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FAIR HOUSING TESTING: ITS LEGAL STATUS AND POLICY IMPLICATIONS

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Segregation in housing remains pervasive despite legislative attempts to end housing discrimination. The lack of a meaningful enforcement scheme has forced private litigants to seek their remedy for housing discrimination through the courts. To present a prima facie case of housing discrimination, private litigants have used individuals known as "testers," who pose as renters or home seekers in an attempt to secure evidence of disparate treatment. Although courts have accepted tester evidence as a necessary evil in exposing housing discrimination, the widespread use of tester evidence imposes significant costs on society and should not become the cornerstone of a national fair housing enforcement scheme.‡

I. INTRODUCTION

Two scenarios have become familiar fact patterns in the civil rights arena. In the first,[1] a minority applicant responding to an advertisement arranges to view a rental unit, but is told that the dwelling is no longer available. Suspecting that he is the object of race discrimination, he contacts a nonprofit organization devoted to the promotion of integrated housing in the metropolitan area. A white individual from

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1. *See, e.g.*, Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1083-85 (7th Cir. 1982) (minority told townhouse already rented; subsequent white applicant told same townhouse still available); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 550 (9th Cir. 1980) (minority told office not available because manager wanted to use it; white friend posing as a secretary later told that office was available); Blockman v. Sandalwood Apartments, 613 F.2d 169, 170-71 (7th Cir. 1980) (minority told no apartments were available; following day white tester told apartments were available); Wharton v. Knefel, 562 F.2d 550, 552-53 (8th Cir. 1977) (black renter told that no apartment available; white female tester told the next day that the apartment was available); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233-35 (8th Cir. 1976) (black woman told no apartment available; white tester told she could move in the next day).

the organization then applies for the apartment, not with a desire to rent the unit, but instead for the purpose of gathering evidence of race discrimination. The landlord accepts the white tester's[2] application.

In the second scenario,[3] a small area of a racially integrated metropolitan neighborhood gradually becomes concentrated with black home owners. This causes certain people in and around the neighborhood to suspect that the real estate brokers in the area are engaged in racial steering.[4] With the assistance of a housing activist group, several individuals, caucasion and black, are quietly recruited for a special assignment. Behind false identities and the pretense of an interest in purchasing a home in the area, their mission is to approach the offices of a real estate firm servicing the area in search of housing discrimination. These individuals engage the services of the owner and sales agents of the realty firm on numerous occasions over several weeks. Sensitized to illegal discriminatory behavior, armed with carefully designed questions, and on occasion acting in ways that will lead the real estate agents to believe they are racially biased, these recruits garner evidence they deem sufficiently incriminating to constitute violations of the Fair Housing Act of 1968.[5] In both instances, once the test

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2. Testers can generally be described as individuals who have absolutely no interest in obtaining the property involved, but instead test the reaction of real estate agents, landlords, or sellers to determine the presence of racial discrimination. In the context of a racial steering case, the Supreme Court defined testers as "[i]ndividuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).
3. *See, e.g.*, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 93-95 (1979) (realtors charged with steering black homeowners into a target area of integrated neighborhood); Denny v. Hutchinson Sales Corp., 649 F.2d 816, 818-19 (10th Cir. 1981) (realtor charged with steering blacks into cul-de-sac because of race); Sherman Park Community Ass'n v. Wauwatosa Realty Co., 486 F. Supp. 838, 840 (E.D. Wis. 1980) (realtor charged with steering blacks from white neighborhoods, and whites from black or integrated neighborhoods); Village of Bellwood v. Dwayne Realty, 482 F. Supp. 1321, 1323 (N.D. Ill. 1979) (neighborhood became concentrated with black homeowners); Zuch v. Hussey, 394 F. Supp. 1028, 1047-48 (E.D. Mich. 1975) (defendants attempted to steer blacks into certain neighborhoods), *aff'd*, 547 F.2d 1168 (6th Cir. 1977).
4. The Supreme Court has defined racial steering as "directing prospective homebuyers interested in equivalent properties to different areas according to their race." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 94 (1979); *see also* R. HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 143-54 (1969); Note, *Real Estate Steering and the Fair Housing Act of 1968*, 12 TULSA L.J. 758, 760 (1976); Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 809-12 (1976) [hereinafter cited as Note, *Real Estate Broker*].
5. Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1976)); *see infra* notes 18-22 and accompanying text.

   Two recent books provide a comprehensive analysis of fair housing law. *See* J. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION (1983); R. SCHWEMM, HOUSING DISCRIMINATION LAW (1983).

is completed a complaint is filed in federal district court alleging that the landlord or realty firm is engaged in the illegal practice of housing discrimination.

In recent years, Congress has embraced the concept of increased private enforcement activity to serve the public interest.[6] In the housing field, litigation is thus encouraged where the complainants, not only on their own behalf, but also as private attorneys general, act to promote the public interest by eliminating housing discrimination. This is a policy that Congress considers to be of the highest priority.[7] Further support for fair housing testing can be construed from judicial acceptance of the private attorneys general rationale in the civil rights area.[8] In addition, testing advocates have found the federal government to be a willing participant and ready source of financial support in recent years.[9]

In the late 1970's, the practice of fair housing testing became institutionalized. Beginning in 1975, the task of measuring the extent of racial discrimination in the nation's housing markets was funded by the United States Department of Housing and Urban Development (HUD).[10] To examine discriminatory housing practices, this study used information gained from fair housing testing. Forty metropolitan areas were tested throughout the country employing a network of some 600 testers, 40 tester supervisors and their assistants, and 40 local spon-

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6. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976) (original version at ch. 324, § 3, 60 Stat. 238 (1946)); Clayton Act, 15 U.S.C. § 15 (Supp. V 1983) (original version at ch. 323, § 4, 38 Stat. 731 (1914)); Securities Exchange Act, 15 U.S.C. §§ 78i(e), 78r(a) (1976) (original versions at ch. 687, Title I, § 18, 49 Stat. 831 (1935), ch. 404, Title I, § 9, 48 Stat. 889 (1934)); Racketeer Influenced and Corrupt Organizations (RICO) Statute, 18 U.S.C. § 1964(c) (Supp. 1983) (original version at Pub. L. No. 91-452, Title IX, § 901(a), 84 Stat. 943 (1970)); Fair Labor Standards Act, 29 U.S.C. § 216(b) (Supp. 1983) (original version at ch. 676, § 16, 52 Stat. 1069 (1938)); patent laws, 35 U.S.C. § 285 (1976) (original version at ch. 950, § 1, 66 Stat. 813 (1952)); Communications Act, 47 U.S.C. § 206 (1976) (original version at ch. 652, Title II, § 206, 48 Stat. 1072 (1934)).

7. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

   The concept of private attorneys general, however, has not been free from attack, especially in the area of fee awards. *See generally* Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 220 (1983) (problem stems from incentive structure current law offers to the private enforcer).

8. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 756 (1980) (civil rights statutes award the prevailing party attorney's fees); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 765 (7th Cir. 1982) (congressional goal of eliminating discrimination in employment serves to encourage private litigants to bring Title VII actions).

9. *See infra* note 10 and accompanying text; *see also Pierce Backs Continued Use of "Testers" to Combat Housing Discrimination*, 10 HOUS. & DEV. REP. (BNA) 404 (1982). *But see* The Washington Post, Jan. 4, 1983, at A13, col. 1 (federal support for fair housing activity may have been temporarily discontinued under Reagan administration).

10. U.S. DEP'T HOUS. & URBAN DEV., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS (1979) [hereinafter cited as HUD STUDY].

soring individuals and organizations.[11] The government's first published report of this project demonstrated the usefulness of testing as a research tool, and as "an especially important tool in enforcing laws."[12] The foundation was thus laid, and government funding of fair housing organizations to support testing programs throughout the country began.

Initially, this article examines the historical background and enforcement of the Fair Housing Act. The article then scrutinizes the premises and methods associated with current forms of fair housing testing, followed by an analysis of the judicial response to fair housing testing. Finally, the article surveys the present state of the law from a public policy perspective focusing on a fair housing enforcement strategy that is based on the widespread use of private testing.

II. HOUSING DISCRIMINATION AND ENFORCEMENT

The need for private enforcement to assist the elimination of housing discrimination is based in part on this country's belated response to this form of discrimination.[13] Although Congress, in enacting the Civil Rights Act of 1866,[14] had unequivocally declared that all citizens of the United States had the same rights as white citizens to purchase, sell, lease, hold, or convey real and personal property,[15] it was more than 100 years before the Supreme Court, in *Jones v. Alfred H. Mayer Co.*,[16] held that the 1866 Civil Rights Act prohibited private as well as public discrimination against blacks in the sale and rental of property.[17]

In the same year as *Jones*, Congress enacted Title VIII of the Civil Rights Act of 1968, the Fair Housing Act.[18] In its opening section the statute declares that "[i]t is the policy of the United States to provide,

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11. *Id.* at v.
12. *Id.* at 203. The report stated:
> The usefulness of testing for enforcement is evidenced by the use of the [testing] data by the Department of Justice. As of December, 1978, Justice had used the [testing] data to initiate over 100 FBI investigations of suspected discriminators. It is expected that the information supplied on individual firms and agents suspected of discriminating will have significant enforcement benefits.

