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## New Look at Sexual Harassment under the Fair Housing Act: The Forgotten Role of 3604

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## ARTICLES

### A NEW LOOK AT SEXUAL HARASSMENT UNDER THE FAIR HOUSING ACT: THE FORGOTTEN ROLE OF § 3604(c)

ROBERT G. SCHWEMM AND RIGEL C. OLIVERI\*

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## INTRODUCTION

Imagine a single woman of limited means living with her two children in an apartment complex. The resident manager would like to go out with her or, to put it less euphemistically, would like to have a sexual relationship with her. Initially, he approaches the matter subtly by complimenting the woman on her appearance and offering to do special maintenance favors for her. Eventually, he asks her out. When she refuses, he becomes verbally hostile, calling her a “tease” and a “bitch.” Thereafter, he threatens to evict her unless she has sex with him. The threat is not carried out, but the manager is now unpleasant in his exchanges with the tenant. She tries to avoid seeing him around the apartment complex, but when he comes to her unit to collect the rent, he often makes crude or sexually suggestive remarks such as “you could make this pay day so much nicer for both of us.”<sup>1</sup>

Do the nation’s fair housing laws prohibit any or all of what the manager has done in this situation? To date, the courts have generally answered “No,”<sup>2</sup> a conclusion that we contend has mistakenly ignored a crucial provision of the federal housing discrimination law and needlessly encouraged repetition of scenarios like the one described above.

Sexual harassment in housing is a significant national problem.<sup>3</sup> Although less visible than the comparable problem in employment, sexual

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1. The scenario described here is a fictional amalgamation of various actual fair housing harassment cases, primarily *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996). See *infra* note 76 and accompanying text.

2. See *infra* Part I.B.3.

3. Commentators and fair housing enforcement officials generally agree that housing harassment is a problem of serious magnitude. *E.g.*, Interview with Joan Magagna, Chief of Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, in Washington, D.C. (June 24, 2002); Interview with David H. Enzel, Deputy Assistant Secretary for Enforcement and Programs, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing & Urban Development, in Washington, D.C. (June 24, 2002); Interview with Shanna L. Smith, President/CEO, National Fair Housing Alliance, in Washington, D.C. (June 24, 2002). We have found that providing documentary support for this conclusion is difficult, however. For example, HUD’s reports on administrative complaints filed each year under the federal Fair Housing Act lump together all sex-based claims, thereby making it impossible to identify the number of claims involving sexual harassment as distinguished from other types of sex discrimination claims. See, *e.g.*, OFFICE OF PROGRAM STANDARDS & EVALUATION, U.S. DEP’T OF HOUS. & URBAN DEV., 1994 ANNUAL REPORT TO CONGRESS ON FAIR HOUSING PROGRAMS 26 (1996). The only source that we are aware of that has ever attempted to provide a statistical basis for the number of such claims is an article published fifteen years ago in the *Wisconsin Law Review*, which reported a survey of housing centers around the country that learned of 288 cases of sexual harassment in housing that had been reported to these centers. See Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1066. Noting studies which indicate that sexual harassment in the

harassment in housing may be as prevalent and probably more devastating to its victims.<sup>4</sup>

Nevertheless, relatively little attention has been paid to this issue or to the law that should govern it. Indeed, the law of sexual harassment in housing developed well after and in virtual lock-step with the law of sexual harassment in employment.<sup>5</sup> Thus, courts have simply interpreted the Fair Housing Act (FHA)<sup>6</sup> to prohibit sexual harassment to the same degree—and only to the same degree—as it is prohibited in employment by Title VII of the 1964 Civil Rights Act.<sup>7</sup>

This is inappropriate. It is true that the FHA contains a “terms and conditions” provision that parallels the one in Title VII that has been the key to sexual harassment law in employment.<sup>8</sup> But the FHA also contains an additional provision—§ 3604(c)<sup>9</sup>—that bans sexually discriminatory statements in a way that goes well beyond its Title VII counterpart.<sup>10</sup> The availability of § 3604(c) as an additional weapon in the arsenal against sexual harassment in housing—and its lack of use by courts and litigants—is the subject of this Article.

One example of the failure to fully appreciate that the FHA’s ban on sexual harassment may go further than Title VII’s is the determination by various federal courts to reject liability in cases where the defendant’s behavior was not egregious enough to warrant a “terms and conditions” violation, but should have been held to violate § 3604(c).<sup>11</sup> While these decisions may be correct in applying Title VII law to sexual harassment

workplace is reported less than 5% of the time, Cahan estimated that these 288 reported cases amounted to less than 5% of the actual number of illegal incidents, which was put at between 6,818 and 15,000. *Id.* at 1069. Cahan further noted that these estimates based on employment data may be disproportionately low for two reasons. *Id.* at 1067-69. First, unlike in cases of workplace harassment, the public is not as aware of the legal protections and enforcement mechanisms available to address housing harassment, and thus victims would undoubtedly be less likely to come forward. *Id.* at 1069. Second, victims of housing harassment may fear more serious repercussions for themselves and their families if they report the harassment—eviction or even physical harm—than do victims of workplace harassment. *Id.* at 1067.

4. See *infra* notes 92-95 and accompanying text; see also Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 44-48 (1998); Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 LAW & INEQ. 351, 368-73 (2000).

5. See *infra* Part I.B.

6. The Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1994) (codifying Title VIII of the Civil Rights Act of 1968).

7. 42 U.S.C. § 2000e (1994).

8. See 42 U.S.C. § 3604(b) (FHA); 42 U.S.C. § 2000e-2(a)(1) (Title VII). These provisions are discussed in greater detail *infra* Parts I.B.1-2.

9. 42 U.S.C. § 3604(c).

10. See *infra* Parts I.D. and II.B.

11. See cases cited *infra* notes 72-74, 80-83, 85-86.

claims based on the FHA's "terms and conditions" provision, they have erred in failing to also consider § 3604(c), which prohibits even isolated discriminatory housing statements.<sup>12</sup> The error is often traceable to the sexual harassment plaintiffs themselves, who have generally not asserted a § 3604(c) claim along with their other FHA claims.<sup>13</sup>

This Article argues that § 3604(c) is applicable in virtually every sexual harassment case involving housing<sup>14</sup> and that its applicability means the FHA can be a more effective statute for attacking sexual harassment than Title VII. Part I reviews the law governing sexual harassment in housing, including the role that Title VII precedents have had in shaping this law. Part II shows how § 3604(c) goes further than its Title VII counterpart in prohibiting statements that are often at the heart of a sexual harassment claim and identifies some specific situations in which § 3604(c) may be helpful in challenging sexual harassment that would otherwise not be illegal. Finally, Part III deals with the potential First Amendment problems that may arise if § 3604(c) were applied to cases involving verbal sexual harassment.

## I. SEXUAL HARASSMENT LAW AND THE FAIR HOUSING ACT

### A. Overview of the Fair Housing Act and Its Similarity to Title VII

As originally enacted in 1968, the FHA banned discrimination in most residential dwellings on the basis of race, color, religion, and national origin.<sup>15</sup> An amendment adding "sex" to the FHA's list of prohibited bases of discrimination was passed in 1974.<sup>16</sup>

Most of the FHA's basic substantive prohibitions have remained unchanged since 1968.<sup>17</sup> For purposes of this Article, four of these

12. See *infra* Part II.A.

13. See *infra* note 110 and accompanying text.

14. See *infra* note 108 (describing how frequently statements are part of housing sexual harassment). Indeed, this provision may be the *only* part of the statute that will apply to many housing harassment situations. See *infra* Parts I.B.3 and I.D.

15. See 42 U.S.C. §§ 3603-3607, 3617 (1970). Certain dwellings are exempted from the FHA's substantive coverage. See § 3603(b) (exempting from most of § 3604 certain single-family houses sold or rented by their owners and units in owner-occupied apartment buildings containing four or fewer units) and § 3607(a) (exempting certain dwellings operated by religious organizations and private clubs).

16. See Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 728 (1974). Two additional bases of discrimination—"familial status" and "handicap"—were added by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1622 (1988).

17. The FHA's substantive prohibitions are contained in 42 U.S.C. §§ 3604-3606 and 3617. See *id.* § 3602(f) (defining a "discriminatory housing practice" for purposes of the FHA as an act that is unlawful under §§ 3604-3606 and 3617). The only changes that

substantive provisions are particularly important: § 3604(a) makes it unlawful to refuse to sell, rent, or negotiate for the sale or rental of, or to “otherwise make unavailable or deny, a dwelling to any person because of race [or other prohibited factor]”; § 3604(b) supplements § 3604(a)’s ban on refusals to deal by prohibiting 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; § 3604(c) prohibits discriminatory notices, statements, and advertising; and § 3617 outlaws coercion, intimidation, threats, and interference with the rights guaranteed by §§ 3604–3606.<sup>18</sup>

The language of all four of these crucial provisions is similar, but not identical, to comparable prohibitions in Title VII of the Civil Rights Act of 1964, the federal employment discrimination law that was passed four years before the FHA.<sup>19</sup> 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 discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment”<sup>20</sup>—practices that roughly correspond to the FHA’s prohibitions of discriminatory refusals to deal and discriminatory terms and conditions in § 3604(a) and § 3604(b). Title VII also prohibits employers from publishing “any notice or advertisement . . . indicating any

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have been made to these substantive prohibitions since 1968 were the addition of sex, familial status, and handicap as illegal bases of discrimination, *see supra* note 16 and accompanying text, and some amendments—not relevant to this Article—made by the Fair Housing Amendments Act of 1988, such as broadening the scope of § 3605’s ban on discriminatory home financing, providing a special set of handicap-related provisions in § 3604(f), adding an exemption for reasonable occupancy restrictions in § 3607(b)(1), and exempting housing for older persons from the new familial status prohibitions in § 3607(b). Fair Housing Amendments Act, §§ 5-6, 102 Stat. at 1619-23 (codified at 42 U.S.C. §§ 3604(f), 3605, 3607(b)(1) and 3607(b) (1994)). The Fair Housing Amendments Act of 1988 also made major changes to the FHA’s enforcement procedures. *See* §§ 7-8, 102 Stat. at 1623-35. (codified at 42 U.S.C. §§ 3610-3614 (1994)). *See generally* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989).

18. *See* 42 U.S.C. §§ 3604(a)-(c), 3617. The FHA’s other substantive provisions are § 3604(d), which bans discriminatory misrepresentations concerning the availability of housing; § 3604(e), which outlaws “blockbusting”; § 3604(f), which contains a number of provisions designed to provide equal housing opportunities for handicapped persons; § 3605, which prohibits discrimination in home loans and certain other housing-related transactions; and § 3606, which bans discrimination in multiple-listing and other brokerage services. 42 U.S.C. §§ 3604(d)-(f), 3605-3606.

19. *See* 42 U.S.C. § 2000e. The 1964 Civil Rights Act also prohibits discrimination in public accommodations, *see id.* § 2000a, and federally funded programs, *see id.* § 2000d, but these prohibitions are much shorter and simpler than those of Title VII and therefore not nearly as comparable to the FHA as Title VII.

20. *Id.* § 2000e-2(a)(1).

preference, limitation, specification, or discrimination,”<sup>21</sup> a provision that is directed against some of the same discriminatory practices outlawed by § 3604(c), although, as we shall see, the latter provision is significantly broader than its Title VII counterpart.<sup>22</sup> Finally, Title VII prohibits retaliation against those who have exercised their rights under the employment statute,<sup>23</sup> a provision that is somewhat similar to § 3617’s protections against coercion and interference.<sup>24</sup>

### *B. The Role of Title VII Law in Housing Cases*

#### I. TITLE VII LAW OF SEXUAL HARASSMENT

Cases recognizing that harassment in employment might violate Title VII date back at least to 1971.<sup>25</sup> In the latter 1970s, “[t]he topic of sexual harassment in the workplace exploded upon the scene.”<sup>26</sup> In 1980, the Equal Employment Opportunity Commission (EEOC) issued guidelines identifying sexual harassment as a form of sex discrimination prohibited by

21. *Id.* § 2000e-3(b).

22. *See infra* Part III.

23. 42 U.S.C. § 2000e-3(a).

24. *Id.* § 3617. There are other major similarities between Title VII and the FHA.

Both statutes prohibit discrimination “because of” race and certain other factors, leading courts to conclude that the standards of proof under the two laws should be interpreted in a similar fashion. *See, e.g.*, cases cited at ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION §§ 10:2 n.25, 10:3 nn.27-28, 10:4(1) nn.18-21, 10:6 n.15 (2001). In addition, both statutes include exemptions for religious organizations, private clubs, and small operators. *See supra* note 15 (FHA exemptions), 42 U.S.C. § 2000e-1(a), § 2000e(b)(2), and § 2000e(b) (Title VII exemptions). As a result of the various similarities and the parallel goals of Title VII and the FHA, courts have generally seen fit to interpret them consistently with one another. *See SCHWEMM, supra*, § 7:4.

25. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986) (identifying *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) as “apparently the first case to recognize a cause of action based upon a discriminatory work environment”).

*Rogers* involved a Hispanic complainant who alleged that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. 454 F.2d at 236. In *Meritor*, the Court cited *Rogers* and other lower court decisions upholding Title VII harassment claims based on race and national origin as well as sex, thereby endorsing the view that harassment in violation of Title VII may be based on the plaintiff’s race, national origin, or other protected status as well as sex. *See Meritor*, 477 U.S. at 65-66.

26. 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION 46-8 (2d ed. 2002). According to LARSON, *supra*, at 46-9, the first federal decision to uphold a Title VII claim based on sexual harassment occurred in 1976 in *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), order vacated by 587 F.2d 1240 (D.C. Cir. 1978), on remand, 487 F. Supp. 1387 (D.D.C. 1980). *Williams* and other early cases are reviewed in Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1010-16 (1978). *See generally* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

Title VII.<sup>27</sup> Two years later, the Eleventh Circuit issued an influential sexual harassment opinion in favor of the plaintiff in *Henson v. Dundee*,<sup>28</sup> which ultimately helped shape Supreme Court jurisprudence in this area and also influenced early FHA harassment cases.<sup>29</sup>

Thus, by 1986 when the Supreme Court decided its first sexual harassment case in *Meritor Savings Bank v. Vinson*,<sup>30</sup> a good deal of Title VII law on this subject had already been written. *Meritor* was a case brought by a bank employee who alleged that her branch manager made unwelcome sexual advances toward her and that she engaged in a lengthy sexual relationship with him out of fear of losing her job.<sup>31</sup> The defendant conceded that sexual harassment affecting the economic aspects of an employee's job (i.e., quid pro quo harassment) violates Title VII, but it argued that harassment leading to noneconomic injuries (i.e., hostile environment harassment) should not be actionable.<sup>32</sup> The Supreme Court disagreed. Without dissent, the Court concluded that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."<sup>33</sup>

The plaintiff's claim in *Meritor* was based on that part of Title VII banning discrimination in the "terms, conditions, or privileges of employment,"<sup>34</sup> and the Court held that this provision is violated by harassment that is shown to be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>35</sup> In applying this "severe or pervasive" standard, the *Meritor* opinion determined that sexual advances are to be considered acts of harassment if they are "unwelcome."<sup>36</sup> In a final section of its opinion

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27. 29 C.F.R. § 1604.11 (2001); see also *Meritor*, 477 U.S. at 65.

28. 682 F.2d 897 (11th Cir. 1982), quoted with approval in *Meritor*, 477 U.S. at 66-67.

29. See *Meritor*, 477 U.S. at 66-67; HUD v. Krueger, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,119, at 26,023 (HUD ALJ 1996) (FHA decision citing *Henson*), *aff'd*, 115 F.3d 487 (7th Cir. 1997); HUD v. Kogut, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,100, at 25,900 (HUD ALJ April 17, 1995) (same); Shellhammer v. Lewallen, 1 Fair Hous.-Fair Lending (Prentice Hall) ¶ 15,472, at 135-36 (W.D. Ohio 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985) (same).

30. 477 U.S. 57.

31. *Id.* at 60.

32. See *id.* at 64.

33. *Id.* at 66.

34. See *id.* at 63 (quoting 42 U.S.C. § 2000e-2(a)(1)).

35. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904) (alteration in original).

36. *Id.* at 68. Thus, the Court held that the fact that the plaintiff in *Meritor* had engaged in a "voluntary" sexual relationship with her harasser did not necessarily defeat her claim if indeed this relationship was unwelcome. *Id.* In deciding the "unwelcomeness" issue, the Court indicated that a variety of factors might be considered, including whether the plaintiff spoke or dressed in a sexually provocative way and how she responded to her supervisor's sexual suggestions. *Id.* at 68-69.



in *Meritor*, the Court addressed the issue of whether the bank should be “strictly liable” for its manager’s harassment, advising that “courts [should] look to agency principles for guidance in this area,” but declining to issue “a definitive rule on employer liability.”<sup>37</sup>

All of the Supreme Court’s subsequent Title VII decisions dealing with sexual harassment built on the foundation established by *Meritor*. For example, in 1993, in *Harris v. Forklift Systems, Inc.*,<sup>38</sup> the Court rejected a defendant’s argument that hostile environment claims could only succeed if the challenged conduct “seriously affect[ed] plaintiff’s psychological well-being.”<sup>39</sup> Such a requirement was seen as inconsistent with the basic “severe or pervasive” standard of *Meritor*, which the *Harris* opinion reaffirmed as controlling hostile environment claims under Title VII’s provision banning discriminatory “terms and conditions.”<sup>40</sup> This standard meant that “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”<sup>41</sup> On the other hand, determining whether specific conduct is sufficiently severe or pervasive to be actionable could not be made to depend solely on whether the target of that conduct suffered psychological harm, because this factor, though relevant, is only one of a myriad of circumstances that must be considered.<sup>42</sup> According to *Harris*, these circumstances “may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>43</sup>

Finally, in 1998, the Court decided three more cases—*Oncale v. Sundowner Offshore Services, Inc.*,<sup>44</sup> *Burlington Industries, Inc. v. Ellerth*,<sup>45</sup> and *Faragher v. City of Boca Raton*<sup>46</sup>—that built on its sexual harassment jurisprudence. All three were prompted by claims under Title

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37. *Id.* at 72. This was the opinion of five members of the Court. Justice Marshall, speaking for the other four, argued for a strict liability standard, noting that generally “the act of a supervisory employee or agent is imputed to the employer.” *Id.* at 75 (Marshall, J., dissenting). For subsequent developments concerning this issue, see *infra* notes 50-52 and accompanying text.

38. 510 U.S. 17 (1993).

39. *Id.* at 22 (alteration in original) (internal quotations omitted).

40. *See id.* at 21-22 (quoting *Meritor*, 477 U.S. at 64-65).

41. *Id.* at 21.

42. *Id.* at 23.

43. *Id.*

44. 523 U.S. 75 (1998).

45. 524 U.S. 742 (1998).

46. 524 U.S. 775 (1998).

VII's "terms and conditions" provision,<sup>47</sup> and all three reaffirmed the basic "severe or pervasive" standard for hostile environment claims originally established in *Meritor*.<sup>48</sup> In particular, the *Oncale* opinion, which held that same-sex harassment could be actionable, noted that Title VII's prohibition of sexual harassment "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment."<sup>49</sup>

*Burlington Industries* and *Faragher* dealt with the circumstances under which an employer would be held vicariously liable for its agent's harassment, the issue left unresolved in *Meritor*.<sup>50</sup> These decisions held that such liability would automatically result in "quid pro quo" situations where plaintiffs suffer some tangible employment action such as discharge or demotion,<sup>51</sup> but that when no such tangible employment action is involved (i.e., only a "hostile environment" claim is made), the defending employer may escape liability by proving as an affirmative defense that it had a reasonable anti-harassment policy which the plaintiff unreasonably failed to take advantage of.<sup>52</sup>

Thus, the Supreme Court's post-*Meritor* decisions, while fine-tuning sexual harassment law under Title VII, continued to reaffirm its basic principles. These principles may be summarized as follows: (1) that sexual harassment is a form of sex discrimination that may violate Title VII's "terms and conditions" provision; (2) that a single incidence of quid pro quo harassment is sufficient to violate the statute and render an employer

47. See *Oncale*, 523 U.S. at 78, 81; *Burlington Indus.*, 524 U.S. at 754; *Faragher*, 524 U.S. at 781.

48. See *Oncale*, 523 U.S. at 81; *Burlington Indus.*, 524 U.S. at 754; *Faragher*, 524 U.S. at 786. For one of the Court's more recent endorsements of the "severe or pervasive" standard, see *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061, 2074 (2002) (racial discrimination).

49. *Oncale*, 523 U.S. at 81.

50. See *supra* note 37 and accompanying text.

51. See *Burlington Indus.*, 524 U.S. at 760-63; *Faragher*, 524 U.S. at 790-92. As the Court explained in the *Burlington Industries* opinion: "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." 524 U.S. at 762 (citations omitted).

52. See *Burlington Indus.*, 524 U.S. at 760-65; *Faragher*, 524 U.S. at 807-08. These opinions expressed some dissatisfaction with the "quid pro quo" and "hostile environment" labels, at least for purposes of determining an employer's vicarious liability, preferring instead to distinguish the two categories of harassment cases on the basis of whether a "tangible employment action resulted from a refusal to submit to a supervisor's sexual demands." *Burlington Indus.*, 524 U.S. at 753. Because this change in terminology does not appear to be significant in terms of the issue of whether particular conduct violates Title VII (as opposed to whether an employer should be held liable for such conduct, see *Burlington Indus.*, 524 U.S. at 753), this Article continues to use the terms "quid pro quo" and "hostile environment."

vicariously liable; (3) that even harassment that does not result in tangible employment actions may be unlawful; but (4) that such hostile environment claims, which do not automatically result in vicarious liability, are actionable only if the harasser's conduct is so "severe or pervasive" that it alters the victim's conditions of employment.

The difficulty of meeting the "severe or pervasive" standard has regularly been emphasized by the Supreme Court.<sup>53</sup> In a recent statement concerning this matter, the Court in *Faragher*, speaking through Justice Souter, stated:

Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." A recurring point in these opinions is that "simple teasing," offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."

These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.<sup>54</sup>

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53. See *supra* note 49 and accompanying text and *infra* note 54 and accompanying text.

54. *Faragher*, 524 U.S. at 788 (citations omitted). At the end of this passage, the *Faragher* opinion cited with approval two appellate decisions that both dealt with fairly serious harassing conduct: *Carrero v. New York City Housing Authority*, 890 F.2d 569 (2d Cir. 1989), and *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986). In *Carrero*, the Second Circuit rejected the defendant's characterization of his conduct, which consisted of several instances over a two-week period of stroking his female subordinate's arms and knees and attempting to kiss her on the lips and neck, as "trivial" and "innocuous." Instead, the court found that these "constant" unwelcome sexual advances pervasively altered the plaintiff's working environment sufficiently to create a hostile environment. 890 F.2d at 577-78. In *Moylan*, the plaintiff alleged that her supervisor repeatedly attempted to kiss and fondle her, and eventually raped her in his office. 792 F.2d at 749. Soon thereafter, she was fired for an unrelated and apparently legitimate reason. The district court, viewing the plaintiff's sexual harassment claim solely as a quid pro quo claim, dismissed it because the firing was warranted. *Id.* at 750. The Eighth Circuit held that the plaintiff's allegations also supported a hostile environment claim and remanded to the district court for a determination of this claim's merit. *Id.* at 750-52.

## 2. SEXUAL HARASSMENT CASES UNDER THE FHA

The first reported FHA decision involving sexual harassment was in the 1983 case *Shellhammer v. Lewallen*.<sup>55</sup> The plaintiffs in *Shellhammer* were a married couple who were evicted from their apartment allegedly because Mrs. Shellhammer refused her landlord's requests to pose for nude photographs and to have sex with him.<sup>56</sup> The initial problem was to determine whether these allegations stated a claim under the FHA. Noting the absence of any housing precedents, the magistrate to whom the case had been assigned turned to employment decisions under Title VII.<sup>57</sup> These cases had established two distinct types of sexual harassment claims: (1) "quid pro quo" claims where sexual favors were sought in exchange for continued employment or other job benefits; and (2) "hostile environment" claims where unwelcome sexual advances occurred but did not lead to lost employment or other economic injuries.<sup>58</sup>

The magistrate ruled that both types of claims were actionable under the FHA.<sup>59</sup> Turning to the facts, he rejected the plaintiffs' hostile environment claim on the ground that the landlord's two sexual requests over a three-to-four month period did not amount to the "pervasive and persistent" conduct necessary to establish this type of claim.<sup>60</sup> On the other hand, the quid pro quo claim, which did not require a showing of persistent conduct, did succeed because the decision to evict the plaintiffs was found to have been motivated by Mrs. Shellhammer's rejection of the defendant's sexual advances.<sup>61</sup> As a result, the magistrate concluded that the defendant had discriminated against Mrs. Shellhammer "on the basis of her sex in violation of 42 U.S.C. § 3604(b)."<sup>62</sup>

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55. 1 Fair Hous.-Fair Lending (Prentice Hall) ¶ 15,472.

56. *Id.* at 135.

57. *Id.*

58. *See id.* at 136.

59. *Id.*

60. *Id.* at 137. Although *Shellhammer*'s precise articulation of this standard differs somewhat from the "severe or pervasive" standard for hostile environment cases that the Supreme Court ultimately chose for Title VII cases, *see supra* notes 35 and 40-43 and accompanying text, and that subsequent fair housing decisions then adopted for FHA cases, *see cases cited infra* note 64 para. 1, there is no reason to suppose that the magistrate's use of a "pervasive and persistent" standard in *Shellhammer* resulted in a different decision than he would have reached had he used the "severe or pervasive" standard.

61. *Shellhammer*, 1 Fair Hous.-Fair Lending (Prentice Hall) at 137.

62. *Id.* at 139. The magistrate also ruled that Mr. Shellhammer was a proper plaintiff, because he suffered a "distinct and palatable [sic] injury" as a result of the landlord's actions against his wife. *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) ("distinct and palpable injury")). However, the magistrate ruled that the plaintiffs would not be permitted to prosecute the case as a class action on behalf of other female tenants who were also allegedly subjected to sexual harassment by Mr. Lewallen. *Id.* at 135. In a separate opinion, the Shellhammers were awarded \$7,410 for their

The *Shellhammer* opinion established the framework for all subsequent sexual harassment decisions involving housing. Virtually all of these decisions agreed with *Shellhammer* that it is appropriate to rely on Title VII precedents in establishing the contours of sexual harassment law under the FHA.<sup>63</sup> All agreed that if the plaintiff's complaint involved not the loss of a tangible housing benefit but rather only a "hostile environment" claim, then liability requires that the defendant's behavior be "severe or pervasive" enough to alter the terms and conditions of the plaintiff's residency.<sup>64</sup> Also, to the extent that subsequent cases cited a specific provision within the FHA that was violated by sexual harassment, they, like *Shellhammer*, generally relied on § 3604(b)'s prohibition of discriminatory "terms and conditions."<sup>65</sup> None ever mentioned § 3604(c)'s ban on discriminatory statements as a basis for a harasser's possible liability under the FHA.<sup>66</sup>

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individual claims. Thereafter, the plaintiffs appealed the magistrate's rejection of their class action and hostile environment claims, but the Sixth Circuit, in an unreported opinion, affirmed these rulings. *Shellhammer v. Lewallen*, No. 84-3573, 1985 WL 13505 (6th Cir. July 31, 1985) (per curiam).

