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# Nonsolicitation and Cease and Desist Orders Against Real Estate Brokers in New York

## **Cover Page Footnote**

B.A., 1971, Herbert H. Lehman College; M.A., 1974, Hofstra University; J.D. expected, Dec. 1987, Touro College, Fuchsberg Law Center.

# NONSOLICITATION AND CEASE AND DESIST ORDERS AGAINST REAL ESTATE BROKERS IN NEW YORK

Aba Heiman\*

## I. Introduction

The laws of the United States,<sup>1</sup> New York State,<sup>2</sup> and New York City<sup>3</sup> prohibit "blockbusting"—"attempts by unscrupulous real estate brokers to induce panic selling of homes and other properties by spreading the fear of falling real estate values due to the prospective entry into the neighborhood of persons of another race, religion or creed."<sup>4</sup> By promoting "white flight" or gentrification or both, blockbusting contributes to neighborhood upheaval.<sup>5</sup>

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1. See 42 U.S.C. § 3604(e) (1982). This law codifies the Fair Housing Act, or Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 83 (1982). To cross reference sections from the codification of the Act, simply replace "36" with "8" (for example, § 3604(e) becomes § 804(e)).

2. See N.Y. COMP. CODES R. & REGS. tit. 19, § 175.17(a) (1985); see also N.Y. EXEC. LAW § 296.3-b (McKinney 1982).

3. N.Y.C. ADMIN. CODE tit. 8, ch. 2, § 8-204 (1986). Section 8-204 authorizes the New York City Commission on Human Rights to designate nonsolicitation areas and requires that a current listing of such areas be available to the public. See *id.* These areas are the same areas designated by the Secretary of State. See *infra* note 8. In fact, all effective orders originate with the Secretary of State. See *infra* note 7 and accompanying text. At least one commentator has criticized the work of local human rights commissions as weak and ineffective due to procedural delays, lacking sufficient authority to investigate and enforce, and lacking public confidence in their effectiveness. See Note, *Blockbusting*, 59 GEO. L.J. 170, 174 (1970) [hereinafter *Blockbusting*].

4. See RACIAL STEERING: A GUIDE FOR REAL ESTATE BROKERS, SALESPERSONS, SELLERS AND PURCHASERS (Secretary of State Pamphlet R105321-002 (Mar. 1982)); see also N.Y. COMP. CODES R. & REGS. tit. 19, § 178.1(a) (1985).

5. See *infra* notes 70-85 and accompanying text. Residents of areas experiencing the "cycle of integration and resegregation" characterize their neighborhoods as "more fragile and vulnerable than overwhelmingly white areas." Smothers, *Housing Segregation: New Twists and Old Results*, N.Y. Times, Apr. 1, 1987, at B1, col. 5. For example, residents believe that the "values of their homes are artificially depressed and contend that their streets are less clean, the hardships imposed by absentee landlords are greater, housing code enforcement is less strict and their community is more likely to be the site of generally unwanted public facilities, such as shelters for the homeless and drug-treatment centers." *Id.* at B4, col. 5.

The purpose of nonsolicitation and cease and desist orders is to prevent blockbusting.<sup>6</sup> A nonsolicitation order directs "all real estate brokers and salesmen licensed by the Secretary of State to refrain from soliciting (initiating the obtaining of listing of properties for sale and for purchase) in any manner whatsoever."<sup>7</sup> The nonsolicitation order applies to a designated area, usually a neighborhood within a county, and lists all streets forming its boundaries.<sup>8</sup>

In contrast to the nonsolicitation order, a cease and desist order lists specific individuals within a geographic area who have petitioned the Secretary of State praying for relief from all solicitation.<sup>9</sup> The cease and desist order directs brokers to refrain from soliciting the signers of the petition.<sup>10</sup> Although a broker may solicit anyone who has not signed the petition in a designated cease and desist area,<sup>11</sup> if a majority of the designated community has signed it, it is impractical for a broker to concentrate his efforts there.<sup>12</sup> In addition, any inexperienced, aggressive salespersons in the broker's employ may compound these problems by approaching the wrong homeowner and thereby costing the broker his license.<sup>13</sup> Unlike nonsolicitation

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6. See N.Y. COMP. CODES R. & REGS. tit. 19, § 178.1(a) (1985).

7. *Id.* § 178.2.

8. See *id.* § 178.4. Section 178.5 refers to the promulgation of other nonsolicitation orders currently in effect. See *id.* § 178.5. For maps of the nonsolicitation areas described in the various orders, see *infra* Appendix A.

9. See Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J.L. & SOC. PROBS. 538, 556-57 (1971) [hereinafter *Novel Approach*]. For a sample of the forms used by the petitioner and the Secretary of State ordering brokers to cease and desist, see *id.* at 556-57 nn. 99-100.

10. See *id.* at 556-57.

11. The petition will only serve to protect those who sign it from the unwanted solicitation of real estate brokers. See N.Y. COMP. CODES R. & REGS. tit. 19, § 175.17(b) (1977).

12. A cease and desist order would frustrate a direct mail campaign because the commercial mailing lists available to brokers do not take the petitioners into account. In addition, it would encumber the hiring of door-to-door circular distributors by requiring them to carry a cease and desist list with them—a single mistake might unnecessarily expose the broker to sanctions, penalties, or liability. See *infra* notes 134-68 and accompanying text. These considerations are sufficient to dissuade the broker from taking bad risks.

13. The Secretary of State has the authority to issue a cease and desist order pursuant to the Official Compilation of Codes, Rules and Regulations of the State of New York. See N.Y. COMP. CODES R. & REGS. tit. 19, § 175.17(b) (1985). The Secretary of State's authority to revoke or suspend a broker's or salesperson's license arises under article 12-A of the Real Property Law. See N.Y. REAL PROP. LAW § 441-c (McKinney 1968 & Supp. 1987). The broker is liable for the acts of his salespersons under the doctrine of respondeat superior. See *State Comm'n for Human Rights v. Suburban Assocs., Inc.*, 55 Misc. 2d 920, 922, 286 N.Y.S.2d

orders, the Secretary of State does not publish cease and desist orders, rather, they are cataloged by internal reference numbers.<sup>14</sup>

While the only purpose of a nonsolicitation order is to prevent blockbusting,<sup>15</sup> a cease and desist order can also curtail solicitation that is unwelcome because of its manner and volume.<sup>16</sup> In particular, this order protects residents of insular, affluent neighborhoods which are often prime targets for extension of soliciting<sup>17</sup> by brokers who seek a commission on a sale that may be worth three or four times as much as a sale in a middle-class neighborhood.<sup>18</sup>

Although nonsolicitation orders may supersede cease and desist orders,<sup>19</sup> it is possible that they will not cover the same exact area.<sup>20</sup>

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733, 737 (Sup. Ct. Nassau County 1967), *modified*, 34 A.D.2d 662, 662, 310 N.Y.S.2d 1019, 1019 (2d Dep't 1970) (employer may be held answerable for discriminatory acts of employee unless he has no knowledge thereof); *cf.* Whitfield v. Century 21 Real Estate Corp., 484 F. Supp. 984, 986 (S.D. Tex. 1979) (licensee granted summary judgment when it did not control marketing practices of franchising agents); Diona v. Lomenzo, 26 A.D.2d 473, 475, 275 N.Y.S.2d 663, 666 (1st Dep't 1966) (broker unaware of salesperson's improper conduct is not liable). The term "broker" includes salespersons and persons with related position titles. *See* N.Y. EXEC. LAW § 292(14) (McKinney 1982).

14. Outside of Rochester, all existing cease and desist orders are in the metropolitan New York City area: QUEENS COUNTY: Arverne, Edgemere, Far Rockaway, Holliswood, Jackson Heights, Jamaica Estates, Richmond Hill, Rosedale, Woodhaven; NASSAU COUNTY: Elmont, Freeport, Hempstead, North Valley Stream, Uniondale, Westbury; SUFFOLK COUNTY: Robin Park (Huntington); KINGS COUNTY: not designated by communities—just known as the "Brooklyn list." Telephone interview with Bernard Friend, Special Projects Manager, Division of Licenses, New York State Dep't of State (May 15, 1987); *see* List of Areas Subject to Nonsolicitation and Cease and Desist Orders (available at *Fordham Urban Law Journal* office) [hereinafter Nonsolicitation Order List].

15. *See supra* note 6; *infra* note 17 and accompanying text.

16. *See infra* note 17 and accompanying text.

17. For example, a broker and his agents may launch a campaign of simultaneous solicitation involving ringing doorbells, mass mailings, street canvassing, distributing circulars, and the use of sound trucks. *See* N.Y.C. ADMIN. CODE tit. 8, ch. 2, § 8-202 (1986).

18. Brokers make higher commissions with the sale of more expensive homes. For instance, if a home is sold for \$100,000 and the commission is eight percent, the broker earns \$8,000. If a home is sold for \$300,000 and the commission is only six percent, the broker earns \$18,000.

19. The nonsolicitation order of August 8, 1985, largely superseded the cease and desist orders for Elmont and North Valley Stream. *See* N.Y. COMP. CODES R. & REGS. tit. 19, § 178.4(4) (1985); *see also* Thompson v. Lomenzo, 78 Misc. 2d 298, 302, 356 N.Y.S.2d 760, 765 (Sup. Ct. Kings County 1974) (cease and desist order in Brooklyn and Queens superseded by nonsolicitation order of July 8, 1971, modified by nonsolicitation order of October 31, 1975), *aff'd*, 48 A.D.2d 869, 369 N.Y.S.2d 191 (2d Dep't 1975); *supra* note 14.

