MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION v. FRANZAROLI: A PROBLEM IN ADMINISTRATIVE ENFORCEMENT OF FAIR HOUSING LAWS

I. INTRODUCTION

In *Massachusetts Commission Against Discrimination v. Franzaroli*,[1] the Supreme Judicial Court of Massachusetts ruled that the state's antidiscrimination agency could award damages for mental suffering to a victim of housing discrimination. Many state and local governments have established antidiscrimination commissions under statutes and ordinances similar to the Massachusetts statute,[2] and although a similar award was successfully enforced in a lower New York court,[3] *Franzaroli* is the first case in which the highest court of a state has upheld a commission award comprised in part of compensation for mental suffering.[4] The Massachusetts decision is also unusual because the mental suffering award was founded upon a bare finding of discrimination with little if any consideration of its effects on the victim.[5]

However laudatory the motives of the agencies or the courts sustaining their awards, compensation for mental suffering absent proof of the effect of discrimination upon the victim cannot be supported by these antidiscrimination statutes. This Comment suggests that underlying such awards is a tension between state and federal fair housing enforcement threatening to disrupt the operation of state agencies and to preempt their function in this area unless they are given expanded authority to award damages capable of deterring discrimination and recompensing victims as adequately as federal remedies.

II. *MCAD v. Franzaroli*

On November 6, 1967, Mandred Henry, a Negro resident of Worcester, Massachusetts, answered a newspaper advertisement for an apartment. A woman identifying herself as the owner politely agreed

[1] — Mass. —, 256 N.E.2d 311 (1970).

[2] By 1961, twenty states had such commissions charged with enforcing antidiscrimination legislation, many of which—including Massachusetts'—were patterned after the New York State Commission. Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 527 n.7 (1961); *see* N.Y. Times, Sept. 21, 1969, at 82, col. 2.

[3] Commission on Human Rights v. Knox Realty Corp., 56 Misc. 2d 806, 290 N.Y.S.2d 633 (Queens County 1968). *Contra*, Commission on Human Rights v. Hardenbrook Realty Corp., 57 Misc. 2d 430, 292 N.Y.S.2d 775 (Queens County 1968); Weynberg v. Commission on Human Rights, 56 Misc. 2d 1, 287 N.Y.S.2d 1002 (Kings County 1968).

[4] Such awards have received favorable publicity. *See, e.g.*, N.Y. Times, Mar. 4, 1970, at 95, col. 3; *id.*, May 17, 1970, at 50, col. 3; *id.*, Sept. 24, 1969, at 1, col. 5.

[5] *See* note 19 *infra*.

to show the apartment the next morning.[6] When no one appeared for the appointment, Mr. Henry approached a tenant in the building who professed to know nothing of the vacant apartment. Several minutes later the tenant and another woman appeared on the porch, then turned and reentered the building without speaking to Mr. Henry. Shortly thereafter a third woman came to the door and explained that the owner had just called saying that the apartment had been rented earlier that day to a school teacher.[7]

Mr. Henry contacted Fair Housing, Inc., a private, nonprofit organization which investigates charges of unlawful discrimination.[8] A Fair Housing representative then visited the apartment and obtained from the owner's agent the name and address of the person who had allegedly rented the still vacant apartment. The representative then contacted the new "tenant" and learned that the agent, a Mrs. Locke, had rented the apartment to her on November 12, and had stated that she had previously received a call from the second-floor tenant concerning Mr. Henry, that she did not want to rent to a Negro, that she would predate the deposit receipt to establish that the apartment had been rented before Mr. Henry applied, and that if anyone inquired, the new tenant should say that the apartment was rented on November 6.[9]

On November 8, Mr. Henry filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) charging George and Mary Franzaroli, the owners, with unlawful discrimination in the rental of housing accommodations.[10] Following its statutory procedure, the MCAD investigated and found probable cause to believe Mr. Henry's allegations.[11] A conciliation agreement was entered on April 2; the Franzarolis agreed to refrain from further unlawful discrimination, to rent the apartment (which the intervening tenant had eventually refused) to Mr. Henry, and to pay him $475 in compensation.[12] But the Franzarolis defaulted on the agreement after paying $175. Pursuant to the Commission's statutory authorization,[13] a public hearing was held on December 5. On January 16, 1969, the

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[6] Hearing Transcript at 19, Henry v. Franzaroli, No. PrH IX-82-C (Mass. Comm'n Against Discrimination, Dec. 5, 1968) [hereinafter cited as Hearing Transcript].