63. See, e.g., *DiCenso*, 96 F.3d at 1007-08, 1010; *Williams v. Poretzky Mgmt., Inc.*, 955 F. Supp. 490, 494-97 (D. Md. 1996); *Beliveau v. Caras*, 873 F. Supp. 1393, 1397-98 (C.D. Cal. 1995); *New York ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988); *infra* note 70 and accompanying text (discussing *Honce v. Vigil*, 1 F.3d 1085, 1088-90, 1092 (10th Cir. 1993)); *infra* notes 84-86 and accompanying text (discussing *Hall v. Meadowood Ltd. P'ship*, No. 99-17122, 2001 U.S. App. LEXIS 5718 (9th Cir. March 28, 2001)); *cf. Gnerre v. Mass. Comm'n Against Discrimination*, 524 N.E.2d 84, 87-88 (Mass. 1988) (interpreting state fair housing law).

64. See, e.g., *DiCenso*, 96 F.3d at 1008; *Williams*, 955 F. Supp. at 496-98; *Beliveau*, 873 F. Supp. at 1398; *infra* note 72 and accompanying text (discussing *Honce*, 1 F.3d at 1090); *see also infra* note 85 and accompanying text (discussing *Hall*, 2001 U.S. App. LEXIS 5718 at \*4 (holding that harassment that "occurred only occasionally and was not severe" is not actionable); *Abrams*, 694 F. Supp. at 1104 (employing a "severe and pervasive" standard) (emphasis added)).

If loss of a tangible housing benefit is involved (i.e., a quid pro quo case), FHA decisions, like those under Title VII, require only a single incident of harassment. See, e.g., *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997); *Kogut*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,900.

65. See, e.g., *Beliveau*, 873 F. Supp. at 1396-98; *Grieger v. Sheets*, 689 F. Supp. 835, 840-41 (N.D. Ill. 1988); *infra* note 70 and accompanying text (discussing *Honce*, 1 F.3d at 1088-90, 1092); *see also Krueger*, 115 F.3d at 491-92 (finding violations of § 3604(b) and § 3617); *DiCenso*, 96 F.3d at 1006 (citing § 3604(b) and § 3617); *Williams*, 955 F. Supp. at 491, 494-96 (citing § 3604(a), § 3604(b), and § 3617); *Kogut*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,904 (finding violations of § 3604(a), § 3604(b), and § 3617); *cf. Gnerre*, 524 N.E.2d. at 87 (finding violation of state fair housing law's equivalent of § 3604(b)).

66. See cases cited *supra* note 65.

## 3. APPELLATE DECISIONS REJECTING HOSTILE HOUSING ENVIRONMENT CLAIMS

One result of the fact that courts deciding sexual harassment cases under the FHA have strictly followed Title VII law is that hostile environment claims have been defeated in cases where the challenged behavior did not reach the level of "severe or pervasive" harassment. Indeed, all three of the federal appellate decisions involving hostile environment harassment in housing have ruled for the defendants on the ground that their conduct, though inappropriate, was not shown to have met this "severe or pervasive" standard.

The first FHA case involving sexual harassment to produce a decision on the merits by a federal court of appeals was *Honce v. Vigil*,<sup>67</sup> where, in 1993, a divided panel of the Tenth Circuit ruled in favor of the defendant in a case containing both quid pro quo and hostile environment claims. The plaintiff in *Honce* was a single mother who was in the process of moving her mobile home into the defendant's trailer park when he asked her out socially on three different occasions.<sup>68</sup> After she had moved in and made clear to him that she did not want to go out with him, a series of disputes arose between them, which resulted in his threatening to evict her and her ultimate decision to move out.<sup>69</sup> In reviewing her FHA claims, all three judges on the panel focused exclusively on § 3604(b) and agreed that Title VII precedents should guide their interpretation of this provision.<sup>70</sup> In response to the plaintiff's quid pro quo claim, the majority held that she failed to show the necessary causal connection between the defendant's interference with her tenancy and her rejection of his advances.<sup>71</sup> As to her hostile environment claim, the court relied on *Meritor* and other Title VII decisions in holding that such a claim cannot be based on isolated or casual examples of discriminatory conduct, but rather requires behavior that is "sufficiently severe or pervasive to alter the conditions of the housing arrangement."<sup>72</sup> This meant, according to the *Honce* majority, that "[h]ostile environment claims usually involve a long-lasting pattern of

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67. 1 F.3d 1085. The Sixth Circuit's unpublished decision in the *Shellhammer* case some eight years before had dealt only with procedural matters. See *supra* note 62. Another purely procedural decision handed down at about the same time as *Honce* was *United States v. Presidio Investments, Ltd.*, 4 F.3d 805 (9th Cir. 1993).

68. *Honce*, 1 F.3d at 1086-87.

69. *Id.*

70. *Id.* at 1088-90, 1092.

71. *Id.* at 1088-89. In dissent, Judge Seymour opined that the plaintiff had presented sufficient evidence for a jury to conclude that the defendant "conditioned the quality of her home environment upon her positive response to his personal overtures . . . [and] that Mr. Vigil's conduct, culminating in his eviction threat, was in retaliation for her refusal of his invitations." *Id.* at 1093-94.

72. *Id.* at 1090 (internal quotation marks omitted).

highly offensive behavior.”<sup>73</sup> Believing that the defendant’s “offensive behavior here did not include sexual remarks or requests, physical touching, or threats of violence,” but only a series of requests to go out with him socially, the majority held that the “severe or pervasive” standard was not met.<sup>74</sup>

Three years after *Honce*, the Seventh Circuit in *DiCenso v. Cisneros*<sup>75</sup> ruled in favor of a landlord who had been held liable for hostile environment harassment in a Department of Housing and Urban Development (HUD) administrative proceeding. The landlord in *DiCenso*, in the course of collecting rent from a female tenant, caressed her arm and back; told her that, if she could not pay the rent, she could take care of it in other ways; and, when she slammed the door in his face, stood outside her apartment calling her names, including “bitch” and “whore.”<sup>76</sup> Based on these facts, HUD brought a charge alleging violations of § 3604(b) and § 3617, but the HUD administrative law judge initially ruled for the landlord, holding that his conduct was not severe enough to be actionable under the hostile environment theory and finding that the facts did not support a quid pro quo claim because a subsequent eviction proceeding was prompted not by the tenant’s rejection of the landlord’s sexual advances but by her refusal to pay the rent.<sup>77</sup> An appeal was taken to the HUD Secretary, who reversed as to the hostile environment claim, holding that the single incident here was “sufficiently severe as to constitute invidious sexual harassment” and therefore violated § 3604(b) and § 3617.<sup>78</sup> The case was remanded for a determination of relief by the HUD ALJ, who awarded the tenant \$5,000 for her emotional distress, assessed a civil penalty of \$5,000 against the landlord, and entered injunctive relief.<sup>79</sup>

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73. *Id.*

74. *Id.* In dissent, Judge Seymour took “issue with the majority’s assertion that the Mr. Vigil’s offensive behavior did not include ‘threats of violence’” and noted that “[the] evidence indicates that numerous women . . . had felt compelled to move out as a result of Mr. Vigil’s behavior or had been evicted by him.” *Id.* at 1095 (Seymour, J., dissenting). Judge Seymour concluded that sufficient evidence was presented to support a hostile environment claim. *Id.* at 1094-96. Although Judge Seymour was “particularly troubled by the majority’s treatment of Ms. Honce’s [hostile environment] claim,” her dissent was based on a different view of the record than the majority’s, rather than a disagreement with them over the propriety of applying Title VII precedent to hostile environment claims based on § 3604(b). *See id.* at 1094-95 (citing Title VII precedents as controlling this claim).

75. 96 F.3d 1004.

76. *Id.* at 1006.

77. 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 25,098, at 25,885-86 (HUD ALJ March 20, 1995).

78. 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 25,101, at 25,912 (HUD Secretary April 18, 1995).

79. 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 25,108, at 25,951-52 (HUD ALJ June 19, 1995).

The landlord appealed to the Seventh Circuit, which held in a 2-1 decision that, based on Title VII law, his behavior was not “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”<sup>80</sup> According to the majority opinion in *DiCenso*: “the problem with [the female tenant’s] complaint is that although DiCenso may have harassed her, he did so only once. Moreover, DiCenso’s conduct, while clearly unwelcome, was much less offensive than other incidents which have not violated Title VII.”<sup>81</sup>

The *DiCenso* majority recognized that a single incident of harassment, if severe enough, could be sufficient to support a hostile environment claim and conceded that the landlord’s behavior here included a comment that “vaguely invited [the tenant] to exchange sex for rent.”<sup>82</sup> Nevertheless, it concluded, based on “the totality of circumstances,” that DiCenso’s conduct was “not sufficiently egregious to create an objectively hostile housing environment” because “he did not touch an intimate body part, and did not threaten [the tenant] with any physical harm.”<sup>83</sup>

Finally, in 2001 in *Hall v. Meadowood Ltd. Partnership*, the Ninth Circuit affirmed a district court’s entry of summary judgment against a plaintiff-tenant who had alleged a variety of FHA violations by his apartment manager, including sexual harassment based on the manager’s “gender-based remarks and conduct.”<sup>84</sup> In an unpublished opinion, the appellate court announced that it would be “guided by interpretations of Title VII” and determined that liability under the FHA was not appropriate because “the conduct at issue occurred only occasionally and was not

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80. *DiCenso*, 96 F.3d at 1008 (citing *Meritor*, 477 U.S. at 67).

81. *Id.* at 1008-09. In dissent, Judge Flaum conceded that “the majority may very well be correct in stating that DiCenso’s conduct would not be sufficient to give rise to a claim for sexual harassment under our Title VII precedent,” but concluded nevertheless that it was appropriate to uphold HUD’s determination that this conduct violated the FHA under the *Chevron* doctrine, which requires courts to defer to an agency’s reasonable interpretation of a statute it has been entrusted to administer. *Id.* at 1009-10 (Flaum, J., dissenting) (relying on *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984)). For one of the Supreme Court’s more recent statements about the judicial deference that is owed to an agency’s decision in this context, see *United States v. Mead Corp.*, 533 U.S. 218 (2001).

82. *DiCenso*, 96 F.3d at 1009. The majority failed to address the impact of what the dissent described as Mr. DiCenso’s “hurling of gender-oriented epithets” after the plaintiff rejected his offer. *Id.* at 1010 (Flaum, J., dissenting).

83. *Id.* at 1009. After the Seventh Circuit’s decision, the HUD ALJ made an award of attorneys’ fees to the landlord based on a finding that HUD’s litigation position was not “substantially justified” after the ALJ’s initial decision finding that DiCenso had engaged in only one “non-severe” incident of harassment. See 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 25,131, at 26,098-102 (HUD ALJ June 26, 1997).

84. *Hall*, 2001 U.S. App. LEXIS 5718 at \*3. The opinion contains no further description of the remarks and conduct at issue.



severe.”<sup>85</sup> Thus, according to the Ninth Circuit, “[w]hile the [manager’s] conduct arguably may have been crude or inappropriate, it did not rise to the level of actionable sexual harassment.”<sup>86</sup>

### C. Critiques of FHA “No Liability” Decisions Based on Title VII

The implicit message of the appellate court decisions described in the previous Section is that a landlord may subject his female tenants to sexual harassment, so long as that harassment does not result in the loss of tangible housing benefits and is not so egregious or frequent as to meet the “severe or pervasive” standard. This result has been criticized by a number of commentators.<sup>87</sup> The Seventh Circuit’s decision in *DiCenso* is seen as particularly troubling.<sup>88</sup> While the majority opinion in *DiCenso* stressed that it did not condone the landlord’s conduct and cautioned that it “should not be read as giving landlords one free chance to harass their tenants,”<sup>89</sup> it seemed to do just that, at least if the landlord’s “one free chance” does not involve “touch[ing] an intimate body part [or] threaten[ing the tenant] with [] physical harm.”<sup>90</sup>

Commentators who have criticized *DiCenso* and other FHA hostile environment cases argue not that these decisions have misread Title VII precedents, but that their reliance on Title VII is inappropriate in FHA cases because the housing context makes sexual harassment there worse than in the workplace.<sup>91</sup> The gist of this argument is that one’s home should be a special place of privacy and sanctuary and should be more protected from an outsider’s unwelcome intrusions than less sacrosanct locales such as the workplace. In addition, a harassing landlord is seen as more threatening than a job supervisor, both because a landlord has virtually unlimited access to his potential victims at any time and because the unequal power relationship that is inherent in harassment cases is generally more pronounced in a landlord-tenant situation than in an employment setting. This latter consideration is underscored by the fact that most reported cases of sexual harassment in housing have involved low-income

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85. *Id.* at \*4.

86. *Id.*

87. See, e.g., Adams, *supra* note 4, at 44-55; Lindemyer, *supra* note 4, at 383-86; Carlotta J. Roos, Note, *DiCenso v. Cisneros: An Argument for Recognizing the Sanctity of the Home in Housing Sexual Harassment Cases*, 52 U. MIAMI L. REV. 1131, 1139-46 (1998).

88. See *supra* notes 75-83 and accompanying text.

89. *DiCenso*, 96 F.3d at 1009.

90. *Id.*

91. See Adams, *supra* note 4, at 21-28, 44-48; Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who Is the Reasonable Person?*, 38 B.C. L. REV. 861, 885-88 (1997); Lindemyer, *supra* note 4, at 352-53, 368-78; Roos, *supra* note 87, at 1139-46.

women whose need for the housing controlled by their harasser is even more desperate than their counterparts' need for a job in most workplace harassment cases.<sup>92</sup>

The view that harassment in housing may be more detrimental than in the workplace actually dates back to the early days of FHA harassment decisions. In an oft-quoted passage in the first major law review article on housing harassment in 1987, Regina Cahan pointed out that:

When sexual harassment occurs at work, at that moment or at the end of the workday, the woman may remove herself from the offensive environment. She will choose whether to resign from her position based on economic and personal considerations. In contrast, when the harassment occurs in a woman's home, it is a complete invasion in her life. Ideally, home is the haven from

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92. See Cahan, *supra* note 3, at 1067 (98% of housing harassment victims identified by survey had annual incomes of less than \$20,000, and 75% had annual incomes of under \$10,000). This trend is borne out by cases and articles on the subject. See *Krueger*, 115 F.3d at 489 (noting that defendant landlord knew that victim's Section Eight voucher was not enough to pay the monthly rent, but he rented to her anyway, pressuring her to have sex with him in order to make up for the shortfall); *Honce*, 1 F.3d at 1094 (Seymour, J., dissenting) (noting that plaintiff was "a single mother of a young child" who "was in severe financial straits"); *Woods v. Foster*, 884 F. Supp. 1169, 1171 (N.D. Ill. 1995) (describing sexual harassment victims as residents of a homeless shelter); Nancy Blodgett, *Lusting Landlords: More Women Tenants Suing*, A.B.A. J., Feb. 1, 1987, at 30 (noting that the "most frequent targets [of harassment] are impoverished single [] women in a tight housing market"); Annette Fuentes & Madelyn Miller, *Unreasonable Access: Sexual Harassment Comes Home*, CITY LIMITS, June/July 1986, at 16, 18 (describing a landlord who rented primarily to women receiving public assistance so that he could request sex in lieu of rent); *Official Accused of Harassment*, DALLAS MORNING NEWS, Sept. 27, 1994, at D22 (describing suit against housing official who had allegedly made sexual advances to women applying for Section Eight housing).

Commentators have also discussed the link between low socioeconomic status of tenants and housing harassment by landlords. See, e.g., Robert Rosenthal, Comment, *Landlord Sexual Harassment: A Federal Remedy*, 65 TEMP. L. REV. 589, 590-93 (1992). Rosenthal argues that socioeconomic conditions in urban areas during the 1970s and 1980s, including a decline in affordable housing options and a growing number of female-headed households receiving welfare, led directly to the problem of landlord sexual harassment. See *id.* at 590-92. Similarly, in Adams, *supra* note 4, at 30-38, Professor Michelle Adams discusses the interplay between gender, poverty, race, and single-parenthood that disproportionately consigns low-income, minority, female heads of households to rental housing, where they are more vulnerable to harassment from landlords and property managers than if they owned their homes. Furthermore, Adams points out, the very precariousness of many of these women's situations—the difficulty of finding affordable housing, their reliance on housing subsidies—is a factor that landlords may seek to exploit. *Id.* at 65-68. See also Zalesne, *supra* note 91, at 882-84 (describing the "power matrix between a landlord and tenant" as a function of gender, race, socioeconomic class, and scarcity of housing).

the troubles of the day. When home is not a safe place, a woman may feel distressed and, often, immobile.<sup>93</sup>

Understanding the home as a uniquely protected place has led commentators to conclude that harassing conduct should be held to violate the FHA even if it would not be egregious enough to be actionable under Title VII. Thus, for example, Professor Zalesne has argued that landlords should be held “to a heightened standard where they have significant power over their tenants.”<sup>94</sup> Similarly, Professor Adams has advocated that, because “[s]exual harassment at home must be recognized and understood as a distinct and significant civil rights issue,”<sup>95</sup> a housing provider’s harassing activities should be evaluated based on “the nature and importance of home in the American cultural imagination,” which would likely change the result in favor of liability in many FHA cases.<sup>96</sup>

The view that sexual harassment in housing might be more damaging to its victims than workplace harassment finds some support in the cases. For example, in *Beliveau v. Caras*, a district court supported its conclusion that principles of sexual harassment law derived from Title VII should apply “as strongly in the housing situation as in the workplace”<sup>97</sup> by quoting Regina Cahan’s statement set forth above.<sup>98</sup> Subsequently, two other trial court decisions—*Williams v. Poretzky Management, Inc.*<sup>99</sup> and *Reeves v. Carrollsburg Condominium Unit Owners Ass’n*<sup>100</sup>—cited this part of the *Beliveau* opinion with approval, with one opinion noting that “[a]t least one court has recognized that sexual harassment in the home may have more severe effects than harassment in the workplace.”<sup>101</sup>

While all three of these decisions upheld the plaintiffs’ sexual harassment claims under the FHA, each did so on the basis of familiar Title VII standards. In *Beliveau*, for example, the defendant-landlord was accused of making several unwelcome sexual remarks and one incident of offensive touching, which the court concluded met the “severe or pervasive” standard applicable to Title VII hostile environment claims.<sup>102</sup>

93. Cahan, *supra* note 3, at 1073.

94. Zalesne, *supra* note 91, at 893.

95. Adams, *supra* note 4, at 71.

96. *Id.* at 62. See also Lindemyer, *supra* note 4, at 368 (“The expectation of both safety and privacy in one’s home is justifiably greater than that in the workplace, and thus a higher standard of conduct is warranted.”). See generally Roos, *supra* note 87.

97. *Beliveau*, 873 F. Supp. at 1397.

98. *Id.* at 1397 n.1 (quoting Cahan, *supra* note 3, at 1073).

99. *Williams*, 955 F. Supp. 490.

100. 3 Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 16,250, at 16,250.5 (D.D.C. Dec. 18, 1997) (citing *Beliveau*, 873 F. Supp. at 1397 n.1).

101. *Williams*, 955 F. Supp. at 498 (citing *Beliveau*, 873 F. Supp. at 1397 n.1); see also *Reeves*, 3 Fair Hous.-Fair Lending (Aspen L. & Bus.) at 16,250.5.

102. *Beliveau*, 873 F. Supp. at 1398.

Similarly egregious behaviors were involved in *Williams* and *Reeves*.<sup>103</sup> Thus, though the courts recognized the possibility that harassment in housing might be worse than in the workplace, this was not a necessary element of their decisions, nor was it offered to justify adoption of a different standard for FHA cases than exists under Title VII.

Indeed, the argument for interpreting FHA's "terms and conditions" provision more rigorously than Title VII's analog is ultimately unpersuasive. The basic premise of this argument—that one's home should receive more protection than one's workplace—may well be sound, but the argument is essentially one of policy, and therefore more properly directed to Congress as the author of the laws involved rather than to the courts who are merely charged with interpreting these laws. The fact remains that Congress, by adopting the identical "terms and conditions" language in the FHA's § 3604(b) that it employed in Title VII's comparable provision four years earlier,<sup>104</sup> chose to outlaw only those types of housing practices in § 3604(b) that it banned in the employment sphere under Title VII's "terms and conditions" provision. Given this congressional decision and the consistent determination by the Supreme Court that a "terms and conditions" violation of Title VII occurs in the hostile environment context only if the harasser's behavior is "severe or pervasive," lower courts really have no choice but to apply a similar standard to FHA claims based on § 3604(b). The result may be unfortunate—for purposes of Title VII, as well as the FHA—but as long as Congress sees fit to accept the Supreme Court's interpretation of the meaning of Title VII's "terms and conditions" provision in harassment cases, that interpretation will control § 3604(b) claims as well.

There is, however, a way out of this Title VII-imposed limitation on housing harassment cases, but it is to look to language in the FHA's prohibitions that is different from, not similar to, Title VII's language. Specifically, the FHA has two substantive provisions—§ 3604(c) and § 3617—where the language is not only significantly broader than their Title VII counterparts, but may be applicable to harassment situations.

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103. See *Williams*, 955 F. Supp. at 491-93, 496-98 (holding that two incidents of sexual assault followed by continued verbal harassment over a three-and-a-half-month period, which included calling plaintiff a "bitch" and other derogatory names, satisfied the "severe or pervasive" standard for hostile environment claims under Title VII); *Reeves*, 3 Fair Hous.-Fair Lending (Aspen L. & Bus.) at 16.250.1-16.250.2, 16.250.5-16.250.6 (holding repeated racial and sexist epithets, including physically intimidating plaintiff by threatening to rape and kill her on numerous occasions over a period of many years, satisfied the "severe or pervasive" standard for hostile environment claims under Title VII).

104. See *supra* notes 18-20 and accompanying text.

*D. The FHA's Broader Language in § 3604(c) and § 3617*

Section 3604(c) of the FHA 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.<sup>105</sup>

The language of this provision is in many respects similar to a provision in Title VII that makes it unlawful for an employer “to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer . . . indicating any preference, limitation, specification, or discrimination, based on race [or other prohibited factors].”<sup>106</sup> The operative language of these provisions is virtually identical with one major exception,<sup>107</sup> which is that § 3604(c) goes beyond its Title VII counterpart by banning discriminatory “statements” as well as discriminatory “notices” and “advertisements.” By extending its prohibitions to discriminatory statements, § 3604(c) provides a source of law that would seem to cover most types of verbal harassment that are in no way addressed by Title VII.

This broad coverage could prove significant for housing harassment cases. Survey data indicate that speech-based harassment is present in virtually all sexual harassment cases.<sup>108</sup> Even more significantly, in a large

105. 42 U.S.C. § 3604(c).

106. *Id.* § 2000e-3(b).

107. Besides the difference discussed in the text, other differences between these two provisions do exist, such as Title VII's inclusion of an exception for a “bona fide occupational qualification”; Title VII's addition of the word “specification” along with “preference, limitation, or discrimination” in the list of prohibited types of communications; the FHA's inclusion of “familial status” and “handicap” as additional bases of prohibited discrimination; and the FHA's addition of a provision also making it unlawful for such communications to indicate “an intention to make any such preference, limitation, or discrimination.” However, with the exception of the last item, *see infra* text accompanying notes 180-87, none of these differences are significant with respect to the coverage issues that are at the heart of this Article.

108. *See Cahan, supra* note 3, at 1070. Among survey respondents who reported being sexually harassed, 71.7% received requests for sexual intercourse, sexual exposure, or to pose for nude pictures, and 38.8% were subjected to abusive remarks. In contrast, conduct-based harassment—unwanted touching or indecent exposure—was only present in 35.4% of cases. *See id.* The numbers total higher than 100% because some respondents reported more than one type of harassing activity. *See id.*

number of cases the *only* type of harassment is verbal.<sup>109</sup> Still, despite the apparent applicability of § 3604(c) to housing harassment cases, few litigants have asserted claims under this provision,<sup>110</sup> and none of the commentators who have argued in favor of a more generous standard for FHA harassment claims than Title VII's have mentioned § 3604(c).<sup>111</sup>

The other FHA provision that might be helpful in addressing housing harassment is § 3617, which makes it unlawful:

to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 803, 804, 805, or 806 [42 U.S.C. §§ 3603, 3604, 3605, or 3606].<sup>112</sup>

This provision also has a counterpart in Title VII, which makes it unlawful for an employer to discriminate against any individual employee "because he has opposed any practice made an unlawful employment

109. *See id.* at 1072 (noting that requests for sexual intercourse occurred independent of any other type of harassment 52.4% of the time, and abusive remarks occurred independently 33.3% of the time). Of course, purely speech-based harassment may be sufficient to violate § 3604(b), but, as decisions such as *DiCenso* show, it may be difficult for a plaintiff to prove that speech-based harassment alone is "severe or pervasive" enough to be actionable under that part of the statute. *See supra* Part I.B.3.

110. The only reported sexual harassment decisions in which § 3604(c) claims were discussed appear to be *Walker v. Crawford*, 3 Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 16,461, at 16,461.1-1.6 (N.D. Ohio July 21, 2000) (upholding a jury verdict in favor of some plaintiffs and against others in a case that included claims under §§ 3604(a), 3604(c), 3617, and various state law theories), and *Woods*, 884 F. Supp. at 1174-75 (denying the defendants' motion to dismiss a sexual harassment complaint that included claims under §§ 3604(a), 3604(b), 3604(c), 3617, and state law). *See also Hall*, 2001 U.S. App. LEXIS 5718 (affirming dismissal of plaintiff's complaint which included a § 3604(c) claim for disability discrimination and allegations of sexual harassment that did not refer to § 3604(c)). In none of these cases were the § 3604(c) claims of independent significance; that is, they neither supported a liability theory nor additional relief based on standards different from the plaintiffs' other FHA claims.

A § 3604(c) claim was asserted in one racial harassment case by a tenant of Lebanese descent who alleged that his apartment complex's managers subjected him to repeated slurs, threats, and insults due to his national origin. *Texas v. Crest Asset Mgmt., Inc.*, 85 F. Supp. 2d 722 (S.D. Tex. 2000). The court upheld many of the plaintiffs' claims but granted summary judgment to the defendants on the § 3604(c) claim without providing any detailed justification for this decision. *Id.* at 732.

111. *See, e.g., Adams, supra* note 4; Lindemyer, *supra* note 4; Roos, *supra* note 87. In her seminal article, which introduced and outlined the cause of action for housing harassment, Cahan analyzed the portions of the FHA which she believed could be used to litigate housing harassment cases. Section 3604(c) was not one of them. *See Cahan, supra* note 3, at 1087-88.

112. 42 U.S.C. § 3617.

practice by this title, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this title.”<sup>113</sup> Here again, the language of the FHA’s provision is clearly broader. Title VII’s prohibition is limited to retaliation against an individual for his opposition to practices condemned by the statute. Section 3617 not only covers retaliation,<sup>114</sup> but bans other types of discriminatory behavior as well.

By its terms, § 3617 prohibits a wide variety of practices, including coercion, intimidation, threats, and—most importantly for present purposes—“interfere[nce] with any person in the exercise or enjoyment of . . . any right granted or protected by” §§ 3603-3606.<sup>115</sup> Certainly, sexual harassment could be characterized as a form of “interference” with a female tenant’s right to nondiscriminatory treatment,<sup>116</sup> and some litigants

113. *Id.* § 2000e-3(a).

114. *See, e.g.,* *Walker v. City of Lakewood*, 272 F.3d 1114, 1126-31 (9th Cir. 2001); *Krueger*, 115 F.3d at 490-92; *Texas*, 85 F. Supp. 2d at 732-34; *Congdon v. Strine*, 854 F. Supp. 355, 363-64 (E.D. Pa. 1994); *Shapiro v. Cadman Towers, Inc.*, 844 F. Supp. 116, 117-18, 123 n.3 (E.D.N.Y. 1994), *aff’d*, 51 F.3d 328 (2d Cir. 1995); *see also* 24 C.F.R. § 100.400(c)(5) (2002) (HUD regulation interpreting § 3617 to prohibit “[r]etaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act”).

