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Slaves for Rent: Sexual Harassment in Housing as Involuntary Servitude

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I. INTRODUCTION

Sheila McClenton and her four children qualified for Section VIII housing assistance, but they languished on the Kansas City Housing Authority's waiting list for three years until funds became available for them.[1] During that time, McClenton and her family waited in the only housing they could afford: a cramped two-bedroom apartment.[2] When word finally came that housing vouchers were available, McClenton began looking for a larger home for her children. She soon found what seemed like the perfect arrangement: a large three-bedroom house, complete with a spacious yard, offered for rent by its owner, Bobby Veal.[3] McClenton later explained, "I felt like I would be able to give my kids what they needed, what they deserved. Instead . . . of us being crammed up into a small apartment, I felt like they could have their own front yard to play in . . . . It was the ideal home for me and my kids."[4]

However, McClenton's hope and optimism faded quickly. During her first inspection of the house, Veal grabbed her around the waist from behind. He told McClenton that she was a "nice looking young lady," and that he was very happy she had inquired about the house.[5] McClenton shoved Veal away and told him she was not interested in "that."[6] Despite Veal's advances, McClenton rented the house because she had few other options: "I desperately needed a place to stay. I didn't have anywhere to go, and my Section VIII was about to expire."[7]

Over the course of the next year, Veal's sexual harassment grew worse. On one occasion, after being let into McClenton's house by her

1. *See* Transcript of Record at 128, United States v. Veal, 365 F. Supp. 2d 1034 (W.D. Mo. 2004) (No. 02-0720-CR-W-DW) [hereinafter "Veal Transcript of Record"].
2. *Id.* at 127–28.
3. At trial, Bobby Veal and his wife, Jewel Veal, were found to have sexually harassed eleven women who rented housing from them in Kansas City. United States v. Veal, No. 04-0755-CV-W-DW, 2005 WL 1532748, at *1–2 (W.D. Mo. June 28, 2005). The Veals were ordered to pay a total of $1,182,804.00 in damages and civil penalties. *Id.*
4. Veal Transcript of Record, *supra* note 1, at 128–29.
5. *Id.* at 126.
6. *Id.* at 127.
7. *Id.*

uncle, Veal came up behind her while she cooked dinner.[8] According to McClenton, "[h]e put his hands around me, and he started pressing up against me, holding me real tight, and I could feel his penis up against my backside. . . . He was just moaning and just saying . . . he had to have me."[9] McClenton pushed him away and told him to stop.[10] Another time, Veal entered McClenton's house unannounced and without her permission. He grabbed McClenton and tried to force her into the bedroom, saying he wanted sex.[11] Fighting to resist, McClenton screamed and grabbed onto the door frame tightly, breaking several fingernails. Veal fled when McClenton's children ran into the hallway.[12] Beyond these physical confrontations, Veal made crude sexual comments around McClenton and repeatedly offered her money, clothes for herself and her children, and assistance with her car in exchange for sex.[13] He finally told McClenton that if she did not relent, she would need to find a new place to live.[14] When McClenton reported the harassment and abuse to her Section VIII caseworker, the caseworker told McClenton to "get off [her] ass and get a job."[15]

Scared for her safety and that of her children, McClenton moved her family out of the house she rented from Veal after just one year.[16] With no other place to go, she moved into her mother's three-bedroom house, which she then shared with thirteen other people: her own four children, her mother and father, her brother and sister, three nieces and nephews, and two uncles.[17] McClenton thought about the abuse she suffered at Veal's hands "all the time," crying during the day and waking up at night with vivid dreams that Veal was storming into her house.[18] She also became extremely worried about her own three daughters, not wanting to let them go out alone or to after-school activities.[19] When asked why she did not report Veal's abusive conduct earlier, McClenton recalled that it was hard to disclose the harassment "[b]ecause I was trying to prove to not only myself, but my mother, my brothers and sisters, that I was a . . . big enough person to go out there and find something and be responsible for something and raise my kids."[20]

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8. *Id.* at 130.
9. Veal Transcript of Record, *supra* note 1, at 130–31.
10. *Id.*
11. *Id.* at 133–34.
12. *Id.* at 134.
13. *Id.* at 135–36.
14. Veal Transcript of Record, *supra* note 1, at 139–40.
15. *Id.* at 144.
16. *Id.* at 142.
17. *Id.*
18. *Id.* at 148–50.
19. Veal Transcript of Record, *supra* note 1, at 150–51.
20. *Id.* at 147.

McClenton's disturbing story is not unique. Although sexual harassment in the employment context receives considerable attention both in popular culture[21] and in the justice system,[22] a significant number of victims endure sexual harassment at home, in silence, and without legal recourse. More often than not, such victims share similar characteristics: they are usually poor, often with young children, and frequently nonwhite. Many victims are so poor that they qualify for governmental housing benefits. Furthermore, it is not unusual for such victims to have recently lived with friends or family members or to have been homeless. Their desperation for housing is usually related to concern not for their own well-being, but rather for their children. More than anything, they want to keep a decent roof over their families' heads.

Victims of sexual harassment in housing are not selected at random. The characteristics they share in common are the same characteristics that make them both attractive and vulnerable to predatory landlords. Because of their poverty, isolation, and desperation, they are more willing to comply and endure than report the harasser or assert their legal rights. Ultimately, they fear the consequences of resisting the harassment—the loss of their current housing, potential blacklisting in the local housing community, and possible termination of governmental housing benefits—more than the harassment itself. In this way, sexual harassment in housing[23] is meaningfully different than other forms of residential harassment, such as racial, disability, or national origin harassment. A neighbor who burns a cross in the lone African-American family's yard is presumably intending to force that family out of its home. The same result is likely intended when insults and religious epithets are scrawled outside a Jewish family's

21. Workplace sexual harassment has been the subject of various books and movies. *See, e.g.*, NORTH COUNTRY (Warner Bros. Pictures 2005); DISCLOSURE (Baltimore Pictures 1994).

22. The U.S. Supreme Court has ruled on several cases involving claims of sexual harassment in the workplace. *See, e.g.*, Pa. State Police v. Suders, 542 U.S. 129 (2004); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). In comparison, the Court has never taken a case involving claims of post-acquisition harassment of housing occupants, much less a case involving sexual harassment.

23. Throughout this Article, I refer to the problem of sexual harassment perpetrated by landlords against existing tenants in terms such as "sexual harassment in housing" or "residential sexual harassment." Both terms have been used by commentators in analyzing this problem. *See, e.g.*, Jill Maxwell, *Sexual Harassment at Home: Altering the Terms, Conditions and Privileges of Rental Housing for Section 8 Recipients*, 21 WIS. WOMEN'S L.J. 223, 230–31 (2006) ("sexual harassment in housing"); Nicole A. Forkenbrock Lindemyer, Note, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VII Housing Cases*, 18 LAW & INEQ. 351 (2000) ("residential sexual harassment"). I use these and similar terms interchangeably.

house. But the landlord who sexually harasses his tenant is not intending to drive her out; instead, he is attempting to draw her in—to hold her captive, through the use of psychological, economic, or sometimes legal coercion—to satisfy his own desire to control and exploit.

The primary federal statute combating discrimination in housing celebrates its fortieth anniversary in 2008. Although the Federal Fair Housing Act (FHA) does not expressly prohibit harassment of existing tenants, its broad terms have been interpreted by various courts, beginning in 1983, to protect occupancy. Since that time, federal doctrine governing claims of post-acquisition harassment has developed piecemeal and inconsistently across the federal circuits, with courts frequently borrowing—often without much thoughtful explanation—significant theories or legal tests from the Title VII employment context. This process has been made more difficult not simply because of the lack of clear statutory protection in this area, but also because the U.S. Department of Housing and Urban Development (HUD) has never promulgated final rules articulating the precise contours of harassment claims under the FHA.

In 2008, the FHA stands at an important crossroads. Although many federal circuits continue to interpret the statute as protecting against post-acquisition harassment, including sexual harassment, concerns have been voiced about exactly how the FHA is applied in practice. In particular, critics point to the fact that courts weighing sexual harassment claims often employ a "reasonable person" standard, which ignores subjective experiences and unfairly tilts the scales against women, who are the typical victims of such abuse. Other complaints focus on the tendency of many courts to overstate a relatively weak analogy when importing Title VII legal standards into the housing context. Some say this has resulted in the systematic undervaluing of the home as the locus of harassment. Unlike the work setting, the home has significant emotional and psychological importance for its occupants, which should be—but often is not—a fundamental component in calculating the severity of harassing conduct. Most troubling, some federal courts have begun expressing especially narrow interpretations of the FHA itself, reasoning that the statute guarantees only a non-discriminatory real estate transaction, not protection against harassment occurring after occupancy begins.[24] Such conclusions seriously undercut fundamental civil rights protections and leave victims of residential sexual harassment potentially without a federal civil remedy.

Recognizing the various shortcomings of the FHA when applied in the context of post-acquisition harassment in general, and sexual har-

24. *See, e.g.*, Halprin v. Prairie Single Family Homes, 388 F.3d 327, 330 (7th Cir. 2004).

assment in particular, this Article explores an alternative vehicle for victims of such abuse: the Thirteenth Amendment. Ratified in 1865, the Thirteenth Amendment provided a formal legal end to African chattel slavery across the United States. But the Thirteenth Amendment has legal importance beyond the abolition of slavery. The Amendment was and remains both a powerful liberating force and a guarantor of fundamental rights for all Americans. In particular, the text of the Thirteenth Amendment extends its reach beyond slavery to explicitly prohibit all forms of involuntary servitude, regardless of the victim's race, gender, or socio-economic background.[25] The true breadth of the Amendment makes it an important tool in the eradication of modern forms of involuntary servitude—including the abusive and sexually coercive relationships that can be created between landlords and their poor, marginalized victims.

Section II begins the analysis by defining what constitutes sexual harassment in the housing context and attempting to quantify the problem using measurements based on empirical studies, governmental and housing advocacy data, and investigative journalism. Section III briefly outlines the traditional vehicle for bringing claims of residential sexual harassment in federal court, the FHA, as well as its potential shortcomings and limitations in this context— including the argument gaining traction with some federal courts that the FHA has no application whatsoever to claims of post-acquisition harassment. Against that backdrop, Section IV explores the possible applicability of the Thirteenth Amendment to claims of sexual harassment in housing. In particular, Section IV calls for a broad but textually accurate reading of the Thirteenth Amendment to trigger the full extent of the Amendment's protections. Through the lens of the Thirteenth Amendment, sexual harassment of low-income, vulnerable women can reasonably be viewed as involuntary servitude.

II. QUALIFYING AND QUANTIFYING SEXUAL HARASSMENT IN HOUSING

Before considering traditional and alternative legal methods of combating sexual harassment in housing, this section seeks to both define and accurately quantify the problem. While the former task is relatively straightforward, the latter is surprisingly difficult.

25. Furthermore, the Amendment is properly interpreted as also directly prohibiting "badges and incidents of slavery"—those burdens or disabilities that helped perpetuate and were fundamental to slavery in the United States and that are suffered today in a modern context. *See infra* note 178.

A. What Constitutes Residential Sexual Harassment?

Sexual harassment in housing encompasses a wide range of sexually abusive conduct perpetrated by someone unrelated to the victim,[26] where the harassment invades the sanctity of the home.[27] A helpful starting point in defining the problem may be the existing legal framework, which has developed over the past thirty years. Perhaps surprisingly, the primary federal anti-discrimination laws that apply to housing—the FHA and its implementing regulations promulgated by HUD—contain no definition of or even any explicit prohibition against sexual harassment. Instead, as a result of amendments to the FHA in 1974,[28] federal law explicitly prohibits various forms of discrimination—such as refusals to sell or rent or modifications to housing terms or conditions—based on sex.[29] Therefore, sexual harassment is prohibited by the FHA to the extent it is considered a type

26. Although most reported cases of residential sexual harassment involve abuse committed by a landlord against his tenant, such abuse can be and is sometimes perpetrated by building managers and others in positions of power. *See, e.g.*, Claiborne v. Wisdom, 414 F.3d 715 (7th Cir. 2005) (involving claims of sexual harassment brought by tenant against apartment manager). For the sake of clarity, references in this Article to perpetrators of sexual harassment in housing are often to "landlord" but are not intended to exclude others, such as building managers, who commit such abuse.

27. Sexual harassment in the housing context has been the subject of various scholarly studies. *See, e.g.*, Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17 (1998); Beverly Balos, *A Man's Home is His Castle: How the Law Shelters Domestic Violence & Sexual Harassment*, 23 ST. LOUIS U. PUB. L. REV. 77 (2004); 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); Lindemyer, *supra* note 23; Maxwell, *supra* note 23; Maggie E. Reed, Linda L. Collinsworth & Louise F. Fitzgerald, *There's No Place Like Home*, 11 PSYCHOL. PUB. POL'Y & L. 439 (2005); Robert Rosenthal, *Landlord Sexual Harassment: A Federal Remedy*, 65 TEMP. L. REV. 589 (1992); Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 WIS. L. REV. 771 (2002); Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061 (1987); Carlotta J. Roos, 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).

28. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383 § 808, 88 Stat. 633 (1974).

