

Pattern Recognition in *Tyus v Urban Search Management*

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INTRODUCTION

Making judgments requires recognizing patterns—paying attention and picking out recurrent features in a noisy environment. Judge Diane Wood’s opinion in *Tyus v Urban Search Management*¹ is a masterwork in pattern recognition at several levels. It speaks to the need for legal doctrines capable of reaching subtle and cumulative acts of discrimination that continue to limit opportunities and stand in the way of the “truly integrated and balanced living patterns”² that were part of the original vision of the federal Fair Housing Act³ (FHA).

Tyus involved advertising campaigns used to market The New York, an upscale Chicago apartment building located on North Lake Shore Drive. Plaintiffs alleged that the depiction of exclusively White human models in the defendant’s ads (which appeared in newspapers and brochures, and on billboards) violated the FHA. Their cause of action hinged on whether the pattern of depictions indicated a racial preference (or an intention to make such a preference) to an ordinary reader.⁴ Judge Wood’s opinion for a unanimous Seventh Circuit panel (joined by then-Chief Judge Richard Posner and Judge Frank Easterbrook) identified reversible errors that interfered with the plaintiffs’ opportunity to make this showing at trial.⁵

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¹ 102 F3d 256 (7th Cir 1996).

² *Interference with Civil Rights, Senate Hearings on HR 2516*, 90th Cong, 2d Sess, in 114 Cong Rec 3421, 3422 (Feb 20, 1968) (statement of Sen Mondale).

³ Pub L No 90-284, 82 Stat 81 (1968), codified as amended at 42 USC § 3601 et seq.

⁴ *Tyus*, 102 F3d at 259–60, citing 42 USC § 3604(c); *Tyus*, 102 F3d at 266. See also Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 Fordham Urban L J 187, 223 (2001) (discussing the “ordinary reader” standard that courts apply in interpreting § 3604(c)).

⁵ *Tyus*, 102 F3d at 261.

In this brief Essay, I will consider the centrality of pattern recognition to legal efforts to combat discrimination. Individual acts that are easy to ignore or dismiss can accumulate to entrench and inscribe systematic disadvantage. The result is no less harmful for having diffuse causes, but it is harder to address. *Tyus* shows how recognizing the significance of patterns is integral to upholding societal commitments to nondiscriminatory access not only to housing, but also to the apparatus of justice.

I. BACKGROUND

To contextualize the legal issues presented in *Tyus*, I will start with some background about the apartment complex and its ad campaign, drawn from Judge Wood's opinion and from the *Chicago Tribune's* online archives.

A. The New York

In 1985, construction began on The New York, a 48-story, 593-unit luxury apartment building located on North Lake Shore Drive.⁶ The earliest tenants began to take occupancy in 1987.⁷ The New York was the first new apartment building to be constructed on North Lake Shore Drive in two decades.⁸ According to the Masonry Institute, it was “the world’s tallest brick structure.”⁹ That designation was reportedly what led Chicago’s streets and sanitation commissioner, John Halpin, to gift free city advertising space to the complex, which let The New York place banners on light poles for two blocks along Lake Shore Drive for two months, *gratis*.¹⁰ Although The New York was a private luxury complex, it received significant government funding. In addition to the free advertising provided by the City of Chicago, the project received a \$4 million Urban Development Action Grant from the federal

⁶ Id at 259–60; The New York Private Residences, *About The New York Private Residences*, archived at <https://perma.cc/S63P-XRPB>.

⁷ Brian Edwards, *Homesteaders: Being a ‘Pioneer’ Tenant Has Its Perks and Its Problems*, Chi Trib § 8 at 13 (May 10, 1991) (describing the experiences of an early tenant who moved in before the building was fully finished).

⁸ Elizabeth Hopp-Peters, *Apartment Market Is Ripe for the Picking*, Chi Trib § 8 at 4 (Apr 15, 1988).

⁹ Charles Hayes, *New York Woos Particular Chicagoans*, Chi Trib § 16 at 1 (Feb 14, 1988).

¹⁰ Kathy O’Malley and Hanke Gratteau, *Sign of the Times . . .*, Chi Trib § 1 at 2 (Sept 25, 1988).

government, and also benefited from \$62.6 million in tax-exempt bonds issued by the city.¹¹

From the outset, The New York was designed to attract a particular sort of tenant. A story that ran in the *Chicago Tribune* shortly before the building opened for occupancy reported that the developer “seeks to attract the more affluent members of the baby boom generation.”¹² The amount of nonresidential space set aside for amenities and services was described as unusually large, but “justified by the building’s anticipated tenancy of attorneys, accountants, financial analysts, securities traders and other professionals.”¹³ Louis Silverman, president of the entity that owned the building (and later a defendant in *Tyus*), explained:

We researched and targeted our tenant market. The building was planned and designed before we even acquired the site.

