Challenging Discrimination in Real Estate Advertising: Do "Mere" Readers Have Standing?

Ronald L. Phillips*

In 1968 Congress passed the Fair Housing Act[1] (FHA) in an effort to provide a non-discriminatory housing market for all Americans. Discriminatory advertising was one of the many evils that Congress perceived to be a barrier to this important national objective. Accordingly, the new law and subsequent amendments made it unlawful "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, handicap, familial status, or national origin."[2] The new statute sent a strong and clear message that long-standing exclusionary advertising practices which pervaded the housing market would no longer be tolerated.

Almost 30 years have passed since fair housing practices became the law; however, one cannot help but believe that housing providers still have not gotten the message, for widespread compliance has not been forthcoming. A survey of *Washington Post* ads conducted in the mid-eighties by the Washington Lawyers' Committee for Civil Rights Under Law found that only two percent of the models in real estate advertisements were non-white.[3] A 1994 study of housing advertisements in 30 major metropolitan newspapers found that only three of the newspapers were in compliance with FHA standards.[4] Twenty of the papers were judged to have not even met the FHA's requirements half-way.[5]

While the continued intransigence of housing advertisers and resulting litigation have given rise to a proliferation of scholarship treating the subject of non-compliance with the advertising provisions of the FHA (hereafter referred to as § 3604(c)), the vast majority of it has dealt with the question of what constitutes a § 3604(c) violation. Surprisingly few commentators have addressed the threshold question of who has standing to bring a claim for discriminatory housing advertising.[6] I say surprising because the critical issue of standing is the

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* B.A., The Ohio State University 1995; J.D. Candidate, The University of Texas School of Law 1998.

1. 42 U.S.C. §§ 3601-3619, 3631 (1994).

2. 42 U.S.C. § 3604(c) (1994).

3. MARILYN KERN-FOXWORTH, AUNT JEMIMA, UNCLE BEN, AND RASTUS 121 (1994).

4. Wendy S. Williams, *Discriminatory Advertising: Do Large Dailies Comply with Fair Housing Act in Portrayal of Minorities in Housing Ads?*, 15 NEWS. RES. J. 77, 81 (1994).

5. *Id.* at 78.

6. At least one law review article has treated the subject in more than a cursory fashion. *See* Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547 (1995).

focus of much FHA litigation and has been virtually the exclusive focus of the Supreme Court's FHA jurisprudence.[7] Although the Supreme Court has yet to decide the issue of FHA advertising standing, several lower federal courts have reached the question, producing contradictory results. The central issue that has divided the federal courts on the question of standing to challenge biased ads has been whether readers of discriminatory advertisements who are not actually seeking housing have standing to sue under § 3604(c).[8]

This Note will examine the current standing jurisprudence of the lower federal courts as it relates to claims for discriminatory housing advertising, focusing specifically on the issue of whether mere readers of such ads have standing. Part I discusses general principles of standing under the FHA that have been announced by the Supreme Court. Part II describes the way that various lower federal courts have decided the issue of reader standing under the FHA. Finally, Part III analyzes, from both a "statutory rights" perspective and a more traditional constitutional approach, the differing results reached by the federal courts by using factors that none of those courts have considered. This Note argues that mere readers of discriminatory housing advertisements do have standing to bring suit for their resulting injuries, though for reasons not always considered by the courts that have addressed the issue.

I. Standing under the Fair Housing Act

The standing decisions of the United States Supreme Court and lower federal courts in FHA cases make clear that potential plaintiffs face few Article III barriers[9] to vindicating their rights under the Act. Since the 1970's, the federal courts have construed FHA standing in an extraordinarily broad fashion and have allowed a wide range of plaintiffs to bring FHA claims for a variety of injuries.[10]

There have been two primary methods by which courts have found broad standing under the FHA. The first method has been the Supreme Court's finding

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7. *See* Robert G. Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1, 3-5 (1980).

8. *Compare* Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590 (10th Cir. 1996) *with* Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993) *and* Saunders v. General Services Corp., 659 F. Supp. 1042 (E.D. Va. 1986).

9. U.S. CONST. art. III, § 2, cl. 1. The requirements for standing imposed by the case-or-controversy language in Article III are that a litigant must allege (1) a "distinct and palpable" injury that is (2) "fairly traceable" to the challenged conduct and (3) is "likely" to be redressed through the fashioning of judicial relief. Allen v. Wright, 468 U.S. 737, 751 (1984).

10. *See generally* JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT, AND REVITALIZATION § 8.12 (2d ed. 1995) (describing the breadth of the federal courts' pronouncements on FHA standing and the variety of plaintiffs who have standing to sue for FHA violations); *see also* Schwemm, *supra* note 7, at 71-73 (same).

that the FHA's legislative history, its enforcement mechanisms, and the Department of Housing and Urban Development's (HUD) subsequent interpretations of the Act all reveal "a congressional intention to define standing [under the FHA] as broadly as is permitted by Article III of the Constitution."[11] This understanding of the FHA was later reaffirmed in several FHA standing cases.[12] Thus, prudential limits on standing, such as the requirements that a plaintiff's claim not assert either generalized grievances or the rights of a third party, and the requirement that a plaintiff's injury be within the zone of interests that a law was intended to protect,[13] have no application in FHA cases, for "the sole requirement for standing to sue under [the FHA] is the Art. III minima."[14]

The other approach to standing under the FHA that has broadened the class of potential plaintiffs has been the finding that certain provisions of the FHA confer statutory rights on persons, the denial of which give rise to standing regardless of whether the injury suffered would have been sufficient to satisfy the Article III injury-in-fact requirement in the absence of such a right. The "statutory rights" rule was best stated in *Warth v. Seldin*, in which the Supreme Court held that "[t]he actual or threatened injur[ies] required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."[15]

A notable application of this principle occurred in *Havens Realty Corp. v. Coleman*,[16] where the Court held that 42 U.S.C. § 3604(d)[17] conferred a right on all persons to "truthful information about available housing."[18] Therefore, persons who are not genuinely seeking housing but who pretend to be doing so in order to monitor compliance with fair housing laws (known as "testers"), persons who may not otherwise have been able to assert sufficient injury in fact for Article III purposes, have standing under § 3604(d).[19] While the United States Supreme Court has not had the opportunity to apply this rule to any other provisions of the FHA, several courts of appeals have found similar statutorily-created injuries in both § 3604(a), which prohibits discriminatory refusals to sell, rent, or negotiate for the sale or rental of a dwelling, and in § 3604(b), which prohibits discrimination in the terms, conditions, and privileges of a sale or

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11. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972).

12. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979); Warth v. Seldin, 422 U.S. 490, 499-501 (1975).

13. Allen v. Wright, 468 U.S. 737, 751 (1984).

14. *Havens Realty*, 455 U.S. at 372.

15. 422 U.S. 490, 500 (1975) (citing Sierra Club v. Morton, 405 U.S. 727, 732 (1972)).

16. 455 U.S. 363 (1982).

17. Section 3604(d) provides that it is unlawful to "represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d) (1994).

18. *Id.* at 373.

19. *Id.* at 373-74.

rental or in the provision of services or facilities connected with a sale or rental.[20]

Thus, with the abrogation of prudential limits and the Supreme Court's willingness to recognize the existence of injury-in-fact through the denial of congressionally-created statutory rights, standing does not pose a significant obstacle to most FHA plaintiffs. It is within this jurisprudential landscape that we now turn to the issue of standing for parties alleging discriminatory advertising practices.

II. Standing to Challenge Discriminatory Advertising: Conflicting Views

Well after the broad approaches to FHA standing in *Trafficante* and *Havens* were established, several lower courts decided the issue of reader standing under § 3604(c), reaching vastly different results. While earlier cases embodied a broad view of reader standing consistent with *Trafficante* and *Havens*, lately a more restrictive path has been chosen.

A. The Early Cases

One early case that decided the § 3604(c) standing issue was *Saunders v. General Services Corp.*[21] In *Saunders*, an African-American plaintiff and a fair housing organization brought suit under § 3604(c) against General Services, a corporation that operated apartment complexes, alleging that General Services was using pictorial advertising brochures that contained a virtually all-white cast of models in an effort to discourage African-Americans from seeking housing in General Services' complexes.[22] The district court noted that the plaintiff had asserted two ill effects from the brochures: emotional injury caused by the defendant's racism and a denial of housing opportunity by being deterred from seeking the advertised housing.[23] Based upon these allegations, the district court concluded that the plaintiff had standing, reasoning that "just as the tester in *Havens Realty* suffered a statutorily recognized injury under the act when she received an unlawful representation, so did [the plaintiff] receive an injury under the act when she *received* an unlawful advertisement indicating a tenant preference based on race."[24] The district court thus held that the statutory rights

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20. *See* United States v. Balisteri, 981 F.2d 916, 929 (7th Cir. 1992) (holding that African-American testers who were quoted higher rental rates than those offered to white testers have standing under § 3604(b)). *See also* Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1525 (7th Cir. 1990) (holding testers have standing for racial steering under § 3604(a)).

21. 659 F. Supp. 1042 (E.D. Va. 1986).

22. *Id.* at 1046-50.

23. *Id.* at 1053.

24. *Id.* at 1053 (emphasis added).

approach of *Havens* was also applicable to § 3604(c). As a result, the district court did not reach the question of whether the plaintiff's injuries would have been sufficient under Article III in the absence of a statutory right.

Another early case that addressed the issue of § 3604(c) standing was *Ragin v. Harry Macklowe Real Estate Co.*[25] *Harry Macklowe* was a suit brought by four African-American plaintiffs against a real estate management company for a series of apartment advertisements in the *New York Times* that indicated a preference for white residents through the use of all white models.[26] The defendant argued that the plaintiffs had not suffered an injury sufficient to confer standing because "they were not in the market for housing when they saw [the] ads but instead actively were combing the newspapers looking for these ads in order to bring [suit]."[27]

The Second Circuit rejected the defendant's argument, finding, consistent with *Saunders*, that mere readers of discriminatory ads have standing to bring § 3604(c) suits by virtue of a statutorily-created right to be free of discriminatory housing advertisements.[28] As in *Saunders*, the court analogized to the § 3604(d) right found to have been conferred in *Havens Realty*, stating that "[t]here is no significant difference between the statutorily recognized injury suffered by the tester in *Havens Realty* and the injury suffered by the [plaintiffs], who were confronted by advertisements indicating a preference based on race."[29]

Taken together, *Saunders* and *Harry Macklowe* stand for the proposition that mere readers of discriminatory housing ads have standing under the FHA. That is, a plaintiff need not have been in the housing market at the time when the ad was read, and therefore, it follows that a plaintiff need not have been deterred from seeking the housing listed in the ad.

B. A More Recent View

In a more recent case, the Tenth Circuit has taken a far more restrictive view of standing under § 3604(c) by explicitly rejecting the *Harry Macklowe* and *Saunders* analyses. In *Wilson v. Glenwood Intermountain Properties, Inc.*,[30] two plaintiffs brought a sex discrimination claim against an apartment complex that had contracted with Brigham Young University to provide BYU's unmarried students with sex segregated housing. The plaintiffs alleged that the defendant's advertisements expressly stated a preference on the basis of sex.[31]

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25. 6 F.3d 898 (2d Cir. 1993).
26. *Id.* at 901-02, 907.
27. *Id.* at 903-04.
28. *Id.* at 904.
29. *Id.* at 904.
30. 98 F.3d 590 (10th Cir. 1996).
31. *Id.* at 592.