[7] *Id.* 20-21.

[8] For an anecdotal account of the operations of one such organization, see Ickeringill, *Was It Really Rented? When A Black Wonders, The White Volunteer Finds Out*, N.Y. Times, Mar. 12, 1970, at 44, col. 1.

[9] Hearing Transcript 50-52.

[10] — Mass. at —, 256 N.E.2d at 312.

[11] MASS. ANN. LAWS ch. 151B, § 5 (Supp. 1969). This section empowers the Commission to combat violations of statutes prohibiting discrimination in areas of employment, labor organizations, employment agencies, insurance and bonding, mortgages, housing, and real estate, *id.* § 4 (Supp. 1969), municipal housing projects, *id.* ch. 121B, § 32(e) (Supp. 1969), and public accommodations, *id.* ch. 272, §§ 92A, 98 (1968).

[12] Brief for Petitioner at 2, Massachusetts Comm'n Against Discrimination v. Franzaroli, — Mass. —, 256 N.E.2d 311 (1970).

[13] MASS. ANN. LAWS ch. 151B, § 3 (1965), *as amended*, (Supp. 1969).

MCAD found that the respondents had engaged in unlawful discrimination and awarded Mr. Henry $844.50 damages including $250 compensation for mental suffering.[14] The respondents failed to comply with the Commission's order and enforcement was sought in the superior court. The court entered a decree without opinion enforcing the cease and desist provisions of the order but not the award of damages.[15] The Commission appealed to the supreme judicial court.

Reversing the superior court's denial of damages, the supreme judicial court looked first to the statute empowering the Commission to compel certain affirmative actions by those practicing unlawful discrimination.[16] In addition to requiring the respondent to cease and desist from the unlawful practice, the Commission's order can require affirmative action including, but not limited to, hiring, reinstating, or upgrading employees, with or without back pay, or reinstating the victim in any labor organization.[17] If the violation relates to housing, real estate, or municipal housing programs, the Commission may additionally award the complainant

> damages not to exceed one thousand dollars, which damages shall include, *but shall not be limited to,* the expense incurred by the petitioner for obtaining alternative housing or space, for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlawful practice or violation; provided, however, that such damages shall not include attorneys' fees.[18]

The court seized upon the phrase "but shall not be limited to" as statutory authorization for the Commission's award. Without offering a rationale for this conclusion, the court simply concluded that the award was supported by substantial evidence and untainted by error of law. As for the mental suffering portion of the award, the court said:

> In view of the statutory power of the commission, and the recognition in our cases that damages for mental suffering may be recovered in appropriate cases, Meagher v. Driscoll, 99 Mass. 281 (wrongful removal of a child's body from its grave), Fillebrown v. Hoar, 124 Mass. 580 (wrongful eviction), Lombard v. Lennox, 155 Mass. 70, 71, 28 N.E. 1125

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[14] Findings of Fact, Conclusions of Law and Orders at 5, Henry v. Franzaroli, No. PrH IX-82-C (Mass. Comm'n Against Discrimination, Jan. 16, 1969). The other elements of damage were $94.50 actual damages for gasoline, tolls, use of a company car and a flat mileage allowance, and $500.00 for loss of time. The total award of $844.50 was reduced to $669.50 by allowing as an offset the $175 previously paid by the Franzarolis. Hearing Transcript 45, 56-58.

[15] Massachusetts Comm'n Against Discrimination v. Franzaroli, Equity No. 89927 (Suffolk Super. Ct., June 4, 1969).

[16] MASS. ANN. LAWS ch. 151B, § 5 (Supp. 1969).

[17] *Id.*

[18] *Id.* (emphasis added).

