

# **The Intentional Targeting Test: A Necessary Alternative to the Disparate Treatment and Disparate Impact Analyses in Property Rentals Discrimination**

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*This Note addresses when a landlord exclusively rents to particular minority groups intending to profit from substandard apartment conditions and services. Because there is no similarly situated group of non-minority tenants with whom they can compare their treatment by the landlord, targeted tenants cannot successfully make a claim of discrimination under any civil rights laws. Reverse redlining, where companies extend credit exclusively to minority communities on unfavorable terms, presents similar difficulties in proving discrimination. Some courts have responded to reverse redlining by allowing plaintiffs to state a claim of discrimination without a comparison group so long as they provide evidence that the defendants “intentionally targeted” them because of their race or ethnicity. This Note argues that this “intentional targeting” test should be extended to habitability-related claims of discrimination so exploited tenants can combat landlords’ racially or ethnically motivated misconduct even without a group of better-treated tenants with which to compare treatment.*

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## I. INTRODUCTION

Over forty years after Congress enacted legislation to combat discrimination in the housing market, minorities still face unique obstacles in obtaining decent housing, particularly rental housing.<sup>1</sup> In a conventional case of discriminatory provision of rental premises and services, injured parties could bring suit against their landlord, claiming that the landlord's conduct constituted disparate treatment or had a disparate impact and therefore violated some civil rights law, including the Fair Housing Act.<sup>2</sup> However, where an owner or landlord rents *exclusively* to tenants of a particular racial or ethnic background for the purpose of providing substandard living conditions, a tenant cannot plead disparate treatment because there would be no similarly situated tenants in the building whom the plaintiff could show were receiving more favorable treatment.<sup>3</sup> Lacking a similarly situated group would also prevent the plaintiff from successfully claiming that the landlord's provision of substandard premises had a disparate impact on the plaintiff class.<sup>4</sup>

Recently, federal courts have developed a solution to a similar problem: "reverse redlining."<sup>5</sup> Reverse redlining means intentionally extending credit on unfair terms to residents in specific geographic areas based on their income, race, or ethnicity.<sup>6</sup> Because such lenders exclusively target one group of people, no other group exists who received loans from the same lender but on more favorable terms — thus, the victims cannot show they were treated differently than similarly situated persons outside the target class. Courts have responded to this dilemma by developing an alternative test — what this Note calls the "intentional targeting" test — that permits plaintiffs to state a claim under the Fair Housing Act and other civil rights even without a comparison group.<sup>7</sup>

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1. See *infra* Part II.
  2. See, e.g., *McDonald v. Coldwell Banker*, 543 F.3d 498, 505 n.7 (9th Cir. 2008) (noting that, under the Fair Housing Act (FHA), "a party can bring either a disparate impact or a disparate treatment cause of action").
  3. See *infra* p. 6.
  4. *Id.*
  5. See *infra* Part IV.A.
  6. *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).
  7. See, e.g., *id.*

While the intentional targeting test has been limited to reverse redlining claims, this Note proposes extending it to scenarios in which a landlord exclusively targets potential tenants based on their race or ethnicity for the purpose of providing substandard premises. Part II will briefly explore the background of housing discrimination in the U.S. and the evolution of the intentional targeting test in the property rentals context. Part III will examine the common and statutory law under which an individual can bring claims of discrimination in the rentals setting, including the implied warranty of habitability, the Civil Rights Act of 1866, and the Fair Housing Act. Part IV will argue for extending the intentional targeting test to habitability-related claims of discrimination. It will first outline the development of the intentional targeting test in reverse redlining cases and then articulate the elements of a prima facie case of intentional targeting in the rentals setting, including the evidence that might satisfy those elements. Part IV will also present several justifications for extending the intentional targeting test to claims of discrimination in the rentals setting. It will show, for example, that adoption of the intentional targeting test is supported by the Supreme Court's seminal decision in *Griggs v. Duke Power Co.*, where the Court liberally interpreted the Civil Rights Act of 1964 to prohibit not just intentional discrimination but conduct disparately impacting protected groups.<sup>8</sup> Finally, this Part will also highlight several advantages that intentional targeting claims based on civil rights laws would have over those based on the implied warranty of habitability, which is currently the principal avenue of relief for tenants living in poorly maintained dwellings.

## II. THE EVOLUTION OF HOUSING DISCRIMINATION IN THE U.S. AND A SHORTFALL OF CONTEMPORARY ANTI-DISCRIMINATION JURISPRUDENCE

The Fair Housing Act of 1968 ("FHA") was a response to the discrimination and segregation in housing that had greatly increased across the U.S. since many blacks migrated to cities dur-

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8. See *infra* Part IV.C; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

ing World War I.<sup>9</sup> Exclusionary laws, racial covenants, organized realtor practices, and private discrimination all led to the ghettoization of African Americans.<sup>10</sup> Congress conceived the FHA primarily to remedy the denial of rental and for-sale housing based on race, national origin, and other protected characteristics.<sup>11</sup> As Senator Walter Mondale, a sponsor of the bill, put it shortly before the legislation's passage: "It is impossible to gauge the degradation and humiliation suffered by a man . . . when he is told that despite his university degrees, despite his income level, despite his profession, he is just not good enough to live in a white neighborhood."<sup>12</sup>

Forty years after the FHA's enactment, housing discrimination not only remains rampant<sup>13</sup> but has arisen in a new setting that traditional fair housing doctrine has not fully anticipated. This discrimination differs from the historically predominant scenario in which an owner or landlord excludes a particular class of people.<sup>14</sup> Instead, the owner or landlord's intent is to rent predominantly or exclusively to such a class, providing them substandard services or conditions. In these cases, landlords may ignore requests to repair defective facilities or provide poor-quality premises that lack basic amenities such as heat or water. Whereas traditional housing discrimination stemmed from a mission to exclude certain groups of people from a community, this newer inclusion-oriented discrimination is based on a desire to profit by providing poorly maintained dwellings to particularly vulnerable groups.

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9. See Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 877 (1988).

10. *Id.*

11. *Id.* at 919–20.

12. *Id.* at 920.

13. For example, a report examining the incidence of housing discrimination between 1989 and 2000 indicates that whites seeking rental housing were favored over African Americans 21.6% of the time. MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 iii (2002), [http://www.urban.org/UploadedPDF/410821\\_Phase1\\_Report.pdf](http://www.urban.org/UploadedPDF/410821_Phase1_Report.pdf). Whites were also favored over Hispanics 25.7% of the time. *Id.* at iv. In both cases, the report found that African Americans and Hispanics seeking rental housing were less likely to receive information about available housing units and had fewer opportunities to inspect available units. *Id.* at iii–iv.

14. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968) (involving defendants' racially motivated refusal to sell a home in a private subdivision to plaintiffs).

Studies showing that minorities and immigrants are more likely than others to live in poorly maintained housing and to be denied access to rentals in safe condition confirm this vulnerability.<sup>15</sup> For example, a survey conducted by the Pratt Center in New York City found that as a group, immigrants are more likely than native-born white and Asian tenants, but less likely than native-born black and Latino tenants, to live in substandard housing.<sup>16</sup> Another survey conducted by the Community for Housing Equity Coalition in New York City found that most immigrant tenants lived with critical housing code violations such as little or no heat, hot water, or running water; collapsing ceilings; leaking pipes and leaking gas.<sup>17</sup>

Several factors contribute to these unfortunate findings: unawareness of better housing; denial of other housing; inability to move to safer housing; fear that complaints about living conditions will provoke landlord retaliation; and unawareness of tenants' rights.<sup>18</sup> Tenants who are not proficient in English have been found less likely than others to report their problems to housing authorities, either because they are unaware of such authorities or because language barriers impede effective communication.<sup>19</sup> Moreover, some unlawful immigrants tolerate substandard living conditions because they fear deportation.<sup>20</sup> Landlords can exploit this fear to increase profits by charging market-rate prices but leaving the apartments in disrepair.

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15. PRATT CTR. FOR CMTY. DEV., *CONFRONTING THE HOUSING SQUEEZE: CHALLENGES FACING IMMIGRANT TENANTS, AND WHAT NEW YORK CAN DO* 23 (2008), <http://prattcenter.net/sites/default/files/publications/Confronting%20the%20Housing%20Squeeze.pdf>.

16. *Id.*

17. CMTYS. FOR HOUS. EQUITY COAL., *HEAR THIS! THE NEED FOR MULTILINGUAL HOUSING SERVICES IN NEW YORK CITY* 3 (2006), [http://www.urbanjustice.org/pdf/publications/Hear\\_This\\_Final.pdf](http://www.urbanjustice.org/pdf/publications/Hear_This_Final.pdf).

18. GREENSBORO HOUS. COAL., *FAIR HOUSING/HEALTHY HOMES: DISPARITIES IN HOUSING CONDITIONS FOR MINORITIES AND IMMIGRANTS* 2 (2008), <http://ghc.illkd.com/wp-content/uploads/2009/08/FairHousingHealthyHomes.pdf>.

19. CMTYS. FOR HOUS. EQUITY COAL., *supra* note 17, at 5. A survey found that residents who were proficient in English were more than twice as likely to file a complaint with the Department of Housing Preservation and Development as residents with limited proficiency in English, despite sixty percent of the limited proficiency group reporting that they lived with one or more critical housing code violations in the past twelve months. *Id.* at 3, 5.

20. Anita R. Brown-Graham, *Housing Discrimination Against Hispanics in Private Rental Markets*, POPULAR GOVERNMENT, 1999, at 45, 47, <http://www.sog.unc.edu/pubs/electronicversions/pg/f99-4551.pdf>.

Tenants who are targeted for such exploitation have substantial difficulty establishing discrimination under traditional civil rights jurisprudence. Claims of discrimination have traditionally been accepted based on either disparate treatment or disparate impact,<sup>21</sup> with disparate impact being recognized where the conduct is facially neutral but either has “a greater adverse impact on one racial group than on another” or “perpetuates segregation and thereby prevents interracial association.”<sup>22</sup> Tenants living in substandard conditions would be unable to claim disparate treatment if there was no similarly situated group of tenants receiving more favorable treatment than them. Tenants would also have trouble showing that the alleged conduct had a disparate impact on their class since they cannot show a “greater adverse impact on one class of people” where the wrongdoer’s conduct only affected one group of people.

On the one hand, a landlord *is* perpetuating segregation when he rents exclusively to one racial or ethnic group. Moreover, under the Supreme Court’s decision in *Trafficante v. Metropolitan Life Insurance Co.*, Hispanic or black tenants could bring a disparate impact claim against a landlord who has rented only to Hispanics or blacks by arguing that the segregated building has denied them the social and other benefits of a living in an integrated community, even though they were not the object of the landlord’s discriminatory practices.<sup>23</sup> However, such a claim is inadequate in the scenario at issue because it neither provides direct injunctive or monetary redress for the tenant’s substandard living conditions nor acknowledges the landlord’s discriminatory intent in providing poorly maintained dwellings. A solution is therefore needed to provide redress for such victims of racially or ethnically motivated misconduct and to deter landlords

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21. See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

22. E.g., *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (holding that the village had a statutory obligation under the FHA to refrain from zoning policies that effectively foreclosed construction of any low-cost housing within its corporate boundaries and perpetuated racial segregation).

23. See 409 U.S. 205, 212 (1972). In *Trafficante*, the Court interpreted the FHA to give standing to white tenants who alleged that the maintenance of a segregated living environment by the building’s owner caused them “embarrassment and economic damage . . . from being ‘stigmatized’ as residents of a ‘white ghetto,’” and denied them the “social benefits of living in an integrated community” as well as “the business and professional advantages which would have accrued if they had lived with members of minority groups.” *Id.* at 208.

from intentionally targeting certain groups of people for providing inadequate facilities and services.

### III. APPLICABLE LAW CONCERNING DISCRIMINATORY PROVISION OF RENTAL CONDITIONS AND SERVICES

Part III explores the legal grounds for requesting relief when a landlord provides substandard rental premises, conditions, or services. This Part begins by briefly describing the warranty of habitability, which governs a landlord's obligation to provide safe, sanitary, and functional dwellings. It then addresses several civil rights laws under which a tenant might bring a claim of discrimination, focusing particularly on § 1981 and § 1982 of the Civil Rights Act of 1866 and § 3604(a) and § 3604(b) of the Fair Housing Act.

#### A. THE WARRANTY OF HABITABILITY

At common law, a landlord usually had no duty to provide a habitable rental property or to repair property defects.<sup>24</sup> However, due to concerns over prospective tenants' unequal bargaining power and their limited ability to inspect and repair property before tenancy,<sup>25</sup> most jurisdictions have rejected the traditional rule, implying a warranty of habitability in all leases.<sup>26</sup> The warranty of habitability requires the landlord initially to provide livable quarters and to keep the premises in a habitable condition throughout the lease.<sup>27</sup> Under the warranty, a landlord is generally required to make all necessary repairs and keep common areas in a clean, safe, and livable condition.<sup>28</sup>

A landlord's failure to comply with applicable housing code regulations,<sup>29</sup> building codes,<sup>30</sup> or sanitary codes<sup>31</sup> can be grounds

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24. *Lian v. Stalick*, 25 P.3d 467, 470 (Wash. Ct. App. 2001).