Retaliation in violation of § 3617 may occur in the context of a sexual harassment case. For example, a landlord was held to have violated § 3617 by, *inter alia*, initiating eviction proceedings against a female tenant in response to her having filed a fair housing complaint based on his harassing behavior toward her. *Krueger*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) at 26,026. In such a situation, however, the § 3617 violation is based not on the landlord’s sexual harassment but instead on his taking an adverse action against the tenant (e.g., eviction) in response to the latter’s having filed an FHA complaint. *Id.* *See also* *Kogut*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) at 25,895, 25,904-05 (finding § 3617 retaliation claim failed in case involving sexual harassment because the evidence did not show that defendants were aware of complainant’s intention to file FHA complaint when they evicted her).

115. 42 U.S.C. § 3617. For a discussion of the meaning of the words “coerce,” “intimidate,” “threaten,” and “interfere” in § 3617, *see Walker*, 272 F.3d at 1128-29.

116. *See* cases cited *infra* note 120. In addition to this direct type of § 3617 claim, a victim of sexual harassment could conceivably sue under § 3617 because the defendant harassed her “on account of [her] having exercised or enjoyed . . . any right granted or protected” by §§ 3603-3606. 42 U.S.C. § 3617. This type of § 3617 claim, however, would not only be subject to the potential difficulties of a direct claim that are discussed in the subsequent two paragraphs of the text, but also to the potential additional defense that the landlord’s offending behavior was prompted by the victim’s sex and not “on account of” her exercise of her §§ 3603-3606 rights. *See, e.g., Walker*, 3 Fair Hous.–Fair Lending (Aspen L. & Bus.) at 16,461.4 (finding that sexual harassment claim based on § 3617 fails even though landlord was shown to have coerced and intimidated female tenant, because “the intimidation and coercion was not ‘on account of [her] having exercised or enjoyed’ any Fair Housing right”); *see also infra* Part II.A.4 (arguing that a landlord’s sexual harassment is typically “because of sex”). *But see Grieger*, 689 F. Supp. at 840-41 (noting that § 3617 would be violated if landlord, after his sexual harassment of female tenant,

have cited § 3617 along with other FHA provisions in their housing harassment complaints.<sup>117</sup>

There are, however, some potential difficulties in using § 3617 as an independent source of law to challenge housing harassment. First, some courts have held that the term “interfere” in § 3617—coming as it does after the words “coerce, intimidate, [and] threaten”—should be interpreted to require a certain level of force,<sup>118</sup> which might mean that the type of offensive and unwelcome, albeit non-threatening, comments that often form the basis for hostile environment claims would not be actionable under § 3617. Other courts, however, have given a more generous interpretation to this term,<sup>119</sup> and at least two decisions have held that sexual harassment may sufficiently “interfere” with a female tenant’s enjoyment of her apartment to establish a § 3617 violation.<sup>120</sup> In both of

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intimidated, threatened, or interfered with her “because of [her] refusal to succumb to [his] sexual demands”) (emphasis added).

117. See *Krueger*, 115 F.3d at 491; *DiCenso*, 96 F.3d at 1006; *Walker*, 3 Fair Hous.–Fair Lending (Aspen L. & Bus.) at 16,461.1-2, 16,461.4; *Reeves*, 3 Fair Hous.–Fair Lending (Aspen L. & Bus.) at 16,250.5 n.7; *Williams*, 955 F. Supp. at 491; *Woods*, 884 F. Supp. at 1175; *Abrams*, 694 F. Supp. at 1102; *Grieger*, 689 F. Supp. at 836, 840-41; *Kogut*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) at 25,895, 25,904-05.

118. See, e.g., *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 208 F. Supp. 2d 896, 903-05 (N.D. Ill. 2002) (holding that various non-violent actions directed against plaintiffs by officials of their homeowners’ association are not sufficiently severe “to implicate[] concerns expressed by Congress in” § 3617); *Egan v. Schmock*, 93 F. Supp. 2d 1090, 1092-93 (N.D. Cal. 2000) (holding that § 3617 claim based on defendants’ interference with plaintiffs’ enjoyment of their home can succeed only if defendants’ conduct was intended to drive plaintiffs out of their home); *Hous. Investors, Inc. v. City of Clanton*, 68 F. Supp. 2d 1287, 1301 (M.D. Ala. 1999) (holding that impermissible interference under § 3617 “must be more than peaceable opposition through legal channels”); *Salisbury House, Inc. v. McDermott*, No. CIV.A. 96-CV-6486, 1998 WL 195693, at \*12 (E.D. Pa. March 24, 1998) (holding that “some type of force or compulsion” is required for a violation of § 3617); see also *Maki v. Laakko*, 88 F.3d 361, 365 (6th Cir. 1996) (holding that incidents amounting to “no more than minimal friction between a landlord and tenants” are insufficient to make out a harassment claim under the FHA); *Mich. Prot. and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994) (rejecting the view that “any action whatsoever that in any way hinders a member of a protected class” in exercising fair housing rights constitutes a violation of § 3617).

119. See, e.g., *Walker*, 272 F.3d at 1128-29; *United States v. City of Hayward, California*, 36 F.3d 832, 835-36 (9th Cir. 1994); *Babin*, 18 F.3d at 347; *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613-14 (D.N.J. 2000); *Texas*, 85 F. Supp. 2d at 732-33; *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 733 n.5 (E.D. Va. 1992); *People Helpers Found., Inc. v. City of Richmond*, 781 F. Supp. 1132, 1135-36 (E.D. Va. 1992). According to the Ninth Circuit’s decision in *Walker*, “interference” for purposes of § 3617 simply means “the act of meddling in or hampering an activity or process.” 272 F.3d at 1129 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1178 (14th ed. 1961)).

120. *Krueger*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) at 26,026 (holding that landlord’s sexual harassment of female tenant interfered with the “quiet enjoyment of her apartment” in violation of § 3617); *Kogut*, 2A Fair Hous.–Fair Lending (Aspen L. &



these cases, however, the defendant's harassment was severe; indeed, it amounted to quid pro quo harassment in violation of the complainant's rights under § 3604(b),<sup>121</sup> which meant that it was sufficiently egregious to satisfy even the restrictive Title VII standards.

A second potential stumbling block in using § 3617 to challenge sexual harassment arises from the concluding part of this provision, which requires that the interference be with a person's exercise or enjoyment of a right "granted or protected by" §§ 3603-3606. In order to assert a § 3617 claim, therefore, a victim of harassment would have to assert a right covered by these other substantive provisions. As explained by the Second Circuit, § 3617 "prohibits the interference with the exercise of Fair Housing rights only as enumerated in these referenced sections [3603-3606]."<sup>122</sup> While this does not mean that a § 3617 claim always requires an outright violation of §§ 3603-3606, there must at least be some sort of connection to a right covered by these other substantive provisions.<sup>123</sup> The problem is that if the "predicate" right in a § 3617 harassment case is

Bus.) at 25,895, 25,904-05 (holding that landlord's eviction of tenant who refused his sexual advances sufficiently interfered with tenant's "right to quiet enjoyment of her apartment" to establish § 3617 violation).

121. *Krueger*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 26,022-26; *Kogut*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,900-04.

122. *Frazier v. Rominger*, 27 F.3d 828, 834 (2d Cir. 1994).

123. *See, e.g., City of Hayward*, 36 F.3d at 836; *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975); *Egan*, 93 F. Supp. 2d at 1092-93; *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 240-43 (E.D.N.Y. 1998); *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992); *Abrams*, 694 F. Supp. at 1103-04 (citing *Stackhouse v. DeSitter*, 620 F. Supp. 208, 210-11 (N.D. Ill. 1985)). *But see Halprin*, 208 F. Supp. 2d at 903-05 (suggesting that, in the Seventh Circuit, it is doubtful that § 3617 could support a claim based on conduct that would not also violate one of the FHA's other substantive provisions).

For example, § 3617 prohibits interference against a person "on account of his having aided or encouraged any other person" in the exercise of §§ 3603-3606 rights, a provision that protects a variety of housing "helpers" (e.g., an apartment manager who is fired for renting to a minority tenant) even if the protected-class member involved is successful in exercising her fair housing rights. *See, e.g., Walker*, 272 F.3d at 1126-31; *see also Grieger*, 689 F. Supp. at 840 (upholding § 3617 claim by husband of target of landlord's sexual demands where husband was thereafter threatened by landlord for "encouraging" his wife to refuse those demands). Section 3617 may also be invoked by protected-class members against non-housing providers who interfere with their §§ 3603-3606 rights (e.g., claims against neighbors who interfere with minority plaintiffs' housing rights in order to drive them out of the neighborhood). *See, e.g., United States ex rel. Smith v. Hobbs*, 44 F. Supp. 2d 788, 789-90 (S.D. W. Va. 1999); *Stirgus v. Benoit*, 720 F. Supp. 119, 123 (N.D. Ill. 1989); *Stackhouse*, 620 F. Supp. at 211 & n.6; *HUD v. Gutleben*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,078, at 25,726-28 (HUD ALJ Aug. 15, 1994) (holding that neighbor violated § 3617 by directing racial epithets at tenant's children); *HUD v. Weber*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,041, at 25,424 (HUD ALJ Feb. 18, 1993) (holding that neighbor's verbal harassment of Hmong who was inspecting house next door as a prospective tenant violates § 3617).

based on § 3604(a)'s ban on discriminatory refusals to deal or on § 3604(b)'s guarantee of nondiscrimination in "terms or conditions," then the fact that these provisions are subject to the restrictive Title VII standards in sexual harassment cases<sup>124</sup> may mean that § 3617 cannot be used without reference to these standards. Of course, the predicate right could be based on § 3604(c), but that would simply shift the analysis of a § 3617 claim back to § 3604(c), thereby raising again the question of the latter provision's applicability to the situation.

Whatever the reason, § 3617 has not proved to be an independently useful source of law in this field. Practically every housing harassment case in which a § 3617 claim has been raised has also included claims under § 3604(a) and/or § 3604(b),<sup>125</sup> and every court that has considered such a case has employed the exact same Title VII standards that would have been appropriate even in the absence of the § 3617 claim.<sup>126</sup> Therefore, the FHA's only provision that provides a clear source of liability in harassment situations that do not violate Title VII's rigorous standards would seem to be § 3604(c). For this reason, § 3604(c) is the focus of the remainder of this Article.

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124. See, e.g., cases cited *supra* note 64 and Part I.B.3.

125. See *infra* note 126.

126. *DiCenso*, 96 F.3d 1004, 1006, at 1008-09; *Reeves*, 3 Fair Hous.-Fair Lending (Aspen L. & Bus.) at 16,250.5-6; *Williams*, 955 F. Supp. at 491, 494-96; *Abrams*, 694 F. Supp. at 1102, 1104; see also *Krueger*, 115 F.3d at 491-92 (affirming decision against landlord under both § 3604(b) and § 3617); *Walker*, 3 Fair Hous.-Fair Lending (Aspen L. & Bus.) at 16,461.1-6 (upholding jury verdicts against landlord based on both § 3604 and § 3617); *Grieger*, 689 F. Supp. at 840-41 (avoiding decision on § 3617 claim in light of the adequacy of § 3604(b) claim and upholding § 3617 claim for post-harassment interference); *Kogut*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,900 (finding that apartment manager's eviction of a female tenant who rejected his advances violated §§ 3604(a), 3604(b) and 3617). But see *Woods*, 884 F. Supp. at 1175 (suggesting that sexual harassment claim against non-profit homeless shelter may be more appropriate under § 3617 than § 3604(a) because the former provision "is not limited to acts of 'sale' or 'rental'").

Some early decisions relied on § 3617 independently of claims under § 3604, because the latter were subject to a more restrictive statute of limitations. See, e.g., *Abrams*, 694 F. Supp. at 1102-04; see also *Grieger*, 689 F. Supp. at 836-37 (holding that statute of limitations decision concerning plaintiffs' §§ 3603-3606 claims not applicable to their § 3617 claim). As a result of the 1988 Fair Housing Amendments Act, however, § 3617 claims were brought under the same enforcement provisions as other FHA claims, which means that this reason for treating § 3617 claims separately is no longer relevant. See SCHWEMM, *supra* note 24, § 20:1 nn.9-16 and accompanying text. Even in these pre-1988 cases, however, the courts never suggested that a § 3617 claim based on sexual harassment should be decided by different substantive standards than those that applied to § 3604(a) and/or § 3604(b).

## II. § 3604(c)'S APPLICABILITY TO SEXUAL HARASSMENT

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

#### 1. OVERVIEW

A violation of § 3604(c) requires a showing of five elements: that a potential defendant (1) “make, print, or publish, or cause to be made, printed, or published” (2) “any notice, statement, or advertisement” (3) “with respect to the sale or rental of a dwelling” (4) “that indicates any preference, limitation, or discrimination . . . or any intention to make any such preference, limitation, or discrimination” (5) “based on . . . sex” or some other factor made illegal by the FHA.<sup>127</sup> An analysis of each of these elements is necessary to determine if § 3604(c) may provide an independent basis for challenging housing harassment.

The first two elements of § 3604(c) would be present in virtually all harassment cases, which invariably involve a landlord or other housing agent<sup>128</sup> “mak[ing]” a “statement” to a current or prospective tenant.<sup>129</sup> It is clear that the word “statement” in § 3604(c) covers oral as well as

127. 42 U.S.C. § 3604(c). Unlike Title VII, which by its terms applies only to “employers” and certain other identified entities, *see id.* §§ 2000e-2, 2000e-3, the FHA simply declares certain practices, such as those identified in § 3604(c), to be unlawful without “limit[ing] or defin[ing] who can be sued for discriminatory housing practices,” thereby implying that any person or entity that engages in such practices would be a proper defendant under the statute. *See Holley v. Crank*, 258 F.3d 1127, 1130 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 1959 (2002).

128. Although we often use “landlord” in the remainder of this Article to refer to a potential defendant in a § 3604(c) suit, it should be noted that this law bans discriminatory statements made by *all* persons—not just landlords—who are engaged in housing sales and rental activity, including apartment managers, other agents and employees of a landlord, condominium and cooperative board members, realtors, and the like. *See cases cited in Robert G. Schwemm, Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 *FORDHAM URB. L.J.* 187, 266 nn.365-68 (2001). In particular, sexual harassment cases often involve statements by a landlord's agent. For purposes of the Fair Housing Act, an agent “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 (2002). *See, e.g., Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (holding that tenant who collected rent and showed apartments for owners but did not receive compensation was an agent of the owners, and therefore her statements could violate § 3604(c) and make owners liable therefor). *See generally* SCHWEMM, *supra* note 24, § 12:10.

129. *See, e.g., Krueger*, 115 F.3d 487; *DiCenso*, 96 F.3d 1004; *Williams*, 955 F. Supp. 490; *Beliveau*, 873 F. Supp. 1393; *Walker*, 3 Fair Hous.—Fair Lending (Aspen L. & Bus.) ¶ 16,461; *Grieger*, 689 F. Supp. 835.

written communications,<sup>130</sup> and that a single offending statement is sufficient to violate this provision.<sup>131</sup> The third, fourth, and fifth elements of a § 3604(c) violation, however, raise some serious issues of coverage, which are discussed, respectively, in the next three Sections.

## 2. THE “WITH RESPECT TO THE SALE OR RENTAL” ELEMENT

The fact that § 3604(c) extends only to discriminatory statements made “with respect to the sale or rental of a dwelling” provides some significant limitations on this provision’s coverage. First, this phrase means that coverage is limited to statements made by persons who are, at the time of the challenged statement, engaged in the activity of selling or renting housing.<sup>132</sup> This would exclude, for example, statements made by neighbors and others who have no authorized role in selling or renting the housing involved.<sup>133</sup> It would also exclude statements by landlords and

130. *See, e.g., Harris*, 183 F.3d at 1054-55; *Jancik v. HUD*, 44 F.3d 553, 557 (7th Cir. 1995); *Soules v. HUD*, 967 F.2d 817, 824 (2d Cir. 1992); *Fair Hous. Congress v. Weber*, 993 F. Supp. 1286, 1290 (C.D. Cal. 1997); *HUD v. Roberts*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 25,151, at 26,217-18 (HUD ALJ Jan. 19, 2001); *HUD v. Dellipaoli*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 25,127, at 26,076-77 (HUD ALJ Jan. 7, 1997). The conclusion that oral as well as written statements are covered is also supported by the lack of limiting language in the statute itself, the evolution of this language and other evidence in the legislative history of the FHA, the natural meaning of the word “statement,” and the subsequent HUD regulation interpreting this provision, which provides that “[t]he 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.” 24 C.F.R. § 100.75(b). *See generally Schwemm, supra* note 128, at 214-15.

131. Cases finding a violation of § 3604(c) based on a single statement include *United States v. Gilman*, 341 F. Supp. 891, 896-97 (S.D.N.Y. 1972); *Dellipaoli*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) at 26,076-77; and *Gutleben*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) at 25,725-26; *see also Harris*, 183 F.3d at 1054-55 (assuming that single discriminatory statement may violate § 3604(c)); *cf. City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 738-41 (1995) (Thomas, J., dissenting) (arguing that the word “any” in a different provision of the FHA should be broadly construed based on its plain meaning).

132. *See, 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 *Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and S. 3170*, 89th Cong. 84 (1966) (testimony of Att’y Gen. Nicholas Katzenbach)); 24 C.F.R. § 100.75(b) (HUD regulation interpreting § 3604(c) to apply to all statements by persons “engaged in the sale or rental” of housing).

133. *See, e.g., United States v. Space Hunters, Inc.*, 3 Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶16,550, at 16,550.3-16,550.4 (S.D.N.Y. Aug. 23, 2001) (holding that § 3604(c)’s “with respect to the sale or rental of a dwelling” language does *not* apply to discriminatory statements made by employees of a rental listing service because “only the

other housing professionals made outside the context of their commercial duties (e.g., in conversations with their family members or friends after work).<sup>134</sup> The gist of these limitations is that § 3604(c) only bans discriminatory statements made in a business context,<sup>135</sup> a restriction that will become important when the First Amendment implications of applying this law to harassing statements are considered.<sup>136</sup> Even as so limited, however, it is clear that § 3604(c) would cover the typical harassing statement made by a landlord to a female tenant, at least if the statement is considered “with respect to the . . . rental” of her apartment.

One problem here is that the word “rental” in § 3604(c) is ambiguous concerning the time frame that is intended to be covered. Whereas the word “sale” in the “with respect to the sale or rental” phrase presumably only applies to the phases of a purchase situation ending with the closing of the transaction, the word “rental” in this phrase can be read in either of two ways—to cover only the initial decision to rent or to include also the on-going relationship between landlord and tenant during the entire term of the tenancy. This issue is of paramount importance to the applicability of § 3604(c) to sexual harassment, because the vast majority of housing

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discriminatory comments of a person selling/renting his dwelling, or an agent acting on behalf of that person, would have a direct influence on the disposition of the property.” (quoting *Babin*, 799 F. Supp. at 716)).

Thus, in situations where neighbors or other non-housing professionals are accused of harassment in violation of the FHA, provisions other than § 3604(c), such as § 3617, would have to be invoked. See *supra* notes 120-23 and accompanying text (concerning § 3617's applicability to harassment cases); see also *Reeves*, 3 Fair Hous.—Fair Lending (Aspen L. & Bus.) at 16,250.5-16,250.7 (citing § 3604(a), § 3604(b), and § 3617 in upholding FHA claim against condominium association based on its failure to protect resident from harassment by another resident).

134. See Schwemm, *supra* note 128, at nn.85 & 362 (legislative history of § 3604(c) suggests that only public statements designed to have some effect on the sale or rental of housing were intended to be covered by this provision). But see *HUD v. Tucker*, 2A Fair Hous.—Fair Lending (Aspen L. & Bus.) ¶ 25,033 (HUD ALJ Aug. 24, 1992) (holding that property manager's racist statements about tenant to customers and employees at restaurant where tenant worked violated § 3604(c)).

135. The references in this Article to “a business context” and “the context of their commercial duties” as proper interpretations of § 3604(c)'s “with respect to the sale or rental” phrase are not meant to suggest that this law is limited to situations involving only for-profit housing. Indeed, it is clear that § 3604(c) also applies to public housing, long-term homeless shelters, and other dwellings where defendants may not be motivated by profit maximization and where residents may not have traditional lease or payment responsibilities. See, e.g., *Woods*, 884 F. Supp. at 1175 (rejecting argument by operators of homeless shelter that, because they did not charge shelter residents rent, they were outside the scope of § 3604(c), and instead finding that, because the shelter received grant moneys in consideration for its provision of services to the homeless, the operators “rented” the property for purposes of § 3604(c)); cf. § 3604(e) (including a “for profit” requirement, in contrast to § 3604(c) and the statute's other substantive prohibitions).

136. For a discussion of First Amendment considerations relating to the application of § 3604(c) to housing harassment, see *infra* Part III.

harassment cases occur in rental as opposed to sale situations and, within rentals, after the initial decision to rent.<sup>137</sup>

We conclude that “rental” within § 3604(c) does cover the entire time of a tenant’s stay. The common understanding of this word, as reflected in the most prominent dictionary in existence at the time of § 3604(c)’s enactment, supports this position by defining “rent” to include “the possession and use” and the “possession and enjoyment of” property.<sup>138</sup> In addition, the courts that have addressed this issue have generally held or assumed that “rental” in § 3604(c) covers the full term of the lease.<sup>139</sup> This conclusion also reflects the general view that the FHA, as remedial civil rights legislation, should be given a broad interpretation, a view that the Supreme Court has regularly endorsed.<sup>140</sup>

Even if landlord-tenant conversations are within the time period covered by § 3604(c), it might be argued that sexually harassing statements should not be considered to be “with respect to the . . . rental of a dwelling” if they do not relate directly to the terms or conditions of the rental arrangement.<sup>141</sup> The argument would be that a landlord’s sex talk to

137. The only reported housing harassment case that does not involve a current rental is *Abrams*, which involved a real estate broker and three salespersons who were accused of harassing their female customers. 694 F. Supp. 1101; *cf. Krueger*, 115 F.3d 487 (finding that landlord began harassing victim before she signed the lease and continued harassing her throughout her tenancy).

138. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1923 (14th ed. 1961).

139. *See, e.g., Guleben*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,726 (rejecting landlord’s argument that, because his racist statement to black 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); *Tucker*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,348 (holding that property manager’s statements to tenant’s boyfriend and co-workers that she wouldn’t have allowed tenant to move in if she had known tenant’s boyfriend was Black violated § 3604(c)); *HUD v. Williams*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,007, at 25,119 (HUD ALJ March 22, 1991) (assuming that landlord’s intimidating conversation with tenant was within the time frame covered by § 3604(c)); *see also Harris*, 183 F.3d at 1054-55 (suggesting that Black tenant may have § 3604(c) claim based on agent’s remarks that owners of apartment complex do not want to rent to Blacks); *HUD v. Denton*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,014 (HUD ALJ Nov. 12, 1991), *on remand*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,024 (HUD ALJ Feb. 7, 1992) (holding that eviction notice containing discriminatory statement violates § 3604(c)). *But see Michael v. Caprice*, No. 99 C 2313, 1999 WL 688733 at \*2 (N.D. Ill. 1999) (“As a tenant already living in the building, Michael has not alleged a violation of § 3604(c).”); *Texas*, 85 F. Supp. at 730-33 (concluding that landlord’s verbal harassment of Arab tenant is sufficient to establish claims under §§ 3604(a), 3604(b), and 3617, but not under § 3604(c)).

140. *E.g., City of Edmonds*, 514 U.S. at 731; *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 24, § 7:2.

141. As discussed in greater detail below, some sexually harassing statements contain references to the terms of the tenancy, such as where a landlord requests sex in lieu of rent. *See infra* text accompanying notes 196-99. However, in many other situations, the

his female tenants should be considered “stray” remarks that do not sufficiently relate to the “rental of a dwelling” to be covered by § 3604(c).

There is some support for this argument in the language of the Ninth Circuit’s opinion in *Harris v. Itzhaki*,<sup>142</sup> a decision that upheld a § 3604(c) claim by a black tenant who overheard her landlord’s agent tell another employee that “[t]he owners don’t want to rent to Blacks.”<sup>143</sup> In the course of its opinion in *Harris*, the court opined that there could be no liability under § 3604(c) for this discriminatory statement if it were just a “stray” remark that was “unrelated to the decisional process [and therefore] insufficient to show discrimination.”<sup>144</sup> In support of its view that § 3604(c) requires the offending statement be related to a housing provider’s “decisional process,” *Harris* cited two Title VII cases<sup>145</sup> that had cited Justice O’Connor’s concurrence in *Price Waterhouse v. Hopkins*,<sup>146</sup> a non-harassment employment discrimination case.

However, *Harris*’s reliance on these Title VII precedents, particularly *Price Waterhouse*, is questionable. The plaintiff in *Price Waterhouse* claimed that her failure to make partner at her accounting firm was the result of gender discrimination.<sup>147</sup> The evidence, which consisted mostly of verbal and written statements, indicated that the partners may have considered both legitimate and discriminatory factors in the partnership decision.<sup>148</sup> As a result, the statements were being examined not as Title VII violations in and of themselves, but as evidence of improper animus in the decisional process. In the cited-to passage, Justice O’Connor simply noted that discriminatory statements which are “unrelated to the decisional process” cannot satisfy the plaintiff’s burden in this type of case.<sup>149</sup> This Title VII analysis, however, is inapplicable to the situation presented by a free-standing § 3604(c) claim, where the statement itself is the violation.<sup>150</sup>

Significantly, Justice O’Connor made clear that even if “stray remarks in the workplace” are not related to hiring or promotion decisions, they may be probative of sexual harassment.<sup>151</sup>

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speech itself will have nothing to do with the rental (e.g., where a property manager makes a sexually explicit comment to a tenant).

142. 183 F.3d at 1054-55.

143. *Id.* at 1048.

144. *Id.* at 1055.

145. *Id.* (citing *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989)).

146. 490 U.S. 228, 277 (1989) (O’Connor, J., concurring).

147. *Id.* at 232.

148. *Id.*

149. *Id.* at 277 (O’Connor, J., concurring).

150. See *supra* notes 105-07 and accompanying text (noting that, unlike § 3604(c), Title VII does not ban discriminatory statements).

151. *Price Waterhouse*, 490 U.S. at 277 (O’Connor, J., concurring) (citing *Meritor*, 477 U.S. at 63-69). See also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133,

There are several reasons why a landlord's harassing statements to a tenant should be considered as having been made "with respect to the sale or rental of a dwelling" even if the statements don't explicitly concern the terms or conditions of the lease. First, the relationship between the speaker and the target of the speech—landlord (or his agent) and tenant—is a business relationship that exists, by definition, because the landlord is engaged in the rental of the dwelling to the tenant. Second, virtually all housing harassment takes place either inside the victim's apartment or elsewhere at the property,<sup>152</sup> which are places of business for the landlord and his agents. Finally, even if the harassing speech doesn't directly concern the terms of a woman's lease, it certainly affects her experience in renting the dwelling.<sup>153</sup>

For purposes of § 3604(c), therefore, the argument that a landlord's harassing statements to his tenant are not "with respect to the . . . rental of a dwelling" seems unpersuasive. This is particularly true in light of the fact that § 3604(c) itself identifies the precise nature of the statements with which it is concerned (i.e., those that "indicate[] any preference, limitation, or discrimination based on . . . sex"). If a landlord makes a statement to a current tenant that includes such an indication, the statement should be considered covered by § 3604(c)'s "with respect to the . . . rental of a dwelling" phrase. We next consider whether sexually harassing statements do indicate such a "preference, limitation, or discrimination."