> (discharge from employment), an award by the commission of $250 for mental suffering was not improper.[19]

This reasoning suggests that rather than testing the legitimacy of each item of damages against the statute itself, the court initially found a general power to award damages and then contented itself with testing

[19] — Mass. at —, 256 N.E.2d at 313. Because, as this citation indicates, Massachusetts cases ruling on awards of damages for mental suffering are scarce, the court was left a great deal of latitude in its review of the MCAD. Lombard v. Lennox, 155 Mass. 70, 28 N.E. 1125 (1891), was an appeal from an action based on the procurement of a wrongful discharge from employment. The court found the case analogous to one of slander (under which penal damages cannot be recovered in Massachusetts, in the absence of statutory authorization, *see* sources cited note 44 *infra*) and, apparently with only the pleadings before it, ruled that "the facts alleged are such as would naturally cause the plaintiff mental suffering." *Id.* at 72, 28 N.E. at 1126. Specifically not ruling on "the question whether these facts conclusively establish the existence of such an injury," the court held that the question of damages for mental suffering should have been considered. *Id.* at 71, 28 N.E. at 1125. In Fillebrown v. Hoar, 124 Mass. 580 (1878), an action of illegal eviction, the plaintiff's family had been turned out in his absence and during inclement weather. The court held that the jury should have been charged that the plaintiff was not entitled to recover for his grief at his family's illness, among other things, but that his recovery "must be limited to the injury to his feelings by reason of the indignity and insult of being unlawfully turned out of his home with his family." *Id* at 585. Meagher v. Driscoll, 99 Mass. 281, 285 (1868) held that in an action for trespass *quare clausem fregit* for the removal of a body from a grave, the father might recover for mental suffering.

> [T]he circumstances which accompany and give character to a trespass may always be shown either in aggravation or mitigation. . . . Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort.

Each of these cases held that damages for mental suffering should be considered as a part of the ordinary and natural consequences of the tort, but none of them offer guidance or standards to establish what must be shown to establish those damages. Assuming the court in *Franzaroli* was holding that such damages could be considered by the MCAD under the same theory, there remains some question whether this award is supportable under generally accepted requirements of proof of damages in such cases. For example, RESTATEMENT OF TORTS, Explanatory Notes § 905, comment *b*(i) at 547-48 (1939) states:

> The length of time during which pain or other harm to the feelings has been or probably will be experienced and the intensity of the distress are the two factors to be considered in assessing the amount of damages. In determining this, all relevant circumstances are considered, including sex, age, condition in life and any other fact indicating the susceptibility of the injured person to this type of harm.

The actual testimony presented at the hearing in support of the award was as follows:

> Q. Now, to go on to a different subject, did you believe, on November 6th, that you were being discriminated against?
> A. I certainly do.
> Q. Did you believe it then?
> A. Yes, I did.
> Q. Please tell the Commission your emotional reaction to these events?
> A. I don't know if you can describe them, other than frustration, to be honest, and complete anger and like a slap in your face. You know, you expect a slap in your face, but when somebody really slaps you, then it starts hurting. That's the only thing I can say.
> Q. Had you suffered prior instances of discrimination?
> A. No, not that I can recall.
> Q. Were you upset by this?
> A. Very much so, upset.
> [Counsel]: That's all I have of this witness.

Hearing Transcript 37. This evidence only questionably supports the "substantial evidence" test applicable here, MASS. ANN. LAWS ch. 30A, § 14(8)(e) (1966).

each item of damages against the common law rules governing damages in tort suits.

But the court's reasoning does not justify the conclusion that the award is to be governed by common law principles from the observation that the Commission may award damages other than those specifically enumerated in the statute. The procedural statute governing the MCAD does empower it to award damages in cases involving housing discrimination, but such awards are part of a complex statutory scheme of antidiscrimination law enforcement and do not derive—contrary to the court's position—from a general power to award damages analogous to common law tort actions.

There are two compelling reasons dictating a strict reading of the Commission's statutory power to award damages. The first is based on an analysis of the remedy clause itself. The enumerated remedies are designed under the clear wording of the statute to operate primarily prospectively through the use of conciliation and orders requiring offenders to cease discrimination and take affirmative action such as hiring the complainant with back pay, admitting him to a labor organization, or renting him previously denied housing. Although not exclusive, the damages authorized in housing discrimination cases are clearly of a common type—compensation for out-of-pocket expenses uniquely connected with housing discrimination and analogous to the allowance for back pay in employment discrimination cases. When the legislature lists the specific damages the Commission may award, and these damages have a common similarity, the *ejusdem generis* principle of construction[20] speaks strongly for restricting the "but shall not be limited to" phrase to out-of-pocket expenses such as commuting or storage costs, especially when this construction produces a harmonious statutory scheme.