20. The nonsolicitation order for Kings County dated Oct. 31, 1975, *see* Nonsolicitation Order List, *supra* note 14, covers a limited area compared to the cease and desist order covering Brooklyn. *See supra* note 19.

As a result, the cease and desist order may offer effective assistance to those not protected by the narrower nonsolicitation order.<sup>21</sup> To date, no nonsolicitation order has been lifted after its promulgation.<sup>22</sup>

While four of the five nonsolicitation orders that are still in effect for the metropolitan New York City area were issued by the Secretary of State between 1971 and 1977,<sup>23</sup> the existence of a more recent 1985 order covering four distinct areas<sup>24</sup> shows that the underlying problems are neither outdated nor resolved. To the contrary, as long as New York City remains the melting pot of the western world, racial and ethnic tensions may be anticipated.<sup>25</sup> Nonsolicitation orders against real estate brokers are not intended as a panacea for neighborhoods in transition, but rather are an attempt to make that transition smoother, thus promoting economic stability and tranquility without frenzied panic selling or charging of the market by blockbusters.<sup>26</sup>

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21. This result is in keeping with the different purposes of the two orders. See *supra* notes 6-18 and accompanying text.

22. See N.Y. COMP. CODES R. & REGS. tit. 19, § 178.5 (1985).

23. See Nonsolicitation Order List, *supra* note 14.

24. See *id.*

25. Indeed, the recent tragic death of a twenty-three-year old black man, Michael Griffith, exemplifies the continuing racial and ethnic tensions in New York City. On December 20, 1986, in Howard Beach, Queens, a gang of white teenagers chased, attacked, and beat Griffith and his two companions, both of whom were black. See McFadden, *Black Man Dies After Beating by Whites in Queens*, N.Y. Times, Dec. 21, 1986, at 1, col. 3. In his attempt to escape, Griffith ran out onto a highway where a car struck and killed him. See *id.* Police labeled it a racial attack. See *id.*

In fact, recent articles have reported persistent racial discrimination in housing in New York City. See Smothers, *Housing Segregation: New Twists and Old Results*, N.Y. Times, Apr. 1, 1987, at B1, col. 5; Bernstein, *When Prejudice Hits Home: Despite Laws, Keeping "Them" Out Persists*, N.Y. Newsday, Jan. 26, 1987, at 3, col. 1.

26. See N.Y. COMP. CODES R. & REGS. tit. 19, § 178.1(a) (1985). One might explain the decline in nonsolicitation orders in New York City by using a demographic approach. While the black population of New York City increased by 53% between 1960 and 1970, it increased only by 7% between 1970 and 1980. See BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS: NEW YORK STATE Table 58, at 55 (1980) (black population in New York City was 1,788,337 in 1980) [hereinafter 1980 CENSUS]; BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION: NEW YORK STATE Table 23, at 87 (1970) (black population in New York City was 1,668,115 in 1970) [hereinafter 1970 CENSUS]; BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, 1960 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: NEW YORK STATE Table 21, at 107 (1960) (black population in New York City was 1,087,931 in 1960) [hereinafter 1960 CENSUS]. The influx of blacks into urban areas during the 1960's created an increased demand for housing which persisted into the 1970's. This demand,

Nonsolicitation and cease and desist orders, however, are limited tools with limited effects.<sup>27</sup> While they effectively target local brokers of victimized neighborhoods to enable transitions to occur without undue influence,<sup>28</sup> their means of enforcement must be improved.<sup>29</sup>

This Article will trace the origin, growth and enforcement of nonsolicitation and cease and desist orders. Part II outlines the federal framework for dealing with discriminatory practices by real estate brokers.<sup>30</sup> Section A focuses on "steering"<sup>31</sup>—the target of cease and desist orders—and illustrates the dilemma of both the victims and the brokers. Section B details blockbusting—the target of nonsolicitation orders. In discussing its genesis, financial operation, and sociological implications, this section also considers whether solicitation by brokers constitutes "commercial speech" protected by the first amendment. Section C briefly explores the effectiveness of section 1982 of the Civil Rights Act of 1866 as a remedy against racial discrimination in housing. Section D examines whether subtle behavior, language, and mannerisms employed by brokers in steering and blockbusting are elements that establish intent to discriminate.

Part III considers the New York response to steering and blockbusting.<sup>32</sup> Section A outlines the various applicable laws, rules, and

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however, was common to various groups of immigrants. The Chinese population in New York City increased from 32,831 in 1960, *see* 1960 CENSUS, *supra*, Table 21, at 107, to 69,324 in 1970, *see* 1970 CENSUS, *supra*, Table 23, at 87, to 124,372 in 1980. *See* 1980 CENSUS, *supra*, Table 58, at 55. The Filipino population in New York City increased from 4,281 in 1960, *see* 1960 CENSUS, *supra*, Table 21, at 107, to 11,207 in 1970, *see* 1970 CENSUS, *supra*, Table 23, at 87, to 25,391 in 1980. *See* 1980 CENSUS, *supra*, Table 58, at 55. The city has historically represented opportunity and the "better life," but when rural masses flocked to central cities, they found deteriorating ghettos, dwindling opportunities, and "white flight" to the suburbs. *See* Daye, *The Race, Class and Housing Conundrum: A Rationale and Proposal for a Legislative Policy of Suburban Inclusion*, 9 N.C.C. L.J. 37 (1977) [hereinafter Daye]. Census reports revealed that New York City's white population dropped from 6,048,841 in 1970, *see* 1970 CENSUS, *supra*, Table 23, at 87, to 4,348,605 in 1980, a 29% drop. *See* 1980 CENSUS, *supra*, Table 58, at 55. Because of a dramatic rise in New York City housing costs in the past decade and a reversal in the trend of "white flight"—known as gentrification, the statistical significance of which has yet to be comprehensively evaluated—whites are returning to black neighborhoods with developers making speculative purchases of depressed housing areas undergoing revitalization.

27. *See infra* notes 134-75 and accompanying text.

28. *See infra* notes 169-75 and accompanying text.

29. *See infra* notes 176-80 and accompanying text.

30. *See infra* notes 35-125 and accompanying text.

31. *See infra* note 52 and accompanying text.

32. *See infra* notes 126-75 and accompanying text.

codes and demonstrates the difficulty in pursuing a cause of action or complaint. Section B discusses hearings, license suspensions, and revocations by the Secretary of State, and examines Article 78 proceedings that provide judicial review of the determination of the Secretary of State. Section C reviews Article 15 (the Human Rights Law) of the Executive Law,<sup>33</sup> which is New York's comprehensive counterpart to the federal Fair Housing Act.<sup>34</sup> Section D examines the Secretary's statutory authority to impose penalties. This Section compares the effectiveness of these penalties with that of nonsolicitation and cease and desist orders.

This Article concludes that while nonsolicitation and cease and desist orders do not mitigate the effects of racial tension, they do effectively target local brokers who victimize neighborhoods. The Article, therefore, includes recommendations to enhance the efficient administration and implementation of these orders.

## II. Federal Response to Discriminatory Practices by Real Estate Brokers

Congress enacted Title VIII—The Federal Fair Housing Act—of the Civil Rights Act of 1968<sup>35</sup> “to encourage the dispersal of the urban ghettos that had experienced rioting and disorder in the summers of 1965 through 1968.”<sup>36</sup> To achieve this objective, Congress prohibited discriminatory practices that tended to exclude blacks from white suburbs.<sup>37</sup> Striving to make Title VIII a comprehensive, open housing law, Congress declared that its policy was to assure “fair housing throughout the United States.”<sup>38</sup> Yet Title VIII does not describe discrimination in terms of either purpose or effect.<sup>39</sup> Since the intent of Congress was to ban racial and other forms of discrimination by real estate agents in the sale and rental of housing,<sup>40</sup> the courts have broadly construed the Act.<sup>41</sup>

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33. N.Y. EXEC. LAW § 290 (McKinney 1982).

34. 42 U.S.C. § 3604 (1982).

35. *See id.*

36. Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 822 (1976) (footnote omitted) [hereinafter *Racial Steering*].

37. *See id.*

38. 42 U.S.C. § 3601 (1982).

39. *See id.* § 3602(f). This section only refers to unlawful acts described in §§ 3604-3606. *See Schwemm, Discriminatory Effect and The Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 202 (1978) [hereinafter *Fair Housing Act*].

40. 42 U.S.C. § 3604(a)-(e) (1982).

41. *See Jones v. Mayer Co.*, 392 U.S. 409, 413-17 (1968) (dictum); *Zuch v. Hussey*, 394 F. Supp. 1028, 1046 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977); *see, e.g., United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).



Section 3604 of the Act prohibits: (1) refusal to deal;<sup>42</sup> (2) discrimination as to terms;<sup>43</sup> (3) discriminatory advertising;<sup>44</sup> (4) false representations to any person that a dwelling is unavailable for sale or rental;<sup>45</sup> and (5) representations, whether true or false, to induce a person to sell or rent a dwelling because of the entry "into the neighborhood of a person . . . of a particular race, color, religion, sex, or national origin."<sup>46</sup> The first four prohibitions protect persons against the actions by the owner who sells or rents a dwelling.<sup>47</sup> In contrast, the last section intends to protect the owner of a dwelling against representations by persons intending to induce panic selling.<sup>48</sup> This Article focuses on the first and fifth prohibitions: steering<sup>49</sup> and blockbusting.<sup>50</sup>

### A. The Fair Housing Act: Steering

Without explicitly using the term, section 3604(a) of the Act prohibits steering.<sup>51</sup> Steering occurs when a real estate broker directs

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42. See 42 U.S.C. § 3604(a) (1982).