We wanted to create a “home” and lifestyle for a prototypical tenant. . . . He or she would be professional—a work-oriented achiever between 25 and 35 years old—with an income over \$25,000, whose active lifestyle is based on where he or she lives. This would be a busy person who needed a lot of building services.¹⁴

In describing the building’s retail component, Silverman described plans for “an upscale gourmet food store, one that’s not big on paper towels or Windex, but on prepared foods and salads.”¹⁵

The target tenants of The New York could, in fact, bypass details like cleaning. As another *Tribune* article discussing The New York explained, “[a] full-time concierge and staff will provide services, including general housecleaning, gift buying and plant watering when tenants are on vacation.”¹⁶ The menu of services provided to renters reportedly ran three pages, spanning everything from “car care to pet walking.”¹⁷ The *Tribune* also ran a story about The New York’s full-time concierge, Divna Vuksanovic, who

¹¹ *Tyus*, 102 F3d at 260. See also *City Paves Way for 4 Projects*, Chi Trib § 2 at 3 (Apr 24, 1984).

¹² David Ibata, *High-Rise Shops for Upscale Tenants*, Chi Trib § 4 at 7 (June 8, 1987).

¹³ *Id.*

¹⁴ Hayes, *New York Woos Particular Chicagoans*, Chi Trib § 16 at 1 (cited in note 9) (quotation marks omitted). Based on Consumer Price Index calculations, \$25,000 in June 1987 equates to \$56,853.52 in March 2020. See Bureau of Labor Statistics, *CPI Inflation Calculator*, online at <https://data.bls.gov/cgi-bin/cpicalc.pl> (visited May 19, 2020) (Perma archive unavailable).

¹⁵ Ibata, *High-Rise Shops*, Chi Trib § 4 at 7 (cited in note 12).

¹⁶ Hopp-Peters, *Apartment Market Is Ripe*, Chi Trib § 8 at 4 (cited in note 8).

¹⁷ J. Linn Allen, *Hotel Service Checks into Posh Homes*, Chi Trib § 3 at 2 (Jan 14, 1989).

was featured in some of the building's print ads. Asked to describe her services, Vuksanovic replied, "I do everything that's legal."¹⁸

One of the services that The New York wished to offer its tenants was a carefully curated social environment. Its lobby, which contained a cafe situated next to a running stream, was designed as a meeting place.¹⁹ The apartment's management touted the complex's outings and get-togethers as opportunities to meet people, including potential dating partners. According to The New York's leasing director, Terrie Whittaker, "It's a safer environment than a singles bar, where you never know what you're getting. At least when you meet someone at [T]he New York, you know they're creditworthy since they're living here. It's like pre-screening."²⁰

Fellow tenants were, in other words, an important part of the product that The New York was leasing. This is not unique to The New York, or to Chicago lakefront luxury buildings, or even to apartment life. When people purchase or rent a home, they are not just consuming housing, but also the surrounding neighborhood as well as a set of neighbors.²¹ This reality has been a key driver of housing discrimination. If people are part of the product, then those who control access to housing have an interest in shaping that product and may do so in ways that cater to the preferences—and prejudices—of their target audience. As Professor Lior Strahilevitz has explored in his work, developers can consciously embed amenities that are designed to attract certain residents and not others (golf courses in the 1990s were one of his primary examples).²² These forms of subtle (and not so subtle) product positioning can work as focal points that telegraph who is and is not welcome, and can induce self-sorting that strengthens that signal.²³

Advertising is a central mechanism that developers and landlords use to position their products and select for particular characteristics in residents. The potential for advertising to operate in

¹⁸ Annmarie Mannion, *At Your Service: Apartment Concierge Caters to 1,100*, Chi Trib § 8 at 12 (Aug 10, 1990).

¹⁹ Brian Edwards, *Grand Entrances: Buildings Lobby Prospective Renters with Fabulous Foyers*, Chi Trib § 8 at 31 (July 12, 1991).

²⁰ Frank James, *Elevating the High-Rise Life: Concierges, Classes, Parties, Create Live-In 'Love Boats'*, Chi Trib § 5 at 5 (Apr 24, 1991).

²¹ See Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J Mathematical Sociology 143, 145 (1971).

²² See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 Va L Rev 437, 464–68 (2006).

²³ See *id.* at 443–44 (discussing sorting and focal point mechanisms and their mutually reinforcing interaction).

a discriminatory way is well recognized, and accounts for one of the core provisions of the FHA.²⁴ The New York's ads emphasized the building's services as well as its premier Lincoln Park location. But the ads were also designed to convey a message about the building's target tenants, and allegedly did so using a strikingly nondiverse set of human models. These ads, described in more detail below, became the subject of the litigation in *Tyus*.

