Section 3604(c) of the Fair Housing Act of 1968, as Amended: What Is It and How Is It Changing the Use of Human Models within Real Estate Advertising?

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SECTION 3604(c) OF THE FAIR HOUSING ACT OF 1968, AS AMENDED: WHAT IS IT AND HOW IS IT CHANGING THE USE OF HUMAN MODELS WITHIN REAL ESTATE ADVERTISING?

INTRODUCTION

It is well known that the neighborhoods of this nation have traditionally been racially and ethnically segregated. Access to housing for minorities has been limited by racial bias. It is believed that some of the contributing factors relate to the way members of the real estate industry have pursued their business. One aspect of this is the advertising used to make the public aware of available housing. For example, from Reconstruction through the 1960s, newspapers listed a separate “colored” real estate section.¹

In response to this situation, the Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968)² was enacted by Congress “to provide, within constitutional limitations, for fair housing throughout the United States.”³ Subsequent to the enactment of Title VIII, overt means of indicating preference, particularly as prohibited in sections 3604(a) and (b),⁴ were rapidly dismantled.

What remained were the more subtle and intractable means of indicating preference. Part of the difficulty stems from the fact that there is less widespread agreement about whether certain practices: (1) are a consequence of an intent to indicate preference; (2) are in themselves discriminatory; (3) have discriminatory consequences (i.e., result in demonstrable injury); and (4) inhibit the Constitu-

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2. 42 U.S.C. §§ 3601-3619, 3631 (1988); [hereinafter “the Act”].
4. 42 U.S.C. § 3604 provides, in part:
   it shall be unlawful:
   (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
   (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin.

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tional rights of any parties involved. Section 3604(c) of the Act specifically makes it unlawful

"[t]o make, print, or publish or cause to be made, printed, or published any . . . advertisement, with respect to the sale or rental of a dwelling that indicates any preference . . . based on race . . . or an intention to make any such preference . . . ."^5

In 1972, the United States Department of Housing and Urban Development (HUD) issued guidelines for real estate advertisements,^6 which it then reissued as substantive regulations in 1980. In part, these regulations provide that "[i]f models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, . . . in an equal social setting . . . ."^8

Since enactment of the Act in 1968, court cases have been tried in various regions of the nation and many law review articles have been written based upon this legislation. This note will review and update the consequences of section 3604(c) of the Fair Housing Act, as amended.^10

I. IS THE INTENT TO DISCRIMINATE OR SHOW PREFERENCE NECESSARY TO ESTABLISH A PRIMA FACIE CASE OF A VIOLATION OF SECTION 3604?

Despite a United States Supreme Court ruling that plaintiffs carry the burden of proving that racially discriminatory intent or purpose was a motivating factor in the defendant's conduct,^11 most federal circuits, throughout the 1970s and 1980s, determined that

the intent to discriminate or show preference is not necessary to establish a prima facie case of violation of section 3604. The Seventh Circuit, noting that "[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct," ruled that all that must be established are facts from which the courts will conclude a discriminatory impact.

Additionally, the statutory language of section 3604(c) has been noted to contain the disjunctive "or" and since the phrase after this connector explicitly refers to intent, it has been concluded that the clause preceding the "or" must refer to unintentional effects of advertisements. Therefore, to establish a section 3604(c) violation, arguably, demonstration of discriminatory intent is not required.

The Court of Appeals for the Fourth Circuit held that a newspaper publisher, having published an advertisement in his newspaper which was discriminatory on its face, violated subsection (c) regardless of whether he did know or only should have known the nature of this conduct. The court focused on the statutory language which made it unlawful to "make, print, or publish, or cause to be made, printed, or published" that which indicates a preference or an intention to make a preference based on race and held that "[n]ewspapers have a far more widespread coverage...magnifying the already mentioned deleterious effect discriminatory advertisements might have on the congressional purpose."