43. See *id.* § 3604(b).

44. See *id.* § 3604(c).

45. See *id.* § 3604(d).

46. See *id.* § 3604(e).

47. See *United States v. Mintzes*, 304 F. Supp. 1305, 1309 (D. Md. 1969).

48. See *id.* The most notable exemption under the Fair Housing Act is for owners of single-family homes or dwellings occupied by no more than four households, one of which is occupied by the owner. See 42 U.S.C. § 3603(b) (1982). This exemption applies when the owners do not employ brokerage services or procure commercial advertisement. See *id.* For a discussion of the legislative debate of this provision, known as the "Mrs. Murphy exception," see Note, *Recent Decisions, Racial Discrimination—Fair Housing Act*, 46 GEO. WASH. L. REV. 615, 627-28 n.139 (1978) [hereinafter *Recent Decisions*]. Passage of the bill hinged upon reconciliation of views favoring either a narrowing or broadening of this exemption. While such owners escape prosecution under the Act, see 42 U.S.C. §§ 3612-3613 (1982) (prosecution), the exemption does not immunize blockbusting brokers who solicit single-family homeowners. See *United States v. Mintzes*, 304 F. Supp. at 1309. Although the single-family homeowner does not need an exemption from the anti-blockbusting prohibitions of § 3604(c), see *id.*, providing an exemption for the blockbusting broker denies protection to the group most in need of it. See UNITED STATES COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 88 (1975) [hereinafter TWENTY YEARS AFTER BROWN]. If a broker were permitted to enjoy the exemption under § 3603(b), then § 3604(e), the anti-blockbusting provision, would be meaningless. See *infra* notes 70-85 and accompanying text for a discussion of § 3603(e).

49. See *infra* notes 51-69 and accompanying text.

50. See *infra* notes 70-95 and accompanying text.

51. See *Zuch v. Hussey*, 394 F. Supp. 1028, 1048 (E.D. Mich. 1975) ("[t]he [c]ourt, therefore, concludes as a matter of law that steering is a violation of Section 3604(a) of the Fair Housing Law"). One commentator has also argued

a buyer toward or away from particular neighborhoods because of the buyer's race.<sup>52</sup> It is thus the converse of blockbusting—the blockbuster makes race-related representations to sellers in order to depress the price of homes, while the steering broker makes such representations to buyers with the intent of increasing the prices of houses.<sup>53</sup> Typically, the white steerer will tell white buyers to stay away from an area because “it’s black” or will tell black buyers that no homes are available in white neighborhoods.<sup>54</sup> A broker steers pursuant to the instructions of sellers or preferences of buyers.<sup>55</sup> At best, a broker might assume that buyers prefer to live with others of their own race and, at worst, a broker might steer in combination with a blockbusting strategy,<sup>56</sup> with the result of pushing black buyers into changing neighborhoods. Sometimes a broker steers as the result of the baiting of an overzealous tester.<sup>57</sup>

It is widely believed that neither legislative efforts nor a purported shift in social values will eliminate steering by real estate brokers,<sup>58</sup>

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that § 3604(b)'s prohibition against discrimination applies to buyers steered by real estate brokers and establishes a legal “colorblind” standard. See *Racial Steering*, *supra* note 36, at 819. While § 3604(a) supports the first proposition, see 42 U.S.C. § 3604(a) (1982), *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), has held that the Constitution is not colorblind—and the Court has “expressly rejected this proposition on a number of occasions.” *Id.* at 356.

52. See *Racial Steering*, *supra* note 36, at 809. Steering is also known as gatekeeping and neighborhood shaping. See *id.*

53. See Note, *Housing and Section 1982: The Advisability of Extending the Statutory Mandate Beyond Acts of Traditional Discrimination*, 1975 DUKE L.J. 781, 799-800 n.80 [hereinafter *Housing and Section 1982*].

54. Steering is not limited to white brokers. One of the ironies in *Zuch* was that the court enjoined several black real estate agencies from providing services that their clients were unable to obtain from white brokers. See *Zuch*, 394 F. Supp. at 1054 n.12.

55. See *Racial Steering*, *supra* note 36, at 810-11.

56. See *id.* at 811-12.

57. See *id.* at 812; see also *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321 (N.D. Ill. 1979) (testimony of testers discounted due to interest in outcome of litigation); Millspaugh, *Fair Housing Testing: Its Legal Status and Policy Implications*, 13 U. BALT. L. REV. 215, 230-34 (1984) (discussing credibility of tester evidence) [hereinafter Millspaugh].

58. E. BISKIND, *LAW OF REAL ESTATE BROKERS* § 37(1) (1969 & Supp. 1983) [hereinafter BISKIND]; *Racial Steering*, *supra* note 36, at 811. For a first-hand field study of steering, see R. HELPER, *RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS* (1969). This study, however, focuses on the Chicago area and is dated. See *id.* This writer has not found any discussions either sympathetic to, or in defense of, brokers. To the contrary, articles hostile to brokers are more typical. See, e.g., Leland, *Going for Broker*, 4 CAL. LAW. 15-16 (Aug. 1984). There have been several legislative efforts to curb steering. See N.Y.C. ADMIN. CODE tit. 8, ch. 2, § 8-203 (1986); N.Y. EXEC. LAW § 296(5)(a)-(c) (McKinney 1982).

a practice historically encouraged by the industry.<sup>59</sup> A contrary view, however, notes that the standard texts used in real estate salespersons courses<sup>60</sup>—courses required for licensing in New York<sup>61</sup>—emphasize high ethical standards and the duty to comply with laws targeting racial discrimination.<sup>62</sup> Furthermore, brokers know that testers exist and, therefore, commonly protect their licenses by instructing their staff never to broach the subject of race and to move away from it whenever the client raises the question.<sup>63</sup>

Since the broker-defendant charged with a violation of section 3604(a) is unlikely to admit his guilt, the use of testers is frequently the only method available for gathering competent evidence of unlawful activity.<sup>64</sup> Although section 3604(a) covers refusals to deal only after a bona fide offer has been made, courts have upheld the use of testers as a means of showing section 3604(a) violations because section 3604(a) also prohibits the unlawful practice of “otherwise” making housing unavailable.<sup>65</sup> Many lower federal courts have held that plaintiff-testers who find discrimination in the course of their investigations have standing to sue under article III of the United States Constitution.<sup>66</sup>

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59. Until 1950, Article 34 of the National Association of Real Estate Brokers' 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.” National Ass'n of Real Estate Brokers' Code of Ethics, *quoted in*, BISKIND, *supra* note 58, § 37(1) n.18 1b.

60. *E.g.*, N. WEINBERG, P. COLLETTI, W. COLAVITO, & F. MELCHIOR, *GUIDE TO THE NEW YORK REAL ESTATE SALESPERSONS' COURSE* (2d ed. 1983) [hereinafter WEINBERG].

61. *See* N.Y. REAL PROP. LAW §§ 440-a, 441 (McKinney 1971).

62. WEINBERG, *supra* note 60, at 175-90. Article 10 of the National Association of Realtors' Code of Ethics now states, in pertinent part: “The Realtor shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin.” *Id.* at 185 (quoting National Association of Real Estate Brokers' Code of Ethics).

63. While this practice may reflect personal experience, encouragement of racial steering by brokers invites financial suicide. *See, e.g.*, *Kranzler Realty, Inc. v. Department of State*, 76 A.D.2d 901, 429 N.Y.S.2d 244 (2d Dep't 1980) (broker's license suspended); *see also* Notice of Proposed Settlement, *Mandel v. Fresh Meadows Assocs.*, *Newsday*, July 18, 1986, at 7, col. 2 (E.D.N.Y. June 19, 1986). *But cf. Blockbusting*, *supra* note 3, at 172 (industry failed to police itself).

64. *See* *Zuch v. Hussey*, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977).

65. *See id.* at 1047, 1051.

66. *See* *Pierson v. Ray*, 386 U.S. 547, 549 (1967) (bus terminals); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (buses); *Wharton v. Knefel*, 562 F.2d 550, 554

At least three legitimate objections, however, may be raised against the use of testers.<sup>67</sup> First, real estate agencies that do not discriminate against clients based upon race or national origin waste time and money interviewing and chauffeuring testers with no interest in purchasing a home. Second, the preference of some whites and some blacks to live with members of their own race cannot be ignored.<sup>68</sup> Third, charges of steering may be misleading. For example, an inexperienced, part-time salesperson may be unable to locate a home fitting the actual specifications of a black tester. If a white tester subsequently goes to the same real estate agency, but deals with an experienced, full-time broker, it is possible that the more experienced broker may be able to locate a home meeting those same specifications. Is it fair under these circumstances for the broker to lose his license? To minimize this problem, the use of testers should be targeted against particular real estate agencies that have had complaints filed against them. A proliferation of random testing—which might be called broker-busting—can be as invidious as blockbusting.<sup>69</sup>

#### B. The Fair Housing Act: Blockbusting

Section 3604(e), the anti-blockbusting provision of the Fair Housing Act, states that "it shall be unlawful [f]or profit, to induce or

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n.18 (8th Cir. 1977) (use of "checkers" to obtain evidence in discrimination cases has been uniformly accepted); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 650 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146, 1148 (N.D. Ill. 1972) (housing); *Brown v. Ballas*, 331 F. Supp. 1033, 1035 (N.D. Tex. 1971) (housing); Comment, *Fair Housing—The Use of Testers to Enforce Fair Housing Laws—When Testers are Sued*, 21 ST. LOUIS U.L.J. 170, 191 (1977) [hereinafter Comment, *Fair Housing*]; see also Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1 (1980) (while many courts have found testers have standing to sue, issue remains unresolved) [hereinafter *Standing to Sue*]: It is notable that whites also have standing to sue under Title VIII. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Walker v. Pointer*, 304 F. Supp. 56, 60 (N.D. Tex. 1969); TWENTY YEARS AFTER BROWN, *supra* note 48, at 89.