Id.
13. For a discussion of racial housing segregation ordinances in Baltimore in the early 20th century, see Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983).
14. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1982 (1976)).
15. *Id.*
16. 392 U.S. 409 (1968).
17. *Id.* at 421. In 1962, President Kennedy took the first significant step by the federal government to end racial discrimination in federally-assisted housing. *See* Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963 Compilation), *reprinted in* 42 U.S.C. § 1982 (1976).
18. Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, §§ 801-19, 82 Stat. 81, (codified as amended at 42 U.S.C. §§ 3601-3631 (1976)).

within constitutional limits, for fair housing throughout the United States."[19] The operative segment of the statute, 42 U.S.C. § 3604, defines and makes unlawful five types of racially discriminatory activity.[20] In addition, it is unlawful under this section to deny a dwelling to any person because of race, color, religion, sex, or national origin,[21] or to discriminate in providing services or facilities associated with the sale or rental of real estate.[22] Thus, by its operative provisions, Title VIII clearly prohibits the consideration of race and other similar classifications in the sale and rental of housing in the United States. Despite this coverage, the residential segregation of blacks in both the sale[23]

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19. 42 U.S.C. § 3601 (1976).
20. The portion of this statute that proscribes various discriminatory practices in the sale or rental of housing states that it is unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
>
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

Id. § 3604. Most courts that have held that racial steering violates the Fair Housing Act have done so under § 3604(a) on the ground that racial steering serves to make unavailable or deny a dwelling to a prospective buyer on the basis of race. *See, e.g.*, Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975); United States v. Real Estate One, Inc., 433 F. Supp. 1140 (E.D. Mich. 1977); Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc., 422 F. Supp. 1071 (D.N.J. 1976); United States v. Henshaw Bros., 401 F. Supp. 399 (E.D. Va. 1974); Zuch v. Hussey, 366 F. Supp. 553 (E.D. Mich. 1973), *aff'd*, 547 F.2d 1168 (6th Cir. 1976).

Despite the scope of § 3604(a), § 3604(b) arguably provides broader protection against racial steering. *See* Note, *Real Estate Broker*, *supra* note 4, at 818-21.

21. 42 U.S.C. § 3604(a) (1976). By contrast, suits under 42 U.S.C. § 1982 are limited to race discrimination. *See supra* text accompanying note 17.
22. 42 U.S.C. § 3604(b) (1976).
23. A national survey found that blacks seeking to purchase a home had a 62% chance of encountering discrimination when visiting four different sales agents. *See* HUD STUDY, *supra* note 10.

The suggestion that more blacks do not purchase homes in suburban areas because of lower income levels is too shallow an explanation of the segregation phenomenon. *See* D. WARFIELD, A STUDY OF THE ECONOMIC POTENTIAL OF BALTIMORE CITY BLACK FAMILIES FOR LIVING IN BALTIMORE COUNTY AND THE OTHER SUBURBAN COUNTIES 3-7 (1980) (published by Baltimore Neighborhoods,

and rental[24] of housing persists.

Those who have analyzed the continuing problem of housing discrimination invariably place some of the blame on the enforcement scheme contained in Title VIII.[25] Indeed, some metropolitan areas, fearing that the enforcement scheme will not suffice to produce residential integration, have enacted integration maintenance programs designed to create and maintain stable interracial balances.[26] Title VIII in fact contains three methods of attack on housing discrimination. First, a person may submit a complaint to the Secretary of HUD.[27] Second, the United States Attorney General, acting through the United States Department of Justice (Justice Department), is authorized to bring suit when he has reasonable grounds to believe that a pattern or practice of discrimination has become an issue of general importance.[28] Finally, the complainant, acting as a private attorney general,[29] can immediately file suit in federal district court or a state

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Inc.) (black families have the ability to purchase and lease property in suburban Baltimore); *see also* BALTIMORE NEIGHBORHOODS, INC., A STUDY OF THE REAL ESTATE PRACTICES BY RACE IN WEST AND NORTHWEST BALTIMORE COUNTY (1982) (extensive racial discrimination and steering against buyers in these sections of Baltimore County); BALTIMORE NEIGHBORHOODS, INC., A STUDY OF THE REAL ESTATE PRACTICES BY RACE IN THE HARBEL AREA OF NORTHEAST BALTIMORE CITY (1981) (racial discrimination and steering against minority buyers in the Harbel area).

24. HUD STUDY, *supra* note 10 (blacks seeking rental housing faced a 75% chance of encountering bias when visiting four rental agents); *see also* BALTIMORE NEIGHBORHOODS, INC., APARTMENT DISCRIMINATION IN BALTIMORE COUNTY AND CITY 1982 (1983) (audit of 35 randomly selected apartments in Baltimore City and Baltimore County revealed a difference of treatment of blacks in 46% of the apartment complexes tested).
25. *See* UNITED STATES COMM'N ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 29, 30-32 (1979); GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES: STRONGER ENFORCEMENT NEEDED TO UPHOLD FAIR HOUSING LAWS (1978) (HUD needs powers to enforce Title VIII) [hereinafter cited as GAO REPORT]; Comment, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289 (1973); Note, *Is the U.S. Committed to Fair Housing? Enforcement of the Fair Housing Act Remains a Crucial Problem*, 29 CATH. L. REV. 641 (1980) (legislation designed to carry out equal opportunity in housing has proven to be largely unenforceable).
26. *See generally* Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891 (integration maintenance programs are unconstitutional); Comment, *Benign Steering and Benign Quotas: The Validity of Race-Conscious Policies to Promote Residential Integration*, 93 HARV. L. REV. 938 (1980) (municipal integration maintenance programs do not violate Title VIII or the equal protection clause of the fourteenth amendment).
27. 42 U.S.C. § 3610 (1976).
28. *Id.* § 3613.
29. The phrase "private attorney general" was first used by Judge Frank in Associated Indus. of New York State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.) (Congress can confer standing on persons, not simply to recover compensation for specific victims, but also "to vindicate the public interest. Such persons so authorized, are, so to speak, private Attorney Generals"), *vacated as moot*, 320 U.S. 707 (1943).

court of general jurisdiction.[30]

Despite these enumerated means of enforcement, the effectiveness of the remedial schemes vary in both speed and uniformity of result. The administrative procedure of filing a complaint through HUD has been criticized for delays in investigation and unsuccessful resolution of complaints.[31] The HUD procedure relies upon "conference, conciliation and persuasion," and permits suit in federal court only if conciliation fails to produce compliance.[32] Yet, federal efforts to secure compliance through HUD is withheld pending state action if the state has enacted legislation that is the substantial equivalent to Title VIII.[33]

30. 42 U.S.C. § 3612 (1976).

31. *Id.* § 3610(a)-(b), (d).

32. *See* Comment, *supra* note 25, at 317-18; Note, *supra* note 25, at 652-53.

33. 42 U.S.C. § 3610(c) (1976). Thirty states have enacted legislation deemed to be the substantial equivalent of the federal statute. *See* ALASKA STAT. §§ 18.80.200-290 (1981); CAL. GOV'T CODE § 12955 (West 1980); COLO. REV. STAT. §§ 24-34-501 to -510 (1982); CONN. GEN. STAT. ANN. §§ 46a-58 (West Supp. 1984); DEL. CODE ANN. tit. 6, §§ 4601-4613 (Supp. 1982); ILL. ANN. STAT. ch. 68, §§ 3-101 to -106 (Smith-Hurd Supp. 1984); IND. CODE ANN. § 22-9-1-2 (Burns Supp. 1983); IOWA CODE ANN. § 601 A.8 (West Supp. 1984); KAN. STAT. ANN. §§ 44-1015 to -1016 (1981); KY. REV. STAT. ANN. § 344.360 (Baldwin 1979); ME. REV. STAT. ANN. tit. 5, §§ 4581-4583 (Supp. 1984); MD. ANN. CODE art. 49B, §§ 19-28 (1979); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1984); MICH. COMP. LAWS ANN. §§ 37.1501-507 (West Supp. 1983); MINN. STAT. ANN. § 363.03 (West Supp. 1984); MONT. CODE ANN. § 49-2-305 (1983); NEB. REV. STAT. § 20-105 to -116 (Supp. 1982); NEV. REV. STAT. § 118.100 (1983); N.H. REV. STAT. ANN. § 354-A:8 (Supp. 1981); N.J. STAT. ANN. § 10:5-12 (West Supp. 1983); N.M. STAT. ANN. § 28-1-7 (1978); N.Y. EXEC. LAW § 296 (McKinney Supp. 1984); OR. REV. STAT. § 659.033 (1981); 43 PA. CONS. STAT. ANN. §§ 953-955 (Purdon Supp. 1984); R.I. GEN. LAWS §§ 34-37-1 to -4 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 20-13-20 (Supp. 1983); VA. CODE §§ 36-88 (1984); WASH. REV. CODE ANN. § 49-60-222 (Supp. 1984); W. VA. CODE § 5-11-9 (Supp. 1983); WIS. STAT. ANN. § 101.22 (West Supp. 1983). Similarly, the following local jurisdictions have substantially equivalent laws: Phoenix, Ariz., New Haven, Conn., Washington, D.C., Clearwater, Fla., Jacksonville, Fla., Orlando, Fla., St. Petersburg, Fla., Bloomington, Ill., Evanston, Ill., Springfield, Ill., Columbus, Ind., Fort Wayne, Ind., Gary, Ind., South Bend, Ind., Iowa City, Iowa, Kansas City, Kan., Salina, Kan., Wichita, Kan., Howard County, Md., Montgomery County, Md., Prince George's County, Md., Minneapolis, Minn., Kansas City, Mo., Lincoln, Neb., Omaha, Neb., New York City, N.Y., Charlotte, N.C., Mecklenburg County, N.C., New Hanover County, N.C., Raleigh, N.C., Philadelphia, Pa., Pittsburg, Pa., Sioux Falls, S.D., Knoxville, Tenn., Seattle, Wash., Tacoma, Wash., Beckley, W. Va., Charlestown, W. Va., Hunington, W. Va., Beloit, Wis. *See generally* 24 C.F.R. § 115.11 (1983) (listing of jurisdictions).

