

# Hate Wins

Courtney Lauren Anderson\*

*The controversy surrounding the conflict between hate crimes and the First Amendment makes the task of even defining hate crimes difficult. Actions that some find prejudicial are simply expressive to others. This diversion obstructs efforts to collect data on hate crimes and deploy a unified legal or prosecutorial response. The antidiscrimination purpose of the Fair Housing Act is known, despite questions surrounding the Act's breadth, and the inconsistent prioritization and interpretation of the Act that comes with changing the person who holds the position of the Secretary of the Office of Housing and Urban Development (HUD). This paper sets forth a framework to support the inclusion of hate crime eradication in HUD's agenda. This paper illustrates protecting the rights of people to be free from discrimination while in their homes is an active and appropriate use of the Fair Housing Act. Furthermore, such a purpose is properly aligned with HUD's traditional accomplishments in the areas of home financing, rental assistance, affordable housing, and homelessness prevention. Therefore, incorporating hate crime eradication into its agenda would allow HUD to actively address violent acts that interfere with the pro-integration mission of HUD and the Fair Housing Act (FHA). Further, providing clarification regarding the tools to combat housing-related violence supports the antidiscrimination intent of the Fair Housing Act.*

*Currently, inconsistencies exist with respect to prosecuting hate crimes under the FHA and among states and localities with respect to collecting data on these crimes. Appointing a HUD Secretary who is willing to, at a minimum, set forth consistent reporting requirements and data collection requirements will assist with providing a unified approach to combating the growing problem of housing-related violence.*

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\* Courtney Lauren Anderson is an associate professor of law at Georgia State University College of Law.

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#### INTRODUCTION

Part I provides an introduction to and historical overview of the Office of Housing and Urban Development (HUD). This illustrates the purpose of HUD and also the regular exclusion of hate crimes from the HUD agenda. Part II provides specific examples of instances when HUD officials expanded their reach to regulate or interpret the purpose of fair housing. This expansion included liability for third parties that provide a platform for internet advertising and to recognize disparate impact as a cause of action under the Fair Housing Act. This provides support for continued expansion of HUD to explicitly incorporate the eradication and mitigation of hate crimes in its agenda. Part III provides an overview of acts and statutes that address hate crimes via the Fair Housing Act. Part III also discusses state laws and regulations of hate crimes, particularly any data collection mandates. The inconsistencies among these laws and regulations, and the lack of a comprehensive data collection exemplify the benefits of a unified agenda for addressing hate crimes and how the Fair Housing Act can provide a foundation for such an initiative. Housing-related violence has been increasing, and Part IV further explains why HUD's response should be clearly outlined in its agenda and gives specific action items to do so. A reminder of the integrationist purpose of the FHA is the basis of the conclusion in Part V.

## I. HISTORICAL OVERVIEW OF THE FAIR HOUSING ACT AND THE OFFICE OF HOUSING AND URBAN DEVELOPMENT

The federal government has been providing affordable housing to the low-income population since the 1930s with a focus mainly on the mortgage market and in promoting construction of low-rent public housing. Today, the federal government focuses on rental housing assistance, assistance to state and local governments, and assistance to homeowners. Housing and Urban Development (HUD) provides most of these programs through housing assistance programs, such as Section 8 vouchers and project-based rental assistance,<sup>1</sup> public housing,<sup>2</sup> housing for the elderly,<sup>3</sup> housing for persons with disabilities,<sup>4</sup> rural rental assistance,<sup>5</sup> Community Development Block Grants (CDBG),<sup>6</sup> HOME Investment Partnerships Block Grants,<sup>7</sup> Low-Income Housing Tax

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1. See generally 24 C.F.R. § 982.1 (2019); see also U.S. Housing Act of 1937, Pub. L. No. 75–412, § 9, 50 Stat. 888, 891 (authorizing assistance of low rentals); see also *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) [<https://perma.cc/DLB2-APY6>] (last visited June 5, 2020) (describing housing choice vouchers).

2. See *HUD’s Public Housing Program*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/topics/rental\\_assistance/phprog](https://www.hud.gov/topics/rental_assistance/phprog) [<https://perma.cc/BYG5-CB8L>] (last visited June 5, 2020) (explaining the purpose of public housing, who is eligible for it, and how to apply for it).

3. See The National Housing Act of 1959 § 202, 12 U.S.C. § 1701q (describing statute’s purpose of supporting the elderly); see also 24 C.F.R. § 891.100 (2019) (program regulations) (describing the general program purpose of aiding the elderly).

4. See The National Affordable Housing Act of 1990 § 811, 42 U.S.C. § 8013 (describing statute’s purpose of aiding those with disabilities); 24 C.F.R. § 891.100 (2019) (describing the general program purpose of aiding persons with disabilities); see also *Section 811 Supportive Housing for People with Disabilities*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/housing/mfh/progdesc/disab811](https://www.hud.gov/program_offices/housing/mfh/progdesc/disab811) [<https://perma.cc/S6WL-AZJ6>] (last visited June 5, 2020) (describing Section 811’s supportive housing for persons with disabilities).

5. See The Housing Act of 1949 § 521, 42 U.S.C. § 1441 (describing the statute’s purpose of providing adequate housing for rural families); see also 7 C.F.R. § 3560.254 (2020) (outlining eligibility requirements for rental assistance).

6. See *Community Development*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/communitydevelopment](https://www.hud.gov/program_offices/comm_planning/communitydevelopment) [<https://perma.cc/GW9W-9VA9>] (May 4, 2020) (describing several Community Development Block Grant programs).

7. See Cranston-Gonzalez National Affordable Housing Act of 1990 § 211, 42 U.S.C. § 12741 (describing Department of Housing and Development’s authority under the act); see also *Home Investment Partnerships Program*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/affordablehousing/programs/home/](https://www.hud.gov/program_offices/comm_planning/affordablehousing/programs/home/) [<https://perma.cc/W3P6-VCMY>] (May 19, 2020) (summarizing the scope of the HOME investment partnerships program).

Credits (LIHTC),<sup>8</sup> homeless assistance programs,<sup>9</sup> FHA and Veterans' Administration mortgage insurance,<sup>10</sup> and the mortgage interest deduction in the tax code.<sup>11</sup> The goal for most of these housing programs is to provide affordable housing for low-income families, meaning only 30% of the family income is spent on housing. Since the inception of the Fair Housing Act, the federal government has enacted a variety of laws designed to increase housing equity.

In 1936, President Franklin Roosevelt won the popular vote by the third largest margin of victory in United States' history, carrying every state except Maine and Vermont.<sup>12</sup> Just two years prior, at a time when unemployment was high and banks were failing, President Roosevelt signed the National Housing Act of 1934, creating the Federal Housing Administration (FHA).<sup>13</sup> The FHA home mortgage insurance program was "designed to restore stability to the nation's housing markets, boost homebuilding, provide jobs, and increase home purchases by easing mortgage credit."<sup>14</sup> After the 1936 landslide victory, the Roosevelt Administration continued to advance its New Deal policies. These

8. See *Low-Income Housing Tax Credits*, U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., <https://www.huduser.gov/portal/datasets/lihtc.html> [<https://perma.cc/PHY3-LA8H>] (June 5, 2020) (describing the purpose, scope, and inception of the LIHTC under HUD).

9. See generally *Homelessness Assistance Programs*, U.S. DEP'T OF HOUS. & URB. DEV. EXCH., <https://www.hudexchange.info/homelessness-assistance/> [<https://perma.cc/PHY3-LA8H>] (last visited June 5, 2020).

10. See generally *The Federal Fair Housing Administration*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/housing/fhahistory](https://www.hud.gov/program_offices/housing/fhahistory) [<https://perma.cc/2D74-TJQ4>] (last visited June 5, 2020); *Veterans and HUD*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/topics/veteran\\_information/Veterans\\_and\\_HUD](https://www.hud.gov/topics/veteran_information/Veterans_and_HUD) [<https://perma.cc/7T3P-H7YU>] (last visited June 5, 2020).

11. See 26 U.S.C. § 25 (outlining the allowance of credit in regard to interest on certain home mortgages); *Common Questions from First-Time Homebuyers*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/topics/common\\_questions](https://www.hud.gov/topics/common_questions) [<https://perma.cc/7T3P-H7YU>] (last visited June 5, 2020) ("[W]hen you own your home, you can deduct the cost of your mortgage loan interest from your federal income taxes, and usually from your state taxes.").

12. See Jugal K. Patel & Wilson Andrews, *Trump's Electoral College Victory Ranks 46th in 58 Elections*, NY TIMES (Dec. 18, 2016), <https://www.nytimes.com/interactive/2016/12/18/us/elections/donald-trump-electoral-college-popular-vote.html> [<https://perma.cc/GNZ9-QUAJ>] (showing the margin by which Franklin Roosevelt won the popular vote); see also Michael Levy, *United States Presidential Election of 1936*, ENCYC. BRITANNICA (Oct. 27, 2019), <https://www.britannica.com/event/United-States-presidential-election-of-1936> [<https://perma.cc/Q55Z-EFFV>] (emphasizing the number of states the Roosevelt carried in the election).

13. LAWRENCE L. THOMPSON, A HISTORY OF HUD 2 (2006); see generally *The Housing Act of 1959*, 12 U.S.C. § 1701 et seq.; see also COMMITTEE ON ECONOMIC SECURITY, SOCIAL SECURITY IN AMERICA 57 (1937) ("In July 1934, on the basis of the American Federation of Labor estimates, 64.9 percent of all persons engaged in construction industries were unemployed, 38.1 percent in service industries, 37.4 percent in mining, 36.2 percent in railroads, 27.4 percent in manufacturing, 19.5 percent in trade, 5.1 percent in public service, and 1.1 percent in agriculture.").

14. THOMPSON, *supra* note 13, at 2 (describing the purpose behind the FHA home mortgage insurance program).

programs focused on the “3 Rs”: relief for the unemployed and poor, recovery of the economy back to normal levels, and reform of the financial system to prevent a repeat depression.<sup>15</sup> In 1937, the Seventy-Fifth United States Congress enacted the Housing Act of 1937, also known as the Wagner-Steagall Act, after sponsors.<sup>16</sup> “On September 1, 1937, President Roosevelt signed the bill which was to begin a ‘new era in the economic and social life of America.’”<sup>17</sup> In just a few decades, the Housing Act of 1937 would lead to the establishment of the United States Department of Housing and Urban Development (HUD).

The Depression-era 1937 Act “was designed to create jobs and to serve as a slum clearance plan. The bill would provide financial assistance for housing ‘to alleviate present and recurring unemployment and to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income.’”<sup>18</sup> Under the Act, public housing would be built by local public housing authorities (PHAs) rather than by the federal government.<sup>19</sup> The Act also created the United States Housing Authority which was authorized to “make loans to public-housing agencies to assist the development, acquisition, or administration of low-rent-housing or slum-clearance projects by such agencies.”<sup>20</sup> Under the Act, a PHA and the federal government would execute an Annual Contributions Contract (ACC), setting forth the parties rights and obligations. In accordance with the ACC, the PHA would fund the purchase of land and the construction of housing by issuing long term bonds, typically with a forty-year maturity.<sup>21</sup> The federal government is then obligated to make all debt service payments on the bonds (effectively subsidizing all capital costs) and the PHA would operate the public housing in a manner consistent with federal statutes and regulations.<sup>22</sup>

Under the 1937 Act, public housing was expected to serve working-class families; no ongoing federal subsidy was provided to make the units affordable. Rents were set at the level needed to operate the

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15. See CAROL BERKIN ET AL., MAKING AMERICA: A HISTORY OF THE UNITED STATES 629–30 (6th ed. 2014) (explaining the purpose behind Roosevelt’s New Deal legislation).

16. See generally United States Housing Act of 1937 (Wagner-Steagall Housing Act), Pub. L. No. 75–412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1404a–1440).

17. Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642, 642 (1966).

18. Herbert R. Giorgio, Jr., *HUD’s Obligation to “Affirmatively Further” Fair Housing: A Closer Look at Hope VI*, 25 ST. LOUIS U. PUB. L. REV. 183, 185 (2006).

19. Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 894 (1990).

20. U.S. Housing Act of 1937, Pub. L. No. 75–412, § 9, 50 Stat. 888, 891 (1937).

21. Schill, *supra* note 19, at 895 (describing how the PHA funds land and construction for the purpose of public housing).

22. See *id.* (explaining the federal government’s role under the Act).

development—not make a profit—and rents were thus reasonably affordable. Public housing, therefore, started its life as a financially stable program.<sup>23</sup> Following enactment of the 1937 Act, various states passed enabling legislation, formed local housing authorities, and investment in public housing flourished.<sup>24</sup> The New Deal era policies reflected an attempt to address the volatile relationship between capital markets and housing prices by segregating housing finance from general capital markets.<sup>25</sup> In doing so, the federal government allotted substantial funds to subsidize the housing capital market and set up a regulatory system for housing finance.<sup>26</sup> At the time, economic stabilization and rationalization of capital movement played a major role in federal housing policy.<sup>27</sup>

The New Deal objectives were pursued primarily through the Federal Home Loan Bank Board (FHLBB) and affiliated agencies, a system of federal support for regulation of savings and loan banks engaged with home mortgage lending.<sup>28</sup> In addition to the FHLBB, from 1932 to 1947, the federal government established five other organizations designed to address and aid housing: the Federal Savings and Loan Insurance Corporation (FSLIC),<sup>29</sup> the Federal Housing Administration (FHA),<sup>30</sup> the Federal National Mortgage Association (FNMA),<sup>31</sup> the home financing division of the Veteran's Administration,<sup>32</sup> and the Housing and Home Finance Agency (HHFA).<sup>33</sup> The FHLBB was established in 1932 but was restructured during FDR's administration and served as the foundation for the New Deal strategy. It was designed to deal primarily

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23. Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 6 (2014).

24. See Friedman, *supra* note 17, at 642 (describing the immediate aftermath of the enactment of the 1937 Act).

25. See Harold A. McDougall, *Affordable Housing for the 1990's*, 20 U. MICH. J. L. REFORM 727, 733 (1987) (“The New Deal sought to counter this dangerous volatility by segregating housing finance from general capital markets.”).

26. *Id.*

27. *Id.*

28. *Federal Home Loan Bank Board (Home Owners' Loan Corporation)*, DC HISTORIC SITES, <https://historicsites.dcpreservation.org/items/show/194> [<https://perma.cc/2JBQ-HEE6>] (last visited Aug. 4, 2020).

29. National Housing Act of 1934, Pub. L. No. 73–479, tit. IV, 48 Stat. 1246, 1257.

30. See tit. I (creating the Federal Housing Administration (FHA) “to encourage improvements in housing standards and conditions [and] to provide a system of mutual mortgage insurance.”).

31. See 12 U.S.C. § 1717 (creating the Federal National Mortgage Association).

32. See Servicemen's Readjustment Act of 1944, Pub. L. No. 78–346, 58 Stat. 284, 284 (describing the benefits for veterans for the purchase or construction of homes, farms, and business property).