67. This Article does not discuss those objections manifested in state and local prohibitions against the use of testers since no such laws exist in New York. See Comment, *Fair Housing*, *supra* note 66, at 192.

68. See *Housing and Section 1982*, *supra* note 53, at 802. This preference is, of course, not limited to members of different races and applies with equal force to various ethnic groups. See TIME, July 8, 1985, at 52 (providing map of New York City's ethnic population concentrations); cf. *Racial Steering*, *supra* note 36, at 823 n.57 (buyers would purchase homes in areas inhabited by members of different races if not steered away).

69. As a result of such abuses, brokers bring charges of entrapment. See *Zuch v. Hussey*, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977).

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."<sup>70</sup> This section has survived various constitutional challenges, primarily as a valid exercise of congressional power to enforce the provisions of the thirteenth amendment.<sup>71</sup>

Blockbusting does not occur in a vacuum. It is best viewed as a process with several stages of development:

First, a sense of panic and urgency immediately grips the neighborhood and rumors circulate and recirculate about the extent of the intrusion (real or fancied), the effect on property values and the quality of education. Second, there are sales and rumors of sales, some true, some false. Third, the frenzied listing and sale of houses attracts real estate agents like flies to a leaking jug of honey. Fourth, even those owners who do not sell are sorely tempted as their neighbors move away, and hence those who remain are peculiarly vulnerable. Fifth, the names of successful agents are exchanged and recommended between homeowners and frequently the agents are called by the owners themselves, if not to make a listing then at least to get an up-to-date appraisal. Constant solicitation of listings goes on by all agents either by house-to-house calls and/or by mail and/or by telephone, to the point where owners and residents are driven almost to distraction.<sup>72</sup>

The only party who gains financially as a result of blockbusting is the broker. Both the white seller and the black purchaser lose in the exchange: the white seller sells in an artificially deflated market, and the black buyer pays an exorbitant amount for his home while unwittingly facilitating an increase in segregated housing.<sup>73</sup> In contrast, the blockbuster is frequently instrumental in financing the purchase of the house with a mortgage arranged through his own lending institution that is based upon fair market value—not the deflated purchase price. He then reaps immediate profits upon the

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70. 42 U.S.C. § 3604(e) (1982).

71. See *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120 (5th Cir.), cert. denied, 414 U.S. 826 (1973); *United States v. Mintzes*, 304 F. Supp. 1305, 1313 (D. Md. 1969). The *Mintzes* court dismissed fourteenth amendment challenges due to an absence of state action. See *Mintzes*, 304 F. Supp. at 1312. But cf. *Daye*, supra note 26, at 44 ("separate but equal" analysis under *Brown v. Board of Education*, 347 U.S. 483 (1954), still relevant).

72. *Zuch*, 394 F. Supp. at 1049 (quoting *United States v. Mitchell*, 335 F. Supp. 1004, 1005-06 (N.D. Ga. 1971)).

73. See *Blockbusting*, supra note 3, at 170.

sale of the house,<sup>74</sup> and accumulates cash reserves sufficient to execute future blockbusting activities.<sup>75</sup> Even organized crime can enter the scheme, when the blockbuster conspires with a real estate developer willing to finance and reward the broker for securing and assembling a group of connected properties that the developer subsequently converts into an apartment building complex.<sup>76</sup>

The havoc wrought by blockbusters, however, is of a much greater dimension than the resulting financial losses and the uprooting of victims. Neighborhoods in transition, whether by blockbusting or other means, tend to lose the political force necessary to command effective municipal services—chaos and deterioration combine to crush community spirit.<sup>77</sup>

While minorities suffer the most from discrimination in housing,<sup>78</sup> “[a]nti-blockbusting legislation . . . alleviates only the symptoms of the problem by salving the nerves of white homeowners, fearful of the arrival of black neighbors.”<sup>79</sup> As a result, the plaintiffs in blockbusting cases are largely white homeowners with community roots.<sup>80</sup> The recent black arrivals, who have a belated appreciation of the less favorable terms or the higher prices charged,<sup>81</sup> comprise a much smaller group of plaintiffs.<sup>82</sup>

Real estate brokers have defended themselves against charges of blockbusting by countering that white plaintiffs seek to destroy their businesses solely because they deal with blacks.<sup>83</sup> Bigotry, however, may not be the white homeowner’s motivation. For the white home-

74. See *Novel Approach*, *supra* note 9, at 550.

75. See *id.*

76. The facts in *Mintzes* suggested this hypothetical situation. See *Mintzes*, 304 F. Supp. at 1310.

77. See Smothers, *Housing Segregation: New Twists and Old Results*, N.Y. Times, Apr. 1, 1987, at B4, col. 5; *Blockbusting*, *supra* note 3, at 176 (“[s]ince blockbusting causes rapid transition and the newcomers are not an organized group, deterioration can occur before community concern can develop and create effective social control.”)

78. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

79. *Novel Approach*, *supra* note 9, at 552.

80. See *Zuch*, 394 F. Supp. at 1034.

81. See, e.g., *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210 (N.D. Ill.), *aff’d sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1969), *cert. denied*, 400 U.S. 821 (1970).

82. See *supra* note 80 and accompanying text.

83. See *Zuch*, 394 F. Supp. at 1030. Facing charges of blockbusting, brokers may even lament, “[i]f we don’t sell to colored [people], we’re bigots. If we do, we’re blockbusters.” *Novel Approach*, *supra* note 9, at 551 (quoting N.Y. Times, Dec. 9, 1969, at 57, col. 4).

owner who is house-rich and cash-poor, his house may represent the only nest egg available for security and retirement. Even if he steadfastly advocates mutual tolerance and respect among races, the fear of losing the only substantial asset his family possesses, resulting directly from an influx of blacks, is enough to send him running to the open arms of the blockbuster. If he has lived on a white block for many years and has made many friends among his neighbors, his sale to a black may create instant enemies—again, not because of bigotry, but because of financial panic. White flight is, therefore, not necessarily irrational.

Blockbusting usually does not occur in a stable, all-white community, rather, it ripens when the number of blacks in the neighborhood reaches about fifteen percent of the population.<sup>84</sup> The arrival of one black family in a white neighborhood does not signify that the whole neighborhood is "changing." This situation is especially true in affluent, suburban communities, such as Great Neck, New York.<sup>85</sup> Thus, blockbusting is basically a middle-class phenomenon: those stricken with poverty or blessed with fortunes remain unscathed.

As previously mentioned, the purpose of nonsolicitation orders is to prevent blockbusting.<sup>86</sup> While realtors have challenged these orders as an abridgment of freedom of speech protected by the first amendment, New York courts have upheld them.<sup>87</sup> Moreover, federal courts have held uniformly that section 3604(e) does not contravene the first amendment.<sup>88</sup> The rationale underlying these decisions is that statements containing racially discriminatory remarks made by blockbusting brokers to prospective clients are unprotected speech.<sup>89</sup> In addition, while the Constitution protects commercial speech, this protection is not absolute.<sup>90</sup> Commercial speech is subject to restriction when government interests are substantial.<sup>91</sup>

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84. See *Novel Approach*, *supra* note 9, at 543.

85. Great Neck has a reputation for wealth and exclusivity in the metropolitan New York City area similar to that of Beverly Hills in Los Angeles, California.

86. See *supra* notes 6-8 and accompanying text.

87. See, e.g., *Thomas v. Lomenzo*, 78 Misc. 2d 298, 356 N.Y.S.2d 760 (Sup. Ct. Kings County 1974), *aff'd*, 48 A.D.2d 869, 369 N.Y.S.2d 191 (2d Dep't 1975).

88. See *United States v. Hunter*, 459 F.2d 205, 212 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); *United States v. Mitchell*, 327 F. Supp. 476, 486 (N.D. Ga. 1971); *United States v. Bob Lawrence Realty, Inc.*, 313 F. Supp. 870, 872 (N.D. Ga. 1970); *United States v. Mintzes*, 304 F. Supp. 1305, 1312 (D. Md. 1969).

89. See Note, *Real Estate Steering and the Fair Housing Act of 1968*, 12 TULSA L.J. 758, 765 (1977).

90. See *infra* note 91 and accompanying text.

91. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,

In New York the prohibition against solicitation also applies to letters, telephone calls, window signs, handbills, and pennysavers.<sup>92</sup> It does not extend, however, to advertisements in newspapers of general circulation or advertisements on radio and television.<sup>93</sup> Yet classified ads that include discriminatory language such as "apartment available in white home" violate section 3604(c) of the Federal Fair Housing Act.<sup>94</sup> The posting of truthful signs on real estate that indicate "For Sale" or "Sold" with the broker's name is protected commercial speech.<sup>95</sup>

### C. Section 1982 of the Civil Rights Act of 1866

Section 1982 of the Civil Rights Act of 1866 guarantees that United States citizens "have the same right, in every [s]tate and [t]erritory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>96</sup> Although section 1982 remained virtually dormant for over one hundred years,<sup>97</sup> the Supreme Court activated section 1982 in 1968, declaring that it "bars *all* racial discrimination, private as well as public, in the sale

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*Inc.*, was the first major case advancing "commercial speech." 425 U.S. 748 (1976). *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), established the "four-step analysis" test to be utilized in determining whether a government restriction of "commercial speech" will survive constitutional scrutiny: (1) The expression must concern lawful, truthful, and forthright activity; (2) The asserted government interest may not be substantial or, if it is—(3) the regulation must directly advance the interest and (4) the regulation may not be more extensive than is necessary to serve the interest. *See id.* at 566. Since § 3604(e) prohibits a broker from encouraging a homeowner to sell because blacks are changing the face of the neighborhood, *see* 42 U.S.C. § 3604(e) (1982), the first part of the test is dispositive. Even if it were not, the state would still have a strong interest in preventing panic-induced selling and community upheaval.