Things did not go smoothly for The New York's owners, who blamed a surge in luxury apartment construction for financial difficulties in the early 1990s. With The New York's occupancy standing around 88 percent in September 1991, Mellon Bank, which held a \$64.2 million mortgage on the property, filed a foreclosure action against the property in Cook County Circuit Court.²⁵ Negotiations ensued but financial difficulties persisted.²⁶ One strategy that The New York (and other buildings facing downturns) employed in this period was offering cash bounties to existing tenants who helped recruit new tenants. The New York obtained some seventy-seven new tenants in this way during 1990 and 1991.²⁷ Word-of-mouth advertising may have been especially attractive to The New York, given its focus on attracting professional tenants. If those who were in the social and professional circles of existing tenants were the Chicagoans most likely to be recruited by them, then The New York could expand its tenant base with tenants who were very similar to the ones it had already attracted.

With its back to the wall, The New York could have dropped its rents, trimmed its services,²⁸ and launched a more inclusive ad campaign. The *Tyus* plaintiffs alleged that it did something else: doubled down on its upscale image and continued to run ads that transmitted an exclusionary message.

²⁴ 42 USC § 3604(c).

²⁵ J. Linn Allen, *Foreclosure Resisted on Apartments*, Chi Trib § 3 at 3 (Sept 24, 1991).

²⁶ A 1994 *Chicago Tribune* story on the *Tyus* jury verdict reported that the building had since been foreclosed upon. Matt O'Connor, *No Damages Awarded on Discriminatory Ad*, Chi Trib § 2 at 3 (June 2, 1994).

²⁷ Pamela Sherrod, *Come on Over! It Can Pay for Tenants to Recruit New Neighbors*, Chi Trib § 8 at 15 (Jan 3, 1992). One existing tenant who was unusually active in this endeavor was a medical student at the University of Chicago who recruited ten people, many of whom were friends or classmates, to lease in the building. *Id.* § 8 at 7.

²⁸ To be sure, The New York's options may have been limited in this regard due to the representations it had made to its current tenants about the continuing availability of particular services and amenities. Many of these "club goods" likely depended on cost-spreading across a large tenant base and could not be scaled down by degrees. See James M. Buchanan, *An Economic Theory of Clubs*, 32 *Economica* 1, 2 (1965) (noting the centrality to club theory of "determining the membership margin" or "the size of the most desirable cost and consumption sharing arrangement").

B. The Plaintiffs, the Ads, and the Jury Verdict

Anthony Tyus and Thomas Walker, the plaintiffs in *Tyus*, were African Americans seeking housing in the Chicago area. Both noticed that the ads for The New York consistently depicted only White human models. Four fair housing organizations (Leadership Council for Metropolitan Open Communities, HOPE Fair Housing, the Interfaith Housing Center, and the South Suburban Housing Center) soon became involved in the case. Over a period from 1989 to 1992, these organizations monitored the advertising of The New York, and found that it continued to feature exclusively White human models.²⁹ Some of the ads omitted any equal housing opportunity logo or statement.³⁰

Because The New York advertised heavily in the *Chicago Tribune*, copies of its ads from this period are accessible through the *Tribune's* archives. For purposes of general background about the case (and without any claim to comprehensiveness), I describe some of the ads.³¹

a) *Perfect Night*.³² This ad features a White man in a suit seated at a desk, talking on the telephone to the concierge at The New York. The text reads in part: "Divna? This is Jonathan Stewart in 4701. Listen, we just closed a major deal and I'm going to be tied up here for another hour. I have a date with Heather tonight and I need your help." The conversation continued with requests that Divna arrange "Casa Blanca lilies" on the dining room table, make dinner reservations, "[c]hill a bottle of my finest champagne," and "if at all possible" add some extra stars to the night sky. The ad lists Urban Search as "Exclusive Leasing Agents" but

²⁹ *Tyus*, 102 F3d at 260. The advertising consultant retained by The New York did not prepare any ads featuring more diverse groups of human models until after the plaintiffs filed suit. *Id.*

³⁰ *Id.* The New York also aired radio ads that omitted any reference to equal housing opportunities. *Id.* A then-existing US Department of Housing and Urban Development regulation provided that "[a]ll advertising of residential real estate for sale, rent, or financing should contain an equal housing opportunity logotype, statement, or slogan as a means of educating the homeseeking public that the property is available to all persons regardless of race, color, religion, sex, handicap, familial status, or national origin" and included this as a factor to be considered "as evidence of compliance" with the FHA's prohibitions on discriminatory advertising. 24 CFR § 109.30(a), removed by Office of the Assistant Secretary for Fair Housing and Equal Opportunity, Regulatory Reinvention, Streamlining of HUD's Regulations Implementing the Fair Housing Act, 61 Fed Reg 14378, 14380 (1996). The equal housing opportunity logotype suggested in the regulation consists of an equal sign inside a house shape that sits atop the words "Equal Housing Opportunity." See 24 CFR §§ 109.30(a), 109 Appendix 1 tbl II, removed by 61 Fed Reg at 14380.

³¹ Although most or all of these ads ran multiple times during the relevant period, I have provided the date associated with one instance of each ad.

