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POST-ACQUISITION HARASSMENT AND THE SCOPE OF THE FAIR HOUSING ACT

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I. INTRODUCTION

In January of 2001, Robyn and Rick Halprin became co-owners of a home in Chicago, Illinois.[1] Over the course of that winter, the Halprins endured a pattern of religiously motivated harassment based on Rick's Jewish faith.[2] According to the most recent court to consider the case, the harassment they suffered was "invidiously motivated," involved the Halprins' "neighbors' ganging up on them," and was "backed by the [local] homeowners' association."[3] The harassment targeting the Halprins included both vandalism to their property and an alleged cover-up of the responsible parties.[4] "H-town property" was scrawled in red marker on the stone wall in front of the Halprins' home,[5] and plants, trees, and holiday light displays were damaged or destroyed on their property.[6] When the Halprins began to investigate the vandalism, they were allegedly met with harassment, intimidation, and interference.[7] According to the Halprins, the defendants altered correspondence regarding an eye-witness to the vandalism;[8] attempted to remove physical evidence in the Halprins' yard;[9] threatened to force the Halprins to sell their home;[10] altered written minutes of the homeowners' association board meetings to conceal wrongdoing;[11] and destroyed a tape recording of one board meeting at which a defendant threatened to "make an example" of the Halprins.[12]

The abuse suffered by the Halprins led them to federal court where they filed suit alleging harassment based on religion under the federal Fair Housing Act (FHA).[13] In the course of that litigation, the district court granted a motion to dismiss the Halprins' claims because the alleged discriminatory and harassing actions did not occur in the context of the sale or rental of

1. Second Amended Complaint at 5, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 208 F. Supp. 2d 896 (N.D. Ill. 2002) (No. 01-C-4673).
2. *Id.* at 6-7.
3. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004).
4. *See id.* The *Halprin* case remains in litigation. *See* United States District Court for the Northern District of Illinois, Civil Docket for Case # 1:01-CV-04673, Halprin, et al. v. Prairie Single, et al. at https://ecf.ilnd.uscourts.gov/cgi-bin/DktRpt.pl?259316980705-L_923_0-1 (last visited on Sept. 1, 2006).
5. Second Amended Complaint, *supra* note 1, at 8.
6. *Id.* at 7-8.
7. *See id.* at 8-17.
8. *Id.* at 10-11.
9. *Id.* at 9.
10. *Id.* at 11.
11. *Id.*
12. *Id.* at 12 (internal quotation marks omitted).
13. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 208 F. Supp. 2d 896, 899 (N.D. Ill. 2002), *aff'd in part, rev'd in part*, 388 F.3d 327 (7th Cir. 2004). The Halprins also brought claims under applicable state law. *See id.*

housing.[14] In the district court's view, the plaintiffs' allegations "fail[ed] to implicate concerns expressed by Congress in the FHA."[15]

On appeal, the Seventh Circuit ordered that one of the Halprins' FHA claims be reinstated.[16] However, the court's decision was based not on the FHA alone but also on the existence of an administrative rule promulgated by the Department of Housing and Urban Development (HUD)[17] that expressly prohibits unlawful conduct interfering with persons "in their enjoyment of a dwelling."[18] Because that rule's language clearly encompassed the defendants' alleged conduct—and, importantly, because defense counsel never challenged the validity of the rule, which, according to the court, "may stray too far" from the FHA to be valid[19]—the Halprins' harassment suit survived.[20]

This appellate victory may have been a Pyrrhic one, however, as the Seventh Circuit adopted an unusually narrow interpretation of the FHA in the course of eventually siding with the Halprins. Breaking with most courts that have considered this issue,[21] the Seventh Circuit ruled that post-acquisition harassment is not actionable under the FHA itself, contending that nothing in the text or legislative history of the FHA reflects "a concern with anything but *access* to housing."[22] Because the Halprins did not claim any interference with their acquisition of housing but simply that they were harassed based on their religious beliefs after they obtained housing,[23] their allegations fell outside the protected ambit of the FHA.[24] In other words, the

14. *Id.* at 900-03.

15. *Id.* at 904. When the district court dismissed the Halprins' federal FHA claims, it also dismissed without prejudice their state law claims over which it initially exercised supplemental jurisdiction. *Id.* at 905-06. Subsequently, when the Seventh Circuit reinstated one of the Halprins' FHA claims, it also reinstated their supplemental state law claims. *See Halprin*, 388 F.3d at 330-31.

16. *Halprin*, 388 F.3d at 330-31.

17. *Id.* at 330.

18. 24 C.F.R. § 100.400(C)(2) (2006).

19. *Halprin*, 388 F.3d at 330 (explaining that the defendants had waived an appellate challenge to the validity of the same HUD rule); *see also* Walton v. Claybridge Homeowners Ass'n, No. 06-1914, 2006 WL 2243902, at *2 (7th Cir. Aug. 2, 2006) (same); East-Miller v. Lake County Highway Dep't, 421 F.3d 558, 562 n.1 (7th Cir. 2005) (same).

20. *See Halprin*, 388 F.3d at 330.

21. *See, e.g.*, United States v. City of Hayward, 36 F.3d 832, 835-36 (9th Cir. 1994); Sofarelli v. Pinellas County, 931 F.2d 718, 722 (11th Cir. 1991); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288 n.5 (7th Cir. 1977); Egan v. Schmock, 93 F. Supp. 2d 1090, 1092-93 (N.D. Cal. 2000); Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 239-43 (E.D.N.Y. 1998); Johnson v. Smith, 810 F. Supp. 235, 238-39 (N.D. Ill. 1992); Stackhouse v. DeSitter, 620 F. Supp. 208, 211 (N.D. Ill. 1985). *See generally* discussion *infra* Part III.A-C and accompanying notes. However, according to the Seventh Circuit in *Halprin*, no decision recognizing a post-transaction dimension to the FHA "contains a *considered* holding on the scope of the Fair Housing Act in general or its application to a case like the present one in particular." 388 F.3d at 329.

22. *See Halprin*, 388 F.3d at 329.

23. *Id*. For the purposes of this Article, harassment that is alleged to have occurred after a sale or rental transaction has been completed is referred to as "post-acquisition harassment," tracking language employed by the Seventh Circuit. *See Halprin*, 388 F.3d at 330 (observing that "we know that § 3604 is not addressed to post-acquisition discrimination"); *see also* Richards v. Bono, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *2-*5 (M.D. Fla. May 2, 2005) (discussing the FHA's application to claims of post-acquisition harassment).

24. *See* 388 F.3d at 329-30.

Halprins' fair housing claims survived not *because of* the FHA but *in spite of* it.[25]

The reaction to *Halprin* has been swift. Defendants in subsequent housing harassment cases have begun relying on the decision to urge a narrow reading of the FHA that would exclude claims of post-acquisition harassment, and lower courts are struggling to make sense of the divergent judicial opinions on the issue.[26] At least one district court in Texas has apparently agreed with the Seventh Circuit, concluding that the HUD rule protecting occupancy of housing is an invalid extension of the protections afforded by the FHA.[27] Concerned reactions have also come from housing rights advocates and from local lawmakers worried that the Seventh Circuit's decision may begin to erode important federal protections for minority groups.[28] The full extent of *Halprin*'s repercussions are unclear at this point; however, the Seventh Circuit's reasoning, if applied in future cases, would result in a significantly restricted ambit for the FHA, one limited only to claims of discrimination occurring during a real estate transaction.

Because it creates a split of circuit authority and threatens established civil rights protections, the Seventh Circuit's decision provides a useful opportunity to reconsider the proper scope of the FHA. The subject of housing harassment, in general, has received significant scholarly attention in the recent past;[29] however, no commentator has focused on the concept of post-

25. *See id.* at 330.

26. *See, e.g.*, George v. Colony Lake Prop. Owners Ass'n, No. 05 C 5899, 2006 WL 1735345, at *2 (N.D. Ill. June 16, 2006) (addressing claim that *Halprin* invalidated 24 C.F.R. § 100.400(c)(2)); United States v. Altmayer, 368 F. Supp. 2d 862, 862-63 (N.D. Ill. 2005); *see also* East-Miller v. Lake County Highway Dep't, 421 F.3d 558, 562 n.1 (7th Cir. 2005) (recognizing the question of § 100.400(c)(2)'s validity left open by the decision in *Halprin*); Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. Civ. A. H-05-3197, 2005 WL 2669480, at *4 n.4 (S.D. Tex. Oct. 19, 2005) (stating that the court "adopts the Seventh Circuit view that 24 C.F.R. § 100.400(c)(2) is invalid").

27. *See Reule*, 2005 WL 2669480, at *4 n.4.

28. *See, e.g.*, Craig Gurian, Executive Dir. of the Anti-Discrimination Ctr. of Metro New York, Inc., Testimony before the New York City Council, Comm. on Gen. Welfare, Intro 22A of the Local Civil Rights Restoration Act (Apr. 14, 2005), at 3, http://www.antibiaslaw.com/legislation/CenterTestimony0405.pdf (arguing in favor of a local civil rights law necessitated, in part, because of decisions like *Halprin* that "threaten to gut the protections of the Fair Housing Act"); Chi. Lawyers' Comm. for Civil Rights Under Law, *Case Report: Halprin v. Prairie Family Homes of Dearborn Park Assoc., 2004 WL 2475106 (7th Cir. Nov. 4, 2004)*, CHI. AREA FAIR HOUSING ALLIANCE NEWSL. (Chicago Area Fair Housing Alliance, Chicago, IL), Feb. 2005, at 3, *available at* www.state.il.us/dhr/Housenet/ Private/CAFHA/News_Feb_05.doc (warning about the potentially "wide-spread, negative effect" of the *Halprin* decision, which "deviates from almost 40 years of common understanding and legal precedent" on FHA issues).

29. Much of the recent academic literature in this area has addressed sexual harassment. *See, e.g.*, Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17 (1998); Deborah Dubroff, *Sexual Harassment, Fair Housing, and Remedies: Expanding Statutory Remedies into a Common Law Framework*, 19 T. JEFFERSON L. REV. 215 (1997); Theresa Keeley, *An Implied Warranty of Freedom From Sexual Harassment: The Solution for Harassed Tenants Where the Fair Housing Act Has Failed*, 38 U. MICH. J.L. REFORM 397 (2005); Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 LAW & INEQ. 351 (2000); Maggie E. Reed et al., *There's No Place Like Home: Sexual Harassment of Low Income Women in Housing*, 11 PSYCHOL. PUB. POL'Y & L. 439 (2005); Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of section 3604(c)*, 2002 WIS. L. REV. 771; Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061; Carlotta J.

acquisition harassment or evaluated the validity of the underlying assumption that the FHA does, in fact, protect against harassment occurring after housing has been secured. With the current schism in federal case law as a backdrop, and with incidents of violence, intimidation, and harassment targeting minorities in housing continuing today,[30] this Article reconsiders the concept of housing discrimination and inquires whether there are solid legal and policy justifications to continue protecting post-acquisition harassment under the FHA.

Part II briefly reviews several restrictive judicial interpretations of the FHA's scope, putting the Seventh Circuit's *Halprin* decision in context. Part III then analyzes various arguments set forth by the *Halprin* court to limit the scope of the FHA. This analysis also tracks the basic framework used by the Supreme Court in its analysis of the FHA in *Trafficante v. Metropolitan Life Insurance Co.*,[31] focusing on the text of the FHA, underlying congressional intent, and the applicability of Title VII to an interpretation of the FHA. Finally, Part IV considers two policy-based arguments bearing on whether the FHA should be read expansively to include a post-transaction dimension. Included in this discussion is a brief treatment of the role that post-acquisition harassment has played in the creation and maintenance of residential segregation. Ultimately, I reject the limiting arguments of the Seventh Circuit and conclude that the FHA is properly interpreted as encompassing claims not only of pre-access discrimination but also of harassment occurring after occupation begins.

II. *HALPRIN* AND OTHER NARROW READINGS OF THE FHA

As discussed throughout the remainder of this Article, many courts considering allegations of post-acquisition harassment have concluded that such claims are encompassed by the FHA. Not all courts agree, however. In particular, a number of courts have interpreted § 3604 in a restrictive manner,

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Roos, Case Note, Dicenso v. Cisneros*: An Argument for Recognizing the Sanctity of the Home in Housing Sexual Harassment Cases*, 52 U. MIAMI L. REV. 1131 (1998).

30. *See, e.g.*, Jeff Bennett, *'Mother Parks, Take Your Rest': 'Rosa May Have Lived Here, But Detroit is Still Racist*,*'* CHI. SUN-TIMES, Nov. 3, 2005, at 7 (reporting that the FBI is investigating cross-burnings at four black-owned homes in four different Detroit suburbs over the summer of 2005); Ray Weiss, *Cross Burning Doesn't Scare Family*, DAYTONA BEACH NEWS J., Jan. 19, 2006, at 1C (reporting data from the Southern Poverty Law Center that approximately one cross-burning per week is reported nationwide at a home of an interracial couple or an African-American family); Press Release, U.S. Dep't of Justice, Two Men Convicted for Criminal Interference with Housing Rights (Mar. 14, 2005), http://www.usdoj.gov/opa/pr/2005/March/05_crt_121.htm [hereinafter March 14 Press Release] (announcing convictions of two men for "a series of racially harassing incidents," including burning a cross near an African-American family's home, hanging a noose on their doorknob, and throwing a dead raccoon in their yard); Press Release, U.S. Dep't of Justice, Statement of Alice H. Martin, U.S. Attorney, N. Dist. of Ala. (Mar. 9, 2006), http://www.usdoj.gov/usao/aln/ (follow "Press Releases" link to March 9, 2006 release) (describing "Operation Home Sweet Home," launched by the U.S. Department of Justice to expose and eliminate housing discrimination and reporting that areas where Hurricane Katrina victims have relocated "have experienced a significant volume of bias-related crimes like cross burnings or assaults on minorities").

31. 409 U.S. 205, 209 (1972).

making it inapplicable after the housing transaction has been completed. More troubling, perhaps, are the recent opinions in the *Halprin* litigation, which significantly undercut the viability of § 3617 as a vehicle for housing harassment claims.

A. Restrictive Interpretations of § 3604

Section 3604(a) of the FHA states, in part, that a person may not refuse "to sell or rent . . . or otherwise make unavailable or deny" housing on a prohibited basis.[32] In perhaps not an unreasonable reading of this language, some courts have construed § 3604(a) as protecting only access to housing. In a 1984 decision, for example, the Seventh Circuit concluded that § 3604(a) "is violated [only] by discriminatory actions, or certain actions with discriminatory effects, that affect the availability of housing."[33] In rejecting the plaintiffs' claims in that case that § 3604(a) protected them post-acquisition, the court observed that § 3604(a) "is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons, but it does not protect . . . intangible interests in . . . already-owned property . . . ."[34] Echoing a similar approach, an Illinois district court recently concluded that the FHA "does not create a private right of action to ensure habitability."[35] In particular, that court held that the proper scope of § 3604(a) "is limited to the refusal to sell or rent housing and thus does not apply once the property has actually been rented."[36] Noting that the plaintiff in that case had "merely alleged discrimination in the maintenance of her apartment and did not allege discrimination in connection with the renting of her unit," the court held she had stated no claim under § 3604(a).[37] Several other courts have taken similarly narrow approaches to § 3604(a), explicitly rejecting claims brought by plaintiffs for discrimination and harassment occurring after occupancy began.[38]

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32. 42 U.S.C. § 3604(a) (2000).

33. Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984).

34. *Id.*; *see also* Smart Unique Servs. Corp. v. Mortgage Correspondence of Ill., No. 94 C 1397, 1994 WL 274962, at *3 (N.D. Ill. June 16, 1994).

35. Ross v. Midland Mgmt. Co., No. 02 C 8190, 2003 WL 21801023, at *4 (N.D. Ill. Aug. 1, 2003).

36. *Id.*

37. *Id.* at *4. The Seventh Circuit and Illinois district court decisions referenced in this paragraph dealt with property values and maintenance issues, respectively, not harassment allegations. *See Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210; *Ross*, 2003 WL 21801023, at *4. Nevertheless, the courts' discussions of § 3604(a) were not limited to those factual scenarios; instead, the courts opined broadly on the applicability of § 3604(a) to disputes where no denial of housing exists.

38. *See, e.g.*, Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714, 719 (D.C. Cir. 1991) (explaining that § 3604(a) "reach[es] only discrimination that adversely affects the availability of housing"); Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1143 (S.D. Fla. 2004) (concluding that "sections 3604(a) and (b) are limited to conduct that directly impacts the accessibility to housing because of a protected classification"); Miller v. City of Dallas, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at *13 (N.D. Tex. Feb. 14, 2002) (concluding that because plaintiffs owned their homes, they had no viable claim under § 3604(a)); Campbell v. City of Berwyn, 815 F. Supp. 1138, 1143 (N.D. Ill. 1993) (holding that § 3604(a) claim must allege conduct detrimental to plaintiffs' ability, as potential homebuyers or renters, to locate in a particular area or to secure housing); Laramore v. Ill.

Section 3604(b)'s language is arguably broader than that of § 3604(a), making it unlawful to discriminate 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 a listed reason.[39] Although this language has been interpreted as encompassing post-acquisition claims,[40] a number of courts have found it ambiguous enough to deny such coverage.

One area of dispute involving § 3604(b) centers on whether the phrase "in connection therewith" refers narrowly to "the sale or rental of a dwelling" or broadly to "dwelling."[41] Several courts have adopted the former interpretation, requiring the alleged discrimination to have occurred at the time of the housing transaction to trigger FHA liability; no claim of harassment or discrimination occurring after the time of sale or rental would be cognizable under § 3604(b). In *Laramore v. Illinois Sports Facilities Authority*, for example, the district court considered this question and concluded that "the most natural reading of the statute is the narrower reading."[42] As a result, the court rejected plaintiffs' claim that the FHA protected them against acts of alleged racial discrimination in the siting of a sports stadium in their neighborhood.[43] Several other courts have taken a similarly narrow view of the phrase "in connection therewith" contained in § 3604(b).[44] The most restrictive of these cases would limit the scope of § 3604(b) to acts of discrimination in the provision of services that actually preclude sales or rentals of housing.[45] However, none of these courts has

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Sports Facilities Auth., 722 F. Supp. 443, 452 n.5 (N.D. Ill. 1989) (concluding that § 3604(a) "concerns only 'the *availability* of housing'" (quoting *Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1209-10)).

39. 42 U.S.C. § 3604(b) (2000).

40. *See infra* notes 89-91 accompanying text.

41. *See* 42 U.S.C. § 3604(b) (2000).

42. 722 F. Supp. at 452.

43. *Id.*

44. *See Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210; Ross v. Midland Mgmt. Co., No. 02 C 8190, 2003 WL 21801023, at *4 (N.D. Ill. Aug. 1, 2003); Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 208 F. Supp. 2d 896, 901 (N.D. Ill. 2002), *aff'd in part, rev'd in part*, 388 F.3d 327 (7th Cir. 2004); Farrar v. Eldibany, No. 04 C 3371, 2004 WL 2392242, at *4 (N.D. Ill. Oct. 15, 2004). In support of a reading of § 3604(b) limited to pre-possession claims, the D.C. Circuit's decision in *Clifton Terrace Associates v. United Technologies Corp.*, 929 F.2d 714 (D.C. Cir. 1991), has been frequently cited by courts. *See, e.g.*, *Ross*, 2003 WL 21801023, at *4. Such reliance appears misplaced. The court in *Clifton Terrace* did note that § 3604(b) is "limited to services and facilities provided in connection with the sale or rental of housing." 929 F.2d at 720. However, the court then concluded that § 3604(b) is "directed at those who provide housing and *then discriminate in the provision of attendant services or facilities*." *Id.* (emphasis added). At issue in *Clifton Terrace* was whether an elevator company could face FHA liability for alleged racial discrimination in refusing to service elevators in a low-income housing complex. *Id.* at 716. The D.C. Circuit concluded that FHA liability would not lie in such a case because the responsibility of providing § 3604(b) services and facilities falls on the "provider of housing—the owner or manager of the property," not a third party. *Id.* at 720. Accordingly, while the *Clifton Terrace* decision does not support a broad right to post-acquisition relief under the FHA, it does support a narrow class of post-acquisition claims—those brought against owners or managers of property who unlawfully discriminate in the provision of services and facilities attendant to possession.

45. *See* Cox v. City of Dallas, No. Civ. A. 398CV1763BH, 2004 WL 370242, at *6-*8, (N.D. Tex. Feb. 24, 2004) (concluding that "section 3604(b) applies only to discrimination in the provision of services that precludes the sale or rental of housing"). Other courts have reigned in the scope of § 3604(b) by concluding that the provision applies only to services generally supplied by governmental entities,

engaged in a thorough analysis of either the relevant statutory language or legislative intent underlying § 3604.

B. Halprin *and the Roles of §§ 3604 and 3617 in Housing Harassment Litigation*

Within the universe of courts narrowly construing the FHA's post-acquisition scope, the district and appellate court decisions in the *Halprin* litigation, introduced earlier, appear to be among the most restrictive.

