

# Tulsa Law Review

---

Volume 12 | Number 4

---

1977

## Real Estate Steering and the Fair Housing Act of 1968

Neil C. Bruce

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Neil C. Bruce, *Real Estate Steering and the Fair Housing Act of 1968*, 12 Tulsa L. J. 758 (1977).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol12/iss4/8>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# REAL ESTATE STEERING AND THE FAIR HOUSING ACT OF 1968

## INTRODUCTION

Racial discrimination in housing has perpetuated a segregated housing market. Exclusionary zoning,<sup>1</sup> restrictive covenants,<sup>2</sup> redlining<sup>3</sup> and burdensome application or financing requirements<sup>4</sup> have been some of the primary methods used to further discrimination in housing. A comparatively recent discriminatory practice which maintains segregated housing is steering.<sup>5</sup> Steering is accomplished by a

---

1. Exclusionary zoning basically consists of various methods designed to exclude minority and lower-income individuals from living in certain residential areas. The "exclusion" is usually accomplished through the use of either minimum lot size requirements which tend to raise the cost of housing beyond the level of many lower-income and minority group members, or by merely excluding certain types of housing, such as apartment buildings, which would provide housing for such individuals. HAGMAN, *URBAN PLANNING*, 498 (1971). See *Palto Alto Tenants Union v. Morgan*, 321 F. Supp. 908 (N.D. Cal.), *aff'd*, 487 F.2d 883 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

2. Restrictive covenants are clauses contained in deeds which are intended to control either the actual use of the deeded property or the types of individuals who may purchase or occupy the property. Restrictive covenants have gained the most notoriety when used for purposes of racial segregation. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

3. "Redlining" refers to the discriminatory practice of lending institutions in denying home loans for individuals and residences located within specific geographical areas of a city which the lender has concluded are high risk areas. The term "redlining" itself is a method of describing how the lender physically demarcates the undesirable lending areas on a map. The offensive aspect of this practice relates to the fact that frequently the redlined areas involve portions of the city inhabited by minority group members. This has provided the basis for the charge that redlining is a racially discriminatory practice. See Note, *Urban Housing Finance and the Redlining Controversy*, 25 CLEV. ST. L. REV. 110 (1976). See also Duncan, Hood and Neet, *Redlining Practices, Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative*, 7 URBAN LAW. 510 (1975); Doehrman, *Redlining: Potential Civil Rights and Sherman Act Violations Raised by Lending Policies*, 8 INDIANA L. REV. 1045 (1975).

4. These practices could vary considerably from charging a higher interest rate or downpayment on the purchase of property to restrictive terms in the mortgage or lease agreement. However, such practices are specifically prohibited by 42 U.S.C. § 3605 (Supp. IV 1974), which concerns discrimination in financing.

5. While it is not clear when the term "steering" itself was coined (probably subsequent to the Civil Rights Act of 1968), the practice of keeping certain prospective purchasers from buying property in certain neighborhoods was established and accepted prior to 1950. See note 53 *infra* and accompanying text. It is difficult to determine whether steering was always motivated by race, especially prior to the Fair Housing Act. However, most if not all, steering claims allege a racial motivation.

real estate agent or broker when a potential customer is either encouraged or discouraged from purchasing housing in a particular area or community because of the agent's actions. This comment will examine the impact of the Fair Housing Act on steering violations. More specifically, it will endeavor to define the practice of steering, determine the requisite activities which constitute a violation and evaluate the damages and remedies available.<sup>6</sup>

### BACKGROUND

Realization of the impact of steering and other similar practices has led to the enactment of legislation prohibiting acts which impede the movement toward equality in housing. In 1968 Congress passed the Civil Rights Act and included therein Title VIII, the Fair Housing Act,<sup>7</sup> which was designed to eliminate all discrimination in the sale and lease of housing.<sup>8</sup> A contemporaneous action by the United States Supreme Court construed the Civil Rights Act of 1866<sup>9</sup> as applying equally to private as well as to state acts of racial discrimination. In deciding *Jones v. Alfred Mayer Co.*,<sup>10</sup> the Court found that the same right to purchase as is enjoyed by white citizens could be impaired as effectively by those who own or place the property on the market as by the state.<sup>11</sup>

It has been recognized that discrimination does not occur solely from refusals to sell property but also through the development of more

---

6. Particular consideration will be given to the use of testers and in relation thereto, the issue of standing.

7. The Fair Housing Act is codified in 42 U.S.C. §§ 3601-3631 (1970 & Supp. IV 1974). The purpose of this act was to eliminate all discrimination in the acquisition of housing. See generally Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149 (1969); 1968 U.S. CODE OF CONGRESSIONAL AND ADMINISTRATIVE NEWS 1837.

8. 42 U.S.C. § 3601 (1970) states that "[i]t is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States." (emphasis added).

9. The Civil Rights Act of 1866, as codified in 42 U.S.C. § 1982 (1970), states:

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

Traditionally, § 1982 was only applicable to state acts of discrimination.

10. 392 U.S. 409 (1968).