33. See Reorganization Plan No. 3 of 1947, 12 F.R. 4981, § 5, 61 Stat. 954 (making the FHA a department of the HHFA); McDougall, *supra* note 25, at 734 (describing the different government authorities established from 1932 to 1947).

with the secondary mortgage market.<sup>34</sup> In 1933, the institution was reoriented in purpose and began chartering federal savings and other loan institutions to serve the home mortgage financing market.<sup>35</sup> In 1934, the FHA was created and chartered to “facilitate home ownership, encourage uniformity among lending institutions, and upgrade housing stock,” and provided home mortgage insurance.<sup>36</sup> Despite the repeated attempts at addressing housing in the United States, the creation of public housing sputtered. From 1937 to 1948, only 117,000 public housing units were constructed with 25,000 additional units deferred because of World War II.<sup>37</sup>

In 1947, the federal government consolidated its housing programs and institutions under the Housing Home Finance Agency (HHFA),<sup>38</sup> the predecessor to the Department of Housing and Urban Development (HUD). In 1949, Congress again revisited the need for public housing when it amended the Housing Act of 1937 and passed the Housing Act of 1949, signed by President Truman. The 1949 Act sought to “[eliminate] substandard and other inadequate housing through the clearance of slums and blighted areas.”<sup>39</sup> The 1949 Act was designed to address the issues related to inhabitation in our country’s densely populated and rapidly growing cities. With this declaration, the Act established the national housing policy of “[a] decent home and a suitable living environment for every American family” in order to “contribut[e] to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.”<sup>40</sup> In essence, the 1949 Act created a mission to “improve the physical, social, and economic health of cities.”<sup>41</sup> To meet these “health of cities” goals, the 1949 Act provided federal subsidies to aid in the clearance of slums and promote urban redevelopment.<sup>42</sup> Congress authorized construction of 810,000 more public housing units as part of the Act. They were not completed until over twenty years later.<sup>43</sup>

The 1950s reflected a paradigm shift in how public housing was perceived. Throughout the 1930s and 1940s, public housing was met with

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34. See McDougall, *supra* note 25, at 733–34 (“The FHLBB tinkers with the secondary mortgage market . . .”).

35. *Id.* at 734.

36. *Id.*

37. JAMES RUSSELL PRESCOTT, *ECONOMIC ASPECTS OF PUBLIC HOUSING* 24 (1974).

38. Reorganization Plan No. 3 of 1947, 12 F.R. 4981, § 5, 61 Stat. 954.

39. Housing Act of 1949, Pub. L. No. 81–171, § 2, 63 Stat. 413, 413 (1949).

40. *Id.*

41. THOMPSON, *supra* note 13, at 6 (explaining HUD’s third core mission).

42. See Schill, *supra* note 19, at 895 (describing the purpose of the 1949 Act).

43. See *id.* at 895–96 (“Congress authorized the construction of an additional 810,000 public housing units . . .”).

criticism and skepticism. Projects were intended to be temporary until residents could get back on their feet, and often were segregated by race and built in less desirable neighborhoods where their presence would not be “offensive” to community residents.<sup>44</sup> Federal government policies and programs facilitated the movement of middle- and moderate-income households out of the city and into the suburbs. At roughly the same time, black migration from the rural south to northern cities accelerated.<sup>45</sup> As many jobs followed white flight to the suburbs, inner cities became home to low-income and minority households.<sup>46</sup> As a result, “public housing no longer served as a temporary haven for upwardly mobile households, but instead became a permanent home to a very poor and disproportionately nonwhite population.”<sup>47</sup>

In the decades that followed, the policies stemming from the New Deal era and postwar America would continue to establish public housing as a cornerstone of American society, and the economic base and ethnic profile of public housing tenants would categorically shift.

## II. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND NOTABLE ACCOMPLISHMENTS

### A. *Origin and Purpose*

The 1960s saw a boom in public housing development.<sup>48</sup> The cost of operating and constructing public housing increased, which resulted in the creation of substandard high rises to lower the cost of land and development. Furthermore, the increase in inventory did not prevent the ongoing segregation which, in addition to the underfunding of the

44. *See id.* at 896 (explaining the Act was meant to be a temporary solution).

45. DANIEL R. FUSFELD & TIMOTHY BATES, *THE POLITICAL ECONOMY OF THE URBAN GHETTO* 49–50 (Susan H. Wilson ed., 1984).

46. *See* Schill, *supra* note 19, at 896 (arguing that manufacturing jobs followed the pattern of migration away from central cities and towards the suburbs); *see also* Alana Semuels, *White Flight Never Ended*, *THE ATLANTIC* (July 30, 2015), <https://www.theatlantic.com/business/archive/2015/07/white-flight-alive-and-well/399980/> [<https://perma.cc/RZ4M-XFEH>] (citing the Kerner Report which “castigated white society for fleeing to suburbs, where they excluded blacks from employment, housing, and educational opportunities.”).

47. Schill, *supra* note 19, at 896 (explaining that increasing manufacturing jobs brought many white employees to the suburbs, leaving behind a mostly poor, nonwhite population).

48. *See* Michael S. FitzPatrick, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD’s Newest Big Budget Development Plan*, 7 *GEO. J. ON POVERTY L. & POL’Y* 421, 431 (2000); *see also* Alexander von Hoffman, *History Lessons for Today’s Housing Policy: The Political Processes of Making Low-Income Housing Policy*, *JOINT CTR. FOR HOUS. STUD. HARV. UNIV.* 1, 24, 33 (Aug. 2012), [https://www.jchs.harvard.edu/sites/default/files/w12-5\\_von\\_hoffman.pdf](https://www.jchs.harvard.edu/sites/default/files/w12-5_von_hoffman.pdf) [<https://perma.cc/L3AB-HGU3>] (noting that in 1968, the Johnson administration adopted the Kaiser committee goals for “300,000 new housing units for low- and middle-income families [in 1969]—more than half of the production of the previous ten years—and 6 million in the following decade”).



physical structures, caused the failure of many public housing structures.<sup>49</sup> The importance of affordable and public housing was illustrated by President Johnson’s decision to make affordable housing a key component of his administration’s policy objectives.<sup>50</sup> In 1965, Congress enacted the Department of Housing and Urban Development Act to consolidate a plethora of older federal agencies created during the 1930s, 1940s, and 1950s. In the 1965 Act, Congress gave HUD its guided mission, stating:

[I]n recognition of the increasing importance of housing and urban development in our national life, the Congress finds that establishment of an executive department is desirable to achieve the best administration of the principal programs of the Federal Government which provide assistance for housing and for the development of the Nation’s communities; to assist the President in achieving maximum coordination of the various Federal activities which have a major effect upon urban community, suburban, or metropolitan development; to encourage the solution of problems of housing, urban development, and mass transportation through State, county, town, village, or other local and private action, including promotion of interstate, regional, and metropolitan cooperation; to encourage the maximum contributions that may be made by vigorous private homebuilding and mortgage lending industries to housing, urban development, and the national economy; and to provide for full and appropriate consideration, at the national level, of the needs and interests of the Nation’s communities and of the people who live and work in them.<sup>51</sup>

The 1965 Act established the Department of Housing and Urban Development (HUD) as a cabinet-level agency, thereby replacing HHFA. For the first time, “urban” was reflected in the agency’s title.<sup>52</sup> On January 18, 1966, Robert C. Weaver—an economist, the incumbent HHFA Administrator, and a former member of President Roosevelt’s “Black Cabinet”<sup>53</sup>—was appointed the first Secretary of HUD.<sup>54</sup> Weaver was also the first African American to serve in a President’s cabinet in

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49. See FitzPatrick, *supra* note 48, at 431 (remarking that many of the new high-rise structures “were ill-conceived from their inception and were under-funded, both in construction and maintenance.”).

50. Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 429 (2004).

51. 42 U.S.C. § 3531 (1965).

52. 42 U.S.C. § 3532.

53. James Barron, *Robert C. Weaver, 89, First Black Cabinet Member, Dies*, NY TIMES (July 19, 1997), <https://www.nytimes.com/1997/07/19/nyregion/robert-c-weaver-89-first-black-cabinet-member-dies.html> [<https://perma.cc/WTA7-CZ25>].

54. HUD HISTORY, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/about/hud\\_history](https://www.hud.gov/about/hud_history) [<https://perma.cc/9B5T-599Z>] (last visited Aug. 18, 2020).

American history.<sup>55</sup> While in office, Weaver championed the Fair Housing Act of 1968, stating, “you cannot have physical renewal . . . without human renewal.”<sup>56</sup>

The year 1973 was another monumental year in the history of public housing in this country. From 1962 to 1972, HUD’s budget increased 336%.<sup>57</sup> Due to the growing skepticism surrounding the feasibility, cost, effectiveness, and manageability of HUD’s major initiatives, President Nixon decided to halt additional funding for many of these programs, including the section 235 homeownership program, public housing, all private rental assistance programs, and the major health of cities programs.<sup>58</sup> This 1973 funding freeze marked the end of the HUD’s early era.<sup>59</sup>

In 1974, the Housing and Community Development Act of 1974 was enacted and signed by President Ford, ushering in HUD’s modern era.<sup>60</sup> The 1974 Act reflected three fundamental policy shifts: (1) reduced emphasis on public housing construction to focus on the new Section 8 “project-based” rental assistance program, (2) introduction of the “tenant-based” Section 8 program, and (3) consolidation of seven of HUD’s health of cities programs into the Community Development Block Grant (CDBG).<sup>61</sup>

### B. Overview of Select HUD Programs

Section 8 housing vouchers, also called the Section 8 Housing Choice Voucher program, are tenant-based rental assistance (TBRA) that are funded by the federal government and administered by local public

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55. Barron, *supra* note 53 (Weaver’s obituary crediting him with being the first African American appointed to the Cabinet).

56. Merrill Fabry, *The Long Fight to Appoint the First African-American Cabinet Secretary*, TIME (Jan. 13, 2016), <https://time.com/4175137/first-african-american-cabinet-member/> [<https://perma.cc/84LN-4ZQK>].

57. THOMPSON, *supra* note 13, at 10 (demonstrating the expansion of HUD programs from 1962 to 1972).

58. *Id.*; see also MAGGIE MCCARTY ET AL., CONG. RSCH. SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 25 (2014), <https://www.hsdl.org/?view&did=752738> [<https://perma.cc/4YWK-3ST8>] (describing the shift from construction subsidies to rent subsidies under the Nixon administration); see generally 1930 to 2020, U.S. DEP’T. HOUS. & URB. DEV., [https://www.huduser.gov/hud\\_timeline/](https://www.huduser.gov/hud_timeline/) [<https://perma.cc/VYZ3-VJ22>] (last visited Aug. 3, 2020) (discussing the moratorium on new housing programs ordered by President Nixon).

59. See THOMPSON, *supra* note 13, at 9–10 (finding that President Nixon ordered HUD to no longer pursue new commitments).

60. See *id.* at 11 (discussing the major policy shifts established by the 1974 act). See generally Housing and Community Development Act of 1974, Pub. L. No. 93–383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301).

61. See THOMPSON, *supra* note 13 at 11 (“The unifying theme [of the 1974 Act] was to move in the direct of program restructuring, consolidation, and devolution . . .”).

housing authorities (PHAs) to private landlords on behalf of low-income families.<sup>62</sup> The vouchers allow low-income families to live in private-market housing of their choice by paying for the difference between the family's contribution and the actual rent of the housing.<sup>63</sup> The family's contribution to rent is 30% of the family's adjusted gross income, and the PHA pays the difference based on the maximum subsidy set by the PHA, based on the local fair market value established by HUD.<sup>64</sup> For a family to be low-income status and thus eligible for the vouchers, they must earn less than 80% of the local area median and meet other criteria, such as elderly or disabled.<sup>65</sup> For a family to be considered very low-income, they must earn less than 50% of the local area median.<sup>66</sup> This distinction is important because PHAs must provide 75% of all vouchers to very low-income families.<sup>67</sup> Families are not automatically entitled to the vouchers just because of their income, age or ability status.<sup>68</sup> Families must apply for the vouchers at their local PHA. If approved, they are placed on a waiting list for Congress's approval.<sup>69</sup> The process could take anywhere from several months to a couple years before the families receive a voucher.<sup>70</sup> Congress generally renews all two million vouchers it has

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62. See MAGGIE MCCARTY ET AL., CONG. RSCH. SERV., R44495, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD): FY2017 APPROPRIATIONS 6 (2017), <https://crsreports.congress.gov/product/pdf/R/R44495> [<https://perma.cc/9Vfy-BPK4>] (explaining the Section 8 program); see MCCARTY ET AL., *supra* note 58, at 6 (explaining the role of PHAs in voucher programs); see generally 24 C.F.R. § 982.1 (2020).

63. MCCARTY ET AL., *supra* note 58, at 8.

64. *Id.*

65. *Id.*; see generally *Subject: Transmittal of Fiscal Year (FY) 1998 Public Housing/Section 8 Income Limits*, OFF. OF POL'Y DEV. & RSCH.: U.S. DEP'T OF HOUS. & URB. DEV. (Jan. 7, 1998), <https://www.huduser.gov/portal/datasets/il/fmr98/sect8.html> [<https://perma.cc/6SRD-UKKD>]; see generally *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) [<https://perma.cc/F4JQ-AJW2>] (last visited Aug. 3, 2020).

66. MCCARTY ET AL., *supra* note 58, at 8 (2014).

67. See 42 U.S.C. § 1437f(o)(4) (defining "low-income family"); MCCARTY ET AL., *supra* note 58, at 8 (specifying that 75% of all vouchers in a year must be set aside for extremely low-income families).

68. See MCCARTY ET AL., *supra* note 58, at 9 ("Families that wish to receive a voucher must generally apply to their local PHA and are placed on a waiting list . . .").

69. See 42 U.S.C. § 1437f(o)(13)(J) ("A public housing agency shall select families to receive project-based assistance pursuant to this paragraph from its waiting list for assistance under this subsection."); see also MCCARTY ET AL., *supra* note 58, at 9 (discussing the tenant selection process and use of the waiting list).

70. See MCCARTY ET AL., *supra* note 58, at 9 (explaining the time spent on the waiting list varies by community, ranging from several months to a couple years); see also Maya Miller, *What You Need to Know About How Section 8 Really Works*, PROPUBLICA (Jan. 9, 2020, 5:30 AM), <https://www.propublica.org/article/what-you-need-to-know-about-how-section-8-really-works> [<https://perma.cc/B9LD-MAQG>] (exploring how to apply for Section 8 housing).

authorized and funded each year.<sup>71</sup>

The Section 8 voucher program is the largest of HUD's rental assistance programs, with roughly a third of the department's budget going to the voucher program.<sup>72</sup> Since the Section 8 voucher program is the largest program in the largest account (rental assistance programs), it has predictably been the source of the most contentious funding issues each year. With two million vouchers in need of renewal each year and costs based completely on the housing market and tenant incomes, this annual controversy is no surprise.<sup>73</sup> The TBRA account also provides funds for administrative costs incurred by the PHAs that administer the program.<sup>74</sup>

Somewhat similar to Section 8 vouchers, public housing developments are owned and operated by local PHAs and funded and regulated by the federal government through HUD.<sup>75</sup> Also, like Section 8 vouchers, public housing tenants must pay 30% of their adjusted gross income to rent.<sup>76</sup> PHAs receive funding from HUD to make up the difference between what the tenants pay and what it cost to maintain the public housing development.<sup>77</sup> Families are eligible for public housing if they are low-income, meaning they are at or below 80% of the area median income.<sup>78</sup> Families at or below 30% of the area median income are considered extremely low-income for public housing purposes, and 40% of public housing units must be made available for extremely low-income families.<sup>79</sup> Public housing is the second-largest direct housing assistance program behind Section 8 vouchers with 1.2 million public housing units under contract with the federal government.<sup>80</sup>

Rental Assistance Demonstration (RAD) is a program started by the

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71. MCCARTY ET AL., *supra* note 58, at 9. However, some years Congress has authorized new vouchers called incremental vouchers. *Id.*

72. *Id.*

73. See MAGGIE MCCARTY ET AL., *supra* note 62, at 6–7; see also MCCARTY ET AL., *supra* note 58, at 9 (explaining that Congress renews about 2 million vouchers each year); see also MAGGIE MCCARTY, CONG. RESEARCH SERV., R44931, HUD FY2018 APPROPRIATIONS: IN BRIEF 6 (2018), <https://crsreports.congress.gov/product/pdf/R/R44931> [<https://perma.cc/C4ZS-4MSX>] (explaining that Section 8 allocations are contentious every year because it is the largest part of the program budget); see also MAGGIE MCCARTY, CONG. RESEARCH SERV., R45294, HUD FY2019 APPROPRIATIONS: IN BRIEF 8 (2019), <https://crsreports.congress.gov/product/pdf/R/R45294> [<https://perma.cc/H99H-627Y>] (exploring how this large federal housing program has changed and developed over a span of a few years).

