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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

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ARTICLES

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

REGINALD LEAMON ROBINSON*

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— [D]own here they see things a little differently. People down here feel some things are worth killing for.

— Where does it come from; all of this hatred?

— You know, when I was a little boy, there was an old Negro farmer, lived down the road from us, name of Monroe. He was, I guess he was just a little luckier than my daddy was. He bought himself a mule. That was a big deal 'round that town. Now my daddy hated that mule, 'cause his friends was always kiddin' him about there was Monroe out plowing with his new mule, and Monroe was goin' to rent another field now that he had a mule. One mornin' that mule jus' show'd up dead—they'd poisoned the water. And after that there was never any mention 'bout that mule 'round my daddy. Jus' never came up. So one time we were driving down the road and we passed by Monroe's place, and we saw it was empty. He'd jus' packed up, I guess. Gon' up North or somethin'. And I looked over at my daddy's face, and I'd knew that he had done it. He saw that I knew—he was 'shamed. I guess he was 'shamed. He looked at me and said, "If you ain't any better

than a nigger, son, who are you better than?"

— I think that's an excuse.

— No, it's not an excuse. It's jus' a story about my daddy.

— Where does that leave you?

— With an old man who was so full of hate, he didn't know that being poor was what was killin' him.¹

I. INTRODUCTION

In American society, the master narrative of black inferiority provides the backdrop out of which this opening dialogue comes. This narrative has a long pedigree,² a pedigree that was institutionalized in American Negro slavery.³ The primary consequence of this narrative has been race discrimination,⁴ includ-

1. Mississippi Burning (Orion 1989) (dialogue between two F.B.I. agents who travelled to Mississippi to investigate the disappearance and presumed death of three Freedom Riders). The story related above is not all that different from the facts of United States v. McInnis, 976 F.2d 1226 (9th Cir. 1992) (affirming conviction for use of force to interfere with minorities' housing rights).

2. See generally JOHN H. FRANKLIN, THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY 5-26 (1993) (beginning with W.E.B. Du Bois' "color-line" thesis and discussing the continuing impact of race and racism in America's socio-political discourse); GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 (1971) (analyzing shifting and divergent white conceptions of Afro-American character and destiny); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 3-43 (1968) (discussing the negative values Europeans ascribed to black or African traits and how those values influenced even the poorest Anglo-American to rationalize the racial oppression of blacks).

3. See generally LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA (1987) (analyzing the development of institutionalized slavery within the "black time line"); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974) (reviewing the history of slavery and its role in creating a separate black national culture); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978) (describing legislative and judicial attitudes toward slavery in colonial America); KENNETH STAMPP, PECULIAR INSTITUTION (1956) (tracing the development and effects of slavery in the United States). For an excellent historical analysis of the impact of slavery on free blacks, see IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974).

4. See, e.g., RICHARD A. APOSTLE ET AL., THE ANATOMY OF RACIAL ATTITUDES 24-25 (1983). Professors Apostle, Charles Y. Glock, and Marijean Suelzle and Research Associate Thomas Piazza illustrated this point in the following interview:

I (interviewer): What do you feel are the essential differences between

ing housing segregation.⁵ Confronted with the long history of racially discriminatory structures in the housing market, Congress enacted the Fair Housing Act (FHA or the Act) as Title VIII of the Civil Rights Act of 1968.⁶ After more than twenty-five years and several legislative amendments, however, housing segregation remains extant.⁷ To this extent, the FHA has failed, and will continue to fail, until its prohibitive scope, bounded as it is by racial limits and constitutional constraints (e.g., the First Amendment), is broadened to cope with the master narrative of black inferiority.

The FHA's prohibitive scope must be broadened to cope decisively with three powerful forces revealed in the opening dialogue—the master narrative of black inferiority, dominant white images, and the violence of neighborhood purity. The master narrative of black inferiority means the absolutely dominant or privileged story that defines how blacks win or lose, succeed or fail.⁸ This story depends on social mythology⁹ and has been pre-

the races?

R (respondent): Whites are obviously of the higher intellectual quality. This is proved by the fact that mostly whites have high governmental positions. Blacks tend to be lazy and live on welfare. They seem to have little intellectual capacity except in athletics. Orientals are quiet and work hard. There are definite physical differences.

I: Are you saying that whites are generally superior to minority groups?

R: Oh, certainly. All the great thinkers have been white. Leaders too. . . .

I: Why aren't [blacks] ambitious?

R: It's in their genes—their makeup. Blacks have no inborn achievement. They are not energetic, not self-starters.

Id.

5. See generally JAMES A. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT, AND REVITALIZATION* 51-409 (1983) (describing different forms of discrimination within the housing market); HERMAN H. LONG & CHARLES S. JOHNSON, *PEOPLE V. PROPERTY: RACE RESTRICTIVE COVENANTS IN HOUSING* (1947) (focusing on housing discrimination in urban communities in the United States); CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959) (tracing the sociological and political events leading to the abrogation of restrictive racial covenants).

6. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631).

7. See Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339, 344-45 (1988).

8. See generally JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (1970) (analyzing racism as a product of the historical development of Western culture); Lisa Ikemoto,

viously defined¹⁰ as a "preexisting narrative."¹¹ Taking the myth and the story together, the master narrative of black inferiority is a systemic story, whether openly spoken or silently acted upon,¹² that describes, solely on racial terms, how and why whites¹³ legitimately hold power over blacks.¹⁴ Although

Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles," 66 S. CAL. L. REV. 1581 (1993) (discussing the post-riot analysis of racial conflict in Los Angeles).

9. For a discussion of social mythology, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: A DIARY OF A LAW PROFESSOR* 8-9 (1991) (discussing the myth of tortfeasors on a remote island simply waiting to be discovered by practitioners of Western jurisprudence).

10. See Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 18 n.4 (1993).

11. By "preexisting narrative," I mean an understanding whether true, factual, or descriptive of generalizable "traits or characteristics" of a particular group of people. These "traits or characteristics" generally focus on race, even though "race" is not an objective notion; it is socially constructed and legally enforced. . . . Such "traits and characteristics" become the defining social lenses through which the dominant class views the "offending" racial group. However, these "traits or characteristics" are not supported by scientific evidence. . . . Thus, any view held by whites of the African American inferiority is mytho-narrative. . . . At least as early as the 1600s, Europeans *fashioned* views of Africans that reinforced white superiority, and in the 1900s white Americans *reinforced* their perceived superiority on the backs of African Americans. In this way, a preexisting narrative of black inferiority predates the United States's founding. . . . It predates enforced slavery and *Plessy's* legalized segregation. It is fiction, it lacks scientific evidence, and it is simply mytho-narrative.

Id. (citations omitted).

12. See ALEXANDER THOMAS & SAMUEL SILLEN, *RACISM AND PSYCHIATRY* 114-17 (1972) (critiquing the limits of a purely psychoanalytic approach to studying and understanding white racism). See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (challenging the intentional/unintentional discrimination dichotomy and the Supreme Court's discriminatory purpose doctrine); David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (arguing that racial discrimination is more closely analogous to negligent conduct than it is to intentional conduct).

13. "Whites" is not used in this Article to refer to any specific group of white persons, but to refer to white people who do believe that blacks are generally worthless. Most people would concede that most whites do communicate or hold such views. See KOVEL, *supra* note 8, at 52 (discussing the cultural stereotypes of blacks that "may have, under the impetus of moral censure, [been] driven . . . from [a person's] consciousness into a latent zone that is not activated until a black attempts to move in next door or pays attention to his daughter"). Rather, in making

it depends more on mythology than reliable empirical evidence,¹⁵ the master narrative of black inferiority is both pervasive and powerful.

In the fair housing context, the master narrative of black inferiority operates coterminously with dominant white images. Dominant white images are a set of pervasive images, such as photographs, that explicitly or implicitly connote whose values, points of view, and symbols are important. These connotations reinforce the view that blacks are inferior to whites,¹⁶ a violently oppressive perspective rooted in American Negro slavery,¹⁷ Reconstruction's *de facto* slavery,¹⁸ and post-*Plessy*'s formal American apartheid.¹⁹ During these social eras, white males

this point, this Article includes those individuals who tell stories that fit the master narrative of black inferiority as well as those individuals who neither tell stories nor write missives, but by their conduct ever so subtly make distinctions between whites and blacks. In either case, their actions create a totalizing story—the master narrative of black inferiority.

14. See, e.g., FREDRICKSON, *supra* note 2.

15. See *id.* at 1.

In the years immediately before and after 1800, white Americans often revealed by their words and actions that they viewed Negroes as a permanently alien and unassimilable element of the population. Yet articulate whites of that period were characteristically unable, and perhaps even unwilling, to defend their anti-Negro predispositions by presenting anything that resembled a "scientific" or philosophical case for the innate moral and intellectual inferiority of the black race.

Id.

16. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting claims that Georgia conducted the death penalty in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments); see also Note, *Racial Steering in the Romantic Marketplace*, 107 HARV. L. REV. 877 (1994) (studying the use of racial preferences in personal ads).

17. See LEON F. LITWACK, *NORTH OF SLAVERY* (1961); CHARLES S. MANGUM, JR., *THE LEGAL STATUS OF THE NEGRO* (1940).

18. See ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION* (1990); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966).

After participating in the political process for less than a decade in the 1860s and 1870s, they were stripped of every vestige of citizenship by one of the most merciless, terror-driven assaults in the annals of modern history. Black men who dared to vote were lynched, and schools that black children dared to attend were burned to the ground, all in the name of the maintenance of high moral and educational standards.

FRANKLIN, *supra* note 2, at 6.

19. See *Evans v. Abney*, 396 U.S. 435 (1970) (approving the reversion of a trust corpus when the discriminatory purpose of the trust was frustrated); *Plessy v.*

and their images were valued highly.²⁰ Conversely, blacks and their images were derided by whites,²¹ who promoted white images that created, and today maintain, a degree of comfort for white males. Dominant white images authenticated a world that did not include blacks.²² When blacks attempted to live in predominantly white communities, they faced violence in all forms and at all levels.²³ When these messages were coupled with vio-

Ferguson, 163 U.S. 537 (1896) (approving "separate but equal" passenger train accommodations); *Corrigan v. Buckley*, 299 F. 899 (D.C. Cir. 1924) (permitting covenants that prevented rental or sale to racial minorities), *appeal dismissed*, 271 U.S. 323 (1926); *Leathers v. Old Fellows' Rest Cemetery*, 69 So. 858 (La. 1915) (suggesting in dictum that deed restrictions voided right to bury minorities on deeded property); *Leeper v. Charlotte Park & Recreation Comm'n*, 88 S.E.2d 114 (N.C. 1955), *cert. denied*, 350 U.S. 983 (1956); Taeuber, *supra* note 7, at 344-45 (describing institutional racism as a persistent feature of American society); see also MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA* (1983) (examining how the black community is exploited by racism and capitalism); A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992) (urging an ongoing battle against oppression and inequality).

20. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

We choose racism and racial depiction as our principal illustration. Several museums have featured displays of racial memorabilia from the past. One exhibit recently toured the United States; in January, *Time* reviewed the opening of another. Filmmaker Marlon Riggs produced an award-winning one-hour documentary, *Ethnic Notions*, with a similar focus. Each of these collections depicts a shocking parade of Sambos, mummies, coons, uncles—bestial or happy-go-lucky, watermelon-eating—African-Americans. They show advertising logos and household commodities in the shape of blacks with grotesquely exaggerated facial features. They include minstrel shows and film clips depicting blacks as so incompetent, shuffling, and dim-witted that it is hard to see how they survived to adulthood. Other images depict primitive, terrifying, larger-than-life black men in threatening garb and postures, often with apparent designs on white women.

Id. at 1259-60 (citations omitted). For another example of an arena where white images are highly valued, see Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1600-01 (1990) (arguing that some models of logic exclude women and minorities).

21. See Delgado & Stefancic, *supra* note 20, at 1260, 1261-67 (discussing how the dominant society presented images of African Americans in negative, derogatory, and stereotypical ways).

22. See generally FREDRICKSON, *supra* note 2 (describing the interplay of basic racial conceptions with social or political ideologies).

23. See Indira A.R. Lakshmanan, *Hate-Crime Reports Rise in Boston*, BOSTON

lence, blacks like Monroe encountered the physical trauma of these dominant messages.²⁴ In America's history of race relations, dominant white images tell blacks expressly and implicitly that they are not welcome in white neighborhoods.²⁵

As this Article will illustrate, and as the history of American race relations reveals, dominant white images can and do contribute to racial violence—the violence of neighborhood purity. Those who promote neighborhood purity reject the integration of blacks and whites, believing that blacks adulterate good communities by their presence.²⁶ This Article argues that the provenance of neighborhood purity lies not only in the master narra-

GLOBE, June 20, 1994 (National/Foreign), at 1.

In an analysis of Boston police figures from 1991-1992, researchers at Northeastern found the most common type of hate crime was a physical assault committed by a group of white, teen-age males. "Reactive hate crimes" targeted at people perceived as threatening the perpetrator's way of life were the next most common, and "mission hate crimes" committed by those dedicated to bigotry, were the least common, with only one incident.

Id.

24. See, e.g., *id.*

25. See, e.g., Scott Harris, *Glendale: Where Image and Fact Sometimes Clash*, L.A. TIMES, Sept. 8, 1994, at B3.

In the past Glendale also has been a magnet for white supremacists, who have been known to spray swastikas in public places and, in a peculiar nod to suburban convention, to apply for barbecue permits in order to burn crosses on neighborhood lawns. . . . [I]t's easy to understand why non-Christian, non-whites didn't consider Glendale to be a particularly friendly place.

Id.

26. See Derrick Bell & Linda Singer, *Making a Record*, 26 CONN. L. REV. 265 (1993).

Either way, African-Americans, whose achievements "forever enjoy only a presumption of theft," are the wrongdoers, stealing jobs from more deserving whites. Slogans shouted by white demonstrators in Bensonhurst, New York, where Yusuf Hawkins, a young African-American male, was killed, illustrate the continuity between these images of African-Americans as thieves of white privilege and the more easily recognized hate of the not-so-distant past. "They rape our women, they take our jobs," some whites yelled. The anger stemming from perceptions that African-Americans are taking whites' jobs is as potent as the lynching-justifying anger that they had taken whites' women.

Id. at 275-76 (quoting Jennifer M. Russell, *On Being a Gorilla in Your Midst, or, the Life of One Blackwoman in the Legal Academy*, 28 HARV. C.R.-C.L. L. REV. 259, 259 (1993)).

tive of black inferiority, but also in the dominant white images undergirding this narrative. The violence of neighborhood purity means physically or symbolically violent acts, committed by whites, that affect how blacks enjoy their rental property or private homes.²⁷ Physical violence is the use of force or threat of force against blacks who live in predominantly white neighborhoods.²⁸ In instances of such violence, whites wilfully injure, intimidate, or interfere with a black person living in a predominantly white neighborhood.²⁹ Symbolic violence involves acts such as cross burning,³⁰ hate speech,³¹ or tire slashing.³²

27. This conduct is actionable under 18 U.S.C. § 241 (1988), although the decision in *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993), demonstrates how the Supreme Court's decisions in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (holding hate speech ordinance unconstitutional on grounds of viewpoint discrimination), and *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (upholding enhanced sentence for racially motivated battery), have imported First Amendment concerns into this analysis.

28. See *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991); *United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989); *Stackhouse v. DeSitter*, 620 F. Supp. 208 (N.D. Ill. 1985).

29. See 42 U.S.C. § 3631(a)-(e) (1988).

30. See *R.A.V.*, 112 S. Ct. 2538; *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *Lee*, 6 F.3d 1297; *United States v. Hayward*, 6 F.3d 1241 (7th Cir.), *cert. denied*, 114 S. Ct. 1369 (1993); *United States v. Kissinger*, 943 F.2d 50 (4th Cir. 1991); *United States v. Gresser*, 935 F.2d 96 (6th Cir.), *cert. denied*, 502 U.S. 805 (1991); *Salyer*, 893 F.2d 113; *United States v. McDermott*, 822 F. Supp. 582 (N.D. Iowa 1993); see also Lyle Denniston, *U.S. Seeks Authority over Cross-Burnings*, BALTIMORE SUN, Feb. 18, 1994, at A3.

Since [R.A.V.], cross-burnings have continued to occur, according to data from the Klanwatch project of the Southern Poverty Law Center in Montgomery, Ala. Based on what it concedes is incomplete data, the project counted 117 cross-burnings in 1992—the last year reported. That was up from 110 a year earlier. The project's preliminary data for 1993 indicate some decline from the 1992 total.

Id. For additional discussion of the constitutional issues implicated by cross burnings, see *Maryland v. Sheldon*, 629 A.2d 753 (Md. 1993) (holding that a Maryland statute criminalizing the burning of a cross or other religious symbol on public or private property, unless the property owner consents and the local fire department has been notified, violates the First Amendment).

31. See, e.g., *United States v. McInnis*, 976 F.2d 1226, 1232 (9th Cir. 1992) ("The poster with the swastika and the words 'Niggers Get Out! Go Back To Your Slums!' is also probative to show that McInnis had the intent to interfere with the victim's housing rights."); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 (5th Cir. 1982) ("Lundy expressed his racial animus in the crudest terms, referring to plaintiffs' guests as 'nigger trash.' Clearly, Mr. Lundy's behavior amounts to a willful and gross disregard of plaintiffs' rights under Section 1982 and the Fair Housing Act."); *Allahar v. Zahora*, No. 92 C 5648, 1992 WL 229537 (N.D. Ill. Sept. 11, 1992) (mem.)

These acts do not physically injure blacks, but do damage them emotionally.³³ Blacks who suffer physical violence or who endure symbolic violence often leave predominantly white neighborhoods.³⁴ Although the violence of neighborhood purity may take different forms, it achieves the goal of keeping blacks out of white communities and promotes the message: "Keep America White."³⁵

(explaining that defendant refused to perform a contract because he did not want "niggers" living in the neighborhood). For analyses of constitutional limits on protecting minorities from hate speech, see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 159-65, 172-79 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-49, 462-66; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2353-58 (1989).

32. See, e.g., *Blacks Plan To Protest in Chicago*, MIAMI HERALD, Oct. 21, 1989, at A13 ("It is an unwritten rule in Chicago: Black people do not generally venture into the Bridgeport neighborhood after dark. Over the years, that rule has been underscored by more than a few beatings and tire slashings."); Ellen O'Brien, *A Family Weathers the Hate*, PHILA. INQUIRER, Feb. 13, 1989, at B1 (noting that a black family recently locating in Hadden Township suffered BB shots, slashed tires, and a racist letter threatening children's lives); Jerry Taylor, *BHA Asks Mayoral Committee To Help Ease Racial Tension*, BOSTON GLOBE, Sept. 5, 1980 (Run of Paper) (explaining that "black families had been driven from Fairmount [a predominantly white neighborhood] since 1975 by window-breaking, tire-slashing, racial epithets and assaults").

33. See, e.g., *Lee*, 6 F.3d at 1298 (quoting a black woman who, upon seeing the burning cross, stated that "I hope they don't come up here and burn us up").

34. See, e.g., Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 755 n.202 (1993) (reviewing millionaire basketball star Dee Brown's search for a new house after "the Boston incident in which . . . [he] was thrown to the ground, handcuffed, and arrested after trying to drive through Newton, Massachusetts, a wealthy, predominantly white suburb"); cf. WILLIAMS, *supra* note 9, at 58-61 (discussing 1986 Howard Beach episode in which three black men were beaten and chased after entering an all-white neighborhood).

35. Cf. THE JAPANESE PROBLEM IN CALIFORNIA (Tasuku Harada ed., R.B.E. Research Assocs. 1971). In response to the question: "Will you mention some of the more important objections or grievances against Japanese in California, or in the United States?", Professor H. Cooley, Department of Sociology, University of Michigan, argued:

It is my observation that nearly all Americans like the Japanese. It is generally admitted that they are personally delightful, and they are much more popular in this regard than, say, the Jews. But many think they are collectively dangerous, either as a nation or as groups of settlers in America. My own opinion is that they are in no way dangerous to us so long as they do not settle here in large numbers. There is a wide-

The master narrative of black inferiority, dominant white images, and the violence of neighborhood purity are all present in the opening dialogue of *Mississippi Burning*.³⁶ The master narrative of black inferiority rejects any notion that blacks are equal or superior to whites.³⁷ When Monroe acquired land and purchased a mule, he challenged the master narrative.³⁸ As a result, a white man, threatened by the possibility of black success, destroyed the mule.³⁹ The story of Monroe suggests that if blacks succeed in a manner that undermines white proprietorship,⁴⁰ whites must then question their own social mythologies.⁴¹ To avoid engaging in this form of racial introspection, a

spread belief, based on experience, that if they did they would form unassimilated groups, and thus destroy the homogeneity of our population. Why this should be the case with Orientals more than with Europeans it is hard to say, but it seems to be a fact, and we must be guided by facts. Much as I like the Japanese I am opposed to their immigration.

Id. at 17. Similarly, in response to the question: "What do you consider the principal reasons of the present anti-Japanese agitations in California: are they economic, social, or racial?", Reverend W.B. Thorp of the Congregational Church in Palo Alto, California, stated:

The primary cause of the anti-Japanese agitation in California is undoubtedly racial. A body of Western immigrants doing precisely the things the Japanese are doing in California would be welcomed and praised. The agitation is essentially agitation for racial homogeneity in this land. Its most telling slogan is "*Keep California White*."

Id. at 16 (emphasis added).

36. See *supra* text accompanying note 1.

37. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Thirteenth Amendment related only to slavery and that the Civil Rights Act of 1875 was unconstitutionally applied to the states).

38. Cf. FONER, *supra* note 18, at 184-91 (describing the efforts of the Ku Klux Klan); MANGUM, *supra* note 17, at 274-307 (discussing violence against blacks and the burning of towns); IDA B. WELLS-BARNETT, *ON LYNCHINGS* (1969) (stating that upstart blacks were often lynched by whites).

39. See *supra* text accompanying note 1.

40. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (investigating how property rights are contingent on, and intertwined with, race); see also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding the legislative exclusion of aliens); *Johnson v. McIntosh*, 21 U.S. 543 (1823) (restricting recognition of land grants from Native American tribes).

41. Cf. ROLLO MAY, *THE CRY FOR MYTH* (1991) (describing the unsound psychiatric treatment of a schizophrenic woman).

[W]hen Dr. Frieda had to go to Europe for a summer, Deborah was temporarily assigned to a younger psychiatrist who was imbued with the new rationalism. This psychiatrist marched in to destroy the "delusions"

type of reflection that destroys all that is certain and concrete, whites use violence to force blacks back into the master narrative's oppressive straits.⁴²

In addition to violence, whites become overly focused on blacks, an obsession that racializes the entirety of their experience.⁴³ As explained in a 1985 study of white working-class Americans who defected from the Democratic party:⁴⁴

[t]hese . . . defectors express a profound distaste for blacks, a sentiment that pervades almost everything they think about government and politics. Blacks constitute the explanation for their vulnerability and for almost everything that has gone wrong in their lives; not being black is what constitutes being middle class; not living with blacks is what makes a neighborhood a decent place to live. . . . These sentiments have important implications, . . . as virtually all progressive symbols and themes have been redefined in racial and pejorative terms.⁴⁵

of Deborah with no understanding whatever of Deborah's need for her myths. The result was that Deborah, her whole system of gods and their extraterrestrial kingdom in shambles, deteriorated markedly. She regressed into a completely withdrawn world. She set fire to the sanatorium, burned and maimed herself, and behaved like a human being whose humanity is destroyed. For this is literally what had happened. Her soul—defined as the most intimate and fundamental function of her consciousness—was taken away, and she had literally nothing to hold on to.

