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## Discriminatory Housing Statements and Section 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision

Robert G. Schwemm

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# Discriminatory Housing Statements and Section 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision

## **Cover Page Footnote**

Ashland Professor, University of Kentucky College of Law; B.A., Amherst College; J.D. Harvard University. For their helpful comments on prior drafts of this article, I thank Mary Davis, John Relman, Michael Selmi, and Sarah Welling.

# DISCRIMINATORY HOUSING STATEMENTS AND § 3604(c): A NEW LOOK AT THE FAIR HOUSING ACT'S MOST INTRIGUING PROVISION

*Robert G. Schwemm\**

## TABLE OF CONTENTS

Introduction.....	189
I. The Role of § 3604(c) within the Fair Housing Act ...	194
A. Overview of the Fair Housing Act .....	194
B. The Legislative History of § 3604(c) and Its Applicability to Exempt Housing .....	197
1. Background and General Observations .....	197
2. The Evolution of the FHA's Substantive Coverage .....	200
3. Source and Evolution of § 3604(c) Language .	206
C. The FHA's Goal of Integration .....	212
II. Judicial Treatment of § 3604(c) .....	213
A. Elements of a § 3604(c) Violation .....	213
B. Early Interpretations of § 3604(c): <i>Hunter and         Mayers</i> .....	216
C. Modern Cases under § 3604(c) .....	220
1. Post-1972 Period .....	220
2. The Human-Models Cases .....	222
3. The Fair Housing Amendments Act of 1988 ..	226
4. Modern Decisions Involving Independently Important § 3604(c) Claims .....	230
a. <i>HUD v. Denton</i> .....	231
b. <i>HUD v. Ro</i> .....	232
c. Claims Against Exempt Landlords.....	234
d. Other Decisions Treating § 3604(c) Claims Separately .....	241
D. Summary of Judicially Recognized Purposes for § 3604(c).....	249
III. Discriminatory Statements and the Non-Use of § 3604(c) .....	251

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\* Ashland Professor, University of Kentucky College of Law; B.A., Amherst College; J.D., Harvard University. For their helpful comments on prior drafts of this article, I thank Mary Davis, John Relman, Michael Selmi, and Sarah Welling.

A.	Discriminatory Statements as Evidence of the Defendant's Illegal Motive .....	251
B.	The Non-Use of § 3604(c) in FHA Cases Involving Discriminatory Statements .....	255
IV.	A Modern Approach to Cases Involving Discriminatory Housing Statements .....	263
A.	Statutory and Constitutional Limitations on § 3604(c) Liability .....	263
1.	Limitations Imposed by the "With Respect To" Phrase .....	263
2.	First Amendment Considerations .....	267
a.	§ 3604(c): A Limited Content-Based Restriction .....	267
b.	The "Commercial Speech" Doctrine .....	268
i.	First Amendment Protection for § 3604(c)-Covered Commercial Speech .....	268
ii.	Applying the <i>Central Hudson</i> Test in § 3604(c) Cases: The First Factor .....	273
iii.	Applying <i>Central Hudson</i> in "Legal" Situations .....	278
c.	Other Potentially Relevant First Amendment Doctrines .....	282
i.	"Fighting Words" .....	282
ii.	"Hate Speech" and the <i>R.A.V.-Mitchell</i> Decisions .....	284
iii.	Title VII Harassment Cases .....	290
3.	Summary of Statutory and Constitutional Limitations .....	293
B.	Liability and Potential Defendants .....	294
1.	Statements Made to Third Parties .....	294
2.	Agents and Non-Provider Defendants .....	297
3.	The "Not True" Defense .....	301
C.	Proper Plaintiffs: Standing to Sue and to Seek Damages .....	302
1.	Standing Concepts and Relief Available in § 3604(c) Suits .....	302
2.	Actual Damages for Persons Aggrieved by FHA Violations .....	305
a.	General Concepts .....	305
b.	Claims by Minority Home Seekers in "Passing On" Cases .....	306



c. Other Potential Plaintiffs ..... 309  
d. A Final Note on Relief ..... 314  
Conclusion ..... 314

INTRODUCTION

Today, more than three decades after the 1968 Fair Housing Act (“FHA”)<sup>1</sup> banned such behavior, blatant discrimination—often accompanied by racist slurs and other explicitly discriminatory statements—continues to plague America’s housing markets.<sup>2</sup> In one recent case, a Louisiana landlord told an African-American applicant he did not rent to “you people.” When the applicant asked what he meant by this, the landlord told her, “black, color[ed], Negro, whatever you call yourself, I don’t rent to y’all.”<sup>3</sup> Lest one think this is aberrational behavior limited to the “Old South,” a steady stream of reported cases from the Midwest, the East Coast, and California provide numerous additional examples of housing providers who not only expressed similar views, but added racial slurs for good measure.<sup>4</sup>

1. The Fair Housing Act (Title VIII of the Civil Rights Act of 1968), Pub. L. No. 90-284, 82 Stat. 73 (1968), as amended, is codified at 42 U.S.C. §§ 3601-3619 (2001).

2. *E.g.*, HOUSING MARKETS AND RESIDENTIAL MOBILITY (G. Thomas Kingsley & Margery Austin Turner eds. 1993); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995). *See generally* THE COUNCIL OF ECON. ADVISORS FOR THE PRESIDENT’S INITIATIVE ON RACE, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN (1998).

The most recent national study of discrimination in housing concluded that African-Americans and Latinos experience discrimination roughly fifty percent of the time when inquiring about buying or renting a home. MARGERY A. TURNER, RAYMOND J. STRUYK & JOHN YINGER, U.S. DEPT. OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION STUDY: SYNTHESIS vi-vii (1991). The results and methodology of this study, which was based on the experiences of thousands of paired testers in some forty metropolitan areas, are summarized in YINGER, *supra*, at 19-41, and in Margery Austin Turner, *Discrimination in Urban Housing Markets: Lessons from Fair Housing Audits*, 3 HOUSING POLICY DEBATE 2 191-92 (1992). The levels of discrimination found in this study were not substantially lower than those found in a similar national study conducted over a decade earlier and reported in RON WIENK ET AL., U.S. DEPT. OF HOUS. & URBAN DEV., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES STUDY (1979).

3. *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 299-300 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1225 (2001).

4. *E.g.*, *Harris v. Itzhaki*, 183 F.3d 1043, 1048 (9th Cir. 1999) (agent of California apartment complex told staff, within hearing distance of African-American tenant, that “[O]wners don’t want to rent to blacks”); *Allahar v. Zahora*, 59 F.3d 693, 694 (7th Cir. 1995) (Illinois home seller, in rejecting Middle-Eastern applicant, told him, “[I’ve] talked with [my] neighbors and they don’t want niggers on the block”); Little-

field v. McGuffey, 954 F.2d 1337, 1341 (7th Cir. 1992) (Illinois landlord, in refusing to rent to a white woman with a mixed race child, harassed her with statements including "nigger" and other racial slurs); Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1450 (4th Cir. 1990) (Maryland housing community's board members described the community's hostility to blacks and its need to defeat efforts by African-American applicant to buy home there by stating that "if we don't beat this case, we'll have every nigger in Baltimore coming here"); Fair Hous. of Marin v. Combs, Fair Hous.-Fair Lending Rptr. ¶ 16,430, at 16,430.1-2 (N.D. Cal. 2000) (California landlord told white tester he no longer rented to blacks, told several white tenants he wanted his complex to be an all-white building, and told the tenants that "I don't want any niggers in my building. I own it. I'll have who I want," "I'll sell the place before I rent to a nigger" and "No niggers are allowed on the premises"); Lane v. Cole, 88 F. Supp. 2d 402, 404 (E.D. Pa. 2000) (Philadelphia landlord threatened violence against white tenant who entertained black guests and said he would "remove the blacks" from her apartment if she did not do so); Chew v. Hybl, Fair Hous.-Fair Lending Rptr. ¶ 16,249, at 16,249.2 (N.D. Cal. 1998) (California landlord told Asian-American applicants she would not rent to them because she had "good white American applicants" and that "we white people" need to "stick together" because "[Y]ou people are taking over this country"); United States v. Lorantffy Care Ctr., 999 F. Supp. 1037, 1041 (N.D. Ohio 1998) (director and staff of Ohio retirement community stated that they did not want blacks); HUD v. Roberts, Fair Hous.-Fair Lending Rptr. ¶ 25,151, at 26,216 (HUD ALJ 2001) (Long Island landlord told black prospect, "I do not rent to Blacks," and told white prospect with African-American husband that, "Oh no, I cannot have that! This is a White neighborhood."); HUD v. Gruzdaitis, Fair Hous.-Fair Lending Rptr. ¶ 25,137, at 26,134 (HUD ALJ 1998) (Buffalo landlord told African-American prospect, "Not for you, no blacks. Fuck you, they don't pay rent."); HUD v. Gutleben, Fair Hous.-Fair Lending Rptr. ¶ 25,078, at 25,726-27 (HUD ALJ 1994) (California landlord, in harassing African-American tenants, regularly referred to them as "niggers" and stated to white tenants that he wanted "the niggers out"); HUD Leiner, Fair Hous.-Fair Lending Rptr. ¶ 25,021, at 25,262 (HUD ALJ 1992) (New York City apartment agent told HUD investigator, "You put five blacks or Hispanics in an apartment and you have a pigsty"); Van den Berk v. Mo. Comm'n on Human Rights, 26 S.W.3d 406, 409 (Mo. Ct. App. 2000) (Missouri landlord told African-American couple she would not rent to them because "black people and white people just don't get along well, living together").

There are, of course, similar examples from the "Old South." *E.g.*, Moss v. Ole S. Real Estate, Inc., 933 F.2d 1300, 1303-04 (5th Cir. 1991) (Mississippi real estate agents told agent for African-American prospect that the owners "don't want niggers living at the front of the subdivision because it makes the rest of the homes hard to sell and lowers prices" and "take your nigger captain somewhere else or sell him \$500 more house"); United States v. Bankert, Fair Hous.-Fair Lending Rptr. ¶ 16,424, at 16,424.1-2 (E.D.N.C. 2000) (North Carolina housing developer's owner and sales agent made racially derogatory statements about African-American-owned finance company, including telling white would-be purchasers they "[were] dealing with a bunch of niggers down there who don't know their ass from a hole in the ground"); Texas v. Crest Asset Mgmt., Inc., 85 F. Supp. 2d 722, 730 (S.D. Tex. 2000) (Texas landlord harassed Lebanese-American tenant by calling him "an Arab terrorist, an F . . . Arab, a dumb Arab, a troublemaker"); HUD v. Lewis, Fair Hous.-Fair Lending Rptr. ¶ 25,118, at 26,014 (HUD ALJ 1996) (Florida landlord told his leasing agent to discourage African-Americans and Latinos: "This is my apartment complex . . . no more niggers. If you want to rent to niggers you can go somewhere else"); HUD v. Joseph, Fair Hous.-Fair Lending Rptr. ¶ 25,072, at 25,667 (HUD ALJ 1994) (maintenance man and husband of rental agent for Mississippi apartment complex told white

The reality of these cases stands in stark contrast to the promise of the Fair Housing Act of 1968. The FHA not only outlawed discrimination in most housing transactions on the basis of race, color, religion, and national origin,<sup>5</sup> but also contained a specific prohibition, § 3604(c), banning all discriminatory housing statements.<sup>6</sup> The special Congressional concern for discriminatory statements reflected in § 3604(c) and the continuing need for this provision's strong enforcement are the subjects of this Article.

Unlike the FHA's more traditional prohibitions against discriminatory refusals to deal and discriminatory terms and conditions,<sup>7</sup> § 3604(c)'s ban on discriminatory statements has not been the subject of much litigation or debate.<sup>8</sup> This is somewhat surprising in light of two facts indicating that the 1968 Congress had a special concern for discriminatory housing statements: first, § 3604(c)'s prohibition of biased statements goes well beyond comparable provisions in other civil rights laws enacted during the 1960s;<sup>9</sup> and second, Congress chose to make § 3604(c) apply to housing otherwise exempt from the FHA's more traditional prohibitions.<sup>10</sup>

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applicant that an advantage of the complex was that there were no African-Americans).

For additional cases containing blatantly racial statements, see *infra* notes 336 and 338. For cases in which blatantly discriminatory housing statements were made concerning other illegal criteria, see *infra* notes 352-53 (religion), 354 (sex), 184 (disability), and 180, 182, and 183 (familial status).

5. Three additional bases of discrimination have since been added to the Fair Housing Act: a 1974 amendment added "sex," and the 1988 Fair Housing Amendments Act added "handicap" and "familial status." *Infra* notes 20-21 and accompanying text. While this Article attempts a thorough review of all biased statements outlawed by § 3604(c), it is primarily concerned with statements that indicate discrimination based on race, color, or national origin.

6. § 3604(c) makes it unlawful

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

The language of this provision has not changed since it was enacted in 1968, with the exception of amendments adding "sex," "handicap," and "familial status" to the list of prohibited bases of discrimination. *Infra* notes 20-23 and accompanying text.

7. *Infra* notes 25-26 and accompanying text (discussing 42 U.S.C. § 3604(a)-(b)).

8. This is also true with respect to § 3604(c)'s prohibition of discriminatory notices, although its ban on discriminatory advertising has prompted a good deal of litigation. Cases dealing with § 3604(c) are discussed *infra* Part II.

9. *Infra* text accompanying notes 78-97.

10. The FHA's principal exemption is for apartment buildings with four or fewer units where the owner resides: the so-called "Mrs. Murphy" exemption. 42 U.S.C. § 3603(b)(2) provides in pertinent part:

Nothing in §3604 of this title (other than subsection (c)) shall apply to:

By excluding § 3604(c) from the FHA's principal exemptions, Congress established a system where even the smallest housing providers, including "Mrs. Murphy"-type landlords,<sup>11</sup> are barred from making discriminatory statements. Such housing providers may engage in discriminatory housing practices, but they cannot tell anyone they are doing so. In addition, larger landlords who are not permitted to discriminate under the FHA are subject to a second "count" under § 3604(c) if they announce the reason for their discrimination, a count that may offer additional relief beyond that prompted by the discriminatory housing practice itself.<sup>12</sup>

Section 3604(c)'s condemnation of biased statements is so broad that it could yield some bizarre results, because liability seems to attach only to defendants who are honest and forthcoming about the reason for their discrimination, while liars and dissemblers will prevail. For example, when an African-American home seeker applies for an apartment in a "Mrs. Murphy" dwelling and the owner decides not to rent because of race, the owner will be liable under § 3604(c) if she says, "I won't rent to you because you're black," but not for just saying, "I won't rent to you." In the latter instance, if the home seeker asks for the reason, the owner who answers, "Because you're black," will be liable, but one who remains silent or says, "I don't have to tell you why," or makes up some race-neutral excuse, will not be liable. The result is the same for non-

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(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

A second exemption covers "any single-family house sold or rented by an owner [subject to certain enumerated provisos]." 42 U.S.C. § 3603(b)(1). Both the "Mrs. Murphy" and the "single-family house" exemptions are subject to the same phrase that begins § 3603(b), providing that "[n]othing in § 3604 of this title (other than subsection (c)) shall apply to" these exempted properties.

11. *Supra* note 10. The term "Mrs. Murphy," apparently first coined in the congressional debates over the 1964 Civil Rights Act to refer to operator-residents of small lodging houses exempted from that law's public accommodations provisions (42 U.S.C. § 2000a(b)(1)), was also adopted in the legislative discussions about the FHA in reference to small housing providers. James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 n.3 (1999).

12. *E.g.*, cases cited *infra* notes 186, 245, 267. This is not to say that all "refusal-to-deal" cases where the defendant explicitly stated discriminatory reasons for turning down the complainant have included a § 3604(c) count in addition to a claim under § 3604(a). Indeed, complainants have often asserted only the § 3604(a) claim, relying on the discriminatory statement simply to prove the refusal-to-deal claim. *E.g.*, cases cited *infra* notes 326, 336, 343. Still, a biased statement is an additional statutory violation, not merely proof of the defendant's illegal motive.

exempt housing providers with respect to their liability on the § 3604(c) count.

What did Congress seek to achieve by having § 3604(c) outlaw all discriminatory housing statements, including those made by otherwise exempt housing providers? This Article addresses this question and also the related issue of whether the statutory scheme goes too far by infringing on a landlord's First Amendment right to freedom of speech. The Article concludes that Congress fully appreciated what it was doing when it enacted § 3604(c)'s broad proscription of discriminatory housing statements; that it had important goals for this provision that were intended to supplement the FHA's other key provisions in order to provide a unified arsenal for opening up America's segregated housing markets; that part of the reason for the FHA's failure to achieve its goal of replacing ghettos with "truly integrated and balanced living patterns"<sup>13</sup> is the failure of courts and litigants to fully utilize § 3604(c); and that more vigorous enforcement of § 3604(c) will not only better reflect the original intent of Congress, but will also, with only minor exceptions, be consistent with the First Amendment.

Part I of the Article provides an overview of the FHA's basic provisions and its goals of nondiscrimination and integration for America's housing markets, with a specific focus on the legislative history and intent underlying § 3604(c). Part II reviews § 3604(c) cases in a further effort to identify this provision's goals and the elements needed to establish its violation. Part III shows how litigants and courts have underused § 3604(c) by failing to assert it as an independent basis for relief in cases involving discriminatory housing statements. Finally, Part IV offers suggestions for the proper approach to be used in applying § 3604(c) in discriminatory statement cases. These suggestions give due consideration to the potential First Amendment problems raised by an aggressive interpretation of § 3604(c) and also address the issues of who might be liable for violating this provision and who might have standing to enforce it. The result is an effort to re-establish the role that Congress envisioned for § 3604(c) as an important part of the nation's fair housing enforcement arsenal.

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13. *Infra* note 18 and accompanying text. See generally *infra* Part I.C.

## I. THE ROLE OF § 3604(C) WITHIN THE FAIR HOUSING ACT

### A. Overview of the Fair Housing Act

The federal Fair Housing Act was passed in April, 1968, shortly after the assassination of Dr. Martin Luther King, Jr., and the publication of the Kerner Commission Report,<sup>14</sup> with its dramatic conclusion that the nation was "moving toward two societies, one black, one white—separate and unequal."<sup>15</sup> Enacted after the 1964 Civil Rights Act<sup>16</sup> and the 1965 Voting Rights Act,<sup>17</sup> the FHA was the last of the great civil rights laws of the 1960s and was intended by its proponents to replace residential ghettos with "truly integrated and balanced living patterns."<sup>18</sup>

As originally enacted in 1968, the FHA banned housing discrimination on the basis of race, color, religion, and national origin only.<sup>19</sup> "Sex" was added to the list of prohibited bases of discrimination in 1974;<sup>20</sup> "familial status" and "handicap" were added in 1988.<sup>21</sup> With the exception of certain minor changes and some special handicap provisions,<sup>22</sup> however, these later amendments did not alter the basic substantive prohibitions of the 1968 law.<sup>23</sup> These substantive prohibitions, which ban a variety of enumerated dis-

14. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

15. *Id.* at 1. For descriptions of the legislative history of the 1968 Fair Housing Act, see BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: PART II 1627-32 (1970); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 5:2 (2001); and Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L. J. 149 (1969).

16. The 1964 Civil Rights Act prohibits discrimination in public accommodations, employment, and federally assisted programs. These prohibitions in the 1964 Civil Rights Act are contained, respectively, in Title II (public accommodations), 42 U.S.C. § 2000a to a-6; Title VII (employment), 42 U.S.C. § 2000e; and Title VI (federally funded programs), 42 U.S.C. § 2000d to d-7.

17. 42 U.S.C. § 1973.

18. 114 CONG. REC. 3422 (1968) (remarks of Senator Mondale). The FHA's integration goal is fully discussed *infra* Part I.C.

19. 42 U.S.C. §§ 3604-3606, 3617 (1969).

20. Pub. L. No. 93-383, § 808, 88 Stat. 633, 729 (1974).

21. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

22. Some changes were made to the substantive prohibitions relating to discriminatory home financing and other "residential real estate-related transactions" in 42 U.S.C. § 3605. SCHWEMM, *supra* note 15, § 18:1. The special handicap provisions are codified at 42 U.S.C. § 3604(f)(3)-(9). SCHWEMM, *supra* note 15, § 11:13-21.

23. The 1988 Amendments Act did, however, make substantial changes in the FHA's enforcement procedures, which are codified at 42 U.S.C. §§ 3610-3614. *E.g.*, SCHWEMM, *supra* note 15, chapters 23-26; James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989).

criminary housing practices, are contained in § 3604, § 3605, § 3606, and § 3617.<sup>24</sup>

The most important FHA provision is § 3604(a), which makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race [or other prohibited factor].”<sup>25</sup> Section 3604(a)’s ban on refusals-to-deal is supplemented by § 3604(b)’s prohibition of discrimination in the terms, conditions, or privileges of the sale or rental of a dwelling and in the provision of services or facilities in connection therewith.<sup>26</sup> Section 3604(c), the focus of this Article, prohibits discriminatory notices, statements, and advertising. Section 3604(d) bans discriminatory misrepresentations concerning the availability of housing, and § 3604(e) outlaws “blockbusting.”<sup>27</sup> Section 3604(f) contains provisions designed to provide equal housing opportunities for handicapped persons. The three other substantive

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24. 42 U.S.C. §§ 3604-3606, 3617. Indeed, the statute defines a “discriminatory housing practice” as “an act that is unlawful under § 3604, § 3605, § 3606, and § 3617 of this title.” *Id.* § 3602(f).

Additional substantive commands can be found in § 3608, which requires HUD and other government agencies to administer their housing programs “in a manner affirmatively to further” the FHA’s purposes. *Id.* §§ 3608(d), 3608(e)(5). Claims based on § 3608, however, are not covered by the FHA’s enforcement provisions and therefore must be brought pursuant to the Administrative Procedure Act. *E.g.*, NAACP, *Boston Chapter v. HUD*, 817 F.2d 149, 152 (1st Cir. 1987); SCHWEMM, *supra* note 15, § 21:7.

25. The bases of discrimination outlawed by § 3604(a) are race, color, religion, sex, familial status, and national origin. A similarly worded provision—§ 3604(f)(1)—was specially created by the 1988 Fair Housing Amendments Act to deal with handicap discrimination and makes it unlawful to discriminate “in the sale or rental, or to otherwise make unavailable or deny, a dwelling” because of the handicap of the buyer or renter or anyone residing or associated with that buyer or renter. SCHWEMM, *supra* note 15, §§ 11:15, 13:1. Because the practices prohibited by § 3604(f)(1) are virtually identical to those prohibited by § 3604(a), § 3604(a) is used throughout this Article as if it also prohibited handicap discrimination.

26. The bases of discrimination outlawed by § 3604(b) are race, color, religion, sex, familial status, and national origin. A similarly worded provision—§ 3604(f)(2)—deals with handicap discrimination and makes it unlawful “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 with such dwelling” because of a handicap of the buyer or renter or anyone residing or associated with that buyer or renter. SCHWEMM, *supra* note 15, §§ 11:15, 14:1. Because the practices prohibited by § 3604(f)(2) are virtually identical to those prohibited by § 3604(b), § 3604(b) is used throughout this Article as if it also prohibited handicap discrimination.

27. Section 3604(e) makes it unlawful “[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.”

sections of the statute prohibit discrimination in home loans and certain other housing-related transactions (§ 3605); discrimination in multiple-listing and other brokerage services (§ 3606); and coercion and other types of interference with the rights guaranteed by § 3604 - § 3606 (§ 3617).

The 1968 law also provided four exemptions, none of which protects housing providers from liability under § 3604(c). The two most important exemptions, those for "Mrs. Murphy" landlords and owners of certain single-family houses, are contained in § 3603(b),<sup>28</sup> a provision whose introductory phrase provides that "[n]othing in §3604 of this title (other than subsection (c)) shall apply to" these types of dwellings.<sup>29</sup> The two other exemptions in the 1968 statute appear in § 3607(a). They protect religious organizations and private clubs from FHA liability for limiting their dwellings or giving preference to their own members.<sup>30</sup> Neither exemption, however, authorizes these organizations to make discriminatory statements or engage in other types of behavior condemned by § 3604(c).<sup>31</sup> Three additional exemptions were added when the 1988 amendments banned "familial status" and

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28. *Supra* note 10.

29. 42 U.S.C. § 3603(b).

30. *Id.* Section 3607(a) provides as follows:

Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

31. As with the "Mrs. Murphy" and single-family house exemptions, *supra* note 10, the religious organization and private club exemptions have been narrowly construed and have rarely succeeded in shielding FHA defendants from liability. *E.g.*, *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990); *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1044 (N.D. Ohio 1998); *United States v. Hughes Mem'l Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975). *See generally* *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (FHA's exemptions to be read narrowly). In particular, no reported case has ever held that these § 3607(a) exemptions protect a religious organization or private club from liability under § 3604(c). There is, however, some legislative history suggesting that § 3604(c) does not apply to the types of organizations exempted by § 3607(b). *See* 114 CONG. REC. 9612 (1968) (House staff memorandum noting that § 3604(c) "applies to *all* dwellings except religious and fraternal organizations exempted by [§ 3607]").



“handicap” discrimination.<sup>32</sup> Only part of one of these exemptions, however—the exemption of housing intended for persons fifty-five years of age or older from claims of familial status discrimination—authorizes discriminatory statements.<sup>33</sup> Thus, with this one minor exception, § 3604(c) is applicable to *all* housing providers, whether or not they are exempt from the statute’s other mandates.

## **B. The Legislative History of § 3604(c) and Its Applicability To Exempt Housing**

### *1. Background and General Observations*

The 1968 Fair Housing Act was the result of extended congressional consideration of housing discrimination legislation that began with a proposal by President Johnson in 1966.<sup>34</sup> The Johnson Administration proposal was embodied in bills<sup>35</sup> that were the subject of lengthy committee hearings by both the House and the Senate Judiciary Committees.<sup>36</sup> The House Committee reported an amended bill, which was passed by the House on August 9, 1966,<sup>37</sup>

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32. One exemption shields “housing for older persons” from claims of familial status discrimination, 42 U.S.C. § 3607(b)(2); one provides that housing need not be made available to a handicapped individual whose tenancy would constitute a “direct threat” to other individuals or their property, *id.* § 3604(f)(9); and one exempts “reasonable occupancy standards” from challenge under the FHA, *id.* § 3607(b)(1).

33. In order to qualify for this exemption, the housing provider must, *inter alia*, “publish[ ] and adhere[ ] to policies and procedures that demonstrate the intent” to rent to persons fifty-five years of age or older. 42 U.S.C. § 3607(b)(2)(C)(ii). This means that such housing provider is not only permitted, but required, to state its commitment to providing housing for this age group.

It should be noted, however, that other types of housing for older persons are not subject to this requirement and that all types of housing for older persons, including those that make discriminatory statements in favor of those fifty-five or older, are not exempt from the FHA’s prohibitions against discrimination on the basis of race, color, religion, sex, national origin, and handicap. *E.g.*, *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037 (N.D. Ohio 1998). Thus, the one area of the FHA’s exemptions that is not subject to § 3604(c) is extremely narrow.

34. Lyndon B. Johnson, Special Message to the Congress Proposing Further Legislation to Strengthen Civil Rights, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON: 1966* 467-69 (1967).

35. S. 3296 and H.R. 14765, 89th Cong. (1966). A copy of Senate Bill 3296 is printed at 112 CONG. REC. 9394-98 (1966), with the fair housing title (Title IV) appearing at pages 9396-97.

36. *Hearings before Subcomm. No. 5 of the H. Comm. on the Judiciary on Misc. Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States*, 89th Cong. (1966); *Hearings before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 3296, the Civil Rights Act of 1966, and Related Bills*, 89th Cong. (1966) [hereinafter *1966 Hearings*].

37. 112 CONG. REC. 18,739-40 (1966).

but in the Senate, no bill was reported, and a successful filibuster prevented any floor action on the matter.<sup>38</sup> In 1967, Senator Mondale sponsored a fair housing bill (Senate Bill 1358) that was the subject of hearings by a subcommittee of the Senate Banking and Currency Committee.<sup>39</sup> Meanwhile, the House passed a civil rights bill (House Bill 2516) that did not include a fair housing title,<sup>40</sup> and when House Bill 2516 came to the floor of the Senate in early 1968, Senators Mondale and Brooke sponsored a fair housing amendment to it.<sup>41</sup> The Mondale-Brooke proposal was subsequently withdrawn in favor of a compromise fair housing amendment offered by Senator Dirksen.<sup>42</sup> The Dirksen compromise was amended somewhat on the Senate floor before its passage on March 11, 1968.<sup>43</sup> Shortly after Dr. King's assassination on April 4, the House voted to accept the Senate amendments to House Bill 2516, including the fair housing title,<sup>44</sup> and the next day President Johnson signed the bill into law.<sup>45</sup>

This legislative history, though protracted, produced little material concerning the provision that became § 3604(c). No committee report was ever issued on the bill that eventually became the FHA, and the hearings held on prior proposals generally dealt only with

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38. 112 CONG. REC. INDEX 1183 (1966).

39. *Hearings on the Fair Hous. Act of 1967 before the Subcomm. on Hous. and Urban Affairs of the S. Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280 Relating to Civil Rights and Hous.*, 90th Cong. (1967) [hereinafter *1967 Banking Hearings*]. Senate Bill 1358 was identical to the fair housing title of a civil rights bill proposed by the Johnson Administration in 1967, Senate Bill 1026 and House Bill 5700, which was the subject of hearings by a subcommittee of the Senate Judiciary Committee. *Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805 (Proposed Civil Rights Act of 1967)*, 90th Cong. (1967) [hereinafter *1967 Judiciary Hearings*].

40. House Bill 2516, which was passed by the House on August 16, 1967, was a modest measure designed to protect African-Americans and civil rights workers by outlawing racially motivated acts of violence against persons exercising their Fourteenth Amendment rights. SCHWARTZ, *supra* note 15, at 1629; *see also* Dubofsky, *supra* note 15, at 149 & n.2. House Bill 2516 originated as one part (Title V) of an omnibus civil rights bill proposed by the Johnson Administration, Senate Bill 1026 and House Bill 5700, whose fair housing and other titles were not passed by the House. Copies of the omnibus bill and of House Bill 2516 are printed in *1967 Judiciary Hearings*, *supra* note 39, at 23-46, 48-50.

41. 114 CONG. REC. 2270-72 (proposal printed), 2279 (amendment formally offered by Senator Mondale) (1968).

42. The Dirksen proposal is printed at 114 CONG. REC. 4570-73 (1968).

43. *Infra* note 76.

44. 114 CONG. REC. 9620-21 (1968).

45. Lyndon B. Johnson, Remarks upon Signing the Civil Rights Act, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON: 1968-69* 509-10 (1970).

the overall need for a fair housing law and whether Congress had the constitutional power to enact such a law. Consequently, most relevant statements about the intent of the FHA's specific provisions were made during floor debates, particularly in the Senate, and little debate focused on § 3604(c).<sup>46</sup> Thus, the meaning of this provision must be derived almost exclusively from the words of the statute, unaided by additional materials.<sup>47</sup>

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46. For example, an analysis of the Dirksen proposal prepared by the Department of Justice and introduced on the Senate floor simply listed the bill's various prohibitions, including those contained in § 3604(c), without providing any additional explanation of their specific meaning. 114 CONG. REC. 4906-08 (1968). However, in its discussion of the Dirksen proposal's exemptions, the analysis did note that: "Individuals who wish to sell or rent their own dwelling would be permitted to advertise such intention, but if discriminatory advertising were used, such a dwelling would thereby be brought within the coverage of the bill." *Id.* at 4907. This observation was made regarding that part of the single-family-house exemption that prevents exemption if such a house is sold or rented using "any advertisement or written notice in violation of section 3604(c)." 42 U.S.C. § 3603(b)(1)(B); *infra* note 71.

Similarly, during the House floor debates, a description of the bill offered by Judiciary Committee Chairman Celler and a memorandum prepared by the staff of the House Judiciary Committee introduced by then-Minority Leader Gerald Ford focused more on the bill's exemptions than its substantive prohibitions. 114 CONG. REC. 9560-61, 9611-12 (1968). These descriptions noted that the single-family-house exemption would be lost if discriminatory advertising were used, and the Judiciary staff memorandum made a reference to § 3604(c) in this regard:

[I]t is clear that regardless of circumstances, no one can "make . . . any notice, statement, or advertisement" that discriminates [citing § 3604(c)]. That applies to *all* dwellings . . . . Thus, the fourth condition [of the single-family-house exemption providing for no use of discriminatory advertisements or written notices], which is stated in more narrow terms (it requires less of the seller) apparently contradicts the broader requirement of [§ 3604(c)] stated above.

The fourth condition would seem to require only the avoidance of written discriminatory advertising whereas [§ 3604(c)] would arguably require the avoidance of both written and spoken (a "statement" may be oral) "indications of preference."

So, does the fourth condition mean that less is required? Or is it simply a nullity?

*Id.* at 9612.

Other references to § 3604(c) in the legislative history are cited *supra* notes 31 and *infra* notes 85, 91, 129, 162, 563. The only other legislative references to § 3604(c) that the author has been able to discover are in 1966 *Hearings*, *supra* note 36, at 16, 1071-72, and 1105 and 1967 *Banking Hearings*, *supra* note 39, at 387-88.

47. See, e.g., *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (relying on the "plain language" to interpret a provision of Title VII of the 1964 Civil Right Act that, like the FHA, resulted from a legislative compromise representing many months of congressional effort, and remarking that: "As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." (citations and internal quotation marks omitted)).

Nevertheless, some insight into the intent underlying this FHA provision may be derived by examining the five distinct versions of the bill that eventually became the FHA: (1) the Johnson Administration proposal; (2) the 1966 House-passed version; (3) the 1967 Mondale proposal; (4) the Mondale-Brooke proposal of early 1968; and (5) the Dirksen compromise.<sup>48</sup> The differences in these five proposals reveal an evolving sense of what practices Congress felt a fair housing law should cover and what Congress wanted § 3604(c) to achieve.

## 2. *The Evolution of the FHA's Substantive Coverage*

The FHA's basic substantive provisions changed very little from those set forth in President Johnson's original proposal. This proposal included seven prohibitions that eventually became § 3604(a), § 3604(b), § 3604(c), § 3604(d), § 3605, § 3606, and § 3617.<sup>49</sup> A fifth subsection—what today is §3604(e)—was later added to prohibit "blockbusting."<sup>50</sup> The only other major change in what became §3604 is that the original introductory phrase of this section—which ultimately became simply "it shall be unlawful:"—included additional language identifying a wide range of potential defendants, including a dwelling's owner, manager, and realtor.<sup>51</sup> With respect to the third subsection of this key provision, the Administration's proposal was very similar to what became § 3604(c).<sup>52</sup>

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48. *Supra* text accompanying notes 34-45.

49. *Supra* note 35.

50. 112 CONG. REC. 18,177-80 (1966).

51. The full version of this introductory phrase read as follows: "It shall be unlawful for the owner, lessee, sublessee, assignee, or manager of, or other person having the authority to sell, rent, lease, or manage, a dwelling, or for any person who is a real estate broker or salesman, or employee or agent of a real estate broker or salesman . . ." This list was later described in a memo for the House as "all inclusive." *Id.* at 18,117.

52. The Administration's proposal for subsection (c), with changes that would eventually be made to it indicated in brackets (with italics for additions and regular print for deletions), read as follows:

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[, or lease] of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

112 CONG. REC. 9397 (1966). Thus, the only changes ultimately made were the addition of the word "make" (and "made") to the verbs "print or publish" and the deletion of the phrase "or lease" from the "sale or rental" phrase. The latter change simply reflects the fact that "lease" was also deleted from the other subsections of this provision in what became § 3604(a), § 3604(b), and § 3604(d). *Infra* note 60.

Unlike the FHA, the Johnson Administration's bill contained no exemptions. This was a clear departure from the 1964 Civil Rights Act, which exempted private clubs, religious organizations, and certain "smaller" entities.<sup>53</sup> Although similar exemptions were ultimately written into the FHA, the Johnson Administration's bill had none of them. This all-encompassing approach was reflected in the first section of the Administration bill, which declared "the right of *every* person to be protected against" housing discrimination "*throughout the Nation*."<sup>54</sup> A memo prepared for the House described the Administration's bill as applying to all possible categories of persons and dwellings without exception, thereby "imply[ing] the total elimination of discrimination in housing."<sup>55</sup>

The changes made by the House Judiciary Committee to the Administration's proposal narrowed the bill's substantive coverage in two significant ways, although it generally left the language of the key substantive provisions intact.<sup>56</sup> The Committee limited those liable under the FHA to real estate professionals and other persons in the business of building, developing, buying, selling, renting, or

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53. With respect to the employment discrimination law, see 42 U.S.C. § 2000e-1(a), the religious organization exemption; § 2000e-(b)(2), exempting private clubs from the definition of an "employer"; § 2000e(b), delineating that only employers with fifteen or more employees are covered; and § 2000e-2(e)(2), allowing religious schools to hire members of that religion. With respect to the public accommodations law, see 42 U.S.C. § 2000a-(e), exempting private clubs and any "other establishment not in fact open to the public," which also had the effect of exempting most religious organizations, and 42 U.S.C. § 2000a-(b)(1), exempting lodging establishments with not more than five units and in which the proprietor resides.

The third antidiscrimination law within the 1964 Civil Rights Act, Title VI, did not explicitly provide for any exemptions, but by its terms only applied to those programs or activities "receiving Federal financial assistance." 42 U.S.C. § 2000d (2001).

54. The full version of this "Policy" section read: "It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use and occupancy of housing throughout the Nation." 112 CONG. REC. 9396 (1966). The version of this "Policy" section that was ultimately enacted as § 3601 reflects the addition of some exemptions by eliminating the former phrase and by adding further limiting language. *Infra* note 69.

55. 112 CONG. REC. 18,117 (1966) (Legislative Reference Service, Library of Congress, "Analysis of the Open Housing Provisions of the Administration's Proposed 'Civil Rights Act of 1966' as Amended by the House of Representative's Committee on the Judiciary").

56. With respect to subsection (c) of the key substantive provision, the Committee made two changes: it added "make" (and "made") to the verbs "print or publish" (and "printed or published"), a change that was made a part of this provision from then on, and it added "oral or written" before the words "notice, statement, or advertisement," a change that was ultimately dropped. 112 CONG. REC. 18,112 (1966).

leasing housing,<sup>57</sup> thereby excluding homeowners and other non-professionals from coverage. The House Judiciary Committee's version also added separate exemptions for religious organizations, private clubs, and owners of "Mrs. Murphy"-type structures. These exemptions, with some modifications, ultimately became part of the FHA.<sup>58</sup> Indeed, the Committee proposal called for these exemptions to apply to *all* of the practices banned by the bill, including the prohibition against discriminatory ads, notices, and statements in subsection (c). Before passage, some additional amendments were added in the House floor debates, but the basic structure of the Judicial Committee proposal was maintained.<sup>59</sup>

Senator Mondale's 1967 proposal, Senate Bill 1358, carried forward the House-passed bill's substantive provisions, including subsection (c).<sup>60</sup> Mondale, however, sought a middle ground between

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57. The lead-in phrase in section 403(a) of this version of House Bill 14765, which was passed by the House of Representatives on August 9, 1966, read as follows: "It shall be unlawful for any person who is a real estate broker, agent, or salesman, or employee or agent of any real estate broker, agent, or salesman, or any other person in the business of building, developing, selling, renting, or leasing dwellings, or any employee or agent of any such person . . . ." 112 CONG. REC. 18,112 (1966).

58. 112 CONG. REC. 18,112 (1966) (setting forth the relevant portions of the proposed fair housing title of House Bill 14765, including § 403(b) (the "Mrs. Murphy" exemption) and § 403(c) (the religious organization and private club exemptions), which was ultimately passed by the House of Representatives on August 9, 1966). The wording of all three of these exemptions was changed somewhat before the FHA was enacted in 1968. *Supra* note 30; *infra* note 76 (regarding the religious organization and private club exemptions). With respect to the "Mrs. Murphy" exemption, the Judiciary Committee's version, which later evolved into the current "Mrs. Murphy" and single-family house exemptions of § 3603(b), *supra* note 10, provided that:

Nothing in this section shall apply to an owner with respect to the sale, lease, or rental by him of a portion of a building or structure which contains living quarters occupied or intended to be occupied by no more than four families living independently of each other if such owner actually occupies one of such living quarters as his residence.

112 CONG. REC. 18,112 (1966).

59. Amendments dealing with substantive coverage that were made on the House floor resulted in the addition of a subsection banning "blockbusting," *supra* note 50 and accompanying text, and the addition of another basis of discrimination—"number of children or the age of such children"—to all of the substantive prohibitions, including subsection (c). 112 CONG. REC. 18,193-94 (1966). The latter addition was ultimately dropped before passage in 1968, and children-based discrimination was not made illegal until the 1988 amendments to the FHA. *Supra* note 21 and accompanying text.

60. Senate Bill 1358 is printed in 1967 *Banking Hearings*, *supra* note 39, at 438-59. With respect to subsection (c) of the key substantive provision, Senate Bill 1358 was virtually identical to the House-passed version with two changes: the senate bill dropped "number of children or the age of such children" as an additional illegal basis of discrimination and deleted "lease" from all of the subsections of this provision, thus limiting the prohibitions to discrimination in "sales" and "rentals." At the same

the Johnson Administration's all-inclusive coverage and the House's wide range of exemptions. Senate Bill 1358's main section identifying prohibited practices—what was to become § 3604<sup>61</sup>—was to apply to all potential defendants, but would go into effect in stages, with a delay of one year for owner-occupied dwellings and those with less than five units.<sup>62</sup> Senate Bill 1358 also exempted religious organizations, but not private clubs.<sup>63</sup>

Hearings were held on Senate Bill 1358 in August 1967,<sup>64</sup> but no further action was taken on the bill. In early 1968, however, when the Senate debated a different civil rights bill (House Bill 2516), Senators Mondale and Brooke moved to amend that bill by adding a fair housing title.<sup>65</sup> The Mondale-Brooke proposal was identical to Senate Bill 1358 in all key respects but one: the proposal added the House-passed version of the "Mrs. Murphy" exemption.<sup>66</sup> This meant that, as was true with the House-passed version of the bill, owners of "Mrs. Murphy" units would be exempt from *all* of the prohibitions of what was to become § 3604, including subsection (c). As with Senate Bill 1358, the Mondale-Brooke amendment covered private clubs, but not religious organizations.

The Mondale-Brooke proposal was withdrawn in favor of a compromise fair housing amendment offered by Senator Dirksen. The

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time, the Mondale bill added a definition of "to rent" that included "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant" which ultimately was enacted as § 3602(d). With this broad definition of "rent," Senate Bill 1358's deletion of "lease" from the substantive prohibitions served only to simplify the phrasing of these provisions, without narrowing their coverage.

61. The substantive provisions of Senate Bill 1358 were virtually identical to those enacted in the FHA: a main section with five subsections prohibited discrimination in refusals to deal; terms and conditions; ads, notices, and statements; misrepresentation of availability; and blockbusting; separate sections banned discrimination in home loans, brokers' organizations, and interference with fair housing rights. *Supra* notes 49-50 and accompanying text.