29. *See, e.g.*, 42 U.S.C. § 3604(a) (2000) (making it unlawful to "refuse to sell or rent . . . or otherwise make available or deny a dwelling to any person because of . . . sex"); *Id.* at § 3604(b) (2000) (prohibiting discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling . . . because of . . . sex"); *Id.* at § 3604(c) (2000) (making it unlawful to "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference . . . based on . . . sex").

of sex-based housing discrimination.[30] As courts have developed the nuances of sexual harassment law under the FHA, they have relied heavily on generally analogous law in the Title VII employment context.[31] In particular, some courts have imported into housing litigation the two forms of sexual harassment recognized under Title VII: "quid pro quo" and hostile environment sexual harassment.[32]

Within this general legal framework a wide range of conduct could be considered sexually harassing.[33] Some women may endure suggestive or vulgar comments from their landlords.[34] Although purely verbal abuse may be relatively mild in some cases,[35] it can also turn threatening and frightening. In one case, for example, a white landlord threatened a black tenant with both rape and lynching.[36] More aggressive conduct might include repeated requests for dates, even when the tenant has indicated that she is not interested.[37] Perpetra-

30. *See, e.g.*, Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993) (concluding that the FHA's prohibition of discrimination based on sex includes a prohibition of sexual harassment); Beliveau v. Caras, 873 F. Supp. 1393, 1396 (C.D. Cal. 1995) (explaining that "it is beyond question that sexual harassment is a form of discrimination").

31. Sexual harassment within the work environment is prohibited under Title VII as a form of sex-based discrimination. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

32. *See* Shellhammer v. Lewallen, 770 F.2d 167 (N.D. Ohio 1983), *aff'd without opinion*, 770 F.2d 167 (6th Cir. 1985); DiCenso v. Cisneros, 96 F.3d 1004, 1007–08 (7th Cir. 1996); *Honce*, 1 F.3d at 1088–90.

33. *See generally*, Cahan, *supra* note 27, at 1064–65 (providing general categories of sexual harassment in housing). Ms. Cahan's analysis, which pre-dated HUD's draft rules on sexual harassment, adopted the following definition of sexual harassment, which was drawn from the United States Merit Systems Protection Board: "[D]eliberate or repeated unsolicited verbal comments, gestures or physical contact of a sexual nature that is considered to be unwelcome by the recipient." *Id.* at 1062–63 (citation omitted).

34. *See, e.g.*, Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84, 86 (Mass. 1988) (including allegations that the landlord harassed his tenant with questions like, "How many times did you get laid this week?" and "I got a big sausage, you want?"); *see also*, Reed, Collinsworth & Fitzgerald, *supra* note 27, at 434–62. The Reed, Collinsworth, and Fitzgerald study reviewed approximately 3,500 pages of sworn testimony provided by 39 victim witnesses in residential sexual harassment lawsuits to analyze, among other things, the type and nature of sexually harassing conduct in such cases. *See id.* at 446–47. Among the verbal abuse identified in such cases were comments about the tenant's body, in general, or her genitals; "[d]irty talk / general sexual comments"; and sexist or threatening comments. *Id.* at 448.

35. *See, e.g.*, *Beliveau*, 873 F. Supp. at 1395 (alleging that the landlord made "off-color, flirtatious and unwelcome remarks").

36. Reeves v. Carrollsburg Condo. Unit Owners Ass'n, No. CIV. A. 96-2495RMU, 1997 WL 1877201 (D.D.C. Dec. 18, 1997); *see also DiCenso*, 96 F.3d at 1006 (including allegations that the landlord called his tenant a "bitch" and a "whore" when she declined his sexual advances).

37. *See, e.g.*, Honce v. Vigil, 1 F.3d 1085, 1087 (10th Cir. 1993); Glover v. Jones, No. 05-CV-6124(CJS), 2006 WL 3207506, at *1–2 (W.D.N.Y. Nov. 3, 2006); Rich v.

tors may also seek to coerce sexual conduct from tenants, promising gifts, a reduction in rent, or forgiveness of an existing debt.[38] Exploiting the financial vulnerability of the victim,[39] an abuser might threaten eviction, a loss of government housing benefits, refusal to undertake needed repairs, or other negative consequences if the tenant does not relent.[40] In one case, for example, the landlord told his tenant that she would be able to keep her apartment only if she had sex with him once a month.[41] Perpetrators may also stalk their victims.[42] Escalating abuse includes a wide range of physical contact—ranging from the landlord putting his arm around the tenant, to grabbing her breasts or buttocks or kissing her without her consent, to rape.[43]

Abusers often exploit their position of power and control to gain access to the victim.[44] In particular, predatory landlords frequently use master keys to enter victims' dwellings without their consent or to abuse victims after initially entering their residences for the purpose

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Lubin, No. 02 Civ. 6786(TPG), 2004 WL 1124662 (S.D.N.Y. May 20, 2004); *see also* Reed, Collinsworth & Fitzgerald, *supra* note 27, at 448.

38. *See, e.g.*, Krueger v. Cuomo, 115 F.3d 487, 489 (7th Cir. 1997) (alleging that the abusive landlord promised the plaintiff that she could "pay money on the side" or "fool around or something" to make up a $100 shortfall in rent); *DiCenso*, 96 F.3d at 1006 (including allegations that the landlord promised the tenant that she could take care of rent "in other ways").

39. Victims of residential sexual harassment are disproportionately poor. *See generally,* Adams, *supra* note 27, at 31–38; Balos, *supra* note 27, at 96–98; Maxwell, *supra* note 23, at 233–35; Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VII: Who is the Reasonable Person?* 38 B.C. L. REV. 861, 884 (1996–97).

40. *See, e.g.*, Doe v. Maywood Hous. Auth., No. 93 C 2865, 1993 WL 243384, at *1 (N.D. Ill. July 1, 1993) (threatening to terminate victim's housing assistance eligibility unless she gave in to sexual demands); Grieger v. Sheets, No. 87 C 6567, 1989 WL 38707, at *1 (N.D. Ill. Apr. 10, 1989) (alleging that when the victim rejected the landlord's sexual advances, he stopped making needed repairs in her apartment and threatened her Section VIII assistance); *see also* Reed, Collinsworth & Fitzgerald, *supra* note 27, at 448.

41. *See Grieger*, 1989 WL 38707, at *1.

42. *See, e.g.*, Maze v. Krueger, HUDALJ 05-93-0196-1, 1996 WL 418886, at *4 (HUDALJ June 7, 1996); *see also* Reed, Collinsworth & Fitzgerald, *supra* note 27, at 448.

43. *See, e.g.*, *Glover*, 2006 WL 3207506, at *1-2 (involving the perpetrator putting his arm around the victim and kissing her); Richards v. Bono, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *1 (M.D. Fla. May 2, 2005) (alleging that the defendant physically attacked the plaintiff, including kissing and fondling her, while making lewd remarks); *Maze*, 1996 WL 418886, at *1 (stating that the perpetrator made physical advances by touching and grabbing the victim); Szkoda v. Ill. Human Rights Comm'n, 706 N.E.2d 962 (Ill. App. Ct. 1998) (alleging that the landlord touched the victim's breasts).

44. *See* Maxwell, *supra* note 23, at 230–31. Beyond the physical access that most landlords have to their tenants' apartments, landlords "also have regular opportunities for interaction when they make repairs, collect rent, or show units to prospective tenants." *Id.* at 231; Adams, *supra* note 27, at 33–35.

of making repairs or discussing rent.[45] In one case, a landlord used his own key to access the victim's apartment while she was there alone taking a bath.[46] All of this abusive conduct occurs in or near the home, and may occur in the presence of the victim's young children.[47] The nature and location of the abuse create significant fear in the victim, both for her own safety and for that of her family, as well as a sense of powerlessness, isolation, and helplessness. One victim of sexual harassment at the hands of her landlord, including incidents perpetrated in front of her young son, described herself as feeling "terribly embarrassed," "degraded," "cheap," and "terrified."[48]

The damage caused by residential sexual harassment is amplified given the location of the abuse. The home has traditionally been viewed and experienced as a place of refuge, safety, comfort, and an intensely private location where we care for our families and recover from the challenges of our public lives.[49] At its core, the home is intimate and isolated from the outside world, except for those people voluntarily allowed in. When landlords sexually harass within this context, their behavior carries with it the added harm of destroying the victim's sense of solitude and protection—injuries that are intensely personal to the particular victim.[50] As a result, the harassment and abuse they suffer in this context is especially damaging.

B. Measuring the Incidence

1. Empirical Studies

Although employment-based sexual harassment has been the subject of considerable empirical study over many years, sexual harass-

45. *See Richards*, 2005 WL 1065141 (perpetrator exposed himself to the victim after she allowed him entry to undertake a needed repair); Beliveau v. Caras, 873 F. Supp. 1393, 1395 (C.D. Cal. 1995) (including allegations that the landlord propositioned and assaulted the tenant after he gained entry to her apartment to repair her bathroom); *Szkoda*, 706 N.E.2d 962 (indicating that the defendant repeatedly propositioned the victim after gaining access to her apartment to repair the stove); Dubois v. House, No. 95 C 0683, 1995 WL 680639 (N.D. Ill. Nov. 14, 1995); Chomicki v. Wittekind, 381 N.W.2d 561 (Wis. Ct. App. 1985).

46. *Maze*, 1996 WL 418886, at *4.

47. *See, e.g.*, *id.* at *1; Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84, 86 (Mass. 1988) (including allegations that the landlord told his tenant, "Nice pair of tits, honey," in front of the victim's young son).

48. *Gnerre*, 524 N.E.2d at 86.

49. *See* Adams, *supra* note 27, at 22-23; D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 276–77 (2006).

50. *See generally*, Lindemyer, *supra* note 23, at 371. Where the victim is nonwhite, the importance of the home environment may be increased. According to one scholar, for African-Americans, "home often represents the only reliable anchor available to them in a hostile white-dominated world." Joe R. Feagin, *A House is Not a Home: White Racism and U.S. Housing Practices*, *in* RESIDENTIAL APARTHEID: THE AMERICAN LEGACY 20 (Robert D. Bullard et al. eds., 1994).

ment in housing has received almost no similar attention. In the words of one researcher, sexual harassment "in rental housing is a virtually unresearched phenomenon."[51]

The only widely available empirical study on the subject was presented in a 1987 law review article by Regina Cahan.[52] The Cahan study, which sought to "determine the number of sexual harassment complaints received and to analyze specific characteristics of the complaints,"[53] was circulated to 150 fair housing advocacy organizations and agencies across the country.[54] Ninety-six entities responded to the survey, with fifty-seven providing usable data and reporting that they had received complaints of sexual harassment in housing.[55] Those fifty-seven housing organizations and agencies reported a total of 288 incidents of sexual harassment.[56] Although there may be drawbacks in relying too heavily on the Cahan study,[57] several of its findings are illuminating.

For example, the study clearly reveals that sexual harassment in housing is a problem suffered primarily by the poor. Seventy-five percent of women who identified themselves as victims of sexual harassment earned less than $10,000 per year; twenty-three percent earned between $10,000 and $20,000 per year; and two percent earned between $20,000 and $30,000 per year.[58] In addition, sexual harassment identified by the Cahan study most often occurred in the small apartment, duplex, or private home rental context.[59] As a result, the harasser was usually the owner of the property, further worsening the power imbalance between the parties and increasing the risk that the victim might suffer housing-related retaliation if she complained. Finally, the Cahan study indicates that much of the sexual harassment

51. Reed, Collinsworth & Fitzgerald, *supra* note 27, at 439.

52. Cahan, *supra* note 27.

53. *Id.* at 1066.

54. *Id.*

55. *Id.* Thirty respondents reported that they had received no complaints of sexual harassment in housing. *See id.*

56. *Id.*

57. Beyond the fact that Ms. Cahan's study is now over twenty years old, it surveyed only "fair housing centers, agencies, and organizations across the country," rather than actual victims of harassment. *Id.* at 1066. As a result, Ms. Cahan's study likely undercounts sexual harassment in housing, for numerous reasons, including victims not fully understanding their legal rights or being unwilling to report abuse to relevant agencies or organizations because of a fear of retaliation or blacklisting. Another limiting factor in the Cahan study is that not all responding organizations or agencies included specific characteristics of the victims or details of the alleged incidents. *See id.* at 1067 n.18.

