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A Social Norm Theory of Regulating Housing Speech Under the Fair Housing Act

Stephanie M. Stern*

ABSTRACT

The Fair Housing Act's prohibition of discriminatory housing statements presents a puzzle. This provision regulates housing speech, such as advertisements and notices, more robustly than acts of housing discrimination (e.g., discriminatory refusals to rent or sell). It extends liability regardless of intent and, unlike other provisions in the Fair Housing Act, does not exempt small-scale landlords from liability. Making discriminatory housing statements legally actionable also burdens commercial speech, diverts enforcement resources from discriminatory refusals to rent or sell, and gives rise to other, often more costly, forms of communicating preferences in residential real estate transactions. Why accord such strong protection to regulation of housing speech? This Article suggests an answer. A wealth of empirical research in social psychology establishes that social norms are one of the most potent methods of reducing prejudice. Our beliefs about what others think, particularly others who are similar to us or part of our group, shape the attitudes and behaviors we express toward people of different races and other protected classes under the Fair Housing Act. This Article assesses the Fair Housing Act's prohibition of discriminatory housing statements, as well as recent conflict between the Fair Housing Act and the Communications Decency Act and debate about roommate advertisements, in light of the power of social norms.

INTRODUCTION

Section 3604(c) of the Fair Housing Act (“FHA”),¹ which prohibits discriminatory housing advertisements and statements, compels some surprising results. It regulates the content of commercial speech in the absence of an accompanying or subsequent discriminatory act (e.g., refusal to sell or rent).² For example, a landlord who advertises “no Jews” or “prefer no children” in a newspaper advertisement has violated § 3604(c) even if he or she subsequently rents to a Jewish person or family with young children.³ Oral statements that indicate preference or discrimination, such as asking a potential buyer who

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1. 42 U.S.C. § 3604(c) (2018).
2. *Id.*
3. *Id.*

phones to inquire about a property if he or she is white, similarly violate § 3604(c).⁴

Section 3604(c) was controversial at its inception and remains so today. Scholars have called the prohibition on discriminatory housing statements and publications the FHA's "most intriguing provision," while critics have alleged it infringes on freedom of speech, delivers minimal benefits, and entraps small-scale landlords or roommate seekers who are unaware of its prohibitions.⁵ Section 3604(c) presents puzzles that have tugged at housing policymakers and scholars since the FHA's inception. For example, the regulation of housing statements and advertisements is more expansive than the FHA's treatment of discriminatory refusals to rent, sell, or lend. The major exemptions to liability under the FHA do not apply to § 3604(c).⁶ In addition, unlike other anti-discrimination laws, § 3604(c) does not require that the defendant have discriminatory intent or, as discussed above, have committed a discriminatory act in a real estate transaction.⁷ Why does § 3604(c) impose stricter liability regardless of intent, with fewer exemptions, than the FHA provisions addressing actual acts of housing discrimination? One wonders why the FHA, which scraped through the legislative process amid controversy and resistance, ultimately included such a robust provision.⁸

Psychology research on social norms suggests some answers. Social norms research reveals important reasons the FHA should regulate speech despite its costs – and why it should do so robustly and regardless of the speaker's

4. *Id.*

5. *See, e.g.,* Bader v. Fair Hous. Council of Orange Cty, No. G041118, 2010 WL 740185 (Cal. Ct. App. Mar. 4, 2010) (discussing claims of a landlord who argued that receiving a violation and fines for his ambiguous housing advertisement that small apartment was well-suited to one or two professional adults constituted extortion and was devoid of public benefit); David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 134–38 (2001) (describing free speech concerns under the FHA and arguing that failures of political process impel protecting First Amendment rights from antidiscrimination laws); 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, 187 (2001) (arguing that housing statement regulation was an intriguing addition to the FHA); *cf.* Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1152–53 (2010) (noting that most people advertising for roommates believe they can lawfully advertise preferences based on characteristics such as gender, race, religion, etc.).

6. *See* 42 U.S.C. § 3603(b)(2) (2018) (clarifying that § 3604(c) applies to small-scale landlords and others otherwise exempted from the FHA); *id.* § 3607(a) (exemption for private clubs and religious organizations applies to discriminatory actions, not statements). *See generally* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION ch. 15 (2018).

7. *See* 42 U.S.C. § 3604(c) (requiring only that the statement would "indicate" such a discriminatory motivation to the listener). *But see id.* § 3604(a); *id.* § 3604(b); *id.* § 3604(d) (requiring that the action occur "because of" a protected status).

8. *See infra* Part I.

intent. Social norms refer to expectations for individual behavior or attitudes derived from the norms of a group that the individual identifies with or values.⁹ These expectations define and reaffirm the identity and composition of the group.¹⁰ Communications, both written and oral, are primary sources of information about the prevailing norms of the group.¹¹ Statements and other forms of communication affect listeners' views of other groups and their behaviors toward members of "outgroups."¹² What we believe others think about groups, such as African-Americans, Christians, or obese individuals, is a primary determinant of our own prejudices.

A substantial body of empirical research shows that reducing the *appearance* of prejudiced attitudes or acts of discrimination can lessen the expression of prejudiced attitudes and promote egalitarian behaviors in listeners.¹³ Specifically, statements that indicate a norm or consensus among a group or that activate a pre-existing norm can shift the attitudes expressed by listeners in the direction of that statement.¹⁴ Even highly prejudiced individuals report lower levels of prejudice and more willingness for contact with members of other groups after they learn that members of a group they identify with (e.g., fellow

9. See Rachel I. McDonald & Christian S. Crandall, *Social Norms and Social Influence*, 3 CURRENT OPINION IN BEHAV. SCI. 147, 147 (2015) ("A social norm is an expectation about appropriate behavior that occurs in a group context."). Economists and legal scholars have conceptualized norms somewhat more punitively, emphasizing the role of norms in sanctioning individuals for non-conforming conduct. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997); Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1095–97 (1986).

10. See McDonald & Crandall, *supra* note 9, at 147–48.

11. *Id.*

12. See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 367–68 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998).

13. See, e.g., Margo J. Monteith, Nicole E. Deneen & Gregory D. Tooman, *The Effect of Social Norm Activation on the Expression of Opinions Concerning Gay Men and Blacks*, 18 BASIC & APPLIED SOC. PSYCHOL. 267 (2010); Elizabeth Levy Paluck, *Reducing Intergroup Prejudice and Conflict Using the Media: A Field Experiment in Rwanda*, 96 J. OF PERSONALITY & SOC. PSYCHOL. 574 (2009); Barbara Masser & Lisa Phillips, "What Do Other People Think?" – *The Role of Prejudice and Social Norms in the Expression of Opinions Against Gay Men*, 55 AUSTRALIAN J. OF PSYCHOL. 184 (2003); Christian S. Crandall, Amy Eshleman & Laurie O'Brien, *Social Norms and the Expression and Suppression of Prejudice: The Struggle for Internalization*, 82 J. OF PERSONALITY & SOC. PSYCHOL. 359, 359 (2002) [hereinafter Crandall, *Social Norms*]; Charles A. Stangor, Gretchen B. Sechrist & John T. Jost, *Changing Racial Beliefs by Providing Consensus Information*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 486 (2001); Fletcher A. Blanchard et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. OF APPLIED PSYCHOL. 993 (1994); Russell D. Clark III & Anne Maass, *The Effects of Majority Size on Minority Influence*, 20 EUROPEAN J. OF SOC. PSYCHOL. 99 (1990). See generally Stephanie M. Stern & Daphna Lewinsohn-Zamir, *THE PSYCHOLOGY OF PROPERTY* (forthcoming 2019).

14. See discussion *infra* note 105–13.

university students) hold unprejudiced attitudes.¹⁵ The limited number of studies that have examined behavior have found that exposure to discriminatory or egalitarian social norms about a group also affects listeners' subsequent behaviors and interactions with that group.¹⁶ As social psychologists Gretchen Sechrist and Charles Stangor observe, "If there is any lesson to be learned from the history of social psychology, it is that attitudes change not so much through persuasive appeals from others or even from direct experience as from perceptions about the beliefs of important in-group members."¹⁷

Viewed through this lens, constraining the appearance of prejudice promotes non-discriminatory norms in real estate transactions. Research showing the effect of even a single statement on listeners' bias supports the legislative decision to deny exemptions to § 3604(c) claims.¹⁸ Applying a social norms framework to § 3604(c) also makes evident why violations should be judged from the standpoint of an "ordinary listener," which captures the normative injury, rather than the standpoint of the speaker's intent.¹⁹ Social norms offer a new perspective on controversial FHA cases about extending standing to non-profit organizations or white residents claiming injuries from segregation.²⁰ While claiming an effect on social norms cannot be the sole basis of standing – such an approach would obliterate standing as a doctrine of restriction – the normative injuries from discriminatory housing speech are one factor that support the generous standing courts have already afforded to fair housing litigants.²¹

More globally, the social norms research counsels a shift from viewing the purpose of housing speech regulation as solely to address emotional harms to members of protected groups or to prevent listeners from misperceiving their

15. Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. OF PERSONALITY & SOC. PSYCHOL. 645, 647–49 (2001).

16. *See, e.g., id.* at 648 (measuring seating distance from an African-American following exposure to information that the participant's fellow students held racist versus egalitarian views).

17. *Id.* at 645. Evidence from other studies highlights the role of likeability of the person expressing the norm and the social dimensions of groups and social norms. *See, e.g.,* Stacey Sinclair et al., *Social Tuning of Automatic Racial Attitudes: The Role of Affiliative Motivation*, 89 J. OF PERSONALITY & SOC. PSYCHOL. 583, 590–91 (2005).

18. *See* Blanchard et al., *supra* note 13, at 995–96; Monteith, Deneen & Tooman, *supra* note 13, at 267.

19. *See, e.g.,* Jancik v. HUD, 44 F.3d 553, 556 (7th Cir. 1995).

20. The same theory of social norms supports controversial judicial decisions extending liability to third-party statements made by people who are not involved in the real estate transaction and to statements of agents made at the direction of their principals. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372–79 (1982).

21. For a comprehensive discussion of these issues, see Schwemm, *supra* note 5, at 294–300.

legal obligations under the FHA.²² Housing speech regulation also performs a task critical to the FHA's goal of promoting integration: it promotes social norms against expressing housing prejudice in words or deeds.²³

Social norms research has implications as well for contemporary debates about housing speech. Recently, § 3604(c) has fulminated debate over its application to the Internet in online housing advertisements and posts.²⁴ The prejudice-reducing power of communications highlights the welfare gains that should be measured against internet providers' interests in determining liability for discriminatory housing posts on websites and raises concerns about court decisions greatly cabining liability under the Communications Decency Act ("CDA").²⁵ A social norm framework also challenges the widely-accepted notion that associational rights should trump housing speech regulation when people advertise for roommates.²⁶ It is not clear why the interest in selecting a roommate outweighs normative harm from discriminatory advertisements, particularly because the person advertising may lawfully decline a roommate or home-sharer on the basis of a protected characteristic under exemptions in the FHA.

This Article presents an empirically grounded model of social norms in housing speech regulation. It unfolds in six parts. Part I describes the surprising robustness of § 3604(c) in light of the legislative history of the FHA and the social costs of this provision. Part II explores the extensive psychology research on the effect of discriminatory statements on prejudice. Part III argues that the impact of discriminatory housing speech on social norms provides a

22. See, e.g., *Spann v. Colonial Vill., Inc.*, 899 F.2d 24 (D.C. Cir. 1990) (stating that without regulation of housing speech, readers and listeners are vulnerable to confusion about housing discrimination law).

23. Oliveri, *supra* note 5, at 1160–62 (“Regardless of whether a particular group is harmed more than another by a social norm, it may still be important for the law to express society’s disapproval of that norm.”); see also, e.g., Fair Housing Issues in the Gulf Coast in the Aftermath of Hurricane Katrina and Rita: Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services, 119th Cong. 6–7 (2006) (statement of assistant secretary of HUD Kim Kendrick that discriminatory advertisements following Hurricane Katrina inflicted harm on those who had already suffered).

24. See Andrew J. Crossett, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195, 206–11 (2008) (discussing limits on fair housing enforcement under the Communications Decency Act); Jean E. Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L. J. 149, 149–60 (1969) (describing difficult legislative path to enactment); see also Oliveri, *supra* note 5, at 1153–80 (collecting data and assessing discriminatory roommate advertisements on an internet site).

25. See *Fair Hous. Council v. Roomates.com*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (finding that website operator who “materially contributed” to the discriminatory posting cannot enjoy immunity); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006); see also 47 U.S.C. § 230 (2018).

26. See Oliveri, *supra* note 5, at 1157–60.

potent justification for § 3604(c). Part IV describes how seeming puzzles of § 3604, including the non-applicability of FHA exemptions, lack of an intent requirement, and broad standing, are no longer surprising in view of the strong normative effects of discriminatory statements. Part V notes some of the limitations of social norms for fair housing and the goal of residential integration. Turning to recent controversies, Part VI addresses the implications of social norms research for website providers' liability for discriminatory housing statements posted on their websites and the debate over § 3604(c)'s applicability to roommate advertisements.

I. THE FAIR HOUSING ACT'S REGULATION OF HOUSING STATEMENTS

The FHA²⁷ was enacted in 1968 amid growing concern about racial segregation and African-American ghettos.²⁸ Racial segregation in housing had burgeoned in the real estate industry, as landlords, sellers, brokers, and lenders refused to transact with African-Americans, Jews, and other groups.²⁹ Government "redlining" had also narrowed opportunities for minorities by systematically undervaluing properties in inner-city neighborhoods.³⁰ Political organizations, such as the National Association for the Advancement of Colored People ("NAACP") and the National Committee Against Discrimination began to lobby, unsuccessfully, for housing civil rights legislation in the early 1960s.³¹ Following a number of urban riots, President Lyndon B. Johnson appointed a group, known as the Kerner Commission, to study the causes of civil unrest.³² The Kerner Commission cited housing segregation and discrimination and it recommended that Congress adopt anti-discrimination housing legislation.³³

27. Pub. L. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. ch. 45).

28. Schwemm, *supra* note 5, at 189–91; Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOC. F. 571, 571–74 (2015).

29. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 46–50 (1993).

