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# Hate Speech and Enforcement of the Fair Housing Laws, 29 J. Marshall L. Rev. 409 (1996)

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# HATE SPEECH AND ENFORCEMENT OF THE FAIR HOUSING LAWS

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## INTRODUCTION

Aggressive enforcement of the fair housing laws need not be at the expense of the First Amendment. The Fair Housing Act (the Act) broadly prohibits discrimination in housing based on race, color, religion, sex, familial status, national origin and disability.[1] Specifically, the Act makes it unlawful "to coerce, intimidate, threaten or interfere" with any person's right to fair housing[2] and makes it a criminal offense to willfully injure, intimidate, threaten or interfere with or attempt to injure, intimidate or interfere with, by force or threat of force, any person's fair housing rights.[3]

Other federal statutes also protect the right to be free from discrimination in housing. Section 1983 of the Civil Rights Act prohibits state and federal officials from discriminating in violation of the Constitution and laws of the United States.[4] Sections 1981 and 1982 of the Civil Rights Act give all persons the equal right to make and enforce contracts and to own or lease property as enjoyed by white citizens.[5] The state can impose criminal penalties on state and local officials who intentionally violate constitutional rights[6] and on any persons who conspire "to injure, oppress, threaten, or intimidate any citizen in the exercise of rights under the Constitution and laws of the United States."[7]

A tempest in a teapot occurred in 1994 when the Federal Department of Housing and Urban Development (HUD) began an investigation of a complaint filed under the Fair Housing Act[8] alleging that a group of private citizens had violated the civil

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1. 42 U.S.C. § 3604 (1988).
2. 42 U.S.C. § 3617 (1988).
3. 42 U.S.C. § 3631 (1988).
4. 42 U.S.C. § 1983 (1988).
5. 42 U.S.C. §§ 1981, 1982 (1988).
6. 8 U.S.C. § 242 (1988).
7. 18 U.S.C. § 241 (1988).
8. Once a complaint is filed, HUD is required by law to investigate the complaint. 42 U.S.C. § 3610 (a)(1)(B)(iv) (1988).

rights of disabled persons when they opposed plans to turn a motel in Berkeley, California into low-income housing for recovering alcoholics and substance abusers.

HUD made a thorough inquiry of the matter and found that the respondents had acted within their First Amendment rights and that no violation had occurred. However, the press, which correctly and zealously watches for abuses that may chill First Amendment freedoms, began a relentless campaign against HUD and particularly against Secretary Henry Cisneros and Under Secretary Roberta Achtenberg. The Washington Times editorialized about Cisneros' war on the Constitution.[9] The Wall Street Journal referred to HUD's "thought police" and "vigilantes" and compared the Berkeley respondents to "[d]issidents who got their names in the papers in the days of the Soviet Union."[10]

The adverse publicity prompted HUD to publish guidelines aimed at protecting First Amendment rights during HUD investigations of fair housing complaints.[11] In announcing these guidelines, Achtenberg referred to "friction between fair housing and free-speech rights" and promised that HUD would be "ever mindful of the need to maintain the proper balance between these rights."[12] The Fair Housing Act and the First Amendment are not at war with each other. In fact, civil rights groups have been the primary beneficiaries of the broad protection given to the rights of free speech and protest under the First Amendment.[13] The Fair Housing Act and the First Amendment are compatible. The government conducts investigations of many activities to determine whether a violation of the law exists. The government places alleged terrorist groups under surveillance, audits campaign contributors and searches adult bookstores to determine if their activities go beyond the protections of the First Amendment. Investigations can chill First Amendment freedoms. For this reason investigations must be carefully supervised and controlled. However, the government can draw lines between what is permissible and what is impermissible.[14] As in many other areas of the

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9. *Henry Cisneros' War on the Constitution*, WASH. TIMES, Aug. 16, 1994, at A16.

10. *HUD's Thought Police*, WALL ST. J., Aug. 23, 1994, at A12.

11. HUD Notice 95-2 from the Office of Fair Housing and Equal Opportunity, issued April 3, 1995, expires April 1, 1996.

12. *Sometimes on a Tightrope at HUD*, WASH. POST, Aug. 22, 1994, at A17.

13. The examples are endless. Some of the most well known instances where civil rights groups benefited from a broad interpretation of the First Amendment are: New York Times v. Sullivan, 376 U.S. 254 (1964) (libel); NAACP v. Button, 371 U.S. 415 (1963) (litigation); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (boycott).

14. The Court of Appeals for the District of Columbia Circuit drew a careful distinction between a proper and an improper investigation into activities implicat-

law, we must depend on government to know and observe its boundaries. In the United States remedies are available when the government exceeds its boundaries. But the Berkeley debacle does not mean that fair housing enforcement must come to a halt whenever respondents or their allies shout "First Amendment."

This Article will not discuss problems of commercial speech, which traditionally receive less First Amendment protection. The Fair Housing Act specifically prohibits discriminatory advertising,[15] and this provision does not violate the First Amendment.[16] Local communities can prohibit the posting of "For Sale" signs to promote stable, racially integrated communities and to stem the flight of white homeowners.[17] Racist representations made by real estate brokers, building managers or mortgage lenders in the course of a commercial transaction are not protected by the First Amendment.[18] Furthermore, purely private ac-

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ing the First Amendment. In ACLU of Southern California v. Barr, 952 F.2d 457, 471 (D.C. Cir. 1991), the plaintiffs sought to enjoin government surveillance of alleged terrorist activities on the basis of the First and Fourth Amendments. The court stated:

> The Government is not limited to investigating crimes already fully consummated. If an organization advocates terrorist acts in violation of federal law, for example, the government surely could investigate it for that reason even if the advocacy were protected by the First Amendment because it was not directed to 'producing imminent lawless action' and was not likely to do so. . . . Of course, if the threats were advanced in only the vaguest and most general terms, and if after some investigation it became clear that the group's only menace was 'rhetorical and ideological,' the government would err by unnecessarily prolonging its investigation.
>
> On the other hand, the government may be violating the First Amendment when it investigates someone because it dislikes the person's political views. Such an investigation would necessarily have no other, legitimate purpose. The Seventh Circuit so indicated in *Alliance to End Repression* and we have held in a *Bivens* action for damages, that government agents violate the Constitution when they conduct surveillance with the intent of deterring membership in or destroying an association engaged in lawful activities.

*Id.* at 471 (citations omitted).

15. 42 U.S.C. § 3604 (c). In Ragin v. New York Times, 923 F.2d 995 (2d Cir.), *cert. denied*, 502 U.S. 821 (1991), the court held that the use of human models indicating a racial preference in newspaper advertisements can violate the fair housing laws. *Id.* at 998. In Jancik v. HUD, 44 F.3d 553 (7th Cir. 1995), the court held that a newspaper advertisement for a "mature person" violated the familial status prohibitions in the Fair Housing Act. *Id.* at 559. HUD has issued guidelines on when advertisements may violate the Act. Memorandum from Roberta Achtenberg, HUD Under Secretary (Jan. 9, 1995).

16. *See* Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 382 (1973) (finding ordinance prohibiting newspaper from carrying sex designated advertising for non-exempt job opportunities did not violate the First Amendment).

17. Linmark Associates Inc. v. Willingboro, 431 U.S. 85, 89 (1977).

18. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 121-22 (5th Cir. 1973).

tion, such as a real estate broker who disciplines an employee engaged in racist speech, does not implicate First Amendment freedoms.