58. Cahan, *supra* note 27, at 1067.

59. *Id.* at 1074.

suffered by female renters is of a relatively short duration:[60] 35% of reported incidents of sexual harassment lasted one day.[61]

2. *Official Data*

Data generated by housing advocacy groups, state and local civil rights commissions, and HUD provide a further window into the problem of residential sexual harassment. In general terms, discrimination based on sex or gender appears to account for up to approximately 10% to 12% of the housing-related claims that such groups investigate. At the state level, for example, the Illinois Department of Human Rights reported that from 2002 to 2005, between 3% and 12% of its housing discrimination charges involved allegations of sex discrimination.[62] In Hawaii, the most recent annual report of the Civil Rights Commission indicates that 5.4% of housing discrimination cases accepted by the commission involved the status of "sex."[63] Texas statistics are consistent with these numbers, reflecting that 8% and 6% of statewide housing complaints filed with the Texas Commission on Human Rights in 2005 and 2006, respectively, were on the basis of "sex."[64] California data are similar: between 4% and 5% of the housing cases filed by the state Department of Fair Employment and Housing in the years 2001 to 2004 involved sexual harassment allegations.[65]

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60. *See id.* at 1073. The forty-three incidents of sexual harassment that were categorized in the Cahan study were broken down according to the following durations: "One day" (15); "One week" (3); "1–3 months" (9); "4–6 months" (8); "7–10 months" (1); "11 months –1 year" (2); "More than one year" (5). *Id.*

61. *Id.*

62. ILL. DEP'T OF HUMAN RIGHTS ANN. REP. 34 (2002-2004), *available at* http://www.state.il.us/dhr/Publications/AnnualReport_02_04.pdf; ILL. DEP'T OF HUMAN RIGHTS, ANN. REP. 21 (2005), *available at* http://www.state.il.us/dhr/Publications/AnnualRpt._2005.pdf. Under Illinois law, a complainant has up to one year after an alleged civil rights violation to file a charge with the Fair Housing Division. *See id.* at 18. Docketed charges are then investigated by the Fair Housing Division, leading to dismissal of the charge, conciliation, or administrative action. *See id.*

63. HAW. CIVIL RIGHTS COMM'N ANN. REP. 18 (2001-2002), *available at* http://www.state.hi.us/hcrc/report2002.htm.

64. TEX. WORKFORCE COMM'N, CIVIL RIGHTS DIV., COMM'N ON HUMAN RIGHTS ANN. REP. 10 (2005), *available at* http://www.twc.state.tx.us/crd/arcrd_05.pdf; TEX. WORKFORCE COMM'N, CIVIL RIGHTS DIV., COMM'N ON HUMAN RIGHTS ANN. REP. 8 (2006), *available at* http://www.twc.state.tx.us/crd/arcrd_06.pdf. Similar data were reflected at the city level in Fort Worth, where 8% of the housing cases investigated by the city's Human Relations Commission in 2005-2006 involved "sex" as the basis. *See* CITY OF FORT WORTH HUMAN RIGHTS COMM'N, ANN. REP. at 5 (2005-2006).

65. Forms on File with Author. Of the 1,203 housing cases filed by the CDFEH in 2004, 50 were categorized under sexual harassment (4%). Data from other years included 46 of 1,176 cases in 2003 (4%); 44 of 1,109 cases in 2002 (4%); and 52 of 1,124 cases in 2001 (5%).

At the federal level, discrimination complaints on the basis of sex generally track those received by state agencies. From 2003 to 2006, HUD received over 2,200 complaints each year regarding perceived acts of housing discrimination.[66] Between 10% and 12% of those complaints alleged sex as a basis of discrimination.[67] Similarly, according to the National Fair Housing Alliance, a consortium of over 220 private, non-profit fair housing organizations and state and local civil rights agencies, housing complaints filed on the basis of sex range from 4% to 7% each year.[68]

As the preceding two paragraphs suggest, a considerable amount of data exists to quantify claims of sex *discrimination* in housing at the federal and state levels. However, the same reports and studies that provide information about sex discrimination are conspicuously silent on the subtopic of sexual *harassment* in housing. Of the reports reviewed, California's state report is the lone exception to this rule, providing specific data on allegations of sexual harassment.[69] These omissions likely have a foundation grounded in the language of both the FHA and HUD's implementing regulations.

As discussed earlier, the FHA prohibits various forms of discriminatory conduct based on "sex,"[70] but does not expressly reference or prohibit harassment of any kind.[71] In fact, harassment is never mentioned in the FHA. The rules promulgated by HUD to implement the

66. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., ANN. REP. ON THE STATE OF FAIR HOUSING IN AMERICA 23 (2006), *available at* http://hud.gov/offices/fheo/fy2006rpt.pdf [hereafter "2006 STATE OF FAIR HOUSING"].

67. *See id.*

68. *See* NAT'L FAIR HOUS. ALLIANCE FAIR HOUS. TRENDS REP. 19 (2006) *available at* http://www.nationalfairhousing.org/resources/newsArchive/resource_2425680275 4560627686.pdf (4%); NAT'L FAIR HOUS. ALLIANCE, FAIR HOUS. TRENDS REP. 9 (2005), *available at* http://www.nationalfairhousing.org/resources/newsArchive/ 2005%20Trends%20Report.pdf (5%); NAT'L FAIR HOUS. ALLIANCE, FAIR HOUS. TRENDS REP. 6 (2004), *available at* http://www.nationalfairhousing.org/resources/ newsArchive/NFHA%202004%20Trends%20Report.pdf (4%); NAT'L FAIR HOUS. ALLIANCE, FAIR HOUS. TRENDS REP. 3 (2003), *available at* http://www.nationalfair housing.org/resources/newsArchive/2003%20Trends%Report.pdf (4%); NAT'L FAIR HOUS. ALLIANCE, FAIR HOUS. TRENDS REP. 2 (2002), *available at* http://www.nationalfairshousing.org/resources/newsArchive/2002%20Trends%20Report.pdf (7%).

69. *See supra* note 65, at 15–16. HUD's 2006 Annual Report provides a summary of "HUD v. Calvert," a case in which HUD's investigation revealed that a property manager made "unwelcome sexual advances" to at least seven tenants. 2006 STATE OF FAIR HOUSING, *supra* note 66, at 22. Although the summary is entitled "HUD Charges Property Manager with Sexually Harassing a Female Tenant," the text indicates that HUD charged the manager with violations of the FHA for "discriminating against [a tenant] based on her sex." *Id.*

70. *See supra* Subsection II.A.

71. The closest express prohibition of harassing behavior may exist in 42 U.S.C. § 3617 (2000), which makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having

FHA are consistent in their phrasing and terminology—prohibiting discrimination based on "sex."[72] Although HUD's FHA rules do provide one scenario of apparent sexual harassment as an example of conduct that would violate the FHA,[73] the rules do not expressly identify sexual harassment as prohibited conduct, much less establish standards for evaluating allegedly harassing behavior. In 2000, HUD prepared and circulated for comment a draft rule that would have established such standards;[74] however, a final rule on sexual harassment never emerged from HUD. The categories and labels listed in the FHA and HUD rules are important because they appear to directly affect the housing discrimination data compiled at the federal[75] and state levels.[76] As a result, it is impossible to accurately estimate the incidence of sexual harassment in housing using available federal,

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exercised or enjoyed . . . any right granted or protected by section 803, 804, 805, or 806 of this article."

72. *See, e.g.*, 24 C.F.R. §§ 100.50(b)(1)–(4), 100.60(a), (b) (2006) (prohibiting various discriminatory housing activities on the basis of "sex").

73. *See* 24 C.F.R. § 100.65(b)(5) (2006). According to this rule, the following scenario would violate 42 U.S.C. § 3604(b) as imposing discriminatory terms or conditions of housing: "Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors." *Id.*

74. *See* Fair Housing Act Regulations Amendments Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67,666-01 (Nov. 13, 2000) (to be codified at 24 C.F.R. pt. 100).

75. For example, HUD solicits allegations of housing discrimination using forms that ask respondents whether they are a "victim of housing discrimination" and specifically state that it is "unlawful to discriminate in housing based on these factors[:] race, color, national origin, religion, sex, familial status (families with children under the age of 18, or who are expecting a child), [or] handicap (if you or someone close to you has a disability)." U.S. Dep't of Hous. and Urban Dev., Form HUD-903.1, *Are You a Victim of Housing Discrimination?* (2002), *available at* http://www.hud.gov/offices/adm/hudclips/forms/files/903-1.pdf.

76. Under federal rules promulgated by HUD, state and local fair housing agencies are directed to provide HUD with data "concerning the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households" seeking housing-related assistance. 24 C.F.R. § 121.2 (2007). Those demographic categories identified by HUD coincide with the prohibited bases of discrimination under the FHA. With only the language of HUD's rules and the text of the FHA to rely on, state and federal agencies tracking housing discrimination complaints appear to ignore the subcategory of sexual harassment and focus exclusively on the broader concept of sex discrimination. A limited sampling of state (Iowa, California, Wisconsin, West Virginia, North Dakota, Delaware) and local (Roanoke, Virginia; Richmond, Virginia; Tacoma, Washington; Austin, Texas; Phoenix, Arizona; and Orange County, California) fair housing intake and complaint forms indicates that none of these agencies explicitly identifies sexual harassment in housing as a potential category of discrimination. *See* Forms on file with author. And where these agencies prompt complainants with questions to identify the exact basis of alleged housing discrimination, none of them includes any reference to post-acquisition mistreatment, much less sexual harassment.

state, and local agency reports on fair housing. At the very least, those reports may subsume sexual harassment claims into a broader category of "sex discrimination." More troubling, however, is the possibility that because relevant agencies may not see an explicit statutory or regulatory proscription against sexual harassment, they are not adequately educating the public on the prohibited nature of such behavior or taking steps to facilitate the reporting of violative conduct.

In addition, the data from state and federal agencies almost certainly reflect a massive underreporting of all forms of housing discrimination. In 2001 and 2005, HUD undertook national surveys to gauge the American public's knowledge of, and attitude towards, fair housing laws.[77] The surveys, in part, described ten housing scenarios and asked respondents whether the facts presented violated any federal law.[78] The surveys then asked what steps respondents would take if they ever suffered housing discrimination.[79] The surveys also inquired whether the respondents had ever suffered housing discrimination and, if so, what steps the individuals took in response to the perceived discrimination.[80] When asked how they would respond to any future acts of housing discrimination, 44% said it was "very likely" or "somewhat likely" that they would seek help from a governmental agency.[81] An even larger percentage—72%—answered that it was "very likely" or "somewhat likely" that they would consult a lawyer if they were ever discriminated against in housing.[82]

However, the respondents' apparent willingness to seek help for any future acts of housing discrimination stands in stark contrast to their actual behavior when faced with discrimination. Of the respondents who reported experiencing some form of housing discrimination, only 1% had filed a report with a relevant governmental agency, and

77. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POL'Y DEV. & RES., HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS (2002), *available at* http://www.huduser.org/Publications/pdf/hmwk.pdf [hereinafter, "HOW MUCH DO WE KNOW?"]; U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POL'Y DEV. & RES., DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW (2006) *available at* http://www.huduser.org/Publications/pdf/FairHousingSurveyReport.pdf [hereinafter, "DO WE KNOW MORE NOW?"]. Between the 2001 and 2005 studies, HUD "conducted an extensive media campaign focused on recognition and reporting of housing discrimination." *Id.* at i.

78. HOW MUCH DO WE KNOW?, supra note 77, at 7–10; DO WE KNOW MORE NOW?, *supra* note 77, at 9. None of the scenarios presented in the HUD studies included harmful conduct occurring post-acquisition. As a result, HUD did not measure the public's knowledge of federal law as it pertains to harassment.

79. HOW MUCH DO WE KNOW?, *supra* note 77, at 27; DO WE KNOW MORE NOW?, *supra* note 77, at 35–36.

80. HOW MUCH DO WE KNOW?, *supra* note 77, at 27; DO WE KNOW MORE NOW?, *supra* note 77, at 35–36.

81. DO WE KNOW MORE NOW?, *supra* note 77, at 39.

82. *Id.*

less than 2% had met with a lawyer about the perceived discrimination.[83] The vast majority of people surveyed—between 80% and 90%—did nothing at all in response to the perceived discrimination.[84] The enormous incongruity between how respondents predict they would react and how they actually react to housing discrimination has led HUD to conclude that "underreporting is a major obstacle to achieving equal opportunity in housing."[85]

The reasons for such underreporting are varied. Earlier studies of residential sexual harassment suggested several explanations: women may feel stigmatized by the harassing conduct; they may fear retaliation against themselves or their children from the perpetrator; they may see reporting the abuse as prolonging their suffering; or they simply may not know that what they have suffered is housing discrimination.[86] Data from HUD's 2005 survey provide similar explanations: 64% of those surveyed responded that taking steps would not have been "worth it" or would not have helped the situation[87] and 8% expressed some fear of being retaliated against.[88]

3. *Case Law*

Another—albeit imprecise[89]—way to evaluate the scope of sexual harassment in housing is to sort reported judicial and administrative decisions involving housing harassment by the type of harassment alleged. As of the spring of 2007, there existed 106 decisions available through online searches from federal and state courts and administrative law judges in cases involving some form of housing-related harassment (disability, religious, race, country of origin, sexual, or some combination of bases).[90] In those cases, the most frequently alleged

83. *Id.* at 36.
84. *Id.*
85. 2006 STATE OF FAIR HOUSING, *supra* note 66, at 7.
86. *See* Cahan, *supra* note 27, at 1066–70. To the extent victims may not know that sexual harassment in housing violates federal law, HUD does not appear to be doing much to remedy the situation. As discussed earlier, HUD does not require its state and local fair housing partners to report data on sexual harassment. *See supra* notes 70–76 and accompanying text. In addition, it is difficult to estimate the public's knowledge of post-acquisition harassment protection in this country, particularly since HUD omitted from its 2001 and 2005 surveys any scenarios dealing with harassment. *See* HOW MUCH DO WE KNOW?, *supra* note 76, at 7–10; DO WE KNOW MORE NOW?, *supra* note 76, at 9.
87. DO WE KNOW MORE NOW?, *supra* note 77, at 37.
88. *Id.*
89. Among other limitations, such an evaluation does not capture harassment disputes never reported to a housing agency or attorney, those never filed in court, or those filed cases that settle or are abandoned.
90. Study on file with the author. Of the 119 reported decisions, thirteen emanated from lawsuits that had already generated one reported decision. Those 19 decisions were excluded, leaving a total of 106 judicial decisions from unique housing harassment disputes.

single basis of harassment was sexual (37% of reported harassment decisions), followed closely by race (36%).[91] After adding decisions in which multiple bases of harassment were alleged, a total of 40% of available housing harassment decisions involved some claim of sexual harassment committed against an existing occupant.[92] For reasons discussed earlier, although these numbers without question undercount all forms of housing harassment,[93] their relative values do suggest a general conclusion: sexual harassment, when compared to other forms of post-acquisition harassment, is a significant societal problem.

