analyze complaints for various types of discrimination -- different treatment, evil motive, disparate impact -- and to recognize which type of evidence is most appropriate for each type of case. Another agency has developed a detailed and thorough intake form to assist both staff and complainant in identifying the specific type or types of discrimination involved, which in turn suggests the type of evidence required. In several agencies, though, decisions of investigative strategy are made less formally and with little guidance, even when the investigator is unfamiliar with the type of case involved.

4.5 Agency Authority to Subpoena Records and Witnesses

While every agency studied in this report has express statutory authority to subpoena witnesses and documents for a public hearing -- either through their own power or through a court petition -- as well as to compel compliance with such a subpoena through the courts, not all agencies have comparable investigative powers prior to the hearing stage. In Delaware and California, there is clearly no subpoena power available until a public hearing is scheduled. In Pennsylvania, a subpoena can be issued only after a finding of 'probable cause' by the Commission. In all these states this means that the important finding of 'probable cause' is unaided by the power of the subpoena, and may effectively mean that records or witnesses can only be sought after the contents of testimony are irrevocably lost. For agencies in this study, the average time from case filing to finding of 'probable cause' was about two months.

Naturally, a state which can subpoena witnesses or documents at the outset of the investigation can gain a significant head-start in investigating and settling a complaint. In Connecticut, New York, and Michigan, there is express authority to subpoena evidence at any time, although the Michigan agency must seek court permission for any subpoena issued prior to a hearing. Massachusetts, New Jersey and Washington have general subpoena powers which are not expressly extended to earlier investigative stages. The most broad ranging access to documents and witnesses is granted in Kansas and Ohio where statutes provide that agency staff may have access to all relevant premises, records, documents and persons and other possible sources of evidence at any reasonable time after a complaint is filed. The only limitation is complaince with general constitutional standards for "searches and seizures". Theoretically at least, these agencies have effective investigative authority equivalent to that provided by a search warrant.

Of course, a subpoena is not the only way to secure preferred forms of testimonial or documentary evidence prior to a full-blown hearing. A few states have particularly effective statutory powers in addition to, or instead of, subpoena powers, to aid them in their investigations; others have developed additional powers through agency rules or regulations. Michigan and Washington, for example, have general powers to depose witnesses throughout the investigation process. This process, one used frequently by lawyers in pre-trial investigation of civil court actions, involves meeting with the respondent or other relevant witnesses in order to cross-examine them and take a formal, sworn statement recorded by a stenographer. The "deposition," as it is commonly called, may also involve a demand for a witness to bring along important documents and to answer questions about their contents and significance. Not only does a deposition allow for discovery of important information, but it also provides the agency, early in the investigation, with a sworn statement which can not easily be denied later by the witness.

4.6 Interrogatories

Less costly than a formal deposition, but nonetheless, of potential usefulness in securing important information from the respondent at an early stage, is the use of "interrogatories," expressly provided in Ohio, Kansas, Connecticut, Washington, New York, New Jersey and also utilized in Massachusetts. Interrogatories are written inquiries mailed to a respondent soon after a complaint is filed. Like a deposition, these inquires may request the respondent's version of the factual situation which can be used as evidence at any later hearing, as well as requesting information concerning the existence and contents of relevant documents. Model forms of questions geared to recurring forms of complaints can be drawn up by an agency and used again and again, with slight variations to fit the specific circumstances of each complaint.

Interrogatories are particularly useful if the agency can impose realistic deadlines for the return of these forms, back them up with subpoenas or injunctions, and compel answers through the court, as in a regular civil court action. In addition, a few agencies have developed special regulations which stipulate that failure of a respondent to answer a question on an interrogatory automatically results in a waiver of any defense regarding that point of information; any unanswered inquiry is deemed to be answered in favor of the complainant.[1] This form of interrogatory default procedure, used successfully in a few states including New Jersey and Washington, expedites investigation, reduces staff time expended, penalizes uncooperative respondents, and serves to deter dilatory tactics in future respondents. In the absence of strengthening provisions such as penalties or time limitations, however, interrogatories can often serve only to delay and impede the actual investigation. In several of the cases reviewed, interrogatories

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1 A related procedure not usually available until just prior to public hearing, is a requirement that a respondent must submit a written answer to the complainant. Failure to respond to all or any portion of the complaint is deemed to be an admission of its contents in Michigan, New York, and Washington.

were permitted to drift in as much as nine months after the complaint was filed.

Of course, the ability to gain access to documentary or statistical evidence from respondents requires the power of an agency to compel realtors and rental agents to record and maintain this information in the first place, either for responses to interrogatories or for more systematic monitoring by agencies. Probably the most valuable mechanism designed to insure the availability of systematic data about housing practices is the Multiple Dwelling Reporting Form, used by the New Jersey Division of Civil Rights. Under this scheme, every owner of a multiple apartment development of 25 units or more must file an annual report with the Division concerning the composition of the dwellings and the factors affecting that composition. Currently, this inquiry extends only to questions relating to racial composition although the forms reveal generally relevant information such as rental turnovers, recruitment techniques, and the size and price of all units and could easily be revised to collect sex and marital status data. The Multiple Dwelling Reporting Rule was expressly upheld by the New Jersey Supreme Court as a rational approach toward fulfilling Division responsibilities in the case of New Jersey Builders, Owners, and Managers Association v Blair, 60 New Jersey 330, A.2d 855 (1972). These records can be used by agencies for investigation of individual complaints, but can also be used for compilation of evidence for pattern and practice suits or for systematic monitoring of market practices.[1] Another helpful investigative technique for securing data about housing market practices is Pennsylvania's special regulation that all applications or other data pertaining to the sale or rental of commercial housing must be preserved for 120 days by any person subject to that state's fair housing law. However, since agencies frequently defer

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1 Uses of such information to combat systemic discrimination are discussed in Chapter 6.

processing cases until the statute of limitations has nearly expired, this limit should, perhaps, be extended.

4.7 Statistical Information Obtained by the Agency

If agencies cannot compel respondents or potential respondents to report statistical information on dwelling occupancy, or if agencies have reason to believe such reports are unreliable, case investigators may themselves compile demographic characteristics of current tenants or ascertain whether respondents have consistently employed relevant rules and policies. For example, investigators may determine whether rules forbidding children or pets or extra security deposits are in practice applied only when the applicants are women or members of a minority group and ignored when the applicants are not. Even this simple form of statistical documentation can be critical in proving the differential treatment of women such as Juanita S., in Case 1, or of Joan R. and Anne B., the single parents in Cases 5 and 6.

Although statistical evidence collected by the agency is typically more reliable than evidence begrudgingly supplied by the respondents, it can, at times, be enormously time consuming to collect. However, statistical evidence from either source can be significant and both have traditionally stood up well in court. It is common for statistical information on the racial composition of dwellings to be contrasted with comparable information for the immediate environs of the dwelling. Statistical breakdowns of neighborhood composition according to sex and marital status have not been used in similar ways, as these demographic features are currently little understood either by state agencies or by the courts. As a result, the use of statistical data in sex and marital status cases has not progressed beyond simple tests and even these simple tests are not always correctly applied. For example, in one state studied, cases were routinely closed as 'no probable cause' if the respondent could show that she/he had ever rented to even one person with characteristics remotely

similar to those of the complainant, regardless of the type of housing, number of units, or neighborhood involved.

All eleven states included in our sample are permitted to compile statistical evidence of discrimination, yet, as indicated in the following table, this evidence was compiled in less than 25 percent of the cases studied. This is probably a result both of the agency time and effort involved to compile such data,or the unavailability in many cases of appropriate respondent records, or both.

Use of Statistical Evidence	Number of Cases	Average Days Elapsed from Case Filing to Finding
Statistical Evidence Used	76 29.1%	42.7**
Statistical Evidence Not Used	185 70.8%	59.7**
Total	261	61.8

(This table is based on 261 cases where both the use of statistical evidence and the average days elapsed could be ascertained. Using a t - test with a 95% confidence level, the difference between these mean times is statistically significant. This difference may reflect easier resolution of cases involving such evidence or may reflect a higher overall efficiency of those agency staff willing to collect data.)

In addition to the relatively low frequency with which such data is collected, there is often a failure on the part of agency staff to understand the proper role of statistical evidence, even when available, particularly in the context of the complexities which may attend sex and marital status discrimination. Unfortunately, at the present time, simple statistics offered by respondents are being accepted by agencies to exonerate the respondents more often than not. The following table indicates that on the average, there is a higher dismissal rate of sex and marital status complaints in housing when statistical evidence is employed.

	Statistical Evidence Used	Statistical Evidence Not Used	Total
Withdrawn, Award	1 1.3%	36 15.3%	37 11.7%
Withdrawn, No Award	3 3.75%	38 16.2%	41 13.0%
Dismissed	60 75.0%	97 41.3%	157 49.8%
Conciliation	16 20.0%	64 27.2%	80 25.4%
Total	80	235	315

This table is based on 315 cases where both the use of statical evidence and the agency disposition of case could be determined.

4.8 Testing

While statistical evidence is most appropriate when the respondent controls a sufficient number of units to reflect trends in rental or sale policies, the use of 'testers' or 'checkers' can establish discrimination in treatment of applicants for dwellings of any size. Testing provides substantial evidence, provided that all pertinent characteristics of the tester have been matched to those of the complainant. The agencies studied, with the exceptions of those in California and Kansas, interpret their general investigatory powers to include authority to test. Testing practices have been expressly upheld in the courts of most jurisdictions. However, one agency maintained that investigators giving testimony from 'testing' had been harassed in court and that testing by agency staff is regard as entrapment. Even in this state, however, testimony of third-party testers is generally admissable and is usually upheld on appeal. An agency which can call upon outside groups to test is gaining a real savings in staff time. Unfortunately, agencies seldom advise complainants to collect their own testing evidence and seldom offer instruction in methods for doing this.

Testing evidence was recorded in only about 9 percent of the cases sampled. The use of testing for cases in our sample is displayed below.

Use of Testing	Number of Cases
No Testing	322 91%
Testing by Agency Staff	17 5%
Testing by Friend of Claimant or by Advocacy Group	15 4%
Total	354

(This table is based on 354 cases where use or non-use of testing could be ascertained.)

At present, evidence from testing is less equivocal and better understood than statistical evidence. Unlike statistical evidence, testing seems to result in a lower percentage of case dismissals, as indicated in the following table.

	No Testing	Testing	Total
Withdrawn, Award	34 10.8%	5 15.6%	39 11.2%
Withdrawn, No Award	53 16.8%	1 3.1%	54 15.6%
Dismissed	162 51.4%	8 25.0%	170 49.0%
Conciliation	66 21.0%	18 56.3%	84 24.2%
Total	315	32	347

(This table is based on 347 cases where both the use of testing and the agency disposition of the case could be ascertained.