74. MAGGIE MCCARTY ET AL., *supra* note 62, at 6.

75. MAGGIE MCCARTY ET AL., *supra* note 58, at 8.

76. *Id.*

77. *Id.* See generally *Housing Choice Vouchers Fact Sheet*, *supra* note 65.

78. 24 C.F.R. § 982.201(b) (2020); see MAGGIE MCCARTY ET AL., *supra* note 58, at 8.

79. MAGGIE MCCARTY ET AL., *supra* note 58, at 9–10.

80. *Id.* at 10.

Obama administration in fiscal year 2012.<sup>81</sup> RAD is not a normal program that requires funding from HUD to do what it is intended. Rather, RAD works by converting a limited number of HUD-assisted housing programs to Section 8 rental assistance programs,<sup>82</sup> and because RAD does not receive funding, the conversion must be cost-neutral.<sup>83</sup> However, in recent years, presidential budget requests have requested funds for RAD to allow for conversions that are not cost-neutral.<sup>84</sup>

The Community Development Block Grant program (CDBG) is administered by HUD and aimed at primarily low- and moderate-income individuals. The purpose of CDBG is to develop decent housing, a suitable living environment, and expand economic opportunities for these targeted individuals.<sup>85</sup> The CDBG distributes 70% of its funds to central cities of metropolitan areas, cities with populations of at least 50,000, and urban counties.<sup>86</sup> The remaining 30% of the funds go to states to use in small communities that are listed above.<sup>87</sup> Of the funds given to communities through CDBG, 70% of it must go to the benefit of low- and moderate-income persons.<sup>88</sup> This includes “acquisition and rehabilitation of property for public works, urban beautification, historic preservation; the demolition of blighted properties; services such as crime prevention, child care, drug abuse counseling, education, or recreation; neighborhood economic development projects; and the rehabilitation or development of housing . . . .”<sup>89</sup>

The HOME Investment Partnerships Program is another program administered by HUD with the purpose of expanding the supply of decent, safe, sanitary, and affordable housing.<sup>90</sup> For the HOME program,

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81. MAGGIE MCCARTY ET AL., *supra* note 62, at 12; *About RAD Public Housing*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.hud.gov/RAD/program-details> [<https://perma.cc/X47B-6G7T>] (last visited Aug. 3, 2020); *see generally* Rental Assistance Demonstration: Final Program Notice, 77 Fed. Reg. 43,850 (July 26, 2012).

82. *See* MAGGIE MCCARTY ET AL., *supra* note 62, at 12 (explaining the function of RAD); *see also* *Rental Assistance Demonstration (RAD)*, U.S. DEP’T OF HOUS. & URB. DEV. 1–2, <https://www.hud.gov/sites/documents/TOOLKIT1WHYRAD.PDF> [<https://perma.cc/3ZBK-7DQW>] (last visited Aug. 3, 2020) (discussing that projects must be able to undergo a cost-neutral conversion because RAD has never received funding).

83. MAGGIE MCCARTY ET AL., *supra* note 62, at 12.

84. *Id.*; *see* MAGGIE MCCARTY, *supra* note 73, at 7 (“The President’s FY2017 budget request included \$50 million to fund RAD in order to allow units that cannot undergo a cost-neutral conversion to participate.”).

85. *See* MAGGIE MCCARTY ET AL., *supra* note 58, at 16 (discussing the purpose of the grants). *See generally* 12 U.S.C. § 1706e (repealed Nov. 28 1990).

86. MAGGIE MCCARTY ET AL., *supra* note 58, at 16.

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.* at 17 (describing the purpose of the Program); *see also* *Home Investment*

60% of the funds go to participating jurisdictions that have a population above a certain threshold, and the remaining 40% are awarded to non-participating jurisdictions.<sup>91</sup> The HOME funds specifically go to rehabilitation of owner-occupied housing, homebuyer assistance, rental housing construction and rehabilitation, and the provision of tenant-based rental assistance.<sup>92</sup> “All HOME funds must go to benefit low-income families (income at or below 80% of the area median income), and at least 90% of funds for rental housing activities or tenant-based rental assistance must be used to benefit families with incomes at or below 60% of area median income.”<sup>93</sup> This just means a subset of the funds goes to benefit a bigger portion of the low-income population, but still benefits low-income families.

The Federal Housing Administration (FHA) is an agency that is now within HUD and insures private lenders against losses on certain home mortgages.<sup>94</sup> This works to incentivize lenders that would not normally give loans to individuals with low down payments or little credit history by insuring lenders against the loss.<sup>95</sup> FHA-insured borrowers pay insurance premiums to the FHA and not the lenders, but the FHA limits the amount of the loan the borrowers can receive.<sup>96</sup> The FHA provides borrowers with a variety of mortgage insurance products, such as reverse mortgages for the elderly; loans for the purchase, repair, or construction of apartments, hospitals, and nursing homes; and for an assortment of special purpose loans.<sup>97</sup> Government National Mortgage Association (Ginnie Mae) provides mortgage-backed securities made up of government-insured mortgages and establishes offsetting receipts when

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*Partnerships Program*, U.S. DEP’T OF HOUS. & URB. DEV. (May 19, 2020), [https://www.hud.gov/program\\_offices/comm\\_planning/affordablehousing/programs/home/](https://www.hud.gov/program_offices/comm_planning/affordablehousing/programs/home/) [https://perma.cc/97UV-83F9] (summarizing the program).

91. MAGGIE MCCARTY ET AL., *supra* note 58, at 17; KATIE JONES, CONG. RESEARCH SERV., R40118, AN OVERVIEW OF THE HOME INVESTMENT PARTNERSHIPS PROGRAM 13 (2014), <https://fas.org/sgp/crs/misc/R40118.pdf> [https://perma.cc/5MG8-DN8N].

92. MAGGIE MCCARTY ET AL., *supra* note 58, at 17, 21.

93. MAGGIE MCCARTY ET AL., *supra* note 58, at 17; KATIE JONES, *supra* note 91, at 7.

94. MAGGIE MCCARTY ET AL., *supra* note 58, at 21; *see also* KATIE JONES, CONG. RESEARCH SERV., RS20530, FHA-INSURED HOME LOANS: AN OVERVIEW 2–3 (2019) (describing the FHA’s purpose and relationship to HUD).

95. MAGGIE MCCARTY ET AL., *supra* note 58, at 21; *see also* Marie Justine Fritz, *Federal Housing Administration (FHA)*, ENCYC. BRITANNICA (Aug. 9, 2019), [www.britannica.com/topic/Federal-Housing-Administration](http://www.britannica.com/topic/Federal-Housing-Administration) [www.perma.cc/AF82-NRTG] (describing the history and function of the FHA).

96. MAGGIE MCCARTY ET AL., *supra* note 58, at 21.

97. *Id.*; *see also* *Let FHS Loans Help You*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.hud.gov/buying/loans> [www.perma.cc/Q36R-DVAR] (last visited Aug. 3, 2020) (noting what products are available for different customers).

the fees it collects exceed any payments made on its guarantee.<sup>98</sup> Both of these offsets are based on the expectations about the housing market, the economy, the credit quality of borrowers, and relevant fee levels, which fall outside the control of the policymakers.<sup>99</sup> These programs offset the HUD budget if the estimated cash inflows exceed the estimated cash outflows. In other words, if the insured loans are expected to earn more money for the government than they cost the government, then the program will have a negative credit subsidy to offset the HUD budget.<sup>100</sup>

### C. HUD and Hate Crimes

To date, HUD's major programs include mortgage and loan insurance through the Federal Housing Administration, Community Development (CDBG) to help communities with economic development, job opportunities and housing rehabilitation, aid development and support for housing for low-income residents through the HOME investment Partnership Act block grants, rental assistance through the Section 8 program including certificates and vouchers, public or subsidized housing for low-income individuals and families, fair housing education and enforcement, and homelessness assistance.<sup>101</sup> However, the programs do not directly address overt acts of racism that exclude minorities from neighborhoods as an underlying factor for housing inequities. It is worth mentioning that HUD, like every other executive agency, does not exist in a vacuum. The history of HUD and its accomplishments are shaped by external forces, including political influence and pressure, social movements, budgets, and the will of its secretary. Hate crimes have been taken up by the legislature and statistics have been collected by the FBI and Department of Justice.<sup>102</sup> To date, very little, if any hate crime policy, has been included as part of the HUD Secretary's policies.

Secretary Samuel Pierce discussed 24 CFR 100.400, promulgated in 1989, which codifies the illegality of harassing a person due to their status in a protected class a housing context.<sup>103</sup> The remarks were given while

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98. MAGGIE MCCARTY, *supra* note 73, at 9; *see generally* ECONOMIC POLICY PROGRAM HOUSING COMMISSION, BIPARTISAN POLICY CENTER, GINNIE MAE: HOW DOES IT WORK AND WHAT DOES IT DO?, 1 (Dec. 6, 2013) <https://bipartisanpolicy.org/wp-content/uploads/2019/03/GinnieMae-final.pdf> [<https://perma.cc/Y9HM-UXKS>].

99. MAGGIE MCCARTY, *supra* note 73, at 9.

100. MAGGIE MCCARTY ET AL., *supra* note 62, at 14.

101. *Questions and Answers About HUD*, U.S. DEP'T OF HOUS. & URB. DEV., [www.hud.gov/about/qaintro](http://www.hud.gov/about/qaintro) [<https://perma.cc/3XPU-SYXZ>] (last accessed Aug. 17, 2020).

102. *See generally 2018 Hate Crime Statistics Released*, U.S. DEP'T OF JUST., [www.justice.gov/hatecrimes/facts-and-statistics](http://www.justice.gov/hatecrimes/facts-and-statistics) [[www.perma.cc/CQ7C-LEMD](http://www.perma.cc/CQ7C-LEMD)] (last accessed Aug. 17, 2020).

103. *See also* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3,232 (Jan. 23, 1989) (implementing the Fair Housing Amendments Act of 1988).

serving as the HUD secretary under President Reagan.<sup>104</sup> In 2010, Secretary Shaun Donovan discussed the murders of Matthew Shepard and James Byrd, Jr., which led to the Hate Crimes Prevention Act, Division E of the National Defense Authorization Act for Fiscal Year 2010.<sup>105</sup> The Act added certain crimes motivated by a victim's actual or perceived sexual orientation or gender identity to the list of hate crimes covered by existing federal law.<sup>106</sup> Other than these two HUD secretaries, an explicit mention of hate crimes is missing from all HUD secretaries' agendas. Including hate crimes in the agenda for HUD would be a break from traditional HUD priorities. However, HUD has been taking on more nontraditional topics lately with disparate impact and internet advertising.<sup>107</sup> Both of these topics align with the intent of the FHA to fight discrimination and to create truly integrated living patterns. The next part explains how disparate impact and third-party internet advertising are reshaping perspectives on the Fair Housing Act.

### III. NONTRADITIONAL HUD ACTIONS

#### A. Disparate Impact Under the Fair Housing Act

The Fair Housing Act (FHA) of 1968 seeks to provide, within constitutional limitations, fair housing in the United States.<sup>108</sup> The FHA bans practices that are motivated by a racially discriminatory purpose and those that "have a disparate impact on minorities."<sup>109</sup> In the years following the Act's enactment, most states and local governments passed their own equivalents to the FHA.<sup>110</sup> The FHA aims to ensure that a clear

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104. Joseph Foote, *As They Saw It: HUD's Secretaries Reminisce About Carrying Out the Mission*, 1 CITYSCAPE 71, 86 (1995), <https://www.huduser.gov/Periodicals/CITYSCAPE/VOL1NUM3/foote.pdf>.

105. See generally National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, Division E—Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 123 Stat. 2190, 2835 (2009) (codified as amended in scattered sections of 42, 18 U.S.C.); Elliott C. McLaughlin, *There Are Two Names on the Federal Hate Crimes Law. One is Matthew Shepard. The Other Is James Byrd Jr.*, CNN (Apr. 25, 2019, 8:15 AM), [www.cnn.com/2019/04/24/us/james-byrd-hate-crime-legislation-john-king-execution/index.html](http://www.cnn.com/2019/04/24/us/james-byrd-hate-crime-legislation-john-king-execution/index.html) [<https://perma.cc/L26S-LTRQ>].

106. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, Division E—Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 123 Stat. 2190, 2839–41 (2009) (expanding the 1969 United States federal hate-crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability).

107. *Infra* Part III.

108. 42 U.S.C. § 3601.

109. Courtney Lauren Anderson, *Integrate and Reactivate the 1968 Fair Housing Mandate*, 13 HASTINGS RACE & POVERTY L.J. 1, 2 (2016).

110. Robert G. Schwemm, Cox, Halprin, and *Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 722 n.28 (2008); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION §30:3 (Thomson Reuters, July 2020 Update) (discussing which state and local jurisdictions prohibit housing discrimination and what factors are considered).



national policy of fair housing can be achieved in the United States without perpetuating segregation or creating discriminatory practices.<sup>111</sup>

The thrust of the FHA is found in §§ 3604 and 3608, which prohibits discrimination in the sale or rental of a dwelling or in the terms, conditions, or privileges of sale or rental of a dwelling.<sup>112</sup> Furthermore, § 3604 prohibits discriminatory *intent* in representing dwelling availability for inspection, sale, or rental to a party.<sup>113</sup> In sum, § 3604 seeks to prohibit acts that prevent certain individuals from attaining housing due to their membership in a protected class and to provide a cause of action when prohibited actions occur.<sup>114</sup>

Section 3608(a) authorizes HUD to administer the FHA.<sup>115</sup> Additionally, this section requires “all executive departments and agencies [to] administer their program and activities relating to housing and urban development (including any federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of the [FHA].”<sup>116</sup> To comply with § 3608, governmental agencies must proactively use their resources to assist with actions to end discrimination in public housing.<sup>117</sup> In 1994, President Clinton expanded HUD’s authority to increase fair housing opportunities and reduce segregation.<sup>118</sup> The order also established the President’s Fair Housing Council, a cabinet-level organization designed to promote coordination across the executive branch in affirmatively furthering fair housing.<sup>119</sup>

Plaintiffs have brought disparate impact claims under the FHA in three areas: lending, exclusionary zoning, and urban renewal.<sup>120</sup> In each of

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111. Courtney Lauren Anderson, *Affirmative Action for Affordable Housing*, 60 HOWARD L.J. 105, 125 (2016). *See also* 42 U.S.C. § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”).

112. 42 U.S.C. § 3604(b), 3608.

113. 42 U.S.C. § 3604(b).

114. Anderson, *supra* note 111, at 118 (describing the prohibitions set forth by § 3604); Anderson, *supra* note 109, at 2 (describing the prohibitions set forth by § 3604 of the Act).

115. 42 U.S.C. § 3608(a).

116. 42 U.S.C. § 3608(d).