This Article first discusses the right to express unpopular speech under the First Amendment. Next, this Article examines the recognized limitations on speech under the First Amendment. In the third section, this Article discusses two U.S. Supreme Court cases involving hate speech and hate crimes. Finally, this Article explores the special problems involving the Fair Housing Act and the First Amendment.

## I. THE RIGHT TO EXPRESS UNPOPULAR SPEECH UNDER THE FIRST AMENDMENT

Mainstream Americans rarely are required to defend themselves through the First Amendment. The primary benefactors of the First Amendment are persons who express unpopular ideas. Most of us are uncomfortable with persons who win First Amendment cases. Nonetheless, those who are obnoxious, as well as those who are polite, have the right to speak in our society. This is what makes the First Amendment so precious. We cannot simply rely on our gut reactions when we want to suppress what offends us. We constantly have to go back to the fundamental principles of the First Amendment.

Justice Holmes challenged us to rise above our own prejudices in his dissent in *Abrams v. United States*:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[19]

The men who inspired these words described themselves as "rebels," "revolutionaries" and "anarchists." During World War I they printed leaflets critical of the war with Germany and sup-

19. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

portive of the Russian Revolution. They were prosecuted under the 1917 Espionage Act, as amended in 1918, that made it unlawful to "incite, provoke and encourage resistance to the United States" in its war efforts.[20]

Another dissident, Arthur Terminiello, created a near riot in Chicago in the 1940's when he gave a pro-fascist, anti-Semitic speech to a packed audience.[21] Nonetheless, he inspired these words from Justice Douglas:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[22]

In 1989 while upholding the right of persons to burn the American flag as a form of political protest, Justice Brennan rejected popular sentiment, declaring that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . ."[23]

One of the most emotional cases involving hate inspired speech was the proposed march of the National Socialist Party of America on the Chicago suburb of Skokie, Illinois in 1978.[24] Skokie had a large Jewish population, including several thousand survivors of the Nazi holocaust in Europe during World War II. The Village tried to stop the march through a number of ordinances. Writing for the Court of Appeals for the Seventh Circuit, Judge Wilbur F. Pell, Jr. commented that:

> No authorities need be cited to establish the proposition, which the Village does not dispute, that First Amendment rights are truly precious and fundamental to our national life. Nor is this truth

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20. Justice Holmes wrote three earlier opinions that upheld the constitutionality of the 1917 Act: Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); and Debs v. United States, 249 U.S. 211 (1919).

21. Terminiello v. City of Chicago, 337 U.S. 1, 9 (1949).

22. *Id.* at 4-5 (citations omitted).

23. Texas v. Johnson, 491 U.S. 397, 413 (1989)

24. Collins v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

> without relevance to the saddening historical images this case inevitably arouses. It is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich.[25]

Among its arguments to suppress the march, the Village suggested that the dissemination of racially defamatory material could undercut its fair housing policy. Judge Pell rejected this argument stating "[t]hat the effective exercise of First Amendment rights may undercut a given government's policy on some issue is, indeed, one of the purposes of those rights. No distinction is constitutionally admissible that turns on the intrinsic justice of the particular policy in issue."[26]

Judge Pell also rejected the Village's argument that the display of swastikas and uniforms would create a substantive evil, the infliction of psychic trauma, that the Village could prohibit. He found that the court could not engraft an exception on the First Amendment for such situations because they are indistinguishable in principle from speech that invites dispute, creates unrest or stirs people to anger.[27] He did find that "there is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure."[28] This was not the case in Skokie because Village residents could simply avoid the Village Hall for thirty minutes on the Sunday afternoon when the march was to take place.

## II. RECOGNIZED LIMITATIONS ON SPEECH UNDER THE FIRST AMENDMENT

### *A. Advocacy of Force or Violence*

The First Amendment does not protect violence.[29] Questions involving advocacy of violence are more problematic. Early on, Justice Holmes articulated this concept:

> [T]he character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the

25. *Id.* at 1201.
26. *Id.* at 1205.
27. *Id.* at 1206.
28. *Id.*
29. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

> substantive evil Congress has a right to prevent. It is a question of proximity and degree.[30]

The Supreme Court has consistently recognized the distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action.[31] This distinction is not without its problems. The Court itself has recognized "that distinctions between advocacy or teaching of abstract doctrines, with evil intent, and that which is directed to action, are often subtle and difficult to grasp, for in a broad sense, as Justice Holmes said in his dissenting opinion in *Gitlow*: 'Every idea is an incitement.'"[32] Nonetheless, the distinction must be made.

The most recent formulation of the distinction was given by the Supreme Court in *Brandenburg v. Ohio*:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States* "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.[33]

### *B. "Fighting Words"*

In *Chaplinski v. New Hampshire*,[34] the Supreme Court upheld the conviction of a Jehovah's Witness who called a policeman a "damned racketeer" and a "damned Fascist" on the ground that these are words likely to cause a person to retaliate and to cause a breach of the peace. The Court stated that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that

30. Schenck v. United States, 249 U.S. 47, 52 (1919).
31. Yates v. United States, 354 U.S. 298, 318 (1957).
32. *Id.* at 326-27 (citation omitted).
33. 395 U.S. 444, 447-48 (1969) (citations omitted).
34. 315 U.S. 568 (1942).

> any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[35]

More recent opinions clearly limit what a court may construe as a "fighting word." Courts cannot proscribe merely vulgar or offensive speech. Thus in *Gooding v. Wilson*,[36] the Supreme Court reversed the convictions of a man who called a police officer a "[w]hite son of a bitch."[37]

The speaker must direct "fighting words" to the person of the hearer or intentionally provoke a given group to a hostile reaction. Thus in *Cohen v. California*,[38] the Supreme Court reversed the conviction of a young man who was observed wearing a jacket bearing the words "Fuck the Draft." The Court stated:

> While the four letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer" . . . No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the state's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. . . . There is . . . no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.[39]

### *C. Racist Speech*

In an early case, *Beauharnais v. Illinois*,[40] the Supreme Court upheld an Illinois law on group libel which made illegal any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion which said publication . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[41] Beauharnais had handed out leaflets asking a halt to "the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro."[42]

This decision almost certainly is not good law today because it is overbroad in its assertion that libel laws do not violate the Constitution.[43] Furthermore, language that merely has a tenden-

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35. *Id.* at 571-72.
36. 405 U.S. 518 (1972).
37. *Id.* at 520.
38. 403 U.S. 15 (1971).
39. *Id.* at 20.
40. 343 U.S. 250 (1952).
41. *Id.* at 251.
42. *Id.* at 252.
43. *See generally* New York Times v. Sullivan, 376 U.S. 254 (1964).

cy to produce violence cannot be constitutionally suppressed.[44]

Many international covenants and declarations prohibit racism.[45] However, the United States has not signed these agreements in part because of First Amendment considerations. The Supreme Court has emphasized:

> [I]t is well established that 'no agreement with a foreign national can confer power on the Congress or on any other branch of Government, which is free from the restraints of the Constitution,' . . . Thus the fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis.[46]

### *D. "Captive Audience"*

The Supreme Court has recognized that the state has an interest in protecting residential privacy. In *Carey v. Brown*,[47] the Court invalidated a residential picketing statute because it was not content neutral. In the course of the opinion, Justice Brennan stated that "[t]he State's interest in protecting the well-being, tranquillity, and privacy of the home is certainly of the highest order in a free and civilized society."[48]

The "captive audience" exception does not serve to protect persons from distasteful speech outside the home.[49] Justice Harlan emphasized in *Cohen v. California*:

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned

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44. Cohen v. California, 403 U.S. 15, 10 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969)); Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978) (citing Gooding v. Wilson, 405 U.S. 518 (1972).