4.9 Investigatory Findings

Investigations typically culminate in one of three findings: 'no jurisdiction', 'no probable cause' or 'probable cause' to believe that discrimination has occurred. Additionally, the agency may informally advise the complainant to withdraw a complaint or may itself withdraw the complaint administratively if the complainant is no longer interested in pursuing the complaint or if some other resolution has been reached.

Preliminary findings by investigators generally require the approval of at least one supervisor or commissioner. In some states several levels of approval are required for each finding. In other states, due to the practical difficulty of locating commissioners, preliminary investigative findings go virtually unreviewed.

Figure 8 summarizes the investigative methods the eleven agencies have at their disposal (viz power to administer oaths, power to subpoena witnesses, power to compel interrogators), the mean processing time for the cases in our sample, and the percentage of cases in which 'probable cause' was found.

The mean processing time for the cases studied was about three and one half months. Only three of the eleven agencies routinely processed cases in less than three weeks. Processing times of six to nine months were not at all unusual. It is axiomatic that satisfactory resolution in any housing case demands expeditious processing to secure the desired unit for the complainant, to ensure the availability of the requisite evidence and testimony. The chances of satisfactory resolution of these cases beings to fall off rapidly within the first week following the occurrence of the discriminatory act, and chances of hopeful outcome for cases processed six months later are dim indeed.

Lengthy case processing time is also often conjoined with unfavorable outcome. The percentage of cases in which 'probable cause' was found varied from 5.3 percent to 60.9 percent. Care must be exercised in

Figure 8

Case Processing Summary

State	Sample Size*	Mean Processing Time (In Days)**	Investigative Methods	Cases Determined 'Probable Cause'
1	38	40.93	All	5.3%
2	11	61.1	All	9.1%
3	37	149.05	All, except compel interrogatories	16.7%
4	54	60.2	All	16.7%
5	15	24.07	All, except compel interrogatories	20.0%
6	56	101.73	All	23.2%
7	33	61.4	All	24.2%
8	14	191.92	All	28.6%
9	32	93.0	All, except compel interrogatories	43.8%
10	41	24.8	All	46.3%
11	23	22.6	All	60.9%
All States	354	75.53	---	26.3%

* Includes only cases for which required information was available.

** Mean processing time is calculated from formal complaint filing date to investigative finding.

analyzing these figures since five of the states have adopted policies for screening cases at intake with the result that caseloads in these states will contain a higher number of cases presumed meritorious. The percentage of cases found 'probable cause' in the states can only be cautiously compared with percentages from states which have no screening policies. Further, as indicated in Figure 8, some of these percentages are based on unreliably small case samples. It is significant, however, that the state with the second highest percentage of cases in which probable cause was found is not a screening state and this state also had one of the lowest case processing times encountered. For the eleven states in our sample, 'probable cause' was found in only slightly more than one quarter of the cases. And although statistical evidence or evidence from testing were not routinely sought, most cases were dismissed for lack of sufficient evidence.

Although screening procedures of varying degrees of stringency and case samples of varying sizes make it difficult to compare the outcome percentages for the eleven states studied, yet it is hard to believe that the differences in the these percentages are just the result of applying screening criteria. The most frequently used investigative methods vary little from state to state although the frequency with which they are used varies more. While it is true that budgetary and staffing constraints fall with greater severity on some agencies than on others, all agencies claimed to be hampered by these difficulties. To a large extent, the percentage differences must be attributed to the interest, skill and diligence with which these cases are handled by the agencies.

It is interesting to briefly consider the outcome of the cases included in the compendium. For these cases, 'probable cause' was found only in Case 2, the case of Barbara T. and Andrea J., and in Case 6, the case of Ann B. All the other cases were either withdrawn or were found to be without merit, even though each case promised the possibility of obtaining strong evidence against the respondent.

4.10 General Recommendations

Investigation of housing discrimination cases involving sex and marital status discrimination could be significantly enhanced through increased funding. Ideally, agencies would be able to employ sufficient staff so that manageable caseloads could be apportioned, and could also encourage specialization by type of case. Investigators permitted to spend more time per case would also be able to carry out more thorough and effective discovery procedures. Investigatory mechanisms such as sophisticated statistical compilations, witness depositions and 'testing' could be utilized more frequently. The latter methods are expensive, but are among the most effective tools for securing strong evidence. Adequate funding would also allow these agencies to hire experts in issues pertaining to sex and marital status or to provide substantial training to current staff to enable them to recognize signs of sex and marital status discrimination more readily and to select the kinds of evidence most appropriate for these cases.

Short of an expanded budget, state agencies can take other steps to develop more efficient investigatory techniques with existing resources. Intake and investigatory methods could be at once streamlined and made more thorough by use of model forms to guide staff quickly and efficiently through the early stages of housing cases involving sex and marital status discrimination. Such forms could be developed as an alternative to or as an adjunct to staff training in this area. Supervisory hierarchies should be examined carefully to ensure that their structure is not unnecessarily cumbersome. Again, diverting even scarce funds for staff training may pay off in the long run in added efficiency.

Ideally, states should, wherever possible, use investigatory techniques which shift the burden of proof to the respondent. In this way they can draw on the examples of highly effective mechanisms developed by some agencies. Often these mechanisms are extremely economical both in terms of time saved in gathering evidence and in the conciliation time saved

by these preferred forms of evidence. For example, the use of well structured, written interrogatories backed up by a strict time limit and default provisions can produce strong evidence with very little investment of staff time. States with a multiple dwelling reporting rule could also draw on these reports for additional statistical evidence. In addition to seeking to extend the range of their investigatory powers, states should try to make more frequent and efficient use of those powers they already possess.

Finally, states should develop cooperative relationships with advocacy groups and and complainants to assist them in case investigation. Specific recommendations are summarized below.

Recommendations to the Department of Housing and Urban Development

- State enforcement agencies frequently process so few cases of sex and marital status discrimination in housing that they lack the experience to develop appropriate guidelines and methods of investigation for these cases. Often the investigative techniques routinely used in other discrimination cases are not directly or straightforwardly applicable to cases of sex and marital status discrimination. Through training or handbooks, HUD could enable the states to pool and augment their expertise in this area. This would assist the agencies in more efficiently using scarce resources and would also offer the victims of sex and marital status discrimination in housing a better chance for decisive investigation of their complaints.

- In addition to disseminating these guidelines for interpretation, HUD might assist the agencies in sharing and refining some of the techniques already developed by enterprising agencies. These techniques would include model forms for conducting cases, forms for interrogatories or reporting forms for multiple dwellings.

Recommendations to Agencies Charged with Enforcing State Housing Laws

- Where these powers are not already granted, states should try to acquire permission to: 1) post dwellings under investigation (particularly in states where injunctions or subpoenas

are difficult or time consuming to obtain); 2) subpoena witnesses or take depositions; 3) require respondents to complete interrogatories quickly and to comply with default provisions; 4) require that records of housing transactions be retained for at least 120 days; and 5) require that owners of multiple dwellings report annually on the composition of those dwellings in terms of race, national origin, sex and so on.

- Investigative forms and guidelines should be developed to assist investigators in gathering evidence in housing cases involving sex and marital status discrimination. Experts on these issues should be hired wherever possible.

- Less cumbersome approval levels should be adopted.

- Any procedures which encourage evasive or dilatory tactics for respondents should be abandoned, for example notification policies which enable respondents to quickly dispose of the unit or incriminating records, or responses to interrogatories in the absence of reasonable time limits which enable respondents to delay until the case becomes impractical to process.

- Agencies should learn to work effectively with advocacy groups in case investigation. Advocacy groups could assist in compiling statistics, locating witnesses and in "testing". The latter assistance can be particularly important in states where agency staff are prevented from "testing", either by express statutory provision or by judicial hostility.

- Complainants themselves could assist by enlisting their acquaintances as "testers." Guidelines for performing "testing" should be developed for use by both advocacy groups and complainants.

Recommendations to Advocacy Groups

- Effective, if not cordial relationships with enforcement agencies should be established and investigative assistance provided as detailed above.

- Agency investigations and findings should be monitored.

Chapter 5

ADMINISTRATIVE REMEDIES

5. ADMINISTRATIVE REMEDIES

5.1 Background

The eleven state agencies examined in this report have, for the most part, been granted a wide range of remedial powers with which to ameliorate the effects of discrimination. These states vary considerably, however, in the extent to which state courts have permitted the agencies to employ these remedies and in the extent to which the agencies have taken advantage of them.

The effectiveness of each available remedy can only be analyzed in the context of the goals an agency seeks to achieve by deploying it. Some remedies, such as injunctive relief followed by award of the disputed unit, may be useful in resolving a complainant's immediate housing need, but will serve less effectively as a deterrant to future discrimination. Broad affirmative action orders and reporting requirements, on the other hand, may benefit individual complainants little but may help act as a check on future discrimination by the respondent and may discourage other respondents from similar practices.[1] The award of monetary damages can be useful in achieving both goals--individual complainants can be "made whole" through compensatory damages for out-of-pocket expenses and for the humiliation suffered, while discrimination can be attacked on a broader scale through the use of substantial punitive damages to punish violators and to notify potential respondents of the seriousness of fair housing violations. While the particular remedies an agency uses most frequently may actually reflect on agency's need to conserve scare time and resources, rather than a deliberate choice among goals to be achieved,

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1 The term "affirmative action" is used in statutes and by agencies to cover a multitude of meanings. In its broadest sense, it encompasses any number of actions respondents can be required to take to remedy the effect of past discrimination: for example, granting preferences to protected classes, posting property or advertising as an equal opportunity realtor.

these choices have a substantial effect on the overall impact of an agency's work in eradicating discrimination.

In previous chapters we have seen that the victims of sex and marital status discrimination who obtain 'probable cause' findings for their complaints are an extremely small, extremely fortunate minority. They are fortunate to live in states which offer something like adequate statutory protection; they are fortunate to be aware of this coverage and to be aware of the availability of enforcement agencies; and they are fortunate in having the merits of their case recognized by those agencies. The statutory provisions and the enforcement agencies included in this study are among the best in the nation -- complainants in other states can scarely hope to do better. It is distressing that even for the fortunate complainants in our sample, so little satisfaction is achieved. Nor can it generally be said that satisfaction in these cases has been sacrificed in favor of some long range deterrent effect.

Remedial and enforcement powers for the eleven states studied are summarized in Figure 9.

5.2 Injunctive Relief

In the majority of cases, the agency's ability to ensure the availability of the disputed housing unit during the complaint process is essential to satisfactory case resolution. Clearly, agencies unable to guarantee this availability are severely hampered in their capacity to aid complainants. Suitable low income housing for women particularly for the female headed family, is scare and the effort required to locate such housing is often considerable. In contrast to Federal law, which grants HUD no powers to prevent respondents from immediately renting or selling property to third persons, most of the state laws in our sample provide some temporary restraining mechanisms. Michigan, New York and Pennsylvania can grant immeidate injunctive relief.