25. *Bd. of Dirs. of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 712 N.E.2d 330, 333-34 (Ill. 1999).

26. *See, e.g., Jablonski v. Casey*, 835 N.E.2d 615 (Mass. App. Ct. 2005); *Favreau v. Miller*, 591 A.2d 68 (Vt. 1991).

27. *E.g., Jablonski*, 835 N.E.2d at 618.

28. *See, e.g., Teller v. McCoy*, 253 S.E.2d 114, 123 n.11 (W. Va. 1978).

29. *Willard v. Parsons Hill P'ship*, 882 A.2d 1213 (Vt. 2005).

30. *See, e.g., Richardson v. Wilson*, 361 N.E.2d 110 (Ill. App. Ct. 1977).

31. *See, e.g., Jablonski*, 835 N.E.2d 615.



for a breach of the warranty of habitability. Considerations may include the nature and seriousness of the defect, how the defect affects safety and sanitation, how long the condition has persisted, and the age of the structure.<sup>32</sup> Additionally, to successfully claim a breach of warranty, except where a law otherwise provides, tenants must show that they gave notice to the landlord of the defect, that the landlord had a reasonable opportunity to make the repairs, and that the landlord failed to do so.<sup>33</sup>

A landlord's severe breach of the warranty of habitability could amount to constructive eviction. Constructive eviction is an act or omission by the landlord, or someone acting under his authority, that renders the entire or a substantial part of the premises unfit for occupancy given the purpose for which it was leased.<sup>34</sup> In other words, a landlord's act or omission must "deprive the tenant permanently or for a substantial time of the enjoyment of the property."<sup>35</sup> While the doctrines of habitability and constructive eviction are not explicitly based on concerns about a landlord's treatment of particular racial groups, they provide grounds for a tenant to seek relief against a landlord who has intentionally provided substandard rental premises or services.

## B. THE CIVIL RIGHTS ACT OF 1866

The Civil Rights Act of 1866 was enacted to ban all racial discrimination in purchasing or leasing property.<sup>36</sup> Under the Act, courts may grant equitable relief as well as both compensatory and punitive damages — the latter only in particular circumstances.<sup>37</sup> Courts have found that the Act protects African Americans<sup>38</sup> and Hispanics.<sup>39</sup>

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32. Pugh v. Holmes, 384 A.2d 1234, 1240 (Pa. Super. Ct. 1978).

33. Loven v. Davis, 783 S.W.2d 152, 156 (Mo. Ct. App. 1990); McIntyre *ex rel.* Howard v. Philadelphia Hous. Auth., 816 A.2d 1204, 1208 n. 9 (Pa. Commw. Ct. 2003).

34. Yee v. Weiss, 877 P.2d 510, 512 (Nev. 1994).

35. Westland Hous. Corp. v. Scott, 44 N.E.2d 959, 963 (Mass. 1942).

36. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968).

37. Johnson v. Ry. Express Agency, 421 U.S. 454, 460 (1975).

38. *See, e.g.*, Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994).

39. *See, e.g.*, Ridgeway v. Int'l Bhd. of Elec. Workers, Local No. 134, 466 F. Supp. 595, 597 (N.D. Ill. 1979).



### 1. Section 1981

Section 1981 of the Civil Rights Act of 1866 provides that all U.S. citizens have the same right “to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”<sup>40</sup> Before 1991, § 1981 did not cover problems arising after a contract was established.<sup>41</sup> However, Congress amended the statute that year so that the phrase “make and enforce contracts” included “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”<sup>42</sup> Under this amendment, the Supreme Court has held that parties to a contract are barred from discriminating in “all phases and incidents of the contractual relationship,” not just at the contract’s inception.<sup>43</sup>

The amended § 1981 language thus should apply when a landlord provides substandard services and facilities, and cases support this proposition. In *Green v. Konover Residential Corp.*, for example, former, low-income African American tenants sued the owners and managers of their apartment complex for racial discrimination violating § 1981, the FHA, and the United States Housing Act of 1937.<sup>44</sup> The plaintiffs alleged that the defendants ignored their requests for repairs and permitted their apartments to exist in unsanitary and unsafe conditions, while providing substantially better premises for Hispanics and white tenants.<sup>45</sup> As a

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40. 42 U.S.C. § 1981(a) (2006).

41. *See id.*

42. Civil Rights Act of 1991, § 101, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981(b) (2006)).

43. *Rivers*, 511 U.S. at 302. In *Rivers*, black garage mechanics brought suit against their employer under Title VII and § 1981, claiming that their employer discharged them based on race and retaliated after the mechanics successfully filed grievances. *Id.* at 301. While recognizing § 101’s expansion of the Civil Rights Act’s “make and enforce contracts” language to embrace the plaintiffs’ discharge from employment, the Supreme Court held that the provision did not apply retroactively. *Id.* at 308–09.

44. No. 3:95CV1984(GLG), 1997 WL 736528 (D. Conn. Nov. 24, 1997). Also, in *Clifton Terrace Associates, Ltd. v. United Technologies Corp.*, 929 F.2d 714, 721–22 (D.C. Cir. 1991), and *Cox v. City of Dallas, Texas*, 430 F.3d 734, 747–48 (5th Cir. 2005), the D.C. and Fifth Circuits each implicitly assumed that § 1981 applies to housing discrimination occurring after the contract’s establishment, while affirming the dismissal of the plaintiffs’ § 1981 claims on other grounds.

45. *Green*, 1997 WL 736528, at \*1.

result of this discrimination, the plaintiffs claimed, they were forced to live with water-damaged ceilings, cockroach infestations, dead birds in the attic, and other objectionable conditions that the complex's non-black tenants did not have to endure.<sup>46</sup> Noting the 1991 amendment, the court found § 1981 applicable to the defendants' conduct and denied their motion to dismiss.<sup>47</sup> *Green* therefore shows that a claim can be brought under § 1981 to challenge the failure of a landlord to maintain an apartment in habitable conditions.

## 2. Section 1982

Under § 1982 of the Civil Rights Act of 1866, all U.S. citizens have the same right as white citizens "to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>48</sup> The Supreme Court has liberally construed § 1982's language to protect not only the enforceability of black citizens' property interests but also their right "to acquire and use property on an equal basis with white citizens."<sup>49</sup> For instance, in *United States v. Greer*, where the defendant was convicted for defacing and vandalizing a Jewish synagogue and community center, the Fifth Circuit held that § 1982's explicit protection of the right to "hold" property extended to the use of property.<sup>50</sup> Therefore, members of the temple and community center could claim that the defendants' acts violated their right to use that property.<sup>51</sup> Another court, noting that courts generally must try to give meaning to each word in a statute, found that the word "hold" must have a different meaning than "purchase," "lease," "sell," and "convey" and therefore was not confined to property transactions.<sup>52</sup> Consequently, an African American woman and her family were held to have adequately stated a claim under § 1982 where a white neighbor allegedly detonated a bomb and shouted racial epithets

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46. *Id.* at \*2-\*3.