The Tenth Circuit held that the mere receipt or reading of a discriminatory advertisement does not establish standing under § 3604(c), stating that the *Saunders* and *Harry Macklowe* cases "take *Havens* too far."[32] Quoting dictum from *Spann v. Colonial Village*,[33] the court rejected the notion that § 3604(c) was intended to confer a right to be free from emotional injuries produced by housing advertising and stated that a party must demonstrate that they were deterred from seeking housing in the advertised dwelling before they can obtain standing.[34]

The court based its holding on two rationales. First, § 3604(c) establishes no statutory right to be free of discriminatory ads in the way that § 3604(d) was found to have conferred a statutory right in *Havens Realty* because the result reached in *Havens Realty* turned on the language "to represent to *any person*," whereas § 3604(c) contains no such language.[35]

The other rationale for rejecting reader standing was that absent a statutory right, the types of injuries that mere readers assert are not cognizable under Article III. The court characterized those injuries as "abstract stigmatic injuries" that do not give rise to standing under the standards set forth in *Allen v. Wright*,[36] an equal protection case which held that stigmatic injuries only give rise to standing when they are the direct result of being personally denied equal treatment.[37] The court then warned that allowing readers to have standing would make standing under § 3604(c) potentially nationwide, which would produce ideological litigation by "concerned bystanders who are not personally subjected to discrimination."[38]

The picture of how the lower federal courts have treated § 3604(c) standing is thus one of conflict over the proper interpretation of the statute and its consequences for readers of discriminatory advertisements. These cases present several questions for the potential § 3604(c) litigant: (1) does § 3604(c) create a statutory right to be free from discriminatory advertisements and the resulting stigmatic injuries that they cause; and (2) in the absence of a statutory right, do readers who suffer only stigmatic injuries still have standing to sue, or is more required than just stigmatic injury to establish standing? If so, what more? These issues are the subject of the next section.

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32. *Id.* at 595.

33. 899 F.2d 24, 29 n.2 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990).

34. *Wilson*, 98 F.3d at 595.

35. *Id.* at 595-96 (emphasis added).

36. 468 U.S. 737 (1984).

37. *Id.* at 755. *Allen* involved a suit by the parents African-American public school children challenging the failure of the Internal Revenue Service to deny tax-exempt status to racially discriminatory private schools. Id. at 739.

38. *Wilson*, 98 F.3d at 596.

III. Standing for Readers of Discriminatory Advertisements

A. The Statutorily-Created Rights Approach

The question of whether § 3604(c) grants a statutory right to all readers of discriminatory housing ads has not been adequately answered by any of the courts that have decided the issue. None of the cases treat the issue in anything but a cursory manner. The *Harry Macklowe* court's analogy to the statutory right found in *Havens Realty* is so spartan in its reasoning that it prompted one commentator to characterize the opinion as "hardly a tour de force."[39] On the other hand, the contrary view of the *Wilson* opinion, which hangs its hat on the absence of a single word in the statutory language without any inquiry into legislative history or the purposes of the Act, is subject to the same criticism. A more thorough examination of the statute strongly supports the result reached in *Harry Macklowe*, though for reasons that none of the courts have thus far considered.

In *Harry Macklowe*, the Second Circuit embraced a statutory rights approach to § 3604(c) by simply stating that there is no difference between the injury suffered by a *Havens Realty* tester who receives a misrepresentation that is motivated by a discriminatory purpose and the injury suffered by a discriminatory ad reader.[40] This seems at least arguably true. Both the tester and the reader of biased ads have been subjected to group-based discrimination, and therefore, are likely to suffer similar stigmatic injuries. Stigma and resulting emotional harm are the only injuries that these persons will incur. Therefore, both tester and reader share the one characteristic that would justify extending standing to them. Furthermore, both persons are similarly situated in the sense that neither the tester nor the reader are actually in the market for housing. Thus, the similarity of circumstances between *Havens Realty* testers and § 3604(c) readers detracts from the argument that § 3604(c) could not conceivably have been intended to give mere readers standing.

Still, one could reasonably argue that while the nature of the injuries suffered by testers and readers is the same, the analogy between *Havens Realty* and § 3604(c) is not perfect. To recognize the similarity in injuries is one thing. But to infer from that fact alone that Congress intended to grant a statutory right in all cases where that type of injury exists is a non-sequitur unless one can demonstrate that Congress was concerned with the psychological well-being of market non-participants. After all, there could be a variety of reasons why Congress would confer a statutory right of standing that are unrelated to issues of injury, such as the need for effective enforcement through creating a larger

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39. Rosman, *supra* note 6, at 586.

40. Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 904 (2d Cir. 1993).

class of potential plaintiffs. Thus, a congressional concern with the stigmatic injuries shared by *Havens Realty* testers and § 3604(c) readers is a missing piece in the analogy.

Furthermore, because granting a statutory right in the latter case creates a much larger class of plaintiffs, one could argue that if Congress did grant *Havens Realty* testers standing out of a desire for maximum enforcement rather than a concern about stigmatic injuries, there were strong policy reasons for not granting § 3604(c) readers such standing. Readers from far and wide could bring suit under a § 3604(c) statutory right, while *Havens Realty* testers are relatively few in number (because of the personal commitment required in having to actually visit or call an entity that is offering a dwelling) and are generally drawn from the local community. It is at least possible that Congress was cognizant of this fact and therefore chose as a matter of policy not to give § 3604(c) readers standing out of a fear of too many lawsuits.

Thus, the *Harry Macklowe* court's analogy to *Havens Realty* does not alone demonstrate that the court correctly found that Congress intended to give readers of discriminatory ads a statutory right, the denial of which produces a cognizable injury under Article III. However, there are other factors which indicate that such a construction is reasonable, and indeed, probably accurate.

As was earlier pointed out, the *Harry Macklowe* court's finding of a § 3604(c) statutory right rested on the conclusion that the stigmatic injury suffered by *Havens Realty* testers, who have a statutory right, is indistinguishable from the injury suffered by a reader of a discriminatory advertisement. Of course, this argument only begins to hold water if one can show that Congress was concerned with these types of injuries, for if Congress was not concerned with them, then they obviously were not a reason why *Havens Realty* testers were granted a statutory right and the analogy breaks down. In other words, the common injury becomes irrelevant because it was not a concern underlying § 3604(c)'s analogue.

The *Harry Macklowe* court did not attempt to justify this analogy to *Havens Realty*. If it had, it would have discovered strong support in both the historical context of the FHA and the FHA's legislative history for the proposition that Congress was deeply concerned about the emotional effects of housing discrimination on persons not in the housing market, such as *Havens Realty* testers and § 3604(c) readers. And of course, this creates the inference that such non-market victims were intended to have a remedy. A statutory right giving rise to standing would have been the logical product of such a concern, as *Havens Realty* demonstrates.

