Discriminatory Use of Models in Housing Advertisement: The Ordinary Black Reader Standard

I. INTRODUCTION

A quarter century after the passage of the Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968),[1] the American landscape remains marked by racial segregation.[2] Housing remains perhaps the most segregated aspect of American life.[3] The Fair Housing Act (FHA) was intended to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."[4] However, by some accounts, the black prospective renter faces a 75% chance of becoming a victim of housing discrimination.[5] This statistic displays one symptom leading many to conclude that Congress' goal in enacting the FHA, ending patterns of housing segregation, has largely gone unrealized.[6]

The FHA prohibition of discriminatory advertising is abused often, but is rarely enforced. Section 3604(c) of the FHA provides in pertinent 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, color, religion, . . . or national origin, or an intention to make any such preference, limitation, or discrimination.[7]

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[1] 42 U.S.C. §§ 3601–3631 (1989) [hereinafter FHA].

[2] James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1061 (1989).

[3] *Id.* at 1051.

[4] Otero v. New York Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973); *see also* Jorman v. Veterans Admin., 579 F. Supp. 1407, 1418 (N.D. Ill. 1984).

[5] Kushner, *supra* note 2, at 1052. The chances of being a discrimination victim are almost as great for the black prospective property buyer. *Id.*

[6] *See, e.g., id.* at 1061; *see also* Michael R. Tein, Comment, *The Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463, 1465 (1992).

[7] 42 U.S.C. § 3604(c) (1988).

While one can envision more distasteful FHA violations, because advertising plays such a critical role in the purchase and rental of housing,[8] violations of section 3604(c) are particularly harmful to the goal of integrated housing.[9]

A subtle form of section 3604(c) violation occurs when advertisers, in promoting their property, utilize human models, all of whom are white.[10] Recognizing that advertisers can and do indicate a racial preference by the choice of models of a particular race, the Department of Housing and Urban Development promulgated regulations to assist advertisers in their effort to avoid violating section 3604(c) by their choice of models.[11] When such subtle indications of preference are challenged under section 3604(c), the standard by which the court interprets the challenged advertisement is crucial to the outcome of the case.

This Comment discusses the standard applied in section 3604(c) cases in which the use of human models is challenged as discriminatory. Courts applying section 3604(c) have reviewed advertisements using a standard commonly called the "ordinary reader" standard. Part II of this Comment will discuss the genesis and history of the ordinary reader standard. Part III will consider the failure of courts to adequately define the attributes of the ordinary reader. Part IV will establish that courts reviewing challenged advertisements do so from the perspective of the "ordinary reader" rather than the perspective

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[8] 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, 1442 (1988).

[9] South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 884 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 971 (1992) (urging affirmative efforts to integrate housing).

[10] Ragin v. New York Times Co., 923 F.2d 995, 999 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

This discussion is limited to the expression of a racial preference through the choice of human models. While other groups protected by the Fair Housing Act have not challenged advertisements which do not include members of those groups, the concepts discussed here would apply to actions by members of any of the groups protected by the FHA.

[11] According to the regulation,

> [H]uman 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 . . . .

24 C.F.R. § 109.30(b) (1992).

of the ordinary black reader. Finally, Part V will argue that courts should review challenged advertisements from the perspective of the ordinary black reader.

II. DEVELOPMENT OF THE ORDINARY READER STANDARD

When determining whether a given advertisement violates section 3604(c), courts have until recently applied one of two competing standards. The first standard requires a plaintiff to prove, through extrinsic evidence, that the advertiser intended to send an exclusionary message.[12] The second standard adopts the position that a plaintiff need not prove intent in order to establish a Fair Housing Act claim;[13] this standard, first adopted in *United States v. Hunter*,[14] requires only that the plaintiff show that "[t]o the ordinary reader the natural interpretation of the advertisements published . . . is that they indicate a racial preference."[15] FHA plaintiffs, under the ordinary reader approach, must establish that the challenged advertisement "suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question."[16]

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[12] The District Court for the District of Columbia applied the intent requirement in Spann v. Colonial Village, Inc., 662 F. Supp. 541, 546 (D.D.C. 1987), *rev'd*, 899 F.2d 24 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990), According to the court, "absent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the Fair Housing Act merely because models of a particular race are not used in one ad or a series of ads." The district court's requirement of discriminatory intent was subsequently reversed by the United States Court of Appeals for the District of Columbia. Spann v. Colonial Village, Inc., 899 F.2d 24, 29 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990).

[13] Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). In *Arlington Heights*, the Seventh Circuit, noting the difficulty in establishing FHA violations, ruled that a plaintiff challenging allegedly discriminatory zoning practices need not establish discriminatory intent in order to maintain an action under § 3604(a). *Arlington Heights*, 558 F.2d at 1290.

[14] 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

[15] *Id.* at 215. It should be noted that the factual situation in *Hunter* made it much easier to apply—thus, to justify—the ordinary reader standard than it is to apply the standard in the typical all-white model case. In *Hunter*, the challenged advertisement listed for rent an apartment, "[i]n a private white home." *Id.* at 209 n.1.

[16] Ragin v. New York Times Co., 923 F.2d 995, 999 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991) (adopting the ordinary reader approach and applying it in a case challenging the use of all-white human models).