### 3. THE "INDICATES ANY PREFERENCE, LIMITATION, OR DISCRIMINATION" ELEMENT

The requirement that an illegal statement under § 3604(c) must "indicate [a] preference, limitation, or discrimination . . . or an intention to make any such preference, limitation, or discrimination" based on some prohibited ground raises two distinct issues. The first deals with the word "indicate." By banning every housing statement that "indicates" discrimination, § 3604(c) is focused not on the defendant-speaker's intent, but rather on the message that is actually conveyed by his words. Thus, courts have interpreted § 3604(c) to cover every communication that

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152-53 (2000) (finding that "potentially damning nature" of supervisor's discriminatory comments is not to be discounted on the ground that they "were not made in the direct context of [plaintiff's] termination").

152. See *infra* note 366 and accompanying text.

153. Harassing speech may, for example, lead a woman to minimize contact with her landlord by taking steps such as not requesting necessary maintenance, paying rent by mail instead of in person, and remaining inside her apartment when the landlord is at the property.



indicates discrimination to an “ordinary listener,”<sup>154</sup> regardless of whether the defendant was motivated in putting it forth by discriminatory animus<sup>155</sup> or whether the particular listener found the statement to be discriminatory.<sup>156</sup> This has led some judges to refer to § 3604(c) as a “strict liability” statute.<sup>157</sup> All that is required to establish liability is a showing that the defendant made a housing-related statement indicating a “preference, limitation, or discrimination” based on one of the factors made illegal by the FHA.

The second key part of this element of § 3604(c) is to determine whether a reasonable person would understand the challenged statement to indicate an illegal “preference,” “limitation,” or “discrimination.” These

154. *Jancik*, 44 F.3d at 556; *accord* *Burnett v. Venturi*, 903 F. Supp. 304, 315 (N.D.N.Y. 1995); *Blomgren v. Ogle*, 850 F. Supp. 1427, 1439-40 (E.D. Wash. 1993); *HUD v. Ro*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,106, at 25,929 (HUD ALJ June 2, 1995). A similar “ordinary reader” standard is employed in evaluating written communications, such as newspaper advertisements, challenged under § 3604(c). *See, 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); *Housing Opportunities Made Equal (HOME) v. Cincinnati Enquirer*, 943 F.2d 644, 646 (6th Cir. 1991); *Ragin v. N. Y. Times Co.*, 923 F.2d 995, 999-1000 (2d Cir. 1991); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972). According to the *New York Times* decision, “[t]he ordinary reader [or listener] is neither the most suspicious nor the most insensitive of our citizenry.” 923 F.2d at 1002.

These standards, with their focus on the reaction of an “ordinary” person receiving the speech, are similar to the standards used in employment cases. The Supreme Court has stated that the “objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position.” *Oncale*, 523 U.S. at 81. This inquiry requires the court to consider “all of the circumstances” surrounding the harassment, including the nature and frequency of the harassment, *Harris*, 510 U.S. at 23, and “the social context in which particular behavior occurs and is experienced by its target,” *Oncale*, 523 U.S. at 81.

155. 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” some prohibited factor, and therefore generally require focusing on the defendant’s intent. *See* 42 U.S.C. §§ 3604(a)-(b), 3604(d)-(f)(2), 3605-3606 (1994). *See generally* SCHWEMM, *supra* note 24, ch. 10. This is not, however, to say that evidence of discriminatory intent is irrelevant in § 3604(c) cases. Where a statement is not overtly discriminatory, evidence of the speaker’s bias can be used as proof that the message transmitted or received actually indicated discrimination. *See, e.g.*, *Jancik*, 44 F.3d at 556; *Soules*, 967 F.2d at 825; *N. Y. Times*, 923 F.2d at 1000.

156. *See, e.g.*, *HUD v. French*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,113, at 25,970, 25,974 (HUD ALJ Sept. 12, 1995) (finding a § 3604(c) violation where landlord told complainant that she could not rent a second-story apartment because she had a child, despite the fact that complainant, unaware at the time that the statement constituted illegal familial status discrimination, had stated that “the policy sounded reasonable [to her]”). A lack of subjective reaction to the statement, however, will undoubtedly affect the damages the listener can recover. The complainant in *French*, for example, was only awarded \$500. *Id.* at 25,979.

157. *E.g.*, *Roberts*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 26,217; *Dellipaoli*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 26,077.

three terms are not defined in the FHA. It seems likely that their presence in § 3604(c) was derived from, and therefore intended to have the same meaning as, comparable language in Title VII's provision outlawing notices and advertisements that indicate a "preference, limitation, specification, or discrimination" based on an illegal factor.<sup>158</sup> However, neither Title VII's legislative history nor case law interpreting this provision of the employment statute casts any light on the meaning of these terms.<sup>159</sup>

In the absence of any direct evidence concerning the intended definition of these terms, their ordinary meanings should control. According to the most prominent dictionary in existence at the time of the enactments of Title VII and the FHA, the relevant definition of "preference" suggests that this term means "someone or something that is preferred : an object of choice : favorite" as in to "[choose] : like better : value more highly";<sup>160</sup> the word "limitation" means "a restriction or restraint imposed from without";<sup>161</sup> and "discrimination" means "the act, practice, or an instance of discriminating categorically rather than individually" as in "the according of differential treatment to persons of an alien race or religion" with "discriminate" meaning "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit."<sup>162</sup>

Most of the judicial decisions that discuss the phrase "preference, limitation, or discrimination" in § 3604(c) involve discriminatory advertisements and the messages they send to prospective tenants. The precise substantive meaning of the terms in this phrase is seldom discussed, and courts seem comfortable in using the ordinary meaning of the words—that is, that a "preference" implies that a particular person or group is favored, that a "limitation" implies that a particular person or group is restricted, and that "discrimination" implies that a particular person will be treated more or less favorably because of membership in his or her race, sex, or other class. The issue in many of the cases is how clear or obvious

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158. 42 U.S.C. § 2000e-3(b). See also Schwemm, *supra* note 128, at 206-07.

159. No significant decision interpreting Title VII's ban on discriminatory notices and ads in 42 U.S.C. § 2000e-3(b) was produced in the four years prior to the enactment of the FHA, and even to this day, only a handful of major § 2000e-3(b) cases exist. See, e.g., *Brush v. S. F. Newspaper Printing Co.*, 315 F. Supp. 577, 579-80 (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, 1008-09 (5th Cir. 1972) (upholding male's claim based on airline's ad for "stewardesses" in "Help Wanted-Female" column). See generally LARSON, *supra* note 26, § 12.02(1) ("Challenges to discriminatory advertisements or notices by employers are all but absent from modern case law.").

160. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1787 (14th ed. 1961).

161. *Id.* at 1312.

162. *Id.* at 648.

the statement of preference or limitation must be in order to run afoul of § 3604(c). The analysis looks to the effect the challenged communication has on the person receiving it and whether the “ordinary reader” or “ordinary listener” would interpret the communication as indicating a preference or limitation.<sup>163</sup>

An early case involving a straightforward statement of preference is *United States v. Hunter*,<sup>164</sup> where the Fourth Circuit held that a newspaper ad for an apartment in a “white home” would indicate to the ordinary reader that the landlord had a racial preference for white tenants.<sup>165</sup> Advertisements with less blatant statements have also been found to contain preferences or limitations in violation of § 3604(c). In *Guider v. Bauer*,<sup>166</sup> the court found that the words “perfect for single or couple” in an apartment advertisement indicated a preference for families without children. And in *Holmgren v. Little Village Community Reporter*,<sup>167</sup> the court held that advertisements stating a preference for buyers and tenants who spoke certain languages violated § 3604(c), because they indicated a preference for persons of certain national origins.<sup>168</sup> In an effort to assist advertisers and publishers in complying with the FHA, HUD set forth advertising guidelines listing words, phrases, and symbols that should be avoided because they signal impermissible preferences or limitations.<sup>169</sup> These include specific terms related to protected classes, such as “Black,” “Protestant,” or “Italian”; catch words such as “private,” “traditional,” or “integrated”; and colloquialisms that imply or suggest protected categories.<sup>170</sup>

163. See *supra* note 154.

164. 459 F.2d 205.

165. *Id.* at 215. See also *United States v. Miss. Publ'g Corp.*, 2 Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 19,352, at 19,477-478 (S.D. Miss. Aug. 22, 1986) (newspaper agrees to consent decree for accepting housing advertisements with phrases such as “white refined middle-aged Christian lady” and “black male”).

166. 865 F. Supp. 492, 494 (N.D. Ill. 1994).

167. 342 F. Supp. 512, 513 (N.D. Ill. 1971).

168. *Id.* at 513.

169. Fair Housing Advertising Guidelines, 45 Fed. Reg. 57,102 (Aug. 26, 1980). This version of the Guidelines appeared at 24 C.F.R. § 109.5-30 for many years. 24 C.F.R. § 109 (1989). Additional advertising regulations appear at 24 C.F.R. § 100.75 (2002), which was originally promulgated in 1989. See 54 Fed. Reg. 3285 (Jan. 23, 1989).

In 1996, HUD removed 24 C.F.R. § 109, and sought to provide the guidance through handbooks or other materials rather than maintaining it in the C.F.R. See 61 Fed. Reg. 14,380 (Apr. 1, 1996). HUD has not provided any new sources of guidance on the subject, and so the pre-1996 Guidelines and § 100.75 remain the most useful referents. An earlier version of the advertising Guidelines was originally adopted in 1972. See 37 Fed. Reg. 6700 (Apr. 1, 1972).

170. 24 C.F.R. § 109.20(b), (d) (1995). HUD stopped short of saying that such terms automatically signal a § 3604(c) violation, although clearly use of the words in §

Even facially nondiscriminatory messages may indicate impermissible preferences depending upon their context.<sup>171</sup> In *Ragin v. New York Times Co.*,<sup>172</sup> the Second Circuit, noting that “Congress used broad language in Section 3604(c),” found that housing advertisements which for twenty years almost exclusively featured white human models as home-seekers violated the FHA.<sup>173</sup> The court rejected a narrow construction of § 3604(c) that would only prohibit “the most provocative and offensive expressions of racism or statements indicating an outright refusal to sell or rent to persons of a particular race.”<sup>174</sup> Instead, the Second Circuit defined “preference, limitation, or discrimination” as anything that discourages an ordinary reader of a particular race from answering an ad or, conversely, encourages readers of a particular race to answer an ad.<sup>175</sup>

The terms “preference” and “limitation” make sense in the advertising context because the act of soliciting renters or buyers contains an implicit notion of selection in which preferences or limitations might come into play. The advertisement is the vehicle for the seller/landlord to signal his preferences, and as a result influence the behavior of the home-seekers who read the ad. At first glance, these terms may not seem to translate as easily into the housing harassment context, at least in those situations where § 3604(c)’s applicability would be most needed (i.e., non-quid pro quo harassment directed at a current tenant). However, as noted above,<sup>176</sup> courts have applied this provision to the full term of a tenancy, so that statements of “preference, limitation, or discrimination” to current as well as prospective tenants are covered. Following the analysis in the advertisement cases, it will also hold true that statements need not blatantly express a preference or limitation in order to violate § 3604(c). Therefore,

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109.20(b)(1)-(5) (which are indicative of race, color, religion, sex, or national origin) would constitute such a violation.

171. See, e.g., *Soules*, 967 F.2d at 824-25 (looking to the context of the statements and evidence of the speaker’s intent to determine whether statements indicated an impermissible preference or limitation); see also *Jancik*, 44 F.3d at 557 (holding that, even though landlord “did not expressly indicate a preference based on race,” when viewed in context, his statements indicated a racial preference).

172. 923 F.2d 995.

173. *Id.* at 999. According to the complaint in *New York Times*, the ads in question had been run over a period of twenty years, featuring “thousands of human models of whom virtually none were black.” *Id.* at 998. The few Black models depicted service employees. The only exception was that Black models portraying housing-seekers were used exclusively in ads for housing in predominantly Black areas. *Id.*

174. *Id.* at 999.

175. *Id.* at 999-1000. In an earlier case dealing with this issue, a district court had noted that “the natural interpretation of [a housing brochure featuring virtually no Black models] is to indicate that [the defendants’] apartment complexes are for white, and not black, tenants, thus discouraging blacks from seeking housing there.” *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1058 (E.D. Va. 1987).

176. See *supra* note 139 and accompanying text.

to the extent that a sexually harassing statement discourages a tenancy based on gender, that statement would constitute an impermissible “preference or limitation” in violation of § 3604(c).

It is hard to see how the word “discrimination” adds much to the ban on illegal statements of “preference” or “limitation” in § 3604(c).<sup>177</sup> Indeed, given the fact that “discriminate” is also used in § 3604(b)’s coverage of “terms or conditions” and that § 3604(b) has been interpreted, like Title VII, to ban only harassment that is severe or pervasive,<sup>178</sup> it might be argued that a statement of “discrimination” doesn’t become actionable under § 3604(c) until it passes such a quantitative or qualitative threshold. This may go too far, however, because the “severe or pervasive” test was developed for purposes of determining whether the “terms or conditions” of a job under Title VII or of housing under § 3604(b) were being disrupted by sexual harassment, not to interpret the word “discriminate” in those laws.<sup>179</sup> In any event, whether a statement may indicate an illegal “discrimination” without also indicating an illegal “preference” or “limitation” seems of limited practical importance in using this part of § 3604(c) to challenge sexual harassment.

One additional part of § 3604(c) that may indeed be of some independent value, however, is this section’s concluding phrase, which adds to the prohibitions against statements indicating illegal preferences, limitations, and discrimination a ban on statements indicating “an intention to make any such preference, limitation, or discrimination.”<sup>180</sup> This phrase, which goes beyond the analogous provision in Title VII,<sup>181</sup> adds coverage for situations in which a housing provider makes a statement indicating “an intention to” violate the FHA even if he does not carry out this intention.<sup>182</sup>

For example, in *Jancik v. HUD*,<sup>183</sup> the defendant-landlord asked the race of people who called him on the phone to inquire about an apartment.<sup>184</sup> The Seventh Circuit held that such questions violated §

177. See, e.g., 24 C.F.R. § 100.75(c)(2) (HUD regulation interpreting § 3604(c) to prohibit statements that express “a preference for or limitation on any purchaser or renter” because of a prohibited factor without also mentioning statements that express a similar “discrimination”); *Jancik*, 44 F.3d at 556-57 (upholding determination that defendant’s ads and statements violated § 3604(c) based on their indications of “preference” and “limitation” regarding familial status without also considering whether they indicated “discrimination”).

178. See *supra* notes 64-65 and accompanying text.

179. See *supra* notes 34-48 and accompanying text (Title VII) and notes 64-65 and accompanying text (§ 3604(b)).

180. 42 U.S.C. § 3604(c).

181. See *id.* § 2000e-3(b). See generally Schwemm, *supra* note 128, at 210-11.

182. Schwemm, *supra* note 128, at 210-11.

183. 44 F.3d 553.

184. *Id.* at 554-55.

3604(c) even though they did not express an explicit racial preference, because, in the context of a screening interview, they “did indicate an intent to discriminate.”<sup>185</sup> Another example of the use of § 3604(c)’s concluding phrase occurred in *Holmgren*, where a district court concluded that housing ads expressing a preference for certain foreign language speakers were unlawful because, even if such ads did not indicate an illegal preference based on national origin per se, they at least demonstrated “an intention to make such a preference” in violation of § 3604(c).<sup>186</sup> Indeed, a number of FHA decisions have found § 3604(c) violations based on housing providers’ statements indicating “an intention to” engage in illegal discrimination, even where the defendants, contrary to such communications, actually made their housing available on a non-discriminatory basis.<sup>187</sup>

The “intention to” language in § 3604(c) is significant for housing harassment situations, because it allows the statute to reach statements that

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185. *Id.* at 557. See also *HUD v. Blackwell*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,001, at 25,009 (HUD ALJ Dec. 21, 1989) (holding that homeowner violated § 3604(c) by asking broker the race of potential buyers), *aff’d*, 908 F.2d 864 (11th Cir. 1990); *Roberts*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 26,218 (holding that landlord violated § 3604(c) by asking the race and nationality of potential tenants because a reasonable person when asked these questions would assume that race would be used as a factor in determining eligibility); cf. *Soules*, 967 F.2d at 824 (agreeing that a landlord’s inquiry about a prospective tenant’s race would violate § 3604(c) because there is “simply no legitimate reason for considering an applicant’s race,” but holding that inquiries concerning familial status are not per se illegal because there might be nondiscriminatory justifications for such questions).

186. 342 F. Supp. at 513. *Holmgren* is also discussed *supra* text accompanying notes 167-68.

187. See, e.g., *HUD v. Kormoczy*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,071, at 25,661 n.7 (HUD ALJ May 16, 1994) (finding that “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*, 850 F. Supp. at 1439-40 (awarding summary judgment in favor of plaintiff with minor son on her § 3604(c) claim based on defendant’s distribution of nonenforced “no children” rules); *HUD v. Schuster*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,091, at 25,834 (HUD ALJ Jan. 13, 1995) (holding that 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*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,029, at 25,319 (HUD ALJ May 1, 1992) (holding that mobile home park’s rule barring families with children violates § 3604(c), even though rule was not enforced). *But see* *HUD v. Kutney*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) ¶ 25,089, at 25,821 (HUD ALJ Nov. 23, 1994) (concluding that 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”); *Gutleben*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,725 (holding that 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). See generally Schwemm, *supra* note 128, at 301.

signal an intent to discriminate to the ordinary listener, without actually requiring proof of a discriminatory act. Thus, for example, where a landlord makes a statement threatening a tenant with eviction if she does not have sex with him but does not carry out this threat, he would seem to have violated § 3604(c)'s concluding phrase, for his statement indicates "an intention to" engage in illegal discrimination (i.e., quid pro quo harassment). And this would be true even if traditional Title VII analysis would lead to the conclusion that he has not engaged in quid pro quo harassment and that this single instance of verbal threatening might not constitute sufficiently severe or pervasive conduct to alter the "terms or conditions" of the tenancy in violation of § 3604(b).<sup>188</sup>

Given the directive to interpret the FHA's language broadly,<sup>189</sup> it is not at all far-fetched to conclude that most instances of verbal harassment would be covered by the "preference, limitation, or discrimination" phrase or at least the "intention to make any such preference, limitation, or discrimination" phrase in § 3604(c). The only remaining issue is whether such harassing statements should be considered "based on . . . sex" as that phrase is used in § 3604(c).

#### 4. THE "BASED ON . . . SEX" ELEMENT

Most § 3604(c) decisions do not devote much space to discussing the requirement that the defendant's offending communication must indicate a preference, limitation, or discrimination "based on race, color, religion, sex, handicap, familial status, or national origin." The presence of this element generally appears obvious, at least once the determination has been made that an ordinary listener/reader would have interpreted the defendant's statement, ad, or notice as indicating some form of preference, discrimination, or limitation. In dealing with sexual harassment, however, it is worth considering this "based on . . . sex" part of § 3604(c) as an independent requirement, because a defendant-landlord might argue that, in directing sexual comments to a *particular individual* and not to *all female tenants*, his remarks should not be considered "based on . . . sex."

This potential defense, however, should be easily dealt with in light of the guidance available from Title VII sexual harassment precedents, particularly *Oncale*.<sup>190</sup> In *Oncale*, a unanimous Supreme Court held that male-on-male harassment could be actionable under Title VII.<sup>191</sup> In reaching this conclusion, the Court focused on Title VII's requirement that

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188. See *Burlington Indus.*, 524 U.S. 742; See *infra* note 198 for a description of *Burlington Industries*.

189. See *supra* note 140 and accompanying text.

190. 523 U.S. 75.

191. *Id.* at 82.

the defendant's actions must amount to discrimination "because of . . . sex." In applying this phrase to a particular situation, Justice Scalia's opinion noted:

"The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. . . . But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.<sup>192</sup>

This passage, as well as *Oncale's* holding applying Title VII's "because of . . . sex" language to the specific male-on-male situation involved there, demonstrates that this element is satisfied if the challenged conduct is directed to an individual plaintiff (as opposed to all members of his/her sex); that the inference of "because of . . . sex" discrimination is easy to draw in the typical male-female harassment situation involving "proposals of sexual activity"; that the harasser may, but need not be, motivated by sexual desire; and that "sex-specific and derogatory terms" directed to a female are to be considered "because of . . . sex" if the harasser would not expose members of the opposite sex to such remarks.<sup>193</sup>

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192. *Id.* at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

193. *See also Honce*, 1 F.3d at 1090 (concluding that, in evaluating hostile environment claim based on § 3604(b)'s prohibition of discriminatory terms and conditions "because of sex," the "offensive acts need not be purely sexual; it is sufficient that they would not have happened but for [the] claimant's gender"). Title VII cases have taken the same approach with respect to harassment "because of sex." *See, e.g., B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1101 (9th Cir. 2002) (noting that harassment "because of race" can take the form of sexual or gender-based insults or threats directed only at a person of a particular race, and vice versa); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (noting that "the conduct underlying a sexual harassment claim need not be overtly sexual in nature" and joining other circuits in holding that "[a]ny unequal treatment of an employee that would not occur but for the employee's gender" may constitute sex discrimination in violation of Title VII); *cf. Jancik*, 44 F.3d at 557 (rejecting landlord's defense to § 3604(c) claim based on racial inquiries to would-be tenants that his remarks should not be considered "based on race" under this statute because they were "merely



Because this is the proper interpretation of Title VII's (and § 3604(b)'s) "because of . . . sex" requirement in harassment cases involving "terms or conditions," the same principles should be applied to harassment cases brought under § 3604(c)'s "based on . . . sex" language.

A final observation from *Oncale* concerning the elements of a § 3604(c) violation is appropriate here. Having shown that these elements do seem to be applicable to many cases of verbal harassment in housing, candor compels the recognition that the use of § 3604(c) to challenge sexually harassing statements was not the principal concern that motivated Congress to enact this provision, particularly when it is remembered that the crucial elements necessary to bring such a claim derive from language created at three distinct moments (i.e., the "preference, limitation, . . . or discrimination" language from Title VII in 1964; the addition to this provision in the 1968 FHA of the word "statement" and of the prohibitions against ads, notices, and statements indicating an "intention to" discriminate in the original version of § 3604(c); and the 1974 addition of "sex" to the list of prohibited bases of discrimination in § 3604(c) and the FHA's other substantive provisions).<sup>194</sup> Nevertheless, if the current elements of § 3604(c) do indeed cover individual instances of verbal harassment in housing, we do not flinch from the conclusion that this was precisely what Congress intended. For, just as Justice Scalia wrote for a unanimous Court in *Oncale* in holding that male-on-male harassment could violate Title VII:

[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.<sup>195</sup>

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conversational"). The commentators generally agree with these conclusions regarding the "because of sex" requirement. *See generally* L. Camille Hebert, *Sexual Harassment as Discrimination "Because of Sex": Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439 (2001); Christopher W. Deering, *Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because of" Sex*, 27 CUMB. L. REV. 231 (1996-1997).

194. *See supra*, respectively, note 158 and accompanying text; notes 105-07 and accompanying text; and note 15 and accompanying text.

195. *Oncale*, 523 U.S. at 79. Moreover, such an approach is consistent with the Supreme Court's recognition that anti-discrimination laws in general, and the Fair Housing Act in particular, are to be broadly construed and applied. *See, e.g.*, *Oxford House*, 514 U.S. at 731; *Havens Realty*, 455 U.S. at 380; *Trafficante*, 409 U.S. at 209; *Meritor*, 477 U.S. at 64 (finding that, with Title VII, Congress intended "to strike at the entire spectrum of disparate treatment of men and women" in employment) (quoting L.A. Dep't of Power

The next Section further explores whether “the provisions of” § 3604(c) go beyond the principal evil to which this provision may have been directed to also prohibit verbal harassment in housing.

### B. § 3604(c) Applied to Hostile Environment Cases

#### 1. APPLICATION TO BASIC TYPES OF SEXUAL HARASSMENT SITUATIONS

Part II.A established that the language used in § 3604(c) may be interpreted to cover some hostile environment situations in which it might be difficult to prove violations of the FHA’s other sections. Here, we describe three common types of sexually harassing statements in order to determine the extent to which § 3604(c) applies.

First is a category of statements that we call “sexual requests.”<sup>196</sup> This would involve situations in which a landlord asks a tenant to engage in sexual activity with him, and implies that her continued tenancy and/or its terms or conditions might be conditioned on her acquiescence.<sup>197</sup> Suppose further that the tenant ignores this veiled threat, but the landlord does not evict her or do anything else to impede her tenancy. The tenant would be unable to make out a quid pro quo claim because she suffered no tangible loss of housing benefits, and it is unlikely (although not impossible) that she could meet the “severe or pervasive” standard for a hostile environment claim based on this single statement.<sup>198</sup> However, the

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and *Water v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). See also *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (noting, in the course of giving an expansive interpretation to anti-disability discrimination statute, that “the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”) (quoting *Penn. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (also an ADA case)).

196. See, e.g., Cahan, *supra* note 3, at 1064 (identifying solicitations of sexual behavior by promise of an award or threat of punishment as common forms of sexual harassment in housing according to survey responses); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 6-8 (1990) (identifying requests or demands for sex as one type of sexually harassing speech).

197. See Strauss, *supra* note 196, at 7. Professor Strauss argues that, when a request for sex is made by a person in a position of authority, it carries an implied threat of repercussion if the listener does not acquiesce, or an implied promise of favorable treatment if she does. Therefore, “as a practical matter, a request often acts as a demand.” *Id.*

198. This situation was discussed in the employment context in *Burlington Industries*, 524 U.S. 742. There, the plaintiff’s supervisor made numerous veiled requests for sex and implied that tangible job benefits, including a promotion, would depend on her willingness to comply. *Id.* at 747-48. The plaintiff refused these overtures and was promoted anyway, but she ultimately quit because of her supervisor’s behavior. The Court found that, because the plaintiff’s claim involved only unfulfilled threats, it should be categorized as a hostile environment claim rather than a quid pro quo claim. *Id.* at 754.

landlord's statement clearly indicates an "intent to discriminate," even though he did not actually follow through with his expressed intent. As discussed above, a speaker need not carry out the discrimination threatened in his statement in order to violate § 3604(c).<sup>199</sup> It is sufficient that the statement indicate to the ordinary listener an intent to discriminate. Therefore, § 3604(c) would be applicable to many statements of the "sexual request" variety.

A landlord's directing "sexual epithets," such as "bitch" or "whore," to a female tenant is another common type of harassing scenario.<sup>200</sup> Under § 3604(b), a single incident of this type of harassment would probably not constitute actionable discrimination, because it would not be severe or pervasive enough to alter the terms or conditions of the victim's tenancy.<sup>201</sup> As demonstrated in the previous Section, however, a landlord's gender-based expression of animosity towards the tenant as a woman could signal to an ordinary listener that the landlord has a low estimation of all women or at least of this particular tenant "based on . . . [her] sex."<sup>202</sup> The statement could also be seen, according to the Second Circuit's analysis in *New York Times*,<sup>203</sup> as discouraging female tenants from living at the property.<sup>204</sup> Therefore, sexual epithets would generally constitute impermissible statements of preference or limitation based on sex in violation of § 3604(c).<sup>205</sup>

The third category of potentially harassing statements can be described as "sexual comments," which can further be divided into two subcategories: "explicit statements" and "flirtatious statements." Explicit

The Court found that the supervisor's behavior did create a hostile environment, but it limited this finding to the facts of the case, noting that "[t]he case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment." *Id.*

199. See *supra* note 187 and accompanying text.

200. See Cahan, *supra* note 3, at 1064 (finding that abusive remarks were one of the most common forms of housing harassment in survey responses); Strauss, *supra* note 196, at 8 (identifying degrading sexual epithets as one type of sexually harassing speech).