Id. at 19.

42. See MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 3-26 (1987). Belknap notes that during slavery, some effective restraints prevented whites from wantonly killing slaves. *Id.* at 4. He also notes that during Reconstruction,

[a]n exasperated federal army officer reported from Jefferson, Texas, that "the civil officers *cannot* and *will not* punish these outrages." Nor would southern juries. One judge observed in 1868 that it was "almost an impossibility . . . to convict a white man of any crime . . . where the violence has been against a black man."

Id. at 4-5.

43. See generally THOMAS B. EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1992) (discussing the significance of race on political choices).

44. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-To-The-Future Essay*, 71 N.C. L. REV. 1487, 1499 (1993).

45. *Id.* at 1499-1500 (quoting Stanley Greenberg et al., *Race*, ATLANTIC MONTHLY, May 1991, at 53, 56).

Therefore, when blacks like Monroe acquire real property, whites attempt to reinscribe blacks with the notion that they are inferior, a reprogramming that depends heavily on reinforcing dominant white images.⁴⁶ Equally important, any success by blacks like Monroe promotes the false zero-sum assumption that whites have lost economic opportunities. As a consequence, whites like the father in the opening dialogue become obsessed with the "Other." This obsession turns not only on false impressions, but also on amplified and deeply held racial and personal insecurities.⁴⁷ The result is fairly predictable. Blacks who challenge the dominant white images are punished by whites and encouraged to leave the community.

In the opening dialogue of this Article, the master narrative of black inferiority resonates as a backdrop, while dominant white images operate in the foreground. The father, for example, became concerned that Monroe owned real property because Monroe had bought a mule and was poised to increase his wealth. By owning land, buying a mule, and increasing his farm output, Monroe suggested that blacks can be equal to whites. To this extent, the master narrative became a context for punishing Monroe and for reasserting dominant white images, images never intended for blacks like Monroe.⁴⁸ Based on this image, whites believe they ought to succeed, even at the expense of blacks.⁴⁹ White success is the "stock" story.⁵⁰ By succeeding,

46. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989) ("The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.").

47. See EDSALL & EDSALL, *supra* note 43, at 234-40 (describing how the black underclass serves to reinforce racial preconceptions about black America).

48. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 94 (1993) ("Given that a home is widely viewed as a symbol of a person's worth, these views imply that whites perceive blacks to be a direct threat to their social status.").

49. For example, the plaintiffs in both *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (employee), and *Reid v. Key Bank*, 821 F.2d 9 (1st Cir. 1987) (creditor), were blacks who had been exploited by others. See also DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* § 1.14 (3d ed. 1993) (discussing racism based on lessons drawn from the nineteenth century).

50. See Delgado, *supra* note 46, at 2418-26 (discussing the "stock" story as the

blacks like Monroe mock the story and its images. By reasserting these images, whites intensify metaracism,⁵¹ a systemic form of conscious and unconscious racial oppression. By acting consciously against a "nigger" and unconsciously through what Joel Kovel calls a "symbolic matrix,"⁵² the father destroyed any conflict between what Richard Delgado calls "ingroup reality" and outgroup counterstory.⁵³ By defeating Monroe's effort to subvert the ingroup reality, the father reinforced the master

dominant narrative).

51. See Ikemoto, *supra* note 8, at 1585; see also KOVEL, *supra* note 8, at 211-12.

Racism, which began with the random oppression of another person, and moved from directly dominative, systematic control of his being, into abstracted averted use of his degradation, now passes beyond consciousness, holding only to its inner connections with the symbolic matrix. Metaracism is a distinct and very peculiar modern phenomenon. Racial degradation continues on a different plane, and through a different agency: those who participate in it are not racists—that is, they are not racially prejudiced—but metaracists, because they acquiesce in the larger cultural order which continues the work of racism. Although metaracism is not the only form of modern American racial behavior, nor even the predominant form at present, it is the form which seems in accord with the latest version of the plague of history.

Id.

52. See KOVEL, *supra* note 8, at 93-105.

Since aversive responses occurred (and still occur) with such irrational intensity, and moreover occurred in people who had little directly to do with the Negro objects of the fantasy of dirt, then it follows that these fantasies pervaded the lives of white Americans and are not limited to racism. If such an infantile response can maintain such intensity in the most mature and "normal" of adults, then *there must be something at large in culture to sustain it*. The normal person is one who lives effectively within his culture; *his normality is grounded in a congruence between his ego and his culture*. Therefore, the best-adjusted, most productive, and most typical of Americans who respond aversively to black people they have not personally oppressed or even known, are no more than vehicles for the larger and axiomatic ideas of their times. This implies that the Negro is not actually the basic object of the fantasy, but a substitute, a surrogate. By virtue of the way he has been treated historically, he continues to represent in a concrete way something which *persists actively in white American culture at an unconscious level, and which rises, as in racism, to find certain objects in the given world*. As whites continue to treat blacks in such a way as to sustain their debased position within society, this in turn maintains the black's suitability to represent the white's fantasy.

Id. at 93-94 (emphasis added).

53. See Delgado, *supra* note 46, at 2411-15.

narrative of black inferiority and the privileged status of dominant white images. To this extent, this narrative and these images coexist.

In the opening dialogue, the master narrative of black inferiority conjoins not only with dominant white images, but also with the violence of neighborhood purity. In truth, the master narrative of black inferiority has never physically violated blacks, and dominant white images have never actually killed blacks. Rather, as Patricia Williams points out, the narrative and images murder blacks' spirit,⁵⁴ making the violence of neighborhood purity both physical and symbolic. Moreover, the narrative and images create the milieu in which any violence by whites toward blacks can be rationalized.⁵⁵

By physically killing Monroe's mule, the father in the opening dialogue symbolically and mortally wounded Monroe. In addition, by killing the mule, the father destroyed the piece of Monroe's property that mocked him personally, thereby denying Monroe a socially sanctioned chance to relate to him as an equal. Without this recognition, blacks like Monroe find the manner in which they express their desire to be free, legally endowed persons increasingly frustrated by whites.⁵⁶ Unfortunately, by violating Monroe, the father impliedly embraced a freedom that depends on denying blacks legal personhood.⁵⁷

54. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

55. See BELKNAP, *supra* note 42, at 3-5.

56. Cf. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988) (comparing different paradigms of property ownership).

57. See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 20-21 (Myra B. Ramos trans., 1990).

Doubt regarding the possible effects of *conscientização* implies a premise which the doubter does not always make explicit: It is better for the victims of injustice not to recognize themselves as such. . . . Fear of freedom, of which its possessor is not necessarily aware, makes him see ghosts. Such an individual is actually taking refuge in an attempt to achieve security, which he prefers to the risks of liberty. . . . Men rarely admit their fear of freedom openly, however, tending rather to camouflage it—sometimes unconsciously—by presenting themselves as defenders of freedom. They give their doubt and misgivings an air of profound sobriety, as befitting custodians of freedom. But they confuse freedom with the maintenance of the status quo; so that if *conscientização* threat-

Even though the father focused on Monroe's mule, the violence was directed equally at Monroe, who consequently left town and moved north. As a result, the father's neighborhood was a little more white, a little more pure. Equally important, other blacks became less inclined to follow in Monroe's footsteps. To this extent, the father's violence reveals the oppressive content of dominant white images and the master narrative of black inferiority.

The Fair Housing Act cannot effectively redress housing segregation until it recognizes the impact of the relationship between the master narrative of black inferiority, dominant white images, and the violence of neighborhood purity. Presently, the Fair Housing Act does not acknowledge this relationship. The Act cannot end what its drafters by and large have not experienced,⁵⁸ and the courts cannot adjudge what they only know

ens to place that status quo in question, it thereby seems to constitute a threat to freedom itself.

Id. at 20-21. In Reginald Leamon Robinson, *Race, Myth, and Narrative in the Social Construction of the Black Self* 42-44 (1994) (unpublished manuscript, on file with author), it is asserted that:

Freire's argument is quite relevant here. To the extent that oppression is dialectical, that is, the oppressor depends on the oppressed for his very status as master, then Mr. Gore qua white supremacist also (or qua institutional gatekeepers) has an ego-centered commitment to this relationship. This commitment perforce represents a thorough grounding in the socially-constructed mythologies both about masters and whites, and about slaves and people of color. Once this mythology has been received as a construct, it remains unquestioned, and, more importantly, neither the oppressor nor the oppressed knows a reality outside of this dialecticism. The mythology rationalizes the dialectical relationship, and the relationship argues for the status quo notion of liberty. At some point, some whites face a cruel irony. That is, whites spend their entire lives, their human energies, as a bulwark for this mythology and its associative institutional practices (e.g., employment discrimination). They invest huge sums of psychic energy not in fulfilling their soul's desire for True Liberty but in denying blacks and other people of color their equal place in the world. As Professors James O'Fallon and Cheyney Ryan would argue, when these whites fail to recognize blacks as equals, they only succeed in repressing their own humanity. Later, some whites may make the rude discovery: they have only a few degrees more liberty and perhaps far less humanity than do blacks or the socialized Other. By working to hold blacks back, whites have had to sacrifice their deep desire for *true* recognition by staying behind to guard America's socio-psychological internment camp called "Black Oppression."

Id. (citations omitted).

58. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364 (1992) (tying the

from a distance.⁵⁹ Without the experience, and with this distance, racial discrimination and housing segregation become not a question of power and oppression, but one of poor judgment and bad manners.⁶⁰ In this regard, the Act does not end American apartheid, but promotes equal opportunity and what then-Senator Walter Mondale called "basic decency in white America."⁶¹ If the Act does not seek out the racially oppressive master narrative and the manner in which this narrative intersects with the dominant white images and physical violence operating behind housing segregation, then judges cannot eradicate what legislators refuse to admit.⁶² In this way, the FHA embodies serious limitations, in part constitutional, in part racial.

Few can dispute the proposition that the Fair Housing Act operates within racial and constitutional limitations. First, the Act cannot in and of itself eliminate racial discrimination and housing segregation because the Act is remedial. As a result, if a

school of racial realists to the legal realism movement and its emphasis on practical experience).

59. See Lisa J. Laplace, *The Legality of Integration Maintenance Quotas: Fair Housing or Forced Housing?*, 55 BROOK. L. REV. 197, 211 (1989) (quoting then-Senator Mondale: "It is impossible to gauge the degradation and humiliation suffered by a man in the presence of his wife and children—when he is told that despite his university degrees, despite his income level, despite his profession, he is just not good enough to live in a white neighborhood").

60. See Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 96, 96-116 (David Kairys ed., 1982); see also Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies To Achieve the Purposes of the Fair Housing Act*, 64 TEMPLE L. REV. 909 (1991) (arguing for redress of minority group injuries through remedies such as forced housing integration).

61. Laplace, *supra* note 59, at 212 ("Senator Mondale described the critical fair housing debate as an issue of 'whether there is any basic decency in white America and whether white America ever really intends to permit equality and full opportunity to black Americans with all that equality and opportunity involves.'").

62. Cf. Reginald Leamon Robinson, *The Impact of Hobbes's Empirical Natural Law on Title VII's Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607, 664-77 (1993) (raising this issue in the context of extant employment discrimination). In the context of the FHA, Senator Edward Brooke admitted its limitation:

Fair housing does not promise to end the ghetto; it promises only to demonstrate that the ghetto is not an immutable institution in America. It will scarcely lead to a mass dispersal of the ghetto population to the suburbs; but it will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America.

Laplace, *supra* note 59, at 211 n.50 (citing 114 CONG. REC. 2279 (1968)).

black person cannot show by adduced evidence that a real estate advertisement expresses an illegal racial preference, then the Act will not sanction either the newspaper or the real estate advertiser. Judges determine what evidence makes this showing, and these judges operate within a racist culture.⁶³ To this extent, the Fair Housing Act, its interpretation, and its remedial power offer limited redress for aggrieved blacks. Second, while the Act does reach glaring examples of impermissible racial preferences,⁶⁴ it has failed to sanction more subtle forms of racial preferences because such seemingly general liability might run afoul of, or burden, the First Amendment.⁶⁵ Meanwhile, racial discrimination and housing segregation continue to flourish in our constitutional democracy. Therefore, not only are racism and democratic ideals coexistent and consistent social practices, but also racism and the master narrative of black inferiority have been indispensable to America's democratic constitutionalism. Although racism thrives in today's social milieu, the Fair Housing Act and its remedial arm cannot achieve a future in which racism does not exist. As a consequence, the Act cannot end housing segregation because it cannot cope with the constitutionalism that legitimizes the master narrative of black inferiority.

Part II of this Article argues that a significant relationship exists between the master narrative of black inferiority and the history of housing segregation, and that the Act cannot eradicate racial discrimination and housing segregation because it cannot account for the most subtle forms of racial oppression. Toward this end, Part III argues that the master narrative of black

63. See generally DAVID T. GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* (1993) (attributing racialized discourse to the dominant culture's subjective categories and conceptions); MARGARET WETHERELL & JONATHAN POTTER, *MAPPING THE LANGUAGE OF RACISM: DISCOURSE AND THE LEGITIMATION OF EXPLOITATION* (1992) (undertaking a "discourse analysis" of the psychology of racism within the New Zealand culture).

64. See *United States v. Hunter*, 459 F.2d 205, 209 (4th Cir. 1972) (interpreting the FHA to prohibit this advertisement: "FOR RENT—Furnished basement apartment. In private white home.").

65. See *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 653 (6th Cir. 1991); see also *infra* part III and accompanying text (developing this point).

inferiority intersects with dominant white images and the violence of neighborhood purity. Consequently, while the Act can cope adequately with clear patterns, practices, and expressions that violate the advertisement preference provisions of the Act,⁶⁶ it cannot cope with general or aggregate messages in which the most subtle forms of impermissible racial preferences occur. Part IV insists that an equal image model begins to respond adequately to the Act's failure to recognize the intersection between dominant white images and the violence that excludes blacks from predominantly white communities. In sum, this Article argues that both all-white human model advertising campaigns and violence are virtually interdependent aspects of the master narrative of black inferiority, and as long as the Fair Housing Act ignores this intersection it will fail to achieve the goals of nondiscrimination and integration.

II. THE FAIR HOUSING ACT: EXTANT HOUSING SEGREGATION AND RACIAL LIMITATIONS

A. The Relationship Between Housing Segregation and the Master Narrative of Black Inferiority: A Brief Overview

In America, the master narrative of black inferiority explains the historical practices of housing segregation⁶⁷ and remains extant more than twenty-five years after the enactment of the Fair Housing Act.⁶⁸ Since the arrival of Africans in this country, America has been committed to discrimination and oppres-

66. See 42 U.S.C. § 3604(c) (1988). Under this subsection, it is unlawful to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Id.

67. See FRANKLIN, *supra* note 2, at 64-65; JORDAN, *supra* note 2, at 295; LONG & JOHNSON, *supra* note 5, at 102-05; Calmore, *supra* note 44, at 1489 (citing Karl Taeuber, *supra* note 7, at 339 ("The racial structure of housing in the United States is rooted in history.")).

68. See GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN & SOUTH AFRICAN HISTORY (1981); DOUGLAS G. GLASGOW, THE BLACK UNDERCLASS: POVERTY, UNEMPLOYMENT, AND ENTRAPMENT OF GHETTO YOUTH (1981).

sion.⁶⁹ This commitment has created "two cities"—one white, one black—as well as a host of social evils,⁷⁰ including crime and poor health.⁷¹ These "two cities" are natural and foreseeable consequences of American Negro slavery, the Black Codes, and America's post-*Plessy*,⁷² apartheid policies.⁷³ Each experience serves as a version of the master narrative of black inferiority.⁷⁴

During American Negro slavery, racial discrimination in housing patterns did not occupy center stage as a vehicle for enforcing the master narrative of black inferiority. Through the rather elaborate checks and balances of America's "peculiar institution,"⁷⁵ people understood that blacks and whites lived in separate worlds, even if they lived in relatively close proximity to each other⁷⁶ or cavorted together.⁷⁷ After all, masters and

69. KUSHNER, *supra* note 5, at 1.

70. Taeuber, *supra* note 7, at 342-43.

71. See LITWACK, *supra* note 17, at 168-70; REPORT OF THE NATIONAL ADVISORY COMM'N OF CIVIL DISORDERS 266-73 (1968) [hereinafter KERNER COMMISSION].

72. 163 U.S. 537 (1896).

73. See *Corrigan v. Buckley*, 271 U.S. 323 (1926) (upholding lower court decision allowing property owners to enter into covenants not to sell property to Negroes); see also A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55, 59-64 (1991) (focusing on the aftermath of *Plessy*); Higginbotham, *supra* note 19, at 1022-25 (describing segregationist housing statutes in the early twentieth century).

74. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), Justice Stewart eloquently made this point:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights [granted by the Thirteenth Amendment], were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-43.

75. See generally VERGE LAKE & PAULI MURRAY, *STATES' LAWS ON RACE & COLOR* (Supp. 1955) (listing examples of statutory discrimination); STAMPP, *supra* note 3 (describing slavery in the antebellum South).

76. See KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* 22 (1965) ("In Charleston, South Carolina, for example, racial residential patterns reflect slavery days, and whites and Negroes tend to live in the same area as they did before Emancipation. Negro servants can come into any area and live in white homes without a lifted eyebrow.").

77. See A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989) (discussing Virginia's efforts to prevent the blurring of the race lines and

white men had legalized violence at their immediate disposal.⁷⁸ In the final analysis, what mattered most was that housing patterns did not undermine the master narrative of black inferiority.⁷⁹

Blacks and whites have, to varying degrees, always lived in two different worlds.⁸⁰ For example, in the antebellum period, most blacks were slaves, and, with few exceptions, almost all slaves lived on plantations.⁸¹ In that situation, whites could more easily tolerate blacks living immediately next door.⁸² Slavery's legal norms impressed rather clear social roles upon both whites and blacks,⁸³ and, within its hellgates, legal sanctions and violence countenanced few deviants.⁸⁴

maintain its elaborate system of white superiority).

78. See, e.g., *State v. Mann*, 13 N.C. 167 (1829); HIGGINBOTHAM, *supra* note 3, at 255; see BELKNAP, *supra* note 42, at 2.

Southern law placed blacks at the mercy not only of their owners but of an entire race. Every white was authorized to apprehend any Negro unable to give a satisfactory account of himself. In South Carolina, if a slave found off the plantation refused to submit to interrogation, his white questioner could summarily execute him. Even for mere insolence, a member of the master race had the right to beat either a slave or a free Negro.

Id. However, "[w]hile antebellum southern law legitimated and incorporated into the legal system a vast range of violent acts by white private citizens, it did impose some restraints on the use of force against blacks." *Id.* at 2.

79. See CLARK, *supra* note 76, at 22.

It is not the sitting [or living] next to a Negro [.] or washing at the next basin that is repulsive to a white, but the fact that this implies equal status. Historically, the most intimate relationships have been approved between Negro and white so long as status of white superiority versus Negro inferiority has been clear.

Id.

80. See generally BELL, *supra* note 49 §§ 1.1-17 (reviewing the history of American racism); LITWACK, *supra* note 17 (describing treatment of Negroes in antebellum north); HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH 1865-1890* (1978) (reviewing the pattern of race relations that existed during this era and noting that its legacy remains today).

81. See GENOVESE, *supra* note 3, at 10-13; JORDAN, *supra* note 2, at 101-03; STAMPP, *supra* note 3, at 3-12.

82. RABINOWITZ, *supra* note 80, at 97.

83. See generally Higginbotham & Kopytoff, *supra* note 77, at 1975-88 (analyzing cultural and statutory classifications of race).

84. LITWACK, *supra* note 17, at 110.

"Some persons think," a Boston Negro leader remarked in 1860, "that because we have the right to vote, and enjoy the privilege of being

Whites created ghettos through these sanctions and violence. For example, in the 1850s, blacks lived and socialized in Boston's "Nigger Hill" and "along the wharves in 'New Guinea.'" "Little Africa," with its crowded wooden shacks and shanties was home to Cincinnati's blacks. In New York, blacks and poor whites were corralled in "Five Points," a notorious neighborhood that one visitor described as "but a step into Hades" and "the worst hell of America."⁸⁵ Once poorer blacks entered the ghettos, they found it virtually impossible to leave.⁸⁶

If blacks did not live in "Hades" or "hell," they lived in segregated but exclusive districts⁸⁷ because despite their financial

squeezed up in an omnibus, and stared out of a seat in a horse-car, that there is less prejudice here than there is farther South." This was only partially true, he continued, for "it is five times as hard to get a house in a good location in Boston as it is in Philadelphia, and it is ten times as difficult for a colored mechanic to get work here as it is in Charleston." Moreover, local restaurants, hotels, and theaters continued to exclude the Negro, while at least two amusement places helped to perpetuate existing prejudices through constant caricature and ridicule.

Id. (citation omitted).

85. LITWACK, *supra* note 17, at 168 (citations omitted). These ghettos had a tremendous impact on the health of black residents. For example,

[i]n New York City, tuberculosis proved fatal to twice as many blacks as whites, a reflection of adverse living conditions. Philadelphia's coroner attributed the high mortality rate in Negro districts to intemperance, exposure, and malnutrition. After conducting an inspection in 1848, he reported that many Negroes had been "found dead in cold and exposed rooms and garrets, board shanties five and six feet high, and as many feet square, erected and rented for lodging purposes, mostly without any comforts, save the bare floor, with the cold penetrating between the boards, and through the holes and crevices on all sides." Some bodies had been recovered "in cold, wet, and damp cellars," while still others had been found lying in back yards and alleys.

Id. at 169 (citations omitted). According to a southern visitor to a northern city, the conditions in which blacks lived demonstrated the folly of emancipation.

"Thar they was," . . . "covered with rags and dirt, livin in houses and cellars, without hardly any furniture; and sum of 'em without dores or winders. . . . This, thinks I, is nigger freedom; this is the condition to which the philanthropists of the North wants to bring the happy black people of the South!"

Id. at 168-69 (citations omitted).

86. See, e.g., ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960, at 16-20 (1983).

87. LITWACK, *supra* note 17, at 168-69 (stating that "some observers . . . pointed to the remarkable number of fine houses owned by Negroes in attractive neighbor-

wherewithal, they were excluded from all-white neighborhoods. Although whites in the 1700s and 1800s perceived blacks as a threat to common decency, civility, and everyday expectations, "[t]he fear of depreciated property values overrode virtually every other consideration."⁸⁸

As early as 1793, the attempt to locate "a Negro hut" in Salem, Massachusetts, prompted a white minister to protest that such buildings depreciated property, drove out decent residents, and generally injured the welfare of the neighborhood. Some years later, New Haven petitioners complained that the movement of Negroes into previously white neighborhoods deteriorated real estate values from 20 to 50 per cent; and Indianan asserted that the proposed establishment of a Negro tract would reduce the value of nearby white-owned lots by at least 50 per cent. Obviously, then, the Negro had to be contained in his own area. Thus when a Boston Negro schoolmistress considered moving to a better neighborhood, the inhabitants of the block where she proposed to settle resolved either to eject her or to destroy the house. By 1847, the residents of South Boston could boast that "not a single colored family" lived among them—only immigrants "of the better class who will not live in cellars."⁸⁹

This fear formed the bulwark against any migration by well-to-do blacks from even exclusive Negro communities into all-white neighborhoods.