Use of the ordinary reader standard is based on judicial acceptance of the argument made by many that Congress' remedial goals in enacting the FHA[17] can only be effectively served by removing from plaintiffs the onerous requirement of proof of discriminatory intent.[18] Courts applying other provisions of the Fair Housing Act have applied similar standards.[19] Noting that courts have applied the ordinary reader standard, rather than requiring a showing of intent to discriminate, the United States Court of Appeals for the Sixth Circuit, in *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*,[20] recognized that "[c]ourts have given a broad reading to the FHA in order to fulfill its remedial purpose."[21] Congress' remedial goal of integrating housing is being effectuated by courts reviewing, from the point of view of the ordinary reader, advertisements alleged to violate section 3604(c). While at one time there was a split in authority as to which standard—proof of intent or ordinary reader—applied in section 3604(c) cases,[22] courts now

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The *Ragin* court also broadly construed the statutory term "preference." The court said an advertisement suggests a racial preference if it, "would discourage an ordinary reader of a particular race from answering it." *Id.* at 999–1000.

Plaintiffs in courts which use the ordinary reader standard may also maintain a cause of action if they can prove discriminatory intent. *See, e.g.*, Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991).

[17] *See* Otero v. New York Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973); *see also* Jorman v. Veterans Admin., 579 F. Supp. 1407, 141 (N.D. Ill. 1984), *aff'd*, 830 F.2d 1420 (7th Cir. 1987).

[18] *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (arguing that in discrimination cases the requirement of discriminatory intent ought to be eschewed in favor of an effects test); *see also* Kushner, *supra* note 2, at 1073–76 (praising the practice of requiring a less burdensome showing by FHA plaintiffs than is required of constitutional claimants).

[19] For example,

> the test used to determine whether a statement constitutes racial steering in violation of Section 3604(a) [which prohibits refusing to sell or rent on the basis of a status listed by the statute] is not the effect of the racial statement on the hearer of the statement, but rather the effect the statement would have if heard by a reasonable person under the circumstances who is seeking housing.

Heights Community Congress v. Hilltop Realty, Inc., 629 F. Supp. 1232, 1250 (N.D. Ohio 1983), *aff'd in part and rev'd in part*, 774 F.2d 135 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986).

[20] 943 F.2d 644 (6th Cir. 1991).

[21] *Id.* at 646 (citing Trafficante v. Metropolitan Life Ins., Co., 409 U.S. 205 (1972)).

[22] Margot S. Rubin, *Advertising and Title VIII: The Discriminatory Use of Models in Real Estate Advertisements*, 98 YALE L.J. 165, 170 (1988). Rubin pointed to the District of

uniformly apply the ordinary reader standard.[23] This standard is also used in cases in which the alleged section 3604(c) violation is the use of all-white human models.[24]

III. JUDICIAL INTERPRETATION OF THE ORDINARY READER STANDARD

Applying a standard that makes an advertisement actionable under section 3604(c) if the ordinary reader would construe the advertisement as indicating a racial preference raises several issues. Courts construing the ordinary reader standard in the section 3604(c) context have failed to adequately describe the attributes of the ordinary reader. Section B of this Part will illustrate how courts evaluating claims of discrimination through the discriminatory use of models have applied the standard.

A. *Failure to Describe the Attributes of the Ordinary Reader*

Few courts applying the ordinary reader standard to determine whether an advertisement violates section 3604(c) have discussed the composition of the ordinary reader. Those courts which have described the ordinary reader have done so in a cursory and superficial manner. Courts which must apply the standard to challenged advertisements thus have little guidance as to the characteristics of the ordinary reader and how the ordinary reader would react to given advertisements.

Some courts applying the ordinary reader standard have attempted to establish the attributes of the hypothetical ordinary reader.[25] Others have avoided attempting to define the ordinary reader and have simply assumed that

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Columbia District Court application of an intent requirement in *Spann v. Colonial Village, Inc.*, as evidence of a split in jurisdictions on the issue of which standard ought to apply. Spann v. Colonial Village, Inc., 662 F. Supp. 541, 546 (D.D.C. 1987), *rev'd*, 899 F.2d 24 (D.C. Cir.), *cert. denied*, 498 U.S. 1019 (1990). The *Spann* application of the intent requirement was rejected when the decision was reversed. Research found no courts currently applying an intent requirement.

[23] *See* Ragin v. New York Times Co., 923 F.2d 995, 1000 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991). The *Ragin* court refers to the use of the ordinary reader standard as a "general, and fairly obvious, proposition[] . . . ."

[24] *E.g.*, *id.* at 999-1000.

[25] *See, e.g.*, Ragin v. New York Times Co., 726 F. Supp. 953, 964 (S.D.N.Y. 1989), *aff'd*, 923 F.2d 995 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

there exists a common understanding as to the ordinary reader's attributes.[26] Courts which have defined the nature of the postulated ordinary reader have done so only in general terms. Such generalized explanations of the ordinary reader are minimally helpful to other courts which must apply the standard and to advertisers who seek to avoid violating section 3604(c).

One court has defined the ordinary reader as "nothing more, but nothing less, than the common law's 'reasonable man': that familiar creature by whose standards human conduct has been judged for centuries."[27] Because regulation of discriminatory housing advertising involves variables unlike those in cases in which the common law's "reasonable man" is the standard of conduct, this description provides little guidance. For example, because we practice conforming our behavior to that of the reasonable man every day, we usually have some idea what precautions the reasonable man would take in order to avoid being negligent. By testing the limits of reason we develop an internal sense for how the hypothetical reasonable man would behave in given circumstances. On the other hand, we rarely have to consider how the ordinary reader would construe an advertisement—despite the fact that courts use the ordinary reader standard in construing a variety of documents.[28] We are therefore likely to have significantly more difficulty in conforming to that standard.

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[26] *See, e.g.*, Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991).

[27] *Ragin*, 726 F. Supp. at 964 (rejecting defendant's contention that the ordinary reader standard is unconstitutionally vague).