4. Investigative Journalism

Anecdotal evidence provides another window into the problem of sexual harassment as a form of housing discrimination. Newspaper reports from across the country strongly suggest at least two conclusions about such harassment. First, landlords who engage in harassing behavior are often repeat offenders. Second, and related, the victims singled out for harassment by predatory landlords share fundamental characteristics.

One of the most striking aspects of many newspaper reports on residential harassment is how frequently an individual landlord faces multiple allegations of sexual harassment. One investigation in Minnesota, for example, identified at least fifteen landlords or property managers who had been accused of sexually harassing tenants.[94] One of the accused landlords had been sued six times and was alleged to have sexually harassed more than a dozen tenants.[95] Another Minnesota landlord settled a sexual harassment dispute with sixteen former tenants two years after he settled similar claims brought by four other tenants.[96] In Sacramento, a landlord settled sexual harassment

91. *Id.*

92. *See id.* Thirty-nine cases (37%) involved only sexual harassment claims; two cases involved claims of racial and sexual harassment (2%); and one case involved claims of race, sexual, and country of origin harassment (1%). *Id.*

93. *See supra* notes 77–88 and accompanying text.

94. Charles Laszewski, *Renters Say Sex Sometimes Part of the Deal*, ST. PAUL PIONEER PRESS, Aug. 25, 2002. The allegedly harassing behavior included landlords making sexual overtures to tenants when they fell behind on rent, inappropriate touching, and forced sexual contact. *See id. See also* Paul Gustafson, *Landlord to Settle Harassment Suit*, MINNEAPOLIS STAR TRIB., Dec. 2, 2004 (reporting $425,000 settlement of claims brought by 16 women claiming sexual harassment by a St. Paul landlord).

95. *See* Laszewski, *supra* note 94.

96. Gustafson, *supra* note 94 (reporting settlement of sexual harassment claims brought by 16 tenants two years after the same landlord settled sexual harassment claims against four other tenants).

claims brought by twelve former tenants for $100,000.[97] A recent federal lawsuit accuses a Cincinnati, Ohio, landlord with a pattern of sexual harassment against female tenants over the past nine years, listing fifty-three properties owned by the landlord.[98] In a final example, a landlord in Kansas City, Missouri, was ordered to pay over $1 million for sexually harassing eleven women.[99]

Investigative reports also highlight the personal dimension to the problem—in particular, the plight of the individual victim, and the damage caused to her and her family at the hands of the abuser. These stories reinforce the common characteristics of the victim of residential sexual harassment. Poverty, in particular, is a recurring problem for such victims.[100] Because sexual harassment in the residential context affects female *renters*, the typical victim is more likely to earn a low or moderate income.[101] She may be the recipient of Section VIII housing assistance[102] or may have recently lived with her

97. Denny Walsh, *Capital Landlord Settles Sexual-Harassment Suit*, SACRAMENTO BEE, April 20, 2004 (describing a Sacramento landlord's $100,000 settlement of sexual harassment claims brought by twelve former tenants).

98. *Landlord Accused of Harassment*, THE CINCINNATI POST, Feb. 27, 2007, at 2A.

99. Associated Press, *Harassing Tenants Nets $1.1 Million Verdict*, HOUSTON CHRONICLE, May 16, 2004. *See also* Rick Ruggles, *Sex-for-Rent Awards Fall Far Short of Request*, OMAHA WORLD HERALD, Dec. 10, 2004, at 1B (reporting award of $66,152 against Omaha, Nebraska landlord who sexually harassed ten former tenants).

100. Associated Press, *Harassing Tenants Nets $1.1 Million Verdict*, HOUSTON CHRONICLE, May 16, 2004 (reporting that victims of sexual harassment in housing are often "lower-income, single women with few opportunities to seek other housing"). To the extent that poverty plays an important role in creating the ideal environment for residential sexual harassment, women suffer a distinct disadvantage. In general, women are 39% more likely to be poor than men. *See* LEGAL MOMENTUM, READING BETWEEN THE LINES: WOMEN'S POVERTY IN THE UNITED STATES (2004), *available at* http://www.legalmomentum.org/womeninpoverty.pdf. Among adults who are extremely poor—those whose incomes are less than half of the poverty standard—60% are women. *Id.* Women who work outside the home are 41% more likely to be poor than men who work outside the home. *Id.* Families with single parents are considerably more likely to live in poverty as compared to families with cohabiting married parents, and the poverty rate for families headed by single mothers is nearly twice that of families headed by single men. *See id.* According to one commentator, "Women . . . are the fastest growing segment of the homeless and ill-housed in the nation." Adams, *supra* note 27, at 34; *see* Maxwell, *supra* note 23, at 234.

101. Because sexual harassment affects renters, as opposed to owners, it disproportionately impacts low- and moderate-income women—the very women with few housing opportunities. *See* Maxwell, *supra* note 23, at 224.

102. *See, e.g.*, Titan Barksdale, *HAWS Wants Inquiry; It Will Ask for Investigation of Sexual-Harassment Suit*, WINSTON-SALEM J., Nov. 6, 2006, at B1 (reporting investigations of claims of sexual harassment brought by women who rented homes from a landlord through the Housing Authority of Winston-Salem); *Suspended Housing Official Accused of Sexual Harassment*, DALLAS MORNING NEWS, Sept. 27, 1994, at 22D (describing an alleged "widespread, pervasive and long-term sex-for-housing scandal" involving alleged harassment by an official with the Merce-

children on a relative's front porch[103] or may be homeless and living with her family in a welfare hotel[104] or a shelter.[105] The exact details vary, but the gist of the underlying story is the same: she is suffering extreme poverty and, as a result, is desperate for housing. Such women are almost certainly not aware of their legal rights.[106] Even if they are, they may not be willing to risk the loss of housing or governmental assistance for their families that could result if they resist the harassment or complain to authorities. Furthermore, as the amount of low income housing decreases across the country, predatory landlords have more and more desperate victims to choose from.[107] As one housing attorney stated, "[a] woman has to choose between making the family homeless or giving in to the landlord."[108]

III. THE FHA AS AN IMPERFECT VEHICLE FOR RESIDENTIAL SEXUAL HARASSMENT CLAIMS

Before turning to an analysis of the Thirteenth Amendment, this section briefly considers the continued viability and effectiveness of the FHA as a vehicle for victims of residential sexual harassment seeking redress in federal court. Although the FHA has been used by a number of plaintiffs to bring such claims, several potential problems exist with the statute in this context. The shortcomings discussed below could be remedied by statutory amendment, the promulgation of

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des Housing Authority against applicants for low-income housing); Laszewski, *supra* note 94.

103. Esther B. Fein, *Complaints Grow as More Tenants Tell of Sexual Harassment by Landlords*, N.Y. TIMES, July 13, 1986, at 27.

104. *Id.*

105. Laszewski, *supra* note 94.

106. This is especially true if, as suggested earlier, HUD and local housing advocacy groups are not effectively engaging in community outreach and education about the FHA's prohibition of unlawful post-acquisition harassment. *See supra* Subsection II.B.2.

107. *See* Elliott D. Lee, *Female Tenants Battle Increased Sex Harassment*, WALL ST. J., Jan. 30, 1987, at 25 (reporting that residential sexual harassment "appears to be intensifying as the number of single women who live alone or with young children has climbed and the supply of affordable housing has shrunk"). In general, there is a significant delay for persons seeking government housing assistance. *See, e.g.*, OAKLAND HOUS. AUTH., ANN. REP. (2006), *available at* http://www.oakha.org/OhaNews/oha.annual2006.pdf (detailing that over 47,000 applications were submitted for a waiting list of 10,000 for housing vouchers in Oakland); SAN FRANCISCO AIDS FOUNDATION, HOUSING/RENTAL SUBSIDY, *available at* http://www.sfaf.org/services/housing_subsidy.html (last visited Dec. 21, 2007) (reporting that over 27,000 people remained on San Francisco's Section VIII housing voucher waiting list); PRESS RELEASE, MINN. HOUS. P'SHIP, MINNESOTA HOUSING PARTNERSHIP SHOWS THAT THOUSANDS OF MINNESOTANS CONTINUE TO WAIT FOR AFFORDABLE HOUSING (Oct. 20, 2006), *available at* http://www.mhponline.org/files/Section8report.pdf (stating that 47,000 individuals and families were stranded on the state Section VIII waiting list).

108. *See* Laszewski, *supra* note 94.

clearer implementing rules, or perhaps even more effective advocacy; nevertheless, these limitations call into question whether the FHA in its current form adequately protects victims of sexual harassment.

A. Transactional Nature of the FHA

Since its enactment in 1968, the FHA has served as the primary vehicle for bringing claims of housing discrimination in federal court. Much litigation under the FHA has addressed what might be termed access-related claims, such as allegations of racial steering,[109] discriminatory lending and financing practices,[110] failure to rent or sell,[111] discrimination in advertisements,[112] and discriminatory sales or rental terms.[113] The FHA has also been interpreted by a number of courts to include basic guarantees of occupancy, use, and enjoyment that arise post-acquisition.[114] As expressed by one district court considering the scope of the FHA, "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."[115]

In the last several years, however, some concern has arisen about the true post-acquisition scope of the FHA. This concern is reflected in a number of federal decisions that narrowly interpret specific provisions of the FHA to apply only to claims of discrimination in the sales

109. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086 (7th Cir. 1992).

110. *See, e.g.*, Johnson v. Kakvand, 192 F.3d 656 (7th Cir. 1999); Edwards v. Flagstar Bank, 109 F. Supp. 2d 691 (E.D. Mich. 2000).

111. *See, e.g.*, Rogers v. 66–36 Yellowstone Blvd. Coop Owners, 599 F. Supp. 79 (E.D.N.Y. 1984); Kaplan v. 442 Coop. Bldg. Corp., 567 F. Supp. 53 (N.D. Ill. 1983).

112. *See, e.g.*, United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).

113. *See, e.g.*, United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992); Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885 (N.D. Ill. 2000).

114. *See, e.g.*, Clifton Terrace Assoc. v. United Technologies Corp., 929 F.2d 714, 720 (D.C. Cir. 1991) (recognizing that FHA 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 the FHA, where such harassment occurred post-acquisition); Whisby-Myers v. Kiekenapp, 293 F. Supp. 2d 845, 851–52 (N.D. Ill. 2003) (rejecting claim that FHA 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 the FHA).

115. United States v. Koch, 352 F. Supp. 2d 970, 976 (D. Neb. 2004). *See also* Schroeder v. Bertolo, 879 F. Supp. 173, 176–77 (D.P.R. 1995) (explaining that an owner's "housing rights did not terminate" once she purchased her condominium, but that under the FHA, she had "the continuing right to quiet enjoyment and use" of her dwelling).

or rental transaction.[116] Most recently, the Seventh Circuit Court of Appeals took the position that the FHA does not protect against post-acquisition harassment. In *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*,[117] the Seventh Circuit concluded that the FHA "contains no hint in either its language or its legislative history of a concern with anything but *access* to housing."[118] In the court's opinion, because Congress was concerned with minority exclusion from desirable neighborhoods when it passed fair housing legislation in 1968, "the problem of how they were treated when 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."[119] Although the soundness of the *Halprin* court's legal reasoning has been questioned by both judges[120] and commentators,[121] its arguments may not be wholly without merit.

Most strikingly, as discussed earlier, the FHA does not expressly prohibit "harassment." Instead, courts that have found post-acquisition harassment protection in the FHA have relied on statutory provisions that make it unlawful under § 3604(a) "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny a dwelling."[122] Others have relied on § 3604(b), which prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental."[123] Although these statutory provisions explicitly address the right of acquisition, expanding it to protect occupancy requires a more subtle interpretation[124]—one rejected by the *Halprin* court and others.