11. *Id.* at 421. However, the Court also held that § 1982 was not to be construed as a comprehensive housing law as it did not deal with discrimination other than that which was racially motivated nor with the provision of services in connection with the sale of a dwelling. Additionally, the Court found that this interpretation of § 1982 did not diminish the significance of the Fair Housing Act. *Id.* at 413.

subtle means.<sup>12</sup> Therefore, both of the above acts have been interpreted broadly<sup>13</sup> to help eliminate those practices which are not specifically enumerated in the legislation.

### THE CONCEPT OF STEERING

Basically, steering can be described as a process by which realtors attempt to guide a particular buyer away from or towards housing in a specified area.<sup>14</sup> Usually, this practice is premised on the notion that the buyer will be either incompatible or unacceptable to the residents of a housing area due to his race, religion or national origin, or that the residents of an area will be unacceptable to that buyer due to racial, religious or ethnic differences.<sup>15</sup>

12. Bogen and Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 Md. L. R. 59, 61 (1974) (hereinafter cited as *Racial Statistics*). Since a refusal to sell was often considered blatant evidence of steering, other, more subtle methods, of promoting segregation, such as words or actions to discourage the purchaser, were developed.

13. The Supreme Court, in *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), gave a broad construction to the Civil Rights Act of 1860. With reference to the Fair Housing Act, the language in 42 U.S.C. § 3604(a) (Supp. IV 1974) makes it unlawful

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

(emphasis added). See *United States v. Youritan Construction Co.*, 370 F. Supp. 643 (N.D. Cal. 1973), modified on other grounds, 509 F.2d 623 (9th Cir. 1975), wherein the district court pointed out that the Congressional intention was for the language to cover a broad range of activities. 370 F. Supp. at 648. In *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc.*, 422 F. Supp. 1071 (N.J. 1976), the court stated:

This § 3604(a) prohibition is broadly drafted. It clearly reflects Congressional intent to extirpate the poisonous influence of racial, religious and ethnic prejudice in the Nation's housing markets.

*Id.* at 1075. The comprehensiveness of the phrase "or otherwise make unavailable" is arguably limited when strictly construed. See notes 17-19 *infra* and accompanying text.

14. It is important to consider a distinction between the motivation of realtors in steering and that of the individual who places the dwelling on the housing market. While the activities of the realtor may be equally in contravention of the law, they are generally made in response to the attitudes and practices of the community. In a majority of cases, the primary determinant is the racial fear of the residents in the areas involved. See, e.g., *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975). This community standard, which has an impact on the realtor and the success of his business vis-à-vis boycotts, is often totally contrary to his personal beliefs and practices. In *Zuch* the court initiated the discussion of its findings by recognizing that

[p]erhaps the single most significant factor operating in this case is the racial fear of the white residents of the areas involved. At times, this fear has become so irrational and pervasive that it reflects a hysterical community psyche.

*Id.* at 1030. The court also found it would have to distinguish between results based on those fears and those based on an exploitation of those fears. *Id.* at n.2.

15. Thus, the realtor is directing the prospective purchaser to an area where the realtor believes the party will be most comfortable. Although religion, national origin, and sex discrimination are also protected under Title VIII, most, if not all, litigation

Initially, steering was interpreted to mean the guiding of a prospective purchaser through the use of verbal persuasion.<sup>16</sup> Subsequently, the concept of steering has been expanded to include as a violation *any* act which influences the choice of the buyer or impedes the home purchase.<sup>17</sup> However, there have been attempts to distinguish between discouraging the prospective purchaser and a failure or refusal to show certain available real estate.<sup>18</sup> An interpretation of the phrase "or otherwise make unavailable" in 42 U.S.C. § 3604(a) to mean that it must be made completely unavailable can be logically supported if this phrase is strictly construed.<sup>19</sup> It is argued though, that real estate brokers would be immune from liability if the interpretation was limited to acts which rendered purchase impossible.<sup>20</sup>

Regardless of whether the phrase is strictly or liberally interpreted, it is difficult to see how the realtor is rendering the property unavailable where there is an opportunity to inspect the property, as the buyer will ultimately make his own decision regarding purchase. It is doubtful that anyone would suggest that the realtor make no comments regarding the property. On the contrary, customers rely on the

---

has been concerned with racially motivated discrimination. See Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 809, n.7 (1975) (hereinafter cited as *Racial Steering*).

16. Steering took place when the purchaser was directed to a particular neighborhood upon reliance of the realtor's representations. Present day steering tactics include restriction of the clients who view the property, misrepresentations made to prospective purchasers, selective advertising, and discriminatory treatment of black sales personnel and brokers dealing regularly with black clients. 422 F. Supp. at 1075.

17. In reference to steering, the court in *Zuch* found that 42 U.S.C. § 3604(a) makes it unlawful to steer or channel a prospective buyer into or away from an area because of race. Unlawful steering or channeling of a prospective buyer is the use of a word, phrase or action by a real estate broker or salesperson which is intended to influence the choice of a prospective property buyer on a racial basis. . . .

