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The Lack of Protection Available to Victims of Domestic Violence in Private Housing

Justin Henry Lubas

December 7, 2012

I. Introduction

“When I reported the domestic violence, first to the police and then to my housing manager, I thought I was making myself and my children safer. Instead, my landlord threw us out of the apartment and we had nowhere to go.”¹

Supreme Court Justices, both houses of the federal legislature, and a growing number of independent studies agree that domestic violence is a growing issue in the United States that needs to be addressed.² Domestic violence is the leading cause of injury to women in the United States.³ Three out of four American women will experience a violent crime at some point in their life.⁴ Four million American women are victims of domestic violence by the hands of their husbands or partners each year⁵, and an estimated quarter of these incidents leave the women in need of medical assistance.⁶

¹ *Private Housing Company Won't Evict Domestic Violence Victims After ACLU Lawsuit*, ACLU BLOG (February 26, 2008), <http://www.aclu.org/womens-rights/private-housing-company-won't-evict-domestic-violence-victims-after-aclu-lawsuit>.

² See *infra* notes 3-8.

³ *United States v. Morrison*, 529 U.S. 598, 631 (2000) (Justice Souter, dissenting) (citing S. REP. NO. 103-138, at 38 (1993) (citing Surgeon General Antonia Novello, *From the Surgeon General, U.S. Public Health Services*, 267 JAMA 3132 (1992))).

⁴ *Morrison*, 529 U.S. at 631 (Justice Souter, dissenting) (citing H.R. REP. NO. 103-395, at 25 (1993) (citing U.S. Dept. of Justice, *Report to the Nation on Crime and Justice* 29 (2nd ed. 1988))).

⁵ *Morrison*, 529 U.S. at 631 (Justice Souter, dissenting) (citing H.R. REP. NO. 103-395, at 26 (citing Council on Scientific Affairs, American Medical Assn., *Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3185 (1992))).

⁶ *Morrison*, 529 U.S. at 631 (Justice Souter, dissenting) (citing S. REP. NO. 101-545, p. 36 (1990) (citing Stark & Flitcraft, *Medical Therapy as Repression: The Case of the Battered Woman*, *Health & Medicine* (Summer/Fall 1982))).

Between two and four thousand women die every year as a result of domestic violence.⁷ Further, this high frequency of domestic violence cases has a direct relation to the number of homeless women and children in America. Studies have found that as many as half of America's homeless women and children are fleeing incidents of domestic violence.⁸

Quinn Bouley became a victim of domestic violence at the hands of her husband on October 15, 2003.⁹ That night she called the police, fled her apartment, and filed a restraining order against her attacker.¹⁰ She was again victimized on October 18th at the hands of her landlord.¹¹ The landlord handed her an eviction letter citing the incident of domestic violence as the main reason for his decision.¹² This letter stated, "Agreement # 10 on your lease states that 'Tenant will not use or allow said premises or any part thereof to be used for unlawful purposes, in any noisy, boisterous or any other manner offensive to any other occupant of the building.' Other tenants, and now myself included, feel fearful of the violent behaviors expressed."¹³

Instances of double victimization¹⁴ such as that described above result from an obvious gap in legislation. Double victimization stemmed from a crackdown on drug use

⁷ *Morrison*, 529 U.S. at 631 (Justice Souter, dissenting) (citing S. Rep. No. 101-545, at 36 (1990) (citing ELIZABETH M. SCHNEIDER, LEGAL REFORM EFFORTS FOR BATTERED WOMEN: PAST, PRESENT, AND FUTURE (Brooklyn Law School, 1990))).

⁸ *Morrison*, 529 U.S. at 631 (Justice Souter, dissenting) (citing S. REP. NO. 101-545, at 37 (1990) (citing SCHNEIDER, *supra*)).

⁹ *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677 (D. Vt. 2005).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 377 (2003).

and violence in public housing in the early 1990's.¹⁵ In response to a public concern, legislation¹⁶ was passed mandating a “zero tolerance” or “one strike” policy in public housing, and many private landlords followed suit by drafting similar terms into their leases.¹⁷ The result was that many public and private housing leases then contained language that provided for eviction when a tenant, or any guest of that tenant, acted illegally or violently.¹⁸ This meant that victims of domestic violence could now be evicted from their housing because of the actions of their abusers.¹⁹ Congress eventually realized the negative effects this policy had on victims of domestic violence, and added an amendment explicitly banning the application of these policies in such cases.²⁰ However, nothing was done to prevent the continuation of these policies in private housing.²¹

This paper will first discuss the history of the “one strike policies” that lead to domestic violence related evictions in Part II.²² Part III will look into the protections currently available to domestic violence victims under the Fair Housing Act, and discuss why those protections have not been adequate in protecting them from eviction.²³ Part IV will then discuss legislative attempts by the states to remedy this issue.²⁴ Finally, part V

¹⁵ See *infra* Part II.

¹⁶ 42 U.S.C.A. § 1437d(l).

¹⁷ See *Bouley*, 394 F. Supp. 2d at 677.

¹⁸ See *infra* Part II.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *infra* Part III.

²² See *infra* Part II.

²³ See *infra* Part III.