By the 1860s, despite violent efforts to remove blacks from, and to prevent them from entering, white neighborhoods, blacks and whites could still be found "living next to one another in certain sections of the city."⁹⁰ Such race mixing, however, was usually limited to special economic circumstances. Blacks either worked for their white neighbors, or whites were too poor to leave the neighborhoods. When they had the economic wherewithal to do so, however, whites often did not hesitate to

hoods," and the fact that "middle- and upper-class Negroes maintained some respectable living quarters").

88. *Id.* at 169.

89. *Id.* at 169-70 (citation omitted).

90. RABINOWITZ, *supra* note 80, at 97.

leave.⁹¹

After the Civil War, the master narrative of black inferiority came under immediate attack, and housing patterns changed as blacks became active politically, socially, and economically.⁹² The South could no "longer formally and openly . . . incorporate white violence against blacks into its positive law."⁹³ Black servants, by living next to their white employers, undermined the master narrative of black inferiority. In addition to the extralegal violence that whites used to reestablish white race dominance,⁹⁴ whites in both the North and South sought new ways to prevent blacks from breaking out of ghettos and leaving the South.⁹⁵

At the close of the nineteenth century, "Black-belt neighborhoods" or "nigger towns" were created by the enactment of race segregation ordinances,⁹⁶ which mushroomed in number⁹⁷ after the Supreme Court gave federal imprimatur to American apartheid in *Plessy v. Ferguson*.⁹⁸ When the Supreme Court struck down these local schemes on constitutional grounds, it did so because they violated a white property owner's right to alienate his property.⁹⁹ For example, in *Buchanan v. Warley*,¹⁰⁰ the Supreme Court invalidated a local segregative ordinance on two grounds. First, because the ordinance violated a white owner's right to sell his property to any willing black buyer, it could not be justified as an exercise of a state's police

91. See MANGUM, *supra* note 17, at 44.

92. See W.E.B. Du Bois, *The Social Effects of Emancipation* (Feb. 1, 1913), reprinted in W.E.B. DU BOIS: A READER 71 (Meyer Weinberg ed., 1970).

93. BELKNAP, *supra* note 42, at 4.

94. See *id.* at 4-26 (discussing the use of lynching to control, dominate, and exploit African Americans).

95. See Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59, 60-61 (1993).

96. See *id.*

97. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917).

98. 163 U.S. 537 (1896); see Higginbotham, *supra* note 19, at 1009-10; Higginbotham, *supra* note 73, at 56-59.

99. Many whites challenged such segregation ordinances because as landlords, they did not want to surrender their right to rent even to blacks, and because as real estate brokers, they wished to buy property cheaply by permitting blacks to enter certain neighborhoods. See MANGUM, *supra* note 17, at 139-40.

100. 245 U.S. 60.

power.¹⁰¹ Second, the ordinance violated the Fifth Amendment because it took property by inverse condemnation, preventing a white owner from disposing of his property.¹⁰² After *Buchanan*, one state sought to protect vested property rights by "forbidding the occupancy of a dwelling on a city block by members of one race where the block is inhabited only by the other race."¹⁰³ The Maryland Court of Appeals decided that this ordinance differed little from the *Buchanan* scheme and invalidated it.¹⁰⁴

Even though the housing segregation ordinances did not pass constitutional muster, whites were motivated by the same concern as were their legislatures—separating the races. Because state involvement created constitutional infirmities, whites turned to alternative arrangements—private agreements¹⁰⁵ or covenants.¹⁰⁶ As late as the 1940s and 1950s, if blacks moved in, whites moved out soon thereafter.¹⁰⁷ In *Shelley v.*

101. *Id.* at 74.

102. See MANGUM, *supra* note 17, at 142; see also A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit of Racial Justice*, 1990 U. ILL. L. REV. 763, 767 (discussing *Buchanan*).

103. MANGUM, *supra* note 17, at 142 (discussing *Jackson v. State*, 103 A. 910 (1918)).

104. *Jackson*, 103 A. 910.

105. See MANGUM, *supra* note 17, at 144.

Certain citizens of the city of Dallas, both white and colored, entered into a voluntary agreement to district the city in such a manner as to segregate the two races. The city then enacted an ordinance punishing criminally a breach of the agreement. In a suit to enjoin the enforcement of this ordinance, the court asserted that since a direct segregation ordinance is invalid, an enactment punishing the breach of an agreement to do the same thing is also of no effect.

Id.

106. See generally LONG & JOHNSON, *supra* note 5, at 10-38 (discussing the development of race restrictive covenants); MAGNUM, *supra* note 17, at 143-50 (discussing a number of private housing segregation schemes); VOSE, *supra* note 5, at 56-57, 68 (noting the court battles over racially restrictive housing covenants); Timothy Jost, *The Defeasible Fee and the Birth of the Modern Residential Subdivision*, 49 MO. L. REV. 695, 724-25 (1984) (reviewing race restrictions in housing developments).

107. See, e.g., 1 ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* (1970); HIRSCH, *supra* note 86, at 5.

The census figures for 1950 revealed not a city undergoing desegregation but one in the process of redefining racial borders after a period of relative stability. Black isolation was, in fact, increasing even as the Black Belt grew. Nearly 53% of the city's blacks lived in exclusively black census tracts in 1950 compared with only 49.7% in 1940; more

Kraemer,¹⁰⁸ the Court prohibited state courts from enforcing these private schemes.¹⁰⁹ Despite the *Buchanan* and *Kraemer* doctrines,¹¹⁰ and later decisions such as *Jones v. Alfred H. Mayer, Co.*,¹¹¹ few blacks have been able to escape from ghettos¹¹² and move into the "white noose" that surrounds them.¹¹³

If one considers the publicly expressed rationales for public and private segregation regimes, one can see that the master narrative of black inferiority explains race discrimination and housing segregation. For example, in 1910, several southern cities enacted segregation ordinances to "discourage friction between the white and Negro races and to keep them from inter-

people moved into the Black Belt than were permitted to leave it. As overcrowded areas became more overcrowded, the pressure of sheer numbers forced some blacks into previously all-white areas. Thus, whereas blacks were becoming more isolated from the white population generally, a large number of whites found themselves living in technically "mixed" areas. Segregation was not ending. It had merely become time to work out a new geographical accommodation between the races.

Id.

108. 334 U.S. 1 (1948).

109. *Id.* at 20; see also *Barrows v. Jackson*, 346 U.S. 249 (1953) (extending the *Shelley* doctrine to prohibit contract damages actions against white property owners who sell to blacks in violation of a racially restrictive covenant).

110. See *Higginbotham et al.*, *supra* note 102, at 770.

The impact of the due process rationale enunciated in *Buchanan* on housing opportunities for black Americans has been critical. If the United States Supreme Court had not exercised its power to review discriminatory state statutes and city ordinances and declare them unconstitutional, many southern states and perhaps many other parts of America could be nearly as destructive of the rights of black Americans in 1990 regarding equality of opportunity in housing as they were seventy-five years or more ago. Without the Supreme Court, the plight of black Americans today concerning urban and suburban housing conditions could be almost akin to that of black South Africans.

Id.

111. 392 U.S. 409 (1968).

112. See *MASSEY & DENTON*, *supra* note 48, at 160-62; Sam Roberts, *Shifts in 80's Failed To Ease Segregation*, N.Y. TIMES, July 15, 1992, at B1 ("Despite the huge shifts in New York City's population in the 1980s, blacks and whites—regardless of their incomes—have remained as segregated as they were when the decade began, according to a block-by-block analysis of the 1990 census.").

113. See *KUSHNER*, *supra* note 5, at 3; see also *EDSALL & EDSALL*, *supra* note 43, at 230-31 (describing predominantly white and republican suburbs).

mingling socially and to some extent commercially."¹¹⁴ Things were no different in 1917, for in *Buchanan*, counsel for the city of Louisville expressed his rationale for segregated housing:

It is shown by philosophy, experience, and legal decisions, to say nothing of Divine Writ, that . . . the races of the earth shall preserve their racial integrity by living socially by themselves. Black neighborhoods are undesirable because "the shiftless, the improvident, the ignorant and the criminal carry their moral and economic condition with them wherever they go."¹¹⁵

Similarly, in 1927, a Virginia city based its segregation ordinance on miscegenation statutes in order to prohibit blacks from using residences if such buildings were occupied by persons whom blacks could not legally marry.¹¹⁶ After World War II, these public sentiments did not change, and as blacks migrated north, the Fair Housing Administration insured housing loans that enabled whites to flee the urban centers and reside in suburban communities that, explicitly or implicitly, excluded "members of other than the Caucasian race."¹¹⁷ Today, as in the 1850s and 1890s, many whites believe that their black neighbors suppress their homes' fair market values.¹¹⁸ As in the years immediately preceding the Fair Housing Act, whites today express their feelings about the sanctity of neighborhood purity¹¹⁹ by burning crosses on blacks' property or brutally assault-

114. MANGUM, *supra* note 17, at 140.

115. Higginbotham et al., *supra* note 102, at 854 (citing Brief for Defendant in Error at 7, 12, *Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 33)).

116. MANGUM, *supra* note 17, at 143.

117. See GEORGE B. TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 1266-68 (2d ed. 1992); Calmore, *supra* note 44, at 1510-12.

118. See MASSEY & DENTON, *supra* note 48, at 94; see also *United States v. Myers*, 892 F.2d 642 (7th Cir. 1992).

Myers' parents wanted to sell their home and were concerned that its value would be impaired if there were blacks living in the neighborhood. Myers decided to scare the black couple into leaving, and together with Randall Neal bought two gallons of gasoline at an all-night gas station and set fire to the [black couple's] car. The black couple took the hint and moved away.

Id. at 643.

119. See *United States v. McInnis*, 976 F.2d 1226, 1229 (9th Cir. 1992) (noting that the defendant had stated that "he did not care to be around 'niggers'").

ing blacks.¹²⁰

In exhibiting such behavior, whites operate on the master narrative of black inferiority. By attacking blacks, burning their property, or preventing them from enjoying their property, these whites are little different from the father in this Article's opening dialogue, who deprived Monroe of his mule—an important factor in Monroe's personal and economic success. A black person's house, like Monroe's mule, can be used to increase income, personal choices, and upward mobility.¹²¹ When the father killed Monroe's mule, Monroe left the county, just as black families are often forced out of their homes by race hatred and violence, perhaps without recouping their valuable investment in their property. The master narrative of black inferiority thus operates not only in the manner described in the opening dialogue, but also in those cases in which whites deny blacks the right to enjoy their property. The same is true if whites prevent blacks from having access to such property.

B. Fair Housing Act, Racial Limits, and Extant Housing Segregation

1. The Fair Housing Act and the Amendments of 1988

Enacted in 1968, the Fair Housing Act¹²² represented an institutional effort to curb housing discrimination and housing segregation, two consequences of the master narrative of black inferiority. Under the Act, Congress prohibited many discriminatory practices that prevented blacks from buying and renting

120. See, e.g., *United States v. Lee*, 6 F.3d 1297, 1297 (8th Cir. 1993) (stating that the defendant "constructed and burned a cross on a hill near an apartment complex in which a number of black families resided"); *McInnis*, 976 F.2d at 1228 ("McInnis fired two shots from an 8mm Mauser rifle through the Kellers' home.").

121. See, e.g., *Sawada v. Endo*, 561 P.2d 1291, 1297 (Haw. 1977).

When a family can afford to own real property, it becomes their single most important asset. Encumbered as it usually is by a first mortgage, . . . it is always available in its entirety for the benefit and use of the entire family. Loans for education and other emergency expenses, for example, may be obtained on the security of the marital estate.

Id.

122. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988 & Supp. V 1993)).

real property¹²³ with the hope of achieving its broadly supported goals of nondiscrimination and integration.¹²⁴ These goals were broadly supported for two reasons. First, the Supreme Court had recently heard arguments for strengthening a similar statutory provision in *Jones v. Alfred H. Mayer Co.*,¹²⁵ and later prohibited racial discrimination in the sale of real property.¹²⁶ Second, after the reaction to Martin Luther King Jr.'s assassination threatened urban markets and white suburbs,¹²⁷ Congress impulsively sought a legislative vehicle for "racial conciliation."¹²⁸ To alleviate the stress, poverty, hopelessness, and violence of black urban life,¹²⁹ the 1968 Fair Housing Act provided for broad remedial measures.¹³⁰ Lastly, federal courts gave this Act a "broad," "inclusive," and "gener-

123. See *id.*; Katherine G. Stearns, *Countering Implicit Discrimination in Real Estate Advertisements: A Call for the Issuance of Human Model Injunctions*, 88 NW. U. L. REV. 1200, 1205-08 (1994).

124. See Edward W. Brooke et al., *Non-Discrimination in the Sale or Rental of Real Property: Comments on Jones v. Alfred H. Mayer Co. and Title VIII of the Civil Rights Act of 1968*, 22 VAND. L. REV. 455, 456-57 (1969).

125. See 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 prohibited private and public discrimination in the sale or rental of real property).

126. *Id.* at 413.

127. See GLASGOW, *supra* note 68, at 7, 105-24 (discussing the Watts riots); KERNER COMMISSION, *supra* note 71, at 75-82 (discussing a riot that occurred in Plainfield, New Jersey, a community in which 30% of the residents were black).

128. See KUSHNER, *supra* note 5, at 3; Ware, *supra* note 95, at 74 ("Dr. Martin Luther King, Jr.'s assassination on April 4, 1968, and the resulting wide-spread civil unrest, provided the final impetus needed to push H.R. 2516 out of the House Rules Committee."). During the final debate, a member of the House argued that

the assassination of Martin Luther King, Jr., has given us a tragic reminder of the urgency for federal protection of the exercise of civil rights. . . . A national fair housing act . . . is required unless the explosive concentration of Negroes in the urban ghettos is to continue. The hour is late. If Congress delays, it may be writing the death warrant of racial conciliation.

Id. (citing 114 CONG. REC. H9589 (daily ed. Apr. 10, 1968) (statement of Rep. Ryan)).

129. MASSEY & DENTON, *supra* note 48, at 83 ("Discrimination in employment exacerbated black poverty and limited the economic potential for integration, and black residential mobility was systematically blocked by pervasive discrimination and white avoidance of neighborhoods containing blacks.").

130. Fair Housing Act of 1968 § 810, Pub. L. No. 90-284, 82 Stat. 81, 85-86 (codified as amended at 42 U.S.C. §§ 3610-3613, 3616a (1988 & Supp. V 1993)). But see DERRICK BELL, *AND WE ARE NOT SAVED* 152-53 (1991) (describing court-approved ceilings on the number of minorities allowed to live in a residential area).

ous construction."¹³¹

The 1968 Act prohibited discrimination and imposed liability on those discriminating against citizens seeking to buy or rent housing based on their race, color, religion, or national origin.¹³² Although the Act exempted any single family house that was sold or rented by its owner,¹³³ it specifically provided in relevant part that it was unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preferences, limitation, or discrimination.¹³⁴

Unfortunately, federal efforts to eliminate these vestiges of the master narrative of black inferiority failed under the 1968 Act. Since 1968, blacks continue to face housing discrimination and live in segregated communities. Of course, some blacks escaped the suffocating poverty and abysmal city services by relocating to more racially integrated communities. These minor successes notwithstanding, the master narrative of black inferiority, which had initially underwritten racial oppression and isolation, continued basically unabated.¹³⁵ As one commentator

131. See, e.g., *United States v. Gilbert*, 813 F.2d 1523, 1525 (9th Cir.), cert. denied, 484 U.S. 860 (1987).

132. Fair Housing Act of 1968 § 804, Pub. L. No. 90-284, 82 Stat. 81, 83 (codified as amended at 42 U.S.C. § 3604 (1988)). The Act now includes sex, familial status, and, in some instances, handicap within this class.

133. Fair Housing Act of 1968 § 803(b)(1), 82 Stat. at 82-83 (codified as amended at 42 U.S.C. § 3603(b)(1) (1988)).

134. Fair Housing Act of 1968 § 804(a)-(c), 82 Stat. at 83 (codified as amended at 42 U.S.C. § 3604(a)-(c) (1988)).

135. See James A. Kushner, *Apartheid in America: An Historical and Legal*

explained, "[a]lthough an increasing number of blacks are present in America's suburbs and predominantly white neighborhoods, the stark pattern of racial residential segregation has worsened. America is more segregated—physically separated by race—today than at any time in its history."¹³⁶

In light of the continuing effects of the master narrative of black inferiority, Congress enacted the Fair Housing Amendments Act of 1988.¹³⁷ Congress intended these amendments to strengthen the original Act's enforcement arm and broaden its remedial scope.¹³⁸ Under the 1988 Amendments, it is unlawful:

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce, or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.¹³⁹

In addition to these statutory amendments, Congress combated the master narrative of black inferiority by placing in the Act three mechanisms to achieve the goals of nondiscrimination and integration. First, Congress granted the United States Department of Housing and Urban Development (HUD) the power

Analysis of Contemporary Racial Residential Segregation in the United States, 22 HOW. L.J. 547, 547 (1979) ("We live in a divided nation. In an examination of desegregation, perhaps the only certainty is that residential segregation is pervasive and the degree of separation is increasing.").

136. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1050 (1989).

137. Fair Housing Amendments Act of 1988, Pub. L. No. 100-340, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993)).

138. See Stearns, *supra* note 123, at 1206. The Fair Housing Amendments of 1988 broadened the FHA in three ways: first, they strengthened the Act by permitting private litigants to seek enforcement through the courts, § 813, 102 Stat. at 1633-34 (codified as amended at 42 U.S.C. § 3613 (1988)); second, they protected the handicapped, § 804, 102 Stat. at 1620-22 (codified as amended at 42 U.S.C. § 3604 (1988)); and third, they prohibited discrimination based on familial status, § 804, 102 Stat. at 1620-22 (codified as amended at 42 U.S.C. § 3604 (1988)).

139. 42 U.S.C. § 3604(d)-(e) (1988).

to enforce the Act administratively.¹⁴⁰ Second, the Act empowered the United States Attorney General to initiate action to eradicate discriminatory "pattern[s] and practice[s]" and to enforce HUD's conciliation agreements.¹⁴¹ Third, the 1988 Amendments provided private citizens with the statutory right to bring civil actions against the Act's violators.¹⁴² This latter provision was not necessarily new, for

[i]t is generally agreed that the original Fair Housing Act was "designed to rely primarily on private enforcement [to achieve its goals]." But the statutory restrictions on remedies severely hampered private enforcement under the original Act. Under the original Private Enforcement Provision, a plaintiff who established a violation of the Act and proved that he suffered injury as a result of that violation could recover compensatory damages, but punitive damages were limited to \$1,000, and attorneys fees were recoverable only if the plaintiff showed financial need. Such limited remedies proved inadequate incentives for plaintiffs facing the financial and emotional toll of filing a privately initiated fair housing suit. Indeed, those limited remedies have been identified as "the primary reasons that [the original] Title VIII was not effective in eradicating housing discrimination."¹⁴³

To eliminate this remedial limitation, Congress in 1988 gave greater incentive to private parties to enforce the Act through civil action. With this new incentive, private parties can more effectively attack housing discrimination and segregation. Toward this end, private parties are allowed to bring an action not within 180 days, but within two years of the discriminatory act. Second, aggrieved citizens can now obtain punitive awards and appropriately chasten offending parties. Lastly, the prevailing plaintiff can seek attorney fees without satisfying a financial needs test. Without the original Act's remedial barriers, a court

140. 42 U.S.C. §§ 3610, 3612 (1988); HUD *ex rel.* Herron v. Blackwell, 908 F.2d 864 (11th Cir. 1990) (enforcing HUD's administrative disposition of Title VIII complaint). See generally Kushner, *supra* note 136 (discussing HUD's administrative enforcement powers).

141. 42 U.S.C. § 3614.

142. 42 U.S.C. § 3613.

143. Stearns, *supra* note 123, at 1208-09 (alterations in original) (citations omitted).

can now grant not only the appropriate amount of compensatory and punitive damages, but also attorney fees and injunctive relief.¹⁴⁴ Despite the possibility of government action, the "main generating force [behind enforcement of the Act] must be private suits," if the Act's priorities of nondiscrimination and integration are going to be advanced.¹⁴⁵

2. *Racial Limits and Extant Housing Segregation*

Despite the enactment of the original Act and the 1988 amendments, which strengthened the national goals of nondiscrimination and integration, the master narrative of black inferiority continues to play a significant role in excluding blacks from all-white and predominantly white communities.¹⁴⁶ Blacks continue to suffer the trauma of hostile physical and psychological separation¹⁴⁷ and the reinforcement of the view that black self-conception and identity are inferior to that of whites.¹⁴⁸ Moreover, blacks continue to live under America's market-driven, apartheid-like housing policies. By strengthening the private enforcement provision of the Act without recognizing the influence of the master narrative of black inferiority on America's racist culture, Congress sent the message that racial discrimination and housing segregation are "problem[s] . . . of individual access rather than . . . illegal activity aimed at a segment of society."¹⁴⁹

144. See 42 U.S.C. § 3613; Stearns, *supra* note 123, at 1208-09.

145. *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 211 (1972); see Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 378 (1988).

146. See MASSEY & DENTON, *supra* note 48, at 102-04.

147. See Brooke et al., *supra* note 124, at 456.

148. See Armstrong, *supra* note 60, at 909.

149. *Id.* at 912.

Despite the increased incentives to initiate a private action under the amended Act, serious obstacles remain. First, victims often do not realize that they are being discriminated against, especially if the method of discrimination is more subtle than an outright or hostile refusal to sell or rent. Second, even if the victims are aware that they have been discriminated against, they may be unwilling to subject themselves to the financial and emotional toll that a trial would inevitably entail. Third, discrimination in the housing market may be extremely difficult to prove, since it is a case-specific area of law with virtually no statistical evidence

Congress and the federal courts must acknowledge that the master narrative of black inferiority is subtle and sophisticated, not only because racist culture operates almost invisibly,¹⁵⁰ but also because people who are not openly racist discriminate without intent.¹⁵¹ At this level, the master narrative of black inferiority coexists with the Fair Housing Act.

In addition to the manner in which racism operates invisibly and pervasively, the master narrative of black inferiority sustains housing segregation because whites explicitly prefer to live with other whites and implicitly assume that racial discrimination can maintain "a racially segmented housing market."¹⁵² Some commentators argue:

Whites can only avoid co-residence with blacks if mechanisms exist to keep blacks out of most white neighborhoods. They can only flee a neighborhood where blacks have entered if there are other all-white areas to go to, and this escape will only be successful if blacks are unlikely to follow. Some method must exist, therefore, to limit black entry to a few neighborhoods and to preserve racial homogeneity in the rest. Although white prejudice is a necessary precondition for the

on which to rely. Thus, the seemingly impossible burden of proof may discourage victims of housing discrimination from bringing suit.

Stearns, *supra* note 123, at 1211 n.43.