Accordingly, any action by a real estate agent which in any way impedes, delays, or discourages on a racial basis a prospective home buyer from purchasing housing is unlawful.

394 F. Supp. at 1047.

18. See *Quinlan and Tyson, Inc. v. City of Evanston*, 25 Ill. App. 3d 879, 324 N.E. 2d 65 (1975). In this case a city housing ordinance prohibited outright refusals to show real estate but did not prohibit discouraging the purchasers. The court stated that steering was not prohibited and the language of the ordinance implicitly required a request to see the property before a refusal could be made. *Id.* at 75.

19. One commentator suggests this interpretation should be avoided by deciding steering claims under 42 U.S.C. § 3604(b) (Supp. IV 1974). See *Racial Steering, supra* note 15 at 818. Presumably § 3604(b) provides a broader prohibition of steering by construing any different treatment of customers as discrimination. See notes 47-49 *infra* and accompanying text.

20. See *Racial Steering, supra* note 15 at 814. This is possible due to the logical extension of the premise that a refusal to negotiate is only an impediment and not an absolute foreclosure to obtaining housing.

representations made to them about the area residents, the schools, and public services. While there are other sources of information available to the buyer,<sup>21</sup> a deprivation would result if the prospective purchaser could not tap the expert source of information of the broker where the answers to the prospective purchaser's questions could be considered steering.<sup>22</sup> In response, distinctions have been created between advice and information, suggesting that it is the demeanor of the salesperson which determines steering.<sup>23</sup>

It is not disputed that the Fair Housing Act protects the freedom of choice for the purchaser,<sup>24</sup> but to what extent this freedom should extend is as yet unsettled due to the inherently subjective nature<sup>25</sup> of the complaints. These characteristics allow complaints to be easily alleged but difficult to disprove. Consequently, to determine the scope of any definition of steering, it is essential to consider the criteria for finding a violation.

### *Implementation of the Fair Housing Act*

To appreciate the complexity of distinguishing which words and actions of the realtor will actually constitute a violation, it is necessary to view the real estate business as a service that disseminates information covering a broad spectrum of factors usually considered by prospective purchasers. The problem arises as to which of these factors may indicate or imply a racial motivation for discrimination.<sup>26</sup>

Inasmuch as steering may result in segregated housing, it is necessary to consider the motivation for the steering to determine whether it will be considered to have contravened the Fair Housing Act. The

---

21. Other sources of information would include that provided by residents of the area, the local Chamber of Commerce or some similar agency, or by anyone familiar with the neighborhood where the contemplated purchase was to take place.

22. See Note, *An Anti-blockbusting Ordinance*, 7 HARV. J. LEGIS. 402, 412 (1970).

23. See *Racial Steering*, *supra* note 15 at n.29.

24. The court in *Zuch* discussed the purpose of the Fair Housing Act in terms of providing a freedom of choice for the purchaser by eliminating influential factors such as race. 394 F. Supp. at 1047.

25. The fact that a steering complaint is alleged and even proven does not necessarily establish a violation in a similar circumstance as same people may feel discriminated against when others would not even consider that possibility. Hence the qualitative and subjective character of steering complaints. See National Association of Realtors, REALTORS GUIDE TO PRACTICE, EQUAL OPPORTUNITY IN HOUSING 51 (1975) (hereinafter cited as REALTORS GUIDE).

26. It has been noted that not all housing patterns, especially in segregated areas, can be explained as economic disparities between races or as the result of individual choice. *Racial Steering*, *supra* note 15 at 808. Therefore, it follows that the real estate industry must play a role in the creation of these areas.

general consensus is that a violation has occurred if the steering or discrimination was racially motivated.<sup>27</sup> One case, cited in several subsequent decisions, held that the Civil Right Act of 1866 prohibited any discussion of race.<sup>28</sup> Theoretically, this means that any reference to race in a transaction would constitute a violation. Practically, this standard has come to mean that a court need not find that racial prejudice is the sole motivating factor in the steering.<sup>29</sup> Once the racially motivated discrimination has been shown to be a factor, the burden of proof of showing that race was not a significant factor in the steering shifts to the alleged discriminator.<sup>30</sup>

There are many factors,<sup>31</sup> personal to the prospective purchaser, which may have given the realtor good reason to emphasize a particular area. Perhaps the most troublesome of these would be community related factors such as the quality and location of the schools, transporta-

---

27. See, e.g., *Seaton v. Sky Realty Company, Inc.*, 491 F.2d 634 (7th Cir. 1974); *Haythe v. Decker Realty Co.*, 468 F.2d 336 (7th Cir. 1972); *Bush v. Kaim*, 297 F. Supp. 151 (N.D. Ohio 1969).

28. *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970). In this case, the seventh circuit cited the decision in *Jones v. Mayer*, 392 U.S. 409 (1968) (wherein the Supreme Court found the language of 42 U.S.C. § 1982 to be plain and unambiguous) as support for finding discrimination in a refusal to rent an apartment to a young black woman who was divorced, working, and caring for her infant child. The court stated that "same right" in § 1982 "means that race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination." 436 F.2d at 349-50.