Second, the different types of affirmative action and categories of damages authorized by the Massachusetts legislature for each of the three respective antidiscrimination statutes within the purview of the MCAD[21] demonstrate that the legislature believed that enforcement would be most effective if sanctions were specifically enumerated for each of the different types of discrimination. An individual can seek enforcement of any one of the three statutes through a private action alleging a violation of one of the substantive statutes or through an MCAD administrative proceeding.[22] In the latter case, the remedies authorized by the legislature are specifically drawn to counter most effectively the particular type of discrimination alleged. For example, if the individual alleges discrimination in employment, the remedy

[20] This principle ordinarily limits general terms given with a series of particular terms to the common class described by the particular terms. *Cf.* Weyerhauser S.S. Co. v. United States, 372 U.S. 597, 600-01 (1963).

[21] *See* note 11 *supra.*

[22] *See* MASS. ANN. LAWS ch. 151B, § 9 (Supp. 1969).

clause provides that the Commission may order the employer to cease unlawful discrimination, rehire the individual, and award damages equal to his loss of pay. But general damages cannot be awarded in employment cases.[23] If the individual alleges public accommodations discrimination in violation of sections 92A and 98 of chapter 272, the Commission can merely issue a cease and desist order under the remedy clause:[24] the legislature apparently believed that the remedies already provided in such cases were adequate to assure compliance. These remedies include (1) a fine of up to $300 in a criminal action brought by the attorney general or (2) a private right of action based upon the substantive violation but specifically limited by that statute to a maximum recovery of $500.[25] So too, the remedies uniquely applicable to housing discrimination cases were limited by the additional phrases added to the remedy clause. The specific enumeration of the types of damages permitted such as moving and storage expenses speak strongly for a limitation of the "but not limited to" phrase. Here again, the MCAD was not authorized to award general damages such as might be recovered if the individual sought to recover in a private tort action. The pattern of specific remedies for specific types of discrimination further supports this narrow construction.

The legislative history of the housing discrimination sections provides further support for a narrow reading of the remedy clause. The statute did not provide a damages remedy until 1965.[26] When the damage remedy was added, however, it was directed only to housing and real estate discrimination although the antidiscrimination laws administered by the Commission were and remain much broader than housing and real estate cases.[27] Thus, absent specific language to this effect, it is extremely difficult to argue that the legislature intended to grant the Commission power to award damages for mental suffering to victims of one class of unlawful discrimination while denying it the power to award such damages to the victims of other types of discrimination. The sounder conclusion from the terms, structure, and history of the housing discrimination remedy clause is that the "but shall not be limited to" phrase was intended to include only out-of-pocket expenses uniquely related to housing discrimination and not general tort damages or compensation for mental suffering.

III. Reaching for Conformity: The Influence of the Federal Housing Act of 1968

An explanation for the *Franzaroli* court's willingness to extend the Commission's enforcement remedies may stem from a federal-state

[23] *See id.* § 5.

[24] *Id.*

[25] *Id.* ch. 272, §§ 92A, 98 (1968).

[26] Ch. 569, [1965] Acts and Resolves of Mass. 339.

[27] *See* note 11 *supra.*

tension in the area of housing discrimination created by the growing federal involvement in the area. Title VIII of the Civil Rights Act of 1968[28] provides complementary federal and state enforcement of fair housing laws. But if a state does not provide its citizens rights and remedies substantially equivalent to those provided by federal fair housing legislation, the state's antidiscrimination commission and courts may find themselves preempted by federal enforcement.