47. *Id.* at \*12-\*13.

48. 42 U.S.C. § 1982 (2006).

49. *City of Memphis v. Greene*, 451 U.S. 100, 120 (1981) (emphasis added).

50. 939 F.2d 1076, 1091 (5th Cir. 1991).

51. *Id.*; see also *United States v. Brown*, 49 F.3d 1162, 1167 (6th Cir. 1995) (holding that drive-by shooting of synagogue that intimidated members violated members' right to "hold" property under § 1982).

52. *Whisby-Meyers v. Kiekenapp*, 293 F. Supp. 2d 845, 849 (N.D. Ill. 2003).

as one of the plaintiffs drove by the neighbor's home.<sup>53</sup> Under the foregoing interpretations of § 1982's language, therefore, tenants would be able to sue the landlord or building owner for providing poor services or living conditions based on race.

Moreover, at least two federal district court cases have affirmed that a § 1982 claim predicated on the racially motivated provision of substandard housing conditions is viable. In *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, tenants claimed that their building owners had allowed the building to fall into disrepair as the racial composition of the tenants changed from mostly white to mostly black.<sup>54</sup> The court rejected defendants' contention that § 1982 only applied to the racially motivated refusal to rent or sell property, citing the Supreme Court's broad interpretation of the law in *Jones v. Mayer Co.* and the Seventh Circuit's view of § 1982 as "a broad based instrument to be utilized in eliminating all discrimination and the effects thereof in the ownership of property."<sup>55</sup> In the second case, *Ross v. Midland Management Co.*, the court relied on the same precedents as *Concerned Tenants* to allow a § 1982 claim based on the defendants' intentional refusal to maintain a safe and sanitary dwelling because of the plaintiff's race.<sup>56</sup> These cases demonstrate how § 1982 applies to instances in which a landlord or property owner fails to maintain tenants' dwellings based on their race.

### C. THE FAIR HOUSING ACT

As discussed in Part II, the Fair Housing Act was created to combat discrimination in the housing market. In contrast to the Civil Rights Act, there are several ways to counter discriminatory practices under the FHA. First, an individual may file a complaint with the U.S. Department of Housing and Development,

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53. *Id.* at 850.

54. 496 F. Supp. 522 (N.D. Ill. 1980).

55. *Id.* at 527. The Illinois district court relied on the Supreme Court's statement that "§ 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and . . . the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." *Id.* (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968)).

56. *Ross v. Midland Management Co.*, No. 02 C 8190, 2003 WL 21801023 (N.D. Ill. Aug. 1, 2003).

which is authorized to resolve matters through conciliation,<sup>57</sup> temporary or preliminary relief,<sup>58</sup> or administrative proceedings.<sup>59</sup> The Attorney General may also independently bring a lawsuit if the conduct is either a “pattern or practice” of denying fair housing rights or an issue of “general public importance.”<sup>60</sup> Finally, the alleged misconduct can be challenged through a private suit.<sup>61</sup> The FHA also differs from § 1982 of the Civil Rights Act by extending protection to non-citizens,<sup>62</sup> a relevant distinction given the particular vulnerability of undocumented immigrants and other non-citizens to discriminatory provision of rental facilities and services.<sup>63</sup>

If a court finds that a discriminatory housing practice has occurred or is about to occur, it can award compensatory and punitive damages or any other injunctive relief it deems appropriate.<sup>64</sup> Additionally, according to the FHA’s terms, a court may allow the winning party reasonable attorneys’ fees and costs.<sup>65</sup> The following subparts discuss the applicability of sections 3604(a) and 3604(b) of the Act to a landlord’s racially motivated provision of substandard rental conditions or services.

### 1. *Section 3604(a)*

Section 3604(a) of the FHA makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>66</sup> If a landlord provides inadequate facilities or services to a targeted racial or ethnic

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57. 42 U.S.C. § 3610(b)(1) (2006).

58. § 3610(e)(1).

59. § 3612(b).

60. § 3614(a).

61. § 3613(a).

62. §§ 3604–3606.

63. *See supra* notes 15–20 and accompanying text.

64. § 3613(c)(1). The 1988 amendments to the FHA removed the \$1,000 limitation for punitive damages. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. 3610-14a (2006)).

65. § 3613(c)(2).

66. § 3604(a).

group, then § 3604(a) applies only where the landlord denies or makes the housing unavailable.<sup>67</sup>

The only circuit courts expressly addressing the issue have ruled that § 3604(a) is inapplicable to habitability claims. For example, in *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, the plaintiffs — current homeowners — alleged that the county violated § 3604(a) by failing to repair or otherwise properly maintain buildings for which it held a tax deed and that were located in mostly black neighborhoods.<sup>68</sup> In holding § 3604(a) inapplicable, the Seventh Circuit stated that this section of the FHA “is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons, but it does not protect the intangible interests in the already-owned property raised by the plaintiffs['] allegations.”<sup>69</sup> The court reasoned that previous cases have applied § 3604(a) exclusively to conduct bearing directly on potential homebuyers' or renters' ability to live in a particular area and to “indirectly related actions arising from efforts to secure housing.”<sup>70</sup>

Other circuit courts have echoed this understanding of § 3604(a). For example, the Fifth Circuit in *Cox v. City of Dallas* held that a city operating a dump in an African American neighborhood did not implicate § 3604(a) because the plaintiffs were current owners alleging merely that the value or habitability of their property had decreased due to discriminatory delivery of municipal services.<sup>71</sup> And in *Clifton Terrace Associates, Ltd. v. United Technologies Corp.*, the D.C. Circuit held that § 3604(a) was inapplicable to an elevator manufacturer's refusal to service and maintain the elevators in the plaintiff's low-income housing complex because elevator service is a matter of habitability, not

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67. *See id.*

68. 743 F.2d 1207 (7th Cir. 1984).

69. *Id.* at 1210.