²⁴ See *infra* Part IV.

of this paper will then propose a federal legislative remedy adopting models of successful private settlement terms that could be drafted under the power of the Commerce Clause.²⁵

II. History of One Strike Policies

In 1988 the federal government set out to address rampant drug related or violent crime in public in federally funded housing.²⁶ Consequently, Congress passed the Anti Drug Abuse Act in order to better provide public housing that is “decent, safe, and free from illegal drugs.”²⁷ This act allowed for a termination of tenancy for anyone in public housing who engaged in criminal activity, as well as anyone whose guest or person under their control engaged in criminal activity.²⁸

The eviction policies under the Anti-Drug Abuse Act were not generally being enforced,²⁹ and in 1996 President Clinton sought out to strengthen the legislation.³⁰ President Clinton called for a strict adherence to a “One Strike” policy,³¹ and worked with Congress to pass the Housing Opportunity Program Extension Act of 1996.³²

²⁵ See *infra* Part V.

²⁶ See 42 U.S.C.A. § 11901.

²⁷ *Id.*

²⁸ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (1988).

²⁹ Renai S. Rodney, *Am I My Mother's Keeper? The Case Against the Use of Juvenile Arrest Records in One-Strike Public Housing Evictions*, 98 NW. U. L. REV. 739, 744 (2004).

³⁰ President William Jefferson Clinton, State of the Union Address (Jan. 23 1996) (transcript available at <http://clinton2.nara.gov/WH/New/other/sotu.html>) (“And I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and peddle drugs should be one strike and you're out.”); see also PRESIDENT CLINTON'S MEMORANDUM ON THE “ONE-STRIKE AND YOU'RE OUT” GUIDELINES, 1996 PUB. PAPERS 521 (Mar. 28, 1996) (recognizing HUD's efforts to assist cities in providing “safer developments” but stating that “there remains too much public housing in this country that is ravaged by drugs, crime, and violence”).

³¹ See President William Jefferson Clinton, State of the Union Address (Jan. 23 1996) (transcript available at <http://clinton2.nara.gov/WH/New/other/sotu.html>).

³² 42 U.S.C.A. § 1437d; see also Elizabeth M. Whitehorn, *Unlawful Evictions of Female Victims of Domestic Violence: Extending Title VII's Sex Stereotyping Theories to the Fair Housing Act*, 101 NW. U. L. REV. 1419, 1435 (2007).

Because of these efforts, federal law currently requires that public housing agencies incorporate language into their leases which states that:

“any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.”³³

Many private landlords soon followed suit by incorporating similar terms into their leases, such as the language mentioned in the introduction.³⁴

After the passage of the Housing Opportunity Program Extension Act, the Secretary of Housing and Urban Development (hereinafter “HUD”) soon after issued guidelines on to this legislation which clearly defined how to enforce the policy.³⁵ These guidelines define guest as “a person temporarily staying in the unit with the consent of a tenant.”³⁶ Additionally, a person under tenant’s control is defined as anyone on the property with the consent of the tenant.³⁷ The Supreme Court has upheld the statute, and determined that it allows for eviction resulting from the actions of the tenant or anyone who is a guest of the tenant.³⁸ In *Rucker* the petitioners challenged the application of “one strike policies” against tenants whose family members or caregivers were found to possess drugs in or near the apartment complexes.³⁹ These challenges claimed an unconstitutional taking of the tenant’s property in violation of the Due Process Clause,

³³ 42 U.S.C.A. § 1437d(l)(6).

³⁴ See *Bouley*, 394 F. Supp. 2d at 677.

³⁵ 24 C.F.R. § 5.100

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002) (“unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity.”).

³⁹ *Id.* at 128.

since they were losing a property interest due to actions that were not actually under their control.⁴⁰ The Court held that it did not matter whether or not the tenant knew about or had control over the actions of their guest.⁴¹ The Supreme Court favored these “no-fault evictions”⁴² since a tenant who “cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.”⁴³

Unfortunately, the Supreme Court’s reading of the statute opened up the application of “one strike policies” to female victims of domestic violence.⁴⁴ While victims of domestic violence obviously do not have control over the actions of their attackers,⁴⁵ the attackers generally do fall into the definition of “guest” or “person under tenant’s control” as outlined by the HUD.⁴⁶ An abusive partner is generally invited into, or given permission to enter the apartment complex at one time, perhaps before they ever became physically abusive. In accordance with the Supreme Court’s strict literal reading of the Anti-Drug Abuse Act in *Rucker*, abusive intimate partners still qualify as a “guest” or “person under the tenant’s control” even once they lose that express permission to be on the property.⁴⁷

⁴⁰ *Id.* at 135.

⁴¹ *Id.* at 130.

⁴² *Id.* at 135.

⁴³ Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51560-01 (Oct. 21, 1991).

⁴⁴ See Whitehorn, *supra* note 32, at 1437.

⁴⁵ See Veronica L. Zoltowski, *Zero Tolerance Policies: Fighting Drugs or Punishing Domestic Violence Victims?*, 37 NEW ENG. L. REV. 1231, 1258 (2003) (If anyone is said to be in “control” in a domestic violence relationship, it is undoubtedly the abuser.).

⁴⁶ 24 C.F.R. § 5.100.

⁴⁷ See *Rucker*, 535 U.S. at 125.