12. See infra text accompanying notes 16-20; see also, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042,reh'g denied 423 U.S. 884 (1975)(ruling that a prima facie case of racial discrimination is established under the Fair Housing Act if it is proven that the conduct of the defendant actually or predictably results in a discriminatory effect); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978)(similarly ruled that a village's refusal to rezone property to permit construction of low income housing, although not intentionally discriminatory, violated the Fair Housing Act); Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), cert. denied, 435 U.S. 908 (1978); United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974).
14. See, e.g., id.; see also, Washington v. Davis, 426 U.S. 229, 253-54 (1976)(Stevens, J., concurring)(the Court may presume intent to affect the foreseeable consequences of conduct).
15. See, e.g., Rubin, supra note 9, at 170; Advertising for Apartheid, supra note 9, at 1430 n.11.
16. See Rubin, supra note 9, at 167.
In *Mayers v. Ridley*, the Circuit Court of Appeals for the District of Columbia ruled that the filing of instruments containing racially restrictive covenants, *regardless of intent*, is also violative of subsection (c). A district court in Texas, however, ruled that a clear intent *not* to discriminate or indicate a preference is a valid defense to charges based upon the extension of racially restrictive deed covenants.

Furthermore, in 1987, a district court in the D.C. Circuit ruled "that absent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the Fair Housing Act merely because models of a particular race are not used in one ad or a series of ads." The Court of Appeals for the D.C. Circuit has subsequently reversed the district court and remanded for further proceedings because it "erred in its method of determining whether a violative act occurred within the prescribed period."

Although not settled completely, the issue of intent is apparently being settled with no requirement for plaintiffs to prove intent. HUD officials, however, may not realize the state of the law: one HUD official blames a backlog of "fair housing" cases at the Justice Department on "the policy decision that intent to discriminate, not simply disparate treatment in housing sales and rentals, ha[s] to be shown." While the question of intent appears to have been rendered irrelevant since plaintiffs do not have to deal with this question at all, decisions like those delivered in *University Oaks Civic Club* and *Colonial Village*, have permitted defendants to show an affirmative defense of a non-discriminatory intent. What remains to be decided is what evidence is sufficient to constitute a valid claim of preferential advertising under section 3604(c).

20. 465 F.2d 630 (D.C. Cir. 1972)(per curiam)(en banc).
21. Id.
24. Spann, 899 F.2d at 34.
26. See supra note 22 and accompanying text.
27. See supra note 23 and accompanying text.
II. How Broad Is The Meaning Of "Indicates Any Preference, Limitation Or Discrimination" And To Whom Does The Law Apply?

Statutory language has always been interpreted in light of the objectives for which it was enacted. In analyzing section 5 of the Federal Trade Commission Act, a statute similar in many ways to 42 U.S.C. section 3604, the FTC defined "false" in terms of a bar to "false advertising" and ruled that "[t]he statutory ban applies to that which is suggested as well as that which is asserted." In the more than 20 years since the Act was passed, the statutory language has similarly come to be broadly interpreted, and many suits have been won asserting violations of section 3604.

In 1971, a federal district court held that newspapers may not print advertisements for the sale or rental of real estate indicating preferences for certain national origins. The court’s rationale was that "[e]ven if an ad for a person who speaks a certain language is deemed not to indicate a preference for a person of a certain national origin, . . . the ad at least demonstrates ‘an intention’ to make such a preference." In fact, this court held that even when a renter is permitted to discriminate in the actual renting of property, advertisements indicating a preference are unlawful.

The following year the Fourth Circuit ruled in United States v. Hunter, that Congress intended for the statute to apply to newspapers and other media, regardless of who designed and placed the advertisement. The defendant argued that such restrictions on newspapers deprive a newspaper of the advertising revenue needed to

31. Id. at 513.
32. 42 U.S.C. § 3603(b) provides, in part: "Nothing in § 3604 . . . (other than subsection (c)) shall apply to . . . rooms or units in dwellings . . . intended to be occupied by no more than four families . . . if the owner actually maintains and occupies one of such living quarters as his residence.”

This exception to the general rule that it is unlawful to discriminate or show a preference when renting out real property is often referred to as the “Mrs. Murphy” rule and permits these exempted people “to effectuate their discriminatory preferences by refusing to sell or rent” to people they wish to discriminate against. United States v. Hunter, 459 F.2d 205, 213 (4th Cir.), cert. denied, 409 U.S. 934 (1972).
33. Holmgren, 342 F. Supp at 513-14; see also Hunter, 459 F.2d at 213.
35. Id. at 210.
remain in business. The court responded that "[s]ince the Act also bars private publication of discriminatory advertisements, an advertiser has no incentive to abandon his regular use of newspapers to publicize his offer to sell or rent." 36 This court, which is credited with establishing the "ordinary reader" standard, reasoned that "[h]owever the language of the advertisement is couched, the purpose of an advertiser who wishes to publish an advertisement in violation of the Act is to communicate his intent to discriminate and a newspaper publisher can divine this intent as well as any of his readers." 37 This issue is discussed more fully in the next section.