29. In *Bush v. Kaim*, 297 F. Supp. 151 (N.D. Ohio 1969), the court's decision contained the following espousal of the prohibitions of § 1982:

Section 1982 does not prohibit an owner from considering factors *other than* race in determining whether to sell or rent this property to a negro, or to any other person for that matter. An owner can refuse to rent or sell to anyone, negro or white, for any reason he chooses so long as the motivating reason for this decision is not the individual's race or color.

*Id.* at 162. These factors included not only the credit standing, financial stability, reputation, age, size of the family, age of the children, and anticipated length of stay of the applicant, but also subjective factors such as the applicant's appearance, demeanor, and the owner's estimation of his trustworthiness. However, the court also noted that the owner may be called upon in court to demonstrate his reliance upon these factors as opposed to racial considerations. *Id.*

30. The plaintiff must show that (1) the owner had placed the property on the market, (2) the plaintiff was willing to meet the owner's terms, (3) the plaintiff had communicated this willingness to the owner, (4) the owner had refused plaintiff on those terms, and (5) there was no reason for the refusal other than the plaintiff's race. Upon establishing these elements, the burden shifts to the defendant to rebut this evidence by showing reasons other than race for the refusal. *Id.* at 163. *But see* *United States v. Henshaw Brothers, Inc.*, 401 F. Supp. 399 (E.D. Va. 1974), where the court stated that other criteria may not be used as a subterfuge for racial discrimination. The criteria allegedly forming the basis for the refusal in this case was the applicant's non-officer status. The court did not accept this as a valid reason.

31. These factors include price range, financial stability, age, and size of the family. *Bush v. Kaim*, 297 F. Supp. 151, 162 (N.D. Ohio 1969).

tion, property values, proximity to employment and the crime rate. The use of these factors in the practice of steering creates difficulties because they are used to an equal extent in many legitimate transactions.

It is imperative then to determine the motivation of the realtor in making statements regarding community related factors. Thus the designation of "code words"<sup>32</sup> to indicate a discriminatory act is helpful in establishing steering. However, two limitations should be made in respect to the use of these code words and consequently on the scope of a steering violation. First, such a designation could give rise to claims of infringement of the realtor's first amendment rights. By construing certain words as prima facie evidence of a violation, the realtor is deprived of his right to free speech. Secondly, it has been proposed that when code words are used by the prospective purchaser to solicit a discussion of racial factors, a response by the realtor to such inquiries should not be considered illegal. In this instance, the realtor does not initiate the discussion; therefore, it is difficult to establish his intent to steer.<sup>33</sup>

The enforcement of the fair housing policy is limited to those acts "within constitutional limitations."<sup>34</sup> Therefore, it is not superfluous to consider claims of infringement of those protected rights. First amendment claims are more prevalent in regards to blockbusting violations<sup>35</sup> but are also relevant to situations involving steering. In *United States v. Saroff*,<sup>36</sup> a district court held that a realtor's good faith response to an inquiry regarding a racial factor was not a per se violation.<sup>37</sup> Reliance has been placed on this interpretation by an association

---

32. Such code words would describe the community as "uncomfortable", "changing", "busted", "deteriorating", and with an "undesirable element". When steering has been alleged to exist in situations where the purchaser has been directed toward a segregated area, such words as "good" and "nice" have been considered code words. See, e.g., *Zuch v. Hussey*, 394 F. Supp. 1028, 1039 (E.D. Mich. 1975).

33. *Id.* at 1039, n.10.

34. See note 8 *supra*.

35. "Blockbusting" is defined as making representations, regarding the entry of a person of a particular race into a neighborhood, to induce an owner of property to sell or rent his property. See note 56 *infra*. For a discussion of blockbusting, see generally Note, *An Anti-blockbusting Ordinance*, 7 HARV. J. LEGIS. 402 (1972).

36. 377 F. Supp. 352 (E.D. Tenn. 1974).

37. *Id.* The court could not find sufficient evidence to establish the intent to steer from statements made by the realtor's agents without his knowledge. An omission of the availability of a dwelling without additional support cannot sustain finding a violation where such omission could be caused by distraction or absentmindedness. *Tomlinson Agency v. Pennsylvania*, (Commw. Ct. 1973), 1 HOUS. & DEV. REP. (BNA), Current Developments, (No. 18) D-7 (January 1, 1974).



of realtors which has suggested to its members that a request for racial information may be answered, absent any unusual circumstances, when it is accompanied by a disclaimer of any intention to show or offer homes on a racial basis.<sup>38</sup> Another court has found that an ordinance prohibiting real estate agents making statements concerning the physical deterioration of certain housing areas was an unconstitutionally vague and overly broad restriction of free speech.<sup>39</sup>

Although it could be argued that the Fair Housing Act is unnecessarily broad both in its language and as applied, such a contention would likely be viewed with judicial and administrative disfavor, since such power is necessary to eliminate something as pervasive as discrimination in housing. The freedoms guaranteed by the first amendment are extensive but are not without limitation. Obviously, one such limitation would be racially motivated comments designed to perpetuate discrimination in housing.<sup>40</sup> Additionally, it has been demonstrated that Title VII regulates conduct, including speech, which can justifiably be inhibited because of the interest in protecting communities from such conduct.<sup>41</sup> To summarize the interaction between the first amendment and Title VII, it should be sufficient to state that enforcement will not infringe those guaranteed rights because it is only employed against those statements not protected under the first amendment. Likewise, those statements made without a discriminatory motivation<sup>42</sup> are protected.