45. For instance, the International Convention on the Elimination of all Forms of Racial Discrimination requires that States to the Convention:

> 1. Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activators, including financing thereof;
> 2. Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
> 3. Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

International Convention on the Elimination of all Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 195.

46. Boos v. Barry, 485 U.S. 312, 324 (1988) (citation omitted).

47. 447 U.S. 455 (1980).

48. *Id.* at 471.

49. *See* Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978).

> from the public dialogue we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectional speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.[50]

## III. *R.A.V.* AND *MITCHELL*

The Supreme Court has decided two cases that involve hate speech and hate crimes. In *R.A.V. v. City of St. Paul*,[51] several teenagers violated a city ordinance prohibiting bias-motivated conduct by burning a cross inside the yard of a black family. The ordinance provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[52]

All of the Justices agreed that the ordinance violated the First Amendment, but they disagreed on the reason. The concurring Justices thought the law was unconstitutionally overbroad. Although the Minnesota Supreme Court had tried to narrow the ambiguity in the law to reach only "fighting words," the concurring Supreme Court Justices felt that the ordinance as construed did not specifically identify the speech that the ordinance sought to regulate but prohibited "expression that 'by its very utterance' causes anger, alarm or resentment."[53] The concurring Justices based their opinion on the well established First Amendment principle that "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."[54]

The majority opinion, written by Justice Scalia, took an opposite view and held that the ordinance was unconstitutional because it was underinclusive. Because the ordinance prohibited only those "fighting words" that provoked violence "on the basis of race, color, creed, religion, or gender," the law was not viewpoint

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50. 403 U.S. 15, 21 (1971) (citations omitted).
51. 505 U.S. 377 (1992).
52. *Id.* at 380.
53. *Id.* at 413 (White, J., concurring).
54. *Id.*

neutral. The ordinance regulated speech based on its content. Rather than proscribing all fighting words that communicate ideas in a threatening manner, the ordinance selected certain topics or messages that could not be communicated. Justice Scalia stated:

> Specifically [St. Paul asserts] that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the "danger of censorship" presented by a facially content-based statute . . . requires that the weapon be employed only where it is "*necessary* to serve the asserted [compelling] interest." . . . The existence of adequate content-neutral alternatives thus "undercut[s] significantly" any defense of such a statute. . . .[55]

The majority opinion sets forth new ideas that are not yet clear in their broader application. Justice Scalia takes a strict approach to content based regulations of speech that is not traditionally protected under the First Amendment. His holding favors broad rather than narrow regulation of "fighting words." Also, as emphasized by Justice Stevens in his concurring opinion, while the ordinance regulated speech based on its content, it was, nonetheless, viewpoint neutral. Justice Stevens emphasized the ordinance's evenhandedness:

> In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's "race, color, creed, religion or gender." To extend the Court's pugilistic metaphor, the St. Paul ordinance simply bans punches "below the belt" — *by either party*. It does not, therefore, favor one side of any debate.[56]

Justice Scalia distinguished the St. Paul ordinance from laws where the basis for the content discrimination consists entirely of the very reason the entire class of speech can be proscribed or where the subclass happens to be associated with particular "sec-

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55. *Id.* at 395. In Madsen v. Womens' Health Center, 114 S. Ct. 2516 (1994), the Supreme Court upheld an injunction against blocking or interfering with access to an abortion clinic. *Id.* at 2523. The Court rejected an argument that the injunction was invalid because it was not content or viewpoint neutral. *Id.* The Court stated that an injunction necessarily only applied to a particular group of persons or activities, and it does so because of the group's past activities in the context of a real dispute between real parties. *Id.* The Court held that it would review an injunction to see whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest. *Id.*

56. *R.A.V.*, 505 U.S. at 435 (Stevens, J., concurring).

ondary effects" of the speech, so that the regulation is "justified without reference to the content of the . . . speech."[57] As an example, he cited Title VII's general prohibition against sexual discrimination in employment to justify prohibiting sexually derogatory "fighting words" in the workplace. The "secondary effects" exception would also apply to the Fair Housing Act where acts of discrimination are not shielded because they express a discriminatory idea or philosophy.

In *Wisconsin v. Mitchell*,[58] a unanimous Supreme Court held that the First Amendment did not bar an enhanced sentence for racially motivated criminal conduct. After watching the movie "Mississippi Burning," several young black men selected a white boy and beat him severely.[59] Because the defendants intentionally selected the victim based on his race, Wisconsin law allowed a maximum sentence of seven years, when normally the crime of battery only carries a sentence of two years.[60] Mitchell argued that the statute punished bigoted thoughts or beliefs.[61]

The Court held that a physical assault is not expressive conduct protected by the First Amendment.[62] Motive is relevant under federal and state anti-discrimination laws and may be used to proscribe conduct unprotected by the First Amendment.[63] As an example, the Court again cited Title VII, which makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin."[64] By inference, the First Amendment would not shield bias motivated violations of the Fair Housing Act.

## IV. SPECIAL PROBLEMS INVOLVING THE FAIR HOUSING ACT AND THE FIRST AMENDMENT

### *A. Petitioning the Government*

Petitioning the government is central to the First Amendment.[65] Writing letters or telephoning government officials, attending and speaking out at government meetings, distributing

57. *Id.* at 388.
58. 508 U.S. 476 (1993).
59. *Id.* at 478-80.
60. *Id.* at 480.
61. *Id.*
62. *Id.* at 480.
63. *Id.*
64. *Id.* at 482 (citing Hishon v. King & Spaulding, 467 U.S. 69 (1984)).
65. The First Amendment provides that the government may not abridge the freedom "to petition the Government for redress of grievances." U.S. CONST. amend. I; *see also* Professional Real Estate Investors v. Columbia Pictures, 508 U.S. 49, 56 (1993); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 614-15 (8th Cir. 1980).

leaflets to influence public opinion and organizing voters are basic to a democratic system.

In *Edwards v. South Carolina*,[66] the Supreme Court upheld the rights of civil rights protesters to peacefully march on the sidewalk around the State House to publicize their dissatisfaction with the way black persons were treated by South Carolina law. Justice Stewart noted that "[t]he circumstances of this case reflect an exercise of . . . basic constitutional rights in their most pristine and classic form."[67]

In *Consolidated Edison v. Public Service Commission*,[68] the Supreme Court held that a state commission could not abridge a corporation's freedom of speech to discuss controversial issues of public policy. The Court stated:

> The First and Fourteen Amendments guarantee that no State shall "abridg[e] the freedom of speech." Freedom of speech is 'indispensable to the discovery and spread of political truth," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." The First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ."
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> This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ."[69]

The First Amendment protects not only those who present their views openly; it also protects those who prefer to remain anonymous. In *McIntyre v. Ohio Elections Commission*,[70] the Supreme Court struck down an Ohio law that prohibited the distribution of anonymous campaign literature. Justice Stevens stated:

> In *Talley* [*v. California*], the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. On occasion, quite

66. 372 U.S. 229 (1963).
67. *Id.* at 235.
68. 447 U.S. 530 (1980).
69. *Id.* at 534-35 (citations omitted).
70. 115 S. Ct. 1511 (1995).

> apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade, the most effective advocates have sometimes opted for anonymity."[71]

If neighborhood residents want to attend a meeting to speak out against a group home for the disabled or if they want to distribute anonymous leaflets urging the repeal of a local fair housing ordinance because they do not want African-Americans moving into their neighborhood, they are protected by the First Amendment. The First Amendment protects them regardless how hateful their motivations.