30. *Id.* at 52. Redlining is the practice of denying or limiting mortgages and other financial services to certain neighborhoods, often on the basis of race, regardless of individual applicants' credit-worthiness. *Id.*

31. Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 552 (2014).

32. *Id.* at 553.

33. *Id.*; see also John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect – An Introduction*, 71 N.C. L. REV. 1289, 1299–300 (1993).

The FHA initially struggled to gain traction for passage.³⁴ The House passed a fair housing bill in 1966, and the Senate sponsored a bill in 1967.³⁵ In 1968, Senators Walter Mondale and Edward Brooke offered a fair housing amendment to a more general civil rights bill passed by the House, which was withdrawn in favor of a fair housing amendment by Senator Everett McKinley Dirksen. Senator Dirksen's amendment became the basis of the FHA.³⁶ A few days after the assassination of Martin Luther King, the House passed the FHA.³⁷ The goals of the statute, as elucidated in its legislative history and subsequent interpretation by the United States Supreme Court, were to reduce discrimination and advance integration – particularly racial integration between African-Americans and whites.³⁸ These goals will feature prominently in this Article's analysis of the normative benefits of housing speech regulation.

The FHA prohibits discriminatory housing statements, as well as discrimination in housing transactions and lending. Specifically, the FHA forbids refusals to rent or sell a dwelling because of race, color, religion, sex, familial status, disability, or national origin,³⁹ as well as discrimination in the “terms, conditions, or privileges of a sale or rental.”⁴⁰ The FHA also makes discrimination by individuals and entities engaged in residential real estate transactions, such as brokers and lenders, unlawful.⁴¹

A. Regulating Housing Speech: Section 3604(c)

One provision of the FHA, however, addresses neither behavior nor discrimination in a transaction. Section 3604(c) makes it unlawful to “make, print, or publish . . . 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

34. See Dubofsky, *supra* note 24, at 149–60; Margaret A. Fiorino, *Advertising for Apartheid: The Use of All White Models in Marketing Real Estate as a Violation of the Fair Housing Act*, 56 U. CINCINNATI L. REV. 1429, 1429 (1988) (describing objections to “coercion, violation of the fundamental freedom to own and dispose of private property, and anti-majoritarianism” in the FHA’s legislative history).

35. Schwemm, *supra* note 5, at 197–98.

36. *Id.* at 198.

37. *Id.*

38. *Id.* at 212. The United States Supreme Court has emphasized integration as a major goal of the FHA. In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Court held that white residents of an apartment complex had standing to sue for injuries from segregation due to their landlord’s discrimination against African-Americans. This holding recognizes the harms from segregation to both African-Americans and whites and, implicitly, the benefits of integration envisioned under the FHA.

39. 42 U.S.C. § 3604(a)–(b) (2018).

40. *Id.* § 3604(f)(2).

41. See *id.* § 3605.

origin.”⁴² This provision regulates both oral and written housing statements. For example, an advertisement by a landlord in a local newspaper that states “black female tenant preferred” violates the FHA, as does the same statement made face-to-face to applicants. Courts have also held that the FHA applies to pictures, such as the use of all-white models, that indicate a racial preference to the ordinary reader.⁴³

The FHA imposes liability on the person making discriminatory statements as well as on publishers of discriminatory statements, such as newspapers, radio, or television.⁴⁴ In the case of discriminatory internet postings – for example, on online housing or roommate matching websites – the CDA typically shields operators of internet sites and online services from liability for posting discriminatory statements about housing but does not shield the individual who posted the statement online.⁴⁵ Complainants include fair housing organizations, who search for discriminatory advertisements and use volunteer or hired fair housing “testers” to pose as housing applicants, and private parties who were subjected to discriminatory housing advertisements and oral statements.⁴⁶ The remedies for a § 3604(c) claim are actual damages for emotional harms and expenses (e.g., greater housing search costs) as a result of reading or hearing the discriminatory statement and punitive damages; injunctive and equitable relief are also available.⁴⁷ For cases tried in an administrative proceeding or by the U.S. attorney general, the defendant may face additional civil penalties.⁴⁸

42. See *id.* § 3604(c).

43. See, e.g., *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1058 (E.D. Va. 1987). For further analysis of § 3604(c)’s application to pictorial advertisements and models, see Fiorino, *supra* note 34, at 1433–43; Ivan C. Smith, Comment, *Discriminatory Use of Models in Housing Advertisement: The Ordinary Black Reader Standard*, 54 OHIO ST. L. J. 1521, 1527–34 (1993).

44. See *United States v. Hunter*, 459 F.2d 205 (1972) (holding a newspaper liable for publishing discriminatory housing advertisement). This has dramatically reduced such advertisements in print and other non-internet media. See Andrene N. Plummer, Comment, *A Few New Solutions to a Very Old Problem: How the Fair Housing Act Can Be Improved to Deter Discriminatory Conduct by Real Estate Brokers*, 47 HOW. L. J. 163, 177 (2003).

45. See *Fair Hous. Council v. Roomates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008); *Chi. Lawyers’ Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

46. Fred Freiberg, *A Test of Our Fairness*, 41 URB. LAW. 239, 240–41 (2009); Fiorino, *supra* note 34, at 1433–43.

47. 42 U.S.C. § 3613(c)(1) (2018) (enforcement by a private person); *id.* § 3612(g)(3) (enforcement by Secretary); *id.* § 3614(d)(1)(A)–(B) (enforcement by Attorney General); see also Schwemm, *supra* note 5, at 302–09.

48. See 42 U.S.C. § 3612(g)(3)(A)–(C) (administrative proceedings); *id.* § 3614(d)(1)(C) (federal suit by attorney general); see also *The FHEO Complaint and Investigation Process*, HUD, https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process (last visited Mar. 11, 2019). See generally SCHWEMM, *supra* note 6.

Section 3604(c) was a surprising addition to the FHA in a number of respects. In a bill that barely eked its way to legislation, an expansive provision regulating commercial speech seems anomalous. Section 3604(c) not only survived a contentious legislative process, but it emerged with arguably greater strength and certainly broader reach than other parts of the FHA. Section 3604(c) takes a strict liability approach to discriminatory housing statements. Thus, unlike the FHA provisions addressing discriminatory refusals to rent, sell, or lend,⁴⁹ § 3604(c) does not require that a discriminatory action (e.g., refusal to extend housing) occurred.⁵⁰

Section 3604(c) does not even require the speaker to intend discrimination. The statutory language requires only that the speaker “indicates any preference, limitation, or discrimination based on [a protected status],”⁵¹ unlike other sections of the FHA that require plaintiffs to show that the alleged discriminatory act occurred “because of” their membership in a protected group.⁵² In § 3604(c) claims, courts determine violations based on whether an ordinary listener would perceive discrimination based on membership in protected group.⁵³ For example, a landlord who publishes an advertisement stating that an apartment is best suited for a couple without children has likely violated § 3604(c) even if he did not intend to exclude families and has rented to families with children in the past. It would be irrelevant to a § 3604(c) claim if, following publication of the advertisement, the landlord ultimately rented the apartment to a family with young children.

Compared to other provisions of the FHA, § 3604(c) imposes broader liability because the exemptions applicable to other provisions of the FHA do not apply to housing statements. Discrimination in rentals and sales is subject to an expansive exemption for small-scale landlords. The federal “Mrs. Murphy” provision exempts dwelling units or rooms in a four-unit or fewer multifamily dwelling where the owner occupies one dwelling unit as her residence from liability for discrimination in rentals and sales.⁵⁴ Approximately half of the states have adopted Mrs. Murphy exemptions identical to the federal approach; most of the remaining states make the exemption more limited (e.g., limiting the Mrs. Murphy exemption to owner-occupants of two-unit buildings

49. 42 U.S.C. § 3604(a) (refusal to sell or rent); *id.* § 3604(b) (discrimination in terms, conditions, or services of sale or rental); *id.* § 3605 (discrimination by businesses engaged in lending, selling, brokering, constructing, repairing, or improving, or appraising residential real estate).

50. *Id.* § 3604(c).

51. *Id.*

52. *See id.* § 3604(a); *id.* § 3604(b); *id.* § 3604(d); *id.* § 3605(a).

53. *See, e.g.*, Jancik v. HUD, 44 F.3d 553, 556 (7th Cir. 1995); Soules v. HUD, 967 F.2d 817, 824 (2d Cir. 1992); Ragin v. N.Y. Times Co., 923 F.2d 995, 999 (2d Cir. 1991); United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972).

54. 42 U.S.C. § 3603(b)(2).

rather than four or fewer units).⁵⁵ There is another exemption for landlords or sellers of single-family homes if the owner does not own more than three single-family homes and does not use a real estate broker or agent.⁵⁶ However, the FHA provides that these exemptions do not apply to claims under § 3604(c).⁵⁷ This means that, under federal law, a Mrs. Murphy may discriminatorily refuse to rent to a Latino tenant with impunity but cannot advertise that preference in her local newspaper. This is an awkward result that has generated critique. For example, one housing scholar has argued in favor of subjecting § 3604(c) to the Mrs. Murphy exemption, noting that there is “something a little backward about a regime in which particular conduct is permitted, but statements of intent to commit that conduct are not.”⁵⁸

The other major exemptions in the FHA are for private clubs and religious organizations.⁵⁹ These organizations may limit the sale, rental, or occupancy of dwellings that they own or operate on the basis of religion, gender, and other characteristics but not on the basis of race, color, or national origin.⁶⁰ This provision allows private clubs and religious organizations to restrict membership on the basis of some characteristics otherwise protected under the FHA.⁶¹ However, the exemption applies to “sale, rental, or occupancy” and does not apply to advertisements, notices, and other housing statements covered under § 3604(c).⁶² Fair housing scholar Robert Schwemm’s excavation of the legislative history, the enactment, and the subsequent judicial interpretation of § 3604(c) notes that no reported case has extended the exemptions for private clubs and religious organizations to a § 3604(c) claim.⁶³ There is only one part of the FHA, a narrow provision for familial status claims against senior housing, that is not subject to § 3604(c).⁶⁴ In general, courts have tended to construe

55. See Scott M. Badami, *The FHA’s “Mrs. Murphy” Exemption – A 50 State Guide*, FAIR HOUSING DEF. (Apr. 22, 2013), <https://fairhousing.foxrothschild.com/2013/04/articles/fha-basics/the-fhas-mrs-murphy-exemption-a-50-state-guide/>. For examples of state statutes that limit the state’s exemption to two-unit owner occupied residential buildings see KY. REV. STAT. ANN. § 344.365 (West 2018); N.J. STAT. ANN. § 10:5-5 (2018).

56. *Id.* § 3603(b)(1).

57. *Id.* § 3603(b).

58. Oliveri, *supra* note 5, at 1165.

59. See 42 U.S.C. § 3607.

60. *Id.* § 3607(a).

61. See *id.*

62. See *id.*

63. There is at least one mention in the legislative history of an intent to exempt § 3604(c) to shield religious and fraternal organizations, but it does not appear crystallized and has not been heeded by the courts. Schwemm, *supra* note 5, at 196 n.31.

64. See 42 U.S.C. § 3607(b)(2)(C)(ii). This provision actually *requires* the housing providers to publish and follow policies demonstrating their intent to house people fifty-five years of age or older. *Id.*

the exemptions narrowly for all kinds of claims brought under the FHA.⁶⁵ Section 3604(c), by virtue of its explicit exclusion from the exemptions, is most benefited.⁶⁶ However, a recent development that has undermined § 3604(c)'s impact is the CDA's protection of internet website operators from liability for discriminatory posts and advertisements by users on their sites.

The application of § 3604(c) to small-scale landlords and roommate advertisements and its eschewal of intent have provoked public consternation. In some cases, such as "mom and pop" landlords or roommate seekers, speakers mistakenly believe it is lawful to express preferences on the basis of protected characteristics.⁶⁷ Punishing ambiguous housing speech without evidence of intent or actual discrimination may also deplete political support for fair housing regulation and cultivate the sentiment that, as one reporter opined, "weak [words] can cost you."⁶⁸ An example of such a case comes from *Bader v. Fair Housing Council of Orange County*, litigation that ensued when the Orange County, California, fair housing authority fined a small-scale landlord \$4,000 and required him to attend a course on fair housing.⁶⁹ Bader, the landlord, had posted a Craigslist advertisement describing his 480 square foot apartment as "well-suited for 1 or 2 professional adults."⁷⁰ To no avail, Bader vigorously argued in court, and to the press, that he had not intended discrimination based on familial status and in fact had rented the apartment to families with children multiple times in the past.⁷¹ While Bader did not prevail in court, his case attracted media attention and negative publicity for the local fair housing agency.⁷²

B. Costs and Challenges of Housing Speech Regulation

In addition to the problems of public acceptance and backlash noted above, regulation of discriminatory housing statements limits speech, imposes enforcement costs, and possibly shifts, rather than reduces, discriminatory activity. The enactment and maintenance of § 3604(c) is even more startling in light of its costs. These costs underscore the importance of the nature and magnitude of § 3604(c)'s countervailing benefits. This Section considers some of the costs of the FHA's regulation of discriminatory housing speech.

65. *E.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731–32 (1995).

66. *See, e.g., id.*; *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990); Schwemm, *supra* note 5, at 196 n.31 (noting that the Mrs. Murphy, single-family home, private club, and religious organization exemptions have "rarely succeeded in shielding FHA defendants from liability").

67. *See* Oliveri, *supra* note 5, at 1167.

68. *See* Brian Joseph, *Unfair Fight?*, ORANGE COUNTY REG. (Mar. 28, 2008), <https://www.oregister.com/2008/03/28/unfair-fight/>.

69. No. G041118, 2010 WL 740185, at *2 (Cal. Ct. App. Mar. 4, 2010).

70. *See id.* at *2.

71. *Id.* at *3; Joseph, *supra* note 68.

72. *See, e.g.*, Joseph, *supra* note 68.