Nowhere in *Saunders*, *Harry Macklowe* or their rival *Wilson* is the historical context of the FHA mentioned. Yet, this history is crucial to understanding the FHA, for the events of 1967 and 1968 were the impetus for

the passage of the Act.[41] To ignore it is truly to "see through a glass, darkly."[42] As one court has stated, "[A] realistic examination of the concerns that led to the adoption of this legislation proves a better guide to congressional intent than the dusty volumes of Sutherland on Statutory Interpretation [sic]."[43]

History demonstrates that the FHA was a congressional response to the urban rioting that devastated cities across the United States in 1967 and again after the assassination of Dr. Martin Luther King, Jr. in 1968.[44] Congress was also responding to the just-released Report of the National Advisory Commission on Civil Disorders, which pointed to discriminatory housing practices as a contributor to the squalid ghetto conditions that spawned the riots.[45] What these events made clear to Congress was that fair housing legislation was needed, not only to open up opportunities for decent housing to those so long denied them, but just as importantly, to ease the years of emotional hurt and consequent rage that had recently set American cities ablaze.[46]

The congressional debates on the FHA confirm that Congress conceived it as a remedy for the harmful emotional effects of discrimination. Senator Mondale stressed on at least four separate occasions the psychological importance of the Act to the victims of housing discrimination,[47] stating that the purpose of the Act was to address "the degradation and humiliation" that housing discrimination causes.[48] Senator Javits echoed these sentiments, calling housing discrimination "a deep hurt and affront to the dignity of the individual"[49] and stating that he supported the FHA "particularly because it relates so directly . . . to the dignity of the individual."[50]

The debates also demonstrate that the concern for the harmful emotional effects of housing discrimination extended to those who were not actively participating in the housing market. Focusing on African-Americans in particular, Senator Mondale expressed this point by stating that "[f]air housing by itself will not move a single Negro into the suburbs — the laws of economics

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41. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 32-33 (1983).

42. 1 *Corinthians* 13:12.

43. Laufman v. Oakley Bldg. and Loan Co., 408 F. Supp. 489, 496 (S.D. Ohio 1976).

44. *See* Schwemm, *supra* note 41, at 32.

45. *Id.* at 33.

46. *See* Edward W. Brooke, *Non-discrimination in the Sale or Rental of Real Property: Comments on Jones v. Alfred Mayer Co. and Title VIII of the Civil Rights Act of 1968*, 22 VAND. L. REV. 455, 456-57 (1969). Senator Brooke, one of the major supporters of the FHA, emphasized that the FHA sought to eliminate the "lingering tension" and "psychological polarization" that led to the rioting. *Id. See also* Jean E. Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 153 (1969) (recounting from her experience on Mondale's staff that support for the FHA rested on its psychological significance).

47. *See* 114 CONG. REC. 3421-22 (1968).

48. *See* 114 CONG. REC. 3422 (1968).

49. 114 CONG. REC. 2706 (1968).

50. *Id.*

will determine that. But we . . . must admit the psychological importance to the Negro of available decent housing is very great."[51] Mondale stated this concern even more clearly in a 1967 subcommittee hearing on the FHA, where he stated, "[I]t is important to the ghetto dweller who may not have the money to buy a house to know at least it is not his neighbors and white America . . . that is preventing him from being able to buy this house that he may want but [for] economics[.]"[52]

Granted, the fact that Congress was concerned about the psychological effects of housing discrimination on persons not in the market may not, without more, establish that mere readers of ads were intended to have a remedy under the FHA. But when taken together with the broad remedial purposes of the Act, its resulting liberal construction, and enforcement shortcomings in the absence of reader standing, Congress' concern for preserving basic human dignity, as embodied in the FHA's legislative history, does forcefully suggest that the *Harry Macklowe* court reached the right result.

It is a fundamental precept of statutory construction that the interpretation of a law must be conducted in light of the law's purpose.[53] While, as one commentator has noted, "the legislative history of the Act is sparse,"[54] it does clearly demonstrate what the overall purposes of the FHA are; namely, the elimination of individual acts of housing discrimination and the creation of residential integration. In congressional debates on the FHA, Senator Walter Mondale, drafter and sponsor of the Act, stated that its purpose was to replace ghettos with "truly integrated and balanced living patterns," and that "the best way for this [C]ongress to start on the true road to integration is by enacting fair housing legislation."[55] This understanding of the FHA's twin sweeping purposes has been recognized by the United States Supreme Court[56] and by lower courts.[57] In view of the statute's extraordinarily broad intended scope, the Supreme Court has held that Congress intended the FHA to be construed liberally, for its

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51. 114 CONG. REC. 3422 (1968).

52. *Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 28 (1967). S. 1358 was the virtually identical forerunner of the FHA that failed to pass when originally introduced, but was passed as an amendment to the Civil Rights Act of 1968.

53. *See* Chisom v. Roemer, 501 U.S. 380, 403 (1991); United Steelworkers of America v. Weber, 443 U.S. 193, 201-03 (1979); Kokoszka v. Belford, 417 U.S. 642, 650 (1974); United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940).

54. Katherine G. Stearns, Comment, *Countering Implicit Discrimination in Real Estate Advertisements: A Call for the Issuance of Human Model Injunctions*, 88 NW. U. L. REV. 1200, 1205-06 n.16 (1994).

55. 114 CONG. REC. 3422 (1968).

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

57. *See, e.g.*, Cabrera v. Jakabovitz, 24 F.3d 372, 390 (2d Cir. 1992) (quoting Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974) for the proposition that the FHA was a "broad legislative plan to eliminate *all* traces of discrimination within the housing field.") (emphasis added), *cert. denied*, 115 S. Ct. 205 (1994).

language is "broad and inclusive"[58] and its purposes can only be fulfilled "by a generous construction."[59]

This doctrine of liberally construing the FHA certainly counsels in favor of a statutory rights interpretation of § 3604(c). The persistent practice of discriminatory housing advertising not only defeats the purposes of the FHA by denying individual homeseekers residential opportunities, but also, as Margalynne Armstrong notes, "result[s] in the aggregate, in larger social problems," for "individual acts and decisions create and perpetuate the residential segregation of entire areas, not just individual segregated units . . . within generally integrated areas."[60] Discriminatory housing ads also have harmful overall societal effects by contributing to an oppressive culture in which housing discrimination becomes legitimized through repetitive exposure to images and declarations of exclusion.[61] Congress was acutely aware of the community-wide effects of discriminatory housing practices when it enacted the FHA.[62] Thus, given Congress' desire to achieve maximum integration and its understanding that individual acts of housing discrimination victimize entire communities, it is quite conceivable that § 3604(c) was intended to provide a remedy to non-homeseeking readers of discriminatory ads in order to achieve the highest possible level of enforcement and to right subtle but very real wrongs.[63] In light of the exceptionally broad remedial purposes of the FHA, the most far-reaching of several plausible interpretations should be selected. In this case, it means that a statutory rights construction of § 3604(c) should be favored.