116. *See, e.g.*, Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210–11 (7th Cir. 1984) (concluding that challenged acts under § 3604(a) must "lead to discriminatory effects on the availability of housing"); Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. 05-3197, 2005 WL 2669480 (S.D. Tex. Oct. 19, 2005) (dismissing plaintiffs' claim under the FHA where she did not allege interference in the acquisition of her residence); King v. Metcalf 56 Homes Ass'n, No. 04-2192, 2004 WL 2538379, at *3 (D. Kan. Nov. 8, 2004) (granting summary judgment against plaintiffs who claimed racial harassment and noting that plaintiffs had not alleged any discrimination in the original acquisition of housing); *Gourlay*, 276 F. Supp. 2d at 1234 (ruling against plaintiff in her FHA harassment claims because defendants' alleged conduct did not preclude plaintiff's ownership of a home).

117. 388 F.2d 327 (7th Cir. 2004).

118. *Id.* at 329 (emphasis in original).

119. *Id.*

120. *See, e.g.*, *Koch*, 352 F. Supp. 2d at 973–80 (disagreeing with both the reasoning and conclusions of the Seventh Circuit in *Halprin*).

121. *See* Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 18–33 (2008); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006).

122. 42 U.S.C. § 3604(a) (2000).

123. *Id.* at § 3604(b).

124. Several courts have concluded, in varying contexts, that § 3604 protects occupancy of housing. *See, e.g.*, Clifton Terrace Assoc. v. United Technologies Corp.,

Even the FHA's clearest harassment-related language in § 3617—which makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" a fair housing right[125]—is poorly drafted and ambiguous. In particular, a number of courts have interpreted this language narrowly to provide plaintiffs a harassment claim only when they also allege discrimination in the acquisition of housing.[126] Such interpretations clearly exclude plaintiffs whose only injury is alleged harassment after their occupation began. In this context, it is noteworthy that an administrative rule promulgated by HUD to implement the FHA attempts to clarify the statute's application to claims of unlawful disturbance of possession by explicitly prohibiting "[t]hreatening, intimidating or interfering with persons *in their enjoyment of a dwelling*."[127] Whether or not HUD's rule impermissibly expands the scope of the FHA beyond what Congress intended,[128] the FHA clearly omits similarly explicit post-acquisition protection.

Advocates of occupancy protection also find little clear support in the FHA's legislative history. In particular, the draft legislation was almost always framed as an "open housing" law—one that would guarantee non-discriminatory access to housing and, as a result, help alleviate racial segregation in American neighborhoods.[129] Through-

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929 F.2d 714, 720 (D.C. Cir. 1991) (ruling that § 3604(b) protects habitability); Betsey v. Turtle Creek Assoc., 736 F.2d 983, 988 (4th Cir. 1984) (recognizing claim of harassment under § 3604); *Koch*, 352 F. Supp. 2d at 976 (concluding that § 3604 protects existing occupants against sexual harassment); Whisby-Myers v. Kiekenapp, 293 F. Supp. 2d 845, 851–52 (N.D. Ill. 2003) (rejecting argument that § 3604 protects only against discrimination in the acquisition of housing).

125. 42 U.S.C. § 3617 (2000).

126. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004) (determining that because plaintiffs did not allege any interference with their acquisition of housing, their claims under § 3617 failed); Frazier v. Rominger, 27 F.3d 828, 834 (2d Cir. 1994) (concluding 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"); Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 241 (E.D.N.Y. 1998) (concluding 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").

127. 24 C.F.R. § 100.400(c)(2) (2007) (emphasis added).

128. *See Halprin*, 388 F.3d at 330 (noting that this "regulation may stray too far from section 3617 . . . to be valid").

129. *See, e.g., Fair Housing Act of 1967: Hearings on S. 1358, S. 2144, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking and Currency*, 90th Cong. 6 (1967) (statement of Ramsey Clark, Att'y Gen. of the United States) (explaining that the FHA 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"); REP. OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 28 (1968) (recommending that Congress pass a "comprehensive and enforceable federal open

out the course of numerous committee, subcommittee, and floor debates from 1966 to 1968, members of Congress, the executive branch, and interested individuals repeatedly discussed the need to protect the housing transaction.[130] As a result, what emerges from the legislative record is an overwhelming focus on access issues, framed as concerns about racial segregation and discriminatory exclusions from housing[131] and the need to open a housing market "virtually closed" to minorities.[132] In comparison to this heavy access focus in the legislative record,[133] the lack of any meaningful discussion of protected occupancy is striking. Although concern was expressed about the social and psychological problems stemming from racial segregation, those problems were usually discussed in the context of discriminatory exclusions from housing, not housing harassment.[134]

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housing law" to help address the growing problems of racial segregation and resulting violence plaguing the nation).

130. *See, e.g., Fair Housing Act of 1967: Hearings on S. 1358, S. 2144, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking and Currency*, 90th Cong. 29 (1967) (statement of Robert C. Weaver, Secretary of Housing and Urban Development) ("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."); 114 CONG. REC. 2279 (1968) (statement of Sen. 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?").

131. H.R. REP. NO. 89-1678, at 59 (1966) (Minority Views of the Hon. Basil L. Whitener) (stating that the bill was proposed to "provide adequate and integrated housing for minority groups"); *Fair Housing Act of 1967: Hearings on S. 1358, S. 2144, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking and Currency*, 90th Cong. 128 (1967) (statement of Rev. Robert F. Drinan, S.J., 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").

132. H.R. REP. NO. 1678, at 19 (1966) (Additional Views of Hon. William M. McCulloch and Hon. Charles McC. Mathias, Jr.).

133. The FHA's access focus began with President Johnson's letter introducing fair housing legislation in 1966. In that letter, he urged Congress to declare as a national policy the eradication of "racial discrimination in the sale or rental of housing." *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. 1049 (1966) (letter from Lyndon B. Johnson, President of the United States).

134. As explained by Senator Mondale, "[t]he real evil in the ghetto effects is the rejection and humiliation of human beings. [A] sense of humiliation goes all through the ghetto." 114 CONG. REC. 2281 (1968) (testimony of Sen. Mondale) (citation omitted). But in the senator's opinion, fair housing legislation would have "great practical psychological significance to the Negro who . . . remains trapped in the ghetto for a lifetime." *Id.* at 3421.

Against this backdrop of statutory language and legislative history, and fueled by the Seventh Circuit's decision in *Halprin*,[135] a number of courts have recently adopted a narrow reading of the FHA's scope to exclude post-acquisition protection. In *Lawrence v. Courtyards at Deerwood Ass'n, Inc.*,[136] for example, the district court granted defendants' summary judgment motion where plaintiffs alleged that a racially hostile housing environment had been created by the management association. In ruling against the plaintiffs, the court observed that "[a]s the statutory language makes clear . . . section 3604 applies only to discrimination related to the acquisition or sale and rental of housing."[137] A more recent decision opined that "[a] majority of courts considering the issue have found that Section 3604(b) is limited to discrimination in provision of services as they are connected to the acquisition or sale and rental of housing."[138] Another district court in Florida has concluded that "Section 3604(a) prevents discriminatory conduct that directly deprives protected persons from housing opportunities"[139] and that "Section 3604(b) only prohibits the discriminatory provision of services and facilities in connection with a sale of a dwelling."[140] Whatever the merits of these positions,[141] a growing body of case law[142] is whittling away at the FHA's potential, possibly leaving victims of housing harassment without a federal claim.

135. *See* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.2d 327 (7th Cir. 2004); Walton v. Claybridge Homeowners Ass'n, No. 06-1914, 2006 WL 2243902, at *2 (7th Cir. Aug. 2, 2006) (explaining that in *Halprin* "we held that [§ 3617] literally provided a cause of action only for plaintiffs who complain about discrimination in acquiring, rather than simply enjoying, property").

136. 318 F. Supp. 2d 1133, 1136–39 (S.D. Fla. 2004).

137. *Id.* at 1142. Rejecting the plaintiffs' claims under § 3617, the *Lawrence* court ruled that to violate § 3617 in the absence of some other FHA claim—such as an interference with access claim under § 3604—"the discriminatory conduct must be pervasive and severe enough to be considered as threatening or violent." *Id.* at 1145.

138. Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n., 456 F. Supp. 2d 1223, 1227–28 (S.D. Fla. 2005) (citations omitted).

139. Gourlay v. Forest lake Estates Civic Ass'n of Port Richey, 276 F. Supp. 2d 1222, 1230 n.10 (M.D. Fla. 2003). The district court's summary judgment decision in the *Gourlay* litigation was withdrawn by stipulation of the parties after they reached settlement. *See* Gourlay v. Forest Lake Estates Civic Ass'n of Port Richey, No. 8:02CV1955T30TGW, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003).

140. *Gourlay*, 276 F. Supp. 2d at 1233.

141. As discussed in depth elsewhere, these narrow interpretations of the FHA are open to considerable criticism. *See* United States v. Koch, 352 F. Supp. 2d 970 (D. Neb. 2004); Oliveri, *supra* note 121; Short, *supra* note 121.

142. *See supra* note 116.

B. Legal Standard for Hostile Housing Environment Claims

Assuming that the FHA continues to be interpreted and applied by most courts as protecting not simply the acquisition but also subsequent occupation of property, other problems exist in the context of sexual harassment. Two such problems can be traced to the heavy reliance that federal courts place on doctrines developed under Title VII: use of a "reasonable person" standard to evaluate allegedly harassing conduct and the failure of courts to appreciate the psychological importance of the locus of harassment, the home.

1. Establishing the Proper Perspective

Where the perpetrator does not condition housing or housing-related services on sexual favors, the tenant's harassment claim exists in the current legal framework as one based on a hostile housing environment: one that "unreasonably interferes with use and enjoyment of the premises."[143] The perspective adopted by courts to evaluate whether use and enjoyment have been unreasonably interfered with is a critical component of this inquiry. However, because neither the FHA nor current HUD rules establish standards for evaluating allegedly harassing behavior, many federal courts considering housing claims have adopted the general perspective used under Title VII.[144]

Although federal courts do not agree on the proper perspective to use in evaluating Title VII hostile work environment claims,[145] most courts ask whether a reasonable person would find the work environment burdensome as a result of the offending conduct.[146] This approach may be advantageous for a number of reasons. In particular, it establishes a neutral standard that can be applied regardless of the specific qualities, characteristics, or background of the victim or perpetrator.[147] This allows for the development of a relatively uniform standard of conduct over time, which helps establish predictability for

143. Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993); *see also supra* notes 109–115 and accompanying text.

144. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996); Neudecker v. Boisclair Corp, No. Civ. 02-4099JNEJGL, 2005 WL 1607409, at *4 (D. Minn. July 7, 2005); Rich v. Lubin, No. 02 Civ. 6786(TPG), 2004 WL 1124662, at *4 (S.D.N.Y May 20, 2004); *see also* Zalesne, *supra* note 39, at 877.

145. *See* William Douglas Woody, Wayne Viney, Paul A. Bell & Nora L. Bensko, *Sexual Harassment: The "Reasonable Person" vs "Reasonable Woman" Standards Have Not Been Resolved*, 78 PSYCHOL. REP. 329, 329–30 (1996) (summarizing arguments advocating and opposing adoption of a reasonable woman standard in the Title VII context).

146. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); Waltman v. Int'l Paper Co., 875 F.2d 468, 476 (5th Cir. 1989); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986). *See also* Emily Epstein, *Federal Sexual Harassment and the "Reasonable Woman" Standard*, 5 GEO. J. GENDER & L. 377 (2004).

147. *See* Patricia Linenberger, *What Behavior Constitutes Sexual Harassment?*, 34 LAB. L.J. 238, 246 (1983).

all involved.[148] The reasonable person standard also avoids difficult questions about how particular aspects of the victim or perpetrator—such as their race, education level, or financial status—affect the analysis.

However, these advantages having to do with certainty and predictability do not outweigh the limitations of the reasonable person standard. In particular, the standard "tends to be male-biased and tends to systematically ignore the experiences of women."[149] In this way, the reasonable person standard "fails to reflect women's perceptions of what constitutes sexual harassment."[150] Because victims of residential sexual harassment are almost always female, their perspective, rather than a "reasonable person," should be the focus. Such a victim-oriented standard would acknowledge general gender-based differences in what men and women consider harassing conduct.[151] Responding to such concerns, a few courts have adopted a "reasonable woman" standard in housing harassment cases.[152] HUD's 2000 draft rules on housing harassment followed this general lead, focusing on how the alleged harassment would have affected a reasonable tenant

148. *See* Robert Rosenthal, Comment, *Landlord Sexual Harassment: A Federal Remedy*, 65 TEMP. L. REV. 589, 594 (1992); Zalesne, *supra* note 39 at 870.

149. *See* Ellison v. Brady, 924 F.2d 872, 878–79 (9th Cir. 1991). A number of commentators have more exhaustively evaluated the reasonable person standard in harassment law generally. *See, e.g.*, Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005 (1992); Deborah B. Goldberg, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 CARDOZO WOMEN'S L.J. 195 (1995); Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411 (1992).

150. *See* Zalesne, *supra* note 144 at 877; *see also*, Adams *supra* note 27, at 44–51.

151. Recent studies have consistently found that men and women perceive potentially sexually harassing conduct differently. In particular, women are more likely than men to describe conduct as harassing and to report a higher frequency of sexual harassment. *See, e.g.*, Brenda L. Russell & Kristin Y. Trigg, *Tolerance of Sexual Harassment: An Examination of Gender Differences, Ambivalent Sexism, Social Dominance, and Gender Roles*, 50 SEX ROLES 565 (2004) (concluding that although women are significantly less tolerant than men of potentially sexually harassing behavior, that variance may be traceable to ambivalent sexism and hostility toward women); Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, HARV. BUS. REV., Mar.–April 1981, at 76 (determining that although men and women generally agree on how to define sexual harassment, women reported that harassing conduct occurs more frequently).