California, Connecticut, Delaware, Massachusetts and New Jersey can grant injunctive relief after a finding of 'probable cause' but, as we have seen, agencies may take from three to six months to reach findings, at which time or injunctions would probably be useless. Additional delays of anywhere from 2 days to 3 weeks are encountered after a request is made for an injunction to the appropriate court. Kansas, Ohio and Washington have no mechanism for seeking injunctive relief during complaint processing.

In every state where restraining mechanisms are available, agencies must petition state courts for temporary injunctive relief, which generally consists of a court order restraining the respondent from selling, renting or otherwise making the property available pending resolution of the complaint. Fair housing laws do not spell out considerations the courts should weigh in deciding whether to grant an application for temporary injunctive relief. Under general equitable principles, however, such determinations depend upon the court's sense of urgency of the situation, on the likelihood that the agency and the complainant will eventually prevail, as well as an estimation of the relative harm to the respondent in holding the unit off the market as opposed to the harm to the complainant of possibly losing the unit. Not surprisingly, therefore, courts vary in the frequency with which they will grant temporary injunctions. In New York, agency personnel reported that motions for temporary restraining orders are routinely granted, and the majority of court refusals are based on presumptions of potentially greater harm to respondents in restraint of sales rather than rentals. By contrast, one state cited the refusal of a state court to consider a temporary restraining order as the reason it had become "court-shy" and had not repeated its attempt to seek injunctive relief.

Figure 9

Remedial and Enforcement Powers

	California	Connecticut	Delaware	Kansas	Massachusetts	Michigan	New Jersey	New York	Ohio	Pennsylvania	Washington
Injunctive Relief	After Finding Probable Cause	After Finding Probable Cause	After Finding Probable Cause	On Appeal Only	After Finding Probable Cause	Immediate	After Finding Probable Cause	Immediate	On Appeal Only	Immediate	On Appeal Only
Affirmative Action	Award Unit	Order Sale Or Rental	Award Unit, Reporting	Award Unit, Reporting	Affirmative Action, Reporting	Award Unit, Reporting	Compliance, Reporting, Award Unit	Award Unit	Award Unit, Reporting	Award Unit, Reporting	Award Unit, Reporting
Monetary Damages	* $1000 Maximum	$500 Maximum for Double Damages	Compensatory Relief	Compensatory and Punitive Relief	$1000 Maximum	$500 Maximum Out-of-Pocket	Actual, Nominal, Pain and Suffering	Out of Pocket, Pain and Suffering	Out of Pocket Only	Compensatory**	Actual and Punitive $1000 Maximum
Cease and Desist	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Private Action by Complainant	Yes	Credit Cases Only	Rental Cases Only		Yes***	Yes		Yes		Yes ***	Yes
Attorney's Fees Explicitly Authorized					Yes	Credit Cases Only	Yes		Credit Cases Only		Yes

* Only if unit not awarded

** Currently being challenged in court

*** Must exhaust administrative remedies first

The type of assistance available to the agency also seems to affect use of injunctive relief. Agencies retaining legal staff to represent them can make quick, internal decisions to seek injunctions. Agencies without in-house legal staff must reply on the assistance of the state Attorney General to determine when injunctions should be sought. At least one agency reports that the Attorney General in that state insists on application of what the agency considers unnecessarily strict criteria before agreeing to request injunctions on behalf of the agency. A particularly effective arrangement exists in one state, where the agency is itself part of the Attorney General's office.

Injunctive relief is only temporary, however, and dissolves upon the issuance of a final finding and order of the Commission. Connecticut's law, the only exception to this rule, provides that, once injunctive relief is sought, the court assumes full jurisdiction over the case, both to decide the merits and to fashion relief. Therefore, in Connecticut the findings proceedings are transferred to the court, which conducts a full hearing to decide whether to make its temporary injunction permanent.

5.3 Conciliation

As we have seen, several agencies have adopted a policy of screening incoming cases to identify those which can be settled immediately through informal conciliation. Agencies generally keep no records of cases thus settled and the frequency of such arrangements could not be determined.

In most states, cases may also be conciliated once investigation is underway, but prior to determination of 'probable cause'. In these circumstances, the complainant may be granted the unit in

question in exchange for withdrawing the formal complaint. About six percent of all the cases in our sample were resolved in this way. For the complainant whose sole or primary goal is to obtain the disputed housing unit, conciliation efforts may represent a quicker and more efficient procedure for case resolution than the inevitably lengthy agency hearing process. Such conciliations also save time for respondents and agency staff as well. Complainants should always be informed, however, where they forfeit rights to damage awards or to public hearing.

Even a finding of 'probable cause' generally is followed by an attempt to conciliate since this is less costly than a full-blown hearing; in some states, conciliation attempts are required by statute up until the hearing date. Only three agencies employ professional conciliators. In one agency, the staff attorney acts as conciliator, and in three other agencies, supervisors and office managers perform this function. Conciliation conferences held after a determination of 'probable cause' may result in a written conciliation agreement, which in some states, can be enforced through court action just as agency orders issued after public hearing case.

Cases not conciliated are generally scheduled for public hearing. In the eleven states studied, however, cases involving sex or marital status discrimination in housing seldom reached the public hearing stage even where 'probable cause' was determined. Of the 84 cases in the complainant case sample in which "probable cause" was found, only 5 cases (or 6 percent) went to public hearing.

The quantity and quality of conciliation agreements reflects a strong emphasis on quick individual case resolution, often at the expense of achieving maximum benefit for either the individual complainant or for public law enforcement generally. This limitation is not inherent. In all eleven states studied, conciliation agreements may contain every kind of term which can be included in a final order.

One state agency takes the position that it may seek greater amounts in conciliation. There is no reason, therefore, why the conciliation process should not be used more effectively to achieve individual client satisfaction as well as broad impact in sex and marital status cases.

5.4 Agency Orders Following Determination

In addition to the routine issuance of "cease and desist" orders after a final determination of discrimination, each state agency in our sample is empowered, either through express statutory language or by interpretation of a more broadly worded "affirmative action" power, to order respondents to convey the unit to the complainant. Authority to order the respondent to rent or sell the next available unit to the complainant, if the disputed one is no longer available, is not specifically mentioned in state statutes, but is easily inferred as a corollary power.

An agreement to make available the desired housing unit or a comparable unit was included in 73.4% of the conciliation agreement reviewed.

Statutes in the eleven states do not deal explicity with the problem of third persons who may have acquired the disputed property during the complaint process, in the absence of or in spite of an injunction. Ohio's regulations interpret a broadly-worded "affirmative action" provision to include power to cancel any deed or lease purporting to convey property rights to a third party who knew of the pending complaint. However, if an entirely innocent third person has leased or bought the unit, there is no further remedy for the complainant.

Authority to award monetary damages is granted with less regularity to enforcement agencies, and is often limited in both type and amount by statute or court decision. Less than 20 percent of the agreements reviewed contained a provision for monetary damages. Five of the eleven state statutes make no express provision for award of monetary damages of any kind in housing cases.[1] However, in three of these states (New Jersey, Kansas and Delaware) agencies freely exercise the power to award damages despite lack of explicit authority to do so, reasoning that a broad grant of power to effectuate the purposes of the act -- the usual "affirmative action" language in fair housing statutes -- encompasses the ability to compel monetary payments.

Interestingly, of all the states studied, New Jersey's agency awards damages most consistently, with the blessing of the state Supreme Court which has reuled favorably on the issue despite the lack of explicit statutory authority. The Ohio Supreme Court reached a contrary result, finding that the agency may not award damages, and in Delaware and Kansas the courts have not yet addressed the matter. In Pennsylvania, the question of agency authority to order damages is currently before the state Supreme Court.

Agencies with no express authority to award damages have, under favorable circumstances, more latitude than those which express statutory powers, since statutory language often restricts the type and amount of award available. Only New York's law contains no monetary limit on the amount of damages to be awarded, but the New York courts have required careful justification of each award and have disapproved

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1 The statutes of Delaware, Kansas, New Jersey, Ohio and Pennsylvania make no such provision.

large awards with some regularity. Of the remaining states, California, Massachusetts and Washington[1] set a maximum of $1,000 on damage awards, while Michigan's limit is $500. Connecticut's statute allows "double damages not to exceed $500" — a provision the agency has successfully interpreted to mean a maximum award of $1,000 to the complainant.

The type of damages permitted plays an important role in determining the extent to which damage awards may be used either to achieve individual complainant satisfaction or to produce further reaching impact on market practices. The majority of states with explicit legal authority to award damages are limited to compenstating actual out-of-pocket expenses incurred by the complainant as a result of the respondent's discriminatory conduct: extra rent, moving costs, travel to and from the Commission office, and similar expenditures.[2]

Out-of-pocket expenses alone, however, are not a fully satisfactory remedy either from the point of view of the victim of discrimination or in light of the agencies' broader mandate to eliminate discrimination from the housing market. The individual victim of discrimination has suffered a violation of legal rights, humiliation, and inconvenience for which only monetary damages over and above her out-of pocket expenses can adequately compensate her;

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1 Washington's statute allows $1,000 for loss of rights, plus actual incurred.

2 The agencies of California, Connecticut, Massachusetts and Michigan, are limited in this way. California's law imposes a unique additional restriction prohibiting the Commission from awarding any damage at all where the respondent has been ordered to give the housing unit to the complainant.

mere restoration of money lost therefore fails totally to "make her whole". Further, the generally small dollar amount of out-of-pocket expense awards prevents this remedy from constituting a serious deterrent to potential respondents or from generating any substantial amount of public attention.[1] The average damage award for cases in the present sample was under $200.

In other areas of law, damage awards for "pain and suffering" are a traditional way to compensate plaintiffs for the less tangible harms suffered as a result of the violation of legal rights. However, few fair housing enforcement agencies are empowered to provide such relief. New Jersey, with its sympathetic state courts, is able to take advantage of the lack of restrictive language in its statute to include "pain and suffering" components in damage awards. New York also seeks awards for "pain and suffering" as part of its statutory authority to seek compensatory damges. New York courts, however, require careful proof of actual humiliation suffered and the effect of such mental anguish on the complainant, with the result that "pain and suffering" awards are uniformly small in amount. Washington's statute resolves this problem in an interesting way by allowing awards of $1,000 for "loss of rights" in addition to compensation for out-of-pocket expenses. Less than one third of the agreements reviewed provided awards for "pain and suffering", and the average amount of such rewards was $200.