However, if public officials act on these protests and take discriminatory action, the officials may be found guilty of violating rights protected by the Fair Housing Act. A party may use the statements made by the citizens at the public meetings or the petition signed by local residents as evidence to show that the official action was taken for discriminatory reasons.[72] In *Arlington Heights v. Metropolitan Housing Development Corp.*,[73] a case involving an allegedly racially motivated denial of a rezoning request to build a multi-family housing complex, the Supreme Court discussed the types of direct and circumstantial evidence available to show an invidious discriminatory purpose. Courts may look to the historical background, the sequence of events and departures from normal procedure.[74] They may also look to the legislative or administrative history, "especially where there are contemporary statements by members of the decision-making body, minutes of its meetings or reports."[75] In this case, the trial court had heard evidence that some of the opponents of the project who had spoken at various hearings might have been motivated

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71. *Id.* at 1516-17 (citations omitted).

72. *See, e.g.*, LeBlanc - Sternberg v. Fletcher, 67 F.3d 412, 428-29 (2d Cir. 1995) (organization formed to keep Orthodox and Hasidic Jews out of community conspired with village to adopt zoning ordinance); United States v. City of Birmingham, Mich., 727 F.2d 60, 564-65 (6th Cir.) (opponents of racially integrated low-income housing openly stated bigoted views and opinions and the commission knowingly pursued policies that appeased these views), *cert. denied*, 469 U.S. 821 (1984); United States v. City of Black Jack, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974) (racist statements made and cheered at public meetings), *cert. denied*, 422 U.S. 1042 (1975).

73. 429 U.S. 252 (1977).

74. Id. at 266-67.

75. *Id.* at 268.

by racial considerations; however, the trial court refused to find, based on all the evidence, that the decisionmakers were motivated by the same considerations.[76] The Supreme Court emphasized in *Wisconsin v. Mitchell*,[77] that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[78]

Public officials, like everyone else, enjoy First Amendment rights, but they cannot act in violation of the Constitution or laws of the United States.[79] Legislative immunity may in a proper case prevent city council members from being called to testify about their motivations in casting a vote[80] and will certainly shield their legislative acts if they are sued for damages.[81] However, what they say is relevant in proving illegal discrimination.[82]

### *B. Residential Picketing and Demonstrations*

Local residents may make their grievances known within the neighborhood. The classic case involving a neighborhood demonstration is *Organization for a Better Austin v. Keefe*.[83] Organization for a Better Austin (OBA) was a racially integrated community group in a Chicago neighborhood that was working to "stabilize" the neighborhood.[84] OBA specifically fought various real estate tactics known as "blockbusting" or "panic peddling."[85] Keefe was a real estate broker whom OBA accused of arousing the fears of local white residents that Blacks were moving into their neighborhood in order to get them to sell their homes.[86] Many brokers signed an agreement with OBA not to engage in these tactics, but Keefe denied that he engaged in blockbusting and refused to sign.[87] OBA members distributed leaflets critical of Keefe's activities in the suburb where he lived.[88] The leaflets were distributed at a local shopping center, to parishioners at the church Keefe attended and to his neighbors by leaving copies at

76. *Id.* at 269.
77. 508 U.S. 476 (1993).
78. *Id.* at 481.
79. U.S. CONST. art. VI.
80. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 (1977).
81. Tenney v. Brandhove, 341 U.S. 367, 372 (1951).
82. *Arlington Heights*, 429 U.S. at 268.
83. 403 U.S. 415 (1971).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 417.

their homes.[89]

Keefe obtained an injunction from the Circuit Court of Cook County ordering OBA to cease its leaflet distribution. The Illinois Appellate court affirmed the injunction on the ground that OBA's activities were "coercive and intimidating, rather than informative and therefore . . . not entitled to First Amendment protection."[90]

Chief Justice Burger held that the injunction was an illegal prior restraint on First Amendment rights. He rejected the argument that coercive activities receive no First Amendment protection:

> Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.[91]

Burger also rejected the argument that the leafletting invaded Keefe's privacy. The injunction did not attempt to stop the flow of information into Keefe's own home; rather it attempted to stop the flow of information to the public.[92]

The activities of the OBA were consistent with and supported the policies underlying the Fair Housing Act. But the same principles would forbid the suppression of activities critical of fair housing or of groups protected by the fair housing laws.

Picketing is a form of First Amendment expression.[93] The public streets and sidewalks are traditional public fora for First Amendment expression,[94] including the public streets and sidewalks in residential neighborhoods.[95] Nonetheless, the Supreme Court has noted that picketing involves elements of both speech and conduct and is subject to controls not constitutionally permissible in cases of pure speech.[96] Courts may properly enjoin picketing that strays from the public streets and sidewalks onto private property.[97] Courts may limit the number of pickets;[98]

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89. *Id.*

90. *Id.* at 418.

91. *Id.* at 419 (citation omitted).

92. *Id.* at 420.

93. Thornhill v. Alabama, 310 U.S. 88, 94 (1940).

94. Hague v. CIO, 307 U.S. 496, 504 (1939).

95. Frisby v. Schultz, 487 U.S. 474, 480 (1988); Carey v. Brown, 447 U.S. 455, 460 (1980); Organization for a Better Austin v. Keefe, 403 U.S. 415 (1971); Gregory v. City of Chicago, 394 U.S. 111, 117 (1969).

96. Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313 (1968); International Brotherhood of Teamsters, Local 695 v. Vogt, Inc., 354 U. S. 284, 292 (1957).

97. Hudgens v. NLRB, 424 U.S. 507, 511 (1976); Adderley v. Florida, 385 U.S.

they may regulate spaces between picket lines to prevent obstructions;[99] and they may subject the time when the picket is conducted to reasonable regulation.[100]

The Supreme Court has affirmed the constitutionality of a narrowly drafted ordinance aimed at picketing that targets a particular residence. In *Frisby v. Schultz*,[101] an ordinance prohibited individuals opposed to abortions from picketing the home of a doctor who performed abortions. In upholding the ordinance, Justice O'Connor reaffirmed that restrictions on public issue picketing are subject to careful scrutiny.[102] O'Connor also reaffirmed that public streets and sidewalks in residential neighborhoods are public fora.[103] O'Connor construed the ordinance only to ban focused picketing taking place solely in front of a particular residence and not "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses."[104] O'Connor found the ordinance narrowly tailored to protect only unwilling recipients of the communication:

> The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. . . . In such cases "the flow of information [is not] into . . . household[s], but to the public." Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt[.][105]

Here, Justice O'Connor further emphasized that the ordinance was content-neutral.[106] However, in *Carey v. Brown*,[107]

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39, 44 (1966).

98. United States v. Pyle, 518 F. Supp. 139, 160 (E.D. Pa. 1981). *But see* Davis v. Francois, 395 F.2d 730, 735 (5th Cir. 1968) (holding that ordinance limiting the number of pickets to two, regardless of the time, place or circumstances was unconstitutional).

99. Cox v. Louisiana, 379 U.S. 536, 554-55 (1965); Cox v. New Hampshire, 312 U.S. 569, 573 (1941).

100. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); Carpenters & Joiners Union, Local 213 v. Ritter's Cafe, 315 U.S. 722, 738 (1942) (Reed, J., dissenting).

101. 487 U.S. 474 (1988).

102. *Id.* at 479.

103. *Id.* at 480-81.

104. *Id.* at 483.

105. *Id.* at 486 (citation omitted).

106. *Id.* at 481.