150. See GOLDBERG, *supra* note 63, at 149.

In the seeming informalities of its modes, literary and cultural production is particularly well-placed to mold, circumscribe, and stamp racialized identity, since racial significations are deeply implicit in the signs employed and employable. Racialized connotations are embedded in the locus of ordinary social meanings that cultural expression reflects in the various space-time contexts of modernity. Knowledge, in particular knowledge of and about the social, is not produced in a vacuum. Knowledge producers are set in social milieus. The political economy and culture of their productive practices act upon the categories employed, and so they inform the knowledge being produced. By furnishing assumptions, values, and goals, this economy and culture frame the terms of the epistemological project. Once produced, the terms of articulation set their users' outlooks. The categories that now fashion content of the known constrain how people in the social order at hand think about things. Epistemological 'foundations,' then, are at the heart of the constitution of social power.

Id. (citations omitted).

151. See Lawrence, *supra* note 12, at 318; Oppenheimer, *supra* note 12, at 900-17.

152. See MASSEY & DENTON, *supra* note 48, at 97.

perpetuation of segregation, it is insufficient to maintain the residential color line; active discrimination against blacks must occur also.¹⁵³

The master narrative of black inferiority thus continues to promote and sustain racial discrimination and housing segregation, even though a clear congressional and constitutional mandate exists to remedy this problem. If the environment that is the basis for the master narrative of black inferiority is a constitutional one,¹⁵⁴ then a broadly remedial act cannot eradicate housing segregation within those very same, albeit somewhat differently interpreted,¹⁵⁵ constitutional boundaries. The master narrative of black inferiority thrived within a constitutional framework, and an Act that is bound by that framework cannot end the violence, either in dominant white images or in physical

153. *Id.*

154. *See, e.g.,* *Evans v. Abney*, 396 U.S. 435 (1970) (refusing to find a violation of the Fourteenth Amendment when a court determined that a testator who conveyed land for the creation of a whites-only park would rather have had the trust terminated than the park integrated); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (finding separate but equal public accommodations beyond the reach of the Equal Protection Clause of the Fourteenth Amendment); *The Civil Rights Cases*, 109 U.S. 3 (1883) (denying Congress the power under the Civil Rights Act of 1866 to regulate private discrimination); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (casting no meaning on the Privileges and Immunities Clause of the Fourteenth Amendment); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (demonstrating that blacks have no rights that a white man is bound to respect).

155. *See, e.g.,* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that the Civil Rights Act of 1964 does not preclude the use of reasonable testing procedures as a condition of employment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (relying on 42 U.S.C. § 1982, originally adopted as part of Civil Rights Act of 1866, to invalidate private racial discrimination in housing); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (finding that Congress may constitutionally use Commerce Clause as basis of civil rights enforcement); *Barrows v. Jackson*, 346 U.S. 249 (1953) (extending *Shelley* doctrine to prevent contract damages actions against whites who sell to blacks in violation of racially restrictive covenants); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that private agreements to exclude persons of certain races from the use of real estate for residential purposes do not violate the Fourteenth Amendment, but state enforcement of these agreements does); *Corrigan v. Buckley*, 271 U.S. 323 (1926) (asserting that the Fifth, Thirteenth, and Fourteenth Amendments do not prohibit private owners from covenanting not to sell to any person of negro blood); *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating ordinance preventing blacks from occupying homes in predominantly white neighborhoods); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (invalidating state law prohibiting blacks from serving on juries).

assault,¹⁵⁶ that attends such a master narrative.¹⁵⁷

During the 1970s, despite the presence of this narrative, blacks did make some gains; those with the financial wherewithal to do so left the urban ghettos and migrated to the suburbs.¹⁵⁸ In effect, blacks broke down the ghetto/suburb dichotomy and altered the spatial inequality¹⁵⁹ that was borne in the 1890s and cemented after World War II.¹⁶⁰ Conceptually, integration was working. As blacks escaped the ghetto, white suburbanization also declined.¹⁶¹

At the same time, the migration of blacks from south to north decelerated and reversed, and for the first time since the Civil War, the south experienced a net in-migration of blacks. Between 1970 and 1980, the northeast and the midwest together *lost* some 342,000 black migrants while the south *gained* 209,000 black entrants. The drying up of this traditional south-to-north migration stream eliminated a key supply-side factor that had contributed to ghetto formation and white racial hostility for a hundred years.¹⁶²

Furthermore, improving socio-economic conditions among blacks

156. See MASSEY & DENTON, *supra* note 48, at 97. Massey and Denton point out that whites have defended the color line traditionally with violence. As physical violence has declined, whites still use violence to insulate blacks within ghetto walls. Because physical violence has a downside, whites have "shifted tactics to adopt less overt and more socially acceptable ways of defending the color line." *Id.* Accordingly, the absence of overt discrimination does not mean that exclusionary practices have ended, however; rather, the character of discrimination has changed. Black homeseekers now face a more subtle process of exclusion. Rather than encountering "white only" signs, they face a covert series of barriers. Instead of being greeted with the derisive rejection "no niggers allowed," they are met by a realtor with a smiling face who, through a series of ruses, lies, and deceptions, makes it hard for them to learn about, inspect, rent, or purchase homes in white neighborhoods.

Id.

157. See BELL, *supra* note 130, at 151-53; KUSHNER, *supra* note 5, at 3; Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Act of 1964 and 1968*, 82 HARV. L. REV. 834, 838, 848 (1969).

158. See MASSEY & DENTON, *supra* note 48, at 61; Ware, *supra* note 95, at 62.

159. See Calmore, *supra* note 44, at 1492-1501.

160. See Joseph B. Robinson, *Fair Housing Legislation in the City and State of New York*, in *THE POLITICS OF FAIR-HOUSING LEGISLATION: STATE AND LOCAL CASES* 27 (Lynn W. Eley & Thomas W. Casstevens eds., 1968).

161. MASSEY & DENTON, *supra* note 48, at 60.

162. *Id.* (citations omitted).

bolstered the Act's goal of integration. With steady urban employment, blacks began to integrate the suburbs. Until the 1973 recession, "black income levels were rising and levels of racial discrimination were falling. In 1973 the rate of black poverty reached its lowest level in U.S. history."¹⁶³ Despite the persistence of the master narrative, the confluence of declining racial discrimination and black social and economic mobility produced the sanguine hope that, within constitutional limits, the Act would end housing segregation.¹⁶⁴

Despite the relative successes in the years immediately after Congress passed the Fair Housing Act, housing segregation and racial isolation remained extant because, as Derrick Bell has noted, "[r]acial policy is the culmination of thousands of . . . individual practices."¹⁶⁵ During the 1970s, segregation persisted in both urban and suburban areas, and the ghetto gave birth to the permanent black underclass.¹⁶⁶ If black upward economic mobility and declining racial discrimination advanced the Act's integration goals, then the permanence of housing segregation can be attributed only to race.

Through the Fair Housing Act, Congress "intended 'to provide, within constitutional limitations, for fair housing throughout the United States.'"¹⁶⁷ Race and constitutional limitations are, however, interdependent; despite the presence of strong constitutional jurisprudence, blacks have been unable to use the Act to eradicate housing segregation. Several factors explain extant housing segregation, all of which are directly or indirectly linked to the master narrative of black inferiority. If the central factor is race, then its subsets are housing markets that prefer race discrimination to profit taking, and hypersegregation and isolation in suburban communities to racial integration.

First, resistant, extant housing segregation continues to belie black financial wherewithal.¹⁶⁸ The rising income levels of

163. *Id.* at 61 (citations omitted).

164. *Id.*

165. BELL, *supra* note 49, at 7.

166. See MASSEY & DENTON, *supra* note 48, at 61, 73-74.

167. *United States v. Gilbert*, 813 F.2d 1523, 1526 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987).

168. *Race vs. Income in Housing Discrimination*, MINORITY MARKETS ALERT (E.P.M.

blacks thus do not, and have not, undermined housing segregation,¹⁶⁹ which cannot be explained by housing market information deficits.¹⁷⁰ Whether blacks lived in the North or South, the

Communications), Sept. 1992.

Race and not income seems to be the most important factor in continuing housing segregation in the city. Currently, over half of [New York City's] Blacks live in block groups in which they constitute 75[% or more] of the population. But Blacks studied are segregated at about the same rates, whether they are above or below the poverty line.

Id.

169. MASSEY & DENTON, *supra* note 48, at 85.

170. *Id.* at 87. One thing that explains the concerted and systematic effort to exclude blacks, affluent or poor, is educational elitism, whereby whites seek to guarantee their children an edge in competing with the "Other"—blacks. See Nancy Folbre, *The Bottom Line: Business to the Rescue?*, 255 NATION 281 (1992).

The shifting demographics of race, age and family structure make privatization more attractive to the largely white, suburban and older Americans who run or invest in corporations. Public education in this country used to be virtually private, because local communities could focus their education spending on their own children and exclude those of a different ethnic or racial background. That remained true even after *Brown v. Board of Education*, the 1954 Supreme Court decision overturning segregation in schools, because of the lethal combination of residential housing segregation and school budgets based on local property taxes.

Id. at 282. Limited employment opportunities are another reason why whites seek a competitive edge on blacks. As corporations restructure in times of economic contraction, especially due to the recent intensification of the internationalization of the United States economy, limited economic opportunities are further complicated when individual racism and the master narrative of black inferiority effectively render blacks socially and economically irrelevant. See Sara McLafferty & Valerie Preston, *Spatial Mismatch and Labor Market Segmentation for African-American and Latina Women*, 68 ECON. GEOGRAPHY 406, 406 (1992) ("[T]he economic and social marginalization of African-Americans and Latinos in inner cities [are] rooted in the broader process of economic restructuring. The shift from a goods-producing to an information- and service-producing economy has dramatically reduced job opportunities for minorities, particularly minority men, who historically found work in manufacturing.").

Blacks can overcome some of the disparities in labor market segmentation by gaining access to all-white or predominantly white communities, primarily because these communities have better schools and services. Blacks can gain this access under the FHA. When a few blacks locate in these communities, they encounter some whites who consciously reject them and others who unconsciously resist them. The result is not only isolation, but also physical or symbolic violence, because whites probably feel that the last remaining vestiges of their supposedly privileged status—all-white communities—have been befouled and that any opportunities derived from this privilege have been lost. See MASSEY & DENTON, *supra* note 48, at 94 ("Given that a home is widely viewed as a symbol of a person's worth, these views imply that whites perceive blacks to be a direct threat to their social status.") (citations omitted).

pattern of housing segregation remained relatively the same among affluent and poor blacks.¹⁷¹

Among northern metropolitan areas, for example, blacks, no matter what their income, remain very highly segregated from whites. As of 1980, black families earning under \$2,500 per year experienced an average segregation index of 86 [out of 100], whereas those earning more than \$50,000 had an average score of 83; . . . This pattern of constant, high segregation was replicated in virtually all northern urban areas.¹⁷²

Although southern areas generally evinced lower levels of racial segregation, the basic pattern by income was the same: rising economic status had little or no effect on the level of segregation that blacks experienced. On average, segregation moved from 74 in the lowest income category to 73 in the highest, with a value of 67 in between. Segregation was particularly high and resistant to change in Atlanta, Baltimore, Dallas, Miami, and Tampa; but even in southern cities with relatively low levels of segregation, there was little evidence of a meaningful differential by income: the poorest blacks in Birmingham, Alabama, displayed a segregation index of 46, whereas the most affluent black families had a segregation index of 45.¹⁷³

Blacks, whether poor or affluent, thus failed to break down racially discriminatory barriers, thereby reinforcing segregated housing patterns. Furthermore, blacks appeared to have sufficient housing market information to identify relocation opportunities.¹⁷⁴ A housing market information deficit thus cannot explain extant housing segregation. This conclusion is strengthened by the work of Reynolds Farley in Detroit. "He found that blacks were quite knowledgeable about housing costs throughout the metropolitan area, even in distant white suburbs, and were well aware that they could afford to live outside the ghetto. Whatever was keeping affluent blacks out of white areas, it was not ignorance."¹⁷⁵

171. MASSEY & DENTON, *supra* note 48, at 86-87.

172. *Id.* at 85.

173. *Id.* at 87.

174. *Id.*

175. *Id.*

Black suburbanization did not achieve integration under the Act, even though some blacks were able to escape from urban ghettos or from racially segregated urban communities. Housing segregation remained extant during the 1970s, despite socio-economic factors that had increased the likelihood that the Act's goal of integration would be achieved. Instead, blacks became geographically isolated within the cities.¹⁷⁶

Second, despite the scope of extant housing segregation under the aegis of the Act, the extent of racial segregation remains understated because it does not include the black underclass, hypersegregation, and isolation within suburban communities. The creation of the black underclass trapped blacks in a cycle of poverty and despair from which few have escaped.¹⁷⁷ When their degree of entrapment is further compounded by racial isolation, blacks are not just segregated, but hypersegregated.¹⁷⁸ Hypersegregation contains five distinctive dimensions:

[B]lacks may be distributed so that they are overrepresented in some areas and underrepresented in others, leading to different degrees of *unevenness*; [second,] they may also be distributed so that their racial *isolation* is ensured by virtue of rarely sharing a neighborhood with whites. . . . [Third,] black neighborhoods may be tightly *clustered* to form one large contiguous enclave or scattered about in checkerboard fashion; [fourth,] they may be *concentrated* within a very small area or settled sparsely throughout the urban environment. Finally, they may be spatially *centralized* around the urban core or spread out along the periphery.¹⁷⁹

This point is a very troubling one. More than mere segregation, blacks are experiencing at least four of the five dimen-

176. See *id.* at 73-74; see also Kushner, *supra* note 136, at 1052; Ivan C. Smith, Note, *Discriminatory Use of Models in Housing Advertisement: The Ordinary Black Reader Standard*, 54 OHIO ST. L.J. 1521, 1521 (1993) (echoing Kushner and suggesting that "Congress' goal in enacting the FHA, ending patterns of housing segregation has, largely gone unrealized").

177. See CLARK, *supra* note 76, at 11-21; GLASGOW, *supra* note 68, at 71-85; MASSEY & DENTON, *supra* note 48, at 60-74.

178. See MASSEY & DENTON, *supra* note 48, at 74-78.

179. *Id.* at 74.

sions of hypersegregation. As a consequence, the effect of such isolation and segregation intensifies. This "multidimensional layering of segregation . . . understate[s] its real severity in American society."¹⁸⁰

Despite its lofty legislative goal, the Act has not ended housing discrimination and its malignant cousin, housing segregation. The woeful social tale of two cities firmly squeezes the hearts of blacks and barely rings the tin ears of whites. Whereas the Act can cope with most individual acts or patterns of housing discrimination, it is absolutely incapable of specifically targeting the underlying social forces that persist in the making and remaking of urban ghettos. Under the Act, individual perpetrators can and are punished. Nonetheless, success in this area has not weakened racial discrimination in housing consumption.

Social conditions under the Act have remained a mystery, though they ought not. Simply put, the Act focuses on individual crimes while failing to note that the *context* from which these discriminatory acts arise has been ignored legislatively, judicially, and prosecutorially.¹⁸¹ If Congress were to turn its remedial attention to these social conditions, it would find that race hatred seethes because people have been inculcated in a milieu of race conscious social development. Moreover, Congress would find that race hatred and housing discrimination depend on the master narrative of black inferiority, an oft told story that has fixed firmly and indelibly in the white mind what it means to be black in America.¹⁸² The Act's blindness to the master narrative is the crucible that explains not only why housing segregation persists, but also why the Act fails. Because Congress has failed to accept that whites hate and fear blacks, that race hatred explains housing segregation, and that the master narrative of black inferiority prevents a real end to this social phenomenon, many cities remain as segregated today as they were during America's early history.

180. *Id.*

181. See Robinson, *supra* note 62, at 610-12.

182. See generally FREDRICKSON, *supra* note 2, at 321 (listing racist propositions that were almost universally recognized in the nineteenth century).

III. MASTER NARRATIVE OF BLACK INFERIORITY: INTERSECTION OF DOMINANT WHITE IMAGES AND THE VIOLENCE OF NEIGHBORHOOD PURITY

The Fair Housing Act has failed to end housing segregation. After almost thirty years, the United States is still a highly segregated nation.¹⁸³ Perhaps one of the most important reasons for this failure is that the Act cannot end what its drafters were ill-prepared to acknowledge—white Americans are profoundly racist and harbor an unacknowledged commitment in whole or in part to some notion of white supremacy.¹⁸⁴ Two observations support this argument. First, some white Americans

183. See Kushner, *supra* note 136, at 1061.

184. See Oppenheimer, *supra* note 12, at 904-14. Psychological experiments attempt to observe white subjects in an interracial situation where their conduct, if uninfluenced by racism, would be expected to be similar to their conduct with other whites. The results present strong evidence that the reduction in racist views expressed in surveys does not foretell a corresponding reduction in racist behavior.

Id. at 911. Professor Oppenheimer also described, "helping behavior studies," in which white subjects were faced with people (half of whom were white, half of whom were black) posing as needing assistance." *Id.* He noted that after analyzing thirty helping behavior studies, Faye Crosby concluded that "in 40% of the studies, white subjects showed discriminatory behavior against blacks." *Id.* at 912 (citing Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546 (1980)). Crosby's analysis, however, has been challenged by Lauren G. Wispe. Oppenheimer noted that:

[h]igh as it is, this 40% measure of discrimination may be understated due to the social scientists' conservative analysis of what constitutes nondiscrimination. For example, Wispe concluded that the white subjects showed no discrimination in their willingness to help the shoppers whose bags broke. However, in her analysis of the Wispe shopping bag experiment, Crosby notes, while whites and blacks were offered assistance in equal numbers, the amount of assistance offered was not equal. Rather, 63% of the time that white subjects were aiding white women, the subjects gave complete help, picking up all of the groceries. But 70% of the time white subjects helped black women, they gave only perfunctory help, picking up only a few packages. When complete help and perfunctory help are distinguished, Wispe's study, which concludes that there was no showing of racial differences in helping behavior, demonstrates that whites are exactly twice as likely to help other whites as they are African Americans.

Id. at 912 (citing Lauren G. Wispe & Harold B. Freshley, *Race, Sex, and Sympathetic Helping Behavior: The Broken Bag Caper*, 17 J. PERSONALITY & SOC. PSYCHOL. 59 (1971)).

are openly hostile to blacks, and these whites rationalize their conduct through the usual and seemingly endless stereotypes about blacks.¹⁸⁵ Second, most white Americans are unconsciously hostile to blacks.¹⁸⁶ These whites, many of whom might fashion themselves as liberals, continue to promote the underlying message of the master narrative of black inferiority,¹⁸⁷ while wishing that America was not prejudiced against

185. See MASSEY & DENTON, *supra* note 48, at 88-96.

White apprehensions about racial mixing are associated with the belief that having black neighbors undermines property values and reduces neighborhood safety. According to the *Newsday* poll, 58% of Long Island's whites believe that property values fall once blacks enter a neighborhood (in fact, evidence suggests the opposite, at least during the transition process). Likewise, among whites in Detroit who said they would leave if blacks moved into their neighborhoods, 40% believed that property values would decrease after black entry, and 17% believed that the crime rate would rise.

Id. at 94 (citations omitted).

186. See generally Lawrence, *supra* note 12 (challenging the intentional/unintentional racial discrimination dichotomy).

187. See Oppenheimer, *supra* note 12, at 909-11.

Although the 1990 NORC survey, and earlier surveys on implementation of civil rights laws, disclose an extremely high level of white racism, one obvious problem with survey data is the risk that the respondents are not being truthful in their answers. As high as the numbers are, the disparity between the questions on principle and those on implementation suggests that survey results generally may underestimate the true level of white racism because of the concern by respondents not to appear racist. If overt racism is socially unacceptable behavior, persons being surveyed, even anonymously, may be reluctant to reveal their true beliefs. This is borne out by a series of experiments conducted in the 1970s in which white subjects were polled regarding their views on African Americans, with half hooked up to a device (a "bogus pipeline") that was described as a sophisticated lie detector. The subjects attached to the bogus pipeline admitted holding far more negative stereotypes than did those merely asked to rate racial characteristics. For example, Sigall and Page describe the subjects hooked up to the device as describing African Americans as less "honest" and "intelligent" and more "lazy," "stupid," and "physically dirty" than did those subject not hooked up to the bogus pipeline. (Both groups of whites, those hooked up and those not hooked up to the machine, rated African Americans negatively as compared to whites.) Allen demonstrated that whites who had been rated as "unprejudiced" in a paper test on racial attitudes showed a significant reduction of expressed admiration of black public figures when hooked up to the bogus pipeline. Carver's study is particularly relevant to employment discrimination. The subjects were asked to characterize a fellow student based on a transcript of an interview. The transcripts were identical,

blacks.¹⁸⁸ In their most benign form, unconscious racists negligently discriminate¹⁸⁹ by what they actively do and passively permit. In either case, the discrimination is equally harmful.

Historically, the United States has always operated between these tensions. Some whites consciously promote the master narrative of black inferiority, whereas other whites unconsciously endorse it.¹⁹⁰ Within our western liberal tradition, this kind of tension is resolved not by seeking the social etiology of white supremacy, which can be viewed as a disease,¹⁹¹ but by seeking to promote mutual tolerance.¹⁹² This approach is flawed, however, because although

[l]iberals may pride themselves in their ability to tolerate others . . . it is only after the other has been redescribed as oneself that the liberal is able to be "sensitive" to the question of cruelty and humiliation. This act of

save that half identified the interviewee as African American. Those not hooked up to the bogus pipeline actually gave the black student a higher rating than the student whose race was not identified, but those persuaded by the operation of the machine that their "true feelings" were being measured, rated the black student significantly lower than the other. These results suggest a high level of dissembling by many survey participants, and raise the question of whether even the data revealed in the more subtle 1990 NORC survey understate the true level of white racism.

Id. (citations omitted).

188. See BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* (1992).

189. See Oppenheimer, *supra* note 12, at 900-17 (discussing unconscious discrimination).

190. See generally Lawrence, *supra* note 12, at 328-44 (exploring the relationship between the unconscious and racially discriminatory practices); Oppenheimer, *supra* note 12, at 900-17 (arguing that discrimination is more closely analogous to negligent conduct than to intentional conduct).

191. See THOMAS & SILLEN, *supra* note 12, at 112-21.

In explaining the origin and meaning of racism, it has become ritualistic to invoke psychiatric concepts. The roots of prejudice are sought in the "sick personality" or the "sick white psyche." Many authors speak of frustration-aggression projection, anxiety, and guilt. Such terms suggest that racism necessarily reflects psychopathology. It is often argued that a mentally normal person cannot be racist, and that a racist cannot be a mentally normal person. Just as Hitler was characterized as a madman and the Germans as a paranoid nation, so the white racists in American society are described in terms of psychological aberrations.

Id. at 112.

192. See Robinson, *supra* note 62, at 664-67.

redescription is still an attempt to appropriate others, only here it is made to sound as if it were a generous act. It is an attempt to make an act of consumption appear to be an act of acknowledgement.¹⁹³

Mutual tolerance never singularly attains mutual recognition because legislation is targeted at identifiable violators, not at unquantifiable social conditions.¹⁹⁴ Consequently, if the FHA focuses only on persons who violate its strictures, then it is restricted in scope because the master narrative of black inferiority operates at both conscious and unconscious levels.

The Act has failed on two counts. First, although many whites are openly hostile and violent toward blacks who wish to move into all-white neighborhoods,¹⁹⁵ the Act has failed to curtail that explicit conduct. Second, to the extent that much of what happens in the housing market today is subtly, unconsciously, and negligently discriminatory, the Act has failed because it cannot reach conduct beyond its constitutional boundaries.¹⁹⁶ If the Act cannot reach the unconscious conduct that has as its background the master narrative of black inferiority, then the Act not only fails in a narrow enforcement context but also falls decidedly short of eradicating housing segregation generally.