Punitive damages serve a similar function, but are based not the theory of punishing the respondent's unlawful conduct rather than of compensating the victim. At present, only the Kansas Commission reported punitive damages to be part of its arsenal of remedies.

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1 It should be noted, however, that the greater number of complainants attracted where damages, however small, are awarded on a regualr basis can greatly increase agency visibility and maximize the agency's impact.

Punitive damages awarded regularly in substantial amounts and accompanied by publicity could clearly play an important role in increasing public awareness of and public adherence to fair housing laws. While such awards would not be appropriate in every case, punitive damage awards could be used effectively in case against large and powerful respondents whose discriminatory practices have a significant effect on the housing market.

Most agencies are given fairly broad by worded grants of authority to require respondents to undertake affirmative action to remedy the effects of discrimination and to effectuate the purpose of the fair housing law. The affirmative action power is sometimes used to confer authority to award a housing unit to the complainant, but generally connotes more far reaching remedies, as well, fashioned to fit the particular situation before the agency. The affirmative action clauses in the New York and New Jersey statutes explicitly include authority to insure "extension of full and equal accommodation to all persons" and the New Jersey statute expressly encompasses power to order compliance reporting. In other states, such as Connecticut and Ohio, affirmative action clauses are left unmodified and unqualified in the statutory language. The most limited affirmative action powers, at least on the face of the statute, are found in the fair housing laws of Michigan, which permit only an order awarding particular housing units to the complainant and compliance reporting, and California, where only educational and promotional activities designed to eliminate discrimination on a voluntary basis are allowed.

A most effective and controversial affirmative action technique involves a requirement that the respondent grant preferences to persons of the complainant's class until a certain numerical balance is reached

for a certain period of time. In Washington, the state Supreme Court has upheld the agency's authority to order such relief. However, other state courts are less receptive to such an interpretation. In New York, for example, the Court of Appeals held that an order requiring the respondent to give preferences to tenants referred by the Division, and to give notice of all vacancies in its buildings was too broadly worded and fell outside the scope of agency authority. In California, the legislature has expressly prohibited the agency from granting this kind of relief. This tendency while perhaps politically expedient, severely hampers the ability of agencies to remedy the effects of past discrimination and to effect significant changes in housing market patterns on the basis of sex and marital status.

Other remedies used by agencies under their affirmative action power involve requirements that respondents publicize the availability of their housing units on a non-discriminatory basis. Typical of such remedies are requirements that newspaper advertisements include equal opportunity notices and that premises be posted with fair housing notices. Such tools, though useful, are probably of limited effect when compared with the broader power to order and monitor sweeping changes in real estate practices.

Half of all conciliation agreements or agency orders reviewed in this study required some form of affirmative action or compliance reporting of respondents. Few agencies however, are able to routinely monitor respondent compliance; most do so only sporadically, or in response to complaints of non-compliance. The Multiple Dwelling Reporting Rule in New Jersey, described in an earlier section, could provide an effective means of monitoring the compliance of large respondents, since computerized records on the occupancy of respondent dwellings could be scanned on a regular basis.

Figure 10 summarizes statutory authorization for the terms most often found in conciliation agreements, the frequency with which these remedies are required and the average amount of cash awards in the eleven states studied. The relatively small number of cases conciliated in each state and the differences in statutes and agency practices make precise comparison difficult. It seems clear, however, that express statutory provision for a given term is neither a necessary nor a sufficient condition for frequent award of that provision. Overall, in only 57.5 percent of the cases reviewed was the disputed unit awarded to the complainant, although power to award the unit is provided in all the states studied. Although analysis of samples of this size is risky, it appears that states also make cash awards rather less often than they are authorized to do so, and it also appears that the amount of these awards is well below the amount states are authorized to grant. This is difficult to understand, and awards of this size seem neither an appropriate restitution for the complainant's discomfiture, nor an effective deterrent for respondents who may imagine that in paying the very occasional small damage award they may realize greater financial gains in excluding blacks, female headed families or single people from their dwellings.

On the other hand, several states have taken the initiative to make cash awards or to require affirmative action even in the absence of express statutory authorization.

A brief summary of the resolution of the sex and marital status based housing complaints included in the present study is in order here. We have seen that many victims of sex and marital status discrimination in housing are without adequate statutory protection, not only in the lack of important supplementary protection against discrimination on the basis of source of income and presence of children, but even, in some states, the lack of even broad coverage to prohibit marital status discrimination. Nor do existing federal laws offer alternative protection

Figure 10

Remedies Provided in Housing Discrimination Cases Based on Sex and Marital Status in Eleven States

State	1	2	3	4	5	6	7	8	9	10	11
1	14	Yes	6	Yes	11	Yes	5	$186		0	
2	5	Yes	0	Yes	4	Yes	5	$561		1	$125
3	12	Yes	6	Yes	9	Yes	2	$243	Yes	8	$246
4	2	Yes	0		2	Yes	0		Yes	1	$150
5	17	Yes	11		4	$500 Maximum for Double Damages	1	Unknown		1	Unknown
6	4	Yes	4	Yes	4	Yes	0			0	
7	1	Yes	1	Yes	1	Yes	1	$ 50	Yes	1	$ 50
8	8	Yes	5	Yes	0	$1000 Maximum	2	$ 35		7	$164
9	13	Yes	12	Yes	4	$500 Maximum	1	$ 25		1	$120
10	3	Yes	3		0	$1000 Maximum	1			1	$158
11	8	Yes	2	Yes	6	$1000 Maximum	0		$1000	3	$350
Total	87		50		45		17			27	

Title Explanations

1 Cases Conciliated
2 Express Statutory Authorization to Award Unit
3 Frequency Unit Award
4 Express Statutory Authorization to Require Other Affirmative Action
5 Frequency Other Affirmative Action Required
6 Express Statutory Authorization to Award Monetary Damages
7 Frequency Monetary Damages Awarded
8 Average Amount of Monetary Damage Award
9 Express Statutory Authorization to Award Pain and Humiliation Compensation
10 Frequency Pain and Humiliation Awarded
11 Average Amount Pain and Humiliation Award

(*Includes only cases in which the terms of agreement could be ascertained.).

for victims of these practices. The undetermined but presumably large number of victims of sex and marital status discrimination have no hope of relief at all under present state and federal laws.

We have also seen that many more victims are prevented by ignorance from seeking relief, and that given the currently inadequate levels of publicity for sex and marital status discrimination, this ignorance is certainly understandable. Even the illegality of sex or marital status discrimination receives little coverage, much less the subtle and covert practices applicants are more likely to encounter. Even where applicants are aware that they are the victims of sex and marital status discrimination, they must still try to convince state agency intake staff, -- frequently overworked and undertrained -- to accept their complaints for processing. Thus many complainants are screened out at intake, or accepted but consigned to files where delayed investigation effectively precludes successful outcome. More victims are then lost as a result of maladroit or lackadaisical case processing. Only a quarter of all cases alleging sex or marital status discrimination filed will be found meritorious although evidence of "testing" and statistical evidence will seldom be gathered.

It would be comforting to think that with just restitution impossible for so many victims of sex and marital status discrimination, that for those few victims who prevail to the point where "probable cause" is found in their cases, jutice will be substantial. But as we have seen, less than half of these complainants receive the units in question and less than 20 percent of them receive monetary restitution, and that restitution actually ordered is usually well below levels authorized by statute. Remedies so meager and infrequent cannot be considered satisfactory complaint resolution for those who have suffered humiliation and inconvenience as a result of sex or marital status discrimination. Nor can these remedies be considered satisfactory resolutions in terms of their long-range deterrent effect. Potential

respondents may now confidently rely on low levels of public awareness, and agency incapacity to ensure that they will be penalized only seldom and midly, and that their compliance with the terms of conciliation agueements is unlikely to be monitored.

The resolution for cases included in the present sample is summarized in Figure 11.

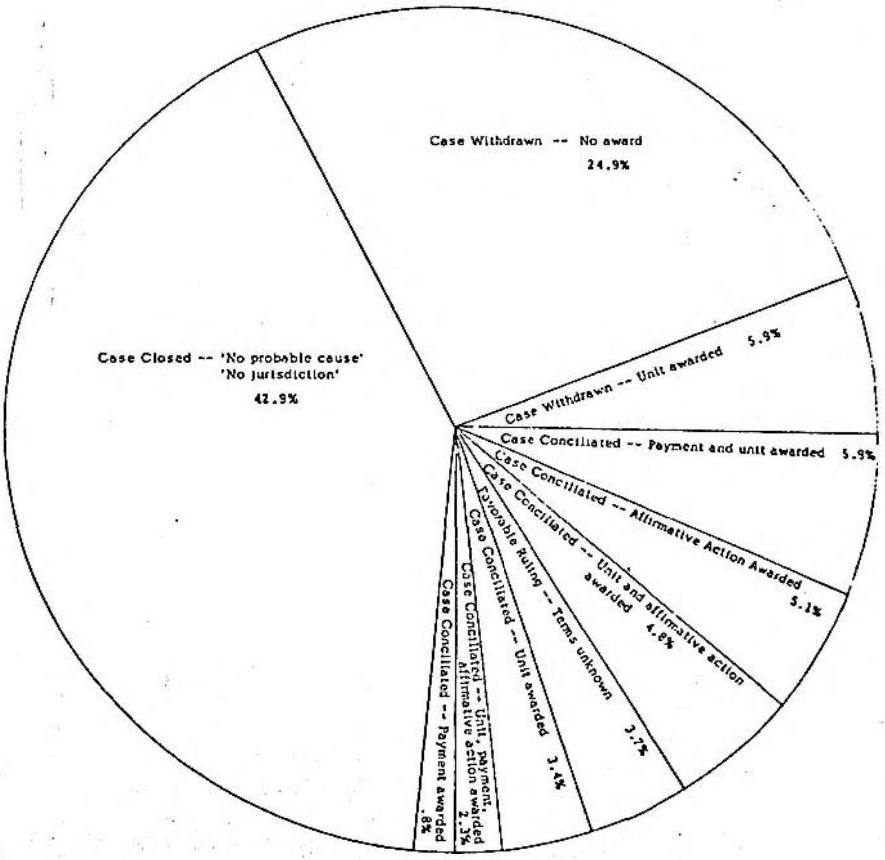
5.5 Judicial Review

The statistics of all eleven states studied include provision for judicial enforcement and review of agency orders. Agencies are universally empowered to seek court enforcement of their orders, with contempt sanctions against respondents who violage outstanding orders. In most cases, court review is limited to a determination of whether the agency based its findings on substantially competent evidence, and whether its actions were within ghe scope of its authority. By contrast, the fair housing laws of Delaware, Michiagan, and Kansas empower the court to decide the case de novo.[1] The greatly expanded scope of review authorized by these de novo provisions drastically reduces agency autonomy and can have severe consequences if reviewing courts are unsympathetic to fair housing goals. In additon, clients under this system must assume the burden of proving their claims all over again -- a substantial inconvenience which must inevitably result in increased complainant attrition.