---

38. See REALTORS GUIDE, *supra* note 25 at 43. However, as advised in REALTORS GUIDE, no such response could be made to a request for a locational preference based on race. *Id.*

39. De Kalb Real Estate Board, Inc. v. Chairman and Bd. of Comm'rs 372 F. Supp. 748 (N.D. Ga. 1973). The court in *DeKalb* further established that:

Because of the vagueness of this provision, it is conceivable that most brokers would avoid all representations concerning the physical condition of property rather than risk revocation of their broker's license. Such a result is clearly unacceptable, especially when measured by the importance of vagueness and and overbreadth in a sensitive area such as free speech. Such an interference with speech must be carefully and narrowly drawn.

*Id.* at 755.

40. Another limitation is commercial speech, *see, e.g.*, United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973). Opinion of Evelle Younger (Cal. Atty. Gen. Opin. SO 74/15, February 11, 1975), 2 HOUS. & DEV. REP. (BNA), Current Developments, 1063. See also Limitations regarding discriminatory advertising under 42 U.S.C. § 3604(c) (Supp. IV 1974), *e.g.*, United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972).

41. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973).

42. See, *e.g.*, Abel v. Lomenzo, 18 N.Y.2d 619, 219 N.E.2d 287 (1966), where the court stated "that so long as information given by a broker to prospective purchaser is accurate and neither in content nor purpose seeks to encourage racial bias as regards housing, it is unexceptionable." *Id.* 219 N.E.2d at 287. See also, Note, *Housing and Section 1982: The Advisability of Extending the Statutory Mandate Beyond Acts of Traditional Discrimination*, 1975 DUKE L.J. 781, 800.

As discussed above,<sup>43</sup> the phrase in § 3604(a) "or otherwise make unavailable," when strictly construed, may be an impediment to proving a violation. As a result, the other subsections of § 3604<sup>44</sup> have been set forth as alternatives for eliminating discrimination through steering. When certain words in § 3604(c) are emphasized, that subsection can be interpreted as extending beyond its stated and intended purpose of prohibiting discriminatory advertising.<sup>45</sup> If steering is accomplished by a representation that the property is not available, when in fact it is currently on the market, the violation is specifically covered by § 3604(d).<sup>46</sup> The primary focus on an alternative section though, has been on § 3604(b),<sup>47</sup> referred to as the "colorblind" standard.<sup>48</sup>

It is not difficult to see how § 3604(b) could be construed as proscribing discrimination in the services related to the sale or lease of a dwelling. Such an interpretation would broaden the scope of activities to be regulated and a violation could exist where a realtor treated similarly situated people differently.<sup>49</sup> The determination to be made is whether the phrase "in connection therewith" is meant to apply to the transaction or the dwelling. An effective elimination of steering can be accomplished when the phrase is found to modify the transaction or sale of a dwelling. On the other hand, it is equally possible to find that this subsection prohibits discrimination of services in connection with the dwelling rather than the transaction, especially where the dwelling is an apartment or a condominium. Acceptance of the

43. See note 19 *supra* and accompanying text.

44. These sections are listed in notes 45-47 *infra*, with the exception of § 3604(e) which is discussed in note 56 *infra* and accompanying text.

45. See *Racial Steering*, *supra* note 15 at 816, n.31. 42 U.S.C. 3604(c) (Supp. IV 1974) provides that it shall be unlawful

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

46. 42 U.S.C. § 3604(d) (Supp. IV 1974) prohibits anyone

[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

47. 42 U.S.C. § 3604(b) (Supp. IV 1974) makes it unlawful

[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

48. See *Racial Steering*, *supra* note 51 at 818. This standard has been so designated in order to reflect the prohibition of all discriminatory practices in providing brokerage services.

49. However, no court has yet construed the phrase "in the provision of services or facilities in connection therewith", nor can it be determined from the legislative intent. *Id.*

former interpretation would presumably eliminate any first amendment problem<sup>50</sup> but would also necessitate the use of testers to prove discrimination.<sup>51</sup>

### *Steering in Response to Anti-blockbusting Statutes*

Prior to 1950, the *Code of Ethics* of the National Association of Realtors<sup>52</sup> required that members promise not to introduce anyone of incompatible character into a neighborhood if that action would lower the property values of the area.<sup>53</sup> While steering actions in response to that clause may have been premised upon community standards and practices, they clearly manifested segregated housing. Even though this section has been rendered invalid by the Association's present *Code of Equal Opportunity*<sup>54</sup> which reiterates the policy of the Fair Housing Act, the concept that integration of a neighborhood would result in unpleasant consequences to the neighborhood residents and the realtor has remained.<sup>55</sup> Therefore, it is possible to conclude that steering can be motivated solely on the basis of race or in response to some other policy.