92. *See* N.Y. COMP. CODES R. & REGS. tit. 19, § 178.2 (1977); *see also* *Eagle v. Paterson*, 83 A.D.2d 837, 837, 441 N.Y.S.2d 566, 567 (2d Dep't 1981), *aff'd*, 57 N.Y.2d 831, 442 N.E.2d 56, 455 N.Y.S.2d 759 (1982) (Pennysaver delivery violating cease and desist order).

93. *See* SOME QUESTIONS AND ANSWERS ABOUT THE NON-SOLICITATION ORDER (unpublished public information by Secretary of State). Examples of publications of general circulation include *The New York Times*, *The New York Post*, *The Daily News*, *El Diario*, *The Village Voice*, and *The Irish Echo*. *See id.*

94. *United States v. Hunter*, 459 F.2d 205, 221 (4th Cir.), *cert. denied*, 401 U.S. 934 (1972).

95. *See* *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

96. 42 U.S.C. § 1982 (1982).

97. *See* C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 22A, at 120-21 (4th ed. 1983).



or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the [t]hirteenth [a]mendment."<sup>98</sup> Furthermore, the Court held that the enactment of Title VIII of the Civil Rights Act of 1968 "had no effect upon [section] 1982."<sup>99</sup>

Hence, in view of the independence of Title VIII from section 1982, different tests for standing to sue<sup>100</sup> and different standards of proof apply.<sup>101</sup> In addition, while Title VIII exempts sales by owners of single-family homes who do not use brokers or commercial advertising,<sup>102</sup> section 1982 categorically prohibits white homeowners from discriminating against blacks when selling their homes.<sup>103</sup>

Plaintiffs may bring section 1982 and Title VIII claims in both federal and state courts.<sup>104</sup> Section 3610(d) of Title VIII, however, provides that state claims pre-empt federal claims.<sup>105</sup> Thus, an advantage in using section 1982 is that it cannot be pre-empted by state or local law.<sup>106</sup>

Although section 1982 does not specifically provide for payment of damages, the Supreme Court has encouraged equitable remedies.<sup>107</sup>

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98. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (emphasis in original); see also *Racial Steering*, *supra* note 36, at 813 n.23 (arguments for application of § 1982 to steering).

99. *Jones*, 392 U.S. at 416.

100. See *Standing to Sue*, *supra* note 66, at 15. In *Trafficante v. Metropolitan Life Insurance Co.*, the Court found it "unnecessary to reach the question of standing to sue under 42 U.S.C. § 1982" because the plaintiffs could proceed under the Fair Housing Act. 409 U.S. at 209 n.8. Professor Schwemm, however, suggests that § 1982 standing may be broader than standing under the Fair Housing Act, but the Supreme Court has not specifically decided the issue. See *Standing to Sue*, *supra* note 66, at 16. For instance, "a membership share in a neighborhood recreational facility clearly comes within its [§ 1982] scope even though it might not be considered a 'dwelling' under Title VIII." *Id.*

101. See *Fair Housing Act*, *supra* note 39, at 232. A number of lower court decisions have distinguished between the Title VIII and § 1982 standards and have indicated that proof of racial intent is required in a § 1982 case. See *id.* at 234 (citing *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 143 n.4 (N.D. Ill. 1977); *Stingley v. City of Lincoln Park*, 429 F. Supp. 1379, 1385 (E.D. Mich. 1977); *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1024 (E.D. Pa. 1976)).

102. See *supra* note 48 and accompanying text.

103. See *Jones*, 392 U.S. at 413, 421; *Racial Steering*, *supra* note 36, at 824 n.60; see also Comment, *Fair Housing*, *supra* note 66, at 176; cf. *Blockbusting*, *supra* note 3, at 175 (whites enjoy no relief under § 1982).

104. See *Standing to Sue*, *supra* note 66, at 12.

105. "[N]o such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law . . ." 42 U.S.C. § 3610(d) (1982).

106. See Comment, *Fair Housing*, *supra* note 66, at 176.

107. See *Jones*, 392 U.S. at 414 n.13.

Following this lead, federal courts have awarded compensatory and punitive damages as well as attorney fees under section 1982.<sup>108</sup> In contrast, Title VIII specifically provides for actual damages, up to \$1,000 in punitive damages, court costs, and attorney fees.<sup>109</sup>

#### D. Behavior, Language, and Intent

Discriminatory real estate practices, such as blockbusting and steering, are frequently covert and involve subtle activity, language, and manner.<sup>110</sup> A court, therefore, must consider the totality of circumstances in each case before rendering a judgment. Subtle activity occurs when realtors employ black real estate salespersons to visit white residents for the purpose of soliciting listings.<sup>111</sup> In such circumstances, the conversation, conducted in neutral business terms, contains no discriminatory representations. The homeowner, however, may readily perceive the writing on the wall. Blockbusters also engage in less subtle tactics such as advertising white-owned homes in newspapers of exclusively black circulation.<sup>112</sup>

Realtors commonly employ ambiguous language such as neighborhoods "changing" or "maintaining the status quo."<sup>113</sup> In addition, information that is neutral on its face may be transformed into advice when communicated in an animated voice with a raised eyebrow.<sup>114</sup> Since section 3604(e) prohibits both inducement and

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108. See *TWENTY YEARS AFTER BROWN*, *supra* note 48, at 87.

109. See 42 U.S.C. § 3612(c) (1968). The absence of similar remedies for successful defendants has engendered resentment and charges of frivolous litigation. Courts, however, rarely refer to the litigation as frivolous. Rather, they dismiss § 3612 cases for insufficient evidence. See, e.g., *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321, 1333 (N.D. Ill. 1979) (witnesses not credible); *Stingley v. City of Lincoln Park*, 429 F. Supp. 1379, 1386 (E.D. Mich. 1977) ("total absence of any proofs relative to a racially discriminatory intent"). In recognition of the general problem, the Federal Rules of Civil Procedure were amended on August 1, 1983, to hold attorneys more accountable and even to impose sanctions for irresponsible pleadings, motions, and discovery practices. See Fed. R. Civ. P. 11; Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640 (Nov. 1983).

110. See *supra* notes 51-95 and accompanying text.

111. See *Zuch v. Hussey*, 394 F. Supp. 1028, 1031 n.2 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977).

112. See *Butterly & Green, Inc. v. Lomenzo*, 36 N.Y.2d 250, 254-55, 326 N.E.2d 799, 802, 367 N.Y.S.2d 230, 233 (1975); *Novel Approach*, *supra* note 9, at 550.

113. See *Kranzler Realty, Inc. v. Department of State*, 76 A.D.2d 901, 902, 429 N.Y.S.2d 244, 246 (2d Dep't 1980). See generally *United States v. Mitchell*, 327 F. Supp. 476, 479 (N.D. Ga. 1971) (reasonable man standard applied to "subtle" statements in § 3604(e) cases).

114. See *Racial Steering*, *supra* note 36, at 815 n.29.

attempted inducement of sellers based upon racial representations, such representations need not be false or successful to be actionable.<sup>115</sup>

As long as a seller makes a representation proscribed by section 3604(e), the requisite intent to blockbust exists.<sup>116</sup> Title VIII plaintiffs charging municipalities with blockbusting need not produce evidence of overt bigotry nor direct or circumstantial evidence of discriminatory intent.<sup>117</sup> In contrast, a section 1982 plaintiff bringing an action against an individual homeowner or a small landlord not covered by Title VIII—the section 3603(b) exemption<sup>118</sup>—would have to prove intentional discrimination.<sup>119</sup> Discriminatory effect would probably be insufficient to show intent.<sup>120</sup>

Representations regarding the racial composition of a neighborhood that do not exhibit discriminatory intent, but are honest answers to innocent questions from brokers' clients do not violate blockbusting or steering prohibitions.<sup>121</sup> Thus, if a buyer asks, "What kind of people live in Laurelton?," it is proper for the broker to respond "It's a mixed neighborhood." A response that "It's mixed, you don't want to live there," however, would constitute overt steering. Likewise, a response that "It's a mixed neighborhood," with a simultaneous head shake, hand wave, or sneer would also constitute steering.<sup>122</sup>

115. See *Zuch v. Hussey*, 394 F. Supp. 1028, 1048 (E.D. Mich. 1975) (success), *aff'd*, 547 F.2d 1168 (6th Cir. 1977); *United States v. Mintzes*, 304 F. Supp. 1305, 1309 (D. Md. 1969); *Forman Enters. v. Department of State*, 58 A.D.2d 801, 801, 396 N.Y.S.2d 250, 250 (2d Dep't 1977) (untrustworthiness demonstrated by racially discriminatory remarks); *Blockbusting*, *supra* note 3, at 176 (falsity).

116. See *Mintzes*, 304 F. Supp. at 1311; *cf. Racial Steering*, *supra* note 36, at 818 ("broker should be liable even if he does not intend to deny the buyer available housing").