This is exactly what happened in the case of Ms. Tiffani Alvera.⁴⁸ Ms. Alvera was assaulted by her then husband in their Creekside Village apartment on the morning of August 2, 1999.⁴⁹ That same day she went to the hospital to treat her wounds, then went to the police station to obtain a temporary restraining order against her husband.⁵⁰ Ms. Alvera gave notice of the restraining order to her landlord, and requested to transfer to a smaller apartment in the complex.⁵¹ A day later, a representative for the housing complex gave her a twenty-four hour eviction notice.⁵² That notice stated: “You, someone in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted personal injury on the landlord or other tenants... Specific details: On August 2, 1999, Humberto Mota reportedly physically attacked Tiffani Alvera in their apartment.”⁵³

The application of a “Zero-Tolerance Policy” to female victims of domestic violence like Ms. Alvera above had quickly become widespread. For that reason, Congress investigated the issue, and found a strong link between domestic violence and homelessness.⁵⁴ In this study, forty-four percent of the cities surveyed listed domestic violence as their primary cause of homelessness.⁵⁵ Congress found that, “Women and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic

⁴⁸ *Alvera v. Creekside Village Apts.*, HUD ALJ No. 10-99-0538-8 (U.S. Dep't of Hous. & Urban Dev., Portland, Or., Oct. 22, 1999) available at <http://www.aclu.org/womens-rights/alvera-v-cbm-group-inc-et-al>.

⁴⁹ Complaint, *Alvera v. Creekside Village Apts.*, HUD ALJ No. 10-99-0538-8 (U.S. Dep't of Hous. & Urban Dev., Portland, Or., Oct. 22, 1999) available at http://www.aclu.org/files/images/asset_upload_file457_33995.pdf.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 42 U.S.C.A. § 14043e(1).

⁵⁵ *Id.*

violence.”⁵⁶ Further, Congress found that legal service providers had responded to almost one hundred fifty cases where the tenant was evicted due to domestic violence in the past year.⁵⁷ Nearly one hundred other clients sought legal services when they were denied housing due to their status as victims of domestic violence.⁵⁸

In order to better protect the safety and provide long-term housing solutions for these victims,⁵⁹ Congress passed the Violence Against Women Act of 2005 (hereinafter “VAWA”).⁶⁰ VAWA explicitly states that “Zero-Tolerance Policies” can no longer be applied to criminal activity connected with domestic violence by a “guest” or a person under the control of the tenant.”⁶¹ VAWA also allows a landlord to bifurcate a lease to evict only the abuser in instances where both the abuser and the victim are on the lease.⁶²

Unfortunately, despite the provisions of VAWA, not all victims of domestic violence are protected against eviction for two reasons. First, eviction is still allowed if the landlord determines that allowing a continuation of tenancy could pose an actual or imminent threat to other tenants or employees of the housing agency.⁶³ Second, VAWA regulates these practices by controlling the amount of grants a public housing project or federally assisted housing receives based on their adherence to prescribed domestic violence guidelines.⁶⁴ However, because most private housing doesn’t receive any kind of federal subsidy, VAWA doesn’t apply. Since VAWA protection applies only to those

⁵⁶ 42 U.S.C.A. § 14043e(3).

⁵⁷ 42 U.S.C.A. § 14043e(4).

⁵⁸ *Id.*

⁵⁹ 42 U.S.C.A. § 14043e-1.

⁶⁰ *See id.*

⁶¹ 42 U.S.C.A. § 1437d(1)(6).

⁶² 42 U.S.C.A. § 1437d(1)(6)(B).

⁶³ 42 U.S.C.A. § 1437d(1)(6)(E).

⁶⁴ 42 U.S.C.A. § 14043e-4.

living in public housing,⁶⁵ it does not protect victims who live in private housing whose landlord added similar “Zero Tolerance” terms to their leases.⁶⁶

III. FHA and Disparate Impact Claims

As a result of the gaps left even after the passage of VAWA, victims of domestic violence facing evictions in public housing have therefore looked to the Fair Housing Act (hereinafter “FHA”) for some protection. The FHA makes it illegal to discriminate in most housing situations on the basis of sex.⁶⁷ The FHA applies to most private and public housing with a few exemptions.⁶⁸ One such exemption is an owner-occupied dwelling with no more than four units.⁶⁹ So long as a victim of domestic violence does not fall within an exemption of the Act, courts have determined that plaintiffs can bring a discrimination claim under the FHA based on the disparate impact theory.⁷⁰

Circuit courts are split as to exactly how to establish a prima facie case of disparate housing discrimination. The United States Court of Appeals for the Second Circuit has stated that, “A prima facie case of disparate impact housing discrimination is established by showing that a particular facially-neutral practice actually or predictably imposes a disproportionate burden upon members of the protected class.”⁷¹ Under this

⁶⁵ See 42 U.S.C.A. § 1437d(l) (“Each public housing agency shall...”).

⁶⁶ See *Bouley*, 398 F. Supp. 2d at 677; See also Rebecca Licavoli Adams, *California Eviction Protections for Victims of Domestic Violence: Additional Protections or Additional Problems?*, 9 HASTINGS RACE & POVERTY L. J. 1, 14 (2012).

⁶⁷ 42 U.S.C.A. § 3604.

⁶⁸ 42 U.S.C.A. § 3603.