Having raised the issue of enforcement, it should be pointed out that a statutory rights construction of § 3604(c) also strongly furthers the purposes of the FHA, because in the absence of such a construction effective enforcement of

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58. *Trafficante*, 409 U.S. at 209.

59. *Id.* at 212.

60. Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purpose of the Fair Housing Act*, 64 TEMP. L.Q. 909, 916 (1991).

61. *See generally* Reginald L. Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69, 76-77, 115 (1995) (describing how discriminatory advertising and other images of exclusion propagate a white supremacist ideology that encourages housing discrimination).

62. *See* 114 CONG. REC. 2706 (1968) (remarks by Senator Javits, a co-sponsor of the act, that housing discrimination affects "the whole community"); *see also* 114 CONG. REC. 3421 (1968) (remarks by Senator Mondale describing how discrimination produces ghettos). Congress' awareness of how individual acts of discrimination victimize society as a whole by creating broad patterns of residential segregation can also be clearly inferred from the fact that the Report of the National Advisory Commission on Civil Disorders was "a matter of general concern to Congress" during the debates on the FHA. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 34-35 (1983). The report describes how discrimination produces community segregation. *See generally* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

63. A congressional intent to make § 3604(c) particularly sweeping in its application is evinced by the fact that statutory exemptions provided to certain FHA defendants accused of violating other provisions of the Act are unavailable to § 3604(c) defendants. *See* 42 U.S.C. § 3603(b).

§ 3604(c) is doubtful. As was previously noted, non-compliance with the statute is shockingly pervasive.[64] The FHA's enforcement scheme relies heavily on the claims of private litigants to address violations.[65] Yet, the vast majority of these potential litigants have not been trained to detect discriminatory ads.[66] Even those who do consciously recognize the exclusionary message being conveyed to them and who suffer injuries as a consequence may not know that the ad is unlawful. It is not likely that the victim will be informed that the ad is unlawful or be provided with legal assistance, because such claims do not promise to be profitable for private attorneys and many cities lack fair housing groups committed to such litigation.[67]

Given these limitations on the number of claims that are possible, fears of nationwide standing to challenge a discriminatory ad ring hollow, for effective enforcement requires a large potential class of plaintiffs in order to produce enough suits to deter violations and ensure more than token compliance with § 3604(c). Once this potential weakness in the enforcement mechanism is taken into account, and knowing that Congress intended the FHA to utterly eradicate housing discrimination, it strains reason to conclude that Congress would grant a statutory right to standing in other sections of the FHA while leaving § 3604(c) toothless.

Furthermore, these are not the only indicia of the accuracy of a statutory rights construction of § 3604(c), for there has been an indication from the Department of Housing and Urban Development (HUD), the agency with primary responsibility for administering the FHA, that the *Harry Macklowe* court was correct. The Supreme Court has emphasized that HUD administrative constructions are "entitled to great weight."[68] In this regard, at least one HUD Administrative Law Judge (ALJ) has applied the *Havens* rule to claims under § 3604(c).[69] While HUD ALJ decisions are subject to review by the Secretary of HUD[70] and therefore in a way could be considered the opinion of the agency, one could argue that the decision of a single ALJ subject to discretionary review by the agency is of marginal value in determining the agency's opinion on a matter. It is, however, at least useful as an indicator of how experts view the issue.

Taking into account the aforementioned, the *Wilson* court's refusal to find

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64. *See supra* text accompanying notes 3-5.

65. *See* Schwemm, *supra* note 7, at 21.

66. Armstrong, *supra* note 60, at 919.

67. Williams, *supra* note 4, at 78.

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

69. *See* Leadership Council for Metropolitan Open Communities, HUD ALJ 05-91-0969-1, Fair Hous.-Fair Lend. Rep.(P-H) 25,058 (Oct. 1, 1993), *aff'd,* Jancik v. Dept. of Housing and Urban Development, 44 F.3d 553 (7th Cir. 1993).

70. *See* 42 U.S.C. § 3612(h)(1)(1994).

a statutory right in § 3604(c) based upon the absence of the phrase "any person" appears less and less sound. Still, the absence of that phrase is conspicuous, given that the other provisions of § 3604 contain that language.[71] One could argue that this omission was calculated to have an effect on the interpretation of the statute.

But this is not necessarily the case. Although there is a general presumption that legislatures include or omit language so as to have a specific effect on a statute's meaning, such a presumption often defies reality. All too often statutes are drafted poorly, not clearly communicating their intended effect. Although there is no evidence that could either prove or disprove this, one could speculate that the absence of "any person" in § 3604(c) was an unintentional omission. Specifically, the language of § 3604(c) does not match the other provisions of § 3604 because its language was taken from another statute already in existence: Title VII of the Civil Rights Act of 1964, which has among its provisions a prohibition of discriminatory employment advertising.[72] The language of the two statutes is extraordinarily similar,[73] giving rise to the inference that Title VII was used as a template for the analogous FHA provision.

If Title VII was a template for § 3604(c), then one could reasonably conclude that § 3604(c) should be construed in a manner consistent with interpretations of Title VII. The Supreme Court has used Title VII as a tool for interpreting the FHA.[74] Consistent with *Wilson*'s approach to the FHA, lower federal courts have held that a party has standing to bring a Title VII discriminatory advertising claim only if they have been deterred from applying for employment; merely reading an ad is not enough.[75]

The problem with this sort of analogy is that it ignores the possibility that two statutes with similar language could have arisen in different political contexts and thus have manifestly different purposes and intended meanings, a problem that is inherent in patterning the language of one statute after another.[76] Such is the case here. The FHA's legislative history shows a deep congressional concern with alleviating the emotional harm caused by housing discrimination,[77] and the statute itself embraces this policy concern by providing for compensatory damage awards.[78] In contrast, Title VII did not embody a concern for emotional

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71. 42 U.S.C. § 3604(a)-(e) (1994).