62. Senate Bill 1358's section 3 provided for coverage of federally assisted dwellings immediately, added non-owner-occupied and over-five unit dwellings by the end of the first year after passage, and covered "all dwellings" by the end of the second year after passage. This phase-in schedule applied to the prohibitions in the main substantive section, but not those in the section banning interference with fair housing rights (which was to go into effect immediately) or to the sections outlawing discrimination in home loans and brokers' organizations (which were to go into effect at the end of the first year after passage). *1967 Banking Hearings, supra* note 39, at 440-42.

63. S. 1358 § 8 (printed in *1967 Banking Hearings, supra* note 39, at 444).

64. *Supra* note 39.

65. *Supra* note 41 and accompanying text.

66. See section 4(f) of the Mondale-Brook proposal, which is set forth at 114 CONG. REC. 2270 (1968), and which is identical to the House-passed version quoted and described *supra* note 57.

Dirksen proposal<sup>67</sup> kept the religious organization exemption and substantive prohibitions of the Mondale-Brooke amendment intact,<sup>68</sup> but significantly changed the "Mrs. Murphy" exemption.<sup>69</sup> This exemption was divided into two parts: one covering owner-occupied dwellings with four or fewer families (which continued to be called the "Mrs. Murphy" exemption)<sup>70</sup>, and the other covering single-family houses sold or rented by their owner-occupants without the use of a real estate agent or discriminatory advertising.<sup>71</sup> Senator Dirksen's proposal also replaced the Mondale-Brooke

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67. *Supra* note 42.

68. The Dirksen proposal did contain slightly different language in subsection (c) of the main substantive provision, dropping the phrase "oral or written" before the words "notice, statement, or advertisement," 114 CONG. REC. 4572 (1968), and thereby returning to the language of the original Johnson Administration proposal that was amended by the House Judiciary Committee to include "oral or written." *Supra* note 56.

69. The other key change made by the Dirksen compromise was to limit HUD's enforcement powers, which had included "cease and desist" orders in the Mondale-Brooke amendment. The Dirksen compromise limited HUD's enforcement powers to "informal methods of conference, conciliation, and persuasion." § 210(a), *reprinted in* 114 CONG. REC. 4572 (1968) (later codified as 42 U.S.C. § 3610(a) (1969)).

One other change made by Senator Dirksen was to shorten the policy statement in the bill's first section to provide that: "It is the policy of the United States to provide for fair housing throughout the United States." 114 CONG. REC. 4571 (1968). The Mondale-Brooke policy statement read "It is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and occupancy of housing throughout the United States." The Dirksen version was ultimately enacted, after being amended on the Senate floor to include the phrase "within constitutional limitations." § 201, *reprinted in* 114 CONG. REC. 4571 (1968) (later codified as 42 U.S.C. § 3601, after being amended at 114 CONG. REC. 4985-86 (1968)).

70. *E.g.*, 114 CONG. REC. 4907 (Senate); *id.* at 9612 (House).

71. 114 CONG. REC. 4571 (1968). In language that was ultimately enacted, Senator Dirksen's single-family-house exemption was to be disallowed if the house involved was sold or rented by any real estate professional or with "the publication, posting or mailing, after notice, of any advertisement or written notice in violation of [§ 3604(c)]." This reference to § 3604(c) within what became the single-family-house exemption in § 3603(b)(1) accompanied the statement that begins § 3603(b), which provided that "[n]othing in § 3604 of this title (other than subsection (c)) shall apply to" units covered by the "Mrs. Murphy" and single-family-house exemptions. The additional reference to § 3604(c) within the single-family-house exemption is limited to "any advertisement or written notice" that violates § 3604(c), which means that use of such an advertisement or notice would subject the house owner to liability not only under § 3604(c), but also under the other subsections of § 3604. On the other hand, because discriminatory oral notices and statements are not included in this part of the single-family-house exemption (even though they are also covered by § 3604(c)), a house owner who employs such discriminatory notices and statements would presumably not thereby lose his § 3603(b)(1) exemption and would therefore be subject to liability only under § 3604(c) and not also the other subsections of § 3604. While this additional "partial" incorporation of § 3604(c)-banned practices within the single-family-house exemption may cause some confusion, *see, e.g., supra* note 46, it rein-



phase-outs with a single specified date for coverage of all private, non-exempt dwellings<sup>72</sup>—a compromise between the House-passed version’s total exemption of all private owners and the Mondale-Brooke proposal to cover such owners, albeit with a one-year delay. The Dirksen proposal also changed the placement of the “Mrs. Murphy” and single-family house exemptions and added the crucial language exempting § 3604(c) from these exemptions.<sup>73</sup> Thus, while the House-version and the Mondale-Brooke proposal had placed these exemptions within the key substantive section and had provided that “[n]othing in this section shall apply” to such dwellings, the Dirksen proposal put them in a separate section—what would become § 3603(b)—and provided a lead-in phrase that made these exemptions apply to all of §3604’s prohibitions except subsection (c).<sup>74</sup>

Senator Dirksen gave no explanation for these changes.<sup>75</sup> In subsequent Senate floor debates, the substantive coverage of the Dirksen proposal was preserved with only minor amendments.<sup>76</sup> With these modest changes, the Senate and the House passed the Dirksen compromise, and the FHA became law.

This description of the evolution of the FHA provides some focus for addressing two questions at the heart of this Article: (1) why did Congress include “statements” as well as ads and notices within the prohibited practices outlawed by § 3604(c)? and (2) why

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forces the notion that Congress clearly intended to limit the opportunity of otherwise exempt housing providers to engage in the practices condemned by § 3604(c).

72. §§ 203(a)(2), 204, 205, 206 (specifying “[a]fter December 31, 1968” for such coverage), *reprinted in* 114 CONG. REC. 4571-72 (later codified as 42 U.S.C. §§ 3603(a)(2), 3604, 3605, 3606).

73. 114 CONG. REC. 4571 (1968).

74. *Id.*

75. *Id.* at 4574 (remarks of Sen. Dirksen).

76. For example, the single-family-house exemption, which in the Dirksen proposal applied only to a house where the owner resided, was broadened to include a second and third house owned by that individual. *Id.* at 5638-44 (amendment by Senator Byrd). Other efforts to expand this exemption were defeated. *Id.* at 4965-77 (defeating a proposed amendment by Senator Byrd to exempt private owners of single-family dwellings and real estate brokers of such dwellings who act in accordance with the owner’s instructions); *id.* at 5214-22 (defeating a proposed amendment by Senator Baker to exempt a homeowner who employed a real estate agent so long as he did not instruct the agent to discriminate). A new version of the private club exemption, somewhat more restrictive than the one passed by the House in 1966, was also added, as was an amendment to make clear that private suits need not satisfy any particular jurisdictional amount. *Id.* at 5526-30. In addition, the introductory “Policy” statement was amended to include the phrase “within constitutional limits” as a limitation on the United States’ policy of providing “for fair housing throughout the United States.” *Id.* at 4985-86; *see also id.* at 5514-25 (other minor amendments).

did Congress make this provision applicable to dwellings covered by the "Mrs. Murphy" and single-family-house exemptions? With respect to the first question, the key language of § 3604(c) originated in the Johnson Administration proposal; with respect to the second question, Senator Dirksen's proposal is crucial.

### 3. *Source and Evolution of § 3604(c)'s Language*

While it is clear that the key language of § 3604(c), including its coverage of discriminatory "statements," first appeared in the original proposal by President Johnson, it is not clear *why* this language was included in the Administration's fair housing bill. None of the Administration's explanations of this proposal focus on the specific purpose or language of what was to become § 3604(c).<sup>77</sup>

Despite the lack of direct evidence concerning the rationale for the language used in the Administration's fair housing proposal, it is likely that the source for much of this language was the employment discrimination law Congress enacted two years earlier as Title VII of the 1964 Civil Rights Act.<sup>78</sup> Indeed, many of the substantive provisions of the Administration's fair housing proposal, including its prohibition against discriminatory ads, notices, and statements, closely track the language adopted in Title VII,<sup>79</sup> and to the extent

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77. *E.g.*, 112 CONG. REC. 9399 (1966) (Attorney General's explanation of the bill includes only general statements about coverage and no specific reference to the prohibition against discriminatory ads, notices, and statements).

78. 42 U.S.C. § 2000e to e-16c. The structure of and language used in the other two antidiscrimination laws in the 1964 Civil Rights Act—Title II ("Public Accommodations") and Title VI ("Federally Assisted Programs")—generally do not parallel those of the Administration's fair housing proposal. For example, unlike Title VII and the fair housing proposal, which outlaw a series of enumerated practices if undertaken because of race or other prohibited grounds, Title II simply uses one sentence to declare that "[a]ll persons shall be entitled to the full and equal enjoyment" of places of public accommodations, 42 U.S.C. § 2000a-(a), and Title VI provides a similarly cryptic guarantee that "[n]o person in the United States shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d. As ultimately enacted, the FHA contained certain exemptions that parallel some of those in Title II. *Compare id.* § 2000a(e) & (b)(1) (exempting from Title II, respectively, private clubs and any lodging establishment which contains "not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence") with *id.* §§ 3607(a), 3603(b)(2) (containing the FHA's private club and "Mrs. Murphy" exemptions). These similarities, however, were not a part of the original fair housing bill proposed by the Johnson Administration. Furthermore, neither Title II nor Title VI contains any provision comparable to § 3604(c) that prohibits discriminatory advertisements, notices, and statements.

79. In addition to § 3604(c), *infra* notes 81-82 and accompanying text, some other obvious parallels exist. For example, Title VII's key substantive prohibition makes it unlawful for an employer both to "refuse to hire or to discharge" and "otherwise to

these similarities were maintained in the enacted version of the FHA, courts have generally found it appropriate to interpret these provisions consistently with their counterparts in Title VII.<sup>80</sup> Specifically, Title VII made it unlawful for employers:

to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer [or other entity covered by the statute], or relating to any classification or referral for employment by [such entity] . . . indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination is a bona fide occupational qualification for employment.<sup>81</sup>

The Johnson Administration's fair housing proposal—with additions to Title VII in italics and deletions in brackets—made it unlawful for anyone:

To print or publish or cause to be printed or published any notice, *statement*, or advertisement *with respect to the sale, rental, or lease of a dwelling that indicates* [indicating] any preference, limitation, [specification,] or discrimination based on race, color, religion, [sex,] or national origin, *or any intention to make any such preference, limitation, or discrimination* [except a BFOQ notice and advertisement].

With obvious substantive differences stripped away, the language of the fair housing provision is quite similar to that used in Title VII. There are some key differences, however, and they tend to broaden the fair housing provision. The most significant difference is that the Johnson Administration's fair housing proposal went beyond Title VII's prohibition of discriminatory notices and advertisements and banned discriminatory statements as well.<sup>82</sup>

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discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), practices that roughly correspond to the FHA's prohibition of discriminatory refusals to deal and discriminatory terms and conditions in the first two subsections of § 3604. Title VII also prohibits retaliation against those who have exercised their rights under the employment statute, *id.* § 2000e-3(a), a provision somewhat similar to § 3617's protections against coercion and interference with fair housing enforcement. In addition, Title VII's exemptions for religious organizations, private clubs, and small employers (respectively, *id.* §§ 2000e-1(a), 2000e(b)(2) & 2000e(b)) are reflected in similar exemptions in the FHA, *id.* §§ 3607(a), 3603(b).

80. SCHWEMM, *supra* note 15, § 7:4, n.4.

81. 42 U.S.C. § 2000e-3(b).

82. There are three other differences, two of which are discussed in the text accompanying notes 87-88 and 95-96. In addition, the fair housing provision drops the word "specification" from the list of prohibited indicators, leaving only "preference,

For a number of reasons, this addition must be seen as an intentional effort to add substantive coverage to the fair housing provision. First and foremost is the basic tenet of statutory construction requiring that each individual word be accorded some meaning.<sup>83</sup> The application of this tenet is appropriate here, particularly because the term "statement" has a separate and independent meaning beyond what Title VII was intended to cover by banning discriminatory "notices" and "advertisements."<sup>84</sup> The use of only these two words in the earlier statute shows that it focuses exclusively on publicly disseminated announcements of jobs, while the fair housing proposal's addition of the word "statement" suggests concerns going beyond public communications.<sup>85</sup>

A contrary interpretation—that the word "statement" was simply included in an excess of caution to make sure all forms of housing notices and ads would be covered—is belied by the provision's

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limitation, or discrimination." The lack of this word in the FHA or its inclusion in Title VII has never proved significant in any reported case under either statute.

83. *E.g.*, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697-98 (1995).

84. The most prominent American dictionary available at the time of the enactment of the 1968 FHA gave as the principal definition of "statement" the "act or process of stating orally or on paper" with the verb to "state" being defined as to "express the particulars of esp. in words." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2228-29 (1966).

85. Some legislative history suggests § 3604(c) was only intended to be limited to statements made to the public. Senator Ervin, an opponent of the bill, regularly argued that § 3604(c)'s use of the word "statement" made this provision so broad it would apply even to statements of preference made by a housing supplier to his own family members. The bill's supporters responded to this argument by claiming this language was only intended to apply to statements made to members of the public. *E.g.*, 1967 *Judiciary Hearings*, *supra* note 39, at 233 (containing Ervin's exchange with William L. Taylor (described *infra* note 91)); 1967 *Judiciary Hearings*, *supra* note 39, at 123-25 (containing Ervin's exchange with George Higgins, Gayraud Wilmore, and Marvin Braiterman in which Dr. Wilmore opined that coverage would extend only to statements of preference in the "public function" of selling or renting housing; Monsignor Higgins noted the law was legitimately concerned with those who made discriminatory stipulations in "a public notice or statement"; and Mr. Braiterman characterized Ervin's suggestion that § 3604(c) might apply to "an oral statement a man may make to his wife" as "a ludicrous construction of the objective of the proposed policy of this law"); 1966 *Hearings*, *supra* note 36, at 971-72 (giving Ervin's exchange with Justice Musmanno of the Pennsylvania Supreme Court in which the latter suggested that § 3604(c) would apply when a "person announces to the world that he does have prejudices"); *see also id.* at 1190 (Attorney General Katzenbach opining that § 3604(c) could ban discriminatory statements without raising First Amendment problems because coverage would extend only to situations where "it may take on the coloration of a public statement . . . designed to have some effect on the sale").

subsequent history.<sup>86</sup> When the House focused on this provision later in 1966, it added the verbs “make/made” to the introductory phrase—so that it reads “[t]o *make*, print, or publish, or cause to be *made*, printed, or published”<sup>87</sup>—an addition that only seems necessary because “statement” is a concept independent of “notice” and “advertisement.” The House seemed to realize that, while a notice or advertisement could only be printed or published,<sup>88</sup> a “statement” could also be “made,” and that the addition of “statement” could only reach its full potential if a violation included the “making,” as well as the printing or publishing, of such a statement.

The 1966 House’s awareness that “statement” provided additional coverage beyond housing ads and notices is also reflected in its addition of the phrase “oral or written” before “notice, statement, or advertisement.”<sup>89</sup> While this phrase was ultimately deleted before passage,<sup>90</sup> its temporary presence in various versions of what became § 3604(c) heightened congressional awareness of the potential coverage provided by the word “statement.” In what may be the most focused part of the congressional history concerning this part of § 3604(c), Senator Ervin noted this provision was so broad that it would bar a housing provider from making “any statement orally in respect to the sale or rental of property that he prefers to sell or rent property to a man of his race, religion, or

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86. In addition to this history, it is worth noting that no court decision gave a narrow interpretation of the words “notice” or “advertisement” under Title VII during the period between that statute’s enactment in 1964 and the addition of the word “statement” in the fair housing bills that led to § 3604(c). Indeed, no significant decision interpreting Title VII’s ban on discriminatory notices and ads in 42 U.S.C. § 2000e-3(b) was produced during this period, and even to this day, only a handful of major § 2000e-3(b) cases exist, most dealing with sex discrimination. *E.g.*, *Brush v. S. F. Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Cal. 1970), *aff’d*, 469 F.2d 89 (9th Cir. 1972) (holding that newspaper may not be sued under Title VII for carrying employment ads in separate “Men” and “Women” categories); *Hailes v. United Air Lines*, 464 F.2d 1006 (5th Cir. 1972) (upholding male’s claim based on airline’s ad for “stewardesses” in “Help Wanted–Female” column). *See generally* LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 12.02, at 12-9 (2d ed. 2001) (“Challenges to discriminatory advertisements or notices by employers are all but absent from modern case law.”).

87. *Supra* note 56.

88. *See infra* note 97 and accompanying text (discussing the subsequently adopted single-family-house exemption that is lost if the subject sale or rental involves the “publication, posting or mailing” of any advertisement or written notice in violation of § 3604(c)).

89. *Supra* note 56.

90. *Supra* note 68; *see also* 114 CONG. REC. 9612 (1968) (House staff memorandum noting with reference to § 3604(c)’s prohibitions of discriminatory statements that such “a ‘statement’ can be oral” as well as written).

national origin in preference to that of a man of another race or another religion or another national origin."<sup>91</sup>

Additional evidence of Congress' intent in adding the word "statement" to § 3604(c) can be found in the 1967 Age Discrimination in Employment Act ("ADEA").<sup>92</sup> The ADEA bans many of the same employment practices condemned by Title VII if engaged in because of age.<sup>93</sup> In language virtually identical to that of Title VII, the ADEA makes it unlawful for an employer, labor organization, or employment agency "to print or publish, or cause to be printed or published, any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination based on age."<sup>94</sup> Thus, in the same time period that Congress changed § 3604(c) to include the word "statement," the "statement"-supporting verbs "make" and "made," and the "statement"-modifying phrase "oral or written," it chose not to make similar additions to a different civil rights statute it felt was more akin to, and should remain verbally consistent with, Title VII.

Apart from the addition of "statement" and other "statement"-related words, there are two other ways § 3604(c) goes beyond its counterparts in Title VII and the ADEA. First, the Johnson Ad-

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91. 1967 *Judiciary Hearings*, *supra* note 39, at 233. This observation by Senator Ervin, an opponent of the bill, was made in a colloquy with William L. Taylor, staff director of the United States Commission on Civil Rights, concerning the meaning of the phrase "oral or written" in this provision:

*Senator Ervin*: I invite your attention to . . . subsection (c) of the section 404. . . . Doesn't it make it unlawful for a man to prefer to sell a house to a man of his own race, religion, or national origin than to others?

*Mr. Taylor*: I think it outlaws advertising that is racial in nature.

*Senator Ervin*: Look at those "or's." They are not "and's," they are "or's." As we lawyers say, they are in the disjunctive. Now leave out the ones that are immaterial. It makes it unlawful to make any oral statement with respect to the sale or rental of a dwelling that indicates any preference based on race, color, religion, or national origin or an intention to make any such preference. Doesn't that make it unlawful for a man to make any statement orally in respect to the sale or rental of property that he prefers to sell or rent property to a man of his race, religion, or national origin in preference to that of a man of another race or another religion or another national origin?

*Id.* Mr. Taylor did not answer this question directly, but rather opined later in the dialog that "I would say that a man cannot print a statement saying 'I prefer to sell my housing to a white man'" and "I think that [the section] is intended to refer to public statements." *Id.*; *cf. supra* note 90 (House memorandum pointing out that "statements" covered by § 3604(c) may be oral or written).

92. 29 U.S.C. §§ 623-634.

93. *Id.* § 623. "Age" for purposes of this statute is defined as "at least 40 years of age or older." *Id.* § 631(a).

94. *Id.* § 623(e).

ministration's fair housing proposal added a phrase absent from both Title VII and the ADEA, a phrase making clear the FHA's prohibitions extend to ads, statements, and notices indicating "any intention to make any such preference, limitation, or discrimination." While this additional phrase has not been important in § 3604(c) litigation,<sup>95</sup> its acceptance by Congress shows a desire to make this provision's prohibitions even broader than those in Title VII and the ADEA. A second difference is that Title VII and ADEA coverage is limited to employers, unions, and certain other entities, whereas § 3604(c) makes it unlawful for *anyone* to engage in housing discrimination. One example of the significance of this difference is that newspapers and other media are covered by § 3604(c), but not necessarily by Title VII and the ADEA.<sup>96</sup> While this second difference does not relate to the substantive practices prohibited by the two provisions, it shows once again Congress' desire to make the fair housing provision broader than its Title VII and ADEA counterparts.

Thus, while Congress rarely discussed the meaning of the language of what was to become § 3604(c), there is a good deal of evidence it was aware of the implications of the broad language it chose to use and intended this language to have its full and natural meaning. The same may also be said of the Dirksen proposal's determination to have § 3604(c) apply even to otherwise exempt dwellings; that is, while virtually nothing was said about *why* this was done, it is clear that Congress was fully aware of its import.<sup>97</sup>

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95. No reported case has ever held that the "intention to make" phrase outlawed a statement that did not also violate § 3604(c)'s prohibition of statements "indicat[ing] any preference, limitation, or discrimination." *But see* case discussed *infra* note 283 (statement held to violate § 3604(c)'s "indicat[ing] any preference" provision even if it did not also violate this section's "intention to make" provision).

96. *E.g.*, *United States v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972) (holding that § 3604(c) applies to newspaper); *Brush v. S.F. Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Cal. 197) (holding that Title VII does not apply to newspapers), *aff'd*, 469 F.2d 89 (9th Cir. 1972); *see also* cases cited *infra* notes 132, 163, 413 (applying § 3604(c) to newspapers and other defendants not in the business of providing housing).

97. For example, during the House floor debates in 1968, then-Minority Leader Gerald Ford introduced a memorandum on the Senate-passed bill prepared by the House Judiciary Committee staff that, in discussing the "Mrs. Murphy" and single-family-house exemptions, stated that "it is clear that regardless of circumstances, no one can 'make . . . any notice, statement, or advertisement' that discriminates [citing § 3604(c)]. That applies to *all* dwellings."114 CONG. REC. 9612 (1968); *see also infra* note 127. The closest thing to a comparable expression of awareness in the Senate floor debates appears to be the introduction by Senator Kuchel on behalf of Senator Dirksen of an analysis of Dirksen's proposed bill prepared by the Justice Department, which described § 3604(c) and its interplay with the single-family-house exemption of

Still, the fact remains that the FHA's legislative history is frustratingly silent about the *reasons* for § 3604(c)'s ban on discriminatory statements and its application to otherwise exempt dwellings. Exploration of these reasons must generally await the review of judicial interpretations of § 3604(c) in Part II.

Before § 3604(c) case law is explored, however, one additional part of the FHA's legislative history is worth noting. That part, described in the next section, suggests Congress may have wanted § 3604(c) to go beyond the provisions of Title VII and the ADEA because the FHA was intended to have a broader purpose than the employment discrimination statutes. While eliminating discrimination was a fundamental goal shared by all these statutes, the FHA was also intended to promote integrated housing patterns, a goal Title VII and the ADEA did not espouse.

### C. The FHA's Goal of Integration

Racial integration was important to the Congress that passed the 1968 Fair Housing Act. Backers of the FHA in both the Senate and the House repeatedly argued that the new law should not only expand housing choices for individual minorities, but also foster racial integration for the benefit of all Americans.

For example, Senator Mondale, the FHA's principal sponsor, decried the prospect that "we are going to live separately in white ghettos and Negro ghettos."<sup>98</sup> The FHA's purpose, he said, was to replace ghettos with "truly integrated and balanced living patterns."<sup>99</sup> Congressman Cellar, the Chairman of the House Judiciary Committee, spoke of the need to eliminate the "blight of segregated housing and the pale of the ghetto,"<sup>100</sup> and Congressman Ryan saw the new law as a way to help "achieve the aim of an integrated society."<sup>101</sup> Aware of the National Commission on Civil Disorders' conclusion that the nation was dividing into two racially separate societies,<sup>102</sup> Congress intended the FHA to remedy segregated housing patterns and their attendant problems—segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and African-Americans.<sup>103</sup> The law's intended

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§ 3603(b)(1). See 114 CONG. REC. 4907 (1968) (described in greater detail *supra* note 46).

98. 114 CONG. REC. 2276 (1968).

99. *Id.* at 3422.

100. *Id.* at 9559.

101. *Id.* at 9591.

102. *Supra* text accompanying note 15.

103. 114 CONG. REC. 2275 (1968) (remarks of Senator Mondale).



beneficiaries were not only African-Americans and other minorities, but, as Senator Javits said, "the whole community."<sup>104</sup>

The Supreme Court's first review of the FHA in 1972, *Trafficante v. Metropolitan Life Insurance Co.*,<sup>105</sup> cited such comments in concluding that residential integration was a major goal of the statute.<sup>106</sup> Thereafter, courts regularly cited this legislative history, as well as the *Trafficante* opinion, to conclude that the FHA is intended not only to advance minority housing rights but also to achieve integration.<sup>107</sup> In this respect, the congressional concerns underlying the FHA were broader than those of Title VII, which is intended to expand minority employment opportunities and lead to an integrated work force, but does not place a strong value on integration *per se*.<sup>108</sup> As discussed later, the congressional desire to promote integrated living patterns through the FHA is an important basis for the proper interpretation of § 3604(c) in discriminatory statement cases.<sup>109</sup>

## II. JUDICIAL TREATMENT OF § 3604(c)

### A. Elements of a § 3604(c) Violation

A § 3604(c) violation requires a showing of four elements. First, a defendant must engage in one of the acts covered by the provision; he must "make, print, or publish, or cause to be made,

104. *Id.* at 2706.

105. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

106. *Id.* at 210-11 (1972). The *Trafficante* decision unanimously upheld the standing of white residents of a large apartment complex to complain about their landlord's racial discrimination against African-American applicants. *Id.* at 209. Other major conclusions about the FHA in the *Trafficante* decision include that the statute should be broadly construed, that Title VII decisions can be relied on in a proper case to interpret the FHA, and that HUD's views concerning the meaning of the FHA are entitled to great weight in construing the statute. *Id.* at 209-12. All of these *Trafficante* principles have continued to be important keys in interpreting the FHA. SCHWEMM, *supra* note 15, at ch. 7.

107. *E.g.*, *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977); 469 F. Supp. 836, 845 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980); *Barrick Realty, Inc. v. City of Gary, Ind.*, 491 F.2d 161, 164-65 (7th Cir. 1974); *Otero v. N. Y. City Hous. Auth.*, 484 F.2d 1122, 1134-35 (2d Cir. 1973); *see also* *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977) (recognizing that Congress, with the FHA, "made a strong national commitment to promote integrated housing" for the benefit of "both whites and blacks").

108. *E.g.*, *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1557-63 (3d Cir. 1996) (en banc).

109. *Infra* text accompanying notes 131, 173-76, 225. For example, courts have held that the FHA's discriminatory effect standard includes "perpetuation of segregation" claims as well as the "disparate impact" claims familiar under Title VII. SCHWEMM, *supra* note 15, § 10:7.

printed, or published" an offending notice, statement, or advertisement. Although anyone who performs one of these acts may be sued under § 3604(c),<sup>110</sup> two groups have been the principal targets of such claims: (1) persons engaged in the sale or rental of housing who make, print, or publish or cause others to make, print, or publish discriminatory notices, statements, or advertising; and (2) newspapers and other advertising media that make, print, or publish the offending materials of others.<sup>111</sup>

The second and third elements of a violation come from the phrases requiring that the defendant's action involve a "notice, statement, or advertisement" that is "with respect to the sale or rental of a dwelling." The definition of notice, statement, or advertisement has caused little difficulty in reported cases: no one has questioned the meaning of the word "advertisement,"<sup>112</sup> and, although a few cases have struggled over the meaning of the word "notice" and over whether oral as well as written "statements" are included, the decisions have invariably held that the particular communication involved was in fact covered by § 3604(c).<sup>113</sup> Indeed, the conclusion that oral as well as written statements are covered seems incontestable in light of the lack of limiting language in the statute itself;<sup>114</sup> the evolution of this language and other evidence in the legislative history of the FHA;<sup>115</sup> the natural meaning

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110. Unlike Title VII, which by its terms applies only to "employers" and certain other identified entities, 42 U.S.C. § 2000e-(2)-(3), the FHA simply declares certain practices, such as those identified in § 3604(c), to be unlawful, thereby implying that any person or entity engaging in such practices would be a proper defendant under the statute. This unlimited coverage of potential defendants resulted from changes made to earlier versions of the FHA, such as the Johnson Administration's proposal and the 1966 House-passed version, both of which specified the types of people and entities covered by the law's substantive provisions. *Supra* notes 53, 57 and accompanying text. For a further discussion of proper defendants in § 3604(c) cases, see *infra* Part IV.B.

111. *E.g.*, *Ragin v. Steiner, Clateman & Assoc.*, 714 F. Supp. 709 (S.D.N.Y. 1989) (advertising agency defendant); cases cited *infra* notes 124, 163, 413.

112. *E.g.*, cases cited *supra* note 111 and *infra* notes 155, 176.

113. *E.g.*, cases cited *infra* notes 183-84, 283-84 and text accompanying notes 214-18, 270.

114. Numerous decisions have held that the FHA is to be broadly construed. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972). See generally SCHWEMM, *supra* note 15, § 7:2.

115. *Supra* notes 86-91 and accompanying text.

of the word "statement",<sup>116</sup> and the subsequent HUD regulation interpreting this provision.<sup>117</sup>

In a number of § 3604(c) cases, however, courts have rejected liability because the defendant's statement was not made "with respect to the sale or rental of a dwelling."<sup>118</sup> This phrase means liability will not attach when, for example, a realtor simply expresses general opposition to fair housing principles, or a housing provider makes a "stray" racial remark not directly connected to a housing transaction.<sup>119</sup>

The final element of a § 3604(c) claim is that the defendant's notice, statement, or advertisement must "indicate[ a] preference, limitation, or discrimination" based on race or some other prohibited ground, or "an intention to make any such preference, limitation, or discrimination." The key word here, and one that has prompted a good deal of litigation, is "indicates." Courts consistently interpret this word to mean § 3604(c) is violated if the notice, statement, or advertisement indicates discrimination to an "ordinary reader" or "ordinary listener," regardless of whether the defendant has discriminatory intent.<sup>120</sup> This is an important distinction between § 3604(c) and the FHA's other substantive provisions, which generally outlaw certain practices only if they are undertaken "because of" race or some other prohibited factor, and therefore require a showing of discriminatory intent.<sup>121</sup> Thus,

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116. *Supra* note 84.

117. 24 C.F.R. § 100.75(b) ("The prohibitions in this section [§ 3604(c)] shall apply to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling."). In accordance with the doctrine established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984), HUD regulations interpreting the FHA are to be followed so long as they are "a permissible construction of the statute." Numerous FHA decisions have deferred to HUD's interpretive regulations pursuant to *Chevron*. *E.g.*, SCHWEMM, *supra* note 15, at § 7:4 n.17.

118. Cases cited *infra* notes 362, 489-90. Compare cases discussed *infra* notes 148, 493 with text accompanying notes 278-79, 280-84.

119. *Harris v. Itzhaki*, 183 F.3d 1043, 1055 (9th Cir. 1999) (no liability if discriminatory statement by landlord's agent is just a "stray" remark "unrelated to the decisional process [and therefore] insufficient to show discrimination"); *United States v. Northside Realty Assoc.*, 474 F.2d 1164, 1169-71 (5th Cir. 1973) (reversing liability finding because of the possibility it may have partially rested on the fact that defendant had stated his belief that the FHA was unconstitutional); see also cases discussed *infra* notes 146-47 and accompanying text.

120. *Infra* cases cited in notes 158-60.

121. 42 U.S.C. §§ 3604(a)-(f)(2), 3605, 3606. Under certain circumstances, a showing of discriminatory effect without a showing of illegal intent may establish a violation of these other provisions. *E.g.*, SCHWEMM, *supra* note 15, § 10:4. This is based on an interpretation of their "because of" language and not the fact that their triggering language is similar to § 3604(c)'s, which is unique in the FHA.

§ 3604(c) is essentially a “strict liability” statute: all that is required to establish liability is that the challenged notice, statement, or advertisement be made “with respect to the sale or rental of a dwelling” and “indicate” discrimination.<sup>122</sup>

With this background about § 3604(c), the remainder of Part II reviews § 3604(c) case law to further explore the congressional purposes underlying its ban of discriminatory statements and the provision’s application to otherwise exempt housing providers.

### B. Early Interpretations of § 3604(c): *Hunter* and *Mayers*

In 1972, two appellate decisions established the basic parameters for all future interpretation of § 3604(c).<sup>123</sup> In *United States v. Hunter*,<sup>124</sup> the Fourth Circuit ruled that a newspaper violated § 3604(c) when it published an ad for an apartment in a “white home” placed by a “Mrs. Murphy” landlord. The *Hunter* opinion remains one of the most important judicial statements about § 3604(c) in discriminatory advertising cases. The crucial points made in *Hunter* about § 3604(c), including that it applies when the underlying property is exempt from the other subsections of § 3604,<sup>125</sup> have never been seriously disputed in subsequent cases.<sup>126</sup>

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122. *HUD v. Roberts*, Fair Hous.–Fair Lending Rptr. ¶ 25,151, at 26,217 (HUD ALJ 2001); *HUD v. Dellipaoli*, Fair Hous.–Fair Lending Rptr. ¶ 25,127, at 26,077 (HUD ALJ 1997).

123. *United States v. Hunter*, 459 F.2d 205, 210-15 (4th Cir. 1972); *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc). Of lesser significance was a district court decision—*United States v. Gilman*, 341 F. Supp. 891 (S.D.N.Y. 1972)—that also dealt with § 3604(c) in 1972. In *Gilman*, the court determined that the managers of two apartment complexes in suburban New York had engaged in a pattern of discrimination against African-Americans in violation of various FHA provisions. Among the individual acts of discrimination was the statement by one of the defendants to a white tenant that she should send her friends over to see a vacant apartment but “to make sure her friends are whites,” which the court held violated § 3604(c). *Id.* at 896-97, 908. The only relief awarded in *Gilman* was an injunction permanently enjoining the defendants from discriminating against African-Americans in violation of the basic provisions of the FHA, including § 3604(c). *Id.* at 908.

124. *United States v. Hunter*, 459 F.2d 205, 210-15 (4th Cir. 1972).

125. *Id.* at 213-14.

126. This is also true for the other main points in *Hunter*: (1) that § 3604(c) applies to newspapers and other media that carry discriminatory advertising, even though someone else actually drafted and placed that advertising; (2) that the application of § 3604(c) to newspaper advertising does not violate the First Amendment’s guarantee of freedom of press; and (3) that whether a particular advertisement violates § 3604(c) is determined by how an ordinary reader would naturally interpret the ad, meaning implicit as well as explicit indications of discrimination are unlawful. *Id.* at 215. Appellate decisions assuming the correctness of the first point are cited in notes 163 and

The *Hunter* opinion's conclusion that § 3604(c) applies to owners of otherwise exempt dwellings was based simply on the plain meaning of the statutory language.<sup>127</sup> According to *Hunter*, the FHA's clarity on this point means that "[w]hile the owner or landlord of an exempted dwelling is free to indulge his discriminatory preferences in selling or renting that dwelling, [he does not have] a right to publicize his intent to discriminate."<sup>128</sup> The Fourth Circuit also found evidence in legislative debates that Congress knew of this exception to the exemptions.<sup>129</sup> The court suggested a reason for this special treatment of § 3604(c):

Widespread appearance of discriminatory advertisements in public or private media may reasonably be thought to have a harmful effect on the general aims of the Act: seeing large numbers of "white only" advertisements in one part of a city may deter non-whites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a non-discriminatory basis.<sup>130</sup>

Furthermore, according to *Hunter*, Congress was justified in applying § 3604(c) to a newspaper carrying a discriminatory ad because the negative effect of such ads would be magnified by their appearance in widely circulated newspapers and other mass media.<sup>131</sup>

Two months after *Hunter* was decided, the District of Columbia Circuit held in *Mayers v. Ridley*<sup>132</sup> that § 3604(c) prohibited the recording of deeds with racially restrictive covenants.<sup>133</sup> Speaking for six of the ten sitting judges in *Mayers*, Judges Wright and Wilkey

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413. The second and third points are discussed in further detail in Part IV.A.2 and the text accompanying notes 157 to 160.

127. *Hunter*, 459 F.2d at 213-14 ("The draftsmen of the Act could not have made more explicit their purpose to bar all discriminatory advertisements, even those printed or caused to be printed by persons who are permitted by § 3603(b) to discriminate in selling or renting."); *id.* at 210 ("Legislative intent is first to be gathered from the plain meaning of the words of the statute.").

128. *Id.* at 213.

129. *Id.* at 214 ("During the House debate on the Fair Housing Title, Representative Celler, a supporter of the bill, said: 'If one [otherwise exempted by § 3603(b)] advertised in a mass media communication like a newspaper using discriminatory material, then one would come within the purview of the fair housing title.'" (quoting 114 CONG. REC. 6490 (1968))).

130. *Id.*

131. *Id.* at 215.

132. *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc).

133. In reaching this conclusion, the D.C. Circuit held that § 3604(c) does what the Equal Protection Clause, as interpreted by the Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948), stopped short of doing: it outlaws the purely private use of racially restrictive covenants. *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc). *But see* cases cited *infra* note 137.

concluded that § 3604(c)'s prohibition on publishing discriminatory notices and statements with respect to the sale of a dwelling prevented the local recorder of deeds from filing racially restrictive covenants on future deeds.<sup>134</sup> *Mayers* established that § 3604(c) extends to notices and statements well beyond the realm of advertising.<sup>135</sup> The decision also reinforced *Hunter*'s view that § 3604(c) applies to dwellings otherwise exempt under § 3603(b).<sup>136</sup> Again, neither of these propositions has ever been seriously challenged.<sup>137</sup>

*Mayers* made one other important point. The case was brought as a class action by homeowners whose properties were burdened by racial covenants.<sup>138</sup> In upholding the plaintiffs' standing, the D.C. Circuit held that they were not only asserting the rights of others—such as would-be minority purchasers—to be free of such covenants, but that they had been harmed directly by these covenants. Even though the covenants were “a legal nullity,”<sup>139</sup> Judge Wright pointed out that they nevertheless might have a negative effect on the marketability of the white plaintiffs' homes:

A certain percentage of blacks no doubt refuse to buy property burdened with such recorded covenants either because they are

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134. *Mayers*, 465 F.2d at 632-35 (Wright, J., concurring), 648-54 (Wilkey, J., concurring). Two of the ten judges in *Mayers*—Judges Miller and Robb—concurred in the result that the recorder had acted illegally in accepting deeds with racially restrictive covenants without specifying that § 3604(c) was one of the bases for this conclusion. Judges Tamm and MacKinnon dissented, arguing that neither § 3604(c) nor the other legal theories put forth by the plaintiffs justified a ruling in their favor. *Id.* at 655-62.

135. *Id.* at 633 (Wright, J., concurring) (“Although the legislative history of this section is sparse, it indicates beyond doubt that, as the words themselves suggest, Congress intended to go beyond advertising to reach other sorts of ‘notices’ and ‘statements’ as well.”); *id.* at 649 (Wilkey, J., concurring) (“Turning to the words *notice*, *statement*, or *advertisement*, unless the words *notice* and *statement* are to be treated as surplusage, they must be interpreted to mean that the Fair Housing Act prohibits other types of communications besides advertisements.”).

136. Apart from the fact that *Mayers* applied § 3604(c) to the deeds of many dwellings that would be covered by the exemptions in § 3603(b), Judge Wright's opinion specifically quoted with approval *Hunter*'s conclusion that “[u]nlike other sections of the Fair Housing title, § 3604(c) does not provide any specific exemptions or designate the persons covered, but rather . . . applies on its face to ‘anyone’ printing or publishing illegal advertisements.” *Id.* at 633 (Wright, J., concurring) (quoting *Hunter*, 459 F.2d at 210).

137. Some subsequent decisions did question whether *Mayers* took § 3604(c) too far by applying it to a defendant not engaged in the sale or rental of a dwelling. *United States v. Univ. Oaks Civic Club*, 653 F. Supp. 1469, 1475-77 (S.D. Tex. 1987); *Woodward v. Bowers*, 630 F. Supp. 1205, 1206-10 (M.D. Pa. 1986). These decisions do not, however, question the applicability of § 3604(c) to notices and statements beyond the advertising context or to dwellings otherwise exempt from the FHA.

138. *Mayers*, 465 F.2d at 630.

139. *Id.* at 640 (Wright, J., concurring).

under misapprehension as to the legal effect of the covenants or because they do not want to go where they appear to be unwanted, whatever their legal rights. To the extent these blacks decline to bid for title to [plaintiffs'] property, the marketability of that property suffers.<sup>140</sup>

Thus, although the individual plaintiffs harmed by the § 3604(c) violation in *Mayers* were quite different from the supposed victims in *Hunter*, the problem identified by the two courts is essentially the same—the discouragement of minority prospects from seeking housing to which they are entitled.<sup>141</sup> *Mayers* also reinforced *Hunter*'s identification of a rationale for applying § 3604(c) in situations where the provision does not directly expand housing choice, and it went beyond *Hunter* by recognizing that persons other than minority home seekers, such as white home sellers, can be harmed by the particular type of discrimination outlawed by § 3604(c).

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140. *Id.* at 641. Judge Wilkey's opinion agreed, noting that

since the market for any such housing [burdened by an illegal notice or statement] is limited by the exclusion of any person who would be prevented from buying or renting by the mere publication of the discriminatory "notice, statement, or advertisement," homeowners such as [plaintiffs] who own property in connection with which such a "notice, statement, or advertisement" has been published have been "harmed" by such a limitation in the marketability of their homes. This is true whether such reluctance to buy or rent stems from "a misapprehension as to the legal effect" of the discriminatory language or simply a desire on the part of such person not to buy or rent where they appear to be unwanted.

*Id.* at 655 (Wilkey, J., concurring).

141. The specific manifestation of this problem identified by the two courts does vary: in *Hunter*, the discriminatory notice or statement, though "enforceable" by the owner of an exempt property, is problematic because it might deter minorities from searching for other housing from which they cannot be excluded; in *Mayers*, the discriminatory notice or statement is unenforceable but might quell minority interest in the housing encumbered by the illegal restriction. In both situations, § 3604(c) is useful not for directly expanding the amount of housing available to minorities, but for eliminating the "deterrence" effect of discriminatory pronouncements. As Judge Wilkey's opinion in *Mayers* put it:

[I]t is the premise of the [FHA] that a mere "notice, statement, or advertisement" indicating a racial preference . . . is *ipso facto* harmful. Since the purpose of the legislation is to prevent discrimination in housing, it must have been assumed by Congress that any such "notice, statement, or advertisement," merely by its publication, might have the effect of preventing some persons from buying or renting housing with regard to which any such discriminatory "notice" or "statement" had been made."

*Id.* at 654-55 (Winkey, J., concurring).