70. *Id.*

71. 430 F.3d 734, 741 (5th Cir. 2005); *see also* *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999). In *Jersey Heights*, the Fourth Circuit held that government agencies did not violate § 3604(a) by locating a highway bypass near African American homes, which allegedly impeded the homeowners from acquiring further housing. *Id.* at 192. The court noted that § 3604(a) does not reach every event “that might conceivably affect the availability of housing,” *id.* (quoting *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984)), but only ensures that “no one is denied the right to live where they choose for discriminatory reasons.” *Id.* (quoting *Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210).

availability, and so is outside the scope of § 3604(a).<sup>72</sup> Given these holdings, a tenant alleging that a landlord discriminatorily provided substandard services would have no claim under this section of the FHA because it would relate to habitability and not housing availability.

However, some courts have suggested exceptions. The Fifth Circuit in *Cox* explicitly left open the possibility that tenants who were constructively evicted from their home might have a claim under § 3604(a) because their dwelling would have been made unavailable.<sup>73</sup> Similarly, the Fourth Circuit in *Jersey Heights* suggested that § 3604(a) would apply if current occupants were evicted from their dwelling.<sup>74</sup> And in *Clifton Terrace Associates*, the D.C. Circuit stated that denying particular “essential” services like basic utilities may constitute a denial of housing under § 3604(a).<sup>75</sup> Under the reasoning of these cases, tenants alleging discrimination based on their race may thus be able to state a claim under § 3604(a) for a landlord’s sub-optimal maintenance of the premises if such conduct amounted to actual or constructive eviction.

## 2. Section 3604(b)

Section 3604(b) of the FHA states that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”<sup>76</sup> Prior to *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*,<sup>77</sup> numerous courts apparently understood this section and the rest of the FHA as applying to discriminatory conduct that occurred after the sale of a home or after a lease was initially established. For example, in *Concerned Tenants Ass’n of Indian Trails Apartments v. Indian Trails Apartments*, tenants sued their building owners for allowing the building to deteriorate as the racial composition of

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72. 929 F.2d 714, 719 (D.C. Cir. 1991).

73. 430 F.3d at 742–43.

74. See 174 F.3d at 192.

75. 929 F.2d at 719–20.

76. 42 U.S.C. § 3604(b) (2006).

77. 388 F.3d 327 (7th Cir. 2004).

the tenants changed from mostly white to mostly black.<sup>78</sup> Rejecting the defendants' argument that the FHA only applied to conduct relating to housing availability, the court held that § 3604(b) was applicable throughout the lease.<sup>79</sup> In another case, *Housing Rights Center v. Donald Sterling Corp.*, plaintiffs claimed that their landlord had discriminated against them based on national origin by, among other things, requiring tenants to "apply" to use the parking garage and provide their citizenship and country of origin on their applications.<sup>80</sup> While the defendants contended that there was no violation because the discriminatory conduct occurred after the plaintiffs became tenants, the court found § 3604(b) fully applicable, noting that "tenants denied garage access to which they previously were entitled are effectively denied the full benefit of the bargain entered into at the moment of first sale or rental."<sup>81</sup>

The Seventh Circuit in *Halprin v. Prairie Single Family Homes Ass'n* severely limited the scope of § 3604(b).<sup>82</sup> There, a Jewish plaintiff brought suit under the FHA against her homeowner's association alleging that homeowner's association president, motivated at least partially by the plaintiff's religion, repeatedly vandalized the plaintiff's property and impeded the plaintiff from investigating his misconduct.<sup>83</sup> Taking the view that the FHA's language and its legislative history demonstrated that Congress was concerned only with housing accessibility, the Seventh Circuit held that discriminatory conduct occurring after housing was acquired was not within the scope of the statute, including § 3604(b).<sup>84</sup>

Several courts followed *Halprin* and rejected post-acquisition claims under § 3604(b).<sup>85</sup> Two such cases that involved habitabili-

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78. 496 F. Supp. 522 (N.D. Ill. 1980).

79. *Id.* at 525–26; *see also* *Schroeder v. De Bertolo*, 879 F. Supp. 173 (D.P.R. 1995) (holding that § 3604(f) of the FHA applied to a condominium owner association's post-sale disability discrimination against a condominium owner and an occupant).

80. 274 F. Supp. 2d 1129, 1142 (C.D. Cal. 2003).

81. *Id.* at 1142.

82. 388 F.3d 327.

83. *Id.*

84. *Id.* at 329–30.

85. *See e.g.*, *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. 05-3197, 2005 WL 2669480 (S.D. Tex. Oct. 19, 2005) (finding no substantive sections of the FHA were violated where the defendant allegedly entered the plaintiff's condominium without permission and physically assaulted her); *Lawrence v. Courtyards at Deerwood Ass'n*, 318 F.



ty-oriented claims are *Farrar v. Eldibany*<sup>86</sup> and *Ross v. Midland Management Co.*<sup>87</sup> In *Farrar*, a black tenant sued her landlord and building manager, claiming that their failure to provide her apartment with heat and hot water for several days violated the FHA, the Constitution, and state law.<sup>88</sup> Noting *Halprin's* construction of the FHA as prohibiting only discrimination in acquiring housing, the court denied plaintiff's claims because they related only to the maintenance of housing.<sup>89</sup> In *Ross*, another black tenant claimed that her landlord had failed to cure various apartment defects such as poor air quality, mold, and unsanitary water filtration.<sup>90</sup> The court first dismissed the tenant's claim under § 3604(a), reasoning that § 3604(a) applied only to refusals to sell or rent housing and not to conduct occurring after the property was rented.<sup>91</sup> The court then cited *Halprin's* narrow interpretation of § 3604(b) and dismissed the plaintiff's claim under that section as well.<sup>92</sup>

The *Halprin* court and later courts that followed it based their holdings on an incorrect understanding of § 3604's scope. First, the *Halprin* court failed to heed *Trafficante v. Metropolitan Life Insurance Co.*, a widely cited fair housing case in which the Supreme Court declared that the FHA's language was "broad and inclusive"<sup>93</sup> and must be subjected to "generous construction."<sup>94</sup> In

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Supp. 2d 1133 (S.D. Fla. 2004) (holding that because a homeowner's association's failure to prevent a neighbor's harassment did not impede the plaintiff from purchasing a home, the FHA was inapplicable).

86. No. 04 C 3371, 2004 WL 2392242 (N.D. Ill. Oct. 15, 2004).

87. No. 02 C 8190, 2003 WL 21801023 (N.D. Ill. Aug. 1, 2003).

88. 2004 WL 2392242, at \*1.

89. *Id.* at \*4.

90. 2003 WL 21801023, at \*1.

91. *Id.* at \*4.