It is proposed that steering may in fact be a response to anti-blockbusting legislation similar to § 3604(e).<sup>56</sup> Support for this contention may be found by comparing the results of a Title VIII violation and a continuation of the policy of the prior *Code of Ethics*. By attempting to avoid a blockbusting violation, a realtor may engage in the same practices that occur while steering a prospective purchaser away

---

50. *Id.* at 818, n.47. The steering claim would not be premised on the statements made to one prospective purchaser but rather on the different treatment of various prospective purchasers.

51. Discussed *infra* notes 75-78 and accompanying text. See *Racial Steering, supra* note 15 at 821, n.48. The testers would be utilized to determine whether different treatment was accorded buyers with similar needs.

52. Known as the National Association of Real Estate Boards (NAREB) until 1973.

53. Article 34 of NAREB's *Code of Ethics* stated:

A realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence would clearly be detrimental to property values in that neighborhood.

See Note, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 Md. L.R. 289, 320 (1973) [hereinafter cited as *Five Years After*].

54. See *Five Years After, supra* note 53 at 320.

55. See REALTORS GUIDE, *supra* note 25 at 15.

56. 42 U.S.C. § 3604(e) (Supp. IV 1974) makes it unlawful

[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

from a housing area. This is not to say, however, that such practices should be condoned, nor is it offered to absolve the realtor from liability. The only purpose is to point out a possible non-racial motivation for steering. A motivation of this type may be related to the contention that when steering is used to promote integration it can also act as a pretext for blockbusting.<sup>57</sup>

### *Remedies and Damages*

Once the discriminatory violation has been established a decision must be made concerning enforcement of the law and the type of remedial relief desired. In addition, it may be necessary to distinguish which parties have standing to enforce those remedies.

Generally, the Fair Housing Act provides three methods of enforcement: (1) an administrative proceeding;<sup>58</sup> (2) a civil action;<sup>59</sup> and (3) an action by the United States Attorney General.<sup>60</sup> The Civil Rights Act of 1866 also provides for enforcement through a civil action brought by the injured plaintiff himself but contains no express provisions regarding damages.<sup>61</sup>

To follow the administrative course, the aggrieved party must file a written complaint within one hundred and eighty days after the incident with the Secretary of Housing and Urban Development (HUD).<sup>62</sup> Subsequently, the Secretary will furnish a copy of the complaint to the alleged discriminator, investigate the complaint within thirty days and, upon notice to the parties, may attempt to resolve the complaint through informal means. If he fails to resolve the matter, the complainant may file a civil action.<sup>63</sup> However, any information or admissions obtained during attempted settlement stages may not be used in subsequent proceedings without the written consent of the parties. Thus, the apparent advantage of using this route, the availability

---

57. See *Racial Steering*, *supra* note 15 at 812 and n.57.

58. 42 U.S.C. §§ 3610, 3611 (1970).

59. 42 U.S.C. § 3612 (1970).

60. 42 U.S.C. § 3613 (1970).

61. 42 U.S.C. § 1982 (1970). However, an action brought under this section would be limited to racial steering. See *Jones v. Mayer*, 392 U.S. 409 (1968).

62. See note 58 *supra*.

63. 42 U.S.C. § 3610(d) (1970) provides, in pertinent part, that

Such civil actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business.

of administrative investigative resources,<sup>64</sup> is limited to the informal HUD procedures. The accessibility of this remedy may also be conditioned on the existence of a substantially equivalent remedy under a state or local agency.<sup>65</sup>

The judicial remedy prescribed for civil actions<sup>66</sup> provides injunctive relief to preserve the rights guaranteed by this title. Such relief is often necessary where the primary interest is in the housing itself, not monetary damages flowing from the discrimination.<sup>67</sup> In addition, the court may award actual and punitive damages, court costs and reasonable attorney fees.<sup>68</sup>

It is important to note that actual damages under this section, as well as under the Civil Rights Act of 1866, have been extended to include compensatory damages for humiliation, inferred from the circumstances surrounding the violation.<sup>69</sup> A significant feature of the implementation of both this remedy and that initiated by the Attorney General is that the proceeding will be assigned for hearing at the earliest possible date,<sup>70</sup> thereby avoiding any incidental damages accruing from the delay.

---

64. 42 U.S.C. § 3611 (1970). See 1 HANDBOOK ON HOUSING LAW (P-H), *Guide to Federal Housing Redevelopment and Planning Programs*, Ch. 9, p. 8 (1970) (hereinafter cited as HANDBOOK ON HOUSING LAW). Any information obtained through these resources may not be used in a subsequent proceeding unless consented to by both parties. *Id.* Therefore, the investigation is only helpful in establishing a claim under HUD.