117. See *Recent Decisions*, *supra* note 48, at 632.

118. See *supra* note 48 and accompanying text.

119. See *Fair Housing Act*, *supra* note 39, at 234.

120. See *id.* (discussing impact of *Washington v. Davis*, 426 U.S. 229 (1976), upon § 1982); see also *Millsbaugh*, *supra* note 57, at 225-30 (some courts recognize difficulty of proving defendant's discriminatory intent by using "prima facie rule" requiring plaintiff to show: (1) he is a member of a minority; (2) he applied and was qualified for the housing sought; (3) he was rejected; and (4) the opportunity sought remained open); Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement*, 17 U.C. DAVIS L. REV. 445, 463-65 (1984) (discriminatory effects test would advance essential goals of Title VIII) [hereinafter Selig].

121. See *Mintzes*, 304 F. Supp. at 1312; *Abel v. Lomenzo*, 25 A.D.2d 104, 106, 267 N.Y.S.2d 265, 266 (1st Dep't), *aff'd*, 18 N.Y.2d 619, 219 N.E.2d 287, 272 N.Y.S.2d 771 (1966); *Novel Approach*, *supra* note 9, at 571; see also N.Y.C. ADMIN. CODE tit. 8, ch. 2, § 8-204 (1986).

122. See *supra* note 121.

If a seller asks whether the influx of blacks into his neighborhood is causing depressed home values, the broker can provide a market analysis based upon his actual records comparing the prices of homes sold in the immediate neighborhood six months ago and at the present time. Even if he honestly believes so, the broker should not say that the influx of blacks depresses the value of homes or that unless the homeowner sells soon the value will continue to drop.<sup>123</sup>

These representations are the direct target of section 3604(e) prohibitions.<sup>124</sup> Although the broker may respond to a question of the seller concerning the prospective buyer's race, the seller is liable under both section 3604(a) and section 1982 if he refuses to deal with the black buyer—the immunity of sellers under section 3603(b) applies only where the seller does not employ brokers.<sup>125</sup>

### III. New York's Response to Discrimination in Housing

Five basic bodies of law in New York govern proceedings involving discrimination in housing: (1) the State Administrative Procedure Act;<sup>126</sup> (2) the Executive Law's Article 15 (Human Rights Law);<sup>127</sup> (3) Title 8 of the Administrative Code of City of New York;<sup>128</sup> (4) Article 12-A of the Real Property Law, especially section 441-c.1;<sup>129</sup> and (5) Title 19 of the Official Compilation of Codes, Rules and Regulations.<sup>130</sup> In addition, courts make reference to the Civil Practice Law and Rules.<sup>131</sup> Since this Article has previously discussed the

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123. See *id.*

124. See *Mintzes*, 304 F. Supp. at 1309.

125. See *id.*

126. See N.Y. ADMIN. PROC. ACT § 306 (McKinney 1984); see also *infra* notes 134-50 and accompanying text.

127. See N.Y. EXEC. LAW §§ 90, 296 (McKinney 1982); see also *infra* notes 151-60 and accompanying text.

128. See N.Y.C. ADMIN. CODE tit. 8, ch. 2, § 8-203 (1986).

129. See N.Y. REAL PROP. LAW § 441 (McKinney 1968 & Supp. 1987); see also *infra* notes 161-68 and accompanying text.

130. See N.Y. COMP. CODES R. & REGS. tit. 19, §§ 175.17, 178.1 to -.5 (1985).

131. See N.Y. CIV. PRAC. L. & R. § 7803(3) (McKinney 1981); see also *infra* notes 143-45 and accompanying text.

While application of penal codes and laws may some day be common, currently such enforcement is rare. Sections 442-e of the Real Property Law and section 8-111 of the Administrative Code of the City of New York punish violations of human rights laws as misdemeanors. See N.Y. REAL PROP. LAW § 442 (McKinney 1968); N.Y.C. ADMIN. CODE tit. 8, ch. 2, § 8-111 (1969). To date, however, no prosecutions pursuant to these penal sections have been noted. Telephone interview with Stanley Whing, Director of the Neighborhood Stabilization Program of the New York City Commission on Human Rights (June 24, 1986). Also, there have

New York Compilation of Codes, Rules and Regulations<sup>132</sup> and the Administrative Code of the City of New York in footnotes,<sup>133</sup> further discussion will be limited to the three other laws.

#### A. The State Administrative Procedure Act

The Secretary of State has authority to issue cease and desist orders pursuant to Title 19 of the Official Compilation of Codes, Rules and Regulations.<sup>134</sup> Since this law does not designate the number of petitions of community residents required to issue a cease and desist order, the matter is left to the discretion of the Secretary. Adjudicatory hearings need not be held, instead, the Secretary of State sends the list of petitioning homeowners to all local brokers.<sup>135</sup> By contrast, adjudicatory proceedings usually precede the issuance of nonsolicitation orders.<sup>136</sup> The reason for this distinction

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been only thirteen civil suits by New York City's Commission on Human Rights from 1983 to date. Telephone interview with Harvey Fisher, Deputy Director of the New York City Commission on Human Rights (Mar. 20, 1987).

A likely reason for failure to prosecute is that law enforcement officials are busy solving crimes of more serious proportions. It is less likely that failure to prosecute is "due to the difficulty of establishing beyond a reasonable doubt the requisite criminal intent." *Blockbusting*, *supra* note 3, at 174. Suspension or revocation of the broker's license is more practical because it directly prevents him from earning a livelihood. *See Novel Approach*, *supra* note 9, at 564. Enforcement at the federal level (Title VIII) is also in general decline. *See Selig*, *supra* note 120, at 469 (significant decline in initiating litigation after election of Ronald Reagan).

132. *See supra* notes 6-8, 13, 22, 26.

133. *See supra* notes 3, 17.

134. *See supra* note 13.

135. Sections 202(2) (notice and comment) and 301 (adjudications) of the Administrative Procedure Act do not require adjudicatory hearings. *See N.Y. ADMIN. PROC. ACT* §§ 202(2), 301 (McKinney 1984 & Supp. 1987). The cease and desist order was a unique approach devised by the department. *See Novel Approach*, *supra* note 9, at 556.

136. *See, e.g.*, Nonsolicitation Order List, *supra* note 14 (various public hearings described). The Secretary of State has the authority to issue nonsolicitation orders pursuant to the Official Compilation of Codes, Rules & Regulations of the State of New York. *See N.Y. COMP. CODES R. & REGS.* tit. 19, § 178.1 (1985); *see also supra* note 7 and accompanying text. No statutory or departmental regulation requires the Secretary of State to hold a public hearing. *See id.* § 178.3 ("[u]pon reasonable notice to interested parties, the Secretary *may* conduct a fact-finding hearing to ascertain the nature and extent of activities upon which such order may be promulgated") (emphasis added). Adjudicatory proceedings are also afforded to license suspensions and revocations. *See N.Y. REAL PROP. LAW* § 441-e (McKinney 1968 & Supp. 1987). A suspension of the broker's license results in the suspension of his salespersons. *See id.* § 441-d. In the event of revocation, the broker must wait one year to be relicensed. *See id.* § 441-c(4) (McKinney 1968).

is that a nonsolicitation order requires substantial evidence of block-busting to survive judicial review.<sup>137</sup> The cease and desist petitions, on the other hand, reflect varying degrees of neighborhood irritation with brokers; homeowners, therefore, need not allege any wrongdoing other than the wish not to sell their homes.

The second important way that the State Administrative Procedure Act shapes law in this area is when a broker challenges the decision of the Secretary of State to suspend or revoke his license.<sup>138</sup> Section 306 of the Act requires "substantial evidence" to support all decisions, determinations, and section 307 orders.<sup>139</sup> Section 306, however, does not define substantial evidence. Rather, it merely indicates that administrative proceedings need not follow the strict rules of evidence observed by the courts.<sup>140</sup> As a result, appellate cases contain conflicting opinions—the majority finds substantial evidence to support the decision of the Secretary of State while the dissent considers the evidence "mere uncorroborated hearsay allegations."<sup>141</sup> The decision of the Secretary of State, however, prevails when the testimony of different witnesses conflicts and reasonable men could differ as to which testimony to accept.<sup>142</sup>

The final important measure of the State Administrative Procedure Act is section 205 which allows judicial review of rules upon petition pursuant to Article 78 of the Civil Practice Law and Rules.<sup>143</sup> For instance, upon the decision of the Secretary of State to suspend or

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137. See N.Y. ADMIN. PROC. ACT § 306.1 (McKinney 1984); see also *infra* notes 138-41 and accompanying text.

138. See, e.g., *Hiltzik v. Lomenzo*, 46 A.D.2d 855, 361 N.Y.S.2d 363 (1st Dep't 1974); *Kamper v. Department of State*, 26 A.D.2d 697, 272 N.Y.S.2d 808 (2d Dep't 1966), *aff'd*, 22 N.Y.2d 690, 238 N.E.2d 914, 291 N.Y.S.2d 804 (1968); *Chiaino v. Lomenzo*, 26 A.D.2d 469, 275 N.Y.S.2d 658 (1st Dep't 1966).