1. Free Speech

Section 3604(c) imposes liability for both written and oral speech.⁷³ In doing so, it affects the important constitutional right (and political tinderbox) of the First Amendment. Section 3604(c) regulates commercial speech, which is entitled to a lower standard of protection than non-commercial speech.⁷⁴ In virtually all § 3604(c) cases, there has been no constitutional violation under the United States Supreme Court precedent in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁷⁵ *Central Hudson* creates a four-part test to determine the constitutionality of government regulation of commercial speech, with the first prong of the test requiring that the speech “must concern lawful activity” to receive First Amendment protection.⁷⁶ Because the housing discrimination underlying § 3604(c) speech is illegal under the FHA, the Civil Rights Act of 1866, and usually state or local housing law as well, discriminatory housing statements do not concern a lawful activity and thus are not protected speech.⁷⁷ The rationale for excluding speech about unlawful activity from the auspices of First Amendment protection is that such speech is unlikely to provide the kind of full, accurate market of information that the First Amendment seeks to preserve in commercial speech cases.⁷⁸ Courts that have considered First Amendment challenges to § 3604(c) have rejected those claims.⁷⁹

While it passes constitutional muster, § 3604(c) causes a substantial degree of constitutional discomfort. This occurs in two ways. First, the animating ideals of the First Amendment support a default position of protecting free speech – both personal or political speech and to a lesser extent commercial speech.⁸⁰ This sentiment underlies resistance and political upset over housing statement regulation.⁸¹ Interestingly, one reason for supporting freedom to engage in discriminatory or hateful speech is the idea that hearing such speech

73. 42 U.S.C. § 3604(c) (2018).

74. Samuel A. DiLullo, *The Present Status of Commercial Speech: Looking for a Clear Definition*, 90 DICK. L. REV. 705, 705–06 (1986).

75. 447 U.S. 557 (1980).

76. *Id.* at 566.

77. See Schwemm, *supra* note 5, at 273–76.

78. See *id.* at 272–78.

79. See, e.g., *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002–05 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 211–15 (4th Cir. 1972). The cases where courts have raised First Amendment concerns have involved statements unrelated to the housing transaction or cases where the facts make unclear if the statement indicated discrimination against a protected group. See, e.g., *Stewart v. Furton*, 774 F.2d 706, 710 n.2 (6th Cir. 1985).

80. See DiLullo, *supra* note 74, at 705–06.

81. See, e.g., Bernstein, *supra* note 5, at 85–101 (arguing that the government does not have a constitutionally legitimate interest in eradicating discriminatory expressions or attitudes).

will change listeners' minds in the opposite direction.⁸² The psychology research suggests that this is unlikely to occur if listeners perceive the speaker as representing a consensus view or a group with whom they identify.⁸³ Yet, other rationales for free speech protection, including safeguarding personal liberty and the flow of information, remain and create tension over housing speech regulation.⁸⁴

The political consternation over First Amendment rights and potential over-reach is evident in the U.S. Department of Housing and Urban Development ("HUD") regulations, which were adopted following political outcry over a HUD investigation. HUD investigated three residents who used petitions and newsletters to advocate against a homeless center in part on the basis of the disabled status of the residents the center would serve.⁸⁵ The investigation sought to determine whether the residents had violated the FHA, including § 3617, which makes it unlawful to threaten or interfere with a housing transaction because of a protected status.⁸⁶ Media publicity about the investigation galvanized public backlash.⁸⁷ Although HUD ultimately found that the residents were expressing their political beliefs and influencing the political process, the controversy led the agency to issue guidelines defining the scope of its authority.⁸⁸ The guidance clarifies that under FHA § 3617 speech directed toward achieving action by a government official or entity is protected under the First Amendment so long as it does not involve force or threats.⁸⁹ It also delineates steps the agency must take to "make every effort to assure" that chilling of speech does not occur and to withdraw agency investigations when it becomes apparent that First Amendment protections apply.⁹⁰ While this guidance does not address § 3604(c) specifically, First Amendment concerns in housing speech investigations are likely similar.

82. See John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1341–54 (2008) (conceptualizing communication as behaviors intended to change minds through the free will of the listener).

83. See *infra* Part II.

84. For further discussion on this point, see *infra* Section III.B.

85. *White v. Lee*, 227 F.3d 1214, 1220 (9th Cir. 2000).

86. *Id.*; see also 42 U.S.C. § 3617 (2018).

87. For more detail on this controversy, see Michael P. Seng, *Hate Speech and Enforcement of the Fair Housing Laws*, 29 J. MARSHALL L. REV. 409, 409–10 (1996); but see Bernstein, *supra* note 5, at 134–38 (describing HUD as making a wrongful preliminary finding and intimidating the residents).

88. See *White*, 227 F.3d at 1228.

89. HUD, NOTICE FHEO-2015-01, SUBSTANTIVE AND PROCEDURAL LIMITATIONS ON FILING AND INVESTIGATING FAIR HOUSING ACT COMPLAINTS THAT MAY IMPLICATE THE FIRST AMENDMENT 1–2 (2015).

90. *Id.* at 3.

Second, many residential real estate transactions implicate interests in freedom of association and involve individual owners without particular business or legal expertise.⁹¹ A retired homeowner advertising to rent a room or basement apartment in his house or a college student seeking a roommate via a campus posting are not what comes to many people's minds when they think of "commercial speech." The prototypical commercial transaction does not require ongoing physical proximity and interaction once the transaction is complete. Of course, many aspects of residential real estate transactions – such as lending, rentals that are not owner-occupied, development, and brokering – do not entail ongoing associational interests. What makes § 3604(c) controversial on free speech grounds are contexts that implicate associational concerns or involve a hybrid of commercial and non-commercial speech.

Regulating housing statements within the bounds of the First Amendment creates complexity and uncertainty for litigants and courts. For example, courts have had to consider whether statements made during, but not in reference to, a real estate action give rise to a claim under the FHA and have declined to extend liability in part due to First Amendment concerns.⁹² A lingering question has been whether the benefits of § 3604(c) justify the costs to not only free speech but also to clarity, certainty, and judicial administration.

2. Policy Targeting

The FHA was designed with limited resources for enforcement. Indeed, enforcement power was a sticking point during the enactment process.⁹³ Housing scholars Douglas Massey and Nancy Denton describe weak enforcement as "the price of passage."⁹⁴ The FHA provides three paths to legal relief: suits by private parties, administrative complaints to HUD, and, in cases involving a pattern or practice or issue of public importance, enforcement by the U.S. attorney general.⁹⁵ The Department of Justice ("DOJ") and HUD have limited

91. Most landlords own only a single property. See FOREMOST INSURANCE GROUP, LANDLORD MARKET FACTS 3 (2014), <https://cp.foremost.com/market-facts/9012548-landlord-market-facts-2014.pdf>.

92. See Schwemm, *supra* note 5, at 276.

93. See *id.* at 203–05. In particular, the infamous "Dirksen Compromise" garnered Senator Dirksen's needed vote in exchange for granting HUD only conciliation and persuasion powers. For more detail on this and other concessions on enforcement, see Dubofsky, *supra* note 24, at 149–60.

94. See MASSEY & DENTON, *supra* note 29, at 195. But see Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 248 (2016) (concluding that legislators' intentions for the FHA's robust operation and enforcement were not as tepid as scholars have alleged).

95. 42 U.S.C. § 3613 (2018) (private person); *id.* § 3610 (administrative enforcement); *id.* § 3614 (enforcement by attorney general).

staff and resources to enforce the FHA, including § 3604(c).⁹⁶ The FHA partially alleviates the federal burden by requiring HUD to refer housing discrimination complaints to a state or local public agency with jurisdiction so long as the applicable rights, procedures, and remedies are substantially equivalent to the FHA.⁹⁷ The FHA also requires HUD to attempt “conciliation” and voluntary resolution of complaints.⁹⁸ Given the limitations of federal enforcement, the primary means of enforcing the FHA is through private litigation by individual plaintiffs and fair housing organizations.⁹⁹ Non-profit housing organizations are responsible for most of the major judicial decisions clarifying, and in some cases extending, the FHA.¹⁰⁰

In some cases, § 3604(c) may consume enforcement resources or divert them from allegations of discriminatory acts to seemingly less injurious, or less certain to be injurious, discriminatory statements. For example, a fair housing agency investigating a discriminatory advertisement might instead devote those resources to substantive discrimination cases or greater enforcement of the FHA’s provision that localities “affirmatively further fair housing” – a provision that saw brief enforcement attempts during the Obama era.¹⁰¹ In practice, most – but not all – cases with a § 3604(c) claim also involve additional claims for discriminatory refusal to rent or sell or discrimination in the terms and conditions of a real estate transaction.¹⁰² This reduces the cost of investigating and enforcing § 3604(c) because the various claims include shared facts and, if litigated, are presented together in a single case. Also, fair housing organizations, who are de facto the primary enforcers of the FHA, can choose

96. See Massey, *supra* note 28, at 583. For example, Bill Lann Lee writes that, while the attorney general has brought important cases, federal resources and federal authority, particularly prior to the 1988 amendments to the FHA, “was far from powerful or complete.” Bill Lann Lee, *An Issue of Public Importance: The Justice Department’s Enforcement of The Fair Housing Act*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/issue-public-importance> (last updated Aug. 6, 2015).

97. 42 U.S.C. § 3610(f)(3).

98. *Id.* § 3610(b).

99. See Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 375 (1988) (“The [FHA] is designed to rely primarily on private enforcement.”); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (“[C]omplaints by private persons are the primary method of obtaining compliance with the [FHA].”).

100. See Schwemm, *supra* note 99, at 381–82.

101. Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KENTUCKY L. J. 154, 176 (2012). See generally Jonathon Sheffield, *At Forty-Five Years Old the Obligation to Affirmatively Further Fair Housing Gets a Face-List, But Will It Integrate America’s Cities?*, 25 U. FLA. J. OF L. & PUB. POL’Y 71 (2014); Michelle Ghaznavi Collins, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV. 2135, 2167–68 (2010).

102. I thank fair housing scholar Robert Schwemm for his helpful comments on this point.

to prioritize fair lending, steering, or other cases over housing speech complaints. More fundamentally, the view that § 3604(c) creates problematic misallocations assumes that § 3604(c) is a less effective provision of the FHA and thus less worthy of enforcement resources – a claim that this Article will dispute in Parts II and III.

3. Discrimination Distortion

The regulation of housing speech may cause discrimination to morph into other forms. For example, following the enactment of the FHA, real estate advertisements often eschewed written or oral statements and instead advertised photographs and other media using all-white models as buyers, tenants, or borrowers.¹⁰³ Forbidden from statements of racial preference, the use of all-white models conveyed the same message with legal impunity. Judicial opinions subsequently restricted the use of all-white models in cases of repeated and numerous advertisements by an advertiser.¹⁰⁴ Thorny questions remain about where to draw the line on white model frequency and whether to aggregate different advertisements run by the same publisher to determine publisher liability.¹⁰⁵ Courts have refused to extend liability to publishers based on aggregate advertisements.¹⁰⁶

Businesses, advertisers, and publishers can adapt, usually quite rapidly, to convey their intended message via lawful alternatives. Restricting discriminatory written advertisements and images may give rise to other, subtler ways of signaling preferences. For example, legal scholar Lior Strahilevitz theorizes that by incorporating and advertising “exclusionary amenities” associated with certain racial or other types of groups, developers and owners can attract the type of buyer they prefer.¹⁰⁷ This can occur in localities, neighborhoods, or common interest communities. For example, a subdivision development may

103. See, e.g., *Ragin v. N.Y. Times, Co.*, 923 F.2d 995, 1000 (2d Cir. 1991) (holding that § 3604(c) applies to use of models to express racial preference).

104. See, e.g., *Ragin*, 923 F.2d at 1000 (holding that § 3604(c) applies to use of models to express racial preference); see also Fiorino, *supra* note 34, at 1431–36.

105. When there is an insufficient number of all-white model advertisements from a single advertiser for a viable § 3604(c) claim, litigants have sought to hold publishers liable based on the fact that all of the publication’s advertisements, viewed in the aggregate, display white models exclusively or near-exclusively. See, e.g., *Ragin*, 923 F.2d at 1002; *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 648, 653 (6th Cir. 1991); cf. Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69, 155–59 (1995) (arguing for image equality by publishers and extension of FHA liability to aggregate white advertisements from different sources to combat the narrative of white superiority).

106. See, e.g., *Ragin*, 923 F.2d at 1002; *Hous. Opportunities Made Equal, Inc.*, 943 F.2d at 648, 653.

107. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 450–79 (2006).

add golf courses and clubs, which are historically associated with whites, to attract buyers who prefer a white residential environment and to dissuade potential minority buyers.¹⁰⁸ The willingness to pay for the golf course, or other shared “club” goods associated with or attractive to a specific group, functions as a sorting device.¹⁰⁹ Although the FHA prohibits direct advertisements or statements of exclusion by developers, buyers can still purchase “the ‘benefits’ of exclusion” of groups otherwise protected by fair housing law by seeking out residential communities with exclusionary amenities.¹¹⁰

In the social media era, prejudice and discrimination can also shift from discriminatory oral statements and newspaper advertisements to social media sites and posts. This can occur directly when landlords or buyers eschew explicit discrimination in a printed advertisement and instead advertise housing on social media to a network of “friends” who are exclusively or predominantly from groups favored by the poster. The morphing of discrimination can also occur as people who face liability for discriminatory housing speech instead express animus and prejudice on social media indirectly and somewhat more subtly. For example, a person who cannot lawfully post a “for rent whites only” sign on their lawn can instead express prejudice by posting a confederate flag on her social media page.

The issue is not merely that discrimination has changed forms. It is that these forms of discrimination may be more harmful, costly, or legally complex to redress. Section 3604(c), like all legal rules, creates incentives and channels behavior. This observation does not condemn § 3604(c) but rather underscores the question: why regulate discriminatory housing statements?

II. THE PSYCHOLOGY OF SOCIAL NORMS AND PREJUDICE

The power of social norms to reduce the expression of prejudice and discrimination is an important justification for § 3604(c)’s sometimes costly regulation of housing speech. Discriminatory housing statements shape the perceived norms of landlords, sellers, lenders, and other housing market participants. Social norms operate through our beliefs about how others think and

108. *See id.* at 464–76. Other legal scholars have also theorized about the informational and focal effects of symbols, such as Eric Posner who theorizes that people conform to in order to signal cooperative behavior and enable cooperation. *See* Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 767 (1998).