Title VIII opened two avenues to victims of housing discrimination:[29] a noncoercive administrative remedy permitting suit in federal court if conciliation efforts fail,[30] and a direct civil suit in federal or state court based on the federal substantive law.[31] In the first, federal efforts to secure compliance are to be withheld pending action by state or local agencies when their rights and remedies for housing discrimination are "substantially equivalent" to those of title VIII.[32] If these

[28] 42 U.S.C. §§ 3601-19 (Supp. IV, 1969). Title VIII became effective immediately upon passage on April 11, 1968, but only as applied to certain classes of housing owned or financed in specific ways by the federal government. *Id.* § 3603(a)(1). Thereafter, coverage was automatically extended on January 1, 1969, and again on January 1, 1970, so that it now covers all housing except (a) single family homes sold by bona fide private individual owners without the aid of real estate facilities or personnel and without advertising indicating the intent to discriminate, and (b) units in owner-occupied dwellings to be occupied by no more than four families including the owner (the "Mrs. Murphy" provision). *Id.* § 3603(b)(1), (2). *See also* DEP'T OF JUSTICE, EXPLANATION OF THE PROPOSED SUBSTITUTE BILL (AMENDMENT No. 554), H.R. No. 2156, 90th Cong., 2d Sess. (1968). For a general discussion of the private enforcement provisions of title VIII, see Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834 (1969).

[29] A third avenue for a victim alleging housing discrimination on *racial* grounds was opened in 1968 by the Supreme Court's holding that 42 U.S.C. § 1982 (1964), originally part of § 1 of the Civil Rights Act of 1866, was constitutional under the thirteenth amendment when construed to forbid purely private discrimination in the sale of real estate, and would support injunctive relief. Jones v. Alfred Mayer Co., 392 U.S. 409 (1968); *accord*, Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (Court held that § 1982 will also support an action for compensatory damages). While the majority opinion held that § 1982 would not be nullified by title VIII, the minority pointed out that title VIII will provide relief for most victims of housing discrimination. The Court spoke of purely private discrimination in both cases, but the factual situations involved housing developments. This, plus the "vague and open-ended" nature of § 1982 as interpreted by the Court, *see* 396 U.S. at 241 (Harlan, J., dissenting), makes it unlikely that any victim who could make a case cognizable under title VIII would seek recourse to § 1982.

[30] 42 U.S.C. § 3610 (Supp. IV, 1969). The person aggrieved may file a complaint with the Secretary of Housing and Urban Development, who in turn may attempt to resolve the complaint through conference, conciliation, and persuasion as governed by certain procedural safeguards, *id.* §§ 3610(a), (b). If the Secretary, and any state or local agency to which he must refer the complaint, cannot resolve it, the person aggrieved may commence a civil action in an appropriate United States district court without regard to any jurisdictional amount. *Id.* § 3610(d). On a finding that a discriminatory housing practice has occurred or is about to occur, the court is empowered to enjoin the respondent or order such affirmative action as may be appropriate. Such relief is made "subject to section 3612," *id.*, which provides procedures and remedies for a direct suit, but whether this is intended as a procedural limitation or as an enumeration of remedies is unclear. *See id.* § 3612(c). It is possible that the remedies under § 3610(d) might be construed to be narrower than those available under § 3612.

[31] *Id.* § 3612.

[32] *Id.* § 3610(c). Questions regarding the efficacy of state and local remedies and procedures are determined by the Secretary of Housing and Urban Development.

agencies fail to effect conciliation, the aggrieved party may sue in federal court unless he has available to him a state judicial remedy "substantially equivalent" to the rights and remedies provided by title VIII.[33] In the second, the aggrieved party apparently faces no exhaustion requirements of any nature, and may simply bring an action directly in the federal court.[34]

A. *The Administrative Remedy—Judicial Control of Access to Federal Court*

The federal standards of title VIII against which the state or local antidiscrimination laws must be compared provide rights roughly coextensive with those provided by the Massachusetts housing discrimination law.[35] But in the area of judicial remedies, the two statutes are different in several important respects. Although both federal and Massachusetts law contemplate similar injunctive relief, the federal remedies further include a potentially broader compensatory damage clause, court costs, attorney's fees for those unable to pay them, and up to $1000 punitive damages.[36]

Because the coverage of title VIII is nearly congruent with the Massachusetts prohibitions against housing discrimination, most Massachusetts complainants may seek relief either through the MCAD or the federal conciliation procedure or district court. If a victim has first chosen federal administrative conciliation and later attempts to carry his complaint into federal court, the court will entertain the action only if the state's judicial remedies are not "substantially equivalent" to those provided by title VIII.[37]

To determine whether Massachusetts' judicial remedies are "substantially equivalent" to the federal remedies, it is necessary to consider the apparently dual purpose of the federal statute—vindication of the victim's interest in open housing and abolition of housing dis-

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[33] *Id.* § 3610(d).