³² "*Tonight Has to Be Perfect*", *Chi Trib* § 16 at 8 (June 25, 1989).

does not contain an equal housing opportunity logo or state that The New York is an equal opportunity housing provider.

b) *Puppy*.³³ An adorable puppy is featured in this ad, which contains no human models. The ad's all-caps headline reads, "Why Your Ficus, Beagle and BMW Prefer Living at The New York." In smaller print, there is discussion of pet-walking and car-washing services, as well as other features of The New York. This ad contains the words "Equal Housing Opportunity" below "Urban Search, Exclusive Leasing Agent."

c) *Divna*.³⁴ Divna Vuksanovic, The New York's concierge, is pictured in this ad. Divna is a White woman. The text discusses her services, which run "from the very simple to the simply outrageous," as well as the amenities of The New York. This ad contains the words "Urban Search, Exclusive Leasing Agent" and "Equal Housing Opportunity."

d) *Social Climbing*.³⁵ This ad depicts a White woman on a Stair Master exercise machine. The text mentions the various fitness amenities and classes offered at The New York and also states that it is "a great place to meet and make friends." This ad also contains the words "Equal Housing Opportunity" below "Urban Search, Exclusive Leasing Agent."

e) *The Chicago of The New York*.³⁶ This ad contains eight narrow photos framing the text: a White woman playing tennis; a theater sign with the title "Do the White Thing" visible;³⁷ a White man riding a bicycle; the exterior of The New York apartment building (with no people visible); a man playing golf who appears to be White (image is a distant side shot); Divna the concierge; the exterior of Wrigley Field with back-of-head shots of several people; and a White woman jogging. This ad does not contain any reference to equal housing opportunities nor does it include an equal housing opportunity logo. The main text closes with the words "Urban Search, Exclusive Leasing Agent."

³³ *Why Your Ficus, Beagle and BMW Prefer Living at The New York*, Chi Trib § 8 at 15 (May 4, 1990).

³⁴ *One Divna Is Worth a Dozen Ivanas*, Chi Trib § 16 at 5 (Jan 13, 1991). The ad's headline is a reference to Ivana Trump; Divna is referred to in the ad copy as The New York's "Trump card."

³⁵ *Social Climbing at The New York*, Chi Trib § 16 at 8 (Mar 17, 1991).

³⁶ *Come Be Part of the Chicago of The New York*, Chi Trib § 16 at 5 (Feb 23, 1992).

³⁷ It appears this was a March 1990 production of Chicago's Organic Theater. For a record of this performance, see Chicago Public Library, *Dr. Morris Binder Playbill Collection*, archived at <https://perma.cc/X3G9-PVYL>.

f) *Go Take a Hike*.³⁸ This ad contains five photos: a White woman jogging; a group of people playing volleyball (those clearly discernible in the foreground appear to be White); three White men playing golf; a White woman playing tennis; and an exterior shot of The New York building with no people visible. Again, the main text closes with the words “Urban Search, Exclusive Leasing Agent.” There is a small equal housing opportunity logo in the lower right corner that omits the words “Equal Housing Opportunity”;³⁹ there is no textual mention of The New York being an equal housing opportunity provider.

g) *Artistic Rendering*.⁴⁰ This ad contains cartoonlike line art images rather than photographs. The pen-and-ink images depict eight people: a White baseball player, two White dancers, a White man playing a musical instrument, a White woman in a bikini, an indistinct profile image of a person jogging, a small silhouette of a woman windsurfing, and a person behind a Steppenwolf Theater sign who appears to be wearing makeup and is holding a mask. In addition to the Steppenwolf, other local attractions depicted in the ad include Wrigley Field, Pops for Champagne, the Lincoln Park Zoo (complete with elephant and giraffe), and Lake Shore Drive. A drawing of The New York building is also included. A small equal housing opportunity logo without the words “Equal Housing Opportunity” appears in the lower right corner as in the *Go Take a Hike* ad. The ad’s main text ends with “Urban Search, Exclusive Leasing Agent.”

* * *

On April 9, 1992, Tyus, Walker, and the four organizational plaintiffs filed a complaint alleging violation of the FHA and the regulations implementing it.⁴¹ The defendants were Development Management Group (owned by Louis Silverman) and Urban Search Management (owned by Diane Silverman), which respectively owned and managed The New York, as well as both of the Silvermans individually (who both served on The New York’s marketing committee).⁴²

³⁸ *Go Take a Hike. Go Jump in the Lake. Go Fly a Kite.*, Chi Trib § 16 at 6 (Mar 8, 1992).

³⁹ These words were part of the equal housing opportunity logotype suggested by the regulations then in force. See note 30.

⁴⁰ *Shop till You Drop. Eat till You Burst. Boogie till You Break.*, Chi Trib § 16 at 4 (Aug 9, 1992).

⁴¹ *Tyus*, 102 F3d at 260.

⁴² *Id* at 259–60.

Following a seven-day trial, the jury ruled in favor of Development Management Group, Urban Search Management, and Diane Silverman on all counts.⁴³ It found that Louis Silverman had violated the FHA's prohibition on discriminatory advertising but concluded that there were no compensable damages.⁴⁴ The appeal to the Seventh Circuit followed.