The *Mayers* court held that the recording of deeds containing discriminatory restrictive covenants on property "falls within [section 3604(c)']s ambit." 38 However, district courts in Pennsylvania and Texas, with very similar facts, have ruled otherwise. 39 In *United States v. University Oaks Civic Club,* 40 the court held that the recorder of deeds did not violate the Act when he recorded a document containing restrictive covenants that discriminated based upon race. 41 In *Woodward v. Bowers,* 42 Bowers was similarly found not to be liable under the Act when he accepted for filing a deed that refers to a racially restrictive covenant. 43 As Judge MacKinnon points out in his dissenting opinion in *Mayers,* "it is not the duty of the Recorder to pass on the legality of documents submitted for recording, other than with respect to the form of their execution and acknowledgment." 44

In several cases, municipalities have been enjoined from enforcing various local laws under the Act. 45 Additionally, a private children's home, created by the trust of a then-deceased individual, was required to abandon discriminatory practices. 46

36. *Id.* at 212.
37. *Id.* at 213.
41. *Id.* at 1476.
42. 630 F. Supp. 1205 (M.D. Pa. 1986).
43. *Id.* at 1209.
45. *See, e.g., Huntington Branch, NAACP v. Huntington,* 844 F.2d 926 (2d Cir. 1988);
Many believe that the scope of what constitutes prohibited activities is unpredictable and therefore fear that even "[m]aps or written directions to a complex that show landmarks associated with a particular group aren't allowed, nor are references to country clubs, schools or other facilities known to appeal to a particular race or sex." 47

III. DOES THE USE OF ALL, OR VIRTUALLY ALL, WHITE MODELS IN ADVERTISEMENTS OR BROCHURES CONSTITUTE INDICATION OF A PREFERENCE? IF NOT, DOES THAT MATTER?

_Saunders v. General Services Corp._ 48 was the first case that decided whether advertising real estate with print advertisements in which only white models appear is a violation of section 3604(c). 49 The court held that a brochure containing sixty-eight photographs picturing over 200 models, of whom fewer than five were black, indicates a preference for white tenants and is, therefore, violative of the Fair Housing Act. 50

The following week, however, Judge Greene of the United States District Court for the District of Columbia ruled, in _Spann v. Colonial Village, Inc._, 51 as discussed above, that "real estate advertisements do not violate the Fair Housing Act merely because models of a particular race are not used in one ad or a series of ads." 52 Interestingly, despite this ruling, no court has yet recognized this right to use models of one race in a series of advertisements. This ruling is distinguished in that it involved the use of a substantial number of non-white models. 53

The growing success of litigation challenging the use of virtually all white models has rested heavily upon the conclusion that potential black tenants and buyers interpret such advertisements to say that only white tenants, like those portrayed, are welcome. Promi-

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47. Harton, _Fair Housing Act Slaps Tight Controls on Residential Real Estate Advertisers_, INDIANAPOLIS BUS. J., Mar. 27, 1989, § 2, at 1B; see _Fair Housing Advertising Regulations_ which provide in part: "Directions can imply a discriminatory preference, limitation, or exclusion." 24 C.F.R. §109.20(e)(1990).
49. _Id._, see _Note, supra note 9 (Saunders was the case of first impression on the issue of whether the race of models used in real estate advertisements is suggestive of a preference._)
50. _Saunders_, 659 F. Supp. at 1058.
52. _Id._ at 546.
53. _See, e.g., Advertising for Apartheid, supra note 9, at 1436, n.70; see also Rubin, _supra note 9, at 166._
minent people have reached this conclusion. Benjamin Hooks, executive
director of the National Association for the Advancement of Colored
People (NAACP), is quoted as having said that "developers run ads
that say with pictures what they can no longer say in words. Either
way, the result is the same and it's wrong."[54] Professor Girardeau
A. Spann of Georgetown University School of Law has commented
that "the message [in the use of virtually all white models in adver-
tisements] is unmistakable that blacks are not wanted."[55]