[34] *Id.* § 3612(a). Under § 3610(c), if the Secretary determines that in his judgment, under the circumstances of the case, the protection of the rights of the parties or the interests of justice require, he may reenter a case previously referred to a state or local agency. Thus under § 3612 if, following a direct suit, conciliation is sought through the Secretary and referred to the state or local agency, that agency may be preempted by either the Secretary or the court if it fails to resolve the complaint promptly and adequately.

[35] *Compare* note 11 *supra, with* note 28 *supra.*

[36] 42 U.S.C. § 3612(c) (Supp. IV, 1969).

[37] *Id.* § 3610(d). In Colon v. Tompkins Square Neighbors, Inc., 289 F. Supp. 104 (S.D.N.Y. 1968), the court, applying § 3610 in a suit alleging unlawful discrimination on the basis of race and status as welfare recipients, first dismissed the suit on the grounds that an adequate state remedy was available. On reargument the court dismissed the racial discrimination claim, but reinstated the welfare recipient discrimination claim pending outcome of an appeal to the Second Circuit in a similar but unrelated case. *Id.* at 108. There was no report that a complaint had ever been filed with the Secretary; therefore, the case may have been properly cognizable under § 3612.

crimination in general.[38] Because Massachusetts empowers its commission both to enjoin unlawful discrimination and take affirmative action to place the victim in previously denied housing and to compensate for out-of-pocket expenses, the first federal objective will in most instances be served by the state scheme. An award of damages in addition to out-of-pocket costs may in one sense assuage the sting of discrimination, but in a larger sense it relates more closely to the elimination of discrimination because it penalizes the discriminator. Thus, in the absence of authority to award damages for mental suffering, the MCAD and other agencies operating under similarly limited enabling statutes may be unable to accomplish the second federal purpose of eliminating housing discrimination generally.

Franzaroli is unusual because the Commission found a factual basis for the substantial award of $594.50 for lost time and out-of-pocket expenses in addition to the award for mental suffering.[39] Housing discrimination cases in New York[40] and New Jersey[41] indicate that most victims are unable to prove such damages. When a discriminator realizes that under the statute he stands to lose little or no money and can only be ordered to cease discrimination and rent to the individual he had previously refused, the statute is unlikely to have any significant deterrent effect. Punitive damages are a windfall rather than a right[42] and a federal court should not be concerned with the omission of a punitive damages provision in a state statute for purposes of vindicating a victim. But a determination of "substantial equivalence" might turn upon the state's inclusion of a damages provision which would achieve a deterrent effect comparable to that of title VIII.

B. *Direct Civil Suit—Unrestricted Access to Federal Court*

In addition, the state must overcome an even more difficult problem if its antidiscrimination agency is to retain a role in fair housing enforcement. In the first alternative available under title VIII, the federal district court may look to the broad purposes of the federal statute to determine whether a "substantially equivalent" state judicial remedy exists. But under the second alternative available under title VIII, the victim may file suit directly in federal or state court under the federal statute without prior recourse to either federal or state admin-

[38] 42 U.S.C. § 3601 (Supp. IV, 1969) declares the policy of the United States to provide, within constitutional limitations, fair housing throughout the United States. In deciding to act under § 3610(c) if the state or local agency has proven ineffectual, the Secretary must consider "the protection of the rights of the parties" and "the interests of justice"; and the judicial remedies of § 3612(c) operate both to compensate the victim and to deter housing discrimination generally.

[39] *See* note 14 *supra.*

[40] *See* note 45 *infra.*

[41] *See* note 46 *infra.*

[42] W. PROSSER, THE LAW OF TORTS 13 (3d ed. 1964).

istrative conciliation.[43] Thus, unless the state provides both a remedy substantially equivalent *in the judgment of the victim* to those available under title VIII, and a procedural framework at least as efficient and effective as the federal framework, a victim is unlikely to look to the state's antidiscrimination agency and courts for relief.