[28] In defamation cases, the jury is instructed to consider the alleged defamatory utterance from the perspective of the ordinary reader (or listener) to determine whether the challenged statement is one of fact or opinion. *E.g.*, Yetman v. English, 811 P.2d 323 (Ariz. 1991). The ordinary reader standard is also used to determine whether the challenged statement is defamatory, *i.e.* whether it would damage the reputation of its subject in the eyes of the reasonable reader (or listener). *E.g.*, Johnson v. Houston Post Co., 807 S.W.2d 613, 614 (Tex. Ct. App. 1991).

Courts view disputed terms in insurance contracts as would the ordinary reader. *E.g.*, Western Am. Ins. Co. v. Tufco Flooring E., Inc., 409 S.E.2d 692 (N.C. Ct. App. 1991), *review granted*, 413 S.E.2d 555 (N.C.), *review dismissed*, 420 S.E.2d 826 (N.C. 1992).

When reviewing state statutes and city ordinances to determine whether they are unconstitutionally vague, courts view the challenged provision from the viewpoint of the ordinary reader. *E.g.*, Area Interstate Trucking, Inc. v. Indiana State Dep't of Revenue, 574 N.E.2d 311, 313 (Ind. Ct. App. 1991); Greenwood v. City of N. Salt Lake, 817 P.2d 816, 817 (Utah 1991).

In each of these contexts, courts have, as in the § 3604(c) context, viewed the document in dispute from the ordinary reader's perspective without describing the ordinary reader.

Another court has provided a description of the ordinary reader which is of equally little value. According to the United States Court of Appeals for the Second Circuit, "[t]he ordinary reader is neither the most suspicious nor the most insensitive of our citizenry."[29] One could assume from the name "ordinary reader" that the hypothetical ordinary reader is neither extremely insensitive nor extremely sensitive. Thus, this description does little in the way of expanding on the ordinary reader label.

A comprehensive description of the characteristics of the ordinary reader—such as age, race, educational background, gender, experiences, and perspective—would assist courts applying the ordinary reader standard and advertisers attempting to comply with section 3604(c).

B. *Refining the Ordinary Reader Standard: Cases Challenging Advertisements Featuring All-White Human Models*

Since no comprehensive description of the ordinary reader has been attempted, application of the standard in section 3604(c) cases is problematic.[30] The difficulty in applying the standard is aggravated in cases in which the allegedly discriminatory message is subtle.[31] When the challenged advertisement is blatantly discriminatory, a larger group of readers will view the advertisement as sending a discriminatory message and the way in which the ordinary reader standard is applied is not likely to be a central issue in the dispute.[32] However, advertisements need not suggest dispreference in order to violate section 3604(c). Advertisements may violate section 3604(c) by suggesting a preference,[33] and advertisements can suggest preferences subtly.[34]

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[29] Ragin v. New York Times Co., 923 F.2d 995, 1002 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

[30] *See* Soules v. United States Dep't of Hous. and Urban Dev., 967 F.2d 817, 824 (2d Cir. 1992) (applying the ordinary reader (listener) standard to statements by real estate company representative to prospective customers).

[31] *Id.* at 825.

[32] In urging the court to adopt a narrow view of what the ordinary reader would construe as expressing a racial preference, one defendant suggested that only blatantly racist symbols, such as a burning cross or a swastika, would send a discriminatory message to the ordinary reader. *Ragin*, 923 F.2d at 999.

[33] Not every manifestation of a preference, however, indicates an actionable communication of dispreference. In *Almonte v. Pierce*, Hispanic plaintiffs challenged a marketing plan which failed to advertise in Hispanic media. In fact, the plan was designed to attract prospective black and Asian clients who were under-represented in the publicly-funded housing project. The court rejected the contention that the intent to attract Blacks

The fact that statements are not facially discriminatory does not end the inquiry into whether the statements, considered in their context, indicate an impermissible preference.[35]

Perhaps the most subtle way in which an advertisement can suggest a racial preference, and, thus, arguably a dispreference, is through its exclusive use of human models of a particular race.[36] It is in the context of the use of all-white human models that application of the ordinary reader standard is especially difficult.[37] The issue in cases challenging advertisements which use only white human models is whether the ordinary reader would, under the circumstances, understand the advertisement as indicating a preference for individuals of the races depicted.[38]

The United States Court of Appeals for the Sixth Circuit faced precisely this issue in *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*[39] In *Housing Opportunities Made Equal, Inc.*, the plaintiff, a group dedicated to the goal of fair housing, sued the Cincinnati Enquirer newspaper under section 3604(c) for publishing housing advertisements over a period of twenty years for a variety of advertisers which featured human models, nearly all of whom were white.[40] The court, in affirming the dismissal for failure to state a claim granted by the district court,[41] concluded that, "the single

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and Asians constituted a dispreference of Hispanics. Almonte v. Pierce, 666 F. Supp. 517, 528–29 (S.D.N.Y. 1987).

[34] For example, the inclusion of Christian symbols and slogans in advertisements was held to create an issue of fact as to whether the ordinary reader would understand the advertisements as indicating a religious preference. The symbols challenged were not ones of dispreference of a religion, but rather were challenged as indicating a preference for a religion. Commonwealth v. Lotz Realty Co., 376 S.E.2d 54, 57 (Va. 1989) (applying Virginia Fair Housing Law Code § 36–88(3) which parallels § 3604(c) of the Fair Housing Act).

[35] Soules v. United States Dep't of Hous. and Urban Dev., 967 F.2d 817, 824 (2d Cir. 1992).

[36] Judge Keith, dissenting from the Sixth Circuit's decision in *Housing Opportunities Made Equal, Inc.*, asserts that the race of the models in advertisements is not a product of chance and that the race of the models indicates to black readers whether or not the advertiser considers them desirable clients. Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 662 (6th Cir. 1991) (Keith, J., dissenting).