152. *See, e.g.*, Beliveau v. Caras, 873 F. Supp. 1393, 1397-98 (C.D. Cal. 1995); Shellhammer v. Lewallen, 770 F.2d 167 (6th Cir. 1985). Similarly, some courts in the Title VII context have adopted or at least recognized the potential benefits of a "reasonable woman" standard. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (concluding that "a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men"). *See generally*, Epstein, *supra* note 146.

in the victim's position.[153] Although there are drawbacks associated with a standard that considers the subjective viewpoint of the victim,[154] such an approach likely results in greater protection against harassing conduct. However, to the extent that the reasonable person standard remains the majority approach in this area, the FHA cannot be seen as fully protecting victims of sexual harassment.

2. Ignoring the Importance of Locus

A related problem under current FHA doctrine flows from courts' heavy reliance on law developed under Title VII. In particular, such reliance may obscure the important characteristics of the locus of harassment, the home, as well as its psychological meaning and value to the victim.

DiCenso v. Cisneros,[155] decided by the Seventh Circuit in 1996, provides one example of how courts can overlook the subjective importance of the home environment. In that case, when DiCenso, the defendant, visited the apartment of the eighteen-year-old plaintiff, Brown, to collect rent, he stood in her doorway and "began caressing her arm and back."[156] He then told her that if she could not pay the rent, she could "take care of it in other ways."[157] After Brown responded by slamming the door in DiCenso's face, he stood outside her doorway calling Brown a "bitch" and a "whore."[158]

In evaluating the plaintiff's sexual harassment claims, the Seventh Circuit's reasoning tracked its approach under Title VII, namely that "isolated and innocuous incidents do not support a finding of sexual harassment."[159] As explained by the court, "the problem with Brown's complaint is that although DiCenso may have harassed her, he did so

153. *See* Fair Housing Act Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67,666, 67,666–67 (Nov. 13, 2000). The draft rules explain that "[a] person creates a hostile environment when that person's unwelcome conduct is sufficiently severe or pervasive that it results in the creation of an environment that a reasonable person in the aggrieved person's position would find intimidating, hostile, offensive, or otherwise significantly less desirable." *Id.* at 67,666. The rules go on to clarify that "[t]he perspective of a reasonable person in the aggrieved person's position is that of an ordinary person in like circumstances." *Id.* at 67,667.

154. In particular, the "reasonable woman" standard risks essentializing women and may help create a subjective and unpredictable standard for housing harassment. *See* Zalesne, *supra* note 144 at 876.

155. 96 F.3d 1004, 1008–09 (7th Cir. 1996).

156. *Id.* at 1006.

157. *Id.*

158. *Id.* In addition to these events, Brown's complaint alleged additional incidents of harassment by DiCenso, as well as unauthorized entries by him into Brown's home. *Id.* at 1006 n.1. However, these additional facts were not considered by the district court because the administrative law judge did not find DiCenso responsible for them. *Id.*

159. *Id.* at 1008.

only once. Moreover, Brown's conduct, while clearly unwelcome, was much less offensive than other incidents which have not violated Title VII."[160] In particular, the defendant did not touch "an intimate body part" of the plaintiff and did not threaten her with physical harm.[161] While "[t]here is no question that Brown found DiCenso's remarks to be subjectively unpleasant . . . this alone did not create an objectively hostile environment."[162]

There are at least two striking problems with the court's reasoning. First, a problem addressed more broadly in the prior subsection, is the court's decision to view the offending conduct through an "objective" lens. This resulted in a finding of no liability against DiCenso, despite the fact that the court explicitly recognized subjective harm to Brown. The court's conclusion that one incident of harassment would not be actionable under the FHA is especially troubling given that the only empirical study of residential sexual harassment found 35% of such abuse to have lasted only one day.[163] Second, in determining whether a "hostile environment" had been created by DiCenso's conduct, the court made no attempt to evaluate the importance of where DiCenso harassed Brown. As discussed earlier,[164] the home is a uniquely personal and intimate environment. It is a place of refuge and protection for the renter and her family, where security normally exists against the outside world. Perhaps most importantly, it is a location of privacy where occupants have the reasonable expectation that they may and can exclude anyone they choose.[165] In these ways, it is distinctly different than a traditional work environment, which is open and public. At work, there is usually less privacy and intimacy, and the regular interaction of employees may allow victims some abilities to distance or shield themselves from harassing co-workers or supervisors.[166] Such a buffer zone is difficult, if not impossible, to create in the landlord-tenant context, where the victim's abuser is the same person she must interact with regularly to pay rent and report main-

160. *Id.* at 1008–09.
161. *Id.* at 1009.
162. *Id.*
163. *See* Cahan, *supra* note 27, at 1073.
164. *See supra* subsection II.A and accompanying notes.
165. In another context, the U.S. Supreme Court has recognized the importance of home: the "[s]anctity of the home is no greater than sanctity of the person." Agnello v. United Sates, 269 U.S. 20, 25 (1925) (concluding that the Fourth Amendment was violated by a warrantless search).
166. *See* Kathleen Butler, *Sexual Harassment in Rental Housing*, 1989 U. ILL. L. REV. 175, 204 (1989) (concluding that sexual harassment in the landlord-tenant relationship "may create a stronger and more real sense of personal danger" than harassment in the employer-employee context); Roos, *supra* note 27, at 1145 (explaining that, unlike the employment context, a tenant victimized by her landlord "is often expected to direct her complaint to close associates of the harasser . . . or even the harasser himself").

tenance problems. This fundamental distinction between work and home—in particular, the different expectations of privacy and protection that reasonably exist in each location—should form a part of courts' analyses in sexual harassment cases. Specifically, heightened protection for the victim of sexual harassment in the home is appropriate.[167]

Under this approach, it should be irrelevant that DiCenso's conduct was "much less offensive than other incidents which have not violated Title VII."[168] What should be relevant, instead, is how DiCenso's conduct—within the environment in which it occurred[169]—affected Brown. From this perspective, DiCenso's behavior appears quite damaging. On Brown's doorstep, DiCenso initiated uninvited physical contact, offered to exchange rent for sex, and verbally assaulted Brown when she rejected his advances. Beyond the trauma of these incidents, Brown likely feared future sexual advances from DiCenso, given his unique ability to access her dwelling at any time and the likelihood that, as her landlord, DiCenso would have reason to call and visit her again.[170] In this way, DiCenso's harassing conduct was not only damaging by itself; it also stripped away the protective shield of Brown's home, isolating her and deepening her injury. Where courts fail to take into consideration in their FHA analyses the psychological and emotional aspects of abuse inflicted within the home environment, they risk underprotecting victims.[171]

167. *See* Lindemyer, *supra* note 23, at 368 (noting that "[t]he expectation of both safety and privacy in one's home is justifiably greater than that in the workplace, and thus a higher standard of conduct is warranted"); Zaslene, *supra* note 144, at 886–88 (arguing that the "fundamental differences" between harassment in the home and on the job make application of the same legal standard in both contexts "a mistake").

168. *DiCenso*, 96 F.3d at 1008–09.

169. *See* Adams, *supra* note 27, at 54–55 (citing the *DiCenso* case as one example of a decontextualized analysis of residential sexual harassment).

170. *See* Lindemyer, *supra* note 23, at 376 (explaining that residential sexual harassment also brings with it the "omnipresent threat of future, more egregious harm due to the fact that the landlord has unrestrained access to the tenants' apartment").

171. Other courts have apparently failed to recognize the subjective value of the home as part of their sexual harassment analyses. In *Cavalieri-Conway v. L. Butterman & Associates*, for example, the district court granted defendants' summary judgment motion where the plaintiff alleged sexual harassment perpetrated by her landlord. 992 F. Supp. 995 (N.D. Ill. 1998). In particular, the plaintiff alleged that the defendant used sexually graphic and crude language around her, demanded that she remain chaste in exchange for undertaking repairs on her property, and kept her under surveillance. *Id.* at 1008. In rejecting her claims, the court concluded that the landlord's language was "not sufficiently egregious to constitute [sexual] harassment," that the landlord used threatening language "on only two occasions way back in 1992," and that his abusive comments were "not coupled with any threat of physical harm." *Id.* In making these conclusions, the court simply imported into its analysis the Title VII standard

IV. THIRTEENTH AMENDMENT PROTECTION AGAINST RESIDENTIAL SEXUAL HARASSMENT

With sexual harassment of tenants being a serious problem in society and one that is likely growing worse given the declining supply of low income housing, potential shortcomings in the traditional avenue for redress are even more problematic. However, a variety of possible obvious solutions exist. For example, HUD could promulgate explicit rules detailing the FHA's post-acquisition protection, including its coverage of sexual harassment. The draft rules prepared and circulated by HUD in 2000, which included standards for *quid pro quo* and hostile housing environment claims, provided a good starting point for such an effort.[172] Of course, even the most comprehensive rules in this context would be ineffectual if they exceed the scope of the FHA itself—a point driven home by the Seventh Circuit's opinion in *Halprin*.[173]

Another way to address any shortcomings in existing occupancy protection would be to amend the FHA to unequivocally bring post-acquisition coverage within the statute. Modifying the FHA's language, however, would surely generate a contentious fight among interest groups seeking to define with specificity the exact contours of the statute.[174] Congress would also run the risk in amending the FHA of implicitly undermining the statutory support for past decisions recognizing post-acquisition protection. An alternative remedy would be to do nothing to the law itself, but simply focus on advocacy: to argue that existing statutory law adequately protects occupants from housing harassment and that judicial opinions to the contrary—such as *Halprin*—have little statutory, historical, or policy support.

In addition to these more traditional and obvious solutions,[175] the Thirteenth Amendment exists as a potential tool to protect tenants

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and never considered the psychological importance of the location of the harassment. *Id.* at 1007–08.

172. *See* Fair Housing Act Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67,666-01 (Nov. 13, 2000).

173. Halprin v. Prairie Single Family Homes of Dearborn Ass'n, 388 F.3d 327, 330 (7th Cir. 2004) (opining that the relevant HUD regulation, which prohibited "[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling" may "stray too far from section 3617 . . . to be valid").

174. Given the heated disagreements that developed during prior attempts to amend the FHA, it is not unreasonable to anticipate similar debates if Congress considers explicitly adding post-acquisition protection to the FHA. *See, e.g.*, Peter W. Salsich, Jr., *Toward a Policy of Heterogeneity: Overcoming a Long History of Socioeconomic Segregation in Housing*, 42 WAKE FOREST L. REV. 459, 486 (2007) (describing the "years of contentious debate" that preceded amendment of the FHA in 1988 to include familial status and disability protection).

175. Plaintiffs might also rely on state law claims, such as the tort of intentional infliction of emotional distress. *See* Haddad v. Gonzales, 576 N.E.2d 658 (Mass. 1991) (awarding a victim of residential sexual harassment damages under a deceptive

against sexual harassment in housing. Without question, the Thirteenth Amendment argument explored in this section is nontraditional. It has not been addressed in reported federal decisions, suggesting that it may not have been advanced very often (if ever) in housing harassment litigation. As a consequence, some degree of resistance to this argument is expected, if for no other reason than it challenges the status quo.

My call for a robust interpretation and modern application of the Thirteenth Amendment is not without precedent. A rediscovery of the Thirteenth Amendment served as the foundation for the civil rights campaign of the U.S. Department of Justice's Civil Rights Section following World War II,[176] and it has provided the springboard for various scholarly arguments seeking innovative ways to address a wide range of modern legal problems.[177] Below I explore the Amendment's text, drafting history, and social context to evaluate its applicability to claims of sexual harassment in housing.[178]

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trade practices statute based on a theory of intentional infliction of emotional distress); Susan Etta Keller, *Does the Roof Have to Cave In? The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663 (1988).

176. *See* Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L. J. 1609, 1659 (2000-2001) (explaining that the Section also "began to treat not only the legal structures that facilitated involuntary servitude, but also the social and economic ones, as potentially coming within the scope of the Thirteenth Amendment").

177. *See, e.g.*, Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Approach to* Deshaney, 105 HARV. L. REV. 1359 (1991-1992); Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992-1993); Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403 (1993); Douglas Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995); Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J. L. & SOC. PROBS. 519 (1994-1995); Marcellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097 (1997-1998); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1991-1992); Larry J. Pittman, *A Thirteenth Amendment Challenge to Both Racial Disparities in Medical Treatments and Improper Physicians' Informed Consent Disclosures*, 48 ST. LOUIS U. L.J. 131 (2003-2004); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002).

178. The Thirteenth Amendment's abolition of all "badges and incidents of slavery" potentially provides further protection in this context. Although a full discussion of badges and incidents is beyond the scope of this Article, such an argument would need to demonstrate that the Amendment directly prohibits remnants of the chattel slavery system and that at least some cases of sexual harassment in housing reasonably qualify as badges or incidents of that system. *See generally*, William M. Carter, Jr., *Race Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007).