72. *See* 42 U.S.C. § 2000(e)(3)(b) (1994).

73. *Compare* 42 U.S.C. § 3604(c) (1994) *with* 42 U.S.C. § 2000(e)(3)(b) (1994).

74. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. at 209.

75. *See* Banks v. Heun-Norwad, 566 F.2d 1073, 1077 (8th Cir. 1977); Hailes v. United Airlines, 464 F.2d 1006, 1008-09 (5th Cir. 1972).

76. *See* Alexander v. Choate, 469 U.S. 287, 294-99 (1985) (rejecting an interpretation of § 504 of the Rehabilitation Act of 1973 that was based upon analogy to Title VI because the two statutes embodied different policy concerns).

77. *See supra* text accompanying notes 44-52.

78. *See* 42 U.S.C. § 3613(c)(1) (1994).

injuries at the time that the FHA was enacted, for it did not provide for any compensatory damages until it was amended in 1991.[79] Therefore, given the fact that the primary injury of mere readers of discriminatory ads is emotional harm, Title VII appears to be of little use in interpreting the FHA in this context.

B. Injury-in-Fact Absent a Statutory Right

Based on the preceding, it is plain that a strong argument can be made for reader standing rooted in a statutory rights construction of § 3604(c). This does not, however, end the inquiry, because even if there is no statutory right for readers to be free of discriminatory housing advertisements, there is the possibility that such claims stand on their own under a more conventional Article III analysis. While *Saunders* and *Harry Macklowe* did not address the issue because both found a statutory right, *Wilson* did reach the issue, holding that a reader of discriminatory ads only suffers an "abstract stigmatic injury" that is not adequate to establish standing absent a congressional grant of a statutory right.[80]

In rejecting the plaintiffs' claims in *Wilson*, the Tenth Circuit relied on *Allen v. Wright*, which involved a suit by parents of African-American schoolchildren attending schools undergoing desegregation against the Internal Revenue Service for its failure to deny tax exemptions to private schools that were discriminating.[81] Among the injuries asserted in *Allen* was denigration produced by IRS actions.[82] The Supreme Court classified this as an "abstract stigmatic injury" and held that such injuries are adequate to establish standing only for "those persons who are personally denied equal treatment by the challenged discriminatory conduct."[83] The Court went on to explain that the reason for requiring a personal denial of equal treatment was to avoid possible nationwide standing, which would flood federal courts with purely ideological litigation.[84]

Applying *Allen*, the Tenth Circuit held that readers of discriminatory

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79. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a (1994)).

80. Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590, 596 (10th Cir. 1996). *See supra* text accompanying notes 36-38.

81. 468 U.S. 737, 739 (1984).

82. *Id.* at 753-54.

83. *Id.* at 755 (paraphrasing Heckler v. Mathews, 465 U.S. 728, 739-40 (1984)). Although the Court holds that stigmatic injury is sometimes sufficient to support standing, it is unclear whether this is actually the case, for the Court also requires a personal denial of equal treatment. The problem with this approach is that a personal denial of equal treatment, even if not an injury by itself, is highly likely to produce other, non-stigmatic injuries that are judicially cognizable. If that is so, then it is senseless to suggest that stigmatic injuries can support standing, because the personal denial requirement guarantees that such injuries will ride into court on the coattails of other bona fide Article III injuries.

84. *Id.* at 755-56.

advertisements are not personally denied equal treatment.[85] The court put forth little effort to explain how it reached this conclusion, but one can gather from the opinion that the court's conception of a personal denial of equal treatment requires, at a minimum, that a plaintiff be in the market for housing at the time that the ad is read and that the effect of reading the ad was to deter the plaintiff from seeking the advertised dwelling.[86]

Of course, to reach this result, the court must have had some idea of what it means to say that an injury is personal. The court discussed the possibility that reader standing would potentially produce a geographically dispersed class of plaintiffs;[87] but surely it could not have meant to say that an injury is not personal solely because it is suffered at the hands of a defendant who does not live in close proximity or that such injury may be suffered by a large number of plaintiffs. The history of mass tort litigation in the United States runs directly counter to reasoning of that sort, for such litigation almost always involves a large class of geographically dispersed plaintiffs. Rather, by "personal" the court seems to have meant that the injured party must have some interest in the matter or transaction that gave rise to the stigmatic injury, hence, the requirements of market participation and deterrence.

But is it really important whether or not the reader of an ad has an interest in the dwelling being advertised? While the mere reader of a discriminatory ad does not have an interest in the subject matter of the advertisement, she or he does have an interest in the advertisement itself. When the reader views an ad, a relationship is formed between the reader and the advertiser that constitutes a transaction that the reader has an interest in. This is so because advertising is not calculated merely to convey information about the availability of a product to persons who are already seeking out that product. It also has the purpose and effect of reaching those who are not in the market and persuading them to purchase the advertised product.[88] In other words, advertising is intended to induce market entry, a fact that Congress was well aware of when it passed the FHA.[89] Advertisers know that persons not in the market for a product regularly read ads for other purposes and view such readers as consumers of their ads.[90] Thus, the stigmatic injuries suffered by non-market readers of discriminatory ads are personal because such readers are part of the relevant audience that the advertiser is attempting to reach. Furthermore, it is not only those whom the

85. *Wilson*, 98 F.3d at 596.

86. *Id.* at 595.

87. *Id.* at 596.

88. *See* LEO BOGART, STRATEGY IN ADVERTISING 38-39, 123 (2d ed. 1986) (detailing the intermediate purposes of advertising and the nature of newspaper advertising).

89. *See* 114 CONG. REC. 2706 (1968) (remarks by Senator Javits demonstrating the connection between real estate advertising and interstate commerce by describing its market entry-inducing effects).