Within the context of housing segregation, the master narrative of black inferiority subtly influences the advertising of houses or subdivisions. Under the Act, discriminatory advertising is prohibited. Courts, however, may be unable to identify whether an advertisement violates the Act when the advertisement's subliminal message operates at very unconscious levels.¹⁹⁷ One

193. HOOKS, *supra* note 188, at 13 (citation omitted).

194. See Freeman, *supra* note 60, at 98-99.

195. See, e.g., *United States v. Gilbert*, 884 F.2d 454 (9th Cir.) (affirming conviction of white supremacist for threatening to use force against local adoption agency that placed minority children with white families), *cert. denied*, 484 U.S. 860 (1989).

196. See, e.g., *United States v. Hayward*, 6 F.3d 1241, 1249-52 (7th Cir. 1993) (discussing defendants' argument that their convictions under § 3631(b) were unconstitutional because cross burning is expressive conduct protected under the First Amendment).

197. See, e.g., *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 648-49 (6th Cir. 1991) (holding that a housing advertisement featuring only white models was not a discriminatory message in violation of the FHA); see Oppenheimer, *supra* note 12, at 903.

might argue that when an advertisement is that subtle, a court cannot impose liability on an alleged violator because people do not receive the racist message and the violator will thus have no guide to avoiding costly future litigation.¹⁹⁸ This argument is the gravamen of the problem.¹⁹⁹ Professor Lawrence understood this difficulty when he wrote that "most of us are unaware of our racism. . . . In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."²⁰⁰ Later, Professor Oppenheimer, in extending the Lawrence thesis to employment discrimination, also recognized this difficulty when he posited that "[i]f whites are frequently unaware of their own racism, a theory of employment discrimination that focuses on an intent to discriminate provides no remedy for most discrimination."²⁰¹ Even though broad enforcement of section 3604(c) specifically,²⁰² and civil rights laws

Given the wide variance between expressions of overt racist principles and evidence of racist behavior, it appears either that huge numbers of whites are falsely denying their consciously held racist beliefs, or that many acts of racist behavior are motivated by unconscious, rather than intentional, racism. If much white racist behavior is unconscious, a theory that tests only for intentional discrimination necessarily misses its mark much of the time.

Id.

198. See 24 C.F.R. §§ 109.25(c), 109.30(b) (1994).

Human models . . . may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin. If models are used . . . the models should be clearly definable as reasonably representing majority and minority groups Models, if used, should . . . indicate . . . that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin

§ 109.30(b). For additional discussion on this point, see *HOME*, 943 F.2d at 647.

199. See Oppenheimer, *supra* note 12, at 903.

Although the surveys show that the percentage of whites openly supporting discrimination against African Americans has dropped considerably, surveys on the implementation of civil rights, and more sophisticated surveys attempting to measure white stereotypes about African Americans, demonstrate extremely high levels of covert racism. These surveys support the view that overt racism has lost favor socially, but racist attitudes lie close beneath the surface of our society.

Id.

200. Lawrence, *supra* note 12, at 322.

201. Oppenheimer, *supra* note 12, at 916. See generally *id.* at 967-72 (discussing theory of negligent discrimination).

202. See *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir.), *cert. denied*,

generally,²⁰³ raises thorny First Amendment issues, courts must use the Act to redress the most subtle forms of discriminatory advertising because this unprosecuted space is where the master narrative of black inferiority, in its most subtle form, does the most permanent damage to black legal personhood²⁰⁴ and to the Act's goal of integrated housing.²⁰⁵

To this extent, the master narrative of black inferiority is carried upon a current of subliminal messages, which, in whole or in part, deny blacks recognition of their personhood and respect for their rights.²⁰⁶ This current provides the continued medium for the use of violence, intimidation, and conspiracy to inhibit and discourage blacks from entering, and remaining in, all-white neighborhoods.²⁰⁷ This current is the province of sections 3604(c) and 3631 of the Fair Housing Act.

A. Dominant White Images Within the Master Narrative

In the promotion or sale of housing, dominant white images coexist with the master narrative of black inferiority because housing segregation does not occur in a vacuum and because

502 U.S. 821 (1991). The *Times* appealed from a lower court ruling holding that "the First Amendment provides no protection for such illegal commercial speech, and that requiring the *Times* to monitor the ads it receives would not impose an unconstitutional burden on the press." *Id.* For further discussion of these First Amendment issues, see *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980).

203. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (holding that a disorderly conduct ordinance prohibiting the burning of crosses violated the First Amendment because of viewpoint discrimination); see also Note, *Federal Prosecution of Cross Burners*, 107 HARV. L. REV. 1729 (1994) (arguing that federal civil rights statutes can constitutionally protect individuals from cross burnings under *R.A.V.*).

204. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (considering tests by Dr. Kenneth B. Clark on black self-hatred as a consequence of the explicit and implicit message of post-*Plessy* race segregation); see also CLARK, *supra* note 76, at 27-110 (describing the social dynamics and psychology of the ghetto that contribute to black self-hatred).

205. See, e.g., *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 884-85 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 972 (1992).

206. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that a black person has no rights that a white person must respect). Although the message in *Dred Scott* was hardly sublime, it is, perhaps, the most glaring example of this phenomenon.

207. Cf. 42 U.S.C. § 3631 (1988) (prohibiting such racially motivated violence).

symbolic images cannot have meaning in a context outside of a racist American history and white supremacy. Dominant white images are an integral part of society's institutional practices, and the dominant white images in America reinforce at least a preference for whites only²⁰⁸ and, at most, a theory of white supremacy.²⁰⁹ As a corollary, the master narrative of black inferiority thus operates not only broadly within society, but also specifically within the arena of housing segregation. Because of the congressional role in combatting this segregation, courts have had little power to eradicate permanently how advertisers abuse and violate the Act's strictures against discriminatory advertisement.²¹⁰ Advertising is thus one method that whites have used to perpetuate dominant white images.²¹¹ Such images affect blacks subtly,²¹² and the effect is deep and permanent.²¹³

The Act recognizes the pervasive impact of dominant white images, and it contains prohibitive language against these abus-

208. See Margot S. Rubin, *Advertising and Title VIII: The Discriminatory Use of Models in Real Estate Advertisements*, 98 YALE L.J. 165 (1988) (analyzing racial preference and intent requirements of § 3604(c)); Margaret A. Fiorino, Comment, *Advertising for Apartheid: The Use of All White Models in Marketing Real Estate as a Violation of the Fair Housing Act*, 56 U. CIN. L. REV. 1429 (1988) (reviewing court decisions on racial preference advertising).

209. See Michael E. Rosman, *Ambiguity and the First Amendment: Some Thoughts on All-White Advertising*, 61 TENN. L. REV. 289, 292 (1993) (challenging the "presumption (or, at least, challeng[ing] its standing as a presumption)" that the use of all-white models sends a discriminatory message and asking "what kind of proof should be required to show that an advertising campaign using primarily white human models sends a discriminatory message").

210. Smith, *supra* note 176, at 1521.

211. See DICK HEDDIGE, *HIDING IN THE LIGHT: ON IMAGES AND THINGS* (1988).

212. See George Gerbner, *The Gospel of Instant Gratification in Advertising and the Corrupting of America*, 41 BUS. & SOC'Y REV. 64, 68 (1982). Advertisements are stories we tell about how society works. "They illuminate the hidden relationships and invisible dynamics of life. Inventing the characters and facts of a narrative permits the development of a culture's truest conceptions about how things really work. This is called mythology, fiction, and drama." *Id.*

213. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (challenging the legality of employers' prohibitions against black hairstyles); Margaret E. Montoya, *Mascaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994) (examining the phenomenon of "masking" as a means of subordinating minority groups).

es.²¹⁴ Section 3604(c) of the Act provides, in relevant part: "it shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race"²¹⁵

In preventing the integration of neighborhoods, a section 3604(c) violation can be relatively subtle. In promoting their properties, advertisers will use all-white human models.²¹⁶ By using these models, the advertisers express a preference for white renters or purchasers that encourages a racially exclusive community.²¹⁷

Even though the dominant white images operate subtly to reinforce the master narrative of black inferiority, advertisers can theoretically avoid costly litigation despite their use of such images. In 1980, HUD issued "guidance" to newspapers and other advertisers.²¹⁸ HUD stated that "[s]elective advertising may involve an advertising campaign using human models primarily in media that cater to one racial or national origin segment of the population without a complementary advertising campaign that is directed at other groups."²¹⁹ This language precluded any use of human models by advertisers who *wanted* to discourage responses from certain groups covered by Title VIII.²²⁰ Furthermore, if advertisers used human models, these

214. See *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 652 (6th Cir. 1991) ("Congress obviously recognized the key role housing advertisements play in potential real estate transactions and concluded that the regulations [sic] of real estate advertisements is warranted.").

215. 42 U.S.C. § 3604(c) (1988).

216. See *Ragin v. New York Times Co.*, 923 F.2d 955, 999 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991); Ann Mariano, *Developer, Firm Settle Avenal Suit*, WASH. POST, Sept. 9, 1989, at D12 ("Use of only white models in house ads 'really works because the message is unmistakable that blacks are not wanted.'") (quoting Professor Girardeau A. Spann, Georgetown University).

217. See Fiorino, *supra* note 208, at 1433-34 (discussing *Saunders v. General Servs. Corp.*, 659 F. Supp. 142 (E.D. Va. 1987)); see also *Ragin*, 923 F.2d at 999-1000 (stating that "we read the word 'preference' to describe any ad that would discourage an ordinary reader of a particular race from answering it").

218. See 24 C.F.R. §§ 109.5-.30 (1994).

219. 24 C.F.R. § 109.25(c).

220. *Id.* (emphasis added).

models were to "be clearly definable as *reasonably representing* majority and minority groups in the metropolitan area."²²¹ Under this section, HUD rejected any notion that "models used should reflect, in numbers, the exact percentage of various covered groups in the population"²²² because this approach was "clearly unworkable."²²³ In *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc. (HOME)*,²²⁴ the court concluded that by using the phrase "reasonably representing," HUD "intended to assure that models will convey a message of general inclusiveness of persons covered by Title VIII, not literal display of each minority group."²²⁵

HUD's "guidance," however, cannot eradicate an impermissible racial preference when an advertiser's advertising campaign has dominant white images. Given HUD's "guidance," dominant white images still operate to enforce the master narrative of black inferiority. Except in those instances in which the alleged violation of section 3604(c) is palpable and discernible to even the most jaundiced eye,²²⁶ some federal courts have struggled to find that all-white advertising campaigns violate the Act's strictures.²²⁷ Some courts require that a general message of discrimination must be traced to a particular advertisement in order to violate the Act.²²⁸

221. 24 C.F.R. § 109.30(b) (emphasis added).

222. See *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 647 (6th Cir. 1991) (quoting 45 Fed. Reg. 57,105 (1980)).

223. *Id.*; see 24 C.F.R. § 109.30(b); see also *Spann v. Colonial Village, Inc.*, 662 F. Supp. 541, 546 (D.D.C. 1987) (holding that § 3604(c) does not require mathematical proportionality).

224. 943 F.2d 644.

225. *Id.* at 647 (quoting 45 Fed. Reg. 57,105 (1980)). In 1989, HUD again significantly revised fair housing advertising regulation by including families and the handicapped among the Act's protected groups. 54 Fed. Reg. 3232 (1989) (codified at 24 C.F.R. pts. 14, 100, 103-106, 109, 110, 115, 121 (1994)). These new regulations created a list of prohibited conduct, that included "[u]sing words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons." 54 Fed. Reg. 3232, 3285 (1989).

226. See, e.g., *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991) (affirming a judgment against the *Times* for publishing all-white advertisements).

227. See *Fenwick-Schafer v. Sterling Homes Corp.*, 774 F. Supp. 361, 364-66 (D. Md. 1991) (denying summary judgment motion because the defendants' exclusive use of white models presented a genuine issue of material fact as to whether such action suggests a racial preference to an ordinary reader).

228. See, e.g., *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati En-*

This Article argues differently. If a publisher permits just *one* all-white advertisement featuring human models to be published, he should be held to violate section 3604(c), even if the community to which the advertising is directed is predominantly, if not exclusively, white. This position must be adopted because the world at large is not predominantly white, and such a dominant white image more than suggests that people of color who live outside of that community are not welcome.

Even if a court finds that a defendant's advertising campaign violates section 3604(c), it may not understand how a single dominant white image works conjunctively with the master narrative of black inferiority. Consider, for example, the Second Circuit's decision in *Ragin v. New York Times Co.*²²⁹ In *Ragin*, the court of appeals addressed two issues. First, it considered whether section 3604(c) prohibits the "use of models as a medium for the expression of a racial preference" and held that it did.²³⁰ Second, the court reviewed whether, and under what circumstances, "the use of models may convey an illegal racial message."²³¹ In applying the ordinary reader standard²³² utilized in *United States v. Hunter*²³³ and *Spann v. Colonial Village, Inc.*,²³⁴ the court of appeals held that in those circumstances in which advertisers target potential consumer groups by using models of a particular race, a trier of fact may conclude that the ads "will be read by the ordinary reader as indicating a racial preference."²³⁵ The court in *Ragin* thus affirmed the lower court's ruling dismissing the *New York Times's* 12(b)(6) motion.

quirer, Inc., 943 F.2d 644, 652 (6th Cir. 1991).

229. 923 F.2d 995 (2d Cir. 1991). The plaintiffs were black persons who were looking for housing in a New York metropolitan area and the Open Housing Center, a not-for-profit New York corporation whose primary goal was to eliminate racially discriminatory housing practices. *Id.* at 998.

230. *Id.* at 1000.

231. *Id.*

232. The court in *Ragin* stated that "we read the statute to be violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question." *Id.* at 999.

233. 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

234. 899 F.2d 24 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990).

235. *Ragin*, 923 F.2d at 1000.

The court's analysis in *Ragin* suggests a heightened awareness of the powerful, albeit subtle, messages conveyed by dominant white images.²³⁶ The plaintiffs alleged that, even after Congress enacted the Fair Housing Act, the *Times* published real estate advertisements for property located in "white buildings, developments, communities or neighborhoods using thousands of human models, virtually all white."²³⁷ Even the *Times*' ads that depicted blacks cast them as "building maintenance employees, doormen, entertainers, sports figures, small children or cartoon characters."²³⁸ On those rare occasions when the *Times* did portray blacks as consumers, the advertisements were for housing located in predominantly black neighborhoods.²³⁹ The plaintiffs in *Ragin* argued that human models "often represent actual or potential purchasers or renters, or the type of potential purchasers or renters that the real estate owner has targeted as desirable occupants,"²⁴⁰ and that advertisements dominated by white models dissuade potential black applicants.²⁴¹ Therefore, they asserted that the *Times*'s ad using human models reflective of the "predominant race of the advertised building, development or community indicated a discriminatory racial preference."²⁴² The court agreed.

In affirming the lower court ruling, the court in *Ragin* concluded that discriminatory message, not discriminatory intent, is

236. See generally Fiorino, *supra* note 208, at 1434 ("Even the average layman . . . knew that advertisers chose their models carefully in order to encourage their target market to identify with the model."); Stearns, *supra* note 123, at 1201 ("The widely accepted premise driving these multibillion dollar advertising budgets and multimedia advertising campaigns is that advertising works—that is, that consumers make choices about products in response to advertisements.").

237. *Ragin*, 923 F.2d at 998.

238. *Id.*

239. *Id.*

240. *Id.*

241. See *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) (concluding that the FHA reaches even subtle expressions of racism in advertising); *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir.) (stating that "seeing large numbers of 'white only' advertisements in one part of a city may deter non-whites from venturing to seek homes there"), *cert. denied*, 409 U.S. 934 (1972); Stearns, *supra* note 123, at 1211-18 (discussing the jurisprudence on real estate advertising and impermissible racial preferences).

242. *Ragin*, 923 F.2d at 998.

the touchstone.²⁴³ The *Times* supported its motion to dismiss by asserting that a publisher could avoid liability under section 3604(c) if the "ad . . . is not facially discriminatory and the publisher has no other evidence of discriminatory intent."²⁴⁴ According to the *Times*, the ordinary reader would only find a real estate advertisement facially discriminatory if it depicted "burning crosses or swastikas."²⁴⁵ Rejecting the *Times's* reading of "preference" under section 3604(c), the court reasoned that while cross burning or swastikas should not be trivialized, the FHA does not

[o]utlaw only the most provocative and offensive expressions of racism or statements indicating an outright refusal to sell or rent to persons of a particular race. Congress used broad language in Section 3604(c), and there is no cogent reason to narrow the meaning of that language. Ordinary readers may reasonably infer a racial message from advertisements that are more subtle than the hypothetical swastika or burning cross, and we read the word "preference" to describe any ad that would discourage an ordinary reader of a particular race from answering it.²⁴⁶

Judge Winter's majority opinion would also allow a lower court finding that advertisers use "sophisticated modes of persuasion"²⁴⁷ to target particular consumers with certain racial characteristics.²⁴⁸ The *Ragin* majority thus demonstrated a heightened sensitivity to the deep places a dominant white image might touch. The court reasoned that "[w]e live in a race-conscious society; and real estate advertisers seeking the attention of groups that are largely white may see greater profit in appealing to white consumers in a manner that consciously or unconsciously discourages non-whites."²⁴⁹ The court also noted that advertisers are either too lazy to take a different approach to creative marketing or too afraid that black models would

243. *Id.* at 1000.

244. *Id.* at 999.

245. *Id.*

246. *Id.* at 999-1000.

247. *Id.* at 1000.

248. *Id.*

249. *Id.*; see Lawrence, *supra* note 12, at 361; Oppenheimer, *supra* note 12, at 911.

frighten white consumers.²⁵⁰ However, the court's most telling language, virtually post-modern in its focus,²⁵¹ illustrated a clear understanding of how the master narrative of black inferiority, upon which advertising's dominant white images depend, works in advertising.

Advertising is a make-up-your-own world in which one builds an image from scratch, selecting those portrayals that will attract targeted consumers and discarding those that will put them off. Locale, setting, actions portrayed, weather, height, weight, gender, hair color, dress, race, and numerous other factors are varied as needed to convey the message intended. . . . Similarly, a housing complex may decide that the use of models of one race alone will maximize the number of potential consumers who respond, even though it may also

250. *Ragin*, 923 F.2d at 1000. In response to the court's point about the real estate advertisers' laziness in failing to use black human models, Goldberg would argue that by not taking the time to use black human models, these real estate advertisers hope to render blacks not only socially invisible, but also economically irrelevant to the target housing market. See GOLDBERG, *supra* note 63, at 110. On the issue of how racist culture makes blacks socially invisible, Goldberg states:

This condition of alienation and anonymity, of what is relation to blacks Orlando Patterson and others problematically characterize as natal alienation, proceeds by rendering racialized peoples invisible, silent, and nameless. To render invisible is to silence, and to silence is to erase the presence of those whose voices are drowned out. What is taken away is self-representation. Rubbed out is the articulation to oneself, to others like one, and to the world at large of who one is, of one's history, of a contesting set of values. One is denied the power to control one's names, what one is called or not, what one calls oneself. For example, traditionally names of blacks under anglophone African colonialism and *apartheid* often suffer(ed) the indignity of being rechristened, usually by a white employer or official, with names of weekdays, with 'John', or simply with 'Boy'. These anglicized names are conferred because dominant whites have been too lazy, unimaginative, or uncaring to learn to pronounce or simply to ask for the person's given name.

Id. While the foregoing goes on to make other related points, the power of representing the Other as invisible or irrelevant by not presenting or permitting them to present their own reality is a powerful feature of federal civil actions in which parties allege that ads violate section 3604(c) of the Fair Housing Act. See Stearns, *supra* note 123, at 1200-01 (presenting a narrative of composite facts in which the fictitious "Pamela" decides not to rent after viewing ads that consistently use single and childless whites as human models).

251. See HEBDIGE, *supra* note 211, at 181-207 (defining "post-modernism" as a term generally difficult to encapsulate and in part a rejection of totalizing concepts key to the Enlightenment or Western philosophical traditions).

discourage consumers of other races.²⁵²

According to Judge Winter, advertisers shape public perceptions by contriving a world based on a racially textualized world.²⁵³ If advertisers socially construct a world in order to maximize their potential consumers and thus their continuing profitability,²⁵⁴ then advertisers who operate within a race-conscious society will rely on race images, symbols, and characteristics. A race-conscious society racializes every experience.²⁵⁵ Despite the court's suggestion that advertisers may lack creativity due to inertia, the larger point is that all advertisers selectively and actively reinforce our racialized experiences.²⁵⁶ To that extent, all advertising suggests a preference for certain racial groups.²⁵⁷ In a country where race-conscious social development has always remained an integral part of the way in which people view their chances in life, the court's reasoning more than suggests that all-white human models reinforce a dominant white image, a symbol that underwrites the master narrative of black inferiority.²⁵⁸

252. *Ragin*, 923 F.2d at 1001.

253. See Peter L. Berger, *Identity As a Problem in the Sociology of Knowledge*, in *THE SOCIOLOGY OF KNOWLEDGE* 373, 374 (James E. Curtis & John W. Petras eds., 1970) ("The sociology of knowledge . . . may be understood as the sociological critique of consciousness, concerning itself with the social construction of reality in general."); Pierre Schlag, *"Le Hors De Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 *CARDOZO L. REV.* 1631 (1990). According to Schlag, the Derridean expression "Le hors de texte, c'est moi" translates to "There is no outside of the text." *Id.* at 1631 n.1. Derrida means that "all that is accessible as knowledge is mediated by the text (and what characteristics, textuality may have) and/or that whatever can be known as such must have the capacity to be textually comprehensible." *Id.*

254. *Ragin*, 923 F.2d at 1000.

255. See YEHUDI O. WEBSTER, *THE RACIALIZATION OF AMERICA* 2 (1992) (stating that "American society is being tied into painful knots by virtue of legislature, social scientific and media practices of racially classifying persons").

256. *Ragin*, 923 F.2d at 1000.

257. See *id.* at 1001 ("In advertising, a conscious racial decision regarding models thus seems almost inevitable").

258. With this argument, the court in *Ragin* rejected the *Times's* assertion that through the vigorous application of section 3604(c) to the newspaper industry, "the specter of racially conscious decisions and of racial quotas in advertising will become a reality." *Id.* at 1000.

In advertising, a conscious racial decision regarding models thus seems almost inevitable. All the statute requires is that in this make-up-your-

At some point, the court in *Ragin* turned on itself and revealed that the FHA cannot eliminate forces that judges and legislators are unable to identify as integral parts of the dominant white images operating in the master narrative of black inferiority.²⁵⁹ On the question of liability,²⁶⁰ an issue not properly before the court, Judge Winter agreed with the *Times* on two points. First, the *Times*'s liability "may not be based on an aggregation of advertisements by different advertisers."²⁶¹ According to the court, the FHA supports this principle. On the one hand, if an advertiser engages in a twenty-year pattern of racially discriminatory campaigns, the advertisements serve as a key factor in housing segregation in the targeted market, and section 3604(c) would prohibit advertising that repeatedly and starkly presents the dominant white image.²⁶² On the other hand, if an advertiser runs one ad containing all-white models two or three times, section 3604(c) imposes no liability as a matter of law.²⁶³ It does not matter that a newspaper publishes several of these short-swing real estate advertisements. The court thus suggested that the repeated imposition of all-white human model advertisements causes discriminatory injury. The

own world the creator of an ad not make choices among models that create a suggestion of a racial preference. The deliberate inclusion of a black model where necessary to avoid such a message seems to us a far cry from the alleged practices that are at the core of the debate over quotas.