⁶⁹ 42 U.S.C.A. § 3603(b)(2).

⁷⁰ See *Metropolitan Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (“We therefore hold that at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect.”).

⁷¹ *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 98 (2d Cir. 2000).

analysis, plaintiffs only need to show that housing practices disproportionately exclude members of a protected group.⁷² There is no need to show any discriminatory intent.⁷³

Surprisingly, the Seventh Circuit has determined that discriminatory intent is a necessary element of a disparate impact claim.⁷⁴ That court has stated that a plaintiff must show four elements to establish a prima facie disparate impact claim in housing discrimination.⁷⁵ The plaintiff must first point to the landlord's specific policy that has a discriminatory effect.⁷⁶ Second, the plaintiff needs to show some evidence of discriminatory intent.⁷⁷ Third, the plaintiff must demonstrate that the landlord had some interest in taking the discriminatory action.⁷⁸ Fourth, the plaintiff must show that relief would successfully remedy the problem.⁷⁹

Despite the courts' differences over a requirement of discriminatory intent, the circuits do agree that once a prima facie case is established, the court should follow a *McDonnell Douglas* burden shifting analysis.⁸⁰ First, the plaintiff has the burden of showing a prima facie case by a preponderance of the evidence.⁸¹ The burden then shifts to the landlord defendant to show some legitimate nondiscriminatory reason for his

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *Arlington Heights*, 558 F.2d at 1290.

⁷⁵ *Arlington Heights*, 558 F.2d at 1290.

⁷⁶ *Id.* at 1290.

⁷⁷ *Id.* at 1290 (note, the level of intent does not need to reach the level to satisfy the constitutional standard in *Washington v. Davis*. However, some lower level of discriminatory intent still must be shown.)

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁸¹ *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992) (quoting *Pollitt v. Bramel*, 669 F.Supp. 172, 175 (S.D. Ohio 1987)).

action.⁸² If the defendant satisfies this burden, the plaintiff may then show that the legitimate reasons offered by the landlord are mere pretext.⁸³

One would think that a disparate impact claim would be quite easy to show in these cases since statistics show that women are overwhelmingly more likely to be victims of domestic violence. Studies have shown that women account for 85% of domestic violence victims.⁸⁴ Indeed, studies show that in 2009, women were 5 times more likely than men to be the victims of domestic violence.⁸⁵ In total, an estimated 1.3 million women a year are victims of domestic violence.⁸⁶ With such statistics it may appear victims of domestic violence facing eviction could easily prove disparate impact under the above analysis, however prevailing on such a claim has proven challenging. For a number of reasons⁸⁷ First, in smaller apartment complexes, a Plaintiff's claim may be the first and only instance where the landlord applied a "Zero Tolerance Policy" to a victim of domestic violence. When the plaintiff is unable to find other similarly situated victims, establishing that the single decision constitutes a "policy or practice" is nearly impossible.⁸⁸ Second is the high cost of providing statistical evidence and expert testimony to show that women are disproportionately affected by domestic violence.⁸⁹ Third, since the issue of a disparate impact theory under the FHA has never reached the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Callie Marie Rennison, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Crime Data Brief, *Intimate Partner Violence, 1993-2001* (2003) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf>.

⁸⁵ Jennifer R. Truman & Michael R. Rand, U.S. Department of Justice, *Criminal Victimization, 2009* (2010) available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2217>.

⁸⁶ Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States* (2003) available at <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

⁸⁷ See Jenifer Knight & Maya Raghu, *Advancing Housing Protections for Victims of Domestic Violence*, COLO. LAW., Sept. 2007, at 77, 80.

⁸⁸ *Id.*

⁸⁹ Whitehorn, *supra* note 32, at 1425.

Supreme Court, there is still uncertainty among the district courts as to the exact standards of such a claim, or whether the claim is available at all.⁹⁰ Finally, what may be the most difficult challenge is the lack of binding precedent to rely upon as the result of frequent settlements.

The *Alvera* and *Bouley* cases previously mentioned both ended in settlement. In the *Alvera* case, the landlord agreed to no longer evict victims of domestic violence, nor discriminate against such victims in any way.⁹¹ The defendant also agreed to adopt and promulgate a new antidiscrimination policy throughout all of its properties.⁹² The landlord also agreed to pay Ms. Alvera some confidential amount of compensatory relief and attorney fees.⁹³ The landlords also explicitly did not admit to violating any statute, nor committing any tort against Ms. Alvera in the settlement.⁹⁴ Because of this settlement, there is no current binding precedent establishing a successful disparate impact claim.⁹⁵

Similar settlement agreements seem to be the only result reached in such cases. Such results can be seen in *Lewis v. North End Village*,⁹⁶ where the victim of abuse obtained a protection order against her ex-boyfriend.⁹⁷ The boyfriend later returned to the

⁹⁰ *Id.*

⁹¹ *Alvera v. C.B.M. Group* – Federal Consent Decree, available online at: <http://www.aclu.org/womens-rights/alvera-v-cbm-group-federal-consent-decree>

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Eliza Hirst, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL'Y 131, 145 (2003).

⁹⁶ See *Lewis v. North End Village*, No. 2:07-CV-10757 (E.D.Mich. 2007).