In considering the Halprins' allegations of religious harassment, the district court found that no viable claim existed under § 3604(a) because the Halprins "already owned their home, and their allegations do not relate to the availability of housing as required under section 3604(a)."[46] Turning to § 3604(b), the court rejected the Halprins' interpretation of that provision as encompassing post-sale harassment. The Seventh Circuit, according to the district court, has "implicitly adopted a narrow reading of the 'services or facilities' language in § 3604(b) by describing the subsection as a 'prohibition against discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling.'"[47] Citing the D.C. Circuit "that 'services' in § 3604(b) means services in connection with the *acquisition* of housing, not its *maintenance*, [the court determined that] § 3604[b] applies to discrimination in services such [as] insurance and pricing that effectively *preclude ownership* of housing . . . ."[48]

Turning to the Halprins' § 3617 claim, the district court first concluded without analysis that where the same allegedly unlawful behavior underlies a party's § 3617 and § 3604 claims, and where a court finds the § 3604 claim meritless, "the court should also find the § 3617 claim meritless."[49] Because the Halprins' § 3617 claim was founded on the same alleged behavior that supported their § 3604 claim, the court held that the Halprins had failed to state a claim under § 3617 as well.[50] Nevertheless, the district court went on to substantively consider the alleged conduct under § 3617.[51] Citing cases involving firebombings, physical assaults, cross-burnings, and arson, the district court observed that § 3617 has been applied to "threaten-

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such as police protection. *See* Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 424 (4th Cir. 1984); *Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210; *Ross*, 2003 WL 21801023, at *4.

46. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 208 F. Supp. 2d 896, 900 n.1 (N.D. Ill. 2002).

47. *Id.* at 901 (quoting *Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210) (emphasis omitted).

48. *Id.*

49. *Id.* at 903 (citing South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 886 (7th Cir. 1991)); Cass v. Am. Props., Inc., No. 94 C 2977, 1995 WL 132166, at *3 (N.D. Ill. Feb. 27, 1995); Baxter v. City of Belleville, 720 F. Supp. 720, 728 (S.D. Ill. 1989).

50. *Halprin*, 208 F. Supp. 2d at 903.

51. *See id.*; *see also* United States v. Koch, 352 F. Supp. 2d 970, 974 n.3 (D. Neb. 2004) (noting the contradiction in the *Halprin* trial court's reasoning, which evaluated the severity of defendants' alleged conduct under § 3617, despite having previously determined that no § 3617 claim could exist because plaintiffs' § 3604 claims failed).

ing, intimidating, or extremely violent discriminatory conduct designed to drive an individual out of his home."[52] Expressing its concern not to "federalize [all] dispute[s] involving residences and people who live in them,"[53] the district court concluded that the Halprins' allegations "fail to implicate concerns expressed by Congress in the FHA," justifying dismissal of their § 3617 claim.[54]

On appeal, the Seventh Circuit appeared to take an even narrower approach to the text of the FHA.[55] Regarding the Halprins' § 3604(a) and (b) claims, the Seventh Circuit agreed that those provisions "indicate[] concern with activities, such as redlining, that prevent people from acquiring property."[56] Because the Halprins were not prevented from buying and moving into their home, the court concluded that "it is difficult to see how they can have been interfered with in the enjoyment of any right conferred on them by section 3604."[57] Although the court acknowledged that constructive eviction resulting from one's house being burned down *might* trigger § 3604(b) liability if the phrase "privileges of sale or rental" were construed to include "the privilege of inhabiting the premises," it noted that no prior decision recognizing post-acquisition claims contains a "*considered* holding on the scope of the [FHA] in general or its application to a case like the present one in particular."[58]

In this context, the Seventh Circuit took special aim at cases defining the scope of the FHA by reference to Title VII, which protects against employment discrimination. According to the court, while Title VII "protects the job holder as well as the job applicant," the FHA "contains no hint either in its language or its legislative history of a concern with anything but *access* to housing."[59] Instead, the court opined, the FHA reflects a congressional concern with the common practice of refusing to rent or sell housing in desirable areas to members of minority groups; accordingly, because "the focus was on their exclusion, the problem of how they were treated when

52. *Halprin*, 208 F. Supp. 2d at 903-04.

53. *Id.* at 904 (quoting United States v. Weisz, 914 F. Supp. 1050, 1054 (S.D.N.Y. 1996)) (internal quotation marks omitted). This concern over potentially federalizing common, ordinary neighbor-to-neighbor disputes arises periodically in decisions restricting the FHA to pre-access claims. *See, e.g.*, Gourlay v. Forest Lake Estates Civic Ass'n, Inc., 276 F. Supp. 2d 1222, 1235-36 (M.D. Fla. 2003) (expressing its fear that the FHA might become "an all purpose cause of action for neighbors of different races, origins, faiths . . . to bring neighborhood feuds into federal court when the dispute has little or no actual relation to housing discrimination"), *vacated by* No. 8:02CV1955T30TGW, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003); Sporn v. Ocean Colony Condo. Ass'n, 173 F. Supp. 2d 244, 251 (D.N.J. 2001) (concluding that the FHA does not "impose a code of civility" on neighbors, nor does it "require that neighbors smile, say hello or hold the door for each other"). While there may be a certain superficial attractiveness to this argument, it ignores the ability of judges to draw appropriate lines in hard cases. *See infra* Part III.D.1.

54. *Halprin*, 208 F. Supp. 2d at 904.

55. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004).

56. *Id.* at 328.

57. *Id.* at 329.

58. *Id.*

59. *Id.*

they were included, that is, when they were allowed to own or rent homes in such areas, was not at the forefront of congressional thinking."[60]

After agreeing with the district court's conclusion that the Halprins had no viable § 3604 claim, the Seventh Circuit observed that:

> [T]his might seem to doom their claim under section 3617 as well, because that section provides legal protection only against acts that interfere with one or more of the other sections of the Act that are referred to in section 3617, of which the only one even remotely relevant to this case is section 3604.[61]

That would be the result, it appears, were it not for the existence of 24 C.F.R. § 100.400(c)(2), a rule promulgated by HUD to implement the FHA—a rule whose validity the defendants in *Halprin* never challenged in district court.[62] According to the rule, it is unlawful to threaten, intimidate, or interfere "with persons in their enjoyment of a dwelling."[63] Although the Seventh Circuit opined that the rule "may stray too far from section 3617 . . . to be valid," the defendants forfeited that argument.[64] Noting that the Halprins alleged "a *pattern* of harassment, invidiously motivated . . . [that was] backed by the homeowners' association," the court concluded that the situation was "far from a simple quarrel between two neighbors or [an] isolated act of harassment."[65] Accordingly, the Seventh Circuit reversed and remanded the case for reinstatement of the Halprins' claims under § 3617 based on the existence of 24 C.F.R. § 100.400(c)(2).[66]

III. EVALUATING THE POST-ACQUISITION SCOPE OF THE FHA

Although the Halprins were allowed to go forward in the trial court, the Seventh Circuit's decision casts serious doubt on the continued viability of the FHA to support similar claims. Defendants in subsequent FHA lawsuits have begun directly challenging both the post-acquisition scope of the FHA and the validity of the HUD rule that ultimately saved the Halprins on ap-

60. *Id.*

61. *Id.* at 330. In a later case, the Seventh Circuit clarified its ruling on § 3617 in *Halprin*: "[W]e held that [§ 3617] literally provided a cause of action only for plaintiffs who complain about discrimination in acquiring, rather than simply enjoying, property." Walton v. Claybridge Homeowners Ass'n, No. 06-1914, 2006 WL 2243902, at *2 (7th Cir. Aug. 2, 2006) (citing *Halprin*, 388 F.3d at 328-30).

62. *Halprin*, 388 F.3d at 330.

63. *Id.*; 24 C.F.R. § 100.400(c)(2) (2006).

64. 388 F.3d at 330. In two Seventh Circuit cases decided subsequent to *Halprin* involving post-acquisition harassment under the FHA, the parties again waived the specific question of whether § 100.400(c)(2) is an invalid extension of § 3617. *See Walton*, 2006 WL 2243902, at *2-*3; East-Miller v. Lake County Highway Dep't, 421 F.3d 558, 562 n.1 (7th Cir. 2005).

65. 388 F.3d at 330. In reaching this conclusion, the Seventh Circuit rejected the defendants' argument that the claimed events are "far less ominous, frightening, or hurtful" than cases in which § 3617 claims were found to be stated, explaining that "[t]here are other, less violent but still effective, methods by which a person can be driven from his home and thus 'interfered' with in his enjoyment of it." *Id.*

66. *Id.* at 330-31.

peal.[67] And at least one district court appears to agree with the Seventh Circuit's narrow reading of the FHA.[68] To better gauge the merits of these positions, this Part evaluates the primary concerns raised, but not thoroughly explored, in the Seventh Circuit's decision—namely, that neither the text nor legislative history of the FHA supports a post-acquisition dimension to the statute, and analogies to Title VII in this context are inapposite.

A. Textual Support for a Post-Acquisition Dimension to the FHA

To determine the intended scope of the FHA, the proper starting point is its language.[69] According to the Seventh Circuit, "the language" of the FHA "contains no hint . . . of a concern with anything but *access* to housing."[70] While it is true that the FHA most clearly prohibits discriminatory conduct that occurs prior to rental or sale, so limiting the FHA's ambit would be possible only through an unnatural reading of the statute. In fact, the words chosen by Congress throughout the FHA clearly suggest some post-access scope, even if that scope is not always articulated with clarity.

Congressional intent appears obvious beginning in the FHA's definitions. For example, the FHA defines a "[d]welling" not only as a structure "*intended for occupancy* as[] a residence,"[71] which presumably would be sufficient if the FHA were focused solely on discrimination precluding sale or rental, but also as a structure "which *is occupied* as . . . a residence."[72] Extending FHA coverage to *occupied* structures necessarily creates some post-acquisition scope for the statute. To counter this interpretation, it might be argued that the FHA extends protection to a person who suffers discrimination in the rental process—for example, being forced to pay a higher rent solely because of the tenant's race—even if that person actually succeeds in securing housing. As a result, the "dwelling" discriminatorily rented out could be actually occupied at the time of suit, making the FHA's preoccupation scope consistent with the FHA's definition of "dwelling" as including already occupied structures.[73] While this scenario is possible, the FHA suit

67. *See, e.g.*, United States v. Altmayer, 368 F. Supp. 2d 862, 862-63 (N.D. Ill. 2005); *see also East-Miller*, 421 F.3d at 562 n.1 (recognizing that the question of § 100.400(c)(2)'s validity was left open by the decision in *Halprin*).

68. *See* Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. Civ. A. H-05-3197, 2005 WL 2669480, at *4 n.4 (S.D. Tex. Oct. 19, 2005) (stating that the court "adopts the Seventh Circuit view that 24 C.F.R. § 100.400(c)(2) is invalid").

69. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) ("The starting point for [the] interpretation of a statute is always its language."); *see also* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (noting that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

70. *Halprin*, 388 F.3d at 329.

71. 42 U.S.C. § 3602(b) (2000) (emphasis added).

72. *Id.* (emphasis added).

73. In *Williamsburg Fair Housing Committee v. New York City Housing Authority*, 493 F. Supp. 1225 (S.D.N.Y. 1980), *aff'd without opinion*, 647 F.2d 163 (2d Cir. 1981), the district court determined that a prima facie FHA case had been established where defendants utilized a 75/20/5 quota system for Caucasians, Hispanics, and African-Americans, respectively. *Id.* at 1247-48. The court reached this conclusion despite the fact that "no person was permanently denied an apartment, or rejected outright,

in such a case would likely allege discrimination in the "terms, conditions, or privileges of sale or rental" under § 3604(b);[74] that is, discrimination occurring during the *process* of renting the dwelling.[75] At the time such discrimination would have occurred, the dwelling in question would still have been "intended for occupancy."[76] Such a scenario, then, would not justify the FHA's inclusion of "occupied" structures within the statute's definition of "dwelling."

The substantive prohibitions of the FHA provide further support for a post-acquisition dimension. Beginning with § 3604,[77] subsection (a) 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" a protected status.[78] This language has been interpreted by some courts to be "as broad as Congress could have made it."[79] By its terms, § 3604(a) prohibits not just the improper refusal to sell, rent, or negotiate—prohibitions clearly focused on barriers to access—but also any act that makes housing "otherwise . . . unavailable."[80] This broad language would prohibit, for example, the burning down of an African-American family's recently purchased home before the family has a chance to move in; in that scenario, § 3604(a) would apply prepossession. However, the language of this provision is expansive enough to cover situations in which existing housing is subsequently made unavailable as a result of violence or threats of violence. For example, if the home the African-American family moves into is later destroyed by arson, housing has been made "otherwise . . . unavailable" post-acquisition. Even the Seventh Circuit in *Halprin* appears to grudgingly recognize this possibility: "As a purely semantic matter the statutory language might be stretched far

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because of the quota." *Id.* at 1248; *see also* United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978) (concluding that FHA plaintiffs "need only establish that race was a consideration and played some role in the real estate transaction"), *superseded by statute*, 42 U.S.C. § 3614 (2000), *as recognized in*, United States v. City of Jackson, 359 F.3d 727, 737 (5th Cir. 2004).

74. 42 U.S.C. § 3604(b) (2000).

75. *See Williamsburg Fair Hous. Comm.*, 493 F. Supp. at 1248 (explaining that, under § 3604(b), "[a]n applicant need not actually be 'denied' a rental").

76. *See* 42 U.S.C. § 3602(b).

77. Beyond the cases discussed in this Part, a number of other courts have either explicitly or implicitly found the FHA to extend post-acquisition. *See, e.g.*, Krueger v. Cuomo, 115 F.3d 487, 491-92 (7th Cir. 1997) (recognizing post-acquisition scope of § 3604 in the sexual harassment context); Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714, 720 (D.C. Cir. 1991) (recognizing that § 3604(b) addresses habitability of premises); Betsey v. Turtle Creek Assoc., 736 F.2d 983, 988 (4th Cir. 1984) (ruling that plaintiffs had made out a prima facie case of harassment under § 3604, where such harassment occurred post-acquisition); Whisby-Myers v. Kiekenapp, 293 F. Supp. 2d 845, 851-52 (N.D. Ill. 2003) (rejecting claim that § 3604 bars only discrimination in connection with a real estate transaction); Marthon v. Maple Grove Condo. Ass'n, 101 F. Supp. 2d 1041, 1052 (N.D. Ill. 2000) (refusing to dismiss plaintiff's post-acquisition disability harassment claim under § 3604); Schroeder v. De Bertolo, 879 F. Supp. 173 (D.P.R. 1995) (same, disability context).

78. 42 U.S.C. § 3604(a).

79. *See, e.g.*, Steptoe v. Beverly Area Planning Ass'n, 674 F. Supp. 1313, 1318 (N.D. Ill. 1987) (quoting Zuch v. Hussey, 366 F. Supp. 553, 557 (E.D. Mich. 1973)) (internal quotation marks omitted).

80. 42 U.S.C. § 3604(a).

enough to reach a case of 'constructive eviction' . . . ."[81] Section 3604(a) has even been suggested by a court to extend to the firebombing of an African-American's personal property in an attempt to drive him out of a white neighborhood.[82] Whether harassment in any particular case would be severe enough to justify a legal conclusion under § 3604(a) that housing had been made "unavailable" would be a question for the fact finder; however, there is no textual reason to categorically reject the viability of harassment claims under § 3604(a) simply because such claims might occur post-acquisition.

Section 3604(b) contains similarly broad pre- and post-access language, prohibiting discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith."[83] Courts and HUD have interpreted its language as covering discriminatory practices that occur during the sales or rental process, including discrimination in appraisals or lending,[84] the imposition of security deposits,[85] the setting of rental rates,[86] and the utilization of a quota or preference system,[87] among others.[88] While pre-access discrimination is clearly prohibited by § 3604(b), its language has also been read to extend to a broad range of post-acquisition claims. For example, denying access to pools or other common areas[89] or to cleaning or janitorial services[90] on a prohibited basis has been held actionable under § 3604(b). In this context, the right to occupy housing free of unlawful harassment has been held to be a protected

81. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004). An alternative reading of the Seventh Circuit's opinion might be that the FHA *does* protect occupants of housing from acts of harassment—but only acts severe enough to result in constructive eviction. This reading would arguably be consistent with the court's emphasis on the FHA protecting "access" to housing. Although this interpretation might be less controversial, it does not fully and accurately reflect the court's opinion in *Halprin*. The court expressly stated that the plaintiffs were "complaining not about being prevented from acquiring property but about being harassed by other property owners," making § 3604 inapplicable. *Id.* According to the court, the forcing of "unwanted associations that might provoke efforts at harassment" was not considered during passage of the FHA. *Id.* Although the court does reference "constructive eviction" and "expulsion" from housing, it appears unconvinced that even acts of violence driving a family from its home would violate the terms of the FHA itself. *See id.* (critiquing decisions applying the FHA to acts of harassment resulting in constructive eviction as not containing a "*considered* holding on the scope of the [FHA] in general or its application to a case like the present one in particular").

82. *See* Stackhouse v. DeSitter, 620 F. Supp. 208, 211 n.6 (N.D. Ill. 1985).

83. *See* 42 U.S.C. § 3604(b).

84. *See, e.g.*, Steptoe v. Savs. of Am., 800 F. Supp. 1542, 1545-57 (N.D. Ohio 1992).

85. *See, e.g.*, Brown v. Lo Duca, 307 F. Supp. 102, 105-06 (E.D. Wis. 1969).

86. *See, e.g.*, Harris v. Itzhaki, 183 F.3d 1043, 1053 (9th Cir. 1999).

87. *See, e.g.*, Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., 493 F. Supp. 1225 (S.D.N.Y. 1980), *aff'd without opinion*, 647 F.2d 163 (2d Cir. 1981).

88. Regulations promulgated by HUD to implement the FHA provide several scenarios that would violate both the regulations and § 3604(b), including disparate treatment with respect to rental charges, security deposits, down payments, and the terms of a lease. *See* 24 C.F.R. § 100.65(b) (2006).

89. *See, e.g.*, Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1292-93 (C.D. Cal. 1997) (ruling that apartment complex rule prohibiting children from playing in common area violated § 3604(b)); United States v. M. Westland Co., CV-93-4141, 3 Fair Hous. Fair Lend. (P-H) ¶ 15,941 (C.D. Cal. Aug. 3, 1994) (same, children's use of billiards room and shuffleboard facility).

90. *See* HUD Preamble I, 53 Fed. Reg. 44,992, 45,001 (Nov. 7, 1988) (citing H.R. REP. NO. 100-711, at 23 (1988)) (commenting on 24 C.F.R. § 100.202(b), which prohibits discrimination in the provision of services or facilities because of handicap).

"privilege" accompanying the sale or rental of a dwelling. In the words of one district court, "it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein; therefore the [FHA] should be (and has been) read to permit the enjoyment of this privilege without discriminatory harassment."[91]

The disability provisions of § 3604 provide further textual support for a post-access dimension to the FHA. Section 3604(f)(1) and (f)(2) largely track the substantive prohibitions contained in § 3604(a) and (b), but they apply those prohibitions to discrimination associated with a person's handicapped status. At least one district court has expressly addressed the post-acquisition scope of § 3604 in the area of disability harassment. In *Schroeder v. De Bertolo*, the plaintiffs alleged that the decedent, who suffered from mental disabilities, had been harassed and discriminated against during her occupancy of a condominium unit.[92] Defendants claimed that § 3604(f) prevented discrimination "only in the sale or rental of housing accommodations."[93] Because the decedent had purchased her condominium unit, the defendants argued, she had already exercised her right to acquire a dwelling, taking her out of the protected ambit of § 3604(f).[94] The district court, however, rejected this "narrow interpretation" of § 3604(f), holding instead that the statute's phrase "to otherwise make unavailable or deny" served to "sweep[] activities which go beyond the initial sale or rental transaction under the scope of the section."[95] Once the decedent purchased her condominium unit, according to the court, "her housing rights did not terminate."[96] Instead, she had "the continuing right to quiet enjoyment and use of her condominium unit and common areas in the building."[97]

Subsection (f) of § 3604 contains additional textual reasons to recognize a post-acquisition dimension. For example, among other persons whose handicap triggers FHA protection under § 3604(f)(1) and (f)(2) is any "*person residing in* or intending to reside in that dwelling after it is so sold, rented, or made available."[98] If the FHA were to apply only to barriers to housing, the protections of § 3604(f)(1) and (f)(2) should apply only where

91. United States v. Koch, 352 F. Supp. 2d 970, 976 (D. Neb. 2004); *see also* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004) (noting that "[i]f you burn down someone's house you make it 'unavailable' to him, and 'privileges of sale or rental' might conceivably be thought to include the privilege of inhabiting the premises").

92. 879 F. Supp. 173, 175-76 (D.P.R. 1995).

93. *Id.* at 176.

94. *Id.*

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

96. *Id.* at 176-77.

97. *Id.* at 177.