92. *Id.*

93. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

94. *Id.* at 212; see also Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1 (2008). Professor Oliveri makes several other strong arguments against the Seventh Circuit's reading of the FHA. For example, Oliveri notes that § 3604(a)'s "otherwise make unavailable" provision bans any discriminatory conduct that effectively makes housing unavailable — including discriminatory terms and services as long as they caused an individual to be deprived of housing. *Id.* at 20. Yet, if § 3604(a) and § 3604(b) only apply to conduct that prevents people from acquiring property, then § 3604(a)'s "otherwise make unavailable" encompasses any behavior that would violate § 3604(b) and thus renders the latter superfluous, in contravention of interpretive principle that the terms of a statute should not be construed in a way "that renders any of them surplusage." *Id.* at 20–21. Oliveri also points out that the Supreme Court has stated that the phrase "terms, conditions, or

*Trafficante*, the Court liberally construed the FHA to give standing to white plaintiffs who were not the objects of discriminatory housing practices but claimed that their building's owner discriminated against nonwhite rental applicants and thereby deprived the plaintiffs of the benefits of an integrated community.<sup>95</sup> In other cases the courts have interpreted the FHA broadly to, among other things, prohibit a recorder of deeds from accepting filing instruments containing racially restrictive covenants,<sup>96</sup> allow claims based on disparate impact,<sup>97</sup> and find a landlord vicariously liable for the discriminatory conduct of its broker, even though the tenants paid him and not the landlord.<sup>98</sup> *Halprin's* narrow construction of the FHA contradicts *Trafficante's* and other cases' broad readings of the Act. Applying § 3604(b) to conduct occurring after the initial home sale or lease would be more consistent with these courts' understanding of the civil rights statute.

Moreover, the *Halprin* court erred because it failed to properly consider 24 C.F.R. § 100.65, promulgated by the U.S. Department of Housing and Urban Development ("HUD").<sup>99</sup> In that regulation, HUD gives examples of conduct prohibited under § 3604(b), which include "[f]ailing or delaying maintenance or repairs of sale or rental dwellings" and "[l]imiting the use of privileges, services or facilities associated with a dwelling because of race . . . or national origin of an owner, *tenant* or a person associated with him or her."<sup>100</sup> These provisions support the proposition that § 3604(b) applies to post-acquisition conduct, and, as a permissible construction of that FHA section, they warrant deference, which the *Halprin* court inappropriately withheld.<sup>101</sup>

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privileges" in Title VII — which is similar to the FHA's language and purpose and thus courts have often used it to interpret the FHA — indicates a legislative intent to "strike at the *entire spectrum* of disparate treatment" between protected classes. *Id.* at 23–24 (emphasis added) (internal quotations omitted).

95. 409 U.S. at 212.

96. *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972).

97. *E.g.*, *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

98. *Cabrera v. Jakobovitz*, 24 F.3d 372, 388 (2d Cir. 1994).

99. 24 C.F.R. § 100.65 (2010).

100. § 100.65(b)(2), (4) (emphasis added).

101. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court established the conditions under which a court must defer to an agency's interpretation of a statute. The Court in *Mead* held that to qualify for deference under *Chevron*, it must first

Indeed, some courts have decided against *Halprin's* rigid construction of the FHA.<sup>102</sup> Most recently, in *Committee Concerning Community Improvement v. City of Modesto*, the Ninth Circuit rejected the Seventh and Fifth Circuits' view of the FHA's applicability with respect to post-acquisition discrimination.<sup>103</sup> In that case, residents of several, mainly Latino, neighborhoods brought

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appear that Congress "delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226–27. Those steps are satisfied in this case because the FHA delegates to the HUD informal rulemaking power, 42 U.S.C. § 3614a (2006), and the HUD regulation here was enacted through that process. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232 (Jan. 23, 1989). The next step — called the *Chevron* test — is to determine, using traditional methods of statutory construction, whether Congress has "directly spoken to the precise question at issue." *Chevron U.S.A., Inc.*, 467 U.S. at 842–43. If so, then the court must give effect to Congress's clear intent. *Id.* If Congress's intent is ambiguous, however, the court must defer to the agency's statutory construction when it is a permissible one. *Id.* Under this analysis, HUD's interpretation of § 3604(b) should prevail. First, *Halprin's* view of the FHA contradicts the interpretative canon that a statute should be construed to give meaning to all of its terms. See *Duncan v. Walker*, 533 U.S. 167, 174 (2001). As Professor Oliveri has pointed out, under *Halprin's* limited view of § 3604's scope, any violation under § 3604(b) would also fall within § 3604(a)'s "otherwise make unavailable" language, rendering § 3604(b) superfluous. Oliveri, *supra* note 94, at 20. Additionally, the ambiguity as to whether the phrase "services or facilities in connection therewith" in § 3604(b) refers to "sale or rental" of a dwelling or to "dwelling" would suggest that § 3604(b)'s applicability to post-acquisition conduct should be resolved at step two of the *Chevron* test. See 467 U.S. at 842–43. The FHA's legislative history further demonstrates ambiguous legislative intent as to whether Congress was concerned exclusively with prohibiting discrimination in acquiring housing or whether it also sought to prohibit post-acquisition discrimination. See Oliveri, *supra* note 94, at 25–32. Professor Oliveri highlighted that a committee never considered the FHA version that passed, so the legislative history does not discuss the meaning of § 3604(b). *Id.* at 27. The legislative history also does not mention how the Act applies to post-acquisition discrimination. *Id.* Therefore, the Seventh Circuit should have found, first, that Congress had not directly addressed whether § 3604 applies to post-acquisition claims of housing discrimination, and, second, that HUD's interpretation of how § 3604(b) applies to post-acquisition conduct was permissible.

102. The Seventh Circuit revisited *Halprin* in *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009). In that case, Jewish plaintiffs claimed that removing the mezuzot fixed outside their doors violated the FHA. *Id.* The court interpreted § 3604(b) to permit a post-acquisition claim of discrimination where harassment of an owner or tenant rises to the level of constructive eviction. *Id.* at 779. The court also held that while individuals generally cannot sue under § 3604 "for isolated acts of discrimination by other private property owners" where owners agree as a sales condition to subject their rights to the restrictions of the governing entity, § 3604(b) does not allow that entity to discriminate against the buyer through its enforcement of the restrictions. *Id.* at 780. The court ultimately denied the defendants' motion for summary judgment, holding that a genuine issue of material fact existed as to whether the condominium association's interpretation of its rule banning owners from placing objects outside their front doors, which included Jewish owners' religious symbols, was based on the owners' religion. *Id.* at 783.