109. *See* Strahilevitz, *supra* note 107, at 441–43. Beginning in the 1990s there was a staggering increase in golf course development, *id.* at 468, which corresponded with African-American migration into the suburbs, *id.* at 466. While factors other than exclusionary amenities may explain the increase in golf courses, Strahilevitz notes that several aspects of the growth of golf developments are consistent with exclusionary amenities as one motivating factor. *See id.* at 469.

110. *Id.* at 442.

act, regardless of whether our beliefs are accurate.¹¹¹ The effect of norms is so robust that even a single communication that suggests a social norm influences listeners' prejudice and behavior.¹¹² There is even evidence that exposure to a social norm affects automatic, unconscious racial attitudes.¹¹³ Social norms expressed in housing advertisements and statements indicate the frequency and the acceptability of prejudice and discrimination in housing.¹¹⁴

A seminal work in social norm psychology, Sherif and Sherif's Group Norm Theory, describes prejudice forming primarily in relation to social norms that become standardized "common property" of the group.¹¹⁵ Sherif and Sherif describe a socialization process whereby "[t]he individual's major social attitudes are formed in relation to group norms."¹¹⁶ Social norm theory is highly influential in psychology and research; however, it is hardly the only theory of the cause of prejudice. It is unlikely that there is a unitary root that accounts for all instances of prejudice. Other theories, for example, describe prejudice as stemming from the need to conserve cognitive resources through categorization or an "authoritarian" personality type.¹¹⁷ Comparing these factors, research by Thomas Pettigrew indicates that social norms play a stronger role than authoritarian personality or childhood influences.¹¹⁸

111. Mirroring the psychological research, prejudice in this Article refers to negative attitudes or affects toward a group or an individual based on group membership and discrimination refers to behaviors on the basis of these categorical evaluations. See Fiske, *supra* note 12, at 357 ("[S]tereotyping is taken as the most cognitive component, prejudice as the most affective component, and discrimination as the most behavioral component of category-based reactions . . ."). See generally Crandall, *Social Norms*, *supra* note 13, at 359.

112. Fiske, *supra* note 12, at 367–68.

113. Sinclair et al., *supra* note 17, at 590–91. Researchers measured the effect of social norms on unconscious bias using a psychological test call the Implicit Association Test ("IAT"). *Id.* at 584.

114. Robert Cialdini and his colleagues divide norms into two categories. Robert B. Cialdini, Raymond R. Reno & Carl A. Kallgren, *A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places*, 58 J. OF PERSONALITY & SOC. PSYCHOL. 1015, 1015 (1990). Descriptive norms provide information about the frequency or typicality of an attitude or behavior and help people to choose and behave "accurately." *Id.* Injunctive norms provide information about the degree of social approval or disapproval toward a behavior. *Id.* Knowing the injunctive norms of a group helps to secure social approval and acceptance within that group. *Id.* This typology maps imperfectly to discriminatory housing statements. Discriminatory advertisements and housing statement appear to convey both elements of information (frequency of housing discrimination) and injunction (do or do not discriminate).

115. See MUZAFER SHERIF, *THE PSYCHOLOGY OF SOCIAL NORMS* 124 (1936). Sherif concluded that "the attitude of prejudice is a product of group membership." *Id.* at 66.

116. See MUZAFER SHERIF & CAROLYN W. SHERIF, *GROUPS IN HARMONY AND TENSION* 202–03 (1953).

117. See Fiske, *supra* note 12, at 358–63.

118. See Thomas F. Pettigrew, *Regional Differences in Anti-Negro Prejudice*, 59 J. OF ABNORMAL & SOC. PSYCHOL. 28, 28–30 (1959) [hereinafter Pettigrew, *Regional*

The information communicated to people about prejudiced beliefs held by a group they find desirable can substantially shift listeners' prejudices. A study by Charles Stangor, Gretchen Sechrist, and John Jost demonstrates how manipulating consensus information can shift the attitudes that people subsequently express in the direction of the perceived consensus.¹¹⁹ In this study, a group of European-American University of Maryland students estimated the percentage of African-Americans who possess nineteen stereotypical traits, both positive and negative.¹²⁰ The students created a second set of identical ratings based on how they believed *other* students at University of Maryland viewed African-Americans.¹²¹ One week later, the experimenter shared information with those students about the percentage of other university students who believed African-Americans possessed each of the traits.¹²² This information was engineered so that the participants received information about other students' views that was more positive than each participant's individual initial ratings.¹²³ Then, the students provided a final rating of their beliefs by completing the same stereotype questionnaire used in the first session.¹²⁴ The researchers found that participants reported fewer negative stereotypes and more positive ones after learning that their fellow students viewed African-Americans positively.¹²⁵ Conversely, when experimenters told a second group that their fellow students had negative beliefs about African-Americans, those participants reported more negative stereotypes but not a lower probability of positive stereotypes.¹²⁶ The magnitude of the participants' reported attitude change was substantial.¹²⁷ Studies that have similarly manipulated information about the "majority" opinion on gay rights have found similar shifts in attitudes based on the communication of norms.¹²⁸

Even people who are highly prejudiced are susceptible to normative influence and report reduced prejudice following exposure to egalitarian norms. In a mock jury experiment, Bernd Wittenbrink and Julia Henley sorted research participants into "high prejudice" and "low prejudice" categories based on their

Differences]; Thomas F. Pettigrew, *Personality and Sociocultural Factors in Intergroup Attitudes: A Cross-National Comparison*, 2 J. OF CONFLICT RESOLUTION 29, 35–40 (1958).

119. Stangor, Sechrist & Jost, *supra* note 13, at 486–87. The students were enrolled in an introductory psychology class at University of Maryland. *Id.* at 488.

120. *Id.*

121. *Id.* at 488–89.

122. *Id.*

123. *Id.* at 489.

124. *Id.*

125. *Id.* at 493.

126. *Id.*

127. *Id.* In the view of Stangor, Sechrist and Jost, manipulating consensus information is more effective than attempts to lessen prejudice through contact with members of differing groups or appeals to morality. *See id.* at 486; *cf.* GORDON ALLPORT, *THE NATURE OF PREJUDICE* 10 (1954).

128. *See* Clark & Maass, *supra* note 13, at 99.

scores on a psychological test entitled the Modern Racism Scale.¹²⁹ One group received biased response scales, which indicated that others thought that a high proportion of African-Americans have negative traits, while a second group of participants received information indicating that others thought a high proportion of African Americans have positive traits.¹³⁰ After receiving positive information, the participants who initially tested as high in racial prejudice reported more favorable attitudes toward African-Americans than those who received negative information.¹³¹ The participants also reported a more positive evaluation of a hypothetical African-American defendant accused of armed robbery.¹³² The low-prejudice participants showed no effects from either positive or negative information, which suggests that the need to conform was not the sole reason for attitude changes.¹³³

Perhaps the most intriguing evidence of social norms comes from a field study of the effect of anti-conflict and egalitarian messages delivered through a radio soap opera.¹³⁴ A 2009 study in Rwanda by Elizabeth Levy Paluck assessed the impact of a radio soap opera whose storyline and characters paralleled the history of the Tutsis and Hutus.¹³⁵ Radio is the most frequently consumed form of media in Rwanda and is thus likely to exhibit a substantial effect on norms.¹³⁶ The soap opera delivered messages about reducing prejudice and violence against other groups to the experimental group, while a control group listened to a radio soap opera with messages about health behaviors.¹³⁷ The experiment found that, compared to the control group who listened to a radio soap opera about health behavior, participants who listened to the radio soap opera advocating egalitarian and non-violent behaviors reported consonant perceptions of social norms.¹³⁸ There were also changes in behavior. Compared to listeners of the health soap opera, participants who listened to the reconciliation soap opera offered more dissenting opinions in community discussions, engaged in greater negotiation, and made more bids for group cooperation and other alternatives when deciding how to share the radio and batteries among villagers.¹³⁹

129. Bernd Wittenbrink & Julia R. Henley, *Creating Social Reality: Informational Social Influence and the Content of Stereotypic Beliefs*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 598, 600–02 (1996).

130. *Id.* at 600.

131. *Id.* at 603.

132. *Id.* at 602–03.

133. *Id.* at 604–05.

134. *See generally* Paluck, *supra* note 13, at 574.

135. *Id.* at 574–75.

136. *Id.* at 576.

137. *Id.*

138. *Id.* at 581–82.

139. *Id.* at 582. In contrast, the health soap opera listeners typically proposed and agreed to allowing the village's local authority to regulate these goods with little discussion. *Id.*

There is also substantial indirect evidence of the effect of social norms on the perceived acceptability of prejudice. For example, an experiment that asked one group of undergraduate students to rate the normative acceptability of negative feelings about 105 different groups (e.g., African-Americans, obese people, child abusers) as “definitely OK,” “maybe OK,” or “definitely not OK” and asked a second group to rate their personal attitudes toward these groups found near-perfect correlation between the two groups’ responses.¹⁴⁰ In a subsequent experiment, the researchers found high correlation between how participants rated the “acceptability of discrimination” averaged across a different group of undergraduate study participants and participant reports of the likelihood that they would discriminate against a member of that group when renting an apartment, dating, or making an employment decision.¹⁴¹ The researchers concluded that “[p]eople will report their own prejudice according to how much it is socially acceptable.”¹⁴² Low variability in attitudes standing alone is insufficient to “prove” a social norm effect. Yet, no other theory to explain these findings has emerged. This line of research provides additional empirical substantiation to the studies discussed previously that directly assessed normative interventions and found conformity effects.

Changes in attitudes and behavior following social norm interventions appear at least moderately durable. Emily Zitek and Michelle Hebl’s research found persistent effects one month after participants heard a norm-activating statement by an experimenter posing as a bystander (a confederate) who condoned or condemned prejudice.¹⁴³ The normative effects were not as strong one month later compared to immediately after hearing the statement of the confederate, but they were still significant. Other research has measured the effects of norms one week after the experiment and has similarly found durability.¹⁴⁴ Due to the difficulty of long-term follow-up, particularly with undergraduate students who often participate in experiments, there is no research assessing norm-conforming attitudes or behaviors several months or years after an experimental intervention.

A critical question from the perspective of fair housing is whether attitude change following communication of a norm translates into behavior. There is significant evidence of behavior change in the studies that have addressed this question. However, more research is needed to understand the contexts likely to produce behavior change and its underlying mechanisms. In Sechrist and Stangor’s 2001 study, the experimenters told high-prejudice and low-prejudice participants that other university students shared their views about African-Americans.¹⁴⁵ The experimenters then asked the participants to leave the room

140. Crandall, *Social Norms*, *supra* note 13, 362–63.

141. *Id.* at 364.

142. *Id.* at 363.

143. Emily M. Zitek & Michelle R. Hebl, *The Role of Social Norm Clarity in the Influenced Expression of Prejudice Over Time*, 43 J. OF EXPERIMENTAL SOC. PSYCHOL. 867, 867 (2006).

144. See Stangor, Sechrist & Jost, *supra* note 13, at 486.

145. Sechrist & Stangor, *supra* note 15, at 645.

and sit in a nearby seating area while the experimenters fixed a computer malfunction.¹⁴⁶ An African-American student who was recruited by the experimenters was stationed in the seat closest to the experimental room that the participants exited.¹⁴⁷ When high-prejudice participants learned that other university students shared the same stereotypes of African-Americans, those participants sat further away from the African-American student in the hallway in comparison to high-prejudice participants told that fellow students did not share their views.¹⁴⁸ Low-prejudice participants who learned that fellow students shared their views also sat closer to the African-American student than low-prejudice participants who learned that other students believed negative stereotypes.¹⁴⁹ Other psychology experiments have found that pre-existing attitudes toward people of different races can affect behavior, such as friendliness in interpersonal interactions.¹⁵⁰

Interestingly, behavior change can occur even when a norm does not affect a listener's personal beliefs. The Paluck field experiment in Rwanda found strong evidence of behavior change from the radio soap opera norm-intervention but no effect on personal beliefs.¹⁵¹ Applied to housing, the prevalence of non-discriminatory housing advertisements and statements may communicate to a listener the normative unacceptability of discrimination in housing transactions while not affecting the listener's prejudiced private beliefs. Belief internalization is desirable because it generalizes to new contexts and likely promotes stronger compliance. However, behavior change standing alone has substantial potential to reduce housing discrimination and open real estate markets.

III. A SOCIAL NORMS MODEL OF HOUSING STATEMENT REGULATION

The FHA controls communications and, indirectly, the public's perception of typical attitudes and conduct toward protected groups in housing transactions. Eric Posner has described the state's role in anti-discrimination as that

146. *Id.* at 647.

147. *Id.*

148. *Id.* at 648.

149. *Id.* The underlying mechanisms driving the effect on social norms are unclear and likely due to multiple variables.

150. See John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. OF PERSONALITY & SOC. PSYCHOL. 62, 66 (2002) (finding that self-reported racial attitudes predicted verbal behavior toward African-Americans, while unconscious, automatic prejudice scores affected non-verbal friendliness and raters' perceptions of bias in the interaction). *But see* Stéphane Doyen et al., *Behavioral Priming: It's All in the Mind, But Whose Mind?*, PLOS-ONE, Jan. 18, 2012, at 1 (replication study failing to find effect of exposure to a stereotype on participants' subsequent behavior).

151. Paluck, *supra* note 13, at 574.

of a “norm entrepreneur” that employs not only law but also symbols and symbolic gestures to promote social norms.¹⁵² Posner observes that “antidiscrimination laws raise the cost of sending the signal” that one wishes to cooperate with others in a certain group or to discriminate against other groups.¹⁵³ The psychological research on social norms reveals another effect. Laws controlling housing communications shape the attitudes and behavior listeners perceive as expected of them.

Applying empirical insights from psychology, this Part first examines how discriminatory advertisements shape social norms and prejudice. Next, the analysis turns to the dynamics and consequences of discriminatory oral speech, which typically reaches smaller audiences. Then, this Part considers research that suggests that the effects of discriminatory statements may differ based on the identity of the group that is the subject of the speech. It concludes by describing how a social norms model of § 3604(c) and attention to the prejudice-enhancing effects of discriminatory housing speech support the integration goals at the heart of the FHA’s enactment.