⁹⁷ See Memorandum for FHEO Directors Re: Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act, Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, U.S. Department of Housing and Urban Development (February 9, 2011) available at <http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf>.

property, damaging a window and door in an effort to break in.⁹⁸ The victim was evicted, and sued the property management company in federal court with the help of the ACLU of Michigan.⁹⁹ Again, the parties reached a settlement agreement.¹⁰⁰ Here, the private landlord agreed to not discriminate against victims of domestic violence in any way, as well as end policies of eviction of victims of domestic violence, dating violence, sexual assault, or stalking.¹⁰¹ The landlord also agreed to create and disseminate a domestic violence policy, which would serve as an amendment to all current leases, and be written into any new lease.¹⁰² The landlord further agreed to allow for victims of domestic violence to flee their abusers by requesting transfer to a different property managed by that group, or by choosing to terminate their lease entirely.¹⁰³

Advocates of domestic violence survivors declared the settlement a great victory.¹⁰⁴ Tenants in these properties were now safe from eviction, and could use one of the landlord's 543 other units to relocate if needed.¹⁰⁵ Ms. Lewis herself stated, "I feel great because they adopted new policy changes and it can help other women or men in the situation that I was in so they won't have to go through the things that I went through."¹⁰⁶ However, the settlement was not reached until nearly two years after the date of her eviction.¹⁰⁷ As a result of the eviction, Ms. Lewis and her children were forced to

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Settlement Order, *Lewis v. North End Village*, No. 2:07-CV-10757 (E.D.Mich. 2007) available at http://www.aclu.org/files/images/asset_upload_file733_34211.pdf.

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 4.

¹⁰³ *Id.* at 3.

¹⁰⁴ See Selene Kaye, *Fair Housing Settlement a Victory for Domestic Violence Survivors*, ACLU BLOG (Jul. 25, 2008, 3:19PM), <http://www.aclu.org/blog/womens-rights/fair-housing-settlement-victory-domestic-violence-survivors>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Private Housing Company Wont Evict Domestic Violence Victims After ACLU Lawsuit*, *supra* note 1.

move into a shelter.¹⁰⁸ She was eventually able to find a new apartment and childcare, however they were much more expensive and further from her job.¹⁰⁹

While Ms. Lewis' settlement was able to provide for greater protection for victims of domestic violence living in a property managed by her landlord, the case still settled, and therefore fell short of setting any binding legal precedent. Any similarly situated victim of domestic violence¹¹⁰ who does not live in the property covered by the settlement can still face eviction, the cost of litigation, and the years of uncertainty and danger that come along with homelessness.

These female victims of domestic violence could be more likely to accept settlement agreements due to the financial situations that many of these victims find themselves in. Abusers often control the finances of their victims, or even go as far as prohibiting them from working.¹¹¹ These attempts to economically control victims leave many without any money when separating from their abusers.¹¹² Victims will most likely not want to, or not be able to, go through the time and expense of litigation, and will favor a quick and favorable settlement.

IV. State Corrective Measures

A. California

The State of California recently recognized the overall lack of protections available to victims of domestic violence facing eviction, and passed state protections

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Meaning any victims not covered by VAWA as discussed above.

¹¹¹ Hirst, *supra* note 95, at 133-34.

¹¹² *Id.*

which became effective on January 1, 2011.¹¹³ The California Legislature found that domestic violence impacts one in three households, and determined that safe housing for these victims is essential for their recovery.¹¹⁴ Further, they found that many landlords were still able to evict victims of domestic violence based on complaints of noise, fighting, or repeated police visits even though the incidents were crimes committed against the victims.¹¹⁵

The California statute prohibits any landlord¹¹⁶ from evicting a tenant or refusing to renew a tenant's lease because of an act committed against that tenant that constitutes domestic violence, sexual assault, or stalking.¹¹⁷ However, this legislation comes with a number of requirements and exceptions.¹¹⁸ First, in order for a victim to have this statute apply, they must have the incident documented in either a police report or a restraining order against the attacker.¹¹⁹ Second, the statute will only apply to incidents where the attacker is not a named party in the lease.¹²⁰

In the event that the victimized tenant is able to show the above two steps, a landlord may still be able to evict. The statute explicitly still allows eviction or refusal to renew a lease if the victim allows the person who committed the acts to revisit the property.¹²¹ Further, a landlord may still evict if he "reasonably believes that the presence of the person against whom the protection order has been issued or who was named in the

¹¹³ See generally, CAL. CIV. PROC. CODE § 1161.3.

¹¹⁴ CAL. CIV. PROC. CODE § 1161.3., Legislative Findings: Section 1 of Stats.2010, c. 626 (S.B.782)(a-b).

¹¹⁵ *Id.* at (d).

¹¹⁶ See Adams, *supra* note 66, at 19 (The statute applies to both public and private landlords. However, most victims of domestic violence suing public landlords will rather rely on VAWA as it seems to provide stronger protections.).

¹¹⁷ CAL. CIV. PROC. CODE § 1161.3(a).

¹¹⁸ See *Id.*

¹¹⁹ CAL. CIV. PROC. CODE § 1161.3 (a)(1).

¹²⁰ CAL. CIV. PROC. CODE § 1161.3 (a)(2).