As to the first question, the debates surrounding congressional consideration of the Thirteenth Amendment suggest that many congressmen expected the proposed Amendment to both unshackle slavery's bonds and "direct[ly] ban . . . many

A. The Legal Basis of Involuntary Servitude

In its first section, the Thirteenth Amendment decrees that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . ."[179] This broad language is noteworthy

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of the evils radiating out from the system of slavery." Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 180 (1951); *see* Douglas Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 8 (1995). Although the Supreme Court hailed the Thirteenth Amendment as a "grand yet simple declaration of the personal freedom of all [people]," Slaughter House Cases, 83 U.S. 36, 69 (1872), the Court has never fully defined the Amendment's scope or articulated whether the Amendment has a self-executing force beyond abolishing slavery. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (refusing to consider whether "the Amendment itself did any more than [abolish slavery]—a question not involved in this case").

Assuming that the Thirteenth Amendment directly prohibits vestiges of the chattel slavery system, the second question is whether residential sexual harassment reasonably constitutes such a burden. In describing badges and incidents of slavery, the Court has called them the "vestiges and incidents of a society half slave and half free" that limit the "fundamental rights [that] are the essence of civil freedom." Civil Rights Cases, 109 U.S. 3, 22 (1883). In evaluating whether specific harms constitute badges and incidents, the Court has looked generally at the similarity between the alleged injuries and the burdens actually suffered under slavery. *See, e.g., Civil Rights Cases*, 109 U.S. at 21. As discussed *infra* in Section IV.A.3, physical subjugation, in general, and sexual harassment, in particular, were common aspects of American slavery. Indeed, compelling similarities between sexual harassment during slavery and sexual harassment perpetrated by landlords against tenants suggest that the latter might properly be labeled a badge or incident of slavery.

First, the players are similar. In both settings, a man sexually preys on a female. The victims of sexual harassment perpetrated by the master during slavery were all obviously black. Today, renters who suffer sexual harassment at the hands of their landlords are overwhelmingly women of color, and often African American. *E.g.*, Zhu v. Countrywide Realty Co., Inc., 165 F. Supp. 2d 1181 (D. Kan. 2001); Maze v. Krueger, HUDALJ 05-93-0196-1, 1996 WL 418886 (HUDALJ June 7, 1996). Second, powerlessness is at the root of both scenarios. For slaves, their powerlessness was imposed by the legal system and the physical force of their owners. Masters also used slave children against the females, knowing that slaves were reluctant to flee abusive owners because of their desire to remain with and protect their children. The slave's overall powerlessness translated into increased dependency on the slave master, which, in turn, fed the slave's powerlessness. Similarly, although victims of residential sexual harassment today are obviously not owned by their landlords, they often lack any realistic ability to escape the abusive setting because of their poverty. Furthermore, victims frequently feel pressured to remain in abusive settings because of their desire to keep a roof over their children's heads. *See, e.g.*, Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993); Zhu v. Fed. Hous. Fin. Bd., 389 F. Supp. 2d 1253 (D. Kan. 2005). As a result, today's sexually harassed tenant is isolated, manipulable, and largely powerless—similar in fundamental ways to the female slave sexually abused by her master.

179. U.S. CONST. amend. XIII, § 1.

for a number of reasons. First, at least in its abolition of slavery and involuntary servitude, the Thirteenth Amendment is self-executing, requiring no congressional enactment to become enforceable by private citizens in court.[180] Second, although it was drafted, debated, passed, and ratified against the backdrop of African chattel slavery, the Amendment's language clearly extends beyond that institution to prohibit both "slavery" and "involuntary servitude" in general.[181] In other words, no person, regardless of race, gender, or other personal characteristic, may suffer in slavery or involuntary servitude. Third, and in contrast to most constitutional mandates, private conduct—and not simply governmental conduct—can violate the Thirteenth Amendment.[182] For these reasons, the Amendment is potentially quite powerful as a legal tool today.

To begin the analysis of whether the Thirteenth Amendment may have application in the housing context, a logical starting point is the relevant legal standard: where did the phrase "involuntary servitude" come from and what does it mean? The origin of the phrase is relatively easy to trace. "Involuntary servitude" was included as part of the Northwest Ordinance of 1787: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."[183] From there, prohibitions against both slavery and

180. *Civil Rights Cases*, 109 U.S. at 20 ("This Amendment . . . is undoubtedly self-executing without any ancillary legislation. . . . Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit.").

181. *See, e.g.*, *Slaughter House Cases*, 83 U.S. at 69 ("The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery."); Butler v. Perry, 240 U.S. 328, 332 (1916) ("[T]he term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."); United States v. Mussry, 726 F.2d 1448, 1451 (9th Cir. 1984) (observing that the Thirteenth Amendment is not "limited to the classic form of slavery" and applies "to contemporary as well as to historic forms of involuntary servitude").

182. This is, of course, a striking and fundamental difference between the Thirteenth Amendment and the other Reconstruction amendments. U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

183. Northwest Ordinance, Art. VI, 32 J. OF CONTINENTAL CONGRESS 343 (1787). *See* United States v. Shackney, 333 F.2d 475, 484 (2d Cir. 1964); Bailey v. Alabama, 219 U.S. 219, 240 (1911) (observing that the Thirteenth Amendment gave the "historic words" of the Northwest Ordinance "unrestricted application within the United States and all places subject to their jurisdiction"); ALEXANDER TSESIS,

involuntary servitude were inserted into the constitutions of states subject to the Ordinance.[184] The phrase was also included in the Missouri Compromise of 1820 and in the constitutions of the states governed by the Compromise.[185] In 1862, Congress passed laws banning both slavery and involuntary servitude in the District of Columbia and the territories.[186] With this widespread acceptance of the phrase "involuntary servitude,"[187] it was, according to one federal court, "natural that these historic words should be used in the Thirteenth Amendment."[188]

Though the origins of the phrase are relatively clear, its meaning may not be. In the words of Justice O'Connor, "[w]hile the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define."[189] Furthermore, as courts have struggled with the meaning of "involuntary servitude," they have usually focused their inquiry on whether a person's condition is "involuntary" under the Thirteenth Amendment, not whether it constitutes "servitude."[190] The following sections seek a more complete understanding of "involuntary servitude," and to that end, explore the requirement of involuntariness and what constitutes servitude for purposes of the Thirteenth Amendment.[191]

THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 38 (New York University Press 2004) (describing the Northwest Ordinance as "the foundation of the Thirteenth Amendment").

184. *See Shackney*, 333 F.2d at 484. The phrase was also part of the 1864 Wilmot Proviso, which had application to the land won from Mexico during the Mexican-American War. *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 450 n.69 (1989-1990) (citation omitted).

185. *See Shackney*, 333 F.2d at 484.

186. *See* Act of Apr. 16, 1862, ch. 54 § 1, 12 Stat. 376 (1862) (District of Columbia); Act of June 19, 1862, ch. 111, 12 Stat. 432 (1862) (territories); *see also* Catherine M. Page, United States v. Kozminski*: Involuntary Servitude – A Standard at Last*, 20 U. TOL. L. REV. 1023, 1024 (1988-1989).

187. Other instances of the use of "involuntary servitude" exist during this general timeframe. *See, e.g.*, Gary K. Wolinetz, *New Jersey Slavery and the Law*, 50 RUTGERS L. REV. 2227, 2257 (1998) (explaining that in 1847, the New Jersey legislature adopted a resolution expressing its sentiment that slavery or involuntary servitude should be excluded from any territory admitted into the union).

188. *Shackney*, 333 F.2d at 484.

189. United States v. Kozminski, 487 U.S. 931, 942 (1988).

190. *See* McConnell, *supra* note 177, at 221.

191. Although courts have not generally focused on the contours of "servitude" under the Thirteenth Amendment, relevant jury instructions have made clear that the words "involuntary" and "servitude" are relevant and important, both as separate words and as a phrase in this context. *See, e.g.*, *Kozminski*, 487 U.S. at 936–37 (reprinting the jury instruction provided by the trial court in that case, which explicitly states that "Involuntary servitude consists of two terms," and then provides a definition of each, followed by more generalized definitions and examples of "involuntary servitude").

1. Involuntariness Under the Thirteenth Amendment

From a textual perspective, the Thirteenth Amendment prohibits all servitude that is "involuntary." The word "involuntary" appears relatively straightforward and simply means that an action is "done contrary to or without choice" or is "not subject to control of the will."[192] The Thirteenth Amendment includes no limitation or qualification. For example, it does not require that involuntariness be brought about in a certain way or through certain means, such as through threatened or actual use of physical violence. Thought of a different way, the Amendment contains no exclusions for involuntariness created through non-violent means, such as economic or psychological coercion.[193] Instead, the Thirteenth Amendment asks only whether servitude is involuntary, not how or by what means the condition of involuntariness was established.

Despite this apparent textual clarity, federal courts before 1988 could not agree on exactly what involuntariness meant in the context of the Thirteenth Amendment. Early cases involving claims of involuntary servitude drew a connection to something like African chattel slavery[194] but recognized the Thirteenth Amendment's application to cases of forced wage labor or labor to pay off existing debt.[195] However, as federal courts evaluated further claims of involuntary servitude brought under the Thirteenth Amendment and its implementing statutes,[196] they began to consider not simply whether a person's ser-

192. Merriam-Webster Online, http://mw1.merriam-webster.com/dictionary/involuntary.

193. This textualist argument is not without its judicial adherents. *E.g.*, *Shackney*, 333 F.2d at 487 (Dimock, J., concurring) (defining the "plain and intended meaning of 'involuntary' as dealing only with the will of the servitor," focusing on "whether [the servitor] has been rendered incapable of making a rational choice, and not the question of what were the means by which the servitude was imposed").

194. *See, e.g.*, Robertson v. Baldwin, 165 U.S. 275, 282 (1897) (explaining that "involuntary servitude" in the Thirteenth Amendment "intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of [African chattel] slavery under a different and less offensive name"); Slaughter House Cases, 83 U.S. 36, 69 (1872) (determining that the Thirteenth Amendment prohibits "all shades and conditions of African slavery").

195. *See, e.g.*, Pollock v. Williams, 322 U.S. 4 (1944) (striking down state law imposing criminal sanctions on debtors who refused to perform labor after receiving advance payments); United States v. Reynolds, 235 U.S. 133 (1914) (determining that compelling services by the fear of criminal prosecution violates the rights protected by the Thirteenth Amendment); Clyatt v. United States, 197 U.S. 207 (1905) (concluding that peonage, where the debtor is required to work to pay off his debt, constitutes involuntary servitude); *see generally*, *Kozminski*, 487 U.S. 931, 942–43.

196. Much of the litigation over the concept of involuntary servitude and discussed in this Article arises out of the federal statutes passed to criminally enforce the Thirteenth Amendment. *See* 18 U.S.C. § 1584 (2000) (criminalizing "knowingly

vitude was involuntary or coerced, but also how the person's servitude *became* involuntary. By 1988, when it considered *United States v. Kozminski*, the Supreme Court faced a circuit split on this issue.

On one side of the debate was the Second Circuit Court of Appeals in its 1964 decision, *United States v. Shackney*.[197] In that case, the court reviewed the conviction of Shackney, who was accused of holding two Mexican families in a contractual labor relationship in violation of federal laws prohibiting involuntary servitude and peonage.[198] Rejecting the government's contention that involuntary servitude "in effect . . . is equivalent to . . . knowingly and willfully hold[ing] to service by duress,"[199] the court adopted a narrow construction of "involuntary servitude." Relying on the basic assumption that "'involuntary servitude' was considered to be something 'akin to African slavery,'"[200] the court concluded that involuntary servitude meant that "[t]here must be 'law or force' that compels performance or a continuance of the service."[201] The master must assert "'superior and overpowering force, constantly present and threatening,'" and the servant must have literally no choice between service and freedom.[202] Under this standard, psychological coercion—such as threatening deportation as a means of forcing continued service—could not create the legal state of involuntary servitude.[203]

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and willfully hold[ing] to involuntary servitude or sell[ing] into any condition of involuntary servitude"); 18 U.S.C. § 241 (20000) (prohibiting "two or more persons conspire[ing] to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States"). Because § 241 prohibits conspiracies to injure constitutional rights, it "incorporates the prohibition of involuntary servitude contained in the Thirteenth Amendment." *Kozminski*, 487 U.S. at 940. With respect to § 1584, "Congress' use of the constitutional language ["involuntary servitude"] in a statute enacted pursuant to its constitutional authority to enforce the Thirteenth Amendment guarantee makes the conclusion that Congress intended the phrase to have the same meaning in both places logical, if not inevitable." *Id.* at 945.

197. 333 F.2d 475 (2d Cir. 1964).

198. *Id.* 476–80. According to the court, "[p]eonage involves the additional element that the involuntary servitude is tied to the discharge of an indebtedness." *Id.* at 481 n.9 (citation omitted). The appellant had hired Mexican families to tend his 20,000 laying hens, requiring work seven days per week, 365 days per year. *Id.* at 477. The families were provided housing with cardboard walls and holes in the floor. *Id.* at 478. The victims in the case alleged that the appellant threatened them with deportation to Mexico if they broke their two-year contract. *Id.* at 477.