Further, the following three states and seven jurisdictions have enacted laws that are currently under proposal for substantially equivalent designation: Florida, Hawaii, North Carolina, Pensacola, Fla., Tallahassee, Fla., Park Forest, Ill., Olathe, Kan., Detroit, Mich., Allentown, Pa., Fort Worth, Tex. 49 Fed. Reg. 5,939 (1984) (to be codified at 24 C.F.R. § 115.11) (proposed Feb. 16, 1984). *See* FLA. STAT. ANN. § 23-167 (West Supp. 1983); HAWAII REV. STAT. § 515-3 to -8 (1976); N.C. GEN. STAT. § 41A-4 (Supp. 1983).

For the criteria used by HUD in making this determination, see HUD, Recognition of Substantially Equivalent Laws, 24 C.F.R. § 115.3 (1983).

In Maryland, state law prohibits discrimination in the sale and rental of housing. MD. ANN. CODE art. 49B, §§ 19-28 (1979). The Maryland Human Rela-

Thus, where the state has enacted this type of legislation, the individual complaint filed with HUD is delegated to the state or local agency for attempts to achieve enforcement.

Although the federal statute reflects the determination that the problem of housing discrimination should be handled by the state or local government, this procedure results in inevitable delay as the complaint is passed through the federal and state bureaucracies. The HUD enforcement procedure automatically delays the filing of a lawsuit for thirty days,[34] and probably longer if the complaint must be forwarded to a state or local agency. The delay in investigation may well result in an inability to secure the desired housing[35] since a bona fide purchaser without actual notice is not affected by a subsequent agency reconciliation or court decision.[36] Moreover, HUD has no power to preserve the status quo until the final disposition of the complaint.[37] Even if the administrative procedure results in an agreement in the individual complaint, there may be no protection against future housing violations by the same party. The agreement itself may be unenforceable and thus the realtor, seller, or lessor is held to a mere moral obligation.[38]

The second method of enforcement is by the Attorney General acting through the Justice Department. The focus of the Justice Department attack on housing discrimination is necessarily aimed at the large housing providers.[39] Despite this focus, the housing market is predominately comprised of independent landlords, sellers, and real estate brokers. The nature of the Justice Department litigation thus cannot act as an effective deterrent in the housing industry. Moreover, the number of cases brought by the Justice Department has slowed in recent years to a pace where in the three year period from 1981 to 1983

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tions Commission is charged with administrative responsibility. *Id.* § 19. For a discussion of the Maryland fair housing statute, see Comment, *supra* note 25, at 314-25.

34. 42 U.S.C. § 3610(d) (1976).

35. The following statistics were provided on May 25, 1984 in a telephone interview with Katrina Ross, Fair Housing Enforcement Division, HUD:

	Number of Complaints Received	Number and Percentage of Successful Conciliations	Number and Percentage of Successful Conciliation in which complainant was able to secure contested housing
1981	4,209	829 (19.6%)	310 (7.4%)
1982	5,112	946 (18.5%)	340 (6.7%)
1983	4,551	1102 (24.2%)	411 (9.0%)

36. 42 U.S.C. § 3612(a) (1976).

37. *See infra* note 39 and accompanying text.

38. Although HUD has no enforcement power, the agreement may be enforceable in a jurisdiction that has enacted substantially equivalent laws. *See supra* note 33 and accompanying text.

In Maryland, for example, such an agreement is enforceable through the Maryland Human Relations Commission. MD. ANN. CODE art. 49B, § 12 (1979).

39. Under Title VIII, the Justice Department is authorized to bring suit only when there is a pattern or practice of discrimination such that the discrimination has become an issue of general importance. 42 U.S.C. § 3613 (1976).

only nine Title VIII cases were filed by the United States.[40] This meager enforcement activity is hardly enough to serve even the symbolic role of previous years and provides little conciliation to the individual aggrieved party. For this reason, the bulk of fair housing enforcement activity is left to private litigation efforts, often proved through the use of fair housing testing.

III. AN ANATOMY OF FAIR HOUSING TESTING

The practice of fair housing testing is little known outside of housing activist circles and segments of the real estate industry. Even more obscure perhaps are the means employed in the testing. A composite of techniques and methods that make up the fair housing test can be assembled by examining the literature emanating from both the government and various fair housing organizations. The test has been described by its practitioners as:

> [a] study done to determine the difference in quality, content, and quantity of information and service given to clients by real estate firms and rental property managers that could only result from a difference in the client's race. The audit [test] is conducted under the supervision of a coordinator who sends teams of trained volunteers to well-known real estate companies to pass as homeseekers. Each team is matched according to income, family size, general appearance, etc. — every factor except skin color. Each member of the team is sent to the same agency at closely spaced intervals presenting similar housing desires. Each volunteer then keeps detailed accounts of his experiences in the categories being tested.[41]

For a fair housing test to be successful, its target must be unsuspecting. The two essential skills that the testers must possess are the ability to maintain secrecy and the ability to assume a false purpose with credibility. Since these are not necessarily qualities endemic to those accustomed to the candid relationships of an open society, the success of the test rests heavily on the indoctrination, training, and rehearsing of dedicated testers.[42]

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40. Between the 1968 passage of the Fair Housing Act and 1980, approximately 300 lawsuits had been filed by the Justice Department, or on the average 25 per year. Fair Housing Amendments Act of 1980, H. REP. No. 86, 96th Cong., 2d Sess. 4 (Apr. 1, 1980). The statistics for the 1981-1983 period were obtained from a telephone interview on May 24, 1984, with Thomas Keeling, Chief, Housing and Civil Enforcement Section, Civil Rights Division, Justice Department.

41. NATIONAL NEIGHBORS, RACIAL STEERING: THE DUAL HOUSING MARKET 20 (1973). The modern fair housing test is distinguishable from the testing employed through acts of civil disobedience that marked the early years of the modern civil rights movement in this country. There the underlying objective was to test the constitutionality of certain suspect laws and ordinances. In contrast, the objective of the present day testing is to secure compliance of favored laws through private litigation.

42. For example, the testers used in the federal government's national survey of hous-

The specific skills that testers must acquire are unconventional at best. For example, they are schooled to misrepresent their identities and intentions, as well as to fabricate responses during the course of the test to the extent necessary to conceal their true purpose.[43] They are also instructed to manipulate the target when necessary to obtain a certain reaction or a specific piece of information. As one tester manual explains, "[s]ometimes the investigator has to fish for the property. That is, instead of asking directly for the apartment or home in question, he has to maneuver the agent or owner into offering him the unit."[44]

The requirements of secrecy and deceit are certain to repulse some tester recruits. This has been anticipated in tester training programs and those uncomfortable in their role are encouraged to withdraw. Organizers fear that uneasy participants may do a mission of such delicacy more harm than good. A strong indoctrination can be helpful, however, in overcoming tester reluctance. Emphasis on the tester's righteousness of the cause, suggestive of an "ends justifies the means" rationalization, is a strong thread running through tester instructional literature. It would appear that participation in fair housing testing may not be suited to those lacking a strong commitment to the purpose for which the testing is undertaken.

IV. JUDICIAL RESPONSE TO TESTING

The form of the fair housing test was influenced largely by the peculiarities associated with securing evidence of sufficient credibility to support a housing discrimination complaint in court. The prospect of garnering evidence reflecting discrimination against a suspect class led to the early technique of team testing. The technique enlisted a non-minority tester to seek housing that had been denied the minority tester to establish a basis of comparison.

Fair housing evidence generated by testing reached the courts in

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ing markets were required to complete a thorough training course consisting of four parts: "(1) Carefully reading this [training] manual, including appendices, (2) Attending group training sessions, (3) Performing two practice audits [tests], and (4) Participating in review and debriefing sessions." HUD STUDY, *supra* note 10, at 10 (Manual for Auditors).