Although "the court [was] not unduly impressed by their re-
search methodology and basis for their opinions," experts in the
Saunders case concurred.[56] Additionally, that court noted that "it
requires no expert to recognize that human models in advertising at-
tempt to create an identification between model, consumer and pro-
duct."[57] Although she was not sufficiently persuasive, an expert did
testify that the brochure in question did not, in fact, indicate a pref-
erence in violation of the Act.[58] The Supreme Court of Virginia, in
deciding a case of alleged indication of preference within real estate
advertisements, held that expert testimony on the issue is inadmissi-
able because "experts can't [provide] anything that the jury could not
determine" and "expert testimony is inadmissible on [the ultimate]
question."[59]

In United States v. Hunter,[60] the court reasoned that a violation
has occurred when "[t]o the ordinary reader the natural interpreta-
tion of the advertisements published . . . is that they indicate a ra-
cial preference in the acceptance of tenants."[61] In a pending case,
plaintiffs allege that, as a result of the use of virtually all white mod-
els in newspaper real estate advertising, they "have been injured and
offended by those advertisements due to their clear indication of a
preference, limitation, and discrimination based on race."[62]

Courts are taking judicial notice that "pictures of whites only
parallel the words 'white only' "[63] and are applying an "ordinary

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56. 659 F. Supp. 1042, 1058 (E.D. Va. 1987); but see Spann, 662 F. Supp. at 545, n.7.
58. Id. at 1059.
61. Id. at 215.
   (WESTLAW, DCT).
63. See Advertising for Apartheid, supra note 9, at 1435.
In December 1989, Judge Haight of the Southern District of New York wrote "the 'ordinary reader' is nothing more, but nothing less, than the common law's 'reasonable man'. . ." This standard, however, is different from the "reasonable person" standard used commonly in both civil and criminal trials. While the "reasonable person" standard is an opinion based upon the factfinder's observations of actual responses, the "ordinary reader" standard is an opinion of what would be a logical response. In other words, when a jury concludes that a "reasonable person" would strike back in self-defense to a certain form of an apparent attack, for example, this jury is proclaiming that they would (or could) perceive the circumstances similarly. However, when attention is drawn to an advertisement, what is elicited is an opinion of how the ad would strike someone who is not being directed to view it with scrutiny.

It seems intuitive to many that members of a racial or ethnic group would read "whites only" from an advertising campaign utilizing exclusively white models. Reinforcing this theory of the obvious, Judge Charles S. Haight, Jr. held, in Ragin v. New York Times Co., that "case law holds and common sense confirms that consistent use of exclusively or near-exclusively white models may operate as the functional equivalent of more explicit verbal racial messages." There is, however, no evidence to substantiate this theory. Scientific evidence is often counter-intuitive. This fact explains why some areas of progress are so hard won and face so much opposition and suppression in their time. Thus, scientifically elicited responses of groups may, surprisingly, be counter-intuitive to expectations.

IV. WHO HAS STANDING TO SUE UNDER SECTION 3604(c)?

In 1972, the United States Supreme Court heard its first Title VIII case, and ruled that the courts "give vitality to [the Act] only by a generous construction" of the statutory language.

64. See, e.g., Hunter, 459 F.2d at 215; Ragin, 726 F. Supp. 953 (S.D.N.Y. 1989).
67. Id. at 963.
68. See T. MOORE, HEART FAILURE 168 (1989).
70. Id. at 212.
guage referred to is: "[a]ny person who claims to have been injured by a discriminatory housing practice." The District Court for the Eastern District of Virginia expressed the prevailing national sentiment when it said that "[s]tanding under the Fair Housing Act is as broad as permitted by Article III of the Constitution and, thus, is not limited by prudential principles."

The Court of Appeals for the Sixth Circuit held that both a city and a nonprofit corporation whose primary objective is promoting the city as open and integrated, have standing to sue real estate agents under the Fair Housing Act. Furthermore, the United States Supreme Court held that a non-profit corporation, suing under the Act for obstruction of its objectives and diversion of its resources, could collect compensatory damages.

By contrast, in *Nur v. Blake Development Corp.*, the federal district held that nonminority "testers" who collected evidence of unlawful steering practices for the Human Rights Commission do not have standing to bring suit against an offending development and its agents. The implication is that only minority individuals are injured by discrimination. The court held that "[t]ester standing is based on a direct injury to a statutory right. . . . [Both testers] failed to demonstrate or allege factually that the defendants violated rights accorded [them] under section 3604." Alternatively, third-party standing is available, said the court, only to plaintiffs who "were genuinely injured by conduct that violated somebody's section 3604 rights." However, the plaintiffs in *Nur* did not allege sufficient facts to establish such harm.