II. HUMAN MODELS AND DISCRIMINATORY HOUSING ADS

Challenging housing ads as racially discriminatory based on the selective use of human models was a novel development in the 1980s, but had started to gain ground by the time of *Tyus*.⁴⁵ The showings required of plaintiffs follow the same basic template as for establishing more traditional claims of discriminatory advertising, but with some wrinkles.

A. Legal Overview

The legal issue in the case centered on the FHA's prohibition on discriminatory advertising, which makes it unlawful

[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.⁴⁶

In 1980, the US Department of Housing and Urban Development (HUD) promulgated a regulation to "provide[] specific guidance"⁴⁷ to newspapers and other publishers and advertisers, which was codified at 24 CFR Part 109.⁴⁸ Some of the provisions spoke directly to the issue of selective use of human models in advertisements. Section 109.25 of the regulation explained that "selective use of advertising media or content" could indicate a violation of the FHA, and included "selective use of human models

⁴³ *Id.*

⁴⁴ *Id.* at 260.

⁴⁵ See Schwemm, 29 *Fordham Urban L J* at 222–26 (cited in note 4).

⁴⁶ 42 USC § 3604(c).

⁴⁷ Department of Housing and Urban Development, Fair Housing Advertising Guidelines, 45 Fed Reg 57102, 57102 (1980).

⁴⁸ Part 109 was removed in 1996 as part of regulatory reforms aimed at "streamlining" regulations by removing "nonbinding guidance or explanations." 61 Fed Reg at 14378 (cited in note 30) (amending 24 CFR Parts 100 and 103, and removing 24 CFR Part 109).

when conducting an advertising campaign” in a list of “examples of the selective use of advertisements which may be discriminatory.”⁴⁹ Section 109.30(b) further provided:

Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and, when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.⁵⁰

Despite the specificity of this guidance, HUD clarified that the practices described in Part 109 were “not intended, *per se*, to establish immutable rules, but to serve as examples of practices, usage, content etc., which *should* be complied with (or avoided), whichever the case may be.”⁵¹ As the majority in a Sixth Circuit case observed, “[m]andatory language was intentionally avoided.”⁵²

Beginning in the late 1980s, plaintiffs began bringing cases to challenge housing ad campaigns that overwhelmingly featured White human models. A Second Circuit case in this line, *Ragin v New York Times*,⁵³ held that the FHA’s prohibitions could be violated based on selective use of human models. As the court explained, “[w]e live in a race-conscious society, and real estate advertisers seeking the attention of groups that are largely white may see greater profit in appealing to white consumers in a manner that consciously or unconsciously discourages non-whites.”⁵⁴ Given this, “a trier plausibly may conclude that in some circumstances ads with models of a particular race and not others will be read by the ordinary reader as indicating a racial preference.”⁵⁵

⁴⁹ 24 CFR § 109.25 (removed 1996).

⁵⁰ 24 CFR § 109.30(b) (removed 1996).

⁵¹ 45 Fed Reg at 57102 (cited in note 47) (emphasis in original).

⁵² *Housing Opportunities Made Equal, Inc v Cincinnati Enquirer, Inc*, 943 F2d 644, 647 (6th Cir 1991).

⁵³ 923 F2d 995 (2d Cir 1991).

⁵⁴ *Id* at 1000.

⁵⁵ *Id*.

Whether an ad (or group of ads) violates the FHA's prohibitions on discriminatory advertising turns on what the advertising "indicates."⁵⁶ Courts have applied an "ordinary reader" standard under which liability can be established if an ad "suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question."⁵⁷ This "ordinary reader is neither the most suspicious nor the most insensitive of our citizenry."⁵⁸ It is not necessary that ads "jump out at the reader with their offending message"; it is sufficient to show that the ad would "discourage an ordinary reader of a particular race from answering it."⁵⁹ Notably, an advertiser's subjective intent to convey a discriminatory message is not required for liability.⁶⁰

Like other subtle means of discrimination, the use of human models in housing ads often presents factual ambiguity and introduces proof problems. Judge Wood's opinion in *Tyus* concluded that the factfinding process was compromised by errors at the trial court level.⁶¹ The next Section focuses on how some of these errors might have interfered with jurors' ability to observe patterns relevant to liability.

B. Aggregation and Mitigation

One wrinkle in human model litigation is that a single ad will often be insufficient to indicate a racial preference to an ordinary reader or viewer. If an ad contains a photograph of just one person, for example, it is impossible for that one individual to personally embody all of the diversity in her community. It may be necessary to aggregate multiple ads placed by a given housing provider to establish liability—that is, to show a pattern of advertising that communicates a discriminatory message. The Second Circuit made this point in *Ragin v New York Times*:

An ad depicting a single model or couple of one race that is run only two or three times would seem, absent some other direct evidence of an intentional racial message, outside Section 3604(c)'s prohibitions as a matter of law. . . . [C]lose questions of liability will involve advertisers that either use a large number of models and/or advertise repetitively. In

⁵⁶ *Id.* at 999.