43. Under a section entitled "Vignettes" in the Manual For Auditors, testers were trained to anticipate and overcome situations where their real purpose might be in danger of discovery by a curious or suspicious target. Set forth below is an example of a hypothetical vignette:

    (Q) The Agent says, "Are you a tester by any chance?"
    (A) Do not answer directly. Ask a question instead.
    "What is a tester?"
    Show that the concept is incomprehensible to you.
    "A what? What is that?"

    Id. at 3.

44. LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, INVESTIGATING AND AUDITING IN FAIR HOUSING CASES 10 (1975).

the late 1960's. The favorable reception it received in a series of early cases encouraged further use and refinement of the technique.[45] The federal government used extensive tester evidence in *United States v. Youritan Construction Co.*,[46] where in support of its allegations, the Justice Department cited evidence from thirty tests conducted by black and white testers over an eleven month period.[47]

The federal courts, acknowledging the difficulty of proving housing discrimination, have continued to ease the plaintiff's burden in fair housing litigation. This policy decision by the courts has, in turn, allowed a more expansive use of tester evidence in three areas of the plaintiff's case. First, the courts have reduced the plaintiff's burden of production in fair housing cases. Second, the courts have continued to acknowledge the credibility of tester evidence. Third, testers have been granted broader standing to sue.

A. Burden of Proof and Tester Evidence

Perhaps in recognition of the lack of an effective remedial scheme, federal courts have become generous in construing the plaintiff's burden of production in housing discrimination litigation. Although earlier cases had required the plaintiff to prove that the defendant had intentionally discriminated to establish a Title VIII violation,[48] recent decisions have adopted a prima facie concept to show a violation of Title VIII.[49] Under this theory, borrowed from the employment dis-

45. *See* Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973); Martin v. John C. Bowers & Co., 334 F. Supp. 5 (N.D. Ill. 1971); Brown v. Ballas, 331 F. Supp. 1033 (N.D. Tex. 1971), *aff'd*, 491 F.2d 634 (7th Cir. 1974); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969); Harris v. Jones, 296 F. Supp. 1082 (D. Mass. 1969); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407 (S.D. Ohio 1968). The Supreme Court has also endorsed the relevance of disparate treatment evidence in the context of employment discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

46. 370 F. Supp. 643 (N.D. Cal. 1973), *modified*, 509 F.2d 623 (9th Cir. 1975).

47. *Youritan*, 370 F. Supp. at 655.

48. *See, e.g.*, United States v. Northside Realty Assocs., 474 F.2d 1164, 1171 (5th Cir. 1973) (intent standard used to analyze defendant's liability under Title VIII), *cert. denied*, 424 U.S. 977 (1976); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 226 (5th Cir. 1971) (intent standard used in Title VIII case).

49. *See, e.g.*, Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982) (prima facie concept employed by courts in Title VII cases applies to Title VIII cases); Halet v. Wend Inv. Co., 672 F.2d 1305, 1331 (9th Cir. 1982) (significant discriminatory effects flowing from rental decisions demonstrate a violation of Title VIII); United States v. City of Parma, 661 F.2d 562, 576 (6th Cir. 1981) (municipal zoning ordinance had discriminatory effect), *cert. denied*, 456 U.S. 926 (1982); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979) (standard under Title VIII is prima facie case); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978) (practices with discriminatory effects are prohibited by Title VIII); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977) (discriminatory effect alone is sufficient to establish Title VIII violation), *cert. denied*, 435 U.S. 908 (1978); Wharton v. Knefel, 562 F.2d 550, 555 (8th Cir. 1977) (prima facie standard applies to Title VIII litigation); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (discriminatory effects

crimination field,[50] the plaintiff establishes a prima facie case of housing discrimination without showing the defendant's discriminatory intent. Instead, the plaintiff's burden of production can be met through the introduction of evidence of a racially neutral housing practice that has a discriminatory effect.[51]

By introducing the prima facie standard of housing discrimination claims under Title VIII, courts have acknowledged the difficulty of proving the defendant's intent to discriminate.[52] In addition, courts have recognized that the statute is designed to remedy not only discriminatory motivation but also the effect of discrimination in the

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alone establishes a prima facie violation of Title VIII), *cert. denied*, 434 U.S. 1025 (1978). *See generally* Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. 199 (1978) (prima facie standard will help the Fair Housing Act end sophisticated as well as blatant discrimination, and eradicate practices that operate to limit housing for minorities).

50. *See* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128 (1976) (prima facie standard permits a method of testing facially neutral housing practices that produce discriminatory effects in a manner consistent with Title VIII).

51. *See* cases cited *infra* note 52. There are many factual patterns that suggest discriminatory effect although not necessarily discriminatory intent. *See, e.g.*, Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 186 (7th Cir. 1982) (residents committee exercised its right to purchase the property); Halet v. Wend Inv. Co., 672 F.2d 1305, 1307 (9th Cir. 1982) (refused to rent to persons with children); Marable v. H. Walker & Assocs., 644 F.2d 390, 391 (5th Cir. 1981) (refused to rent to unmarried persons); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1033-34 (2d Cir. 1979) (required approval from a resident committee); Bunn v. Central Realty, 592 F.2d 891, 892 (5th Cir. 1979) (per curiam) (required references from current or former occupants); Wharton v. Knefel, 562 F.2d 550, 552 (8th Cir. 1977) (refused to rent to divorced persons); Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 896-97 (3d Cir. 1977) (preference given to relatives of current tenants); Wang v. Lake Maxinhall Estates, 531 F.2d 832, 834 (7th Cir. 1976) (required approval of residents committee); Dillon v. Bay City Constr. Co., 512 F.2d 801, 802 (5th Cir. 1975) (made a belated decision to transfer property to a relative); Boyd v. Lefrak Org., 509 F.2d 1110, 1111 (2d Cir.) (imposed rules causing applicant to be financially unable to afford the housing), *cert. denied*, 423 U.S. 896 (1975); Williams v. Matthews Co., 499 F.2d 819, 824-25 (8th Cir.) (refused to deal with other than "qualified builders"), *cert. denied*, 419 U.S. 1027 (1974); Jeanty v. McKey & Poague, Inc., 496 F.2d 1119, 1120 (7th Cir. 1974) (no single men); Stevens v. Dobs, Inc., 483 F.2d 82, 83 (4th Cir. 1973) (per curiam) (rejected applicant on the basis of his offensive odor); Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 347 (7th Cir. 1970) (refused to rent to unmarried employed persons with small children); Carson v. Pierce, 546 F. Supp. 80, 82 (E.D. Mo. 1982) (refused to rent to persons with too many children); McHaney v. Spears, 526 F. Supp. 566, 571 (W.D. Tenn. 1981) (subsequent demand for cash only terms); Bishop v. Pecsok, 431 F. Supp. 34, 36 (N.D. Ohio 1976) (refused to rent to undergraduate students); United States v. Henshaw Bros., 401 F. Supp. 399, 401 (E.D. Va. 1974) (refused to rent to military personnel below the rank of major).

52. *See, e.g.*, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288-90 (7th Cir. 1977) (focus on only intent allows racial discrimination to go unpunished absent evidence of blatant racism), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974) (prima facie case is proper standard under Title VIII because "clever men easily conceal their motivations" concerning racial discrimination), *cert. denied*, 422 U.S. 1042 (1975).

housing market.[53] As applied, courts have described the plaintiff's burden under the prima facie rule as a four part inquiry in which the plaintiff must show that (1) he is a minority; (2) he applied for and was qualified to rent or purchase the desired dwelling; (3) he was rejected; and (4) the opportunity to rent or purchase the dwelling remained open.[54]

The qualified minority who applies for but is denied housing because of suspected discrimination has established the first three components of the prima facie case. The minority can establish the fourth element through discovery of the defendant's records or with greater ease and economy through the use of tester evidence. If a white tester subsequently applies for and is offered the dwelling at issue, the plaintiff has made out his prima facie case. Nevertheless, defendants will often raise justifications for their conduct that, they allege, are purely subjective, and demonstrate that their housing practices do not amount to racial discrimination.[55]

A conflict exists among the federal circuits regarding the effect of these justifications on the plaintiff's prima facie case.[56] The federal courts of appeal have employed three separate approaches. Under the first, a court uses a four factor test to determine whether the defendant's conduct has produced discriminatory effects sufficient to violate

53. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977) (noting Supreme Court has emphasized need to construe Title VIII broadly), *cert. denied*, 435 U.S. 908 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974) (in Title VIII cases effect, and not motivation, is gravamen), *cert. denied*, 422 U.S. 1042 (1975).

54. *See, e.g.*, Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 190 (7th Cir. 1982) (prima facie case where black plaintiff was qualified to purchase, applied for the house but was rejected, and the house remained on the market); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 551-52 (9th Cir. 1980) (prima facie case where qualified black applied for office, was told office no longer available, and white applicant subsequently rented the office); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979) (prima facie case where minority could afford to purchase the space sought, his application was denied, and the opportunity remained open).