98. 42 U.S.C. § 3604(f)(1)(B) (2000) (emphasis added). Similarly, under 42 U.S.C. § 3604(f)(3)(A), discrimination occurs when there is a refusal to undertake or allow reasonable modifications to "existing premises occupied or to be occupied by" a person with a handicap. Once again, Congress chose to extend the scope of the FHA not simply to dwellings that would be occupied at some point in the future—which would have clearly limited the FHA to pre-access disputes—but also to "existing premises occupied" presently by persons with handicaps. *Id.* This necessarily extends FHA protection post-access.

a handicapped person "*intend*[s] to reside"[99] in the dwelling after it is sold or rented. By explicitly including in subsection (f) any "person *residing in*"[100] such dwelling, Congress unmistakably indicated that § 3604(f) prohibits discriminatory conduct occurring after occupancy begins. In fact, judging by the lawsuits filed under § 3604(f)(1) and (2), disability harassment disputes do frequently arise post-access.[101]

Further evidence that the FHA is concerned with more than mere access is found in § 3604(f)(3)'s requirement that dwellings be modified to "afford . . . full enjoyment of the premises"[102] or to "afford . . . equal opportunity to use and enjoy a dwelling."[103] Because § 3604(f)(1) and (2) already specifically addresses denial of access and discriminatory conditions or privileges of sale or rental, the guarantees of use and enjoyment in § 3604(f)(3) must mean something more.[104] If, instead, Congress meant to extend the FHA not just to denials of housing but also to denials of reasonable access to housing, which would be logical in the context of disabilities, Congress could have specifically required "reasonable access to the premises" or used similar language; it did not do so. Instead, the language chosen by Congress in § 3604(f)(3) is quite expansive, and it should be interpreted to mean what it says.[105] Although the right "to use and enjoy a dwelling"[106] might be abridged when reasonable access to housing is denied, that right might also be abridged post-access.

The text of § 3617 provides additional reason to interpret the FHA as protecting more than mere "access to housing." Section 3617 makes it unlawful "to coerce, intimidate, threaten, or interfere with any person" in three contexts: (1) "in the exercise or enjoyment of . . . any right granted or protected by [§§ 3604-3606 of the FHA]"; (2) "on account of his having

99. *Id.* § 3604(f)(1)(B), (2)(B) (emphasis added).

100. *Id.* (emphasis added).

101. *See, e.g.*, Neudecker v. Boisclair Corp., 351 F.3d 361, 364-65 (8th Cir. 2003) (recognizing a FHA claim where plaintiff alleged that he suffered unwelcome harassment because of his mental disability while he was a tenant at the defendant's apartment complex); Radecki v. Joura, 114 F.3d 115 (8th Cir. 1997) (involving claims of harassment and unlawful eviction under § 3604(f)); Anast v. Commonwealth Apartments, 956 F. Supp. 792, 800-01 (N.D. Ill. 1997) (involving claims of harassment and unlawful eviction under § 3604(f)); Valenti v. Salz, No. 94 C 7053, 1995 WL 417547 (N.D. Ill. July 13, 1995) (involving claims of harassment and unlawful eviction under § 3604(f)); Roe v. Sugar River Mills Assocs., 820 F. Supp. 636 (D.N.H. 1993) (involving claim of disability discrimination brought under § 3604(f) by existing tenant against landlord). For an evaluation of the competing legal obligations that arise in the context of housing the mentally disabled, see Frederic White, *Outing the Madman: Fair Housing for the Mentally Handicapped and their Right to Privacy Versus the Landlord's Duty to Warn and Protect*, 28 FORDHAM URB. L.J. 783, 799-802 (2001).

102. 42 U.S.C. § 3604(f)(3)(A).

103. *Id.* § 3604(f)(3)(B).

104. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995) (citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)) (restating and applying the rule of construction that statutes should not be read to "render[] some words altogether redundant").

105. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (identifying that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case"); *see also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989).

106. 42 U.S.C. § 3604(f)(3)(B).

exercised or enjoyed . . . any right granted or protected by [§§ 3604-3606 of the FHA]"; or (3) "on account of his having aided or encouraged any other person in the exercise or enjoyment of[] any right granted or protected by [§§ 3604-3606 of the FHA]."[107] This provision, which has been interpreted by HUD as making a "broad range of activities" unlawful,[108] has also been found by courts to reach "all practices which have the effect of interfering with the exercise of rights under the [FHA]."[109]

It is important to recognize in this context that § 3617 expressly prohibits coercion, intimidation, threats, or interference "on account of [a person's] having exercised or enjoyed" a right under §§ 3604-3606.[110] Because this language is couched in the past tense—the person has already "exercised or enjoyed" a FHA right[111]—the real estate transaction in question is not prospective. The person either is currently in possession or was denied housing. If the applicant were denied housing, a claim would exist under § 3604(a). If the person obtained housing but under discriminatory terms or conditions, a claim would exist under § 3604(b). Assuming that § 3617 is not intended to duplicate protection already afforded under § 3604, the only reasonable option remaining is that the § 3617 claimant obtained housing without suffering any discrimination and is in actual possession when the wrongful conduct occurs. Any other reading would render at least a portion of § 3617[112] redundant of other FHA protections.[113] Indeed, many—but not

107. 42 U.S.C. § 3617.

108. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3,232, 3,257 (Jan. 23, 1989) (codified at 24 C.F.R. § 100.400) [hereinafter HUD Preamble II].

109. United States v. Am. Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977); *see* United States v. City of Hayward, 36 F.3d 832, 835 (9th Cir. 1994).

110. 42 U.S.C. § 3617. Other language in § 3617 could possibly support post-acquisition suits, as well. For example, if a landlord threatened or intimidated Tenant A for assisting Tenant B in obtaining legal advice for a potential FHA claim, Tenant A would have a viable § 3617 claim against the landlord because the harassment would have occurred "on account of [Tenant A] having aided or encouraged [Tenant B] in the exercise or enjoyment" of a fair housing right. *See id.* Such a claim could exist after both Tenant A and Tenant B were in possession of their dwellings. However, suits under this language in § 3617 usually involve threats or intimidation directed at persons who help others obtain *access* to housing. *See, e.g.*, Gonzalez v. Lee County Hous. Auth., 161 F.3d 1290, 1301-05 (11th Cir. 1998); Stackhouse v. DeSitter, 620 F. Supp. 208, 211 (N.D. Ill. 1985); Meadows v. Edgewood Mgmt. Corp., 432 F. Supp. 334, 334-35 (W.D. Va. 1977).

111. 42 U.S.C. § 3617. An additional distinction in this context has been drawn between "exercised" and "enjoyed." *See* United States v. Koch, 352 F. Supp. 2d 970, 979 n.8 (D. Neb. 2004). If a woman, for example, rents an apartment and receives all the terms, privileges, and benefits as do other tenants, she has acquired housing free from discrimination under § 3604. *Id.* In so doing, in the language of § 3617, the woman has effectively "exercised" a "right granted or protected" by § 3604. *See* 42 U.S.C. § 3617. Once in possession, the tenant can be seen as "enjoy[ing]" that same right. If she subsequently is threatened or intimidated by her landlord because of her gender, the tenant suffers harassment *because* she exercised and enjoyed her right to acquire housing free from discrimination under § 3604. *Koch*, 352 F. Supp. 2d at 979 n.8. Such harassment occurring post-rental constitutes unlawful conduct on the part of the landlord under a plain reading of § 3617.

112. Although such a narrow reading would create redundancy in the context of a post-acquisition claim under the "on account of his having exercised or enjoyed" language of § 3617, *see* 42 U.S.C. § 3617, it might not necessarily do so for all claims cognizable under § 3617. For example, § 3617 prohibits unlawful conduct against a person "on account" of that person "having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected" by §§ 3604-3606. *Id.* A narrow reading of § 3617 would require there to have been an underlying act of discrimination in the occupant's acquisition or attempted acquisition of housing; however, any claim for such discrimination under §§

all—courts considering this issue have properly determined that § 3617 claims may exist independently,[114] and even in the absence, of a viable claim under §§ 3604-3606. Reflecting this approach, the Ninth Circuit has noted that § 3617 may be violated where "no discriminatory housing practice [i.e., no discrimination at the outset of occupancy] may have occurred at all."[115] Under similar reasoning, one district court concluded that "[w]hether or not the firebombing of [plaintiff's] house violated any other section of the Fair Housing Act, this brutal act falls squarely within the parameters of section 3617."[116]

Some of the clearest textual evidence of the intended post-acquisition scope of the FHA is contained in 42 U.S.C. § 3631. Although § 3631 was passed as part of Title IX of the Civil Rights Act of 1968[117] and §§ 3601-

3604-3606 by the occupant would presumably not extend to and cover the person who "aided or encouraged" the occupant and who also suffered coercion, intimidation, threats, or interference "on account" of that action. *See id.*

113. *See* Hibbs v. Winn, 542 U.S. 88, 101 (2004) (citing and applying the rule that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 181-86 (rev. 6th ed. 2000)) (internal quotation marks omitted)). At one time, an advantage did accrue to litigants separating out their § 3617 claims even where the alleged wrongful conduct occurred during the course of a housing transaction. Prior to 1988, conduct violating § 3617 was not considered a "[d]iscriminatory housing practice" under the FHA, which resulted in § 3617 claims being exempted from the FHA's statutory limitations period. *See, e.g.*, People v. Merlino, 694 F. Supp. 1101, 1103 (S.D.N.Y. 1988) (determining that § 3617 claim is not covered by FHA's limitations period applicable to discriminatory housing practices). After the 1988 amendments to the FHA, however, § 3617 claims expressly became claims of "[d]iscriminatory housing practice[s]" under the FHA, subject to the same limitations periods applicable to § 3604 claims. *See* 42 U.S.C. § 3602(f) (2000) (defining "[d]iscriminatory housing practice" as including "an act that is unlawful under . . . §§ 3604, 3605, 3606, or 3617").

114. The question of whether a § 3617 claim is viable in the absence of a claim under §§ 3604-3606 is an especially important question in the harassment context because harassment claims can and do arise where the plaintiff has experienced no discrimination in the actual acquisition of housing. Most, though not all, courts addressing this question have concluded that a § 3617 claim can exist in the absence of a pleaded claim under §§ 3604-3606. *See, e.g.*, *City of Hayward*, 36 F.3d at 836; Sofarelli v. Pinellas County, 931 F.2d 718, 722 (11th Cir. 1991); Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1288 n.5 (7th Cir. 1977) (assuming but declining "to decide whether § 3617 can ever be violated by conduct that does not violate [§§ 3603, 3604, 3605 or 3606]"); Egan v. Schmock, 93 F. Supp. 2d 1090, 1092-93 (N.D. Cal. 2000); Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 239-43 (E.D.N.Y. 1998); Johnson v. Smith, 810 F. Supp. 235, 238-39 (N.D. Ill. 1992); *Stackhouse*, 620 F. Supp. at 210. However, not all courts agree. *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004) (concluding that because the plaintiffs were found to have no claim under § 3604, "this might seem to doom their claim under section 3617 as well, because that section provides legal protection only against acts that interfere with one or more of the other sections of the Act that are referred to in section 3617"); Frazier v. Rominger, 27 F.3d 828, 834 (2d Cir. 1994) (holding that § 3617 "prohibits the interference with the exercise of Fair Housing rights only as enumerated in [§§ 3603-3606], which define the substantive violations of the Act"). This comment has been interpreted as suggesting that "plaintiffs, once having secured their housing, have no right under the FHA to be free from interference with the peaceful enjoyment of their home by one not associated with its sale or rental." *Ohana*, 996 F. Supp. at 241.

115. *City of Hayward*, 36 F.3d at 836 (quoting Smith v. Stechel, 510 F.2d 1162, 1164 (9th Cir. 1975)) (internal quotation marks omitted); *see also* Seaphus v. Lilly, 691 F. Supp. 127, 139 (N.D. Ill. 1988) (concluding that a § 3617 claim could lie where plaintiff allegedly suffered racial harassment after purchasing a home); Waheed v. Kalafut, No. 86 C 6674, 1988 WL 9092, at *4 (N.D. Ill. Feb. 2, 1988) (holding that firebombing of plaintiff's home fell within the scope of conduct prohibited by § 3617).

116. Stirgus v. Benoit, 720 F. Supp. 119, 123 (N.D. Ill. 1989).

117. 114 CONG. REC. 5983-6003 (1968); *see* Jean Eberhart Dubofsky, *Fair Housing: A Legislative*

3619 were originally passed as Title VIII of the same Act, § 3631 is frequently cited as part of the FHA.[118] Section 3631 makes it a crime to use force or the threat of force to injure, intimidate, or interfere with a person in their exercise of various housing rights.[119] To violate § 3631, the wrongful conduct must be "because of [the] race, color, religion, sex, handicap . . . , familial status . . . , or national origin [of the person]" and must occur "because [the person] is or has been selling, purchasing, renting, financing, *occupying*, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling."[120] The breadth of this congressional language is important.[121] Congress chose to bring within the ambit of § 3631 not simply illegal acts aimed at persons *attempting to gain access* to housing ("contracting or negotiating for the sale, purchase, rental, financing or occupation") but also such acts directed at persons *already in possession* of housing ("occupying").[122] Indeed, many—if not most—prosecutions under § 3631 arise in the post-acquisition context and involve actual or threatened physical assaults or other forms of harassment.[123]

All of the statutory language discussed in this section[124] demonstrates that Congress must have intended the FHA to address housing disputes be-

History and a Perspective, 8 WASHBURN L.J. 149 (1968); Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733, 750 n.87.

118. The fair housing statutory provisions appear in chapter 45 of Title 42 of the United States Code. Subchapter I of the chapter is entitled, "Generally" and contains §§ 3601 through 3619. Subchapter II is subtitled, "Prevention of Intimidation" and contains § 3631. Chapter 45 has been organized this way since the sections first appeared in the United States Code. The placement of § 3631 in the chapter of the Code titled Fair Housing suggests that Congress intended it to be part of what was eventually referred to as the FHA even though it was not part of Title VIII of the Civil Rights Act of 1968. The confusion may stem simply from the fact that Title VIII was drafted by the House and Title IX was added by the Senate. Since the passage of the Civil Rights Act, § 3631 has been cited as part of the FHA. *See, e.g.*, Preferred Props., Inc. v. Indian River Estates, Inc., 276 F.3d 790, 794 (6th Cir. 2002) (citing the FHA as 42 U.S.C. §§ 3601-3631); Walker v. City of Lakewood, 272 F.3d 1114, 1121 (9th Cir. 2001) (same); Comer v. Cisneros, 37 F.3d 775, 781 (2d Cir. 1994) (same); Gibson v. County of Riverside, 181 F. Supp. 2d 1057, 1062 (C.D. Cal. 2002) (same). Substantive amendments to § 3631 in 1974 and 1988 also tracked those to Title VIII. The text of Public Law 103-322, section 320103(e) also supports this argument. It reads, "Section 901 of the Fair Housing Act (42 U.S.C. 3631) is amended." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320103(e), 108 Stat. 1796, 2110.

119. 42 U.S.C. § 3631 (2000).

120. *Id.* § 3631(a) (emphasis added).

121. For a treatment of how § 3631's legislative history bears on the FHA's post acquisition scope, see *infra* notes 252-267 and accompanying text.

122. *See* 42 U.S.C. § 3631(a).

123. *See, e.g.*, United States v. Vartanian, 245 F.3d 609, 611 (6th Cir. 2001) (upholding conviction under § 3631 based on threats of injury and death associated with a black family's purchase of a home in a white neighborhood); United States v. Hartbarger, 148 F.3d 777, 779 (7th Cir. 1998) (upholding conviction for burning cross in yard of black family in white neighborhood), *overruled on other grounds*, United States v. Colvin, 353 F.3d 569, 576 (7th Cir. 2003); United States v. McInnis, 976 F.2d 1226, 1228-29 (9th Cir. 1992) (upholding conviction for firing rifle into home of black family); United States v. Wood, 780 F.2d 955, 961-62 (11th Cir. 1986) (upholding conviction for physical attacks because of the victims' association with persons of other races in their homes); *see also* United States v. Hayward, 6 F.3d 1241, 1250 (7th Cir. 1993) (identifying as the purpose of § 3631(b) the protection of a person's right to associate with others in his home without regard to race), *overruled on other grounds*, United States v. Colvin, 353 F.3d 569, 576 (7th Cir. 2003).

124. The FHA's post-acquisition scope is reflected in other parts of the statute as well. For example, § 3605 prohibits discrimination in the lending of money "for purchasing, constructing, *improving*, *repairing*, or *maintaining* a dwelling." 42 U.S.C. § 3605(b)(1)(A) (2000) (emphasis added). While it is

yond simple denials of accommodation.[125] At this surface level, then, the FHA's language is inconsistent with the Seventh Circuit's conclusion that the FHA contains "no hint . . . of a concern with anything but *access* to housing."[126] In particular, the plain language of § 3617 appears specifically to reach harassment and intimidation occurring post-acquisition. Where there is such textual clarity, there is no requirement that a court delve into the morass of a statute's legislative history; in such a case, in fact, resorting to legislative history is contra-indicated.[127] Nevertheless, and because the precise scope of the FHA's language may be open to reasonable debate, the legislative history of the FHA should be considered when attempting to define the contours of the statue's protections.[128]

possible that a purchaser of a dwelling might improve, repair, or maintain that dwelling before ever actually moving into it, a more reasonable interpretation of this statutory language is that it applies post-acquisition. Indeed, if a new owner of a dwelling were being loaned money to repair or maintain the dwelling pre-access, it is likely that the loan for repair or maintenance would be folded into the loan amount for the purchase price of the dwelling.

125. Even if the text of the FHA is not construed to extend post-acquisition, § 100.400(c)(2) of HUD's rules explicitly prohibits "[t]hreatening, intimidating or interfering with persons in their *enjoyment* of a dwelling." *See* 24 C.F.R. § 100.400(c)(2) (2006) (emphasis added). Although the *Halprin* court remanded the plaintiffs' claims because of the existence of this rule, it appeared to do so reluctantly, noting that "[t]he regulation may stray too far from section 3617 . . . to be valid." Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004). Following the Seventh Circuit's lead, litigants in subsequent FHA disputes have directly attacked the validity of § 100.400(c)(2). *See, e.g.*, United States v. Altmayer, 368 F. Supp. 2d 862, 862-63 (N.D. Ill. 2005). The only federal decision to express an opinion on the validity of the rule post-*Halprin* concluded, without explanation, that the rule is invalid because it applies post-acquisition. *See* Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. Civ. A. H-05-3197, 2005 WL 2669480, at *4 n.4 (S.D. Tex. Oct. 19, 2005). This Article does not separately evaluate the validity of § 100.400(c)(2); however, one of the central questions in such an evaluation would be whether the FHA protects occupancy or enjoyment of a dwelling, which is the central focus of this Article. Under a full analysis, § 100.400(c)(2) would appear likely to survive as a "reasonable interpretation" of the FHA, particularly since an agency's construction of a statute it administers is entitled to "considerable weight." *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984). This is especially true because courts "normally accord particular deference to an agency interpretation of 'longstanding' duration." *See* Barnhart v. Walton, 535 U.S. 212, 220 (2002) (quoting North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 522 n.12 (1982)). Section 100.400(c)(2) was promulgated in its current form in 1989. *See* HUD Preamble II, *supra* note 108, at 3291. Furthermore, both § 100.400(c)(2) and other HUD rules reflect a consistent interpretation of the FHA by HUD to include at least some post-acquisition coverage. For example, HUD's rules refer to "sale, rental or *occupancy*" of dwellings, 24 C.F.R. § 100.10(a)(1) (emphasis added), unlawfully failing to make necessary repairs or delaying such repairs, *id.* § 100.65(b)(2), and improperly denying loans for the maintenance of dwellings, *id.* § 100.125(a).

126. *Halprin*, 388 F.3d at 329.

127. *See* Whitfield v. United States, 543 U.S. 209, 216 (2005) (concluding that silence in legislative history does not justify modification of statute's clear text); Barnhill v. Johnson, 503 U.S. 393, 401 (1992) (appeals to legislative history are well taken only to resolve statutory ambiguity).

128. *See* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 n.1 (2004) (Stevens, J., concurring) ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than from ignoring it." (quoting Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 611 n.4 (1991)) (internal quotation marks omitted)).

B. Legislative History of the FHA

1. Social Context and Enactment

In the years immediately preceding the 1968 enactment of the FHA, significant racial tension gripped the country.[129] Civil rights advocates and members of minority groups were attacked and killed,[130] sometimes by police,[131] and race riots, with both physical and human tolls, exploded in U.S. cities from Los Angeles to Newark.[132] Problems between racial groups were so severe in the early 1960s that President Kennedy labeled racial discrimination "a moral issue" facing the United States.[133] In response, the federal government exerted pressure to force desegregation and integration.[134] A

129. For a more in-depth discussion of the social context of the FHA and the sequence of the events leading to its passage, see Dubofsky, *supra* note 117; *Historical Overview—Equal Opportunity in Housing*, 1 Fair Hous. Fair Lend. (P-H) ¶ 2301, at 2312-14 (1993) [hereinafter *Historical Overview*]; Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 207-12 (1978); and Comment, *supra* note 117, at 749-50.