90. *Cf.* BOGART *supra* note 88, at 37-38.

advertiser is trying to attract that compose the relevant audience, for discriminatory ads send a dual message: the same message serves the function of both welcoming the desirable and discouraging the undesirable.[91]

By requiring deterrence to establish a personal injury, the *Wilson* court focused solely on the reader's interest in the property being advertised while totally ignoring the very real interest that the reader has in the transaction between advertiser and reader. However, even if we assume that the court's focus on the relationship between the reader and the thing advertised was correct, the resulting deterrence requirement is problematic as a practical matter. How is one to know whether a plaintiff has actually been deterred, or was even in the market for housing for that matter? There are few objective indicators. Certainly not being able to afford the housing in the ad could show that one was not really deterred. Being in the early stages of a lengthy lease or being tied to a current dwelling by significant financial commitment would also tend to demonstrate that a person was not in the market. But absent these facts, a court must rely on the self-serving assertions of a plaintiff about his or her own state of mind and desire to locate housing, assertions that would be virtually impossible to refute, especially for apartment dwellers claiming to be looking for their next apartment. Such a rule hardly provides a meaningful distinction from reader standing, while it simultaneously hobbles enforcement in a field rife with non-compliance.

Of course, this analysis of the *Wilson* court's application of the standards set forth in *Allen* assumes that *Allen* is properly applicable to the issue. There is reason to doubt this assumption. In requiring that a stigmatic injury be personal in nature, the *Allen* court spoke in terms of the "generalized grievance" doctrine, noting that standing for bare stigmatic injuries could produce nationwide standing for a single wrong.[92] In a later case, the Supreme Court interpreted *Allen* as a generalized grievance case.[93] The Court has also held on numerous occasions that the generalized grievance doctrine is a prudential limitation on standing that has no application in FHA cases, for the congressional intent behind the FHA was to eliminate prudential barriers to standing.[94] Therefore, one could argue that the *Wilson* court's use of *Allen* was improper because it involved a prudential limitation, which is not relevant to FHA claims.[95]

Challenging the applicability of *Allen* to FHA advertising cases is not

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91. *See* Stearns, *supra* note 54, at 1202-03.

92. *See* Allen v. Wright, 468 U.S. 737, 755-56 (1984).

93. *See* United States v. Hays, 115 S. Ct. 2431, 2435 (1995).

94. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); Warth v. Seldin, 422 U.S. 490, 499-501 (1975); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972).

95. One commentator has noted the tendency of the lower courts to favor prudential limits on standing, even where such analysis appears improper. *See* Rosman, *supra* note 6, at 562.

without its weaknesses. In the perplexing quagmire of standing jurisprudence, it is unclear whether the generalized grievance doctrine is a prudential or constitutional limitation.[96] In *Lujan v. Defenders of Wildlife*, [97] the Court suggested that the generalized grievance doctrine is a constitutional limitation, but at the same time failed to overrule the FHA cases that identified it as a prudential limitation.[98] However, *Lujan* is potentially distinguishable on the ground that the case involved a citizen challenge to government conduct that implicated Article II concerns arising from improper judicial oversight of responsibilities committed to the executive branch, a fact stressed by the Court in holding that the generalized grievance doctrine is a constitutional limitation.[99] By contrast, FHA claims under § 3604(c) challenge private conduct, thus implicating to a lesser degree the primary policy interest underlying the standing doctrine—the separation of powers.[100] Whatever the correct view on the generalized grievance doctrine is, the confusion is not likely to be cleared up any time soon.

Thus, an argument can be made that the personal denial of equal treatment requirement of *Allen* is satisfied by mere readers of discriminatory ads. Furthermore, there is some reason to doubt *Allen*'s applicability to the issue of § 3604(c) reader standing given its emphasis on the "generalized grievances doctrine." However, even if the *Wilson* court properly found the personal denial of equal treatment standard of *Allen* to be a barrier to reader standing, not *all* non-market readers would be barred from bringing suit under § 3604(c). There are at least three classes of such readers who could possibly bring suit notwithstanding their failure to satisfy the deterrence requirement that the *Wilson* court thought was mandated by *Allen*.

One group of readers who may survive a standing inquiry despite *Wilson/Allen* are fair housing organizations. In *Havens Realty Corp. v. Coleman*, a fair housing organization asserted that it had suffered a cognizable injury-in-fact because the "defendants' racial steering practices [frustrated] its efforts to assist equal access to housing through counseling and other referral services" which caused the organization to have to "devote significant resources

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96. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982).

97. 504 U.S. 555 (1992).

98. *Id.* at 573-74.

99. *See Lujan*, 504 U.S. at 573-74 (stating, "We have consistently held that a plaintiff raising only a generally available grievance about *government*-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws...does not state an Article III case or controversy.") (emphasis added).

100. *See* 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.4, 423-24, 430 (2d ed. 1984) (noting that concerns regarding separation of powers control the definition of sufficient injury and that standing is more likely to be denied when such concerns are strongly implicated).

to identify and counteract the defendant[s'] . . . practices."[101] The Court held that if the defendants' discrimination "perceptibly impaired [the organization's] ability to provide counseling and referral services . . . there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."[102]

Therefore, although an individual reader may not be able to allege sufficient injury to confer standing, a fair housing organization may be able to obtain standing if one of its members is acting on its behalf as a reader in a role analogous to the testers in *Havens Realty*. As the Court noted in *Havens Realty*, such an organization would have to adduce proof at trial that its mission had indeed been adversely affected by a defendant's advertisement.[103] Some examples of sufficient evidence to satisfy *Havens Realty* could be a showing of a financial drain on the organization caused by the need to divert resources from its other activities (such as counseling) to combat discriminatory ads,[104] or that the ads themselves interfere with the ability of the organization to make housing referrals by acting as an absolute bar to certain classes of clients.

Another group of readers who may have standing are persons who live in the neighborhood of the property that is being advertised. In a series of FHA cases, the Supreme Court has interpreted the enforcement provisions of the Act[105] to provide standing to persons who live in a neighborhood where discrimination is taking place who allege that a defendant's discriminatory practices are injuring them by denying them "the social and professional benefits of living in an integrated society."[106] The Court has rejected the argument that

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101. 455 U.S. 363, 379 (1982).

102. *Id.* at 379.

103. *Id.* at 379 n. 21.