107. 447 U.S. 455 (1980).

the Supreme Court struck down a residential picketing statute that distinguished speech based on its content. An Illinois statute barred residential picketing but exempted labor picketing.[108] A civil rights organization picketed Chicago's mayor to protest racial segregation in Chicago's public schools.[109] The protesters were arrested and convicted under the statute.[110] The Supreme Court held that the statute illegally discriminated among pickets based on the subject matter of their expression.[111]

The Court in *Carey* cited another limitation on picketing — it cannot be directed at an illegal purpose.[112] Picketing cannot be used to pressure someone to do something that is illegal.[113] In *Hughes v. Superior Court*,[114] the United State Supreme Court upheld a California state court injunction prohibiting the picketing of a store to secure compliance with a demand that the race of its employees be in proportion to the race of its customers. The Court found that California could invoke an injunction to protect businesses from being forced to engage in proportional hiring.[115]

In contrast, in *NAACP v. Claiborne Hardware Co.*,[116] the Supreme Court held that a non-violent boycott of white businesses to protest racial injustices was protected by the First Amendment. The Court distinguished secondary boycotts and picketing by labor unions from peaceful political activities, which have "always rested on the highest rung of the hierarchy of First Amendment values."[117] While the distinction comes close to content regulation, the distinction turns upon the legality of what is proposed. Picketing a real estate office to force it to violate the Fair Housing Act would be illegal.[118] Picketing a real estate office to protest blockbusting that violates the Fair Housing Act would be protected by the First Amendment,[119] as would picketing on matters of gen-

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108. *Id.* at 455.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 470.
113. NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 611 (1980) (prohibiting picketing that encourages customers to boycott a secondary business in violation of the National Labor Relations Act); International Brotherhood of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957) (prohibiting picketing that is directed toward achieving a "union shop" in violation of state law); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 499 (1949) (prohibiting picketing to force company into a combination that would violate state antitrust law).
114. 339 U.S. 460 (1950).
115. *Id.* at 463.
116. 458 U.S. 886 (1982).
117. *Id.* at 912-13.
118. *E.g., Claiborne*, 458 U.S. at 886; *Hughes*, 339 U.S. at 460.
119. Organization for a Better Austin v. Keefe, 402 U.S. 415, 421 (1971).

eral public concern.[120]

### C. Coercive, Threatening, Intimidating or Harassing Behavior

The government cannot curtail speech simply because it is offensive and, as *Organization for a Better Austin v. Keefe*[121] points out, the government also cannot curtail speech simply because it is coercive. However, the government may proscribe speech which incites imminent unlawful action or which is associated with particular "secondary effects." The distinctions between these categories of speech may on occasion require careful inquiry into the facts and circumstances.

When does speech cross the line between being merely offensive and producing the illegal "secondary effects" proscribed under the Fair Housing Act? The distinction would seem to lie between speech which merely expresses disapproval of government policies or even of particular neighborhood residents and speech which directly prevents someone from enjoying their property rights protected by the Fair Housing Act. Several cases demonstrate when such speech crosses the line.

In *Sofarelli v. Pinellas County*,[122] the Court of Appeals for the Eleventh Circuit held that the plaintiff might be able to prove a violation of the Fair Housing Act and, therefore, the district court should not have dismissed portions of his complaint. Sofarelli planned to move a house and potentially sell it to a minority purchaser.[123] Sofarelli claimed that neighbors blocked the road, left notes threatening Sofarelli if he did not get out of the neighborhood, ran up to his truck and hit it, called Sofarelli obscenities and spit at him.[124] Sofarelli presented strong evidence that these actions were racially motivated.[125] The Court held that Sofarelli stated a claim for coercion and intimidation.[126] Sofarelli should be able to prove a violation if: the notes did indeed threaten serious imminent harm; the conduct of restraining the trailer, hitting the truck and spitting interfered with the rights protected by the Act; and, these actions were not merely annoyances.[127]

A closer case is *People Helpers Foundation v. City of Richmond*.[128] The district court denied a motion to dismiss a com-

120. *Claiborne*, 458 U.S. at 886; *Carey*, 447 U.S. at 455.
121. 402 U.S. 415 (1971).
122. 931 F.2d 718 (11th Cir. 1991).
123. *Id.* at 721.
124. *Id.* at 722.
125. *Id.*
126. *Id.*
127. *Id.*
128. 781 F. Supp. 1132 (E.D. Va. 1992).

plaint brought by the Foundation against two individuals, the Riddells, who lived directly across the street from one of the Foundation's housing facilities.[129] The Foundation's mission included finding housing for disabled individuals, many of whom were African-American.[130] The Riddells made derogatory comments about African-Americans to Foundation employees.[131] When furniture was moved into the facility, the Riddells gathered their neighbors together in a threatening manner on their front lawn across the street from the facility.[132] Mrs. Riddell also stood in her front yard on numerous occasions taking photographs of the Foundation's helpers and staff.[133] The Foundation alleged that these actions were taken to create an atmosphere of intimidation to prevent the disabled persons from locating in the neighborhood.[134] The Riddells also complained to the police that they did not want these "types" living in the building.[135] The police threatened to close the facility even though it did not violate the building codes.[136]

The district court noted that the conduct alleged was not particularly egregious as measured by other cases, but allowed the plaintiffs to proceed with their case.[137] On the basis of the allegations, the plaintiffs would have difficulty proving a violation of Section 3617 of the Act. While clearly hateful and offensive, the conduct involved no trespass or threats of violence. As an administrative matter, the police, instead of supporting the Riddells in their demands that the home be moved, should have simply told them to lay off.

An egregious situation involving threats of violence was *HUD v. Johnson*,[138] a case tried by HUD Chief Administrative Law Judge Alan Heifetz. The complainants were an African-American man, Simpson, who moved into a public housing project, and a white man, Dennis, who was a resident and tenant council president of the seventy-four unit public housing project in Vidor, Texas.[139] Until that time all the residents in the housing project were white.[140] Edith Johnson, who lived across the street from Simpson, shouted slurs and threats at him whenever she saw

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129. *Id.* at 1136.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 1138.
135. *Id.*
136. *Id.*
137. *Id.*
138. P.H. Fair Housing - Fair Lending ¶ 25,706 (1994).
139. *Id.* at 25,706.3.
140. *Id.*

him.[141] She called him a "nigger" and on numerous occasions threatened to kill him with a baseball bat and a gun.[142] She ridiculed Dennis as a "nigger lover."[143] She boasted about attending Ku Klux Klan meetings and talked about burning down the apartment complex.[144] She encouraged others to make similar slurs and threats.[145]

The complainants took Johnson's threats seriously. She boasted of having been in the penitentiary and killing an African-American with a pork chop bone.[146] She distributed literature that talked about "beating back . . . minorities."[147] The complainants alleged they suffered severe emotional trauma, were forced to alter their lives and both eventually moved from the project.[148]

Judge Heifetz found a violation of Section 3617.[149] He ordered Johnson to pay $175,000 to Simpson's estate, $125,300 to Dennis and a civil penalty of $10,000.[150] The threats and intimidation in *Johnson* were clearly prohibited by Section 3617 of the Act. Similarly, violence itself violates Section 3617 of the Act. Violence is not protected by the First Amendment and, if done to coerce and threaten people who move into a neighborhood, a clear violation of Section 3617 of the Act occurs. Thus, firebombing a home[151] or an automobile[152] or committing assault or battery or property damage to coerce a person to move out of a neighborhood[153] are illegal acts under Section 3617 of the Act.[154]

### *D. Cross-Burning*

Cross-burnings belong to a special category. They have long been associated with the Ku Klux Klan, perhaps the most notorious of the hate organizations that have flourished in the United States. Cross-burnings convey a clear message of racism, anti-

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141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 25,706.4.
150. *Id.*
151. Stirgus v. Benoit, 720 F. Supp. 119, 124 (N.D. Ill. 1989).
152. Stackhouse v. De Sitter, 620 F Supp. 208, 212 (N.D. Ill. 1985).
153. Seapus v. Lilly, 691 F. Supp. 127, 134 (N.D. Ill. 1988).
154. Law enforcement officials may violate the Fair Housing Act if they do not provide equal police protection to minority homeowners who suffer harassment from their neighbors. Campbell v. City of Berwyn, 815 F. Supp. 1138, 1142 (N.D. Ill. 1993).