55. *See* cases cited *supra* note 49.

56. *See* Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982) (federal courts of appeal have applied different standards in determining importance of discriminatory effects). *Compare* Smith v. Anchor Bldg. Corp., 536 F.2d 231, 235-36 (8th Cir. 1976) (Title VIII prohibits practices with racially discriminatory effects so that the plaintiff need only establish that race was a factor in rejecting plaintiff's application for housing) *and* Metropolitan Hous. Dev. Co. v. Village of Arlington Heights, 558 F.2d 1283, 1289-90 (7th Cir. 1977) (balancing of four critical factors to determine whether a discriminatory effect is permissible under Title VIII) *with* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-48 (3d Cir. 1977) (Title VIII criteria must emerge on a case-by-case basis, but a rough measure can be made by examining first whether the justification served a legitimate interest of the defendant and second, whether the defendant could have taken an alternative course of action that would allow his interest to be served with less discriminatory impact). *See generally* Comment, *Justifying Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398 (1979) (balancing test recommended as the most appropriate standard of review).

Title VIII. Under this procedure, the court reviews the evidence of a discriminatory effect, the showing of some racially discriminatory intent, the defendant's interest in taking the challenged action, and the nature of relief sought by the plaintiff.[57] Under the second approach, once the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to demonstrate that the challenged practice arises for a legitimate business reason.[58] Under the final method, the defendant's burden of justifying discriminatory effects is measured on a case-by-case basis.[59]

Under each approach, once the defendant introduces evidence in justification of his conduct the court must carefully view the facts and circumstances surrounding the challenged action to determine if a Title VIII violation has occurred.[60] Courts may infer discrimination from the sequence of events surrounding the alleged conduct, and they have generally viewed the defendant's subjective explanations with considerable skepticism.[61] Nevertheless, because the plaintiff retains the ultimate burden of persuading the trier of fact that a Title VIII violation has occurred, if he fails to dispute the defendant's alleged justifications or fails to introduce evidence beyond that necessary to make out a prima facie case, he may also fail to meet his burden of persuasion.

Tester evidence allows the plaintiff to build a stronger prima facie case of housing discrimination that is less susceptible to attack by the defendant's introduction of nondiscriminatory justifications for his conduct. Defendants commonly allege two types of legitimate justifications for their refusal to deal with a minority homeseeker.[62] First, the defendant alleges that the desired dwelling was not available at the time the minority applied.[63] Second, the defendant asserts that al-

57. *See, e.g.*, Smith v. Town of Clarkton, 682 F.2d 1055, 1065-66 (4th Cir. 1982) (violation of Title VIII where: (1) plaintiff made a strong showing of discriminatory effects; (2) plaintiff proved racial motivation; (3) defendant had no legitimate justification for his action; and (4) plaintiff sought only to restore status quo); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290-93 (7th Cir. 1977) (four critical factors are discernable from previous cases: (1) strength of plaintiff's showing of discriminatory effect; (2) evidence of discriminatory intent; (3) defendant's reasons for taking the action at issue; and (4) whether plaintiff's request for relief requires the defendant to take action or seeks to restrain the defendant), *cert. denied*, 434 U.S. 1025 (1978).

58. *See* Williams v. Matthews Co., 499 F.2d 819, 827 (8th Cir.) (after plaintiff establishes prima facie case of discrimination, burden shifts to defendant to articulate some legitimate nondiscriminatory reason for the challenged practice), *cert. denied*, 419 U.S. 1027 (1974).

59. *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977) (after rejecting the tests employed by the other circuits, *Rizzo* stated that the problem of measuring the defendant's justification requires a case-by-case approach, and that a defendant can rebut a prima facie case of housing discrimination only by showing a legitimate interest in the challenged action).

60. *See* cases cited *supra* note 51.

61. *Id.*

62. *See* Schwemm, *supra* note 49, at 239-41.

63. *See, e.g.*, Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983); Washington v.

though the unit remained open, there was some nondiscriminatory reason for rejecting the minority applicant.[64]

In both instances, tester evidence can be used to refute the defendant's justification. In the first circumstance the strategy is straightforward: if a white tester subsequently applies for and receives the contested housing, the plaintiff has effectively contradicted the defendant's justification. As a result, the defendant cannot justify his refusal to rent or sell the dwelling to the minority on the basis that the opportunity was no longer available. The second common defense—that the plaintiff's application was denied on a basis other than his minority status—is a more subtle excuse and therefore requires a more sophisticated test to corroborate the plaintiff's suspicion of disparate treatment. Cases in the housing discrimination area are replete with examples of justifications given by defendants to account for the rejection of a minority application.[65] Although the justification may seem feeble or eccentric, the defendant's conduct may correspondingly be difficult to evaluate as a Title VIII violation. Despite this difficulty, if the plaintiff can demonstrate that this facially neutral standard was applied in a discriminatory manner, he will consequently rebut the defendant's proferred justification.

The key to the plaintiff's case is his ability to prove that the defendant's justification is merely a pretext for illegal discrimination. In this situation tester evidence may be indispensable to substantiate the plaintiff's suspicion that the subjective criteria were applied in a discriminatory manner. The test must be carefully designed to eliminate subjective differences between the minority applicant and the white tester so that common justifications are eliminated. To this end, the white tester should be assigned economic, family, and social characteristics that are slightly less desirable than the minority applicant. As a result, if the minority applicant, for example, describes himself as divorced with two children and an annual income of $15,000, the white tester might characterize himself as divorced with three children and an annual income of $14,000. The defendant who accepts the white tester after rejecting the minority applicant will encounter difficulty in explaining his decision since he cannot justify his choice on income requirements, social, or family characteristics. Therefore, tester evidence allows the plaintiff to build a strong case of race discrimination that is less susceptible to the defendant's allegations of nondiscriminatory conduct.

In short, despite the reduction of the plaintiff's burden of production in fair housing litigation, defendants will often interpose nondis-

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Sherwin Real Estate, Inc., 694 F.2d 1081 (7th Cir. 1982); Price v. Pelka, 690 F.2d 98 (6th Cir. 1982); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548 (9th Cir. 1980); Blockman v. Sandalwood Apartments, 613 F.2d 169 (7th Cir. 1980).

64. *See* cases cited *supra* note 1.

65. *See* cases cited *supra* note 51.

criminatory justifications for the rejection of the minority's application. Although courts are split on the effect of the defendant's justification, because the plaintiff retains the burden of persuasion he stands a better chance of convincing the trier of fact of discrimination if he can show through tester evidence that the defendant's justification is merely a subterfuge.

B. The Credibility of Tester Evidence

The issue of the credibility of tester evidence has been virtually dormant. In light of the dubious nature of fair housing testing techniques, one might anticipate that defendants would be successful in challenging tester credibility. This has not been the case. While a few courts have questioned the use of tester evidence,[66] most consider the use of tester testimony to be well established and necessary to produce evidence of housing discrimination.[67]

A tester's credibility cannot be called into question simply on the basis that as a tester he is automatically lacking in credibility. Indeed, the United States Court of Appeals for the Eighth Circuit recently advanced the view in *Richardson v. Howard*[68] that tester evidence might properly be accorded greater weight because testers are more likely to be careful and dispassionate observers of the events in question.[69] *Richardson* involved a fact pattern typical of the first scenario mentioned at the outset of this discussion.[70] Responding to a newspaper advertisement, a minority called and confirmed the availability of an apartment but was subsequently told in person by a white landlord that the last unit had just been rented. Later that day the minority, without identifying herself, again called the landlord and was told that two apartments were available. Believing she was the object of race discrimination, the minority contacted a housing activist group that conducted a test at the apartment complex. A white tester was able to verify that the landlord was apparently discriminating against minority applicants.[71]

The United States District Court for the Northern District of Illinois discounted the testimony of the white tester, stating that this evi-

66. *See, e.g.*, Wharton v. Knefel, 415 F. Supp. 633, 635-36 (E.D. Mo. 1976) (purpose of tester's visit was to manufacture evidence), *rev'd*, 562 F.2d 550 (8th Cir. 1977); Smith v. Anchor Bldg. Corp., 397 F. Supp. 256, 259 (E.D. Mo. 1975) (testers had attitude of champerty), *rev'd*, 536 F.2d 231, 234 (8th Cir. 1976).

67. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983); Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081 (7th Cir. 1982); Price v. Pelka, 690 F.2d 98 (6th Cir. 1982); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548 (9th Cir. 1980).

68. 712 F.2d 319 (7th Cir. 1983).

69. *Id.* at 321-22.

70. *See supra* note 1 and accompanying text.