[37] Section 3604(c) applies to the use of models of a particular race as the mode for expressing a racial preference. Ragin v. New York Times Co., 923 F.2d 995, 1000 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

[38] Saunders v. General Serv. Corp., 659 F. Supp. 1042, 1058 (E.D. Va. 1987).

[39] 943 F.2d 644 (6th Cir. 1991).

[40] *Id.* at 649.

[41] Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 731 F. Supp. 801, 805 (S.D. Ohio 1990), *aff'd*, 943 F.2d 644 (6th Cir. 1991).

publication of an advertisement which uses a small number of all-white models does not, without more, state a cognizable claim under section 3604(c) as a matter of law."[42] Because the court applied the ordinary reader test,[43] the court's conclusion is that the ordinary reader would not view the use of a small number of all-white models in a single advertisement as indicating a racial preference.

In seeming conflict with the Sixth Circuit's decision in *Housing Opportunities Made Equal, Inc.*[44] is the decision by the United States Court of Appeals for the Second Circuit in *Ragin v. New York Times Co.*[45] The *Ragin* court held that a newspaper could be held liable[46] under section 3604(c) for publishing, over a period of time, housing advertisements which featured virtually all-white human models.[47] The court affirmed the district court's denial of defendant's motion to dismiss.[48] The practical impact of the Second Circuit's decision is to allow the trial court to apply the ordinary reader standard to the challenged advertisements. The court went on, however, to say that as a matter of law an advertisement which uses one or two models of one race and which is displayed two or three times would not indicate a racial

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[42] *Housing Opportunities Made Equal, Inc.*, 943 F.2d at 648. The court also held that § 3604(c) did not create liability for a newspaper for publishing a series of otherwise nondiscriminatory advertisements (on behalf of separate advertisers) which in the aggregate send a discriminatory message. *Id.* at 650. Furthermore, the court said that construing § 3604(c) as imposing such liability would "fail[] to pass constitutional muster based on an analysis of relevant first amendment principles." *Id.* at 651.

[43] *Id.* at 646.

[44] The *Housing Opportunities* majority reconciles its decision with the *Ragin* decision. *Id.* at 648 n.3; *see also infra* notes 49–52 and accompanying text. Judge Keith's dissent in *Housing Opportunities* attempts to characterize the *Housing Opportunities* decision as inconsistent with the decision reached in *Ragin*. *Id.* at 658 (Keith, J., dissenting).

[45] 923 F.2d 995 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

[46] The court assumes, as is made clear in its treatment of the constitutionality of holding a newspaper liable for a § 3604(c) violation, that newspaper liability depends on the liability of individual advertisers. *See Ragin*, 923 F.2d at 1001–04. Furthermore, the court states, "[the newspaper's] liability may not be based on an aggregation of advertisements by different advertisers . . . . [T]he statute provides a prohibition only with regard to individual advertisers." *Id.* at 1001-02. Thus, newspapers (and other media) can only be held liable for publishing advertisements which are in themselves discriminatory.

[47] The complaint alleged that nearly all the human models portrayed were white and that when Blacks were portrayed, the depiction was only in advertisements for housing occupied predominately by Blacks. *Id.* at 998.

[48] Ragin v. New York Times Co., 726 F. Supp. 953, 965 (S.D.N.Y. 1989), *aff'd*, 923 F.2d 995 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

preference to the ordinary reader and thus would not violate section 3604(c).[49] According to the court, section 3604(c) liability would most likely exist for advertisers who "use a large number of models and/or advertise repetitively."[50]

Thus, while the *Housing Opportunities Made Equal, Inc.* and *Ragin* courts disposed of the cases differently, they applied the same principle.[51] Both courts established that the use of all-white models only sends a discriminatory message to the ordinary reader when the particular advertisement features a large number of models or when numerous advertisements placed by an advertiser with a particular publisher fail to include non-white models.[52] The necessary corollary of the established rule of law, that the ordinary reader could not interpret an isolated advertisement featuring a small number of all-white models or a single white model as indicating a racial preference, is the source of debate regarding the propriety of the rule.

The requirement of proof of long-term failure to use non-white models or of the use of a large number of all-white models in order to establish the allegation that the use of models indicates a racial preference is often criticized. Critics say the approach ignores the true impact of the race of models in advertisements[53] and disserves the remedial goal of the FHA.[54] According to Judge Keith's dissent in *Housing Opportunities Made Equal, Inc.*, the requirement of the use of a large number of models or of an established trend of advertisements with all-white models has several flaws. First, Judge Keith argues that while the ordinary white reader may not understand an advertisement with one white model as indicating a preference for Whites, the

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[49] The court apparently assumes, or leaves it for the trial court to determine, in establishing this standard, that the instant case is not of this variety. *Ragin*, 923 F.2d at 1002.

[50] *Id.* Courts recognize that the use of all-white models for an extended period could lead the reasonable reader to interpret the advertisements as indicating a racial preference. *See, e.g.*, Fenwick-Schafer v. Sterling Homes Corp., 774 F. Supp. 361 (D. Md. 1991). In *Fenwick-Schafer*, the defendant, over a 25-month period, had featured 132 models in advertisements, all of whom were white. *Id.* at 363. The trial court rejected defendant's motion for summary judgment. *Id.* at 366.

[51] The difference in outcome is explained by the fact that the *Housing Opportunities* court dealt with a complaint which did not allege repeated publication of all-white advertisements or the use of a large number of models by particular advertisers. Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 649 (6th Cir. 1991). However, the *Ragin* court refused to assume that no such scenario had been alleged by the plaintiff's complaint and chose to allow the trial court to determine whether such facts could be proven. *Ragin*, 923 F.2d at 1002.

[52] *Housing Opportunities Made Equal, Inc.*, 943 F.2d at 648.