### C. Modern Cases Under § 3604(c)

#### 1. Post-1972 Period

For about fifteen years after *Hunter* and *Mayers*, litigation under § 3604(c) all but ceased. With respect to advertising, HUD issued a set of guidelines in 1972 that identified the types of housing ads that would raise problems under § 3604(c).<sup>142</sup> This guidance, along with the *Hunter* decision, sufficiently curtailed most blatant discriminatory advertising. Occasionally, a discriminatory ad was challenged in court,<sup>143</sup> but few cases went to trial and none resulted in a reported decision of major significance.<sup>144</sup>

Similarly, only a few § 3604(c) cases involving notices and statements were reported during this period.<sup>145</sup> One of the rare examples was *United States v. L & H Land Corp.*,<sup>146</sup> where a district court in 1976 held that statements made by a rental agent indicating African-Americans were not welcome in the defendant's complex violated § 3604(c). Another case was *Stewart v. Furton*,<sup>147</sup> a 1985 decision by the Sixth Circuit holding that a trailer park owner violated § 3604(c) by stating that he would not allow African-American tenants in his park. Neither of these decisions raised difficult issues with respect to the meaning of § 3604(c), because both involved non-exempt housing providers, and the illegal statements in both cases were tied to a discriminatory refusal to deal that also violated § 3604(a) or § 3604(b). The presence of a discriminatory transaction meant that the § 3604(c) "count" was a minor part of these cases: the courts could find against the defendants without deciding whether their § 3604(c) violations had any independent significance.<sup>148</sup>

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142. 37 Fed. Reg. 6700 (April 1, 1972) (publishing HUD's "Advertising Guidelines for Fair Housing"). In 1980, these guidelines were promulgated as a regulation. 45 Fed. Reg. 57,102-07 (Aug. 26, 1980) (promulgating 24 C.F.R. Part 109). In 1996, HUD "removed" this regulation, because it felt that such "nonbinding guidance" did not amount to regulatory requirements appropriate for codification in the Code of Federal Regulations. 61 Fed. Reg. 14,380 (April 1, 1996). However, HUD still views the guidance contained in that regulation as "very helpful." *Id.* at 14,378. The text of the now-removed version of 24 C.F.R. Part 109 is available at 54 Fed. Reg. 3308-10 (Jan. 23, 1989).

143. SCHWEMM, *supra* note 15, § 15:3 n.14.

144. SCHWEMM, *supra* note 15, § 15:3 n.15, § 15:6 nn.3, 4.

145. While claims based on § 3604(c) were rare during this period, numerous cases did include evidence of discriminatory statements that may well have violated this provision. *E.g.*, cases cited *infra* notes 326, 336-37, 342, 352, 354.

146. *United States v. L & H Land Corp.*, 407 F. Supp. 576, 580 (S.D. Fla. 1976).

147. *Stewart v. Furton*, 774 F.2d 706, 709 (6th Cir. 1985).

148. In *Stewart*, the Sixth Circuit recognized that the plaintiff, a white woman with a mixed-race child, could recover damages for the emotional distress the park owner's



With respect to exempt housing providers, the availability of § 3604(c) turned out to be of less practical importance than might have been expected. This was mainly due to the fact that, shortly after the FHA's enactment, the Supreme Court held that a second federal statute—the Civil Rights Act of 1866<sup>149</sup>—also prohibits racial discrimination in housing,<sup>150</sup> and this statute contains none of the exemptions found in the FHA.<sup>151</sup> Subsequent lower court decisions confirmed that a claim under the 1866 Act is not foreclosed by exemption from the FHA.<sup>152</sup> With the 1866 Act available as a basis for challenging discrimination by FHA-exempt landlords, minority victims of such discrimination rarely felt the need to add a

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statement caused her, noting that “plaintiff can assert damages for emotional distress based on this statement, since it related to a specific discriminatory transaction.” *Stewart v. Furton*, 774 F.2d 706, 710 (6th Cir. 1985). In so holding, however, the court did not distinguish between the emotional distress caused by the defendant's rejection of the plaintiff and that caused by his biased statement, suggesting, as many other decisions have done, that the plaintiff's recovery would have been the same regardless of the presence of a § 3604(c) violation. *E.g.*, cases described *infra* notes 180, 183, 342, 354. Furthermore, by tying its finding of a § 3604(c) violation to a specific discriminatory transaction, the Sixth Circuit was able to avoid what it referred to as the “pure speech issue”—and related First Amendment concerns—that the court felt would have been raised if the defendant's statement “had not related to a specific discriminatory and illegal transaction.” *Stewart*, 774 F.2d at 710 n.2. For a further discussion of whether § 3604(c) should be interpreted to cover biased statements unrelated to specific discriminatory transactions and whether such speech is protected under the First Amendment, see *infra*, respectively, Parts IV.A.1 and IV.A.2.

149. 42 U.S.C. §§ 1981-1982.

150. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Eventually, the Supreme Court extended the 1866 Act's definition of prohibited racial discrimination to include many forms of national origin and religious discrimination. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (holding that “Jews” are a race protected by the 1866 Act); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987) (holding that “Arabs” are a race protected by the 1866 Act). This meant that an FHA-exempt landlord who engaged in any of the four bases of discrimination condemned by the original FHA—race, color, religion, or national origin—might well be liable for this discrimination under the 1866 Act.

151. *Jones*, 392 U.S. at 415 (“§ 1982 [the 1866 Act] contains none of the exemptions that Congress included in the Civil Rights Act of 1968”). In addition, many state and local fair housing laws prohibit such discrimination and provide for narrower exemptions than the FHA. *Infra* notes 402-04 and accompanying text. The FHA specifically endorses state and local coverage extensions. 42 U.S.C. § 3615 (providing that nothing in the FHA “shall be construed to invalidate or limit any law of a State or political subdivision of a State . . . that grants, guarantees, or protects the same rights as are granted” by the FHA).

152. *E.g.*, *Bills v. Hodges*, 628 F.2d 844, 845 n.1 (4th Cir. 1980); *Morris v. Cizek*, 503 F.2d 1303, 1304 (7th Cir. 1974); *Johnson v. Zaremba*, 381 F. Supp. 165, 166 (N.D. Ill. 1973); see also cases cited *infra* note 153.

§ 3604(c) claim to their suits just because the defendants may have compounded their discrimination by publicizing the reason for it.<sup>153</sup>

Thus, no case during this period presented a § 3604(c) challenge to a discriminatory notice or statement where the § 3604(c) claim was the key to liability. The result was a dearth of focused judicial consideration of this provision; the understanding of its role as a weapon against housing discrimination remained much the same as it had in the early days of *Hunter* and *Mayers*.<sup>154</sup>

## 2. *The Human-Models Cases*

Two developments in the latter half of the 1980s prompted a renewed interest in § 3604(c). The first was a series of cases beginning in 1987 challenging the exclusive use of white human models in real estate ads.<sup>155</sup> The issue in these cases was whether the use of such models violates § 3604(c). The cases resulted in a number of important decisions defining the appropriate legal standards for evaluating this type of advertising. However, with three exceptions, these decisions did not stretch the understanding of § 3604(c)'s basic applicability to discriminatory advertising beyond what *Hunter* and the HUD guidelines had already established.<sup>156</sup>

The three exceptions were that: (1) the human-models decisions reinforced the view that § 3604(c) could be violated without a showing of the defendant's discriminatory intent, (2) minority victims of § 3604(c) violations could recover damages for intangible injuries such as emotional distress, and (3) an additional purpose of § 3604(c) was to educate housing providers and the general pub-

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153. See, e.g., *Lamb v. Sallee*, 417 F. Supp. 282, 285-86 (E.D. Ky. 1976) (only using discriminatory statements made by owner of FHA-exempt single-family house to prospective tenants as evidence of § 1982 violation and not as a basis for § 3604(c) claim); see also *Thronson v. Meisels*, 800 F.2d 136, 138-40 (7th Cir. 1986) (using discriminatory statements made by landlord who may be exempt from the FHA only as proof to secure full relief under § 1982 without the addition of § 3604(c) claim); *Laudon v. Loos*, 694 F. Supp. 253, 254-55 (E.D. Mich. 1988) (same).

154. *Supra* Part II.B.

155. The principal reported decisions spanned a ten-year period, beginning in 1987 with *Saunders v. General Service Corp.*, 649 F. Supp. 1042 (E.D. Va. 1987), and ending in 1996 with *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996). Other major decisions included *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993); *HOME v. Cincinnati Enquirer*, 943 F.2d 644 (6th Cir. 1991); and *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990). Law review articles included 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 (1994), and Michael E. Rosman, *Ambiguity and the First Amendment: Some Thoughts on All-White Advertising*, 61 TENN. L. REV. 289, 290-91 (1993) as well as articles cited *id.* at 290-91 nn.3 & 5.

156. *Supra* notes 124-31, 142 and accompanying text.

lic about the need for nondiscrimination in housing. With respect to the first point, the courts noted that while the FHA's other substantive prohibitions outlaw behavior undertaken "because of" race or some other prohibited ground,<sup>157</sup> § 3604(c) does not focus on the reason for the prohibited behavior, but rather bans the making of any housing-related ad, notice, or statement that "indicates" discrimination, regardless of the actor's reason for communicating in this way. The key word—"indicates"—means that § 3604(c) is violated if an ad, notice, or statement indicates discrimination to an "ordinary reader" or "ordinary listener."<sup>158</sup> This understanding of § 3604(c)—that it does not require a showing of discriminatory intent on the part of the defendant—is suggested in the *Hunter* opinion,<sup>159</sup> but was not well developed until subsequent appellate decisions, resulting from the human-models cases, dealt with this provision.<sup>160</sup>

The second key determination made in the human-models cases was that minority home seekers who observe and are offended by illegal ads can recover damages for emotional distress and other intangible injuries. By the latter half of the 1980s, when these cases began, it was well established that victims of other types of FHA violations could receive awards for intangible injuries,<sup>161</sup> but no such award had ever been made in a § 3604(c) case.<sup>162</sup> This changed with the human-models decisions.

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157. *Supra* note 121 and accompanying text.

158. *E.g.*, *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 266-67 (7th Cir. 1996); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905-07 (2d Cir. 1993); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991); *HOME v. Cincinnati Enquirer*, 943 F.2d 644, 646 (6th Cir. 1991); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24 (D.C. Cir. 1990); *Fenwick-Schafer v. Sterling Homes Corp.*, 774 F. Supp. 361, 364 (D. Md. 1991).

159. *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972).

160. Following the lead of the human-models cases, courts in other types of § 3604(c) cases eventually adopted this understanding of the provision as well. *E.g.*, *Jancik v. HUD*, 44 F.3d 553, 556 (7th Cir. 1995); *SCHWEMM*, *supra* note 15, § 15:8 n.2 (citing supportive cases).

It should be noted that this interpretation of § 3604(c), though important in many contexts, is often not significant in situations at the heart of this Article: situations involving housing providers making blatant, and therefore clearly intentional, discriminatory statements. *But see* cases discussed *infra* text accompanying notes 200-02, 267-70, 281-83.

161. *E.g.*, *SCHWEMM*, *supra* note 15, § 25:5 nn.24 & 25 (citing relevant cases).

162. *But see* case discussed *supra* note 148. Despite the dearth of early damage awards for § 3604(c) violations, the FHA's legislative history includes a number of references to the potential for emotional injury resulting from discriminatory statements directed at minority home seekers. *E.g.*, 1967 *Banking Hearings*, *supra* note 39, at 120 (statement of Roy Wilkins, Executive Director of the NAACP and Chairman of the Leadership Conference on Civil Rights: "There is nothing more humiliating to a father and a mother and two small children when he . . . wants to purchase a home,

For example, in 1991, in *Ragin v. The New York Times*,<sup>163</sup> the Second Circuit noted that a plaintiff in a human-models case under § 3604(c) “may establish a prima facie case for such damages simply by oral testimony that he or she is a newspaper reader of a race different from the models used and was substantially insulted and distressed by a certain ad.”<sup>164</sup> Two years later, the same court affirmed damage awards of \$2,500 to each of four African-American plaintiffs for emotional distress in a human-models case.<sup>165</sup> The recognition that minority home seekers can suffer psychic injuries from § 3604(c) violations is significant because it provides an additional rationale for the provision—to protect minorities from the insult of discrimination.<sup>166</sup>

Finally, because a number of the human models cases involved challenges to the plaintiffs’ standing to sue, the decisions often had occasion to consider the types of injuries that might result from a § 3604(c) violation and, therefore, the purposes underlying the provision. For example, in *Spann v. Colonial Village, Inc.*,<sup>167</sup> the District of Columbia Circuit, in an opinion by then-Judge Ruth Bader Ginsburg, upheld the standing of two organizational plaintiffs to

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and somebody tells him you can’t do it because you are black. This hurts his wife, it hurts his children. It is a crushing thing.”); 114 CONG. REC. 5643 (1968) (remarks of Senator Mondale, the FHA’s chief sponsor in the Senate, that the law “removes the opportunity to insult and discriminate against a fellow American because of his color”); *id.* at 5641 (remarks of Senator Mondale: “I still believe that one of the basic and fundamental objections to discrimination in the sale or rental of housing is the fact that through public solicitation the Negro father, his wife and children are invited to go up to a home and thereafter to be insulted solely on the basis of race.”).

163. *Ragin v. N.Y. Times*, 923 F.2d 995, 1005 (2d Cir. 1991).

164. *Id.*; see also 1966 Hearings, *infra* note 36 (observation by Senator Ervin regarding who might sue for damages in discriminatory advertising cases). The *Times* opinion did recognize the defendant newspaper’s concern that it might be exposed to a huge number of such claims, with no ready device for separating those of the genuinely injured from those that were baseless. *Times*, 923 F.2d at 1005. Rather than regarding this possibility as a reason to immunize publishers from liability for such claims under § 3604(c), however, the Second Circuit simply advised that judicial control should be asserted “over the size of damage awards for emotional injury in individual cases” and expressed its confidence that “courts will be able to keep such awards within reason.” *Id.*

165. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907-09 (2d Cir. 1993); see also *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1053 (E.D.Va. 1987) (minority individual’s mere receipt of discriminatory advertising in violation of § 3604(c) confers standing to sue for emotional distress); SCHWEMM, *supra* note 15, § 15:6 n.29 (citing other supporting cases). But see *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29 n.2 (D.C. Cir. 1990) (discussed *infra* notes 167-75 and accompanying text).

166. See *supra* texts accompanying notes 130-31, 140-41. For legislative history indicating Congress’ concern over the intangible injuries that § 3604(c) violations might inflict on racial minorities, see *supra* note 162 and *infra* note 423.

167. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24 (D.C. Cir. 1990).

challenge all-white ads placed by housing providers in the Washington, D.C. area.<sup>168</sup> The organizations alleged that the defendants' advertising "tended to steer black home buyers and renters away from the advertised complexes and thus impelled the organizations to devote resources to checking or neutralizing the ads' adverse impact."<sup>169</sup> The plaintiffs also claimed the ads required them "to devote more time, effort, and money to endeavors designed to educate not only black home buyers and renters, but the D.C. area real estate industry and the public that racial preference in housing is indeed illegal."<sup>170</sup>

Applying traditional Article III standing requirements—that a proper plaintiff "must show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision"<sup>171</sup>—the D.C. Circuit held that the organizations' claims were sufficient. According to the *Spann* opinion: "Expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public impressions created by defendants' use of print media, are sufficiently tangible to satisfy Article III's injury-in-fact requirement."<sup>172</sup>

Thus, Justice Ginsburg recognized that the practices banned by § 3604(c) might not only discourage minorities from seeking homes available to them, but also might create "a public impression that housing segregation is legal, thus facilitating discrimination by defendants or other property owners and requiring a consequent increase . . . in educational programs on the illegality of housing discrimination."<sup>173</sup> In claiming injury because of the need to counteract these harms, the plaintiff organizations were, according to *Spann*, seeking to vindicate "values [that] were endorsed by the Congress in the Fair Housing Act."<sup>174</sup> As Justice Ginsburg wrote:

Plaintiffs' interests here overlap with the public interest in open housing and nondiscriminatory advertising embodied in the Fair

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168. *Id.* For a more detailed discussion of the standing of fair housing organizations to sue under the FHA generally and under § 3604(c) in particular, see *infra* Part IV.C.1.

169. *Spann*, 899 F.2d at 27.

170. *Id.*

171. *Id.* (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

172. *Id.* at 29.

173. *Id.* at 30.

174. *Id.*

Housing Act. The policies of the Act and the concrete injuries alleged by the plaintiff organizations thus intertwine to support plaintiffs' standing to bring this suit.<sup>175</sup>

In addition to *Spann*, a number of other human-model advertising decisions during this period also recognized the negative impact discriminatory advertising might have on the FHA's basic goals and, therefore, the role of § 3604(c) in banning practices that might require additional efforts to educate the real estate industry and the general public about the need for nondiscrimination in housing.<sup>176</sup>

### 3. *The Fair Housing Amendments Act of 1988*

A second major development of the late 1980s that led to increased litigation under § 3604(c) was the passage of the 1988 Fair Housing Amendments Act.<sup>177</sup> This law added "familial status" and "handicap" to the types of discrimination outlawed by the FHA and strengthened the statute's enforcement procedures by, among other things, providing for prosecution of more FHA claims by government lawyers and for the option of pursuing FHA claims through administrative proceedings that culminate in decisions by HUD administrative law judges.<sup>178</sup>

The 1988 Amendments Act produced a number of new cases that included § 3604(c) claims, although few of these claims proved to be important apart from the other accompanying FHA claims.<sup>179</sup> Many of the new § 3604(c) claims were based on blatantly discriminatory statements by housing providers indicating hostility to families with children.<sup>180</sup> Others involved more subtle statements

175. *Id.* at 31.

176. *E.g.*, *Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 84 (3d Cir. 1998) (Nygaard, J., dissenting) (noting educational efforts undertaken by fair housing organization to counteract defendant's discriminatory ads); *Fair Hous. Council v. Main Line Times*, 141 F.3d 439, 445-46 (3d Cir. 1998) (Nygaard, J., dissenting) (same); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905, 909 (2d Cir. 1993); *Saunders v. Gen. Servs. Corp.*, 649 F. Supp. 1042, 1052 (E.D. Va. 1987); *see also id.* at 1058-59 (noting that all-white ads discourage minority home seekers); *HOME v. Cincinnati Enquirer*, 943 F.2d 644, 663 (6th Cir. 1991) (Keith, J., dissenting) (same).

177. *Supra* note 21.

178. See sources cited *supra* note 23 and *infra* text accompanying note 342. *See generally* Kushner, *supra* note 23.

179. See cases described *infra* notes 180, 183, 184, 342 (HUD-prosecuted cases).

180. *E.g.*, *HUD v. Active Agency*, *Fair Hous.-Fair Lending Rptr.* ¶ 25,141, at 26,159 (HUD ALJ 2000) (holding that real estate agent's statements to testers that mobile home park owners want "to keep it senior citizen" and "try to keep kids out" are evidence of a § 3604(a) violation and a violation of § 3604(c) resulting in award to local fair housing organization for its investigation expenses that does not differenti-

ate between the expenses caused by the § 3604(a) violation and those caused by the § 3604(c) violation); *HUD v. Welch*, Fair Hous.-Fair Lending Rptr. ¶ 25,125, at 26,067, 26,070 (HUD ALJ 1996) (holding that landlord's statement to home seeker with two-year-old daughter that he did not rent "to families with small children" is evidence of a § 3604(a) violation and a violation of § 3604(c) resulting in undifferentiated award for lost housing opportunity); *HUD v. Lee*, Fair Hous.-Fair Lending Rptr. ¶ 25,121, at 26,032-34 (HUD ALJ 1996) (holding that statement by landlords' agent to home seeker with minor son that "[w]e don't rent to people with children on the second floor" is evidence of a § 3604(a) violation and a violation of § 3604(c) resulting in undifferentiated award for out-of-pocket expenses and emotional distress); *HUD v. French*, Fair Hous.-Fair Lending Rptr. ¶ 25,113, at 25,973-78 (HUD ALJ 1995) (holding that property manager's statement to home seeker with infant daughter that she "[did not] rent upstairs units to people with children" is "direct evidence" of § 3604(a) and § 3604(b) violations and a violation of § 3604(c) resulting in undifferentiated award for economic injuries and emotional distress); *HUD v. Kormoczy*, Fair Hous.-Fair Lending Rptr. ¶ 25,071, at 25,657, 25,661-64 (HUD ALJ 1994), *aff'd*, 53 F.3d 821 (7th Cir. 1995) (holding that landlord's statement to home seekers with six-year-old child that she "did not want children living there" is evidence of a § 3604(a) violation and a violation of § 3604(c) resulting in undifferentiated award for economic injuries and emotional distress); *HUD v. Sams*, Fair Hous.-Fair Lending Rptr. ¶ 25,069, at 25,647, 25,649-50 (HUD ALJ 1994) (holding that landlord's statement to home seeker with five children that he would not rent to complainant "because he had too many children" is "direct evidence" of a § 3604(a) violation and a violation of § 3604(c) resulting in undifferentiated award for lost housing opportunity and emotional distress to each family member), *aff'd without opinion*, 76 F.3d 375 (4th Cir. 1996); *HUD v. Schilling*, Fair Hous.-Fair Lending Rptr. ¶ 25,052, at 25,484-87 (HUD ALJ 1993) (holding that landlord's statements to home seeker with two teenage daughters that he would not rent to tenants with children are "direct evidence" of a § 3604(a) violation and a violation of § 3604(c) resulting in undifferentiated award for emotional distress); *HUD v. Bucha*, Fair Hous.-Fair Lending Rptr. ¶ 25,046, at 25,455-58 (HUD ALJ 1993) (holding that landlord's statements to home seeker with three-year-old and twelve-year-old daughters that "[w]e do not rent to children" and that he is "precluded from renting [to complainant] because of the children" are "direct evidence" of a § 3604(a) violation and a violation of § 3604(c) resulting in civil penalties but no compensatory award); *HUD v. DiBari*, Fair Hous.-Fair Lending Rptr. ¶ 25,036, at 25,376-80 (HUD ALJ 1992) (holding that landlord's statement to pregnant home seeker that he "does not rent to kids" is "direct evidence" of a § 3604(a) violation and a violation of § 3604(c) resulting in undifferentiated award for economic injuries and emotional distress); *HUD v. Lewis*, Fair Hous.-Fair Lending Rptr. ¶ 25,035, at 25,367, 25,369-72 (HUD ALJ 1992) (holding that landlord's statement to tenant with two children that she was being evicted because she "had teenage children" is "direct evidence" of § 3604(a) and § 3604(b) violations and a violation of § 3604(c) resulting in undifferentiated award for out-of-pocket expenses and emotional distress); *HUD v. Wagner*, Fair Hous.-Fair Lending Rptr. ¶ 25,032, at 25,332-33, 25,336 (HUD ALJ 1992) (holding that rental agent's statement to tester that family with two children would not be allowed is evidence of § 3604(a) and § 3604(d) violations and a violation of § 3604(c) resulting in undifferentiated award for out-of-pocket expenses, emotional damages, and lost housing opportunity); *HUD v. Kelly*, Fair Hous.-Fair Lending Rptr. ¶ 25,034, at 25,358 (HUD ALJ 1992) (holding that statements by landlord's agents to home seeker with five-year-old twin daughters that owner "only allowed one child in the apartment" and that the home seeker "had one child too many" are evidence of § 3604(a) and § 3604(b) violations and a violation of § 3604(c) resulting in undifferentiated award for lost housing opportunity and emotional distress that is reduced somewhat on appeal), *aff'd in pertinent part and rev'd in*

requiring application of the "ordinary listener" standard<sup>181</sup> to determine if they violated § 3604(c).<sup>182</sup> An additional source of § 3604(c) claims was anti-children rules or policies adopted by mo-

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*part*, 3 F.3d 951 (6th Cir. 1993); HUD v. Frisbie, Fair Hous.-Fair Lending Rptr. ¶ 25,030, at 25,325-27 (HUD ALJ 1992) (holding that landlord's statement to home seeker with nine-year-old son that she "did not rent to children" is "direct evidence" of a § 3604(a) violation and a violation of § 3604(c) resulting in undifferentiated awards for inconvenience and emotional distress); HUD v. Edelstein, Fair Hous.-Fair Lending Rptr. ¶ 25,018, at 25,237-42 (HUD ALJ 1991) (holding that landlord's statements to home seeker with twelve-year-old daughter that he has "a policy against permitting children" and "[w]e do not rent to people with children over the age of five" are evidence of § 3604(a) and § 3604(b) violations and a violation of § 3604(c) resulting in undifferentiated awards for out-of-pocket damages and inconvenience and emotional distress), *aff'd without opinion*, 978 F.2d 1258 (6th Cir. 1992); HUD v. Props. Unlimited, Fair Hous.-Fair Lending Rptr. ¶ 25,009, at 25,144-46 (HUD ALJ 1991) (holding that statements by property managers to various home seekers with children to the effect that they do not rent certain apartments to "anyone with children" are evidence of § 3604(a) and § 3604(d) violations and a violation of § 3604(c) resulting in undifferentiated awards for economic losses and inconvenience and emotional distress); *see also* Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1293-94 (C.D. Cal. 1997) (granting summary judgment to fair housing organization and prior tenant with minor child based on holding that apartment manager's statements to prospective tenants that she would not rent certain units "to families with small children" amount to illegal steering in violation of § 3604(a), § 3604(b), and § 3604(c)); *infra* text accompanying notes 189-92, 209-19, 230-44, 267-68, 285-86 (describing similar cases).

181. *Supra* text accompanying notes 158-60.

182. *E.g.*, HUD v. Ineichen, Fair Hous.-Fair Lending Rptr. ¶ 25,099, at 25,888-90 (HUD ALJ 1995) (landlord's statement to homeseeker with four children that her townhouse unit was too small for home seeker's family held to be evidence of § 3604(a), § 3604(b), and § 3604(d) violations and a violation of § 3604(c)); HUD v. Gwizdz, Fair Hous.-Fair Lending Rptr. ¶ 25,086, at 25,791, 25,794 (HUD ALJ 1994) (landlord's statement to home seeker with two children that she would not rent to home seeker because her children would make too much noise held to be evidence of a § 3604(a) violation and a violation of § 3604(c)); HUD v. Gutleben, Fair Hous.-Fair Lending Rptr. ¶ 25,078, at 25,722-26 (HUD ALJ 1994) (landlords' statements to tenants with children about their not having intended to rent to families with children and there being "too many kids" in the building held to be evidence of a § 3604(b) violation and a violation of § 3604(c)); HUD v. Leiner, Fair Hous.-Fair Lending Rptr. ¶ 25,021, at 25,262, 25,267-68 (HUD ALJ 1992) (landlord's question about pregnant home seeker's ability to pay the rent after her baby is born held to be evidence of § 3604(a) and § 3604(d) violations and a violation of § 3604(c)); HUD v. Jeffre, Fair Hous.-Fair Lending Rptr. ¶ 25,020, at 25,253, 25,256 (HUD ALJ 1991) (landlord's statement to home seeker with three-year-old son that she rented to "singles only" held to be evidence of a § 3604(a) violation and a violation of § 3604(c)); HUD v. Rollhaus, Fair Hous.-Fair Lending Rptr. ¶ 25,019, at 25,249 (HUD ALJ 1991) (landlord's statements to women home seekers with children that she preferred to rent to a single man and that she did not rent to single mothers held to be evidence of sex and familial status discrimination in violation of § 3604(a) and § 3604(b) and to indicate preference based on sex and familial status in violation of § 3604(c)); *see also* Blomgren v. Ogle, 850 F. Supp. 1427 (E.D. Wash. 1993) (described *infra* note 284); HUD v. Schuster, Fair Hous.-Fair Lending Rptr. ¶ 25,091 (HUD ALJ 1995) (described *infra* text accompanying notes 280-84).



mobile home parks and other housing providers<sup>183</sup> and a few cases involved statements or notices directed against disabled persons.<sup>184</sup>

183. *E.g.*, *United States v. Lepore*, 816 F. Supp. 1011, 1024 (M.D. Pa. 1991) (holding that mobile home park's publication and enforcement of rules containing unreasonable occupancy restrictions that discriminate against families with children violate § 3604(a), § 3604(b), and § 3604(c), resulting in awards to resident couple, who were expecting a child, for economic losses and emotional distress not differentiating between the damages caused by the § 3604(a) violation and those caused by the § 3604(c) violation); *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1290-94 (C.D. Cal. 1997) (granting summary judgment on plaintiff's claims under § 3604(b) and § 3604(c) prompted by apartment complex's rules limiting how and where children could play and some parts of their § 3604(a) and § 3604(c) claims prompted by statements of complex's manager steering families with children away from certain units in the complex); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1327-29 (D. Or. 1996) (granting summary judgment on plaintiffs' claims under § 3604(a) and § 3604(c) prompted by farm's application of a "no families with children" rule to its housing for seasonal workers); *HUD v. Paradise Gardens*, Fair Hous.-Fair Lending Rptr. ¶ 25,037, at 25,389-95 (HUD ALJ 1992) (development's rules limiting children's use of the swimming pool and clubhouse violate § 3604(b) and § 3604(c), resulting in awards to resident with children and to resident couple who were expecting a child that do not differentiate between the damages caused by the § 3604(b) violation and those caused by the § 3604(c) violation); *HUD v. Carter*, Fair Hous.-Fair Lending Rptr. ¶ 25,029, at 25,317-21 (HUD ALJ 1992) (holding that mobile home park's rule barring families with children violates § 3604(a), § 3604(b), and § 3604(c) resulting in undifferentiated awards for economic damages and emotional distress to resident with twelve-year-old daughter who tried to sell her mobile home to couple with nine-year-old child); *HUD v. TEMS*, Fair Hous.-Fair Lending Rptr. ¶ 25,028, at 25,310-12 (HUD ALJ 1992) (planned community's rule prohibiting children violates § 3604(a) and § 3604(c) resulting in undifferentiated awards for economic damages and emotional distress to residents who tried to convey their property to family with children); *HUD v. Morgan*, Fair Hous.-Fair Lending Rptr. ¶ 25,008, at 25,137-41 (HUD ALJ 1991) (holding that mobile home park's publication and enforcement of a rule that "no children will be allowed in the park" violates § 3604(a), § 3604(b), § 3604(c), and § 3604(d) resulting in undifferentiated awards for economic damages, inconvenience, and emotional distress to prospective resident with children (some elements of award reversed on appeal)), *aff'd in part and rev'd in part on other grounds*, 985 F.2d 1451 (10th Cir. 1993); *HUD v. Guglielmi*, Fair Hous.-Fair Lending Rptr. ¶ 25,004, at 25,076-79 (HUD ALJ 1991) (holding that mobile home park's rule prohibiting families with children from occupying certain lots violates § 3604(a), § 3604(b), § 3604(c), and § 3617 resulting in undifferentiated award for emotional distress and other intangible injuries to resident who sought to sell her mobile home to family with children); case described *infra* notes 280-84 and accompanying text.

184. *E.g.*, *Niederhauser v. Independence Square Hous.*, Fair Hous.-Fair Lending Rptr. ¶ 16,305, at 16,305.5-7 (N.D. Cal. 1998) (holding that landlord's inquiries of disabled applicants concerning their ability to live independently violate § 3604(c) and other FHA provisions); *HUD v. George*, Fair Hous.-Fair Lending Rptr. ¶ 25,010, at 25,163-64 (HUD ALJ 1991) (holding that developer's statement to representative of prospective group home for mentally retarded people expressing concern about first home in subdivision being such a facility is evidence of illegal steering in violation of § 3604(f)(1) and § 3604(c) and should result in a damage award for home's lost housing opportunity and out-of-pocket expenses caused entirely by the § 3604(f)(1) violation); *see also United States v. Salvation Army*, Fair Hous.-Fair Lending Rptr. ¶ 16,376, at 16,387.7 (S.D.N.Y. 1999) (holding that proof fails to establish that landlord

With respect to race and other "old" bases of discrimination, a number of cases decided after the 1988 Amendments Act also included evidence of blatantly discriminatory statements.<sup>185</sup>

The vast majority of these new § 3604(c) claims, however, were based on fact patterns also including a refusal to deal or discrimination in terms and conditions in violation of § 3604(a) or § 3604(b). Indeed, in most of these cases, the discriminatory statement was used primarily as evidence that the defendant's behavior violated other provisions of the FHA.<sup>186</sup> Even where a § 3604(c) "count" was separately pursued, it rarely made any difference, for the relief awarded was fully justified by the defendant's violation of § 3604(a) or § 3604(b).<sup>187</sup> Thus, like the early cases of *United States v. L & H Land Corp.* and *Stewart v. Furton*,<sup>188</sup> the § 3604(c) claim in most of these more modern cases was often not treated as significant by itself. There were, however, some notable exceptions to this rule, which are discussed in the next section.

#### 4. *Modern Decisions Involving Independently Important §3604(c) Claims*

Roughly a dozen decisions reported during the past decade contain independently important § 3604(c) claims. These claims are independently important either because the defendant is exempt and therefore not subject to other § 3604 prohibitions, because the proof fails to establish a violation by a non-exempt defendant of another FHA section, or because additional relief is prompted by the § 3604(c) violation. Because of the importance of the § 3604(c)

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violated § 3604(c) by making "no SDDI" comment to disabled applicant, and landlord's elimination of questions concerning disabilities from its housing application forms defeats plaintiff's claim for injunctive relief under § 3604(c)); *HUD v. Williams*, Fair Hous.-Fair Lending Rptr. ¶ 25,007, at 25,118-20 (HUD ALJ 1991) (holding that landlord's inquiry whether tenant has AIDS is evidence of § 3604(f)(2) and § 3617 violations but not a violation of § 3604(c)).

185. *E.g.*, cases cited *supra* notes 3, 4 and *infra* note 196 (race, color, and national origin); case cited *infra* note 352 (religion); cases cited *infra* note 354 (sex).

186. *E.g.*, *HUD v. Schuster*, Fair Hous.-Fair Lending Rptr. ¶ 25,091, at 25,831-32 (HUD ALJ 1995); cases cited *supra* notes 180, 182, 183. Cases where a § 3604(c)-violating statement was described as also being "direct evidence" of a violation of another provision of the FHA include five described *infra* note 180 (*HUD v. French*; *HUD v. Sams*; *HUD v. Bucha*; *HUD v. DiBari*; *HUD v. Lewis*; *HUD v. Frisbie*) and *HUD v. Denton*, Fair Hous.-Fair Lending Rptr. ¶ 25,014, at 25,204-05 (HUD ALJ 1991), *remanded to*, Fair Housing-Fair Lending Rptr. ¶ 25,024 (HUD ALJ 1992).

187. *E.g.*, cases cited *supra* notes 180, 183. The injunction resulting from these decisions would, however, invariably include a prohibition against violating § 3604(c) as well as the other provisions of the FHA found to have been violated.

188. *Supra* notes 146-48 and accompanying text.

claim in these cases, the decisions often focus on the meaning and purposes of this provision in a way other cases involving § 3604(c) claims do not. These decisions, and the § 3604(c) insights they provide, will be discussed in four sections: (a) *HUD v. Denton*, an early familial status case where the landlord's only FHA violation was of § 3604(c); (b) *HUD v. Ro*, also a "pure" § 3604(c) case based on a landlord's racial statement directed at someone not in the process of buying or renting housing; (c) cases where the statement violating § 3604(c) was made by an otherwise exempt housing provider; and (d) other cases where the alleged § 3604(c) violation is treated separately in the opinion.

#### a. HUD v. Denton

The first important modern § 3604(c) case was *HUD v. Denton*.<sup>189</sup> The case involved the Smerling family whose children caused a variety of problems that eventually led their landlords, the Dentons, to begin eviction proceedings. Although the behavior of the Smerlings and their children provided a host of legitimate reasons for their eviction, the Dentons stated in the eviction notice that the eviction was due to the presence of the Smerlings' two children in the apartment.<sup>190</sup> The Smerlings responded by filing a FHA complaint with HUD alleging familial status discrimination. Their case was eventually decided by HUD's Chief Administrative Law Judge, who held that the eviction itself did not violate § 3604(a) or (b), because the Dentons would have taken evictive action based on the Smerlings' misconduct even in the absence of any illegal discrimination.<sup>191</sup> The eviction notice, however, was held to violate § 3604(c), because it explicitly referenced the Smerlings' children as the reason for their eviction.<sup>192</sup>

Moving on to relief, the ALJ held that while damages for emotional distress can be awarded to the target of an illegal statement in a § 3604(c) case, the evidence here failed to show the Smerlings suffered any such injury.<sup>193</sup> According to the ALJ, whatever inju-

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189. *HUD v. Denton*, Fair Hous.-Fair Lending Rptr. ¶ 25,014 (HUD ALJ 1991), *remanded to*, Fair Hous.-Fair Lending Rptr. ¶ 25,024 (HUD ALJ 1992).

190. *HUD v. Denton*, Fair Hous.-Fair Lending Rptr. ¶ 25,024, at 25,199, 25,277 (HUD ALJ 1992).

191. *Id.* at 25,277-80.

192. *Id.* at 25,280-81. Also complaining in the *Denton* case were the Hoags, another family evicted by the Dentons, whose children had not behaved badly and who therefore prevailed under § 3604(a), § 3604(b), and § 3604(c). *HUD v. Denton*, Fair Hous.-Fair Lending Rptr. ¶ 25,014, at 25,204-05 (HUD ALJ 1991).

193. *HUD v. Denton*, Fair Hous.-Fair Lending Rptr. ¶ 25,024, at 25,281 (HUD ALJ 1992).

ries the Smerlings suffered were caused by their eviction, and not "as a result of the statement that their *familial status* was the cause of their eviction."<sup>194</sup>

*Denton* is important for a number of reasons. Besides providing an example of how § 3604(c) liability can exist without liability under any other FHA provisions it reinforces the notion raised in the human-models cases that a § 3604(c) violation may inflict emotional injuries on those targeted.<sup>195</sup> *Denton* also shows, however, that the relief available in such a case is limited to harm caused by the § 3604(c) violation itself, and does not extend to injuries resulting from other causes.

### b. HUD v. Ro

One of the most dramatic examples of emotional distress caused by a § 3604(c) violation is *HUD v. Ro*.<sup>196</sup> In this case, the target of the illegal statement, Julie Obi, was not even in the market for housing. Ms. Obi, a thirty-eight-year-old black woman from Nigeria, was a social worker required to help a twenty-one-year-old white client, Angela Perrero, acquire housing. In response to a newspaper ad, the women went to tour an apartment in Frederick, Maryland—one of about thirty residential properties owned by Dr. and Mrs. Ro, a Korean couple. When the women arrived at the Ros' office, Ms. Ro asked them what they wanted, and Ms. Obi told her that they were there to inspect the advertised apartment. Ms. Ro then pointed at Ms. Perrero, looked at Ms. Obi, and said, "She's okay for the apartment, you are not." When Ms. Obi asked Ms. Ro what she meant by this statement, Ms. Ro just repeated, "She's okay for it, you are not."<sup>197</sup>

Ms. Ro then showed the apartment to the women. During the tour, Ms. Obi explained that she was Ms. Perrero's caseworker and that the state agency she worked for would pay Ms. Perrero's first

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194. *Id.* Another complaining family in the *Denton* case was, unlike the Smerlings, successful in showing their eviction violated § 3604(a), § 3604(b), and § 3604(c), *supra* note 192, but the damages awarded this family reflected injuries caused entirely by eviction (i.e., the violations of § 3604(a) and § 3604(b)), not the reason given for eviction on which the § 3604(c) violation was based. *HUD v. Denton*, Fair Hous.—Fair Lending Rptr. ¶ 25,014, at 25,205-06 (HUD ALJ 1991).

195. *Supra* notes 163-65 and accompanying text.

196. *HUD v. Ro*, Fair Hous.—Fair Lending Rptr. ¶ 25,106 (HUD ALJ 1995).

197. *Id.* at 25,924. Ms. Ro denied making these statements, but the HUD ALJ found her denial not credible and chose instead to believe the testimony of Ms. Obi and Ms. Perrero. *Id.* at 25,924 n.3, 25,926-28.

month's rent and the security deposit. Ms. Ro then became friendlier and eventually rented the apartment to Ms. Perrero.<sup>198</sup>

This experience greatly upset Ms. Obi,<sup>199</sup> and she eventually filed a FHA complaint with HUD. The HUD ALJ held that Ms. Ro's statements violated § 3604(c) because they "indicate to an ordinary listener that Ms. Ro preferred Ms. Perrero and rejected Ms. Obi solely because of race."<sup>200</sup> Prior to her statements, the ALJ noted, Ms. Ro received no information about the two women, and their appearance provided no basis for her to distinguish between them. Therefore, the ALJ concluded, "[t]he only ostensible difference between Ms. Obi and Ms. Perrero was race."<sup>201</sup> The ALJ found that an "ordinary listener" would reasonably interpret Ms. Ro's statements as expressing a preference and limitation because of race, and were therefore violative of § 3604(c).<sup>202</sup>

With respect to relief, the ALJ found that this incident upset Ms. Obi and caused her substantial humiliation and embarrassment.<sup>203</sup>

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198. *Id.* at 25,925.

199. According to the HUD ALJ:

The record demonstrates that Ms. Obi suffered emotional distress because of Ms. Ro's rejection. She was humiliated, embarrassed, and upset. The incident was particularly painful because it occurred in front of Ms. Perrero, someone with whom Ms. Obi maintained a professional relationship. Ms. Obi began doubting her ability to help clients obtain housing because she questioned whether her mere presence was a hindrance. In addition, she became withdrawn with white coworkers after the incident. The discrimination also affected her family life. The evening of [the incident], she wept at home while discussing the incident with her husband. That evening and for several days thereafter she was unable to perform household chores or care for her children. Her physical reactions provided further evidence of her emotional distress. Ms. Obi had difficulty sleeping and eating for several days after the incident.

*Id.* at 25,929-30 (footnote omitted); *see also id.* at 25,925 (recounting similar factual findings regarding Ms. Obi's emotional distress). Two weeks after the incident, Ms. Obi filed a FHA complaint with HUD after first seeking assistance from a local human rights organization. *Id.*

200. *Id.* at 25,929.

201. *Id.* By Ms. Ro's own admission, Ms. Obi had a "'professional look,' was wearing a beautiful dress, and had her hair fixed beautifully," thus presenting a very professional, positive appearance. *Id.*

202. *Id.*

203. *Supra* note 199. An additional cause of Ms. Obi's emotional distress was Ms. Ro going to her office on three separate occasions after the incident to try to convince Ms. Obi she had misunderstood what had occurred, visits Ms. Obi characterized as "insulting her intelligence." *Ro*, ¶ 25,106 at 25,925, 25,930. While this post-violation activity by Ms. Ro may have increased Ms. Obi's emotional distress and therefore resulted in a somewhat higher compensatory award, *see id.* at 25,930, it changes neither the basic nature of the violation nor the victim's reaction to it. Since this type of post-violation activity is rarely present in § 3604(c) cases, it is viewed as a tangential matter here.

The opinion noted, however, that Ms. Obi's emotional distress lasted only a few days and "did not drastically impact her lifestyle."<sup>204</sup> Because she was not actually seeking housing, Ms. Obi's experience was likened to that of fair housing testers who encounter discrimination, although the ALJ felt her injury was more severe because, unlike testers, Ms. Obi "was unable to anticipate the discrimination, and to brace herself against the shock of a rejection because of her race."<sup>205</sup> Based on these considerations, the ALJ ruled that Ms. Obi was entitled to an award of \$10,000 in damages for the emotional distress caused by Ms. Ro's statements.<sup>206</sup>

The *Ro* case shows how devastating a discriminatory statement can be to a minority target, even if she is not deprived of housing as a result. Because of Ms. Obi's special situation, *Ro* is a "pure" § 3604(c) statement case.<sup>207</sup> It is therefore closely analogous to situations where an exempt housing provider makes a discriminatory statement in violation of § 3604(c), and its lessons concerning the injuries caused by discriminatory statements help reveal the potential congressional purpose in making § 3604(c) apply to otherwise exempt landlords.