71. *Richardson*, 712 F.2d at 320-21.

dence had to be considered along with the fact that the witness was a professional tester and had given false information to the landlord under the pretense of obtaining an apartment.[72] The Seventh Circuit, however, reversed and held that the the district court had no reason to question the testimony of professional testers simply because they are acting as testers.[73] The *Richardson* court noted that other jurisdictions had repeatedly sanctioned the role of testers and that this information often proved indispensable in establishing a housing discrimination case. Moreover, the court suggested that it might be proper to consider tester evidence more persuasive than other testimony in a fair housing case.[74]

The decision in *Richardson* is consistent with earlier cases that have recognized that testers are competent to testify as witnesses in housing discrimination litigation.[75] The Seventh Circuit's enthusiastic support for tester testimony, however, has been rare in other jurisdictions. As a result, *Richardson* appears to expand previous decisions by suggesting that because testers are careful observers of the issues and disinterested participants in the litigation, their testimony should be accorded greater weight than the self-serving testimony of the plaintiff and defendant. Despite *Richardson*, before courts can consider testers as independent observers, one must carefully examine the factual situations in which tester evidence is gathered to determine whether the testers are genuinely disinterested in the litigation.

Where it can be shown that the tester is not a disinterested witness or party, credibility considerations can have a dramatic impact on the outcome of the litigation. For example, in *Village of Bellwood v. Dwayne Realty*,[76] the United States District Court for the Northern District of Illinois held that the testimony of the testers was tainted with an interest in the outcome of the case and, as a consequence, the court was compelled to discount the tester testimony and rule in favor of the defendants.[77] *Dwayne Realty* is typical of the fact pattern found in a case of racial steering.[78] A racially integrated neighborhood gradually became concentrated with black homeowners, thereby causing people in the area to suspect that the emerging racial segregation was the product of racial steering by real estate brokers. Next, a local housing activist group sent testers to the defendant's real estate agency and gathered evidence of what they believed constituted fair housing discrimination. Finally, the testers and the neighborhood filed suit in federal district court alleging that the real estate firm was engaged in racial

72. *Id.* at 321, *rev'g* No. 78C 2641 (N.D. Ill. Nov. 19, 1981).
73. *Id.* at 321-22.
74. *Id.* at 322.
75. *See* cases cited *supra* note 67.
76. 482 F. Supp. 1321 (N.D. Ill. 1979).
77. *Id.* at 1331-34.
78. *See supra* note 3 and accompanying text.

steering.[79]

Although the *Dwayne Realty* court acknowledged that testers had generally been considered competent witnesses in fair housing actions, it found that the testers in that case had created testimony to corroborate evidence they expected to find.[80] The credibility of each of the four testers was placed in doubt following their cross-examination and the direct testimony of the defendants. Although the testers stated that they had not been shown properties in integrated neighborhoods, the facts of the case proved otherwise.[81] Moreover, the minority testers called as witnesses by the plaintiffs indicated that the realtor had treated them with respect and in a manner that the court felt was inconsistent with racially discriminatory practices.[82]

The *Dwayne Realty* court used strong language to criticize the role of the testers in that case. The court contended that the testers had initiated the lawsuit to advance their own economic or noneconomic interests. In addition, the court noted that the testers had admitted strong feelings against real estate brokers in general, and especially against those located in the neighborhood that appeared to be moving towards racial segregation.[83] The court found that when such a witness has an interest in the outcome of the case or has strong feelings against a party, he has a tendency to see and hear the testimony he wants to give. Finally, the court noted that in the testing situation these psychological considerations regarding the potential bias of the witness must be taken into account along with the other evidence presented in the case.[84]

At first blush *Richardson* and *Dwayne Realty* appear inconsistent. On one hand, *Richardson* states that tester testimony may properly be given greater weight because testers tend to be more careful and dispassionate observers of the events in question. On the other hand, *Dwayne Realty* suggests that tester evidence should be considered in light of the potential psychological bias in the sensory perceptions of the testers. The difference in the decisions could perhaps be explained by the credibility of the testers involved in the individual cases. Despite this plausible explanation, the differences can be more adequately understood by examining the underlying fact patterns that distinguish the type of tester evidence involved in the two cases.

In the first place, the use of tester evidence always arises in a case of suspected housing discrimination. This suspicion can arise in various factual settings, as demonstrated in *Richardson* and *Dwayne Realty*. In the *Richardson* situation, the suspicion of race discrimination is

79. *Dwayne Realty*, 482 F. Supp. at 1323.
80. *Id.* at 1331-34.
81. *Id.*
82. *Id.* at 1333.
83. *Id.* at 1331.
84. *Id.*

aroused by a person outside the housing activist organization who is interested in a particular dwelling. The minority has knowledge of a specific incident with a particular individual that he believes constitutes housing discrimination. As in *Richardson*, the plaintiff himself may conduct a test to verify his suspicion that the housing opportunity remained open.[85] This individual then contacts the housing activist organization with this detailed information. The organization then conducts a test, limited to the housing opportunity at issue, in an attempt to corroborate the plaintiff's belief that a housing discrimination incident has occurred.

In a situation such as *Richardson*, where the scope of the test is limited, the potential for prejudice or bias in the perception of testers is consequently minimized. The white tester is used only to corroborate the minority's suspicion of discrimination by providing evidence that the housing opportunity remained open. The initial suspicion of discrimination comes from outside the housing organization. Beyond this, the suspicion is also strong enough that the minority is compelled to contact the housing activist organization.

By contrast, the use of testers to prove a fact pattern evincing a prima facie case of racial steering, such as that presented in *Dwayne Realty*, is broader in scope and consequently has a greater potential for tester bias and misconception. In a steering situation, there is a more generalized feeling of discrimination that is not linked to a specific incident or particular realtor. Instead, the perception of a neighborhood becoming racially segregated is linked merely by inference to a belief that realtors selling homes in the neighborhood are engaged in the practice of racial steering. Moreover, outsiders rarely complain to the housing activist organization that they have been subjected to racial steering. On the contrary, those who have been steered may be unaware or may even be grateful that the realtor has directed them to or away from certain neighborhoods.

In a racial steering case, testers will attempt to confirm that the realtor shows white testers listings in white neighborhoods and discourages white applicants from homes in black or integrated neighborhoods. Similarly, black testers will attempt to discover evidence that they are steered to listings in black and integrated neighborhoods and discouraged from dwellings in white neighborhoods. Thus, instead of attempting to confirm a past incident of housing discrimination, the testers seek to expose current discriminatory conduct. In short, the testers themselves trigger the discriminatory practice.

The potential is significant that the preconceptions of testers will bias the results of a racial steering test. Rather than seeking to corroborate independent evidence of housing discrimination, the testers must personally create a situation in which disparate treatment can be

85. *Richardson*, 712 F.2d at 320-21.

prompted and observed. The testers have deduced that since the neighborhood has become segregated, the realtors selling real estate in that area are engaged in the practice of racial steering. Because the form of discrimination in a racial steering case may be as subtle as a hint, a suggestion, or a failure to show a listing, the likelihood of misinterpretation of the realtor's language or actions is thereby increased. Indeed, the testers may be so convinced that steering is involved that they fail to recognize facts basic to their case, such as whether the neighborhoods to which they have been directed are integrated.[86]

This is not to say of course that testers in racial steering cases are generally biased and allow preconceptions of housing discrimination to blind their sensory perceptions. On the contrary, both *Robinson* and *Dwayne Realty* recognize that professional testers can be credible witnesses. Nonetheless, *Robinson* goes too far in stating that testers are generally dispassionate observers and therefore more credible witnesses than the parties themselves in housing discrimination litigation. This is not always the case. In fact, in patterns similar to *Robinson*, where the tester is seeking merely to corroborate that a specific housing opportunity remained open, a tester's prejudice or preconception is not likely to influence his testimony—either the housing opportunity remained open or it did not. Alternatively, in a racial steering case such as *Dwayne Realty*, evidence of housing discrimination is of a more elusive nature and tester testimony is critical in distinguishing between a properly intentioned suggestion and illegal racial steering. In these situations, the trier of fact must carefully observe the statements and demeanor of the tester to reduce the potential for tester subjectivity influencing the outcome of the case.

C. Tester Standing to Sue

In general, standing is one aspect of the case or controversy doctrine used by courts to determine whether a claim falls within the limited subject matter jurisdiction of the federal courts.[87] When a plaintiff alleges a constitutional injury, he must clear two hurdles: Article III considerations and prudential rules of judicial self-restraint.[88] Despite these hurdles, if Congress enacts legislation that implicitly or explicitly grants standing to litigate a particular constitutional or statutory right, the Court will generally accept the congressional decision to confer standing and not impose prudential limitations on the claim.[89] Thus, a federal statute can remove the prudential consideration that normally confines a plaintiff to the assertion of his own rights, not those of third

86. *Dwayne Realty*, 482 F. Supp. at 1325-28.
87. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531, at 176 (1975).
88. *See, e.g.*, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); Warth v. Seldin, 422 U.S. 490, 498-99 (1975).
89. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 81 (2d ed. 1983).

parties.[90]

It required several years of litigation to determine whether Congress had removed prudential considerations from litigants under the Fair Housing Act.[91] In 1979, the Supreme Court determined that Congress did not intend to limit federal court access to the complainant experiencing direct injury in a discrimination complaint brought under the Fair Housing Act.[92] Thus, the Fair Housing Act affords standing equal to the constitutional limit.