In this context, a peculiar feature of Massachusetts law takes on added significance. The common law of Massachusetts permits punitive damages only when specifically authorized by statute.[44] Thus, the supreme judicial court found itself confronted by a three-pronged dilemma. The MCAD enabling legislation permits no more than out-of-pocket expenses. The common law prohibits punitive damages unless specifically authorized. But title VIII requires by its purposes and alternative provisions for federal relief both an effective deterrent to housing discriminators and potential remedies at least as promising as the federal legislation if a state's agency and lower courts are to remain in the business of protecting Massachusetts' citizens from Massachusetts' discriminators. Faced with this dilemma, the MCAD and the supreme judicial court in *Franzaroli,* by luck or design, hit upon a dubious solution. Regardless of the basis for the award of damages for mental suffering, there can be little doubt that such an award will both deter potential discriminators and provide substantially similar remedies for a victim who might otherwise be tempted to go directly into federal court.[45] Thus, by giving an unsupportably broad inter-

[43] *See* Brown v. LoDuca, 307 F. Supp. 102 (E.D. Wis. 1969) (order granting preliminary injunction). Section 3612(a) authorizes a court to continue a civil case if the victim has filed a complaint under § 3610(a) and "the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of," but does not empower the court to require resort to such measures in lieu of or as a condition to judicial relief.

[44] City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N.E.2d 265 (1943); Genga v. Director General of R.Rs., 243 Mass. 101, 137 N.E. 637 (1922); Boott Mills v. Boston & M. R.R., 218 Mass. 582, 106 N.E. 680 (1914); Ellis v. Brockton Publishing Co., 198 Mass. 538, 84 N.E. 1018 (1908). *See also* Comment, *Punitive Tort Damages In New England,* 41 B.U.L. REV. 389, 390 (1961).

[45] The New York State Division for Human Rights and the New York City Commission on Human Rights have recently attempted to enforce damages for mental suffering, but with considerably less success than the MCAD. In language much broader than the Massachusetts statute, these two agencies are identically empowered to award "compensatory damages to the person aggrieved by such practice, as, in the judgment of the division, will effectuate the purposes of this article." N.Y. EXEC. LAW § 297(4)(c)(iii) (McKinney Supp. 1969); N.Y.C. ADMIN. CODE § B1-8.0(2)(c) (Supp. 1969-70). While this language standing alone might support an award of compensatory damages for mental suffering, it places the New York agencies on the same footing as the MCAD with respect to penal damages.

The first attempts to obtain enforcement of mental suffering damages were made by the City Division in three successive reported awards of $100. The first failed on the grounds, *inter alia,* that while discrimination had been shown, "[t]here is not the slightest degree of proof in this regard that [the complainant] was in anywise humiliated, outraged and anguished by the result of the landlady's action." Weynberg v. Commission on Human Rights, 56 Misc. 2d 1, 3, 287 N.Y.S.2d 1002, 1005 (Kings County 1968). The second was enforced with no recitation of the facts, Commission on Human Rights v. Knox Realty Corp., 56 Misc. 2d 806, 290 N.Y.S.2d 633 (Queens County 1968), and the third failed on the grounds that the complainant was making a practice of seeking out discrimination and collecting damages, Commission on Human Rights v. Hardenbrook Realty Corp., 57 Misc. 2d 430, 292 N.Y.S.2d 775 (Queens

pretation to the phrase "but shall not be limited to" in the MCAD enabling statute, the supreme judicial court has produced a result which brings Massachusetts enforcement remedies in line with federal law, thereby keeping its state antidiscrimination agency in the forefront of local discrimination problems and limiting federal enforcement to an auxiliary role.[46]

It is clear from the construction of title VIII of the Civil Rights Act of 1968 that state and local fair housing commissions were intended to play a broad and basic role in the enforcement of antidiscrimination

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County 1968). These three cases indicate that the City Commission is not only awarding damages on dubious statutory grounds, but further, that it is awarding at least a flat $100 without any proof of damages at all. Such awards are penal in nature and not payable under the New York City statute.

The only report of an order which would tend to negate this pattern of flat awards with no proof of damages actually makes the situation appear more flagrant. The *New York Times* reported that, on a finding of housing discrimination against a member of the Jewish faith by a Manhattan cooperative apartment group and the cooperative's managing firm (stated to be one of the largest in the city), the City Commission awarded the complainant $1000 for humiliation, outrage, and mental anguish. N.Y. Times, Sept. 24, 1969, at 1, col. 5. It appears that the Commission looked to the financial status of the respondents—a traditional element of punitive damages—rather than the suffering of the complainant. *See* RESTATEMENT OF TORTS § 908 (1939).