103. 583 F.3d 690 (9th Cir. 2009).

suit against the city and county, alleging that the government's failure to provide adequate municipal services and to annex their neighborhoods into the city, constituted discrimination violating the FHA and other civil rights laws.<sup>104</sup> To support its ruling that the FHA applied to post-acquisition claims, the court noted that the word "privileges" in § 3604(b) suggests continuing rights, "such as the privilege of quiet enjoyment of the dwelling."<sup>105</sup> The court also disagreed that "the provision of services or facilities in connection therewith" referred exclusively to services or facilities provided at the moment of acquisition by sale or rental.<sup>106</sup> The court highlighted that few services or facilities are provided at the moment of sale or rental; on the other hand, "there are many 'services or facilities' provided to the dwelling associated with the occupancy of the dwelling," and so the more reasonable reading of the provision would allow post-acquisition claims.<sup>107</sup> In addition to the Ninth Circuit's decision in *Committee Concerning Community Improvement*, several district courts have strayed from *Halprin's* reading of § 3604.<sup>108</sup> The Ninth Circuit's and these courts' broad view of § 3604(b)'s applicability regarding post-acquisition claims enables tenants to seek relief under that section when a landlord provides substandard premises on the basis of race or ethnicity.

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104. *Id.*

105. *Id.* at 713.

106. *Id.*

107. *Id.*

108. For example, in *United States v. Koch*, 352 F. Supp. 2d 970 (D. Neb. 2004), the Department of Justice brought suit against a landlord on behalf of current and prospective tenants alleging sexual harassment. The district court rejected the Seventh Circuit's view of the FHA's applicability with respect to post-acquisition claims, arguing that "[o]n the contrary, a broad interpretation of the FHA that encompasses post-possession acts of discrimination is consistent with the Act's language, its legislative history, and the policy 'to provide . . . for fair housing throughout the United States.'" *Id.* at 978 (quoting 42 U.S.C. § 3601 (2006)). The court thus held that § 3604(b) applied to sexual harassment occurring after the lease was established. *Id.* at 975–76; *see also* *Krieman v. Crystal Lake Apts. Ltd. P'ship*, No. 05 C 0348, 2006 WL 1519320, at \*6–\*7 (N.D. Ill. May 31, 2006) (distinguishing *Halprin* as involving a claim of harassment and thus inapplicable to a claim alleging racially motivated denial of service); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*3 (M.D. Fla. May 2, 2005) (finding the *Halprin* court's view of post-acquisition FHA claims "inconsistent with the spirit of the Fair Housing Act, contrary to the Act's 'broad and inclusive' language, and at odds with a 'generous construction' of its provisions"); *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223 (S.D. Fla. 2005) (declining to extend *Halprin's* view of post-acquisition claims to planned communities where access to common areas was integral to home ownership).

#### IV. THE CASE FOR EXTENDING THE INTENTIONAL TARGETING TEST TO THE RENTALS SETTING

Part IV argues for extending the intentional targeting test to cases in which landlords intentionally provide substandard services or facilities to targeted minority groups. This Part begins by examining how federal courts adopted the intentional targeting test in cases of reverse redlining and then uses the principles from those cases to articulate a *prima facie* cause of action for intentional targeting in the rentals setting, including the required evidence. It concludes by highlighting both past judicial practice and notions of justice to support extending the intentional targeting test to the discriminatory provision of substandard rental services and conditions.

##### A. REVERSE REDLINING CASES AND CREATING THE INTENTIONAL TARGETING TEST

Thus far, reverse redlining has been the only area in which courts have directly confronted the inadequacies of the disparate treatment and disparate impact approaches to discrimination claims. Some courts have articulated the requirements of a reverse redlining claim as a variation of the traditional disparate treatment test under the FHA, requiring that plaintiffs demonstrate: (1) that they are members of a protected class; (2) that they applied for and were qualified for loans; (3) that the loans were given on grossly unfavorable terms; and (4) that the lender continues to give loans to other applicants with similar qualifications but on much more favorable terms.<sup>109</sup> Instead of alleging that they were treated differently, plaintiffs may argue that the defendant's conduct has a disparate impact on the targeted class.<sup>110</sup>

However, courts handling reverse redlining claims have approved an alternative approach: the intentional targeting test. One federal circuit court and several district courts have held that if plaintiffs provide evidence that the defendant intentional-

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109. *Barkley v. Olympia Mortgage Co.*, No. 04 CV 875 (RJD) (KAM), 2007 WL 2437810, at \*13 (E.D.N.Y. Aug. 22, 2007).

110. *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

ly targeted him for unfair loans based on their protected status, they “need not show that the defendant made loans on preferable terms to [others].”<sup>111</sup> Courts have justified allowing evidence of intentional targeting instead of evidence of disparate treatment or impact because “to hold otherwise would allow predatory lending schemes to continue as long as they are exclusively perpetrated upon one racial group.”<sup>112</sup> Furthermore, allowing a claim based on intentional targeting has been considered consistent with the FHA’s goals of “forbidd[ing] those practices that make housing unavailable to persons on a discriminatory basis as well as discriminatory terms and conditions with respect to housing that *is* provided.”<sup>113</sup>

In *Barkley v. Olympia Mortgage Co.*, one of the first cases to employ the intentional targeting test in reverse redlining claims, a group of first-time homebuyers brought suit against various real estate companies, lenders, appraisers, and attorneys.<sup>114</sup> The homebuyers claimed that the defendants targeted them because they were minorities and conspired to sell them over-priced and substandard homes with predatory loans.<sup>115</sup> As evidence of intentional racial discrimination, the plaintiffs claimed that one company, United Homes, utilized advertising that featured minority consumers.<sup>116</sup> The plaintiffs also claimed that United Homes placed advertisements in a “newspaper that serves the West Indian immigrant community, while not advertising in community papers that are part of the same newspaper chain but serve primarily white neighborhoods.”<sup>117</sup> Additional evidence of intentional targeting included allegations that the plaintiffs were shown homes only in minority neighborhoods and comments by United Homes representatives suggesting that the company engaged in racially discriminatory outreach strategies and had a Puerto Rican and African American customer base.<sup>118</sup> The court rejected

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111. *Steed v. EverHome Mortgage Corp.*, No. 08-13476, 308 Fed. App’x 364, 369 (11th Cir. 2009); *see also* *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874, 886–87 (S.D. Ohio 2002).

112. *Barkley*, 2007 WL 2437810, at \*14.

113. *Id.* (internal quotation marks omitted).