### c. Claims Against Otherwise Exempt Landlords

Four decisions in recent years hold "Mrs. Murphy" landlords liable for making discriminatory statements in violation of § 3604(c).<sup>208</sup> In the first of these cases, *HUD v. Dellipaoli*,<sup>209</sup> the defendants rented out the upper level of their house. In 1994, the

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204. *Ro*, ¶ 25,106 at 25,930

205. *Id.*

206. *Id.* The ALJ also assessed a civil penalty of \$10,000 against the Ros and entered an order that, inter alia, enjoined them from further similar violations of the FHA. *Id.* at 25,930-31.

207. It should be noted that the ALJ in *Ro* held that Ms. Ro's statements to Ms. Obi violated § 3604(a) as well as § 3604(c). *Id.* at 25,926-28. According to the ALJ, the fact that Ms. Obi was not in the market for housing did not undercut her claim under § 3604(a), because that section's prohibitions go beyond a "refusal to rent after the making of a bona fide offer" to include a "refusal to negotiate." *Id.* at 25,926 n.4. Nevertheless, the relief section of the ALJ's opinion shows that he treated the case as primarily, if not exclusively, based on § 3604(c), because he ordered compensation based on her reaction to Ms. Ro's statements as opposed to the refusal to negotiate. *Id.* at 25,930. Indeed, the ALJ was at pains in this part of his opinion to point out that Ms. Obi was not denied housing, *id.*, which presumably would be the principal loss resulting from a refusal to negotiate. Thus, because nothing turned on the § 3604(a) violation in *Ro*, it is fairly described as a "pure" § 3604(c) case. *See id.*

208. Cases cited *infra* notes 209, 220, 230, 245. In addition to these four cases, see *Chew v. Hybl*, Fair Hous.-Fair Lending Rptr. ¶ 16,249, at 16,249.3-8 (N.D. Cal. 1997) (holding landlords who unsuccessfully argued that they were covered by § 3603(b)(1)'s single-family house exemption to have violated § 3604(a), § 3604(c),

Dellipaolis placed an ad for the upper-level unit in a local newspaper, which led to a telephone inquiry by Lucia Terrizzi. Mrs. Dellipaoli asked Ms. Terrizzi how many persons would reside in the apartment. When Ms. Terrizzi responded that she and her teenage son would occupy the unit, Mrs. Dellipaoli stated that teenagers were not permitted. In response, Ms. Terrizzi pointed out that the Dellipaolis' newspaper ad had not indicated any such restriction and that such a restriction would probably be unlawful. When Ms. Terrizzi threatened to file a housing discrimination complaint, Mrs. Dellipaoli told her to "go right ahead."<sup>210</sup>

Ms. Terrizzi filed a FHA claim with HUD. In response, the Dellipaolis argued that, since their house was covered by the FHA's "Mrs. Murphy" exemption,<sup>211</sup> they should not be liable for the discriminatory statement made by Mrs. Dellipaoli. The HUD ALJ rejected this argument, noting that § 3604(c) is not subject to the "Mrs. Murphy" exemption. The ALJ cited the Fourth Circuit's opinion in *United States v. Hunter*<sup>212</sup> for the proposition that an exempt owner, though "free to indulge his discriminatory preferences in selling or renting that dwelling, [does not have] a right to publicize his intent to so discriminate."<sup>213</sup>

The Dellipaolis next argued *Hunter* should not apply to "mere statement" cases—as opposed to advertising cases—because Congress' purpose in allowing § 3604(c) claims to be asserted against exempt property owners was "to preclude otherwise exempt individuals from exercising their discriminatory preferences through advertising or by using the *media as a conduit*."<sup>214</sup> The ALJ pointed out, however, that the exception to the exemption refers to all of § 3604(c), not just the part that prohibits discriminatory advertising.<sup>215</sup>

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and § 3617, based on discriminatory statements to and treatment of Asian-American applicants).

209. HUD v. Dellipaoli, Fair Hous.—Fair Lending Rptr. ¶ 25,127 (HUD ALJ 1997).

210. *Id.* at 26,073-74.

211. The Dellipaolis' house was described as a "two-family, owner-occupied" dwelling, bringing it within the "Mrs. Murphy" exemption of § 3603(b)(2). *Id.* at 26,073, 26,076.

212. *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972). For a discussion of the *Hunter* case, see *supra* text accompanying notes 124-131.

213. *Dellipaoli*, ¶ 25,127 at 26,077 (quoting *Hunter*, 459 F.2d at 213-14).

214. *Id.* at 26,076.

215. *Id.* at 26,076-77. In support of his conclusion that § 3604(c)'s prohibition of discriminatory "notices" and "statements" as well as "advertisements" applies even in cases involving otherwise exempt properties, the ALJ cited, *inter alia*, *Mayers v. Ridley*, 465 F.2d 630, 649 (D.C. Cir. 1972) (*en banc*) (discussed *supra* text accompanying notes 132-41). *Dellipaoli*, ¶ 25,127 at 26,077.

Finally, the Dellipaolis argued that this interpretation simply makes no sense because it allows "Mrs. Murphy" landlords to discriminate in choosing with whom they will share their home, but "[does] not give them the right to convey to the prospective buyers the reason for their choice."<sup>216</sup> In other words, this interpretation essentially directs owners to maintain a cloak of secrecy or lie if asked the reason for their decisions; they are only liable if they tell the truth. The ALJ did not respond directly to this argument, but instead cited the principle that a statute must be interpreted according to the plain meaning of its words.<sup>217</sup> According to the ALJ, the FHA's words so clearly exempt § 3604(c) from the "Mrs. Murphy" exemption that Congress must have intended this result.<sup>218</sup> As a consequence, the Dellipaolis were held liable for the discriminatory statement made to Ms. Terrizzi and were ordered to pay her \$500 in compensatory damages for the resulting emotional distress.<sup>219</sup>

*HUD v. Gruzdaitis*<sup>220</sup> was a racial discrimination case in which the defendants owned a two-unit building in Buffalo, New York. They lived in one unit and rented the other. In 1995, Sheila Stover, an African-American woman, stopped to inquire about a "For Rent" sign posted at the building. She was greeted through an open window by Mr. Gruzdaitis, who asked what she wanted. When she replied that she was inquiring about the apartment for

216. *Dellipaoli*, ¶ 25,127 at 26,076.

217. *Id.* With respect to this principle, see cases cited *supra* notes 47 and 127.

218. *Dellipaoli*, ¶ 25,127 at 26,076-77.

219. *Id.* at 26,078-81. This was substantially less than the amount requested, but the ALJ noted that most of the requested damages had to do with Ms. Terrizzi's inability to find housing, which is not a proper element of the award in a "pure" § 3604(c) case. *Id.* at 26,078. According to the ALJ:

Although Ms. Terrizzi's testimony shows that she reacted to the statement with hurt and humiliation as a woman who had had the sole responsibility for the care and housing of her minor children over the years, her testimony shows that by far the greatest distress to her came not from hearing the statement, but from her perception that she was being denied housing to which she erroneously believed she was entitled under the law. . . . [B]ecause of the exemption enjoyed by the Dellipaolis, they could refuse to rent to the Terrizzis for any reason without violating the law. Accordingly, I have discounted most of Ms. Terrizzi's distress resulting from Mrs. Dellipaoli's statement.

For the compensable portion of Mrs. Terrizzi's emotional reaction to Mrs. Dellipaoli's statement, I award \$500.

*Id.* at 26,078-79 (footnote omitted). The ALJ also assessed a \$500 civil penalty against the Dellipaolis and permanently enjoined them from making such discriminatory statements in the future. *Id.* at 26,079-81.

220. *HUD v. Gruzdaitis*, Fair Hous.-Fair Lending Rptr. ¶ 25,137 (HUD ALJ 1998).



rent, he said angrily, "Not for you, no blacks. Fuck you, they don't pay rent."<sup>221</sup> Mr. Gruzdaitis then asked Ms. Stover to move closer to him. When she did, he spit at her and said: "Fuck you all, you don't pay your rent. Get off my porch, get off my property."<sup>222</sup>

Ms. Stover filed a FHA complaint with HUD. When the Gruzdaitises failed to respond, the HUD ALJ entered a default judgment against them, received evidence on relief, and filed a detailed opinion that included factual findings and legal conclusions. The ALJ found the Gruzdaitis's building was covered by the "Mrs. Murphy" exemption, but noted the exemption did not preclude a § 3604(c) claim.<sup>223</sup> According to the ALJ, the exemption allowed the Gruzdaitises "to discriminate with impunity against a prospective tenant, provided that during the process of renting their apartment, they do not make discriminatory statements."<sup>224</sup> The ALJ offered a rationale for the availability of § 3604(c) in such situations: § 3604(c) "gives a Black person the right to inquire about the availability of housing from a housing provider without having to endure racially discriminatory statements."<sup>225</sup>

The ALJ held that Mr. Gruzdaitis' statements to Ms. Stover violated § 3604(c) and that his spitting at her was an act of intimidation violating § 3617, which is also applicable to otherwise exempt landlords.<sup>226</sup> The ALJ found Ms. Stover's encounter with Mr. Gruzdaitis caused her severe emotional distress,<sup>227</sup> for which she was awarded \$25,000,<sup>228</sup> although the opinion did not distinguish

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221. *Id.* at 26,134.

222. *Id.*

223. *Id.* at 26,135.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 26,136. According to the ALJ's opinion:

[Ms. Stover's] response to Mr. Gruzdaitis' bigotry falls within the range of typical reactions to racial discrimination. Surprised and intimidated by his profane and threatening rejection of her as a potential tenant, she walked away crying, her head bowed in humiliation. For weeks thereafter she had difficulty sleeping, concentrating, and eating. During this period her children suffered from her trauma-induced bad temper, a fact that causes her deep regret. She was so upset by the experience on the [Gruzdaitis'] porch that she discontinued her search for new housing for a month. Consequently, Mr. Gruzdaitis' racially discriminatory conduct extended by a month the time that [Ms. Stover] had to live in unsatisfactory, over-crowded housing.

*Id.*

228. Although he found that Ms. Stover's intangible injuries were severe, the ALJ rejected a higher award because the injuries did not greatly impair her "relationships with family, friends, co-workers, and White people in general," "left no permanent

how much was for the illegal statements under § 3604(c) and how much was for the intimidation under § 3617.<sup>229</sup>

In *HUD v. Schmid*,<sup>230</sup> the Schmids lived in one of two units in a duplex they owned in Tonawanda, New York. They rented out the other unit. The complainant, Gayle Herman, read an ad for the rental unit in a local newspaper and called Karen Schmid to inquire. During their phone conversation, Ms. Schmid asked if Ms. Herman would be living alone. Before she responded, Ms. Schmid stated, "This apartment has a pool, so we don't want children or pets."<sup>231</sup> Ms. Herman then said she had a son and tried to explain that her son was thirteen years old and would not fall in the pool. Ms. Schmid interrupted her, stating, "No, because this is my house—because we live here, we can make these rules."<sup>232</sup>

Ms. Herman reported her experience to a local fair housing agency, which conducted two telephone tests. The second tester purported to have no children.<sup>233</sup> During the tests, Ms. Schmid again stated that, because of her swimming pool, she did not want a tenant with pets or children.

Ms. Herman then filed a FHA complaint with HUD on behalf of herself and her son. The Schmids did not respond and were declared in default.<sup>234</sup> They did, however, appear at the hearing on relief, and the HUD ALJ wrote a detailed opinion on both liability and relief. He found that the Schmids' duplex qualified for both the "Mrs. Murphy" and the single-family-owner exemptions,<sup>235</sup> but, citing *Hunter* and *Dellipaoli*, noted that these exemptions do not preclude a claim under § 3604(c).<sup>236</sup> Borrowing language from the *Gruzdaitis* decision,<sup>237</sup> the ALJ concluded that § 3604(c) gives people seeking housing the right to inquire about the availability of

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scars," and "[Ms. Stover] appears to have fully recovered except for occasional painful memories." *Id.*

229. Because Ms. Stover chose to file her complaint with HUD instead of filing a lawsuit in court, the ALJ could not consider her potential claim under the 1866 Civil Rights Act, *supra* notes 149-153 and accompanying text, nor was he empowered to award her punitive damages. The ALJ did, however, enjoin the Gruzdaitises from similar discriminatory behavior in the future and assessed a \$25,000 civil penalty against Mr. Gruzdaitis based in part on evidence he had also used obscenities and racial epithets in discriminating against a prior black tenant. *Id.* at 26,136-38.

230. *HUD v. Schmid*, Fair Hous.-Fair Lending Rptr. ¶ 25,139 (HUD ALJ 1999).

231. *Id.* at 26,147.

232. *Id.*

233. *Id.*

234. *Id.* at 26,146-47.

235. *Id.* at 26,148-49 n.5.

236. *Id.* at 26,149.

237. *Id.*; *supra* note 225 and accompanying text.

housing without having to tolerate insulting discriminatory statements.<sup>238</sup>

The ALJ then found that Ms. Schmid's statements violated § 3604(c)<sup>239</sup> and caused Ms. Herman and her son to suffer emotional distress.<sup>240</sup> As in *Dellipaoli*,<sup>241</sup> the defendants in *Schmid* argued that any distress resulted not from the illegal statements, but from the lawful denial of housing, and therefore were not an appropriate basis for compensation in a pure § 3604(c) case such as this one.<sup>242</sup> The ALJ agreed in theory,<sup>243</sup> but held that some of the complainants' emotional distress did result from the illegal statements. The ALJ awarded \$1,500 to Ms. Herman and \$500 to her son for these injuries.<sup>244</sup>

Finally, in *HUD v. Roberts*,<sup>245</sup> Margaret Roberts, who rented out part of her home near Glen Cove, New York, made racially discriminatory statements to three prospective tenants. The prospective tenants had responded by telephone to an ad she placed in a

238. *Schmid*, ¶25,139 at 26,149.

239. *Id.*

240. According to the ALJ's findings:

[Ms. Herman] testified that she was angered and outraged by the statement refusing to rent to her because she had a child. . . . [A]s a single parent who was struggling financially, Mrs. Schmid's statement of rejection added to the normal anxiety involved in Ms. Herman's search for an apartment. Hearing Mrs. Schmid's statement caused her to worry that she might again be denied an apartment because of her child. Ms. Herman told her son about the conversation. According to her, Justin was "upset" and "insulted" by the discriminatory remarks. . . . He was not a toddler who would fall into the swimming pool. He said: "I'm not a little kid."

*Id.* at 26,150. The ALJ seemed particularly moved by Ms. Herman's testimony concerning "the fear generated in her by the statement that she might face similar discrimination in the future." *See id.* at 26,152.

241. *Supra* note 219.

242. *Schmid*, ¶25,139 at 26,150, 26,152.

243. In support of this position, the ALJ cited the opinions in *Denton* and *Dellipaoli*, *supra*, respectively, notes 194 and 219. *Schmid*, ¶25,139 at 26,152. However, he noted that "Ms. Herman has not claimed damages for loss of housing opportunity. She has claimed damages from distress caused only by the utterance of the statements." *Id.* In addition, an earlier portion of the ALJ's discussion of damages showed a clear awareness that: "In order for damages to be awarded, the injury must be linked to an unlawful act." *Id.* This view was expressed in connection with the ALJ's rejection of damages for distress caused by that part of Ms. Schmid's statements equating children with pets. According to the ALJ, since Ms. Schmid's statements opposing tenants with pets were not illegal, there was "no causal connection between a statement which is violative of the law and Complainants' distress resulting therefrom." *Id.*

244. *Id.* at 26,152-53.

245. *HUD v. Roberts*, Fair Hous.-Fair Lending Rptr. ¶ 25,151, at 26,215-16 (HUD ALJ 2001).

local paper. The first inquiry came from an African-American woman named Regina Patterson. Roberts asked Patterson her race. Patterson said she was black, whereupon Roberts told her the apartment had just been rented.<sup>246</sup> The second inquiry came from a white woman named Dierdre Isaac. In response to Roberts' question, Isaac said she was white, but when she told Roberts her husband was black, Roberts said, "Oh no, I cannot have that! This is a White neighborhood."<sup>247</sup> The third prospect was an African-American woman named Jeanette Watson-Burns. When Roberts asked her to identify her nationality, Watson-Burns responded that she was black. Roberts replied, "I do not rent to Blacks."<sup>248</sup> The evidence also showed that Roberts asked various testers working for a local fair housing organization what their race or nationality was. Ms. Patterson, Mr. and Mrs. Isaacs, Ms. Watson-Burns, and the fair housing organization all filed FHA complaints with HUD against Roberts. Roberts defaulted, and the HUD ALJ issued an opinion finding that, although Roberts' property was covered by the "Mrs. Murphy" exemption, the exemption did not preclude liability for § 3604(c) claims.<sup>249</sup>

The ALJ held that Roberts' statements to all three individual complainants violated § 3604(c), as did her inquiries as to their race and the race of the testers.<sup>250</sup> For their resulting emotional distress, the ALJ awarded \$500 to Ms. Patterson, \$1500 to Mr. and Mrs. Isaacs, and \$1500 to Ms. Watson-Burns.<sup>251</sup> The latter's dam-

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246. *Id.*

247. *Id.* at 26,216.

248. *Id.*

249. *Id.* at 26,215, 26,217-18.

250. *Id.* at 26,217-18.

251. *Id.* at 26,218-19. According to the ALJ's opinion:

Mrs. Roberts' inquiry about Ms. Patterson's race made Ms. Patterson feel that she was inferior, and Ms. Patterson felt embarrassed and frustrated that she allowed Mrs. Roberts to treat her with such disrespect. . . .

[Mrs. Isaac] reacted to [Roberts'] statement with hurt and humiliation. She suffers from depression as a result of it. She still finds it difficult to accept the inconsiderate and rude comments and behavior she experienced in her conversations with [Roberts] simply because her husband is Black. Mr. Isaac feels angry and hurt that his wife was considered for renting the apartment until she disclosed the fact that he was Black. He feels that he and his wife were unfairly treated simply because of his race and the color of his skin. . . .

Complainant Watson-Burns . . . states that she experienced a tremendous emotional blow when [Roberts] told her that she would not rent to her because she is Black. She was a person who had never operated in a color-oriented way, and she was shocked and disheartened, depressed and dispondent by the blatant racism shown by [Roberts]. Mrs. Roberts' act of discrim-

age claims for lost housing opportunity and for related out-of-pocket expenses, however, were denied on the ground that they resulted not from Roberts' illegal statement, but from her refusal to rent to Ms. Watson-Burns, which was not illegal under the FHA because of Roberts' exempt landlord status.<sup>252</sup>

*Dellipaoli*, *Gruzdaitis*, *Schmid*, and *Roberts* reinforce the basic understanding that § 3604(c) is available even in cases involving otherwise exempt housing. While this notion has not been seriously challenged since *Hunter*,<sup>253</sup> the argument in *Dellipaoli* that such a claim is only appropriate when the offending statement is made publicly in a newspaper or other mass media had not yet been squarely rejected. *Dellipaoli*, *Gruzdaitis*, *Schmid*, and *Roberts* all involved illegal statements made only to housing applicants with no one else around, thus providing examples of the narrowest of concerns that may lie in a § 3604(c) case. All four cases recognized, with compensatory damage awards, that the discriminatory statements condemned by § 3604(c) may cause targets emotional distress or other psychic injuries (and in *Schmid* and *Roberts*, family members to whom the targets repeated the statements), although *Dellipaoli*, *Schmid*, and *Roberts* were careful to limit these awards to injuries caused by illegal statements and not housing denial. The *Gruzdaitis* and *Schmid* opinions also nicely articulated a rationale for having § 3604(c) apply to otherwise exempt housing: protecting minority home seekers from having to endure the insult of discriminatory statements. Home seekers are thereby shielded not only from the immediate psychic injuries such statements may cause, but also, as the *Schmid* opinion noted, from having their ongoing housing search disrupted by the fear, which such statements may induce, of facing similar discrimination elsewhere.

#### *d. Other Decisions Treating § 3604(c) Claims Separately*

Several other reported decisions in the 1990s, including four federal court of appeals decisions, treated § 3604(c) claims separately

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ination took a great toll on her mental and emotional state. She felt frustration, embarrassment and humiliation. She felt discouraged and "devastated." She withdrew from her usual social contacts. The incident, she said, "put a scar in my heart" and mind that will never go away. She sought the help of a mental health counselor to help her through the aftermath of the event. She hopes never to have this experience again.

*Id.* at 26,219.

252. *Id.* The ALJ also awarded \$4,625 to the fair housing organization for investigatory expenses, a civil penalty of \$8,000, and injunctive relief. *Id.* at 26,219-21.

253. *Supra* text accompanying notes 124-31.

from the plaintiff's other FHA claims. Most of these cases involved familial status discrimination, although two of the appellate decisions concerned racial statements and one HUD ALJ decision was prompted by discrimination against handicapped persons.

One of the first familial status cases under the FHA to reach a federal appeals court was *Gorski v. Troy*,<sup>254</sup> where the Seventh Circuit upheld the right of a married couple in the process of becoming foster parents to challenge their landlords' "no children" policy. The Gorskis' lease provided that children were not permitted without written consent from the owners. The Gorskis sought such consent from their landlord after deciding to become foster parents. The owners refused, stating the Gorskis' apartment was "inappropriate for children." When the Gorskis made a more formal written request, the owners served them with an eviction notice.<sup>255</sup> The Gorskis sued under the FHA, but the district court dismissed their claims for lack of standing because they had not yet been assigned any foster children.

The Seventh Circuit reversed. The court noted that the liberal standing rules approved by the Supreme Court for FHA claims meant a proper plaintiff "need not be a member of the class that was the object of [the defendant's] discrimination."<sup>256</sup> The court then held that the absence of children in the Gorskis' household did not prevent them from challenging their landlords' familial status discrimination. This discrimination, according to the Seventh Circuit, included the defendants having "expressed a preference for tenants on the basis of familial status in violation of section 3604(c) and, in violation of section 3617, retaliated against the Gorskis when the couple attempted to have the discriminatory policy changed."<sup>257</sup> Because the case was resolved below by motion to dismiss, the court of appeals expressed no opinion on the merits and remanded the case for further proceedings.<sup>258</sup>

*Soules v. HUD* involved less blatant statements.<sup>259</sup> In this case the Second Circuit affirmed a HUD ALJ's decision that a rental

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254. *Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991).

255. *Id.* at 1185.

256. *Id.* at 1189. For a more detailed discussion of standing rules under the FHA, see *infra* Part IV.C.1.

257. *Gorski*, 929 F.2d at 1189-90. In addition to § 3604(c) and § 3617, the *Gorski* opinion made note of § 3604(a) and § 3604(b), *id.* at 1184, but the court did not refer to these other provisions in concluding that the defendants' actions clearly violated the FHA. *Id.* at 1189-90.

258. *Id.* at 1190.

259. *Soules v. HUD*, 967 F.2d 817 (2nd Cir. 1992), *aff'g* *HUD v. Downs*, Fair Hous.-Fair Lending Rptr. ¶ 25,011 (HUD ALJ 1991).

agent, Mary Jean Downs, did not violate the FHA's familial status provisions. In response to Downs' newspaper advertisement for an apartment, a prospective renter named Sherry Soules called Downs to inquire. During the phone call, Downs asked whether Soules' household included children. When Soules said she had one child, Downs asked, "How old is your child?" Soules objected to the question, and Downs decided not to rent to Soules because of this "unpleasant" conversation. Soules contacted a local fair housing organization, which had two testers contact Downs. In her phone calls with the testers, Downs asked both how many people were in their household. One tester responded that she had a young son, and Downs inquired whether the boy was quiet. Downs stated that an elderly couple living downstairs "would probably not be able to take a noisy child running around."<sup>260</sup> Soules and the fair housing organization filed a HUD complaint alleging that Downs violated § 3604(a) and § 3604(c). The ALJ ruled for Downs on both counts, and the Second Circuit affirmed.

The court of appeals applied an "ordinary listener" standard in determining whether Downs' statements indicated an illegal preference under § 3604(c). According to the Second Circuit, this standard requires a distinction be drawn between statements that are "[o]penly discriminatory," which violate § 3604(c) without further evidence, and those that are "not facially discriminatory," which require additional analysis of such matters as context and speaker inflection to determine if an illegal preference was indicated.<sup>261</sup> The *Soules* opinion cited, as examples of openly discriminatory violations, three cases involving blatantly anti-black statements made by housing providers.<sup>262</sup> The opinion also suggested that this category includes any inquiry by a housing provider concerning a prospective tenant's race because "[t]here is simply no legitimate reason for considering an applicant's race."<sup>263</sup> On the other hand, the Second Circuit opined that, since it sometimes is legitimate to inquire about the number of individuals interested in occupying an apartment and their ages (e.g., because of local zoning regulations or neighborhood conditions), Ms. Downs' inquiries could not be

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260. *Soules v. HUD*, 967 F.2d 817, 820 (2nd Cir. 1992) (internal citation omitted).

261. *Id.* at 824-25.

262. *Id.* at 824 (citing *Stewart v. Furton*, 774 F.2d 706, 708-09 (6th Cir. 1985); *United States v. L & H Land Corp.*, 407 F. Supp. 576, 578-80 (S.D. Fla. 1976); *United States v. Gilman*, 341 F. Supp. 891, 896-97 (S.D.N.Y. 1972)). These cases are discussed *supra* note 123 and in the text accompanying notes 146 to 148.

263. *Soules*, 967 F.2d at 824.

considered per se violations of § 3604(c).<sup>264</sup> Thus, the ALJ properly went on to consider the context of the remarks, including whether Downs intended to indicate a preference against children.<sup>265</sup> Given his views about the overall context of Downs' statements, the ALJ determined they did not indicate impermissible familial status discrimination, and the Second Circuit found sufficient evidence to support this determination.<sup>266</sup>

*Jancik v. HUD* involved claims of both familial status and race discrimination.<sup>267</sup> In this case, the Seventh Circuit affirmed a HUD ALJ's determination that a landlord violated § 3604(c) in several ways, including by making statements to an African-American tester indicating a racial preference. The case began when Jancik, the owner of a large apartment complex, ran a newspaper advertisement including the phrase "mature person preferred." Suspecting familial status discrimination, a local fair housing organization had two testers inquire. The testers—a white woman named Gunderson and a black woman named Allen—made separate phone calls to Jancik, who told both of them he did not want tenants with children or teenagers. He also asked each caller what her race was.

Based on this information, the fair housing organization and Ms. Allen filed a HUD complaint that resulted in an ALJ finding Jancik's print ad and statements to have violated § 3604(c) based on familial status and race.<sup>268</sup> The ALJ awarded over \$21,000 in damages to the fair housing organization and \$2000 to Ms. Allen for emotional distress resulting from the defendant's racial references.<sup>269</sup> In affirming on all points, the Seventh Circuit noted that,

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264. *Id.* at 824. According to the Second Circuit, Downs' further inquiry about whether Soules' and the testers' children would be noisy also was not a per se violation because "if Downs had stereotyped all children as impermissibly noisy, then she would not have asked [this] question." *Id.*

265. *Id.* at 825. According to *Soules*, "factfinders may examine intent, not because a lack of design constitutes an affirmative defense to a [§ 3604(c)] violation, but because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it." *Id.*

266. *Id.* at 825-26.

267. *Jancik v. HUD*, 44 F.3d 553 (7th Cir. 1995), *aff'g* Fair Hous.-Fair Lending Rptr. ¶ 25,058 (HUD ALJ 1993) (liability and basic relief) and Fair Hous.-Fair Lending Rptr. ¶ 25,068 (HUD ALJ 1994) (attorney's fees award).

268. *HUD v. Jancik*, Fair Hous.-Fair Lending Rptr. ¶ 25,058, at 25,566-67 (HUD ALJ 1993).

269. *Id.* at 25,567-69. The ALJ characterized the \$2000 award for Ms. Allen's emotional distress as "modest," noting her testimony that she was upset and angered by Jancik's question about her race and by the fact that it indicated she would be discriminated against because of her race was "somewhat general and conclusory." *Id.* at 25,569. The ALJ also assessed a \$10,000 civil penalty against Jancik and entered an extensive injunctive order against him. *Id.* at 25,569-72. In a subsequent decision, the



although he merely asked the testers about their race, Jancik posed the questions in the context of a screening interview that would have been understood by an "ordinary listener" to indicate an impermissible racial preference; the questions therefore violated § 3604(c).<sup>270</sup>

In *Harris v. Itzhaki*,<sup>271</sup> the Ninth Circuit upheld FHA claims—including one based on § 3604(c)—by an African-American tenant against the owners of her apartment complex. The tenant, Anna Harris, was the only African-American to have rented at the complex. One day, she overheard a conversation between the repairman and another resident, Ms. Waldman, who worked as the owners agent, in which Ms. Waldman stated, "The owners don't want to rent to Blacks."<sup>272</sup> Ms. Harris immediately informed Ms. Waldman her comments were "illegal and racist," and then complained to a local fair housing organization. The fair housing organization sent a white and an African-American tester to the complex. The testers received somewhat different information about available units. Later, the landlords served notices on Ms. Harris, demanding that she pay her rent in a more timely fashion or leave the complex. She then filed suit based on the FHA and other laws. While the case was pending, Ms. Harris moved. The district court granted summary judgment to the defendants on the grounds that the evidence did not support her claims and her move had mooted the case.

The Ninth Circuit reversed on all points but one, agreeing that Ms. Harris' move mooted her claims for injunctive and declaratory relief.<sup>273</sup> The court of appeals held that Ms. Harris could seek damages for three distinct claims: "(1) for eviction notices contrary to established policy; (2) for disparate treatment of rental testers; and (3) for the discriminatory statement by Ms. Waldman."<sup>274</sup> Section 3604(c) was the basis for the third claim,<sup>275</sup> and the Ninth Cir-

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ALJ also awarded attorney's fees to the fair housing organization. *HUD v. Jancik*, Fair Hous.-Fair Lending Rptr. ¶ 25,068 (HUD ALJ 1994).

270. *Jancik v. HUD*, 44 F.3d 553, 557 (7th Cir. 1995).

271. *Harris v. Itzhaki*, 183 F.3d 1043 (9th Cir. 1999).

272. *Id.* at 1048.

273. *Id.*

274. *Id.* at 1052.

275. *Id.* at 1054. The first claim was based on § 3604(a), § 3604(b) and § 3617, and the second claim was based on § 3604(d). *Id.* at 1052-54. In discussing the third claim and § 3604(c)'s coverage of discriminatory statements, the Ninth Circuit cited a HUD regulation for the proposition that § 3604(c) "applies to all oral notices or statements by a person engaged in the rental of a dwelling," and a Second Circuit decision noting that "[o]penly discriminatory oral statements merit . . . straightforward treatment"

cuit held that "Ms. Harris has asserted a prima facie case of discrimination under the FHA—that Ms. Waldman's discriminatory statement caused Ms. Harris emotional distress and disruption in the quiet enjoyment of her apartment."<sup>276</sup>

The owner-defendants did not contest this point, arguing instead that they should not be responsible for Ms. Waldman's statement. The Ninth Circuit held that the owner-defendants' liability depended on whether, for purposes of the FHA, an agency relationship existed between the owners and Waldman. The court found that the plaintiff produced sufficient evidence of such a relationship to avoid summary judgment.<sup>277</sup> While discussing this issue, the Ninth Circuit implied that if Ms. Waldman's statement was a "stray" remark "unrelated to the decisional process, then it [would be] insufficient to show discrimination."<sup>278</sup> The court held, however, that there was sufficient evidence to support the plaintiff's theory that Ms. Waldman's statement "related to her decision to recommend tenants," and therefore was not a "stray remark as a matter of law."<sup>279</sup>

*HUD v. Schuster*<sup>280</sup> was a noteworthy administrative decision where the § 3604(c) claim became important. In *Schuster*, a woman and her two children brought claims under § 3604(a)-(c) against a condominium and its president for their efforts to block the family's purchase of a unit. The condominium's rules barred pets and young children. When the complainant asked that these rules be waived, the president told her the anti-pet rule would not be waived but that she could move in with her children although "they would be the only children in the complex and . . . might be 'a little uncomfortable.'"<sup>281</sup> The woman then filed a HUD complaint that led to an ALJ deciding against her § 3604(a) and (b) claims on the ground that the condominium's rule against pets was a valid, nondiscriminatory reason for rejecting her application.<sup>282</sup> With respect to the § 3604(c) claim, however, the ALJ found liability based on both the condominium's rule barring young children

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(citing 24 C.F.R. § 100.75(b); *Soules v. HUD*, 967 F.2d 817, 824 (2d Cir. 1992)). *Id.* at 1054. The pertinent parts of this regulation and the *Soules* case are discussed *supra*, respectively, in note 117 and the text accompanying notes 259-62.

276. *Harris*, 183 F.3d at 1054.

277. *Id.* at 1054-55.

278. *Id.* at 1055.

279. *Id.*

280. *HUD v. Schuster*, Fair Hous.—Fair Lending Rptr. ¶ 25,091 (HUD ALJ 1995).

281. *Id.* at 25,829.

282. *Id.* at 25,831-34.

and the president's statement about the complainant's children being "a little uncomfortable," a statement the ALJ held would be understood by the "ordinary listener" to indicate a preference against children.<sup>283</sup> Regarding relief, the ALJ found both the complainant and her two children suffered some, albeit not severe, emotional distress as a result of the defendants' § 3604(c) violations. He awarded them a total of \$2,500 but did not specify how much was for the written violation and how much was for the oral violation of § 3604(c).<sup>284</sup>

A few other 1990s decisions commented on § 3604(c) claims, although these claims were not independently significant in establishing either liability or grounds for additional relief. Examples included *HUD v. Wagner*,<sup>285</sup> a familial status case where liability was based in part on a rental manager's statements to a tester expressing a desire to rent only to households with fewer than two children,<sup>286</sup> and *HUD v. George*,<sup>287</sup> where liability was based in

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283. *Id.* at 25,834-35. In reaching these conclusions, the ALJ held that the condominium's rule against young children violated § 3604(c) despite the fact that it had not been enforced and that the president's statement violated that part of § 3604(c) banning statements "indicat[ing] a preference," even if it did not also indicate "an intention to make any such preference," because § 3604(c)'s language covers both types of statements. *Id.* at 25,834-35.

284. *Id.* at 25,835-36. The ALJ also assessed civil penalties of \$1,500 against the condominium association and \$750 against its president and entered a decree permanently enjoining the defendants from making any notices or statements indicating familial status discrimination in violation of § 3604(c). *Id.* at 25,836-37.

*Blomgren v. Ogle*, 850 F. Supp. 1427 (E.D. Wash. 1993) is somewhat like *Schuster*. In *Blomgren*, a woman who challenged her landlords' efforts to evict her and her son prevailed on a § 3604(c) claim while not succeeding on her claims under § 3604(a) and (b). The magistrate judge denied the plaintiff's motion for summary judgment on her § 3604(a) and (b) claims, ruling that the defendants' claimed nondiscriminatory reason for eviction (i.e., the son's disruptive behavior) raised material fact issues that could only be resolved at trial. *Id.* at 1437-39. Summary judgment was granted, however, on the plaintiff's § 3604(c) claim, which was based on the defendants' having distributed a set of written rules and regulations including the statement "[n]o children or pets allowed." *Id.* at 1439-40. As in the *Schuster* case, the magistrate judge in *Blomgren* held this written rule violated § 3604(c) despite the defendants' insistence that they had no intention of enforcing it. *Id.* at 1440. The *Blomgren* opinion reached this conclusion by applying the familiar principles that the defendants' rule should be read from the perspective of the "ordinary reader" and by holding that an intent to discriminate need not be proven to establish a violation of § 3604(c). *Id.* Because *Blomgren* was a decision on summary judgment, the judge did not assess damages for the plaintiff's claim that she was "upset" by this violation, which he noted would require proof that the "[d]efendants' illegal actions actually caused her to suffer injuries within the meaning of the statute." *Id.* at 1440.

285. *HUD v. Wagner*, Fair Hous.-Fair Lending Rptr. ¶ 25,032 (HUD ALJ 1992).

286. Although the ALJ in *Wagner* held that the statement violated § 3604(c), he used it primarily as evidence that the manager's treatment of the complainant violated § 3604(a) and (d), and the relief he awarded complainant was based entirely on

part on statements by the president of a development company to representatives of an organization seeking to build a home for mentally handicapped persons that he preferred not to sell to the organization because their tenants would be disabled and his partners were concerned "that having a group home as the first home in the . . . subdivision would make it harder to market and sell the remaining houses."<sup>288</sup> Two other cases—*Fair Housing of Marin v. Combs*<sup>289</sup> and *Chew v. Hybl*<sup>290</sup>—involved egregious racial statements that, although held to violate § 3604(c), did not lead to any relief independent of that justified by the defendant's other FHA violations.

As a group, these additional 1990s cases reinforced the key themes established by other § 3604(c) decisions. A number of these cases held that discriminatory statements violated § 3604(c) even when made to people not seeking housing.<sup>291</sup> Many of these decisions also recognized that the target of such a statement can recover damages for emotional distress and other intangible injuries. The *Jancik* and *Soules v. HUD* decisions also made clear that some statements are so obviously discriminatory that no additional

the emotional distress and lost housing opportunity resulting from non-§ 3604(c) violations. *Wagner*, ¶ 25,032 at 25,335-38.

287. *HUD v. George*, Fair Hous.—Fair Lending Rptr. ¶ 25,010 (HUD ALJ 1991).

288. *Id.* at 25,160. Although the ALJ in *George* held these statements violated § 3604(c), he also held the company's refusal to sell violated § 3604(f)(1), and none of the relief awarded complainant was based exclusively on the § 3604(c) violation. *Id.* at 25,163-67.

289. *Fair Hous. of Marin v. Combs*, Fair Hous.—Fair Lending Rptr. ¶ 16,430 (N.D. Cal. 2000) (California landlord held to have violated § 3604(a) and (c), § 3617, and other fair housing laws based in part on his telling white tester that he no longer rented to African-Americans and telling several white tenants that he wanted his complex to be an all-white building: "I don't want any niggers in my building. I own it. I'll have who I want . . . I'll sell the place before I rent to a nigger . . . No niggers are allowed on the premises").

290. *Chew v. Hybl*, Fair Hous.—Fair Lending Rptr. ¶ 16,249, at 16,249.2, 16,249.4-.8 (N.D. Cal. 1998) (California landlord held to have violated § 3604(a) and (c) and § 3617 based in part on her statements to Asian-American applicants that she would not rent to them because "she had 'good white American applicants' and that 'we white people' need to 'stick together' because 'you people are taking over this country'").

291. This principle—that § 3604(c) may be invoked by persons other than home seekers who are the direct target of a defendant's discriminatory statement—is also supported by the decision in *HUD v. Schuster* to award damages not only to the mother, who was the direct target of discrimination, but also to her son who was not present when the offending statement was made; and by *Gorski v. Troy*, wherein plaintiffs' § 3604(c) claim was upheld even though they were not "member[s] of the class that was the object of [the defendant's] discrimination." *Supra* notes 280-84 and accompanying text; *supra* notes 256-57 and accompanying text. For a further discussion of this issue, see *infra* Part IV.C.2.c.

proof beyond that the statement was made is necessary to establish a § 3604(c) violation. For the most part, however, judges in the 1990s, like their earlier counterparts, used discriminatory housing statements primarily as evidence that the defendant violated other provisions of the FHA.<sup>292</sup> Even when such a statement was recognized as an independent violation, rarely was it used as grounds to award additional relief.<sup>293</sup>

#### D. Summary of Judicially Recognized Purposes for §3604(c)

Although decisions focusing on § 3604(c) are relatively few in number, taken as a whole, they identify important purposes of the provision and stress Congress' decision to have § 3604(c) apply to housing exempt from the other § 3604 prohibitions. From the earliest appellate treatment of § 3604(c),<sup>294</sup> courts have noted that the provision reduces barriers that might deter minorities seeking homes in neighborhoods that must be open to them under the FHA but might appear restricted if discriminatory ads, notices, or statements are allowed.<sup>295</sup> This "market-limiting" effect of § 3604(c) violations was recognized early on in *Mayers v. Ridley*,<sup>296</sup> which noted that standing to sue under this provision extends to white homeowners harmed by this effect. *Mayers* thus paved the way for judicial recognition of a wide range of proper § 3604(c) claimants beyond those who are the direct target of an unlawful communication.<sup>297</sup>

Section 3604(c)'s second key purpose is protecting minority home seekers from suffering insult, emotional distress, and other intangible injuries resulting from discriminatory ads, notices, or statements. First noted by the Sixth Circuit in 1985 in *Stewart v. Furton*,<sup>298</sup> and further developed in the human-model advertisement cases of the late 1980s and early 1990s,<sup>299</sup> this purpose of protecting minority home seekers from emotional distress has often been cited in more recent cases.<sup>300</sup> Focusing on protecting minority

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292. *E.g.*, cases cited *infra* notes 326, 6 341.

293. *E.g.*, cases cited *infra* notes 180, 182, 183.

294. *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972); *supra* notes 124-31 and accompanying text.

295. *Supra* texts accompanying notes 130-31, 140-41.

296. *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc); *supra* notes 132-41 and accompanying text.

297. *Supra* notes 167-75 and accompanying text.

298. *Stewart v. Furton*, 774 F.2d 706 (6th Cir. 1985); *supra* note 148.

299. *Supra* notes 161-66 and accompanying text.

300. *Supra* notes 199, 203, 219, 227, 240, 244, 251, 269, 284 and accompanying texts.

home seekers from psychic injury is particularly appropriate in § 3604(c) cases involving housing providers whose dwellings are otherwise exempt from the FHA and/or where the offending statement is made only to the individual complainant and therefore presumably impacts a narrow "audience." While this "protection-against-psychic-injury" purpose is now well recognized as an independent § 3604(c) rationale, it is also related to the anti-"market-limiting" goal because the emotional harm suffered may well deter victims from engaging in an unrestricted housing search.<sup>301</sup>

Section 3604(c) also helps break down the notion that illegal discrimination continues to permeate America's housing markets by banning every ad, notice, and statement suggesting the FHA's promise of nondiscrimination is not a reality. This purpose was first articulated in the human-models cases and Judge Ginsburg's opinion in *Spann v. Colonial Village, Inc.*<sup>302</sup> The underlying theory is that the continuing presence of discriminatory ads, notices, and statements encourage a variety of groups—particularly minority home seekers and housing providers—to believe housing discrimination is an accepted norm despite the FHA's pronouncements to the contrary.<sup>303</sup> Violations of § 3604(c) delay acceptance and appreciation of the notion that fair housing is now the law of the United States and require ongoing, costly efforts to re-educate relevant groups about their rights and responsibilities under the FHA. As with the "protection-against-psychic-injury" purpose, this "re-education" purpose has an obvious connection to the anti-"market-limiting" goal, for if home seekers and housing providers believe discrimination is more widespread than the FHA allows, their misperceptions may result in fewer housing opportunities being pursued and made available than the FHA actually guarantees.

These three main purposes of § 3604(c)—avoiding market narrowing, protecting against psychic injury, and public education—have a direct bearing on the FHA's ultimate goals. The Congress

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301. *HUD v. Rollhaus*, Fair Hous.-Fair Lending Rptr. ¶25,019, at 25,251 (HUD ALJ 1991) (stating that biased statements in violation of § 3604(c) may discourage other protected class members from seeking housing); cases quoted *supra* notes 199, 227, 240.

302. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24 (D.C. Cir. 1990); *supra* notes 167-75 and accompanying text.