¹²¹ CAL. CIV. PROC. CODE § 1161.3 (b)(1)(A).

police report of the act or acts of domestic violence, sexual assault, or stalking poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession.”¹²²

This statute is obviously flawed, and most likely will offer little to no protection additional protection to victims of domestic violence. The most obvious hole in the statute is that it does not protect victims who currently live with their abuser.¹²³ This shows a fundamental misunderstanding of domestic violence on the part of the California legislature, and overlooks the fact that most victims of domestic violence live with their abuser.¹²⁴ Also problematic is the landlord’s ability to evict the victim if they “allow” their abuser to “visit” the property.¹²⁵ This eliminates protection for any victims who wish to continue any kind of a relationship with their former abuser.¹²⁶

Complete separation from an abusive partner is an unrealistic expectation placed on victims of domestic violence by the California Statute.¹²⁷ A victim of constant domestic abuse is generally isolated and led to the belief that she cannot survive on her own.¹²⁸ There are a number of reasons why a victim might chose not to, or be unable to, immediately end all contact with their abuser.¹²⁹ One of the most significant reasons a victim might not leave their abusive partner is a fear of separation assault, or a more

¹²² CAL. CIV. PROC. CODE § 1161.3 (b)(1)(B).

¹²³ CAL. CIV. PROC. CODE § 1161.3 (a)(2).

¹²⁴ Adams, *supra* note 66, at 19.

¹²⁵ CAL. CIV. PROC. CODE § 1161.3(b)(2).

¹²⁶ See Adams, *supra* note 66, at 19.

¹²⁷ See generally Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1232 (1993).

¹²⁸ Adams, *supra* note 66, at 20.

¹²⁹ *Id.*

intense physical retaliation to her decision to leave.¹³⁰ These fears are generally not unreasonable, as most deaths from domestic violence come from a partner after the relationship has been severed.¹³¹ Victims may also lack the economic resources to separate from their abuser.¹³² Without such resources, it may be impossible for a victim to support themselves and their children with basic necessities such as food, childcare, medical expenses, and paying for a residence on their own.¹³³ Some victims may also not want to completely cut ties with their abuser due to concerns as to the welfare of their children.¹³⁴ Some women may believe that separating their child from his or her father completely will have a detrimental effect on the child.¹³⁵ Some other factors that could contribute to a victim choosing not to leave their abuser could be an emotional attachment to the abusive partner,¹³⁶ hope and optimism that the relationship will get better,¹³⁷ and racial or cultural views of domestic relationships.¹³⁸

This section of the statute also assumes that a victim is in control of her attacker's access to her property.¹³⁹ Especially in cases of stalking or sexual assault, it is impossible to imagine how this could be accurate. The misguided assumption that the victims are in control of their attackers is essentially what caused the issue of double victimization in the first place.¹⁴⁰

¹³⁰ Dutton, *supra* note 127, at 1232.

¹³¹ *Id.*

¹³² Dutton, *supra* note 127, at 1233.

¹³³ *Id.*

¹³⁴ Dutton, *supra* note 127, at 1234.

¹³⁵ *Id.*

¹³⁶ Dutton, *supra* note 127, at 1234-35.

¹³⁷ Dutton, *supra* note 127, at 1235-36.

¹³⁸ Dutton, *supra* note 127, at 1237.

¹³⁹ See CAL. CIV. PROC. CODE § 1161.3(b)(1)(A).

¹⁴⁰ See *infra* Part II.

Allowing landlords to evict victims because their attackers pose a possible threat to other tenants safety or quiet enjoyment is the most problematic area of the statute.¹⁴¹ It is hard to see how this statute would then be able to protect any victims of domestic violence from eviction since those are usually the reasons that a landlord chooses to evict in the first place.¹⁴² In many apartment complexes, rooms are in close proximity, and neighboring tenants may complain of shouting, breaking glass or furniture, or frequent slamming of doors after incidents of domestic violence.¹⁴³ Landlords generally evict victims of domestic violence because they are concerned that the abuser's violence could harm another tenant or other tenant's property, and because other tenants are usually frightened by the noise coming from incidents of domestic violence, or the actual witnessing of the acts.¹⁴⁴ With all of the limitations and exceptions to this statute, it is hard to see how it provides any protection to victims of domestic violence at all.

B. Other State Legislation

A number of other states have also realized that evictions of victims of domestic violence continue to be a serious problem. These states have passed statutes in an attempt to put an end to such evictions, however they are similar to California's statutes in that they realistically offer very little protection to victims. Colorado has passed legislation stating that domestic violence cannot be a basis for landlord possession in the eviction process.¹⁴⁵ However, Colorado requires that there be some form of documentation such

¹⁴¹ CAL. CIV. PROC. CODE § 1161.3(b)(2).

¹⁴² Adams, *supra* note 66, at 22.

¹⁴³ Adams, *supra* note 66, at 23.

¹⁴⁴ Adams, *supra* note 66, at 22.

¹⁴⁵ COLO. REV. STAT. ANN. § 13-40-107.5(5)(c)(I).

as a police report or protection order.¹⁴⁶ Minnesota simply bars a residential landlord from evicting a tenant due to a phone call to the police for emergency assistance in relation to an incident of domestic abuse.¹⁴⁷ A Wisconsin statute seems to offer even less protection, simply stating that, “No claim that an individual's tenancy would constitute a direct threat to the safety of other persons or would result in substantial damage to property may be based on the tenant's status as a victim of domestic abuse, sexual assault, or stalking.”¹⁴⁸ This statute obviously leaves out any other reason a landlord would choose to evict such as nuisance due to the noise levels coming from such incidents, or eviction due to illegal activity.