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71. *Id.* at 208 (referring to the language of what is now codified as 42 U.S.C. § 3610(a)). The definition of "aggrieved person" for purposes of Title VIII is "Aggrieved person' includes any person who— (1) claims to have been injured by a discriminatory housing practice; or (2) believes that [he/she] will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i)(1988).


76. "[T]esters are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp.*, 455 U.S. at 373.

77. *Nur*, 655 F. Supp. 158 (N.D. Ind. 1987); but see *Havens Realty Corp.*, 455 U.S. 363 (minority "testers" alleging damage to their neighborhood due to denial of benefits of interracial association have standing to sue under the Act.)


79. *Id.* at 163.

80. *Id.*
Another district court, in 1989, recognized an even narrower standard which stated that, in order to have standing, plaintiffs must "[allege] such a personal stake in the outcome of the controversy as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on their behalf." The question then, which has not been fully addressed, is what constitutes a personal stake in the outcome of the controversy.

One statutory exception to the "personal stake" standard is that the federal government, through the Department of Housing and Urban Development, has standing to sue under the Fair Housing Act. In fact, "[t]he Government need not demonstrate nor must the Court require evidence that an issue of general public importance exists as a prerequisite to the Government's filing suit." *V. WHAT FACTORS HAVE CONTRIBUTED TO AN INCREASE OF ACTIVITY UNDER THIS STATUTE?*

Several factors have contributed to an increase of activity under the Fair Housing Act, the most obvious of which is the success of litigation brought under the Act. Since the Saunders decision, "[s]ix similar suits are pending in federal court [in the D.C. area]." Another factor is the Fair Housing Amendments Act of 1988 which allows for greater punitive damages, a longer statute of limitations, and the ability of the Department of Justice to initiate actions on behalf of private parties.

Prior to the Fair Housing Amendments Act of 1988, prevailing plaintiffs were able to recover "actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees." The 1988 amendments permit fines of $10,000 for

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82. The Act provides in part: "If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this subchapter, the Secretary may authorize a civil action for appropriate . . . relief." 42 U.S.C. § 3610(e)(1).
84. See supra note 48.
the first offense, $25,000 for an additional offense within five years, and $50,000 for a third offense in seven years, as well as permitting attorneys' fees without requiring a demonstration of financial need.89 Between March 12, 1989, the date the amendments took effect, and September 30 of the same year, 4,417 complaints were filed with HUD; this six month total exceeded that for the entire 1988 fiscal year.90

Prior to the Fair Housing Amendments Act of 1988, aggrieved persons had 180 days in which to commence a civil action under Title VIII. As amended, 42 U.S.C. section 3613(a)(1)(A) provides a two year statute of limitations.91 Additionally, under subsection (a)(1)(B), "such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this title based upon such discriminatory housing practice."92 The length of the statute of limitations is important in cases based upon section 3604(c) because many "victims of discriminatory housing practices do not realize they have been injured" at the time of the alleged violation.93

During Senate debates, Senator Alan Cranston of California noted that "the Federal Government does not have an active enforcement role in cases involving probable violation of title VIII [sic] . . . . [L]egislation before us today will provide for a meaningful remedy for violations of title VIII by establishing an administrative enforcement procedure whereby the Secretary of HUD, upon a determination that there is reasonable cause to believe that discrimination has occurred or is about to occur, can commence an action . . . ."94 The amended section 3613 provides that "the court may—(1) appoint an attorney for [a complainant]; or (2) authorize the [waiver] of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action."95 As of early October 1989, "the Department of Justice—on case referrals
from HUD and other public and private housing groups—has filed 21 lawsuits across the country on behalf of [housing] discrimination victims.\(^9\)

VI. WHAT HAVE BEEN SOME OF THE CONSEQUENCES OF THESE SUITS?

"[I]n the mid 1970s, five human model advertising complaints were filed by the Housing Opportunities Council of Metropolitan Washington."\(^9\) A settlement was reached prior to the filing of civil action in four of these cases and prior to trial in the fifth. The affirmative relief granted in these cases "included commitments to depict racially integrated settings in at least 25% or 50% (depending on the case) of the firms' display advertisements."\(^9\)

Additionally, in *NAACP v. ITT Community Development Corp.*,\(^9\) the court agreed to a consent order by which the defendant must refrain from various practices, use minority group models in advertisements that utilize human models, allocate a portion of its media budget to advertise in media which serves primarily minority populations, and to pay plaintiff's costs and fees.\(^10\) Plaintiffs, in return agreed not to test the defendant's denials of the charges through litigation.\(^10\)