1 In cases decided de novo, courts make new findings of fact and conclusions of law and also fashion their own remedies.

Figure 11

Resolution of Housing Complaints Based On
Sex and Marital Status in Eleven States



5.6 General Recommendations

State enforcement agencies are not, at present, taking full advantage of the arsenal of remedies at their disposal for housing discrimination cases involving sex or marital status. The awards in the great majority of these cases achieve neither satisfaction for the individual complainant nor deterrent value for the respondent. Due to stringencies imposed by what they regard as small budgets and large caseloads, agencies have nearly always chosen to attempt to achieve some satisfaction for a large number of complainants rather than to achieve maximum satisfaction for just a few complainants. While these policies are perhaps more equitable for the present, they do little to prevent, and possibly much to encourage future discrimination.

The haste with which most agencies urge conciliation has two major results. First, a premium is placed on informal conciliation in which the complainant agrees to withdraw the case in return for award of the disputed unit. When complainants desire no more than the unit and are willing to forego damage and pain and suffering awards in return for quick settlement, informal conciliation saves time for complainant, respondent and agency alike. But, complainants should alwasys be apprised that they are relinquishing the rights to additional remedies by informally conciliating. Further, records of these informal proceedings should always be maintained so that patterns of discrimination can be discerned and respondents will be encouraged to adhere to fair housing laws more fully than in infrequent instances in which this discrimination is actually detected and reported.

Secondly, the agency's eagerness to conciliate appears to result in its settling for far less than the statutorily authorized battery of remedies for the complainant. It is difficult to understand why the full range of remedies should be awarded so seldom unless the agency is neither unsure of its evidence or eager to make conciliation attractive to the respondent

in order to achieve quick resolution of the case. Nearly all the conciliation agreements reviewed for the present study included far less than the number and the amount of remedies stipulated by statute. Again, respondents, and particularly large respondents can exploit this situation and may consider that the occasional mild penalty of warding a unit or paying a few hundred dollars to the exceptional complainant may well be worth what they see as the advantage of excluding the numerous members of the protected classes who won't file cases.

It is not clear that equitable distribution of remedies among large numbers of complainants and award of maximum benefits are mutually exclusive alternatives and that the time and money required to exact better remedies is prohibitive even under present agency operating constraints. Moreover, the adoption of an interim policy whereby large and well publicized awards were made and agencies appeared more willing to go to hearing than to settle for less than satisfactory resolution, would emphasize both that the agency had adopted a firm stance in these matters both reducing the general incidence of discrimination and placing the agency in a stronger position to negotiate in cases which are filed.

Specific recommendations are summarized below:

Recommendations to HUD

- HUD should make special efforts to enforce fair housing practice by public housing projects and other federally-administered housing programs. Special remedies should be designed, administered and enforced, and assistance should be rendered to state agencies engaged in processing complaints against such projects.

Recommendations to Agencies Charged with Enforcing State Fair Housing Laws

- Informal conciliation should be recommended advisedly. Complainants in these cases should always be informed that they are exchanging stronger remedies for quick resolution. Records of cases informally conciliated should also be maintained to detect recurring discrimination by some respondents.

- If the agency feels that it cannot achieve maximum satisfaction for the complainant and if she can afford to retain a private attorney, she should be advised to do so.

- Some attempt should be made to hold the unit off the market until the complainant can secure it. Injunctions or posting techniques are the best methods for ensuring this, but respondents may occasionally volunteer to do this.

- The full amount of damages incurred as a result of the discrimination should always be awarded to the complainant.

- Pain and humiliation should be presumed to have occurred in cases where an applicant is informed that she is considered an undesirable tenant, particularly where witnesses are present or where her moral character is impugned. Maximum pain and humiliation awards should be sought where warranted and they should be assumed to be warranted more often.

- Terms of conciliation agreements should be monitored with more frequency and consistency. Advocacy groups can be enlisted to assist the agency.

- Professional conciliators should be employed, who have experience with handling this aspect of cases and are less cowed by respondent tactics than investigative staff who may perform these functions infrequently.

  Authority for posting dwellings under investigation should be sought even in states where injunctions are available but time consuming to obtain.

- State and municipal enforcement agencies should work together to make maximum use of the remedies available to them. Where possible, state agencies should designate municipal agency staff with power to impose any remedies authorized under state but not under municipal law.

Recommendations to Advocacy Groups

- Terms of conciliation agreements should be monitored, at least in cases where the complainants were referred to the agency by the advocacy group.

- In states where the enforcing agencies fail to use the full battery of legislatively-authorized remedies, advocacy groups should encourage them to do so. Public and political support should be provided for agencies which do penalize discrimination.

Chapter 6

ALTERNATIVES TO COMPLAINANT CASE PROCESSING BY STATE HUMAN RIGHTS AGENCIES

6. ALTERNATIVES TO COMPLAINANT CASE PROCESSING BY STATE HUMAN RIGHTS AGENCIES

In previous chapters, we have seen that all too frequently agency intake, screening and investigative procedures can be both prolonged and disappointing for the victims of sex and marital status discrimination in housing. Yet for most of these victims, there are few viable alternatives to state administrative processing.

Administrative complaint processing by HUD under Title VIII of the Federal Hair Housing Act is theoretically one way in which victims of sex and marital status discrimination in housing can bypass the state administrative process. But, in states declared "substantially equivalent", complaints are deferred to the state agency for processing anyway. In addition, deferral procedures often occasion considerable delays and state agencies are reluctant to divert staff to process "Federal" cases when they cannot keep abreast of the backlog of cases initiated at the state level. Thus, the chances of satisfactory resolution for deferral cases are probably somewhat worse than for cases filed directly with the state agency.

Private litigation under Federal law appears to be another alternative avenue of redress for the victims of sex and marital status discrimination in housing, and also holds the promise of more lucrative compensation. Yet the scope of coverage under Federal law may be less adequate than under state law. Private litigation under state fair housing law remains virtually unexplored, however, even for cases involving race discrimination. Further, victims of sex and marital status discrimination in housing are often unaware of their right to private litigation and state agencies seldom inform them of this right even when they know that the complaint stands little chance of quick and thorough administrative processing. Finally, for many victims of sex and marital status discrimination in housing, the cost of litigation is prohibitive. Little has been done to establish the right of a civil rights plaintiff in state court to be awarded

attorney fees, so the private bar is generally reluctant to take on fair housing cases with that uncertainty of recovering costs.

In their battle against discrimination, agencies have generally not shifted emphasis from individual case processing to a more balanced approach including policies with potentially broader impact on institutional and systemic discrimination. While agencies are aware of the limitations of case processing noted above, most maintain that present funding levels preclude a more diversified approach and that, under present conditions, they cannot maintain case processing at sufficient strength, much less expand their enforcement efforts to include more innovative approaches. Currently, potential respondents may regard, with some complacency, the low levels of publicity for laws forbidding discriminatory practices in housing, coupled with the large backlogs and often superficial case processing performed by enforcement agencies. Most importantly, while processing of individual complaints is an important method of securing justice for individual victims of discrimination, it is an expensive and time consuming law enforcement mechanism, and, at best, can only deal with the small percentage of personal incidents actually brought to the attention of the agency.

Individual case processing must proceed in tandem with more inclusive approaches to combatting discrimination. Some promising approaches are already employed by several of the states included in the present study. These include agency pursuit of expansive pattern and practice or class action suits, monitoring of proposed Federa, State and municipal housing and community development projects in terms of equal opportunity and affirmative action standards, use of systematic reporting rules for reviewing patterns of occupancy, and research generally in the area of urban renewal and land use. These projects usually focused on racial or ethnic minorities, could be expanded to include more emphasis on sex and marital status discrimination. While present funding levels make it difficult for state enforcement agencies to sustain these alterna-

tive approaches, projects such as New Jersey's multiple dwelling reporting rule could eventually reduce both the level of discrimination and the time required for investigating individual cases.

6.1 Alternatives for Complainants

6.1.1 Administrative Complaints to HUD

The HUD administrative complaint process offers few benefits to victims of housing discrimination based on sex or marital status. In those states accorded "substantial equivalency" status by HUD (most of the states included in this study), cases are automatically deferred to the stage agency for processing. Agency staff reported that cases deferred by HUD are often received so long after the occurrence of the discriminatory action that effective processing is hopeless and that cases containing inaccurate or incomplete records have also been deferred to them. In one striking instance, agency staff claimed that essential information had been deliberately withheld in order to protect the respondent. Moreover, state agency staff felt relectant to divert scarce time to process cases originating with HUD and for which their agency staff receives no extra funding or compensation. As a result, complaints initiated with HUD but deferred to state enforcement agencies are even less likely to be satisfactorily resolved than complaints initiated directly with the state agency itself. Even when HUD retains or reassumes jurisdiction, it's role is limited to conciliation with no coercive powers at its disposal to aid the individual complainant. Administrative complaints which cannot be successfully conciliated must then be pursued by the complainant at her own expense in Federal court. Further, Title VIII addresses only the problem of sex discrimination, to the exclusion of discrimination based on marital status, source of income, or other forms of discrimination which directly affect large numbers of women in the housing market. Thus, the complaints of single parents and others who are victims of forms of discrimination related to sex, but not strictly falling within that prohibition, may not be heard or decided by HUD.

6.1.2 Private Action Under Federal Law

Of course, the recent amendment of Title VIII to include sex discrimination means that the Civil Rights Act now offers to women the potential of an effective Federal court forum traditionally available to victims of race discrimination. Due in part to the explicit authorization of attorney's fees in Title VIII[1] and to the traditional preference of the civil rights bar for the Federal forum, litigation in Federal courts challenging racial discrimination in housing has been relatively frequent and successful, resulting in substantial damage awards for complaints.[2] Accordingly, fair housing litigation under Federal law appears to be assuming a new aura of legitimacy for the private bar as a potentially lucrative area of practice for lawyers both inside and outside the public interest field.[3] Expertise developed by the private bar in race discrimination could be applied as well to sex discrimination cases.

However, Title VIII's failure to include marital status and source of income as protected categories results in a serious lack of protection for many under Federal law. While disparate impact theories can and should be urged in the Federal courts to protect single parents, welfare recipients and others who bear the brunt of sex-related forms of discrimination, the state law forum for fair housing litigation should be seriously considered in those states which have legislated directly against these practices.

6.1.3 Private Action Under State Law

Private civil action in state court to enforce fair housing rights can be an important alternative to the administrative complaint process. Indeed,

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1 42 U.S.C. Section 3612 (c) (1970).