130. In 1963, for example, civil rights leader Medgar Evers was killed by a sniper. Emanuel Perlmutter, *Mississippi Victim Lived With Peril in His Job; Leader's Wife Remains Determined*, N.Y. TIMES, June 13, 1963, at 12. During the same year, bombings at an Alabama church known for civil rights activism killed four young, black girls. John Herbers, *Funeral is Held for Bomb Victims; Dr. King Delivers Tribute of Rites in Birmingham; Points to 'Evil System'; 300 Ready to March*, N.Y. TIMES, Sept. 19, 1963, at 17. In 1964, three civil rights workers were killed in Mississippi by members of the Ku Klux Klan. Claude Sitton, *Chaney Was Given a Brutal Beating; Re-examination is Made of Slain Rights Worker*, N.Y. TIMES, Aug. 8, 1964, at 7. In 1966, civil rights protesters marched against housing discrimination in Chicago and met with violent opposition. Donald Janson, *Dr. King and 500 Are Jeered by Whites in 5-Mile Chicago March*, N.Y. TIMES, Aug. 22, 1966, at 1. In 1968, Rev. Martin Luther King, Jr. was assassinated. Paul Hoffman, *National Political, Labor and Religious Leaders Mourn Dr. King*, N.Y. TIMES, Apr. 6, 1968, at 27.

131. In 1965, fifty civil rights marchers were hospitalized after police in Alabama blocked their access to a bridge and then used tear gas, whips, and clubs on the marchers. Roy Reeds, *Alabama Police Use Gas and Clubs to Rout Negroes*, N.Y. TIMES, Mar. 8, 1965, at 1.

132. In 1963, race riots in Maryland prompted the imposition of modified martial law. Hedrick Smith, *Martial Law is Imposed in Cambridge, Md.*, N.Y. TIMES, July 13, 1963, at 1. In 1965, riots broke out in the Watts neighborhood of Los Angeles, eventually resulting in numerous deaths. Peter Bart, *2,000 Troops Enter Los Angeles on Third Day of Negro Rioting*, N.Y. TIMES, Aug. 14, 1965, at 1. In 1967, twenty-three people were killed in race riots in Newark and forty-three were killed in riots in Detroit. Other cities, including Washington, Kansas City, Chicago, and Baltimore, also suffered through violent race riots. Sydney H. Schanberg, *Sociologists Say Latest Riots Differ From Those of the Past*, N.Y. TIMES, Aug. 17, 1965, at 17.

133. John F. Kennedy, President of the U.S., Radio and Television Report to the American People on Civil Rights (June 11, 1963) (transcript available at http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm).

134. The Executive Branch was active in civil rights causes. In 1962, for example, President Kennedy ordered 400 federal marshals to oversee the matriculation of the University of Mississippi's first black student, amid race riots that killed two and injured 300. *See* Tom Dent, *Portrait of Three Heroes*, *reprinted in* REPORTING CIVIL RIGHTS: PART ONE 845, 845-56 (Library of Am. 2003); Kenneth L. Dixon, *Courthouse Square is Authentic Picture of Occupied Town*, THE MERIDIAN STAR, Oct. 2, 1962, at 1, *reprinted in* REPORTING CIVIL RIGHTS, *supra*, at 669, 669-70; George B. Leonard et al., *How a Secret Deal Prevented a Massacre at Ole Miss*, *reprinted in* REPORTING CIVIL RIGHTS, *supra*, at 671, 671-701. Also in that year, President Kennedy issued Executive Order No. 11063, which prohibited racial discrimination in federally owned housing. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962). Importantly for present purposes, this executive order expressly protected "occupancy" of housing. *Id.* The courts were also involved in race issues. For example, in 1967, sixteen states that prohibited interracial marriage were forced by the United States Supreme Court to revise their state laws. Loving v. Virginia, 388 U.S. 1 (1967).

significant component of the government's efforts to address racial tension was introduction and enactment of civil rights legislation in the 1960s.[135] The cause of federal housing legislation, in particular, was advanced by publication of the National Advisory Commission's Report on Civil Disorders on March 1, 1968.[136] The report stated in stark terms that "[o]ur nation is moving toward two societies, one black, one white—separate and unequal."[137] Among the commission's various recommendations was that a comprehensive and enforceable open housing law be enacted.[138]

Fair housing legislation was first introduced in Congress by the Johnson Administration in 1966.[139] Although both the House and Senate Judiciary Committees held extensive hearings on the proposed legislation, only the House Committee reported out an amended bill, which the full House subsequently passed.[140] The Senate never voted on fair housing legislation in 1966.[141] The following year, President Johnson tried once again, introducing a fair housing bill similar to the 1966 version.[142] In 1967, however, the House Judiciary Committee reported out a version of the President's proposed legislation that did not contain any fair housing provisions;[143] instead, that version, numbered H.R. 2516, addressed only protection of civil rights workers.[144] H.R. 2516 was passed by the House in late 1967.[145]

During the Senate's consideration of H.R. 2516, Senators Walter Mondale and Edward Brooke offered a floor amendment inserting fair housing guarantees into the bill. Although there were no committee hearings on the newly amended H.R. 2516, a subcommittee of the Senate Banking and Currency Committee had considered and reviewed the same language in August of 1967.[146] Heated debate on the Senate floor ensued.[147] In an effort to reach

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135. For example, in 1965 President Johnson signed the Civil Rights Act of 1964, enacting the most sweeping civil rights legislation enacted since Reconstruction. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000a-2000h (2000)). Also that year, President Johnson proposed and Congress passed a voting rights bill, prohibiting, among other things, the use of literacy tests for voter registration. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

136. *See* Dubofsky, *supra* note 117, at 158; Schwemm, *supra* note 129, at 208.

137. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) [hereinafter CIVIL DISORDERS].

138. *Id.* at 263.

139. *See Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States: Hearings Before Subcomm. No. 5 of the Comm. on the Judiciary*, 89th Cong. 1048-55 (1966) [hereinafter *Miscellaneous Proposals*] (letter from President Lyndon B. Johnson).

140. *See* 112 CONG. REC. INDEX 1183 (1966); *Historical Overview*, *supra* note 129, at 2312.

141. *See* 114 CONG. REC. 23,019-45 (1968); Comment, *supra* note 117, at 749 n.84.

142. *See* H.R. 5700 & S. 1026, 90th Cong. (1967); Schwemm, *supra* note 129, at 208.

143. 113 CONG. REC. 17,975 (reporting bill).

144. Schwemm, *supra* note 129, at 207-08.

145. *Id.* at 208.

146. *Hearings on S. 1358, S. 2114 and S. 2280 Relating to Civil Rights and Housing Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. 5 (1967) [hereinafter *Civil Rights and Housing*]; Schwemm, *supra* note 129, at 208 n.59; Comment, *supra* note 117, at 750 n.86.

147. *See, e.g.*, 114 CONG. REC. 23,019-45 (1968) (including Sen. Ervin's description of enforcement procedures contained in the Mondale-Brooke amendment as "rank a proposed prostitution of the judicial process as has ever been [put forward] in [this] nation"); *see* Comment, *supra* note 117, at 750 n.87.

a compromise bill with broader support for fair housing, the Mondale-Brooke amendment was eventually tabled in early 1968 to allow for a substitute amendment offered by Senator Everett Dirksen.[148] The Dirksen substitute also faced significant opposition.[149] The Senate ultimately passed H.R. 2516, containing the Dirksen substitute on fair housing, on March 11, 1968 by a vote of 71 to 20.[150] Additional support for H.R. 2516 was garnered, to a large extent, by publication of the National Advisory Commission's Report on Civil Disorders ten days before the Senate vote.[151]

After returning to the House on March 14, 1968, H.R. 2516 was sent to the House Rules Committee, where fears increased that the civil rights bill would die.[152] On April 4, 1968, however, Dr. Martin Luther King was assassinated.[153] That event, coupled with the ensuing social unrest, helped motivate the Rules Committee to report out the Senate version of H.R. 2516 without additional House amendments and without affording any other members of the House the opportunity to offer additional amendments.[154] As the House undertook final debate on H.R. 2516, National Guard troops preparing for possible riots in Washington were waiting in the basement of the Capitol.[155] After just an hour's debate, the House passed H.R. 2516, which contained the Dirksen substitute on fair housing, on April 10, 1968.[156] President Johnson signed the Civil Rights Act of 1968 into law on April 11, 1968.[157]

At least two observations can be drawn from the process of enacting the FHA as well as its social context. First, enactment of the FHA resulted, in part, from enormous social pressure. Significant and building racial tensions, grounded in concerns about unequal employment and housing opportunities, helped motivate passage of fair housing legislation in 1968 after the legislation had been largely stalled for two years. Second, passage of the FHA did not involve thoughtful, meticulous drafting or consideration of the statute's language. In fact, one commentator has referred to the "rather chaotic circumstances under which the law was passed."[158] Because the operative FHA language was adopted from floor amendments in the Senate, committee reports and other traditional sources of legislative history are unavailable.[159] In the words of the Third Circuit, the FHA's legislative his-

148. Dubofsky, *supra* note 117, at 155-58. Because it was introduced on the Senate floor, no Senate committee report exists considering the Dirksen substitute. *See* Comment, *supra* note 117, at 750 n.86.
149. Dubofsky, *supra* note 117, at 157-58.
150. *See* 114 CONG. REC. 5,983-6,003 (1968); Dubofsky, *supra* note 117, at 159; Comment, *supra* note 117, at 750 n.87.
151. *See* Dubofsky, *supra* note 117, at 158; Schwemm, *supra* note 129, at 208.
152. *See* Dubofsky, *supra* note 117, at 160.
153. Hoffman, *supra* note 130.
154. Dubofsky, *supra* note 117, at 160.
155. *Id.*
156. *Id.*
157. *Id.*; *see* 42 U.S.C. §§ 3601-3631 (2000).
158. Schwemm, *supra* note 129, at 209.
159. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 n.29 (3d Cir. 1977); Schwemm, *supra* note 129, at 209. Traditionally, the reports of legislative committees involved in drafting a statute and steering

tory is "somewhat sketchy,"[160] and according to the Supreme Court, that same history is "not too helpful"[161] as a guide to the statute's meaning. With an appreciation of both the social context that generated the FHA as well as the limitations of the statute's legislative history, the remainder of this Part evaluates available historical material in an effort to determine whether Congress intended the FHA to embody post-acquisition coverage.

2. Congressional Intent and Motivation

The historical record reveals that the primary focus during debate over fair housing legislation from 1966 to 1968 was the elimination of de facto racial segregation in housing—"a malady so widespread and so deeply imbedded in the national psyche that many Americans, Negroes as well as whites, have come to regard it as a natural condition"[162]—and its impacts on minority education, employment opportunities, and related issues. In his 1966 letter accompanying the initial draft of fair housing legislation, President Johnson focused on the critical role played by housing in alleviating the plight of many minorities:

> All the links—poverty, lack of education, underemployment and now discrimination in housing—must be attacked together. If we are to include the Negro in our society, we must do more than give him the education he needs to obtain a job and a fair chance for useful work. We must give the Negro the right to live in freedom among his fellow Americans.[163]

As explained by Representative Emanuel Celler during House debate over the FHA two years later, "Segregated housing isolates racial minorities from the public life of the community [and] means inferior public education, recreation, health, sanitation, and transportation services and facilities, and often means denial of access to training and employment and business op-

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it through Congress are principally relied upon when evaluating legislative history. *See* United States v. Nelson, 277 F.3d 164, 186 (2d Cir. 2002); *In re* Kelly, 841 F.2d 908, 912 n.3 (9th Cir. 1988) (explaining that "official committee reports . . . provide the authoritative expression of legislative intent"); Mills v. United States, 713 F.2d 1249, 1252 (7th Cir. 1983) (opining that "committee reports represent the most persuasive indicia of Congressional intent (with the exception, of course, of the language of the statute itself)").

160. *Resident Advisory Bd.*, 564 F.2d at 147.

161. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972).

162. 114 CONG. REC. 2280 (1968) (statement of Sen. Edward W. Brooke) (quoting *Civil Rights and Housing*, *supra* note 146, at 298).

163. *Miscellaneous Proposals*, *supra* note 139, at 1053 (letter from President Lyndon B. Johnson) (internal quotation marks omitted). Similar sentiments have echoed in the writing of commentators. *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 2 (1993) ("Because of racial segregation, a significant share of black America is condemned to experience a social environment where poverty and joblessness are the norm, where a majority of children are born out of wedlock, where most families are on welfare, where educational failure prevails, and where social and physical deterioration abound.").

portunities." [164] Calling segregation "deeply corrosive both for the individual and for his community," Representative Celler observed the appalling effects of segregation, such as deteriorated housing, crime, disease, and high infant mortality.[165] During earlier Senate debate, Senator Walter Mondale voiced a similar sentiment: "Declining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor will persist as long as discrimination forces millions to live in the rotting cores of central cities."[166] In the words of Senator Brooke, the FHA would "make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America."[167]

In debating the need for fair housing legislation, lawmakers also focused on the subjective impact of the ghetto. As Congress heard during testimony on the FHA, "The real evil in the ghetto effects is the rejection and humiliation of human beings. . . . [A] sense of humiliation goes all through the ghetto."[168] In Senator Mondale's view, fair housing legislation would have "great practical psychological significance to the Negro who has 'tried harder' and yet remains trapped in the ghetto for a lifetime."[169] Segregated housing, he explained, "is the simple rejection of one human being by another without any justification but superior power; we have closed our hearts to our fellow human beings to the extent that we have closed our neighborhoods to them."[170]

While the broader effects of segregation were clearly of concern to Congress, it is undeniable that the primary legislative focus during this process was to ensure nondiscriminatory *access* to housing. As a semantic matter, this emphasis is demonstrated by repeated shorthand references during congressional debates to the FHA as an "open housing" law, suggesting

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164. *To Prescribe Penalties for Certain Acts of Violence or Intimidation: Hearings Before the H. Comm. on Rules*, 90th Cong. 4 (1968) (statement of Rep. Emmanuel Celler).

165. BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II 1786 (1970).

166. 114 CONG. REC. 2274 (1968) (statement of Sen. Walter F. Mondale); *see also Civil Rights and Housing*, *supra* note 146, at 128 (statement of Reverend Robert F. Drinan, Dean, Boston College Law School) ("As is well known, Congress in 1957, 1960, 1964, and 1965 has pledged itself to the eradication of discrimination in education, employment, voting, and other crucial areas. But it seems to me that the failure of Congress to enact a fair housing law constitutes an indefensible omission in a series of interlocking laws designed to guarantee equality of opportunity."); 114 CONG. REC. 2276 (1968) (discussing testimony before Congress relating to the disproportionate location of new businesses in suburban areas and the failure of inner-city schools to adequately educate minority children); *id.* at 3421 ("[F]air housing is one more step toward achieving equality in opportunity and education for the Negro."); *id.* at 3422 ("It is impossible to ga[u]ge the degradation and humiliation suffered by a man in the presence of his wife and children—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.").

167. 114 CONG. REC. 2279 (1968) (statement of Sen. Edward W. Brooke); *see also id.* at 2707 (statement of Sen. Philip A. Hart) ("This problem of where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions.").

168. 114 CONG. REC. 2281 (1968) (testimony of Sen. Walter F. Mondale) (quoting *Civil Rights and Housing*, *supra* note 146, at 179 (testimony of Algernon D. Black, American Civil Liberties Union)) (internal quotation marks omitted).

169. 114 CONG. REC. 3421 (1968) (testimony of Sen. Walter F. Mondale).

170. *Id.* at 3422.

a focus on initial access to accommodation. As explained by Attorney General Ramsey Clark during congressional testimony in 1967, the proposed legislation would provide "open housing, housing unrestricted. It will eliminate widespread forced housing where racial minorities are barred from residential areas and confined to the ghetto and other segregated areas."[171] Senator Philip Hart echoed this sentiment, explaining that the legislation would "create a national policy of open housing that will greatly facilitate movement of people free from the artificial barriers of racial restrictions."[172] References to "open housing" legislation were also contained in the 1968 Report of the National Advisory Commission on Civil Disorders, which helped spur Congress to finally pass the FHA.[173] In particular, the report specifically recommended that Congress enact a "comprehensive and enforceable federal open housing law" to help curb the racial violence plaguing the country.[174]

Although the "open housing" label strongly suggests a focus on access to housing, the substance of congressional testimony received on the proposed legislation makes that focus absolutely clear. Over the course of thousands of pages of subcommittee, committee, and floor discussion of fair housing legislation from 1966 to 1968, members of Congress and others repeatedly described the legislation as targeting the sale and rental of housing. For example, when President Johnson first proposed a fair housing bill in 1966, his accompanying letter to Congress explicitly described the legislation as "cover[ing] the sale, rental and financing of all dwelling units."[175] During the same year, Attorney General Nicholas Katzenbach explained that the fair housing bill targeted, among other things, "discriminatory practices in the sale, rental or financing of housing."[176] In testimony on fair

171. *Civil Rights and Housing*, *supra* note 146, at 6 (statement of Att'y Gen. Ramsey Clark).

172. *Proposed Civil Rights Act of 1967: Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805 Before the Subcomm. on Const. Rights of the S. Comm. on the Judiciary*, 90th Cong. 479 (1967) [hereinafter *Proposed Civil Rights Act of 1967*] (statement of Sen. Philip A. Hart); *see id.* at 59 (statement of Sen. Sam J. Ervin, Jr.) (referring to the "so-called open-housing title"); *id.* at 417 (statement of Whitney M. Young, Jr., Executive Director, National Urban League) ("But open housing is not just at issue for the Negro. It is a matter affecting the welfare of the total society. Without dispersal of the ghetto population, there can be no real solution to any of our urban problems."); 114 CONG. REC. 2086 (1968) (statement of Sen. Edward M. Kennedy) (referencing the need for "a Federal open-housing law"); *id.* at 2707 (statement of Sen. Philip A. Hart) (discussing the need for "favorable action on open housing").

173. *See, e.g.*, CIVIL DISORDERS, *supra* note 137, at 263-64. Although the commission report also referenced "open occupancy" legislation as synonymous with "open housing" legislation, the report appeared clearly focused on ensuring access, not occupancy. *See id.* at 263 (stating that an "open-occupancy law" would "mak[e] it an offense to discriminate in the sale or rental of any housing").

174. *Id.* at 263.

175. *Miscellaneous Proposals*, *supra* note 139, at 1054 (letter from President Lyndon B. Johnson) (emphasis omitted). In the same letter, President Johnson urged Congress "to declare a national policy against racial discrimination in the sale or rental of housing, and to create effective remedies against that discrimination in every part of America." *Id.* at 1049.

176. *Id.* at 1057 (statement of Att'y Gen. Nicholas deB. Katzenbach). The House of Representatives Committee of the Judiciary Report accompanying H.R. 14765 in 1966 also described the fair housing proposal as "prohibit[ing] . . . discriminat[ion] on grounds of race, color, religion, and national origin in the sale, rental, or financing of . . . dwellings." H.R. REP. NO. 89-1678, pt. 2, at 15 (1966).

housing legislation from 1967, numerous witnesses, including Attorney General Ramsey Clark,[177] the Secretary of Housing and Urban Development Robert Weaver,[178] and the Dean of Boston College Law School,[179] focused on the proposed legislation's application to commercial transactions involving the sale or rental of housing. In February of 1968, as the Senate undertook final consideration of the FHA, Senator Mondale described the legislation as an important step, though "[o]utlawing discrimination in the sale or rental of housing will not free those trapped in ghetto squalor."[180] Numerous other statements, including those by Senator Brooke,[181] Senator Kennedy,[182] Senator Hart,[183] and Senator Tydings,[184] made during congressional consideration of the bill in 1968, focused clearly guaranteeing nondiscriminatory access to housing.[185]

Beyond explicit references to sales and rentals of housing, the legislative history of the FHA is filled with related references to commercial housing transactions,[186] examples of unfair exclusion from housing,[187] discussions of racial segregation[188] and the remedy of promoting integration,[189]

177. *Civil Rights and Housing*, *supra* note 146, at 5 (statement of Att'y Gen. Ramsey Clark).

178. *Id.* at 29 (statement of Robert C. Weaver, Sec'y of HUD) ("This is a comprehensive proposal which would prohibit discrimination in the sale, rental, or financing of housing, including discriminatory advertising and discrimination in representations made as to the availability of housing.").

179. *Id.* at 132 (statement of Reverend Robert F. Drinan, Dean, Boston College Law School) ("[T]he enactment of this bill . . . would bring to the Nation a nationally guaranteed right to purchase or rent a home regardless of one's race.").

180. 114 CONG. REC. 2274 (1968) (statement of Sen. Walter F. Mondale).

181. *Id.* at 2279 (statement of Sen. Edward W. Brooke) ("Millions of Americans have been denied fair access to decent housing because of their race or color. If we perceive this reality, on what possible grounds can we delay the evident remedy?").

182. *Id.* at 2085-86 (statement of Sen. Edward M. Kennedy). In concluding that the "insidious effect of discrimination in housing is incalculable," Senator Kennedy quoted the Civil Rights Commission from 1967: "Even Negroes who can afford the housing in [the suburbs] have been excluded by the racially discriminatory practices not only of property owners themselves, but also of real estate brokers, builders, and the home finance industry." *Id.* at 2085.

183. *Id.* at 2707 (statement of Sen. Philip A. Hart) ("The best spokesman for this bill would be a Negro father who had worked hard all his life, saved diligently, had gone out and then had come back that night, and had to explain to his children why he had not been able to get the house.").