117. Anderson, *supra* note 111, at 119 (describing how to comply with § 3608).

118. Anderson, *supra* note 109, at 7 (describing Clinton’s executive order and the expansion of HUD’s authority).

119. *Id.*

120. Michael G. Allen et al., *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 162 (2014); *see, e.g.*, Complaint for Declaratory and Injunctive Relief and Damages, Mayor of Balt. v. Wells Fargo, 677 F.Supp.2d 847 (No. 08-062) (involving a novel challenge to “reverse redlining” in neighborhoods of color in Baltimore following an unprecedented crisis of residential mortgage foreclosures); Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish, 641 F.Supp.2d 563, 565 (E.D. La. 2009) (challenging zoning ordinances in post-Katrina New Orleans that limited housing availability and

these contexts, district courts have found claims cognizable.<sup>121</sup> The federal district courts recognized two types of disparate impacts under the FHA. The first type requires the plaintiff to show that the challenged practice imposes a disproportionate harm on members of a protected class.<sup>122</sup> The second type requires a plaintiff show that the challenged action tends to create, reinforce, or perpetuate patterns of racial segregation.<sup>123</sup>

Despite there being two types of disparate impact claims, data shows that fewer than twenty percent of plaintiffs succeed on FHA disparate impact claims on appeal.<sup>124</sup> Furthermore, even though courts recognize discriminatory intent claims and disparate impact claims, courts have been conservative in providing relief for aggrieved parties under the disparate impact theory because they fear reaching beyond the scope of harm protected by Congress.<sup>125</sup>

On July 19, 2013, during Shaun Donovan's tenure, HUD issued a proposed rule titled "Affirmatively Furthering Fair Housing."<sup>126</sup> The proposed rule codified the burden-shifting framework used by a majority of federal courts, thereby establishing standards for proving disparate impact under the FHA.<sup>127</sup> Moreover, the rule sought to provide recipients of HUD funds with the tools they need to fulfill their statutory obligation "to take steps proactively to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities for all."<sup>128</sup> Pursuant to the rule, HUD would provide data describing the neighborhood demographics, particularly for those in high poverty areas, related to race and discriminatory actions such as the ethnicity of

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disproportionately affected African American households); *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, (No. 11-1507), 2013 WL 6050174 bringing a disparate impact challenge against a redevelopment plan in a predominantly nonwhite neighborhood that allegedly intended to reduce overcrowding and crime rates).

121. Anderson, *supra* note 111, at 123 (stating that lower federal courts have found the claim cognizable in several contexts).

122. Allen, *supra* note 120, at 170, 178 n.146 (outlining what the defendant must provide in order to meet their burden).

123. *Id.*

124. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 393 n.222 (2013).

125. Anderson, *supra* note 109, at 54–55 (describing the relief provided under the disparate impact theory).

126. Anderson, *supra* note 109, at 3 (describing the proposed rule titled Affirmatively Furthering Fair Housing Act); *see generally* Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,709 (proposed July 19, 2013) (to be codified at 24 C.F.R. pt. 100).

127. 78 Fed. Reg. 43,709.

128. *Id.* at 43,710.

residents, segregation and integrations statistics.<sup>129</sup> In essence, HUD's 2013 proposed rule seeks to aid plaintiffs attempting to prove a prima facie case for disparate impact brought under § 3604 by supplying data, the absence of which often acts as a deciding factor in denying relief for aggrieved plaintiffs.

In 2016, the affirmative duty imposed on the federal government by the FHA resurfaced in the Supreme Court case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* In the *Inclusive Communities* case, the Supreme Court addressed whether to recognize the plaintiff's disparate impact claims under the FHA.<sup>130</sup>

The Supreme Court first recognized a disparate impact claim in *Griggs v. Duke Power*, in which the Court held that Title VII of the Civil Rights Act of 1964 "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."<sup>131</sup> Disparate impact is based on the "reality that private or public actions, even taken without animus, can have a disproportionately negative impact on particular groups, especially minorities."<sup>132</sup> Because the FHA provides a cause of action for any aggrieved party, under the disparate impact theory, "a plaintiff may allege discrimination based on statistically disparate impacts of the defendant's facially neutral practice on members of a group who share a protected characteristic."<sup>133</sup> To avoid liability under a disparate impact claim, a defendant must show that the challenged practice has a "legitimate, nondiscriminatory policy objective and the practice is necessary to attain that objective, and there is no other practice which can achieve the same results that also has a less discriminatory effect."<sup>134</sup>

Prior to the *Inclusive Communities* decision, eleven of the twelve circuits to consider disparate impact claims in the housing context held that the FHA prohibited facially neutral housing practices that create disparate impacts on protected classes, even in the absence of a

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129. Anderson, *supra* note 109, at 3 (explaining the types of data that HUD would provide).

130. *Tex. Dep't Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015).

131. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

132. Anderson, *supra* note 111, at 121; *see also* Brief of Hous. Scholars as Amici Curiae Supporting Respondent at 11, 17, *Inclusive Cmty.*, 135 S. Ct. 2507 (No. 13-1371).

133. Anderson, *supra* note 111, at 121 (describing the disparate impact theory); *see also Griggs*, 401 U.S. at 430 ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

134. Anderson, *supra* note 111, at 121; *see also* Brief for the Petitioners at 23, *Inclusive Cmty.*, 135 S. Ct. 2507 (No. 13-1371) (describing how disparate impact claims can be made).

discriminatory intent.<sup>135</sup> In *Inclusive Communities*, the Supreme Court upheld its reasoning from *Griggs*, finding disparate impact claims cognizable in other civil rights statutes, such as the Fair Housing Act.<sup>136</sup>

This broad interpretation of the Fair Housing Act is necessary in order to further its mission. Updates to the interpretation in the context of current times is also exemplified by holding online advertising platforms accountable for fair housing violations in addition to the actual advertisers.

### B. Internet Advertising Under the Fair Housing Act

The Fair Housing Act of 1968 (FHA) prohibits discriminatory advertising for housing, explicitly in the housing acquisition process.<sup>137</sup> In 1991, the Second Circuit defined “preference” as “any ad that would discourage an ordinary reader of a particular race from answering it.”<sup>138</sup> In 1995, the U.S. Court of Appeals for the Seventh Circuit clarified that the FHA prohibits the making or publishing of any statement or advertisement that indicates a preference or limitation based on race or family status, among other factors.<sup>139</sup>

Recently, HUD has ventured into regulating internet advertising under the Fair Housing Act. This can appear ancillary to hate crimes and not within the traditional definition of housing and thus may seem outside of the scope of HUD. Nonetheless, the Department of Housing and Urban Development has reinitiated an investigation into Facebook for enabling housing advertisers to discriminate against possible renters or purchasers based on protected characteristics.<sup>140</sup> The case was originally opened after a ProPublica article was published on October 28, 2016, which reported on potentially discriminatory advertisement targeting procedures in the Facebook platform.<sup>141</sup> However, in November of 2017,

135. Allen, *supra* note 120, at 156 (“Every circuit to consider the question . . . has held that the FHA prohibits housing practices that have a disparate impact on a protected group, even in the absence of discriminatory intent.”).

136. See *Inclusive Cmty.*, 135 S. Ct. at 2525 (“[D]isparate-impact claims are cognizable under the [FHA] upon considering its results-oriented language . . .”).

137. See 42 U.S.C. § 3604(c) (“[I]t shall be 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.”).

138. *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999–1000 (2d Cir. 1991).

139. See *Jancik v. Dep’t of Hous. & Urb. Dev.*, 44 F.3d 553, 556 (7th Cir. 1995) (relying on the FHA’s definition of “preference” in the analysis).

140. See *Charge of Discrimination*, at 1–6, *Dep’t of Hous. and Urb. Dev. v. Facebook, Inc.*, (FHEO No. 18-0323) (describing how Facebook’s advertising platform facilitates discrimination).

141. See Kriston Capps, *Behind HUD’s Housing Discrimination Charges Against Facebook*,

HUD ended its initial investigation into Facebook until further notice.<sup>142</sup> In April of 2018, a HUD spokesperson said that, “while the agency has ‘made no findings’ in its resumed investigation, it has learned more about Facebook practices ‘that warrant a deeper level of scrutiny.’”<sup>143</sup> If the complaint moves forward, the issue will be whether Facebook is protected under the protections of the Communications Decency Act (CDA) for “interactive computer service[s].”<sup>144</sup>

The first ProPublica article reported that Facebook allows advertisers to target users by their interests, background, and “Ethnic Affinity.”<sup>145</sup> As part of its investigation, ProPublica purchased an advertisement that targeted Facebook members who were looking for housing and excluded anyone with an “‘affinity’ for African-American, Asian-American, or Hispanic people,” which was quickly approved by Facebook.<sup>146</sup> In the article, Facebook stated that its “policies prohibit using our targeting options to discriminate” and it “take[s] prompt enforcement action when [it] determine[s] that ads violate [its] policies.”<sup>147</sup> Facebook also stated that “Ethnic Affinity” is not the same as race, and members are assigned an “Ethnic Affinity” based on their interactions on Facebook.<sup>148</sup> The exclusive categories, Facebook states, are used by advertisers to test their marketing platforms, and “Ethnic Affinity” was added as part of a

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BLOOMBERG CITY LAB (Mar. 28, 2019, 12:25 PM), <https://www.bloomberg.com/news/articles/2019-03-28/why-hud-charged-facebook-with-discrimination> [https://perma.cc/RFW8-BMBS] (explaining HUD’s charges against Facebook); see also Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016, 1:00 PM), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race> [https://perma.cc/9773-4JFF] (“Ads that exclude people based on race, gender and other sensitive factors [that] are prohibited by federal law in housing and employment.”).

142. See Julia Angwin et al., *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA (Nov. 21, 2017, 1:23 PM), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin> [https://perma.cc/X7BE-DCU4] (demonstrating that ProPublica could purchase housing advertisements on Facebook, request that they not be shown to “certain categories of users, such as African Americans, mothers of high school kids, people interested in wheelchair ramps, Jews, expats from Argentina and Spanish speakers,” and the ads were approved by Facebook within minutes).

143. See Ali Breland, *Facebook Investigated Over Alleged Housing Discrimination*, THE HILL (Apr. 19, 2018, 3:15 PM), <https://thehill.com/policy/technology/383992-facebook-is-being-investigated-over-alleged-housing-discrimination> [https://perma.cc/P9E5-SGND] (detailing HUD’s reopening of the investigation into Facebook).

144. Communications Decency Act (CDA) § 314, 47 U.S.C. § 230(f)(2).

145. See Angwin & Parris Jr., *supra* note 141 (describing the advertisement experiment ProPublica ran on Facebook).

146. *Id.*

147. *Id.*

148. See *id.* (“Facebook assigns members an ‘Ethnic Affinity’ based on pages and posts they have liked or engaged with on Facebook.”).

“multicultural advertising” effort.<sup>149</sup>

In November 2016, shortly after the ProPublica article was published, consumers filed a class action lawsuit against Facebook in the Northern District of California.<sup>150</sup> The suit challenged the exclusory advertisement categories as a violation of the Fair Housing Act, as amended, and the Civil Rights Act of 1964.<sup>151</sup> Complainants in the suit sought declaratory relief, injunctive relief, penalties, and monetary damages.<sup>152</sup> Defendants listed in the complaint were Facebook and “Doe Defendants” who had used the ad platform to “illegally discriminate on the basis of race, color, religion, sex, familial status, or national origin, with advertisements for employment or housing.”<sup>153</sup> The complaint alleged that Facebook’s ad platform enabled illegal discrimination by allowing ad buyers to target specific users seeking housing<sup>154</sup> and exclude users by selecting an “Exclude People” option that prevented the ads from being shown to certain sets of users.<sup>155</sup>

According to the complaint, advertisements could exclude users based on race characteristics, such as “African American (US),” “Asian American (US),” and “Hispanic (US);” familial status characteristics, such as “Parents (All),” “Divorced,” and “Expectant parents;” sex characteristics, such as “Moms;” religion characteristics, such as “Christian,” “Muslim,” or “Sunni Islam;” and national origin characteristics, such as “Expat (All).”<sup>156</sup> Notably, the complaint alleged that Facebook gave no option to exclude white or Caucasians.<sup>157</sup> After extensive mediation and settlement discussions, the case was settled in March 2019, with Facebook agreeing to remove discriminatory targeting options from its ad platform and create a tool that allows users to search housing options even if the individuals were not in the subject groups for

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149. *See id.* (discussing privacy and public policy manager at Facebook, Steve Satterfield’s defense of the “ethnic affinity” categorization as a standard industry practice so that advertisers could compare success of advertisement campaigns, for example, in different languages).

150. *See* Stephen Engelberg, *HUD Has ‘Serious Concerns’ About Facebook’s Ethnic Targeting*, PROPUBLICA (Nov. 7, 2016, 4:27 PM), <https://www.propublica.org/article/hud-has-serious-concerns-about-facebooks-ethnic-targeting> [<https://perma.cc/9X5R-SNSB>] (recounting HUD and Facebook response to previous article detailing ad discrimination); Complaint Class Action, Jury Demand at 1, *Onuoha v. Facebook, Inc.* (No. 5:16-cv-06440), 2016 WL 6599689 (N.D. Cal., filed Nov. 3, 2016).

151. Complaint Class Action, *supra* note 150, at 1 (listing the plaintiff’s claims against Facebook).

152. *Id.*

153. *Id.* at 2.

154. *Id.* at 5.

155. *Id.*

156. *See id.* at 5–6 (highlighting that Facebook defines “Expat” as “[p]eople whose original country of residence is different from the current country/countries selected above”).

157. *See id.* at 6 (citing count 28 that “[t]here is no option in Facebook’s platform to exclude the ‘demographic’ of White or Caucasian Americans from the target audience.”).

the advertisements.<sup>158</sup>

On February 8, 2017, Facebook announced it was developing “updates to [their] advertising policies, new advertiser education and stronger enforcement tools.”<sup>159</sup> Nevertheless, in November 2017, ProPublica purchased advertisements that excluded “certain categories of users, such as African Americans, mothers of high school kids, people interested in wheelchair ramps, Jews, expats from Argentina and Spanish speakers.”<sup>160</sup> The advertisements were quickly approved without any self-certification despite the fact that Facebook’s new policies which supposedly catch and reject discriminatory ads aimed at racial categories and require self-certification that the ads are compliant with nondiscrimination laws.<sup>161</sup>

In March of 2018, the National Fair Housing Alliance (NFHA) and several other housing groups sued Facebook in the Southern District of New York.<sup>162</sup> The plaintiffs contended that Facebook had violated the FHA through its advertising tools that “make[] it possible for housing advertisers to exclude certain home seekers from ever seeing their ads,”<sup>163</sup> based on characteristics prohibited by the FHA, including “sex, religion, familial status, national origin, and pretexts for protected characteristics.”<sup>164</sup> The complaint cited a Fourth Circuit case stating that the FHA advertising prohibitions apply to both the individual advertiser and the publisher.<sup>165</sup> Facebook moved to dismiss, arguing that the Communications Decency Act “immunizes them from the FHA.”<sup>166</sup>

The CDA protects “interactive computer services” from being treated

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158. *Facebook Agrees to Advertising Overhaul to Settle Bias Suits*, BUS. INS. (Mar. 20, 2019), <https://www.businessinsurance.com/article/00010101/-NEWS06-/912327397/Facebook-agrees-to-advertising-overhaul-to-settle-bias-suits#> [<https://perma.cc/GG6N-2A2B>].