114. *Id.* at \*11.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*



the defendant's contention that a reverse redlining claim required evidence of disparate treatment or impact. Instead, the court found that, collectively, the plaintiffs' allegations of intentional targeting were sufficient to state a claim under the FHA and therefore denied the defendants' motion to dismiss.<sup>119</sup>

A slightly different intentional targeting test emerged in *Hargraves v. Capital City Mortgage Corp.*<sup>120</sup> In that case, African-American plaintiffs brought suit against a mortgage company for making predatory loans on a discriminatory basis.<sup>121</sup> In contrast to the *Barkley* court, the *Hargraves* court did not require that the plaintiffs be qualified for the discriminatory loans.<sup>122</sup> Rather, the court stated that to make a claim of reverse redlining, the plaintiffs need only show that "the defendants' lending practices and loan terms were 'unfair' and 'predatory,' and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race."<sup>123</sup> In holding that the plaintiffs need not show that the defendants made loans on more favorable terms outside the targeted group, the court noted the following allegations as sufficient to plead an intentional targeting claim: The defendants (1) utilized brokers who work primarily in the black community; (2) distributed flyers and advertisements in black communities; (3) placed their offices in black communities, and (4) hung a picture of mortgage company's president standing with several local and national black leaders by the office entrance.<sup>124</sup> As the following section demonstrates, *Hargraves*, *Barkley*, and the other reverse redlining cases have laid the foundation for tenants to bring a viable claim against landlords who exclusively target certain ethnic or racial groups for providing substandard rental conditions and services.

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119. *Id.* at 15.

120. 140 F. Supp. 2d 7, 18 (D.D.C. 2000).

121. *Id.* at 14.

122. *Id.*

123. *Id.* at 20.

124. *Id.* at 21.



B. INTENTIONAL TARGETING IN THE RENTAL SETTING: THE  
PRIMA FACIE CASE

Adapting the intentional targeting test to the rentals setting, a prima facie case of discriminatory provision of rental facilities would require plaintiffs to show: (1) they are a member of a protected class; (2) they were intentionally targeted for the provision of substandard rental services or conditions based on their protected status; and (3) they were provided substandard rental services or conditions. The first element is fairly straightforward, and the third element will turn on the same factors used to assess breaches of the warranty of habitability.<sup>125</sup> The challenging part of the test, therefore, is the means utilized to show that a tenant was intentionally targeted based on a protected status.

The reverse redlining cases discussed above suggest the evidence to which a court could refer in the absence of similarly situated tenants who lack protected status. The most convincing evidence of intentional targeting would be explicit landlord statements exposing their invidious intentions to rent to particular racial groups for providing substandard facilities or services. However, less overt evidence of intentional targeting should suffice as well. For example, a property manager's advertising that exclusively features black renters may be considered evidence of the manager's desire to target African Americans for providing shoddy apartments or services. Similarly, a landlord's placing advertisements exclusively in newspapers aimed at, say, Hispanic immigrants could support a showing of intentional targeting. Courts may also consider the fact that a landlord places advertisements mainly or only in particular minority communities or that a landlord advertises exclusively in a language associated with a particular ethnic group.

C. JUSTIFICATIONS FOR EXTENDING THE INTENTIONAL  
TARGETING TEST

Extending the intentional targeting test to the rentals setting is a necessary and justifiable application of civil rights law. As the reverse redlining cases demonstrate, the federal courts have

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125. See *supra* note 28.

not hesitated to expand civil rights doctrine to more adequately effectuate the goals of anti-discrimination legislation. The Supreme Court made a similar move in the seminal case *Griggs v. Duke Power Co.*<sup>126</sup> There, a class of black employees challenged a company's requirement that applicants for particular positions have a high school education or pass a standardized intelligence test.<sup>127</sup> The court of appeals held that the requirement was valid under the Civil Rights Act of 1964 so long as the company's motivation was not discriminatory.<sup>128</sup> The Court stated that the clear purpose of the Act was to achieve equal employment opportunities and "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."<sup>129</sup> Reversing the Fourth Circuit's requirement that plaintiffs show discriminatory intent, the Court held that, under the Act, practices that are both neutral on their face and in their intent are unlawful "if they operate to 'freeze' the status quo of prior discriminatory employment practices."<sup>130</sup>

The Supreme Court's approval in *Griggs* of a new type of claim under the Civil Rights Act — discriminatory effect — should be a model for federal courts' approach to intentional targeting in the property rentals setting. As in *Griggs*, courts today must recognize that they need to adapt judicial doctrine to the circumstances in which housing discrimination arises to allow civil rights laws to more fully achieve their remedial purposes. Therefore, tenants who are victims of racial or ethnic exploitation should not be barred from obtaining relief simply because their landlords do not rent to tenants outside the protected class.

Plaintiffs living with substandard services or premises would also gain distinct benefits by bringing an intentional targeting claim under federal civil rights laws rather than bringing claims under the traditional doctrines of habitability and constructive eviction. First, allowing intentional targeting claims under civil rights laws would bring habitability-oriented claims within the scope of fair housing and other civil rights organizations' missions, thus increasing the number of organizations who could

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126. 401 U.S. 424 (1971).

127. *Id.*

128. *Id.* at 428–29.

129. *Id.* at 429–30.

130. *Id.* at 430.

seek relief for victimized tenants. Moreover, in addition to compelling a landlord to make any necessary repairs or provide vital services, an aggrieved tenant would be able to obtain other equitable relief, such as requiring the landlord to adopt an anti-discrimination policy for its employees and agents, the violation of which would result in termination. A court could also compel the landlord to cease any advertising or marketing strategies designed to attract only particular racial or ethnic groups. Lastly, a court could require a landlord who is found guilty of discriminatory conduct to undergo fair housing training or place fair housing posters on its premises, apprising prospective and current tenants of their housing rights.<sup>131</sup> These remedies highlight not only the condemnable failure of landlords to provide habitable living quarters but also the egregious motives behind their failure.

## V. CONCLUSION

Since the Fair Housing Act was passed in 1968, housing discrimination has evolved from the exclusion of certain groups to encompass the provision of substandard rental facilities and services to vulnerable populations. Because such discrimination often occurs where there is no similarly situated group of tenants to which the victimized class can compare its treatment, the disparate treatment and disparate impact analyses that presently govern housing discrimination jurisprudence are inadequate to properly redress victims' grievances or to deter future discrimination by owners and landlords. Therefore, courts must extend the intentional targeting test from reverse redlining cases to situations in which owners and landlords exclusively rent to certain ethnic or racial groups for the purpose of providing substandard rental conditions. The above discussion of the Civil Rights Act of 1866 and the Fair Housing Act shows that there is some room for these provisions to accommodate intentional targeting claims regarding discrimination that occurs after a lease's inception. Such an accommodation is crucial if these statutes are to persist as invaluable tools in the fight against housing discrimination.

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131. See, e.g., *S. Cal. Hous. Rights Ctr. v. Krug*, 564 F. Supp. 2d 1138, 1148–49 (C.D. Cal. 2007).