⁵⁷ *Ragin v New York Times*, 923 F2d at 999.

⁵⁸ *Id.* at 1002.

⁵⁹ *Jancik v Department of Housing and Urban Development*, 44 F3d 553, 556 (7th Cir 1995); *Ragin v New York Times*, 923 F2d at 999–1000.

⁶⁰ See *Ragin v New York Times*, 923 F2d at 1000.

⁶¹ *Tyus*, 102 F3d at 261.

such cases, the advertiser's opportunities to include all groups are greater, and the message conveyed by the exclusion of a racial group is stronger.⁶²

Similar in tone is the discussion in *Housing Opportunities Made Equal, Inc v Cincinnati Enquirer, Inc*,⁶³ where the Sixth Circuit concluded that "the single publication of an advertisement which uses a small number of all-white models" would be insufficient for liability, and that the complaint must instead allege that the advertiser "had the opportunity . . . to include models of a protected group," either because an individual ad included a large number of models or a large number of ads were run depicting human models.⁶⁴ Occasionally a single ad might contain a large enough number of models to support a § 3604(c) claim on its own. For example, one of the ads at issue in *Ragin v Harry Macklowe Real Estate*⁶⁵ recreated a famous *Life* magazine cover depicting an all-White movie audience wearing 3D glasses, using seventy-five White human models.⁶⁶ But most ads do not contain such a large sample size.

Judge Wood's opinion in *Tyus* emphasizes the need, in a typical human model case, to aggregate ads to make the necessary showing under § 3604(c). She explains that "[t]he discriminatory character of an advertising campaign is often not self-evident. . . . Only when enough ads have run to allow a pattern to emerge is a violation likely to become apparent."⁶⁷ Recovery on a human models theory thus requires monitoring ads over time—at least in a traditional print media context where ads could not be rotated constantly as they can in a digital environment.

At trial, however, the defendants argued that the *Tyus* plaintiffs had failed to mitigate their damages when they continued to monitor and view the allegedly discriminatory ads.⁶⁸ The thrust of defendants' argument was that the plaintiffs were to blame for their own injuries, since they could have "simply averted their eyes," or perhaps engaged in a form of self-help by

⁶² *Ragin v New York Times*, 923 F2d at 1002.

⁶³ 943 F2d 644 (6th Cir 1991).

⁶⁴ *Id* at 648.

⁶⁵ 6 F3d 898 (2d Cir 1993).

⁶⁶ *Id* at 902. Because the 3D movie audience ad was run multiple times and was part of a larger campaign that included other ads with (only) White models, the court in that case had no occasion to decide whether a single instance of the ad standing alone would be enough to violate § 3604(c). See *id*.

⁶⁷ *Tyus*, 102 F3d at 265.

⁶⁸ *Id* at 264.

notifying the defendants that the ads they were viewing were offensive to them.⁶⁹ But, as Judge Wood explained, “repeated exposure to discriminatory ads is not masochistic behavior, or something designed only to run up the damages tab, but instead is normally the only way to tell if an advertising campaign as a whole violates the Fair Housing Act.”⁷⁰ The defendants’ mitigation theory and the jury instruction embodying it would keep fair housing plaintiffs from being able to do the one thing that they would nearly always need to do to prevail on a human models theory: show a pattern.

Compounding this error was the trial court’s misapplication of the FHA’s two-year statute of limitations. Because the plaintiffs alleged a continuing violation that unfolded over time, the full complement of ads was relevant to the damage inquiry—not, as the trial court had instructed the jury, only those that occurred in the two years prior to the lawsuit.⁷¹ Because “[t]he jury may have thought that all the damages suffered between the two dates specified by the court were self-inflicted, given the mitigation instruction they had heard,” they might not have taken the defendants’ full “course of conduct” into account.⁷² In combination, these errors (and others) could have explained what otherwise seemed like a puzzling outcome: that the jury found Louis Silverman had violated the FHA but awarded the plaintiffs zero damages.⁷³

Proper application of the statute of limitations in human models cases is essential not only for the reasons indicated in *Tyus*, but also because it can sidestep a different aggregation-related gambit: defendants who try to use aggregation to their own advantage by running more diverse ads after they get wind of a complaint. The district court in *Spann v Colonial Village, Inc*⁷⁴ used the FHA’s statute of limitations—then 180 days—to focus its assessment of plaintiffs’ discriminatory advertising claim on the 180-day period that immediately preceded the filing of the complaint.⁷⁵ It found no violation of the FHA because the defendants (apparently tipped off by the plaintiffs’ prior administrative complaint) had featured significant percentages of Black

⁶⁹ Id at 264–65.

⁷⁰ Id at 265.

⁷¹ *Tyus*, 102 F3d at 265–66.

⁷² Id at 266.

⁷³ Id at 264. For an alternative possibility, see Part III.B.