A. Discriminatory Advertisements

The psychological research on social norms reveals important justifications for regulating housing speech – and for doing so strictly and without exception. Let us turn first to discriminatory advertisements and notices, which by virtue of their wider audience typically have a more powerful effect on social norms than oral statements. For landlords and sellers, discriminatory advertisements and notices communicate prejudiced norms of expression and conduct in residential rentals and sales. The number of discriminatory advertisements influences the normative impact because it conveys information about the strength of the majority and hence the norm.¹⁵⁴ A high number of discriminatory advertisements from speakers perceived as similar to the listener takes on the status of “consensus information,” which research has shown

152. Posner, *supra* note 108, at 778. He elaborates that, in addition to laws, “official pronouncements play an important role[] because official[s] enjoy the attention of the nation and thus can cheaply create focal points [This] accounts for the heavily symbolic content of so much political behavior.” *Id.*

153. *Id.* at 787.

154. See Clark & Maass, *supra* note 13, at 99 (discussing norm-induced attitude changes moderated by the numerical strength of the majority); Masser & Phillips, *supra* note 13, at 184 (finding that people lower in homophobia expressed less prejudice than those higher in homophobia after hearing an alleged majority opinion either in support of or opposed to gay rights); Benjamin H. Walker, H. Colleen Sinclair & John MacArthur, *Social Norms Versus Social Motives: The Effects of Social Influence and Motivation to Control Prejudiced Reactions on the Expression of Prejudice*, 10 SOC. INFLUENCE 55, 64 (2015) (finding people who faced unanimous opposition to their position on gay rights from four experimenters disguised as participants showed more conformity, though not change in personal beliefs, than those faced with non-unanimous opposition).

affects listeners' expressed attitudes and sometimes their behaviors.¹⁵⁵ However, even a single statement of prejudice or egalitarianism can shift listeners' attitudes and actions in a corresponding manner, presumably because the statement communicates a norm or activates a pre-existing norm in the listener. Importantly, these effects may be on the attitudes that people express to others rather than the attitudes themselves. Recall that some studies have found that while communications conveying prejudice changed perceptions of norms and in some cases behavior, the communications did not affect participants' personal beliefs.¹⁵⁶

In addition to affecting social norms, discriminatory advertisements and other statements may cause housing participants to misapprehend their legal obligations under the FHA. Discriminatory advertisements and speech cause confusion about the law – an important point in a statute with underfunded enforcement.¹⁵⁷ As then-judge, now Justice, Ruth Bader Ginsberg wrote in *Spann v. Colonial Village, Inc.* for the U.S. Court of Appeals for the District of Columbia Circuit, discriminatory statements can create “a public impression that segregation in housing is legal, thus facilitating discrimination by defendants or other property owners”¹⁵⁸

The strength of conformity to social norms increases when the norm emanates from a group the listener feels affinity with or finds desirable.¹⁵⁹ Much of the research discussed in this Article uses protocols that inform people that their fellow university students, jurors, or members of other personally relevant groups hold a certain view.¹⁶⁰ Research has also found that exposing people who identify highly with a group to that group's norms affected intentions to engage in behaviors supported by the group.¹⁶¹ The same was not true for low identifiers.¹⁶² Applied to discriminatory housing publications, it seems likely that landlords or sellers will be highly attentive to the actions of their peers. This occurs because of their identification as part of a group (e.g., landlords in a certain city) as well as because the advertisements suggest norms for residential transactions. Interestingly, the data on landlords reveal that their demographic characteristics are surprisingly cohesive with a broad swathe sharing similar investment profiles (number of properties owned) as well as educational and family backgrounds.¹⁶³ These similarities may increase landlords'

155. See *supra* Part II; see also Sechrist & Stangor, *supra* note 15, at 645; Wittenbrink & Henley, *supra* note 129, at 598–610.

156. See *supra* Part II; see also Paluck, *supra* note 13, at 582.

157. See *supra* Section I.B.2.

158. See 899 F.2d 24, 30 (D.C. Cir. 1990).

159. See SHERIF & SHERIF, *supra* note 116, at 202; Sechrist & Stangor, *supra* note 15, at 646.

160. See *supra* Part II.

161. See generally Deborah J. Terry & Michael Hogg, *Group Norms and the Attitude-Behavior Relationship: A Role for Group Identification*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 776 (1996).

162. See *id.*

163. See FOREMOST INSURANCE GROUP, *supra* note 91, at 5.

solidarity as a group and the tendency to conform to the apparent norm of other landlords. Publication of a discriminatory statement may also strengthen its normative impact. Publication suggests that the publisher, or the publication's readership, share the norm or at least do not disagree strongly enough to refuse the advertisement.

By regulating housing advertisements and publications, the FHA artificially constrains the appearance of discriminatory norms.¹⁶⁴ The fact that the FHA creates an inaccurate representation of the frequency of prejudice and discrimination may not be a weakness but rather a *strength* of the provision. As the experiments discussed in Part II reveal, a listener's perception of a social norm is more important than the actual social norm.¹⁶⁵ By the same token, the social norms research supports regulating only housing speech that listeners will understand as expressing a preference based on group status.¹⁶⁶ For example, where a landlord merely advertises that an apartment is well-suited to one or two professional adults, as occurred in the *Bader* case discussed previously,¹⁶⁷ it is less likely that such an ambiguous message will negatively affect social norms regarding the protected group (or dissuade professional adults with children from applying). Moreover, as discussed previously, enforcement in such ambiguous cases may provoke backlash against fair housing efforts.¹⁶⁸

The power of perceived norms is evident in other areas of law as well. Writing about tax compliance, Dan Kahan notes that "an individual's perception of the extent of evasion powerfully predicts compliance behavior: the higher an individual believes the rate of tax cheating to be, the more likely he or she is to cheat too."¹⁶⁹ Tax compliance increases following interactions with others who express a positive attitude toward tax laws and their intention to comply and decreases following interactions with those who express negative

164. Research indicates that while racial and certain other forms of bias have decreased, people retain more subtle preferences not to associate closely with other groups. See, e.g., Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 560 (1980); Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, SOC. & PERSONALITY PSYCHOL. COMPASS 314, 314–35 (2009) (reviewing research literature on subtle biases and racism).

165. See ALAN D. BERKOWITZ, *THE SOCIAL NORMS APPROACH: THEORY, RESEARCH, AND ANNOTATED BIBLIOGRAPHY* 5 (2004), http://www.alanberkowitz.com/articles/social_norms.pdf.

166. *Id.*

167. See *supra* notes 69–72 and accompanying text.

168. The press account of the fair housing enforcement against *Bader* suggests a degree of public upset and backlash against fair housing over-reach. See *supra* notes 69–72 and accompanying text.

169. See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 81 (2003).

attitudes and disinclination to comply.¹⁷⁰ A study by the Minnesota Department of Revenue found that taxpayers who received a letter stating that tax compliance was much higher than what citizens generally estimate subsequently reported more income and fewer deductions than taxpayers who received a letter indicating an increased risk of audit.¹⁷¹

What about buyers, tenants, and borrowers exposed to discriminatory advertisements? Exposure to communications indicating prejudice can affect the norms of these listeners as well. There is some research suggesting that increases in prejudice can occur even when the person receiving the prejudiced or discriminatory message is a member of the group being discriminated against.¹⁷² The research on the reactions of members of “stigmatized groups” to prejudiced communications is still preliminary, and further investigation is needed before we can draw definitive conclusions.¹⁷³ At a minimum, it is evident that buyers, tenants, and borrowers from protected groups who read or hear about advertisements discriminating against their group will perceive discrimination norms as more prevalent than they would have otherwise. This is likely to affect where they look for housing and the types of landlords or sellers they prefer – indeed, this may be the cause of some of the “self-sorting” by race observed in the research literature.¹⁷⁴

The normative impact of discriminatory housing speech extends beyond members of protected groups to affect others exposed, directly and indirectly, to such messages. The ill effects are worsened by the tendency of stereotypes and prejudice to spread across social networks. Social networks are the constellations of direct and indirect ties that connect people to each other and to cultural beliefs and information.¹⁷⁵ For example, researchers have found in field studies that recent migrants to New York City who met anti-Semitic people became more anti-Semitic.¹⁷⁶ Another study found that white southern men in the 1950s who entered the comparatively more egalitarian environment of the army became less prejudiced against African-Americans.¹⁷⁷ The transference of social norms is also apparent in the startlingly high degree of social accord about stereotypes. Stereotypes are the characteristics people believe to be representative of different groups.¹⁷⁸ In most cases, people hold stereotypes

170. See Marco R. Steenbergen et al., *Taxpayer Adaptation to the 1986 Tax Reform Act: Do New Tax Laws Affect the Way Taxpayers Think About Taxes?*, in *WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* 9 (Joel Slemrod ed., 1992).

171. *Id.* at 214.

172. See generally Crosby et al., *supra* note 164.

173. See Part IV.

174. See generally, e.g., Massey, *supra* note 28.

175. See Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 *SOC. THEORY* 201, 202 (1983).

176. Jeanne Watson, *Some Social and Psychological Situations Related to Change in Attitude*, 3 *HUMAN RELATIONS* 15, 47 (1950).

177. Pettigrew, *Regional Differences*, *supra* note 118, at 30.

178. Marvin Karlins et al., *On the Fading of Social Stereotypes: Studies in Three Generations of College Students*, 13 *J. PERSONALITY & SOC. PSYCHOL.* 1, 1 (1969).

even though they have had minimal or no contact with the stereotyped group, which suggests that those stereotypes are the result of culture and not personal experience.¹⁷⁹

In addition to social norms, cognitive dissonance plays a role in the prejudice-altering effects of housing speech. Research on cognitive dissonance shows that eliciting an initial cognition or action, even when it is involuntary, increases the likelihood that individuals will strive to reduce dissonance by making subsequent thoughts, attitudes, or behaviors consonant with the elicited position.¹⁸⁰ Laws mandating non-discriminatory advertisements and statements make it more likely that speakers will subsequently behave in an egalitarian manner.

B. Oral Statements

In addition to written advertisements and notices, the FHA also forbids discriminatory oral statements. For example, a landlord cannot lawfully tell a family, “I never rent to families with children under the age of five.” In addition to blocking or dissuading the home seeker from the transaction at hand, discriminatory oral statements can also affect whether the listener subsequently explores housing options in the same neighborhoods or with sellers or landlords with similar characteristics to the discriminatory speaker. A home seeker may view landlords and sellers in the area as members of the same group and assume that bias is shared by the group. Moreover, as noted previously, perceptions of discrimination tend to spread. People may discuss a discriminatory incident with those in their social network who may in turn share the information with others.¹⁸¹

While discriminatory advertisements that reach wide audiences usually have the greatest impact on norms, the psychology research demonstrates that a single oral statement can also affect social norms of prejudice. Investigating the effect of racial slurs, Jeff Greenberg and Tom Pyszczynski found that participants who received vignettes about either an African-American or a white person winning a debate and then overheard a single racial slur subsequently rated the skills of the African-American debater who lost more negatively than

179. *See id.*

180. *See* LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 1–10 (1957); *see also* Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 78 (John C. Gonsiorek & James D. Weinrich eds., 1991) (“One likely consequence of such behavior change [as a result of anti-discrimination statutes] is attitude change: People who are required to act in a non-prejudiced manner may subsequently change their attitudes as well.”).

181. *See* Section II.A.

participants who overheard a neutral remark or nothing.¹⁸² There is also evidence that exposure to a prejudiced norm can increase the listener's prejudice against the targeted group even when the listener is part of that group.¹⁸³ While the normative effect of discriminatory oral statements is more incremental than publications, the effect of oral statements on norms is nonetheless substantial and troubling, as are its direct effects on housing opportunities.¹⁸⁴

For both oral statements and written advertisements, a social norms model does not resolve the free speech tensions over § 3604(c) but rather raises new questions. In particular, the research on the effect of hearing discriminatory or prejudiced statements on listeners' willingness to express prejudice – and possibly on internal beliefs – creates complexity for the view of the First Amendment as protecting a marketplace of ideas and the assumption that contrary points of view will be readily forthcoming.¹⁸⁵ This is not meant as an argument against First Amendment rights, which protect a range of interests in liberty, discourse, citizenship, and information, but rather an acknowledgement that the psychology research unsettles certain assumptions about the effects of free speech.¹⁸⁶ Full discussion of the implications of social norms research for the First Amendment is an important undertaking, but it is one beyond the scope of this Article. As a doctrinal matter, § 3604(c) does not require us to resolve these questions and tensions. The case law has firmly established that discriminatory housing speech is not protected commercial speech because it relates to an illegal activity.¹⁸⁷

182. See Jeff Greenberg & Tom Pyszczynski, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21 J. OF EXPERIMENTAL SOC. PSYCHOL. 61, 61–70 (1985).

183. Jenessa R. Shapiro & Steven L. Neuberg, *When Do the Stigmatized Stigmatize? The Ironic Effects of Being Accountable to (Perceived) Majority Group Prejudice-Expression Norms*, 95 J. OF PERSONALITY & SOC. PSYCHOL. 877, 877 (2008) (concluding that perception that the majority norm is discriminatory appears to increase discrimination by racial and ethnic minorities).

184. In other work, I have discussed the negative effects of discriminatory oral statements in producing “stereotype threat,” meaning the tendency of members of stereotyped groups to show impairments in performance after exposure to stereotypes suggesting lower competence in that area by their group. See Stern & Lewinsohn-Zamir, *supra* note 13.

185. The marketplace of ideas for the First Amendment has origins over a century old. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”); JOHN STUART MILL, ON LIBERTY (1859).

186. Another extension of the psychology research is that, from a psychological standpoint, more moderate discriminatory speech may be more damaging to norms than extreme hate speech, which is likely to be perceived by listeners as an outlier view.