With the tremendous costs of litigation, including time, money, and potential adverse publicity, other potential defendants are seeking to avoid going to court. An unnamed HUD official has been quoted as explaining that the purpose of the amendments is to "motivat[e] conciliations. And the real key is speed in fair housing, because apartments get rented and homes get sold."\(^10\)

Avenol Corp., a developer marketing a luxury home project in Maryland, and its advertising agency, in September 1989, without admitting wrong, agreed to pay $325,000 to two local nonprofit housing organizations associated with Prof. Spann of Georgetown Law School who had brought suit in 1987.\(^10\) The developer and advertising agency had allegedly excluded black people from their

\(^9\) Rubin, *supra* note 9, at 167.
\(^9\) Scanlon, *supra* note 93, at 1460.
\(^10\) Id.
\(^10\) Id. at 367.
\(^10\) L.A. Times, Sept. 9, 1989, \$1, at 2, col. 1; see also Washington Post, Sept. 9, 1989, at D12, col. 4.
promotional campaign. In addition to the financial settlement, the settlement requires defendants to continue using human models in their ads. William D. North, executive vice president of the National Association of Realtors, reiterates that "[s]ettlements are frequently made on the basis of economics rather than guilt or principle. The last thing most building managers want is to spend the equivalent of ten years of rental trying to defend some case." In August 1986, the Washington Post entered into an agreement with the Washington Lawyers' Committee for Civil Rights Under Law, whereby the Post agreed to maintain at least 25% minority representation in its real estate advertisements. In April 1987, twenty two businesses in the greater Washington, D.C. metropolitan area agreed to utilize black models in one third of their advertising.

In late 1987, attorneys from Shearman & Sterling, representing Open Housing Center, Inc., a not-for-profit corporation based in New York, and several black individuals seeking housing in the City of New York, met with lawyers for the New York Times and "asked the Times to sign an agreement similar to one that . . . had [been] obtained from the Washington Post . . . . The Times refused to enter into such an agreement." The Times made this decision despite their earlier response to the ground swell which was developing, where they evaluated real estate advertisements in the April and May, 1987 Sunday Times and found that "162 advertisements depicted 790 people in photos and illustrations. Only [one] advertisement, which appeared three times, showed a model who could easily be identified as black."

Subsequently, the Times did, however, publish a notice advising that real estate advertisements without the "Equal Opportunity Housing" tagline as recommended in section 109.30(a) of the Fair Housing Advertising Regulations would not be published. Additionally, they simultaneously published a pamphlet stating that the Times "would not accept . . . [a]dvvertisements which fail to comply with the express requirements of federal and state laws against dis-
Thereafter, the attorneys of the parties who previously met with the New York Times filed suit in federal court alleging that "the Times has continued to print . . . advertisements that contain virtually all white human models." Their complaint further alleged that "[t]he few blacks represented are usually depicted as building maintenance employees, doormen, entertainers, sports figures, small children or cartoon characters." In defense to this action, the New York Times argued that monitoring advertisements for indications of preference is an undue burden upon publishers. The court denied the defendant's motion to dismiss the claim, exclaiming its "reluctance to conclude that what the Washington Post can do to eliminate all the ads unfit to print, the New York Times cannot do." However, this court later amended its decision and granted the defendant's motion for an interlocutory appeal to the Court of Appeals for the Second Circuit, because it felt that due to the limited amount of case law construing section 3604(c), and because a publisher's first amendment rights were involved, this case was "an entirely appropriate, perhaps even quintessential case for certification . . ." Additionally, the Cincinnati Enquirer was recently sued because of an alleged Fair Housing Act violation, by featuring only white models in its real estate advertisements. The plaintiff in this suit, Housing Opportunities Made Equal, alleged that "among 1,000 ads appearing in The Enquirer between Nov. 8, 1987 and Oct. 15, 1989, only nine featured nonwhite models." This complaint was subsequently dismissed in federal court because HUD regulations are not binding upon a judicial determination and, standing alone, allegations of discriminatory advertisements do not violate this Act. However, this determination was made because the court could not