Semitism, anti-Catholicism and nativism. Cross-burnings historically precede acts of unspeakable violence. They are meant to put terror in the hearts of those the Klan targets.

Like flag burning[155] or saluting a red flag,[156] cross-burning is a form of symbolic speech. Its message is clearly one of hate. But no matter how distasteful, a cross-burning is communicative. Does such communication of hate and terror merit any protection under the First Amendment?

In his opinion in *R.A.V. v. St. Paul*,[157] Justice Scalia reversed the conviction of the teenage cross-burners because of the impermissible content discrimination in the St. Paul Bias-Motivated Crime Ordinance. Scalia began his opinion by stating, however, that the city could have punished the defendants for violations of any number of other Minnesota laws, including prohibitions against making terroristic threats, arson and criminal damage to property.[158]

The United States Courts of Appeals for the Seventh and Eighth Circuits have each reviewed cross-burning cases. The Seventh Circuit used a "secondary effects" analysis and the Eighth Circuit an "imminent danger" analysis in testing cross-burning against the First Amendment.

The Seventh Circuit Court of Appeals examined cross-burning in *United States v. Haywood*.[159] The defendants were prosecuted under Section 3631 of the Act for interfering with housing rights by force or threat of force.[160] They had burned two crosses on the property of a white family that had entertained black persons in their home. The Court stated that:

> Inevitably the cross-burnings here involved some degree of expression conduct, albeit not absolutely protected conduct. No doubt, the defendants wanted to express their dislike, even hatred, of blacks through the cross-burnings. But the act of cross-burning also promotes fear, intimidation, and psychological injury. Therein lies the reason cross-burning, as done in this case, lacks First Amendment protection.[161]

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155. Texas v. Johnson, 491 U.S. 397, 403 (1989); *see also* United States v. O'Brien, 391 U.S. 367, 371 (1968) (draft card burning).

156. Stromberg v. California, 283 U.S. 359, 366 (1931); *see also* Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969) (wearing a black armband).

157. 112 S. Ct. 2538 (1992).

158. *Id.* at 2541 n.1.

159. 6 F.3d 1241 (7th Cir. 1993).

160. The defendants were also prosecuted under 18 U.S.C. § 844 (h)(1) prohibiting the use of fire or an explosive to commit a felony. *Id.* at 1248. The appeals court rejected the defendants' argument that this statue was only intended to apply in arson cases. *Id.* The court found § 844 to be clear and unambiguous and to apply to any felony including cross-burnings to violate a person's civil rights. *Id.*

161. *Id.* at 1250 (citation omitted).

The Court found that the government's regulation of the defendant's conduct was unrelated to the suppression of free expression:

> The purpose of Section 3631(b) is to protect the right of an individual to associate freely in his home with anyone, regardless of race. To achieve that end, the statue prohibits acts of willful intimidation against people based on race. The statue, then, is aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech.[162]

Because Section 3631(b) of the Act is content neutral, the court analyzed it under the four-part framework of *United States v. O'Brien*.[163] First, Congress had power to enact the statute under the Thirteenth Amendment to eradicate the badges and incidents of slavery.[164] Second, the statute advances a substantial governmental interest by protecting a person's right to occupy a dwelling free from threats or intimidation because of race.[165] Third, the statute does not proscribe cross-burning as a form of expressive conduct, hence the government's interest is unrelated to suppressing free expression.[166] Fourth, the government does not target conduct on the basis of its expressive content, and consequently acts are not shielded from regulation because they express a discriminatory idea or philosophy.[167] Hence, "any incidental restrictions on alleged First Amendment rights in this case are no greater than is necessary to further the government's valid interest of protecting the rights of those in the Jones' household to associate freely with whomever they choose."[168]

District courts in Chicago have followed *Haywood's* approach to cross-burning in two civil cases. In *Cotton v. Duncan*,[169] an African-American family filed a suit for damages against two minors who burned a cross with the inscription "KKK Rules" on their front lawn.[170] They alleged violations of Sections 1982, 1985(3), 3617 and the Illinois Hate Crime law.[171] The court denied the defendants' motion to dismiss the complaint. Relying on *Haywood*, the Court held:

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162. *Id.* (citation omitted).
163. 301 U.S. 367 (1968).
164. *Id.* at 374.
165. *Id.*
166. *Id.*
167. *Id.*
168. United States v. Haywood, 6 F.3d 1241, 1250-51 (7th Cir. 1993).
169. No. 93C3875, 1993 WL 473622 (N.D. Ill. Nov. 15, 1993).
170. *Id.* at *1.
171. *Id.*

> Because burning a cross on an African-American family's front lawn with the inscription "KKK Rules" emblazoned upon it is clearly conduct that can be regulated without offending the protections of the First Amendment, we reject Duncan's free speech argument without further analysis.[172]

Similarly, in *Johnson v. Smith*,[173] the District Court upheld a civil rights action brought under Sections 1982, 1985(3) and 3617 by a white woman, her two African-American children and her daughter-in-law. The defendants allegedly burned a cross in the plaintiffs' yard and threw a brick through the window.[174] The court subsequently awarded compensatory damages to the four plaintiffs totalling $87,151, and punitive damages totalling $168,000.[175]

The Eight Circuit Court of Appeals adopted a different analysis. In *United States v. Lee*,[176] the defendant Lee was convicted of a conspiracy to violate civil rights under Section 241.[177] Lee burned a cross on a hill overlooking an apartment complex where a number of black families resided.[178] The Eight Circuit found that cross-burning is symbolic expression protected by the First Amendment.[179] Because Section 241 is content neutral on its face, the sole question on appeal was whether the jury was properly instructed.[180] The trial court had instructed the jury that the defendant must have acted "with the specific intent to intimidate or interfere with the residents' rights to occupy a dwelling free of force or threats of force based on race."[181] The trial court broadly defined "threaten" and "intimidate" and did not require "a threat of physical force or the intimidation of physical fear."[182]

The Court of Appeals found the instruction too broad because "it would criminalize a great deal of conduct, some of it pure speech, which does no more than forcefully state a view that others find revolting or appalling."[183] The Court also rejected the prosecution's "secondary effects" argument and held that cross-burning could not be "swept up incidentally" within a statute

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172. *Id* at *3.
173. 810 F. Supp. 235 (N.D. Ill. 1992).
174. *Id.* at 1236.
175. Johnson v. Smith, 890 F. Supp. 726, 730 (N.D. Ill. 1995).
176. 6 F.3d 1297 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1550 (1994).
177. The defendant was acquitted by the jury of a violation of § 3631. *Id.* at 1299.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 1297.
182. *Id.* at 1298-99.
183. *Id.* at 1301.

prohibiting housing discrimination.[184] The Court relied on *Brandenburg v. Ohio*,[185] and held that the expression must be "directed to inciting and producing imminent lawless action and is likely to incite or produce such action."[186] Lee could be convicted if he intended to threaten acts of violence against the black residents of the apartment, or at least intended to cause the residents to reasonably fear the use of imminent force or violence.[187]