187. See *supra* Section I.B.1.

C. Effects on Different Groups Protected Under the Fair Housing Act

There is some evidence that the kind of norm and its clarity affect the magnitude of norm-induced attitude and behavior change from discriminatory statements. A study by Margo Monteith and co-researchers found that participants conformed to the normative stance of an experimenter posing as a bystander when that person expressed egalitarian opinions about African-Americans and gays but not prejudiced ones.¹⁸⁸ Monteith concluded that this finding is due to the strong social norm, evidenced in much survey research, against expressing bias toward African-Americans and gay people.¹⁸⁹

It is not certain how this finding translates to the context of fair housing. Contrary to the conclusion of Monteith and her co-researchers, discriminatory housing speech may have a greater prejudice-enhancing effect if listeners view housing discrimination as a more socially acceptable form of prejudice.¹⁹⁰ Also the research findings are mixed, with some research finding that exposure to prejudiced norms shifts listeners' attitudes in a consonant direction but less robustly than exposure to tolerant norms. The study by Zitek and Hebl discussed previously found that people were more strongly influenced by communications about ambiguous norms than well-established norms.¹⁹¹ In their study, participants responded to a survey about discrimination against one of five different groups after hearing the responses of another participant who was actually a confederate planted by the experimenters.¹⁹² The confederate's normative influence was much stronger when the survey addressed ambiguous, low clarity norms, such as discrimination against ex-convicts, than when the survey asked identical questions about African-American, gay, and obese individuals – groups associated with stronger anti-discrimination norms.¹⁹³

If conformity increases when norms are less crystalline, regulating discriminatory housing statements may have the strongest impact when strong anti-discrimination norms do not attach to particular protected group. Families with children offer a paradigm example; people with disabilities likely do as well. Discrimination against these groups is more common and tolerated in our society. In contrast, abundant survey and experimental research, including a measure developed by Zitek and Hebl, find robust social norms against discriminating against minority racial groups and to a somewhat lesser degree gay

188. Monteith, Deneen & Tooman, *supra* note 13, at 267. She interpreted this finding to indicate that “hearing nonprejudiced expressions served to activate a powerful social norm suggesting that one should not be prejudiced [and] . . . the social norm favoring prejudice is not, at present, as strong as the norm opposing prejudice.” *Id.* at 283; *see also* Walker, Sinclair & MacArthur, *supra* note 154, at 65–66 (finding that pro-gay rights norms induced more attitude and behavior change than anti-gay rights norms).

189. Monteith, Deneen & Tooman, *supra* note 13, at 267.

190. *See* Blanchard et al., *supra* note 13, at 993–94.

191. *See* Zitek & Hebl, *supra* note 143, at 867–70.

192. *Id.* at 870.

193. *Id.*

individuals.¹⁹⁴ This does not mean that people lack prejudice toward these groups but rather that there is social pressure not to express it overtly.¹⁹⁵ Although the research is too limited to be certain, it seems likely that prohibiting discriminatory housing statements regarding low clarity norms (e.g., discriminating against families) will have particularly strong, and needed, prejudice-reducing effects.

D. Social Norms and the Fair Housing Act's Goal of Integration

Social norms affect whether landlords, sellers, and others eschew discriminatory conduct, the willingness to transact between different groups, and the extent to which house hunters view neighborhoods as tolerant. All of these effects promote integration – a goal that was at the heart of the work of the Kerner Commission in advocating legislation and the FHA's passage.¹⁹⁶ In view of the FHA's major goal of integration, it seems likely that the enactors had something akin to social norms in mind when they crafted § 3604(c).¹⁹⁷ At the time, discriminatory housing advertisements and notices against blacks were ubiquitous and segregation was a pressing issue as alarm over black ghettos burgeoned.¹⁹⁸ It would not require a mental leap for legislators to realize that the frequency of discriminatory housing speech bolstered its social acceptability and thwarted residential integration by discouraging applicants from targeted groups from seeking housing in certain areas.

The legislative history does not illuminate the degree to which the House and Senate apprehended the normative force of § 3604(c) at the time it was enacted.¹⁹⁹ In fact, the legislative history does not explain the impetus for § 3604(c) at all except to record that Congress felt that Title VII should be the starting place for crafting the FHA.²⁰⁰ However, as noted above, given the social context and prevalence of housing discrimination at the time of the FHA's passage, it seems likely that its supporters intuited that discriminatory statements and advertisements would undermine the goal of integration by cultivating the impression of widespread prejudice. In a similar vein, the United States Supreme Court has repeatedly recognized the FHA's critical mission of

194. *Id.* at 870; *see also* Monteith, Deneen & Tooman, *supra* note 13, at 267.

195. *See* Christian S. Crandall, *Prejudice Against Fat People: Ideology and Self-Interest*, 66(5) J. OF PERSONALITY & SOC. PSYCHOL. 882, 889-90 (1994) (describing how social norms and egalitarian values suppress overt racism while weaker social norms against anti-fat prejudice offer less constraint on the expression of anti-fat sentiments) [hereinafter Crandall, *Anti-Fat Prejudice*]; Crandall, *Social Norms*, *supra* note 13, at 362–64.

196. Crandall, *Social Norms*, *supra* note 13, at 362–64.

197. *See* 114 Cong. Rec. 2276, 3422, 9559, & 9591 (1968); *see also supra* Part I.

198. *See* Schwemm, *supra* note 5, at 212–13.

199. *Id.* at 199, 204–11.

200. *See id.* at 207–08.

promoting residential integration in interpreting § 3604(c) and other FHA provisions.²⁰¹

IV. REVISITING SOME PUZZLES OF SECTION 3604(C)

Section 3604(c) of the FHA embodies both paradoxes and controversies. A social norms model of housing speech regulation illuminates some of these puzzles and offers compelling justifications for seemingly anomalous aspects of § 3604(c). This Part considers how social norms support § 3604(c)'s lack of an intent requirement, the inapplicability of exemptions that shield defendants from other provisions of the FHA, and standing rules for discriminatory housing speech claims.

A. Intent

Section 3604(c) is unusual within anti-discrimination law because it imposes liability without a requirement that the plaintiff establish the defendant's intent.²⁰² The statutory language requires only that the housing statement, notice, or advertisement "indicates" discrimination or preference based on a protected status.²⁰³ Other provisions of the FHA require that discriminatory refusal to rent or sell or discrimination in the terms and conditions of a housing transaction occurred "because of" the protected status.²⁰⁴ Courts have consistently interpreted this language to mean that an "ordinary listener or reader" test applies to determine whether housing speech violates the FHA.²⁰⁵ In difficult cases, where the language used in the statement is ambiguous and the ordinary listener standard hard to apply, courts have considered evidence of intent to adjudicate § 3604(c) claims.²⁰⁶ As the court in *Soules v. HUD* explained, courts may look to intent in § 3604(c) claims "not because a lack of design constitutes an affirmative defense to an FHA violation [] but because it helps determine the manner in which a statement was made and the way an ordinary [reader] would have interpreted it."²⁰⁷

201. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (suggesting the importance of integration by upholding standing for white residents of an apartment complex to sue for their landlord's racial discrimination against African-American applicants based on their injuries from segregation); see also *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

202. See 42 U.S.C. § 3604(c) (2018).

203. *Id.*

204. *Id.* § 3604(a); *id.* § 3604(b); *id.* § 3604(d); *id.* § 3605(a).

205. See, e.g., *Jancik v. HUD*, 44 F.3d 553, 556 (7th Cir. 1995); *Soules v. HUD*, 967 F.2d 817, 824 (2d Cir. 1992); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972).

206. See, e.g., *Soules*, 967 F.2d at 825; *Mancuso v. Douglas Elliman, LLC*, 808 F. Supp. 2d 606, 625–26 (S.D.N.Y. 2011); *Maziarz v. Hous. Auth. of the Town of Vernon*, 281 F.R.D. 71, 78 (D. Conn. 2012).

207. 967 F.2d at 825.

While an ordinary listener standard is unusual from the perspective of discrimination law, it is unsurprising from the vantage point of social norms. A standard that focuses on the ordinary reader or listener rather than the speaker's intent better captures the injury to norms. If an average individual who reads an advertisement or hears a housing statement finds that the housing speech indicates a preference based on membership in a protected group, then that statement is likely to affect social norms. The standard of the speaker's intent, on the other hand, does not closely track normative effects on listeners. At times, the case law seems to allude to norms when it elaborates on the ordinary listener/reader standard. In *Ragin v. New York Times Co.*, the U.S. Court of Appeals for the Second Circuit clarified that the ordinary reader "is neither the most suspicious nor the most insensitive of our citizenry."²⁰⁸ Viewed from a normative perspective, this holding eschews a focus on outliers and instead captures statements that activate more widespread norms.

The ordinary listener or reader standard expands § 3604(c)'s function from remedying individual psychic injury to also addressing normative harms. Accordingly, most cases refer to a generic ordinary reader or listener. However, the Second Circuit has stated that the statutory test is whether an advertisement "would discourage an ordinary reader of a particular [protected group] from answering it."²⁰⁹ A social norms perspective favors the former approach of an unspecified ordinary reader or listener rather than an ordinary reader or listener from a specific protected group. As the social norms research makes clear, the impact of discriminatory advertisements on ordinary readers and listeners from non-protected groups is substantial.

It may seem unfair to impose liability on defendants for statements they did not intend as discriminatory. Multiple factors counteract this concern. First, unintentional discrimination is particularly likely to involve ambiguous and opaque statements (in contrast, one who writes "no blacks" in their housing advertisement can hardly claim lack of intent to discriminate). Given the limited resources for FHA enforcement, unequivocal discriminatory housing speech is more likely to be subject to a complaint or prosecution than ambiguous, possibly unintentional claims. Second, in complaints and actions by HUD, the government must seek "conciliation . . . to the extent feasible."²¹⁰ Although settlement negotiations are not required for suits brought by private parties, voluntary settlement often has attractions for both sides (particularly for defendants who do not have insurance policies to indemnify their legal expenses). Third, we must weigh potential unfairness to defendants under the current, strict liability approach against the consequences of an intent-based standard. Exempting unintentional statements, or those in a gray area of partial or confused intent, would stymie litigation with difficult-to-resolve questions of intent and create incentives for landlords and sellers to use thinly veiled statements and then claim lack of intent. It would make it exceedingly hard for

208. *Ragin*, 923 F.2d at 1002.

209. *Ragin*, 923 F.2d at 999–1000.

210. See 42 U.S.C. § 3610(b)(1) (2018); 24 C.F.R. § 103.300(a) (2012).

plaintiffs to prevail on § 3604(c) claims. These results would undermine § 3604(c)'s capacity to promote open residential markets and cultivate non-discriminatory norms.

B. Exemptions: The Psychology of a Single Statement

A puzzle of the FHA is the fact that numerous exemptions to liability apply to discriminatory acts but not to discriminatory statements or publications. As discussed in Part I, § 3604(c) is not subject to the exemptions for Mrs. Murphys who own and occupy housing of four units or less; sellers or landlords who do not own more than three single-family homes and do not use a real estate broker or agent; and private clubs and religious organizations.²¹¹ It is not immediately evident why these owners should be able to lawfully discriminate but not lawfully advertise their intentions. Some aspects of the exemptions, such as the inapplicability of some provisions of the FHA to owners of single-family homes who do not use a real estate agent, suggest a concern in part with the burden on owners who lack legal expertise to comply with the FHA.²¹² Presumably, however, these owners are similarly challenged to ascertain and understand § 3604(c)'s prohibition of discriminatory statements and publications.

A social norms model of § 3604(c) offers a fresh perspective on the question of exemptions. The broad applicability of housing statement regulation is necessary to prevent norm dilution. Norms represent a consensus – or, more accurately, a perceived consensus – within a group. Even a small number of dissonant statements can muddy the norm, rendering it ineffective. Psychology studies have found that one instance of a person expressing a racist, or anti-racist, view can affect or activate social norms. For example, in a 1994 study by Fletcher Blanchard, Christian Crandall, John Brigham, and Leigh Ann Vaughn, participants who heard the ratings of an experimenter posing as a survey participant (a confederate) on how the campus should respond to racial harassment altered their responses in line with those of the confederate.²¹³ This effect occurred with both African-American and white confederates; it also occurred when participants responded to the survey privately as well as publicly.²¹⁴ A subsequent study by Margo Monteith, Nicole Deneen, and Gregory Tooman using a similar experimental design replicated the normative effect of hearing a single confederate condemn discrimination on participants' responses to survey scenarios depicting discrimination against African-Americans and gay men.²¹⁵ Even mere overhearing can affect perceptions. A study

211. See 42 U.S.C. § 3603(b)(1); *id.* § 3603(b)(2); *id.* § 3607(a).

212. See *id.* § 3603(b)(1).

213. See Blanchard et al., *supra* note 13, at 995–96.

214. See *id.* at 995. Following the statement of the confederate condemning racism, participants who responded publicly condemned racism more strongly than private responders. See *id.*

215. Monteith, Deneen & Tooman, *supra* note 13, at 267.

by Eaaron Henderson-King and Richard Nisbett found that white participants who overheard a nearby confederate talking on a phone about a recent violent robbery committed by an African-American were more likely to rate African-Americans as hostile and antagonistic.²¹⁶

The research showing that a single statement can alter prejudiced responses and behaviors underscores the importance of comprehensive regulation of housing speech. Discriminatory refusals to sell or rent and other actions prohibited under the FHA can increase prejudiced norms as well. Although the courts have interpreted exemptions restrictively in practice, it remains true that a number of claims cannot proceed or are never brought because the defendant falls within an exempted category.²¹⁷ Were these exemptions to apply to § 3604(c), it is likely that there would be a high number of discriminatory statements in printed notices and advertisements and some increase in discriminatory oral statements as well. If a single statement can shape prejudice and discrimination, the prospect of many advertisements indicating that others discriminate is sobering. Indeed, this concerning situation is occurring with internet housing advertisements, which have been partially shielded from fair housing liability under the more recently-enacted CDA. As a result, online advertisements feature discriminatory statements far more often than print media.²¹⁸

C. Standing

Social norms also lend support to the expansive standing to bring suit for violation of § 3604(c) and other provisions of the FHA. The FHA empowers an “aggrieved person” to bring suit privately or file an administrative complaint with HUD.²¹⁹ In a § 3604(c) suit, a member of a protected group can sue for emotional and psychological damages caused by a discriminatory housing statement (though not for the loss of the housing unit itself).²²⁰ In addition, a wide range of other plaintiffs can bring suit. The United States Supreme Court has defined standing broadly, holding that the FHA’s private enforcement and administrative investigation provisions reveal Congress’ intention “to define standing as broadly as is permitted by Article III of the Constitution.”²²¹

Prudential limitations, such as requirements that a party raise his or her own grievance and not the grievances of others and the rule barring suits alleging generalized grievances, are also relaxed in FHA claims.²²² In *Gladstone*

216. See Eaaron I. Henderson-King & Richard E. Nisbett, *Anti-Black Prejudice as a Function of Exposure to the Negative Behavior of a Single Black Person*, 71 J. OF PERSONALITY & SOC. PSYCHOL. 654, 661–62 (1996).