[53] *Id.* at 658 (Keith, J., dissenting).

[54] *Id.*

ordinary black reader very well may.[55] Second, Judge Keith reiterates the argument made in *Saunders v. General Services Corp.*[56] that "human models in advertising attempt to create an identification between the model, the consumer, and the product."[57] Thus, requiring plaintiff to allege that a large number of all-white models is pictured ignores the reality that an advertisement with one white model may indeed send the message that Blacks are not welcome. Finally, Judge Keith argues that no authority supports requiring that the plaintiff allege the depiction of a large number of all-white models.[58]

The *Housing Opportunities Made Equal, Inc.* majority's approach is superior to that of the *Housing Opportunities Made Equal, Inc.* dissent. First, while the ordinary reader test does not inquire as to whether challenged advertisements are understood by actual readers as indicating a preference, anecdotal evidence supports the contention that a single advertisement with a white model does not send an exclusionary message, while a series of advertisements (or a single advertisement with a large number of models) with all-white models may. In a recent section 3604(c) case in which the use of all-white models was challenged,[59] testimony adduced by the plaintiff indicated that plaintiff and others came to understand the message of a long-term advertising campaign featuring all-white models to convey a dispreference for non-whites.[60] This understanding developed only after the advertisements had been run multiple times.[61] In entering judgment in favor of the plaintiffs, the

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[55] *Id.* For a discussion of whether the ordinary reader standard should consider the race of the recipient, see *infra* Parts IV and V.

[56] 659 F. Supp. 1042 (E.D. Va. 1987).

[57] *Id.* at 1058; *Housing Opportunities Made Equal, Inc.*, 943 F.2d at 658 (Keith, J., dissenting).

[58] *Housing Opportunities Made Equal, Inc.*, 943 F.2d at 659 (Keith, J., dissenting).

[59] Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 898 (2d Cir. 1993). Defendants promoted an up-scale apartment complex which ran a series of 104 advertisements over a two-year period depicting human models, all of whom were white. *Id.* at 1223.

[60] One plaintiff testified:

> The first time you see it, you don't make much of it, but as time goes on, the repetitiveness of the advertisement begins to drum a message home to you . . . . [T]he message I got from that is that blacks and minorities were not very welcome in the particular area, or the particular buildings that these advertisements were [sic] represented.

Id.

[61] *Id.*

court noted, "the ads cannot be read singly in determining their message because each is informed by the cumulative message of the campaign of which it was a part."[62] Thus, actual readers' perception of messages sent by advertising is impacted, at least in some instances, by the long-term failure to use non-white models or by the use of large numbers of all-white models in individual advertisements.[63]

Second, adoption of Judge Keith's position would create an environment in which advertisers would be unable to use models in advertising. If the use of a single model were viewed as sufficient to send the message to the ordinary reader that customers of the same race as the model are preferred, advertisers would be potentially liable under section 3604(c) for every advertisement with a single model. If the advertiser chooses to feature a black model, all non-black readers would be able to argue that the natural interpretation of the ordinary reader is that the advertisement excludes them. Moreover, the ramifications of Judge Keith's position might extend to create liability for an advertiser who features a large number of models, each of a different race, but who fails to include a model of a particular race.[64] Requiring a plaintiff to allege nothing more than the use of a single white model in a single advertisement would likely make it economically unfeasible for real estate owners to use models in advertising. Despite the relative lack of analysis in support of the requirement, the *Housing Opportunities Made Equal, Inc.* and *Ragin*[65] standard requiring proof of a large number of models or a pattern of failure to include non-white models is the most workable standard because it best comports with the way in which advertising impacts actual readers.[66]

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[62] *Id.* at 1232. The fact that the plaintiffs inferred a discriminatory message from the pattern of the advertising campaign was not dispositive. The court concluded that "*[g]iven this pattern*, an ordinary reader . . . would naturally infer from these ads . . . that white individuals were preferred as tenants . . . ." *Id.* (emphasis added).

[63] *See, e.g.*, Ragin v. Steiner, Clateman and Assocs., 714 F. Supp. 709, 713 (S.D.N.Y. 1989) (holding that plaintiffs who alleged that defendant had depicted exclusively white models in 27 separate advertisements had stated a claim under § 3604(c)).

[64] The regulations promulgated by the Department of Housing and Urban Development to assist in applying § 3604(c) make clear that § 3604(c) does not require such a literal display of each minority group. 24 C.F.R. § 109.30(b) (1992).

[65] Ragin v. New York Times Co., 923 F.2d 995, 1002 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

[66] *See* Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213, 1223 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 898 (2d Cir. 1993).

IV. THE RACE OF THE ORDINARY READER

Discussion of the race of the ordinary reader is conspicuously absent from most cases applying the ordinary reader standard to alleged instances of subtle exclusionary advertising, particularly all-white models cases. This Part of this Comment summarizes court treatment of the issue of the race of the ordinary reader. Discussion in Part V will turn to the question of whether the race of the plaintiff ought to be considered in analyzing the challenged advertisement from the ordinary reader's perspective.

In *United States v. Hunter*,[67] the United States Court of Appeals for the Fourth Circuit created the ordinary reader standard to be applied in cases in which section 3604(c) violations are alleged. The *Hunter* court applied, without elaboration, the standard it created.[68] The *Hunter* court, in creating the ordinary reader standard, did not refer to the ordinary reader of the excluded race.[69] At least facially, the case, which was the genesis of the ordinary reader standard, did not contemplate viewing advertisements challenged under section 3604(c) from the perspective of, for example, the "ordinary black reader."[70]

Courts considering section 3604(c) challenges subsequent to *Hunter*, especially those alleging the discriminatory use of human models, have not been absolutely clear as to whether the hypothetical ordinary reader is thought to be of the race of the litigant challenging the advertisement or not. However, most courts do not consider the race of the litigants when applying the ordinary reader standard.[71] At least one court has explicitly rejected the argument that

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[67] 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

[68] *Id.* at 215. For a discussion of the facts and the rule created in *Hunter*, see *supra* notes 14–16 and accompanying text.