65. 42 U.S.C. 3610(c) (1970). If a state or local housing ordinance provides rights similar to this section, the Secretary of HUD shall notify the appropriate agency and defer action for a period of thirty days. This restriction is also applicable to the subsequent filing of a civil action where there is an appropriate judicial remedy under a state or local fair housing law. *Id.*

66. See note 59 *supra*.

67. See HANDBOOK ON HOUSING LAW, *supra* note 64. It is possible that the housing market is so restricted that the dwelling involved is the only appropriate one available.

68. 42 U.S.C. 3612(c) (1970). The award of attorney fees will only be allowed where, in the opinion of the court, the plaintiff is not financially able to assume such fees. Financial ability has been interpreted to mean the plaintiff's finances will enable him to assume the expenses not just his present ability to pay. It is also pointed out that this allowance to a successful civil rights plaintiff is not regarded as a punitive damage but that its purpose is to encourage those injured parties to seek judicial relief. See *Steele v. Title Realty Co.*, 478 F.2d 380, 385 (10th Cir. 1973).

69. *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974); *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (10th Cir. 1973). The prospective purchaser may have been denied the dwelling in front of his family of friends and thereby may feel belittled and humiliated.

70. 42 U.S.C. 3614 (1970) provides for expedition of proceedings by requiring "[a]ny court in which a proceeding is instituted under section 3612 or 3613 of this title shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited."

The third method provides that the Attorney General may commence an action whenever he has reasonable cause to believe that an individual or group is engaging in a "pattern or practice" of discrimination or that any group has been denied rights guaranteed under Title VIII.<sup>71</sup> This method of enforcement may be preferred in some cases as it allows preventive relief. Also, under this procedure the investigative resources of HUD may be utilized by the Attorney General. The difficulty with this mode of obtaining relief is the standard of proof required in establishing the existence of a "pattern or practice." Some courts have been flexible in this requirement,<sup>72</sup> while others have demanded that a greater burden be met.<sup>73</sup> Unlike the other means of enforcement, an action brought by the Attorney General need not address the issue of standing, which has become an increasingly more important focal point in fair housing litigation.

### *Standing*

The process by which standing is determined depends primarily upon the specifications of the legislation, which usually are related to the damages suffered by the aggrieved party. There is no doubt that those parties at whom the discrimination is directed are significantly deprived of equal housing and therefore are provided standing to vindicate their rights. However, the harm that collateral parties suffer is generally more remote and thus they have less of an immediate need to file a claim of discrimination. Standing is, therefore, more restricted as to these individuals. One such collateral party, common to many fair housing proceedings, is the "tester."

A tester is instrumental in providing proof of a violation by posing as a purchaser with similar, if not the same, criteria for housing and approximately the same personal characteristics as the aggrieved party<sup>74</sup> except for the fact that the tester is of a different race. Any significantly different treatment of the tester by a realtor provides a good

---

71. 42 U.S.C. § 3613 (1970). A finding that a group has been denied rights granted under Title VIII is not alone sufficient to constitute a violation. Such denial must first raise an issue of general public importance. *Id.*

72. *See* *United States v. Bob Lawrence Realty Co.*, 474 F.2d 115 (5th Cir. 1973) where an individual act was held to constitute a pattern or practice of discrimination.

73. *United States v. Grooms*, 348 F. Supp. 1130 (M.D. Fla. 1972). To prove a pattern or practice of discrimination in housing, the government was required to show that the act was not an isolated, accidental or peculiar departure from a nondiscriminatory norm. *Id.* at 1133.

74. *See* REALTORS GUIDE, *supra* note 25 at 51. The tester maintains the same price range, family size and neighborhood selection as the prospective purchaser.

basis for a claim of racial discrimination; consequently the tester is very valuable to the plaintiffs in any resulting litigation. Furthermore, it has been shown that the use of testers may be the only effective method of obtaining proof of housing discrimination.<sup>75</sup> This belief is so pervasive that a state statute prohibiting the use of testers was held invalid as an obstacle to accomplishing the objectives of the Fair Housing Act and chilling the exercise of the right to equal housing.<sup>76</sup> On the other hand, since, to prove a violation it is often necessary for the tester to induce the broker into believing an actual sale would occur, one commentator has suggested that the use of testers smacks of entrapment.<sup>77</sup> If the practice of using testers is condoned categorically, the door may be left open for harassment of realtors through various agencies employing testers.

Irrespective of any debate concerning the efficacy of using testers, it is more important to determine whether testers or other collateral parties have an independent cause of action for housing discrimination. Similarly, consideration should be given to whether fair housing organizations or the residents of an affected community have standing. In *Zuch v. Hussey*,<sup>78</sup> the court considered the argument that housing may not be made unavailable, so as to violate § 3604, where the party had no actual interest in the housing.<sup>79</sup> More specifically in *Trafficante v. Metropolitan Life Insurance Co.*,<sup>80</sup> the Supreme Court unanimously held that anyone in the same housing unit who is injured by discriminatory housing practices had standing to sue under § 3610 of the Fair Housing Act. Standing was broadened by this interpretation, but only as to those complaints filed with the Secretary of HUD under § 3610. Thus when an action was commenced under § 3612 by homeowners alleging an injury of deprivation of the benefits derived from living in an integrated community, the standing granted in *Trafficante* was held inapplicable.<sup>81</sup>

---

75. 394 F. Supp. at 1051, see *Racial Statistics supra* note 12 at 64.