139. See N.Y. ADMIN. PROC. ACT § 306 (McKinney 1984).

140. See *id.*

141. *Eagle v. Paterson*, 83 A.D.2d 837, 837, 441 N.Y.S.2d 566, 567 (2d Dep't 1981), *aff'd*, 57 N.Y.2d 831, 442 N.E.2d 56, 455 N.Y.S.2d 759 (1982); see also *Jernigan v. Perales*, 109 A.D.2d 838, 839-40, 486 N.Y.S.2d 364, 365-66 (2d Dep't 1985) (citing *Eagle* to show that "residuum rule" of sufficiency of evidence at administrative hearings is no longer valid). The residuum rule required sufficient legal evidence to support a claim. See *Ayala v. Toia*, 59 A.D.2d 739, 398 N.Y.S.2d 567 (2d Dep't 1977) (although hearsay is admissible in administrative proceedings, there must be a residuum of legal evidence to support claim). *But see* Poerio, *Fairness in New York's Administrative Process: A Call for Revival of the Residuum of Legal Evidence Rule*, 57 N.Y. St. B.J. 26 (Dec. 1985).

142. See *Butterly & Green, Inc. v. Lomenzo*, 43 A.D.2d 707, 709, 350 N.Y.S.2d 188, 192 (2d Dep't 1973) (Shapiro, J., dissenting), *rev'd on other grounds*, 36 N.Y.2d 250, 326 N.E.2d 799, 367 N.Y.S.2d 230 (1975).

143. See N.Y. ADMIN. PROC. ACT § 205 (McKinney 1984).

revoke a broker's license, section 7803 of the Civil Practice Law and Rules inquires "whether a determination . . . was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed."<sup>144</sup>

The judicial standard of review used to evaluate the order of the Secretary of State to issue nonsolicitation and cease and desist orders is, therefore, whether the action was "arbitrary and capricious or an abuse of discretion."<sup>145</sup> Although it is difficult for a broker to overturn an order under this lenient standard of review, in *Hawley v. Cuomo*,<sup>146</sup> the New York Court of Appeals found a two-county nonsolicitation order to be "so broad in geographic scope" that it was "arbitrary and capricious."<sup>147</sup> In *Hawley*, evidence showed that brokers solicited homeowners in two specified areas more frequently than in the past, but "there [was] no indication that the majority of those solicitations were purposely infected with racially based representations which placed undue pressure on those homeowners to list their houses for sale."<sup>148</sup> Hence, in evaluating nonsolicitation and cease and desist orders, courts apply concepts of overbreadth<sup>149</sup> and vagueness.<sup>150</sup>

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144. N.Y. CIV. PRAC. L. & R. § 7803(3) (McKinney 1981). Section 205 of the Administrative Procedure Act further requires that a potential article 78 petitioner first request the Secretary of State to reconsider. See N.Y. ADMIN. PROC. ACT § 205 (McKinney 1984). Inaction of the Secretary of State for thirty days renders the request denied. See *id.*

145. *Hawley v. Cuomo*, 46 N.Y.2d 990, 991, 389 N.E.2d 827, 828, 416 N.Y.S.2d 232, 233 (1979) (quoting N.Y. CIV. PRAC. L. & R. § 7803(3) (McKinney 1981)).

146. 46 N.Y.2d 990; 389 N.E.2d 827, 416 N.Y.S.2d 232 (1979).

147. *Id.* at 992, 389 N.E.2d at 828, 416 N.Y.S.2d at 233.

148. *Id.* More recently, the court in *Campagna v. Shaffer*, upheld the nonsolicitation order of the Secretary of State, finding it neither arbitrary nor capricious. See *Campagna*, 131 Misc. 2d 1029, 1036, 502 N.Y.S.2d 639, 644 (Sup. Ct. Bronx County 1986).

149. See *Hawley*, 91 Misc. 2d at 18, 396 N.Y.S.2d at 991 (Sup. Ct. Queens County 1977), *aff'd*, 61 A.D.2d 1046, 403 N.Y.S.2d 280 (2d Dep't 1978), *aff'd*, 46 N.Y.2d 990, 389 N.E.2d 827, 416 N.Y.S.2d 232 (1979). But see *Bedford-Stuyvesant Real Estate Bd., Inc. v. Lomenzo*, 39 A.D.2d 742, 742, 332 N.Y.S.2d 266, 267 (2d Dep't 1972) (nonsolicitation order of July 8, 1971 covering Laurelton-Cambria Heights in Queens would have been enjoined for its "unlimited scope" had court not dismissed case for lack of standing); *Thompson v. Lomenzo*, 78 Misc. 2d 298, 303, 356 N.Y.S.2d 760, 766 (Sup. Ct. Kings County 1974), *aff'd*, 48 A.D.2d 869, 369 N.Y.S.2d 191 (2d Dep't 1975) (geographical boundaries of nonsolicitation order clearly delineated and order well suited to deal with specific problem of excessive or illegal solicitation).

150. See *State Comm'n for Human Rights v. Suburban Assocs., Inc.*, 55 Misc. 2d 920, 924, 286 N.Y.S.2d 733, 739 (Sup. Ct. Nassau County 1967) (commission's

## B. Article 15 of the Executive Law: The Human Rights Law

Section 290 of Article 15 of the New York Executive Law—the Human Rights Law—declares itself to be an exercise of the police power of the state and states its purpose to be, in part, “to eliminate and prevent discrimination . . . in housing accommodations.”<sup>151</sup> Declaring that equality of opportunity is a civil right, the law ensures equal opportunity to use and occupy housing accommodations without discrimination.<sup>152</sup>

Section 296 is the New York State counterpart to the Fair Housing Act.<sup>153</sup> Like section 3602, section 296 provides many examples of unlawful discriminatory practices.<sup>154</sup> It specifically outlaws block-busting.<sup>155</sup> The law prohibits sellers, renters, and assignors from printing or circulating any statement, advertisement or publication, for the purchase, rental, or lease of a housing unit “which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sex, or disability or marital status.”<sup>156</sup> Like the section 3603(b) exemption, these sections do not apply to rentals in single or two-family homes.<sup>157</sup>

Section 296 also outlaws steering.<sup>158</sup> Since steering practices tend to be devious, subtle, and elusive, the Secretary of State’s finding

order to broker to make all listings available to prospective purchasers was “far too vague” because “prospective purchasers” might be shoppers, testers, or even competitors), *modified on other grounds*, 34 A.D.2d 662, 310 N.Y.S.2d 1019 (2d Dep’t 1970); *see also Thompson*, 78 Misc. 2d at 301-02, 356 N.Y.S.2d at 764-65 (order not unconstitutionally vague because it gave fair notice to any person of ordinary intelligence that soliciting properties for purchase or sale was forbidden).

151. N.Y. EXEC. LAW § 290 (McKinney 1982).

152. *See id.*

153. *Compare id.* § 296 (McKinney 1982 & Supp. 1987) with 42 U.S.C. § 3604 (1983).

154. *See* N.Y. EXEC. LAW § 296 (McKinney 1982 & Supp. 1987).

155. *See id.* Section 296(3-b) provides:

It shall be an unlawful discriminatory practice for any real estate broker . . . to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin or marital status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences . . . including but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

*Id.* § 296(3-b).

156. *Id.* § 296(5)(a)(3).

157. *See id.*

158. *See id.* § 296(5)(c)(1). Section 296(5)(c)(1) states:



of steering after a hearing is conclusive when “ ‘others might reasonably make the same choice.’ ”<sup>159</sup> This holding applies even if the victim fails to testify at trial.<sup>160</sup>

### C. Section 441-c of Article 12-A of the Real Property Law

Section 441-c of New York's Real Property Law empowers the Department of State to suspend or revoke a broker's license or impose a fine of up to \$1,000.<sup>161</sup> As head of the Department of State, the Secretary's delegated authority is neither narrow nor doubtful: “Where an administrator is clothed by the [l]egislature with the responsibility of licensing and disciplining a calling, he must not be denuded of the commensurate authority to punish those licensees who violate professional standards unless his measures are shockingly unfair.”<sup>162</sup>

A ground for a finding of steering or blockbusting is “untrustworthiness.”<sup>163</sup> Thus, a broker has a duty to maintain high ethical standards—mandated by both common law principles of fiduciary and agency relationships and New York statutory law. Racially discriminatory real estate practices are indicative of untrustworthiness, as is charging exorbitant fees<sup>164</sup> and having a conflict of interest (self dealing).<sup>165</sup> The term “untrustworthiness” is necessarily broad

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It shall be an unlawful discriminatory practice for any real estate broker . . . [to] refuse to sell, rent, or lease any housing accomodation . . . to any person or group of persons . . . because of the race, creed, color, national origin, sex, or disability or marital status . . . or otherwise to deny or withhold any housing accomodation . . . because of race . . . .

*Id.*

159. See *Mid Village Realty, Inc. v. New York State Comm'n for Human Rights*, 59 Misc. 2d 651, 654, 300 N.Y.S.2d 483, 487 (Sup. Ct. Suffolk County 1969) (citations omitted), *aff'd*, 34 A.D.2d 794, 311 N.Y.S.2d 977 (2d Dep't 1970).

160. See *id.*

161. See N.Y. REAL PROP. LAW § 441-c (McKinney 1968 & Supp. 1987).

162. *Butterly & Green, Inc. v. Lomenzo*, 36 N.Y.2d 250, 258, 326 N.E.2d 799, 804, 367 N.Y.S.2d 230, 236 (1975).

163. See N.Y. REAL PROP. LAW § 441-c (McKinney 1968 & Supp. 1987). Other grounds for penalties include, but are not limited to, misstatement on license application, fraud, misleading advertising, and incompetence. See *id.*

164. See *Gold v. Lomenzo*, 35 A.D.2d 1054, 1054-55, 316 N.Y.S.2d 830, 833 (3d Dep't 1970), *modified on other grounds*, 29 N.Y.2d 468, 280 N.E.2d 640, 329 N.Y.S.2d 805 (1972); see also *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 214-16 (N.D. Ill.) (excess fees related to discrimination), *aff'd sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1969), *cert. denied*, 400 U.S. 821 (1970).