[69] In *Hunter*, the advertisement excluded non-white people. *Id.* at 209.

[70] The vast majority, if not all, of the reported § 3604(c) cases challenging the allegedly discriminatory use of human models involve a black plaintiff or plaintiffs challenging the use of all-white models in advertisements. Thus, this discussion will consider the propriety of viewing challenged advertisements from the perspective of the ordinary black reader. The arguments made here would apply equally to a case in which a white plaintiff who alleged the communication of a preference for non-whites urged the court to view the advertisement from the perspective of the ordinary white reader.

[71] *See, e.g.*, Soules v. United States Dep't of Hous. and Urban Dev., 967 F.2d 817, 824 (2d Cir. 1992); Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991); Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213, 1229-31 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 898 (2d Cir. 1993). These cases are examples of many which simply reiterate without elaboration the ordinary reader standard stated in *Hunter*.

challenged advertisements ought to "be evaluated through the eyes of the 'ordinary *black* reader[]' . . . ."[72]

Ragin[73] may be an exception to the standard approach of simply applying the ordinary reader standard without reference to the ordinary reader's race. The *Ragin* court defines the word "preference" in section 3604(c) as describing "any ad that would discourage an ordinary reader *of a particular race* from answering it."[74] Because the court made this statement—after stating that it would apply the ordinary reader standard[75]—in the context of defining the term "preference," whether the *Ragin* court considered the challenged advertisement from the point of view of the ordinary black reader is unclear.[76] In his dissent in *Housing Opportunities Made Equal, Inc.* Judge Keith interprets the *Ragin* decision as applying the ordinary black reader standard.[77] Judge Keith criticizes the *Housing Opportunities Made Equal, Inc.* majority for refusing to consider the race of the ordinary reader and heartily endorses the approach taken, in his view, by the *Ragin* court.[78] Judge Keith says, in paraphrasing *Ragin*, "[t]he relevant question is whether a member of an excluded race would feel excluded. The test is not whether a member of the included race would feel excluded."[79]

While one court arguably considers challenged advertisements from the perspective of the ordinary black reader, most courts do not consider the hypothetical ordinary reader's race in analyzing advertisements under section 3604(c). Courts should consider the race of the litigants in applying the ordinary reader standard.

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[72] Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. at 1227 n.7.

[73] Ragin v. New York Times Co., 923 F.2d 995 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

[74] *Id.* at 999–1000 (emphasis added).

[75] In its discussion of the ordinary reader standard, the court did not differentiate between the ordinary white and the ordinary black reader. *Id.* at 999.

[76] The alternative interpretation is that the court considered whether the ordinary *race-neutral* reader would construe the challenged advertisement as indicating a racial preference to the ordinary *black* reader.

[77] Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 658 (6th Cir. 1991) (Keith, J., dissenting).

[78] *Id.*

[79] *Id.* (citing Ragin v. New York Times Co., 923 F.2d 995, 999-1000 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991)).

V. THE ORDINARY BLACK READER STANDARD

We are each a product of a culture that shapes the interpretations of the stimuli we encounter. No one views events in complete isolation.[80] Rather, our perceptions are influenced by experience,[81] culture,[82] and learned meanings.[83] Because people with different perspectives may react differently to the same stimulus, courts applying the ordinary reader standard without considering the race of the actual recipient of the allegedly discriminatory message disserve the goal of section 3604(c).

One scholar's argument that our judicial system fails to consider issues from the perspective of the litigants[84] has generated substantial commentary. According to this scholar, we define ourselves by our social group membership.[85] Members of minority groups have a stronger tendency to define themselves by their group membership.[86] One's group membership (especially minority group membership), in turn, profoundly impacts the way in which one perceives stimuli.[87] This scholar's argument concludes that unjust results are achieved in our justice system because judges fail to consider the group membership and the resulting preconceptions of the litigants.[88]

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[80] A.J. AYER, PHILOSOPHY IN THE TWENTIETH CENTURY 157 (1982).

[81] *Id.*

[82] Many argue that differing group histories are a central part of the factual situation in all legal arrangements and, as such, should be considered in deciding disputes. *E.g.*, Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Tradition*, 48 WASH. & LEE L. REV. 381, 415, 418 (1991).

[83] *See, e.g.*, Christopher Steskal, Note, *Creating Space for Racial Difference: The Case for African-American Schools*, 27 HARV. C.R.-C.L. L. REV. 187, 191 (1992).

[84] MARTHA MINOW, MAKING ALL THE DIFFERENCE 65 (1990); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 15 (1987).

[85] MARTHA MINOW, MAKING ALL THE DIFFERENCE 355 (1990).

[86] *Id.*

[87] Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975). In *Blank*, an employment discrimination case, defendants moved to have the judge recused from the case on the basis that she was black and had, in her career as an attorney, represented employment discrimination plaintiffs. The judge refused to recuse herself, arguing that, were defendant's position to be accepted, no judge would be able to hear a case since everyone, including judges, has characteristics and has had experiences which influence how one views different issues.