112. Id.
113. Id.
116. Id. at 964.
infer discriminatory intent by the Enquirer.\textsuperscript{121}

In Chicago, four housing organizations have combined efforts and "conducted a year-long survey of real estate advertisements published in the Chicago Tribune and the Chicago Sun-Times, which they say proves the companies use only white models in the ads."\textsuperscript{122} These housing organizations threatened a lawsuit against three large home builders and a major rental agency and "expect[ed] to have a settlement with from one to three of the defendants before the end of November [1989]."\textsuperscript{123} In response to this challenge, the Homebuilders Association of Greater Chicago formed an advertising committee to ensure that its 300 members receive the information necessary to comply with federal law.\textsuperscript{124} At its convention in January 1990, the National Association of Home Builders was expected to distribute a fair housing compliance manual.\textsuperscript{125} The attorneys for the National Association of Home Builders have warned builders not "to use [any] human models []" unless they follow the guidelines established in the Association's fair housing compliance manual.\textsuperscript{126} As would be anticipated, "to avoid any violations, most advertisers are avoiding the use of human models in their ads."\textsuperscript{127}

Another disparate effect of the Act (mostly with respect to subsection (a)) has been "the court-ordered destruction of local zoning."\textsuperscript{128} In their zeal to promote integrated housing, the courts have, in addition to interpreting statutes as broadly as possible, made leaps which may be considered to exceed the law's mandate.\textsuperscript{129}

Despite the fact that zoning is racially, although not socially class, neutral, it is being challenged and struck down because it is believed to adversely affect proportionately more blacks than whites. Rather than addressing all the underlying causes of proportionately greater black poverty, some of which undoubtedly are based in insti-

\begin{itemize}
  \item \textsuperscript{121} Compare id. and supra notes 23-24 and accompanying text (intent is a necessary element of § 3606 claim) with supra notes 11-20 and accompanying text (proof of intent not required).
  \item \textsuperscript{122} Crain's Chicago Business, Nov. 6, 1989, at 1.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Harton, \textit{Fair Housing Act Slaps Tight Controls on Residential Real Estate Advertisers}, \textit{Indianapolis Bus. J.}, Mar. 27, 1989, § 2, at 1B.
  \item \textsuperscript{128} Wiemer, \textit{The Court Fouls on the Fair Housing Act}, Newsday, Nov. 27, 1988, Ideas section, at 10, col. 1.
  \item \textsuperscript{129} See, eg., id.
\end{itemize}
tutional racism, the courts have acceded to demands to turn this social class issue into a racial one.

In many geographic areas, i.e., boroughs or counties, people of virtually homogeneous socioeconomic levels share the same community. Thus, we have middle class neighborhoods, working class neighborhoods, and areas in which wealthy people reside alongside other wealthy people. This fact is usually determinative of how high a property is economically valued.

Indeed, the desire of individuals to maintain a particular community “character” does not reside with the wealthy alone. One has only to consider the angry responses of city residents to the “gentrification” of their neighborhoods. That is, they view with appropriate apprehension the moving in of substantial numbers of wealthier people. Such movement is invariably accompanied by increased property values and the concomitant increases in costs of local goods and services which follow escalating property values. Local residents feel they are being driven out of their own homes by these “invaders.”

Hence, one is justified in assuming that the court actions in striking down zoning ordinances pave the way for the construction of lower income housing thus reducing property values which effectively constitute governmental confiscation of property.

Finally, one other effect of the increased activity under the Act has been the backlog alluded to above in another context.\(^1\) Shanna Smith, director of the Toledo [Ohio] Fair Housing Center has gone on record stating “it was a much timelier process under the old act.”\(^1\)

VII. **What Have Been the Outcomes of Non-Racially Based Suits Under This Law, and How Do the Outcomes Compare?**

Although the language of section 3604(c) prohibits activity indicating a preference “based on race, color, religion, sex, handicap, familial status, or national origin,”\(^1\) there have been very few cases in which this section has been the basis of charges unrelated to race.