217. See Schwemm, *supra* note 5, at 196 n.31.

218. See Oliveri, *supra* note 5, at 1153–80; see also *infra* Section VI.A.

219. 42 U.S.C. § 3610(a)(1)(A)(i) (2018); *id.* § 3613 (a)(1)(A).

220. See Schwemm, *supra* note 5, at 241.

221. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

222. See *e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

Realtors v. City of Bellwood, the United States Supreme Court held that any person or entity can bring suit for housing discrimination that violates someone's rights so long as the person suing has been "genuinely injured."²²³ Residents and localities have sued for injury from segregation, and fair housing organizations have sued for housing statements and other discrimination against "testers" who pose as home seekers.²²⁴ These decisions have greatly aided enforcement of the FHA by empowering fair housing advocacy organizations and a wide range of other private parties to bring suit.²²⁵

This does not mean standing is without bounds. While standing doctrine in FHA suits remains generous on the whole, there are hints of increasing restrictiveness. The recent United States Supreme Court case of *Bank of America Corp. v. City of Miami* held that while the City was an "aggrieved person" under the FHA for its claims that Bank of America had engaged in racially discriminatory lending, the City failed to show the proximate cause required by the FHA to recover damages.²²⁶ The Court held that the plaintiff must do more than show that its alleged injury foreseeably flowed from the defendant's conduct and instead show a direct relation between the injury asserted and the alleged discriminatory housing practices.²²⁷ In 2018, the U.S. Court of Appeals for the Sixth Circuit declined to extend standing to a resident suing the county recorder for violating the FHA and civil rights statutes by maintaining real estate records containing racially restrictive covenants.²²⁸ The court held that the plaintiff had not suffered an actual or threatened injury because he did not allege an intent to buy or rent property and, even if he had, the restrictive covenants were no longer valid or enforceable.²²⁹ Merely alleging that the racially restrictive covenants discouraged him from purchasing real estate and created a feeling that he and others were not welcome was not sufficient to confer standing.²³⁰

To be clear, this Article does not assert that social norms should dictate standing doctrine as a general matter – such a move runs the risk of collapsing standing as a doctrine of restriction. Instead, it considers the narrower point of the inter-relationship between standing under the FHA and a conception of injury to social norms. In the case of the FHA, the jurisprudence already extends capacious, although not unlimited, standing. A social norms model of § 3604(c) does not change this result. Rather it offers a new way of understanding expansive standing decisions and additional support for extending standing in disputed cases. In addition to psychic injury to members of pro-

223. 441 U.S. 91, 103 n.9 (1979).

224. *See id.* at 94.

225. *See Schwemm, supra* note 99, at 382–83.

226. 137 S. Ct. 1296, 1306 (2017).

227. *See id.* at 1311.

228. *Mason v. Adams Cty. Recorder*, 901 F.3d 753 (2018).

229. *Id.* at 755–57.

230. *Id.*

tected groups or harms to integration from truncated housing searches, discriminatory housing statements cause harms to listeners' social norms. These norms in turn are likely to negatively affect attitudes and behaviors and impede the goal of integration.

V. THE LIMITS OF SOCIAL NORMS

Richard McAdams, the leading legal scholar of social norms, has wisely observed that social norms have both potential and limitations for law.²³¹ Similarly, the power of social norms in housing speech regulation is subject to constraints as well as concerns about unintended consequences. This Part of the Article discusses these limitations and briefly considers some of the alternatives to norm-based intervention.

First, prohibiting discriminatory housing statements in furtherance of egalitarian norms may have unintended consequences. For example, in the employment context, a recent study found that state legislation prohibiting employers from inquiring about criminal history substantially decreased the number of young, uneducated African-American and Latino men interviewed and hired.²³² More research is needed to ascertain how home seekers react when the discriminatory preferences of other parties to the transaction are revealed versus hidden. Absent statements revealing a seller's or landlord's preferences, it is possible that home seekers will focus their search in localities and neighborhoods where their group predominates in an effort to avoid unpleasant rejections.

Faced with prohibitions on discriminatory housing speech, landlords, sellers, and lenders may shift to more covert forms of expressing discriminatory preferences. As discussed previously, following the enactment of § 3604(c), developers and landlords tried to use only white models in order to signal preferences; case law now restricts such conduct.²³³ There have been contentions in the legal scholarship that developers use certain amenities, such as golf courses, to discourage African-Americans.²³⁴ Despite these possibilities for evasion, § 3604(c) still conveys benefits by raising the cost of communicating discriminatory housing preferences.²³⁵ Covert signals, such as residential amenities, are a costlier and less reliable way of effecting discrimination than bald statements that certain groups are not welcome.

231. See RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 1–15 (2015); see also Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHL.-KENT L. REV. 1537, 1543–45 (2000).

232. See Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* 16–20 (Oct. 2017) (unpublished manuscript), http://jenniferdoleac.com/wp-content/uploads/2015/03/Doleac_Hansen_BanTheBox.pdf.

233. See *supra* notes 103–06 and accompanying text.

234. See Strahilevitz, *supra* note 107, at 450–79; see also *supra* Section I.B.

235. Even if the FHA did not regulate housing speech at all, property owners might still use amenities and other, more covert signals to communicate preferences. Outright

Second, perhaps it is paternalistic for the government to attempt to change people's attitudes and preferences by artificially constraining housing speech.²³⁶ This concern is endemic to a wide range of psychological interventions and behavioral “nudges.”²³⁷ In the case of social norms, it is not so evident that § 3604(c) has altered underlying preferences. Recall that some experiments have found that perceptions of *norms* changed following egalitarian communications but not personal beliefs.²³⁸ Virtually all of the psychology experiments use self-report measures that the participants know will be read by the experimenters. Participants may not be confident that their responses will remain anonymous. As Crandall observes, “[W]hen using self-report techniques to measure racial attitudes, social norms about public behavior, egalitarian values, and social desirability concerns all contaminate the process.”²³⁹ Thus, a normative theory of housing speech regulation may not implicate the classic concern of government manipulating beliefs and preferences. However, regulation of housing speech does influence norms and, in some instances, behaviors. This is also true of a decision by the government not to regulate housing speech. The omission of housing speech regulation also affects norms and behaviors with respect to prejudice and housing discrimination. It is unclear why the former should be considered paternalistic while the latter is deemed liberty-regarding.

Third, one might reasonably ask, if communicating non-discriminatory social norms for housing transactions is effective, then why does prejudice and residential segregation remain a challenge?²⁴⁰ The contention in this Article is not that social norms eliminate housing discrimination but that they reduce it.

expressions of prejudice are normatively objectionable to most Americans even in the absence of laws forbidding such statements. *See e.g.*, Charles E. Case & Andrew M. Greeley, *Attitudes Toward Racial Equality*, 16 HUMBOLDT J. OF SOC. RELATIONS 67, 67 (1990); John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches*, in PREJUDICE, DISCRIMINATION, AND RACISM 1, 1–10 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

236. *See* Oliveri, *supra* note 5, at 1171 (“At the level of the individual, it is fairly paternalistic to use the law as a tool to encourage a person to change his preferences by preventing him from articulating them . . .”).

237. *See, e.g.*, Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1059–60 (2012); Robert Sugden, *On Nudging: A Review of Nudge: Improving Decisions About Health, Wealth and Happiness by Richard H. Thaler and Cass R. Sunstein*, 16 INT. J. OF THE ECON. OF BUS. 365, 367, 370 (2009); *see also* Gary M. Lucas, Jr., *Paternalism and Psychic Taxes: The Government's Use of Negative Emotions to Save Us from Ourselves*, 22 S. CAL. INTERDISC. L. J. 227, 257–62 (2013).

238. *See, e.g.*, Paluck, *supra* note 13, at 582.

239. *See* Crandall, *Anti-Fat Prejudice*, *supra* note 195, at 889.

240. *See, e.g.*, Massey, *supra* note 28, at 581–82. Massey recently concluded, “Despite some signs of progress toward a more integrated society, the pace of desegregation has been quite uneven and 46 years after the passage of the Fair Housing Act many areas remain just as [racially] segregated as they were in 1968.” *Id.*

There is evidence that residential segregation has decreased significantly since the passage of the FHA.²⁴¹ There is also evidence that racial and ethnic prejudice has declined on surveys, with overwhelming majorities rejecting prejudice and discrimination against African-Americans and other racial minorities.²⁴² “Subtle racism” or unconscious bias in interpersonal interactions, employment, and other settings has substantially displaced overt bias and hostility.²⁴³ One theory offered to explain these results is that people repress racism in accordance with social norms sanctioning it.²⁴⁴ Although this falls short of true egalitarianism, a change in the norms of expressing prejudice is nonetheless beneficial for reducing discrimination in housing transactions. While it is impossible to attribute reductions in overt prejudice to any one provision or law, at a minimum these findings are consistent with a theory of normative gains from housing speech and other civil rights regulation.

Fourth, another possible objection is that the altering social norms may not redress important forms of direct housing discrimination. For example, while prohibiting discriminatory housing statements promotes non-discriminatory social norms, it does nothing for the individual who answers a facially non-discriminatory advertisement only to find that a small-scale landlord may lawfully discriminate against him.²⁴⁵ The contention of this Article is not that social norms can solve all manner of fair housing law ills, replace the FHA’s

241. Edward Glaeser & Jacob L. Vigdor, *The End of the Segregated Century: Racial Separation in America’s Neighborhoods, 1890-2010*, MANHATTAN INSTITUTE POL’Y RES. (Jan. 22, 2012), <https://www.manhattan-institute.org/html/end-segregated-century-racial-separation-americas-neighborhoods-1890-2010-5848.html>. While racial segregation does appear to have decreased, the magnitude of the effect depends on how researchers define segregation. See Ray Sin & Maria Krysan, *What Is Racial Residential Integration? A Research Synthesis, 1950–2013*, 14 SOC. OF RACE & ETHNICITY 467, 472–73 (2015) (suggesting Glaeser and Vigdor’s strong finding of integration was partially due to defining integration as black-nonblack rather than black-white residential proximity).

242. See e.g., Dovidio & Gaertner, *supra* note 235, at 1–10; Case & Greeley, *supra* note 235, at 67.

243. Crosby et al., *supra* note 164, at 546; see also Pearson, Dovidio & Gaertner, *supra* note 164, at 314–35 (reviewing research literature on subtle biases and racism).

244. Crosby et al., *supra* note 164, at 559; see also Crandall, *Anti-Fat Prejudice*, *supra* note 195, at 889 (concluding that “whether positive or negative behaviors [toward African-Americans] are carried out usually depends on the social norms about the expression of racism.”). As psychologist Crandall and his co-researchers observe, “Although it may be encouraging that survey reports of prejudice are on the decline, these reports may reflect conformity to social rules regarding appropriate behavior rather than personal values and beliefs.” Crandall, *Social Norms*, *supra* note 13, at 360.

245. A number of scholars have criticized the Mrs. Murphy exemption legalizing discrimination and maintaining segregation. See, e.g., Marie Failing, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U. L. REV. 383, 383–85 (2001); James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L.L. REV. 605, 605–10 (1999).

prohibitions on discriminatory refusal to rent, sell, or lend, or justify exemptions from the FHA. Rather, it is that social norms are a powerful complement to other rules and policies.

Last, unanswered questions and data gaps are a limitation of a social norms theory of housing speech regulation. In particular, it would be helpful to have research on communications and social norms specific to housing and various types of real estate transactions (e.g., roommate, small-scale landlord, sales, lending). To date, the bulk of the research on social norms has assessed other contexts, such as jury trials, employment, and dating, but not housing.²⁴⁶ There are also substantial gaps in understanding the psychological processes that mediate the response to social norms.²⁴⁷ For example, we do not know whether persuasion techniques deplete resources for self-regulation (i.e., altering behavior in the face of preferred, automatic, or low-cost alternatives). Depleting cognitive resources may make people more likely to conform to certain norms, particularly those that convey information about the frequency or likelihood of a behavior.²⁴⁸ This is highly relevant to the context of housing transactions, which, like any commercial transaction, typically entail attempts at persuasion and manipulation (e.g., framing information, manipulating order of presentation, and obscuring negative pricing information).²⁴⁹ Additionally, there are data gaps on individual variability in response to social norms and the reactions of different groups to normative information.²⁵⁰ For example, there is limited research addressing the effect of communications and consensus information on the attitudes of racial minorities and members of other “stigmatized groups.”²⁵¹

Despite these limitations, social norms play an important role in redressing housing discrimination and promoting integration. The benefits of shifting social norms via housing speech come into sharper focus when one compares

246. See, e.g., Wittenbrink & Henley, *supra* note 129, at 598; Crandall, *Social Norms*, *supra* note 13, at 364.

247. See, e.g., Ryan P. Jacobson, Chad R. Mortensen & Robert B. Cialdini, *Bodies Obligated and Unbound: Differentiated Response Tendencies for Injunctive and Descriptive Social Norms*, 100 J. OF PERSONALITY & SOC. PSYCHOL. 433, 433 (2010).

248. See *id.* at 434–35, 442–46 (finding that the hypothesized increase in conformity to descriptive norms in the depletion condition was present but was not statistically significant). Other research has shown that people have a reduced capacity to regulate themselves following exposure to persuasion techniques such as the foot-in-the-door technique and greater vulnerability to subsequent persuasion techniques. See Bob M. Fennis, Loes Janssen & Kathleen D. Vohs, *Acts of Benevolence: A Limited-Resource Account of Compliance with Charitable Requests*, 35 J. OF CONSUMER RES. 906, 906–10 (2009).