The Eight Circuit Court of Appeals reaffirmed the *Lee* formulation in *United States v. Juvenile Male J.H.H.*[188] The same juveniles whose convictions under the St. Paul Ordinance were invalidated in *R.A.V.*[189] were later convicted of cross-burning under Sections 241 and 3631. The court reaffirmed the *Lee* holding that cross-burning is not inevitably beyond the pale of the First Amendment.[190] It noted that in some situations cross-burning might be done solely to make a political statement, "as reprehensible as that might be."[191] The Court also reaffirmed the formulation of the jury instruction approved in *Lee*.[192] The Court found that the evidence supported the finding that the cross-burnings were intended to threaten the black family with violence or at least to cause the family reasonably to fear the imminent use of force or violence.[193]

In *Haywood*, the Seventh Circuit focused on the "secondary effects" of cross-burning and found it not protected by the First Amendment.[194] The government did not target the conduct because of its expressive content but because it was a discriminatory practice prohibited by the Fair Housing Act.[195] The Eighth Circuit rejected this approach. It found that cross-burning can be a form of symbolic speech. It required that at a minimum the party must intend that the cross-burning causes the victims to reasonably fear the use of imminent force or violence.[196] HUD has adopted the approach urged by the Eighth Circuit in reviewing cases for prosecution.[197] As a practical matter, the two standards will probably produce the same result in most cases because

184. *Id.*
185. 395 U.S. 444 (1969).
186. *Lee*, 6 F.3d at 1302.
187. *Id.* at 1303.
188. 22 F.3d 821 (8th Cir. 1994).
189. R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992).
190. *Juvenile Male J.H.H.*, 22 F.3d at 826.
191. *Id.*
192. *Id.*
193. *Id.* at 826-27.
194. United States v. Haywood, 6 F.3d 1241 (7th Cir. 1993).
195. R.A.V. v. City of St. Paul, 505 U.S. 377, 388-89 (1992).
196. *Lee*, 6 F.3d at 1299.
197. HUD Notice 95-2 from the Office of Fair Housing and Equal Opportunity, issued April 3, 1995, expires April 1, 1996.

someone who burns a cross so as to interfere with another's fair housing rights will inevitably have the intent to put that person in imminent fear of force or violence.

Cross-burning is clearly a form of First Amendment expression. It is certainly offensive, but offensive speech is not outside the protection of the First Amendment. Supreme Court opinions distinguish between speech that is merely offensive and speech that threatens force and violence. Congress likely intended to employ this distinction in defining a crime under Section 1361 when it used the words "force or threat of force."[198] Section 3617, which provides for civil liability, is written more broadly. Congress likely intended that psychological intimidation alone without the threat of force or violence could provide the basis for a civil action under Section 3617. Cross-burnings that have the "secondary effect" of interfering with the right to fair housing, either because they threaten violence or because they cause serious psychological distress, could thus be proscribed under Section 3617 without violating the First Amendment.

### *E. Litigation*

Litigation can impede persons from exercising their rights under the Fair Housing Act. The issue has arisen in a number of different contexts.

In *Woods-Drake v. Lundy*,[199] the Court of Appeals for the Fifth Circuit found that a landlord could violate Section 3604 of the Act and Section 1982 of the Civil Rights Act by threatening to evict tenants if they continued to entertain black guests. Such conduct directly violated Section 3604 and 1982 in that the landlord discriminated against the tenants in the "terms, conditions and privileges of rental" on the ground of race.[200]

A court also found a violation of Section 3604 in *United States v. Scott*.[201] Neighbors brought a state court action to enforce a restrictive covenant against converting a residence into a group home for the mentally retarded.[202] The state court found that the group home did not violate its restrictive covenant.[203]

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198. The California Supreme Court, in a thoughtful decision in People v. M.S., 896 P.2d 1365, 1374 (Cal. 1995), discussed conditions under which a threat is not protected by the First Amendment. The court required the prosecution prove that the speech itself seriously threatened violence and that the defendant had the "apparent ability" to carry out the threat, meaning that the threat "would reasonably tend to induce fear in the victim." *Id.*

199. 667 F.2d 1198, 1201 (5th Cir. 1982).

200. *Id.*

201. 788 F. Supp. 1555 (D. Kan. 1992).

202. *Id.* at 1556.

203. *Id.*

The state court, however, refused to assess attorneys' fees against the neighbors because the action was not frivolous.[204] Thereafter, HUD issued a charge against the neighbors which the parties elected to litigate in federal district court. The Justice Department prosecuted the suit.[205] The United States moved for partial summary judgment on the issue of whether the state court action violated Section 3604.[206] The district court held that the language of Section 3604 reasonably encompassed the act of enforcing a neutral restrictive covenant through the judicial system for the purpose of denying equal housing opportunity to disabled persons.[207]

In *Northside Realty Associates v. Chapman*,[208] the district court found a violation of Section 3617 of the Act. A real estate broker had brought a class action in state court against fair housing testers for damages.[209] The broker claimed interference with economic relations, trespass, nuisance, implied contract, unjust enrichment and libel.[210] The defendants removed the action to federal court on the ground that the action violated Section 3617 of the Act.[211] The district court held that the defendants should be given the opportunity to prove that the action had "the effect of coercing, intimidating, threatening, and otherwise interfering with their rights under § 3617."[212]

Similarly in *Casa Marie Inc., v. Superior Court of Puerto Rico*,[213] a district court held that the plaintiffs had issued an injunction under Section 1983 of the Civil Rights Act and Section 3617 of the Act against neighbors who had filed for and obtained an injunction in state court to halt the renovation and use of a home for handicapped elderly persons. The court held that the plaintiffs had "a right to be free of neighborhood interference as they provide residence for the elderly handicapped."[214] On appeal, the Court of Appeals for the First Circuit held that the district court's actions of enjoining the state court order was barred by the Anti-Injunction Act[215] and *Younger* abstention.[216] The

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204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 1562-63.
208. 411 F. Supp. 1195 (N.D. Ga. 1976).
209. *Id.* at 1196-97.
210. *Id.* at 1197.
211. Removal was sought under the Civil Rights Removal Statute. *Id.* at 1196. *See* Georgia v. Rachel, 384 U.S. 780, 785 (1966); City of Greenwood v. Peacock, 384 U.S. 808, 812 (1966).
212. *Northside Realty*, 411 F. Supp. at 1199-1200.
213. 752 F. Supp. 1152 (D.P.R. 1990), *rev'd*, 988 F.2d 252 (1st Cir. 1993).
214. *Id.* at 1169.
215. 28 U.S.C. § 2283 (1988).
216. Younger v. Harris, 401 U.S. 37, 45 (1971) (holding that the interests of

Court of Appeals also held that the plaintiffs had failed to state a claim under Section 1983 because there was no state action.[217]

None of these cases discussed whether the First Amendment protects the filing of the lawsuit. The Supreme Court has clearly established that litigation can be a form of political expression protected by the First Amendment.

In *NAACP v. Button*,[218] the Supreme Court held that Virginia statutes conflicted with First Amendment freedoms. The statutes made it illegal to advise potential litigants to seek assistance from particular lawyers and to advise persons that their legal rights had been violated. Justice Brennan stated: "[litigation] is . . . a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[219] This statement about the right of the NAACP to engage in litigation to vindicate the rights of African-Americans applies to all persons who resort to the courts to protect what they believe are their rights.