303. See also *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 n.10 (5th Cir. 1982) (rejecting defendant's argument that his "age and environment" should be considered mitigating factors in reducing punitive damage award in case involving blatant racist statement, described *infra* note 336, on the ground that "[i]n considering these factors, we note that it is precisely these ingrained and historical prejudices which the civil rights laws were enacted to combat").

that passed the original FHA sought not only to eliminate housing discrimination but also to replace segregated living patterns with truly integrated communities.<sup>304</sup> FHA goals can only be achieved if the highly entrenched system of discrimination that pervaded America's housing markets in 1968 is both eliminated and perceived as eliminated. As the *Hunter* opinion points out,<sup>305</sup> the "market-limiting" effect of § 3604(c) violations—and, as we have seen, all three of § 3604(c)'s main purposes relate to this problem—discourages home seekers from believing housing markets are open to all.

Section 3604(c) prohibitions were designed to foster the perception that housing sales and rentals are non-discriminatory, a necessary prerequisite to fulfilling the FHA's ultimate goals. As such, § 3604(c), with its applicability to otherwise exempt housing and its unique ban on discriminatory statements, must be seen as a consciously devised part of the arsenal assembled to battle housing discrimination. As the next part demonstrates, however, courts and litigants often treat discriminatory statements outlawed by § 3604(c) as minor FHA violations, or not violations at all, undercutting the provision's envisioned role.

### III. DISCRIMINATORY STATEMENTS AND THE NON-USE OF §3604(c)

#### A. Discriminatory Statements as Evidence of the Defendant's Illegal Motive

While § 3604(c) decisions focusing on discriminatory housing statements are rare, numerous reported FHA cases have noted such statements exist. Most cases merely cite discriminatory statements as evidence the defendant violated other FHA provisions, rather than use the statement as the basis for an independently significant § 3604(c) violation.

In assessing proof for claims based on FHA provisions such as § 3604(a) and § 3604(b), courts generally follow precedents established for Title VII employment discrimination cases.<sup>306</sup> Most § 3604(a) and § 3604(b) cases turn on whether the defendant has

304. *Supra* Part I.C.

305. *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972); *supra* text accompanying note 130.

306. *E.g.*, SCHWEMM, *supra* note 15, § 10:2 n.23 and accompanying text (citing cases giving prima facie case approach to disparate treatment cases), §10:3 nn.27-28 and accompanying text (mixed motive cases), §10:4 nn.18-21, § 10:5 n.15 and accompanying text (discriminatory effect cases).

been shown to have acted on the basis of one of the factors made illegal by the FHA. As in Title VII cases, the plaintiff in a FHA case has the burden of proving the defendant's illegal motivation.<sup>307</sup>

Evidence of the defendant's discriminatory motive in Title VII and FHA cases may be either direct or indirect. Direct evidence is defined as evidence proving the existence of facts without inference or presumption.<sup>308</sup> In discrimination cases, direct evidence of the defendant's hostility toward racial minorities or other protected groups usually takes the form of biased comments in the defendant's written documents or oral statements to witnesses.<sup>309</sup> If a case includes a statement indicating illegal motivation and that statement is linked to the defendant's action,<sup>310</sup> little else is required to prove a violation. Direct evidence, if believed by the trier of fact, is usually sufficient to justify a finding of illegal discrimination.<sup>311</sup>

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307. SCHWEMM, *supra* note 15, § 32:1 nn.1-2; *infra* notes 313-18 and accompanying text.

308. *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641 (11th Cir. 1998); *HUD v. Las Vegas Hous. Auth., Fair Hous.-Fair Lending Rptr.* ¶ 25,116, at 26,001 (HUD ALJ 1996); BLACK'S LAW DICTIONARY 413-14 (spec. 5th ed. 1979) (quoted in *HUD v. Schuster, Fair Hous.-Fair Lending Rptr.* ¶ 25,091, at 25,831 (HUD ALJ 1995)); *see also Kormoczy v. HUD*, 53 F.3d 821, 824 (7th Cir. 1995) (direct evidence is an acknowledgment of the defendant's discriminatory intent); *HUD v. Gwizdz, Fair Hous.-Fair Lending Rptr.* ¶ 25,086, at 25,793 n.7 (HUD ALJ 1994) ("Direct evidence establishes a proposition directly rather than inferentially."); *HUD v. Corrigan, Fair Hous.-Fair Lending Rptr.* ¶ 25,084, at 25,770 n.7 (HUD ALJ 1994) (same).

309. *E.g.*, cases cited *supra* notes 180, 186 and *infra* notes 321, 336, 341, 354.

310. A biased statement not linked to the defendant's challenged action does not qualify as direct evidence of discrimination because such "[d]irect evidence, by definition, is evidence that does not require such an inferential leap between fact and conclusion." *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642 (11th Cir. 1998). *See also HUD v. Las Vegas Hous. Auth., Fair Hous.-Fair Lending Rptr.* ¶ 25,116, at 26,002 (HUD ALJ 1996) (evidence of statements and other behavior showing "general racial bias" on the defendant's agent's part "is not proof of her intent with regard to the Complainants"); *HUD v. Schuster, Fair Hous.-Fair Lending Rptr.* ¶ 25,091, at 25,831-32 (HUD ALJ 1995) (discouraging statement concerning complainant's children is not direct evidence of discrimination because it was not given as the reason for disapproving the sale).

311. Some cases find such proof establishes liability unless the defendant proves by a preponderance of the evidence that he would have reached the same decision without impermissible motive. *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642 (11th Cir. 1998) (Title VII case); *Kormoczy v. HUD*, 53 F.3d 821, 824 (7th Cir. 1995) (FHA case). This formulation introduces the difficulties associated with "mixed motive" cases, the proper analysis of which under Title VII is currently governed by the 1991 Civil Rights Act's response to the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and may be different from the proper analysis of comparable FHA cases. *See SCHWEMM, supra* note 15, § 10:3. Re-



Absent direct evidence, a Title VII or FHA plaintiff may establish the defendant's illegal intent indirectly by the "prima facie case" method, which the Supreme Court developed in a series of employment discrimination cases.<sup>312</sup> Under this method, the plaintiff must first prove certain basic elements to establish a prima facie case of discrimination. In a § 3604(a) refusal-to-rent case, for example, the elements are (1) that the plaintiff is a member of a racial minority or some other class protected by the FHA; (2) that the plaintiff applied for and was qualified to rent the unit involved; (3) that the plaintiff was rejected by the defendant; and (4) that the unit remained available thereafter.<sup>313</sup> Proof of these elements shifts to the defendant the burden to "[p]roduce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."<sup>314</sup> If the defendant fails to meet this burden of production, the plaintiff prevails.<sup>315</sup> If, on the other hand, the defendant does meet this burden, the plaintiff is afforded an opportunity to prove by a preponderance of the evidence that the defendant's allegedly legitimate reasons were not genuine but instead a pretext for discrimination.<sup>316</sup> Throughout this process, although intermediate evidentiary burdens shift back and forth, the ultimate burden of proving the defendant intentionally discriminated against the plaintiff remains with the plaintiff.<sup>317</sup>

In the vast majority of cases tried under this framework, the plaintiff establishes a prima facie case and the defendant meets its burden of articulating a legitimate reason for its behavior. The final stage, therefore, is the key to determining liability—the persuasiveness of the plaintiff's rebuttal evidence concerning the falseness of the defendant's asserted reason. Disbelief of the defendant's legitimate reason will generally permit, but does not require, the

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ardless of how "mixed motive" cases should be dealt with, however, it remains clear that direct evidence of the defendant's illegal motivation may itself be sufficient to establish a violation of both Title VII and the FHA.

312. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Other important decisions that have refined and clarified the *McDonnell Douglas* method of proof include *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

313. *E.g.*, cases cited at SCHWEMM, *supra* note 15, § 10:2 n.26.

314. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

315. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-11 (1993).

316. *Reeves*, 530 U.S. at 143 (quoting *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

317. *Id.*

factfinder to conclude that the defendant's real reason for rejecting the plaintiff was illegal discrimination.<sup>318</sup>

Statements made by the defendant's agents indicating their animus toward the plaintiff's race or other protected classification are one type of evidence that may help establish that the defendant's asserted justification is false. This is true even if these statements are not made in the context of the action being challenged by the plaintiff.<sup>319</sup> For example, in *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>320</sup> an age discrimination case, the Supreme Court upheld a plaintiff's jury verdict where evidence was introduced that Reeves' supervisor had told him he "was so old [he] must have come over on the Mayflower" and that he "was too damn old to do [his] job."<sup>321</sup> In a unanimous opinion, the Court held that this and other evidence was sufficient for the jury to find the defendant's asserted legitimate reason for plaintiff's firing was false and, thus, to conclude the defendant unlawfully discriminated.<sup>322</sup> The Court also noted that "the potentially damning nature" of the supervisor's age-related comments was not to be discounted on the ground that they "were not made in the direct context of Reeves's termination."<sup>323</sup> By ruling that biased statements may demonstrate illegal intent even if they do not directly address the employment decision under review, the *Reeves* opinion suggests that virtually every derogatory remark about the plaintiff's protected class made by a defendant's agents may have probative value to the ultimate issue in a discrimination case.

Thus, in employment cases, discriminatory statements may be a rich source of evidence of the defendant's illegal intent, either as direct evidence or as part of the plaintiff's rebuttal evidence under the prima facie case framework. Such statements, however, do not constitute an independent violation of the employment discrimination statutes because those statutes, unlike the FHA, ban only discriminatory ads and notices, not discriminatory statements.<sup>324</sup> In FHA cases, however, discriminatory statements not only serve as direct or rebuttal evidence, but also independently violate the statute, at least if made "with respect to the sale or rental of a dwell-

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318. *Id.* at 146-48; see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

319. *Reeves*, 530 U.S. at 151-52.

320. 530 U.S. 133 (2000).

321. *Reeves*, 530 U.S. at 151.

322. *Id.* at 151-54.

323. *Id.* at 152-53.

324. *Supra* text accompanying notes 81-82, 94.

ing.”<sup>325</sup> Too often, however, litigants and judges have ignored the independent significance of a discriminatory statement in a FHA case, perhaps because of their misplaced confidence that Title VII precedents provide an entirely appropriate method for evaluating fair housing cases.

### **B. The Non-Use of § 3604(c) in FHA Cases Involving Discriminatory Statements**

In numerous FHA cases, racially discriminatory statements are considered with no mention of § 3604(c). One noteworthy example is *Phillips v. Hunter Trails Community Ass'n*,<sup>326</sup> where the Seventh Circuit affirmed a finding of illegal discrimination by a homeowner's association that sought to block the sale of a house in its area to an African-American couple. The evidence included “explicit racist remarks” made at an association meeting held to consider the couple's application. The association's lawyer also stated to a business acquaintance that the community was “an exclusive [one] that did not include ‘niggers’ and ‘car wash operators.’”<sup>327</sup> The Seventh Circuit agreed with the trial judge's categorization of these statements as “direct evidence,” and held them sufficient to violate the 1866 Civil Rights Act.<sup>328</sup> The court of appeals went on to uphold the district court's ruling that the defendants also violated the FHA, finding that the plaintiffs made out a prima facie case that the association failed to rebut with nonracial reasons for its actions.<sup>329</sup> The court did not identify which FHA provisions were violated, although the prime candidates are § 3604(a) and § 3617.<sup>330</sup> What is clear, however, is that § 3604(c) was not considered, an interesting omission in light of the fact that the case was prosecuted by an experienced plaintiff's fair housing lawyer, tried by a highly regarded trial judge, and reviewed by a distinguished panel of the Seventh Circuit.<sup>331</sup>

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325. *Supra* text accompanying notes 118-19; *infra* Part IV.A.1.

326. *Phillips v. Hunter Trails Comm. Ass'n*, 685 F.2d 184 (7th Cir. 1982).

327. *Id.* at 188. The reference to “car wash operators” was prompted by Mr. Phillips owning a number of car wash businesses.

328. *Id.* at 187-89.

329. *Id.* at 189-90.

330. The Seventh Circuit's discussion of the plaintiffs' prima facie case refers to their having proved “that they were rejected,” which suggests a refusal-to-deal claim under § 3604(a), and the possibility that the suit was not brought only “under Sections 3603, 3604, 3605, and 3606,” suggesting an interference claim under § 3617. *See id.* at 190-91.

331. The references are to, respectively, plaintiffs' lawyer F. Willis Caruso, District Judge Prentice H. Marshall, and the appellate panel of Chief Judge Walter J. Cum-

One might argue that § 3604(c) does not apply to the facts of *Phillips* because the biased statements do not fall within the provision's "with respect to the sale or rental of a dwelling" language.<sup>332</sup> While the statements related to the sale of a house, they were made during a private conversation at a closed association meeting and were not communicated directly to the minority plaintiffs. Whether such "internal" statements are covered by § 3604(c)'s "with respect to" language is at least a debatable point, and it should have been discussed if a § 3604(c) claim was asserted.<sup>333</sup> It is likely, however, that the lack of attention paid to § 3604(c) in *Phillips* indicates that neither the parties nor the courts felt it was significant enough to mention. This is unfortunate because the one point on which the Seventh Circuit ruled that the trial court's decision for the plaintiffs was not fully justified was the compensatory damage award for intangible injuries.<sup>334</sup> A discussion of § 3604(c) might have provided additional grounds for this award.<sup>335</sup>

*Phillips* exemplifies the many fair housing decisions ignoring the § 3604(c) implications of a racially discriminatory statement. Most of these decisions merely use the statement as evidence the defendant violated some other FHA provision and/or § 1982,<sup>336</sup> a few

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mings, Judge Richard A. Posner, and Senior District Judge Robert A. Grant. *Id.* at 184.

332. *Supra* text accompanying notes 118-19.

333. For a discussion concluding that the *Phillips* statements would be covered by § 3604(c) because they occurred in the context of the defendant's "decisional process" regarding the Phillips' application, see *infra* text accompanying notes 483-91.

334. *Phillips*, 685 F.2d at 190-91. As a result of this ruling, the court of appeals reduced the award for intangible injuries from \$25,000 to \$10,000 each for Mr. and Mrs. Phillips. *Id.* at 191; see also *Allahar v. Zahora*, 59 F.3d 693, 694, 697 (7th Cir. 1995) (relief limited in case ignoring obvious § 3604(c) violation (further described *infra* note 341)).

335. See *Phillips*, 685 F.2d at 190-91. Of course, to add to the basis for such an award, the statements in *Phillips* would have to have been communicated to the plaintiffs. The insults were communicated as part of the litigation process, albeit not by the original speakers themselves. For a discussion of whether a § 3604(c) claim may be brought by a person who is the subject of a discriminatory housing statement made by the defendant to others who then pass on this statement to the plaintiff, see *infra* Parts IV.B.1 and IV.C.2.b.

336. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1450, 1452 (4th Cir. 1990) (affirming housing development's liability under § 1982 based in part on the "direct evidence" provided by various statements made by defendant's board members at board meetings reflecting their hostility to African-Americans and their need to defeat the African-American plaintiff's efforts to buy a home there because "if we don't beat this case, we'll have every nigger in Baltimore coming here"); *Tolliver v. Amici*, 800 F.2d 149, 150-51 (7th Cir. 1986) (affirming relief based on landlord's having violated the FHA and § 1982 by refusing to rent to African-American plaintiff based in part on defendant's statement to white tester that she "would not rent to a black person such as [plaintiff] because she had experienced problems with a previous

black tenant"); *Thronson v. Meisels*, 800 F.2d 136, 139 (7th Cir. 1986) (affirming landlord's liability under § 1982 for refusing to rent to mixed-race group based in part on defendant's statement to white tester that he couldn't rent to plaintiffs' group "because one of them was black"); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1200-03 (5th Cir. 1982) (affirming landlord's liability under § 3604(b) and § 1982 for evicting tenants who entertained African-American guests based in part on evidence that defendant "threatened to evict the plaintiffs if they continued to receive black persons as guests in their apartment"; that he "expressed his racial animus in the crudest terms, referring to the plaintiffs' guests as 'nigger trash'"; and that he had evicted another white tenant after telling her that "he did not want 'niggers' in his house"); *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528, 530 (7th Cir. 1973) (holding real estate firm liable under FHA (citing § 3604(a) and § 3604(d)) and § 1982 for refusing to show listings in white communities to African-American couple based in part on statement by defendant's agent to white prospect that, "We don't have to show them [African-Americans] everything. Ha. We can misplace a few pages."); *Texas v. Crest Asset Mgmt., Inc.*, 85 F. Supp. 2d 722, 730 (S.D. Tex. 2000) (upholding tenant's § 3604(a) and § 3604(b) claims, but dismissing § 3604(c) and other FHA claims, in case based on "direct evidence" that officer of apartment management firm told plaintiff that "he wanted me to move out of the complex because I was an Arab, that he did not want Arabs in the complex," and that plaintiff was "an Arab terrorist, an F . . . Arab, a dumb Arab, a troublemaker"); *Lane v. Cole*, 88 F. Supp. 2d 402, 404-05 (E.D. Pa. 2000) (upholding § 3604(a) and § 3617 claims against landlord of evicted white tenant who had entertained African-American guests based in part on landlord's statement to tenant that he would "remove the blacks" from her apartment if she did not do so); *Cato v. Jilek*, 779 F. Supp. 937, 943 (N.D. Ill. 1991) (holding landlord liable under FHA (citing § 3604(a), § 3604(b), and § 3604(d)) and § 1982 for refusing to rent to mixed-race couple based in part on "direct evidence" that defendant told white testers that he "would like to kill her [the white plaintiff] for bringing a black man to my property"); *Laudon v. Loos*, 694 F. Supp. 253, 254 (E.D. Mich. 1988) (holding landlord liable under § 1982 based in part on his statements first to white applicant that applicant "could not have blacks visit the apartment" and then to tester that he "would not rent to blacks"); *Pollitt v. Bramel*, 669 F. Supp. 172, 174-75 (S.D. Ohio 1987) (holding landlord liable under FHA, citing § 3604(a) and § 3604(d), and § 1982 for refusing to rent to African-American couple based on defendant's failure to rebut plaintiffs' prima facie case under *McDonnell Douglas* as shown in part by defendant's statement three years earlier to a man named Martin that defendants "preferred the Martins not rent to a black man"); *Bishop v. Pecsok*, 431 F. Supp. 34, 36-38 (N.D. Ohio 1976) (holding landlord liable under § 3604(a) and § 1982 for refusing to rent to mixed-race couple based in part on defendant's statement to plaintiffs that he "does not allow blacks in his building because their friends would hang around and terrorize the other tenants" and his statement to other African-American prospect that "he did not rent to blacks as it would upset his other tenants"); *Williamson v. Hampton Mgmt. Co.*, 339 F. Supp. 1146, 1148 (N.D. Ill. 1972) (holding apartment management firm liable under FHA and § 1982 for refusing to allow sublet to African-American tenants based on statement by defendant's agent to tester that defendant "did not want blacks"); *HUD v. Las Vegas Hous. Auth., Fair Hous.-Fair Lending Rptr.* ¶ 25,116, at 26,002-05 (HUD ALJ 1996) (holding housing authority liable for steering under § 3604(a) and race-based refusal to transfer under § 3604(b) based on prima facie case framework as shown in part by statements of defendant's agent to co-workers that they should limit blacks to certain areas); *see also* *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, 779-81, 783 (N.D. Miss. 1972) (holding development company owner liable under FHA based in part on "persuasive evidence" in the form of his statements that "come close to admissions of a discriminatory policy" and his failure on many occasions to assure local Air Force housing officers that he would

also rely on the statement in determining whether the defendant's violation is sufficiently egregious to justify a punitive damages award,<sup>337</sup> but the fact that the statement itself is a potential FHA violation and might lead to additional relief is generally not recognized. It is true that the offending statements in a number of these cases were made to persons other than minority home seekers—such as the defendant's agents, tenants, white prospects, testers, and others<sup>338</sup>—suggesting, as in *Phillips*, that a § 3604(c) claim might have raised some thorny coverage issues.<sup>339</sup> In some cases, however, the discriminatory statements were made directly to a protected class member during a housing-related discussion, leaving no doubt that a separate claim under § 3604(c) was appropriate.<sup>340</sup> Indeed, in two direct cases, the plaintiff foreswore *all* FHA

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obey the FHA); *cf.* *Van den Berk v. Mo. Comm'n on Human Rights*, 26 S.W.3d 406, 409, 411-13 (Mo. Ct. App. 2000) (affirming agency's decision holding landlord liable under state law equivalent of § 3604(a) and § 3604(d), without mentioning state law equivalent of § 3604(c), based on landlord's statement to African-American home seeker that she would not rent to her because "black people and white people just don't get along well, living together"); cases cited *infra* note 341.

337. *E.g.*, *Tolliver v. Amici*, 800 F.2d 149, 151 (7th Cir. 1986) (affirming \$10,000 punitive award in refusal-to-rent case in part based on defendant-landlord's "blatant racial statements" to African-American plaintiff and to tester); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 n.10 (5th Cir. 1982) (described *supra* note 303); *see also* *Allahar v. Zahora*, 59 F.3d 693, 694, 697 (7th Cir. 1995) (discussed *infra* note 341).

338. *E.g.*, *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1450 (4th Cir. 1990) (described *supra* note 336 (internal board discussions)); *Tolliver v. Amici*, 800 F.2d 149, 150-51 (7th Cir. 1986) (described *supra* note 336 (tester)); *Thronson v. Meisels*, 800 F.2d 136, 139 (7th Cir. 1986) (described *supra* note 336 (tester)); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1202-03 (5th Cir. 1982) (described *supra* note 303 (tenants)); *Sorenson v. Raymond*, 532 F.2d 496, 498 (5th Cir. 1976) (described *infra* notes 343-351 and accompanying text (tenant and federal investigator)); *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528, 530 (7th Cir. 1973) (described *supra* note 336 (white prospect)); *United States v. Reddoch*, 467 F.2d 897, 898 (5th Cir. 1972) (described *infra* note 342 (defendant's agents)); *Lane v. Cole*, 88 F. Supp. 2d 402, 404 (E.D. Pa. 2000) (described *supra* note 336 (tenant)); *Cato v. Jilek*, 779 F. Supp. 937, 943 (N.D. Ill. 1991) (described *supra* note 336 (testers)); *Laudon v. Loos*, 694 F. Supp. 253, 254 (E.D. Mich. 1988) (described *supra* note 336 (tester)); *Pollitt v. Bramel*, 669 F. Supp. 172, 174 (S.D. Ohio 1987) (described *supra* note 336 (defendant's agent)); *Williamson v. Hampton Mgmt. Co.*, 339 F. Supp. 1146, 1148 (N.D. Ill. 1972) (described *supra* note 336 (tester)); *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, 780-81 (N.D. Miss. 1972) (described *supra* note 336 (local Air Force housing officers)); *HUD v. Las Vegas Hous. Auth., Fair Hous.-Fair Lending Rptr.* ¶ 25,116, at 26,002 (HUD ALJ 1996) (described *supra* note 336 (defendant's agents)); *cf.* *Chapp v. Bowman*, 750 F. Supp. 274, 276 (W.D. Mich. 1990) (religious discrimination case described *infra* notes 352-53 and accompanying text (tester)).

339. For a discussion of this issue suggesting that most of these statements to third parties would in fact be covered by § 3604(c), see *infra* text accompanying notes 483-91.

340. *E.g.*, *Allahar v. Zahora*, 59 F.3d 693, 694 (7th Cir. 1995) (described *infra* note 341); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990) (de-

relief and proceeded solely under the 1866 Civil Rights Act despite the defendant's clear violation of § 3604(c).<sup>341</sup> A few cases, particularly those prosecuted by Justice Department or HUD attorneys specializing in fair housing work, do mention § 3604(c) along with other FHA provisions, but even these decisions rarely focus on the defendant's statement as a potential source of additional relief.<sup>342</sup>

scribed *supra* note 336); *Texas v. Crest Asset Mgmt., Inc.*, 85 F. Supp. 2d 722, 730 (S.D. Tex. 2000) (described *supra* note 336); *Laudon v. Loos*, 694 F. Supp. 253, 254 (E.D. Mich. 1988) (described *supra* note 336); *Bishop v. Pecsok*, 431 F. Supp. 34, 36 (N.D. Ohio 1976) (described *supra* note 336); *cf. Chapp v. Bowman*, 750 F. Supp. 274, 276 (W.D. Mich. 1990) (religious discrimination case described *infra* notes 352-53 and accompanying text); *Van den Berk v. Mo. Comm'n on Human Rights*, 26 S.W.3d 406, 409, 411-13 (Mo. Ct. App. 2000) (race discrimination case based on state law equivalent of FHA, described *supra* note 336).

In *Pinchback*, the plaintiff failed to file suit within the FHA's statute of limitations—a possible explanation for the absence of a § 3604(c) claim. See 907 F.2d at 1447. *Laudon* was also brought only under the 1866 Civil Rights Act, although no explanation for the absence of FHA claims appears in the decision. 694 F. Supp. 253. In *Texas*, the plaintiff did make various FHA claims, including one under § 3604(c), but the court, with little explanation, dismissed the § 3604(c) claim. 85 F. Supp. 2d at 732.

341. *Allahar v. Zahora*, 59 F.3d 693, 694 (7th Cir. 1995) (affirming house seller's liability under § 1981 and § 1982 based in part on his statement to minority applicant that "[I've] talked with [my] neighbors and they don't want niggers on the block"); *Young v. Parkland Vill., Inc.*, 460 F. Supp. 67, 69 (D. Md. 1978) (holding apartment complex liable under § 1981 and § 1982 based in part on resident manager's statement to black plaintiff that complex "did not rent to blacks").

In *Allahar*, the plaintiffs may have relied exclusively on the 1866 Act because the dwelling involved was a single-family house sold by its owner and therefore may have been perceived as covered by the § 3603(b)(1) exemption. See *Allahar*, 59 F.3d at 694, 697. As we have seen, however, this exemption does not preclude a § 3604(c) claim, *supra* note 10 and accompanying text and *supra* Part II.C.4.c, and the addition of such a claim in *Allahar* may have resulted in additional relief. The plaintiff received only a modest award for intangible injuries, and the trial judge set aside the jury's punitive damages award, a ruling that the Seventh Circuit affirmed in part because it concluded that a punitive award would have been "a windfall to the plaintiff." *Id.* at 697.

In *Young*, 460 F. Supp. at 68, the plaintiff "abandoned" her FHA claim, although the opinion does not explain why. She may have initially pursued her FHA claim as an administrative complaint to HUD, *id.* at 70, decided that the relief available would be limited in ways that § 1981 and § 1982 claims would not, and took her grievance elsewhere. See *Brown v. Ballas*, 331 F. Supp. 1033, 1036 (N.D. Tex. 1971). Of course, another explanation is that the plaintiff was simply unaware that she might obtain additional relief by making a statement-based claim under § 3604(c).

Other cases involving racially discriminatory statements where the plaintiffs proceeded only under the 1866 Civil Rights Act include *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990), described *supra* note 336, *Thronson v. Meisels*, 800 F.2d 136 (7th Cir. 1986), described *supra* note 336, and *Laudon v. Loos*, 694 F. Supp. 253 (E.D. Mich. 1988), described *supra* note 336.

342. *E.g., United States v. Reddoch*, 467 F.2d 897, 898 (5th Cir. 1972) (affirming apartment owners' liability under FHA and resulting injunction barring defendants from future discrimination in violation of all of §3604's substantive provisions, includ-

Most of these cases simply involve sins of omission, and it is unlikely that potential § 3604(c) claims would have changed the ultimate results anyway. A few, however, such as *Sorenson v. Raymond*,<sup>343</sup> were badly mishandled.<sup>344</sup> In *Sorenson*, the defendant-landlord made a discriminatory statement that clearly violated § 3604(c) while evicting a white couple that was entertaining guests to whom the landlord objected. Some of these guests were African-American, and when one of the tenants asked the landlord if this was the reason for the eviction, the landlord said "Yes."<sup>345</sup> At trial, the landlord convinced the jury that he made the statement about having a racial justification for the eviction just to annoy the plaintiffs, and that his real reason for evicting the plaintiffs was his objection to one of their white guests, who had caused him trouble in the past.<sup>346</sup> On appeal, the Fifth Circuit, after noting that the plaintiffs were not challenging the trial court's dismissal of their § 3604 claims because of statute of limitations problems, considered only the issue of whether the defendant's statement to his tenants amounted to conclusive proof of his racial discrimination in violation of § 1982. The court held that it did not, thereby affirming the defendant's victory below.<sup>347</sup> While this is no doubt the

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ing § 3604(c), based in part on statements made by owners and resident managers instructing other resident managers to discriminate on the basis of race); *United States v. Bankert*, Fair Hous.-Fair Lending Rptr. ¶ 16,424 (E.D. N.C. 2000) (upholding claims based on § 3604(a)-(c), and § 3605 for defendants' interference with home purchase based on their hostility to black-owned finance company that manifested itself in, inter alia, numerous racially derogatory statements); *HUD v. Gutleben*, Fair Hous.-Fair Lending Rptr. ¶ 25,078, at 25,721-30 (HUD ALJ 1994) (landlords' various statements indicating bias against African-Americans and families with children held to be evidence of § 3604(b) and § 3617 violations as well as to violate § 3604(c) resulting in substantial damage awards to African-American family, of which only \$75 is separately attributable to § 3604(c) violation); *HUD v. Leiner*, Fair Hous.-Fair Lending Rptr. ¶ 25,021, at 25,262, 25,264-69 (HUD ALJ 1992) (apartment rental agent's refusal to rent to African-American complainant and statements to complainant that included profanity, racial remarks, and race-based stereotyping held to violate § 3604(c) as well as § 3604(a) and § 3604(d), with complainant's award limited to damages resulting from the refusal to rent but injunctive relief including an order barring future § 3604(c) as well as other FHA violations); cf. Justice Department- and HUD-prosecuted cases described *supra* notes 180, 182, 183 (familial status cases), 184 (handicap cases).

343. *Sorenson v. Raymond*, 532 F.2d 496 (5th Cir. 1976).

344. See also cases cited *supra* notes 331-35, 341.

345. *Sorenson*, 532 F.2d at 498.

346. *Id.* Some days after the eviction, the defendant told a federal investigator that he would prefer not to rent to blacks, although he did not object to their being guests on his property. *Id.* at 498 n.5.

347. *Id.* at 497, 499-500.



correct decision regarding the plaintiffs' unlawful eviction claim,<sup>348</sup> it ignores that the defendant's inculpatory comment was a "statement . . . with respect to the . . . rental of a dwelling that indicates [a] limitation[ ] or discrimination . . . based on race" and thus was a clear violation of § 3604(c).<sup>349</sup> Responsibility for this omission, of course, lay not with the court, but with the plaintiffs, whose tardy filing of the complaint resulted in the loss of their § 3604 claims.<sup>350</sup> The fact remains, however, that the defendant in *Sorenson* should have been held liable under one provision of the FHA.<sup>351</sup>

Fair housing cases involving non-racial discrimination similarly ignore possible § 3604(c) claims. For example, in *Chapp v. Bowman*,<sup>352</sup> the court cited only § 3604(a) and § 3604(b) in granting a preliminary injunction to plaintiff-home seekers based on statements made by the defendant-home seller that he would sell only to a "good Christian" and that "the Lord had told his wife not to sell to [the plaintiffs]."<sup>353</sup> Similarly, in sex discrimination cases

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348. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (sex-based remarks in Title VII case "do not inevitably prove" a violation, because plaintiff must prove that defendant actually relied on such biased feeling in making employment decision).

349. See e.g., *United States v. L & H Land Corp.*, 407 F. Supp. 576, 580 (S.D. Fla. 1976) (construing 42 U.S.C. § 3604(c)); see also cases cited *infra* note 571.

350. Indeed, in *Sorenson*, the Fifth Circuit explicitly recognized that oral statements, by themselves, may violate certain FHA provisions (referring to the "anti-blockbusting" provision in § 3604(e)), but that here, under only § 1982's prohibition of discriminatory rental conduct, the defendant's statement could be considered "only evidence of the violation – a racially-discriminatory motive – not the violation itself." *Sorenson*, 532 F.2d at 499.

351. Of course, if the plaintiffs had prevailed only on the basis of a § 3604(c) claim, their relief would be limited to the injuries suffered as a result of the defendant's statement and would not have included those associated with their eviction. *Supra* notes 193-95, 219, 241-44 and accompanying text.

The *Sorenson* defendant's statement to the federal investigator also may have violated § 3604(c), see *supra* note 346, although it is hard to see how these plaintiffs could have benefited from this potential violation. See *HUD v. Rollhaus*, Fair Hous.-Fair Lending Rptr. ¶ 25,019, at 25,249 (HUD ALJ 1991) (described *supra* note 182 and *infra* note 354).

352. *Chapp v. Bowman*, 750 F. Supp. 274, 276 (W.D. Mich. 1990).

353. *Id.* at 276; see also *Leadership Council for Metro. Open Cmty. v. Rossi*, Fair Hous.-Fair Lending Rptr. ¶ 16,501, at 16,501.3-4 (N.D. Ill. 2001) (§ 3604(c) not mentioned as defendants win summary judgment concerning religious part of steering case that also alleged racial violations of § 3604(a), § 3604(b), and § 3604(d) where the religious claim was based on defendant real estate agent's comment to tester that "there may be people with different religious beliefs in the area and that's fine but it may not be what you want to be around").

The failure of the plaintiffs in *Leadership Council* and *Chapp* to press their potential § 3604(c) claims is understandable. The *Leadership Council* plaintiffs clearly viewed their racial claims, which they supported sufficiently to defeat summary judgment, as more important than their religious allegations. *Leadership Council*, ¶ 16,501 at 16,501.3-4. As for *Chapp*, the only relief sought was an injunction restraining the

showing evidence of a biased statement, the decisions generally rely on the statement only to establish liability under some other FHA provision or, if § 3604(c) is mentioned, its violation yields no relief beyond that prompted by the other FHA violations.<sup>354</sup>

Cases involving biased statements brought under the FHA's newer prohibitions against familial status and handicap discrimination, particularly those prosecuted by government lawyers and decided by HUD ALJs, are more likely to discuss § 3604(c), but even these cases rarely result in additional relief awarded solely because of the defendant's § 3604(c) violation.<sup>355</sup> The principal exceptions generally involved claims against "Mrs. Murphy" landlords and other housing providers whose properties are exempt from the other prohibitions of § 3604.<sup>356</sup> Thus, even the best trained fair

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defendant from selling his house to someone other than the plaintiffs, 750 F. Supp. at 274, 278, which is the type of relief that would be generated by a refusal-to-sell claim but not by a discriminatory statement claim. *Supra* notes 193-94, 219, 241-44 and accompanying texts.

354. *E.g.*, HUD v. Yankee Dev. Assocs., Fair Hous.-Fair Lending Rptr. ¶ 25,074, at 25,691-94 (HUD ALJ 1994) (holding that statements to male home seekers by apartment complex manager that he preferred not to rent to males and that males were less desirable tenants than females was "direct evidence" of violations of § 3604(a), § 3604(b), § 3604(c), and § 3604(d), which resulted in damage awards that did not separate the damages prompted by the § 3604(c) violation from those prompted by the other FHA violations); HUD v. Rollhaus, Fair Hous.-Fair Lending Rptr. ¶ 25,019, at 25,246-47, 25,249-51 (HUD ALJ 1991) (holding that home owner's statements to two female rental applicants that the owner "preferred to rent to a man and that she did not rent the house to single mothers" was "direct evidence" of violations of § 3604(a) and § 3604(b) as well as a violation of § 3604(c), which resulted in a damage award that did not separate the damages prompted by the § 3604(c) violation from those prompted by the other FHA violations); HUD v. Baumgardner, Fair Hous.-Fair Lending Rptr. ¶ 25,006, at 25,691-94 (HUD ALJ 1990) (holding that a landlord's statement to a male home seeker that he preferred not to rent to males was "direct evidence" of violations of § 3604(a), § 3604(c), and § 3604(d), which resulted in various elements of relief that did not separate the damages prompted by the § 3604(c) violation from the other FHA violations and some of which were reversed on appeal), *aff'd in part and rev'd in part*, 960 F.2d 562 (6th Cir. 1992); *see also* HUD v. Krueger, Fair Hous.-Fair Lending Rptr. ¶ 25,119, at 26,019, 26,026 (HUD ALJ 1996) (holding that landlord's sexual harassment, some of which took the form of sexually suggestive statements to female tenants, violated § 3604(b) and § 3617), *aff'd*, 115 F.3d 487 (7th Cir. 1997); HUD v. DiCosmo, Fair Hous.-Fair Lending Rptr. ¶ 25,094, at 25,847-51 (HUD ALJ 1994) (holding that landlord's sexual and national origin harassment, some of which took the form of sexually suggestive and offensive statements to a female tenant, violated § 3617).

355. Handicap cases supporting this proposition include those cited *supra* note 184. Familial status cases supporting this proposition include those cited *supra* notes 180 and 182.

356. For a discussion of those few statement-based cases with significant § 3604(c) claims beyond those involving exempt housing providers, see *supra* Parts II.C.4.a, b, d.

housing litigators and judges have rarely used § 3604(c) as anything more than a stop-gap measure whose primary importance is its applicability in those few situations where no other FHA provision is available to challenge the defendant's discrimination.

This inattentiveness to the independent and important role Congress envisioned for § 3604(c) undermines the proper enforcement of the FHA and is no doubt one of the reasons the ultimate goals of this statute remain unrealized.<sup>357</sup> A more aggressive, and therefore more appropriate, approach to § 3604(c)'s ban of discriminatory statements is proposed in Part IV.

#### **IV. A MODERN APPROACH TO CASES INVOLVING DISCRIMINATORY HOUSING STATEMENTS**

The themes established thus far by this Article are: (1) that Congress fully appreciated the significance of § 3604(c)'s ban on discriminatory housing statements; (2) that this ban was designed to serve three important purposes crucial to the FHA's overriding goals of eliminating racial discrimination and residential segregation; (3) that despite the important role Congress envisioned for § 3604(c), litigators and courts generally have ignored or underused this provision; and (4) that one consequence of failure to fully employ § 3604(c) is that biased statements continue to pollute America's housing markets, which in turn continues to frustrate the realization of the FHA's ultimate goals. This part of the Article offers some observations on how § 3604(c) should be applied to better effectuate the intent of the Congress that enacted it and to make it a more effective part of the nation's fair housing arsenal. The first section deals with two potential limitations: § 3604(c)'s "with respect to" phrase and the First Amendment. With these limitations noted, the second and third sections explore how § 3604(c) can be more effectively applied to all appropriate defendants and utilized by all proper plaintiffs.

##### **A. Statutory and Constitutional Limitations on § 3604(c) Liability**

###### *1. Limitations Imposed by the "With Respect To" Phrase*

We begin with the statutory language. The language of § 3604(c) focuses on four elements: a potential defendant must (1) "make, print, or publish, or cause to be made, printed, or published" (2) a "notice, statement, or advertisement" (3) "with respect to the sale

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357. See *supra* note 2 and accompanying text; Part I.C.

or rental of a dwelling” (4) “that indicates any preference, limitation, or discrimination” based on one of the seven factors made illegal by the FHA. In “statement” cases, the focus of this Article, element (2)’s coverage of “notices” and “advertisements” is not relevant, although these types of communications may also be the target of a § 3604(c) claim. With respect to element (4), this Article is primarily concerned with blatantly discriminatory statements that will clearly be held to “indicate” the necessary illegal preference, limitation, or discrimination. It is worth noting, however, that this element of a § 3604(c) claim is also satisfied by less blatant communications indicating an illegal preference, limitation, or discrimination to the “ordinary listener” or “ordinary reader.”<sup>358</sup> Similarly, element (1) is easily satisfied in the cases discussed in this Article because the statements are invariably “made” by the defendant, although it is worth noting that § 3604(c) also covers those who “cause [such statements] to be made.”

When a biased housing statement is made, therefore, the only possible defense to liability under § 3604(c) is the failure of element (3); that is, that the statement was not made “with respect to the sale or rental of a dwelling.” A proper understanding of this phrase is crucial to the correct interpretation of § 3604(c).

Obviously, § 3604(c)’s “with respect to” phrase applies when a landlord or other housing provider makes an offending statement directly to a minority home seeker in the course of their conversation about the latter’s interest in buying or renting the former’s dwelling. However, as fact patterns move away from this classic violation, § 3604(c)’s applicability becomes less certain.

For example, does § 3604(c) ban biased statements made by persons other than housing providers? Certainly, agents acting on behalf of housing providers are covered,<sup>359</sup> but what about a white tenant or neighbor who states to his landlord or a local homeowner that he would prefer the landlord-homeowner not rent or sell to a minority?<sup>360</sup> Such a statement is covered if the “with respect to”

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358. *Supra* note 126; *supra* text accompanying notes 157-60.

359. *E.g.*, cases cited *infra* notes 365-68 and HUD-prosecuted cases cited *infra* note 496. “Agent” for purposes of the Fair Housing Act includes “any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions.” 24 C.F.R. § 100.20 (2000) (HUD regulation). *See generally* SCHWEMM, *supra* note 15, § 12:10.

360. *E.g.*, *Allahar v. Zahora*, 59 F.3d 693, 694 (7th Cir. 1995).

phrase is read literally,<sup>361</sup> but there are problems with this reading. First, § 3604(c)'s context suggests the provision was intended to apply only to persons and entities who have some authority over the housing involved (i.e., those with some ability to carry out the "preference, limitation, or discrimination" that the statement "indicates").<sup>362</sup> In addition, HUD's interpretive regulation implies that this limitation is appropriate by providing that § 3604(c)'s prohibitions apply to statements "by a person engaged in the sale or rental of a dwelling."<sup>363</sup> Finally, as will be discussed in the next section, the First Amendment concerns raised by § 3604(c)'s ban on discriminatory statements would be much greater if this provision were applied to persons not then engaged in a commercial activ-

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361. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1907, 1934 (1986) (defining "with respect to" as "as regards; insofar as; concerns; with reference to" and defining the relevant meaning of "refer" as "to have relation or logical or factual connection"). In the text's example of a neighbor's biased statement to a housing provider, the statement clearly has a "logical or factual connection" to the sale or rental being contemplated by the provider; there is no reason for the neighbor to make the statement other than to try to influence the provider's behavior with respect to this sale or rental.

362. *E.g.*, *Woodward v. Bowers*, 630 F. Supp. 1205, 1209 (M.D. Pa. 1986) (noting that § 3604(c)'s legislative history "indicates that by including the phrase 'with respect to the sale or rental of a dwelling,' Congress intended to reach the activities of 'property owners, tract developers, real estate brokers, lending institutions, and all others engaged in the sale, rental or financing of housing.'" (quoting the testimony of Attorney General Katzenbach in 1966 *Hearings*, *supra* note 36, at 84)). *But see* *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) (holding that a letter from neighbors' lawyer threatening suit to stop a group home for handicapped persons violates § 3604(c)); *see also infra* note 369 (discussing the possible applicability of another FHA provision—§ 3617—to neighbors whose biased statements interfere with minority housing rights).

The *Woodward* opinion is somewhat misleading on this point because the quoted portion of Attorney General Katzenbach's testimony actually relates to the entire fair housing title, not just § 3604(c). On another occasion, however, the Attorney General did indeed express the view that § 3604(c)'s prohibition of discriminatory statements should be limited to those "public statement[s] . . . designed to have some effect on the sale" or rental of housing, a view adopted by other proponents of the bill as well. *Supra* note 85. While this "public statement-some effect" requirement is not totally inconsistent with the notion of subjecting non-housing providers to § 3604(c)'s coverage, it does tend to support *Woodward*'s basic point: that § 3604(c) is concerned only with those persons who are engaged in some aspect of the housing business.