⁷⁴ 662 F Supp 541 (DDC 1987), revd, 899 F2d 24 (DC Cir 1990).

⁷⁵ *Spann*, 662 F Supp at 546.

models during that time period.⁷⁶ Reversing the district court on this point, then-Judge Ruth Bader Ginsburg's opinion for the DC Circuit explained that where a "continuing violation" is alleged, the plaintiff need only file within the requisite time from the last occurrence in a chain of discriminatory acts, but can base the claim on the full pattern of prior conduct—which in *Spann* encompassed a period of time when defendants allegedly featured only White models.⁷⁷

When an advertiser delivers signals in small increments, *Tyus* teaches, plaintiffs must be allowed to put the pieces together to reveal the overall shape of the message. An additional question (not raised in *Tyus*) is whether the cumulative pattern of ads run by different advertisers in the same publication can give rise to publisher liability. Courts have rejected this "aggregate message" theory,⁷⁸ despite strong dissenting voices.⁷⁹ Nonetheless, the possibility that discriminatory ads may trigger public misperceptions about antidiscrimination law, which is one rationale for organizational standing in such cases,⁸⁰ suggests some recognition of the way in which unconnected individual acts spill over and contribute to aggregate harms.

The specific doctrinal questions discussed above relate to a form of advertising—print media—that is increasingly obsolescent. But aggregate, cumulative harms continue to bedevil efforts to address discriminatory societal patterns, including those in housing. Small, dispersed decisions that disappear into a background of large and familiar patterns can be especially hard for law to detect and reach, given the human tendency to focus on discrete acts by plainly culpable wrongdoers. This observation brings us to another facet of *Tyus*—jury decision-making.

III. JURIES AND PATTERNS

A flawed jury selection process marred the trial court's handling of the *Tyus* case, and represented one of several grounds for

⁷⁶ Id at 546–47. See *Spann v Colonial Village, Inc.*, 899 F2d 24, 34–35 & n 7 (DC Cir 1990).

⁷⁷ *Spann*, 899 F2d at 34–35.

⁷⁸ *Housing Opportunities Made Equal*, 943 F2d at 649–50. See also *Ragin v New York Times*, 923 F2d at 1001–02.

⁷⁹ See *Housing Opportunities Made Equal*, 943 F2d at 660–62 (Keith dissenting); Reginald Leamon Robinson, *White Cultural Matrix and the Language of Nonverbal Advertising in Housing Segregation: Toward an Aggregate Theory of Liability*, 25 Cap U L Rev 101, 215–17 (1996).

⁸⁰ *Spann*, 899 F2d at 27.

reversal. But the jury's verdict on remand raises larger questions about the practical reach of antidiscrimination law.

A. Jury Selection

Judge Wood's opinion spotlighted a problem in the way the court below conducted jury selection, one that may have potentially biased the entire panel.⁸¹ Even though The New York was a luxury complex that catered to high-end tenants, the court decided to ask potential jurors whether any of them lived in public housing. In a colloquy reproduced in Judge Wood's opinion in *Tyus*, the court began by asking the assembled prospective jurors: "Does anybody on the panel reside in public housing?"⁸² When one man answered in the affirmative, the court asked him to "stand up and tell us about it, please," querying him on the racial composition of the housing in which he lived, and asking whether there had been "any racial problems in that project."⁸³ When the potential juror indicated there had been, the court asked if it would "interfere in any way with you coming up with a fair and impartial verdict."⁸⁴ Upon hearing the man's equivocal response ("I can't really say"), the court dismissed him for cause.⁸⁵

Judge Wood made clear that the court's dismissal for cause following such a response would not be problematic had the underlying line of questions been relevant to the case at hand.⁸⁶ But it wasn't. Whether a member of the panel resides in public housing had nothing to do with the discriminatory advertising allegations at issue in the case.⁸⁷ Moreover, by asking about racial composition and "racial problems" the court might have been understood to suggest that the two go hand in hand, an implication that "injected a note of prejudice into the trial that plaintiffs had no way of overcoming."⁸⁸ The line of questioning was aptly described not only as "embarrassing" to the juror who was forced to stand and discuss his housing situation in front of the entire

⁸¹ The judge was Henry Alvan Mentz Jr, sitting by designation. Judge Mentz was a senior status judge in the US District Court for the Eastern District of Louisiana at the time of the trial. See Federal Judicial Center, *Mentz, Henry Alvan, Jr.*, online at <https://www.fjc.gov/history/judges/mentz-henry-alvan-jr> (visited Apr 26, 2020) (Perma archive unavailable).

⁸² *Tyus*, 102 F3d at 261.

⁸³ *Id.*

⁸⁴ *Id.* at 261–62.

⁸⁵ *Id.* at 262.

⁸⁶ *Tyus*, 102 F3d at 262.