With the elimination of prudential standing considerations, satisfaction of the case or controversy standard of Article III remains as the measure for Fair Housing Act litigants. Qualification for standing under Article III entails demonstrating a personal stake in the outcome of the controversy sufficient to warrant federal court jurisdiction.[93] Specifically, the litigant must show a distinct and palpable injury[94] to himself that is fairly traceable[95] to the challenged action and that is likely to be redressed by a favorable decision.[96]

Article III requirements do not pose a significant impediment to most prospective fair housing litigants. Direct victims of discrimination can easily demonstrate injury in fact, and indirect victims need only show some actual or threatened injury that is likely to be redressed by a favorable decision.[97] In previous decisions, the Court has granted standing to indirect victims who alleged that they had been deprived of the benefits of interracial association. In a 1972 case, the Court found that black and white tenants of an apartment complex had Article III standing in a suit against the owners for discriminating

90. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 501 (1975); Sierra Club v. Morton, 405 U.S. 727, 737 (1972).

91. The decision came in two parts, reflecting the two separate enforcement schemes provided by the Fair Housing Act. In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Court held that no prudential limitations existed on plaintiffs who brought suit under the administrative enforcement section of the Fair Housing Act, 42 U.S.C. § 3610 (1976). *See supra* note 27 and accompanying text. Seven years later, in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979), the Court held that the plaintiffs were not barred by prudential considerations under the section of the Fair Housing Act that allows immediate suit in federal court, 42 U.S.C. § 3612 (1976). *See supra* note 30 and accompanying text.

92. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979); *see also* Note, Gladstone, Realtors v. Village of Bellwood: *Expanding Standing Under the Fair Housing Act*, 8 B.C. ENVTL. AFF. L. REV. 783 (1980); Note, 57 U. DET. J. URBAN L. 671 (1980) (discussing *Gladstone, Realtors*).

93. Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

94. Warth v. Seldin, 422 U.S. 490, 501 (1975); *see* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 114 (1979).

95. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978) (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977)).

96. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976).

97. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

against minorities in their rental practices.[98] In a subsequent decision, the Court granted standing to a similar group of plaintiffs who had made an analogous claim of deprivation of interracial association in a twelve by thirteen block neighborhood because of the defendant's alleged racial steering.[99] Beyond this, the Court has granted Article III standing to a neighborhood as an indirect victim of racial steering. For example, in *Gladstone, Realtors v. Village of Bellwood*,[100] the Court found standing in the plaintiff's allegation that racial steering had led to a reduction in property values that resulted in a lower tax base and therefore a decrease in the municipality's ability to provide local services.[101] Although the Court analyzed the standing of various parties who had alleged indirect injury, the *Gladstone, Realtors* Court expressly reserved judgment on whether a litigant tester had standing to sue under the Constitution to assert a Fair Housing Act interest other than his own.[102]

Ostensibly to consider this and other standing refinements under the Fair Housing Act, the Supreme Court granted review to a Fourth Circuit decision, *Havens Realty Corp. v. Coleman*.[103] In that case three individual plaintiffs, a bona fide renter, a white tester, and a black tester joined with a housing activist organization, Housing Opportunities Made Equal (HOME), as plaintiffs in a class action suit against a realtor for racial steering. The complaint stated that the black renter attempted to lease an apartment at the defendant's complex but was told no apartment was available. A black and white tester, employees of HOME, attempted to determine if the defendant was engaged in racial steering practices. The testers each made three separate inquiries regarding the availability of apartments and on each occasion the white tester was told that an apartment was available while the black tester was told just the opposite.[104] In their complaint, the individual plaintiffs claimed injury based on denial of living in an integrated community and the bona fide renter also claimed injury resulting from his inability to rent property in a designated community. HOME claimed injury on the ground that the defendant's racial steering practices frustrated the organization's purpose and consequently resulted in a drain on its resources. All plaintiffs sought an injunctive relief, damages, and attorneys' fees.[105]

On defendant's motion, the United States District Court for the Eastern District of Virginia dismissed the claims of the two testers and

98. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 207-12 (1972).
99. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109-11 (1979).
100. 441 U.S. 91 (1979).
101. *Id.*
102. *Id.* at 111 (respondents did not press the claim that they had standing to sue as testers and therefore the Court did not reach the question).
103. 455 U.S. 363 (1982).
104. *Id.* at 368.
105. *Id.* at 369.

HOME for lack of standing, but allowed the bona fide renter complainant to proceed to trial. In the interim, the two tester plaintiffs and HOME appealed the dismissal of their claims. The Fourth Circuit reversed and restored the standing of all appellants.[106]

The Supreme Court in *Havens Realty* affirmed the decision of the Fourth Circuit and held that testers who allege injury-in-fact have standing to sue as plaintiffs under the Fair Housing Act.[107] The Court, reviewing earlier decisions, first reiterated the rule that standing to sue under the Fair Housing Act is free from prudential limitations. Therefore, testers need only to meet Article III standing requirements and allege that as a result of the defendant's actions the tester had suffered a distinct and palpable injury.[108]

The Court concluded that the Fair Housing Act expressly gave all persons, including testers, a legal right to truthful information on the basis of the Fair Housing Act's prohibition against misrepresentation[109] and its enforcement through the use of private attorneys general causes of action.[110] According to the *Havens Realty* Court, a breach of this statutory right to truthful information results in an injury-in-fact that meets the Article III standing requirement.[111] Because testers have a statutory right to receive truthful information about housing, those testers who are given false information thus have standing to sue under the Fair Housing Act. Accordingly, the Court differentiated between the posture of the white tester and his black counterpart by noting that the realtor's alleged response to the white tester was truthful as to the availability of housing. Since the white tester's statutory right to truthful information was not violated, he therefore had no standing to sue in his capacity as a tester.[112]

The concept of tester standing implies that a direct injury to the tester complainant is at stake. The Court contrasted this first party standing issue based on an individual's right to receive accurate housing information with the concept of neighborhood standing based on the allegations that one has been denied the benefits of living in an integrated community.[113] In the latter situation, the primary injury is to the neighborhood, and the complainant is injured secondarily, if at all. A person claiming neighborhood standing must therefore first allege the adverse impact on his neighborhood that may, in turn, indi-

106. Coles v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980), *aff'd sub nom.* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).
107. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-75 (1982).
108. *Id.* at 372.
109. 42 U.S.C. § 3604(d) (1976).
110. *Id.* § 3612(a).
111. *Havens Realty*, 455 U.S. at 373-74.
112. *Id.* at 374-75. For a criticism of the Court's reasoning that the white tester did not have standing, see Le Bel, *Standing After* Havens Realty: *A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013 (Court improperly read the legal injury test into Article III requirement of standing).
113. *Havens Realty*, 455 U.S. at 375.

rectly cause injury to himself as a resident or potential resident. Since the white tester had also claimed neighborhood standing, the case was remanded to the district court with instructions to allow the plaintiff the opportunity to make factual averments sufficient to meet the Court's neighborhood standing requirements.[114] *Havens Realty* thus makes clear that testers may claim standing for two types of injury. First, testers who are given false or incomplete housing information have standing for direct injury under Title VIII. Second, testers may claim standing for indirect injury if they have been denied the benefits of interracial association.

The decision in *Havens Realty* is consistent with previous cases in which the Court granted standing to testers who sustained direct injury as a result of challenging the constitutionality of local statutes under the Civil Rights Act.[115] Despite this consistency, the Supreme Court's recognition of tester standing in *Havens Realty* significantly expands the role of testers in fair housing enforcement. The Court, through its interpretation of the Fair Housing Act, determined that testers who are given false housing information are aggrieved persons under Title VIII. This decision affects the enforcement of housing discrimination through testing in two important aspects.

First, in the context of a racial steering claim, testers no longer need to be residents of the neighborhood in which the alleged discrimination occurred. In previous racial steering decisions, testers had predicated their standing on the denial of the benefits of living in an integrated community. *Havens Realty* eliminates this requirement and allows the tester to bring suit based upon the direct injury suffered through the receipt of false housing information. Of course, if an individual tester had received complete and truthful housing information he would have to rely on neighborhood standing since he had suffered no direct injury as a result of the test.

Second, and more significantly, *Havens Realty* can be read to encourage housing enforcement agencies to seek out violations of the Fair Housing Act in the marketplace. Since testers are aggrieved persons under Title VIII, it is no longer necessary for HUD or state and local housing enforcement agencies or housing activist organizations to predicate their actions on the receipt of actual complaints of discrimination. On the contrary, the Court's recognition of testers as proper parties to sue for direct injury under Title VIII encourages employees of these agencies to test realtors or landlords whom they suspect of racial discrimination on a random basis.

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114. *Id.* at 376-78.

115. Pierson v. Ray, 386 U.S. 547 (1967) (black and white testers who attempted to use restroom in a segregated bus terminal had standing to sue under 42 U.S.C. § 1983); Evers v. Dwyer, 358 U.S. 202 (1958) (black resident who attempted to take a seat in the front of a segregated bus had standing to sue the municipality, the bus company, and a company employee).