2 See e.g. Allen v. Gifford, 368 F. Supp. 317 (E.D. Va. 1973), where the plaintiffs were awarded $3500 in compensatory damages and $500 in punitive damages.

3 See Friedman, Avery S., "Federal Fair Housing Practice," The Practical Lawyer, December 1974.

where agencies are beset by heavy backlogs or possess only weak enforcement powers, private court action may be the most effective method of vindicating fair housing rights.[1] However, in contrast to private action under Federal law, private action under state law is an alternative which remains virtually unexplored, even by complainants of race discrimination.

Only three of the state fair housing laws in our sample explicitly authorize victims of discrimination to seek vindication of their rights through private action in civil court, in lieu of filing an administrative complaint.[2] The Massachusetts provision permits complainants to seek agency waiver or jurisdiction or to institute private action 90 days after filing a complaint with the Commission. The Commission must dismiss the complaint as soon as such action is initiated.

In addition, Pennsylvania law specifically allows for a private court action if the Commission fails to act within one year. It is unclear at this time whether this provision precludes immediate state court action, bypassing Commission procedures altogether. Also, Delaware's Landlord-Tenant Code provision prohibiting discrimination on the basis of sex and other characteristics in rentals authorizes private court action, although the state's fair housing law does not. California's Unruh Civil Rights Act, outlawing discrimination by business establishments, provides a private right of action which, if pursued, precludes later recourse to the administrative process. Kansas law authorizes civil court action for coercing, intimidating or interfering with any person in the exercise or enjoyment of a fair housing right.

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1 See Note 24, Cleveland State Law Review 79 (1975), in which the author develops the thesis that effective enforcement of state and Federal laws prohibiting sex discrimination in housing will be largely dependent on pursuit of private civil court actions, because of ineffective administrative relief.

2 Such authorization is granted in Michigan, New York and Ohio.

While the remainder of the state laws contain no express authorization to sue in court, it is far from clear that such actions may never to maintained. In the Washington law, for example, while no private right is expressly created, it is provided that the statute should not be construed to deny any person the right to institute an action based on a violation of civil rights. Where legislatures have not explicitly labeled administrative remedies as exclusive, private actions based on the statutory rights or on various common law tort theories may still be available. Exploration of these avenues by private litigants is an important step for increasing the availability of private court action to fair housing complainants.

Of course, almost every jurisdiction allows a dissatisfied complainant to seek court review of an agency finding. While this usually is limited to a determination of whether the agency abused its discretion or made a clearly erroneous finding of fact, in a few states court review is de novo, which means that an entire new record of testimony is taken. In effect, then, a dissatisfied complainant in such a jurisdiction can get a full-blown private court action as a second resort.

Private suit can, in most states, offer attractive advantages to the fair housing complainant. Indeed, in states such as Ohio, where agencies cannot seek injunctive relief, or in states where heavy caseloads or other priorities prevent quick action by the state, direct resort to the courts, at least for injunctive relief, may be the complainant's only hope of obtaining a desired housing unit. In addition, private court action may provide greater opportunity for award of damages to successful complainants. In Michigan, for example, damage awards by the Commission may not exceed $500, while private suits are not so limited. In Ohio, only the court may award damages.

Even where agencies are authorized to award damages, experience shows that such awards are not frequent or large in housing cases, and are generally limited to out-of-pocket expenses. By contrast, civil court

judges have long experience in calculating damages based on less tangible injuries such as pain and suffering and mental anguish, as well as out-of-pocket losses. They tend to view such awards as predictable and legitimate outcomes of the litigation process, as illustrated by sizable awards granted in Federal cases. In states with sympathetic courts, then, damage awards which more nearly compensate the victim for the violation of her rights may be easier to obtain through civil litigation than through agency complaint process. Also, courts in some states may be willing to award punitive damages -- an option not open to most agencies. Through the deterrent value of well-publicized and regularly obtained punitive and actual damage awards, private action can compensate individual victims of discrimination and simultaneously further the public goals of fair housing.

Regardless of statutory rights, private court actions to enforce fair housing laws are rare or non-existent in most states. As noted above, most fair housing litigation has taken place in Federal courts, which have historically taken the lead in enforcing civil rights of all kinds. However, at this time many state laws offer wider statutory protection for victims of sex discrimination. Therefore, greater use of state forums should play an important part in private fair housing enforcement.

One of the primary barriers to state court action is the expense involved in litigation. Even if complainants are aware of the right to sue privately, the cost of such an undertaking is usually prohibitive. While annual complainant income was not always available from state agency records, the mean income of complainants in this study was around $6,000. Obviously few complainants within this group could bear the cost of a private law suit. However, of all the states in our sample, only Massachusetts gives explicit stautory authorization to its courts to award attorney's fees for successful housing complainants, although several of the corresponding state credit provisions do authorize such awards. Many fair housing complainants while middle to low income, do not qualify for free legal services through publically-funded programs

for the lowest income groups. These complainants will be effectively excluded from private state court action until attorney's fees awards become available.[1]

A second reason for the lack of significant utilization of private court remedies is the widespread unfamiliarity with fair housing practice on the part of the private bar. All too commonly, fair housing, even in the Federal forum, is een solely as a public interest issue, without relevance for the private practitioner. As a result, few lawyers are interested in fair housing laws, and fewer have developed any expertise in the area. Certainly, the provision of attorney's fees could attract more members of the bar to fair housing practice; however, private lawyers must also be made aware of fair housing law as an economically viable area of legal practice. To this end, fair housing enforcement agencies could be of assistance in encouraging local bar associations and law schools to sponsor training in fair housing practice to foster both awareness and competence in the legal profession in the area of fair housing.

6.2 Agency Alternatives to Case Processing

The focus of Federal anti-discrimination efforts has evolved since the 1960's from an emphasis on individual case-processing to an emphasis on incorporating equal opportunity concepts into all Federal housing policies and programs. In written policies, at least, fair housing law enforcement efforts now include identification and elimination of "systemic discrimination" -- that body of practice which reinforces discrimination through a coalition of interests designed to exclude many minority group members

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1 Lack of explicit authorization for attorney's fees does not necessarily prohibit state courts from awarding them. However, the general rule in American jurisdictions is that attorney's fees are not part of a damage award in civil litigation. As a result, attorney's fees awards must be based on a court's wide-ranging equitable powers and the theory that civil rights complainants are acting for the public good as "private attorney general" -- notions that many state courts may not be reliably assumed to accept.

from a large part of the housing market and, to a large extent, to confine them in deteriorating ghettoes.[1]

Most state-level efforts to enforce civil rights laws have, however, remained focused on case-processing operations. Unfortunately, the features of the case-processing approach most often attacked by its critics are particularly burdensome for victims of sex and marital status discrimination. Case processing generally places the burden of ensuring equal opportunity on the victim herself, since she must not only be informed, willing and able to discern and report the discriminatory practice, but must also assume the responsibility for goading a frequently unresponsive enforcement agency to pursue the case in an effective manner. Moreover, case processing is often slow, which makes it a futile time investment for the victim whose sole or primary need is to secure safe and adequate housing quickly. Finally, case processing as an enforcement strategy has not been shown to be cost-effective, since the handling of individual complaints drains agency resources heavily with little cumulative effect on market practices in general. As an obvious example, race discrimination in housing has been prohibited and complaints have been received and processed by enforcement agencies for over 10 years. Yet race discrimination in housing, though now appearing in more subtle forms, remains a serious social problem. The efficacy of individual complaint processing as a mechanism for attacking systemic discrimination is even less probable in the area of sex and marital status discrimination, a social problem which is, for the present, less publicly recognized and understood even than race discrimination.

This is not to say that individual complaint processing has not been and will not be an important component of civil rights enforcement

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1 Mary Pinkard, "An Approach to Developing Equal Opportunity Policy," HUD Challenge, April 1976, p. 16.

strategies. However, it is critical that state agencies begin to augment this approach with more sweeping mechanisms for reform.

6.3 Pursuing Pattern and Practice or Class Action Cases

Despite the inefficiencies of relying on individual case processing to guarantee fair housing to women, some state laws do not legislatively authorize agencies to initiate and pursue pattern and practice cases geared to reform the practices of large classes of respondents. Large scale actions against groups of respondents or industry-wide practices are an important tool which has been effectively used by enforcement agencies in the area of employment and in race discrimination in housing, but rarely if at all to attack systemic discrimination in housing against women. Of the eleven states studied, only Kansas and Michigan have specific statutory provisions allowing the Attorney General to bring a "pattern and practice" suit in court, while New Jersey's law authorizes agency-initiated investigation of groups and industries which would logically lead to widescale complaints. All of the remaining agencies except California and Ohio are authorized to initiate their own complaints, as well as to process those of individual respondents, leading to the conclusion that "pattern and practice" actions could be fairly broadly utilized by state agencies.

Most agencies insist, however, that budgetary and time constraints effectively preclude their taking advantage of these provisions. Only two of the eleven agencies studied claim to seek out such cases in the area of sex and marital status housing discrimination, or even actively to encourage private groups to prepare large suits. Agency staff cited lack of time, the costliness and complexity of organizing evidence, a lack of experience with sex and marital status cases which could lead to the identification of patterns, and priorities given to race-based pattern and practice cases as the major reasons for neglecting to initiate sex and marital status cases.

Innovative techniques for identifying and discouraging patterns of race discrimination have been developed in several states. Some of

these techniques could be used to research sex and marital status discrimination in housing as well. A number of states are currently conducting or planning research on race-related issues of red-lining, for example. Unfortunately, none are attempting to include research on sex-related issues such as lending practices in neighborhoods with high percentages of single-parent families. Other examples include systematic collection and analysis of sex and marital status characteristics of occupants of large multi-unit dwellings,[1] studies of zoning laws (some of which prohibit construction of family-size, low rent housing units suitable for female headed families), and widespread testing of realtor practices.

Seven state agencies included in our study were also participating at least minimally in reviews of the use of state and Federal housing and community development funds, particularly the A-95 review process. One agency reports that their efforts led to withholding of Federal funds for several discriminatory projects; another agency has played an important role in causing state funds to be denied to a municipal government practicing discrimination in hiring. Although several states agencies have sponsored pending legal suits which are attempting to force Federal agencies to withhold funds from projects rated as discriminatory, most agencies have yet to see any return on the efforts staff have invested in the reviews.

Agency experience with project reviews is of such short duration that agencies report widely different results of reviews. For example, within the A-95 review program, the percentage of projects rated unacceptable by state agencies varies, since they use a wide variety of criteria for evaluation of proposed projects. Some agencies limit reviews to brief inspections of recipients' hiring plans. Other agencies have developed strict affirmative action standards for recipients based on the type of project and area of neighborhood involved. For example, some state

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1 See the discussion of New Jersey Multi-Dwelling Reporting Rule in Chapter 4 above.

agency staff analyze proposed publicly-funded or assisted housing and recreational projects to ensure that needs of lower income groups are met. These review standards should include concern for the impact of proposed projects on female-headed families.