A few states have passed legislation stating that domestic violence can be raised as a defense in an eviction action. A Washington statute states that a household member's status as a victim to domestic violence can serve as a defense to a state action to remove the tenant and regain possession.¹⁴⁹ However, the statute then explicitly points out that it doesn't prohibit any “adverse housing decisions based upon other lawful factors within the landlord's knowledge.”¹⁵⁰ It is unclear exactly what these other lawful factors might be, and how a court might decide a case where a victim of domestic violence is evicted from other lawful factors such as nuisance coming from the incidents of domestic violence. New Mexico offers a similar defense to such actions.¹⁵¹

¹⁴⁶ COLO. REV. STAT. ANN. § 13-40-104(I)-(II).

¹⁴⁷ MINN. STAT. § 504B.205.

¹⁴⁸ WIS. STAT. § 106.50(5m)(d).

¹⁴⁹ WASH. REV. CODE § 59.18.580(3).

¹⁵⁰ WASH. REV. CODE § 59.18.580(4).

¹⁵¹ N.M. STAT. ANN. § 47-8-33(J).

The general ineffectiveness of these statutes can be seen in the lack of cases that apply them.¹⁵² In searching for any reported or unreported case, I have only found one that mentions any interpretation of one of the above-mentioned statutes.¹⁵³ In that case, as soon as the landlord was informed of the statute he decided to drop the eviction action.¹⁵⁴ There are a few possible explanations for this lack of case law supporting these statutes. First, this type of case simply may never make it to court, or if it does, it may not make it past the trial level.¹⁵⁵ Second, landlords may simply chose not to proceed with eviction actions once confronted with such statutes.¹⁵⁶ Third, tenants may be unaware of their rights, and simply move out once evicted.¹⁵⁷ Fourth, since many of these statutes require some type of reporting to authorities, many women may not be covered by them due to a resistance to end the relationship with their abuser as explained above.¹⁵⁸ No matter what the exact reasoning is for this lack of case law, it is clear that states offer inconsistent and often ineffective protection to victims of domestic violence who then face eviction.

V. Recommendation

As demonstrated above, the currently available federal and state protections are simply not working. The only way to assure protection for all victims of domestic violence from eviction is to pass new Federal Legislation. Since the only instance that I have found where victims are given complete protection is in the settlement of *Lewis*,¹⁵⁹ I recommend that this legislation follow the guidelines set forth in that document. This

¹⁵² Adams, *supra* note 66, at note 111.

¹⁵³ See *Indigo Real Estate Services v. Rousey*, 151 Wash. App. 941, 945 (Wash. Ct. App. 2009).

¹⁵⁴ *Id.*

¹⁵⁵ Adams, *supra* note 66, at note 111.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* Part IV(A).

¹⁵⁹ See *supra* Part III.

legislation should offer complete protection from discrimination in procuring a place to live, assure protection from eviction as a response to domestic violence, allow for bifurcation of the lease so the abuser can leave, and allow for relocation to another apartment or termination of the lease entirely. This Legislation should go even further than that settlement and punish landlords who do continue these evictions. In many cases, the time immediately following eviction can be the worst for victims who would then need to enter a shelter before they could commence litigation and avail themselves of the protections offered.¹⁶⁰ If harsh civil penalties were made available it would ensure the safety of victims of domestic violence and possibly mark the end of such double victimization. This Federal Legislation could follow the New York legislatures lead in allowing treble damages for certain offenses by landlords.¹⁶¹

This legislation could be a valid exercise of the Interstate Commerce Clause. In a dissenting opinion joined by three other Justices, Justice Souter makes a compelling argument that regulating gender violence is within congress' power under the Commerce Clause.¹⁶² Justice Souter points out that the government spends somewhere between five and ten billion dollars a year on health care, criminal justice, and other social costs of domestic violence.¹⁶³ The issue in that case was whether or not a civil remedy was available to a victim alleging rape.¹⁶⁴ The majority seemed to base its determination on the fact that gender-motivated crimes of violence are not an economic activity.¹⁶⁵ However, Congress would be able to make a much stronger case that the regulation of

¹⁶⁰ *Id.*

¹⁶¹ *See generally*, N.Y. UNCONSOL. LAW § 26-516 (McKinney).

¹⁶² *Morrison*, 529 U.S. at 628 (Justice Souter, dissenting).

¹⁶³ *Id.*

¹⁶⁴ *See Morrison*, 529 U.S. at 599 (2000).

¹⁶⁵ *Id.*

evictions of victims of domestic violence is an economic activity that directly relates to interstate commerce. These victims may have to cross state lines to find new housing. Such considerations could be enough to gain the Supreme Court's support of such a rule.

Opponents to such a rule could point out that it puts too much of a burden on landlords, the enforcement might prove costly, or that it could allow for a continued nuisance to nearby residents. While all valid concerns, the interest of protecting victims of domestic violence from facing homelessness and the high costs of litigation should prevail.