159. *Improving Enforcement and Promoting Diversity: Updates to Ads Policies and Tools*, FACEBOOK (Feb. 8, 2017), <https://newsroom.fb.com/news/2017/-02/-improving-enforcement-and-promoting-diversity-updates-to-ads-policies-and-tools/> [<https://perma.cc/F5K6-GUCX>].

160. Angwin, *supra* note 142 (citing ProPublica’s admission that they purchased advertisements from Facebook which excluded specific groups).

161. *Id.*

162. *See* Complaint at 1, Nat’l Fair Hous. Alliance v. Facebook, Inc., No. 1:18-cv-02689 (S.D.N.Y. Mar. 27, 2018) (documenting NFHA’s allegations against Facebook for housing discrimination); Craig Timberg & Tracy Jan, *HUD Secretary Carson Accuses Facebook of Enabling Housing Discrimination*, WASH. POST (Aug. 17, 2018, 4:38 PM), <https://www.washingtonpost.com/technology/2018/08/17/facebook-could-be-responsible-how-advertisers-use-its-platform-justice-department-says/> [<https://perma.cc/6T6B-WWV9>].

163. Complaint, *supra* note 162, at 1 (quoting count 2 of the Complaint).

164. Statement of Interest of the U.S. at 2, Nat’l Fair Hous. All. v. Facebook, Inc., No. 1:18-cv-02689-JGK (S.D.N.Y. Mar. 27, 2018).

165. *See* Complaint, *supra* note 162, at 10 (citing *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972)).

166. Statement of Interest of the United States of America, *supra* note 164, at 2 (arguing that Facebook’s argument “rests on the faulty premise that it is merely interactive computer service”).

as publishers or speakers within the Act,<sup>167</sup> thereby giving immunity to those interactive servers from liability for content on their platforms.<sup>168</sup> Section 230 of the CDA provides that when an internet service provider publishes user-generated content, the provider is not implicated in the way a traditional publisher would be implicated.<sup>169</sup> Instead, liability is retained in the content provider, which is “anyone who creates or develops the content at issue.”<sup>170</sup> However, the service provider may lose that protection if it created or developed the content.<sup>171</sup> Although section 230 has been construed very broadly in the past—to the extent that the underlying legal issue is rarely addressed—judges in recent years have begun to consider the internet service provider’s actual involvement in the content and conduct.<sup>172</sup> For example, the Seventh Circuit of the U.S. Court of Appeals defined the Craigslist platform as an interactive computer service without the power to control editorial content, which absolved them of liability for discriminatory posts on its platform.<sup>173</sup>

In August 2018, the DOJ filed a statement of interest in the NFHA

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167. See 47 U.S.C. § 230(c) (“No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph 1.”).

168. See Ariana Tobin & Jeremy B. Merrill, *Besieged Facebook Says New Ad Limits Aren’t Response to Lawsuits*, PROPUBLICA (Aug. 23, 2018, 12:48 PM), <https://www.propublica.org/article/facebook-says-new-ad-limits-arent-response-to-lawsuits> [<https://perma.cc/7MFA-QE8D>] (“Raising the prospect of tighter regulation, the Justice Department said that the Communications Decency Act of 1996, which gives immunity to internet companies from liability for content on their platforms, did not apply to Facebook’s advertising portal. Facebook has repeatedly cited the act in legal proceedings in claiming immunity from anti-discrimination law.”).

169. See Catherine Tremble, *Wild Westworld: Section 230 of the CDA and Social Networks’ Use of Machine-Learning Algorithms*, 86 FORDHAM L. REV. 825, 829 (2017) (“Section 230 of the CDA provides that where an ISP hosts user-generated content, none of it—however illegal—implicates the provider in the way a traditional publisher would be implicated. Instead, liability lies with the ‘information content provider,’ a term that encompasses anyone who ‘create[s] or develop[s]’ the content at issue.”).

170. *Id.*; see also 47 U.S.C. § 230(f)(3) (defining the term “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”).

171. See Tremble, *supra* note 169, at 829 (citing *Chi. Laws’ Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) (explaining the expansive liability afforded to hosts of user generated content and how the liability protection may be lost)).

172. *Id.*; see also Benjamin Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597, 605 (2019) (discussing recent court decisions finding liability for internet intermediaries).

173. See *Chi. Laws’ Comm. for C.R. Under L., Inc.*, 519 F.3d at 671–72 (taking a dim view of the argument that Craigslist is liable because “nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination”).



case, stating that—unlike Craigslist—the CDA did not apply to Facebook.<sup>174</sup> The Department argued that the allegations in the complaint were sufficient to state a claim under the FHA, and Facebook’s argument “rests on the faulty premise that it is merely an interactive computer service.”<sup>175</sup> According to the Department, Facebook’s motion to dismiss should be denied because “the Complaint sufficiently alleged that Facebook is an internet content provider and that it may be held to account for that content.”<sup>176</sup> The Department cited HUD’s statement on the implementing regulations for § 3604(c): HUD believes that an FHA violation “occurs whenever the advertiser determines the manner for advertising because of the race, color, religion, sex, or national origin of persons who receive or do not receive a publication . . . .”<sup>177</sup> The Department concluded that the regulations were intended to prevent targeting of advertisements, noting that “unlawful discrimination can occur through the choice of who receives an ad, regardless of whether the content of the ad itself is facially discriminatory.”<sup>178</sup>

On August 13, 2018—around the same time that the Justice Department filed their statement of interest—HUD reopened their case against Facebook.<sup>179</sup> The FHA provides that an aggrieved person may file a complaint with the HUD Secretary alleging housing discrimination, and the Secretary may file such a complaint on her own initiative.<sup>180</sup> In the Secretary-initiated complaint, HUD alleged that Facebook had engaged in “[d]iscriminatory advertising, statement and notices” on the basis of race, color, religion, sex, familial status, national origin, and disability “[t]hroughout the United States.”<sup>181</sup> Specifically, the complaint alleged that Facebook discriminates by enabling advertisers to restrict which users receive housing-related ads. Facebook uses extensive user data to classify its users based on protected characteristics, then its

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174. Statement of Interest of the U.S., *supra* note 164, at 17 (arguing that in comparison to cases where a party is entitled to CDA immunity, Facebook should be treated differently because it “mines user data, some of which users must provide, and then actively classifies users based on that data).

175. *Id.* at 2.

176. *Id.*

177. Fair Housing Advertisement Guidelines, 45 Fed. Reg. 57,104 (Aug. 26, 1980).

178. Statement of Interest of the U.S., *supra* note 164, at 10.

179. See Timberg & Jan, *supra* note 162 (explaining HUD’s allegations against Facebook).

180. See 42 U.S.C. § 3610(a)(1)(A)(i) (“An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary’s own initiative, may also file such a complaint.”).

181. Housing Discrimination Complaint at 1, Assistant Sec’y for Fair Hous. & Equal Opportunity v. Facebook, Inc., FHEO No. 01-18-0323-8 (Aug. 13, 2018), [https://www.hud.gov/sites/dfiles/PIH/documents/HUD\\_01-18-0323Complaint.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/HUD_01-18-0323Complaint.pdf) [<https://perma.cc/E3ZJ-6NPM>].

advertisers may use those characteristics to tailor ads to certain groups. For example, advertisers have included only men, excluded users with disabilities, excluded potential residents who are affiliated with a particular religion, race or national origin, or have limited the ads to be viewed only by users with older offspring.<sup>182</sup> Additionally, the complaint alleged that Facebook promoted the “ad targeting platform with ‘success stories’ for ‘finding the perfect homeowners,’ ‘attracting renters,’ and ‘personalized property ads.’”<sup>183</sup>

In August of 2018, the company announced it would be “removing more than 5,000 ad target options” in an effort to “prevent misuse.”<sup>184</sup> The company denied the change was in reaction to the lawsuits, and stated that the categories had not been “widely used by advertisers to discriminate and their removal is intended to be proactive.”<sup>185</sup> The majority of the target options that were removed were those that allowed advertisers to exclude certain populations from viewing their advertisements.<sup>186</sup> Some of the removed categories are “Passover,” “Evangelicalism,” “Native American culture,” “Islamic culture,” and “Buddhism.”<sup>187</sup> Facebook, however, did not remove any categories based on age, sex, or zip code.<sup>188</sup>

Nevertheless, advertisement buyers stated that they were not concerned by the changes because they could still exclude people of certain races or ethnicities from seeing their ads by using similar terms that were not removed.<sup>189</sup> For example, if an advertiser wanted to exclude Hispanic audiences, even if the term “Hispanic” was removed, they could still use interests, such as “Telemundo interest” or “specific Hispanic artists that are less known by other communities.”<sup>190</sup> In an effort to

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182. *Id.* at 2 (describing the extent Facebook’s features allow for discrimination in its advertisements).

183. *Id.*

184. See Ben Lane, *Facebook Cuts Thousands of Ad Targeting Options After HUDO Housing Discrimination Allegation*, HOUSING WIRE (Aug. 22, 2018, 5:44 PM), <https://www.housingwire.com/articles/46551-facebook-cuts-thousands-of-ad-targeting-options-after-huds-housing-discrimination-allegation/> [<https://perma.cc/WP5T-F9RD>] (describing the ad targeting changes Facebook made).

185. See Tobin & Merrill, *supra* note 168 (discussing how the CDA could protect Facebook from liability).

186. See Ilyse Liffreing, *Facebook Moves to Cut 5,000 Targeting Options but Ad Buyers See Workarounds*, DIGIDAY (Aug. 22, 2018), <https://digiday.com/marketing/facebook-cutting-5000-targeting-options-advertisers-prepared-use-workarounds/> [<https://perma.cc/7ZFS-38T6>] (showing that this policy is aimed at preventing discrimination).

187. *Id.*

188. See Tobin & Merrill, *supra* note 168 (reasoning that these demographics are important for employment ads).

189. Liffreing, *supra* note 186 (noting ways that advertisers could get around the new system to still exclude).

190. See *id.* (showing a particular example of how to exclude groups within the new rules).

prevent such work-arounds, Facebook did not release a full list of the removed targeting options.<sup>191</sup> Additionally, in some instances targeting categories have been used for nondiscriminatory purposes, such as Jewish groups using the “Passover” category to advertise Jewish cultural events or the Michael J. Fox Foundation using it to find people of Ashkenazi Jewish descent for research on Parkinson’s disease.<sup>192</sup>

Facebook also announced it would require all U.S. advertisers using the Facebook platform to comply with a nondiscrimination policy. Previously, Facebook only required advertisers that it identified as offering housing, employment, or credit ads to certify their compliance with the nondiscrimination policy.<sup>193</sup> Now, all U.S. advertisers will be required to complete a certification, offered through the Ads Manager tool, to continue advertising through the website.<sup>194</sup> The certification is designed to be educational and was developed to emphasize the difference between acceptable and discriminatory ad targeting.<sup>195</sup>

HUD decided that third-party liability for internet advertising is within its scope and should do the same for hate crimes. Currently, federal housing laws are used to address hate crimes in limited instances, and state regulations that do exist (in some states) or can be created to collect information to help shape the proper laws and responses with respect to hate crimes. However, a coherent federal agenda for housing-related discriminatory violence is lacking and should be included in HUD’s agenda.

#### IV. HATE CRIMES: IDENTIFICATION, PROSECUTION, AND INCONSISTENCIES

##### *A. Overview of §§ 3631 and 3617 of the Fair Housing Act*

A hate crime, simply put, is a criminal offense against someone or someone’s property motivated by an offender’s bias due to a victim’s race, color, religion, disability, sexual orientation, national origin, gender,

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191. *See id.* (demonstrating the ways in which Facebook is attempting to avoid advertisers working around the new rules).

192. Tobin, *supra* note 168 (illustrating how targeted ads can be used for nondiscriminatory purposes).

193. Lane, *supra* note 184.

194. *Id.*

195. *Id.*

or gender identity.<sup>196</sup> What distinguishes hate crime from other crimes is the offender's prejudicial motive or bias behind the criminal action.<sup>197</sup>

Two provisions of the Fair Housing Act address hate crimes and housing: §§ 3617 and 3631 of Title 42 of the United States Code.<sup>198</sup> Section 3631 provides the most common basis for prosecution of hate crimes related to housing.<sup>199</sup> It criminalizes "acting by force or threats of force" to willfully injure, intimidate, or interfere with an individual's right to buy, sell, or rent housing based on their race, color, religion, sex, disability, familial status, or national origin.<sup>200</sup> The section further protects those financing, contracting, or negotiating for such transactions and those applying for or participating in "any service, organization, or facility relating to the business of selling or renting dwellings . . . ."<sup>201</sup> Although § 3631 does not require that the prosecution prove "that the defendant intended to drive the victims out of the neighborhood,"<sup>202</sup> they must prove the defendant's actions were motivated by the victim's membership in a protected class.<sup>203</sup>

Section 3631 "provides broad protection that covers almost any type of intimidation directed at individuals in their homes."<sup>204</sup> Prosecutors often refer to this section when the case involves a victim of a violent act or harassment when acquiring housing, or in any act that is defined as anti-integrationist.<sup>205</sup> Anti-integrationist or move-in violence includes "actions targeted at racial and ethnic minorities . . . whose moves to all-

196. See Shirlethia V. Franklin, Barbara Mack Harding & Becky Monroe, *Combating Hate: A National Campaign to Protect and Defend Targets of Hate*, AMERICAN BAR ASSOCIATION ARCHIVES, EQUAL JUSTICE CONFERENCE (2018), [https://www.americanbar.org/content/dam/aba/directories/pro\\_bono\\_clearinghouse/ejc\\_2018\\_196.pdf](https://www.americanbar.org/content/dam/aba/directories/pro_bono_clearinghouse/ejc_2018_196.pdf) [<https://perma.cc/ZC9Z-DK7L>] (emphasizing that a hate crime is a criminal offense); see also 18 U.S.C. § 249 (a)(2) (criminalizing actions that willfully cause bodily injury to another because of "actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.").

197. Franklin, Harding & Monroe, *supra* note 196 (showing that hate crimes are particularly important with regard to the offender's state of mind).

198. 42 U.S.C. §§ 3617, 3631.

199. See Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47, 56 (2007) ("[T]he most common federal remedy is prosecution under § 3631 of the Federal Fair Housing Act.").

200. 42 U.S.C. § 3631.

201. *Id.*

202. See Bell, *supra* note 199, at 58 (stating that although there doesn't need to be proof that the defendant tried to drive someone out of a neighborhood, "defendants' intentions seem clear").

203. See *Hate-Crimes Legislation: Local, State and Federal Perspectives*, 24 SETON HALL LEGIS. J. 371, 379 (2000) [hereinafter *Hate-Crimes Legislation*] ("[W]e have to show that the defendants used force or threats of force" and "they were motivated by these factors.").

204. Bell, *supra* note 199, at 57 (stating that § 3631 prohibits interference with a person's right to "buy, sell, or rent housing").

205. *Id.* at 56-57.

white neighborhoods prompted violent responses.”<sup>206</sup>

Section 3617 criminalizes actions that “coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of” his or her fair housing rights.<sup>207</sup> Unlike § 3631, § 3617 requires that the prosecution prove the defendant “intended to interfere with the activity of this victim in relation to housing.”<sup>208</sup> Like § 3631, § 3617 protects a broad range of activities—occupying, selling, buying, renting, and even financing a dwelling—and a broad range of people—the occupant, realtors, landlords, and landowners selling their property.<sup>209</sup> The Fair Housing Act also protects the right to associate with others in one’s home.<sup>210</sup>

### B. Hate Crimes in Selected Circuits

The circuits are split on the issue of “whether a section 3617 claim must be predicated on a violation of sections 3603, 3604, 3605, or 3606.”<sup>211</sup> The Second<sup>212</sup> and Sixth<sup>213</sup> Circuits have indicated in the affirmative, while the Seventh,<sup>214</sup> Eighth,<sup>215</sup> Ninth,<sup>216</sup> and Eleventh<sup>217</sup> have found in the negative. The Tenth Circuit has yet to rule on the issue, but at least one district court in the circuit has found that a claim need not be predicated on such a violation.<sup>218</sup> Guidance from HUD on addressing hate crimes under the Fair Housing Act would assist with interpretation of these laws.