165. See *Kostika v. Cuomo*, 41 N.Y.2d 673, 677, 363 N.E.2d 568, 571, 394 N.Y.S.2d 862, 865 (1977) (suspension of broker for obtaining “ill-gotten profit”).

in order to vest the Secretary of State with wide discretion.<sup>166</sup> Courts have repeatedly rejected the contention that the Secretary of State has insufficient power to make determinations of untrustworthiness based on discriminatory acts.<sup>167</sup> In short, most courts base their decisions on a finding of untrustworthiness.<sup>168</sup>

#### D. Effectiveness of Laws Prohibiting Blockbusting and Steering

Numerous suspensions and fines have generated shock waves throughout the real estate brokerage industry. Because obtaining listings is fundamental to the broker's ability to earn a living, nonsolicitation and cease and desist orders directly limit a broker's earning capacity. Since these orders apply to a large number of brokers simultaneously without litigation of complaints they are effective in broadcasting the message that discriminatory real estate practices will not be tolerated.

Nevertheless, while the Secretary of State appears to have a statutory arsenal for enforcing penalties for discriminatory real estate practices, judicial review of his orders has often resulted in their dilution and nullification.<sup>169</sup> As previously stated, courts invalidate nonsolicitation and cease and desist orders on grounds of vagueness, overbreadth, and arbitrariness.<sup>170</sup> Extensive litigation has sometimes resulted in the imposition of a \$350 fine and restitution,<sup>171</sup> a one month suspension or, in lieu of suspension, a \$500 fine,<sup>172</sup> or even a reduction of penalties and a reprimand.<sup>173</sup> Courts have also shown

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166. See *id.*; *Birch v. Lomenzo*, 31 A.D.2d 835, 835, 298 N.Y.S.2d 281, 283 (2d Dep't 1969) (while Secretary of State must establish knowledgeable violation of state law, he "has wide discretion in determining what conduct constitutes 'untrustworthiness'").

167. See *Diona v. Lomenzo*, 26 A.D.2d 473, 477, 275 N.Y.S.2d 663, 668 (1st Dep't 1966); see also *Thompson v. Lomenzo*, 78 Misc. 2d 298, 305, 356 N.Y.S.2d 760, 767 (Sup. Ct. Kings County 1974), *aff'd*, 48 A.D.2d 869, 369 N.Y.S.2d 191 (2d Dep't 1975).

168. Section 441-c does provide for other grounds, such as incompetence and fraud, see *supra* note 163, but their elements are more difficult to prove.

169. See *infra* notes 170-75 and accompanying text.

170. See *supra* notes 145-50 and accompanying text.

171. See *Mid Village Realty, Inc. v. New York State Comm'n for Human Rights*, 59 Misc. 2d 651, 652, 300 N.Y.S.2d 483, 485 (Sup. Ct. Suffolk County), *aff'd*, 34 A.D.2d 794, 311 N.Y.S.2d 977 (2d Dep't 1969).

172. See *Eagle v. Paterson*, 57 N.Y.2d 831, 442 N.E.2d 56, 455 N.Y.S.2d 759 (1982).

173. See *Butterly & Green, Inc. v. Lomenzo*, 43 A.D.2d 707, 350 N.Y.S.2d 188 (2d Dep't 1973); *rev'd on other grounds*, 36 N.Y.2d 250, 326 N.E.2d 799, 367 N.Y.S.2d 230 (1975) (some petitioners suffered only reprimand, others were fined \$50, and others suspended).

leniency to first offenders by reducing the revocation penalty to suspension<sup>174</sup> because revocation amounts to a denial of a broker's livelihood<sup>175</sup>—an excessively harsh penalty when the discriminatory act is isolated in nature and is not part of a continuing or systematic pattern.

#### IV. Recommendations

The administration and enforcement of such penalties must be improved. Currently, the maximum fine the Secretary of State may impose for untrustworthiness under section 441-c of the Real Property Law is \$1,000.<sup>176</sup> Twenty years ago, \$1,000 may have been a substantial deterrent, but today it may be viewed as a nominal cost of doing business. The fine is not enough to deter a blockbusting or steering broker who can earn much larger commissions from racially pressured sales.<sup>177</sup> Raising the maximum fine to \$50,000 would clearly serve as a warning that New York will not tolerate discriminatory practices by brokers. The imposition of higher fines is also a better alternative to suspension of a broker's license because suspension has the disadvantage of simultaneously putting potentially innocent salespersons in the broker's employ out of work. A higher fine, however, is necessary to put some teeth into the law.

It is clear that the law will be ineffective without sufficient administrative personnel to enforce it. Hence, it should not be subject to politics—that is, cutbacks in funding following a change in administration. City, state, and federal legislators should make long-term budgetary commitments to ensure that present laws, representing a century of struggle to achieve racial equality, do not wilt and wither into oblivion as a result of lack of funding.

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174. See *Kranzler Realty, Inc. v. Department of State*, 76 A.D.2d 901, 429 N.Y.S.2d 244 (2d Dep't 1980).

175. See *Blatchly v. Department of State*, 83 A.D.2d 845, 845, 441 N.Y.S.2d 755, 755 (2d Dep't 1981); *Bernard-Charles, Inc. v. Cuomo*, 58 A.D.2d 535, 536, 395 N.Y.S.2d 656, 657 (1st Dep't 1977). See generally BISKIND, *supra* note 58, § 36.01.

176. See N.Y. REAL PROP. LAW § 441-c (McKinney 1968 & Supp. 1987).

177. Brokers' commissions are somewhat negotiable, but typically range between five and eight percent in the metropolitan New York City area. In the bargaining process, it is not uncommon for the broker to settle for a lower percentage when the price of the home is relatively high or to insist on a higher percentage when the price is relatively low. Brokers' commissions are not fixed by statute or regulation. See *Gold v. Lomenzo*, 35 A.D.2d 1054, 1055, 316 N.Y.S.2d 830, 834 (3d Dep't 1970), *modified on other grounds*, 29 N.Y.2d 468, 280 N.E.2d 640, 329 N.Y.S.2d 805 (1972).

The currently unenforced penal sanctions available under section 442-e of the Real Property Law of New York<sup>178</sup> and section 8-204 of the Administrative Code of the City of New York,<sup>179</sup> however, should be stricken. Since profit, as opposed to racism, motivates most brokers, civil remedies should be sufficient to promote equal housing without placing brokers behind bars. In addition to a fine or suspension imposed upon the broker, the homeowner victimized by blockbusting should be able to recover the difference between the fair market value of his home and the actual selling price created by panic instilled by the broker; the buyer victimized by blockbusting should likewise be able to recover the difference between the inflated price he paid for the house and its fair market value. The feasibility of including such damages in determinations by the Secretary of State ordering a fine or suspension should be studied.

### V. Conclusion

No published reports have studied the effectiveness of nonsolicitation and cease and desist orders in New York. While some federal and state cases deal with discriminatory practices in housing, the full extent of steering and blockbusting is unknown. Considering the subtlety of steering behavior and blockbusting tactics, it is likely that much goes unnoticed and unreported. The mere fact that complaints are made to the Secretary of State, does not mean a reportable case will emerge or that such complaints will be statistically significant.<sup>180</sup> Some controversies settle before full judicial adjudication.<sup>181</sup>

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178. See N.Y. REAL PROP. LAW § 442-e (McKinney 1968 & Supp. 1987).

179. See N.Y.C. ADMIN. CODE tit. 8, ch. 2, § 8-204 (1986).

180. Contact with the Department of State revealed that there were no studies indicating either: (1) how many brokers have been subject to fines, license suspension or revocation resulting from violation of cease and desist or nonsolicitation orders; or (2) the volume of complaints against brokers after the issuance of such orders as compared with just before. Telephone interview with Bernard Friend, Special Projects Manager, Division of Licenses, New York State Dep't of State (May 15, 1987).

181. On June 19, 1986, a class comprised of black plaintiffs alleging steering practices and a defendant housing development corporation reached an agreement. See Notice of Proposed Settlement, *Mandel v. Fresh Meadows Assocs.*, N.Y. Newsday, July 18, 1986, at 7, col. 2 (E.D.N.Y. June 19, 1986). Plaintiffs alleged violations under, *inter alia*, 42 U.S.C. § 1982, 42 U.S.C. § 3604, and section 296 of the Executive Law of New York. See *id.* The complaint indicated the use of testers and alleged that among the tactics used to steer blacks away from Fresh Meadows was the underlining in red of the letter "M" in Fresh Meadows on their applications to indicate that the applicant was black. Telephone interview with plaintiffs' counsel, Teitelbaum & Hiller, P.C. (July 18, 1986).

Study of the problem is complicated by social attitudes, economic considerations, and demographic shifts.

Twenty years ago, this area of the law was virtually uncharted. Today, the Fair Housing Act and the recently revitalized section 1982, along with state and local laws, curb discrimination by providing an enforcement arsenal that deters discriminatory real estate practices by punishing violators at both federal and state levels. The modern realtor now realizes that steering and blockbusting are illegal and could put him out of business. Nonsolicitation and cease and desist orders against real estate brokers in New York advance the promise of fair housing by throwing a wet blanket over specific neighborhoods ignited by panic selling. While they are not a cure-all for racial tension, such orders effectively target local brokers of victimized neighborhoods, so that transitions may occur naturally without the brokers' undue influence.

Appendix A