184. *Id.* at 2533 (1968) (statement of Sen. Josephy Tydings) ("Basically, what the law would do is make it possible for all citizens to buy decent houses without discrimination against them because of the color of their skin.").

185. A summary of the Dirksen substitute, *id*. at 4906-08, which was almost identical to the final version of the FHA passed by Congress, prepared by the U.S. Department of Justice and included in the Congressional Record, explained that the fair housing portion of the bill was designed "to assure the availability of most housing in the United States to all persons, without discrimination on the basis of race, color, religion or national origin," *id.* at 4907. *See also Proposed Civil Rights Act of 1967*, *supra* note 172, at 289 (colloquy between Sen. Edward M. Kennedy and Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights); H.R. REP. NO. 89-1678, pt. 2, at 15 (1966).

186. *Proposed Civil Rights Act of 1967*, *supra* note 172, at 80 (statement of Att'y Gen. Ramsey Clark) ("Title IV is aimed at commercial transactions: at the 'for sale' and 'for rent' signs which proclaim to all that housing is available to whomever makes the best offer."); *Civil Rights and Housing*, *supra* note 146, at 131 (statement of Sen. Walter F. Mondale) ("[T]his bill . . . is designed to deal with property offered to the public for sale. So, almost by definition, it is a public transaction that is involved.").

187. *Civil Rights and Housing*, *supra* note 146, at 78 (statement of Frankie M. Freeman, U.S. Comm'n on Civil Rights).

188. *Hearing on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and*

calls for providing equal opportunity[190] and fair competition for housing,[191] urgings for the removal of discrimination as a barrier to housing,[192] and the need to provide an entry into a housing market described as "virtually closed."[193]

The picture that emerges from the FHA's legislative history is a broad concern with segregation and its related consequences, with a particular focus on ensuring non-discriminatory access to housing. But was Congress concerned *only* with access? Is it fair and accurate to conclude that the Act's legislative history reveals "no hint . . . of a concern with anything but *access* to housing"?[194] Or, might the FHA have been intended as a broad, remedial statute addressing access and other housing practices that could perpetuate segregation and discourage integration? To resolve these questions from the perspective of legislative intent, we must go beyond general statements about access in the legislative record to search out specific evidence reflecting the precise contours of the FHA as intended by Congress.

3. Policy Statements as Guides to the FHA's Scope

The FHA's "Declaration of policy" states, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[195] This concise, general guarantee was added as part

S. 3170 Before the Subcomm. on Const. Rights of the Comm. of the Judiciary, 89th Cong. 82 (1966) [hereinafter *Civil Rights: Hearing on S. 3296*] (statement of Att'y Gen. Nicholas deB. Katzenbach) (explaining, in support of the proposed fair housing legislation, the need to address "enforced housing in segregated ghettos of vast numbers of Negro citizens"); *Proposed Civil Rights Act of 1967*, *supra* note 172, at 79 (statement of Att'y Gen. Ramsey Clark) (explaining that "[p]rimarily because of housing discrimination, more persons are living in segregated sections of cities today than ever before"); *Civil Rights and Housing*, *supra* note 146, at 423 (statement of Andres Heiskell, Chairman of the Board, Urban America) ("It is no exaggeration to say that we are now at the point where the social, economic, and physical future of our metropolitan complexes is dependent on the elimination of racial segregation.").

189. *Proposed Civil Rights Act of 1967*, *supra* note 172, at 425 (statement of Whitney M. Young, Jr., Executive Dir., National Urban League) ("Integration provides an opportunity for white citizens to help prepare their children in a natural, diversified setting for the world they're going to live in . . . . For a youngster to grow up today with no knowledge of social diversity in a world which is two-thirds nonwhite is a terrible handicap."); *Civil Rights and Housing*, *supra* note 146, at 128 (statement of Reverend Robert F. Drinan, Dean, Boston College Law School) (explaining that "the guarantee of integrated housing for Negroes is the one great commitment which Congress has still refused to make"); H.R. REP. NO. 89-1678, pt. 2, at 59 (minority views of the Hon. Basil L. Whitener) (stating that the proposed bill was intended to "provide adequate and integrated housing for minority groups").

190. H.R. REP. NO. 89-1678, pt. 2, at 19 (statements of Hon. William M. McCulloch and Hon. Charles McC. Mathias, Jr.).

191. 114 CONG. REC. 2279 (1968) (statement of Sen. Edward W. Brooke).

192. *Civil Rights: Hearing on S. 3296*, *supra* note 188, at 68 (statement of Sen. Edward M. Kennedy) (explaining that the fair housing bill "seeks as a matter of national policy to remove racial and religious discrimination as a barrier to obtain housing").

193. H.R. REP. NO. 89-1678, pt. 2, at 19 (statements of Hon. William M. McCulloch and Hon. Charles McC. Mathias, Jr.).

194. Halprin v. Prairie Single Family Homes of Dearburn Park Ass'n., 388 F.3d 327, 329 (7th Cir. 2004).

195. 42 U.S.C. § 3601 (2000).

of the Dirksen substitute amendment to H.R. 2516 in March of 1968.[196] The other fair housing bills considered by Congress in the preceding years contained more detailed language, including specific references to use and occupancy of housing. For example, the 1966 fair housing legislation passed by the House of Representatives explained that, "It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, *use and occupancy* of housing throughout the Nation."[197] Similarly, in 1967, the Senate considered fair housing legislation articulating the following policy: "[I]t is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and *occupancy* of housing throughout the Nation."[198]

Should this shift in policy language be considered determinative? In other words, because Congress deleted proposed statutory language explicitly including use and occupancy of housing within the ambit of the FHA, should the statute now be read to exclude such protections? For at least two reasons, modifications to the policy language considered and ultimately passed by Congress do not appear to reflect any clear congressional position on the FHA's post-acquisition reach. First, if we exclude "use and occupancy" as categories of protection because those entitlements were deleted from earlier proposed versions of the FHA, we should logically do the same with the other entitlements deleted from fair housing bills between 1966 and 1968. In fact, all specific entitlements—including protection in the purchase and leasing of dwellings—were deleted from earlier fair housing policy statements when the Dirksen substitute was passed by Congress.[199] Reading all of those specific guarantees out of the FHA would, of course, render the statute meaningless. And no clear reason exists to treat use or occupancy differently in this context than other protected areas, such as sales and rental.[200]

Second, if the deletion of specific references to use and occupancy protection in earlier fair housing policy statements signaled a revised scope for the fair housing bill, Congress did not carry out such a revision by any meaningful modification to the bill's substantive provisions. In fact, the primary fair housing guarantees and prohibitions in §§ 3604 and 3617 were

196. 114 CONG. REC. 4975 (1968). The "fair housing" policy statement was contained in the amended version of H.R. 2516 passed by the Senate on March 11, 1968. *See* 114 CONG. REC. 5992, 5995 (1968).

197. 112 CONG. REC. 18,739-40 (1966). The bill reported out by the House Judiciary Committee declared that "it is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, *use*, and *occupancy* of housing throughout the Nation." H.R. REP. No. 89-1678, pt. 2, at 28 (1966) (emphasis added); 112 CONG. REC. 9396 (1966).

198. *Proposed Civil Rights Act of 1967*, *supra* note 172, at 16 (emphasis added).

199. *See* 114 CONG. REC. 5992, 5995 (1968).

200. A construction of the FHA that would render its provisions inoperative should be avoided under basic concepts of statutory interpretation. *See* United States v. Nordic Vill., Inc., 503 U.S. 30, 36 (1992).

largely unchanged from the initial consideration in 1966 to the time the FHA was signed into law by President Johnson in 1968.[201] Because the "teeth" of the FHA stayed constant during the time that the statute's policy language was modified, the most reasonable conclusion to draw is that the Dirksen substitute was seen by Congress as making only superficial changes to the bill's policy statement. Indeed, there is no obvious textual reason to read the FHA's broad guarantee of "fair housing" as extending only to housing transactions and excluding occupancy.

4. Statements by Senator Mondale

In attempting to divine congressional intent, statements made by any member of Congress during relevant debates might prove insightful;[202] however, the opinions of Senator Mondale appear to carry significant weight. As discussed earlier, Senator Mondale was one of the cosponsors of a 1968 Senate floor amendment to H.R. 2516, which inserted fair housing language into the bill.[203] Although the Mondale-Brooke amendment was replaced by the Dirksen substitute,[204] the substituted language was similar in many respects to Senator Mondale's proposal.[205] In addition, despite the tabling of his proposed legislation, Senator Mondale remained a vocal proponent of federal fair housing guarantees and the FHA.[206]

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201. In the proposed Civil Rights Act of 1966 considered by the Senate, for example, Sections 403(a) and (b) made it unlawful "[t]o refuse to sell, rent, or lease, refuse to negotiate for the sale, rental, or lease of, or otherwise make unavailable or deny, a dwelling" and "[t]o discriminate against any person in the terms, conditions, or privileges of sale, rental, or lease of a dwelling." *See Civil Rights: Hearing on S. 3296*, *supra* note 188, at 26. Section 405 of the same bill made it unlawful for any person to "intimidate, threaten, coerce, or interfere with any person in the exercise or enjoyment of . . . or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted by section 403 or 404." *See id.* Similar language was considered by Congress in 1967. *See Proposed Civil Rights Act of 1967*, *supra* note 172, at 17. This early language is nearly identical to the substantive provisions of the FHA. *See* 42 U.S.C. §§ 3604 & 3617 (2000).

202. Statements by individual legislators may provide evidence of congressional intent when consistent with statutory language and other pieces of legislative history. *See* Brock v. Pierce County, 476 U.S. 253, 263 (1986) (citing Grove City Coll. v. Bell, 465 U.S. 555, 567 (1984)).

203. *See supra* notes 146-150 and accompanying text.

204. *See* 114 CONG. REC. 4570-73 (1968); Dubofsky, *supra* note 117, at 156-57. Because it was introduced on the Senate floor, no Senate committee report exists considering the Dirksen substitute. *See* Comment, *supra* note 117, at 750 n.86.

205. The language contained in Senate Bill 1358, which was introduced by Senators Mondale and Brooke, is strikingly similar to the FHA in many substantive respects. For example, section 4(a) of S.1358 makes it unlawful "[t]o refuse to sell or rent, 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, or national origin," and section 4(b) prohibited discrimination "in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith . . . ." *See Title: Hearing Before the Subcommittee on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. 442 (1967). This language is nearly identical to 42 U.S.C. § 3604(a)-(b) (2000) of the FHA. Similarly, section 7 of S.1358 is almost identical to the FHA, 42 U.S.C. § 3617 (2000). In construing legislative history, courts may give added weight to statements made by a bill's sponsor. *See, e.g.*, Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 598-99 (2004).

206. Particularly as passage of the FHA neared, Senator Mondale spoke frequently in support of fair housing legislation from the Senate floor. *See, e.g.*, 114 CONG. REC. 4974-75, 5218-19, 6000-01 (1968) (statements of Sen. Walter F. Mondale).

On at least two occasions, one of which was cited by the Seventh Circuit in *Halprin*,[207] Senator Mondale made statements during congressional consideration of the FHA that arguably sought to define the limits of the statute rather than simply to provide examples of prohibited conduct. On March 8, 1968, three days before the Senate voted to approve fair housing legislation, Senators Mondale and Murphy discussed on the Senate floor the meaning of the new policy language provided by the Dirksen substitute.[208] Under the Dirksen substitute, the stated policy of the bill was "to provide for fair housing throughout the United States."[209] When questioned about this policy by Senator Murphy, Senator Mondale explained, "Obviously, this is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing . . . . It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean."[210] At least one federal court has cited this statement by Senator Mondale as support for the proposition, following *Halprin*, that the FHA was intended to apply only to discrimination in the sale or rental of housing.[211]

This reading, however, ignores the broader context of Senator Mondale's statements. In particular, Senator Mondale's "all it could possibly mean" comment responded to repeated inquiries from Senator Murphy regarding the precise meaning of the phrase "to provide for fair housing" in the policy language of the Dirksen substitute.[212] In this discussion, Senator Murphy asked, "Is there not a possibility of misconception of what the word 'provide' means? . . . I would think there could be a great chance that the word 'provide' [in the policy statement] could be read to mean almost anything, including 'give.'"[213] Apparently understanding Senator Murphy's concern, Senator Mondale replied, "Not at all. . . . This is a declaration of purpose. The phrase to be construed includes the words 'to provide for.' I see no possibility of confusion on that point at all."[214] Pushing the issue, Senator Murphy continued: "If the Senator will forgive me, it says 'provide fair housing.'[215] Does that mean to give the housing, to make it avail-

207. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004).

208. *See* 114 CONG. REC. 4975 (1968).

209. *Id.* at 4975. In response to a request from Senator Murphy, Senator Mondale read the Dirksen substitute's policy language into the record. *See id.*

210. *See id.* at 4975 (statement of Sen. Walter F. Mondale).

211. Cox v. City of Dallas, No. Civ. A. 398CV1763BH, 2004 WL 370242, at *8 (N.D. Tex. Feb. 24, 2004). According to the district court, Senator Mondale's "all it could possibly mean" comment fully supported decisions by other courts refusing to apply the FHA post-acquisition. *See id.*

212. *See* 114 CONG. REC. 4975 (1968).

213. *Id.* (statement of Sen. George Murphy).

214. *Id.* (statement of Sen. Walter F. Mondale).

215. Senator Murphy was wrong on this point. Neither the Dirksen substitute nor the FHA signed into law by President Johnson articulated a policy to "provide fair housing." Both the Dirksen substitute and the enacted FHA stated that it is the policy of the United States to provide *for* fair housing. *See* 42 U.S.C. § 3601 (2000); 114 CONG. REC. 4975 (1968).

able?"[216] Clearly tiring of Senator Murphy's questioning, Senator Mondale ended the conversation: "Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean."[217] In light of the full colloquy, it is apparent that Senator Mondale was responding to a narrow question—whether the policy statement contained in the Dirksen substitute was intended to and could reasonably be construed as requiring that housing be *provided* or *given* to protected persons. Given the full context of Senator Mondale's comments, it is clear that his "all it could possibly mean" statement has no bearing on whether the FHA should be read to include post-acquisition claims.[218]

One week later on the Senate floor, Senator Mondale discussed coverage of the Dirksen substitute: "The coverage of the fair housing provisions is far greater than we had anticipated, but I must warn that this bill is only a foot in the door. . . . It puts only a negative restriction on the sale and rental of housing."[219] Although the *Halprin* court cites to a partial reprint of this discussion to support its reading of the FHA's legislative history,[220] the full context of Senator Mondale's statement makes clear that he was not addressing the possible post-acquisition scope of the FHA.[221] Instead, Senator Mondale was addressing the concern voiced repeatedly by opponents of fair housing legislation: that the bill would require or force housing sales or rentals to minorities.[222] Immediately after stating that the legislation "puts only a negative restriction" on sales and rentals, Senator Mondale explained his comment: "A person is left with all of his rights to sell to whomever he pleases . . . but there is one thing he cannot do: he cannot if he uses a real estate broker refuse on the grounds of race to sell to a Negro buyer."[223] Two sentences earlier, Senator Mondale explained that although the housing bill provided a "negative restriction" against discrimination, "[i]t does nothing affirmative to relieve the immense problems our Nation faces."[224] In other

216. 114 CONG. REC. 4975 (1968) (statement of Sen. George Murphy).
217. *Id.*
218. *See supra* notes 207-217 and accompanying text.
219. 114 CONG. REC. 6000 (1968).
220. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004) (citing SCHWARTZ, *supra* note 165, at 1709-17, 1742-51, 1762, 1769). The full text of Senator Mondale's comments following Senate passage of the Dirksen substitute are found at 114 CONG. REC. 6000 (1968).
221. *See* 114 CONG. REC. 6000 (1968) (statement of Sen. Walter F. Mondale).
222. *Id.* One criticism of fair housing legislation raised throughout its consideration was that the statute would force homeowners to sell or rent to minorities. *See, e.g.*, *Civil Rights: Hearing on S. 3296*, *supra* note 188, at 60-65 (statement of Sen. Samuel Ervin) (contending that "forced housing" legislation "would deprive the American people of their right to sell, lease, or rent their property to whom they choose"); *Civil Rights and Housing*, *supra* note 146, at 6 (statement of Att'y Gen. Ramsey Clark) ("There is nothing in this bill to prevent personal choice where personal choice, not discrimination, is the real reason for action."); H.R. REP. No. 89-1678, pt. 2, at 54, 57-58 (1966) (statement of Rep. Basil L. Whitener) (arguing, in part, that if fair housing legislation were passed, "precious rights of all of us would be lost").
223. 114 CONG. REC. 6000 (1968) (statement of Sen. Walter F. Mondale). Failure to employ a broker alone does not exempt a housing transaction from FHA coverage. *See* 42 U.S.C. § 3603(b)(1) (2000).
224. 114 CONG. REC. 6000 (1968) (statement of Sen. Walter F. Mondale).

words, the fair housing bill encompassed discrimination in refusals to sell or rent, but it did not guarantee housing for any protected group by, for example, forcing homeowners into compulsory sales.[225] Once again, when seen in context, Senator Mondale's statement does not help clarify whether Congress intended to exclude post-acquisition claims from the FHA.

5. Constitutional Bases for the FHA

Throughout congressional debate over the FHA, the legislation's constitutionality was the subject of discussion.[226] Proponents of the measure saw two constitutional bases to support fair housing legislation. As explained by Attorney General Nicholas Katzenbach after introduction of the Johnson administration's fair housing proposal in 1966, "Title IV [the fair housing title] is based primarily on the commerce clause of the Constitution and on the 14th amendment."[227] Subsequent debates in 1967 and 1968 made clear that housing advocates saw those two constitutional provisions as supporting the proposed legislation.[228]

In testimony from 1966, Attorney General Katzenbach argued that "interstate commerce is significantly affected by the sale even of single dwellings, multiplied many times in each community."[229] Given the interstate nature of the housing design, financing, and construction industries, he concluded that "anything which significantly affects the housing industry also affects interstate commerce."[230] Because "[d]iscriminatory housing practices" restrict the amount and type of new housing, discourage maintenance of existing housing, and frustrate relocation efforts, such practices directly affect interstate commerce and are proper subjects for federal legislation.[231] Attorney General Ramsey Clark took this argument one step further in 1967 by explaining that the plenary power of Congress to protect interstate commerce "extends to all activities which affect interstate commerce, even if the

225. *See* 42 U.S.C. § 3603.

226. *See, e.g.*, *Proposed Civil Rights Act of 1967*, *supra* note 172, at 480-81 (statement of Sen. Philip Hart); *Civil Rights and Housing*, *supra* note 146, at 6-14; H.R. REP. No. 89-1678, pt. 2, at 12 (statement of Rep. Emanuel Celler).

227. *Miscellaneous Proposals*, *supra* note 139, at 1070 (statement of Att'y Gen. Nicholas deB. Katzenbach); *see also* H.R. REP. No. 89-1678, pt. 2, at 12 (statement of Rep. Emanuel Celler) ("The power of Congress to prohibit discrimination in commercial housing transactions by persons engaged in the housing business is supported by two independent constitutional grounds: the commerce clause . . . and the enforcement clause of the 14th amendment . . . .").

228. *See, e.g.*, *Civil Rights and Housing*, *supra* note 146, at 6-14 (statement of Att'y Gen. Ramsey Clark) ("This measure seeks to proceed not on the ground of one constitutional section alone but both, the commerce clause and the 14th amendment.").

229. *Miscellaneous Proposals*, *supra* note 139, at 1070-71 (statement of Att'y Gen. Nicholas deB. Katzenbach). As explained by Attorney General Katzenbach, it would not be unusual for a real estate developer from California to plan a subdivision in Arizona using banks in New York, pension funds in Chicago, contractors from Texas, lumber from Oregon, and steel products from Pennsylvania. In this scenario, "the 'housing' as a marketable commodity, was created, financed, and sold in and through the channels of interstate commerce." *Id.* at 1071.

230. *Id.* at 1071.

231. *Id.*

goods or persons engaged in the activities are not then, or may never be, traveling in commerce."[232] That position was supported by others who spoke in favor of fair housing, including the deans of several law schools who provided testimony on legal aspects of the proposed legislation.[233]

If the FHA was never intended to cover post-acquisition disputes, then the law applies only to commercial housing transactions and related services, such as financing.[234] If the FHA was solely transaction-focused, however, the Commerce Clause would provide adequate constitutional support for the proposed legislation.[235] In other words, it would not be necessary to articulate a Fourteenth Amendment constitutional basis for the new fair housing law. However, if the FHA's coverage extended beyond the commercial transaction into occupancy, the Commerce Clause might not provide adequate constitutional support. For the FHA to constitutionally apply to such post-acquisition claims, fair housing proponents might need an alternative constitutional basis—which the Fourteenth Amendment provides. Accordingly, it could be argued that the identification of two constitutional bases for the FHA demonstrates that members of Congress understood the FHA to include both a transaction component, supported by the Commerce Clause, and a post-acquisition component, supported by the Equal Protection Clause of the Fourteenth Amendment.