363. *Supra* note 117. The phrase "engaged in" in this regulation—as is true for the phrase "with respect to" in § 3604(c) itself—implies a time-and-place element in addition to a type-of-person limitation. Thus, it seems clear that even a housing professional would not be liable for violating § 3604(c) based on a biased statement made in a private conversation with, say, his family or personal friends. *See supra* notes 85 and 362; *cf.* case described *infra* note 368 (§ 3604(c) does cover biased statement made in a conversation between two agents of a housing provider that was overheard by a member of the public).

ity.<sup>364</sup> Thus, § 3604(c) seems properly limited to statements made by those persons who are in some way engaged in the sale or rental of housing, such as real estate agents,<sup>365</sup> apartment managers,<sup>366</sup> condominium and cooperative board members,<sup>367</sup> and the like.<sup>368</sup> It should be noted, however, that while this interpretation makes § 3604(c) inapplicable to biased statements made by neighbors and others who are not themselves in the housing business, bigoted remarks by such persons, if egregious enough to interfere with a minority's housing search or the quiet enjoyment of his home, may be prohibited by other FHA provisions.<sup>369</sup>

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364. *Infra* text accompanying notes 383-85. To the extent that First Amendment problems would arise if § 3604(c) were interpreted to apply in non-commercial situations—and Part IV.A.2 argues that such problems would arise—then the statute should be construed more narrowly. See, e.g., *United States v. Clark*, 445 U.S. 23, 27 (1980) (courts should “not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided”); see also *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (normally courts “will not decide a constitutional question if there is some other ground upon which to dispose of the case”). This approach—of limiting § 3604(c) to commercial settings to avoid unnecessary First Amendment problems—is especially appropriate because the FHA explicitly announces in its introductory section that “[i]t is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States,” 42 U.S.C. § 3601 (emphasis supplied), thereby evincing a special Congressional preference for the statute to be applied with constitutional constraints in mind.

365. E.g., *HUD v. Active Agency, Fair Hous.-Fair Lending Rptr.* ¶ 25,141 (HUD ALJ 2000) (described *supra* note 180); see also *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991) (described *infra* note 501).

366. E.g., cases described *supra* note 180.

367. E.g., *HUD v. Schuster, Fair Hous.-Fair Lending Rptr.* ¶ 25,091 (HUD ALJ 1995) (described *supra* text accompanying notes 280-84); see also *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990) (described *supra* note 336).

368. E.g., *Harris v. Itzhaki*, 183 F.3d 1043, 1048, 1054-55 (9th Cir. 1999) (§ 3604(c) applied to conversation between apartment owners' rental agent and repairman/gardener).

369. For example, § 3617, which makes it unlawful to “coerce, intimidate, threaten, or interfere with” any person in the exercise or enjoyment of his FHA rights, may be violated by a neighbor's harassing statements directed against a minority resident or home seeker. E.g., *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 239 (E.D.N.Y. 1998) (upholding § 3617 claim based on neighbors' anti-Jewish epithets, threats of violence, and noise disturbances); *Reeves v. Carrollsburg Condo. Unit Owners Ass'n, Fair Hous.-Fair Lending Rptr.* ¶ 16,250, at 16,250.5-6 (D.D.C. 1997) (upholding claims under § 3604(a), § 3604(b) and § 3617 based on neighbor's racist and sexist threats and epithets directed against African-American condominium resident); *Byrd v. Brandenburg*, 922 F. Supp. 60, 62-65 ((N.D. Ohio 1995) (racially motivated slurs, harassment, and violence directed against African-American family by white neighbors violate § 3617); *HUD v. Weber, Fair Hous.-Fair Lending Rptr.* ¶ 25,041, at 25,424 (HUD ALJ 1993) (neighbor's verbal harassment of Hmong who was inspecting next door house as a prospective tenant violates § 3617).

Of course, the fact that a defendant's remarks may violate another substantive provision of the FHA does not mean that § 3604(c) is inapplicable, for a particular dis-

## 2. First Amendment Considerations

### a. § 3604(c): A Limited Content-Based Restriction

By prohibiting every discriminatory “notice, statement, or advertisement” with respect to all housing sales and rentals, § 3604(c) specifically restricts certain types of communication. It is not surprising, therefore, that defendants accused of violating § 3604(c) have occasionally argued that the First Amendment protects the expression forming the basis of the charge against them.<sup>370</sup> Indeed, the legislative history of § 3604(c) indicates some concern about First Amendment problems, at least by opponents of this provision.<sup>371</sup>

Thus far, however, no court has held that an otherwise unlawful communication under § 3604(c) is protected by the First Amendment.<sup>372</sup> Some decisions, however, have acknowledged First Amendment concerns and have suggested that § 3604(c) should be

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criminatorial statement may violate more than one provision of the statute. *E.g.*, *Fair Hous. of Marin v. Combs*, Fair Hous.–Fair Lending Rptr. ¶ 16,430, at 16,430.1-.2 (N.D. Cal. 2000) (landlord’s statements that he did not want African-American tenants held to violate § 3604(a), § 3604(c), § 3617 and other fair housing laws); *Chew v. Hybl*, Fair Hous.–Fair Lending Rptr. ¶ 16,249, at 16,249.4-.8 (N.D. Cal. 1997) (landlord’s hostile statements and behavior toward Asian-American applicants held to violate § 3604(a), § 3604(c), § 3617 and other fair housing laws); *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) (letter from neighbors’ lawyer threatening suit to stop a group home for handicapped persons held to violate § 3604(f)(1), § 3604(c), § 3604(d), and § 3617); *HUD v. Gutleben*, Fair Hous.–Fair Lending Rptr. ¶ 25,078, at 25,726-28 (HUD ALJ 1994) (landlord’s racial remarks directed at African-American tenants violate § 3604(c) and § 3617); *HUD v. Williams*, Fair Hous.–Fair Lending Rptr. ¶ 25,007, at 25,118-19 (HUD ALJ 1991) (landlord’s intimidating phone call to tenant suffering from AIDS interfered with tenant’s quiet enjoyment of his home in violation of § 3617); other cases cited *supra* notes 180, 182, 184, 336, 342, 354. A challenged statement must be analyzed under each of these potentially applicable provisions, and, as to the § 3604(c) claim, only discriminatory communications made “with respect to the sale or rental of a dwelling” are forbidden.

370. *E.g.*, cases cited *infra* notes 372-73.

371. In particular, Senator Ervin and his staff regularly suggested that § 3604(c)’s prohibitions would violate the First Amendment’s guarantee of freedom of speech. *1967 Judiciary Hearings*, *supra* note 39, at 127; *1966 Hearings*, *supra* note 36, at 895, 1071, 1189-90; *see also* 114 CONG. REC. 9612 (1968) (House staff memorandum observing with respect to § 3604(c)’s prohibition of discriminatory statements: “[D]on’t these prohibitions violate ‘free speech’ under the First Amendment? Does not a citizen have the right to indicate his preference by the spoken or written word? Those questions are not easy to answer.”).

372. Cases based on § 3604(c) in which a First Amendment defense was rejected include *Ragin v. New York Times*, 923 F.2d 995, 1002-05 (2d Cir. 1991) (discussed *infra* text accompanying notes 406-09) and *United States v. Hunter*, 459 F.2d 205, 211-15 (4th Cir. 1972). *See also infra* note 410.

interpreted in a way that will steer clear of these problems.<sup>373</sup> These decisions make clear that the basic theme of this Article—that § 3604(c) should be more aggressively used to challenge discriminatory statements—must be squared with such First Amendment concerns.

By its terms, § 3604(c) outlaws certain types of expressions based on their content. The statute is directed only against those ads, notices, and statements that “indicate[ a] preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.” While this prohibition is limited to communications “with respect to the sale or rental of a dwelling,” § 3604(c) is undeniably, in this narrow context, a content-based speech restriction. As such, it would ordinarily be subjected to the highest level of judicial scrutiny in a challenge based on the First Amendment,<sup>374</sup> a level of scrutiny § 3604(c) would probably be unable to satisfy.<sup>375</sup> There are exceptions to this rule, however, and those that seem most applicable in § 3604(c) cases, such as the “commercial speech” doctrine, are explored in the next two sections.

### *b. The “Commercial Speech” Doctrine*

#### *i. First Amendment Protection for § 3604(c)-Covered Commercial Speech*

The high level of judicial scrutiny that generally applies to content-based restrictions on speech is reduced substantially when the

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373. *E.g.*, *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer*, 943 F.2d 644, 650-53 (6th Cir. 1991) (rejecting “aggregate message” theory of liability in human model case against newspaper because this theory hinges on a construction of § 3604(c) that raises serious First Amendment concerns); *Stewart v. Furton*, 774 F.2d 706, 710 n.2 (6th Cir. 1985) (implying landlord’s biased statement unrelated to a specific discriminatory transaction would raise difficult First Amendment issues); *United States v. Northside Realty Assoc.*, 474 F.2d 1164, 1169-71 (5th Cir. 1973) (reversing liability finding because of the possibility that it may have rested in part on the fact that defendant had stated his belief that the FHA was unconstitutional).

374. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 540 (1980) (“Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest”); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”); *infra* text accompanying note 448.

375. *See infra* note 413; *infra* Part IV.A.2.b.iii.



restriction applies only to commercial activities.<sup>376</sup> For example, while the government's ability to ban the advocacy of unlawful behavior is limited to those rare instances where such advocacy is directed to inciting an imminent lawless action and is likely to succeed,"<sup>377</sup> governmental restrictions on *commercial* solicitation of unlawful activity are virtually unrestrained by the First Amendment.<sup>378</sup>

Because the level of constitutional protection is lower when speech is merely "commercial," it is important to determine whether § 3604(c) is limited to such speech. The Supreme Court's definition of "commercial speech," while problematic in some settings,<sup>379</sup> seems to cover virtually all § 3604(c) situations. The Court has employed a "commonsense" approach in determining what is included within the commercial speech concept.<sup>380</sup> The concept covers not only speech "proposing a commercial transaction,"<sup>381</sup> but also the entire "set of communicative acts about commercial subjects that convey[ ] information of relevance to [the public's] decision making [process]."<sup>382</sup>

This definition covers all § 3604(c)—applicable situations because the statute is limited by its terms to notices, statements, and advertisements that are "with respect to the sale or rental of a dwelling." This phrase indicates § 3604(c)'s ban on discriminatory statements applies only to communications by landlords, realtors, and other housing professionals made in the context of the sale or

376. *E.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980).

[O]ur decisions have recognized "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." . . .

The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.

*Id.*; see generally Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 26-33 (2000) (identifying various ways commercial speech receives less First Amendment protection than other types of speech).

377. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

378. See *infra* text accompanying notes 394-98.

379. *E.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420-23 (1993); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 67 (1983). See generally John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW 1141 (6th ed. 2000); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 896-99 (2d ed. 1988); Post, *supra* note 376, at 5-25; Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55 (1999).

380. *E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

381. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980).

382. Post, *supra* note 376, at 15.

rental of a dwelling.<sup>383</sup> This is classic commercial speech.<sup>384</sup> At the

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383. *Supra* notes 362-69 and accompanying text. Note that statements covered by § 3604(c) and by the “commercial speech” doctrine generally are not limited to those made in connection with “for profit” ventures and would therefore include publicly assisted and other not-for-profit housing. Thus, although “commercial speech” is typically motivated by the speaker’s desire to earn profits, *e.g.*, Post, *supra* note 376, at 6, the concept also extends to speech relating to the sale or rental of housing by those working on behalf of public housing authorities and other non-profit organizations and public bodies. *E.g.*, HUD v. Las Vegas Hous. Auth., Fair Hous.-Fair Lending Rptr. ¶ 25,116, at 26,002-05 (HUD ALJ 1996) (FHA claims based in part on biased statements considered in context of discrimination by public housing authority). Compare the FHA’s § 3604(e), which prohibits “blockbusting” and which is, unlike all of the other prohibitions in the statute, explicitly limited to “[f]or profit” activity. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 561 (1980) (“commercial speech” defined as “expression related solely to the economic interests of the speaker and its audience”).

384. *E.g.*, United States v. Racey, No. 96-2023, 1997 U.S. App. LEXIS 10151 (4th Cir. May 7, 1997) (unpublished decision holding that landlord’s § 3604(c)-violative statement to African-American applicant that “she would not rent to blacks” was commercial speech for purpose of First Amendment analysis, because, although the statement “did not explicitly propose a commercial transaction, . . . [it was] made in the context of a potential commercial transaction”); *cf.* Thomas v. Anchorage Equal Rights Comm’n, 165 F.3d 692, 710-11 (9th Cir. 1999) (opining that “not all speech which takes place in the context of a commercial transaction is ‘commercial speech’” in the course of holding that landlord’s statement that he would prefer, for religious reasons, not to rent to unmarried couple, which was challenged under a state fair housing law whose § 3604(c)-like provision banned marital status discrimination, was “not mere commercial speech, but fully protected religious speech” for First Amendment purposes because it was motivated “not for economic reasons, but out of religious conviction”), *panel opinion withdrawn and reh’g en banc granted*, 192 F.3d 1208 (9th Cir. 1999), *district court’s decision vacated and dismissal ordered*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1078 (2001). The panel opinion in *Thomas* suggests the commercial speech doctrine is inapplicable in § 3604(c) cases if the offending statement is motivated by non-economic concerns, but this seems erroneous. Section 3604(c) clearly applies if a housing provider makes a racially discriminatory statement to an African-American applicant not out of economic self-interest but simply because he is a racist. *See also supra* note 383 (statements need not be “for profit” to be illegal under § 3604(c) and the commercial speech doctrine).

As a general matter, housing transactions are commercial in nature. *E.g.*, Russell v. United States, 471 U.S. 858, 862 (1985) (noting that “the rental of real estate is unquestionably” an “‘activity’ that affects commerce” and that “the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties” in upholding the constitutionality of applying the federal arson statute to a defendant accused of burning a building he was renting to residential tenants at the time of the fire); Groome Res., Ltd. v. Parish of Jefferson, La., 234 F.3d 192, 206 (5th Cir. 2000) (noting that “it is a transparently commercial action to buy, sell, or rent a house” in the course of upholding Congress’ power under the Commerce Clause to prohibit handicap discrimination in the 1988 Fair Housing Amendments Act); *see also infra* notes 388-89 and accompanying text (discussing Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977), where the Supreme Court applied the commercial speech doctrine in a case involving residential “For Sale” signs). Reaffirming *Russell*, the Supreme Court recently drew a distinction between the apartment building there and the “owner-occupied private residence not used for any

same time, because § 3604(c) does not apply, say, to a housing provider's "stray" racial remarks or to a realtor's comments about the FHA if unrelated to a specific housing transaction,<sup>385</sup> the statute does not proscribe speech that would be entitled to a higher degree of First Amendment protection than that accorded commercial speech.

At the time of § 3604(c)'s enactment, commercial speech received less First Amendment protection than it does today. Thus, in 1972, in the first appellate decision dealing with the interplay between § 3604(c) and the First Amendment, the Fourth Circuit in *United States v. Hunter*<sup>386</sup> was able with some confidence to reject a constitutional challenge to § 3604(c)'s application to a discriminatory newspaper ad on the ground that the ad, being only commercial speech, was not entitled to as much constitutional protection as other forms of expression.

In the years following *Hunter*, however, the Supreme Court issued a series of decisions greatly expanding the degree of First Amendment protection afforded commercial speech.<sup>387</sup> Indeed, one of these decisions, *Linmark Associates, Inc. v. Township of Willingboro*<sup>388</sup> in 1977, invalidated a law restricting certain advertising techniques for selling homes that was enacted to help maintain residential integration.<sup>389</sup> Three years later, in striking down a

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commercial purpose" in *Jones v. United States*, 529 U.S. 848, 850 (2000), which the Court held did not involve sufficient interstate commerce to justify Congressional regulation.

385. *Supra* text accompanying notes 278-79; *supra* notes 362-68 and accompanying text.

386. *United States v. Hunter*, 459 F.2d 205, 211-15 (4th Cir. 1972). The *Hunter* case is discussed *supra* text accompanying notes 124-31.

387. *E.g.*, cases cited *supra* notes 379, 380, 381 and *infra* notes 388, 392.

388. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

389. In *Linmark*, the Court struck down a local ordinance that banned "For Sale" signs for homes in a residential community. The township that enacted this ordinance had experienced a dramatic influx of minority residents and a corresponding decline in its white population. The ban on "For Sale" signs was designed to reduce public awareness of and concern over realty sales and thereby promote stable, racially integrated housing patterns. In a unanimous opinion written by Justice Marshall, the Supreme Court accepted the importance of this goal, noting that "substantial benefits flow to both whites and blacks from interracial association and that Congress [in the Fair Housing Act] has made a strong national commitment to promote integrated housing." *Id.* at 94-95. Nevertheless, the Court held that the ordinance violated the First Amendment. *Id.* at 98. The *Linmark* opinion pointed out that the subject matter of the banned speech—information about available homes—was "of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families." *Id.* at 96. Noting that society's strong interest in the free flow of this type of commercial information could be outweighed only by substantial government justifications, the Court held that the

state ban on advertising by electric utilities in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*,<sup>390</sup> the Court articulated a four-part test reflecting its newly expanded protection for commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>391</sup>

Today, some twenty years later, the Supreme Court still considers the four-part *Central Hudson* test the proper standard to govern commercial speech cases.<sup>392</sup>

The basic rationale behind these decisions is that the public has a strong interest in receiving full and accurate information about the price and availability of all products and services. If the public is well informed, the cumulative effect of consumer decisions will dis-

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Township failed to prove that panic selling and other conditions existed to such a degree a "For Sale" sign ban was needed to assure Willingboro would remain an integrated community. *Id.* at 95-96. Because other means were available to promote Willingboro's goal of integrated housing, the *Linmark* opinion concluded the ban on "For Sale" signs unconstitutionally impaired "the flow of truthful and legitimate commercial information." *Id.* at 98.

390. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

391. *Id.* at 566. Applying this test in the *Central Hudson* case, the Court ruled that, although the state's interest in energy conservation was substantial and there was a direct connection between advertising and the demand for electricity, the regulation was invalid because the government failed to show a more limited restriction on speech would not have adequately served the state's interest. *Id.* at 568-71.

392. *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404, 2421 (2001); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499-500, 528-529 (1996) (opinions of Justices Stevens and O'Connor for a total of seven Justices); *United States v. Edge Broad. Co.*, 509 U.S. 418, 424, 426 (1993).

Justice Thomas and occasionally Justices Kennedy and Scalia have argued for a test that would accord even more protection to commercial speech. *E.g.*, *Lorillard Tobacco*, 121 S.Ct. at 2430-33 (Kennedy, J., concurring in part, and Thomas, J., concurring in part); *Greater New Orleans Broad.*, 527 U.S. at 197 (Thomas, J., concurring); *44 Liquormart*, 517 U.S. at 517-24 (Scalia, J., concurring, and Thomas, J., concurring). Their argument for a more stringent standard is apparently limited to those cases "in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *See Greater New Orleans Broad.*, 527 U.S. at 197 (Thomas, J., concurring). However, because this interest is not among the rationales for § 3604(c), *supra* Part II.D, it is assumed here that even these Justices would not advocate a tougher standard than the *Central Hudson* test in § 3604(c) cases.

tribute the nation's resources efficiently. The Supreme Court elaborated on this efficiency argument in *Central Hudson*:

Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." <sup>393</sup>

ii. Applying the *Central Hudson* Test in § 3604(c) Cases:  
The First Factor

The first and most important basis for shielding § 3604(c) claims from First Amendment challenge is that the statements involved do not "concern lawful activity," and therefore do not qualify for protection under the first element of the *Central Hudson* text.<sup>394</sup> In fact, the principal case establishing the "illegal activity" exception to First Amendment protection for commercial speech involved an anti-discrimination law. In *Pittsburgh Press Co. v. Human Relations Comm'n*,<sup>395</sup> the Court rejected a First Amendment challenge

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393. 447 U.S. at 561-62 (quoting *Va. Pharmacy Board v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976)); see also *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184-85 (1999); *Linmark Assoc. v. Township of Wilkesboro*, 431 U.S. 85, 92 (1977). The classic statement of the value of commercial speech was put forth by Justice Blackmun in *Virginia Pharmacy Board*:

Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.

425 U.S. at 765.

394. *Supra* text accompanying note 391.

395. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973). The *Pittsburgh Press* decision was the only precedent cited in *Central Hudson* for the proposition that "[t]he government may ban . . . commercial speech related to illegal activity," 447 U.S. at 563-64, and continues to be the most important precedent cited for this proposition in the principal treatises on constitutional law today. *E.g.*, NO-WAK & ROTUNDA, *supra* note 379, at 1145-46; TRIIBE, *supra* note 379, at 890-91, 947.

to a Pittsburgh employment discrimination ordinance prohibiting newspapers from carrying "help-wanted" advertisements in sex-designated columns. The Court held that Pittsburgh's anti-discrimination law does not burden constitutionally protected speech:

Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.<sup>396</sup>

The rationale for excluding advertisements for illegal activities from First Amendment protection is that such ads do not provide information necessary for the proper functioning of the economic marketplace.<sup>397</sup> Thus, in citing *Pittsburgh Press* with approval, the *Central Hudson* opinion noted that, because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising . . . , there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."<sup>398</sup>

The first issue, therefore, in testing the constitutionality of a § 3604(c) claim is to determine whether the defendant's statement was made with respect to an unlawful activity. In the vast majority of situations, the answer is "yes." In most cases, the Fair Housing Act itself provides a positive answer, as provisions such as § 3604(a) and § 3604(b) ban most discriminatory housing practices. The only situations where the FHA itself does not condemn a defendant's discrimination are those falling within the FHA's exemptions.<sup>399</sup> The question in these exempt dwelling contexts is whether § 3604(c)'s prohibition of discriminatory speech still falls outside of First Amendment protection.

The answer in most cases would be "yes." First, racial discrimination in FHA-exempt dwellings is illegal under the Civil Rights

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396. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973).

397. *Supra* note 393 and accompanying text.

398. *Pittsburgh Press*, 447 U.S. at 563; *see also* *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 772-73 (1976) (citing *Pittsburgh Press* and *United States v. Hunter* to contrast the situation in those cases with the situation in *Virginia Board*, where the transactions proposed in the ads under review were not "themselves illegal in any way").

399. *Supra* note 10 and text accompanying notes 28-32.

Act of 1866,<sup>400</sup> which covers discrimination based on race, color, most national origins, and some religions.<sup>401</sup> Second, even if the defendant is accused of violating § 3604(c) by making a discriminatory statement based on sex, familial status, handicap, or some other basis not covered by the 1866 Act, the underlying transaction might still be illegal under state or local fair housing law. Some thirty-two states and fifty-four localities have fair housing laws at least as broad as the FHA,<sup>402</sup> and many such laws have narrower exemptions than the FHA.<sup>403</sup> In these jurisdictions, a defendant exempt from the FHA may well be prohibited from discriminating by applicable state law or local ordinance.<sup>404</sup> If so, the speech involved would be illegal and thus not protected by the First Amendment, as the Supreme Court has recognized that the source of illegality justifying a federal statute's ban on certain types of commercial speech may be state or local law.<sup>405</sup>

Thus, the Fourth Circuit's conclusion in *Hunter* that § 3604(c) does not violate the First Amendment is still sound despite the sub-

400. *Supra* text accompanying notes 149-52.

401. *Supra* note 150.

402. SCHWEMM, *supra* note 15, § 24:9. See *id.* at Appendix C for a list of the thirty-two states and fifty-four localities whose fair housing laws have been certified by HUD as providing substantive rights, remedies, and enforcement procedures substantially equivalent to the FHA. These states and localities include most heavily populated areas of the United States. *Id.* In addition, many other areas also have fair housing laws whose substantive coverage is similar to and may even exceed the FHA's in many respects. *E.g.*, ALA. CODE § 24-8-1 to -15 (2000); ALASKA STAT. § 18.80.01 *et seq.* (2000); ARK. CODE ANN. § 16-123-201 to -210 (Michie 1999); IDAHO CODE § 67-5901 to -5912 (Michie 1989); 775 ILL. COMP. STAT. ANN. 5/7-101, 105-112 (West 2001); KAN. STAT. ANN. § 44-1001 to -1044 (2000); MINN. STAT. § 363.01-.15 (West 1991); MONT. CODE ANN. § 49-2-101 to -102 (2001); NEV. REV. STAT. § 118.010-.120 (2001); N.H. REV. STAT. ANN. § 354-A:1 to -26 (2000); N.J. STAT. ANN. § 10:5-1 to -8, 10-19, 21, 24-30 (West 2001); N.M. STAT. ANN. § 28-1-1 to -15 (Michie 2001); N.D. CENT. CODE § 14-02.4-01 to -23 (2001); OR. REV. STAT. § 659.010-.110, .400-.545 (1999); S.D. CODIFIED LAWS § 20-13-1, 20-13-20 to 20-13-21.2 (Michie 1995); WIS. STAT. ANN. § 106.04(1) (West 1997). Only two states, Mississippi and Wyoming, have no fair housing law.

403. *E.g.*, the New York Human Rights Law and the Kentucky Civil Rights Act, whose prohibitions against housing discrimination contain an exemption for owner-occupied apartment buildings with two or fewer units (respectively, N.Y. EXEC. LAW § 256, Subd. 5, par. (a), closing para. (McKinney 2001) and KY. REV. STAT. ANN. § 344.365(1)(a) (Michie 1997)), as opposed to the FHA's "Mrs. Murphy" exemption in § 3603(b)(2) that covers four or fewer units.

404. The FHA specifically authorizes state and local laws to ban housing discrimination in situations beyond those covered by the federal statute. 42 U.S.C. § 3615 (discussed and quoted *supra* note 151).

405. *E.g.*, *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (rejecting First Amendment challenge to a federal statute that permitted only those broadcasters located in states that had legalized lotteries to air lottery advertising).

sequent expansion of constitutional protection for commercial speech. A more recent endorsement of this view is the Second Circuit's 1991 decision in *Ragin v. The New York Times*.<sup>406</sup> In *Ragin*, the Court found that § 3604(c)'s prohibition of newspaper advertisements indicating a racial preference in housing through the discriminatory use of human models is not inconsistent with the First Amendment.<sup>407</sup> Relying primarily on the Supreme Court's decision in *Pittsburgh Press*, the Second Circuit stressed that the housing advertisements banned by § 3604(c) relate to illegal commercial activity. "As was the case with the Pittsburgh ordinance prohibiting employment discrimination and ads indicating such discrimination in *Pittsburgh Press*, the Fair Housing Act prohibits discrimination in the sale or rental of housing, as well as ads that indicate a racial preference."<sup>408</sup> Noting that the Times' advertisements were alleged to have discouraged African-Americans from pursuing housing opportunities in much the same way that the sex-designated columns in *Pittsburgh Press* furthered illegal employment discrimination, the Second Circuit concluded that the newspaper's "publication of real estate advertisements that indicate a racial preference is, therefore, not protected commercial speech."<sup>409</sup> Subsequent cases generally agree.<sup>410</sup>

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406. *Ragin v. N. Y. Times*, 923 F.2d 995, 1002-05 (2d Cir. 1991).

407. For additional discussion of this and other cases dealing with § 3604(c)'s application to human model advertising, see *supra* Part II.C.2.

408. *Ragin*, 923 F.2d at 1003 (citations omitted).

409. *Id.*

410. *E.g.*, *United States v. Racey*, No. 96-2023, 1997 U.S. App. LEXIS 10151 (4th Cir. May 7, 1997) (unpublished decision holding that First Amendment does not protect landlord from liability for anti-black statement in violation of § 3604(c)); *HOME v. Cincinnati Enquirer*, 943 F.2d 644, 651 n.9 (6th Cir. 1991) (noting that the First Amendment does not protect newspapers from liability for publishing individual ads that violate § 3604(c)).

The Sixth Circuit's *Cincinnati Enquirer* opinion did, however, express some concern about the First Amendment implications of applying § 3604(c) to a newspaper in a human models case based on the "aggregate message" theory. Under this theory, a newspaper might be liable for a long-term pattern of publishing all-white ads, even if no particular ad could be said to violate § 3604(c). In a 2-1 decision, the Sixth Circuit rejected this theory, in part because it was concerned a contrary interpretation of § 3604(c) would violate the First Amendment. The majority opinion began its First Amendment analysis by determining that the commercial speech at issue was not related to unlawful activity. *Id.* at 652. The Sixth Circuit argued this determination was to be made by analyzing the content of the challenged speech, apart from whether or not that speech was declared to be illegal by a statute like the Fair Housing Act. According to the majority's opinion:

When analyzing the constitutional protections accorded a particular commercial message, a court starts with the content of the message and not the label given the message under the relevant statute. . . . Starting with the



One might argue that a discriminatory notice, statement, or advertisement in violation of § 3604(c) does not concern “unlawful activity” because the “activity” involved is providing housing as opposed to providing an illegal product or service. But *Pittsburgh Press* forecloses this argument by specifically likening a discriminatory advertisement for employment to advertisements proposing narcotics sales or soliciting prostitutes—all involve “illegal commercial activity.”<sup>411</sup> Even if a discriminatory statement is not viewed as proposing an illegal transaction, it is at least misleading—and thus subject to the other part of *Central Hudson*’s first factor.<sup>412</sup> Such a statement implies a dwelling is not available on a non-discriminatory basis when, in fact, it must be. The only time such statements are not misleading is when the dwelling involved is not subject to *any* anti-discrimination law. *Central Hudson*’s first

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language of a statute would foreclose a court from ever considering the constitutionality of a particular commercial speech because the statute would label such speech illegal and thus unprotected by the first amendment. Constitutional review by a court is not so easily circumvented.

*Id.* at 652. The majority opinion did concede that the First Amendment would not protect publication of an individual ad that violated § 3604(c), but concluded that the viability of the “aggregate message” theory “hinges on a statutory construction which raises serious first amendment concerns.” *Id.* at 653. In a vigorous dissent, Judge Keith argued that § 3604(c) applies to an “aggregate message” claim and, so construed, is consistent with the First Amendment. *Id.* at 654-66. His dissent specifically “disagree[d] with the majority’s view that the aggregate message of racially exclusive housing concerns lawful activity.” *Id.* at 663.

The majority’s concern in *Cincinnati Enquirer* that the FHA, itself, could be used as the source of illegality for purposes of applying the first part of the *Central Hudson* test runs contrary to the Second Circuit’s view in *Ragin v. New York Times*, 923 F.2d 995 (2d. Cir. 1991), where the court rejected the *Times*’ argument that this amounts to circular reasoning:

Such circularity would exist only if there were doubt about Congress’s power to prohibit speech that directly furthers discriminatory sales or rentals of housing. The *Times* understandably shrinks from such a bold and fruitless challenge to the Fair Housing Act. Given that Congress’s power to prohibit such speech is unquestioned, reliance upon the statute to determine the illegality of ads with a racial message is not circular but inexorable.

*Id.* at 1003. Based on the *Cincinnati Enquirer* majority’s recognition that § 3604(c) can constitutionally be applied to individual ads with a discriminatory message, 943 F.2d at 651 n.9, its refusal to rely on the FHA as a proper source of illegality must be seen as limited to the specific context of the case, where the court was called upon to determine whether § 3604(c) applies in an unusual situation involving no individually identified illegal ad and no discriminatory intent by the defendant. Because virtually all situations covered by this Article involve single statements whose discriminatory nature is undeniable, it is fair to assume even the *Cincinnati Enquirer* majority would find such statements involve illegal activity and are therefore outside the bounds of First Amendment protection.

411. *Supra* text accompanying notes 395-96.

412. *Supra* text accompanying note 391.

factor, therefore, excludes from First Amendment protection all situations other than those where the defendant is free to discriminate without violating either the FHA, the 1866 Act, or a state or local fair housing law.

iii. Applying *Central Hudson* in "Legal" Situations

Thus, the only situations where a § 3604(c) claim might apply to a non-illegal or non-misleading activity are those involving non-racial discrimination where the dwelling is not only exempt from the FHA but also not covered by a state or local fair housing law. In such situations—for example, familial status discrimination by a "Mrs. Murphy" landlord in Wyoming—the remaining three parts of the *Central Hudson* analysis must be applied. For a § 3604(c) claim to withstand First Amendment scrutiny in this type of situation, the governmental interest in prohibiting the defendant's statement must be substantial, § 3604(c) must directly advance that interest, and § 3604(c)'s prohibition of the defendant's speech must be no more extensive than necessary to serve that interest.<sup>413</sup>

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413. The only court to have applied this analysis in a § 3604(c) case is the Sixth Circuit in *HOME v. Cincinnati Enquirer*, 943 F.2d 644 (6th Cir. 1991), a 2-1 decision rejecting a fair housing organization's attempt to assert a § 3604(c) claim against a newspaper that had allegedly published a series of housing ads with all-white human models. The majority opinion in *Cincinnati Enquirer* refused to accept the plaintiff's "aggregate message" theory of liability under § 3604(c) in part because of First Amendment concerns it felt would be raised by such a theory. *Supra* note 410. After concluding that this "aggregate message" theory did not focus on illegal or misleading speech, the *Cincinnati Enquirer* majority proceeded to apply the remaining parts of the *Central Hudson* test. It conceded the first of these parts was met, noting that the governmental interest in prohibiting discriminatory advertising is substantial because such a ban "contributes to the eradication of discriminatory housing practices." 943 F.2d at 652. The other two elements, however, were not satisfied. With respect to the "directly advance" element, the majority held that, because the "aggregate message" theory did not focus on discriminatory ads for specific real estate, its connection to the goal of eradicating housing discrimination was too attenuated. *Id.* at 652-53. With respect to the "no more extensive than necessary" element, the majority held that the "aggregate message" theory placed too heavy a burden of self-regulation on newspapers, instead of on the advertisers themselves or governmental enforcement agencies, where it more properly belonged. *Id.* at 653. As a result of this analysis, the *Cincinnati Enquirer* majority concluded the viability of the "aggregate message" theory "hinges on a statutory construction which raises serious first amendment concerns." *Id.* A vigorous dissent by Judge Keith argued that all elements of the *Central Hudson* test were satisfied. *Id.* at 663-66.

Because the *Cincinnati Enquirer* case involved racial discrimination and dealt with the special "aggregate message" theory, its application of the latter three parts of the *Central Hudson* test is only of limited value in assessing the situations discussed in this section (i.e., non-racial cases involving clear violations of § 3604(c) based on blatantly discriminatory statements). *Infra* note 418 and accompanying text.

The governmental interest in such a case is probably limited to protecting home seekers from having to endure psychic injuries caused by housing providers' discriminatory statements. While a number of other governmental interests might be triggered by a § 3604(c) violation involving racial discrimination and/or non-exempt dwellings,<sup>414</sup> these situations do not elicit First Amendment protection in the first place because the discrimination involved is illegal. Thus, the various rationales for § 3604(c)'s condemnation of racial statements based on the FHA's goal of eradicating residential segregation,<sup>415</sup> while certainly qualifying as "substantial" for purposes of the *Central Hudson* test,<sup>416</sup> are not needed to fend off a First Amendment challenge to § 3604(c)'s prohibition of such statements.

There are several reasons to believe courts might not weigh the governmental interest in protecting home seekers from psychic injuries as heavily in non-racial as in racial cases. The interest in protecting against this type of injury has at least two elements: the direct injury to the home seeker and the effect this injury might have in deterring the home seeker from continuing his search for housing similar to that offered by the defendant. The latter is particularly important in race cases in light of the FHA's goal of racial integration, but integration is not so clearly a goal in sex, familial status, or handicap discrimination cases.<sup>417</sup> The same can be said of

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414. *Supra* Part II.D.

415. *Supra* Parts I.C, II.D.

416. *E.g.*, *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977); *HOME v. Cincinnati Enquirer*, 943 F.2d 644, 652 (6th Cir. 1991); *United States v. Racey*, No. 96-2023, 1997 U.S. App. LEXIS 10151 (4th Cir. May 7, 1997) (unpublished § 3604(c) decision holding that public interest in preventing housing discrimination outweighs landlord's freedom-of-speech interest in making racially discriminatory statement to African-American applicant); *cf.* *Bob Jones Univ. v. United States*, 461 U.S. 574, 592-95, 604 (1983) (eliminating racial discrimination is a fundamental national policy sufficiently compelling to override First Amendment claim based on the Free Exercise Clause).

417. While the legislative history of Congress' condemnation of racial discrimination in the 1968 FHA shows a great deal of concern for the law's role in achieving residential integration, *supra* Part I.C, the legislative history of the amendments adding sex and familial status to the types of discrimination outlawed by the FHA is focused exclusively on eliminating these types of discrimination and not on achieving residential integration of the sexes or of households with and without children. With respect to handicap discrimination, there is some legislative history indicating Congress' hope that adding this basis to the FHA might reduce the residential isolation of handicapped persons. *E.g.*, H. R. REP. No 100-711 at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2183, 2179 (House Judiciary Committee's Report describing the 1988 Fair Housing Amendments Act as "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American main-

the former concern. It is quite possible that courts might take shielding home seekers from psychic damage more seriously in race cases than in sex, familial status, or handicap cases because, for example, the insult might be viewed as less damaging if based on a status that Congress made illegal years after it first condemned racial discrimination, and, at least in the case of familial status and some types of handicaps, the classification might not be viewed as totally beyond the individual's control.<sup>418</sup>

Even if the governmental interest is considered substantial in § 3604(c) cases involving non-illegal behavior, it would still be difficult to satisfy the latter two parts of the *Central Hudson* test. It is these parts of the test, not identifying a substantial governmental interest, that have led the Supreme Court to find unconstitutional-ity in modern commercial speech cases.<sup>419</sup>

Whether treated as separate or complementary elements,<sup>420</sup> the latter two parts of the *Central Hudson* test require that the government demonstrate the challenged regulation is narrowly tailored to serve the asserted interest.<sup>421</sup> Here, again, there are reasons to doubt § 3604(c) could satisfy this standard if applied where a landlord simply gives a truthful reason for refusing to rent to an appli-

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stream"). This history, however, is not nearly as extensive as that concerning the intended impact on racial segregation of the original FHA. *Supra* Part I.C.

418. *Cf.* *Tr. of the Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 963-68 (2001) (holding that the standard of review under the Equal Protection Clause is less demanding for disability discrimination than for racial discrimination, and evidence of state governments' disability discrimination in legislative history of 1990 Americans with Disabilities Act was significantly less than comparable evidence concerning race discrimination in the legislative history of the 1965 Voting Rights Act); *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 714-17 (9th Cir. 1999) (eliminating marital status discrimination does not involve as compelling a governmental interest for First Amendment purposes as eliminating racial discrimination), *panel opinion withdrawn and reh'g en banc granted*, 192 F.3d 1208 (9th Cir. 1999), *district court's decision vacated and dismissal ordered*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001).

419. *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404, 2421-28 (2001); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188-95 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505-08, 529-34 (1996); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 568-71 (1980).

420. The Supreme Court has used both approaches. *Compare* *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (fourth part of the *Central Hudson* test "complements" the third) *with* *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-31 (1993) (treating third and fourth parts separately, with the fourth, but not the third, focusing on the particular situation of the individual party challenging the restriction).

421. *E.g.*, *Greater New Orleans*, 527 U.S. at 188. The required "fit" between the government's interest and the restriction on speech need not be "perfect, but reasonable" in the sense that it "represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.*

cant. First, although there is evidence Congress was concerned about the psychic harm discrimination might cause in racial cases,<sup>422</sup> there is little similar evidence in the legislative histories of the amendments adding sex, familial status, and handicap to the FHA.<sup>423</sup> If Congress wanted to protect home seeking members of later protected classes from psychic injuries caused by non-illegal discriminatory statements, there were a number of other ways it could have done so. The most direct way would have been to eliminate or reduce the FHA's exemptions so that the illegality of discriminatory statements directed against such groups would be certain instead of dependant upon the vagaries of state and local fair housing laws.<sup>424</sup>

Alternatively, Congress could have fine-tuned § 3604(c) to reduce the likelihood home seekers from non-racial protected classes would be exposed to insulting statements. For example, Congress could have allowed FHA-exempt housing providers to publish advertisements indicating a preference not to rent or sell to members of these groups, while outlawing discriminatory statements in personal encounters with applicants. Or, § 3604(c) could have been amended to limit its prohibition against discriminatory statements in non-illegal rentals or sales to those statements the speaker knew or should have known would cause emotional distress to a reasonable member of a protected group.

These potential re-workings of § 3604(c) would be highly cumbersome, particularly because no alteration is necessary for cases involving race, color, most national origins, and some religions. Nevertheless, they do suggest the "fit" of the current version of § 3604(c) and its goal of protecting certain groups of home seekers from the intangible injuries resulting from discriminatory statements by FHA-exempt housing providers is not sufficiently close to satisfy the last two parts of the *Central Hudson* test. In the few situations where no other law makes the underlying transaction illegal, it is hard to see how a landlord's discriminatory statement

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422. *Supra* note 162.

423. *But see* 134 CONG. REC. 15,663 (1988) (remarks of Rep. Edwards, the chief sponsor of the 1988 Fair Housing Amendments Act in the House: "There are few experiences more humiliating, more cruel, than to be denied housing because of your race, handicap, or because you have children.").

424. *Cf. Greater New Orleans*, 527 U.S. at 190 (relying on the fact that the "attendant regulatory regime is so pierced by exemptions and inconsistencies" in holding that a congressional prohibition of commercial speech fails the fourth part of the *Central Hudson* test). For an argument that the "Mrs. Murphy" FHA exemption should be eliminated, see Walsh, *supra* note 11.

identifying the reason for his refusal to rent—a truthful statement concerning the availability of a product—would not be protected by the First Amendment.

Of course, the conclusion might be otherwise for statements embellished by slurs or other unreasonably hostile phrases directed toward an applicant's protected class. There is an obvious difference between the First Amendment concerns raised by the statement, "No, I'm not going to rent to you because you are a woman" and the statement, "No, I'm not going to rent to you because you are a woman, and no bitch is ever going to get an apartment from me." The latter phrase in the second statement adds no market-useful information about the price or availability of a legal product, and therefore does not square with the spirit and intent of Supreme Court cases extending First Amendment protection for commercial speech.<sup>425</sup> Contrasting these two statements also focuses attention on the primary concern underlying § 3604(c)'s prohibition of discriminatory statements in non-illegal situations—the prevention of psychic harm, not just from a legally based rejection, but from hateful comments made in connection with such a rejection. This focus also raises the possibility that § 3604(c) is protected from First Amendment challenge because the statements it prohibits are limited to "fighting words" or "hate speech." This approach is discussed in the next section.

*c. Other Potentially Relevant First Amendment Doctrines*

*i. "Fighting Words"*

The First Amendment's general hostility toward content-based regulations of speech does not extend to "fighting words," a narrowly defined category of speech thought to be of such slight social value that any benefit derived therefrom is outweighed by its costs to public order.<sup>426</sup> "Fighting words" jurisprudence begins in 1942 with *Chaplinsky v. New Hampshire*,<sup>427</sup> where the Supreme Court held that fighting words, defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of peace," may be banned without violating the First Amendment.

Since *Chaplinsky*, the Court has narrowed the fighting words doctrine in a number of ways. The doctrine now only applies to

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425. *Supra* note 393 and accompanying text.

426. *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); cases cited *infra* note 428.