The right to litigate is, of course, not absolute. It does not immunize baseless litigation.[220] The Federal Rules of Civil Procedure recognize the right to litigate is not absolute by limiting the filing of lawsuits. Rule 11 specifically provides that the person filing the lawsuit must certify that:

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of

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comity and federalism prevent a federal court from interfering with pending state court proceedings that implicate a vital state interest).

217. Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 260 (1st Cir. 1993).

218. 371 U.S. 415 (1963).

219. *Id.* at 429-30.

220. McDonald v. Smith, 472 U.S. 479, 484 (1985) ("[B]aseless litigation is not immunized by the First Amendment right to petition.").

information or belief.[221]

Rule 11 provides two grounds for sanctions. The first is when the lawsuit is "frivolous" and the second is when the lawsuit was filed for an "improper purpose."[222] The standard for testing whether a lawsuit is "frivolous" is objective reasonableness.[223] The "improper purpose" clause applies a subjective standard and is analogous to "the torts of abuse of process (filing an objectively frivolous suit) and malicious prosecution (filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning)."[224]

The results of the lawsuits discussed above are arguably consistent with Rule 11. The court found that the lawsuits were filed for the "improper purpose" of interfering with rights protected by the Fair Housing Act.[225] But does this standard give sufficient protection to the First Amendment?

In *United States v. Robinson*,[226] the defendants raised the First Amendment as a defense in an action for damages filed in Federal Court under the Fair Housing Act. The defendants were neighbors who had filed a lawsuit in state court to enforce a facially valid zoning ordinance to bar a family containing handicapped foster children from occupying a residence without first getting a variance or a zoning permit. The neighbors had voluntarily dismissed the action in state court.

The district court held that the neighbors were not protected by an absolute immunity from liability under the Fair Housing Act when they filed their lawsuit in state court. The First Amendment afforded them only a qualified immunity that depended upon whether the lawsuit was a genuine exercise of the right to

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221. FED. R. CIV. P. 11(b).

222. Lancellotti v. Fay, 909 F.2d 15, 22 (1st Cir. 1990); Brown v. Federation of State Medical Boards, 830 F.2d 1429, 1435-36 (7th Cir. 1987); Zaldwar v. City of Los Angeles, 708 F.2d 823, 830-31 (9th Cir. 1986).

223. *Lancellotti*, 909 F.2d at 22; *Brown*, 830 F.2d at 1436; *Zaldwar*, 708 F.2d at 830-31.

224. Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987); Ridge v. United States Postal Service, 154 F.R.D. 182, 184 (N.D. Ill. 1992).

225. The district court in Casa Marie Inc. v. Superior Court of Puerto Rico, 732 F. Supp. 1152 (D.P.R. 1990), *rev'd*, 988 F.2d 252 (1st Cir. 1993), found that the filing of the injunction in state court had both a discriminatory intent and effect against the elderly disabled residents of the group home. *Id.* at 1157. However, the Court of Appeals noted that even a finding of discriminatory effect required some showing of a discriminatory purpose and questioned whether the trial court could have found a causal link between the discriminatory actions of the neighbors and the injury to the plaintiffs because the state court had also found that the home did not comply with the zoning laws. Casa Marie Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 269-70 (1st Cir. 1993).

226. P.H. Fair Housing - Fair Lending ¶ 15,979 (D. Conn. 1995).

petition or whether it constituted baseless litigation.[227] The court held that the standard for determining if litigation is baseless is whether the lawsuit is supported by "a reasonable basis in law or fact" or was "objectively meritless."[228] In finding that the state lawsuit was not "objectively meritless," the district court noted that it had to view the lawsuit from the perspective of an objective litigant when it was filed. The court also emphasized that the federal court action did not seek an injunction, but rather damages under the Fair Housing Act.

The "objectively meritless" standard in the context of a suit for damages[229] makes perfect sense. Allowing a court to grant damages because of a person's purpose to interfere with fair housing rights is too broad to properly protect First Amendment rights. The action must also have been without merit.[230] Threat-

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227. *Id.* at 15,979.4.

228. *Id.* at 15,979.9. The Court rejected the defendants' suggestion that it apply the *Noerr-Pennington* "mere sham" standard applicable under the anti-trust laws. United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Rail Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *Noerr-Pennington* shields those who petition the government from anti-trust liability unless their activities are a mere sham. In Professional Real Estate Investors v. Columbia Pictures, 113 S. Ct. 1920, 1927-28 (1993), the United States Supreme Court emphasized that neither the *Noerr-Pennington* immunity nor its sham exception turned on subjective intent alone. The Court outlined a two part definition of sham litigation:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor. . . ." through the "use [of] the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon."

*Id.* (citations omitted) (emphasis in original).

229. A suit for an injunction against filing a lawsuit in state court will have to meet the Anti-Injunction Act and *Younger* abstention problems raised by the Court of Appeals in Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993). The First Amendment concerns are not as apparent in a suit requesting an injunction as in a suit for damages. In a damage suit in federal court to enjoin a state court action, the plaintiff is simply asking the federal court to decide the issue whether the action can be properly maintained in the state forum.

230. In Tizes v. Curcio, P.H. Fair Housing - Fair Lending ¶ 16,021 (N.D. Ill. 1995), the district court in ruling on a motion to dismiss a complaint took a somewhat broader view then that urged above when the filing of a lawsuit was combined with other acts of harassment. *Id.* at 16,021.2. The Tizes filed suit for equitable and monetary relief against neighbors who engaged in an ethnically-motivated campaign to harass the Tizes and delay the family's plans to renovate their properties. *Id.* The neighbors filed objection to the renovation before the Chicago Land-

ening tenants with evictions because they entertain black guests[231] or filing a lawsuit for damages to harass testers[232] are good examples of fair housing cases that do not implicate the First Amendment because they lack objective merit. Cases like *United States v. Scott*,[233] where the state trial court found that the action to enforce a neutral restrictive covenant was not clearly frivolous, would probably not meet this standard.

## CONCLUSION

Housing discrimination is at the heart of many societal problems in the United States. Consequently, congress has mandated its elimination. People feel strongly about their homes and their neighborhoods and are apt to express themselves vigorously when they perceive a threat. The First Amendment guarantees everyone the right to speak out on issues concerning them. However, the First Amendment is not absolute. Vigorous enforcement of the Fair Housing Act does not inevitably conflict with the First Amendment. Fair housing can be achieved without encroaching on First Amendment freedoms. The right to be free from discrimination and the right to speak freely go hand-in-hand in a just society. Controlling anti-social conduct is required; policing thought is not required. Some cases will require careful line-drawing, but in most cases the line is fairly self-evident.

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mark Commission, the Department of Zoning and the Department of Buildings. *Id.* They also filed a lawsuit in state court seeking review of the zoning decision. *Id.* The federal court denied a motion to dismiss the complaint. *Id.* The court held that "so long as the Tizes' Complaint alleges that the Defendants used the petitioning process primarily, if not exclusively, to harass or to discriminate against the Tizes, the Complaint states a potentially valid claim for relief, the First Amendment right to petition and the *Noerr-Pennington* doctrine notwithstanding." *Id.* 16,021.4. The court noted that the complaint alleged that the petitioning activity was part of a broader scheme to harass and intimidate the Tizes, which included the use of ethnic and religious slurs, the leveling of physical threats, attempted extortion and destruction and interference with the Tizes' property rights. *Id.* The court also rejected the defendant's abstention arguments. *Id.*

231. Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982).

232. Northside Realty Assoc. v. Chapman, 422 F. Supp. 1195, 1200 (N.D. Ga. 1976).

233. 788 F. Supp. 1555 (D. Kan. 1992).