⁸⁷ *Id.*

⁸⁸ *Id.*

panel, but also “stigmatizing” to him as well as to the African American plaintiffs in the case.⁸⁹

Recent research indicates that for-cause dismissals—usually overlooked in studies of and challenges to the racial composition of juries—disproportionately exclude African Americans.⁹⁰ The trial court’s questioning of the potential juror in *Tyus* was especially egregious and, one would hope, atypical. But it is nonetheless part of a larger pattern of disproportionate exclusion that is deeply troubling and that warrants sustained attention and systematic investigation. In the meantime, judges who are acutely attuned to the potential disparities that such questions can introduce offer a crucial first line of defense.

B. Null Results

The initial jury verdict, which included a finding of liability for Louis Silverman but no award of damages, might well have been influenced by the several errors that Judge Wood identified.⁹¹ Yet on remand, after a new trial that was presumably free of such errors, the jury returned a verdict in favor of the defendants.⁹² With two Chicago juries coming to the same ultimate conclusion on the question of whether the defendants owed damages to the plaintiffs, we must look beyond the initial court’s errors for an explanation.

It seems probable that both sets of jurors were unconvinced that the ad campaign was truly discriminatory or harmful—even though the first jury found that it actually ran afoul of the FHA. What might have led to this conclusion? One potential factor was evidence that defense counsel introduced showing that there were some African American residents of The New York, and testimony indicating that the ads attracted some African American applicants.⁹³ Such facts do not disprove a § 3604(c) case—even an indication of preference that fails to fully screen applicants based on race would still violate the FHA and could still cause harm to

⁸⁹ *Id.*

⁹⁰ See generally Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich L Rev 785 (2020) (examining for-cause disparities in criminal jury trials in Louisiana and Mississippi).

⁹¹ *Tyus*, 102 F3d at 264.

⁹² Civil Docket, No 49–50, *Tyus v Silverman*, No 1:93-cv-05071 (ND Ill 1997).

⁹³ O’Connor, *No Damages Awarded on Discriminatory Ad*, Chi Trib § 2 at 3 (cited in note 26) (reporting defense attorney Thomas Foran’s statement that 6 percent of The New York’s tenants were Black, and that four African Americans testified that the ads had attracted them, two of whom actually rented an apartment).

plaintiffs who observed the ads—but it might well have mattered to the jury.

Another factor relates to overall advertising patterns, and the capacity of a constant stream of ads depicting only White models to normalize that imagery.⁹⁴ The ads that the defendants ran may have seemed unremarkable to jurors who had been continually exposed to similar ads their entire lives. A related conjecture is that the jurors recognized that such ads might indicate a preference, but did not see the defendants' ads in particular as causing any marginal damage to plaintiffs beyond that caused by all the other similar images and advertising appearing in print.⁹⁵ These possibilities illustrate the limitations of using a model of individual liability to address broader societal problems—especially if jury determinations implicitly depend on a defendant's conduct standing out as unusually blameworthy.

The question of blame circles back to a broader point: protecting people from status-based harms requires more than reaching present-day intentional wrongdoers. Given the history of residential segregation, acts that do nothing more than entrench and reinforce existing patterns also limit housing opportunities. Whether existing antidiscrimination law can effectively disrupt these patterns may be as much a question of psychology as of doctrine, and seeing how factfinders approach their work—after errors are taken out of the equation—can help to inform legal and policy innovation.

CONCLUSION

The New York is still a fixture on North Lake Shore Drive. It was converted to condominiums in 2000 and still claims to be “the world's tallest masonry building.”⁹⁶ Chicago remains racially segregated, although Black-White segregation has decreased modestly since the time of The New York's advertising campaign.⁹⁷ Advertising, meanwhile, has radically changed. With the ubiquity

⁹⁴ See Robinson, 25 Cap U L Rev at 123–25 (cited in note 79).

⁹⁵ For a proposed remedy for this problem, see *id.* at 221–22 (arguing for burden shifting with respect to causation).

⁹⁶ *About The New York Private Residences* (cited in note 6). I have found nothing to corroborate this claim, which is contradicted by a variety of online sources identifying other buildings for this distinction—although the definitional bounds of the relevant category appear to vary as well.

⁹⁷ See, for example, William H. Frey, *Black-White Segregation Edges Downward Since 2000* (Brookings, Dec 17, 2018), archived at <https://perma.cc/76BG-JPW5> (reporting a modest decline for Chicago in the dissimilarity index, a primary measure of segregation, from 81.2 in 2000 to 75.3 in 2013–17).

of the internet, print advertising holds less sway, and new tactics of selective ad targeting have emerged.⁹⁸ But the core challenges of addressing subtle, cumulative acts of discrimination remain. Judge Wood's powerful opinion in *Tyus* highlights the importance of seeing and responding to these harmful patterns.

⁹⁸ For example, HUD recently charged Facebook with FHA violations for enabling advertisers to direct ads for housing to particular demographics. US Department of Housing and Urban Development, Press Release, *HUD Charges Facebook with Housing Discrimination over Company's Targeted Advertising Practices* (Mar 28, 2019), archived at <https://perma.cc/NG9K-FT8N>.