427. *Chaplinsky*, 315 U.S. at 572.

words "tend[ing] to incite an immediate breach of peace."<sup>428</sup> Words fall within this definition only if they "naturally tend to provoke violent resentment."<sup>429</sup> Finally, the Court has held that fighting words must be "directed to the person of the hearer."<sup>430</sup>

One can imagine a statement violating § 3604(c) might fall within the modern definition of fighting words and, therefore, not be entitled to First Amendment protection. Recent cases include a number of examples.<sup>431</sup>

Most § 3604(c) cases, however, have not involved speech easily categorized as fighting words. First of all, discriminatory housing ads and notices are directed to the public at large, rather than to "the person of the hearer," and thus cannot be considered fighting words.<sup>432</sup> Second, even in "statement"-based § 3604(c) cases, the offending statement is often made to the housing provider's employees, or others not the target of the discriminatory remark.<sup>433</sup> Finally, even in cases where the remark is directed toward the person of the hearer, only those statements involving the most extreme type of insult would qualify as fighting words because the words used must tend to provoke immediate violence. Thus, for example, as insulting as were the landlord's statements to the Asian-American prospects in *Chew v. Hybl*<sup>434</sup>—about her having "good white applicants" and the need for "we white people . . . to stick together" because "you people are taking over this country"—it seems unlikely that such words would lead to an immediate altercation. Indeed, most epithets and other demeaning statements condemned by § 3604(c) probably fall into this cate-

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428. *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (striking down as overbroad a Georgia statute that, unlike the one upheld in *Chaplinsky*, was not limited to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed"); see also *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-33 (1974); *Cohen v. California*, 403 U.S. 15, 20 (1971). The *Chaplinsky* opinion anticipated this result by ultimately focusing only on whether the words used there were "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." 315 U.S. at 574.

429. *Gooding v. Wilson*, 405 U.S. 518, 525 (1972) (statute is not protected by the fighting words doctrine because, among other things, it was not limited to words "naturally tend[ing] to provoke violent resentment"); see also *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (speech constituting fighting words must be regarded by a reasonable addressee as "an invitation to fisticuffs").

430. *Cohen v. California*, 403 U.S. 15, 20 (1971).

431. E.g., *HUD v. Gruzdaitis*, Fair Hous.-Fair Lending Rptr. ¶ 25,137 (HUD ALJ 1998) (discussed *supra* text accompanying notes 220-22).

432. *Supra* text accompanying notes 430.

433. E.g., cases described *supra* notes 289, 327, 346 and *infra* notes 483, 489, 490.

434. *Chew v. Hybl*, Fair Hous.-Fair Lending Rptr. ¶ 16,249 (N.D. Cal. 2000) (discussed *supra* note 290).

gory: hurtful, but not likely to provoke a violent response. This seems particularly true in cases involving discriminatory statements directed toward the FHA's non-racial protected classes, which are the only situations where the fighting words doctrine would be needed because the speech is unrelated to illegal behavior and, therefore, does not fall under the commercial speech doctrine.<sup>435</sup>

More fundamentally, the text of § 3604(c) does not invite a fighting words defense to First Amendment challenge. The language of the statute is not limited to banning speech that, by its very utterance, tends to incite violent reaction by the hearer. Statements are prohibited regardless of to whom they are directed, and regardless of whether they might provoke a violent response. Thus, even though § 3604(c) may ban some statements beyond First Amendment protection, the fact that it is directed toward and outlaws many non-inciting statements means that § 3604(c) cannot be defended based on the fighting words doctrine.<sup>436</sup>

ii. "Hate Speech" and the *R.A.V.-Mitchell* Decisions

In the 1980s and 1990s, a number of courts reviewed government efforts to curb racist, sexist, and other types of "hate speech." The cases produced a wealth of information about the negative effects of such speech.<sup>437</sup> However, despite the legitimate concerns underlying these efforts to limit hate speech, courts invariably held them

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435. *Supra* Part IV.A.2.b.ii.

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It matters not that the words [appellant] used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

*Lewis v. City of New Orleans*, 415 U.S. 130, 133-34 (1974) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972)).

437. E.g., Alan E. Brownstein, *Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles*, 39 BUFF. L. REV. 1 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-37, 173-74 (1982); Charles H. Jones, *Equality, Dignity, and Harm: The Constitutionality of Regulating American Campus Ethnoviolence*, 37 WAYNE L. REV. 1383 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 436-48, 462-66 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990).



inconsistent with the First Amendment.<sup>438</sup> The fighting words doctrine serves as the backdrop for this discussion, with hate speech

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438. A number of these cases involved hate speech on college campuses. For example, in 1991, in *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1165 (E.D. Wis. 1991), a district court struck down a state university's rule that authorized discipline of students for

racist or discriminatory comments, epithets or other expressive behavior directed at an individual . . . if such comments, epithets or other expressive behavior or conduct intentionally [d]emean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and [c]reate an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

This rule was adopted in response to an increasing number of incidents of discriminatory harassment of minorities and women, and covered such situations as students calling each other "nigger" or "bitch." *Id.* at 1164-67. The University argued that the prohibited speech inflicted great harm, but the court held that the rule banned a good deal of speech not covered by the fighting words doctrine and, therefore, as a content-based regulation, could not be squared with the First Amendment. *Id.* at 1168-78. A similar decision was rendered two years earlier in *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989), where a district court struck down a similarly motivated university policy restricting speech "that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status." *See also* *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993) (striking down campus hate speech code on First Amendment grounds), *aff'd*, 55 F.3d 1177 (6th Cir. 1995); *cf.* *Corry v. Stanford Univ.*, No. 740309 (Cal. Super. 1995) (invalidating private university's hate speech code under state statute). In both the *Wisconsin* and *Michigan* cases, the courts also held that the restrictions were unconstitutionally vague. *Wisconsin*, 774 F. Supp. at 1178-81; *Michigan*, 721 F. Supp. at 866-67.

Leaving the campus arena, in *American Bookseller Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), the Seventh Circuit invalidated an Indianapolis ordinance that sought to curb violence and discrimination against women by banning certain forms of pornography that depicted "the graphic sexually explicit subordination of women." The court accepted "the premises of this legislation"—that is, that depictions of female subordination might well result in job discrimination, insults, battery, rape, and a myriad of other "unhappy effects" directed against women. *Id.* at 329. Nevertheless, because "[t]he ordinance discriminates on the ground of the content of speech"—indeed, was seen as "not neutral with respect to viewpoint"—and because its prohibitions covered sexual materials not qualifying as "obscenity" and were therefore not beyond First Amendment protection on that ground, the Seventh Circuit held it unconstitutional. *Id.* at 324-25. In making clear that the potential negative effects of speech may rarely justify its prohibition other than under a few narrowly defined doctrines such as fighting words and obscenity, Judge Easterbrook's opinion noted that "[r]acial bigotry, anti-semitism [and other expressions of bias are] all . . . protected as speech, however insidious." *Id.* at 330. The *American Booksellers* opinion also rejected the government's argument that the speech prohibited there was not entitled to First Amendment protection because it was not "answerable" in the "marketplace of ideas." *Id.* at 330-32. According to the Seventh Circuit, "the Constitution does not make the dominance of truth a necessary condition of freedom of speech. . . . The Supreme Court has rejected the position that speech must be 'effectively answerable' to be protected by the Constitution." *Id.* at 330-31.

generally viewed as less likely than fighting words to lead to immediate violence and thus protected by the First Amendment.

While these hate speech decisions prompted much commentary,<sup>439</sup> none effectively challenged the basic proposition that such content-based regulations are unconstitutional.<sup>440</sup> Then, in 1992, in *R.A.V. v. City of St. Paul*,<sup>441</sup> the Supreme Court gave additional support to these decisions by striking down a city's "hate crime" ordinance on First Amendment grounds.

In *R.A.V.*, the City of St. Paul sought to prosecute a juvenile under the city's "Bias-Motivated Crime Ordinance" for burning a cross on the lawn of an African-American family. The ordinance made it a misdemeanor to knowingly arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" by placing a burning cross, Nazi swastika, or other symbol on public or private property.<sup>442</sup> The defendant argued that the St. Paul ordinance was unconstitutional because it too broadly proscribed permissible speech, and also discriminated against certain types of speech.<sup>443</sup>

The Supreme Court agreed. In a five-four decision,<sup>444</sup> Justice Scalia concluded the ordinance involved content and even viewpoint discrimination,<sup>445</sup> and thus could be upheld only if shown to

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439. *E.g.*, sources cited *supra* note 437.

440. *See, e.g.*, David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 BROOK. L. REV. 1165 (1991); Robert Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech."* *The View from Without and Within*, 53 U. PITTSBURGH L. REV. 631 (1992); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L. J. 484 (1990).

441. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

442. *Id.* at 380.

443. The Supreme Court's opinion listed a number of laws under which the defendant's conduct could have been punished. *Id.* at 380 n.1.

444. The four other justices joined an opinion arguing that the ordinance was unconstitutionally overbroad. *Id.* at 397-415 (White, J., with whom Blackmun, O'Connor, and Stevens, JJ., join, concurring). In addition to this principal concurring opinion, Justices Blackmun and Stevens also wrote separate concurring opinions. *Id.* at 415-36.

445. *Id.* at 391-96. In response to the City's argument that the ordinance only prohibited fighting words, Justice Scalia noted that it barred only certain types of fighting words (e.g., those arousing resentment on the basis of race) while allowing others (e.g., those arousing resentment based on political affiliation). According to Justice Scalia's opinion, the government has no authority "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." *Id.* at 392.

Nor was the Court receptive to the City's argument that its ordinance could be validated because its content discrimination was aimed only at the "secondary effects" of the prohibited speech. According to the City, the intent of the ordinance was not

be reasonably necessary to achieve a compelling government interest.<sup>446</sup> The Court held that St. Paul's ordinance failed to satisfy this standard, noting that the underlying goals could be achieved through legislation "not limited to the favored topics."<sup>447</sup> According to Justice Scalia, "the only interest distinctively served by the content limitation is that of displaying the city council's special hostility toward the particular biases thus singled out. That is precisely what the First Amendment forbids."<sup>448</sup>

Justice Scalia's opinion in *R.A.V.* made clear his belief that cross burning is "reprehensible" conduct that government has the right and responsibility to prevent in constitutionally appropriate ways.<sup>449</sup> According to *R.A.V.*, however, the proper means is through statutes focused on conduct, not speech.<sup>450</sup> The decision stands as a powerful limitation on government's ability to restrict speech based on its racial hostility.

In *R.A.V.*'s principal concurring opinion, Justice White suggested that the majority's view of the First Amendment raised questions about the constitutionality of Title VII's prohibition of sexual harassment in the workplace.<sup>451</sup> Less than a year after *R.A.V.*, in *Wis-*

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to limit free expression, but to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against." *Id.* at 394. This was irrelevant, the Court ruled, because the desire to protect such persons is not the type of "secondary effects" that can justify a content-based restriction on speech. According to *R.A.V.*, neither "[l]isteners' reactions to speech" nor "[t]he emotive impact of speech on its audience" are the types of "secondary effects" that the Court has allowed to save an otherwise discriminatory law. *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

446. *Id.* at 395-96.

447. *Id.* at 396.

448. *Id.* In their concurring opinions, Justices Stevens and Blackmun argued, to the contrary, that laws based on a special hostility toward racial bias could well be justified under the First Amendment because of the special harm that flows from such bias. For his part, Justice Stevens noted that "[t]hreatening someone because of her race or religious beliefs may cause particularly severe trauma," which led him to conclude that "such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such specific rules." *Id.* at 416. He also opined that:

St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic.

*Id.* at 424; see also *id.* at 416 (Blackmun, J., concurring).

449. *Id.* at 396.

450. *Id.* at 379-80 n.1 (citing anti-arson and other conduct-based criminal laws in support of the proposition that the *R.A.V.* defendant's "conduct could have been punished under any of a number of laws"); see also *infra* text accompanying note 456.

451. 505 U.S. at 409-10 (White, J., concurring).

*consin v. Mitchell*,<sup>452</sup> the Supreme Court again addressed this subject in a way that seemed designed to allay such fears. In *Mitchell*, the Court upheld a Wisconsin statute providing for enhanced sentences for convicted criminal batterers who intentionally select their victim based on "race, religion, color, disability, sexual orientation, national origin, or ancestry."<sup>453</sup> In rejecting the defendant's claim that this sentence-enhancement statute violated the principles laid down in *R.A.V.*, the Supreme Court, in a unanimous opinion by Chief Justice Rehnquist, noted that "the statute in this case is aimed at conduct unprotected by the First Amendment";<sup>454</sup> in contrast, the "ordinance struck down in *R.A.V.* was explicitly directed at expression."<sup>455</sup>

Furthermore, according to the *Mitchell* opinion, the fact that the Wisconsin statute enhanced the defendant's penalty for "conduct motivated by a discriminatory point of view" did not render the law unconstitutional.<sup>456</sup> In a passage that seemed designed to make clear that conduct-focused civil rights laws were not in jeopardy from *R.A.V.*, the Chief Justice noted that:

[M]otive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge. Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." In *Hishon [v. King & Spalding]*, 467 U.S. 69 (1984), we rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in *R.A.V. v. St. Paul*, we cited Title VII as an example of a permissible content-neutral regulation of conduct.<sup>457</sup>

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452. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

453. *Id.* at 480 (citing Wis. STAT. § 939.05(1)(b) (2000)).

454. *Id.* at 487.

455. *Id.* The Court in *Mitchell* did not consider the defendant's conduct (a physical assault) as "by any stretch of the imagination expressive conduct protected by the First Amendment." *Id.* at 484.

456. *Id.* at 485; cf. *Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000) (holding that New Jersey's "hate crime" law, which provided for an enhanced sentence when the defendant was found to have "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity," violates due process because it authorized this finding to be made by a judge based on a preponderance of evidence rather than by a jury on the basis of proof beyond a reasonable doubt).

457. 508 U.S. at 487 (citations omitted). The Court recently made a similar observation in *Hill v. Colorado*, 530 U.S. 703, 718-22 (2000):

It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a

The *R.A.V.* and *Mitchell* decisions do not bode well for protecting § 3604(c) statement-based claims from First Amendment challenge. First of all, § 3604(c) is directed at expression, not conduct. The Supreme Court considered this distinction vital in both *R.A.V.* and *Mitchell*.<sup>458</sup> Thus, those parts of the FHA aimed at conduct—such as § 3604(a)'s ban on discriminatory refusals to deal, § 3604(b)'s prohibition of discriminatory terms and conditions, and § 3617's directive against coercion, interference, and other acts of harassment—stand in no danger of First Amendment challenge.<sup>459</sup> The explicit prohibition of discriminatory statements in § 3604(c), however, does face this danger. While *Mitchell* makes clear that biased statements may be used to prove a defendant's illegal motive in a claim based on one of the FHA's conduct-focused provisions, it is quite another matter to use discriminatory statements to establish a violation of a statute, like § 3604(c), that is directed against expression. Additionally, even if § 3604(c) is considered only content-based discrimination and not also viewpoint discrimination,<sup>460</sup> the hate speech decisions suggest the provision goes too far by outlawing a great deal of speech that cannot be categorized as "fighting words."<sup>461</sup>

This is not to say that the Congressional desire to protect home seekers from the harm resulting from group-based insults and other § 3604(c) violating statements is insubstantial. But similar concerns motivated the governmental actions in *R.A.V.* and the hate speech cases, all to no avail. It is worth remembering, however, that First Amendment challenge is only a concern in those few situations where the discriminatory statement is made by an FHA-exempt housing provider and involves non-racial discrimination not covered by the FHA or any other fair housing law, because it is only in those situations that the speech would be unregulatable under the commercial speech doctrine.<sup>462</sup>

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threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

458. *Supra* text accompanying note 456.

459. *But see* *White v. Lee*, 227 F.3d 1214, 1226-38 (9th Cir. 2000) (First Amendment bars this particular § 3617 claim, which was based on defendants' speech and petitioning behavior).

460. *Compare supra* note 438 (second paragraph) *and* note 445 *with infra* note 476.

461. *Supra* note 438 and accompanying text.

462. *Supra* Part IV.A.2.b.ii.

## iii. Title VII Harassment Cases

In *R.A.V.* and *Mitchell*, the Supreme Court purported to “protect” Title VII sexual harassment claims from First Amendment challenge on the ground that the subject statute aims at conduct, and considers offensive speech to be mere evidence of illegal motive.<sup>463</sup> Although this was a satisfactory explanation when those decisions were rendered, the Court’s more recent pronouncements concerning “hostile environment” harassment make clear that sexually offensive statements may be used not merely as evidence of illegal motive but also to establish a Title VII violation.<sup>464</sup>

For example, in 1998 in *Burlington Industries, Inc. v. Ellerth*,<sup>465</sup> the Court upheld a Title VII claim based largely on three incidents where a male supervisor made offensive sexual remarks to a female employee. One of these incidents included physical touching, but the other two consisted entirely of verbal statements.<sup>466</sup> Essentially, the Court decided that pure-speech incidents could, by themselves, establish a Title VII claim.

In *Ellerth*, the Court distinguished between harassment cases where a tangible employment action is taken against the plaintiff (traditionally called a “quid pro quo” claim) and those in which no such action is taken (traditionally called a “hostile environment” claim).<sup>467</sup> A “quid pro quo” claim, characterized by a firing, demotion, or the undesirable transfer of the plaintiff after she has refused a supervisor’s sexual advances, is a conduct-based complaint

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463. *E.g.*, *supra* text accompanying notes 455-56.

464. As well as sex, Title VII harassment claims may be based on the plaintiff’s race, national origin, or other protected status. *E.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986) (citing with approval lower court decisions upholding Title VII harassment claims based on race and national origin). Most of the Court’s harassment cases, however, have been based on sex, and the discussion here focuses on sex-based harassment because of the need for a First Amendment doctrine that protects § 3604(c) claims from constitutional challenge, which is not a concern in race cases. *Supra* Part IV.A.2.b.ii.

465. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

466. *Id.* at 747-48.

467. *Id.* at 751-54. The *Ellerth* opinion expressed some dissatisfaction with the “quid pro quo” and “hostile environment” labels, preferring instead to distinguish the two categories of harassment cases on the basis of whether or not a “tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands.” *Id.* at 753. The change in terminology suggested by *Ellerth* may not be significant in terms of its effect on liability in individual cases, but the focus on whether a “tangible employment action” was or was not involved does provide a conduct-oriented phrase that nicely distinguishes the two classes of sexual harassment cases for purposes of First Amendment consideration.

raising no serious First Amendment issues.<sup>468</sup> A "hostile environment" claim, on the other hand, involves no tangible job action, although threats of such action often accompany the request for sexual favors. This type of claim may be based primarily or even entirely on statements made to the plaintiff by her supervisor or co-workers, at least if the statements are severe or pervasive enough to alter the terms or conditions of the plaintiff's employment.<sup>469</sup>

In *Ellerth*, the Court held that the supervisor's behavior met this "severe or pervasive" standard and then focused on whether his employer was liable for the harassment. Vicarious liability clearly exists, the Court held, in cases where a supervisor takes "a tangible employment action" against the plaintiff-subordinate.<sup>470</sup> On the other hand, when a supervisor's harassment does not culminate in a tangible employment action (i.e., the plaintiff is asserting only a "hostile environment" claim), the defending employer is liable, but can escape liability by proving that it had a reasonable anti-harassment policy of which the plaintiff unreasonably failed to take advantage.<sup>471</sup>

Under *Ellerth*, a supervisor's harassing speech alone may establish a Title VII violation.<sup>472</sup> True, liability may ultimately turn on the employer's and the plaintiff's conduct concerning the employer's anti-harassment policy, but, because such conduct relates only to the employer's potential affirmative defense, the initial showing needed to establish liability may be based entirely on speech. This result was anticipated by the Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.*,<sup>473</sup> which upheld, for the first time, a Title VII hostile environment claim based on a supervi-

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468. E.g., Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHICAGO-KENT L. REV. 701, 704-05 (1995).

469. E.g., *Ellerth*, 524 U.S. at 754; *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

470. *Ellerth*, 524 U.S. at 760-63. "Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. . . . For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Id.* at 762.

471. *Id.* at 760-65; see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-08 (1998).

472. See also *Faragher*, 524 U.S. at 780-83, 807-10.

473. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

sor's offensive sexual remarks.<sup>474</sup> The decision prompted a series of law review articles addressing the First Amendment implications of such a holding.<sup>475</sup> To the extent these articles argued that a speech-based Title VII claim can withstand First Amendment challenge, they did so on the grounds that the speech involved does not deserve constitutional protection because it is of low value, it occurs in a special workplace context often characterized by a hierarchical structure and unequal power relationships, it usually targets an isolated individual, and it cannot be effectively rebutted in the "marketplace of ideas."<sup>476</sup>

However, whether Title VII trumps First Amendment concerns in harassment cases is far from certain. The speech involved cannot fairly be categorized as "fighting words," and, because Title VII's antidiscrimination mandate involves at least content-discrimination and perhaps even viewpoint-discrimination,<sup>477</sup> its curbs on speech would be subject to the strictest degree of judicial scrutiny.<sup>478</sup>

More importantly for purposes of this Article, Title VII harassment cases are not analogous with § 3604(c) claims. First of all, the Title VII provision involved in harassment cases is by its terms directed at conduct.<sup>479</sup> Section 3604(c), in contrast, is directed at speech. The distinction is of crucial First Amendment significance in light of the Supreme Court's holdings in *R.A.V.* and *Mitchell*.<sup>480</sup>

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474. In *Harris*, the Court cited a number of examples of offensive remarks made to the plaintiff by Forklift's president, such as "You're a woman, what do you know," and calling her "a dumb-ass woman." *Id.* at 19.

475. *E.g.*, Strossen, *supra* note 468 (and articles cited *id.* at 701 n.2 and 710 n.37). Some articles on this subject appeared shortly before the Court's decision in *Harris*. *E.g.*, pre-1993 articles cited in Strossen, *supra* note 468, at 701 n.2.

476. A variation on these themes is that such speech involves a "captive audience" and therefore is entitled to little or no First Amendment protection, but the captive audience concept does not seem particularly suitable to the workplace. *See* Strossen, *supra* note 468, at 709.

477. Strossen, *supra* note 468, at 708-09.

478. *Supra* text accompanying notes 374, 446. Interestingly, despite the plethora of law review articles on the subject, few courts since *Harris* have been called upon to address the constitutional problem in such cases, perhaps because employers in Title VII cases generally choose to defend on grounds other than their agents' right to free speech, and the agents whose speech is at issue are generally not parties in such cases. *See, e.g.*, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279-82 (7th Cir. 1995). Whatever the reason, modern Title VII decisions offer little help in resolving this problem.

479. 42 U.S.C. § 2000e-2(a)(2) (2001) (barring employers from "discriminat[ing] against any individual with respect to that individual's compensation, terms, conditions, or privileges of employment").

480. *Supra* text accompanying notes 454-57.



The FHA does contain a comparable provision that has been interpreted to ban harassment in housing, but it is § 3604(b)'s prohibition against discriminatory "terms or conditions," not § 3604(c)'s ban against discriminatory statements.<sup>481</sup> Title VII contains a provision analogous to the FHA's § 3604(c), but it is not used to challenge speech-based harassment and prohibits only discriminatory notices and advertisements, not discriminatory statements.<sup>482</sup> Indeed, § 3604(c) is the only federal antidiscrimination statute that, by its own terms, bans biased statements. Thus, while the treatment of First Amendment concerns in Title VII harassment cases might be instructive for comparable housing-related claims, it is not particularly helpful in dealing with First Amendment challenges to statement-based § 3604(c) claims.

### 3. *Summary of Statutory and Constitutional Limitations*

Properly interpreted, § 3604(c)'s ban on discriminatory housing statements raises few serious First Amendment problems. Because this statute covers only statements made "with respect to" the sale or rental of a dwelling, it is limited to commercial activity, and thus its speech restrictions are constitutional as long as the speech concerns an illegal practice.

The vast majority of biased statements condemned by § 3604(c) involve illegal practices. The FHA outlaws most housing discrimination based on race, color, national origin, religion, sex, familial status, and handicap in the sale or rental of all but the few dwellings covered by the FHA's exemptions. In FHA-exempt contexts, the 1866 Civil Rights Act applies and outlaws all discrimination based on its version of race, which includes most national origins and many religions likely to be targeted for discrimination. Additionally, the other types of discrimination covered by § 3604(c)

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481. Actually, sexual harassment in housing may violate a variety of the FHA's substantive provisions, including § 3604(a)-(c), § 3605, § 3606, and § 3617. *E.g.*, *Krueger v. Cuomo*, 115 F.3d 487, 491-92 (7th Cir. 1997) (§3604(b) and § 3617); *Honce v. Vigil*, 1 F.3d 1085, 1088-90 (10th Cir. 1993) (citing § 3604(b)); *Williams v. Poretsky Mgmt.*, 955 F. Supp. 490, 491, 494-96 (D. Md. 1996) (citing § 3604 and § 3617); *Beliveau v. Caras*, 873 F. Supp. 1393, 1396-98 (N.D. Ill. 1995) (§ 3604(b)); 65 Fed. Reg. 67,666 (Nov. 13, 2000) (HUD's proposed rule establishing standards for sexual harassment cases under the FHA and commenting that sexual harassment may violate § 3604(a)-(c), § 3605, § 3606 and § 3617). However, no case has ever held that a defendant's statement-based sexual harassment violates § 3604(c) without also violating one of the other, conduct-focused provisions of the FHA, nor has any case provided separate relief under § 3604(c) or otherwise indicated that the § 3604(c) claim was of independent significance apart from the FHA's other substantive prohibitions.

482. *Supra* text accompanying notes 81-82.

(that is, sex, familial status, and handicap) may be illegal under applicable state or local fair housing law. As a result, the modern "commercial speech" doctrine, though generous in its protection of legal and non-misleading messages, continues to provide a safe haven for § 3604(c) in all but the narrowest of circumstances.

Thus, while § 3604(c) is a content-based limitation on speech unlikely to survive a First Amendment challenge based on the "fighting words" doctrine or the types of concerns that have prompted "hate speech" and anti-harassment cases, the need for additional protection arises only under a narrow set of circumstances—those cases alleging sex, familial status, and handicap discrimination in FHA-exempt housing that arise in a state or locality that has not outlawed such discrimination. In all other situations, § 3604(c) may be aggressively interpreted and enforced without violating the First Amendment. This is certainly true in the classic § 3604(c) case, where a housing provider makes a biased statement directly to a minority home seeker. How far § 3604(c) may go in banning discriminatory statements beyond this classic application is explored in the next two sections: the first deals with potential defendants, and the second with potential plaintiffs.

## **B. Liability and Proper Defendants**

### *1. Statements Made to Third Parties*

The most difficult coverage question under § 3604(c)'s "with respect to" requirement arises when a housing provider makes a biased statement to someone other than a minority applicant. As noted above, there are cases where discriminatory statements were made to the defendant's agents, fellow board members, and other associates; current tenants, testers, friends, and family members of the plaintiff; government investigators; and others.<sup>483</sup> For the most part, courts have found that § 3604(c) covers these statements.<sup>484</sup>

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483. Cases cited *supra* notes 289, 327, 346 and *infra* notes 484, 489, 490. No doubt, discriminatory statements have also been made in private conversations with a housing provider's family and friends, but these statements have not been the subject of any reported § 3604(c) decisions, and, as discussed *supra* notes 85 and 362, § 3604(c) was not intended to apply to such private statements.

484. *E.g.*, *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (discussed *supra* text accompanying notes 271-79); *HUD v. Roberts*, Fair Hous.-Fair Lending Rptr. ¶ 25,151, at 26,217-18 (HUD ALJ 2001) (landlord's inquiries of testers' race and nationality held to violate § 3604(c)); *HUD v. Lewis*, Fair Hous.-Fair Lending Rptr. ¶ 25,118, at 26,014-15 (HUD ALJ 1996) (landlord's statement to leasing agent that he did not want her to rent to Blacks and Hispanics held to violate § 3604(c)); *HUD v. Gutleben*, Fair Hous.-Fair Lending Rptr. ¶ 25,078, at 25,726 (HUD ALJ 1994) (landlord's statement to white tenant, which was overheard by African-American tenant,

As long as the statement is made in the context of the defendant's "decisional process" for the sale or rental of a dwelling (i.e., it is not a "stray remark"),<sup>485</sup> then § 3604(c) should apply.<sup>486</sup> Such a statement is not only covered by the statute's literal language, but also implicates one of § 3604(c)'s major purposes—not encouraging housing providers to believe they may continue to discriminate.<sup>487</sup> In these "indirect" cases, there is some question whether a minority plaintiff who hears of an offending statement from a third party some time after it is made should be allowed to recover damages under § 3604(c), a question explored in the next section,<sup>488</sup> but there should be no question a violation has occurred.

This rule has two possible exceptions. The first is less an exception and more a variation of the requirement that the defendant's statement be made in the context of a "decisional process." This requirement exempts from § 3604(c) liability so-called "stray" remarks, such as racist jokes told by a landlord to one of his white tenants unrelated to any pending rental.<sup>489</sup> It also provides a ratio-

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accusing latter's children of misbehaving and referring to them as the "little nigger kids next door" held to violate § 3604(c)); *HUD v. Joseph*, Fair Hous.-Fair Lending Rptr. ¶ 25,072, at 25,667, 25,670 (HUD ALJ 1994) (statement by maintenance man-husband of leasing agent to white prospect that an advantage of the complex was that there were no blacks, which prospect then repeated to an African-American friend who had earlier been rejected by the complex, held to violate § 3604(c)); *HUD v. Wagner*, Fair Hous.-Fair Lending Rptr. ¶ 25,032, at 25,332-33, 25,336 (HUD ALJ 1992) (rental agent's statement to tester that family with two children would not be allowed held to violate § 3604(c)); *HUD v. Rollhaus*, Fair Hous.-Fair Lending Rptr. ¶ 25,019, at 25,249 (HUD ALJ 1991) (statement by home owner to third party who had inquired at request of bona fide applicant that owner "did not rent to single mothers" held to violate § 3604(c)); *cf.* cases discussed *infra* notes 489-90 and accompanying text.

485. *Supra* text accompanying notes 278-79 (discussing *Harris v. Itzhaki*, 183 F.3d 1043, 1055 (9th Cir. 1999)); *supra* note 148 (describing *Stewart v. Furton*, 774 F.2d 706, 710 (6th Cir. 1985)); cases cited *infra* notes 489-90.

486. *Supra* text accompanying notes 278-79.

487. *Supra* text accompanying notes 173-75; *supra* notes 302-03 and accompanying text.

488. *Infra* Part IV.C.2.b.

489. *E.g.*, *United States v. Northside Realty Assocs., Inc.* 474 F.2d 1164, 1169-71 (5th Cir. 1973) (illustrating that the First Amendment protects defendant from FHA liability based solely on his criticism of the fair housing statute); *Wainwright v. Allen*, 461 F. Supp. 293, 294-296, 298 (D. N.D. 1978) (described *infra* note 490); *United States v. Real Estate One*, 433 F. Supp. 1140, 1154 n.8 (E.D. Mich. 1977) ("A nasty racial remark from one white salesman to another about a black salesperson [does not violate the FHA] if no transaction, salesperson, seller, or buyer was influenced thereby"); *HUD v. Las Vegas Hous. Auth.*, Fair Hous.-Fair Lending Rptr. ¶ 25,116, at 26,002 (HUD ALJ 1996) (described *supra* note 310); *HUD v. Gutleben*, Fair Hous.-Fair Lending Rptr. ¶ 25,078, at 25,726 n.24 (HUD ALJ 1994) (avoiding the question of whether § 3604(c) is violated by landlord's statement to white tenant that

nale for excluding after-the-fact statements made by defendants to fair housing investigators, a situation that has bothered courts without resulting in a definitive resolution.<sup>490</sup> There should be no liability in such situations, if only because of the First Amendment implications of a contrary ruling.<sup>491</sup>

The other exception suggested by the "decisional process" requirement is statements made by a landlord or his agent after consummating a rental agreement with a minority tenant. This issue, which is one of timing, concerns whether protection under 3604(c)'s "with respect to the . . . rental" phrase is limited to the initial phases of arranging for a leasehold or extends throughout the full term of a minority resident's tenancy.<sup>492</sup> The problem is that the word "rental" can be read two ways: it can be interpreted as covering only the initial decision to rent, or it can be read to include the landlord and tenant's on-going relationship during the

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referred to African-American tenants as "niggers"); cases cited *supra* notes 148, 278-79.

490. *E.g.*, HUD v. Leiner, Fair Hous.-Fair Lending Rptr. ¶ 25,021, at 25,267 (HUD ALJ 1992) (avoiding the question of whether § 3604(c) is violated by apartment rental agent's post-complaint statement to HUD investigator that "You put five blacks or Hispanics in an apartment and you have a pigsty"); *see also* Sorenson v. Raymond, 532 F.2d 496, 498 n.5 (5th Cir. 1976) (described *supra* note 346); Wainwright v. Allen, 461 F. Supp. 293, 294-296, 298 (D.N.D. 1978) (landlord's bigoted statement to Air Force housing officer who was investigating whether landlord had discriminated against a black Air Force couple some ten days earlier cannot establish liability because "[t]he first amendment protects the freedom of speech even though that speech be bigoted. The statement may show [defendant] was prejudiced but it cannot establish actionable discrimination as a fact, where no discriminatory act has been shown.").

491. In these situations, two aspects of the subject speech support First Amendment protection. One is that the statements are opinions not rendered in the context of a commercial transaction, and the other is that a party has a "right to petition" inherent in its use of the court system, in this case, to defend oneself against civil liability. *E.g.*, White v. Lee, 227 F.3d 1214, 1227-28, 1230-37 (9th Cir. 2000). While the cases quoted in the previous footnote suggest racist statements are protected by the First Amendment, this is only true if such statements are made outside a commercial context, *infra* Part IV.A.2, and thus not covered by § 3604(c) in the first place. The reference in the text to "First Amendment implications," therefore, deals primarily with the "right to petition" concern.

492. The FHA contains a definition of "rent" but does not address this problem. The definition, which provides that "[t]o rent" includes to lease, to sublet, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant," 42 U.S.C. §3602(e), simply includes additional terms, thereby leaving the word "rental" in § 3604(c) ambiguous when considered in the context of the timing problem discussed in the text. The standard dictionary definition available when the 1968 FHA was enacted suggests that "rental" should be understood to cover the entire time period of the lease. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1966) (defining "rent" to include "the possession and use" and the "possession and enjoyment of" property).

entire lease term. "Rental" in § 3604(c) is thus a more ambiguous term than "sale" in this provision, which presumably only applies up to the transaction's closing. The few decisions to address this issue have generally held that "rental" in § 3604(c) covers the full term of the lease.<sup>493</sup> This seems correct, at least to the extent that the discriminatory statement involved indicates how the landlord would apply his "decisional process" to an active prospect or to a specific minority tenant's on-going occupancy.<sup>494</sup>

## 2. Agents and Non-Provider Defendants

Section 3604(c) should be interpreted to ban discriminatory statements made not only by housing providers, but others involved in the sale or rental process. Liability is clearly appropriate for statements made by a housing provider's agent, such as a landlord's resident manager or a home seller's realtor.<sup>495</sup> Agent liability is certainly proper if the agent makes such a statement on his own initiative, and extends to the housing provider based on FHA agency principles.<sup>496</sup> However, an agent should also be liable for § 3604(c) violative statements made at the behest of his principal,

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493. *E.g.*, HUD v. Gutleben, Fair Hous.-Fair Lending Rptr. ¶25,078, at 25,726 (HUD ALJ 1994) (rejecting landlord's argument that, because his racist statement to African-American tenant was not made in the context of seeking a renter, it was not covered by § 3604(c), and instead holding that such a remark is indeed "with respect to the . . . rental of a dwelling" under this provision); HUD v. Williams, Fair Hous.-Fair Lending Rptr. ¶25,007, at 25,119 (HUD ALJ 1991) (landlord's intimidating conversation with tenant assumed to be within the time frame covered by § 3604(c)); *see also* Harris v. Itzhaki, 183 F.3d 1043, 1054-55 (9th Cir. 1999) (African-American tenant may have § 3604(c) claim based on agent's remarks that owners of apartment complex do not want to rent to blacks); *see also* cases cited *infra* notes 494 and 572. *But see* Texas v. Crest Asset Mgmt., 85 F. Supp. 722, 730-33 (S.D. Tex. 2000) (holding landlord's verbal harassment of Middle-Eastern tenant is sufficient to establish claims under § 3604(a), § 3604(b), and § 3617, but not under § 3604(c)).

494. *See, e.g.*, Harris, 183 F.3d at 1055; HUD v. Denton, Fair Hous.-Fair Lending Rptr. ¶ 25,014, at 25,201-02 (HUD ALJ 1991), *on remand*, Fair Hous.-Fair Lending Rptr. ¶ 25,024 (HUD ALJ 1992) (eviction notice containing discriminatory statement violates § 3604(c)).

495. *E.g.*, cases cited *supra* notes 365-68 and HUD-prosecuted cases cited *infra* note 496 (holding the agent who made a § 3604(c)-violative statement liable along with his principal in each case).

496. *E.g.*, Harris v. Itzhaki, 183 F.3d 1043, 1054 (9th Cir. 1999); Reeves v. Rose, 108 F. Supp. 2d 720, 722, 727 (E.D. Mich. 2000); United States v. L & H Land Corp., 407 F. Supp. 576, 580 (S.D. Fla. 1976); HUD v. Active Agency, Fair Hous.-Fair Lending Rptr. ¶ 25,141, at 26,159-60 (HUD ALJ 1999); HUD v. Lee, Fair Hous.-Fair Lending Rptr. ¶ 25,121, at 26,033 (HUD ALJ 1996); HUD v. French, Fair Hous.-Fair Lending Rptr. ¶ 25,113, at 25,974-75 (HUD ALJ 1995); HUD v. Yankee Dev. Assocs., Fair Hous.-Fair Lending Rptr. ¶ 25,074, at 25,692 (HUD ALJ 1994); HUD v. Joseph, Fair Hous.-Fair Lending Rptr. ¶ 25,072, at 25,670 (HUD ALJ 1994); HUD v. Kormoczy, Fair Hous.-Fair Lending Rptr. ¶ 25,071, at 25,661 (HUD ALJ 1994), *aff'd*, 53 F.3d 821

for this provision, like all others in the FHA, makes no exception for an agent simply "following orders."<sup>497</sup> This may seem a harsh rule, particularly for an apartment agent whose job may be at stake,<sup>498</sup> but the FHA does provide some protection for agents who are fired or otherwise sanctioned for refusing to carry out discriminatory orders.<sup>499</sup> And a § 3604(c) plaintiff need not sue a reluctant agent to gain full relief against an actively discriminating principal.<sup>500</sup> In any event, the proper course for an agent or realtor instructed to discriminate is not to pass on discriminatory statements to a minority prospect, but to ignore the illegal instructions or resign the position.

Who else might be liable for passing on discriminatory statements? If a home seller's agent tells the agent for a minority prospect that the home seller refuses to sell to African-Americans and the buyer's agent passes that information on to the minority prospect, has the buyer's agent—as well as the seller and the seller's agent—violated § 3604(c)?<sup>501</sup> What of condominium board mem-

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(7th Cir. 1995); HUD v. Wagner, Fair Hous.-Fair Lending Rptr. ¶ 25,032, at 25,336 (HUD ALJ 1992).

Generally, in FHA cases a principal is liable for its agents' discriminatory acts and statements under the doctrine of respondeat superior, and because the duty to obey the FHA is non-delegable. *Alexander v. Riga*, 208 F.3d 419, 433 (3d Cir. 2000), cert. denied, 121 S.Ct. 757 (2001); *Jankowski Lee & Assocs. v. HUD*, 91 F.3d 891, 896-97 (7th Cir. 1996); *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992). See generally SCHWEMM, *supra* note 15, § 12:10.

497. *E.g.*, *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556, 562-63 (5th Cir. 1979); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1120-21 (7th Cir. 1974).

498. See, *e.g.*, *HUD v. Lewis*, Fair Hous.-Fair Lending Rptr. ¶ 25,118, at 26,014 (HUD ALJ 1996) (landlord tells leasing agent to discourage blacks and Hispanics and that "[t]his is my apartment complex . . . no more niggers. If you want to rent to niggers you can go somewhere else").

499. *E.g.*, *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1301-05 (11th Cir. 1998); *Crumble v. Blumthal*, 549 F.2d 462, 468-69 (7th Cir. 1977); *Smith v. Stechel*, 510 F.2d 1162 (9th Cir. 1975); *Meadows v. Edgewood Mgmt. Corp.*, 432 F. Supp. 334, 335 (W.D. Va. 1977); 24 C.F.R. § 100.400(c)(3) (HUD regulation interpreting § 3617).

500. *E.g.*, *Harris v. Itzhaki*, 138 F.3d 1042, 1047, 1054-55 (9th Cir. 1999) (upholding § 3604(c) claim against owner of housing complex in case where agent was not named as a defendant); *Villegas v. Sandy Farm, Inc.*, 929 F. Supp. 1324, 1327-29 (D. Or. 1996) (same); *HUD v. DiBari*, Fair Hous.-Fair Lending Rptr. ¶ 25,036, at 25,374-77 (HUD ALJ 1992) (same).

501. *E.g.*, *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1303-04 (5th Cir. 1991) (regarding African-American couple's agents repeating statements made to them by sellers' agents that sellers "don't want niggers living at the front of the subdivision because it makes the rest of the homes hard to sell and lowers prices" and that agents should "take [their] nigger captain somewhere else or sell him \$500 more house"); see also *HUD v. Kormoczy*, Fair Hous.-Fair Lending Rptr. ¶ 25,071, at 25,656 (HUD ALJ 1994), *aff'd*, 53 F.3d 821 (7th Cir. 1995) (a neighbor-interpreter translating anti-children statement made by non-English-speaking agent to complainants); *DiBari*, ¶

bers and other "insiders" privy to conversations in which § 3604(c) violating statements are made who then choose to "help" the minority applicant by sharing this information with him?<sup>502</sup> What about testers or friends who make inquiries of a housing provider on behalf of a minority home seeker, are told by the provider that minorities are not welcome, and then repeat this statement to the minority home seeker?<sup>503</sup> Finally, to suggest the most extreme example, what about a family member told by a housing provider that her relationship to a protected class member (such as her marriage to an African-American spouse or her parenting of a child) is the reason for the provider's refusal to sell or rent and who then passes this statement on to the family member who is the direct target of the provider's discrimination?<sup>504</sup>

Intuitively, § 3604(c) claims seem inappropriate in these scenarios, but a reason other than intuition must be found, particularly since the literal language of § 3604(c) seems to apply regardless of the identity of the person who makes the violating statements. The defense cannot be that the speaker is merely "carrying" someone else's message because case law under § 3604(c) makes clear that conduits such as newspapers are just as liable as the statement's original provider.<sup>505</sup> The speaker is also not protected by the truthfulness of his statement, for "truth" is not a defense to a § 3604(c)

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25,036, at 25,374 (rental agent who is told by apartment owner not to rent to families with children tells him she cannot "do business that way and that the agency would have to stop servicing his apartment" and then informs complainants of this conversation and of owner's reason for not renting to them).

502. *E.g.*, *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1449-50 (4th Cir. 1990); *Phillips v. Hunter Trails Cmty. Ass'n*, 685 F.2d 184, 188 (7th Cir. 1982).