Id. at 1001.

259. Richard Delgado and Jean Stefancic call this process of identification "empathic fallacy." Delgado & Stefancic, *supra* note 20, at 1261.

[W]e can enlarge our sympathies through linguistic means alone. By exposing ourselves to ennobling narratives, we broaden our experience, deepen our empathy, and achieve new levels of sensitivity and fellow-feeling. We can, in short, think, talk, read, and write our way out of bigotry and narrow-mindedness, out of our limitations of experience and perspective. . . . [H]owever, we can do this only to a very limited extent.

Id.

260. See *Ragin*, 923 F.2d at 1001-02.

261. *Id.*; see also *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644 (6th Cir. 1991) (refusing to follow the *Ragin* reasoning on the theory that, under § 3604(c), multiple advertisements by unrelated realtors do not send a racially discriminatory message to the ordinary reader).

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

263. *Id.*

court implied that the master narrative of black inferiority does not exist without such repeated plays. Liability attaches to the advertiser who operates in the "make-up-your-own world" and promotes racism. Although Judge Winter acknowledged the existence of a race-conscious society, he concluded that the master narrative of black inferiority does not exist in that same social context. Rather, only individual perpetrators violate the prohibition of section 3604(c).

Second, in obiter dictum, the court in *Ragin* agreed to impose liability on the *Times* "only when an ordinary reader would understand the ad as suggesting a racial preference."²⁶⁴ The term "ordinary reader" refers to the common law's anti-subjective juggernaut called the "reasonable man."²⁶⁵ As a result, the complaining party can have neither a suspicious nature nor heightened sensitivities. Moreover, the complaining party can not apply a mechanical test to determine whether a given advertisement is racially offensive. Accordingly, if a real estate advertisement used an all-white couple, a complaining party relying on section 3604(c) would not succeed under the FHA prohibitions. If, however, a real estate advertisement illustrated whites as consumers and blacks as doormen or custodial employees played several times a week for a year, it would facially indicate a racial preference.²⁶⁶ Under the first example, the court would willingly permit the master narrative of black inferiority to marginalize and oppress blacks. In the latter example, the court would invoke known images of stark racial contrast as giving rise to section 3604(c) liability. Unfortunately, the court in *Ragin* conceded the easy case, but established a test that permits short-swing, single-play ads to escape liability.

Under section 3604(c)'s liberal remedial goals, the court's approach in *Ragin* is troubling, and it suggests the following question: why must advertisements not simply slap but brutally bludgeon blacks? The answer is unclear. Perhaps Judge Winter assumed that all whites are not racists because they have not had all of their social experiences racialized. As such, if an objec-

264. *Id.*

265. *Id.*

266. *Id.*

tive standard yields to a touchy subjective standard, and if one publication exposes an advertiser to unacceptable tort liability, then anyone would be able to allege that an advertisement's racial preference caused injury.²⁶⁷ If true, the court in *Ragin* believed that the newspaper industry would suffer when forced to monitor all advertisements. This unconstitutionally heavy burden would "undermine other civil rights laws."²⁶⁸ In addition to this potential loss of the free press, the newspaper industry would incur financial losses if courts awarded staggering damages.²⁶⁹ Although these issues were irrelevant to the central question raised by the *Times's* failed motion to dismiss, the court in *Ragin* suggested that lower courts can closely monitor awards for emotional injury.²⁷⁰ This close monitoring and the need for an objective standard would thus turn implicitly on the belief that if white racism does not promote a seamless web, then black plaintiffs must assert that the repeated plays of the dominant white image caused their impermissible injury.²⁷¹ Without the assumedly pervasive impact of racism or the master narrative of black inferiority, advertisers can use such images for a sufficiently compelling business necessity.²⁷²

Yet, both factual settings may not only offend the ordinary

267. See *id.* at 1005 ("The problem is that a claimant may establish a *prima facie* case for such damages simply by oral testimony that he or she is a newspaper reader of a race different from the models used and was substantially insulted and distressed by a certain ad.").

268. *Id.* at 1004.

269. *Id.* at 1004-05 (stating that "the *Times* is fearful that such claims from a multitude of plaintiffs might lead to a large number of staggering, perhaps crushing, damage awards that might over time impair the press's role in society").

270. *Id.*

271. See WEBSTER, *supra* note 255, at 114 ("The black experience turns out to be composed of many different experiences. Indeed, only the premise that white racism is a pervasive influence on the lives of all blacks sustains the idea of a black experience. Abandon this premise and the racial nature of the experiences is dissolved."). See generally GOLDBERG, *supra* note 63, at 97-147 (arguing for an analytical model that recognizes "multiple racisms" and positing that only some racist experiences are based on domination).

272. See, e.g., *Peyton v. Reynolds Assocs.*, 955 F.2d 247, 252 (4th Cir. 1992) (using a disparate impact theory under the Fair Housing Act, the tenant plaintiffs "established a *prima facie* case by showing the discriminatory effect of Reynolds' objections on the voucher holders; thus, the burden of proof shifted to Reynolds to demonstrate a sufficiently compelling business necessity").

black reader, but also, in the aggregate, suggest a racial preference for white consumers. In part, the court implicitly addressed this issue. By defining the *ordinary* reader as the reasonable *man*, the court invoked not only a white male presence but also white male experiences.²⁷³ By impliedly limiting the scope of

273. See Robinson, *supra* note 57 at 117-74 (deconstructing and analyzing Professors Daniel Farber and Suzanne Sherry's reliance on the customary test for truth); see also Allan C. Hutchinson, *Gender, Difference, and Postmodernism: Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1564 (1991).

It is as culpable to ignore difference as it is to dwell on it as an excuse to take it seriously. The goal is not to locate and give expression to the authentic voice of African Americans', gays', or women's experience—this will ensure the continued dominance of white and male voices against which other voices will always vie for attention and whose importance will be reinforced at the very moment of their greatest threat.

Id. Furthermore,

[t]here is a saying among Irish poets that the translator is a traitor. Black scholars work within a tradition and discourse in which the white male voice is dominant. Much of our work is necessarily translation. We are either translating the work of our colleagues in the legal establishment for use by our brothers and sisters who seek needed, if temporary, remedies in that establishment's legal institutions, or we are translating the life experience of our brothers and sisters in the hope that broader awareness of that experience will produce new converts to the cause of liberation. But translation is a treacherous business.

Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2276 (1992); see also Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 955 (1992) ("The closest approach to a separate methodology in feminist and critical race theory lies in the concept of narrative. This technique draws on the observation that women and minorities have had different life experiences from white males, experiences that centrally involve marginalization and oppression."). In addition,

[a]ny evaluation of the sources, however, must start with a recognition that the voices included were predominantly, if not exclusively, white male voices. It is crucial, therefore, to resist the temptation to which the original intentionalists succumb; namely, seeing the peculiar historical facts of an earlier era as limiting the choices and opportunities of the present and future.

Barry R. Schaller, *Getting the Stories Rights: Reflections on Narrative Voice in State Constitutional Interpretation*, 26 CONN. L. REV. 671, 682 (1993); see also Jesse B. Semple, Note, *Invisible Man: Black and Male Under Title VII*, 104 HARV. L. REV. 749, 751 (1991) ("reasoning that black men's experience of being male represents a mere racial variation on the white male experience, courts incorrectly assume that black men suffer from discrimination only because they are black and not because they are black men."). Finally,

the notion of human nature underlying that discourse is inadequate.

racial preferences to the perceptions of a mythical reasonable white man—a construct developed during a historical period when blacks did not formally participate in the development of Western jurisprudence²⁷⁴—the court in *Ragin* subtly confessed two critical understandings. First, if the master narrative of black inferiority pervades a race-conscious society, and if people of color can nimbly move between objective and subjective theories of liability, then such an interpretation of section 3604(c) would confer an unintended largess and wealth transfer on blacks. Second, if courts do not view racism, dominant white images, or the master narrative of black inferiority from a white male perspective, a society dominated by white images would come to a halt under the pressure of mounting litigation. In this way, then, the court in *Ragin* viewed racism, dominant white images, or the master narrative of black inferiority as an analog not to race-centered oppression, but to dulled sensitivities, bad taste, or poor manners.

As in *Ragin*, if a court connects a broad reading of section 3604(c) with housing integration, then dominant white images effectively undermine the Act's goals. This proposition holds because dominant white images explicitly and implicitly determine whether blacks are really fully endowed legal persons—citizens with not only standing in a given community but also recognition to assert claims before that community's properly constituted legal authority. Unfortunately, except in a few historical instances²⁷⁵ in which the interests of blacks and whites have converged,²⁷⁶ blacks have not enjoyed this status.

However, my understanding of that inadequacy as tied to the partiality of the European-American, white, male experiences that inform the discourse distinguishes my rights critique from that of Glendon. I find in the European alternatives that she values the same partiality posing as objectivity and neutrality, only slightly masked by a rhetoric of sexual equality.

Marie Ashe, *Review Essay: Conversation and Abortion*, 82 NW. U. L. REV. 387, 390 n.20 (1988) (reviewing MARY ANN GLENDON, *A REVIEW OF ABORTION AND DIVORCE IN WESTERN LAW* (1987)).

274. See Robinson, *supra* note 57, at 27-62.

275. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

276. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

In addition to denying blacks this status, dominant white images are imbued symbolically with white male voices or experiences. From the perspective of this voice or experience, white supremacy no longer exists self-consciously. Accordingly, because broad systematic racial hostility does not exist, only a few wayward whites individually discriminate against blacks.²⁷⁷ To this extent, blacks do not require broad social redress. As a consequence, federal law should not mandate association between blacks and whites. Instead, people should be free to express their living preferences—a choice that permits housing segregation.

In view of this rationale, housing segregation festers like a boil, a condition surviving the Act's feeble efforts to lance it and to find the etiology of race oppression. Unfortunately, the Act denies the omnipresence of an inoperable story,²⁷⁸ and, with this denial, courts cannot seriously consider the ordinary *black* reader's sensitivities.²⁷⁹ By denying its presence, the court in *Ragin* implicitly rejected any notion that the master narrative of black inferiority is a seamless web.²⁸⁰ By rejecting how the master narrative pervades law and society, the court, and thus the Act, refused to destroy the fount of housing segregation. In the end, the master narrative of black inferiority not only connects but also intersects with dominant white images, all in the name of the mythic totem called "white world."²⁸¹

277. Cf. Geoffrey C. Hazard, *Rising Above Principle*, 135 U. PA. L. REV. 153, 159 (1988) (asserting that pervasive discrimination continues, despite Supreme Court decisions guaranteeing blacks full citizenship under the law).

278. See Lawrence, *supra* note 12, at 317-18 (discussing cultural victimization through the continued recycling of *Little Black Sambo*).

279. See Kushner, *supra* note 136, at 1104.

280. But see WEBSTER, *supra* note 255, at 114 (suggesting that white racism might not form the seamless web that explains black racial experiences).

281. See *United States v. Juvenile Male J.H.H.*, 22 F.3d 821, 829 (8th Cir. 1994) (providing a government witness's characterization of the "skinhead movement as one 'dedicated wholly to the philosophy of white supremacy, Anti-Semitism and racism'" and statement that "when a cross is placed on the private property of another person . . . it communicates to all who see it that the Ku Klux Klan is present and will engage in the activities that it is notorious for; namely, lynching, murder, assault, and other forms of harassment"); BELKNAP, *supra* note 42, at 24-25; see also ELAINE LANDAU, *THE WHITE POWER MOVEMENT: AMERICA'S RACIST HATE GROUPS* (1993) (tracing recent developments in the white supremacy movement).

B. Aggregated Single Play All-White Human Model Advertisements as Master Narrative

Today, as in the past, the master narrative of black inferiority orchestrates and perpetuates dominant white images so that white values and points of view control the socialized Other's view of the world. This proposition should raise few objections. Each reader may not understand how dominant white images suggest an impermissible racial preference that violates section 3604(c). Questions arise, however, when a white real estate advertiser only makes a single play in the advertising market, and in so doing, he uses all-white human models in an ad running only three times and for just one week. Indeed, several unrelated advertisers might also have single plays in the same advertising market and in the same newspaper. In the aggregate, these advertisements might also express an impermissible racial preference. The issue becomes whether these unrelated advertisers should expose a publisher to section 3604(c) liability.²⁸²

In the context of the master narrative of black inferiority, this question becomes vital because those controlling the hegemony of ideology—information or images—win.²⁸³ For blacks who

282. See, e.g., *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644 (4th Cir. 1991).

283. See Edward Greer, *Antonio Gramsci and "Legal Hegemony"*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 60, at 304, 305.

By hegemony Gramsci meant the permeation throughout civil society—including a whole range of structures and activities like trade unions, schools, the churches, and the family—of an entire system of values, attitudes, beliefs, morality, etc. that is in one way or another supportive of the established order and the class interests that dominate it. . . . To the extent that this prevailing consciousness is internalized by the broad masses, it becomes part of "common sense"; . . . For hegemony to assert itself successfully in any society, therefore, it must operate in a dualistic manner: as a "general conception of life" for the masses, and as a "scholastic programme" or set of principles which is advanced by a sector of the intellectuals. . . . [Gramsci observed that where] hegemony appeared as a strong force, it fulfilled a role that guns and tanks could never perform. . . . [I]t encouraged a sense of fatalism and passivity towards political action; and it justified every type of system-serving sacrifice and deprivation. In short, hegemony worked in many ways to induce the oppressed to accept or "consent" to their own exploitation and

grow up in isolated inner city ghettos, social relationships often exclude meaningfully substantive, emotionally complex interactions with whites, and, if Massey and Denton have correctly analyzed their data, the same must be true for whites. Massey and Denton argue:

Typical inhabitants of one of these ghettos are not only unlikely to come into contact with whites within the particular neighborhood where they live; even if they traveled to the adjacent neighborhood they would still be unlikely to see a white face; and if they went to the next neighborhood beyond that, no whites would be there either. People growing up in such an environment have little direct experience with the culture, norms, and behaviors of the rest of American society and few social contacts with members [of] other racial groups. Ironically, within a large, diverse, and highly mobile post-industrial society such as the United States, blacks living in the heart of the ghetto are among the most isolated people on earth.²⁸⁴

Although blacks and whites may not have complex social experiences with each other, they still encounter one another. The master narrative of black inferiority ensures that these encounters take place vicariously, through exported images. To this extent, each group consumes images of the other, but whites tend to consume images over which blacks have little control. As such, the images whites consume of blacks more than likely reflect stereotypes. Similarly, blacks consume images of whites that reinforce the dominant story. In this dominant story, whites are central players, while blacks are irrelevant backdrops, if they appear at all. In either case, both groups consume stereotypes. For whites, however, the images are enhancing. In this regard, blacks and whites are ordinary readers. At the very least, the single play of all-white human models in a real estate advertising campaign reminds blacks that a real estate world without a "ghetto tax"²⁸⁵ does not welcome them as the

daily misery.

Id.

284. MASSEY & DENTON, *supra* note 48, at 77.

285. See IVAN LIGHT & EDNA BONACICH, IMMIGRANT ENTREPRENEURS: KOREANS IN LOS ANGELES 1965-1982 (1988) (analyzing the success of Korean small business

community's ideal members. If blacks consume single plays by a variety of unrelated real estate advertisers, dominant white images might also express an impermissible racial preference. If in the aggregate, the single play advertisements by unrelated real estate advertisers over a twenty-year period express a racial preference, a newspaper should suffer civil liability under section 3604(c). Unrelated real estate advertisers can conspire even while promoting similarly destructive images to the black public. Any dominant white image, if expressed just once, indicates an impermissible racial preference and reinvigorates the master narrative of black inferiority.²⁸⁶

1. Aggregation Theory of Liability.²⁸⁷ Dominant White Images and Unrelated Real Estate Publications

The court in *Home Opportunities Made Equal, Inc., v. Cincinnati Enquirer, Inc.*,²⁸⁸ would disagree with this conclusion, and, in so doing, would probably suggest that unrelated real estate advertisers should be treated differently than the *Ragin* defendant and real estate advertisers.²⁸⁹ According to the court in *HOME*, if real estate advertisers are unrelated, they have not agreed collectively to indicate an impermissible racial preference.²⁹⁰ Yet that court proffered specious reasoning because it fallaciously assumed that people living in a racist society do not all consume the same suggestive message about the inherent

owners in Los Angeles).

286. See Bernard Guerin, *Behavior Analysis and the Social Construction of Knowledge*, 47 AM. PSYCHOL. 1423, 1424 (1992).

Social representations are socially constructed knowledge formed through the "give and take" of social life. They go beyond individual attitudes and beliefs, however, because they are not the province of one person but of a whole group or community. Any individual could not know the complete social representation. . . . [N]o presumption [exists] of a cohesive social group that shares such social representations.

Id.

287. *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 650 n.7 (6th Cir. 1991) ("When discussing this claim, we will refer to this theory of liability as the 'aggregation theory of liability' and to the message allegedly created and communicated as the 'aggregate message.'").

288. 943 F.2d 644.

289. See *id.* at 653 (rejecting the aggregation theory of liability).

290. See *id.* at 650.

value of blacks.²⁹¹ As the court in *HOME* acknowledged, however, unrelated real estate advertisers can produce a general message.²⁹² In a country in which the master narrative of black inferiority remains extant, unrelated real estate advertisers have not only been indelibly marked by white supremacy, but also have been, in the aggregate, suggesting the same message: *all-white living communities are perfect ones*.

In *HOME*, the court addressed two questions:²⁹³ first, "whether a single advertisement which features only white models" violates the Fair Housing Act and, second, "whether the publication of multiple advertisements by unrelated realtors which features only white models, when taken in the aggregate,"²⁹⁴ expresses a racially discriminatory message to the ordinary reader in violation of section 3604(c).²⁹⁵ In affirming the lower court's ruling, the court responded negatively to both questions.²⁹⁶

In *HOME*, Housing Opportunities Made Equal, Inc. (*HOME*), brought an action against the *Cincinnati Enquirer* (*Enquirer*), a local newspaper.²⁹⁷ The plaintiff contended that the paper had violated section 3604(c) of the Fair Housing Act, section 1982 of the Civil Rights Act of 1866,²⁹⁸ and the Thirteenth Amendment

291. *Ragin v. New York Times Co.*, 923 F.2d 995, 1000 (2d Cir.), *cert. denied*, 502 U.S. 821 (1991).

292. *See HOME*, 943 F.2d at 650.

293. In *HOME*, the plaintiffs' primary purpose was the "elimination of unlawful racially discriminatory housing practices to all persons seeking housing in the Cincinnati metropolitan area." *Id.* at 646. This characterization of the plaintiff's goal was important because *HOME* had to survive a standing question. *Id.* (citing *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir.) (allowing the plaintiff to demonstrate injury by showing "purportedly illegal action [that] increases the resources the group must devote to programs independent of its suit challenging the action"), *cert. denied*, 498 U.S. 980 (1990)).

294. *Id.* at 645.

295. *Id.*

296. *Id.* at 648, 653.

297. *Id.* at 645.

298. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) ("We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.") (citation omitted). Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase,

to the United States Constitution.²⁹⁹ The lawsuit specifically alleged that for more than twenty years, the newspaper had published real estate advertisements that "in almost every instance, pictured only white human models. Less than one percent of the advertisements depicting human models pictured a black model."³⁰⁰ According to HOME, these real estate advertising campaigns violated the Act because the black population constituted thirty-four percent of the population in the City of Cincinnati, nineteen percent in Hamilton County, and twelve percent in the metropolitan area.³⁰¹ Basically, HOME relied on *Ragin's* reasoning to argue that real estate advertisers violated section 3604(c) by impliedly stating that these communities did not welcome blacks.

To advance its position, the plaintiff proffered a far-reaching, two-pronged assault. First, HOME insisted that the *Enquirer's* "publication of any advertisement with all-white models violates the FHA or at least raises a factual issue of whether such advertisement is discriminatory."³⁰² Second, HOME alleged that "a layout of advertisements which depict models virtually all of whom are white even though independently submitted by various real estate organizations or their agents, when taken in the aggregate, sends a discriminatory message in violation of section 3604(c)."³⁰³ In launching this assault, HOME did not identify a particular advertisement that may have violated section 3604(c) and did not specifically name an advertiser who may have violated the Act. Without a clearly offending advertisement, the court could not trace a suggested racial preference to its source, and without a real estate advertiser potentially in violation, the court could not know whether it had appropriately identified the

lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1988).

299. U.S. CONST. amend. XIII, § 1 (barring slavery and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted").

300. *HOME*, 943 F.2d at 645.

301. *Id.*

302. *Id.* HOME's first attack contained this alternative pleading because the lower court had granted the *Enquirer's* motion to dismiss the case. HOME thus needed to allege facts which, if proved, would have stated a claim for which relief could be granted. See *id.* at 646 (discussing the standard for 12(b)(6) motions).

303. *Id.*

perpetrator.

For this court, HOME had reached too far. Under HOME's theory, a direct relationship exists between the master narrative of black inferiority, which operates pervasively and relatively invisibly, and aggregated dominant white images. Before agreeing to this argument, the court in HOME needed clearly identifiable violators; the court required more than a proverbial "they," who systematically violated section 3604(c). Without more than pointing broadly at what Yehudi Webster calls blacks' dependence on a mythic *white racism*,³⁰⁴ such an institutional attack would be unwarranted. Furthermore, the court in HOME was unwilling to sustain a legal theory which, on its face, would find all dominant white images in real estate advertisements offensive. After all, the communication medium allows society to inculcate dominant white images, but a wicked and sidwinding broadside on that institution would not necessarily make blacks whole³⁰⁵ and would do a great deal to weaken the power of the free press.³⁰⁶ In *Ragin*, the court made this very point in dicta.³⁰⁷

In response to HOME's first assault, the Sixth Circuit balanced a free press against a radical, far-reaching reading of section 3604(c).³⁰⁸ For the court, HUD's regulations sought a

304. See WEBSTER, *supra* note 255, at 114.

An overall racial economic situation is as elusive as the amount of melanin that makes a person white or black. The black experience turns out to be composed of many different experiences. Indeed, only the premise that white racism is a pervasive influence on the lives of all blacks sustains the idea of a black experience. Abandon this premise and the racial nature of experiences is dissolved.

Id.

305. This point is vital because, as the HOME court noted: "A reviewing court shall grant a motion to dismiss for failure to state a claim when it is 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" HOME, 943 F.2d at 646. Thus, if relief would not necessarily make a black plaintiff whole, the court would dismiss the claim.

306. See *id.* at 647 (concluding that "HUD sought to balance between the 'identification of practices which might be viewed as violations of Title VIII and . . . the limitations which the First Amendment may impose on mandatory restrictions relating to the publication of advertising'").

307. *Ragin v. New York Times Co.*, 923 F.2d 995, 1003 (2d Cir.) (discussing issues not on direct appeal from the lower court ruling), *cert. denied*, 502 U.S. 821 (1991).