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206. *Id.* at 57.

207. 42 U.S.C. § 3617.

208. *Hate-Crimes Legislation*, *supra* note 203, at 379–80 (showing that prosecutors must also point out the force or threats of force from the offender).

209. *Id.* at 380 (suggesting that § 3617 is meant to protect a variety of persons and scenarios).

210. *Id.*; *see also* 42 U.S.C. § 3604(f)(1) (“[I]t shall be unlawful . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . any person associated with that buyer or renter.”).

211. *United States v. Pospisil*, 127 F. Supp. 2d 1059, 1063 (W.D. Mo. 2000).

212. *See Frazier v. Rominger*, 27 F.3d 828, 834 (2nd Cir. 1994) (finding that the alleged § 3617 claim of interference is “without a predicate”).

213. *See Wells v. Rhodes*, 928 F. Supp. 2d 920, 931 (S.D. Ohio 2013) (setting forth elements required to have a § 3617 claim that include a violation of §§ 3603–3606).

214. *See Stirgus v. Benoit*, 720 F. Supp. 119, 123 (N.D. Ill. 1989) (reasoning that § 3617 can be violated without any other FHA violation).

215. *See Pospisil*, 127 F. Supp. 2d at 1063 (requiring a second violation would render § 3617 redundant).

216. *See United States v. City of Hayward*, 36 F.3d 832, 836 (9th Cir. 1994) (arguing that one violation is enough).

217. *See Sofarelli v. Pinellas Cnty.*, 931 F.2d 718, 722 (11th Cir. 1991) (finding that plaintiffs can prove violations of the Fair Housing Act through a § 3617 claim).

218. *See Xiangyuan Zhu v. Countrywide Realty Co.*, 160 F. Supp. 2d 1210, 1233 (D. Kan. 2001) (“A violation of Section 3617 may be plead even absent other violations of the Fair Housing Act.”).

### 1. Sixth Circuit

A § 3631 violation in the Sixth Circuit has been found in a few cases of race-motivated crimes designed to drive the victims from the neighborhood,<sup>219</sup> including cross-burnings.<sup>220</sup> In *Singer v. United States*, the defendant was convicted under § 3631 for burning a cross between the houses of two black families and shouting “racially derogatory remarks and threats.”<sup>221</sup> The Sixth Circuit upheld the conviction, rejecting defendant’s argument that the cross-burning was an expressive act protected by the First Amendment.<sup>222</sup>

To assert a § 3617 claim in the Sixth Circuit, the plaintiff must prove “(1) that he exercised or enjoyed a right guaranteed by §§ 3603–3606; (2) that the defendant’s intentional conduct constituted coercion, intimidation, threat, or interference; and (3) a causal connection between his exercise or enjoyment of a right and the defendant’s conduct.”<sup>223</sup> The Sixth Circuit employs a broad reading of § 3617, in which a claim is not limited to defendants who used potent force or duress but may be made against individuals who are “in a position directly to disrupt the exercise or enjoyment of a protected right and exercise their powers with a discriminatory animus.”<sup>224</sup> To prevail on an interference claim under the Fair Housing Act, a plaintiff must demonstrate a discriminatory animus.<sup>225</sup> Additionally, the Sixth Circuit applies similar analyses to Fair

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219. See *United States v. Mahan*, 190 F.3d 416, 419 (6th Cir. 1999) (affirming a conviction and sentence under § 3631 when the defendant participated in “a conspiracy to oust an African-American family from their home by littering their yard with approximately one hundred copies of a hate flyer threatening physical violence.”); *United States v. Wiegand*, No. 93-1735, 1994 WL 714347, at \*1, \*3 (6th Cir. Dec. 22, 1994) (affirming a conviction and sentence under § 3631 when the defendant intentionally set fire to a house that was recently purchased by a black man and a white man when the defendant said he burned the house “so that blacks could not move in”).

220. *Singer v. United States*, No. 94-3039, 1994 WL 589562, at \*8 (6th Cir. Oct. 24, 1994); *United States v. Retford*, 1984 U.S. App. LEXIS 14325, at \*2 (6th Cir. Apr. 27, 1984) (affirming a conviction under § 3631 when the defendant “pleaded guilty to burning a cross in the front yard of the residence of a Haitian family and to leaving a poem on their front porch which contained a violent and racist message.”).

221. *Singer*, 1994 WL 589562, at \*11.

222. *Id.*

223. *Wells v. Rhodes*, 928 F. Supp. 2d 920, 931 (S.D. Ohio 2013) (granting summary judgment on § 1982, § 1985, and FHA claims brought against a defendant who burned a cross with “KKK will make you pay” and the n-word written on it on plaintiffs’ lawn, because the plaintiffs belonged to a protected class, there was no question that the defendant displayed discriminatory animus, the defendant clearly interfered with the plaintiffs’ FHA rights, and “a reasonable jury could only conclude that [the defendant’s] conduct was causally connected to [p]laintiffs’ enjoyment of their right to rent their home”).

224. *Id.* at 932 (internal quotation omitted).

225. *Id.* at 931–32 (relying on *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 613 (6th Cir. 2012)).

Housing Act discrimination claims as it does to § 1982 claims.<sup>226</sup>

The Sixth Circuit also employs a burden-shifting standard when evaluating § 3617 claims:

[T]he plaintiff has the burden of production to demonstrate a prima facie case of discrimination. The burden of production then shifts to the defendant to articulate a nondiscriminatory reason for the action taken. The burden of production then shifts back to the plaintiff to demonstrate that the defendant's nondiscriminatory reason is, in fact, a pretext for discrimination.<sup>227</sup>

In *Byrd v. Brandenburg*, the plaintiffs were African Americans, a fact of which the defendant was aware.<sup>228</sup> The defendant was found “delinquent” in the juvenile court for the attempted arson, and the Northern District of Ohio found that he “interfered with the plaintiffs’ exercise and enjoyment of their rights to fair housing.”<sup>229</sup> The court reasoned that the defendant failed to articulate a nondiscriminatory reason, and there was compelling, undisputed evidence beyond that of the prima facie case that the defendant’s acts were racially motivated because the defendant routinely used racial slurs.<sup>230</sup> Therefore, “there [was] sufficient un rebutted direct evidence of racial animus in this record to reject any [nondiscriminatory] explanation as a mere pretext racial discrimination.”<sup>231</sup>

The Sixth Circuit also increases sentences for crimes against vulnerable victims.<sup>232</sup> In *United States v. Salyer*, the defendant and his co-conspirator burned a cross on an African American neighbor’s lawn.<sup>233</sup> They were indicted on three counts: (1) conspiracy to violate the constitutional rights of another citizen, (2) interference in housing rights by threat or intimidation, and (3) use of fire in the commission of a felony.<sup>234</sup> Under a plea agreement, the defendant plead guilty to count

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226. *Id.* at 932 (citing *Lindsay v. Yates*, 578 F.3d 407, 414 (6th Cir. 2009)); *see also* 42 U.S.C. § 1982 (“All 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, lease, sell, hold, and convey real and personal property.”).

227. *Byrd v. Brandenburg*, 922 F. Supp. 60, 63 (N.D. Ohio 1996) (holding that a finding of delinquency for throwing a Molotov cocktail onto a front porch of an African American’s home was sufficient for a prima facie discrimination case under § 3617).

228. *Id.* at 64.

229. *Id.*

230. *Id.*

231. *Id.* at 64–65.

232. *United States v. Salyer*, 893 F.2d 113, 115 (6th Cir. 1989).

233. *Id.* at 114.

234. *Id.*; *see also* 42 U.S.C. § 3631(a) (describing what constitutes a violation of the statute); 18 U.S.C. § 844(h)(1); 18 U.S.C. § 241 (explaining that it is illegal if “two or more persons conspire to injure, oppress, threaten, or intimidate” another in the enjoyment of any privilege secured by the Constitution or other laws).

one, and counts two and three were dismissed.<sup>235</sup> The district court increased the defendant's sentence by two levels for victim vulnerability.<sup>236</sup> The Sixth Circuit affirmed the district court's sentence because the federally protected right in question was the FHA "right to hold and occupy a dwelling without injury, intimidation or interference because of race and color," and "the defendant knew or should have known that the [plaintiffs] were unusually vulnerable to the threat of cross burning because they are black."<sup>237</sup>

## 2. Seventh Circuit

The Seventh Circuit has likewise upheld convictions under § 3631 in cases of hate crimes that were designed to drive plaintiffs to leave neighborhoods (typically black plaintiffs living in white neighborhoods). In *United States v. Hayward*, the Seventh Circuit affirmed a conviction under § 3631 when the defendants used racial slurs and burned two crosses in front of a white family's home.<sup>238</sup> The family lived in an all-white community and occasionally entertained black friends in their home.<sup>239</sup> The defendants were convicted of interference with housing rights by force or threat of force.<sup>240</sup> The Seventh Circuit found that "the evidence showed that the defendants burned the crosses to tell those in the [plaintiffs'] household . . . that black people were unwelcome in [the community] and that association with blacks was not approved."<sup>241</sup> In another Seventh Circuit case, *United States v. Redwine*, the defendants were indicted for two counts of violating § 3631 for throwing rocks and firebombs into the plaintiffs' home and intentionally threatening and harming them because they did not want the black family in a white neighborhood.<sup>242</sup>

Seventh Circuit courts have also consistently applied § 3617 to

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235. *Salyer*, 893 F.2d at 114.

236. *Id.*; see also U.S. SENT'G GUIDELINES MANUAL § 3A1.1 (U.S. SENT'G COMM'N 2018) ("If the defendant knew or should have known that the victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was particularly susceptible to the criminal conduct, increase by 2 levels.").

237. *Salyer*, 893 F.2d at 115.

238. *United States v. Hayward*, 6 F.3d 1241, 1243–44, 1250 (7th Cir. 1993) (rejecting the argument on appeal that cross burning is protected speech because "the act of cross burning also promotes fear, intimidation, and psychological injury."), *overruled by United States v. Colvin*, 353 F.3d 569 (7th Cir. 2003).

239. *Id.* at 1243.

240. *Id.* at 1244; see also 42 U.S.C. § 3631(b) (explaining that it is illegal for an individual to use force or threat of force in order to injure, intimidate, or interfere with another due to his race, color, religion, sex, handicap, familial status or national origin because the other is or has been buying, selling, or renting property).

241. *Hayward*, 6 F.3d at 1249–50.

242. *United States v. Redwine*, 715 F.2d 315, 316 (7th Cir. 1983).



“threatening, intimidating, or extremely violent discriminatory conduct designed to drive an individual out of his home . . . typically, cases have involved acts such as cross-burning, firebombing homes or cars, shooting shotguns, physical assaults, or throwing Molotov cocktails.”<sup>243</sup> In *Whisby-Myers v. Kiekenapp*, the court found that the plaintiffs had standing under both § 1982 as well as the Fair Housing Act for three reasons.<sup>244</sup> First, they had standing because they were alleging an injury from the defendant’s conduct in that they had been prevented from “using their property to its full extent” and had suffered harm including “humiliation, embarrassment, emotional distress, and financial loss.”<sup>245</sup> Second, the injuries could be redressed through a favorable judicial decision.<sup>246</sup> And finally, the court held the plaintiffs had standing because the “zone of interests” covered by § 1982 and the Fair Housing Act encompassed the plaintiffs’ injuries.<sup>247</sup>

In the Seventh Circuit, plaintiffs make a prima facie case of racial violence under §§ 3604(a) or 3617 by showing that (1) they were members of a minority group, (2) the defendants knew they were members of a minority group, (3) the defendants committed an act of violence toward the plaintiffs’ home, and (4) the defendants’ action “interfered with plaintiffs’ right to purchase and retain their residence.”<sup>248</sup> An “invidiously motivated” pattern of harassment—in addition to the more “ominous, frightening, or hurtful” actions such as cross burning or physically assaulting a neighbor—can satisfy element four.<sup>249</sup>

Element four was further explained in *Stackhouse v. DeSitter*, in which accusations of a firebombing of a family’s car to drive them from the

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243. *Whisby-Myers v. Kiekenapp*, 293 F. Supp. 2d 845, 852 (N.D. Ill. 2003) (internal quotation omitted); see *United States v. Montgomery*, 23 F.3d 1130, 1132 (7th Cir. 1994) (attempting to burn a cross outside a residential treatment center with sixty percent black residents, located in an all-white neighborhood); *United States v. Hartbarger*, 148 F.3d 777, 780 (7th Cir. 1998) (burning a cross in the yard of an interracial couple).

244. *Whisby-Myers*, 293 F. Supp. 2d at 853.

245. *Id.*

246. *Id.* (noting that a favorable judicial decision would indisputably remedy the harm suffered).

247. *Id.* (citing *City of Memphis v. Greene*, 451 U.S. 100, 122 (1981) (“[S]ection 1982 is designed to protect ‘the right of black persons to hold and acquire property on an equal basis of white persons.’”); see also 42 U.S.C. § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”)).

248. *Waheed v. Kalafut*, No. 86 C 6674, 1988 WL 9092, at \*3 (N.D. Ill. Feb. 2, 1988) (finding the plaintiffs made a prima facie case under §§ 3604 and 3617 of racially motivated interference with property rights by producing evidence that the defendants had been convicted in state court of firebombing the plaintiffs’ home, and the defendants had committed other acts of racial intolerance, such as banging on garbage cans and shouting racial epithets at the plaintiffs’ home).

249. See *Halprin v. Prairie Single Fam. Homes of Dearborn Park Ass’n*, 388 F.3d 327, 330 (7th Cir. 2004) (describing the case as “far from a simple quarrel between two neighbors . . .”).

neighborhood were sufficient to state a claim under § 3617.<sup>250</sup> The plaintiff in *Stackhouse* claimed “that after he and his family exercised their right to rent an apartment free of racial discrimination, as protected by § 3604, [the defendant] attempted to frighten and drive them away from the previously all-white neighborhood through acts of violence and property damage.”<sup>251</sup> The court found that “[s]uch conduct is squarely within the range of actions prohibited by § 3617, whether or not any other section of the Act was violated.”<sup>252</sup> Additionally, even if a defendant had not interfered with a potential plaintiff’s “initial exercise of his or her right to rent or purchase housing free of racial discrimination,” it would nonetheless be a violation of the statute to undertake later efforts to drive the plaintiff out of such housing.<sup>253</sup> A defendant’s later effort to drive the plaintiff out of such housing will nonetheless run afoul of the statute because it “specifically protects both the exercise and the enjoyment of rights granted or protected by the substantive provisions.”<sup>254</sup> Therefore, a § 3617 claim in the Seventh Circuit is not dependent upon a violation of any other section of the FHA.<sup>255</sup>

### 3. Ninth Circuit

To satisfy the third element of a violation of § 3631(a) in the Ninth Circuit, the Government must prove “that the defendant acted with the specific intent to injure, intimidate or interfere with the victim because of her race and because of the victim’s occupation of her home.”<sup>256</sup> In *United States v. McInnis*, the defendant was convicted by a jury for violating § 3631(a) after firing two shots into the residence of an African American family, hitting a resident.<sup>257</sup> On appeal, he argued that the evidence at trial was insufficient to establish the intent element.<sup>258</sup> The court upheld the conviction because the defendant had made statements before and after the shooting to support a finding of intent by the jury.<sup>259</sup> The evidence showed that the defendant had made “racially derogatory

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250. *Stackhouse v. DeSitter*, 620 F. Supp. 208, 211 (N.D. Ill. 1985).