When the State Division followed suit, however, it met with a firmer reply in the appellate division. A divided court denied enforcement of two awards, one for compensatory damages and attorneys fees, and another for mental suffering, State Division of Human Rights v. Luppino, — App. Div. 2d —, 313 N.Y.S.2d 28 (2d Dep't 1970), holding first that the division had no power to award compensatory damages other than out-of-pocket expenses, and second that, contrary to law, there was no evidence supporting either award. *Id.* at —, 313 N.Y.S.2d at 32, 33. The dissenter, Acting Presiding Justice Hopkins, while asserting that the statute would support compensatory damages for mental suffering, agreed that "[t]he proof of discrimination alone is not enough to found a claim for damages for mental anguish. There should be such evidence of the claim as would be sufficient in a common law action . . . . Failing that evidence, the award cannot be sustained." *Id.* at —, 313 N.Y.S.2d at 35. Justice Hopkins sensed the issue discussed in this Comment when he said:

> The violation of a civil right under the Executive Law may be categorized as a wrong—whether as a new form of a tort created by statute, or as simply the means whereby socially inimical behavior is penalized, is not necessary now to be decided.

Id. at —, 313 N.Y.S.2d at 34.

[46] New Jersey is about to join Massachusetts and New York in facing the choice between enlarging the antidiscrimination agency's powers or forgoing effective agency deterence to discrimination. *See* N.J. STAT. ANN. §§ 18:25-1 to 18:25-28 (Supp. 1967) ("Law Against Discrimination"). Originally, the director of the New Jersey Division on Civil Rights took the position that his Division had power to award damages for "out of pocket" expenses only. N.Y. Times, May 6, 1970, at 1, cols. 6-7. But shortly thereafter, the Division, contrary to its director's earlier statement, awarded $2000 to a Malayasian official for humiliation, mental pain, and suffering resulting from unlawful housing discrimination. *Id.*, May 17, 1970, at 50, col. 1. The probable reason for this switch in the Division's policy was the award by the Superior Court of Essex County, New Jersey of $500 for "psychological trauma"—on a showing of nothing more than the momentary shock of being racially insulted—to a plaintiff who had chosen to bypass the Division and go directly to court. *Id.*, May 6, 1970, at 1, cols. 6-7.

> Also, according to Richard Bellmon, the staff attorney of the National Committee against Discrimination in Housing, the only previous awards for mental anguish in housing discrimination cases were made by state agencies in cases where prolonged mental anguish had been suffered by the victim. In this case, the only mental anguish shown by Mr. Gray was the momentary traumatic shock of being racially insulted when he sought to rent the apartment.

Id., May 10, 1970, § IV, at 5, col. 1.

laws, and federal machinery only to supercede local administration when it would not or could not achieve the purposes of title VIII.[47] It is also apparent that both Congress and state and local agencies believe that a punitive sanction is essential if the antidiscrimination laws are to be effective.[48] If state and local antidiscrimination commissions are to play an active and coordinated role in the congressional scheme, part of which is deterrent law enforcement, state legislatures should empower their antidiscrimination agencies to award punitive damages comparable to title VIII.

CONCLUSION

The day of enforcing fair housing laws through persuasion backed only with the threat of the state's command to cease and desist has passed. Congress has now provided a punitive remedy available to every victim of housing discrimination whether or not the state legislature agrees with that policy. The only option to the state legislature is to either bring its agency into the fray with punitive damage legislation or abandon the field to federal enforcement entirely. If the task of bringing the state agencies into the federal scheme continues to be ignored by these legislatures, judicial attempts at legislating within the confining language of statutes written in that earlier day can only produce questionable law.

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[47] *See, e.g.*, Colon v. Tompkins Square Neighbors, Inc., 289 F. Supp. 104 (S.D.N.Y. 1968). While federal administrative proceedings cannot be compelled because of § 3612's optional remedy of a private suit, the existence of that option is, in effect, impetus for the state to provide remedies at least as promising as federal remedies.

[48] *See* notes 45, 46 *supra*.