249. See, e.g., Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 758 (2006).

250. *But see* Walker, Sinclair & MacArthur, *supra* note 154, at 64–66.

251. *But see* Shapiro & Neuberg, *supra* note 183, at 877 (concluding that perception that the majority norm is discriminatory appears to increase discrimination by racial and ethnic minorities).

the alternatives. Rules that prohibit acts of discrimination have high enforcement costs due to the decentralized nature of housing.²⁵² In comparison, at least some § 3604(c) cases can be brought by fair housing organizations perusing advertisements.²⁵³ Because fair housing organizations, as well as publishers who are liable for violations, review print housing advertisements, reporting by an individual victim is often not necessary to prevent or redress discriminatory housing speech. In contrast, substantive discrimination, such as experiencing a refusal to rent based on ethnicity, often requires that the victims of the discrimination report what is typically an unpleasant and humiliating experience. Research in both psychology and law shows that victims of acts of discrimination under-report.²⁵⁴ This likely occurs in part because people who report discrimination are rated negatively by others. Empirical work finds that people view those who complain about discrimination as sensitive, irritating, and troublemakers.²⁵⁵ Not surprisingly, individuals who pursue anti-discrimination suits have a much lower likelihood of succeeding in court than other types of litigants.²⁵⁶ In response to these obstacles, fair housing organizations have hired “testers” who pose as housing applicants and report violations.²⁵⁷ Yet, use of testers is resource-intensive and can only reach a tiny fraction of housing discrimination.²⁵⁸

Social norm interventions have been successful at reducing prejudice, or at least its expression, compared to other psychological strategies. In general, strategies to combat bias and discrimination have proven difficult to engineer. For example, a recent study by Calvin Lai and co-researchers tested seventeen interventions and found that none durably reduced bias.²⁵⁹ As discussed in Part

252. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1100 (1989).

253. Crosssett, *supra* note 24, at 211; Oliveri, *supra* note 5, at 1174.

254. *See, e.g.*, HUD, DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT, AND USE OF FAIR HOUSING LAW iii (2006), <https://www.huduser.gov/portal/publications/hsgfin/FairHsngSurvey.html>.

255. *See* Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP GROUP PROCESSES & RELS. 227, 229 (2003); Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, PERSONALITY & SOC. PSYCHOL. BULL. 254, 254 (2001).

256. *See* Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1333, 1342–45 (2012) (arguing that claims that do not directly evoke discrimination, like just cause or infliction of emotional stress, may be more effective routes to plaintiffs due to the prejudice against them).

257. *See* Freiberg, *supra* note 46, at 240–48.

258. *Id.* at 247.

259. In this “intervention contest,” none of the interventions reduced explicit bias, and only half had any effect on reducing automatic, unconscious bias measured by the IAT. *See* Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. OF EXPERIMENTAL PSYCHOL. GEN. 1765, 1765 (2014). When the researchers re-measured several days later, even those modest effects

II, there is evidence that social norms can reduce the expression of prejudice and can do so in situations where other strategies have proven difficult to implement successfully.

For example, historically both law and psychology have envisioned contact between members of different groups as the remedy for prejudice and discrimination.²⁶⁰ Yet, direct intergroup contact has limitations to its ability to reduce prejudice, stereotyping, and discrimination.²⁶¹ Contact with people from other groups tends to reduce prejudice, but it does not invariably do so.²⁶² The magnitude of prejudice reduction from inter-group contact is higher when the contact is voluntary and under conditions of equal status.²⁶³ If these conditions are difficult for psychologists to engineer in the lab, then it is that much more difficult for housing agencies and programs that operate in private, capitalist housing markets. Accordingly, it is possible that laws that change the perceived frequency of housing discrimination and prejudice may have an equal, or greater, effect on opening housing markets than direct initiatives to integrate neighborhoods.

VI. IMPLICATIONS FOR CURRENT DEBATES IN FAIR HOUSING

The research on social norms offers a different perspective on controversies within fair housing law. The effect of communications on social norms clarifies the multi-faceted nature of the harm from discriminatory housing statements. Discriminatory housing statements not only injure members of protected groups who hear them but also shape listeners' and others' prejudices and their propensity to engage in discriminatory conduct. This shift in conceptualizing the nature of the harm from discriminatory statements is relevant to a number of current debates. To illustrate, this Part of the Article briefly considers how social norms research informs (1) the conflict between the FHA and the CDA and (2) debates over whether § 3604(c) should be applied to roommate advertisements.

had disappeared. *Id.* at 1782. The IAT measures how closely a participant associates different concepts by measuring how quickly he or she categorizes two target concepts (e.g., black, white) with an attribute (e.g., good, bad). *Id.* at 1782.

260. *See supra* notes 119–28.

261. *See* Stangor, Sechrist & Jost, *supra* note 13, at 486–87 (“Studying alternative approaches to stereotype change is important because there are theoretical and practical limitations to the assumption that stereotypes are changed primarily as a result of direct intergroup contact.”).

262. *See* ALLPORT, *supra* note 127, at 1–10. Pettigrew and Tropp conducted a meta-analysis of studies on intergroup contact and found that contact decreased prejudice and that Allport’s “optimal conditions” (e.g., voluntary contact, equal status) increased the magnitude of this effect. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. OF PERSONALITY & SOC. PSYCHOL. 751, 751 (2006).

263. *See* Pettigrew & Tropp, *supra* note 262, at 766.

A. Communications Decency Act

Section 230 of the CDA protects online service providers from liability for user-generated content posted on their sites.²⁶⁴ The CDA provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²⁶⁵ The CDA exempts federal criminal laws, intellectual property laws, and some privacy laws from this provision but does not exempt or even mention the FHA.²⁶⁶ There is no indication that the enactors of the CDA perceived the conflict with the FHA or considered its ramifications.

As a result, courts have been left to interpret FHA claims in light of the CDA. In a key case, *Chicago Lawyers’ Committee for Civil Rights v. Craigslist*, the U.S. Court of Appeals for the Seventh Circuit held that the plain language of the CDA established that Craigslist was not a publisher but a conduit for third party content.²⁶⁷ The website was merely posting content rather than altering or creating it.²⁶⁸ Thus, the Lawyers’ Committee for Civil Rights had no claim against Craigslist but could bring suit against individuals who posted discriminatory housing advertisements on the Craigslist website.²⁶⁹ But in *Fair Housing Council v. Roommates.com, LLC*, Roommates.com created a search function that prompted posters to list discriminatory preferences and allowed them to filter potential roommates by various characteristics, some of which are protected under the FHA.²⁷⁰ The U.S. Court of Appeals for the Ninth Circuit held that the website became a publisher by virtue of helping to create the discriminatory content and thus faced liability under the FHA.²⁷¹ Given the divergence in the case law, there is the possibility that a deepening circuit split could garner United States Supreme Court review.²⁷²

Notably, the CDA does not shield individuals who post discriminatory advertisements on websites.²⁷³ However, identifying individual posters is laborious and sometimes impossible.²⁷⁴ In many cases, websites do not collect identifying information and some even promote anonymity by creating temporary, anonymous email addresses for each post.²⁷⁵ The CDA removes from fair

264. See 47 U.S.C. § 230 (2018).

265. *Id.* § 230(c)(1).

266. *Id.* § 230(e).

267. 519 F.3d 666, 671–72 (7th Cir. 2008).

268. *Id.*

269. *Id.* at 672.

270. See 521 F.3d 1157, 1161–62 (9th Cir. 2008).

271. *Id.* at 1166–68.

272. See Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 376–78 (2008).

273. See Oliveri, *supra* note 5, at 1174.

274. *Id.* at 1174–75.

275. *Id.* at 1173; see also Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 N.W.U. L.

housing enforcement the far more efficient alternative of imposing liability on internet service providers. Internet service providers who are liable have a strong incentive to develop policies and systems to restrict discriminatory advertisements.

The lack of liability for online service providers has opened a significant chasm in FHA enforcement, particularly as more housing advertisements go online and eschew print media.²⁷⁶ This chasm threatens to undo some of the positive gains from § 3604(c), including its benefits to social norms. Discriminatory advertisements on the Internet can spread prejudicial norms with unprecedented reach and rapidity, eroding the gains from § 3604(c)'s prohibition of discriminatory housing speech in print media, television, and oral communications.

In response to the potential of the CDA to undermine § 3604(c), some commentators have argued that Congress should amend the CDA to specifically exempt website operators from immunity for FHA claims.²⁷⁷ While this would better safeguard fair housing and social norms, it may not be practicable for websites that have thousands of advertisements flowing in daily or weekly. Even a diligent website operation, when operating under high volume and rapid posting by users, is bound to miss some discriminatory advertisements.²⁷⁸

Another option to reduce normative and other injuries from discriminatory housing statements online is a legal rule that looks to whether a website has created a filtering and blocking system that is calculated to be effective, and is in fact reasonably effective, at preventing discriminatory housing advertisements. For example, the website could create systems that automatically block certain terms in housing or roommate advertisements, such as “kids,” and create a warning that appears on the screen explaining that preferences or limitations based on protected categories violate federal or state law.²⁷⁹ The liability of the online service provider would hinge on the quality of the filtering and blocking process rather than on the publication of individual discriminatory advertisements. This approach could balance the interests of website

REV. 1471, 1494 (2008); Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. the Communications Decency Act*, 25 CARDOZO ARTS & ENT. L. J. 805, 828 (2007) (proposing plaintiff-friendly discovery standards for unmasking posters in housing discrimination suits).

276. See, e.g., Katharine Q. Seelye, *Newspaper Circulation Falls Sharply*, N.Y. TIMES (Oct. 31, 2006), <https://www.nytimes.com/2006/10/31/business/media/31paper.html> (describing decline in newspaper circulation as a result of the Internet).

277. See, e.g., Crossett, *supra* note 24, at 211; Oliveri, *supra* note 5, at 1174.

278. Of course, fair housing enforcers face the same, and in some respects steeper, burdens. Fair housing organizations or private parties who wish to sue individual posters for § 3604(c) violations must comb through a high volume of advertisements and complete legal discovery processes to unmask posters.

279. Cf. Oliveri, *supra* note 5, at 1174–76 (proposing exempting the FHA from the CDA).

operators against the normative and other harms from discriminatory housing speech.²⁸⁰

B. Discriminatory Roommate Advertisements

There has been significant debate about whether roommates should be regulated under the FHA.²⁸¹ The Mrs. Murphy exemption shields roommate seekers who refuse applicants or alter the terms and conditions of the rental based on protected characteristics.²⁸² However, the exemption does not apply to discriminatory housing statements under § 3604(c). Roommate seekers may not lawfully place discriminatory advertisements or make discriminatory statements regarding the rental.²⁸³

Liability for roommate advertisements under § 3604(c) has generated substantial controversy. Some commentators maintain that a roommate situation involves such close physical association and intimacy that it should not be subject to the FHA in any way.²⁸⁴ Others reason that it makes little sense to forbid discriminatory roommate advertisements and similar speech but allow discriminatory refusals to rent.²⁸⁵ Fair housing scholar Rigel Oliveri argues that not applying the exemptions to § 3604(c) runs counter to the widespread belief that one can discriminate in roommate selection, violates norms of free choice about intimate associations within our dwellings, and creates public backlash.²⁸⁶ Perhaps the thorniest issue is whether roommates should be able to advertise a gender preference in light of concerns about privacy, nudity, or sexual assault.

The power of social norms to reduce the expression of prejudiced attitudes and promote egalitarian behavior offers a rejoinder to these critiques. A proliferation of discriminatory roommate advertisements would create the perception of widespread prejudice and might deter roommate seekers from considering a range of potential roommates. One scholar argues that “it does little good to conceal the existence of these preferences [for roommates based on protected characteristics under the FHA].”²⁸⁷ Yet, an abundant body of social science research suggests the contrary is true. There are significant benefits to

280. In addition, lowering the costs of prosecuting individual posters who discriminate would be helpful. This could be done through more plaintiff-friendly discovery standards for FHA violations on the Internet. See Kurth, *supra* note 275, at 828.

281. See, e.g., Brenna R. McLaughlin, #AirbnbWhileBlack: Repealing the Fair Housing Act’s Mrs. Murphy Exemption to Combat Racism on Airbnb, 2018 WIS. L. REV. 149, 178–79; Oliveri, *supra* note 5, at 1153–67.

282. See 42 U.S.C. § 3603(b)(2) (2018).

283. *Id.* § 3604(c).

284. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 687 (1980) (“[A]ny government intrusion on personal choice of living arrangements demands substantial justification . . .”).

285. See Oliveri, *supra* note 5, at 1165.

286. *Id.* at 1162–64.

287. *Id.* at 1171.

social norms and the expression of prejudice from prohibiting discriminatory communications. Of course, as discussed previously, immunity under the CDA for online service providers may have undone some of these gains. Removing liability under § 3604(c) for individuals seeking roommates, either on the Internet or in other forums, would worsen this situation.

It is not clear why this result, with its increase in the appearance of prejudiced statements, is necessary. After all, under the current structure of the FHA, the roommate-seeker is ultimately free to refuse a roommate or roommate rental so long as he or she avoids discriminatory statements.²⁸⁸ While this may be frustrating or upsetting to both parties seeking a roommate, it is questionable whether these effects outweigh the harms to social norms from discriminatory advertisements. It is also possible that neutral advertisements might lead a roommate-seeker to accept someone from a group he or she initially intended to avoid. This could, in turn, create the type of “contact” and interaction that psychologists have found to sometimes reduce prejudice.²⁸⁹

CONCLUSION

The psychology of social norms suggests a critical, yet often overlooked, purpose of housing speech regulation: to promote norms against expressing prejudice and against discrimination. The social norms research casts the FHA’s surprising prohibition on discriminatory housing statements in a fresh light. Communication of a norm or consensus viewpoint can affect listeners’ attitudes, willingness to express prejudice, and discriminatory behavior. As a result, discriminatory housing speech is not mere talk or injury solely to members of protected groups. Instead, it imposes a normative result contrary to the mission of the FHA to promote integration and reduce discrimination. Social science research suggests that prejudiced communications can shape listener norms and that these changes can ripple through social networks.

288. See 42 U.S.C. § 3604(a).

289. See *supra* notes 261–62 and accompanying text.