The first such case, briefly discussed above,\(^1\) was *Holmgren v. Little Village Community Reporter*,\(^1\) in which the defendant news-

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130. *See supra* note 25 and accompanying text.
132. 42 U.S.C. § 3604(c).
133. *See supra* notes 29-33 and accompanying text.
papers were held violative of the Act for publishing various classified advertisements which indicated preferences for purchasers and lessees of various nationalities.\textsuperscript{135} The defendants were unsuccessful in convincing the court that indicating a preference for people who speak Polish, Bohemian, Slavic, German, or Spanish is distinguishable from the prohibitions within the Act.\textsuperscript{136}

However, in 1989, a Virginia state commission was unsuccessful in enjoining a real estate broker and his realty company from displaying Christian symbols and slogans within advertisements.\textsuperscript{137} Despite the plaintiff’s insistence that a per se violation occurred involving the Virginia Fair Housing Law,\textsuperscript{138} the Supreme Court of Virginia held that “an issue of fact was presented by the question whether a [defendant’s] advertisements indicated a preference. Hence, this is not a proper case for the application of the per se rule.”\textsuperscript{139} Additionally, the court ruled that, even if “one could possibly perceive an undertone suggesting discrimination [in the caricature of a fish encompassing the words ‘Jesus Is Coming’], such a perception would be destroyed by the disclaimer [attached to the advertisement].”\textsuperscript{140}

Subsequently, a federal district court in Pennsylvania granted summary judgment to defendant in a case of alleged discrimination, on the basis of religion, in the sale and rental of space for summer homes on the defendant’s country club property.\textsuperscript{141} In this case, the court found that, although membership in the defendant country club is restricted to Roman Catholics, the country club is entitled to restrict summer residency to members only. This court recognized

\textsuperscript{135.} Id.
\textsuperscript{136.} Id. at 513; see also id. at 513 & n.1.
\textsuperscript{138.} The Virginia provision, which parallels the Federal Fair Housing Act, provides in part:

\begin{quote}
It shall be an unlawful discriminatory housing practice, because of... religion... for any person having the right to sell, rent, lease... any dwelling: (3) To make, print or publish, or cause to be made printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination, or an intention to make any such preference, limitation, or discrimination.
\end{quote}


\textsuperscript{139.} Lotz, 237 Va. at 1, 376 S.E.2d at 57.
\textsuperscript{140.} Id. at 9, 376 S.E.2d at 58.
that section 3604 is applicable, but found that the facts presented fall within an exception under section 3607.\textsuperscript{142}

Despite explicitly stated ethnic and religious preferences, the courts in two of these three cases have held to narrow interpretations of the law. The Virginia Supreme Court even upheld a trial court ruling which barred evidence of substantial religious bias of the defendants.\textsuperscript{143} One can strongly suspect that had the basis of this complaint been racial, these two cases would have had very different outcomes.

**Summary**

Thus, while today in this country a substantial consensus exists that housing discrimination is impermissible, there are deep divisions about many of the methods currently used to achieve integrated housing. For example, requiring housing advertisements to use a certain percentage of minority models elicits challenges of violating an advertiser’s constitutional rights of free commercial speech and also elicits challenges violating the civil rights of non-minority models to seek employment. The concomitant shift from “equality of opportunity” to “equality of result” and the abandonment of requirements to demonstrate “negative” results of specific practices, let alone causality, has further contributed to and exacerbated these divisions. These questions taken both separately and together have dominated the defenses of those accused of violations of section 3604(c).

Courts have had to respond to assertions even as recently as December 18, 1989 that the “Act is ‘impermissibly vague’ and that applying it to publishers ‘would violate the First Amendment.’”\textsuperscript{144} In his dissent in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,\textsuperscript{145} Justice William O. Douglas wrote “there can be no valid law censoring the press . . . for publishing . . . the views of . . . customers who express their ideas . . . in want ads or other commercial space.”\textsuperscript{146}

As this paper is concluded, we have come full circle. The blatant forms of discrimination addressed in section 3604 subsections

\textsuperscript{142.} Id.

\textsuperscript{143.} Lotz, 237 Va. at 10, 376 S.E.2d at 58.


\textsuperscript{146.} Id. at 398.
(a) and (b) are unacceptable and substantially eliminated. The questions of whether other matters dealt with principally under subsection (c) are discriminatory or even have discriminatory effects are less obvious and more questionable. Extending litigation to matters increasingly more far removed from the statutory language provokes more controversy about means and ends.

It would appear warranted at this time, after more than twenty years since the enactment of the Fair Housing Act and countless lawsuits filed yielding decisions which affirmatively promote integrated housing, for Congress to determine whether these have had the desired effect. Is housing in America, 1990, substantially more integrated? If so, can this be reasonably attributed to this legislation, et al? If not, what other factors may account for segregated housing and how may they best be addressed?

In either case, whether the desired effect has been achieved or not, questions remain as to whether the "fair housing" legislation is necessary, sufficient, or impotent for this goal in its present form.

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