308. See HOME, 943 F.2d 646-47 (recognizing that § 3604(c) applies to all publish-

balance between two crucial interests. First, the regulations provided courts with a baseline for identifying advertising practices that probably violated Title VIII.³⁰⁹ Second, they recognized that the First Amendment imposed limits on the power of governments and courts to restrict the manner in which newspapers publish advertisements.³¹⁰ The court resolved the tension created by section 3604(c) through its interpretation of HUD's regulations. Accordingly, although real estate advertisements can indicate an impermissible racial preference of the type at issue in *Ragin*, "no fixed and immutable rules [exist] to determine whether an advertisement is discriminatory."³¹¹ Without a bright-line rule, the court looked to *Ragin's* analysis of the "ordinary reader" standard.³¹² Although *Ragin's* analysis of the single-play advertisement was dicta, the Sixth Circuit cited it approvingly.

"[The ordinary] reader does not apply a mechanical test to every use of a model of a particular race. An ad depicting a single model or couple of one race that is run only two or three times would seem, absent some other direct evidence of an intentional racial message, outside Section 3604(c)'s prohibitions as a matter of law. . . . It thus seems inevitable that close questions of liability will involve advertisers that either use a *large number of models* and/or *advertise repetitively*. In such cases, the advertiser's opportunities to include all groups are greater, and the message conveyed by the exclusion of a racial group is stronger."³¹³

Relying on *Ragin*, the court rejected HOME's first argument because HOME failed to identify a single advertisement that purportedly violated Title VIII.³¹⁴ The real estate advertisers' ads contained equal housing opportunity logos indicating that

ing mediums, but allowing for flexibility in that application).

309. *Id.* at 646.

310. *See id.* at 647.

311. *Id.*

312. *Id.* at 648.

313. *Id.* (quoting *Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir.), *cert. denied*, 502 U.S. 821 (1991) (emphasis added)).

314. *Id.* at 647 n.2.

the properties remained open to all races.³¹⁵ The advertisements neither used words that expressed a racial preference nor described the "property's location in a preferential manner."³¹⁶ Further, the *Enquirer* published a notice in which it refused to accept illegal advertisements.³¹⁷ Because the one-time publication of a real estate advertisement containing all-white human models does not violate section 3604(c) unless a plaintiff shows that the advertiser intended to express an impermissible racial preference,³¹⁸ HOME's radical aggregation theory of liability failed.

2. Aggregation Theory of Liability: Dominant White Images as General Message

In response to HOME's second claim, the court similarly rejected any relationship between legal real estate advertisements and an aggregated message expressing an impermissible racial preference.³¹⁹ In the court's view, the *Enquirer* published legal advertisements.³²⁰ HOME protested not the purported legality of the real estate advertisements, but rather the aggregate message that they conveyed to ordinary readers over a twenty-year period. According to the court, HOME premised its legal theory of liability on the assumption that "the whole is greater than the sum of the individual parts."³²¹ By this, the court meant that even if the individual advertisements were legal, they may have indicated an illegal racial preference when read in sum. The

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 649. The court reasoned that:

Once clarified, HOME's first allegation in its complaint deals only with individual advertisements, and not with a plurality of advertisements. HOME's purpose for pointing to the publication of multiple advertisements is to raise its claim of liability based on its "aggregate message" theory. HOME is not alleging this fact in order to state a claim based on the repetitive advertising by a single advertiser. We hold that such an allegation fails to state a cause of action for purposes of section 3604(c).

Id. (citations omitted).

319. *Id.* at 650.

320. *Id.*

321. *Id.*

court found that under the FHA and HUD's regulation, HOME's theory had no support, and thus any ruling imposing liability on the *Enquirer* could not pass constitutional muster for three reasons.³²²

First, the court in *HOME* concluded that section 3604(c) of the FHA did not support the plaintiffs theory that the aggregate messages expressed an impermissible racial preference rendering the *Enquirer* liable.³²³ According to the court, the relevant section clearly required that a discriminatory message follow from an advertisement, and that the advertisement express a racial preference.³²⁴ The plaintiffs theory, however, identified neither an advertisement nor a message. Rather, HOME asserted that the impermissible message is "separate from and incidental to the individually placed advertisements."³²⁵ The court concluded that any imposition of liability for legal advertisements that might, in the aggregate, suggest a possibly impermissible message required too liberal an interpretation of the remedial statute. Relying on the FHA's plain meaning and finding no discriminatory advertisement, the court concluded that HOME's aggregate message theory fell outside the scope of section 3604(c).³²⁶

Second, the court in *HOME* also rejected the plaintiffs aggregate message theory under HUD's regulation. Under the HUD regulation, the FHA focused on "advertising campaigns" targeting white or black readers for "certain housing or neighborhoods."³²⁷ The *Enquirer*, however, published both unrelated and random real estate advertisements that did not qualify as an "advertising campaign."³²⁸ Unless they were part of a concerted campaign, the advertisements could not, in the particular case, target either whites or blacks for a certain neighborhood.³²⁹ In interpreting the regulations, the court reasoned

322. *Id.* at 650-53.

323. *Id.* at 650.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 652.

that:

In publishing unrelated advertisements, a newspaper is not directing an advertising campaign, and as an advertising medium, a newspaper does not limit advertisements to certain housing or neighborhoods. The regulations contemplate a certain level of specificity in the discriminatory message vis-a-vis the real estate in order to establish a violation of the FHA. A different message may be conveyed by a brochure or related advertisements for a property or development which shows multiple pictures of multiple models, all of them white.³³⁰

Thus, if the regulations do not impose liability, but the aggregate message of different advertisers suggests an impermissible racial preference, the court in *HOME* would not stray far from *Ragin*.³³¹ The FHA and HUD's regulations do not prohibit the aggregation of unrelated advertisers, but do prohibit the campaigns of individual advertisers from expressing a racial preference.³³² Thus, the court in *HOME* would not look to broad social conditions that could provide the context of the master narrative of black inferiority. In this context, the aggregation of dominant white images creates just as compelling a claim for relief under section 3604(c) as an individual real estate advertiser's use of all-white human models.

Third, the court in *HOME* refused to impose liability on the *Enquirer* based on the plaintiff's aggregate message theory because such a ruling would have rested on constitutionally suspect grounds. Rejecting *HOME*'s theory, the court took refuge in the First Amendment.³³³ Although the First Amendment provides less protection for commercial speech than for other types of expression,³³⁴ the Supreme Court has established a four-prong test to determine whether a challenged practice deserves protection.³³⁵ Under this test, commercial speech receives pro-

330. *Id.* at 650 (citation omitted).

331. *Id.* at 651 (citing *Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir.), *cert. denied*, 502 U.S. 821 (1991)).

332. *Id.* at 653.

333. *Id.* at 651.

334. *Id.* at 651-52.

335. *Id.* at 652 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*,

tection if it is lawful and not misleading. Under the three remaining prongs of the test, the government's interest must be substantial, the regulation must directly advance that interest, and the regulation must not be "more extensive than is necessary to serve that interest."³³⁶ According to the court in *HOME*, the *Enquirer's* speech was both legal and truthful, and the government's interest was substantial.³³⁷

After the court had posited these obvious decisions, it paid close attention to the two remaining prongs of the *Central Hudson* test. Applying the third prong, the court in *HOME* concluded that the plaintiff's aggregate theory of liability bore almost no relationship to the FHA's goals. An interpretation of section 3604(c) that would support plaintiff's theory thus could not promote the government's interest.³³⁸ In reaching this conclusion, the court posited that, under the FHA, Congress sought to end housing discrimination and to promote housing desegregation.³³⁹ Toward achieving those goals, Congress promulgated section 3604(c). If the FHA did not prohibit discriminatory advertising, "realtors could deter certain classes of potential tenants from seeking housing at a particular location."³⁴⁰ If, however, the *Enquirer* published *legal* real estate advertisements, the plaintiff's attack would not further the FHA's goals. Indeed, *HOME* would hold "a publisher liable for the creation of a *general message* of discrimination not traceable to a particular advertisement."³⁴¹ According to the court, however, section 3604(c) requires more than a general message reaching the real estate market and creating an unfriendly environment for blacks.³⁴² At the very least, the publisher must also *express* an impermissible racial preference.³⁴³ If so, the issue becomes whether the challenged advertising prevented blacks from renting or buying

447 U.S. 557, 566 (1980)).

336. *Id.* (quoting *Central Hudson*, 447 U.S. at 566).

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* (emphasis added).

342. *Id.*

343. *See id.* at 653 (stating that publishers remain liable for publishing obviously discriminatory advertisements and intentional discrimination).

real property. If the court could not answer this question negatively, HOME would urge the court to impose liability even if the *Enquirer* affirmatively complied with the FHA. In the court's view, however, HOME's theory undermined, rather than promoted, the FHA's goals.³⁴⁴

Addressing the fourth prong of the *Central Hudson* test, the court concluded that HOME's aggregate message theory required a statutory construction of section 3604(c) "too extensive to serve the state's interest."³⁴⁵ Under HOME's theory, section 3604(c) required the *Enquirer* to ensure that, individually and in the aggregate, real estate advertisements did not express an impermissible racial preference. The *Enquirer* would have to bear the oppressive burden of achieving a properly mixed racial layout using undefined statistics or standards. In addition, the *Enquirer* would have to require real estate advertisers to use minority human models. If these steps failed, the *Enquirer* would have to refuse to publish real estate advertisements with human models. With paltry analysis, the court concluded that these steps were extreme and too extensive to serve the FHA's goal because the free press would be required to enforce governmental policy.³⁴⁶ Such a construction of the Act would still expose the *Enquirer* to potential liability.³⁴⁷ Because HOME's statutory construction only nominally promoted the FHA's goals and significantly impaired the normal function of the press, the court in *HOME* held that, without any proof of the *Enquirer's* intent to discriminate, the plaintiff's aggregate message theory required a constitutionally infirm ruling.³⁴⁸ Thus, the court concluded that the *general message* was constitutionally protected commercial speech.³⁴⁹

344. *Id.* at 652-53.

345. *Id.* at 653.

346. *Id.*

347. *Id.*

348. See Lawrence, *supra* note 12, at 322 (stating that "the Court thinks of facially neutral actions as either intentionally and unconstitutionally or unintentionally and constitutionally discriminatory").

349. *HOME*, 943 F.2d at 652-53. See generally Cass R. Sunstein, *Conflicting Values in Law*, 62 *FORDHAM L. REV.* 1661 (1994) (arguing that different decision modes are necessary and valuable because they reflect differing values not susceptible to intrinsic, instrumental, and commensurable measurement). The court in *HOME* viewed

3. General or Aggregate Message as Master Narrative

In *HOME*, the court's reasoning acknowledged that a general or aggregate message of dominant white images could intersect with section 3604(c) violations. If, however, a general or aggregate message of dominant white images does not affirmatively injure blacks, it has impolitely slapped but not illegally bludgeoned them. The court in *HOME* confused racially oppressive images with a public nuisance. For example, if a general or aggregate message of dominant white images noxiously pervades our "perceptual air," a complaining party can demonstrate that a public nuisance exists. If, however, the complainant fails to show that she has suffered substantial damage, such as an inability to rent or buy, then she does not have standing.³⁵⁰

To have standing, the plaintiff must suffer not only the violence of an offending image but also a legally cognizable injury.³⁵¹ Unfortunately, when advertising imposes dominant white images on the socialized Other, the images do not leave a visible stain or create a tell-tale odor in the air.³⁵² Although blacks may lack a gaping wound, they have no self-affirming images that recognize their spiritual beingness.³⁵³ Without this recognition, a general or aggregate message of dominant white images increasingly victimizes blacks. Each new generation cannot depend on the preceding one to fashion the counterstory neces-

free speech as intrinsically and instrumentally valuable, but saw its value as incommensurate. Because race has limited utility and is commensurate, the court in *HOME* held that a general or aggregate message did not violate § 3604(c) unless the plaintiffs demonstrated that the *Enquirer* intended to discriminate racially.

350. See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970); see also *Ragin v. Harry Macklowe Real Estate Co.*, 801 F. Supp. 1213, 1228-29 (S.D.N.Y. 1992) (stating that under Title VIII, a party has standing if a "controversy" exists and an injury has in fact occurred), *aff'd in part and rev'd in part*, 6 F.3d 898 (2d Cir. 1993).

351. *Ragin*, 801 F. Supp. at 1228-29.

352. See Delgado, *supra* note 31, at 133.

353. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (discussing the impact of segregated education on the self images of black students); CLARK, *supra* note 76, at 133 ("As Haryou gathered data on the schools, it became increasingly clear that the attitude of the teachers toward their students was emerging as a most important factor in attempting to understand the massive retardation of these children."); *id.* at 125-39 (discussing the different attitudes of white and black teachers toward their urban students).

sary for its attempts to recast or reinscribe itself. Without legal standing, blacks cannot systematically challenge a general or aggregate message, or expose the extent to which the message and all section 3604(c) violations promote housing segregation. Without legal standing, the master narrative of black inferiority continues to undermine the FHA.

Although it acknowledged that general or aggregate messages could intersect with section 3604(c) violations, the court in *HOME* completely missed the point. The court protected a publishing industry that plays a key role in disseminating dominant white images, suggesting impermissible racial preferences, and promoting housing segregation. By permitting publishers to turn their backs on the degree to which pictures, which speak volumes about whose race is in and whose is out, impact blacks,³⁵⁴ the court implicitly asserted that the free press does not have a stake in an ism-free society and should play no role in promoting liberty interests. Therefore, either the press did not actively participate in representing this general or aggregate message, or, if it did participate, it did not undermine the community's collective liberty interest.

The court in *HOME* implicitly made a critical point: the master narrative of black inferiority operates at the level of the unconscious. However, because the court could not "see" the injury that dominant white images in the aggregate have done to blacks, it fashioned no relief. As a historical matter, when these dominant white images aggregate daily and continuously, they become part of a very complex culture pattern. Many people do not see culture; rather, cultural patterns only take on a public persona when given effect. If dominant white images are like an odorless gas that cumulatively and negatively distorts a black person's perceptions of self-worth and that gradually and posi-

354. See Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097 (1994) (arguing that feminist attacks on pornography have the counterproductive effect of reinforcing "sex as sin" stereotypes and of contributing to media self-censorship of sexually explicit material that is actually useful to the women's movement); Note, *supra* note 16, at 881 (asserting that "to discern stigma it is necessary to evaluate the conduct at issue to 'determine whether it conveys a symbolic message to which the culture attaches racial significance'" (quoting Lawrence, *supra* note 12, at 351)).

tively inflates a white person's personhood, their effect remains unknown without sensitivity to aggregate messages and effects like extant housing segregation.

In *HOME*, the court had such an opportunity. Had it taken up the lance and tilted at the proverbial windmill, it would have condemned the sacred and the defamed. By broadening section 3604(c), the court would have acknowledged that whites unconsciously act upon the master narrative of black inferiority. The court would have admitted its inability to measure adequality the real, permanent harm that occurs when a general or aggregate message of dominant white images becomes part of the nation's cultural thinking for more than twenty years. By shifting the burden to produce blacks injured by the general or aggregate message to the plaintiff, the court—unconsciously perhaps—gave a legal imprimatur to the master narrative of black inferiority little different from the effect of *Plessy v. Ferguson*³⁵⁵ and *Shelley v. Kraemer*.³⁵⁶ In *HOME*, the general or aggregate message differed little from a *Ragin* violation: dominant white images represent the master narrative of black inferiority and play a vital role in the subtle promotion of neighborhood purity.

C. *Intersection of Dominant White Images and Violent Enforcement of Neighborhood Purity as Master Narrative*

In any social context, people are a function of what they believe; an individual cannot be in truth something not considered and accepted as true. In a nation that has based its institutional practices on race-conscious social development, the master narrative of black inferiority, not surprisingly, has two vital subsets—dominant white images *and* violent enforcement of white supremacist notions. An additional subset of the master narrative of black inferiority consists of those liberal whites who reject open and public displays of violence against blacks, but who nevertheless consciously act on an unconsciously held belief that blacks are basically inferior to whites.³⁵⁷

355. 163 U.S. 537 (1896).

356. 334 U.S. 1 (1948).

357. See Oppenheimer, *supra* note 12, at 903 (arguing that "surveys support the

If the medium is the message,³⁵⁸ and if that message is "whites only,"³⁵⁹ be it "sophisticated [or] simple-minded,"³⁶⁰ truly believing, dyed-in-the-wool racists have no reason not to act to preserve the "whiteness" and "sanctity" of their communities.³⁶¹ The "hidden persuaders" in all-white advertising³⁶² not only assert that Pangloss's best of all possible worlds is a *white* one,³⁶³ they also suggest that the best white world is possible only if white residents intimidate blacks who relocate into white communities or if they physically injure, maim or kill blacks who ignore the explicit or subtle "No Niggers Allowed" signs.³⁶⁴

The assertion that advertisers who discriminate in their advertising campaigns intend to cause violent reactions to incom-

view that overt racism has lost favor socially, but racist attitudes lie close beneath the surface of our society").

358. See Debra L. Alligood, Comment, *When the Medium Becomes the Message: A Proposal for Principal Media Liability for the Publication of Racially Exclusionary Real Estate Advertisements*, 40 UCLA L. REV. 199, 203 (1992).

359. See *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1060-63 (E.D. Va. 1987) (awarding damages because a landlord's discriminatory refusal to rent caused the black plaintiffs to feel "unwelcome in [their] own community").

360. See *Wheatly Heights Neighborhood Coalition v. Jenna Resales Co.*, 447 F. Supp. 838, 841 (E.D.N.Y. 1978).

361. See, e.g., *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994); *United States v. Montgomery*, 23 F.3d 1130 (7th Cir. 1994); *United States v. Juvenile Male J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1576 (1994); *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994); *United States v. Garner*, No. 92-5069, 1993 U.S. App. LEXIS 1925 (4th Cir. Feb. 4, 1993); *United States v. McInnis*, 976 F.2d 1226 (9th Cir. 1992); *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991), *cert. denied*, 114 S. Ct. 1550 (1994); *United States v. Kissinger*, Nos. 9-5553, 90-5562, 1991 U.S. App. LEXIS 21200 (4th Cir. Sept. 10, 1991); *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1990), *cert. dismissed*, 502 U.S. 922 (1991); *United States v. Myers*, 892 F.2d 642 (7th Cir. 1990); *United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989); *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990); *United States v. White*, 861 F.2d 994 (6th Cir. 1988); *United States v. Gilbert*, 813 F.2d 1523 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987); *United States v. White*, 788 F.2d 390 (6th Cir. 1986); *United States v. Wood*, 780 F.2d 955 (11th Cir. 1986); *Munger v. United States*, 827 F. Supp. 100 (N.D.N.Y. 1992).

362. See VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957).

363. See *supra* note 281 and accompanying text.

364. See, e.g., *United States v. Gilbert*, 884 F.2d 454, 455 (9th Cir. 1989) ("Gilbert told a college newspaper reporter that there were 'seventeen niggers' in Kootenai County, the county in which he resided, and that by the time his group was through there wouldn't be any."), *cert. denied*, 493 U.S. 1082 (1990).

ing black residents goes too far.³⁶⁵ However, "advertisers cho[ose] their models carefully in order to encourage their target market to identify with the model."³⁶⁶ By targeting a particular housing market, the discriminatory advertising campaign achieves its goals, and "the message [is] just as clear: 'the product is not for me.'"³⁶⁷

Because blacks perennially suffer housing discrimination,³⁶⁸ a clear message expressing a racial preference creates two critical moments. First, the ordinary black reader "hears" *Niggers stay away*.³⁶⁹ As a consequence, blacks refuse to live in those communities.³⁷⁰ Second, the ordinary white reader "understands" *Niggers don't belong*. Whites thus refuse to permit blacks into those communities.³⁷¹ Further problems arise if the ordinary white reader hates blacks, thinks that blacks are bestial, or becomes committed to violence. After blacks move into the community, white residents leave for fear that property values will fall.³⁷² Moreover, the ordinary white reader refuses to create a community with those blacks, hopefully expecting that isolation will drive them away. In addition, the ordinary white reader violently persecutes blacks.³⁷³ Whether the ordinary white reader engages in actual violence, exclusion, or fear tactics such as isolation, each instance operates structurally and

365. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

366. Fiorino, *supra* note 208, at 1434 (citation omitted).

367. *Id.* (citing *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1058 (E.D. Va. 1987)).

368. See KUSHNER, *supra* note 5, at 1.

369. See Ruth Marcus, *Realty Firm Loses Suit Over Ads with White Models*, WASH. POST, May 14, 1987, at A6.

370. See MASSEY & DENTON, *supra* note 48, at 95 ("Given the harassment that historically has followed their entry into white areas, blacks express considerable reluctance at being the first to cross the line."); Peter S. Canellos, *Future Shock Visions and Challenges for the Next 10 Years*, BOSTON GLOBE, Sept. 12, 1993, (Magazine) at A34, A35 (describing communication breakdowns in mixed race neighborhoods, including black residents' concerns that neighborhood crime watches were really "a cover for white resistance to sharing space with those of different races and different cultures").

371. See *infra* notes 386-421 and accompanying text.

372. Brenda J. Gilchrist & Dan Gillmor, *Whites Say They're More Accepting*, DETROIT NEWS & FREE PRESS, Oct. 10, 1992, at 1A (noting survey results that a majority of residents of three Detroit suburbs would leave a majority black neighborhood).

373. See *infra* notes 386-421 and accompanying text.

violently against blacks.³⁷⁴ To this extent, dominant white images intersect not only with unconscious race hatred and fear, but also with conscious expressions of hate and fear³⁷⁵—racial violence.³⁷⁶ In the end, this intersection depends on the master narrative of black inferiority.

Whites who believe that the master narrative of black inferiority precludes blacks and whites from living in the same community generally use violence to achieve the goal of neighbor-

374. See Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 396 (1993) (discussing law as structural violence). Unfortunately, even though some of these instances are not actionable under section 3631, such violence ought to have been envisioned by the FHA, and blacks, at the very least, should have an action for intentional or negligent infliction of emotional distress. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 54-55 (5th ed. 1984) ("[T]he law has been slow to accept the interest in peace of mind as entitled to independent legal protection . . ."). See generally Oppenheimer, *supra* note 12, at 899 (discussing negligence in employment discrimination).

375. Psychopathology does not, however, explain hate crimes, racial oppression, or violently enforced housing segregation. See THOMAS & SILLEN, *supra* note 12, at 114-15 (rejecting as reductionist the argument that, because white racism manifests itself in behavior, language, and attitudes, its roots lie in "instinctual drives, infantile stages of psychological development, or specific types of personality structure"); *id.* at 119 ("[R]acism is both 'a set of beliefs whose structure arises from the deepest levels of our lives' and 'the product of the historical unfolding of Western culture.'"); *id.* at 120 ("To give primacy to social causes does not mean that the psychological expressions of racism are accidental or superficial. . . . They may profoundly affect an individual's thinking and behavior. They nevertheless remain essentially the consequences, not the causes of racism.").

376. See MASSEY & DENTON, *supra* note 48, at 88-96.

Although the level of antiblack violence has declined since the 1920s, black apprehensions about entering white neighborhoods are by no means unfounded. Some 213 racial "hate crimes" were reported in Chicago during 1990, about half directed at blacks. These crimes included 57 incidents of battery, 18 cases of vandalism, and 28 reports of threats or racial harassment. As in the past, these incidents occurred mainly along the color line: of 1,129 hate crimes reported in Chicago during 1985-1990, half were located in ten community areas undergoing racial change. The Los Angeles Commission on Human Relations reported 167 racially motivated hate crimes during 1989, representing an increase of 78% over the prior year. About 60% of the crimes were directed against blacks and about 70% occurred at the victim's residence. The specific complaints included 54 instances of racist graffiti or literature, 53 assaults, 34 acts of vandalism, 19 threats, 6 cross-burnings, and one case of arson.