If this motivation for relying on the Fourteenth Amendment did exist for members of Congress, however, it is not clearly reflected in the legislative debates.[236] In discussing the Fourteenth Amendment—in particular, Section Five, or the Enforcement Clause[237]—Reverend Robert Drinan, Dean of Boston College Law School, explained to Congress that the provision "is a positive grant of legislative power" authorizing passage of all legislation

232. *Civil Rights and Housing*, *supra* note 146, at 14 (statement of Att'y Gen. Ramsey Clark).

233. *See, e.g.*, *id.* at 129 (statement of Reverend Robert F. Drinan, Dean, Boston College Law School) (arguing that Congress has the constitutional power "to enact legislation to curb bias" under the commerce clause and the Fourteenth Amendment, and that the Commerce Clause justifies "[f]ederal action even if there is a very slight impact on interstate commerce of the regulated activities"); *see also id.* at 256 (Memorandum of Law on the Constitutionality of Federal Fair Housing Legislation, submitted by Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing) ("It is also well settled that the power of Congress under the Commerce Clause extends to activities which are ordinarily considered local and which seem to have at most a very slight impact on interstate commerce.").

234. The Seventh Circuit made clear in *Halprin* that the focus of the FHA was on the problematic exclusion of minorities from housing opportunities, not how they might be treated once they moved into majority-occupied neighborhoods. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004).

235. The adequacy of the Commerce Clause as constitutional support for a transaction-only reading of the FHA is further supported by the Supreme Court's decision—handed down twenty-six years before passage of the FHA—that the Commerce Clause is triggered even where the activity is intrastate but exerts an economic effect on interstate commerce. *See* Wickard v. Filburn, 317 U.S. 111, 123-25 (1942).

236. *See* 114 CONG. REC. 6000 (1968).

237. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; *see Civil Rights and Housing*, *supra* note 146, at 260 (Memorandum of Law on the Constitutionality of Federal Fair Housing Legislation, submitted by Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing).

needed to secure the guarantees of the Fourteenth Amendment.[238] In his opinion, Section Five was intended as a "mandate to Congress to end inequality and all of the badges and indicia of slavery."[239] When applied to the housing context, Reverend Drinan believed that Section Five would authorize passage of a law that "would bring to the Nation a nationally guaranteed right to *purchase* or *rent* a home regardless of one's race."[240]

Jefferson Fordham, Dean of the University of Pennsylvania School of Law, identified a broader purpose underlying the FHA, also supported by the Enforcement Clause of the Fourteenth Amendment.[241] According to Dean Fordham, the Enforcement Clause enables Congress to use any rational means to effectuate equal protection, even where the means are "not confined to regulation of activities violative of the prohibition, but extend[] to a regulation of other activities if that regulation is a rational means of effectuating the prohibition."[242] Although Dean Fordham did specifically identify private decisions to discriminate in housing as an "obstacle . . . to the practical enjoyment of civil rights,"[243] his focus was broader. Dean Fordham discussed the "great urban crisis" of de facto segregation, which "calls for comprehensive programs of immense proportions."[244] Such segregation, he argued, led to other societal ills, including restricted opportunities in education and employment—problems that "cannot be dealt with effectively in isolation."[245] In this context, Dean Fordham spoke of a need to ensure "formal freedom to acquire *and use* housing" and the importance of protecting the "freedom to acquire *and enjoy*" property.[246] In testimony the previous year, Attorney General Katzenbach expressed a similar belief: "To me it is clear that the 14th amendment gives Congress the power to address itself to the vindication of what is, in substance, the freedom to live."[247]

In short, articulation of a Fourteenth Amendment constitutional basis for the FHA suggests, but does not prove, an intended scope of the Act beyond guaranteeing a nondiscriminatory housing transaction—which would

238. *Civil Rights and Housing*, *supra* note 146, at 131 (statement of Reverend Robert F. Drinan, Dean, Boston College Law School).
239. *Id.* at 132.
240. *Id.* (emphasis added).
241. *Id.* at 133 (statement of Jefferson Fordham, Dean, University of Pennsylvania Law School).
242. *Id.*
243. *Id.*; *see also id.* ("[e]quality of opportunity as to housing is of the highest order of importance"; "[t]he familiar insistence that an owner should be protected in a freedom to dispose of his property as he pleases, especially his residence, is not compelling"; "a broad openhousing policy that is given vitality in practice is essential to the effective relief of slum conditions").
244. *Id.*; *see also Miscellaneous Proposals*, *supra* note 139, at 1070 (statement of Att'y Gen. Nicholas deB. Katzenbach) (discussing Fourteenth Amendment support for the elimination of segregated living through enactment of the FHA).
245. *Civil Rights and Housing*, *supra* note 146, at 133 (statement of Jefferson Fordham, Dean, University of Pennsylvania Law School).
246. *Id.* (emphasis added).
247. *Miscellaneous Proposals*, *supra* note 139, at 1070 (statement of Att'y Gen. Nicholas deB. Katzenbach). Attorney General Katzenbach clearly saw the broader implications of the FHA: "To the extent that [segregated living] impedes States and localities from carrying out their obligations under the 14th amendment to promote equal access and equal opportunity in all public aspects of community life, the 14th amendment authorizes removal of this impediment." *Id.*

have been adequately supported by the Commerce Clause alone. Testimony regarding the Act's constitutionality clearly reflects a desire to broadly attack both actual denials of housing and the problems flowing from racial segregation. As discussed earlier, that same concern surfaced throughout congressional consideration of the FHA[248] and is consistent with a desire to prohibit post-acquisition harassment.

6. Relevance of Title V / § 3631

Another insight into the intended scope of the FHA may be gleaned from congressional debate and discussion regarding Title IX of the Civil Rights Act of 1968. As discussed earlier,[249] Title IX, which is codified at 42 U.S.C. § 3631, provides criminal sanctions for the use of force or threats of force to injure, intimidate, or interfere with persons who sell, purchase, rent, finance, or *occupy* housing.[250] Unlike §§ 3601-3619, which address housing rights from a civil perspective, § 3631 explicitly extends federal criminal protection to persons who suffer unlawful discrimination or harassment while they either occupy housing or are contracting to occupy housing.[251]

Section 3631 developed out of what was originally designated Title V of the draft civil rights bills considered by Congress from 1966 to 1968.[252] Title V, labeled "Interference with Rights," sought to criminalize interference with a person "because of his present or past participation in" various enumerated activities.[253] From the activities listed in the draft bills, Title V was intended to have a broad scope, covering both predicate acts (e.g., "qualifying to vote," "enrolling in" schools, "applying for . . . employment," attending court in connection with possible jury service, and acquiring housing) and the more substantive resulting activities (e.g., "voting," "attending" schools, "enjoying employment," "serving . . . as a grand or petit juror," and "occupying . . . any dwelling").[254] Title V of the draft civil rights bills eventually split into two separate provisions late in the process of enacting the Civil Rights Act of 1968.[255] Title I of the new law, captioned "Interference with Federally Protected Activities," criminalizes unlawful interference in various non-housing contexts, including voting, federal employment, public education, jury service, federal assistance, travel in interstate commerce, and public accommodation.[256] Title IX of the Act, or § 3631, applies solely

248. *See supra* pp. 225-29.
249. *See supra* text accompanying notes 117-120.
250. *See* 42 U.S.C. § 3631 (2000).
251. *See* 42 U.S.C. §§ 3601-3619 (2000); 42 U.S.C. § 3631.
252. *See, e.g.*, *Proposed Civil Rights Act of 1967*, *supra* note 172, at 42-43.
253. *See, e.g.*, *id.*
254. *See, e.g.*, *id.*
255. *Id.* at 48 (original version of the bill without fair housing provisions); *id.* at 50 (companion bill adding the fair housing provision); 114 CONG. REC. 5807, 5812-14, 5819-22, 5840-45 (1968) (Senate debate on March 4 and March 8, 1968, amending H.R. 2516 and moving the fair housing provisions).
256. Title I of the Civil Rights Act of 1968 is codified at 18 U.S.C. § 245 (2000).

to housing.[257] Like earlier drafts of Title V, § 3631 explicitly prohibits unlawful actions occurring before or during the real estate transaction ("because [the person] is . . . selling, purchasing, renting, financing"[258]) and afterward ("because [the person] is . . . occupying"[259]). Very little legislative history exists that specifically relates to § 3631. Instead, because § 3631 has its origins in Title V of the draft civil rights bills and was separated out only at a very late stage, congressional debates over draft Title V are instructive when attempting to construe the meaning and intended impact of § 3631.[260]

For the purposes of evaluating the post-acquisition scope of the FHA, an important point discussed repeatedly during congressional debates was that the criminal protections provided by Title V were seen to complement existing civil protections for the same enumerated rights. As explained by Senator Hart in 1967, "In passing title V, the Congress would be acting to protect rights that it has, either through constitutional amendment or statutory enactment, declared to be the citizen's due."[261] This is consistent with the House Judiciary Committee Report accompanying H.R. 14765 in 1966, which explained that Title V was "designed to deter and punish interference by force or threat of force with activities protected by Federal law or the Constitution."[262] Title V was intended to provide criminal sanctions against unlawful interference,[263] targeting not only protected activities but also "interference that occurs either before or after a person engages in protected conduct but which is related to that conduct."[264] Under Title V, the victim "need not himself have had anything to do with any kind of civil rights activity," as long as the attack was "for the purpose of discouraging [protected

257. 42 U.S.C. § 3631 (2000).

258. *Id.*

259. *Id.*

260. The Supreme Court considers the legislative history of an unenacted bill "wholly relevant to an understanding of" a subsequently enacted statute containing the same operative language. United States v. Enmons, 410 U.S. 396, 404 n.14 (1973); *see also* Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1347 n.1 (Fed. Cir. 2001).

261. *Proposed Civil Rights Act of 1967*, *supra* note 172, at 481 (statement of Sen. Philip A. Hart); *see also Miscellaneous Proposals*, *supra* note 139, at 1073 (statement of Att'y Gen. Nicholas deB. Katzenbach) (explaining that Title V "would make it a crime for private individuals forcibly to interfere, directly or indirectly, with participation in activities protected by Federal laws," and explaining the provision "prohibits injury, intimidation of interference based on race, color, religion, or national origin that occurs while the victim is actually engaging in protected activity"); H.R. REP. No. 89-1678, pt. 2, at 23 (1966) (statements of Reps. Richard H. Poff & William C. Cramer) ("Force or threat of force on account of race or color against those lawfully engaged in activities protected by Federal law is defined as a Federal crime.").

262. H.R. REP. No. 89-1678, pt. 2, at 31. *But see id.* at 14-15 (statement of Rep. Emanuel Celler). Rep. Celler expressed his view that Title V "is not limited to the scope of the 'rights' created by other Federal laws outlawing discrimination with respect to those activities," explaining that, for example, Title V would cover employers who, because of their small size, would be exempt from civil restrictions on discrimination. *Id.* According to Rep. Celler, the Constitution empowered Congress to "regulate[] intrastate commerce in order to insure the effective regulation of interstate commerce." *Id.*

263. The Johnson Administration, at the very least, saw Title V as covering both actual and threatened physical damage to property, such as the threat to burn down one's house. *See Miscellaneous Proposals*, *supra* note 139, at 1238 (statement of Att'y Gen. Nicholas deB. Katzenbach).

264. *Id.* at 1076.

persons] generally from engaging in activities" specifically listed in Title V and protected by federal law.[265]

If, as the legislative history reflects, Title V serves as the criminal law counterpart to existing civil protections for the enumerated activities, the only logical conclusion is that existing federal civil law was believed to protect, at least in some circumstances, the occupation of property. No federal law existing prior to 1968 could reasonably be cited as protecting such occupation of property. The most likely federal candidate possibly would have been 42 U.S.C. § 1982, passed as part of the Civil Rights Act of 1866, which guaranteed, in part, the right to "inherit, purchase, lease, sell, *hold*, and convey real and personal property."[266] However, it was only in June of 1968—after the FHA was signed into law in April of 1968—that § 1982 was held for the first time by the U.S. Supreme Court to apply to all public and private real estate transactions.[267] With § 1982 ruled out, only the FHA remains as a reasonable source of federal law protecting a general right to occupy housing. Although the congressional statements cited above seem to suggest that the civil law parallels to § 3631 were already in existence in 1968, contemporaneous passage of the FHA and § 3631 would reach the same result: when § 3631 was finally enacted into law, it codified criminal prohibitions that tracked civil guarantees, including the right to occupy housing, enacted under the FHA at the same time.

* * *

In summary, a fair reading of the FHA's voluminous legislative history does not unequivocally resolve whether Congress understood the statute to apply to post-acquisition harassment claims. The congressional record reflects a recurring recognition of a national, multifaceted racial problem gripping the country in the 1960s, with its core centered on the issue of housing. Guaranteeing nondiscriminatory access was certainly a fundamental part of the solution, but discussions about fair housing legislation never limited the law's scope to access. In fact, recognizing some level of occupancy protection is consistent with a number of aspects of the FHA's legislative history, such as the expression of a Fourteenth Amendment basis for the law and the creation of parallel criminal protection for occupancy. However, because no definitive statement or testimony compels the conclusion that occupancy protection was intended by Congress, the FHA's legislative history is of limited usefulness in clearly demarcating the statute's boundaries.

265. *Id.* at 1074.
266. *See* 42 U.S.C. § 1982 (2000) (emphasis added).
267. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

C. Analogy to Title VII

Where the text and legislative history of the FHA leave questions about the statute's contours, federal courts have relied on Title VII of the Civil Rights Act of 1964 for guidance. To a significant extent, this reliance is based on the U.S. Supreme Court's 1972 decision in *Trafficante v. Metropolitan Life Insurance Co.*,[268] in which the Court construed FHA standing using an analogy to Title VII.[269] In particular, the Court cited approvingly a federal decision that identified "a congressional intention to define [Title VII] standing as broadly as is permitted by Article III of the Constitution."[270] In the context of standing under the FHA, the Court "reach[ed] the same conclusion."[271] The Supreme Court's reliance on Title VII case law to interpret the scope of the FHA paved the way for lower federal courts to invoke Title VII when faced with various FHA questions, including whether to recognize discriminatory effects,[272] how to approach mixed motive cases,[273] and when burden shifting should be implemented in the process of evaluating discriminatory intent,[274] among others.[275]

Analogy to Title VII has specifically played a key role in developing post-acquisition harassment law under the FHA. In *Shellhammer v. Lewallen*, an Ohio district court became one of the first district courts to apply in the housing context the hostile environment cause of action drawn from employment litigation.[276] Since that time, numerous courts have evaluated post-acquisition harassment claims in housing disputes by referencing, if not heavily relying on, case law involving on-the-job harassment of employees.[277] This reliance often occurs after a court makes two related find-

268. 409 U.S. 205 (1972).

269. *Id.* at 209.

270. *Id.* (quoting Hackett v. McGuire Bros., Inc. 445 F.2d 442, 446 (3d Cir. 1971)) (internal quotation marks omitted).

271. *Id.*

272. *See, e.g.*, Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-47 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1289-90 (7th Cir. 1977).

273. *See, e.g.*, Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1262-63 (7th Cir. 1990); Cato v. Jilek, 779 F. Supp. 937, 943-44 (N.D. Ill. 1991); Aloqaili v. Nat'l Hous. Corp., 743 F. Supp. 1264, 1270-71 (N.D. Ohio 1990).

274. *See, e.g.*, Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48-52 (2d Cir. 2002); Allen v. Muriello, 217 F.3d 517, 520 (7th Cir. 2000); Sec'y, U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 870-72 (11th Cir. 1990).

275. *See, e.g.*, Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1451-52 (4th Cir. 1990) (relying on "futile gesture" law under Title VII in denial of housing case); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988) (holding "the disparate impact approach of Title VII cases is fully applicable to this Title VIII case"); Hall v. Lowder Realty Co., 160 F. Supp. 2d 1299, 1313 (M.D. Ala. 2001) ("In both FHA and section 1981 cases, courts apply the methods of analysis developed for use in cases under Title VII . . . .").

276. No. C. 82-689, 1 Fair Hous. Fair Lend. (P-H) ¶ 15,472 (W.D. Ohio Nov. 22, 1983), *aff'd*, No. 84-3573, 1985 WL 13505 (6th Cir. July 31, 1985); *see* DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996) (recognizing the *Shellhammer* decision as the first district court to so rule); Beliveau v. Caras, 873 F. Supp. 1393, 1396 (C.D. Cal. 1995) (same).

277. *See, e.g.*, Neudecker v. Boisclair Corp., 351 F.3d 361, 364 (8th Cir. 2003); *DiCenso*, 96 F.3d at 1008; Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993); Reeves v. Carrollsburg Condo. Unit Owners

ings: first, that post-hiring harassment is considered to be actionable under Title VII,[278] and second, that striking similarities exist between Title VII and the FHA in terms of design, scope, and purpose.[279] As one court described these similarities, because Title VII and the FHA "share the same purpose—to end bias and prejudice—[post-acquisition] harassment should be actionable under [the FHA]."[280]

Despite the tendency of most federal courts to analogize from Title VII to the FHA, the Seventh Circuit in *Halprin* recognized the potential disconnect in that analogy, at least in the context of post-acquisition harassment claims.[281] The court noted that in several instances, the FHA has been seen to encompass certain post-acquisition harassment claims "by analogy to 'constructive discharge,' a form of discrimination recognized in Title VII cases."[282] The Seventh Circuit observed that Title VII "protects the job holder as well as the job applicant," extending the statute's reach beyond the time of hiring. [283] As a result, when an employer's harassment forces an employee to quit her job, the employer "is engaged in job discrimination within the meaning of [Title VII]."[284] However, the court refused to draw any parallel to the FHA in this context.[285] In particular, the *Halprin* court opined that courts relying on an analogy to Title VII to support a post-acquisition dimension to the FHA did not "consider the difference in language between the two statutes."[286]

A careful evaluation of Title VII's text, however, does appear generally to support the analogy drawn by most federal courts in this area. One important and ironic similarity between the two statutes is that neither expressly speaks to post-transaction harassment[287]—neither even mentions the word

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Ass'n, No. CIV. A. 96-2495RMU, 1997 WL 1877201, at *6 (D.D.C. Dec. 18, 1997); Williams v. Poretsky Mgmt., Inc., 955 F. Supp. 490, 494-95 (D. Md. 1996); *Beliveau*, 873 F. Supp. at 1396-97; New York v. Merlino, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988). *But see* Lawrence v. Courtyards at Deerwood Ass'n, Inc., 318 F. Supp. 2d 1133, 1148-49 (S.D. Fla. 2004) (rejecting hostile racial housing environment claim and related analogy to Title VII).

278. *See, e.g.*, *Reeves*, 1997 WL 1877201, at *6; *Williams*, 955 F. Supp. at 494-95; *see also Neudecker*, 351 F.3d at 364 (making the same point in the disability context by analogy to the Rehabilitation Act and the Americans with Disabilities Act).

279. The Second Circuit in *Huntington Branch, NAACP*, for example, described the "persuasive . . . parallel between Title VII and Title VIII" making the two statutes "part of a coordinated scheme of federal civil rights laws enacted to end discrimination." 844 F.2d at 934.

280. *Williams*, 955 F. Supp. at 495. As the district court in *Beliveau* explained, "[I]t is beyond question that sexual harassment is a form of discrimination . . . [and] the purposes underlying Titles VII and VIII are sufficiently similar so as to support discrimination claims based on sexual harassment regardless of context." 873 F. Supp. at 1397; *see also Reeves*, 1997 WL 1877201, at *6. The frequent third step in this process is to recognize that other courts have recognized harassment claims under the FHA. *See, e.g.*, *Williams*, 955 F. Supp. at 495.

281. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004).

282. *Id.*

283. *Id.*

284. *Id.*

285. *See id.*

286. *Id.*

287. *See* 42 U.S.C. § 2000e to 2000e-15 (2000); 42 U.S.C. §§ 3601-3631 (2000); Shellhammer v. Lewallen, No. C. 82-689, 1 Fair Hous. Fair Lend. (P-H) ¶ 15,472 (W.D. Ohio Nov. 22, 1983) (noting

"harassment."[288] Instead, each statute has at its substantive core the guarantee of access—to employment, in the context of Title VII, and in the FHA, to housing. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual . . . because of" the individual's protected status.[289] Similarly, the FHA deems it unlawful for any person "[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of" the person's protected status.[290] This statutory focus on ensuring access is evidenced throughout both Title VII and the FHA.[291]

Despite the textual focus of Title VII on ensuring access, the statute has been interpreted as providing federal protection for harassment claims that arise post-hiring.[292] As explained by one commentator, in the context of Title VII, it is the "universal rule now . . . that [unlawful] harassment on the job is employment discrimination within the meaning of Title VII."[293] A considerable body of federal case law, including decisions by the U.S. Supreme Court, supports this position, recognizing that Title VII's prohibition against discrimination encompasses harassment suffered post-hiring.[294]

In reaching that conclusion in the employment context, courts have interpreted Title VII's prohibition against discriminatory "compensation, terms, conditions, or privileges of employment" in 42 U.S.C. § 2000e-2(a)(1) as "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial [or sexual] discrimination."[295] Importantly, the FHA contains phrasing that is nearly identical in relevant part.[296] Section 3604(b) of the FHA prohibits unlawful discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facili-

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that although "[s]exual harassment is not specifically addressed in either Title VII or its legislative history[,] . . . courts have had little difficulty in interpreting and applying Title VII to claims of such harassment"), *aff'd*, No. 84-3573, 1985 WL 13505 (6th Cir. July 31, 1985).