104. *E.g.*, Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 904-05 (2d Cir. 1993); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990). Some courts have disagreed with the position of the Second and Seventh Circuits that the diversion of resources to combat discrimination is enough to confer standing on fair housing organizations. For example, the D.C. Circuit has rejected this approach to injury-in-fact, regarding it as self-referential and asserting that it abolishes the requirement of injury-in-fact altogether by allowing organizations to create their own injuries by electing to pursue reports of discrimination. Fair Employment Council v. BMC Marketing Corp., 28 F.3d 1268, 1277 (D.C. Cir. 1994). The D.C. Circuit's opinion in BMC Marketing appears to be rooted in a rather narrow and inaccurate interpretation of *Havens*. Nevertheless, while there is a split among the courts of appeals on this issue, there is still at least a strong possibility that a showing of resource diversion would be enough to confer standing on fair housing organizations. Furthermore, such organizations may be able to show more extensive injuries to their missions than just diversion of resources, such as increased difficulty in making referrals to housing, which would clearly confer standing in all jurisdictions under *Havens*. *Id.* at 379.

105. 42 U.S.C. §§ 3610, 3613 (1994) (authorizing enforcement by any "aggrieved person").

106. Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 (1982); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208 (1972).

an individual act of discrimination gives standing to persons throughout a metropolitan area who allege such injury; instead, the Court has required that such persons and the property where the discrimination is taking place be within "a relatively compact neighborhood" where there is "an appreciable effect" on the interest of the plaintiff in living in an integrated community.[107] Therefore, a mere reader would not have to live on the property in question but must live in fairly close proximity to it. Of course, the number of potential litigants would also vary with the geographic size of the property being advertised and the population density of the area in which it is located.[108] Apart from these concerns, however, there does not seem to be any barrier to a litigant bringing suit for a neighbor's discriminatory ads.

Finally, readers who bring a § 3604(c) suit in state court, where the requirements of Article III are not applicable, could possibly have standing even if they do not satisfy the requirements of *Allen* as interpreted in *Wilson*. Although one authority has expressed doubts about whether state courts would be willing to disregard federal standing requirements when enforcing a federal statute,[109] this option is at least available for an attempt by FHA litigants in jurisdictions with relaxed standing rules.

IV. Conclusion

As has been shown, the question of standing for readers of discriminatory advertisements under the Fair Housing Act has not been thoroughly analyzed by the courts that have decided the issue. These courts have neglected to take every one of the relevant considerations into account. Still, two of the three courts, the *Saunders* and *Harry Macklowe* courts, do seem to have reached the correct result. According to those courts, as a matter of both statutory interpretation and constitutional law, participation in the housing market is not required for a reader to bring suit for discriminatory housing advertising.[110]

With all of this talk of statutory construction, legislative history, and rather amorphous and fluid standing doctrines, it is easy to forget what is really going on in these cases. Ultimately, the question of standing involves asking whether a party has sufficient stake in a matter to be able to provide the adverseness needed to thoroughly illuminate all of the issues at trial.[111] One can suspect that

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107. *Havens*, 455 U.S. at 377.

108. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 114 (1979). One could imagine that the class of potential plaintiffs could be very large in some circumstances, such as discriminatory ads run by a large gated community.

109. *See* Schwemm, *supra* note 7, at 12-13.

110. Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 904 (2d Cir. 1993); Saunders v. General Services Corp., 659 F. Supp. 1042, 1053 (E.D. Va. 1986).

111. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982); Baker v. Carr, 369 U.S. 186, 204 (1962).

what truly lies at the heart of cases like *Wilson* is a deep skepticism about the "stake" that victims of social stigmatization have in their claims. Such skepticism betrays a fundamental ignorance of, and perhaps indifference to, the injuries asserted by such plaintiffs.[112]

Discrimination and stigmatization on the basis of group membership, especially groups that have been traditionally disfavored and/or that share an immutable characteristic, has profound and long-enduring effects on a victim's psyche. The degree of anguish produced by being the object of hatred, by being branded as inferior, by having one's individual worth denigrated, is almost indescribable. In a survey of psychological literature on racial stigmatization, Richard Delgado noted that among the effects of such stigmatization are deep emotional pain, self-hatred, self-doubt, and at the extreme, mental illness and physical disease.[113] No doubt similar effects are observed in other forms of group-based stigmatization. Furthermore (and this is important for discriminatory advertising claims), the psychological effects are cumulative.[114] While one individual act of discrimination may appear to a jurist to be of insufficient severity when viewed in isolation, it takes on a whole new significance when understood in the context of a lifetime of being told "you're not welcome."

These emotional harms are potentially more severe when they involve discriminatory housing advertising. Advertising is a powerful and pervasive medium that greatly impacts the way we view the world and ourselves.[115] The fact that an ad relates to housing compounds its effects, because where we live shapes our very identities.[116] Given this tremendous capacity to communicate ideas about our identities, discrimination in housing advertising is particularly hurtful. It does not merely temporarily upset its victims; rather, it destroys self-esteem and crushes aspirations.[117]

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112. Results like the ones reached in *Allen* and *Wilson*, where significant barriers are erected to standing by persons claiming stigmatic injury, seem to betray a judicial bias against injuries that are not easily quantifiable or that are linked to subjective emotional states rather than tangible interests. Of course, it is less than clear why a litigant should have standing for the most nominal of economic damages while another litigant with emotional trauma caused by an act of discrimination is denied standing. Are the competing interests that weigh against granting standing for stigmatic injuries like those alleged in *Allen* and *Wilson* so great that we are willing to say that a dollar in damages will get you into court but years of abuse suffered under the yoke of oppression culminating in a recent act of discrimination will not grant you that same access? It seems that an entire realm of human existence—emotion—is being devalued by our legal institutions and our legal culture.

113. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-39 (1982).

114. *Id.* at 136-37.

115. *See* KERN-FOXWORTH, *supra* note 3, at 131-32 (describing the effects of advertising on the individual and on race relations).

116. Armstrong, *supra* note 60, at 909.

117. *See* KERN-FOXWORTH, *supra* note 3, at 168.

In view of these concerns, the language in *Wilson* characterizing readers of discriminatory ads as "concerned bystanders" trivializes serious injuries and ignores the victim's very real stake in his or her claim. Unfortunately, such attitudes threaten to render the Fair Housing Act's prohibition of discriminatory housing advertising a dead letter.