201. See, e.g., *DiCenso*, 96 F.3d at 1008-09; *Cavalieri-Conway v. L. Butterman & Assocs.*, 992 F. Supp. 995, 1007-08 (N.D. Ill. 1998). In *Cavalieri-Convey*, the court relied on *DiCenso* in ruling for a property manager who was accused of sexual harassment in violation of § 3604(a) and § 3604(b) based on "only two occasions" that did not go beyond "an offensive, verbal insult" (i.e., threatening to call plaintiff a whore if she had male visitors). See *id.* at 1008 (citing *DiCenso*, 96 F.3d at 1008). The pro se plaintiff in *Cavalieri-Conway* did not assert a claim under § 3604(c).

202. See *supra* Part II.A.4.

203. 923 F.2d at 1000.

204. See *supra* notes 172-75 and accompanying text.

205. Cf. *Gutleben*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,726 (holding that landlord's use of racial epithets toward tenant and her children conveyed an intention not to rent to them because of their race and therefore indicated a preference or limitation based on race in violation of § 3604(c)).

statements are unambiguously sexual and, assuming they are unwelcome,<sup>206</sup> would clearly be offensive to the ordinary listener. Examples would include comments about a woman's body (particularly intimate body parts), speculation about what sort of sexual partner a woman would be or how many sexual partners she has had, graphic descriptions of sexual acts, and the like.<sup>207</sup> If a landlord made one or two such statements to a female tenant, it is unlikely that this would be sufficiently severe or pervasive to violate § 3604(b). However, explicit statements are likely to cause embarrassment, fear, and/or anger in the average listener. They signal that the landlord views women in general, or at least the particular tenant, as a sexual object. This would indicate that the landlord has a low estimation of women, and it would discourage female tenants from living at the property. Therefore, much like sexual epithets, sexually explicit statements would generally be considered as expressing a gender-based preference or limitation in violation of § 3604(c).

Flirtatious statements, in contrast, would include more benign, less overtly sexual comments, such as telling a woman "you are very attractive" or calling a woman "honey," "baby," etc. While such statements might make a listener feel uncomfortable or demeaned, they are not as blatant or offensive as sexually explicit statements,<sup>208</sup> and it would be harder to argue that they automatically indicate impermissible preferences and limitations to the ordinary listener. As a result, such statements would not be unlawful per se. This does not mean, however, that flirtatious statements can never violate § 3604(c). Rather, it means that a court would have to look to the context of the statement—including what sort of conversation preceded it, where it was made, where the speaker was standing in relation to the listener, and other relevant factors—as well as

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206. Unlike harassment under Title VII or § 3604(b), a § 3604(c) violation does not require a showing that the speech was unwelcome or offensive to a *particular* listener or reader. Put another way, there is no subjective requirement contained in the text of § 3604(c) or recognized by the cases interpreting it. A listener may be unaffected by—or even agree with—a landlord's discriminatory statement and a violation can still be found. *See, e.g., French, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,970, 25,974; see also supra* note 157 and accompanying text. HUD's proposed sexual harassment regulations do include an "unwelcomeness" requirement, but it appears that these regulations are geared toward "terms and conditions" cases brought under § 3604(b). *See Fair Hous. Act Regulations Amends. Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67666-68 (Nov. 13, 2000) (to be codified at 24 C.F.R. pt. 100); discussion infra* notes 234-44 and accompanying text. Nevertheless, sexual statements obviously have different implications if they occur between two willing parties. As § 3604(c) becomes more widely used in sexual harassment cases, courts will no doubt fashion ways to deal with this complication.

207. *See Strauss, supra* note 196, at 7-8.

208. *See id.* at 9 (noting that there is no societal consensus that terms such as "sweetie" and "honey" are offensive or degrading).

evidence of the speaker's actual intent in order to determine whether the statement indicated an impermissible preference or limitation.<sup>209</sup>

## 2. APPLICATION TO *DICENSO* AND *HONCE*

In light of the discussion above, we now apply § 3604(c) to the claims in the two published federal appellate decisions that have dealt in detail with hostile environment sexual harassment in housing, *DiCenso*<sup>210</sup> and *Honce*.<sup>211</sup>

*DiCenso* appears to be just the sort of case in which a § 3604(c) harassment claim should be successful in filling the gaps left by the "severe or pervasive" standard. In this case, the landlord came to the plaintiff's door to collect the rent. He touched her arm and back suggestively, and stated that if she didn't have the money, she could "take care of it in other ways."<sup>212</sup> When the plaintiff slammed the door in his face, the landlord stood outside and called her a "bitch" and a "whore."<sup>213</sup> The plaintiff and her boyfriend subsequently had confrontations with the landlord, and he evicted them.<sup>214</sup> Although recognizing that the landlord's "comment vaguely invited [the plaintiff] to exchange sex for rent" and that the plaintiff found his "remarks to be subjectively unpleasant," the Seventh Circuit determined that this single incident was not severe enough to create an objectively hostile environment under traditional Title VII standards.<sup>215</sup>

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209. See *supra* notes 171, 185 and accompanying text; see also *infra* note 224 and accompanying text. The Ninth Circuit recently endorsed the approach of analyzing the complete context in which a statement is made in order to determine how the statement should be interpreted. *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc). The court held that particular statements, which contained no threatening language, should be considered threats when "the whole factual context, and all of the circumstances" surrounding the statement were taken into account. *Id.* at 1078 (internal quotation marks and citation omitted); see also *id.* at 1074-75 n.7 (citing numerous cases from other circuits and concluding that "all consider context"); *id.* at 1089 (Kozinski, J., dissenting) (agreeing with the majority that threatening statements must be considered "in the entire context and under all circumstances"). For further discussion of this case see *infra* note 371 and accompanying text. In terms of sexual harassment, one can imagine a scenario in which a landlord makes an apparently innocuous flirtatious statement to a female tenant, but the context in which the statement is made causes the words to take on a different meaning. A statement like "you look good today, honey" becomes much more sinister if it is uttered, for example, by a landlord who is standing in the doorway to a female tenant's apartment and holding his set of keys that allow him to enter her apartment at any time, or by a landlord who has just warned his female tenant about her late rent payment.

210. 96 F.3d 1004.

211. 1 F.3d 1085.

212. *DiCenso*, 96 F.3d at 1006.

213. *Id.*

214. *Id.*

215. *Id.* at 1009.

There are two statements in *DiCenso* to which § 3604(c) could apply: the veiled request for sex in lieu of rent, and the epithets the defendant directed at the plaintiff after she rebuffed his advances. Either of these statements, standing alone, should be sufficient to violate § 3604(c). The sex-for-rent request, which falls into the “sexual request” category of harassing speech discussed above, communicated an intent to discriminate against the victim—to exact sex from her if she was unable to pay the rent. Even though the landlord failed to follow up on his request, his statement communicated this intent. The sexual epithets, which fall into the second category of harassing speech discussed above, are statements of a gender-based preference or limitation. Both statements, therefore, could have been found to violate § 3604(c), if claims under this provision had been asserted.

*Honce* presents a more difficult fact pattern. The plaintiff’s landlord asked her to attend social and religious events with him on three occasions, and she declined every invitation.<sup>216</sup> Eventually, the landlord asked the plaintiff, “When can we go out?”<sup>217</sup> The plaintiff then told him that she did not want to go out with him at all, and the landlord replied that he had only wanted to be friends and did not ask her out again.<sup>218</sup> Over the course of the next six weeks, the plaintiff and the landlord had a series of disputes about the property. Their final confrontation took place when the plaintiff tried to construct a fence in her yard. The landlord sent the workmen away and got into a shouting match with the plaintiff.<sup>219</sup> As the landlord was driving away, the plaintiff’s dog ran in front of his car, and he revved the engine as though he was going to hit the dog.<sup>220</sup> The plaintiff left the property the next day and officially vacated a few weeks later.<sup>221</sup>

*Honce* doesn’t involve clearly offensive statements like *DiCenso*, making a liability determination under § 3604(c) more difficult. The landlord made no explicit or veiled sexual requests and did not imply that the plaintiff’s tenancy was contingent upon her going out with him socially. The landlord made no statements of a sexual nature, and he did not make any disparaging or degrading remarks about women. The only statements were the invitations, which themselves were fairly benign,<sup>222</sup> and the question, “When can we go out?”<sup>223</sup>

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216. *Honce*, 1 F.3d at 1087.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. The landlord had invited the plaintiff to a religious seminar, asked her to view some property with him, and offered to take her and her son to the state fair. *Id.*

223. The dissent, however, cites the testimony of a police officer who said the plaintiff had told him that the defendant was “coming to the house at all hours of the night

One could argue that these statements indicated a “preference or limitation” for the plaintiff as a woman. For facially nondiscriminatory statements of this sort, however, a court would have to look to factors such as the context of the statement and the intent of the speaker.<sup>224</sup> Certainly, such persistent requests could indicate to the ordinary listener that the landlord was interested in having a sexual relationship with the plaintiff. However, this conclusion could be weakened by the landlord’s statement that he “only wanted to be friends.”<sup>225</sup>

### 3. A NOTE ON HUD’S SEXUAL HARASSMENT REGULATION

HUD is authorized to promulgate regulations interpreting the FHA,<sup>226</sup> much like the EEOC is under Title VII.<sup>227</sup> Pursuant to this authority and to a specific directive in the Fair Housing Amendments Act of 1988,<sup>228</sup> HUD published a detailed set of fair housing regulations in 1989.<sup>229</sup> In accordance with the doctrine established in *Chevron, U.S.A. v. Natural Resources Defense Council*,<sup>230</sup> HUD regulations interpreting the FHA are to be followed so long as they are “a permissible construction of the statute.”<sup>231</sup>

As detailed as they otherwise were, however, the 1989 HUD fair housing regulations dealt with sexual harassment only in the most superficial way. The only reference in these regulations to sexual harassment was in the section interpreting § 3604(b), which simply listed an example of quid pro quo harassment as one of the practices forbidden

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and banging on her door, screaming at her obscenities and all types of abusive language.” *Id.* at 1095 n.2 (Seymour, J., dissenting). This is the only mention in either of the opinions of additional offensive or threatening statements.

224. See, e.g., *Jancik*, 44 F.3d at 557; *Soules*, 967 F.2d at 824-25.

225. *Honce*, 1 F.3d at 1087.

226. 42 U.S.C. §§ 3608, 3614a.

227. *Id.* § 2000e-4; see, e.g., *Meritor*, 477 U.S. at 65. The EEOC guidelines concerning sexual harassment were originally published in 1980. 45 Fed. Reg. 74,676-77 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11 (2001)).

228. The Fair Housing Amendments Act of 1988 ordered the Secretary of HUD to “issue rules to implement” the newly amended FHA within 180 days after the enactment of the Amendments Act. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, sec. 13(b), 102 Stat. 1636 (1988) (set forth at 42 U.S.C. § 3601 note).

229. 54 Fed. Reg. 3232 (Jan. 23, 1989) (to be codified at 24 C.F.R. pts. 14, 100, 103-106, 109-110, 115, 121).

230. 467 U.S. 837, 842-44 (1984). For a recent case describing the nature of “*Chevron* deference” and the situations in which such deference is warranted, see *Mead*, 533 U.S. at 227-31.

231. *Chevron*, 467 U.S. at 843. Pursuant to *Chevron*, numerous FHA decisions have deferred to HUD’s fair housing regulations. See, e.g., cases cited in SCHWEMM, *supra* note 24, at § 7:5 n.17.

by this provision.<sup>232</sup> This limited, rather obvious—and therefore not very helpful—coverage of sexual harassment in the HUD regulations caused one court in 1996 to remark critically that “HUD has not even enacted guidelines regarding hostile housing environment sex discrimination.”<sup>233</sup>

In November of 2000 at the “Eleventh Hour” of the Clinton Administration, HUD issued a proposed rule that would have amended its fair housing regulations to establish detailed standards for evaluating claims of sexual harassment under the FHA.<sup>234</sup> This proposed rule specifically noted that sexual harassment may violate § 3604(c), as well as other portions of the FHA.<sup>235</sup> However, the rule mainly approached sexual harassment from the touchstone of § 3604(b), meaning that most of the rule was concerned with setting forth guidelines to determine when conduct is severe or pervasive enough to create a hostile environment that would unlawfully alter the “terms or conditions” of housing. Nevertheless, two aspects of the proposed rule are significant to the application of § 3604(c) in housing harassment cases.

First, the proposed rule endorsed a “totality of the circumstances” test, similar to the test first set forth in the Title VII cases, for determining whether conduct constitutes sexual harassment.<sup>236</sup> According to the proposed rule, critical factors in applying this test include “the context, nature, severity, scope, frequency, duration, and location of the incidents, as well as the identity, number, relative ages and relationships of the persons involved.”<sup>237</sup> This list is most notable for what it does *not* contain. The first version of the test, as originally articulated by Supreme Court in *Harris v. Forklift Systems, Inc.*,<sup>238</sup> also included the following factor: “whether [the conduct] is physically threatening or humiliating, or a *mere offensive utterance*;<sup>239</sup> with the obvious implication that a “mere offensive

232. See 24 C.F.R. § 100.65(b)(5) (2002) (listing the following as an example of a prohibited action: “Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors”).

233. *DiCenso*, 96 F.3d at 1007.

234. 65 Fed. Reg. 67,666-68 (proposed Nov. 13, 2000) (to be codified at 24 C.F.R. pt. 100).

235. “Sexual harassment violates the prohibitions against discrimination on the basis of sex found in sections 804(a), 804(b), 804(c), 805, and 806 of the [Fair Housing] Act. Sexual harassment can also violate section 818 of the Act.” *Id.* at 67,666. The references in these statements are to the original section numbers within the 1968 Fair Housing Act, which are now codified, respectively, at 42 U.S.C. § 3604(a), § 3604(b), § 3604(c), § 3605, § 3606, and § 3617.

236. The test was first articulated in *Harris*, 510 U.S. at 23.

237. 65 Fed. Reg. 67,668 (proposed Nov. 13, 2000) (to be codified at 24 C.F.R. § 100.500(b)).

238. 510 U.S. at 23.

239. *Id.* (emphasis added). This phrase appears to have its origins in *Rogers*, 454 F.2d 234. There, the court stated that it did not wish “to be interpreted as holding that an employer’s mere utterance of an ethnic or racial epithet which engenders offensive feelings



utterance” would not be sufficient to violate Title VII. Despite the fact that it was adopted in the Title VII context, this language has been relied on in housing harassment cases, frequently to prevent a victim of verbal harassment from asserting a claim under § 3604(b).<sup>240</sup> HUD’s proposed regulation rejected this position, at least by implication.

Secondly, the proposed rule’s definition of “unwelcome conduct” made clear that this term “may include, but is not limited to, sexual epithets.”<sup>241</sup> This, combined with the conspicuous absence of the “mere offensive utterance” factor, gives added impetus to the notion that statement-based harassment should be considered an actionable form of sexual harassment under the FHA.

This proposed regulation has not been finally adopted. The proposal called for the comment period to end on January 12, 2001,<sup>242</sup> but shortly thereafter, the Bush Administration took office, and no further action on this proposal has been taken by HUD to date. In the absence of a final regulation, it cannot be said that courts should defer to the understanding of § 3604(c)’s role in sexual harassment cases reflected in HUD’s 2000 proposal.<sup>243</sup> Nevertheless, on the theory that HUD’s proposed rule simply reflected a correct understanding of current FHA law, as opposed to being considered an effort to expand this law, the existence of even the proposed rule may be taken as support for the position that victims of verbal harassment in housing should be able to bring claims under § 3604(c).<sup>244</sup>

### C. Summary

Part II has demonstrated that § 3604(c) appears to be applicable to most types of sexually harassing speech. It is clear to us that this law covers sexual requests, sexual epithets, and sexually explicit statements and may cover flirtatious statements depending upon the context in which they

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in an employee” should constitute harassment. *Id.* at 238, cited with approval in *Meritor*, 477 U.S. at 67.

240. See, e.g., *DiCenso*, 96 F.3d at 1008; *Hall*, 2001 U.S. App. LEXIS 5718, at \*3-4; *Cavalieri-Conway*, 992 F. Supp. at 1008; *Williams*, 955 F. Supp. at 497.

241. 65 Fed. Reg. 67,668 (proposed Nov. 13, 2000) (to be codified at 24 C.F.R. § 100.500(c)).

242. *Id.* at 67,666.

243. See *supra* notes 230-31 and accompanying text.

244. Obviously, HUD’s authority to issue fair housing regulations does not encompass the power to take positions that are inconsistent with the clear meaning of the statute. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 514-15 (1999) (Breyer, J., dissenting) (opining that the EEOC has the power to issue regulations as long as they are consistent with existing definitions and interpretations); *Capitol Mortgage Bankers, Inc. v. Cuomo*, 222 F.3d 151, 154-55 (4th Cir. 2000) (concluding that HUD has similar power to issue regulations). Therefore, the 2000 proposal must be seen as an effort by HUD simply to reflect the intended meaning of the FHA vis-à-vis sexual harassment.

are made. Had a § 3604(c) claim been made in *DiCenso* and *Honce*, at least one of these cases—*DiCenso*—should have had a different result. Nevertheless, 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 harassment 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. Advocates have generally overlooked § 3604(c)’s potential, choosing to focus instead on sections of the FHA that prohibit the denial of housing or discrimination in terms and conditions. It may also be the case that many women who are victims of the sort of “non-severe or pervasive” verbal harassment that may violate § 3604(c) do not realize that such statements are prohibited and therefore don’t seek redress. If, however, sexually harassing statements to home-seekers and current tenants can be deemed to violate § 3604(c) even if those statements are not sufficiently “severe or pervasive” to meet the traditional standards for § 3604(a) and § 3604(b) claims, then the protection against harassment in one’s home provided by the FHA may well be greater than it is in the workplace under Title VII.

One hurdle remains to reaching this conclusion: the First Amendment’s limitation on Congress’s ability to pass laws that abridge the freedom of speech.<sup>245</sup> This final hurdle to using § 3604(c) to challenge harassing housing statements is considered in Part III.

### III. FIRST AMENDMENT CONSIDERATIONS

#### A. Overview; the Basic Problem

A landlord or other housing provider accused of violating § 3604(c) by making sex-based harassing statements might well be expected to assert that his remarks are protected by the First Amendment.<sup>246</sup> After all, this

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245. The First Amendment provides in pertinent part that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

246. See, e.g., cases cited *infra* note 248. Claims brought under § 3604(c) may be more likely than those under other anti-harassment laws to invite a First Amendment challenge for the simple reason that there will be one fewer defense. Indeed, in Title VII hostile environment cases, defendants rarely raise First Amendment arguments. See Schwemm, *supra* note 128, at 292 n.478; Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 512 (1991); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 415-16 (1991). Instead, they usually just litigate whether the alleged conduct occurred and, if it did, whether it was severe or pervasive enough to constitute illegal harassment. Only after a finding or admission that the defendant engaged in such harassment will a defendant look to the First Amendment, making it “a defense of last resort.” Horton, *supra*, at 416.

statute by its terms bans certain types of communications and does so based on their content (e.g., statements that “indicate[ a] preference, limitation, or discrimination based on . . . sex”), so a statement-based § 3604(c) claim would naturally invite a First Amendment defense. True, § 3604(c) is limited to communications that are made “with respect to the sale or rental of a dwelling,” but in this narrow context, it is undeniable that the statute is a content-based restriction on speech and, as such, would ordinarily be subjected to the highest level of judicial scrutiny in a challenge based on the First Amendment.<sup>247</sup>

Despite the rather obvious potential for conflict between § 3604(c) and the First Amendment, little has been written about this subject. Only a few court decisions have addressed § 3604(c)’s relation to the constitutional guarantee of freedom of speech.<sup>248</sup> And while many commentators have discussed the tension between other civil rights laws that prevent

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A § 3604(c) defendant, on the other hand, will not be able to use the “not severe or pervasive” argument. *See supra* text accompanying note 131. Thus, even though the First Amendment may also be the defense of last resort in § 3604(c) harassment cases, the defendant will get there more quickly than his Title VII counterpart.

247. *See, e.g.*, *Consol. Edison Co. of N.Y., Inc. 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) (“[A]bove 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.”); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (standard of review discussed *infra* notes 256 and 273).

248. *E.g.*, *United States v. Racey*, No. 96-2023, 1997 U.S. App. LEXIS 10151, at \*3 (4th Cir. May 7, 1997) (holding that First Amendment does not protect landlord from liability for anti-black statement in violation of § 3604(c)); *HOME*, 943 F.2d at 650-53 (rejecting “aggregate message” theory of liability in human model advertising case against newspaper because this theory hinges on a construction of § 3604(c) that raises serious First Amendment concerns); *New York Times*, 923 F.2d at 1002 (rejecting First Amendment defense to § 3604(c)’s ban on discriminatory newspaper advertising); *Stewart v. Furton*, 774 F.2d 706, 710 n.2 (6th Cir. 1985) (implying that landlord’s biased statement unrelated to a specific discriminatory transaction would raise difficult First Amendment issues); *Hunter*, 459 F.2d at 211-15 (holding that § 3604(c)’s application to discriminatory housing ad does not violate newspaper’s constitutional rights). Non-§ 3604(c) cases have also recognized the potential for First Amendment conflict in the enforcement of fair housing laws. *See United States v. Northside Realty Assocs., Inc.*, 474 F.2d 1164, 1170-71 (5th Cir. 1974) (holding that, to the extent district court based its finding of discrimination on defendant’s statement that he believed the FHA to be unconstitutional, this violated the First Amendment); *Wainwright v. Allen*, 461 F. Supp. 293, 296, 298 (D. N.D. 1978) (holding that landlord’s statement to investigator that “spics, niggers, wops, Jew boys and the ACLU” were ruining the country was a statement of opinion, albeit a bigoted one, that was protected by the First Amendment).

harassment and the First Amendment,<sup>249</sup> few have dealt with this subject in the context of the FHA.<sup>250</sup>

Furthermore, the distinction between the First Amendment implications of claims under § 3604(c) and claims under other civil rights laws is significant, because only § 3604(c) seeks to ban speech per se. It is worth remembering here that the provision in Title VII that has been used in harassment cases—even hostile environment cases based primarily on sexual comments—is the one that outlaws discrimination in the “terms and conditions” of employment<sup>251</sup> and not Title VII’s prohibition against discriminatory notices and ads, which, as we have seen, does not also ban discriminatory statements.<sup>252</sup> Indeed, neither Title VII nor any other federal anti-discrimination statute of which we are aware purports, by its terms, to ban biased statements, as § 3604(c) does. As such, § 3604(c) raises unique First Amendment issues.<sup>253</sup>

There are two basic approaches to defending § 3604(c) from First Amendment challenge. The first is to accept the fact that, as a content-based restriction on speech, § 3604(c) will be subjected to a high level of judicial scrutiny and attempt to satisfy this standard. This standard requires that the government show that its restriction on speech serves “a

249. See, e.g., Browne, *supra* note 246; Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1; Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-On-Student Sexual Harassment and the First Amendment in School*, 75 N.D. L. REV. 205 (1999); Bernice Resnick Sandler, *Sexual Harassment and the First Amendment*, 3 TEMP. POL. & CIV. RTS. L. REV. 49 (1993-1994); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Horton, *supra* note 246; Aileen V. Kent, Note, *First Amendment Defense to Hostile Environment Sexual Harassment: Does Discriminatory Conduct Deserve Constitutional Protection?*, 23 HOFSTRA L. REV. 513 (1994); Strauss, *supra* note 196; Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

250. Among the few articles that address First Amendment issues in the housing harassment context are Daniel Barkley, Comment, *Beyond the Beltway: Fair Housing and the First Amendment*, 6 J. AFF. HOUS. & COMM. DEV. 169 (1997) and Schwemm, *supra* note 128, at 267-94. Other articles have addressed the First Amendment implications of § 3604(c)’s ban on discriminatory advertising. E.g., Michael E. Rosman, *Ambiguity and the First Amendment: Some Thoughts on All-White Advertising*, 61 TENN. L. REV. 289 (1993); Matthew G. Weber, *Media Liability for Publication of Advertising: When to Kill the Messenger*, 68 DENV. U. L. REV. 57 (1991); Mary A. Fiorino, Comment, *Advertising for Apartheid: The Use of All White Models in Marketing Real Estate as a Violation of the Fair Housing Act*, 56 U. CIN. L. REV. 1429 (1988).

251. See, e.g., *Burlington Indus.*, 524 U.S. at 747-48, 751-54; *Faragher*, 524 U.S. at 780-83; Schwemm, *supra* note 128, at 290-93; *supra* text accompanying notes 35-49.

252. See *supra* text accompanying notes 107-08.

253. See *infra* text accompanying notes 274-283.

compelling state interest” and is “a precisely drawn means” of serving that interest.<sup>254</sup> The first part of this test might well be met in a case where the government’s interest is to prevent sexual harassment of women in their homes, for the Supreme Court has on numerous occasions confirmed that protecting women from sex discrimination is a governmental interest of the highest order.<sup>255</sup>

The difficulty would be that § 3604(c) is not sufficiently narrow or precisely drawn to achieve this interest.<sup>256</sup> First of all, having § 3604(c) apply to sexual harassment is not necessary to protect women from many types of sex discrimination in housing, which is outlawed by other provisions of the FHA.<sup>257</sup> Therefore, the precise governmental interest in adding § 3604(c) to this overall arsenal of anti-sex discrimination provisions would only extend to those “non-severe or pervasive” statements of harassment that are not already banned by § 3604(b) or other FHA prohibitions.<sup>258</sup>

With respect to this interest, § 3604(c) is hardly a precisely drawn measure. Apart from the fact that this law also bans six other bases of discrimination that may well involve different degrees of governmental interests,<sup>259</sup> § 3604(c) covers a variety of types of communications (ads,

254. *E.g.*, *Consol. Edison*, 447 U.S. at 540; *see also* other cases cited *supra* note 247.

255. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657-58 (2000) (observing in case involving First Amendment defense to state civil rights statute that “[s]tates have a compelling interest in eliminating discrimination against women in public accommodations” (citing *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)); *R.A.V.*, 505 U.S. at 395 (described *infra* notes 256 and 272); *see also* *Johnson v. County of L.A. Fire Dep’t*, 865 F. Supp. 1430, 1439 (C.D. Cal. 1994) (“There is no doubt that the prevention of sexual harassment is a compelling government interest.”).

256. *See, e.g.*, *R.A.V.*, 505 U.S. at 395-96 (striking down ordinance outlawing, *inter alia*, gender-based “hate speech” on the ground that, although the government interests of ensuring “the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish . . . are compelling,” the ordinance was not “narrowly tailored” to serve these interests, given the fact that “adequate content-neutral alternatives” existed that would have achieved “precisely the same beneficial effect”).

257. *See supra* note 65 and accompanying text.

258. *Cf. HOME*, 943 F.2d at 652-53 (deciding that, for purposes of First Amendment analysis, the governmental interest underlying the particular theory of § 3604(c) liability proposed here is limited to eliminating only those forms of discrimination uniquely addressed by this theory).

259. For example, it seems likely that, while the high level of governmental interest in eliminating sex discrimination would be every bit as great with respect to harassment cases under § 3604(c) involving race, color, religion, and national origin discrimination, it is at least arguable that a lower level might obtain in cases involving handicap or at least familial status discrimination. *Cf. Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-74 (2001) (concluding that the standard of review under Equal Protection Clause is less demanding for disability discrimination than for racial discrimination based on evidence

notices, and statements), a number of different housing transactions (sales, prospective rentals, and, we contend, current rentals), and all such communications in such transactions that indicate, both intentionally and unintentionally, any illegal preference, limitation, or discrimination or an intention to make such a preference, limitation, or discrimination.<sup>260</sup> A statute that bans everything from newspaper ads indicating discrimination with respect to the sale of luxury homes to restrictive covenants in condominium deeds to landlords' demands for sex from their female tenants hardly seems the type of narrowly focused statute that would likely survive the strictest level of scrutiny under the First Amendment.