288. *See* 42 U.S.C. § 2000e to 2000e-15; 42 U.S.C. §§ 3601-3631.

289. 42 U.S.C. § 2000e-2(a)(1).

290. 42 U.S.C. § 3604(a).

291. For a discussion of the FHA's textual focus on access, see *supra* Part III.A. and accompanying notes. Title VII contains numerous statutory references reflecting a concern with access as well. For example, Title VII refers repeatedly to "applicants for employment," "fail[ing] or refus[ing] to hire and employ," "reinstatement or hiring of employees," and "refus[ing] to refer for employment." *See* 42 U.S.C. § 2000e-2(a)(2), -2(g), -5(g)(1), -2(b).

292. *See Shellhammer*, Fair Housing-Fair Lending Rep., ¶ 15,472, at 135.

293. *See id.* (quoting 1 LEX K. LARSEN, EMPLOYMENT DISCRIMINATION 8-99 (1975)) (internal quotation marks omitted).

294. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (recognizing that Title VII prohibits same-sex harassment post-hiring); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (noting that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"); *see also* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981); Zabkowicz v. W. Bend Co., 589 F. Supp. 780 (E.D. Wis. 1984).

295. *See Meritor*, 477 U.S. at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)) (internal quotation marks omitted).

296. 42 U.S.C. § 3604(b) (2000).

ties in connection therewith."[297] Several courts interpreting this language in the housing context have found it, like in the parallel employment setting, to cover harassment suffered post-transaction.[298] As one federal court in New York explained, "Sexual harassment constitutes discrimination in the terms, conditions, or privileges of rental of a dwelling on the basis of sex."[299] From the face of virtually identical statutory language, it is difficult to justify a post-hiring dimension to Title VII while also rejecting a post-acquisition scope for the FHA.

Beyond their failure to explicitly address "harassment" and their use of nearly identical "terms, conditions, or privileges"[300] language, Title VII and the FHA are structurally similar—each is a broad civil rights statute—which lends further credit to analogies drawn between them. For example, both statutes expressly extend to retaliation against persons who have sought protection under the federal laws;[301] prohibit the printing and publishing of discriminatory advertisements;[302] establish federal agency oversight over and administration of their respective substantive areas, including how the agencies will receive, evaluate, and respond to alleged statutory violations and how they will undertake conciliation and education activities;[303] outline the situations in which private suits may be brought to enforce statutory protections;[304] and specify the circumstances in which either the administrative agency and/or the U.S. Attorney's office may institute proceedings under the statutes.[305] In terms of both general areas of coverage and specific statutory language applicable to harassment claims, Title VII and the FHA share many similarities.[306]

Nevertheless, textual differences do exist between the two statutes.[307] Most importantly for this analysis, Title VII arguably contains language more clearly and more frequently indicating post-transaction coverage than does the FHA. For example, Title VII prohibits an employer from improperly segregating its "*employees* or applicants for employment."[308] Similarly, labor organizations may not improperly limit their "*membership* or applicants for membership," including in ways that would affect an employee's "*status as an employee* or as an applicant for employment."[309] Title VII also

297. *Id.*
298. *See supr*a note 77 and accompanying text.
299. Rich v. Lubin, No. 02 Civ. 6786(TPG), 2004 WL 1124662, at *4 (S.D.N.Y. May 20, 2004).
300. *See, e.g.*, 42 U.S.C. § 3604(b); 42 U.S.C. § 2000e-2(a)(1) (2000).
301. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-3(a); FHA, 42 U.S.C. § 3617 (2000).
302. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-3(b); FHA, 42 U.S.C. § 3604(c).
303. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-4 to e-5; FHA, 42 U.S.C. §§ 3608-3609.
304. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-5(f); FHA, 42 U.S.C. § 3613.
305. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-5 to e-6; FHA, 42 U.S.C. § 3610-12, 3614.
306. *Compare* 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination based on an individual's race, color, religion, sex, or national origin), *with* 42 U.S.C. § 3604 (prohibiting discrimination based on a person's race, color, religion, sex, familial status, and national origin).
307. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004).
308. *See* 42 U.S.C. § 2000e-2(a)(2) (emphasis added); *see also id.* § 2000e-3(a).
309. *Id.* § 2000e-2(c)(2) (emphasis added).

allows employers to utilize a bona fide seniority or merit system that can result in different levels of compensation or privileges of employment.[310] In addition, the statute prohibits employers from adjusting the scores of, or applying different cutoff scores for, "applicants or candidates for employment or *promotion*" based on improper criteria.[311] Title VII also stipulates that one way to determine when charges of an "unlawful employment practice" must be filed will hinge on "when a person aggrieved is injured by the application of the seniority system."[312]

The language chosen by Congress in Title VII appears clearly to protect both applicants for employment and current employees, providing unquestionable post-hiring coverage under Title VII. However, contrary to the *Halprin* court's suggestion, Title VII's clear post-hiring scope strengthens, rather than weakens, the analogy to the FHA. As discussed above in Part III.A., the FHA also contains various textual indications of a desire by Congress that the statute apply post-acquisition.[313] Such intent is especially apparent in the case of § 3617, whose text most clearly supports a claim of post-acquisition harassment under the FHA.[314] Furthermore, federal courts are expected to broadly construe the FHA's language—like that of Title VII—given the expansive remedial purposes underlying the statute.[315] Overall, the textual and underlying similarities between Title VII and the FHA appear compelling. While there are certainly differences between the two statutes, none of those differences meaningfully undercuts the post-acquisition analogy that has been drawn between the statutes by most courts.

D. Policy Considerations in Support of FHA Harassment Coverage

The analyses in the preceding parts suggest that courts recognizing post-acquisition harassment protection under the FHA are on solid legal ground. The text of the FHA clearly speaks to issues beyond simple access to housing, including providing protection from intimidation, coercion, and threats.[316] Although the statute's legislative history does not definitively

310. *See id.* § 2000e-2(h).
311. *Id.* § 2000e-2(*l*) (emphasis added).
312. *See id.* § 2000e-5(e)(2).
313. *See* discussion *supra* Part III.A.
314. *See supra* text accompanying notes 107-116.
315. Courts have routinely recognized that the FHA should be broadly construed. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972) (explaining that the "language of the Act is broad and inclusive"); Mayers v. Ridley, 465 F.2d 630, 635 (D.C. Cir. 1972) (en banc) (Wright, J., concurring) (concluding that its interpretation of § 3604(c) would be broad, consistent with the "well established" practice "that civil rights statutes should be read expansively in order to fulfill their purpose"); *see also* Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 95 (1977) (observing that "Congress has made a strong national commitment to promot[ing] integrated housing"). Similarly, courts have broadly construed Title VII. *See* Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994) (explaining that "it has been long established that Title VII, as remedial legislation, is construed broadly"); Jones v. Flagship Int'l, 793 F.2d 714, 726 (5th Cir. 1986) (recognizing that the provisions of Title VII "must be construed broadly in order to give effect to Congress' intent in eliminating invidious employment practices").
316. *See* 42 U.S.C. § 3617.

prove that protecting occupancy was at the forefront of legislators' minds, the record does reflect a consistently repeated concern with guaranteeing broad housing rights.[317] Congress was concerned not with mere access to housing but with facilitating integration and eliminating the wide-ranging employment, social, and economic effects flowing from segregated living patterns. Protecting minority occupation of housing is fully consistent with congressional motivations underlying the FHA. Furthermore, nowhere in the FHA's legislative history is harassment protection explicitly excluded from coverage. Adding to the statute's text and legislative history is a compelling analogy to Title VII, under which post-hiring harassment is actionable. Similarities in the statutes' substantive provisions and broad, remedial scope further support the recognition of a parallel claim in the housing context.

Beyond the legal analysis of whether the FHA can be read to include post-acquisition harassment protection is the question of whether policy considerations suggest that it should be read so broadly. Although a thorough analysis of relevant policy in this area is beyond the scope of this Article, this Part briefly addresses two policies that weigh in favor of a broad reading. The first Subpart asks whether recognizing post-acquisition harassment coverage necessarily and improperly draws federal courts into everyday disputes between neighbors. The second Subpart briefly considers the role that harassment has played in the creation and maintenance of de facto residential segregation.

1. Policing Neighborhood Quarrels

Several courts have expressed a concern that extending the scope of the FHA beyond the initial acquisition of housing would result in federal oversight of common, ordinary neighbor-to-neighbor disagreements. At the most extreme end, this concern provided the Seventh Circuit in *Halprin* further justification for its restrictive reading of the FHA. According to that court, effectively policing how minority groups are treated once they finally gain access to "desirable residential areas . . . would have required careful drafting in order to make sure that quarrels between neighbors did not become a routine basis for federal litigation."[318] The court appears to conclude that without such careful drafting, the danger of reviewing simple neighborhood disputes is simply too great; as a result, the FHA's text should be narrowly read to exclude all such disputes.

In fact, a number of courts, regardless of whether they ultimately recognize a post-acquisition dimension to the FHA, have been troubled by this same line drawing dilemma.[319] In *United States v. Altmayer*, for example,

317. *See* discussion *supra* Part III.B.

318. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004).

319. *See, e.g.*, Cox v. City of Dallas, 430 F.3d 734, 741 (5th Cir. 2005); Silcox v. Flagship Mgmt.,

the district court explained, "[W]e do not want, and we do not think Congress wanted, to convert every quarrel among neighbors in which a racial or religious slur is hurled into a federal case."[320] In the words of another district court, the FHA does not "impose a code of civility" on neighbors, nor does it "require that neighbors smile, say hello or hold the door for each other."[321] To allow all manner of neighborhood disputes to be actionable under the FHA, in the court's view, "would have the effect of demeaning the aims of the [statute] and the legitimate claims of plaintiffs who have been subjected to invidious and hurtful discrimination and retaliation in the housing market."[322] Although distinguishing between viable housing harassment claims and those that should be dismissed may be challenging in some cases, any significant concern about the ability of courts to actually draw such lines is overblown.

The FHA clearly is not a model of textual clarity[323] and could include more detailed factors to screen harassment claims; however, its operative provisions provide courts adequate guidance to determine which post-acquisition harassment claims may be brought. For example, § 3617's prohibition against acts that unlawfully "coerce, intimidate, threaten, or interfere with any person" in their exercise or enjoyment of fair housing rights[324] is considerably more descriptive than language from Title VII that has consistently been held to prohibit post-hiring harassment.[325] Title VII's relevant language covers discriminatory "compensation, terms, conditions, or privileges of employment,"[326] which has allowed judges to differentiate between

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No. Civ. A. H-04-1967, 2005 WL 3262550, at *3 n.3 (S.D. Tex. Nov. 30, 2005); Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. Civ. A. H-05-3197, 2005 WL 2669480, at *4 (S.D. Tex. Oct. 19, 2005).

320. 368 F. Supp. 2d 862, 862-63 (N.D. Ill. 2005) (quoting *Halprin*, 388 F.3d at 330) (internal quotation marks omitted). The court nevertheless went on to hold that a FHA claim had been articulated where "invidiously motivated" harassment was "backed by the homeowners' association." *Id.* at 863 (quoting *Halprin*, 388 F.3d at 330) (internal quotation marks omitted).

321. Sporn v. Ocean Colony Condo. Ass'n, 173 F. Supp. 2d 244, 251 (D.N.J. 2001); *see also* Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. Civ. A. H-05-3197, 2005 WL 2669480, at *4 (S.D. Tex. Oct. 19, 2005) (noting that "[s]ection 3617 does not impose a code of civility on neighbors").

322. *See Sporn*, 173 F. Supp. 2d at 251-52. In the *Sporn* decision, the court determined that the defendant's alleged "shunning" of a physically handicapped tenant did not rise to the level of harassing conduct prohibited under the FHA. *Id.* at 252; *see also Reule*, 2005 WL 2669480, at *4; Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1143 (S.D. Fla. 2004); Walton v. Claybridge Homeowners Ass'n, No. 1:03-CV-69-LJM-WTL, 2004 WL 192106, at *7 (S.D. Ind. Jan 22, 2004) (holding that "unfortunate skirmishes between neighbors, tinged with discriminatory overtones or occasional discriminatory comments," do not trigger FHA protection); Gourlay v. Forest Lake Estates Civic Ass'n, Inc., 276 F. Supp. 2d 1222, 1236 (M.D. Fla. 2003) (explaining that the FHA should not become "an all purpose cause of action for neighbors of different races, origins, faiths . . . to bring neighborhood feuds into federal court when the dispute has little or no actual relation to housing discrimination"), *vacated and appeal dismissed per stipulation*, No. 8:02CV1955T30TGW, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003).

323. *See, e.g.*, Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 57 (D.D.C. 2002) (observing that "the failure of the FHA to 'define key terms such as "service" and "make unavailable"'" makes congressional intent in § 3604 unclear (quoting Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1356 (6th Cir. 1995))); *see also* discussion *supra* Part II.A.

324. *See* 42 U.S.C. § 3617 (2000).

325. *See supra* text accompanying note 294.

326. *See* 42 U.S.C. § 2000e-2(a)(1) (2000).

complaints that state a claim of post-hiring harassment and those that do not.[327] As discussed earlier, the FHA contains nearly identical language in § 3604, prohibiting discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith."[328] If the "terms, conditions, or privileges" language in Title VII allows judicial line drawing,[329] that language should be sufficient under the FHA as well. And if it is not, § 3617 provides additional criteria and detail for courts considering claims of housing harassment.[330]

Assuming that courts possess adequate textual guidance to draw lines in housing harassment cases, those lines still must be drawn. In that process, courts have struggled to determine how violent, intimidating, or threatening conduct must be to state a claim under, and then violate, the FHA. In *Walton v. Claybridge Homeowners Ass'n*,[331] the district court dealt at some length with how properly to define the outer limit of post-acquisition claims under § 3617. Rejecting the assertion that the FHA should apply only to "extraordinarily violent and discriminatory" claims, the court noted that Congress in § 3617 prohibited not just coercion, intimidation, and threats but also "interference," suggesting that § 3617 was intended to cover "a broad range of discriminatory conduct associated with the exercise of housing rights."[332] Although recognizing that "drawing a line" in cases involving claims of less egregious forms of discrimination may be challenging, the *Walton* court noted that judges "are not unfamiliar with difficult questions of line drawing in discrimination cases."[333]

On one outer extreme of harassment disputes lie "cross-burning, firebombing and other similarly overt discriminatory acts designed to intimidate, coerce, or interfere with housing rights," which the *Walton* court de-

327. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (recognizing that Title VII prohibits same-sex harassment post-hiring); Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (noting that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"); *see also* Spicer v. Va. Dep't of Corr., 66 F.3d 705, 709-10 (4th Cir. 1995) (en banc); Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981); Zabkowicz v. W. Bend Co., 589 F. Supp. 780, 783 (E.D. Wis. 1984).

328. 42 U.S.C. § 3604(b) (2000).

329. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (explaining that "[a] recurring point in [Supreme Court] opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" (quoting *Oncale*, 323 U.S. at 82) (citation omitted)).

330. *See supra* pp. 217-19.

331. No. 1:03-CV-69-LJM-WTL, 2004 WL 192106 (S.D. Ind. Jan. 22, 2004).

332. *Id.* at *6; *see also* Mich. Prot. & Advocacy Serv., Inc., 18 F.3d 337, 347 (6th Cir. 1994) (observing that § 3617 "is not limited to those who used some sort of 'potent force or duress,' but extends to other actors who are in a position directly to disrupt the exercise or enjoyment of a protected right and exercise their powers with a discriminatory animus"); Fowler v. Borough of Westville, 97 F. Supp. 2d 602, 614 (D.N.J. 2000) (concluding that "violence or physical coercion is not a prerequisite to a claim under section 3617"); Campbell v. City of Berwyn, 815 F. Supp. 1138, 1144 (N.D. Ill. 1993) (denying motion to dismiss § 3617 claim alleging interference with plaintiff's right to enjoy police protection).

333. *Walton*, 2004 WL 192106, at *7 (citing, as an example, sexual harassment cases under Title VII, in which judges are required to determine "whether or not a plaintiff has alleged conduct that is severe or pervasive enough to create a hostile work environment").

termined to be clearly encompassed by the FHA.[334] At the other extreme are "unfortunate skirmishes between neighbors, tinged with discriminatory overtones," which are not appropriate for resolution under the FHA.[335] In the middle are the difficult cases, in which "factors such as the frequency and severity of the conduct are relevant when determining how to assess a case, just as they are in a sexual harassment case [under Title VII]."[336] In fact, courts evaluating housing harassment claims often import into their analyses a Title VII-like judicial gloss,[337] asking "whether the [conduct is] sufficiently severe or pervasive to alter the plaintiff's conditions of tenancy and to create an abusive living environment."[338] Because this is "quintessentially a question of fact,"[339] resolution of housing harassment allegations on defendants' motions for summary judgment will likely be rare if the Title VII hostile work environment standard is used.[340]

Other courts, however, take a more narrow approach to housing harassment, inquiring whether the plaintiff was actually driven out of possession or, at the very least, whether the defendant attempted to do so.[341] As previously noted, the Seventh Circuit in *Halprin* appeared to reluctantly recognize that certain violent acts of post-acquisition harassment might violate the express terms of the FHA: "As a purely semantic matter the statutory language might be stretched far enough to reach a case of 'constructive eviction,' which is one way to describe the present case (more precisely,

334. *Id.*

335. *Id.*

336. *Id.* The *Walton* court then denied the defendants' motion to dismiss and ruled that the plaintiff might be able to make out a claim under § 3617, where dog feces were placed on her door mat, trash had been thrown in her yard, beer bottles had been left in her mailbox, and she had been threatened with bodily injury both in person and over the phone, all with discriminatory animus. *Id.*

337. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996) (recognizing hostile housing environment harassment claim under the FHA); Honce v. Vigil, 1 F.3d 1085, 1088-90 (10th Cir. 1993) (concluding that hostile housing environment claims are actionable under the FHA where the alleged harassment unreasonably interferes with plaintiff's use and enjoyment of premises and harassment is sufficiently severe or pervasive to alter conditions of the housing arrangement); Williams v. Poretsky Mgmt., Inc., 955 F. Supp. 490, 496 n.2 (D. Md. 1996) (asking whether the alleged conduct is "sufficiently severe or pervasive to alter the plaintiff's conditions of tenancy and to create an abusive living environment"). This approach is lifted from the Title VII context, where courts recognize hostile work environment harassment claims where the offending conduct is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (quoting Faragher v. Boca Raton, 524 U.S. 775, 786 (1998)); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (explaining that Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment").

338. *Williams*, 955 F. Supp. at 496 n.2 (D. Md. 1996).

339. *Id.* at 497 (quoting Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989)).

340. *See id.* at 498. Another approach in this context is to ask whether the alleged activities have improperly disrupted or intruded into the peacefulness and sanctity of the home living environment. *See, e.g.*, Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 243 (E.D.N.Y. 1998) (observing in the § 1617 context that "peaceful enjoyment of one's home is a root concept of our society . . . obviously sufficiently pervasive to embrace the expectation that one should be able to live in racial and ethnic harmony with one's neighbors [and therefore one should be held] accountable for intentionally intruding upon the quietude of another's home because of that person's race, color, religion, sex, familial status or national origin").

341. *See, e.g.*, Whisby-Myers v. Kiekenapp, 293 F. Supp. 2d 845, 851 (N.D. Ill. 2003); Schroeder v. De Bertolo, 879 F. Supp. 173, 178 (D.P.R. 1995); Congdon v. Strine, 854 F. Supp. 355, 359-60 (E.D. Pa. 1994).

'attempted constructive eviction')."[342] Taking a similar approach, the trial court in *Halprin* appeared to interpret § 3617 as applying to harassment cases only where "threatening, intimidating, or extremely violent discriminatory conduct [was] designed to drive an individual out of his home."[343] That position, to some degree, is supported by cases recognizing FHA causes of action where extremely violent harassment was intended to, or did in fact, drive persons from their housing. For example, firebombings targeting African-American families' homes and cars, where the attacks were intended to intimidate the families and drive them from their neighborhoods, have been found by courts to state a claim under § 3617.[344] Housing harassment cases involving less violent or extreme acts have also focused on whether the plaintiff was constructively evicted from housing.[345]

For the purposes of this analysis, the important fact is not that courts use different standards and criteria to draw lines between actionable housing harassment claims and those that should be dismissed; instead, the importance of these divergent approaches is simply that courts are capable of drawing such lines, and they routinely do so. For most courts, any difficulty in distinguishing between serious harassment allegations and common neighborhood squabbles does not dissuade them from drawing appropriate lines and entertaining colorable claims. The FHA provides courts textual guidance at least as detailed as—and arguably more detailed than—Title VII, under which courts are consistently able to draw necessary lines between actionable cases and those that should be dismissed. Given the statutory tools at their disposal and their inherent discretion, courts should not fear that hearing serious post-acquisition harassment claims will require them to open the floodgates to all neighborhood disputes.

342. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004). The court went on: "If you burn down someone's house you make it 'unavailable' to him, and 'privileges of sale or rental' might conceivably be thought to include the privilege of inhabiting the premises." *Id.*

343. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 208 F. Supp. 2d 896, 903-04 (N.D. Ill. 2002).

344. *See* Stirgus v. Benoit, 720 F. Supp. 119, 123 (N.D. Ill. 1989); *see also* Johnson v. Smith, 810 F. Supp. 235, 238-39 (N.D. Ill. 1992); Waheed v. Kalafut, No. 86 C 6674, 1988 WL 9092, at *1 (N.D. Ill. Feb. 2, 1988); Stackhouse v. DeSitter, 620 F. Supp. 208 (N.D. Ill. 1985).

345. In *Schroeder*, for example, the district court allowed claims of post-acquisition harassment to go forward where the plaintiff was "allegedly forced . . . out of a portion of the physical space which she was entitled to use" as a result of threats and intimidation. 879 F. Supp. at 178. By excluding the plaintiff from common areas, defendants discriminated in the "provision of facilities" under the FHA. *Id.* In another example, the Seventh Circuit in *Krueger v. Cuomo*, considered the existence of a constructive eviction claim in a sexual harassment case under the FHA. 115 F.3d 487 (7th Cir. 1997). Although the court did not engage in a detailed FHA analysis of the underlying allegations, it did highlight the ALJ's findings of constructive eviction: "Significantly, the ALJ found that [the defendant's] conduct had caused [the plaintiff] to move out of her apartment. . . . 'Eventually the tenancy became so miserable that she felt compelled to move out.'" *Id.* at 491 (quoting the factual findings of the Administrative Law Judge). In the ALJ's conclusion, the plaintiff's rejection of the defendant's advances "resulted in an adverse consequence (i.e., being forced out of her apartment)." *Id.*

2. Harassment as a Cause of Racially Segregated Housing

As discussed throughout this Article, courts evaluating claims of post-acquisition harassment have analyzed the considerations that normally arise whenever statutory interpretation is undertaken. The text and legislative history are probed, and analogies to related law—here, Title VII—are evaluated. Even a degree of pragmatism creeps into the analysis, as courts consider whether they are capable of distinguishing between worthy FHA claims and those that are simple neighborhood skirmishes undeserving of a federal forum. However, as courts struggle to make sense of harassment claims under the FHA, there is at least an underlying sense that without such justifications, harassment occurring post-acquisition does not constitute housing discrimination.[346] What has been overlooked in these analyses, however, is history. As briefly outlined below, segregated residential patterns that were the focus of the FHA in 1968 were not created overnight solely by exclusionary sales and rental practices. Instead, harassment, intimidation, threats, and violence have been powerful driving factors since at least the 1800s in the development and maintenance of segregated housing patterns across the United States.

The foundations of segregationist policy trace not simply to the obvious inequalities of slavery but also to the reaction of northern society to African-Americans in the nineteenth century.[347] Although slavery was virtually abolished in the North by 1830, racial tensions remained, with many residents of northern states believing that blacks were an inferior race, "incapable of being assimilated politically, socially, or physically into white society."[348] Nevertheless, in the mid- to late-nineteenth century in many northern cities,[349] housing patterns reflected considerable racial intermixing.[350] The census performed in Detroit in 1860, for example, reflected that although the African-American population was 1,402, blacks did not make up a majority of residents on any street in the city.[351] Twenty years later, new census data from Detroit showed that even in the highest areas of African-

346. *See Halprin*, 388 F.3d at 329 (explaining that the focus of the FHA was to remedy minorities' "exclusion" from desirable housing and that "the problem of how they were treated when they were included . . . would tend not to arise until [after the FHA] was enacted and enforced").

347. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 17-21 (commemorative ed. 2002).

348. *Id.* at 18.

349. In southern states following the Civil War, black workers employed as domestic servants often lived next to their white employers on nearby side streets and alleys. *See* CHARLES ABRAMS, FORBIDDEN NEIGHBORS 6 (1955); MASSEY & DENTON, *supra* note 163, at 17. One newspaper reporter from the North is reported to have responded with surprise at "'the proximity and confusion, so to speak, of white and negro houses' in both the countryside and cities of South Carolina" after the Civil War. *See* WOODWARD, *supra* note 347, at 32. No later than 1890, however, segregation had descended on southern blacks. *See id.* at 42.

350. *See* JAMES A. KUSHNER, APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES 6 (1980).

351. DAVID M. KATZMAN, BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY 26-27 (1973).

American concentration, blacks and whites continued to live next to each other.[352] While ethnic and racial neighborhoods existed during this time, they were "[o]verlapping and integrated."[353] This pattern of general racial integration in housing was not uncommon in northern and midwest cities in the mid- to late-1800s.[354] To the extent that blacks and other minorities occupied substandard housing in disproportionate numbers, the primary cause appears to have been discrimination in employment rather than in housing.[355] As minorities were excluded from higher-paying skilled employment, they were often forced into less desirable but affordable housing.[356] To the extent that minorities were able to secure wages equal to those of white workers, empirical evidence suggests that they were also able to secure better housing alongside whites.[357]

After the turn of the century, southern hostility and the lure of new industrial jobs in the North spurred an enormous migration of African-Americans to cities such as Cleveland, Detroit, Trenton, and Philadelphia.[358] These new waves of migrant blacks were not always well received, as many northern whites feared losing their jobs and damage to their culture and communities.[359] To make matters worse, African-Americans were often recruited to northern cities from the South to serve as strike breakers, con-

352. *Id.* at 69.

353. *Id.* at 55.

354. *See* DARREL E. BIGHAM, WE ASK ONLY A FAIR TRIAL: A HISTORY OF THE BLACK COMMUNITY OF EVANSVILLE, INDIANA 26-27 (1987) (describing the racially mixed neighborhoods of Evansville in the late 1800s); MASSEY & DENTON, *supra* note 163, at 21 (providing indices of black-white segregation for southern and northern cities in 1860, 1910, and 1940); WOODWARD, *supra* note 347, at 100-01 (explaining that residential segregation was rare until the 1910s); Henry L. Taylor, *Spatial Organization and the Residential Experience: Black Cincinnati in 1850*, 10 SOC. SCI. HIST. 45, 46-48 (1986) (explaining that residential neighborhoods around the time of the Civil War were "highly heterogeneous; different populations lived side by side in the city, despite the important ethnic, racial, and socio-economic cleavages that separated these groups in most other aspects of urban life").

355. *See* KATZMAN, *supra* note 351, at 70-71; MASSEY & DENTON, *supra* note 163, at 19-20.

356. *See* MASSEY & DENTON, *supra* note 163, at 19-20; *see also* Taylor, *supra* note 354, at 63 (explaining that "[o]ccupation and socio-economic status functioned as the primary determinants of residential location in antebellum Cincinnati").

357. MASSEY & DENTON, *supra* note 163, at 19-20. Beyond housing, substantial social and economic connections existed between blacks and whites during this time. *See* KUSHNER, *supra* note 350, at 15-16; ALLAN H. SPEAR, BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO 1890-1920, at 54 (1967) (explaining that the black leadership in Chicago around 1900 "had economic ties with the white community and numbered among their associates white men of comparable social position"). In perhaps an overstatement, one account explains that blacks and whites at this time "moved in a common social world, spoke a common language, shared a common culture, and interacted personally on a regular basis." MASSEY & DENTON, *supra* note 163, at 18.

358. *See* ABRAMS, *supra* note 349, at 7, 23-24; ALLEN B. BALLARD, ONE MORE DAY'S JOURNEY: THE STORY OF A FAMILY AND A PEOPLE 183 (1984); KUSHNER, *supra* note 350, at 13; STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 32 (2000) (describing that between 1901 and 1930, more than 235,000 African-Americans moved to New York City, Philadelphia's African-American population increased two-and-a-half times to 220,000, Detroit's African-American population increased ten-fold, and more than 200,000 African-Americans relocated to Chicago).

359. KUSHNER, *supra* note 350, at 15-16; MASSEY & DENTON, *supra* note 163, at 29. Competition for jobs as a source of racial and ethnic tension in the early twentieth century was a carryover from the late nineteenth century. *See* KATZMAN, *supra* note 351, at 44-45 (discussing the tension between African-Americans and Irish immigrants in Detroit for unskilled service jobs in the late 1800s).

tributing to the hostility they faced as they moved into racially mixed, middle-class neighborhoods.[360] As large numbers of blacks settled into northern cities, they faced growing resentment and antagonism in the areas of education, employment, and largely for the first time, housing.[361] Many whites resorted to violence and intimidation rather than live in increasingly racially mixed neighborhoods,[362] and blacks who escaped such hostility by moving into predominantly minority areas were often too fearful to return to their old neighborhoods.[363] As the concentration of blacks in "black neighborhoods" increased, fueled by escalating migration from the South, the foundations of the American ghetto developed.[364] When African-Americans attempted to relieve the increasing pressure inside ghettos by moving into adjacent white, middle-class neighborhoods, they often faced resistance and resentment from their new, wary neighbors.[365] On the mild end, hostile reactions from white neighbors included harassing letters and offers to buy the black family's property;[366] at their most vicious and destructive, the response from the new community involved physical attacks, gunshots, cross-burnings, and even bombings.[367] In Chicago alone, between 1917 and 1921,

360. *See* BALLARD, *supra* note 358, at 184-86; MASSEY & DENTON, *supra* note 163, at 28.

361. MASSEY & DENTON, *supra* note 163, at 30. Assimilation difficulties for blacks, as compared to other minority groups, were exacerbated by the fact that they were easily identifiable by their skin color. *See* ABRAMS, *supra* note 349, at 7. The reaction of northern African-Americans to the influx of large numbers of southern African-Americans was not always welcoming. In 1917, the head of the Armstrong Association, a precursor to the Philadelphia Urban League, said that "both the native colored and white people of our community have a feeling that the southern man is more criminal than the northern which creates a very unpleasant attitude towards the newcomers." *See* BALLARD, *supra* note 358, at 187.

362. The histories of various northern cities are filled with examples of violence and intimidation directed at blacks who moved into "white neighborhoods." *See, e.g.*, BIGHAM, *supra* note 354, at 113-14 (explaining that a contributing factor to the greater concentrations of African-Americans in the early 1900s were the "outbursts of hostility to those few blacks who dared to consider moving into regions tacitly understood as for whites only"); Lawrence B. De Graaf, *The City of Black Angels: Emergence of the Los Angeles Ghetto 1890-1930*, 39 PAC. HIST. REV. 323, 336, 346 (1970) (providing examples of attempts to harass, intimidate, and drive African-American homeowners out of predominantly white neighborhoods in Los Angeles in the early 1900s). During congressional consideration of the FHA, the problems faced by African-American families moving into white neighborhoods were highlighted. *See Proposed Civil Rights Act of 1967*, *supra* note 172, at 462 (statement of Sanford Kahn, Assistant Director, Washington Office, American Civil Liberties Union) (discussing the physical and psychological violence endured by minority group members who lead the way moving into "often-hostile 'White areas'").

363. MASSEY & DENTON, *supra* note 163, at 34.

364. *Id.* at 34.

365. *See id.* at 34-35. Racially restrictive covenants were also regularly employed to limit the relocation of black families into affordable, predominantly white neighborhoods adjacent to black neighborhoods. *See* KUSHNER, *supra* note 350, at 17; De Graaf, *supra* note 362, at 336-37.

366. *See* MEYER, *supra* note 358, at 33-34 (cataloging letters of racial intimidation received by African-Americans who moved into traditionally white neighborhoods).

367. *See, e.g.*, KATZMAN, *supra* note 351, at 78-79 (describing the "mysterious[]" burning of an African-American family's home in an Irish neighborhood in Detroit in the early 1920s, where volunteer firemen refused to extinguish the fire); MASSEY & DENTON, *supra* note 163, at 34-35; Meyer, *supra* note 358, at 33-47 (providing numerous examples from New York, Chicago, Detroit, and Cleveland of cross-burnings and physical attacks on the homes of African-Americans who had moved into neighborhoods previously occupied exclusively or predominantly by whites); Joe R. Feagin, *A House is Not a Home: White Racism and U.S. Housing Practices*, *in* RESIDENTIAL APARTHEID: THE AMERICAN LEGACY 17, 37-38 (Robert D. Bullard et al. eds., 1994). According to one commentator, "The racial issue was becoming centered around the home, the most emotional possession of the American family." *See*

fifty-eight black homes were bombed, averaging one every twenty-one days.[368] Most of those attacks occurred in the neighborhoods of Kenwood and Hyde Park, which had once been predominantly white but had experienced an influx of African-Americans in the preceding years, much to the dismay of the surrounding white homeowners.[369] In the 1910s and 1920s, full-scale riots exploded in Chicago, New York, Indiana, Illinois, and Pennsylvania reflecting increasing racial discord over housing.[370] Although such housing-related violence may have peaked in the 1920s,[371] it continued to some degree through the ensuing decades.[372] Even today, incidents of harassment, violence, and threats directed at minorities in the housing context are not rare.[373] And the dilemma of racially divided housing in the United States has not been solved,[374] particularly in cities that historically experienced significant segregation.[375]

The damage caused[376] by these acts of harassment, intimidation, and violence is exacerbated because they target one of the most psychologically

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ABRAMS, *supra* note 349, at 8.

368. MEYER, *supra* note 358, at 34.

369. CHICAGO COMMISSION ON RACE RELATIONS, THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT 117 (1923).

370. MASSEY & DENTON, *supra* note 163, at 30; MEYER, *supra* note 358, at 30-31. *See generally* CHICAGO COMMISSION ON RACE RELATIONS, *supra* note 369.

371. MASSEY & DENTON, *supra* note 163, at 35.

372. *See* ABRAMS, *supra* note 349, at 82-87 (detailing specific examples of housing-related violence, intimidation, and harassment across the country directed at minorities); Robert D. Bullard & Charles Lee, *Racism and American Apartheid*, *in* RESIDENTIAL APARTHEID, *supra* note 367, at 1, 10 (claiming that "[r]acially motivated violence is increasing both numerically and geographically," citing as evidence that between 1985 and 1986, forty-five known arson and cross-burning attempts were perpetrated against the homes of African-Americans who had moved into predominantly white neighborhoods).

373. *See, e.g.*, Bennett, *supra* note 30 (reporting that the FBI investigated cross-burnings at four black-owned homes in four different Detroit suburbs over the summer of 2005); *Candidate Downplays Role in Cross Burning*, AUGUSTA CHRON., June 15, 2005, at B3 (describing reaction of Pratt, West Virginia, mayoral candidate that his role in a 1999 cross-burning had been "exaggerated," when he pleaded guilty in 2001 to a criminal conspiracy charge and admitted to building a cross and carrying it to the home of a grandmother babysitting her biracial granddaughter); *Cross-burning Case Results in Probation*, SEATTLE TIMES, Feb. 18, 2006, at B3 (describing conspiracy to burn five-foot cross in Arab American family's yard); *Taylor Men Indicted for Civil Rights Violations*, U.S. FED. NEWS, Jan. 10, 2006, *available at* 2006 WLNR 1974039 (describing alleged racially motivated arson of an African-American family's home); *Two Plead Guilty in South Phila. Cross Burning*, PHILA. INQUIRER, Feb. 23, 2006, at B4 (reporting the burning of two crosses in the yard of an interracial couple); Weiss, *supra* note 30 (reporting data from the Southern Poverty Law Center that approximately one cross-burning per week is reported nationwide at a home of an interracial couple or an African-American family); Rop Zone, *Cross is Burned on Arlington Lawn of Black Minister*, SEATTLE TIMES, Mar. 25, 2004, at B1; March 14 Press Release, *supra* note 30 (announcing convictions of two men for a series of "racially harassing incidents," including burning a cross near an African-American family's home, hanging a noose on their doorknob, and throwing a dead raccoon in their yard).

374. Bennett, *supra* note 30 (reporting census data reflecting that "Detroit is among the most racially divided metro areas in the United States," with the city more than 80% black and the surrounding suburbs are 96% white); *see* JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST 112-13 (1995) (providing indices of black-white segregation for the twenty-three metropolitan areas with the largest African-American populations in 1980 and 1990).

375. *See* Nancy A. Denton, *Are African Americans Still Hypersegregated?*, *in* RESIDENTIAL APARTHEID, *supra* note 367, at 49, 62.

376. The income opportunity denied due to residential segregation, alone, has been estimated at $10 billion annually. Joe T. Darden, *Accessibility to Housing: Differential Residential Segregation for Blacks, Hispanics, American Indians, and Asians*, *in* RACE, ETHNICITY, AND MINORITY HOUSING IN THE

significant locations in society: the home. Considerable scholarship across various disciplines, much of it after passage of the FHA, has explored the meaning and sanctity of "home."[377] Beyond affording physical shelter, the home provides intensely personal benefits to its inhabitants, including rootedness, privacy, and safety.[378] Members of minority groups may attach added significance to the concept of home. For many African-Americans, for example, "home often represents the only reliable anchor available to them in a hostile white-dominated world."[379] To the extent that members of minority groups feel discriminated against or oppressed in their daily lives, home is where they may retreat to receive support, comfort, and strength.[380] Harassment and violence occurring in this environment, then, is doubly damaging, disrupting both objective safety and the subjective psychological comfort provided by the home.[381]

Seen in the proper historical context, threats, intimidation, and violence are directly related to the problems of residential segregation. Although decisions by white owners to deny sales or rentals to African-Americans were obviously important components leading to segregated housing patterns throughout the nineteenth and twentieth centuries, they were not the entire story. Harassment of existing home owners and renters directly contributed to the entrenched segregation problems facing Congress in 1968. In this way, post-acquisition harassment is properly considered a form of housing discrimination and should remain remediable under the FHA.

IV. CONCLUSION

On the ladder of civil rights concerns for many Americans, fair housing occupies a relatively low rung. Today, housing rights are almost never the subject of marches or picketing, and politicians rarely give speeches focus-

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UNITED STATES 109, 111 (Jamshid A. Momeni ed., 1986).

377. *See, e.g.*, D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006); Roberta M. Feldman, *Settlement-Identity: Psychological Bonds with Home Places in a Mobile Society*, 22 ENV'T & BEHAV. 183 (1990); Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. & SOC. 580 (2002); Lindemyer, *supra* note 29, at 351; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991-1002 (1982); Sandy G. Smith, *The Essential Qualities of a Home*, 14 J. ENVTL. PSYCH. 31 (1994). Beyond the psychological significance of protecting the "home," there are important financial considerations as well. Home ownership is a significant method of capital accumulation, and considerable tax advantages accrue to home owners. *See* Mary R. Jackman & Robert W. Jackman, *Racial Inequalities in Home Ownership*, *in* RACE, ETHNICITY, AND MINORITY HOUSING IN THE UNITED STATES, *supra* note 376, at 39, 39.

378. *See* Barros, *supra* note 377, at 276-77. The home represents an embodiment of privately and publicly valued concepts, including identity, family, protection from public life, security, continuity, and a safe haven in which to relax and rejuvenate. *See* Fox, *supra* note 377, at 592; Lindemyer, *supra* note 29, at 370-71.

379. Feagin, *supra* note 367, at 20.

380. *See id.* at 20-24. It is not surprising, then, that the law often affords the home favorable treatment and greater protections, both civil and criminal, than exist in other settings. *See* Barros, *supra* note 377; Lindemyer, *supra* note 29, at 368-69; Debora Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 886-88 (1997).

381. *See generally* Lindemyer, *supra* note 29, at 371.

ing on housing. New or amended legislation on the subject at the state or federal level is somewhat more frequent but still not frequent enough to suggest that any significant concern about housing exists in the general American psyche. This relative complacency, however, is out of synch with the reality experienced by many minorities across the country, even today. Although housing opportunities have generally increased over the years, racial segregation persists, especially in cities with large African-American populations. Furthermore, acts of racially motivated violence aimed at housing continue to be perpetrated.

It is against this backdrop that the *Halprin* litigation arises. The Seventh Circuit's decision is most troubling because faced with an opportunity to reinforce the federal commitment to both the letter and spirit of the FHA, the Seventh Circuit retreated in a needlessly provocative way. Instead of simply reinstating the Halprins' FHA claim given the existence of an unchallenged HUD rule directly on point, the Seventh Circuit floated its restrictive interpretation of the FHA while nevertheless ultimately deciding for the Halprins. Because a significant area of FHA coverage has now been thrown into question, further unnecessary attention in this area seems certain to result. Subsequent case law already suggests that some courts will adopt the Seventh Circuit's reasoning.

As demonstrated in this Article, a thorough analysis of the FHA undermines a narrow construction of the statute. The FHA's application to appropriate cases of post-acquisition harassment is supported by its text, its legislative history, analogous legislation in the employment context, and an appreciation for the role of post-acquisition harassment in the creation of the very housing problem that was the target of the FHA in 1968. Nevertheless, the FHA's post-acquisition scope is not limitless. Judges should evaluate harassment claims to ensure that "quarrels between neighbors [do] not become a routine basis for federal litigation."[382] But in doing so, courts must continue to recognize that harassment, intimidation, and violence occurring after the sale or rental of housing can be as violative of federal fair housing guarantees as actual denials of housing.

382. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004).