251. *Id.*

252. *Id.*

253. *Johnson v. Smith*, 810 F. Supp. 235, 239 (N.D. Ill. 1992).

254. *Id.* (holding that plaintiffs had stated a claim under § 3617 by alleging a cross burning in their yard and the breaking of house windows).

255. *See Stirgus v. Benoit*, 720 F. Supp. 119, 123 (N.D. Ill. 1989) (holding the plaintiff stated a claim under the FHA when she alleged “that defendants ignited her home to intimidate and coerce her into moving out of the neighborhood because of her race . . .”).

256. *United States v. McInnis*, 976 F.2d 1226, 1230 (9th Cir. 1992); *see also United States v. Skillman*, 922 F.2d 1370, 1373 (9th Cir. 1990) (affirming a conviction under § 3631 after a cross-burning incident because the “necessary intent is demonstrated by the evidence of racial animus.”).

257. *McInnis*, 976 F.2d at 1228.

258. *Id.* at 1230.

259. *Id.*

remarks” and used racial slurs while gesturing toward the house.<sup>260</sup> In addition, evidence seized from the defendant’s house demonstrated “a clear hatred and violent attitude toward African Americans” and supported the finding that he acted based on the plaintiffs’ race and intended to interfere with their occupancy of their residence.<sup>261</sup>

In *United States v. Gilbert*, the Ninth Circuit examined whether § 3631 applies to threats against an adoption agency.<sup>262</sup> The defendant “allegedly (1) drove an automobile at a black child; (2) verbally threatened a white male who has a black step-brother; (3) ordered his dog to attack a black child; and (4) spat in the face of a mentally retarded black child.”<sup>263</sup> The Ninth Circuit found that this section protects adoption agency workers when they place minority children in a home because both the language of the law and the case law support a broad interpretation of the section, and the director of the agency was “aiding or encouraging” minority children in the occupancy of dwellings.<sup>264</sup>

Although not discussing cases of hate crimes of move-in violence specifically, the Ninth Circuit has also applied a broad interpretation to § 3617. In *United States v. City of Hayward*, the Ninth Circuit first defined § 3617’s language “interfere with” to include “all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws.”<sup>265</sup> The Northern District of California later held that “a § 3617 claim may be based upon discriminatory conduct which is designed to drive the individual out of his or her home.”<sup>266</sup> The court noted that it had found little case law discussing application of § 3617 in the context of a claim that was not directly related to the sale or rental of property, and therefore declined to “interpret § 3617 more broadly to cover *any* discriminatory conduct which interferes with an individual’s enjoyment of his or her home[.]” reasoning that it was unaware of any cases that applied the FHA in such a broad manner.<sup>267</sup>

Section 3617 protects two distinct groups of individuals. First, it safeguards members of the protected class from coercion, intimidation, threats, or interference in the exercise or enjoyment of their Fair Housing Act rights.<sup>268</sup> Second, it protects third parties, not necessarily members of the protected class, who aid or encourage protected class members in

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260. *Id.*

261. *Id.*

262. *United States v. Gilbert*, 813 F.2d 1523, 1527 (9th Cir. 1987).

263. *Id.* at 1525.

264. *Id.* at 1527–28.

265. *United States v. Hayward*, 6 F.3d 832, 835 (9th Cir. 1994).

266. *Egan v. Schmock*, 93 F. Supp. 2d 1090, 1093 (N.D. Cal. 2000).

267. *Id.*

268. *See, e.g., Stirgus v. Benoit*, 720 F. Supp. 119, 120 (N.D. Ill. 1989) (firebombing of plaintiff’s house).

the exercise or enjoyment of their Fair Housing Act rights.<sup>269</sup> However, there are inconsistencies with this application. The plaintiff was protected by the FHA in *Inclusive Communities Project, Inc. v. Texas Dept. of Housing and Community Affairs*, where the court stated, “if a plaintiff establishes its prima facie case of discriminatory effect in an action for racial discrimination under the FHA, discrimination is presumed.”<sup>270</sup> Here, the court held:

Non-profit organization that secured housing in predominately Caucasian neighborhoods for African Americans relying on government assistance established prima facie case that state housing authority engaged in disparate impact discrimination, in violation of FHA, by disproportionately approving tax credits for non-elderly developments in minority neighborhoods and disproportionately denying tax credits for non-elderly housing in predominately Caucasian neighborhoods, given evidence, including state legislative committee report stating that housing authority disproportionately allocated federal low income housing tax credits funds to developments located in areas with above-average minority concentrations.<sup>271</sup>

FHA claims under § 3617 were also upheld where racial protests were occurring in Charlottesville, Virginia.<sup>272</sup> *Sines v. Kessler* held that counterprotesters stated a claim for an FHA violation against defendants, including white supremacist group members, which arose from injuries sustained during a torchlight march at a white supremacist rally. The plaintiffs, counterprotesters, alleged that “a torchlight march was designed to intimidate racial minorities by replicating the Ku Klux Klan’s and Nazi’s use of torches.”<sup>273</sup>

Violations of the FHA may be established either by proof of discriminatory intent or a significant discriminatory effect.<sup>274</sup> In *Radcliffe v. Avenel Homeowners Ass’n, Inc.*, the court said there was “insufficient evidence” to support a violation of the plaintiff’s FHA claim, although there was ample evidence of the plaintiff being called derogatory names

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269. See, e.g., *Wilkey v. Pyramid Constr. Co.*, 619 F. Supp. 1453, 1454 (D. Conn. 1985) (firing a rental agency secretary for refusing to discriminate against minorities seeking housing); see *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975) (firing managers of apartment complex for renting to Mexican Americans).

270. *Inclusive Cmty. Project, Inc. v. Tex. Dept. of Hous. Cmty. Affs.*, 749 F. Supp. 2d 486, 489 (N.D. Tex. 2010); 42 U.S.C. §§ 3604(a), 3605(a) (explaining that it is illegal to discriminate in the sale or rental of housing).

271. *Inclusive Cmty. Project, Inc.*, 749 F. Supp. 2d at 499; see also Fair Housing Act, 45 U.S.C. (explaining that it is illegal to discriminate in the sale or rental of housing).

272. See German Lopez, *The Most Striking Photos from the White Supremacist Charlottesville Protests*, VOX (Aug. 12, 2017, 11:43 AM), <https://www.vox.com/identities/2017/8/12/16138244/charlottesville-protests-photos> [<https://perma.cc/QS4V-P9JN>] (highlighting that the protests included phrases like “white lives matter.”).

273. *Sines v. Kessler*, 324 F. Supp. 3d 765, 801 (W.D. Va. 2018).

274. *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996).

based on her Christian religion.<sup>275</sup> Yet the court still found no intentional discrimination.<sup>276</sup> This factor of *intentional discrimination* is not easily identified by some courts, further showing inconsistency. In the case of *McZeal v. Ocwen Financial Corp.*, the court stated that McZeal had not sufficiently provided evidence that the defendant would not engage with him in a real estate transaction for discriminatory reasons.<sup>277</sup>

### C. States and Hate Crime Legislation

Hate crimes can also be addressed at the state level. However, as the following section illustrates, the problem of inconsistency also exists among states. Without a unified data collection or reporting process, there will not be a complete set of information that can be used to mitigate hate crimes.

Hate crime is still prevalent today and has not been stifled even as the years go by, despite the many preventive steps taken. Of the hate crime that exists today, more than half of hate crime victimizations are not reported to the police.<sup>278</sup> This low reporting rate is more than likely due to the fact that not all states have hate crime laws and not all states collect data on hate crimes.<sup>279</sup>

Most states have hate crime laws and require data collection on hate crimes.<sup>280</sup> A handful of states have hate crime laws but do not require data collection on hate crimes.<sup>281</sup> Only one state, Indiana, does not have state hate crime laws but requires data collection of hate crimes.<sup>282</sup> There are several states and U.S. territories that have neither hate crime laws

275. *Radcliffe v. Avenel Homeowners Ass'n, Inc.*, No. 7:07-CV-48-F, 2013 WL 556380, at \*5–6 (E.D. N.C. Feb. 12, 2013).

276. *Id.* at \*6.

277. *McZeal v. Ocwen Fin. Corp.*, No. 00-20817, 2001 WL 422375, at \*1–2 (5th Cir. Mar. 28, 2001). Thus, the claim under a § 3617 violation could not be sustained. *Id.*

278. *Hate Crime Victimization, 2004–2015*, BUREAU OF JUST. STAT. (June 2017), [https://www.bjs.gov/content/pub/pdf/hcv0415\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/hcv0415_sum.pdf) [<https://perma.cc/7JX9-3JEQ>]; see also Weiha Lu, *Why Police Struggle to Report One of the Fastest-Growing Hate Crimes*, MARSHALL PROJECT (Nov. 26, 2019), <https://www.themarshallproject.org/2019/11/26/why-police-struggle-to-report-one-of-the-fastest-growing-hate-crimes> [<http://perma.cc/D5JF-TYAL>] (explaining the reasons so many hate crimes go unreported).

279. Summary of State Laws and Policies Regarding Hate Crime and Data Collection, THE U.S. DEP'T. OF JUST., <https://www.justice.gov/hatecrimes/laws-and-policies> [<https://perma.cc/4MY2-BWQD>] (last visited Apr. 10, 2019).

280. *Id.* These states include Arizona, California, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, and Washington.

281. *Id.* These states include Alabama, Alaska, Colorado, Delaware, Kansas, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, Puerto Rico, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin.

282. *Id.*

nor require collection on hate crimes.<sup>283</sup> Since many states do not have hate crimes and others do not require collection of data on hate crimes, this explains, in part, why more than half of the victims do not report the hate crime and why it is difficult to grasp how prevalent hate crime is in the United States.

The Bureau of Justice Statistics uses a National Crime Victimization Survey (NCVS) to collect data on the amount of hate crime that occurs throughout the nation.<sup>284</sup> The survey measures crimes perceived by victims to be motivated by bias against the victims for being in or associating with a group identified by certain characteristics.<sup>285</sup> This is different from the FBI statistics because this survey includes both reported and unreported hate crimes.<sup>286</sup> The main type of evidence that the NCVS uses to classify a hate crime offense is the offender's use of hate language.<sup>287</sup> Hate language was in almost all hate crime victimizations during 2011 to 2015.<sup>288</sup> From 2004 to 2015, U.S. citizens experienced an average of 250,000 hate crime offenses, with no statistically significant change in the rate of violent hate crime during that eleven-year period.<sup>289</sup> From 2011 to 2015, 48% of hate crime victims were motivated by race, 35% were motivated by ethnicity, and 30% were motivated by gender.<sup>290</sup>

The FBI, on the other hand, uses the Uniform Crime Reporting program for its crime statistics. Both the NCVS and UCR measure similar crime categories, like rape, burglary, robbery, theft, motor vehicle theft, and aggravated assault.<sup>291</sup> However, the UCR and NCVS depart in some areas. The first difference is the purpose of the program. The UCR is trying to offer reliable criminal justice statistics for managing and operating law enforcement.<sup>292</sup> Conversely, the NCVS attempts to provide

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283. *Id.* These states and territories include American Samoa, Arkansas, Georgia, Guam, Northern Mariana Islands, South Carolina, U.S. Virgin Islands, and Wyoming.

284. *Hate Crime Victimization, 2004–2015*, *supra* note 278 (highlighting that the NCVS tracks data regarding victims who perceived the crime to be motivated by bias).

285. *Id.*

286. *Id.* (“Unlike the FBI data, which is based on hate crimes known to law enforcement, the NCVS includes hate crimes both reported and unreported to police.”).

287. *See id.* (explaining that hate language was used as evidence of a hate crime in almost all hate crime victimizations).

288. *Id.* (highlighting that hateful language was apparent in many hate crimes).

289. *Id.*

290. *Id.*

291. Harbani Ahuja, *The Vicious Cycle of Hate: Systemic Flaws in Hate Crime Documentation in the United States and the Impact on Minority Communities*, 37 *CARDOZO L. REV.* 1867, 1879 (2016) (citing *Data Collection: National Crime Victimization Survey*, BUREAU OF JUST. STAT., (2018), <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> [<http://perma.cc/G3BZ-WWM8>]).

292. *See id.* (explaining the purpose of the UCR program).

statistics about crimes that were not previously available.<sup>293</sup> The NCVS is likely a better option between the two when it comes to statistics regarding hate crime since hate crime is a newer criminal sanction in most states and not even available in all states.

Another interesting observation of the state hate crime laws is that different types of state hate crime laws prohibit certain types of hate crimes, but not others. For example, California and Washington, DC have hate crime laws criminalizing offenses based on interference with religious worship, race, religion, ethnicity, sexual orientation, gender, gender identity, disability, political affiliation, and age.<sup>294</sup> These two states have the most hate crime laws compared to other states.<sup>295</sup> Conversely, Arkansas only criminalizes interference with religious worship.<sup>296</sup> Excluding Arkansas, South Carolina, and states that do not have hate crime laws in general, every state has a penalty enhancement for crimes motivated by race, religion, or ethnicity.<sup>297</sup> Lastly, of all the hate crime laws, a penalty enhancement for crimes motivated by political affiliation is the least prevalent among the states' hate crime laws.<sup>298</sup>

Hate crime laws in the above-mentioned states primarily include “(1) animus; (2) a defendant who belongs to one identity group and a victim who belongs to a different group; and (3) a choice of victim that is largely symbolic, such that one victim is interchangeable with, and serves as a representative of, other members of the victim’s identity group.”<sup>299</sup> However, even when all three elements to a hate crime are present, prosecutors may still be reluctant to charge the defendant with a hate crime. For example, where adding a hate crime charge will not have any legal effect, meaning the hate crime charge could not elevate the sentence

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293. *See id.* (explaining the purpose of the NCVS program).

294. *State by State Hate Crime Laws*, WASH. BUREAU - NAACP, <https://www.naacp.org/wp-content/uploads/2017/09/Hate-Crimes-laws-by-state.pdf> [<https://perma.cc/FRJ6-WULA>] (last visited Aug. 16, 2020); *see also* CAL. PENAL CODE § 422.55 (West 2005) (listing the actual or perceived victim characteristics that will qualify a criminal act against a victim as a hate crime); D.C. CODE § 22-3701 (2020) (“Bias-related crime . . . demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act.”).

295. *State by State Hate Crime Laws*, *supra* note 294 (providing a chart demonstrating that California and Washington, DC have the most hate crime laws).

296. *Id.* (providing a chart demonstrating that Arkansas only criminalizes interference with religious worship).

297. *Id.* (providing a chart demonstrating that most states have a penalty enhancement for crimes motivated by race, religion, or ethnicity, except Arkansas, Utah, and states with no hate crime laws).

298. *Id.* (providing a chart demonstrating that only six states have penalty enhancements for crimes motivated by political affiliation).

299. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014).

any higher, prosecutors will generally not bring the charge.<sup>300</sup>

Prosecutors may wish to charge more offenders under hate crime laws, but they also worry about their efficiency in prosecuting crimes.<sup>301</sup> Prosecutors may have a difficult time proving animus in general; but even if they could prove animus, they still have to consider whether the hate crime will add any meaningful time to the sentencing.<sup>302</sup> This issue could be solved with hate crime laws that have a substantial penalty in addition to the underlying crime. However, the problem with implementing harsher punishments can be seen in New York. New York's hate crime statute also covers age, where anyone over sixty is a protected class.<sup>303</sup> Prosecutors from the Elder Fraud Unit have included hate crime charges where defendants have swindled elderly people.<sup>304</sup> Despite no evidence of animus, prosecutors bring this claim because it turns a theft of less than \$1 million into a possible prison sentence of one to twenty-five years under hate crime laws.<sup>305</sup> Thus, hate crime laws turn into the most appealing charge for prosecutors and most used, even where there is no identity-based animus, which dilutes the hate crime's intended message of promoting group tolerance.<sup>306</sup>

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300. *Id.* at 863 (citing *No Hate Crime Charges After Brutal Attack*, NBC NEWS (Apr. 28, 2006, 2:49 PM) (referencing a case in which a prosecutor did not add a hate crime charge since it would not elevate the defendant's sentence)); *see also* Tamara F. Lawson, *Whites Only Tree, Hanging Nooses, No Crime: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 123, 131 (2008) (arguing to restrict the use of prosecutorial "veto" power in hate crime prosecution).

301. Eisenberg, *supra* note 299, at 863–64 (explaining that prosecutors may be concerned with the efficiency of charging hate crime offenders since it can be difficult to prove animus and hate crime convictions may barely elevate a sentence, if at all); *see also* Shirin Afsous, *Proving Hate: The Difficulties of Successfully Prosecuting Bias-Motivated Crimes*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 273, 291 (2016) (explaining that prosecuting hate crimes is challenging due to the difficulty of building rapport with victims and finding enough evidence to show the defendant was motivated by animus, and that this animus caused him to commit the hate crime).

302. Eisenberg, *supra* note 299, at 863–64 (explaining that proving animus is difficult and might not even result in an elevated sentence).

303. *Id.* at 895–96; *see also* N.Y. PENAL LAW § 485.05 (McKinney 2008) (highlighting that age is included in New York's protected categories).

304. Eisenberg, *supra* note 299, at 896 (citing Anne Barnard, *A Novel Twist for Prosecution of Hate Crimes*, N.Y. TIMES (June 23, 2010) (describing New York cases in which defendants singled out elderly people for crimes like mortgage fraud, believing they were more vulnerable targets)); *see also* Gregory C. Pavlides, *Economic & Environmental Crimes Bureau*, QUEENS DIST. ATT'Y'S OFF., <http://www.queensda.org/economiccrimes.html> [<https://perma.cc/85JF-WC52>] (last visited Aug. 18, 2020) (describing the Elder Fraud Unit as a unit created in response to an increase in financial crimes against the elderly); Irene Byhovskoy, *Financial Crimes Against the Elderly as a Hate Crime in New York State*, 81 ALB. L. REV. 1139, 1148 (2017) (arguing that financial crimes targeting vulnerable populations, like the elderly, deserve more systemic attention).

305. Eisenberg, *supra* note 299, at 895–96 (citing Barnard, *supra* note 304) (describing a case in which Queens prosecutors charged two women with stealing more than \$31,000 from three elderly men).

306. Eisenberg, *supra* note 299, at 896 (comparing the vulnerable victim statutes to other more lenient hate crime statutes).



Another obstacle in prosecuting hate crimes starts on the ground. Police officers' and law enforcement's discretion comes into play in prosecuting and reporting hate crime.<sup>307</sup> Law enforcement has a difficult task of investigating the predicate or underlying offense, while simultaneously identifying a bias in the crime.<sup>308</sup> It becomes more difficult when the bias implicates First Amendment issues and when the bias is unclear.<sup>309</sup>

In this similar vein, hate crime legislation has constitutional issues.<sup>310</sup> Opponents of hate crime statutes argue they infringe First Amendment rights by punishing individuals for exercising their right to free speech.<sup>311</sup> Two cases have offered some insight on this topic, but there are some gray areas that still need to be clarified. In *Wisconsin v. Mitchell*, the United States Supreme Court found that the motive for a hate crime can be separated from constitutionally protected speech.<sup>312</sup> This only pertains to penalty enhanced provisions for hate crimes in a state sentencing statute.<sup>313</sup> It is still unclear whether this applies outside the penalty-enhancing area of hate crime.<sup>314</sup> In another case, the Court suggested that

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307. Ahuja, *supra* note 291, at 1883–84 (2016) (citing Laura Meli, Note, *Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime*, U. ILL. L. REV. 921, 936 (2014) (arguing that police officer enforcement is essential to hate crime prosecution)); *see also* Lawson, *supra* note 300, at 128 (arguing that police officers are the first to decide which crimes will be investigated and prosecuted through their discretionary law enforcement).

308. Ahuja, *supra* note 291, at 1884 (explaining the challenge further by discussing the need for evidence of bias as motivation).

309. *Id.*; *see also* Afsous, *supra* note 301, at 277 (explaining that some critics of hate crime legislation raise concerns of First Amendment implications).

310. Ahuja, *supra* note 291, at 1884 (highlighting that First Amendment issues are particularly difficult); *see also* Gregory R. Nearpass, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 554–55 (2003) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (focusing on a Fourteenth Amendment challenge to penalty-enhancement provisions and striking the statute)).

311. Ahuja, *supra* note 291, at 1885 (citing Jeannine Bell, *Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime*, 4 RUTGERS RACE & L. REV. 33, 34 (2002) (noting that one of the most serious problems of controlling hateful behavior is to do so “without offending the First Amendment by silencing speech”)); *see also* Amy Dieterich, *The Role of the State Attorney General in Preventing and Punishing Hate Crimes Through Civil Prosecution: Positive Experiences and Possible First Amendment Potholes*, 61 ME. L. REV. 521, 540 (2009) (examining whether state hate crime laws are permissible regulations of speech under the First Amendment).

312. *Wisconsin v. Mitchell*, 508 U.S. 476, 476 (1993) (upholding, unanimously, Wisconsin's hate crime statute); *see also* Ahuja, *supra* note 291, at 1885

313. *Mitchell*, 508 U.S. at 490; Ahuja, *supra* note 291, at 1885; *see also* Tracey L. Coghill, *Wisconsin v. Mitchell: The Debate between Hate Crime Statutes and Freedom of Speech Continues*, 45 MERCER L. REV. 1475, 1476 (1994) (arguing that states should model hate crime enhancement statutes after Wisconsin's).

314. Ahuja, *supra* note 291, at 1885 (claiming that *Mitchell* offered little guidance on whether state statutory schemes that make misconduct with bigoted motives a crime in and of itself); *see also* Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 4 (1994).

hate crimes are difficult to identify and separate from politically protected speech.<sup>315</sup> There still exists a debate as to whether hate crimes can be a legitimately separate class of crimes, independent from penalty-enhancing hate crime statutes.<sup>316</sup>

At the state level, there are two main hurdles that disrupt hate crime statutes. First, varying state statutes lead to inaccurate statistics.<sup>317</sup> With different statutes in each state, the statistics are skewed since not all states are reporting the same hate crimes and not all states have the same hate crimes.<sup>318</sup> Second, varying reporting requirements for law enforcement agencies prevent accurate statistics of hate crimes.<sup>319</sup> Roughly eighty percent of law enforcement agencies that report to the UCR report zero hate crimes.<sup>320</sup>

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315. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (stating that politicians are allowed to express hostility, but not through the imposition of limitations on people who disagree).

316. Ahuja, *supra* note 291, at 1886 (stating there is further debate about whether hate crime statutes are constitutional); see also Lu-In Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1409–10 (2000) (“[L]aw enforcement officers and prosecutors recognize only a narrow set of cases as ‘real’ bias crimes because they perceive only those cases to have been driven by the hatred they assume the laws are designed to condemn.”).

317. Ahuja, *supra* note 291, at 1889 (citing MICHAEL SHIVELY, *STUDY OF LITERATURE AND LEGISLATION ON HATE CRIME IN AMERICA* iii (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf> [https://perma.cc/C9p5-WV8y]) (“Differences between state and federal hate crime definitions create differences in reported levels of hate crime. For example, Wyoming has no hate crime statutes, yet five hate crimes were reported in the 2002 Uniform Crime Reports. It is likely that the predicate crimes (e.g., vandalism) were locally recorded as conventional crimes, and the hate-motivated nature of the crime was noted elsewhere and reported as such to the UCR. It is also possible that some or all of the five hate crimes were reported to local law enforcement, and then were subsequently referred to federal authorities.”); see also Ken Schwencke, *Why America Fails at Gathering Hate Crime Statistics*, PROPUBLICA (Dec. 4, 2017), <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics> [https://perma.cc/C2Z1-CJ3Z] (noting that variations in a state’s definitions of hate crimes may contribute to underreporting).

318. Ahuja, *supra* note 291, at 1886 (explaining that state law enforcement data is not consistent because state hate crime statutes vary considerably).

319. *Id.* at 1890 (citing SHIVELY, *supra* note 317, at 28) (“For example, Connecticut General Statutes § 29-7 mandates collection of data on ‘all crimes motivated by bigotry or bias,’ and states that the Division of State Police within the Department of Public Safety shall monitor, record, and classify all crimes committed in the state which are motivated by bias.”); see also Ronald L. Davis & Patrice O’Neill, *The Hate Crimes Reporting Gap: Low Numbers Keep Tensions High*, THE POLICE CHIEF (May 2016), <https://www.policechiefmagazine.org/the-hate-crimes/> [https://perma.cc/YT99-QEVE] (arguing that if hate crime data is not accurate, law enforcement will not know how prevalent hate crimes are and will not allocate enough resources to preventing it).

320. Ahuja, *supra* note 291, at 1890 (stating that although eighty percent of law enforcement agencies participate in the UCR, a handful still do not); see, e.g., *Hate Crime Statistics by Jurisdiction, Table 14*, FED. BUREAU OF INVESTIGATION (2018), <https://ucr.fbi.gov/hate-crime/2018/topic-pages/jurisdiction> [https://perma.cc/YVH5-A9VS] (showing all the jurisdictions which reported zero hate crimes for the 2018 year across all fifty states, hundreds of counties, and dozens of universities).

V. RECONCILING AND RECONSTRUCTING HUD'S RESPONSE TO HATE  
CRIMES

Remedies protecting housing rights are a crucial part of civil rights law. With respect to anti-integrationist violence, behavior directed at racial and ethnic minorities integrating white neighborhoods may be punished under a variety of types of federal and state law. The broad protections against interference under the FHA have been used to prosecute racial violence in a variety of contexts. “For instance, §§ 3617 and 3631 of the FHA have been used to prosecute a variety of violent acts, including cross burnings, fire bombings, vandalism, assault, and threats targeted at racial and ethnic minorities and whites in the exercise and enjoyment of their fair housing rights.”<sup>321</sup> This part will suggest how HUD can integrate hate crime into its agenda, and that based on best practice suggestions for local agencies, it should do so.

The National Fair Housing Alliance's rapid response network supports addressing hate crimes through an existing framework.<sup>322</sup> This rapid response network has three golden rules.<sup>323</sup> First, “[a]lways collaborate with law enforcement.”<sup>324</sup> Law enforcement is there to provide assistance and keep the peace. Second, “[a]lways interact with the existing structure or protocol for hate crime response.”<sup>325</sup> This network is supposed to make the existing structure and protocol better and more efficient, not replace it. And third, “[a]lways focus on victim healing and reconciliation.”<sup>326</sup> Using existing housing laws, HUD can address hate crimes in its agenda using these rules as guidelines, especially since the Fair Housing Act has twin missions of integration and antidiscrimination.

HUD could promote an anti-hate agenda through data collection efforts. One way this can be achieved is by requiring data collection regarding hate crimes from local housing authorities that administer public housing and tax credit housing programs. These agencies and the states they are in should also have protocols for hate crime prevention in order to receive federal funding for housing assistance. Reporting would help to provide information that HUD could use to address hate crime and bias-motivated violence. If HUD expects private actors, such as Facebook, to take action in reexamining the advertising platform and

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321. Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537, 548 (2008).

322. See generally PowerPoint Presentation on *Housing-Related Hate Activity*, NAT'L FAIR HOUSING ALLIANCE (Oct. 2019)

323. See *id.* (stating how important it is for people in the community to connect with those who are involved in hate crime prevention).

324. *Id.*

325. *Id.*

326. *Id.*

business model in order to adhere to fair housing laws, HUD should set an example by directly addressing hate crimes in the housing context. The Facebook lawsuit exemplifies the importance of data in understanding discriminatory intent. Recognizing disparate impact under the FHA also relies on the significance of data. A baseline requirement in understanding if people are able to reside in their neighborhoods is understanding if external, violent forces are causing them to move out, or prohibiting them from moving in. In addition to state collection and reporting requirements, the Department of Justice and FBI oversight is necessary to ensure the accuracy of the state-reported statistics.

HUD can also require states to implement proactive educational training to federal housing recipients in order to receive federal funding for housing.<sup>327</sup> Also, requiring states to enact rehabilitative educational training to convicted hate crime offenders in order to receive federal funding for housing would greatly improve proper responses to hate crimes.<sup>328</sup>

Finally, it is of paramount importance that a HUD Secretary be appointed who is aware of how detrimental and impactful hate crime can be on a community. This would be pivotal to incorporating hate crime into a fair housing agenda.

#### CONCLUSION

The number of incidents of move-in violence is partly affected by the fact that there are so many potential spaces for anti-integrationist violence. Almost by definition, move-in violence is a byproduct of U.S. housing segregation—without segregated white neighborhoods, there would not be move-in violence. In fact, housing segregation by race is a problem of great magnitude in the United States. The growing racial diversity of the United States has not been matched by an increase in diversity within neighborhoods. The problem of segregation is particularly severe in the case of African Americans in comparison to whites. Though black-white segregation declined during the 1980s, the majority of black people continue to live in locations starkly isolated from those of other races.<sup>329</sup> “The 2000 U.S. Census results revealed that

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327. See Meli, *supra* note 307, at 962 (arguing that proactive education could expose future offenders and nonoffenders to different cultures, which could deter would-be offenders from committing hate crimes).

328. See *id.* (stating that rehabilitative educational training should be required with the hate crime penalty enhancement).

329. See William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS INST.: THE AVENUE (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/> [<https://perma.cc/Z6N3-PQTG>] (showing that after the passage of the 1968 Fair Housing Act, the segregation between black and white people began to decrease).

blacks were hypersegregated—the most extreme form of segregation—in twenty-eight of the fifty largest metropolitan areas in the United States.”<sup>330</sup> The FHA had broadly integrationist aims. A broad reading of the FHA’s legislative history suggests the Act was an attempt to pave the way for significant nationwide housing integration. In order to align with this intention, hate crime eradication should be a priority of HUD and supported by a secretary who explicitly states this in the department’s agenda. Enhancing data collection efforts to better understand the magnitude of the problem and to create effective solutions will reduce the racial intimidation that people of color face in their homes. The government’s affordable housing goals and programs cannot be achieved long-term if ongoing harassment and violence make it impossible to live in integrated communities.

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330. Bell, *supra* note 199, at 67 (stating that even as segregation declined, black people were still very isolated from people of other races); see also Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation in the 2000 Census: Promising News*, BROOKINGS INST. (Apr. 2001), <https://www.brookings.edu/research/racial-segregation-in-the-2000-census-promising-news/> [<https://perma.cc/ML9Z-PGWB>] (analyzing racial segregation in roughly 300 metropolitan statistical areas using 2000 census districting files); Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52(3) DEMOGRAPHY 1025, 1026 (June 2015) (showing how Chicago, for example, has many hypersegregated neighborhoods).