Both to improve the role of civil rights agencies in Federally-mandated review programs, and to promote consistency in interpretation of Federal equal opportunity standards, state agency staff suggest that Federal agencies should agree on Federal affirmative action standards, adopt more uniform equal opportunity reporting requirements and forms for contractors, pool Federal resources for enforcement of affirmative action plans, and provide technical assistance to municipalities and private contractors, many of whom need both persuasion and assistance in developing adequate affirmative action plans. One agency has suggested that Federal agencies augment their compliance monitoring staff by deferring compliance monitoring of affirmative action to select state civil rights agencies. And, of course, state agencies adamantly insist that Federal agencies should not approve funding for projects which have been rated by those agencies as unacceptable. Several agency staff persons felt that rules for A-95 reviews ought to be written into specific law, since legal restrictions on funds for projects could bind Federal agency action more effectively than the current A-95 regulations. Because Federal, as well as state, laws guarantee equal housing opportunity free of sex discrimination, both state civil rights agencies and the Division of Program Standards in HUD's Office of Fair Housing and Equal Opportunity should be working to ensure that considerations of sex discrimination are not overlooked in reviews of housing projects and plans.

6.4 General Recommendations

The availability of reliable and effective processing procedures for all housing complaints based on sex and marital status discrimination is a necessary first step in securing justice for these victims. In preceding

chapters, ways in which these procedures could be made more responsive to the needs of these complainants have been detailed. Even if strong and effective case processing were the rule rather than the occasional exception, however, this method of combatting discrimination would still need to be augmented by more sweeping approaches aimed at preventing discrimination rather than just at compensating its victims and admonishing its perpetrators. Moreover, since budgetary constraints on most agencies preclude the possibility of really effective case processing in the foreseeable future, these alternative methods of combatting discrimination assume increased importance.

The availability of a private bar experienced in litigation involving sex and marital status discrimination in housing and willing to undertake this litigation at both Federal and state levels is an essential step. The existence of such a bar could both reduce agency caseloads and provide a source of specialized help as an alternative to agencies which have little experience and frequently little interest in this form of discrimination. Training and funds should be provided in order to publicize and elucidate this area of litigation. Workshops are funding to law schools for this specific purpose could help establish sex and marital status discrimination in housing as an attractive and interesting area of litigation. Further, since the cost of such litigation is often prohibitive and since few victims of sex and marital status discrimination could afford to bear the cost unassisted, a revolving fund should be provided to make this avenue of relief available to all victims of sex and marital status discrimination in housing, regardless of their income or the availability of court-ordered fees.

Administrative complaint processing under Title VIII of the Federal Fair Housing Act does not, at present, offer many advantages for victims of sex and marital status discrimination, and will not do so until Federal laws provide adequate coverage, HUD acquires coercive powers for conciliation, and cases are deferred to state agencies only where there is a reasonable chance they will be effectively handled.

States, as well as complainants, should have viable alternatives to case processing methods available to them in order to launch a more effective attack on all forms of discrimination and particularly on neglected forms such as sex and marital status discrimination in housing. Agencies with severely restricted budgets are often reluctant to diversity their efforts to include more general approaches and in the face of budget cuts have generally elected to protect the strength of their case processing efforts to the virtual exclusion of other techniques. This conservatism is reinforced by legislative funding procedures which apportion state budgets according to agency caseload size and which, by restricting funds for activities needed to attract cases, simultaneously hold caseload levels down to unrepresentative levels. These funding methods clearly need closer scrutiny. Agencies are also disillusioned with some of the prominent approaches to fighting systemic discrimination, such as the A-95 review process and the arduous and time-consuming preparation of pattern and practice cases.

Despite these difficulties, some agencies have developed promising approaches to combatting systemic discrimination, and the effectiveness of these methods should inspire other states to adopt them. Adoption of a multiple dwelling reporting rule and computer processing of submitted forms is an enormously effective method both for launching a sweeping attack on discrimination and for the resulting economy in investigative efforts. Another state has litigated to throttle off Federal, state and municipal funds to projects considered discriminatory, and in particular, to back up its unfavorable A-95 reviews. While the A-95 review process could be strengthened, this litigation provides an effective method of supporting these reviews for the present. Interesting research in urban planning and land use is also being conducted by several agencies, although specific research on sex and marital status does not receive very much emphasis. Agencies who do adopt innovative approaches to combatting discrimination are much to be commended, particularly where budgets are most restricted. Funds should be provided to effective agencies to enable them to develop

innovative approaches to combatting discrimination and to demonstrate the effectiveness of such methods to agencies who might otherwise be too timid to adopt such techniques. The current HUD program to provide grants to eight states to develop these methods is an excellent approach, but the danger exists that sex and marital status discrimination will be ignored. Considerations of fairness demand that this research benefit all victims of discrimination equally. Moreover, states should be pursuaded that the use of data on the impact of projects or practices on sex and marital status discrimination, as well as on race and national origin discrimination, can often result in a stronger indictment than when one or more classes of affected persons are ignored.

Specific recommendations are summarized below:

Recommendations to the Department of Housing and Urban Development

- Administrative complaint processing procedures under Title VIII of the Federal Fair Housing Act should be strengthened to include coercive powers.

- States without laws prohibiting sex discrimination should not be declared "substantially equivalent" and cases should not be deferred to state agencies for processing unless deferral can be accomplished expeditiously and unless the agency is likely to take effective action on the case.

- Incentives to state agencies for processing cases deferred by HUD should be provided. Agencies indicated that they would be more inclined to process deferral cases more energetically if this did not require diverting staff from processing cases initiated with the state agency itself.

- Training for attorneys in litigation involving sex and marital status discrimination in housing should be provided either through workshops or through funding to law schools. Such training would serve both to attract attorneys to this field of litigation as well as to ensure that informed legal assistance will be available to assist in these cases.

- Pattern and practice cases based on sex and marital status discrimination in housing should be brought by the Attorney General in order to publicize and clarify some of the important legal issues involved in this area of litigation.

- A-95 review should be mandated by statute and state agencies should be provided with guidelines for conducting these reviews. States should be provided with explanations when unfavorable reviews submitted by them are unheeded.

- A revolving fund for litigating housing cases based on sex and marital status discrimination in housing should be established to provide relief for all victims of these forms of discrimination regardless of their income.

Recommendations to Agencies Charged with Enforcing State Fair Housing Laws

- Complainants alleging housing discrimination based on sex and marital status discrimination should always be informed when the processing of their cases may be prolonged. When these complainants have a simultaneous or alternative right to private action, and when they can avail themselves of this right, they should be encouraged to do so.

- Revolving funds for supporting private litigation should be established, and lists of lawyers in this field should be maintained.

- Agencies should try to obtain funds to diversify their enforcement efforts to include research and A-95 and other review efforts. Agencies should be willing to litigate in order to block funds for projects with discriminatory impact.

- Adoption of provisions similar to the Multiple Dwelling Reporting Rule can greatly assist agency enforcement efforts. Although the cost of initiating such a project may be substantial, yet computer monitoring and statistical compilations may result in later economy both in staff time expended for investigation as well as in the probable reduction in the overall incidence of discrimination. All multiple dwelling reporting forms should request information on the sex and marital status of occupants.

- Research projects on urban planning and land use should consider the impact of programs and projects on sex and marital status discrimination.

- Agencies should try to initiate pattern and practice suits against large respondents in cases where important legal issues are involved. Where possible the assistance of advacacy groups should be enlisted in these cases.

- Guidelines for initiating pattern and practice suits should be provided to interested groups who wish to organize such cases.

Recommendations to Advocacy Groups

- Pattern and practice or individual cases involving significant legal issues should be supported.
- A revolving fund to defray the cost of such litigation should be established and with luck should become self-supporting.
- State enforcement agencies should be assisted in their research and review efforts. Ways in which proposed projects are likely to affect sex and marital status discrimination should be brought to the attention of these agencies.
- Legal groups should attempt to pool expertise obtained in litigating housing discrimination cases based on sex or marital status.

Appendix

SITE SELECTION METHODOLOGY

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Thirty-six states have laws prohibiting sex discrimination in various aspects of the sale, rental, and/or financing of housing. Eleven of these states were finally selected for on-site review because they seemed to offer the most comprehensive and informative combination of characteristics for this study, based on information from telephone interviews with agency directors or their designated representatives and follow-up analyses of annual reports, pamphlets and other educational material which they kindly forwarded to us. The site selection was accomplished in two stages. First, the universe of relevant states was narrowed to the 13 which presented the best combination of a strong anti-discrimination law and an experienced civil rights agency. The minimum criteria used to arrive at this original grouping included:

(1) A statute granting specific administrative enforcement powers for implementation of the state prohibition on sex discrimination in housing;

(2) A full-time state agency responsible for enforcement of the law, and;

(3) A sufficient number of complaints filed with the agency to allow for meaningful analysis of the relationship between enforcement powers and procedures and complaint resolution.

The following 13 states met the three initial screening criteria listed above:

- Colorado. Operating under the oldest state statute prohibiting housing discrimination on the basis of sex (passed in 1959, with marital status added in 1973), the state agency processes a steady but moderate caseload: 28 housing cases in 1975, of which 14 were based on sex and/or marital status. A majority of the 10 cases based on marital status were filed by unmarried men and women. Injunctive relief is seldom sought. Damages, which

are rarely awarded, are limited to actual costs sustained by the complainant. "Checking" is used as an investigative technique. Although the agency maintains five offices, only the central office in Denver reported housing complaints based on sex and/or marital status. The great majority of these complaints are from the Denver metropolitan area, while a small number were from Ft. Collins. Two municipalities, Boulder and Ft. Collins, administer substantially equivalent ordinances, but the caseload in each city is small.

- Connecticut. The state statute (extended to sex in 1973 and to marital status in 1974) appears to be the least definitive of the 13 states noted, but the human rights agency has attracted a relatively large number of complaints and is evidently employing a wide range of investigative and enforcement mechanisms. Although not specifically authorized by statute, injunctive relief is regularly sought after a finding of probable cause; damages are awarded to complainants for pain and suffering, as well as actual costs; and "testing" is conducted by volunteer organizations. New Haven and Stanford have fair housing ordinances, but the caseload is small and actual equivalency between the local ordinances and the state statute is unknown. Connecticut is a good example of a state with relatively narrow statutory leeway, but a strong enforcement effort.