The second approach to defending the constitutionality of applying § 3604(c) to harassment cases is to identify one or more First Amendment doctrines that, based on the special context or nature of the speech involved, would allow the government to place even content-based restrictions on speech without having to satisfy the highest level of judicial scrutiny. Likely candidates in the context of applying § 3604(c) to sexually harassing statements include: the "Fighting Words" doctrine, a variation of which might allow some restrictions on "Hate Speech"; the "Commercial Speech" doctrine; and the "Captive Audience" doctrine. We consider these three doctrines individually in Parts III.B, III.C, and III.D below, which conclude, respectively, that the "Fighting Words"- "Hate Speech" doctrine is unlikely to be helpful in protecting § 3604(c) from a First Amendment challenge, but that the "Commercial Speech" and "Captive Audience" doctrines do provide a measure of protection.

### B. "Fighting Words" and "Hate Speech"

Ever since 1942 when the Supreme Court decided *Chaplinsky v. New Hampshire*,<sup>261</sup> the First Amendment has been understood to allow government to outlaw "fighting words," a narrowly defined category of speech that is thought to be of such slight social value that any benefit derived therefrom is outweighed by its costs to public order.<sup>262</sup> *Chaplinsky's* definition of fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of peace"<sup>263</sup>—would at first glance seem to cover some forms of verbal sexual harassment, particularly those we have called "sexual epithets,"<sup>264</sup> which

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of state governments' disability discrimination in legislative history of 1990 Americans with Disabilities Act being significantly less than comparable evidence concerning race discrimination in legislative history of 1965 Voting Rights Act).

260. See *supra* Parts II.A.2-3.

261. 315 U.S. 568 (1942); see also cases cited *infra* notes 265-66.

262. *Chaplinsky*, 315 U.S. at 571-72.

263. *Id.* at 572.

264. See *supra* text accompanying notes 200-05.

could well be seen as statements “which by their very utterance inflict injury.”

The problem is that in the years since *Chaplinsky*, the Court has substantially narrowed the scope of the fighting words doctrine by, *inter alia*, holding that the second element of the *Chaplinsky* test is a necessary, not just an alternative, part of the definition of fighting words. Thus, the only types of speech that may be banned under this doctrine are utterances that not only inflict injury on their targets,<sup>265</sup> but that also “tend to incite an immediate breach of the peace” by “provok[ing] violent resentment.”<sup>266</sup> This requirement that a sexual epithet be so extreme that its utterance would tend to provoke immediate violence from its target seems to make the fighting words doctrine an unlikely candidate for protecting § 3604(c) from First Amendment challenge.

For example, as insulting as were the landlord’s statements to his female tenant in *DiCenso*<sup>267</sup>—his calling her a “bitch” and a “whore” from outside her closed apartment door—it seems unlikely that such statements would lead to an immediate violent altercation. Indeed, most of the epithets and other demeaning statements condemned by § 3604(c) would probably fall within this category; that is, hurtful, but not likely to provoke a violent response. And this would seem to be particularly so in those cases where § 3604(c)’s contribution to challenging sexual harassment is most significant (i.e., where the statements involved are not sufficiently “severe or pervasive” to alter the terms or conditions of the target’s tenancy).<sup>268</sup>

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265. Fighting words must be “directed to the person of the hearer.” *Cohen v. California*, 403 U.S. 15, 20 (1971). While this requirement might result in some group-based epithets being considered too impersonal to be fighting words, we assume here that virtually all the sexual epithets that would be covered in § 3604(c) cases (i.e., those directed to individual female tenants by their landlords) would satisfy this “directed to the person of the hearer” requirement.

266. *Gooding v. Wilson*, 405 U.S. 518, 524-25 (1972); *see also Texas v. Johnson*, 491 U.S. 397, 409 (1989) (holding that speech constituting fighting words must be regarded by a reasonable addressee as “an invitation to exchange fisticuffs”); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-33 (1974) (holding that statute prohibiting the use of “obscene or opprobrious” language toward police officers was unconstitutionally overbroad because it encompassed language that “convey[s] disgrace” without inflicting injury or inciting a breach of the peace); *Cohen*, 403 U.S. at 20 (holding that the phrase “Fuck the Draft” on defendant’s jacket did not constitute fighting words because it was not directed toward any particular person and was not likely to provoke a violent reaction from those who saw it). The *Chaplinsky* opinion, itself, 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.

267. 96 F.3d at 1006. *See supra* text accompanying note 213.

268. *See supra* notes 64-65 and accompanying text. Another fundamental problem with trying to use the fighting words doctrine to protect § 3604(c) from a First Amendment challenge is that this law is written too broadly for a fighting words defense. *See, e.g.*,

A variation on the “fighting words” doctrine is to label certain forms of verbal harassment based on race, sex, and some other protected-class statuses as “hate speech” and argue that the potential negative consequences of such speech on its targets are so severe that the government is justified in banning it. Certainly, there is a wealth of information about the harms that such hate speech can inflict on its victims.<sup>269</sup> Nevertheless, courts have invariably struck down hate speech regulations, concluding that the speech they seek to ban, albeit offensive and even harmful to many who hear it, cannot be considered either fighting words likely to provoke immediate violence or to be otherwise outside the protection of the First Amendment. And this is true even where the challenged regulation is limited to a certain arena, such as student interactions at a state university,<sup>270</sup> or is addressed only to the problems

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*Gooding*, 405 U.S. at 524 (striking down as overbroad a 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”). The language of § 3604(c) 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 would tend to provoke a violent response. *See, e.g.*, *HUD v. Lewis*, 2A Fair Hous.–Fair Lending (Aspen L. & Bus.) ¶ 25,118, at 26,013 (HUD ALJ April 19, 1996) (holding in favor of leasing agent in § 3604(c) claim based on her employer’s instructions to her not to rent to minorities). Thus, even though § 3604(c) may well ban *some* statements that are beyond First Amendment protection, the fact that it is directed against and outlaws many other statements means that it is too broad to be defended based on the fighting words doctrine. As the Supreme Court has observed:

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*, 415 U.S. at 133-34 (quoting *Gooding*, 405 U.S. at 520-21).

269. *See, 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; 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).

270. *See, e.g.*, *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163, 1164-78 (E.D. Wis. 1991) (holding that the First Amendment overrides a state



created for women by certain explicitly sex-based and offensive communications.<sup>271</sup>

The most important of these decisions is *R.A.V. v. City of St. Paul*,<sup>272</sup> where the Supreme Court struck down a city's "hate crime" ordinance that was used to prosecute a juvenile who had burned a cross in front of a Black family's home.<sup>273</sup> *R.A.V.* is noteworthy in relation to § 3604(c)

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university's rule that disciplines students for, inter alia, "racist or discriminatory comments [and] epithets . . . directed at an individual [that] intentionally [d]emean the race [or] sex [of such] individual [e.g., 'bitch']," which had been adopted in response to a series of incidents of discriminatory harassment of minorities and women); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 853 (E.D. Mich. 1989) (striking down a similarly motivated university hate speech restriction); see also *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995).

271. See, e.g., *Am. Bookseller Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985). In *American Bookseller*, 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." *Id.* at 324. 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 the speech" and because its prohibitions covered sexual materials that did not qualify 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 outside a few narrowly defined areas 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.

272. 505 U.S. 377. The Court is currently considering another cross-burning case that presents many of the same First Amendment issues dealt with in *R.A.V.* See *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001), *cert. granted*, 122 S. Ct. 2288 (2002).

273. 505 U.S. at 379-80. St. Paul's "Bias-Motivated Crime 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. *Id.* at 380. The defendant in *R.A.V.* conceded that his conduct could have been prosecuted under a properly drawn statute, but he successfully argued that the St. Paul ordinance was unconstitutional because it too broadly proscribed permissible speech and also because it discriminated against certain types of speech. *Id.* According to Justice Scalia's opinion, joined by four other members of the Court, the St. Paul ordinance, being content-based, could be upheld only if it were shown to be reasonably necessary to achieve a compelling government interest. *Id.* at 395-96. The Court held that St. Paul failed to satisfy this standard, noting that the goals underlying its ordinance could also be achieved by a law that was "not limited to the favored topics." *Id.* at 396. 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." *Id.* (footnote omitted).

because the key to the Court's decision was that the challenged ordinance focused on a defendant's communicative activities rather than his conduct. Indeed, Justice Scalia's opinion made clear his belief that cross burning was "reprehensible" conduct that government has the responsibility and the means to prevent in constitutionally appropriate ways.<sup>274</sup> According to *R.A. V.*, however, the proper means were statutes that focused on conduct, not speech.<sup>275</sup>

The *R.A. V.* opinion specifically took note of Title VII's prohibition of sexual harassment, contrasting it with the St. Paul ordinance and arguing that Title VII was in no danger of a First Amendment challenge because it was focused primarily on conduct and therefore only on the "secondary effects" of speech.<sup>276</sup> According to Justice Scalia:

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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. *See id.* at 416 (Blackmun, J., concurring); *id.* at 424 (Stevens, J., concurring). For his part, Justice Stevens 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 . . . 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.*; *see also id.* at 416 (Blackmun, J., concurring).

274. *Id.* at 396.

275. *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* *United States v. J.H.H.*, 22 F.3d 821, 824-26 (8th Cir. 1994) (described *infra* note 283).

276. *R.A. V.*, 505 U.S. at 389-90. The "secondary effects" doctrine serves to protect certain types of content-based limitations on speech from First Amendment challenge based on the realization that speech may "cause secondary effects . . . unrelated to the [primary] impact of the speech on its audience." *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728, 1739 (2002) (Kennedy, J., concurring) (giving as examples billboards that obstruct views and newspaper factories that cause pollution and noting that such secondary effects may be regulated "even though they are produced by speech"). The doctrine has most often been used to uphold municipal efforts to restrict adult bookstores and movie theaters to certain locations based on the negative impact of these businesses on local neighborhoods. *E.g.*, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The Court has made clear, however, that governmental regulation of the secondary effects of speech must be "*justified* without reference to the content of the . . . speech." *Id.* at 48, *quoted with approval in R.A. V.*, 505 U.S. at 389; *see also Alameda Books*, 122 S. Ct. at 1739 (holding that government "may not regulate the secondary effects of speech by suppressing the speech itself").

In *R.A. V.*, Justice Scalia relied on the "secondary effects" doctrine to justify his conclusion that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." 505 U.S. at 389. Because sexual harassment was viewed as a violation of Title VII's "terms and conditions" provision (that is, a statute aimed at conduct, not speech), it could be banned without violating the First Amendment, because "[w]here the government

[S]exually derogatory “fighting words,” among others words, may produce a violation of Title VII’s general prohibitions against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.<sup>277</sup>

One year after *R.A.V.*, the Supreme Court again stressed the distinction between antidiscrimination laws that focus on conduct and those that focus on speech in the course of a unanimous opinion that upheld a sentence-enhancement hate crime law in *Wisconsin v. Mitchell*.<sup>278</sup> The Wisconsin statute challenged in *Mitchell* provided for longer sentences for perpetrators of criminal battery who had intentionally selected their victims on the basis of the victim’s “race, religion, color, disability, sexual orientation, national origin or ancestry.”<sup>279</sup> In rejecting the defendant’s claim that this statute violated the principles laid down in *R.A.V.*, Chief Justice Rehnquist’s opinion noted that “the statute in this case is aimed at conduct unprotected by the First Amendment” in contrast to the “ordinance struck down in *R.A.V.* [which] was explicitly directed at expression.”<sup>280</sup>

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does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *Id.* at 389-90. The “secondary effects” doctrine could not protect the St. Paul ordinance under review in *R.A.V.*, however, because it was directed not against the secondary effects, but rather the primary consequences of cross burning (i.e., the ordinance was designed to protect the audience’s sensibilities). *Id.* at 394. According to Justice Scalia: “‘Listeners’ reactions to speech are not the type of ‘secondary effects’ we referred to in *Renton*. . . . ‘The emotive impact of speech on its audience is not a “secondary effect.”’” *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

Presumably, the same distinction would hold true for sexual harassment claims under the Fair Housing Act. Thus, if such claims were brought under § 3604(b)’s prohibition of discriminatory terms and conditions, they might well be protected against First Amendment challenge by the “secondary effects” doctrine as described in *R.A.V.*, whereas claims based on § 3604(c)—a statute that is explicitly directed against certain types of speech based on its content and one whose purpose in the sexual harassment context would be to protect against the primary consequences of the banned speech—would not be able to benefit from this doctrine.

277. *R.A.V.*, 505 U.S. at 389-90 (citing 42 U.S.C. § 2000e-2 (Title VII’s provision banning discriminatory “terms and conditions”); 29 C.F.R. § 1604.11 (1991)). In a concurring opinion joined by four members of the Court, Justice White suggested that the majority’s First Amendment analysis, which he disagreed with, did indeed raise questions about the constitutionality of Title VII’s prohibition of hostile work environment claims based on sexual harassment. *Id.* at 409-10 (White, J., concurring).

278. 508 U.S. 476 (1993).

279. WIS. STAT. § 939.645 (1989-1990); see *Mitchell*, 508 U.S. at 480.

280. 508 U.S. at 487. The Court in *Mitchell* did not consider the defendant’s conduct (a physical assault) as “by any stretch of the imagination expressive conduct

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>281</sup>

The *R.A.V.* and *Mitchell* decisions do not bode well for protecting sexual harassment claims under § 3604(c) from First Amendment challenge. First of all, this statute, unlike those cited with approval in those decisions, is specifically directed at statements and other forms of expression, not conduct, a distinction considered vital in both *R.A.V.* and *Mitchell*.<sup>282</sup> The result seems to be that 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 a First Amendment challenge when applied to sexual harassment,<sup>283</sup> but § 3604(c)'s explicit prohibition of discriminatory statements does.

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protected by the First Amendment." *Id.* at 484 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982)).

281. *Id.* at 485-87. According to *Mitchell*, "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which [the Court has] previously upheld against constitutional challenge." *Id.* at 487 (citing *Roberts*, 468 U.S. at 628; *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976)). "Title VII . . . 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.'" *Id.* (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(1)).

In *Hishon*, [the Court] rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in *R.A.V. v. St. Paul*, 505 U.S. at 389-390, [the Court] cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct.

*Id.*

282. That § 3604(c) is directed at expression rather than conduct is not changed by the fact that the statute's ban is couched in terms of certain verbs ("[t]o make, print, or publish, or cause to be made, printed, or published" an offending communication). First Amendment values would hardly countenance drawing a distinction between a statute that outlaws "making a statement" and one that simply outlaws the statement. In this regard, it might be noted that HUD's proposed sex harassment regulation, *see supra* Part II.B.3, at times speaks in terms of "verbal conduct" as sufficient to establish hostile environment harassment, *see* 65 Fed. Reg. 67,668 (proposed Nov. 13, 2000) (to be codified at 24 C.F.R. § 100.500(a)(2), which may be an effort, albeit not a particularly convincing one, to finesse the speech/conduct distinction that is so important to First Amendment analysis in *R.A.V.* and *Mitchell*.

283. *See, e.g., J.H.H.*, 22 F.3d at 824-26 (affirming convictions of *R.A.V.* and his companion for the same cross burning activity that was involved in the *R.A.V.* case based on 42 U.S.C. § 3631, which is the criminal version of § 3617, on the ground that § 3631, unlike the *St. Paul* ordinance in *R.A.V.*, does not violate the First Amendment because it is directed toward conduct rather than expression); *cf. White v. Lee*, 227 F.3d 1214, 1226-34, 1237-38 (9th Cir. 2000) (holding that the First Amendment bars this particular § 3617 claim, which was based on defendants' speech and petitioning behavior).

Furthermore, *R.A.V.* makes clear that even with respect to speech that appears to have little or no value in the marketplace of ideas, government is not free to prohibit only those forms of such speech that involve particular topics or perspectives.<sup>284</sup> Thus, even if it is assumed that verbal sexual harassment is valueless speech that could be subjected to extensive regulation—hardly an obvious assumption for First Amendment purposes<sup>285</sup>—the fact that § 3604(c) bans only those statements of preference, limitation, or discrimination that are based on certain identified protected classes makes it, in *R.A.V.*'s terms, "limited to . . . favored topics," which is "precisely [the type of statute] the First Amendment forbids."<sup>286</sup>

Thus, the governmental interest in protecting women from verbal harassment, even if it is as weighty as the interest in protecting them from "hate speech" and "hate crimes," apparently cannot be achieved through laws, like § 3604(c), that by their terms outlaw a great deal of speech

284. See *R.A.V.*, 505 U.S. at 391-96.

285. It seems clear that sexually harassing speech in housing is far removed from the types of political and religious advocacy about issues of public concern that involve "core" First Amendment values and that therefore command the highest degree of constitutional protection. See, e.g., *Watchtower Bible & Tract Soc. of N. Y., Inc. v. Vill. of Stratton*, 122 S. Ct. 2080, 2087 (2002); *infra* note 78 (discussing *Frisby v. Schultz*, 487 U.S. 474, 479 (1988)). It is equally clear, however, that the Supreme Court often accords a good deal of First Amendment protection to sex-based speech, at least if it falls short of being obscene under the stringent standards of *Miller v. California*, 413 U.S. 15 (1973). See, e.g., *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1403 (2002) (striking down Congress's ban on simulated child pornography that did not satisfy the *Miller* standards and commenting that "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought"). See generally Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 752 (1993) (criticizing the entire approach of according reduced constitutional protection to certain types of allegedly low-value speech on the ground that "[t]his is exactly the type of argument the First Amendment should foreclose").

With respect to a landlord's sexually harassing statements, such speech could, for example, express the speaker's deeply-held beliefs about the status of women in society or the role that sexuality should play in every day life. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the advocacy of racist and violent beliefs was protected by the First Amendment in most situations (i.e., except those involving incitement to, and the likelihood of, imminent lawless action)). Justice Douglas, concurring in *Brandenburg*, opined that such protected advocacy originated from the "sanctuary of belief and conscience." *Id.* at 457 (Douglas, J., concurring). Nor would such statements necessarily be considered devoid of expressive content. Cf. *R.A.V.*, 505 U.S. at 384-85 ("It is not true that 'fighting words' have at most a '*de minimis*' expressive content, or that their content is *in all respects* 'worthless and undeserving of constitutional protection'; sometimes they are quite expressive indeed." (citation omitted)). Thus, while the low value of sexually harassing speech in housing may well be relevant in determining the degree of First Amendment protection to which it is entitled, this element alone would be insufficient to justify its prohibition by § 3604(c).

286. *R.A.V.*, 505 U.S. at 396.

beyond “fighting words.” If § 3604(c) is to be applied constitutionally to sexual harassment, then some other approach must be found to deal with the potential First Amendment problems that such an application would raise.

### C. *The Commercial Speech Doctrine*

The high level of judicial scrutiny that generally applies to content-based restrictions on speech is reduced substantially when the restriction applies only to commercial activities.<sup>287</sup> This is due to “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”<sup>288</sup> Because § 3604(c)’s ban on discriminatory statements applies only to those made “with respect to the sale or rental of a dwelling,”<sup>289</sup> the speech involved seems likely to be “commercial” and therefore subject to a lower level of First Amendment protection.

For over twenty years, the test for evaluating the constitutionality of restrictions on commercial speech has been the one set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*:

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

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287. *E.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (“We have always been careful to distinguish commercial speech from speech at the First Amendment’s core. “[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,” and is subject to “modes of regulation that might be impermissible in the realm of non-commercial expression.””) (quoting *Bd. of Trs. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978))); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“[First Amendment] accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”). *See generally* Robert Post, *The Constitutional Status of Commercial Speech*, 48 *UCLA L. REV.* 1, 26-33 (2000) (identifying various ways in which commercial speech receives less First Amendment protection than other types of speech). One of these ways, which is further discussed *infra* Part III.E, is that the overbreadth doctrine does not apply in commercial speech cases. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 379-81 (1977).

288. *Cent. Hudson Gas & Elec.*, 447 U.S. at 562 (quoting *Ohralik*, 436 U.S. at 455-56).

289. *See supra* Part II.A.2.

directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>290</sup>

The inquiries called for by this test fall into two groups. The first deals with whether the speech at issue concerns “lawful activity” and is not “misleading.” The second applies the test’s last three factors to determine if the governmental interest underlying the challenged regulation is substantial, is directly advanced by the regulation, and could not be served by less restrictive means. As a practical matter, the constitutionality of a particular law regulating commercial speech is usually determined by the first factor; that is, by whether the restricted speech “concerns lawful activity and is not misleading” or does not. If it does not, there is virtually no First Amendment protection.<sup>291</sup> If it does, the regulation is usually struck down, for the Court has made clear that truthful commercial speech, albeit less protected than noncommercial speech, is still highly valued in our society.<sup>292</sup>

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290. *Cent. Hudson Gas & Elec.*, 447 U.S. at 566. Recent decisions employing this test include *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1504, 1509-10 (2002) (opinions of Justices O’Connor (plurality) and Breyer (dissenting) for a total of eight Justices); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (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, 528-29 (1996) (opinions of Justices Stevens and O’Connor (concurring) for a total of seven Justices).

291. *See, e.g.*, *United States v. Edge Broad. Co.*, 509 U.S. 418, 424-25 (1993); *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 388-89 (1973).

292. Indeed, no modern Supreme Court decision has upheld a content-based restriction on this type of commercial speech, *see* cases cited *infra* note 290, although some have upheld time, place, or manner restrictions on such speech. *E.g.*, *Went For It*, 515 U.S. 618; *Friedman v. Rogers*, 440 U.S. 1, 8-16 (1979); *Ohralik*, 436 U.S. 447.

The basic rationale for giving a high degree of protection to commercial speech concerning lawful activity is that, in a market economy, the public has a strong interest in receiving full and accurate information about the price and availability of all legal products and services, so that the cumulative effect of consumer decisions will be to distribute the Nation’s resources in the most efficient way. As the Court explained 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.”

447 U.S. at 561-62 (alteration in original) (quoting *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)). Other endorsements of the value of commercial speech, and therefore of the importance of protecting it under the First Amendment, are found in *Greater New Orleans Broad. Ass’n*, 527 U.S. at 184-85, and *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977). The classic

In determining whether the commercial speech doctrine may be helpful in § 3604(c) cases involving sexual harassment, three basic issues must be considered. The first is whether § 3604(c)-outlawed harassing statements should even be considered “commercial speech” so as to bring this doctrine into play. Assuming an affirmative answer to this question, the second issue is whether verbal harassment may be considered outside First Amendment protection because it concerns unlawful activity or is misleading. Finally, if the high degree of protection accorded lawful and nonmisleading commercial speech is considered appropriate, the determination must be made whether the government’s interest in banning verbal sexual harassment meets the last three elements of the *Central Hudson* test.<sup>293</sup>

With respect to the first issue, the Supreme Court has struggled to find a proper definition of “commercial speech,”<sup>294</sup> and the resulting uncertainty

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statement of the value of commercial speech was provided by Justice Blackmun in the *Virginia State Board of Pharmacy* case:

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 decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

425 U.S. at 765 (footnote and citations omitted).

293. Professor Schwemm has dealt with these three issues at some length in a recent article on § 3604(c). See Schwemm, *supra* note 128, at 268-82. His conclusions were that the concept of “commercial speech” covers virtually all § 3604(c)-outlawed communications, *id.* at 269-71, that such communications would not concern lawful activity—and therefore would not be protected by the First Amendment—in all race cases and all others types of cases except some of those that are subject to the FHA’s exemptions, *id.* at 273-78, and that for those sex-based and other non-race cases occurring in FHA-exempt dwellings not subject to a state or local fair housing law, the government would probably fail to satisfy one or more of the last three elements of the *Central Hudson* test, so that § 3604(c)’s ban on discriminatory communications would be held to violate the First Amendment (or should be construed in a more narrow way so as not to be unconstitutional). *Id.* at 278-82. These conclusions were reached in an article that focused primarily on race-based cases under § 3604(c) and on statements at the initial stages of a housing sale or rental as opposed to sex-based cases involving current tenants. These differences are significant enough to warrant revisiting all three of these issues here.

294. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420-23 (1993); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.29, at 1140-41 (6th ed. 2000); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-15, at 896-99 (2d



may make for some difficulties in the context of sexual harassment cases under § 3604(c). The Court has advocated a “commonsense” approach in determining what is included within the concept of commercial speech,<sup>295</sup> and this concept covers not only speech “proposing a commercial transaction,”<sup>296</sup> but also the entire “set of communicative acts about commercial subjects that conveys information of relevance to [the public’s] decision making.”<sup>297</sup>

This definition would no doubt cover all § 3604(c) cases involving ads, notices, and statements dealing with housing sales and with the phases of rentals leading up to an actual tenancy.<sup>298</sup> The key time-period for many sexual harassment cases, however, occurs *during* the tenancy. Even assuming that § 3604(c) applies to this time period,<sup>299</sup> the question remains whether a landlord’s harassing statement made to a current tenant could be considered commercial speech when the time has passed for initially “proposing a commercial transaction.”<sup>300</sup>

One approach to answering this question is to conclude that *all* conversations between a landlord and a tenant are inherently commercial, because they would not have occurred but for the commercial relationship between the parties, and thus they always have implications, at least implicitly, for the terms and conditions of that relationship. As discussed above,<sup>301</sup> virtually all housing harassment takes place either inside the victim’s apartment or elsewhere at the property, which are places of business for the landlord and his agents. And even if the harassing speech

ed. 1988); Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 VAND. L. REV. 693, 765-66 (2002); Post, *supra* note 287, at 5-25; Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 80-82, 146 (1999).

295. See, e.g., *Discovery Network*, 507 U.S. at 423; *Ohralik*, 436 U.S. at 455-56; *supra* text accompanying note 288 (quoting *Cent. Hudson Gas & Elec.*, 477 U.S. at 562). According to the *Discovery Network* opinion, although a “commonsense” distinction between commercial and non-commercial speech does exist, the importance of this distinction for purposes of First Amendment analysis may well be overestimated and the difference is simply “a matter of degree.” 507 U.S. at 419, 423.

296. *Central Hudson Gas & Elec.*, 447 U.S. at 562.

297. Post, *supra* note 287, at 15; see also *Bolger*, 463 U.S. at 66 (holding that informational-advertising pamphlets concerning defendant’s prophylactic products are commercial speech even though they “cannot be characterized merely as proposals to engage in commercial transactions”).

298. See, e.g., *Racey*, 1997 U.S. App. LEXIS 10151, at \*3 (holding that landlord’s § 3604(c)-violative statement to prospective renter that landlord would not rent to blacks was commercial speech for the purposes of the First Amendment); *HOME*, 943 F.2d at 651-53 (treating newspaper housing ads challenged under § 3604(c) as commercial speech subject to the *Central Hudson* test); *New York Times*, 923 F.2d at 1002-05 (same). See generally Schwemm, *supra* note 128, at 268-82.

299. See *supra* text accompanying notes 139-40.

300. See *supra* note 297 and accompanying text.

301. See *supra* text accompanying note 137.

doesn't directly concern the terms of a woman's lease, it undoubtedly affects her experience in renting the dwelling, which is the ongoing commercial transaction at the heart of her interactions with her landlord.