V. COUNTERVAILING POLICY IMPLICATIONS

Judicial receptiveness to the practice of fair housing testing is now well established. This is evident from the adoption of the prima facie standard for claims under Title VIII and from the numerous unavailing attempts to challenge the practice, particularly in the areas of admissibility of tester evidence and tester standing to sue. As a result, fair housing activists are now broadly licensed to litigate directly under the Fair Housing Act based on testing. Consequently, the elements of a private enforcement strategy calling for the expanded use of fair housing testing to threaten litigation and thereby force compliance are in place. Ridding the nation's housing markets of illegal discrimination in this manner would be realized largely through a process of judicial regulation. An enthusiastic embrace of today's fair housing test as the centerpiece of a national enforcement policy, however, should be tempered by some of the countervailing implications inherent in such an approach. Some serious and disquieting questions concerning the potential for abuse, the costs, and the reliability of wide discretionary testing need to be considered.

At the outset, it is important to distinguish between two types of testing activity. The fair housing test triggered by an act against a bona fide renter or buyer is an appropriate and useful check on potential housing discrimination. This test is narrow in scope and initiated at the request of one outside the housing activist organization with a particularized suspicion against a specific individual. By contrast, discretionary testing driven by an interest in confirming preconceptions of racial steering and other illegal practices can be dangerously grounded on little more than conjecture and speculation. It is this latter application of testing that introduces a number of serious policy implications.

Initially, the extensive use of private clandestine activity directed against an unsuspecting citizenry presents an awkward fit in an open society. Legally sanctioned undercover activity in criminal law enforcement continually presses the outer limits of official conduct. In the absence of legal restraints on its use, the fair housing test can be indiscriminately employed by the private citizen or organization. This unfettered discretion to test raises practical concerns for its abuse.

Abuses in the practice of fair housing testing can take a number of forms. In addition to the excessive zeal of well intentioned testers such as those in *Dwayne Realty*,[116] abuses can be anticipated by those who would choose to test for ulterior motives. These motives can include the desire to seek monetary gain, harass, embarrass, extort, retaliate, gain competitive advantage, and the like. The unfettered discretion to target surreptitiously and direct covert activities against others, even in pursuit of a laudable goal such as fair housing, is an important question that should be addressed.

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116. *See supra* note 76 and accompanying text.

The economic burden on the target of a fair housing test may be significant. Initially, the target must absorb the costs associated with responding to the test and the costs attendant to any subsequent litigation, should it materialize. Litigation of course generates familiar costs such as attorney's fees, court costs, and witness costs. Intangible injuries difficult to quantify can also be present, such as a general stigmatization, disparagement of the testing target's product, and injury to the personal reputations of principals and employees. These injuries could translate into actual losses in business revenue.

Short of litigation, however, the impact of the test itself can place a substantial burden on its unsuspecting targets. Multiple tests conducted against a single target are often recommended.[117] At a minimum, each bogus tester visit draws on the limited time and energy of the firm and its employees, generates expenses that must be absorbed by the firm, and diverts the energy and efforts away from productive activity.

This burden is particularly difficult to justify in those instances where testing subsequently proves to have been unwarranted. Inherent in any testing program is the troubling fact that a certain incidence of those tested will in effect "pass" the test. In addition, a percentage of those tested and subsequently sued will succeed in disproving the charges against them. Combining these two groups with those tested who are the targets of disgruntled clients, unprincipled business competitors, and others intent on abusing the practice, one can envision a class of testing casualties of some consequence.

Another area that deserves further examination is the proposition that the modern fair housing test may lack sufficient reliability as an instrument for detecting and securing evidence of illegal discrimination to warrant large-scale application. Although substantial efforts have been made in the design of the test and the techniques it employs in an attempt to enhance its validity,[118] a fundamental flaw may remain. This shortcoming relates to the test's dependence upon objective sensory impressions in an environment where objectivity is particularly apt to be elusive. As an examination of the anatomy of the fair housing test suggests,[119] the testing process itself demands a formidable psychological and emotional commitment from its participants. At best, this commitment can complicate the tester's ability to distinguish between what he is trained to detect, and what is perceived. Arguably, this interest also could create a predisposition that also would attack the objectivity necessary for valid results. Factors such as these taint the process and fuel the contention that the fair housing test is susceptible to fabricating its own evidence and thereby making up its own case. This same concern applies to testing techniques that are manipulative

117. *See* R. SCHIVEMAN, HOUSING DISCRIMINATION LAW 429-30 (1983).
118. *See* HUD STUDY, *supra* note 10, at v-vii.
119. *See supra* Section III.

and encourage the test target to produce a certain reaction.[120] Consequently, the trustworthiness of tester evidence stands suspect and reflects unfavorably on the proposition that the fair housing test should play a central role in the context of a broad enforcement strategy.

Surely genuine disagreement exists as to the extent to which discrimination has been eliminated from the nation's housing markets since the enactment of the Fair Housing Act in 1968. The aggressive and confrontational strategy of widespread testing as a means of attaining universal open housing is counseled by those often harboring rising expectations. Two centuries ago, Alexis de Tocqueville insightfully described the phenomenon of rising expectations that is helpful in understanding the enhanced expectations in housing enforcement today:

> The evil which suffered patiently as inevitable, seems unendurable as soon as the idea of escaping from it crosses men's minds. All the abuses then removed call attention to those that remain, and they now appear the more galling. The evil, it is true, has become less, but sensibility, to it has become more acute.[121]

The danger encountered in pursuit of a broad testing policy is that this approach can aggravate more than advance the cause of integrated housing under present conditions.

A substantial effort on the part of housing activist organizations, the real estate industry, and various levels of government in the field of fair housing has been underway in the sixteen years since passage of the Fair Housing Act. There has been a good faith effort on the part of the nation and its institutions to abide by the law's dictate of equal housing opportunity.[122] This national investment in a good faith effort must be carefully weighed against the offensive and costly aspects of a policy of widespread fair housing testing. Countervailing considerations associated with the indiscriminate use of testing, suggestive of universal noncompliance, may be inappropriate. New perspectives, capable of further advancing the cause of open housing without jeopardizing the gains and the reservoir of good will so painstakingly achieved to this point, may better define the immediate challenge.

VI. CONCLUSION

Legislative attempts to solve the problem of housing discrimination have failed to provide an effective enforcement scheme for aggrieved parties. Consequently, complainants have been encouraged to

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

121. G. STEINER & J. STEINER, BUSINESS, GOVERNMENT, AND SOCIETY: A MANAGERIAL PERSPECTIVE 33 (1980).

122. This is not to suggest that society has necessarily done the best it can nor progressed as far as it might, but simply that gradually and patiently progress has been made.

litigate, not only on their own behalf, but as private attorneys general in an attempt to end housing discrimination. The fair housing test has gained considerable acceptance as the centerpiece for a national policy of private enforcement of the Fair Housing Act of 1968. Both the federal government and the courts have joined the fair housing activists in contributing to this development. Starting in the late 1970's, the federal government funded a nationwide testing program in search of illegal discrimination in the nation's major housing markets. Courts, in turn, have been instrumental in encouraging the use of evidence produced from testing. The application of the prima facie standard to housing discrimination claims has promoted the use of tester evidence in both meeting the plaintiff's burden of production and in rebutting the defendant's alleged justifications for his conduct. Moreover, courts have continued to recognize the credibility of tester testimony. Finally, the tester who has been given incomplete housing information has standing to sue for direct injuries under the Fair Housing Act.

Despite these advances, courts have failed to distinguish between the two distinct forms of fair housing testing. A critical difference exists between the test that merely attempts to corroborate the account of a bona fide renter or buyer and the widespread use of testing to substantiate presumptions of racial steering or general suspicions of discrimination. In the former setting, the circumscribed use of tester evidence is an appropriate application of the private attorney general concept. In the latter situation, however, the widespread use of tester evidence introduces a number of disturbing countervailing policy considerations.

First, the extreme measures employed by the fair housing test, coupled with the psychological and emotional factors apt to attend its administration, evaluation, and use place the validity of its results in question. To this extent, its fundamental reliability as a test instrument is suspect. Second, government-encouraged covert activities endemic in an uncircumscribed fair housing testing policy can be easily abused. In these instances the civil rights of every citizen stand in jeopardy. Third, fair housing testing can also be questioned as an instrument too blunt for a task that more appropriately requires the deftness of a scalpel. The extent to which widespread testing stands to injure innocent targets is a troubling consideration. In this regard, extensive testing may lack the requisite minimum efficiency or economy as a policy instrument. The costs to society associated with this form of testing are significant and should be weighed in the balance.

To a large extent, public policy is as sound as the perspective brought to bear in its formulation. How an expansive national testing policy fits into the present day social and political milieu is the final disquieting implication that must be evaluated. A policy that incorporates the aggressive and covert techniques of widespread fair housing testing may no longer represent a viable course of action. Should this

be the case, this testing policy would not only fail, but risks generating widespread resentment and suspicion in precisely those segments of society whose cooperation and good faith are essential to continued progress in open housing.