While it is true that such legislation would put somewhat of a burden of landlords, there are a few different tort theories that support the landlords being the responsible party. One well-recognized tort theory is "least-cost avoider."¹⁶⁶ This theory essentially states that where two parties could possibly avoid some type of an injury, the party who is likely to incur the least expense in doing so should be the responsible party.¹⁶⁷ In *Tennessee Trailways, Inc. v. Ervin* the injury was caused by a bus traveling down a highway at 75 miles per hour colliding with a motorcycle that pattered out into traffic.¹⁶⁸ There, since the cost of the bus constantly traveling down the highway at a slow enough speed to avoid any type of collision was much higher than the cost of the motorcycle to take care whenever entering a highway, the liability was determined to be with the motorcycle driver.¹⁶⁹

¹⁶⁶ See *Tennessee Trailways, Inc. v. Ervin*, 222 Tenn. 523 (Tenn. 1969); see also John Cirace, *A Theory of Negligence and Products Liability*, 66 ST. JOHN'S L. REV. 1, 68 (1992).

¹⁶⁷ William Barnett II, Ph.D., J.D. et. al., *The Paradox of Coase As A Defender of Free Markets*, 1 NYU J.L. & LIBERTY 1075, 1086 (2005).

¹⁶⁸ *Tennessee Trailways, Inc.*, 222 Tenn. at 525.

¹⁶⁹ *Id.*

In the present case, we must examine the costs of a landlord not evicting a victim of domestic violence, versus the cost of the victim putting a swift end to, or preventing domestic violence all together. The cost of a landlord not evicting a tenant who is a victim of domestic violence is relatively low. While the case could arise where there are so many complaints of noise coming from the apartment that the landlord could lose an adjoining tenant, this kind of a situation would be rare and still not all that costly. For the most part, it is hard to imagine any cost at all coming from simply allowing a tenant to remain in their home. On the other hand, the cost of a victim of domestic violence ousting her abuser before any reports reached the landlord could be extremely high. As noted above, the final separation abuse is usually the most sever, and is often when we see women lose their lives to domestic violence.¹⁷⁰ Therefore, it is clear that under the “least-cost avoider” theory, the landlord should be the party held responsible if an eviction as a result of domestic violence were to occur. Avoidance of such practices would cost the landlord next to nothing, while they could cost the victim of domestic violence her life.

These landlords are also the party in the best position to handle any kind of a financial burden after such an incident of domestic violence occurs. If we look at these incidents after the domestic violence has occurred, there are essentially two options. First, we could allow the victims of domestic violence to continue to be evicted, thereby placing the costs on the victims’ shoulders. The second option would be to require the landlords to allow these victims to stay, and place the burden on the landlords. Looking at the issue through a strictly financial lens, the landlords are much more likely to be able to incur these costs. As mentioned above, female victims of domestic violence are likely to

¹⁷⁰ See *supra* Part IV(A) (discussion of reasons why women may not be able to separate from their abusers.).

have suffered from financial as well as physical abuse, and have little to no money available to support themselves.¹⁷¹ These women simply cannot handle being kicked to the curb by their landlords, and would most likely have to face homelessness. On the other hand, if some financial costs were placed on the landlords, it is only likely that they would only see a slightly lower profit margin on their investment properties. Therefore, if the legislature is faced with a choice as to who should have to bear some kind of a financial burden, the landlords are obviously more capable of incurring such a cost.

Further, Congress has already expressed a strong government interest in providing safe and reliable housing for victims of domestic violence in passing the Violence Against Women Act.¹⁷² If the recommended legislation were passed, it would simply ensure that the government is better able to protect such an interest in the future. As described above, there have been a number of attempts to provide protection to victims of domestic violence from both the federal government and from the states.¹⁷³ It is unfortunate that previous efforts have fallen short. New federal legislation, as I have recommended above, could be the only way of assuring that these protections are finally available to those who need them the most.

VI. Conclusion

Victims of domestic violence living in private housing are still offered little protection from eviction. The federal government essentially created the problem by enacting the Anti-Drug Abuse Act and enforcing “Zero Tolerance Policies.” Congress

¹⁷¹ *See supra* Part IV.

¹⁷² *See* 42 U.S.C.A. § 14043e-1.

¹⁷³ *See supra* Part II-IV.

realized the negative impact such legislation was having on victims of domestic violence, and sought to remedy the problem by enacting VAWA. However, VAWA however only applied to the public housing that required the “Zero Tolerance Policies” and not the private landlords who copied such terms into their leases, so a large number of victims were left unprotected.

Advocates then tried to apply the FHA and disparate claims to protect these victims. These attempts however have proven unsuccessful. There is still much uncertainty as to exactly what standards apply to these claims, and those claims that are well pled have all ended in settlement. While these settlements have certainly improved the living conditions for the victims that they directly apply to, they are not binding precedents that can apply to other domestic violence survivors.

States have recognized that there is still a need for protection for these victims, and some states such as California have attempted to offer that protection in the form of legislation. However, it is still unclear if such state statutes have provided for any additional help at all. Further, not many states have passed statutes similar to California, so victims living outside of those few states remain unprotected.

There are still far too many victims of domestic violence left unprotected from eviction under current federal and state legislation. The federal government needs to take action, and ensure that all victims of domestic violence are not forced into homelessness because of the actions of their attackers.