76. *United States v. Wisconsin*, 395 F. Supp. 732 (W.D. Wis. 1975).

77. See *Racial Statistics, supra* note 12 at 65.

78. 394 F. Supp. 1028 (E.D. Mich. 1975).

79. *Id.* at 1051. The court, however, dismissed the contention that buyer initiated discussions should absolve the real estate salesperson of liability and consequently overruled the holding of *United States v. Saroff*, 377 F. Supp. 352, 361 (E.D. Tenn. 1974). 394 F. Supp. at 1051, n.11. *But cf.:* *Racial Steering, supra* note 15 at n.48, where the author proposes that testers may establish a cause of action under § 3604(b) if they are treated differently by a broker on the basis of race.

80. 409 U.S. 205 (1972). The Court noted: "The definition of person(s) aggrieved contained in § 810(a) [3610] is in terms broad, as it is defined as any person who claims to have been injured by a discriminatory housing practice." *Id.* at 208.

81. *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir. 1976), *cert. denied*, 97 S. Ct.

In *TOPIC v. Circle Realty Co.*,<sup>82</sup> the Ninth Circuit distinguished the *Trafficante* decision on both the facts and the remedies available under Title VIII. In *TOPIC* the plaintiffs were residents of a section of Los Angeles rather than a single apartment complex as in *Trafficante*. The court found that the benefits which the plaintiffs claimed to have been deprived of were so attenuated that no injury in fact could be established.<sup>83</sup> However, the court found that this factual distinction was not the controlling factor but rather that § 3612 limited actions to those parties who were the direct objects of the discriminatory practices.<sup>84</sup> In so finding, the court indicated that § 3610 permits collateral parties to vindicate their rights but that § 3612 provides suit only to enforce the rights specified in § 3604. Therefore, initial access to the courts was limited to those rights which could not apply to collateral parties. Since the plaintiffs were homeowners already, they were not the direct victims of steering violations.

This position is supported by the numerous requirements for suit enumerated in § 3610 as contrasted with the notable lack of requirements under § 3612. Additionally, § 3614, which concerns the expedition of proceedings, applies only to § 3612 and not to § 3610.<sup>85</sup> The underlying policy was made clear in that not only was this distinction a protection against excess litigation, but it also provided an adequate administrative remedy for those parties who would not suffer greater damages by a delay. The judicial remedy was therefore reserved for those who would suffer more severely if they were unable to obtain immediate judicial relief. This order of priority would require third parties to seek relief under § 3610 to allow easy access to § 3612 for direct victims of discrimination.

---

160 (1976). The alleged deprivation consisted of the social and economic benefits of living in an integrated community and the embarrassment they had suffered from being stigmatized as residents of a ghetto. 532 F.2d at 1274.

82. 532 F.2d 1273 (9th Cir. 1976).

83. *Id.* at 1275. Since Los Angeles is a city with many integrated areas, the alleged deprivation seemed slight.

84. *Id.* at 1273. *But see:* Fair Housing Council of Bergen County v. Eastern Bergen County Multiple Listing Service, Inc., 422 F. Supp. 1071 (N.J. 1976), which declined to follow the result suggested by *TOPIC*. The court in *Bergen County* failed to decide the case in light of the Ninth Circuit's decision by finding that no distinction should be drawn between the apartment complex in *Trafficante* and the community in *Topic*. The court found to the contrary regarding the attenuation of damages, in that the effects of steering practices may be more severe by affecting more people. It was also held that it was impossible to distinguish any standing difference as to § 3610 and § 3612 from the language in the *Trafficante* decision. Thus, the court allowed the Fair Housing Council to establish standing as the representative of those of its members who were injured by the practices.

85. 532 F.2d at 1275. The court in *TOPIC* felt that its position on standing was consistent with the statutory intent of Title VIII,



## CONCLUSION

The elimination of racially discriminatory practices such as steering is necessary to achieve the purposes stated in the Fair Housing Act. In accomplishing this purpose, the courts must follow the enforcement procedures closely to avoid an incongruous result. Those parties who allege they have been the victims of discrimination are provided with the statutory means to secure their rights which steering may impede. This should not be considered a mandate to induce a statement or act, or employ a ruse to establish a violation of Title VIII. The real estate industry should not become a scapegoat for the "unexpressed fears of white in integrating areas"<sup>86</sup> nor should they be allowed to disregard the legislative intent behind fair housing legislation. The paramount consideration must be to bring the actions of those directly affected by any discrimination to a judicial remedy as soon as possible to avoid further harm. Concurrently, spurious or attenuated claims, especially those of organizations or testers who do not risk immediate future injury, should be dealt with and sifted out through HUD's administrative remedies.

*Neil C. Bruce*

---

86. See *Five Years After*, *supra* note 53 at 322.