Id. at 90 (citations omitted).

hood purity.³⁷⁷ Upon encountering violence, blacks who integrate all-white neighborhoods soon discover that they cannot enjoy rights taken for granted by whites. By using violence, for example, whites intimidate blacks who later abandon their homes.³⁷⁸ In order to prevent or punish racist intimidation and to perfect the Fair Housing Act's goal of integration, Congress enacted section 3631, the "Prevention of Intimidation."³⁷⁹ Under section 3631, Congress clearly intended to protect a black person's "right to occupy a dwelling of one's choice free from racial pressure."³⁸⁰ With this choice, blacks can associate freely with whites and should feel physically safe within their abode.³⁸¹ To ensure these rights, section 3631 imposes criminal punishment on any person, who, through force or the threat of force, willfully injures, intimidates or interferes with a black person "because of his race . . . and because he is . . . occupying . . . any dwelling."³⁸² If convicted of this federal misdemeanor, violators either go to jail for less than a year, pay not more than \$1,000.00, or both.³⁸³ With this prohibitive regime, the government enforces blacks' rights to live where they can afford and to associate with whom they please. Section 3631 thus weakens the violent enforcement of

377. See *infra* notes 386-421 and accompanying text.

378. See, e.g., Taylor, *supra* note 32 (describing the racially motivated violence that forced black families to abandon one Boston neighborhood).

379. The Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1988), originated as part of Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered portions of the United States Code). The "Prevention of Intimidation" section was originally incorporated into the Fair Housing Act as § 901, 82 Stat. 89 (1968), and codified as amended at 42 U.S.C. § 3631 (1988).

380. *United States v. Wood*, 780 F.2d 955, 961 (11th Cir. 1986).

381. *Id.*

382. *Id.* In order to establish a § 3631 violation, the government has to prove: (1) that the defendant used force or threats of force; (2) that he attempted to intimidate or interfere with the victim's right to associate in his or her home with members of another race; (3) that he acted willfully; (4) that he "acted as [he] did because [the victim] was occupying a dwelling [in a particular area] and because the [victim] had there associated with persons of the black race or to prevent them in the future from their association in that house with persons of the black race"; (5) that the victim suffered bodily injury as a result of the offense.

Id.

383. *United States v. White*, 788 F.2d 390, 391 n.1 (6th Cir. 1986).

neighborhood purity,³⁸⁴ an integral part of the master narrative of black inferiority.³⁸⁵

Despite the statutory relief that section 3631 provides aggrieved blacks, a difficult and prolonged struggle is necessary to eradicate housing segregation imposed by the violent enforcement of neighborhood purity.³⁸⁶ Consequently, throughout

384. Section 3631 provides in pertinent part:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color, . . . , and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from —

(1) participating, without discrimination on account of race, color, . . . in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate

42 U.S.C. § 3631.

Further, § 245(b)(5) of Title I of the 1968 Civil Rights Act states that any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate without discrimination on account of race, color . . . [in such public assistance programs as seeking or enjoying employment, or partaking of benefits, services, privileges, programs, facilities or activities provided by the United States] shall be fined not more than \$1,000, or imprisoned not more than one year, or both

18 U.S.C. § 245(b)(5) (1988 & Supp. IV 1992); see *Johnson v. Mississippi*, 421 U.S. 213, 224-27 (1975) (stating the origins of § 245); *United States v. Johns*, 615 F.2d 672, 675-76 (5th Cir.) (holding that shooting into a residence to discourage interracial living and interracial dating violated 42 U.S.C. § 3631, and intimidating NAACP leaders seeking to find housing and employment opportunities violated 18 U.S.C. § 245(b)(5)), *cert. denied*, 449 U.S. 829 (1980); *Williams v. Tri-County Community Ctr.*, 452 F.2d 221, 223 n.3 (5th Cir. 1971) (stating that § 245 is a "criminal statute that in terms confers no rights").

385. See THOMAS & SILLEN, *supra* note 12, at 121.

To be sure, prejudice is not automatically and immediately eliminated by changes in social institutions. This persistence is especially marked in the case of race prejudice, "in which the traditionally transmitted antipathies often provide the central core around which there gather other supporting antipathies constituting together an emotional system difficult to eradicate."

Id.

386. *Id.* ("It would be the height of naivete to expect that the social changes re-

America, blacks residing in predominantly white or all-white neighborhoods live under siege.³⁸⁷ Consider the case of Mr. and Mrs. Richard Woods, who are black.³⁸⁸ The Woods planned to build a home in Knoxville, Tennessee, across the street from T. Lynn White.³⁸⁹ In January 1982, at the request of Troy L. Castile, James Brown and T. Lynn White burned down Castile's house in an effort to collect insurance proceeds.³⁹⁰ Some time after June 11, 1982, White asked Brown and Castile to help him with another problem.³⁹¹ White told Brown and Castile that "I've got some niggers . . . moving in right across the street from me, and I don't want that to happen."³⁹² According to White's brother-in-law, "White was concerned about 'niggers' moving into the neighborhood."³⁹³ In response to White's request, Castile told White: "I think we can handle that for you. Take [Brown] out there and show him where the house is."³⁹⁴

After locating the Woods' home, Castile and Brown asked Mack Shelton, a convicted felon, to "remodel" the Woods' home.³⁹⁵ Before "hiring" Shelton to destroy the Woods' home, White indicated to the Woods' builders that "they would be 'lucky if it [the Woods' house] stands for two months."³⁹⁶ On the night of July 31, 1992, fire and an attendant explosion "totally destroyed" the Woods' home.³⁹⁷ After the blaze, White told one of the builders that "if that black son of a bitch [re]built . . . across the street from me . . . I'd burn it down."³⁹⁸ With the

quired to eliminate racism can be achieved without difficult and prolonged struggle.").

387. See, e.g., MASSEY & DENTON, *supra* note 48, at 91.

In New York City, an Italian American told the sociologist Jonathan Rieder about the treatment he and his friends gave to Puerto Rican and black families who invaded their turf: "We got them out of Canarsie. We ran into the house and kicked the shit out of every one of them."

Id.

388. *United States v. White*, 788 F.2d 390, 392 (6th Cir. 1986).

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.* at 393.

394. *Id.* at 392.

395. *Id.*

396. *Id.* at 393.

397. *Id.* at 392.

398. *Id.* at 393.

testimony of Brown and Shelton, who pled guilty prior to trial, the Sixth Circuit affirmed White's conviction for violating section 3631.³⁹⁹

Dominant white images and violent enforcement of neighborhood purity come together rather virulently when whites use threats or acts of violence to prevent a blurring of racial lines.⁴⁰⁰ The actions of these whites fall into a long line of historically reprehensible conduct,⁴⁰¹ and this history is often not lost on the white enforcers.⁴⁰²

When an interracial couple blurs the racial dividing line between blacks and whites by owning a home in an all-white community, the violence reaches a heightened level because the false dichotomy between superior and inferior breaks down. For example, on June 3, 1990, at approximately 10:30 P.M., Ralph Ramey and James "Bo" Payne burned down a mobile home occupied by JoAnn Vance and Alex Nelms.⁴⁰³ Vance was white; Nelms was black.⁴⁰⁴ Ramey lived near the victims, and Payne's mother lived across from the mobile home.⁴⁰⁵ Ramey and Vance generally disliked blacks, and they particularly hated Vance and Nelms.⁴⁰⁶ At some point, "Ramey told his own father-in-law that somebody should 'burn out' Vance and Nelms because he did not like the idea of a white woman living with a black man."⁴⁰⁷ Prior to taking steps to destroy the couple's home, Payne predicted two things: someone could burn their home, and someone could get away with the crime.⁴⁰⁸ After a night of drinking, Ramey, Payne, and a cohort bought gasoline, and, as they neared the victims' trailer, Ramey boasted that "they were going 'to burn the niggers out.'"⁴⁰⁹ Ramey and

399. *Id.* at 392.

400. See Higginbotham & Kopytoff, *supra* note 77, at 1970 (describing the introduction of laws in pre-Civil War Virginia designed to prevent mixture of the races).

401. WOODWARD, *supra* note 18, at 86.

402. FONER, *supra* note 18, at 188.

403. *United States v. Ramey*, 24 F.3d 602, 604 (4th Cir. 1994).

404. *Id.*

405. *Id.* at 605.

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

Payne set the fire with Vance and Nelms at home.⁴¹⁰ After a useless effort to put out the blaze, Vance and Nelms escaped, and their trailer burned to the ground.⁴¹¹

In addition to acts of physical violence, whites often use historical symbols to enforce violently their desire for neighborhood purity. By using a particular symbol of hate and intimidation, these whites demonstrate a link between dominant white images, race hatred, and the master narrative of black inferiority. That historical symbol is cross burning.⁴¹²

In *Juvenile Male J.H.H.*,⁴¹³ several young white males, including some juveniles, talked about their dissatisfaction with racial incidents generally and their "disgust[]" with the Joneses, a black family living in their neighborhood.⁴¹⁴ In this talk on racial tensions, the Joneses undoubtedly symbolized lost control over the whites' security and their neighborhood. The testimony shows that

J.H.H. told of being accosted by three African-Americans. R.A.V. related that an African-American male had recently pulled a knife on him. Arthur Miller testified that the members of the group were "really disgusted" about having an African-American family living across the street from Miller and they decided to do something about it. J.H.H. suggested puncturing the tires of the Joneses' car, but Miller said that had already been done and "it didn't do no good . . . They're

410. *Id.*

411. *Id.*; see also *United States v. Garner*, No. 92-5069, 1993 U.S. App. LEXIS 1925 (4th Cir. Feb. 4, 1993) (stating that Garner, an ex-member of the Ku Klux Klan, threatened physical violence and death against a black co-worker who dated a white woman); *United States v. Wood*, 780 F.2d 955 (11th Cir. 1986) (describing how defendants used racially motivated threats against a mother and her children because the mother dated a black man, beat the mother, called her a "nigger" lover, asked the daughter if she or her mother or brother had been sleeping with "niggers," and promised to take the daughter if the mother continued to associate with the "nigger," and how, in a separate incident, the defendants beat a black man).

412. See, e.g., *United States v. Juvenile Male J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1550 (1994); *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994); *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991), *cert. denied*, 114 S. Ct. 1550 (1994).

413. 22 F.3d 821.

414. *Id.* at 823. Russell and Laura Jones lived with their five children. *Id.* at 823 n.2.

still there." R.A.V. brought up the movie "Mississippi Burning," a movie which portrays Klan violence, cross burnings, and murders, which gave the group the idea of burning a cross.⁴¹⁵

At that point, Miller encouraged racial violence: "Let's go burn some niggers."⁴¹⁶ After constructing the cross, placing it in the Joneses' backyard, and setting it on fire at 2:30 A.M., the men ran away, and the Joneses awoke to watch in terror as the cross burned.⁴¹⁷

Unfortunately, *Juvenile Male J.H.H.* typifies the terror that blacks face when they live in all-white or predominantly white neighborhoods. Another typical case is *United States v. Hayward*,⁴¹⁸ in which the defendants "burned crosses in front of the Joneses' house to underscore their dislike of blacks—or as they referred to them, 'niggers' and 'coons'—being in Keeneyville and staying with a white family."⁴¹⁹ *United States v. Lee*⁴²⁰ provides another example. The defendants "burned the cross to take a stand and . . . 'maybe that would get rid of some of the bad blacks that were there, they would take the message seriously and leave."⁴²¹

In each case, whites wished to convey a message of fear, hatred, and violence, and they also did not wish blacks and whites to coexist in the same neighborhood. With the presence of blacks, the neighborhood's purity somehow becomes adulterated. That purity is the mythic symbol conveyed by dominant white

415. *Id.* at 826-87.

416. *Id.* at 823.

417. *Id.* In addition to this cross burning, the defendants constructed and burned two more crosses on the Joneses' property. On each occasion, the Joneses called the police. No indication exists whether the police ever actually responded. *Id.* at 823-24. After their arrest, Miller pled guilty as an adult to misdemeanor charges for cross burning. *Id.* at 823 n.1. R.A.V., a juvenile, also pled guilty to a felony for his role in the cross burning. *Id.* The court convicted all three juveniles for violating 18 U.S.C. § 241 (1988), 42 U.S.C. § 3631 (1988), and 18 U.S.C. § 2 (1988). *Id.* at 823. Each appealed his conviction, in part alleging that the convictions under §§ 241 and 3631 could not stand "because the expressive act of cross-burning is protected by the First Amendment." *Id.* at 824.

418. 6 F.3d 1241 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1550 (1994).

419. *Id.* at 1243-44.

420. 935 F.2d 952 (8th Cir. 1991), *cert. denied*, 114 S. Ct. 1550 (1994).

421. *Id.* at 954.

images, and, with those images consciously and unconsciously inculcated, the master narrative of black inferiority clearly intersects with dominant white images and violent enforcement of neighborhood purity. This privileged narrative gives articulated meaning to white images and purity.

In both *Ragin*⁴²² and *HOME*,⁴²³ whites sought fundamental protection for the master narrative of black inferiority by invoking the First Amendment.⁴²⁴ In *Juvenile Male J.H.H.*,⁴²⁵ *Lee*,⁴²⁶ and *Hayward*,⁴²⁷ defendants attacked their convictions on First Amendment grounds by relying on *R.A.V. v. City of St. Paul*.⁴²⁸ In *R.A.V.*, Justice Scalia, writing for the majority, struck down a local ordinance as facially invalid because it regulated bias-motivated expressive conduct such as cross burning.⁴²⁹ At a fundamental level, First Amendment jurisprudence mandates that communicative conduct falls within the First Amendment's scope,⁴³⁰ and government regulations that ban speech or expressive conduct based on content are presumptively invalid.⁴³¹ The courts, however, have also established that certain categories of speech or expressive conduct that threaten or provoke violence do not receive the same broad constitutional protections given other types of expression.⁴³² Section 3631 does not punish speech, but does punish conduct that intentionally threatens, intimidates, and interferes with blacks' right to occupy their property.⁴³³ The court in *Juvenile Male J.H.H.* concluded that the defendants' expressive conduct—cross burn-

422. *Ragin v. Harry Macklowe Real Estate Co.*, 801 F. Supp. 1213 (S.D.N.Y. 1992), *aff'd in part and rev'd in part*, 6 F.3d 898 (2d Cir. 1993).

423. *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644 (6th Cir. 1991).

424. *See id.* at 651; *Ragin*, 801 F. Supp. at 1226-27.

425. *United States v. Juvenile Male J.H.H.*, 22 F.3d 821 (8th Cir. 1994).

426. *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991), *cert. denied*, 114 S. Ct. 1550 (1994).

427. *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1550 (1994).

428. 112 S. Ct. 2538 (1992).

429. *Id.* at 2547.

430. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

431. *Id.* at 414-15.

432. *United States v. Juvenile Male J.H.H.*, 22 F.3d 821, 825 (8th Cir. 1994).

433. *See* 42 U.S.C. § 3631 (1988).

ing—fell outside the ambit of the First Amendment because the cross burning sought to threaten “some niggers who lived across the street” and because the young men did not “like niggers, and they wanted them out of the neighborhood.”⁴³⁴

IV. CONCLUSION: A PROPOSAL FOR IMAGE EQUALITY

This Article has argued that the master narrative of black inferiority explains not only the persistence of racial discrimination, but also extant housing segregation. As such, if the Fair Housing Act does not concern itself with both individual conduct and the broader social milieu that produces that conduct, it has failed in its legislative mandate to end discrimination and segregation in housing. The FHA will continue to fail to end discrimination and promote integration. Today, in real terms, the ghettoization of blacks, their isolation in suburbs, and the hypersegregation in virtually every major city in the United States symbolize the FHA's failure.

The legislature must reorient the FHA's focus. The FHA must not only target racially discriminatory conduct, but also social conditions. To focus on conduct and social conditions, the FHA must posit that all whites operate consciously or unconsciously on the master narrative of black inferiority; this story has been a most pervasive theme in American race relations.⁴³⁵ This initial premise is vitally important. The master narrative of black inferiority not only energizes white flight and housing segregation, but also rationalizes race hatred and the violence of neighborhood purity. By altering its focus, the FHA's enforcers, both private and public, can develop steps to identify the manner in which the privileged story operates, and then, hopefully, they can successfully target its effects.

If the FHA has ignored the master narrative of black inferiori-

434. *Juvenile Male J.H.H.*, 22 F.3d at 828.

435. See Taeuber, *supra* note 7, at 344 (“[I]nstitutionalized racism and the web of discrimination are persistent features of American society.”); *id.* at 345 (“My sympathies with the view that deeply institutionalized racism perpetuates residential segregation are apparent in this historical account, where I have emphasized overt discrimination and intentional segregation.”).

ty,⁴³⁶ it also has ignored the intersection of dominant white images and the violence of neighborhood purity.⁴³⁷ This intersection remains a crucial aspect of Title VIII's enforcement. Such enforcement will not occur if courts rely on HUD's regulation for a very narrow interpretation of section 3604(c). A narrow interpretation eliminates courts' ability to see the conjunctive relationship of dominant white images, race hatred, and the violence of neighborhood purity. If this relationship does not enter Title VIII jurisprudence, very powerful general or aggregate messages escape legal retribution and official public awareness. Punishing the violence that follows naturally and directly from the pervasive impact of dominant white images ratifies the intersection between section 3604(c) and section 3631. However, if courts refuse this route of properly enhanced enforcement, the FHA's legislative myopia will continue to condemn blacks not only to housing segregation, but also to race hatred and violence.

Furthermore, without a liberal remedial jurisprudence that links aggregate white images with the violence of neighborhood purity, the FHA fails to achieve its goals. At present, courts remain unwilling to broaden the FHA's prohibitive reach to a general or aggregate message that impermissibly indicates a racial preference.⁴³⁸ Courts misunderstand the ability of a general or aggregate message to write a narrative about who is valued and what symbols matter. These general or aggregate messages also subtly but violently deny blacks a level and degree of legally cognizable personhood. After hundreds of years of general or aggregate messages, whites reject blacks as valued members of the broader community, and blacks who have internalized that message refuse to participate actively in the making or re-making of that community.⁴³⁹ When whites reject blacks subtly, section 3604(c) should come into play. The violent rejection of blacks by whites triggers section 3631. Unless they still favor open racial violence, courts must recognize that a general

436. See *supra* notes 8-15 and accompanying text.

437. See *supra* notes 400-21 and accompanying text.

438. See, e.g., *Housing Opportunities Made Equal, Inc. (HOME) v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 653 (6th Cir. 1991) (rejecting the plaintiff's aggregation theory of liability).

439. See *supra* notes 368-75 and accompanying text.

or aggregate message creates the social milieu that produces the violence of neighborhood purity. To this extent, the race-oriented message directly or indirectly *causes* the race violence.⁴⁴⁰ Even if the message is unconscious, it effects concrete, conscious consequences such as housing segregation. By failing to recognize the intersectionality and causality of unconscious racism, the FHA fails at the legislative level, and courts compound that failure in their jurisprudence.

In the context of the master narrative of black inferiority, Professors Charles Lawrence and Benjamin Oppenheimer have proffered a theoretical basis on which the FHA can succeed legislatively and the courts can creatively and constitutionally enforce its mandate.⁴⁴¹ To this extent, courts can move beyond narrow constructions of remedial statutes. Coupling this sociopsychological approach with a programmatic jurisprudential response would promote real, institutional responses to extant housing segregation and provide an understanding of the FHA's failed integration imperative as well as cope with the far-reaching implications of the master narrative of black inferiority.⁴⁴² In this regard, Professor John Calmore has argued for spatial equality under section 3604(b) of the FHA.⁴⁴³ Writing about spatial equality, Calmore argues:

I believe there is tremendous untapped potential to further the goal of spatial equality through reliance on Title VIII's provision making it illegal "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." . . . On this basis, HUD should be obligated to equalize the conditions of its HUD

440. See, e.g., Courtland Milloy, *Black-on-Black Murders*, WASH. POST, Oct. 12, 1989, at J1 ("We've known for years that violence on television promotes violence in real life, yet we allow black children to have the dubious distinction of watching more television than any other children in the world."); Don Oldenburg, *Primal Screen Kids: T.V. Violence and Real Life Behavior*, WASH. POST, Apr. 7, 1992, at E5.

441. See generally Lawrence, *supra* note 12 (asserting a theory of unintentional discrimination); Oppenheimer, *supra* note 12 (equating racial discrimination with negligence).

442. See Calmore, *supra* note 44.

443. *Id.* at 1514-15.

inventory so that there is parity between white and black residents. This is spatial equality.⁴⁴⁴

Taking Lawrence, Oppenheimer, and Calmore together, a jurisprudential awareness of unconscious racism and a mandate for spatial equality holds promise for *image equality* under section 3604(c). Image equality would require HUD to force advertisers to create racial images that reinforce the notion that America is a multi-racial, multi-cultural, and heterogeneous living community whenever they use human models. This model of image equality would mandate that real estate advertisers take account of any racial group or any protected class under the FHA. Furthermore, advertisers could not use cost as a barrier to satisfying this regulation. At the very least, because cyclically heightened tension and violence have historically characterized race relations between blacks and whites in America, a real estate advertisement using human models would have to include one white and one black model. Moreover, as required by section 3604(c) and HUD's regulations, these advertisements could not contain facially discriminatory material. If a real estate advertiser did not comply with these schematic requirements, courts would deem the ads discriminatory per se. A plaintiff could bring a claim against advertisers for even suggesting an impermissible racial preference through the human models and the context of the image. In either case, after the plaintiff made out a prima facie case, the advertiser would have the burden of proof by the preponderance of the evidence. By continuing to expose real estate advertisers to liability, the image equality model recognizes that society has consumed the master narrative of black inferiority, and bright-line rules cannot therefore serve as an adequate benchmark to determine when an image expresses a racial preference in violation of section 3604(c).

Given Calmore's model, the image equality model recognizes that the FHA cannot eradicate racial discrimination in housing consumption by prohibiting only individuals from violating its legislative strictures. Furthermore, the image equality model assumes that the current approach used by the courts, HUD,

444. *Id.*

and prosecutors to enforce the FHA consciously or unconsciously overlooks the long-term effect of the socio-historical development and practices of white supremacy. Between individual violators and the social conditions created by the master narrative of black inferiority, those practices underwrite the extant basis not only of racial discrimination, but also of housing segregation.

This Article has given attention to two practices. First, it has focused on violations of section 3604(c)—practices that suggest a preference for dominant white images. Second, it has argued that, in real terms, these images provide the practical environment for violations of section 3631—acts of race hatred that reinforce a notion of neighborhood purity and exclude blacks through symbolic or physical violence. Taken together, the practice and the acts are violent. Unfortunately, while section 3631 reaches the violent acts and section 3604(c) prohibits clear indications of racial preferences, general or aggregate white images escape whatever enforcement authority exists under the FHA.

By imposing an image equality model, the FHA acquires renewed vigor for several reasons. First, it copes self-consciously with the master narrative of black inferiority. Second, it recognizes that the race discrimination that promotes housing discrimination can operate unconsciously. Finally, it accepts that dominant white images reinscribe on blacks silencing and oppressive categories, at once violently imposed and racially oppressive. In this way, an image equality model under the Act copes actively with the master narrative of black inferiority.