[88] MINOW, *supra* note 85, at 62; *see also* Kim M. Watterson, Note, *The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech*, 52 U. PITT. L. REV. 955, 966 (1991) (arguing that lawyers often incorrectly assume that the perspectives of

Much study has centered on how American black culture affects the way in which American Blacks perceive their environment and react to occurrences. Researchers commonly conclude that differences between black American culture and white American culture create major differences in the way Blacks and Whites react to identical stimuli.[89]

Specifically, much research has centered on the reaction of Whites (non-target group members) and Blacks (target group members)[90] to racist, so-called "hate speech."[91] This research generally establishes the fairly obvious proposition that anti-discrimination law can take either the perspective of the alleged perpetrator or of the alleged victim.[92] Studies comparing Black and White reaction to hate speech indicate that the perspective from which one views incidents makes a difference in the way in which individuals react to such incidents. In general, while the vast majority of Whites are disgusted by racist speech, incidents of hate speech are viewed by Whites as being less serious than are the same incidents in the view of Blacks.[93]

Blacks and Whites, by virtue of cultural differences, also react differently[94] to a more subtle racist gesture, the displaying of the Confederate flag.[95] Whites

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those being judged are irrelevant or have already been taken into account through the perspective of the judge).

[89] *See, e.g.*, Steskal, *supra* note 83, at 191; *see also* MINOW, *supra* note 85, at 26 (reporting that some contend that the use of a different dialect, "Black English," accounts for poor language performance by black children).

[90] The author of this Comment by no means intends to imply that Whites are never hate speech targets. However, this discussion treats Blacks as target group members and Whites as non-target group members because most published research deals with Blacks who have been targeted by hate speech and considers how their reaction is influenced by their cultural background.

[91] The analogy between reaction to hate speech and reaction to advertising featuring all-white models is not a flawless one. While the ordinary reader standard focuses on how one would *perceive* a given advertisement, cultural differences regarding hate speech seem to be in *reaction* to the speech. That is, most people perceive hate speech as offensive, but may react to it differently.

[92] Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981) (reviewing DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW (2d ed. 1980)) (arguing that anti-discrimination law has incorrectly adopted the viewpoint of the perpetrator).

[93] Watterson, *supra* note 88, at 965; *see also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2326 (1989).

[94] *E.g.*, Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 311–12 (1990).

[95] Several states fly the Confederate flag or flags that incorporate the Confederate flag. Further, many schools, including the University of Mississippi, unofficially use the flag as a school symbol. Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political*

opposed to the Confederate flag ignore the flag; others feel that the flag merely expresses pride in "southern heritage." Blacks tend to have a more emotional reaction to the flying of the flag and cannot disassociate the message of racial isolation conveyed by the flag.[96]

In addition to differences in reaction to racist speech, research of advertising indicates that Blacks and Whites react differently to advertisements depending on the race of the actors in the advertisement. One study indicates that, despite the fact that black and Hispanic actors are typically cast in smaller, less-important roles, Blacks and Hispanics viewing television commercials perceive black and Hispanic actors as playing the more important roles in the advertisements.[97] Furthermore, Blacks more easily identify with and perceive themselves as more similar to black commercial actors than to white commercial actors.[98] Black viewers thus respond more favorably to products promoted by black actors.[99] Finally, in a study in which black actors were used, it was found that "whites were less likely to purchase the products and had less favorable attitudes toward the products and the advertisements when the advertisements featured black rather than white actors," thus indicating that race-group identification functions to alter the perception of Whites as well as Blacks.[100] Advertisers compose advertisements with the understanding that members of different races generally react differently to advertisements depending on the race of the actors in advertisements. The fact that Blacks are absent from the overwhelming majority of advertisements and that black actors are heavily utilized by advertisers who target black consumers displays that advertisers realize (or assume) that the race of advertisement actors impacts the reception of the product or service being advertised.

First, mainstream media advertisers generally avoid using black models. A survey by the New York City Consumer Affairs Commissioner found that in a sample of 2,108 magazine advertisements only 5.2% of the models were

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Correctness: Free Speech and Race Relations on Campus, 66 TUL. L. REV. 1411, 1416 (1992).

[96] *Id.*

[97] Robert E. Wilkes & Humberto Valencia, *Hispanics and Blacks in Television Commercials*, 18 J. OF ADVERTISING 19, 25 (1989).

[98] Tommy E. Whittler & Joan DiMeo, *Viewers' Reactions to Racial Cues in Advertising Stimuli*, J. OF ADVERTISING RES., Dec. 1991, at 37, 38.

[99] Tommy E. Whittler, *The Effects of Actors' Race in Commercial Advertising: Review and Extension*, 20 J. OF ADVERTISING 54, 59 (1991).

[100] Whittler & DiMeo, *supra* note 98, at 43.

black.[101] Another study reports that less than 3% of print advertisements include black actors.[102] Black actors appear more frequently in television advertisements. One study indicates that, while Blacks comprised only 5% of the actors appearing in prime-time television commercials in 1964, in a 1984 sample of 904 prime-time television commercials, 26% of the models were black.[103] Still, when black models are utilized, they are typically cast in roles of little importance or as a member of a large group of people.[104] While progress is being made, Blacks are still underrepresented in mainstream media advertising.

At the same time, when advertisers seek to attract black consumers, they employ black models and advertising agencies which are experienced in targeting a black audience.[105] The incidence of advertisements with black models is highest in black-oriented media, such as *Ebony* magazine and the Black Entertainment Television network.[106] Furthermore, black community leaders are displeased by the fact that destructive products like tobacco and alcohol are often targeted to black consumers through the use of advertising tactics (including the use of black models) designed to appeal to Blacks.[107] Thus, advertisers, both those attempting to target a white audience and those attempting to target a black audience, choose models of certain races in

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[101] Janet Braunstein, *A Warped Mirror on African Americans; Survey Targets What's Wrong With Too Many of the Images Seen on Television, Print*, DETROIT FREE PRESS, Aug. 24, 1992, at 4F.

[102] Wilkes & Valencia, *supra* note 97, at 20.

[103] *Id.* at 20, 23.