- Delaware. The state human rights agency, which enforces a moderately comprehensive law effective in 1972, received a total of seventeen housing complaints based on sex and/or marital status during the first ten months of 1975. However, because the agency attempts to arrange informal conciliation prior to the filing of a formal complaint, (a "predetermination settlement"), the caseload may not reflect the level of activity in this area. Unlike any other state among the thirteen which met the criteria set forth above, Delaware reports that a significant fraction of housing complaints filed on the basis of sex and/or marital status relate to mortgage financing. Also, it is reported that because of informal agreements with respondents and rapid processing, injunctive relief is generally not required to keep a unit off the market until a complaint has been resolved. Monetary damages are limited to actual costs, and "testing" or "checking" is occasionally performed. Although the agency maintains three offices, most housing complaints based on sex and/or marital status originated in the Wilmington area. No municipality has adopted a substantially equivalent ordinance.

- Iowa. The state statute, effective July 1974, prohibits both sex and marital status discrimination in mortage lending, but prohibits only sex discrimination in sales and rentals. The law affords a relatively comprehensive array of investigative and enforcement powers. Of the eighteen sex-based housing complaints filed during fiscal year 1975, all involved rentals and most were from university towns -- Des Moines, Waterloo and Cedar Rapids. The agency maintains only a single office in Des Moines. The state agency seeks injunctive relief; monetary damages are not awarded and "testing" is performed only in the Des Moines area.

- Maryland. The state statute is relatively comprehensive in scope. Sex-based housing discrimination was prohibited in 1972, and marital status coverage was added in 1975. Of the 52 complaints filed with the agency on the basis of sex and/or marital status last year, more than half were filed on multiple bases, generally race. Injunctive relief is sought in housing cases, and "testing" is performed. The state agency may request monetary damages as part of a conciliation agreement, but is not empowered to order awards. One housing specialist is employed in the agency's single office, located in Baltimore, where a large proportion of the cases originate. The city of Baltimore and Montgomery County (suburban Washington) administer substantially equivalent ordinances on a concurrent basis.

- Massachusetts. The state agency operates under a relatively comprehensive statute (extended to sex discrimination in 1971) and to marital status discrimination in 1973), which also includes a prohibition against discrimination based on presence of children. The caseload of housing discrimination complaints based on sex or marital status -- approximately 70 per year for the two categories combined -- is relatively high; but according to the most recent annual report available, a large proportion of housing cases are dismissed for lack of probable cause. Although authorized by statute, injunctive relief has seldom been sought during the past year. Damages are awarded to complainants for actual expenses and pain and suffering; and "testing" is used in housing cases. The agency maintains three offices, and a housing supervisor and two housing specialists are employed at the central office. There are no substantially equivalent municipal ordinances.

- Minnesota. Under a relatively comprehensive statute (effective in 1973), the state agency has received a comparatively large number of housing complaints based on sex or marital status; approximately 90 during the past two years. Injunctive relief

is not sought in housing cases, although investigation time is reported to be two to three months. The agency awards both actual and punitive damages, with a $500 limit in each case. Little "testing" or "checking" is performed. Although the agency maintains two offices, only the St. Paul office reportedly receives a substantial number of housing complaints based on sex and/or marital status. The municipalities of Minneapolis and St. Paul administer substantially equivalent ordinances.

- New Jersey. Liberal interpretation of a comparatively limited state statute (effective 1970) by the human rights agency and the state courts has enabled the state agency to employ a relatively strong battery of investigative and enforcement mechanisms in combatting housing discrimination. Approximately 40 housing discrimination cases based on sex and/or marital status are filed annually from all areas of the state. Although the state statute is silent with respect to injunctive relief, restraining orders are regularly sought after a finding of probable cause. Damages for pain and suffering, as well as actual costs incurred, are awarded to complainaints, and volunteer organizations perform "testing." The state agency maintains four offices, at least three of which will be contacted during field investigation. The city of Newark administers a fair housing ordinance.

- New York. Although the state statute (effective in 1974, extended to marital status in 1975) appears to be relatively comprehensive in prohibiting all aspects of housing discrimination on the basis of sex or marital status, the state human rights agency has generated a relatively small caseload in this area -- approximately 30 complaints per year. The City of New York, which administers a substantially equivalent ordinance on a concurrent (and mutually exclusive, "first filing") basis, is reported to receive some 20 complaints annually. Injunctive relief is sought in some cases, damages are awarded for both actual costs and mental anguish, and "testing" is performed. The agency maintains eleven offices (eight in the New York metropolitan area).

- Ohio. Operating under a statute that prohibits discrimination in housing on the basis of sex only (effective in 1973), the state agency has interpreted the law as extending to complaints brought on the basis of marital status, as well. A total of 23 sex-based housing cases were filed during fiscal 1975. The agency staff have also conducted research concerning the disparate impact of certain apparently neutral actions and policies, particularly the issue of single-parent families. As the result of a state court decision, the human rights agency has been limited in damage awards to

equitable relief in the form of restitution, as distinguished from compensatory or punitive damages. The Ohio agency does not attempt to secure injunctive relief, but "testing" and "checking" are regularly performed. There are seven agency offices. No municipalities are known to administer substantially equivalent ordinances.

- Oregon. The moderately extensive state statute passed in 1973 is administered by the Civil Rights Division of the Bureau of Labor. Only one of the 37 housing cases filed on the basis of sex and/or marital status in 1974 was filed on the basis of sex discrimination. Some 27 cases were filed with the agency in the first 10 months of 1975. Although a backlog of cases reportedly results in a six-month delay between filing and investigation, injunctive relief is rarely sought. Monetary damages for both actual costs and pain and humiliation are awarded by the agency. "Testing" is not performed but "checking" is sometimes employed in investigation. The state agency maintains seven offices which process housing complaints, but most of the cases involving sex or marital status reportedly come from the Portland area. No municipalities have passed substantially equivalent ordinances.

- Pennsylvania. Although lacking explicit prohibition against marital status discrimination, the state statute prohibiting sex discrimination in housing has been extended to cover many aspects of marital status by the state agency. The law, passed in 1969, was one of the first to provide protection on the basis of sex. A 1973 court decision found that the state agency was not authorized to ascertain and award compensatory damages, but the agency has continued to make monetary awards pending the outcome of an appeal. The agency seeks injunctive relief on behalf of complainants, and employs "testing" and "checking" as investigative aids. The Pennsylvania human rights agency employs a full-time housing director and twelve housing specialists in three offices. Approximately two-thirds of all housing complaints result in a finding of probable cause and are conciliated -- the highest conciliation percentage reported by any state agency contacted. Two municipalities, Philadelphia and Pittsburgh, administer substantially equivalent ordinances. The Philadelphia caseload of sex-based housing complaints (approximately 25 per year) is very close to that processed by the state agency.

- Washington. Processing the largest number of housing discrimination cases based on sex and marital status of any state agency, the Washington agency operates under a relatively comprehensive

statute, effective in 1973. Washington is a community property state. The state agency seeks injunctive relief, awards both monetary damages for pain and suffering, as well as actual costs, and performs "testing". Of the eight agency offices, three report a relatively high percentage of housing complaints based on sex and/or marital status. Two municipalies within the state administer substantially equivalent ordinances.

In the second stage of site selection, an additional number of sites which could not meet the minimum criteria discussed above (usually because of insufficiency of caseload), but which nevertheless offered various other interesting characteristics were considered. In particular, we were interested in exploring at least one decentralized enforcement effott and one jurisdiction in which the state civil rights agency had a strong tradition, but was relatively unacquainted with the issue of sex-based housing discrimination. In addition, we felt that the sites selected should have a variety of racial, ethnic and economic backgrounds. These additional factors led us to expand our original group of 13 states to include 5 other potential sites.

These additional sites, with a brief description, are as follows:

- California. The state legislature recently extended the statute prohibiting housing discrimination to include sex and marital status, with an effective date of January 1, 1976. Approximately 100 inquiries concerning sex-based housing discrimination and 10 formal complaints were received by the state agency during a one-month period in 1975, when the agency initiated enforcement under a previous statute subsequently ruled insufficient to authorize activity. San Francisco's municipal ordiance includes discrimination against children as a prohibited act.

- Indiana. Because the state agency administers a decentralized technical and financial assistance program for municipal human rights and housing agencies, the state caseload is relatively low. The seven sex-based housing discrimination complaints received by the state agency during the last two years represent an insufficient number to judge the effectiveness of state enforcement alone. Through the decentralization approach, eleven municipalities now enforce the anti-discrimination ordinances sub-

stantially equivalent to the state statute. Although granting a broad range of powers to the state agency, the statute (effective in 1971) did not extend to mortage financing or any form of housing discrimination on the basis of marital status until very recently. In November 1975, the law was broadened to prohibit discrimination in mortage lending on the basis of sex and marital status.

- Kansas. The state agency has adopted an approach similar to that employed by Indiana. The state caseload is somewhat greater (13 complaints based on sex and/or marital status during the past two years), with five municipalities now enforcing substantially equivalent ordinances. The statute, adopted in 1972, prohibits discrimination on the basis of sex only.

- Kentucky. The state agency has enforcement responsibility for a strong statute limited to discrimination in mortgage lending on the basis of sex or marital status. Despite widespread publicity concerning the law, only three complaints have been filed with respect to sex-based discrimination in mortage financing since the law became effective.

- Michigan. In the first four months since the housing section of the strong state human rights statute was extended to include sex and marital status (in June 1975), twelve complaints were received by the state agency. The Michigan agency is among the largest in the nation and appears to conduct a particularly vigorous enforcement effort.

Selection Criteria

From among the eighteen states, we recommended the selection of a sufficient number of sites to assure that each of the following characteristics, as well as the primary screening criteria discussed earlier were included in at least one case study:

- A state statute prohibiting discrimination in housing on the basis of sex only. Inclusion of such cases permits analysis of the extent to which such statutes have been interpreted to include complaints based on marital status; six of the eighteen states noted above do not include marital status in their anti-discrimination statute.

- Use of injunctive powers to block the sale or rental of a property until a complaint is settled. The use of injunctive relief is a significant factor in the achievement of satisfactory resolution of complaints, and we wanted to include states which do not provide restraining orders, those which seek such orders only after a finding of probable cause, and those which can pursue injunctions immediately after the filing of a formal complaint.

- Award of damages by the state agency. The award of damages is an important element in complainant satisfaction and may have a deterrent effect upon certain respondents. We wanted to include states which limit their awards to actual costs sustained by complainants as well as those which award "pain and suffering", and punitive damages as well.

- Use of testing. Testing is a particularly important investigative tool in achieving satisfactory settlement of individual complaints, as well as in establishing discriminatory pattern and practice. Hence, it was felt that the sample should include (a) state agencies which conduct testing with their own staff, (b) state agencies which rely upon volunteers (such as fair housing councils) to perform this function, and (c) state agencies which do not use this investigative technique.

Based on these criteria, the following states were selected: California, Connecticut, Delaware, Kansas, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania and Washington.