Even if the proposition that *all* conversations between a landlord and tenant are inherently commercial goes too far, we would argue that the concept of commercial speech should at least apply to all landlord-tenant conversations where a reasonable person in the tenant's position would consider the landlord's statements to be related to the terms or conditions of the rental relationship. In such conversations, the landlord's speech should be seen as "proposing" a change in the parties' "commercial transaction." Under this approach, it is clear that some types of verbal harassment would be covered. One example is what we have called "sexual requests" (e.g., a demand for sex in exchange for allowing the tenancy to continue).<sup>302</sup>

On the other hand, "sexual epithets" might or might not be reasonably understood to be effecting a change in the parties' commercial relationship, depending on the context in which a particular epithet is uttered. For example, if a landlord directs sexual epithets at a female tenant who has just rejected his sexual requests, as was done in *DiCenso*,<sup>303</sup> there would seem to be a clear connection between the landlord's attempt to change the terms of the rental relationship and his epithets, which would mean that they should be considered part of the parties' commercial relationship.<sup>304</sup> If, however, this connection is absent (i.e., the epithet is not prompted by a discussion of the rental relationship), it would be much harder to argue that commercial speech is involved.

Similarly, the context would seem to be the key to deciding whether a landlord's "sexual comments" to a female tenant could be considered commercial speech. If these comments are explicit enough to suggest to a reasonable tenant that the landlord is making an implied sexual request, the terms of the tenancy might well be sufficiently affected to allow the comments to be considered commercially related; a simple flirtatious statement, on the other hand, would probably not suffice.<sup>305</sup>

To the extent verbally harassing statements by a landlord to a tenant are *not* considered commercial speech, the usual assumption would be that

302. See *supra* text accompanying notes 196-99.

303. See *supra* note 213.

304. Cf. *Lowe v. SEC*, 472 U.S. 181, 210 (1985) (assuming that SEC's regulation of individualized advice attuned to client's particular needs is consistent with First Amendment, because "communications [that] develop into . . . fiduciary, person-to-person relationships" in a commercial setting may be more heavily regulated than those directed to the public at large); *Bolger*, 463 U.S. at 66-68 (holding that informational pamphlets concerning defendant's products are commercial speech despite the fact that their advertising message was linked to a "current public debate").

305. See *supra* text accompanying notes 206-09.

a higher standard of First Amendment protection applies.<sup>306</sup> This might seem odd, given the basic commercial nature of the landlord-tenant relationship<sup>307</sup> and the fact that *all* of a landlord's harassing statements, including sexual epithets and sexual comments unrelated to the parties' commercial relationship, would seem to be of little or no value. Indeed, the relative value of the speech at issue in commercial and near-commercial cases has often been considered by the Supreme Court in reaching its ultimate conclusion concerning the constitutionality of the restriction involved.<sup>308</sup> For the moment, however, we leave the issue of the relative value for First Amendment purposes of sexually harassing speech<sup>309</sup> and move on to the next phase in the commercial speech analysis, which is to determine if the particular speech at issue involves unlawful activity or is misleading so as to fall outside the First Amendment's protection under the first part of the *Central Hudson* test.

Coincidentally, the Supreme Court principal decision concerning the "unlawful" element of the *Central Hudson* test involved an anti-discrimination law. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>310</sup> the Court rejected a First Amendment challenge to a local employment discrimination ordinance that prohibited newspapers from carrying "help-wanted" advertisements in sex-designated columns.<sup>311</sup> In holding that Pittsburgh's anti-discrimination law did not burden constitutionally protected speech, the Court explained that:

Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no

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306. See, e.g., *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 8 (1986) (holding that newsletter that utility included with its billing statements is not merely commercial speech and is therefore entitled to "the full protection of the First Amendment") (Powell, J., plurality opinion); see also *Discovery Network*, 507 U.S. at 420-24 (implying that, were the speech at issue here not properly considered commercial, a higher level of First Amendment protection would apply).

307. See *supra* text accompanying note 301.

308. E.g., *Pac. Gas & Elec.*, 475 U.S. at 9 (holding that utility's monthly newsletter is entitled to more protection than commercial speech because it "extends well beyond speech that proposes a business transaction and includes the kind of discussion of 'matters of public concern' that the First Amendment both fully protects and implicitly encourages") (citations omitted); *Ohralik*, 436 U.S. at 459 (holding that specific nature of the commercial speech here—" [a] lawyer's procurement of remunerative employment [—] is a subject only marginally affected with First Amendment concerns"); see also Berman, *supra* note 294, at 772-82 (arguing that the First Amendment should permit greater restrictions on certain "lower value" forms of commercial speech, such as tobacco and gambling advertisements, than on other ads).

309. This topic is discussed in greater detail *supra* note 258 and accompanying text, *infra* note 313 and accompanying text, and *infra* note 317 and accompanying text.

310. 413 U.S. 376 (1973).

311. *Id.* at 388-89.

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>312</sup>

The rationale for excluding advertisements for illegal activity from First Amendment protection is that such ads do not provide information that is needed for the proper functioning of the economic marketplace.<sup>313</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>314</sup>

A key factor, therefore, in deciding whether § 3604(c) may be constitutionally used to challenge verbal harassment is to determine if the defendant’s statement was made with respect to an unlawful activity. Courts have occasionally been called upon to do this in § 3604(c) cases involving race and advertising,<sup>315</sup> but thus far none has done so in a sexual harassment case involving current tenants.

In conducting our own analysis, we again find it helpful to refer to the three types of verbal harassment identified in Part II.B.1. We conclude that some, but not all, of these forms of harassment would involve illegal activity or at least be misleading speech. The first type—“sexual requests” tied to the terms or conditions of tenancy—involves a threat, albeit one that is not carried out, to engage in quid pro quo harassment. Because such a statement threatens an activity (e.g., eviction of a tenant who does not

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312. *Id.* at 388 (footnote omitted).

313. *See supra* note 297 and accompanying text.

314. 447 U.S. at 563 (citation omitted). *See also Va. State Bd. of Pharm.*, 425 U.S. at 772-73 (citing *Pittsburgh Press*, 413 U.S. 376, and *Hunter*, 459 F.2d 205 (a § 3604(c) decision) by way of contrasting 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”).

315. *See HOME*, 943 F.2d at 651 n.9 (holding that newspaper housing ads that are illegally discriminatory “fall outside the ambit of first amendment protection” (citing *Central Hudson Gas & Elec.*, 447 U.S. at 563-64)); *N.Y. Times*, 923 F.2d at 1002-03 (holding that the illegality of discriminatory housing ads means that they are outside First Amendment protection based on the first part of *Central Hudson* test); *see also Racey*, 1997 U.S. App. LEXIS 10151, at \*2-3 (holding that landlord’s racially discriminatory statement to black prospect violated § 3604(c) and was commercial speech not protected by the First Amendment); *Hunter*, 459 F.2d at 215 (pre-*Central Hudson* decision holding that newspaper housing ad made illegal by § 3604(c) is not entitled to First Amendment protection because of its low commercial value).

grant the landlord's sexual requests) that would be illegal as a "terms or conditions" violation of § 3604(b),<sup>316</sup> the statement relates to an unlawful activity and thus would fail to qualify for First Amendment protection under the first part of the *Central Hudson* test.<sup>317</sup> This would be so even if the landlord knew all along that he did not intend to carry out his threat, because *Central Hudson*'s first factor eliminates from First Amendment protection not only speech relating to an illegal activity but also speech that is false or misleading.<sup>318</sup>

"Sexual epithets" and "sexual comments" are more difficult, at least to the extent they are not tied to an explicit or implied threat to change the terms or conditions of the parties' rental relationship and therefore would not run afoul of any other provision of the FHA.<sup>319</sup> Since all other FHA

316. See, e.g., cases cited *supra* note 64 para. 2; cf. cases cited *supra* note 51 (Title VII).

317. See, e.g., *New York Times*, 923 F.2d at 1003 (holding that § 3604(c)-violative newspaper ads relate to discrimination in housing sales and rentals made illegal by the FHA's § 3604(a) and are therefore illegal commercial speech not protected by the First Amendment). In a footnote to the majority's opinion in *HOME*, a Sixth Circuit panel seemed to suggest that it would be inappropriate, "[w]hen analyzing the constitutional protections accorded a particular commercial message [challenged under § 3604(c)]," to look to other provisions of the FHA as a source of illegality, because this would somehow "circumvent[]" the court's review under *Central Hudson*. 943 F.2d at 651 n.9. This position is clearly wrong. As the Second Circuit pointed out in the *New York Times* case, it is perfectly appropriate, and not at all circular, to use other FHA provisions in this context; given Congress's "unquestioned" power to enact such prohibitions, "reliance upon the statute [referring to the FHA's § 3604(a)] to determine the illegality of ads with a racial message is not circular but inexorable." 923 F.2d at 1003. The correctness of this position is underscored by the fact that the Supreme Court's principal case dealing with the "illegal activity" part of the *Central Hudson* text involved a civil rights ordinance that, like the FHA, both outlawed discriminatory conduct and, based on this prohibition, went on to ban discriminatory advertising. See *Pittsburgh Press*, 413 U.S. at 388, which is cited with approval as to the "illegal activity" point in both *Central Hudson Gas & Electric*, 477 U.S. at 563-64, and *Virginia State Board of Pharmacy*, 425 U.S. at 772-73.

318. See *supra* text accompanying note 290; see also *Lowe*, 472 U.S. at 189, 209-10 (SEC's regulation concerning false or misleading securities advice assumed to be consistent with the First Amendment). See generally *Cent. Hudson Gas & Elec.*, 477 U.S. at 563-64 (finding that commercial messages "that do not accurately inform the public about lawful activity" or that are "more likely to deceive the public than to inform it" are as unentitled to First Amendment protection as commercial speech that is "related to illegal activity").

319. We assume here that none of the scores of state and local fair housing laws that have been certified as substantially equivalent to the FHA, see SCHWEMM, *supra* note 24, § 24:9 and app. C, contains sex-based prohibitions that go beyond the FHA's. However, to the extent that such laws do provide additional protection against sexual harassment, they could provide the basis for a finding of "unlawful activity" under *Central Hudson* in order to protect a § 3604(c) claim from First Amendment challenge. See, e.g., *Edge Broad. Co.*, 509 U.S. 418 (rejecting First Amendment challenge to a federal statute that barred only those broadcasters located in states that had not legalized lotteries from airing lottery advertising).

prohibitions require a showing of “severe or pervasive” harassment,<sup>320</sup> the only other part of the FHA that could be invoked to make a harassing statement unlawful would be § 3604(c) itself, but this would amount to a form of circular reasoning on the “unlawful activity” point that has not been accepted by the courts.<sup>321</sup>

If commercial speech is neither misleading nor relates to an unlawful activity, the government’s ability to ban it is quite limited, extending only to those situations where the interest underlying the ban is substantial, is directly advanced by the ban, and could not be served by a more narrowly tailored restriction.<sup>322</sup> As to the first point, there can be little doubt that the government has a substantial interest in protecting female tenants from their landlords’ verbal harassment.<sup>323</sup> Also, § 3604(c), as we have construed it,<sup>324</sup> would seem to directly advance this interest by outlawing all housing-related statements indicating sex-based harassment.<sup>325</sup> Thus, the key issue, as it is in most commercial speech cases, would be the

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320. See *supra* Part I.B.2-3.

321. See *HOME*, where the Sixth Circuit, in narrowly construing § 3604(c) to avoid a challenge under *Central Hudson*, opined:

When analyzing the constitutional protections accorded a particular commercial message, a court starts with the content of the message and not with the label given the message under the relevant statute. Starting with the language of a statute would foreclose a court from ever considering the constitutionality of 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.

943 F.2d at 651 n.9 (citation omitted).

322. See *supra* text accompanying note 290.

323. See *supra* note 255 and accompanying text.

324. See *supra* Part II.A.

325. Compare *Cent. Hudson Gas & Elec.*, 447 U.S. at 569 (recognizing the “immediate connection” between a utility’s ads and the demand for its product) with *Va. State Bd. of Pharm.*, 425 U.S. at 766-70 (holding that a ban on price advertising for prescription drugs only indirectly serves state’s interest in maintaining pharmacists’ high professional standards, which is more directly guaranteed by close enforcement of licensing regulations).

Although § 3604(c), as we have construed it, would outlaw every harassing statement that indicates a “preference, limitation, or discrimination . . . based on . . . sex,” it is possible to visualize an even more direct attack on the problem of verbal harassment in housing *see, e.g.*, laws prohibiting various types of “hate speech” that were challenged in cases cited *supra* notes 270-72, which means that a court could conceivably hold that § 3604(c) fails even the “directly advance” part of the *Central Hudson* test. Still, it seems unnecessary to dwell at length on this issue, because all modern Supreme Court decisions according First Amendment protection to commercial speech have relied on *Central Hudson*’s final factor, regardless of whether the “directly advance” factor was considered a problem.

application of *Central Hudson's* final factor<sup>326</sup>—specifically, determining whether § 3604(c) is likely to be considered a more extensive ban on speech than is needed to serve this interest.

This final factor requires that there be “a reasonable fit between the legislature’s ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieved the desired objective.”<sup>327</sup> While the government need not meet a “least restrictive means” standard,<sup>328</sup> it must have “‘carefully calculated’ the costs and benefits associated with the burden on speech imposed by its prohibition.”<sup>329</sup>

In applying these standards to § 3604(c)’s ban on verbal harassment, it must be conceded that the statute is a broadly drafted prohibition of discriminatory speech,<sup>330</sup> and that there is little evidence that Congress focused on, must less “carefully calculated,” the pros and cons of limiting landlord-tenant harassment when it enacted either the original version of § 3604(c) or its later inclusion of sex-based discriminatory statements.<sup>331</sup> It is clear, therefore, that § 3604(c) was not consciously tailored to narrowly address verbal harassment in rental situations. Thus, for example, Congress could have, but has not, limited § 3604(c)’s applicability to sex-based statements that do not amount to “severe or pervasive” harassment to those situations where the “very utterance” of the statement is likely to “inflict injury” on the individual to whom it is directed and thereby disrupts that person’s “full [and] equal opportunity to use and enjoy a dwelling.”<sup>332</sup>

On the other hand, there is evidence in some Supreme Court decisions that the government’s position is viewed more favorably when it is regulating person-to-person commercial speech, particularly between parties in an unequal bargaining relationship. For example, in *Ohralik v. Ohio State Bar Ass’n*,<sup>333</sup> the Court, in upholding a disciplinary rule barring lawyers from soliciting clients in person, drew a distinction between this practice and lawyer advertising to the general public,<sup>334</sup> which a year

326. See, e.g., *Lorillard Tobacco Co.*, 533 U.S. at 561-70; *Greater New Orleans Broad. Ass’n*, 527 U.S. at 188-95; *44 Liquormart*, 517 U.S. at 504-08, 529-34; *Cent. Hudson Gas & Elec.*, 447 U.S. at 568-71.

327. *Lorillard Tobacco*, 533 U.S. at 556 (alternations in original) (quoting *Went For It*, 515 U.S. at 632).

328. *Id.*

329. *Discovery Network*, 507 U.S. at 417, *quoted with approval in Lorillard Tobacco*, 533 U.S. at 561.

330. See *supra* text accompanying notes 247 and 256-60.

331. See *supra* text accompanying note 194.

332. The quoted language is a combination of the “fighting words” doctrine, see *supra* note 263 and accompanying text, and FHA provisions dealing with special protections for disabled persons. See 42 U.S.C. § 3604(f)(3)(A), (B).

333. 436 U.S. 447.

334. *Id.* at 448-49.

earlier had been held to warrant First Amendment protection in *Bates v. State Bar of Arizona*.<sup>335</sup> The difference, according to *Ohralik*, lay in the greater danger that in-person solicitation posed.<sup>336</sup> The Court recognized that in-person solicitation by lawyers has long been viewed “as posing a significant potential for harm to the prospective client.”<sup>337</sup> Unlike lawyer ads directed to the general public, “in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.”<sup>338</sup> *Ohralik* noted that the evils of such solicitation included “potential harm to the solicited client” and that among the government’s compelling reasons for restricting this practice were “to protect the privacy of individuals” and to prevent “undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct.’”<sup>339</sup>

The *Ohralik* opinion also noted that a lawyer who engages in in-person solicitation and his prospective client participate in this conversation on unequal terms.<sup>340</sup> According to *Ohralik*:

[T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person . . . . Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more

335. 433 U.S. at 382-83.

336. According to the *Ohralik* opinion, “*Bates* does not predetermine the outcome in this case. The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State’s countervailing interest in prohibition.” 436 U.S. at 455; *see also infra* note 343 and accompanying text.

337. *Ohralik*, 436 U.S. at 454.

338. *Id.* at 457. In a footnote supporting the observation quoted in the text, the Court noted that “[t]he immediacy of a particular communication and the imminence of harm are factors that have made certain communications less protected than others.” *Id.* at 457 n.13. The cases cited in support of this latter comment, *Cohen*, 403 U.S. 15, and *Chaplinski*, 315 U.S. 568, dealt with “fighting words,” and their citation here suggests that the Court feels it is appropriate to consider the factors involved in such cases even if that doctrine itself would, as in *Ohralik*, clearly not apply. This approach of considering “fighting words” factors in evaluating a First Amendment defense in a commercial speech case could well be useful in determining § 3604(c)’s constitutionality in verbal harassment cases.

339. 436 U.S. at 461-62. *see also Went For It*, 515 U.S. at 624, 630 (upholding state bar’s 30-day restriction on direct-mail solicitations to accident victims on the ground that the bar’s “interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers” is substantially greater in this targeted solicitation situation than it would be if “an untargeted letter mailed to society at large” were involved).

340. 436 U.S. at 465.



vulnerable to influence but also may make advice all the more intrusive.<sup>341</sup>

Indeed, the Court held that this risk meant that a state may “presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.”<sup>342</sup> The Court also rejected *Ohralik*’s argument that his particular solicitation could not be constitutionally sanctioned without a showing that it had indeed caused harm to a prospective client, noting that the state’s adoption of a prophylactic rule was justified in part because of the likely difficulties in proving such individual harm: “Unlike the advertising in *Bates*, in-person solicitation is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place.”<sup>343</sup>

Virtually all of the reasons mentioned in *Ohralik* for justifying the government’s restriction of commercial speech—including protecting the target of the speech from invasion of privacy, intimidation, and other vexatious conduct; guarding against such a sense of immediacy that the target of the speech lacks a reasonable opportunity for reflection on its merits; the inherently unequal relationship between the parties; and the difficulties of proving actual harm based on one-on-one conversations—are also likely to be present in § 3604(c) harassment cases.<sup>344</sup> Indeed, the

341. *Id.* (footnotes omitted).

342. *Id.* at 466.

343. *Id.* Similar themes regarding the potential dangers of person-to-person commercial speech were sounded in *Lowe*, 472 U.S. 181. There, the Court cited *Ohralik* in distinguishing between the high degree of First Amendment protection that would be accorded an investment newsletter directed to the public and the type of “person-to-person communication in a commercial setting [that] may be subjected to regulation” consistent with the First Amendment. *Id.* at 189. In *Lowe*, the Court construed an exemption in the federal law regulating investment advisors to include a publisher of a publicly distributed newsletter, primarily because it felt that to subject such a publication to the statute would violate the First Amendment. *Id.* at 210. The Court made clear, however, that Congress did intend to, and could constitutionally, regulate personalized investment advice. *Id.* According to *Lowe*:

The dangers of fraud, deception, or overreaching that motivated the enactment of the statute are present in personalized communications but are not replicated in publications that are advertised and sold in an open market.

*Id.* Thus, the particular newsletter at issue in *Lowe* was protected, but only “[a]s long as the communications between petitioners and their subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships” that were of concern to Congress. *Id.*

344. See *supra* text accompanying notes 91-95. In addition, *Ohralik*’s comment that the speech restricted there “is a subject only marginally affected with First Amendment concerns,” 436 U.S. at 459, could also be said about harassing statements violative of § 3604(c). See also *supra* note 285 and accompanying text and *infra* note 349 and accompanying text.

potential harms may well be greater in the housing harassment situation, for the primary danger to the target of the speech in *Ohralik* (i.e., a prospective legal client with a civil claim who is solicited personally) is the less immediate, primarily financial one of hiring a non-optimal lawyer.<sup>345</sup>

Still, even if it is accepted that serious problems justify § 3604(c)'s ban of verbal harassment, the fact that this statute is not narrowly drafted to deal with this set of problems remains a possible stumbling block for purposes of applying *Central Hudson's* final factor. Furthermore, the restriction on speech upheld in *Ohralik* was both written and justified based on the *manner* of the speech involved there, whereas § 3604(c) focuses on a statement's content, not the time, place, or manner of its delivery.<sup>346</sup> Thus, it must be said that the fact that § 3604(c) could have been written in a more focused, less speech-restrictive way leaves real doubts, even after *Ohralik*, about whether this law could satisfy the last part of the *Central Hudson* test in all verbal harassment cases.<sup>347</sup>

We conclude this section not only with some uncertainty as to § 3604(c)'s constitutionality in harassment cases, but also by recognizing that much of the commercial speech doctrine seems not to fit well as a method for assessing the proper level of First Amendment protection to be accorded a landlord's sexual requests, epithets, and comments to a female tenant. Here, unlike the classic commercial speech case, the government's primary concern is not likely to be preventing commercial harms to the tenant.<sup>348</sup> Indeed, were only traditional commercial speech concerns

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345. *Ohralik*, 447 U.S. at 461.

346. *See supra* text accompanying note 247. This distinction between content-based and time-place-manner restrictions on speech is not only a matter of high significance in First Amendment cases generally, *see, e.g.*, cases cited *supra* notes 275-80, but has been specifically noted as a crucial factor affecting the standard of review in commercial speech cases. *See, e.g., Discovery Network*, 507 U.S. at 428-31; *see also* cases cited *supra* note 292 para. 1. Furthermore, while it might well be assumed that most § 3604(c)-violative harassment occurs in or near the victim's home, the statute is not written so as to limit its ban of discriminatory statements only to those occurring in certain places. *See* 42 U.S.C. § 3604(c).

347. *See, e.g.*, cases cited *supra* note 290; *see also supra* note 282-86 and accompanying text, *see also* Schwemm, *supra* note 128, at 278-82 (concluding that *Central Hudson's* final factors would generally favor housing providers who make truthful, non-illegal statements in violation of § 3604(c)). *But see Racey*, 1997 U.S. App. LEXIS 10151, at \*3 (holding that *Central Hudson's* concluding factors favor § 3604(c) over landlord's First Amendment right to make racially discriminatory statement to black prospect).

348. *See, e.g., Discovery Network*, 507 U.S. at 426 (noting that government's "interest in preventing commercial harms by regulating the information distributed . . . is, of course, the typical reason" given for restricting commercial speech); *see also supra* note 292.

This is not always true, however. Indeed, there are cases in which governmental restrictions on commercial speech have been successfully defended on grounds having to do not with commercial harms but with protecting the personal privacy of the speech's targeted audience. *See infra* notes 388-98 and accompanying text.

involved, it could well be argued that all unwelcome sex-based speech by a landlord to a tenant should be unprotected because it has virtually no value in the proper working of the marketplace for housing,<sup>349</sup> which is the underlying rationale for according First Amendment protection to commercial speech,<sup>350</sup> and because it is so harmful to the target's enjoyment of her home. While this may be true, it points more to the fact that such verbal harassment is harmful because of *where* it takes place and because of the *relationship* between the parties, rather than because it involves commercial information about the price and availability of goods and services in the marketplace. Seen in this light, the problem of statements that amount to housing harassment should be addressed under a First Amendment doctrine that deals more directly with the actual governmental interests involved than does the "commercial speech" doctrine. Such an alternative doctrine—the one involving limits on speech directed to a "captive audience" in their homes—is considered in the next Section.

#### *D. The Captive Audience Doctrine*

The Supreme Court has recognized that there is a "significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication."<sup>351</sup> This so-called "captive audience doctrine" could prove to be a significant source of protection for § 3604(c) harassment claims from First Amendment challenge.

The doctrine holds that the government has greater authority to restrict speech that is directed at unwilling listeners who are "practically helpless" to avoid it.<sup>352</sup> In such situations, the individual's right to privacy can trump the speaker's right to be heard. Thus, the captive audience doctrine creates

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349. See, e.g., *Cent. Hudson Gas & Elec.*, 447 U.S. at 563-64 (finding that commercial messages "that do not accurately inform the public about lawful activity" are entitled to no more First Amendment protection than those that are deceitful or related to illegal activity).

350. See *supra* note 292, para. 2.

351. *Hill v. Colorado*, 530 U.S. 703, 715-16 (2000).

352. The doctrine was first articulated in *Kovacs v. Cooper*, 336 U.S. 77 (1949), where the Supreme Court upheld an ordinance that prohibited the use of sound amplification devices on public streets, stating that, "[t]o enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." *Id.* at 88. Numerous Supreme Court cases have since recognized the doctrine. See, e.g., *Hill*, 530 U.S. at 715-18; *Frisby*, 487 U.S. at 487; *Consol. Edison*, 447 U.S. at 542 & n.11; *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); *id.* at 306 (Douglas, J., concurring); *Cohen*, 403 U.S. at 21; *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 735-38 (1970).

a narrow exception to the general principle that the government cannot prohibit speech simply because it offends or upsets the listener.<sup>353</sup>

One of the key concepts at work in this doctrine is the notion of “captivity.” The listener is seldom literally captive to speech—indeed, there is virtually always *something* that one could do to avoid hearing or seeing an unwanted message.<sup>354</sup> The question, then, becomes a normative one: in what contexts do we believe that a listener should not have to be confronted with unwanted speech, and should not have to assume the burden of avoiding it? Although the captive audience doctrine has occasionally been applied in non-residential settings,<sup>355</sup> the Supreme Court

353. The principle has been expressed both in terms of a particular listener’s desire not to hear the speech and of a general societal dislike of the speech. *See, e.g.*, *United States v. Eichman*, 496 U.S. 310, 319 (1990) (“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” (quoting *Johnson*, 491 U.S. at 414)); *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); *Pacifica Found.*, 438 U.S. at 745)); *Claiborne Hardware*, 458 U.S. at 910 (“Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”).

354. *See, e.g.*, *Erznoznik*, 422 U.S. at 210-11 (striking down a ban on the exhibition of nudity on the screens of drive-in movie theaters because offended passers-by could simply not look at the screen); *Cohen*, 403 U.S. at 21 (reversing defendant’s conviction for disturbing the peace, where the “disturbance” consisted of wearing a jacket bearing the words “Fuck the Draft” into a courthouse, because those inside the courthouse could avert their eyes to avoid the message); *see also* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 89-91 (1991).

355. *E.g.*, *Hill*, 530 U.S. at 718 (applying captive audience doctrine to statute regulating speech outside health care facilities and noting that “[t]his Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts” (alternations in original)); *Lehman*, 418 U.S. at 302-04 (plurality opinion) (subway riders held to be captive to the messages placarded on the inside of subway cars); *Carey v. Brown*, 447 U.S. 455, 470-71 (1980) (noting that laws may constitutionally protect persons from boisterous and threatening speech in certain places, in addition to their homes, “that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals” (quoting *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring))).