[104] *Id.* at 24–25.

[105] Braunstein, *supra* note 101; *see also* Janice C. Simpson, *Buying Black; Mainstream Companies are Cashing in on African-American Consumers*, TIME, Aug. 31, 1992, at 52.

[106] Janet Braunstein, *Marketing Diversity; Ads Designed for Minority Consumers Offer Positive Images but Fail to Reach the Mainstream*, DETROIT FREE PRESS, Oct. 19, 1992, at 13F.

[107] Black community leaders criticized the marketing of St. Ides malt liquor, claiming that the advertising was intended to lure black teenagers. *Malt Liquors Continue to Draw Criticism; Offensive Advertising by Manufacturers*, MODERN BREWERY AGE, May 18, 1992, at 2. After a ground swell of opposition to the advertisements, which featured a black rap star, the manufacturer withdrew the advertisement. W. John Moore, *An Industry on the Rocks*, 24 NAT'L J. 8 (1992).

Additionally, studies of billboards indicate that a higher proportion of the billboards in black neighborhoods advertise tobacco (and alcohol) than is true for billboards in general. Richard W. Pollay et al., *Separate, but Not Equal: Racial Segmentation in Cigarette Advertising*, J. OF ADVERTISING 45, 47 (1992). Ethnic neighborhoods are clearly targeted for tobacco and alcohol billboards. Naresh K. Malhotra, *Health Care Marketing Abstracts*, J. OF HEALTH CARE MARKETING, Sept. 1992, at 84.

complete understanding of the fact that the race of the models impacts the recipient's reaction to the advertisement.

In light of the fact that recipients react more or less favorably to advertisements depending on the race of the actors, it is not surprising that black models are absent from some advertisements and present in others. Advertisers, in choosing actors for advertisements, can be expected to choose actors who will maximize the number of consumers who will be positively impacted by the advertisement. The failure to cast black models is likely not the result of personal bias on the part of advertisers, but rather a rational reaction to the fact that some Whites react adversely to advertisements with black models.[108]

In this vein, a divisive issue is whether we should forbid advertisers to make such business decisions.[109] For example, assume that an advertiser with a limited marketing budget has the choice of casting two white models or one white and one black model. He also knows that using a black model will gain ten black customers, but will lose twenty white customers. We must face the issue of whether we should dictate the advertiser's decision in such circumstances. While we generally allow advertisers to decide how to compose advertisements on a purely profit-oriented basis, in the realm of housing advertising, we have decided that the goal of desegregated housing outweighs the right of advertisers to make profit-maximizing decisions. The wisdom of this policy should not be uncritically accepted.

Comparing Blacks' and Whites' reaction to blatant and subtle racist gestures and to racial cues in advertising indicates that Blacks and Whites, by virtue of cultural differences, do not view potentially discriminatory gestures in the same way. These findings militate in favor of considering the race of the litigants when applying the ordinary reader standard. Because, according to the research summarized above, the ordinary black reader is more likely to notice and be offended by a racist statement aimed at Blacks than is the ordinary white reader, and is likely to identify more favorably with black than white actors in advertisements, the ordinary reader standard should take into account the race, and hence, the perception, of the litigants. For instance, if a black plaintiff alleges that an advertisement violates section 3604(c), the advertisement should be reviewed to determine if the ordinary black reader would naturally infer that

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[108] Whittler & DiMeo, *supra* note 98, at 44.

[109] The issue of whether § 3604(c) infringes on First Amendment free speech rights, an issue beyond the scope of this Comment, should also be considered. For a discussion of the First Amendment issues, see Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 651–53 (6th Cir. 1991).

the advertisement indicates a racial preference.[110] Just as a White might react differently than would a Black to subtle racist speech, a Black might discern a subtle statement of racial preference that a White would not notice.[111] As Judge Keith's dissent in *Housing Opportunities Made Equal, Inc.* argues, opposition to the consideration of race in applying the ordinary reader standard arises from the "inability to see that people in the minority, when excluded, are likely to feel that others are preferred."[112] An approach which views the advertisement from the perspective of the ordinary reader of the allegedly excluded race is better tailored to achieve the goal of the FHA—integrated housing.

VI. CONCLUSION

The goal of truly integrated housing embodied in the FHA is not being achieved. The race of the human models in housing advertisements has a great impact on who inquires about and ultimately obtains advertised housing. Thus, if we are truly devoted to the ideal of integrated housing, we should act to end the subtle, but effective, discriminatory use of models in real estate advertisements.

The ordinary reader standard, the standard by which courts review challenged advertisements, should be refined so as to give courts applying the standard more guidance and so as to inform advertisers what practices, with respect to human models, would be interpreted by the ordinary reader as indicating a racial preference. Additionally, because differences in perspectives cause differences in the perceptions of Blacks and Whites, the ordinary reader standard should be altered. Advertisements should be evaluated from the perspective of the ordinary reader of the race of the individual challenging the advertisement. Most commonly, this would require assessing the advertisement from the viewpoint of the ordinary black reader. These changes would go far to stop discriminatory housing advertising through the use of all-white models, thus expediting the achievement of the goal of integrated housing.

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[110] This approach is the one urged by Judge Keith in his *Housing Opportunities* dissent. *Id.* at 658 (Keith, J., dissenting).

[111] *See, e.g.*, Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213, 1224 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 898 (2d Cir. 1993). Plaintiff's testimony indicated that his understanding of the challenged advertisements as indicating a preference for Whites partially grew out of his knowledge of historical patterns of discriminatory housing practices; plaintiff testified, "I didn't just wake up in the morning without these advertisements being in some context." *Id.*

[112] *Housing Opportunities Made Equal, Inc.*, 943 F.2d at 659 (Keith, J., dissenting).