503. *E.g.*, *HUD v. Joseph*, Fair Hous.-Fair Lending Rptr. ¶ 25,072, at 25,667-68 (HUD ALJ 1994) (white applicant told by maintenance man and husband of rental agent for apartment complex that an advantage of the complex was that there were no blacks repeats this statement to African-American friend who had also applied there); *HUD v. Schilling*, Fair Hous.-Fair Lending Rptr. ¶ 25,052, at 25,481-82 (HUD ALJ 1993) (woman who was helping her sister-in-law seek housing for herself and her two teenagers told her of conversation the former had with landlord in which landlord made anti-children statements); *HUD v. Rollhaus*, Fair Hous.-Fair Lending Rptr. ¶ 25,019, at 25,246-47 (HUD ALJ 1991) (woman who had inquired at the request of, and had a professional relationship with, complainant is told by home owner that the latter "did not rent to single mothers").

504. *E.g.*, *HUD v. Roberts*, Fair Hous.-Fair Lending Rptr. ¶ 25,151, at 26,216-19 (HUD ALJ 2001) (white wife repeats prospective landlord's anti-black statement to African-American husband); *HUD v. Schmid*, Fair Hous.-Fair Lending Rptr. ¶ 25,139, at 26,150 (HUD ALJ 1999) (mother repeats prospective landlord's anti-children statement to her 13-year-old son).

505. *E.g.*, cases cited *supra* notes 124, 163.

claim.<sup>506</sup> Were it otherwise, virtually every housing provider and agent whose biased statements are clearly covered by § 3604(c) would be able to escape liability.<sup>507</sup>

Other than that plaintiffs simply don't want to sue their friends, family members, or others who help them discover they are being discriminated against, the answer seems to be that the "innocent" speakers in these situations are not liable under § 3604(c) because they played no role in the housing provider's "decisional process."<sup>508</sup> Because provider's agents are clearly covered by § 3604(c),<sup>509</sup> the "decisional process" concept must be broad enough to cover those who help carry out a provider's sales and rental decisions, while narrow enough to exclude those who play no role in the housing provider's "decisional process." This clearly excludes such "passers on" as testers and friends and relatives of minority prospects, but it is not as clear that a prospect's agent in a home-purchase situation isn't helping to "carry out" the seller's discriminatory directions. In this situation, a buyer's agent could escape liability for repeating § 3604(c)-banned statements only if he limits his activity to providing information about another's "decisional process" and plays no additional role in facilitating a discriminatory result.

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506. *E.g.*, HUD v. Dellipaoli, Fair Hous.-Fair Lending Rptr. ¶ 25,127, at 26,076-77 (HUD ALJ 1997) (discussed *supra* text accompanying notes 209-19); cases cited *supra* note 510.

507. That truth should not be a defense to a § 3604(c) claim is perhaps most dramatically demonstrated by the fact that Congress made this provision applicable even to those housing providers otherwise exempt from § 3604, *see supra* notes 10 and accompanying text, and that it did so, at least in part, to protect minority home seekers from the psychic injuries caused by exposure to biased statements, *see supra* notes 298-301 and accompanying text; *supra* note 423. *Supra* note 10 and accompanying text. As to these otherwise exempt providers, therefore, the "right" to make biased statements, whether true or not, was virtually the *only* practice which Congress forbid them from engaging in. To recognize a truth defense in § 3604(c) cases would, therefore, not only add a restriction to this provision that does not appear in its language, but would also ignore both the congressional mandate that § 3604(c) apply to *all* housing transactions, and one of the most crucial purposes underlying this mandate.

Nor does the First Amendment mandate a truth defense. As long as § 3604(c) is limited to commercial housing transactions, the First Amendment doctrine of "commercial speech" applies, and this doctrine, though according some protection to truthful speech, specifically excludes protection for statements that convey an illegal, albeit accurate, message, such as those indicating racial discrimination in housing or employment. *Supra* text accompanying notes 391, 396. For a more extensive discussion of the interplay between the "commercial speech" doctrine and § 3604(c), *see supra* Part IV.A.2.b.

508. *See supra* notes 278-79 and accompanying text.

509. *Supra* notes 495-97 and accompanying text.



### 3. *The "Not True" Defense*

Some housing providers have argued that their discriminatory notices and statements should be excused if, contrary to such communications, they actually make their housing available on a non-discriminatory basis. Courts have split on whether such a "Not True" defense defeats a § 3604(c) claim, with most imposing liability because the language of § 3604(c) does not provide for any such exemption.<sup>510</sup> This position is correct, not only according to the language of § 3604(c),<sup>511</sup> but also due to its most oft cited purpose: protecting minority home seekers against psychic injuries from gratuitous discriminatory statements.<sup>512</sup> Furthermore, all of the reasons for rejecting a "Truth" defense in § 3604(c) cases<sup>513</sup> apply with equal force to a "Not True" defense; whatever slight First Amendment concerns might be raised by § 3604(c)'s ban of truthful discriminatory statements are entirely absent if the statement involved is not true.<sup>514</sup>

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510. *E.g.*, HUD v. Kormoczy, Fair Hous.-Fair Lending Rptr. ¶ 25,071, at 25,661 n.7 (HUD ALJ 1994) ("a statement need not be true in order to constitute a violation of § 3604(c)"), *aff'd*, 53 F.3d 821 (7th Cir. 1995); Blomgren v. Ogle, 850 F. Supp. 1427, 1439-40 (E.D. Wash. 1993) (plaintiff with minor son whose lease was not renewed wins summary judgment on her § 3604(c) claim based on defendant's distribution of nonenforced "no children" rules); HUD v. Schuster, Fair Hous.-Fair Lending Rptr. ¶ 25,091, at 25,834 (HUD ALJ 1995) (statement expressing a preference against families with children violates § 3604(c) "regardless of the absence of any application or enforcement of the language"); HUD v. Carter, Fair Hous.-Fair Lending Rptr. ¶ 25,029, at 25,319 (HUD ALJ 1992) (mobile home park's rule barring families with children violates § 3604(c), even though rule was not enforced). *But see* HUD v. Kutney, Fair Hous.-Fair Lending Rptr. ¶ 25,089, at 25,821 (HUD ALJ 1994) (landlord's statement that he "normally likes to keep children under ten on the first floor" does not violate § 3604(c), because it was shown that this policy was never "actually applied or put into effect"); HUD v. Gutleben, Fair Hous.-Fair Lending Rptr. ¶ 25,078, at 25,725 (HUD ALJ 1994) (landlord's statements expressing concern about the damage and noise that children may cause do not violate § 3604(c) where she stated in the same conversation that she knew she could not act on such a concern because it would violate the law).

511. Indeed, § 3604(c), by its terms, outlaws not only statements indicating an illegal preference, limitation, or discrimination, but also those indicating "an intention to make any such preference, limitation, or discrimination." This additional phrase further demonstrates Congress' desire to absolutely rid the housing market of discriminatory statements regardless of whether such statements correctly reflect the actual practices of the housing providers who utter them. *See supra* text accompanying note 95.

512. *See supra* notes 298-301 and accompanying text; *supra* note 423.

513. *Supra* Part IV.A.2.b.i-ii.

514. The "commercial speech" doctrine that would govern most if not all First Amendment challenges to § 3604(c) claims provides some protection for truthful commercial speech, but none for misleading or deceptive commercial speech. *Supra* text accompanying note 391.

### C. Proper Plaintiffs: Standing To Sue and To Seek Certain Types of Relief

#### 1. *Standing Concepts and Relief Available in FHA Suits*

By now, it is well established that a minority home seeker subjected to a § 3604(c) violative statement by a housing provider is entitled to sue the provider for the psychic injuries caused by that statement,<sup>515</sup> but not for injuries resulting from other causes, such as losing the particular housing unit involved.<sup>516</sup> This section explores the additional questions of whether home seekers may collect for psychic damages resulting from biased statements made to and passed on by third parties, and what other types of plaintiffs may sue for § 3604(c) violations.

The FHA provides for enforcement by both government-initiated actions and private lawsuits.<sup>517</sup> The Department of Justice is authorized to sue for FHA violations in "pattern or practice" and "general public importance" cases. Such suits may seek injunctive relief, monetary damages for the persons aggrieved by the violations shown, and limited civil penalties.<sup>518</sup> HUD is authorized to file administrative complaints challenging individual FHA violations, which may result in an administrative law judge awarding injunctive relief, actual damages for the persons aggrieved, and limited civil penalties.<sup>519</sup> In these government-initiated suits, therefore, injunctive relief and civil penalties may be awarded simply on the basis of a determination that the defendant engaged in a discriminatory housing practice, such as a violation of § 3604(c), without concern for the plaintiff's standing.<sup>520</sup> In other words, the making of any statement determined to be prohibited by § 3604(c)—as established in the previous section—could justify appropriate injunctive relief and civil penalties in suits brought by Justice or HUD.

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515. Cases cited *supra* notes 219, 227-28, 244, 251, 269 and text accompanying note 284; see also cases cited *supra* notes 276 and text accompanying note 206.

516. Cases cited *supra* notes 193-94, 219, 242-44, 252.

517. The FHA's enforcement scheme, which was substantially changed by the 1988 Fair Housing Amendments Act, *supra* note 23, is codified at 42 U.S.C. §§ 3610-3614.

518. 42 U.S.C. § 3614(a), (c). See generally SCHWEMM, *supra* note 15, § 26:2-9.

519. 42 U.S.C. §§ 3610(a), 3612(g)(3). See generally SCHWEMM, *supra* note 15, §§ 24:3, 24:21.

520. In Justice Department actions, showing that the defendant engaged in a "pattern or practice" of discrimination or that its FHA violation raised "an issue of general public importance" is sometimes said to be necessary to establish the Department's standing to sue. *United States v. Univ. Oaks Civic Club*, 653 F. Supp. 1469, 1474 (S.D. Tex. 1987). See generally SCHWEMM, *supra* note 15, § 26:2-4.

Thus, issues of standing and the right to obtain damages for certain types of injuries arise only in privately initiated suits and government actions seeking additional damages for persons aggrieved by the defendant's violation. The FHA authorizes private lawsuits and privately initiated administrative complaints to HUD by any "aggrieved person,"<sup>521</sup> a concept that includes "any person who claims to have been injured by a discriminatory housing practice."<sup>522</sup> A "discriminatory housing practice" means any act unlawful under the FHA's substantive provisions (i.e., §§ 3604 - 3606 and § 3617).<sup>523</sup> In a court suit, an aggrieved person may be awarded injunctive relief, actual damages, punitive damages, and attorney's fees.<sup>524</sup> In an administrative proceeding, a HUD ALJ may award injunctive relief, actual damages for the aggrieved person, and limited civil penalties,<sup>525</sup> although the option exists for either the aggrieved person or the defendant to elect to resolve the charges in a federal court,<sup>526</sup> which is authorized to award the same relief to the aggrieved person as would be available in a privately initiated court suit.<sup>527</sup>

The Supreme Court has held the FHA's authorization of suits and administrative complaints by "aggrieved persons" reflects "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."<sup>528</sup> Because the sole requirement for standing to bring a FHA claim is the Article III minimum,<sup>529</sup> FHA standing is not subject to the "prudential" limi-

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521. 42 U.S.C. §§ 3610(a), 3613(a)(1)(A). "Persons" who may be aggrieved and have standing to sue include individuals, corporations, associations, legal representatives, and a wide variety of other entities. *Id.* § 3602(d).

522. *Id.* § 3602(i)(1). Aggrieved persons also include those who believe they "will be injured by a discriminatory housing practice that is about to occur." *Id.* § 3602(i)(2).

523. *Id.* § 3602(f).

524. *Id.* § 3613(c).

525. *Id.* § 3612(g)(3).

526. *Id.* § 3612(o)(1).

527. *Id.* § 3612(o)(3) (referring to *id.* § 3613(c)).

528. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971)); *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109 (1979).

529. *E.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979). To satisfy Article III, a FHA plaintiff must only show he has suffered a "distinct and palpable injury" resulting from the defendant's action. *Havens Realty*, 455 U.S. at 372 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Actually, Article III requires three elements: (1) the plaintiff must have suffered some actual, particularized "injury in fact" (2) causally connected ("fairly traceable") to the defendant's challenged action (3) likely to

tations federal courts generally must observe in dealing with other claims.<sup>530</sup> Thus, for example, FHA plaintiffs may assert the legal rights of others who might be considered more "direct" victims of a violation of the statute.<sup>531</sup> According to the Supreme Court, anyone may sue who is "genuinely injured by conduct that violates *someone's* rights" under the FHA; standing exists "as long as the plaintiff suffers actual injury as a result of the defendant's conduct."<sup>532</sup>

Among the types of plaintiffs the Supreme Court has held satisfy the FHA's standing requirements are: municipalities and local residents whose communities are being segregated by the discriminatory practices of local landlords or realtors,<sup>533</sup> fair housing testers discriminated against while testing,<sup>534</sup> and fair housing organizations whose resources have been diverted and/or whose missions have been frustrated by the defendant's discrimination.<sup>535</sup> Any one of these "aggrieved persons" may sue a defendant who has made a statement in violation of § 3604(c) and thus obtain injunctive relief, actual damages, and punitive damages or civil penalties.<sup>536</sup> Of course, standing will be recognized and actual damages

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be "redressed by a favorable decision." *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In a FHA case seeking actual damages, the third element ("redressability") presents no difficulty. The key, therefore, is whether the plaintiff has suffered a personal injury fairly traceable to the defendant's violation. Because this amounts to the same basic causation requirement that must be satisfied to establish the merits of any FHA claim, *see, e.g.*, cases discussed *supra* texts accompanying notes 193-94, 242-44, 251-52 and note 219, the issue of a particular plaintiff's standing to sue in FHA cases is essentially identical to the issue of whether that plaintiff should prevail on the merits. *See* Robert G. Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L. J. 1, 23-25, 56-58, 66-67 (1980).

530. *E.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979). The prudential limitations on standing include "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

531. *E.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

532. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979).

533. *Id.* at 91; *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-79 (1982).

534. *Havens*, 455 U.S. at 373-74.

535. *Id.* at 378-79.

536. *Supra* notes 524-27 and accompanying text. The availability of punitive damages or civil penalties depends on whether the case is tried in court (where punitive damages, but not civil penalties, are available) or in an administrative proceeding (where civil penalties, but not punitive damages, are available). Another distinction between these two types of relief, of course, is that punitive damages are paid to the person aggrieved, whereas civil penalties are paid to the United States.

will be awarded only if such a plaintiff proves the defendant's violation caused the plaintiff a particularized injury, but this is true for all FHA plaintiffs, including those who are more "direct" victims of the defendant's discrimination.<sup>537</sup>

## 2. *Actual Damages for Persons Aggrieved by § 3604(c) Violations*

### a. *General Concepts*

Thus, the only difficult question with respect to relief in a § 3604(c)-statement case is the causation issue as it affects a plaintiff's claim for actual damages. Even with respect to "direct" victims, such as minority home seekers, this question raises some tricky issues concerning the extent to which such a plaintiff may be compensated for biased statements made by the defendant to third parties. And where the plaintiff is someone other than a minority home seeker whose inquiry has triggered the illegal statement, additional difficulties are presented.

An award of actual damages in a FHA case is designed, as it is in civil litigation generally, "to put the plaintiff in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for the injury actually sustained."<sup>538</sup> The Supreme Court has noted that, while equitable relief in a FHA case is left to the discretion of the trial judge, there is no comparable discretion with respect to an award of actual damages: "if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount."<sup>539</sup>

Furthermore, the Court has indicated that general tort principles should govern private FHA claims for damages. In an early FHA case,<sup>540</sup> the Court likened an action to redress housing discrimination to a "dignitary tort," such as defamation or intentional infliction of emotional distress, and stated that a FHA damage claim "sounds basically in tort—the statute merely defines a new legal

537. *Supra* texts accompanying notes 193-94, 242-44, 251-52 and note 219.

538. *Lee v. S. Home Sites Corp.*, 429 F.2d 290, 293 (5th Cir. 1970); *cf. Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (similar purpose identified for constitutional claims under 42 U.S.C. § 1983).

539. *Curtis v. Loether*, 415 U.S. 189, 197 (1974); *see also United States v. City of Hayward, California*, 36 F.3d 832, 839-40 (9th Cir. 1994) (following *Curtis* in holding that the FHA's authorization for compensatory damages for persons aggrieved in Justice Department actions is mandatory, not discretionary); *N.J. Rooming & Boarding House Owners v. Asbury Park*, 152 F.3d 217, 222-24 (3d Cir. 1998) (endorsing *Hayward's* view that the FHA's actual damages are mandatory, not discretionary).

540. *Curtis v. Loether*, 415 U.S. 189, 195 & n.10 (1974).

duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach."<sup>541</sup>

*b. Claims by Minority Home Seekers in "Passing On" Cases*

How would such principles apply where a minority home seeker learns of a housing provider's discriminatory statement prompted by his application but made to someone else? The problem is not one of identifying a distinct and personal injury to the minority home seeker, for the potential psychic injuries from hearing the housing provider's biased statement repeated are apparent.<sup>542</sup> The only issue would be causation; that is, whether the housing provider should be held liable for such injuries when they were produced, not at the moment of the initial illegal statement, but when the intermediary repeated the statement to the home seeker.

The problem is akin to the one involving "intervening" (or "superseding") causes in negligence law, where a defendant is sued for injuries he substantially contributed to but which were brought about by a later cause of independent origin.<sup>543</sup> The question is whether the defendant is to be relieved of responsibility and his liability superseded by the subsequent event. In general, the answer depends on whether the intervention of the later cause is determined to be a "foreseeable" or "normal" risk in the situation created by the defendant, so that it may fairly be said that the defendant's responsibility for the resulting injury should not terminate.<sup>544</sup> As is true with much "proximate cause" doctrine, the real question here is one of policy: whether the defendant should be held legally responsible for the particular injury involved.<sup>545</sup>

Focusing on the foreseeability of the harm easily solves the problem of the minority home seeker who is told of a biased statement

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541. See also *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1234 (D.C. Cir. 1997) (relying on *Curtis* in holding that tort principles should govern actual damage awards in FHA cases).

542. E.g., *HUD v. Joseph*, Fair Hous.-Fair Lending Rptr. ¶25,072, at 25,667-68, 25,670-71 (HUD ALJ 1994); cases cited *supra* notes 240, 251.

543. See, e.g., W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 301 (5th ed. 1984) [hereinafter *PROSSER AND KEETON*].

544. *Id.* at 302-03. See also *RESTATEMENT (SECOND) TORTS* § 433 (1965) (identifying among the considerations important in determining whether an actor's negligent conduct is a substantial factor in bringing about harm to another "whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm" as compared with creating a situation "harmless unless acted upon by other forces for which the actor is not responsible").

545. *PROSSER AND KEETON*, *supra* note 543, at 273.

by a family member to whom the statement was initially made. Clearly, a housing provider should foresee his discriminatory statement to a white wife about her African-American husband or to a mother about her teenage child will be repeated by the family member to the statement's actual target. Thus, liability for all psychic injuries that result when such a statement is repeated to the protected-class family member should be imposed on the originator of the illegal statement, and courts have invariably done so.<sup>546</sup>

The result is less clear where a discriminatory statement is passed on to a minority home seeker by someone whose connection to the home seeker was not apparent to the defendant when the statement was made. In one set of these situations—where the biased statement is made to the defendant's agents, fellow board members, or other "insiders"—liability might still result if based on an analogous type of intervening cause case where "foreseeability" has been found. In a § 3604(c) case, while the original speaker may not expect his agents or associates to repeat his statement to the minority home seeker,<sup>547</sup> his statement has put those agents or associates in a position of harm (i.e., potential liability), from which it is foreseeable they will try to escape. The subsequent "defensive acts" of agents or associates, which at least include those acts necessary to disassociate themselves from the original speaker's intended illegal behavior, have often been considered sufficiently foreseeable to "not relieve the original wrongdoer of liability."<sup>548</sup>

A harder case is presented where the statement is passed to the minority home seeker by a friend, tester, tenant, or someone else with neither an obvious connection to the home seeker nor the potential for shared liability with the original speaker. This situation is analogous to the torts problem of "foreseeable results of unfore-

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546. See cases cited *supra* notes 240, 251; *supra* text accompanying note 284.

547. It might be argued, to the contrary, that a housing provider who makes a racially biased statement in this day and age should foresee that not every agent or associate to whom he speaks will simply absorb such a remark without taking counter action, such as passing it on to its target or to someone else who might take corrective action. If this is so, then the basic foreseeability element is present here, and the additional doctrine of "defensive acts" discussed in the remainder of the textual paragraph would be unnecessary to impose liability on the original speaker.

548. In a large number of cases these normal intervening causes have been held not to supersede the defendant's liability. Thus defensive acts, such as the reasonable attempt of an individual threatened with harm to escape it . . . will not relieve the original wrongdoer of liability, whether the act be instinctive or after time for reflection, and whether the resulting injury is to the person so seeking to escape, or to another. The same is true of attempts to defend the actor's property, or the actor's rights or privileges.

PROSSER AND KEETON, *supra* note 543, at 307 (footnotes omitted).

seeable causes," where the ultimate harm is foreseeable, but not the *manner* in which it results. That is, it is analogous to the situation where a negligent defendant's conduct "threatens a result of a particular kind which will injure the plaintiff, and an intervening cause which could not be anticipated changes the situation, but ultimately produces the result."<sup>549</sup> In such situations, defendants are often held liable on the theory they were obligated to protect the plaintiff against the risk of such harm. Thus, the fact that the danger is created through external factors that could not be anticipated does not inappropriately extend liability.<sup>550</sup> Applying this approach in a § 3604(c) case would require the court to determine whether the context of the defendant's biased statement, made in response to an inquiry from a minority home seeker, created a sufficiently foreseeable risk the statement would be repeated to the home seeker. If the risk is determined to be sufficiently foreseeable, the defendant should not be excused from liability.

It should be noted that the doctrine of intervening cause is designed to provide some reasonable limits to a defendant's liability in negligence cases.<sup>551</sup> Thus, the doctrine's applicability to the situations discussed here, which involve statements uttered with a clear intent to discriminate, may actually be too restrictive of the defendant's liability. Where a § 3604(c) claim is based on a blatantly discriminatory statement, the original speaker's conduct is intentional, not negligent. It is true that § 3604(c) may be violated without intent to discriminate,<sup>552</sup> and in such cases, liability-limiting doctrines associated with negligence law might be appropriate. In cases involving blatantly discriminatory statements, however, a less rigorous application of causation principles is appropriate. For intentional torts, the rules are more liberal concerning matters such as "the consequences for which the defendant will be held liable, the certainty of proof required, and the type of damages for which recovery is to be permitted."<sup>553</sup> This means that, although the intervening cause doctrine might protect some housing providers against liability for the psychic injuries caused when a third party

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549. *Id.* at 316.

550. *Id.*

551. *Id.* at 301-02.

552. *Supra* text accompanying notes 157-60.

553. PROSSER AND KEETON, *supra* note 543, at 37. "For an intended injury the law is astute to discover even very remote causation. . . . [I]t has been felt to be just and reasonable that liability should extend to results further removed when certain elements of fault are present." *Id.* (quoting *Derosier v. New England Tel. & Tel. Co.*, 130 A. 145, 152 (N.H. 1925)).



repeats the housing provider's "inadvertently" biased statements to minority home seekers, liability might well be appropriate for statements that reflect a clear intent to discriminate.

Thus, in virtually all the third-party situations discussed here, a housing provider who makes an intentionally discriminatory statement in violation of § 3604(c) should be liable for any psychic injuries that statement causes a minority home seeker, even those resulting from the home seeker having heard the statement second-hand.<sup>554</sup>

### c. Other Potential Plaintiffs

Persons other than protected-class members searching for housing may have standing to sue for damages resulting from statements that violate § 3604(c). Ever since 1982 when the Supreme Court, in *Havens Realty Corp. v. Coleman*,<sup>555</sup> recognized the standing of fair housing testers to challenge discriminatory misrepresentations of availability made to them in violation of § 3604(d), courts have upheld tester standing in cases involving all types of FHA violations,<sup>556</sup> including those based on § 3604(c).<sup>557</sup> Furthermore, it is clear that such standing also includes the right of testers to sue for psychic injuries resulting from a defendant's discrimination against them.<sup>558</sup> In many cases, such injuries are modest,<sup>559</sup>

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554. Of course, the home seeker must provide some proof that the repetition of the defendant's statement did, in fact, cause injury to the plaintiff. *HUD v. Rollhaus*, Fair Hous.-Fair Lending Rptr. ¶ 25,019, at 25,249 (HUD ALJ 1991) (no damages awarded to home seeker who failed to allege she was harmed by a § 3604(c)-violative statement made by a homeowner to a third party who inquired at complainant's request and who told complainant of homeowner's statement).

555. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982).

556. *E.g.*, *United States v. Balistreri*, 981 F.2d 917, 929 (7th Cir. 1992) (*Havens*' "logic also extends to § 3604(b)"); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990) ("logic of *Havens* embraces" § 3604(a)-(b) as well as § 3604(d)).

557. *E.g.*, *HUD v. Jancik*, Fair Hous.-Fair Lending Rptr. ¶ 25,058, at 25,565 (HUD ALJ 1993), *aff'd*, 44 F.2d 553 (7th Cir. 1995); *see also* *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d F.2d 898, 903-04 (2d Cir. 1993) (holding that minority plaintiffs have standing to sue under § 3604(c) based on discriminatory advertisements they read, even though the court assumes they "were not actively looking for an apartment when they viewed the defendant's ads").

558. *E.g.*, *United States v. Balistreri*, 981 F.2d 917, 930-33 (7th Cir. 1992) (upholding awards of \$2,000 each for testers' emotional distress); *HUD v. Jancik*, Fair Hous.-Fair Lending Rptr. ¶ 25,058, at 25,569 (HUD ALJ 1993) (awarding \$2,000 for tester's emotional distress), *aff'd*, 44 F.2d 553 (7th Cir. 1995); *see also* *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d F.2d 898, 903-04 (2d Cir. 1993) (upholding awards of \$2,500 each for emotional distress to four minority plaintiffs who were not actively looking for housing at the time they viewed each defendant's discriminatory ads).

559. As the Seventh Circuit observed in *United States v. Balistreri*, 981 F.2d 917, 932 (7th Cir. 1992), there is an obvious difference between the emotional distress

but, as demonstrated by *HUD v. Ro*,<sup>560</sup> serious emotional distress may result from a housing provider's biased statement to a person even if she is not then actively seeking housing.

The *Ro* case also demonstrates that persons other than testers who are the direct targets of § 3604(c) violating statements have standing to sue despite not being in the market for housing. The result in *Ro* seems correct, given that the setting so clearly involved the active pursuit of housing by someone accompanying the complainant.<sup>561</sup>

There is a real question, however, whether § 3604(c) was intended "to confer a legal right on all individuals to be free from indignation and distress" caused by discriminatory housing statements.<sup>562</sup> In § 3604(c) cases involving discriminatory advertising, courts have generally held that the mere receipt or observation of such ads is sufficient to confer standing on a minority reader,<sup>563</sup> although one important opinion suggested that standing could be established only if reading the ad deterred the plaintiff from seeking particular housing.<sup>564</sup> The concern in these cases is that a particularized injury to the plaintiff must be shown and that an individual who is merely exposed to a discriminatory ad cannot be

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testers suffer and the emotional distress actual home seekers suffer, because "on top of the racial discrimination, [actual home seeker cases involve] the inevitable disappointment and frustration involved in being unable to obtain housing." Nevertheless, as the *Balistreri* opinion pointed out, testers who challenge a defendant's unlawful treatment of them do "suffer the indignity of being discriminated against because of their skin color." They are, therefore, entitled to an award for whatever emotional distress the proof establishes. *Id.* at 933. *But see* *HUD v. Rollhaus*, Fair Hous.-Fair Lending Rptr. ¶ 25,019, at 25,249 (HUD ALJ 1991) (awarding no damages to non-complainant who inquired of homeowner on behalf of home seeker and who was subjected to biased statement in violation of § 3604(c)).

560. *HUD v. Ro*, Fair Hous.-Fair Lending Rptr. ¶ 25,106 (HUD ALJ 1995) (discussed *supra* text accompanying notes 196-206).

561. *Cf.* *Lane v. Cole*, 88 F. Supp. 2d 402, 404-06 (E.D. Pa. 2000) (upholding standing to sue under FHA (citing only § 3604(a)-(b), and § 3617) of African-American guest based on landlord's biased statement to white tenant in case of first impression).

562. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29 n. 2 (D.C. Cir. 1990) (questioning whether § 3604(c) created such a right).

563. *E.g.*, *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 903-04 (2d Cir. 1993); *Ragin v. New York Times*, 923 F.2d 995, 1005 (2d Cir. 1991); *Saunders v. Gen. Serv. Corp.*, 659 F. Supp. 1042, 1053 (E.D.Va. 1987); *see also* 1966 *Hearings, supra* note 36, at 396 (observation by Senator Ervin, an opponent of the FHA, that, in response to an advertisement by a retirement home for elderly people of a particular religion, "it would be possible for a person who hasn't even applied for admission to that home, if he is of another religion, to [sue and] recover unlimited damages").

564. *See Spann*, 899 F.2d at 29 n.2 (opinion of now Justice Ginsburg).

distinguished from countless other potential claimants who may also have seen the ad.<sup>565</sup>

This concern, however, does not exist in oral statement cases where the defendant speaks directly to the potential plaintiff. Thus, it is likely that anyone who is the direct target of a biased statement in violation of § 3604(c) has standing to sue. While this result may seem to take § 3604(c) beyond its purpose of protecting minority home seekers, this rule advances another key purpose: deterring providers from continuing to act as if housing discrimination is permissible.<sup>566</sup>

Three other types of persons who directly receive statements in violation of § 3604(c) may also suffer particularized injuries sufficient to give them standing. The first is a housing provider's agents or employees who are given discriminatory instructions by the provider and who may face lawsuits if they carry out such illegal instructions or may lose their jobs if they ignore such instructions. The language and purposes of § 3604(c) suggest such agents should be able to sue for the emotional distress they suffer as a result of receiving such instructions and being put in the unpleasant dilemma described above. Thus far, however, while many courts have recognized a FHA cause of action based on § 3617 for agents and employees who are fired or otherwise sanctioned for carrying out discriminatory instructions,<sup>567</sup> few have held that protection may also be available under § 3604(c).<sup>568</sup>

Another category of potential § 3604(c) plaintiffs is those trying to sublet or sell their dwellings where someone else, such as a landlord or mobile home park owner, has veto power over those to whom the dwelling may be rented or sold and instructs them not to deal with minorities.<sup>569</sup> Again, while other FHA sections allow these people to sue for the economic losses associated with the de-

565. See, e.g., *Ragin*, 923 F.2d at 1005.

566. *Supra* texts accompanying notes 173-75, 302-03.

567. *Supra* note 499 and accompanying text.

568. For a rare example, see *HUD v. Lewis*, Fair Hous.-Fair Lending Rptr. ¶ 25,118, at 26,014-15 (HUD ALJ 1996), where a leasing agent who complained that her employer told her to discriminate against African-American and Hispanic apartment applicants was awarded \$2,800 for lost wages and \$7,500 for intangible injuries based on her employer's violations of § 3604(c) and § 3617.

569. E.g., *HUD v. TEMS*, Fair Hous.-Fair Lending Rptr. ¶ 25,028, at 25,303-05, 25,310-12 (HUD ALJ 1992) (complainants sought to rent their unit to families with children); *HUD v. Guglielmi*, Fair Hous.-Fair Lending Rptr. ¶ 25,004, at 25,076-77 (HUD ALJ 1991) (complainant sought to sell her unit to family with children); see also *Stewart v. Furton*, 774 F.2d 706, 707 (6th Cir. 1985) (tenant told by trailer park owner not to sub-let to blacks).

fendant's refusal to allow them to deal with minorities,<sup>570</sup> few cases have recognized a § 3604(c) claim. Still, it seems clear these types of recipients of biased statements, like the agents in the previous paragraph, may suffer compensable psychic injuries from being placed in the difficult position created by the defendant's illegal instructions.<sup>571</sup>

A third category of possible § 3604(c) plaintiffs is tenants or other residents whose landlords tell them they intend to discriminate in violation of the FHA. Such persons have an obvious right to sue if the statement takes the form of a threat to the quiet enjoyment of their home, such as a demand under threat of eviction that the person not entertain African-American guests.<sup>572</sup> If such a threat is carried out, of course, the evicted tenant has a claim under § 3604(a) and/or (b),<sup>573</sup> but the threat itself should be sufficient to allow a targeted tenant to sue immediately under § 3604(c) for resulting psychic injuries.<sup>574</sup>

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570. *Crumble v. Blumthal*, 549 F.2d 462, 468-69 (7th Cir. 1977) (relying on § 3617); *Williams v. Miller*, 460 F. Supp. 761 (N.D. Ill. 1978) (citing no specific FHA provision), *aff'd without opinion*, 614 F.2d 775 (7th Cir. 1979); cases cited *supra* note 569.

571. *See also* *Stewart v. Furton*, 774 F.2d 706, 707-10 (6th Cir. 1985) (trailer park tenant who first responded to owner's direction not to sub-let to African-Americans by saying, "It's better to rent to them than get involved in a lawsuit," but who later rented instead to white applicant is sued along with owner for racial discrimination by original African-American applicant); *supra* notes 138-41 and accompanying text (discussing economic injuries to white homeowners who are limited in selling to African-Americans as noted in *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc)).

572. *E.g.*, *Woods-Drake, v. Lundy*, 667 F.2d 1198, 1202-03 (5th Cir. 1982); *United States v. L & H Land Corp.*, 407 F. Supp. 576, 580 (S.D. Fla. 1976) (discussed *supra* text accompanying note 146); *see also* *Littleton v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992) (affirming FHA judgment for white prospective tenant against landlord who refused to let her move in after he discovered she had a mixed-race child and African-American friends); *Sorenson v. Raymond*, 532 F.2d 496, 498 (5th Cir. 1976) (discussed *supra* text accompanying notes 343-51); *Green v. Westgate Vill., Fair Hous.-Fair Lending Rptr.* ¶ 16,440 (N.D. Ohio. 2000) (upholding FHA claims by white tenant and his African-American guest based on defendants' interference with his tenancy prompted by guest's race); *cf.* *Lane v. Cole*, 88 F. Supp. 2d 402, 404-06 (E.D. Pa. 2000) (upholding white tenant's standing to sue under FHA (citing only § 3604(a), § 3604(b), and § 3617) based on landlord's threatening statements prompted by tenant's African-American guest); *United States v. Bankert, Fair Hous.-Fair Lending Rptr.* ¶ 16,424 (E.D. N.C. 2000) (upholding claims under § 3604(a), § 3604(b), § 3604(c), and § 3605 by white home purchasers and their African-American financier based on housing developer's hostility to latter's race).

573. Cases cited *supra* note 572.

574. This situation may also invite a state law claim for intentional infliction of emotional distress. *See, e.g.*, *Littlefield v. McGuffey*, 954 F.2d 1337, 1340, 1343 (7th Cir. 1992); *Lane v. Cole*, 88 F. Supp. 2d 402, 406-07 (E.D. Pa. 2000). *See generally* RESTATEMENT (SECOND) TORTS § 46 (1965). Establishing the elements of this tort, however, would be more difficult than establishing the elements necessary to obtain a judgment for emotional distress damages in a FHA suit. *See, e.g.*, *Lane*, 88 F. Supp.2d

If no threat is involved, the question is more difficult. In some circumstances, the Supreme Court has recognized that local residents may sue landlords or area realtors for discrimination depriving them of the opportunity to live in an integrated community.<sup>575</sup> These decisions, however, were rendered in cases where it was alleged that the particular defendant had engaged in such widespread discrimination that the plaintiff's loss of interracial associations could be fairly traced to the defendant's behavior. Establishing such causation based only on a biased statement that violates § 3604(c)—as opposed to the defendant actually carrying out its stated intention by engaging in discriminatory conduct in violation of, say, § 3604(a)—might be possible in theory, but presumably difficult in practice.

In addition to claims brought by individuals who receive a statements violating § 3604(c), it is possible that a housing provider's biased statement might be challenged in a suit brought by a local fair housing organization under the authority of the Supreme Court's *Havens Realty Corp. v. Coleman* decision.<sup>576</sup> There has been a good deal of post-*Havens* litigation dealing with exactly what types of injuries such an organization must show to establish its standing, much of which involved § 3604(c) claims based on discriminatory advertising.<sup>577</sup> The gist of these decisions is that an organization has standing to sue if it devotes substantial resources to investigating and attempting to counteract a series of violations by the defendant shown to have a widespread impact. Standing, however, is more problematic if a small-impact violation is involved. Presumably, a single biased statement falls into the latter category, and thus raises the issue, over which courts are split, of whether organizational standing may be recognized simply because the plaintiff-organization expended resources investigating and prosecuting the very violation on which the case is focusing.<sup>578</sup>

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at 406 ("Invidious discrimination is not alone sufficient to support an intentional infliction of emotional distress claim"); see also *Texas v. Crest Asset Mgmt., Inc.*, 85 F. Supp.2d 722, 734-36 (S.D. Tex. 2000) (rejecting minority tenant's intentional infliction of emotional distress claim after upholding his FHA claims based on landlord's racially based harassment).

575. See *supra* cases cited in note 533.

576. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); see *supra* note 535 and accompanying text.

577. E.g., cases cited *supra* notes 167, 176.

578. Compare *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 304-06 (5th Cir. 2000) (denying organizational standing), *cert. denied*, 121 S. Ct. 1225 (2001) with *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629, 639-43 (11th Cir. 2000) (upholding organizational standing). Cases in which courts have upheld § 3604(c) claims

*d. A Final Note on Relief*

Once a proper plaintiff is found for a § 3604(c) claim, it is worth remembering that the relief available includes both actual damages and punitive damages (if the case is tried in court) or civil penalties (if the case is tried in an administrative proceeding).<sup>579</sup> It is clear that punitive damage and/or civil penalty awards may take into account that the defendant has made statements in violation of § 3604(c), even if some of these statements were neither made nor passed on to the particular plaintiff prosecuting the case.<sup>580</sup>

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To summarize, with respect to proper plaintiffs and the relief available under § 3604(c), the only significant limitation is the "with respect to the sale or rental of a dwelling" phrase. Thus, as long as a biased statement is made in this context, the FHA makes it illegal. Who may sue and for what relief are in no way restricted by § 3604(c) itself, and are thus subject only to the basic causation concepts of tort law and Article III standing requirements.

### CONCLUSION

Since its enactment over thirty years ago, the federal Fair Housing Act has banned discrimination in virtually all housing transactions and has outlawed, through § 3604(c), biased statements with respect to an even broader range of housing sales and rentals. While Congress exempted certain small housing providers from the other substantive prohibitions of the FHA's § 3604, it chose to include even these exempt providers within § 3604(c)'s ban on discriminatory housing statements. The FHA includes this broad prohibition against biased statements for reasons that were important in 1968 and remain so today as the nation continues its struggle to realize the promise of the FHA: to replace racially segregated neighborhoods with truly integrated housing patterns through the promotion of nondiscriminatory housing markets.

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by fair housing organizations based on a defendant's discriminatory statements involving isolated incidents include *Jancik v. HUD*, 44 F.3d 553 (7th Cir. 1995) and *Fair Housing of Marin v. Combs*, Fair Hous.-Fair Lending Rptr. ¶ 16,430 (N.D. Cal. 2000).

579. *Supra* notes 524-27 and accompanying text. The courts are divided over whether punitive damages may be awarded in a FHA case in the absence of an award for actual damages. *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 300-036 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1225 (2001) (and cases cited).

580. *E.g.*, *HUD v. Gruzdaitis*, Fair Hous.-Fair Lending Rptr. ¶ 25,137, at 26,136-37 (HUD ALJ 1995); *HUD v. Rollhaus*, Fair Hous.-Fair Lending Rptr. ¶ 25,019, at 25,249-51 (HUD ALJ 1991).

The 1968 Congress understood that the FHA's basic goal could never be achieved if minority home seekers were regularly exposed to discriminatory housing statements. From the earliest years of § 3604(c) jurisprudence, courts have noted that this provision reduces barriers that might deter minorities from seeking homes in neighborhoods open to them under the FHA, but that might appear restricted if discriminatory ads, notices, or statements are permitted. This "market-limiting" effect is also at the heart of the two other principal purposes of § 3604(c): to protect minority home seekers from suffering the insult, emotional distress, and other intangible injuries that might result from being targeted by discriminatory statements; and to help eradicate the perception that illegal discrimination continues to permeate America's housing markets by banning communications suggesting the FHA's promise of non-discrimination is not being achieved.

The three main purposes of § 3604(c)—avoiding market narrowing, protecting against psychic injury, and public education—directly bear on the FHA's ultimate goals of eliminating housing discrimination and achieving residential integration. These goals can only be achieved if the entrenched discriminatory system that pervaded America's housing markets in 1968 is eliminated and, in addition, if people come to believe this system is in fact being eliminated. Discriminatory statements in violation of § 3604(c) discourage minority home seekers and other relevant participants from believing housing markets are indeed open to all. Thus, § 3604(c), including its applicability to otherwise exempt housing and its ban of discriminatory statements extending well beyond the coverage of comparable provisions in the federal employment discrimination laws, must be seen as a consciously devised and important part of the overall arsenal provided by Congress to battle housing discrimination.

Under the FHA, discriminatory statements are not only probative of a defendant's illegal intent, but also, by themselves, violate the statute if made "with respect to the sale or rental of a dwelling." Too often, however, litigants and judges ignore the independent significance of discriminatory statements in fair housing cases, perhaps because of their misplaced confidence that Title VII precedents provide an entirely appropriate method for interpreting the FHA. Indeed, despite clear evidence that discriminatory housing statements continue to pollute the nation's housing markets, only a handful of fair housing cases have used § 3604(c) as an independent source of liability and relief.

The lack of aggressive enforcement of § 3604(c) cannot be attributed to legitimate First Amendment concerns. While § 3604(c) does indeed outlaw certain types of expressions based on content—and therefore might ordinarily be expected to trigger strict scrutiny under the First Amendment—the fact that § 3604(c), by its terms, is limited to “commercial speech” means it generally can survive constitutional challenge. This is true in all cases where biased statements are made with respect to unlawful activity—the case in most situations covered by § 3604(c). *All* racial discrimination cases involve unlawful activity, as do all non-racial cases (e.g., those based on sex, familial status, and handicap) except those occurring in FHA-exempt housing where a state or local fair housing law does not apply. Thus, in only the rarest of cases (e.g., a situation involving familial status discrimination by a “Mrs. Murphy” landlord in Wyoming) would the First Amendment bar the application of § 3604(c)’s prohibition of discriminatory housing statements.

In all other situations, § 3604(c) may be aggressively interpreted and enforced without raising constitutional concerns. This certainly is true in the classic § 3604(c) case where a housing provider makes a biased statement directly to a minority home seeker. And, as the concluding sections of this Article show, a proper interpretation of § 3604(c) will extend its applicability to situations beyond this classic example, holding liable virtually every person who makes a biased statement in connection with the “decisional process” of a home sale or rental, and authorizing a variety of additional plaintiffs to challenge such statements.

This Article promised a “new look” at § 3604(c), but it might more accurately be termed a call for a return to the original understanding of the 1968 Congress that enacted this provision. Perhaps such an “old-fashioned approach” to discriminatory housing statements under § 3604(c) is the only way to achieve the FHA’s ultimate goals of nondiscrimination and truly integrated living patterns.