Lower courts have also applied the captive audience doctrine to settings outside of the home, most often in Title VII harassment cases. *See, e.g.*, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535-36 (M.D. Fla. 1991) (female employees were captive audience to sexual comments and pictures at work); *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 871-73 (Cal. 1999) (Werdegar, J., concurring) (upholding injunction which prohibited manager from using particular racial epithets to Hispanic employees, in part because the employees were “captive” at work), *cert. denied*, 529 U.S. 1138 (2000); *cf. Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986) (college teacher had no First Amendment right to use profane and abusive language in the classroom where his students were an unwilling and captive audience). The cases, however, are few, and there is no consensus as to whether employees should be considered “captive” to speech occurring at

has been particularly diligent in applying it in cases involving communicative intrusions into a listener's home.<sup>356</sup> The rationale is that, while people assume the risk of being confronted with unwanted speech whenever they go out into the world, they are entitled to at least one place (i.e., their home) to which they can retreat to enjoy privacy, repose, and control over their environment.<sup>357</sup> The government's interest in protecting unwilling listeners from speech in this one place is, therefore, substantial.<sup>358</sup>

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their workplaces. The *Robinson* court argued that the level of coercion present in employer-employee relations was significant enough to justify protecting employees from harassing speech. 760 F. Supp. at 1535 ("Few audiences are more captive than the average worker." (quoting J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 (1990) (internal quotations omitted))). Justice Thomas dissented to the denial of certiorari in *Aguilar*, arguing that the case presented serious First Amendment problems because the injunction—which actually listed words that the manager was not to utter at work—amounted to a prior restraint. 529 U.S. at 1141 (Thomas, J., dissenting). Justice Thomas recognized the validity of the captive audience doctrine in some contexts, but questioned whether the doctrine should be applied to the broad category of workplace speech. *Id.* Commentators have generally been skeptical about applying the captive audience doctrine to the workplace as a way of shielding Title VII harassment claims from First Amendment challenge. See, e.g., Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 709-10 (1995) (quoting Volokh, *supra* note 249, at 1832-33; KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 86 (1995)); Jules B. Gerard, *supra* note 249, at 1030-32. *But see* Strauss, *supra* note 196, at 35-37 (noting that an employee at work may qualify for captive audience status, particularly if a communication is directed to her in a way that she cannot avoid hearing or seeing it).

356. See, e.g., *Frisby*, 487 U.S. at 484-85 (described *infra* notes 359-64 and accompanying text); *Consol. Edison*, 447 U.S. at 542 & n.11 (recognizing "the special privacy interests that attach to persons who seek seclusion within their own homes"); *Pacifica Found.*, 438 U.S. at 748 ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."); *Erznoznik*, 422 U.S. at 209 ("Such selective [speech] restrictions have been upheld only when the speaker intrudes on the privacy of the home."); *Cohen*, 403 U.S. at 21-22 ("[T]his Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue."); *Rowan*, 397 U.S. at 737 ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another."). See also Gerard, *supra* note 249, at 1031.

357. See *Cohen*, 403 U.S. at 22 ("[While] it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely there is nothing like the interest in being free from unwanted expression in the confines of one's own home.").

358. See, e.g., *Carey*, 447 U.S. at 471 ("Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel

One of the leading cases involving this doctrine is *Frisby v. Schultz*,<sup>359</sup> where the Court rejected a First Amendment challenge to an ordinance that banned picketing targeted at an individual residence.<sup>360</sup> Speaking for the Court in *Frisby*, Justice O'Connor wrote:

Our prior decisions have often remarked on the unique nature of the home . . . and have recognized that “[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.”

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. “That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.” Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom . . . . We have “never intimated that the visitor could insert a foot in the door and insist on a hearing.” There simply is no right to force speech into the home of an unwilling listener.<sup>361</sup>

These sentiments bode well for protecting § 3604(c)'s ban on housing harassment from a First Amendment challenge. As discussed above, housing harassment is particularly damaging precisely because it affects a woman's sense of security in her home, a place that should function as a special area of repose and privacy,<sup>362</sup> and where, according to *Frisby*, all citizens have a right to be protected from unwanted intrusions.<sup>363</sup> Commenting on the nature of targeted residential picketing in *Frisby*, the Court noted that this type of speech has a “devastating effect . . . on the quiet enjoyment of the home”: “To those inside . . . the home becomes

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of the tired, the weary, and the sick.’ The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” (citations omitted).

359. 487 U.S. 474.

360. The stated purpose of the ordinance in *Frisby* was “‘the protection and preservation of the home’ through assurance ‘that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy.’” *Id.* at 477.

361. *Id.* at 484-85 (alteration in original) (citations omitted).

362. See *supra* notes 91-95 and accompanying text.

363. See *supra* text accompanying note 361.

something less than a home when and while the picketing . . . continue[s]. . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.”<sup>364</sup> Surely, sexual harassment in housing would have no less dire consequences for its targets than those identified in *Frisby* for the victims of targeted residential picketing.<sup>365</sup>

The captive audience doctrine’s focus on the physical location of the listener requires that, for it to apply, the woman must be at home. As a practical matter, this should not serve to significantly limit the housing harassment cases in which the doctrine can be used. Although it is theoretically possible for housing harassment to take place somewhere other than at the victim’s dwelling (e.g., a landlord, during an encounter with a tenant at the local grocery store, requests that she have sex with him that month in lieu of rent), in virtually all of the reported housing harassment cases that mention the location of the harassment it occurred either inside the victim’s apartment, just outside the door, or elsewhere on the grounds or in the building.<sup>366</sup>

Another important aspect of the captive audience doctrine is that it provides some support for upholding even content-based restrictions on speech such as § 3604(c). This is because a court must frequently look to the content of the speech in order to classify the listener as unwilling to receive it.<sup>367</sup> For example, despite the *Frisby* Court’s characterization of the challenged ordinance there as content neutral,<sup>368</sup> it described the speech involved in content-based terms, noting that “[t]he First Amendment

364. *Frisby*, 487 U.S. at 486 (quoting *Carey*, 447 U.S. at 478 (Rehnquist, J., dissenting)) (alteration in original).

365. See *Cahan*, *supra* note 3, at 1073-74 (noting that typical reactions of housing harassment victims include feelings of nervousness, frustration, fear, and anger, which can manifest themselves in physical illness, decreased work productivity, and depression).

366. See, e.g., *DiCenso*, 96 F.3d 1004 (harassment occurred in victim’s doorway); *Beliveau*, 873 F. Supp. 1393 (harassment occurred inside victim’s apartment); *Williams*, 955 F. Supp. 490 (harassment occurred in laundry room, elevator, and hallway); *Kogut*, 2A Fair Hous.-Fair Lending (Aspen L. & Bus.) at 25,904 (harassment occurred inside victim’s apartment); cf. *Krueger*, 115 F.3d 487 (harassment occurred during rental interview and at lease-signing, and later occurred inside victim’s apartment and in the stairwell); *Abrams*, 694 F. Supp. 1101 (described *supra* note 137).

367. See *Strauss*, *supra* note 354, at 105; see also, e.g., *Hill*, 530 U.S. at 720 (recognizing that “the content of the oral statements made by an approaching speaker must sometimes be examined to determine” if the statute at issue here applies); *Pacifica Found.*, 438 U.S. at 747-48 (holding that government has the authority to limit the context in which a public broadcast containing “vulgar, offensive, and shocking” language aired); *Lehman*, 418 U.S. 298 (upholding municipal policy prohibiting political advertisements in subway cars); *Rowan*, 397 U.S. 728 (allowing residents to block sexually oriented mail from being delivered to their homes); cf. *Frisby*, 487 U.S. 474 (discussed *infra* text accompanying notes 359-64).

368. *Frisby*, 487 U.S. at 481-82.

permits the government to prohibit *offensive speech* as intrusive when the ‘captive’ audience cannot avoid the *objectionable speech*.<sup>369</sup> The *Frisby* opinion went on to assume that the individual who was the target of the focused residential picketing (a doctor who performed abortions) was “presumptively unwilling” to receive the speech being directed at him (protests by anti-abortion activists).<sup>370</sup> Presumably, the Court would not have made this assumption if the picketers were instead members of a pro-choice group holding a supportive rally outside the doctor’s house.<sup>371</sup> Similarly, in *FCC v. Pacifica Foundation*,<sup>372</sup> the Court, in upholding a federal restriction on radio broadcasting of “indecent” language, recognized that the “vulgar, offensive, and shocking” nature of the speech involved was precisely what made it necessary for unsuspecting radio listeners to be shielded from it.<sup>373</sup>

This approach may at first glance seem to conflict with *R.A.V.* and other cases discussed in Part III.B that bar the government from prohibiting the expression of an idea simply because society finds the idea offensive.<sup>374</sup> Indeed, as a matter of basic First Amendment values, the fact that speech may be offensive to the majority of the populace is the very reason that such speech needs and commands constitutional protection.<sup>375</sup> The Supreme Court has resolved this apparent conflict, however, by noting that once certain types of vulgar and offensive speech have been inflicted on the unwilling listener, the damage is done regardless of the listener’s ability to subsequently shut out the speech. As the Court noted in *Pacifica Foundation*:

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369. *Id.* at 487 (emphasis added).

370. *Id.* at 488.

371. In *American Coalition of Life Activists*, the Ninth Circuit held that similar use of context to determine whether facially non-threatening speech should in fact be considered threatening did not result in viewpoint discrimination. 290 F.3d 1058 at 1078-79. In that case, the speech at issue consisted of “Wanted” posters and Internet sites that focused on doctors who provided abortions. *Id.* at 1080. The context was an intimidating atmosphere created by acts of violence against clinics and abortion providers, carried out entirely by people opposed to abortion. *Id.* at 1079-80. Furthermore, the court determined that, because the statute being enforced was viewpoint neutral (prohibiting violence and obstructive activity at any clinic providing reproductive services, not just those that perform abortions) and the speakers were being punished for the threats and not their viewpoint, the approach was permissible. *Id.* at 1071-86.

372. *Pacifica Found.*, 438 U.S. at 747-49.

373. *Id.* (internal quotation marks omitted); see also *Aguilar*, 980 P.2d 846 (upholding injunction which prohibited manager from using particular racial epithets to Hispanic employees).

374. See *supra* notes 272-75 and accompanying text (discussing *R.A.V.*, 505 U.S. 377); see also *Johnson*, 491 U.S. at 414.

375. See *supra* note 353.



To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.<sup>376</sup>

In the housing context, of course, the target of sexual harassment is unlikely to have a means of shielding herself from the harassing speech of her landlord or property manager in the first place, due to the high degree of access that these individuals have to their victims.<sup>377</sup> Because the Court recognizes that some types of speech, *by nature of their content*, can be prevented from intruding into the homes of unwilling listeners, it follows that § 3604(c)'s content-based ban on certain housing-related statements should not be seen as automatically conflicting with the First Amendment, at least in those cases where the prohibited speech amounts to harassment forced on an unwilling tenant in or near her home. Moreover, as *Frisby* made clear, where the intruding speech is directed solely at an individual rather than the general public, even "core" First Amendment speech like picketing is less worthy of protection, and the government's ability to restrict it is correspondingly stronger.<sup>378</sup>

The only reason that *Frisby* and other "captive-audience-in-the-home" cases are not a total defense of § 3604(c)'s constitutionality in sexual harassment situations occurring in or near the target's home is that the captive-audience cases invariably involve laws that, by their terms, focus on the *place* of the offending speech and therefore are treated by the Court as time-place-manner restrictions entitled to a more generous standard of review than content-based statutes like § 3604(c).<sup>379</sup> As *Frisby* itself pointed

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376. *Pacifica Found.*, 438 U.S. at 748-49.

377. See *supra* note 365 and accompanying text. The notion of "captivity" is particularly powerful in the case of housing harassment, because it is so likely to affect low-income women who have little ability to change their housing situations. See *supra* note 92 and accompanying text.

378. See *Frisby*, 487 U.S. at 479, 486 (noting that, while the First Amendment protects the flow of information to the public and the anti-picketing ordinance "operates at the core of the First Amendment," the picketers whose speech was restricted "do not seek to disseminate a message to the general public, but to intrude upon the targeted resident . . . in an especially offensive way"); see also *supra* notes 310-12, 340-43 and accompanying text; cf. *Am. Coalition of Life Activists*, 290 F.3d at 1072-80 (concluding that intimidating speech that was specifically and personally targeted to particular individuals was more threatening and therefore less deserving of First Amendment protection).

379. Compare *Hill*, 530 U.S. at 719-25 (determining that challenged statute is a content-neutral time-place-manner restriction which triggers lighter standard of review), and *Frisby*, 487 U.S. at 481-82 (same), with *Carey*, 447 U.S. at 460-63 (holding that residential picketing restriction is subject to higher level of scrutiny because it is content-based). But see *supra* text accompanying notes 372-73 (discussing *Pacifica Found.*, 438 U.S. 726).

out, “the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content.”<sup>380</sup> Having determined that the ordinance was properly characterized as “content neutral,” the Court proceeded to apply a First Amendment standard that is substantially more generous to the government than would be appropriate in content-based cases.<sup>381</sup>

Unlike the ordinance in *Frisby*, § 3604(c) is by its terms directed against certain types of housing-related statements based on their content.<sup>382</sup> Furthermore, the governmental interest underlying § 3604(c)’s ban on verbally harassing statements would be to protect against the harms that such statements cause because of their content, not because of the time, place, or manner of their utterance.<sup>383</sup> This latter point, which is crucial in the Supreme Court’s determination of how to evaluate a “mixed” content/time-place-manner restriction on speech,<sup>384</sup> is reflected in the fact

380. *Frisby*, 487 U.S. at 481-82.

381. *Id.*; see also *Hill*, 530 U.S. at 719-25. The standard articulated in *Frisby* for content-neutral restrictions on speech is “whether the ordinance is ‘narrowly tailored to serve a significant government interest’ and whether it ‘leave[s] open ample alternative channels of communication.’” *Frisby*, 487 U.S. at 482 (alteration in original) (quoting *Perry Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983)); *accord Hill*, 530 U.S. at 725-26. For an example of the higher level of scrutiny that applies in captive audience cases where the challenged law is perceived as content-based, see *Carey*, 447 U.S. at 461-62 (striking down anti-residential picketing ordinance that exempted labor picketing). See also *R.A.V.*, 505 U.S. at 383-86.

In *Carey*, the Court was at pains to point out that its ruling striking down the discriminatory ordinance was not to be understood to prevent government from subjecting residential picketing to “uniform and nondiscriminatory regulation.” 447 U.S. at 470. According to the *Carey* opinion:

[N]o mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people . . . for homes, wherein they can escape the hurly-burly of the outside business and political world.

*Id.* at 470-71 (quoting *Gregory*, 394 U.S. at 118 (Black, J., concurring)). Indeed, *Carey* went so far as to conclude that “certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives.” *Id.* at 465. Although *Carey* assumed that the state’s interest in protecting residential privacy was especially compelling, it concluded that the statute’s allowance of labor picketing fatally undercut this position by showing that the state “itself has determined that residential privacy is not a transcendent objective.” *Id.* A different conclusion might well be appropriate, *Carey* indicated, concerning a statute, like § 3604(c), that includes no exemptions. *Id.* at 470; see also *Hill*, 530 U.S. at 720-23 (upholding speech-restricting statute based on captive-audience doctrine and distinguishing *Carey* on the ground that the statute in *Hill* included no exemptions).

382. See *supra* text accompanying note 247.

383. See generally Schwemm, *supra* note 128, at 249-51 (identifying purposes that have been recognized as underlying § 3604(c)’s ban on discriminatory statements).

384. See, e.g., *Hill*, 530 U.S. at 719-25; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

that § 3604(c) is written so as to apply even to harassing statements made away from the victim's dwelling and, in addition, to housing ads and notices that are made in newspapers and all other places.<sup>385</sup>

Thus, it is clear that a First Amendment challenge to § 3604(c) would have to evaluate this statute under a more rigorous standard, based on its lack of content neutrality, than was applied in *Frisby*. It follows, therefore, that, although some language in captive-audience opinions may be of great value for purposes of defending § 3604(c)'s constitutionality in the context of sexual harassment cases, the actual holdings of those cases would not be conclusive on this issue. Still, because the captive audience cases have upheld restrictions on even "core" First Amendment speech where the speaker "has legitimate and important [constitutional] concerns"<sup>386</sup> and have done so by concluding that the challenged law "reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners,"<sup>387</sup> they provide at least a strong underpinning for supporting § 3604(c)'s ban of such low-value speech as housing-related harassing statements.

Further support can also be found in a few "hybrid" cases, which justify governmental restrictions on commercial speech on grounds having to do with protecting the personal privacy of the speech's captive audience. For example, in *Went For It*,<sup>388</sup> the Supreme Court upheld bar rules creating a 30-day blackout period after an accident during which lawyers were prohibited from soliciting accident victims,<sup>389</sup> because the bar's "interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers"<sup>390</sup> was determined to satisfy the requirements of *Central Hudson*.<sup>391</sup> A crucial part of the Court's analysis in *Went For It* was its recognition of the state's overriding "interest in protecting the well-being, tranquility, and privacy of the home"<sup>392</sup> and the home's special role as a place to "avoid intrusion," "which the State may legislate to protect."<sup>393</sup>

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385. See, e.g., *Discovery Network*, 507 U.S. at 428-31 (rejecting government's argument that its anti-newsrack ordinance was merely a time-place-manner restriction because the ordinance was not limited in a way that would support a governmental interest based on time, place, or manner as opposed to content).

386. *Hill*, 530 U.S. at 714. See also *Frisby*, 487 U.S. at 479, 486 (described *supra* note 378).

387. *Hill*, 530 U.S. at 714.

388. 515 U.S. 618.

389. *Id.* at 620.

390. *Id.* at 624.

391. *Id.* at 635.

392. *Id.* at 625 (quoting *Carey*, 447 U.S. at 471) (discussed *infra* note 358).

393. *Id.* (quoting *Frisby*, 487 U.S. at 484-85 (discussed *supra* in the text accompanying 359-64).

Another case that deals with the intersection of the commercial speech and captive audience doctrines is *Anderson v. Treadwell*,<sup>394</sup> where the Second Circuit relied on *Went For It* and *Frisby* in holding that New York's ban on realtors' solicitation of home listings in certain designated areas satisfied the *Central Hudson* test.<sup>395</sup> The ban was part of an effort to curtail the practice of "blockbusting," which violated the state's fair housing law, and was defended on the basis of both the state's interest "in protecting neighborhoods from blockbusting" and its interest "in protecting the privacy of homeowners from harassing in-home real estate solicitations."<sup>396</sup> The Second Circuit chose to focus only on the latter, sustaining the ban "solely on the homeowners' privacy interest" and citing *Went For It*, *Frisby*, and other Supreme Court decisions acknowledging the importance of this interest.<sup>397</sup> The *Anderson* opinion pointed to evidence that "homeowners feel harassed by the amount and the intensity of the solicitations," and held that the ban satisfied *Central Hudson's* "reasonable fit" requirement because, by relying on a "resident-activated" system to identify those targets who could no longer be solicited, the New York scheme "is precisely co-extensive with those who are experiencing the particular harm."<sup>398</sup> Certainly, at least as much could be said for § 3604(c)'s ban on sexually harassing statements, which, because they would only be actionable if found to be unwelcome by their target and also offensive to a reasonable person, would surely be seen as no less intrusive than the real estate solicitations in *Anderson*. By viewing a commercial speech case with fair housing implications through the lens of the special interest that government has in protecting homeowner privacy, *Anderson* acknowledges the connection between the doctrines we discuss in Part III.B and III.C and thereby establishes a precedent for unifying these doctrines to provide an even more powerful defense of § 3604(c)'s constitutionality in sexual harassment cases than their separate discussion might suggest.<sup>399</sup>

### *E. Final Considerations*

In the preceding Sections of Part III, we have shown that § 3604(c) may be applied to many, if not all, cases of verbal harassment without violating the First Amendment. Although the statute is explicitly directed against certain "statements" based on their content and such statements

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394. 294 F.3d 453 (2d Cir. 2002).

395. *Id.* at 461.

396. *Id.*

397. *Id.* (citing *Watchtower Bible & Tract Soc'y of N.Y.*, 122 S. Ct. 2080; *Went For It*, 513 U.S. at 625; *Frisby*, 487 U.S. at 484-85).

398. *Id.* at 462.

399. *See id.*

would rarely constitute unprotected “fighting words,” the commercial context of most of these statements, the captive nature of the targets of such statements, the extremely sensitive location where most such statements would occur, and the marginal value of sexually harassing speech mean that the level of First Amendment protection that should be accorded the types of harassing statements condemned by § 3604(c) would be low.

When a speech-restricting statute is challenged on First Amendment grounds, the challenge is brought against the restriction either “on its face” or “as applied.”<sup>400</sup> A facial challenge contends that the statute at issue intrudes so heavily into speech protected by the First Amendment that it cannot be upheld regardless of the particular facts that might give rise to the individual speaker’s prosecution.<sup>401</sup> Facial challenges often focus on the precise wording of the law under review (e.g., to determine if it is sufficiently “narrowly tailored” to withstand constitutional challenge) and often consider whether the law, although possibly capable of constitutional application in certain circumstances, is not overly broad with respect to its restriction of speech in other potential applications.<sup>402</sup> Because § 3604(c)’s ban of verbally harassing statements would not be unconstitutional in the vast majority of cases, a facial challenge should certainly fail.<sup>403</sup>

A concept related to facial unconstitutionality is the “overbreadth doctrine,” which allows a statute to be struck down if, despite the fact that it applies to unprotected speech in the particular case presented, it is written so broadly that it may also cover substantial amounts of speech protected by the First Amendment.<sup>404</sup> The evil of an overbroad statute is that it may unduly chill the First Amendment rights of others not before the court.<sup>405</sup> As the Supreme Court recently noted: “[T]he overbreadth doctrine enables litigants ‘to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.’”<sup>406</sup>

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400. See, e.g., *Hill*, 530 U.S. at 708 (facial challenge); *Frisby*, 487 U.S. at 476 (same); *Carey*, 447 U.S. at 458 (both facial and as applied challenges); *Ohralik*, 436 U.S. at 462-68 (as applied challenge).

401. See, e.g., *Ohralik*, 436 U.S. at 462 & n.20; *Gooding*, 405 U.S. at 520-21.

402. See, e.g., *Hill*, 530 U.S. at 725-32; *Frisby*, 487 U.S. at 485-88.

403. See, e.g., *Frisby*, 487 U.S. at 476, 488 (rejecting facial challenge to ordinance).

404. See, e.g., *Hill*, 530 U.S. at 731-32.

405. *Id.*

406. *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)); see also *Ohralik*, 436 U.S. at 462 n.20 (explaining that, under the overbreadth doctrine, “a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him”).

The overbreadth doctrine, however, would be unavailing in a constitutional challenge to § 3604(c) for the same reason that a facial challenge would fail (i.e., most, if not all, of the statute's applications would be constitutional). Indeed, for the overbreadth doctrine to be invoked, a challenged statute must be substantially overbroad and not readily interpreted to avoid protected speech.<sup>407</sup> Also, the unavailability of the overbreadth doctrine would be particularly apparent in those situations where a landlord's harassing speech is considered "commercial,"<sup>408</sup> for the Court has held that the overbreadth doctrine applies "weakly, if at all," in commercial speech cases.<sup>409</sup>

This is not to say that a particular housing provider accused of violating § 3604(c) by making a sexually harassing statement could never prevail in asserting a First Amendment defense. Though we feel that most such cases would result in upholding § 3604(c)'s constitutionality, our discussions of both the commercial speech doctrine in Part III.C and the captive audience doctrine in Part III.D recognize specific situations in which applying § 3604(c) to a landlord's speech might raise serious First Amendment concerns.<sup>410</sup> As the Supreme Court noted in rejecting a facial challenge to the residential picketing ordinance in *Frisby*,<sup>411</sup> "the constitutionality of applying the ordinance to such [specific] hypotheticals remains open to question" and such specific-application questions "need not [be] address[ed] today in order to dispose of [plaintiffs'] facial challenge."<sup>412</sup> In like fashion, we readily concede that not every specific fact pattern involving verbal harassment to which § 3604(c) might be applied can be guaranteed at this point to be free of constitutional problems.

To summarize, we believe that litigants are fully justified in asserting § 3604(c) claims of verbal housing harassment and that the exact parameters of First Amendment protection for such statements should be left for courts to develop over time based on the particular facts of individual situations and the doctrines we have discussed above. In the course of conducting these fact-specific reviews, courts should also bear in mind "the well-established principle that statutes will be interpreted to

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407. *E.g.*, *Ohralik*, 436 U.S. at 462-63 n.20; *Broadrick*, 413 U.S. at 615; *see also Frisby*, 487 U.S. at 482-83; *id.* at 491 (White, J., concurring) (accepting narrow construction of ordinance in order to defeat overbreadth challenge).

408. *See supra* Part III.C.

409. *Ohralik*, 436 U.S. at 462 n.20 (quoting *Bates*, 433 U.S. at 380).

410. *See supra* text accompanying notes 298-305 (commercial speech) and 377-87 (captive audience).

411. 487 U.S. at 488.

412. *Id.*

avoid constitutional difficulties.”<sup>413</sup> Thus, to the extent that § 3604(c)’s application to a particular instance of housing harassment would appear to violate the First Amendment, the better course would be to construe the statute not to apply to the defendant’s behavior rather than to hold § 3604(c) unconstitutional.<sup>414</sup> This approach—of limiting § 3604(c)’s scope in individual cases to avoid conflict with the First Amendment—would be especially appropriate under the FHA, which 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,”<sup>415</sup> thereby evincing a special Congressional preference for the statute to be applied with constitutional constraints in mind.

#### IV. CONCLUSION

Sexual harassment in housing is a serious and probably widespread national problem. Although such behavior is prohibited by a number of provisions in the federal Fair Housing Act, the FHA has thus far not been used as effectively as it could be to challenge sexual harassment, because courts and litigants have relied primarily on only one of these provisions—§ 3604(b)—whose coverage is similar to a comparable “terms and conditions” provision in Title VII. The result, as the Seventh Circuit’s decision in *DiCenso* illustrates, is that only harassment deemed “severe or pervasive” enough to meet Title VII standards is considered illegal under the FHA, thus allowing landlords and other housing providers to engage in a good deal of unwelcome verbal harassment without incurring liability.

This approach ignores the fact that the FHA includes another provision—§ 3604(c)—that is significantly broader than its Title VII counterpart and that, by its terms, outlaws discriminatory statements based on sex. Because housing harassment almost always involves and indeed often consists entirely of verbal statements, a good deal of such harassment should be held to violate § 3604(c). Focused as it is on discriminatory statements and without a “severe or pervasive” standard, § 3604(c) would

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413. *Id.* at 483; *see also Lowe*, 472 U.S. at 190, 211 (applying the principle that courts should “not decide a constitutional question if there is some other ground upon which to dispose of the case” (quoting *Escambia County, Fla. v. McMillan*, 466 U.S. 48, 51(1984)) and holding that Congress intended to exclude, perhaps based on First Amendment concerns, defendant’s newsletter from a speech-restricting statute and therefore finding it unnecessary to “specifically address the constitutional question we granted certiorari to decide”); *United States v. Clark*, 445 U.S. 23, 27 (1980) (holding that 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”).

414. *See, e.g., HOME*, 943 F.2d at 650-53 (rejecting particular application of § 3604(c) because it would have hinged on a construction of the statute that raised serious First Amendment concerns).

415. 42 U.S.C. § 3601 (2000) (emphasis added).

seem to be a potent weapon for combating sexual harassment in the housing context.

And yet, § 3604(c)'s potential has gone unrealized. To date, this provision has been invoked in only two reported housing sexual harassment cases, and in neither was § 3604(c)'s applicability treated as crucial to the decision. The reason for ignoring § 3604(c) in these cases is hard to fathom, for a close reading of this provision shows that the elements required for its violation would seem to be present in most situations involving verbal harassment. Nor should the potential for a First Amendment conflict deter use of § 3604(c) in most harassment cases. While free speech concerns must be taken seriously whenever a statute like § 3604(c) bars certain types of statements based on their content, we have shown that most harassing speech outlawed by § 3604(c) should be accorded little or no First Amendment protection.

Thus, the only reason for failure to make better use of § 3604(c) in housing harassment cases seems to be the misguided sense among courts and litigants that Title VII law provides a complete guide for the proper application of the FHA in harassment cases. The purpose of this Article has been to show the fallacy of this approach and to encourage a greater reliance on § 3604(c) as a way of providing more protection to women who are targeted for sexual harassment in their home.



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