199. *Id.* at 480.

200. *Id.* at 486 (citing Butler v. Perry, 240 U.S. 328, 332 (1916)).

201. *Id.* at 487 (citing Clyatt v. United States, 197 U.S. 207, 215-16 (1905)).

202. United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964) (citing Hodges v. United States, 203 U.S. 1, 34 (1906)).

203. *Id.* Other federal courts have adopted similarly restrictive interpretations of involuntary servitude. *See, e.g.*, United States v. Bibbs, 564 F.2d 1165, 1167–68 (5th Cir. 1977) (concluding that "[v]arious combinations of physical violence and of threats of physical violence for escape attempts" are needed).

On the other end of the spectrum, the Ninth Circuit Court of Appeals approached the concept of involuntary servitude more liberally in its 1984 decision, *United States v. Mussry*.[204] In that case, the court evaluated whether defendants held Indonesian workers in involuntary servitude and peonage.[205] In crafting its approach to involuntary servitude, the Ninth Circuit stressed that methods for subjugating other people's will have changed from blatant physical force to more subtle forms of coercion.[206] Rejecting the "too narrow" approach of the Second Circuit in *Shackney*,[207] the Ninth Circuit focused on what it considered "the essence" of involuntary servitude: "the exercise of control by one individual over another so that the latter is coerced into laboring for the former."[208] In particular, the court considered crucial whether a person "coerce[s] an individual into his service by subjugating [her] will."[209] Such complete control, the court reasoned, could be achieved not simply through the use or threat of force or law, but also through other means of coercion.[210] In deciding whether a person has been coerced into service and "believe[s] that he or she has no alternative but to perform the labor,"[211] the focus should be on how "a reasonable person of the same background and experience"[212] would be affected by the coercive conduct. Furthermore, because unlawful coercion is the crux of this analysis, a person's opportunity to escape the servitude "is not enough in and of itself to preclude a finding [of] involuntary servitude."[213]

To "resolve [the] conflict among the Courts of Appeals on the meaning of involuntary servitude,"[214] the Supreme Court granted certiorari

204. 726 F.2d 1448 (9th Cir. 1984).
205. *Id.* at 1450. According to the indictment in the case, "the defendants unlawfully held poor, non-English speaking Indonesian servants against their will by enticing them to travel to the United States, paying them little money for their services, and withholding their passports and return airline tickets, while requiring them to work off, as servants, the debts resulting from the costs of their transportation." *Id.*
206. *See id.* at 1452.
207. *Id.*
208. *Id.*
209. United States v. Mussry, 726 F.2d 1448, 1453 (9th Cir. 1984).
210. *Id.* The court's argument largely paralleled that of Judge Dimock in his concurrence in the *Shackney* decision. *See* United States v. Shackney, 333 F.2d 475, 488 (2d Cir. 1964) (Dimock, J., concurring) (noting that "[w]here the subjugation of the will of the servant is so complete as to render him incapable of making a rational choice, the servitude is involuntary").
211. *Mussry*, 726 F.2d at 1453.
212. *Id.*
213. *Id.* at 1454. This relatively relaxed involuntary servitude standard was adopted by other federal courts. *See, e.g.*, United States v. Warren, 772 F.2d 827, 833 (11th Cir. 1985) (concluding that "[v]arious forms of coercion may constitute a holding in involuntary servitude").
214. United States v. Kozminski, 487 U.S. 931, 939 (1988). The Sixth Circuit in *Kozminski* had essentially adopted the narrow approach of the Second Circuit in

in *United States v. Kozminski*.[215] In reality, however, no significant disagreement existed among the federal circuits "on the meaning of involuntary servitude." The courts largely agreed that compelled work for another person constituted the essence of involuntary servitude.[216] The only contentious issue was whether federal courts should look beyond the state of involuntary servitude to inquire *how* the servitude became involuntary—and if so, which means of creating involuntariness would satisfy the legal standard.

The Court in *Kozminski* recognized that although the Thirteenth Amendment was designed primarily to end African slavery, it was not limited to that purpose. In particular, the words "involuntary servitude" were "intended to extend 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.'"[217] Because the Thirteenth Amendment explicitly excludes forced work as a form of criminal sanction, the Court determined that "involuntary servitude" includes "at least situations in which the victim is compelled to work by law."[218] And because the Thirteenth Amendment is designed to eradicate conditions "akin to African slavery," combined with the fact that it applies to private action, the Court determined that "involuntary servitude" encompasses "compulsion through physical coercion."[219] Requiring either legal or physical coercion as a component of involuntary servitude was consistent, in the Court's view, with its earlier decisions that had found conditions of involuntary servitude in the context of peonage, a criminal surety system, and criminal sanctions for failing to perform work after receiving an advance payment.[220] Conversely, the Court concluded that "[t]he guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion."[221] As a result, any claim of involuntary servitude must also allege "the use or threatened use of physical or legal coercion."[222] In its analysis, however, a court should consider "the victim's special vulnerabilities" as it decides

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Shackney, but had added one additional method of creating involuntary servitude: using "fraud or deceit to obtain or maintain services . . . [of] a minor, an immigrant, or [a person] who is mentally incompetent." United States v. Kozminski, 821 F.2d 1186, 1192 (6th Cir. 1987).

215. 487 U.S. 931, 939 (1988).

216. *See* Page, *supra* note 186, at 1024.

217. *Kozminski*, 487 U.S. at 942 (quoting Butler v. Perry, 240 U.S. 328, 332 (1916)).

218. *Id.* at 942.

219. *Id.*

220. *Id.* at 942–43 (citing and discussing Clyatt v. United States, 197 U.S. 207 (1905); United States v. Reynolds, 235 U.S. 133 (1914); Pollock v. Williams, 322 U.S. 4 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); Bailey v. Alabama, 219 U.S. 219 (1911)).

221. *Id.* at 944.

222. United States v. Kozminski, 487 U.S. 931, 944 (1988).

whether the physical or legal coercion compelled the victim's service.[223]

After *Kozminski*, it was clear that a person claiming involuntary servitude must allege that her condition was compelled through the threat or actual use of force or legal coercion.[224] Because this standard forms part of the current law on involuntary servitude, I analyze below in Section IV.B how claims of sexual harassment in housing would fare under it. However, the standard established by the Court in *Kozminski* is open to criticism. Most obviously, and as discussed earlier,[225] the text of the Thirteenth Amendment provides no support for a legal analysis of involuntariness that includes certain types of coercion but excludes others. The most textually consistent approach in this area would simply inquire whether a person's servitude is truly involuntary without regard to how the state of involuntariness came into existence. This approach appears more logical as well, given that different people react in different ways to different types of coercion.[226] Parents, for example, might be quite easily coerced if threats are made to withhold food or water from their children. In the words of Justice Brennan, who concurred in the *Kozminski* decision, "the coercive impact of such threats turns not on any direct physical effect that would be felt by the laborer but on the psychological [and] emo-

223. *Id.* at 952. This recognition of the importance of the victim's special vulnerabilities is generally consistent with the Sixth Circuit's third element of involuntary servitude in *Kozminski*, which would have included cases where the master uses "fraud or deceit to obtain or maintain services where the servant is a minor, an immigrant, or one who is mentally incompetent." 821 F.2d 1186, 1192 (6th Cir. 1987).

224. In at least a limited way in the criminal context, Congress has overridden the *Kozminski* Court's narrow view of involuntary servitude. In the Trafficking Victims Protection Act (TVPA), which became law in 2000, Congress authorizes the President to take steps against persons who engage in certain types of human trafficking. 22 U.S.C. § 7108(a)(1) (2000). For the purposes of the TVPA, Congress has defined "involuntary servitude" broadly to include "any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint" or "the abuse or threatened abuse of the legal process." *Id.* at § 7102(5). In doing so, Congress noted that the *Kozminski* decision narrowly interpreted "involuntary servitude" in the absence of a broader legislative definition. *Id.* at § 7101(b)(13). The TVPA provides such a definition, recognizing that "[i]nvoluntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion." *Id.* at § 7101(b)(13). *See generally*, Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting* United States v. Kozminski *and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 963–71 (2007).

225. *See supra* Section IV.A.2.

226. *Mussry*, 26 F.2d at 1453 (noting that "[c]onduct other than the use, or threatened use, or law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion—or may be more coercive").

tional . . . injury the laborer would suffer as a result of harm to his . . . loved ones."[227]

Justice Brennan's observation hints at a broader problem with the involuntary servitude standard established by the Supreme Court. Although actual force or legal action taken against a victim is sufficient to satisfy the *Kozminski* test, the Court held that *threats* of force or legal action also satisfy the test.[228] This is true even though the Court made clear that psychological coercion, by itself, cannot create involuntary servitude under the Thirteenth Amendment.[229] However, if threats of force or legal action have a coercive value, it lies in the psychological impact of the threats on the victim. For example, a victim threatened with violence against herself or her children would likely comply with the abuser's demands precisely because of the psychologically coercive nature of the demands, not because of the objective nature of those statements as the "threatened use of physical . . . coercion." If we care about the psychological impact of threats—and the Court appears to in its involuntary servitude standard[230]—we should abandon the artificial distinction between psychological coercion and threats of violence or legal action. Doing so would pave the way to abandoning all distinctions among types of coercion, with the resulting focus simply on whether the victim's actions were involuntary. And that result, as discussed above, would be consistent with the plain language of the Thirteenth Amendment.

Finally, to the extent that "involuntary servitude" in the Thirteenth Amendment is intended to capture those societal arrangements "akin to African slavery,"[231] there is little sound reason to distinguish between physical and legal coercion on the one hand and coercion through psychological, economic, or social means on the other. As discussed below, the institution of slavery as practiced in the United States was about more than simply physical violence and a supporting legal apparatus. It was a thorough system of subordination that operated on various levels to completely subjugate the will of slaves. To reinforce that subjugation, masters used a variety of coercive techniques, both physical and nonphysical. Furthermore, the very beat-

227. 487 U.S. 931, 955–56 (1988) (Brennan, J. concurring).

228. *Id.* at 952–53 (holding that "the jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude").

229. *Id.* at 944 (noting that "[t]he guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion").

230. In particular, the Court suggested that the impact of such threats must be viewed from the subjective perspective of the victim if she suffers from "special disabilities." *Id.* at 952. The Court also states that its holding "does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution under these statutes." *Id.*

231. Butler v. Perry, 240 U.S. 328, 332 (1916); *Kozminski*, 487 U.S. at 942.

ings that were so common under slavery were intended to have both an immediate physical impact on the slave being abused and a broader psychological impact on the wider slave community. If multiple types of coercion helped create and maintain slavery, it makes little sense to now read most of those methods of establishing involuntariness out of the Thirteenth Amendment.

2. The Scope and Breadth of Servitude

While courts have carefully analyzed what makes servitude involuntary under the Thirteenth Amendment, they have largely ignored parsing the definition of "servitude" itself.[232] Although servitude is most commonly used in the context of forced labor, the word is better understood as having a more nuanced meaning in this context.

In litigation involving the Thirteenth Amendment and its implementing statutes, judicial definitions of "involuntary servitude" almost always include the concept of work, labor, or service. In the Supreme Court's *Kozminski* decision, for example, Justice O'Connor clarified the phrase "involuntary servitude" as "necessarily mean[ing] a condition of servitude in which the victim is *forced to work* for the defendant by the use or threat of [legal or physical harm]."[233] Lower courts have been equally focused on the concept or labor, explaining that "[t]he essence of . . . involuntary servitude is the exercise of control by one individual over another so that the latter is *coerced into laboring* for the former,"[234] and that "the worker *must labor against his will* for the benefit of another."[235] According to this perspective, the Thirteenth Amendment was designed "to prevent the reappearance of *forced labor* in whatever new form it might take."[236]

This judicial attention to work might be partially explained by the fact that almost all litigation addressing involuntary servitude has involved traditional forms of labor in extreme or sometimes barbaric circumstances—for example, migrant or domestic workers kept in degrading or confined settings.[237] To this extent, the use of "work" or

232. *See* McConnell, *supra* note 177, at 221.
233. 487 U.S. at 952 (emphasis added).
234. United States v. Mussry, 726 F.2d 1448, 1452 (9th Cir. 1984) (emphasis added).
235. Wicks v. Union Pac. R.R. Co., 231 F.2d 130, 138 (9th Cir. 1956) (emphasis added).
236. United States v. Booker, 655 F.2d 562, 565 (4th Cir. 1981) (emphasis added).
237. *See, e.g.*, United States v. Lee, 472 F.3d 638 (9th Cir. 2006) (finding a condition of involuntary servitude when defendant hired garment factory workers and then controlled all aspects of their lives, including their comings and goings from the compound and when and whether they would eat or be paid); United States v. Flores, 199 F.3d 1328 (4th Cir. 1999) (affirming conviction for violating involuntary servitude statute where agricultural workers were threatened that if they tried to leave, they would be "hunted down and killed"); United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995) (upholding conviction of defendant for conspiring to hold domestic worker in involuntary servitude where she was forced to work fifteen hours each day, without adequate food or water, and was prohibited from

"labor" by courts may simply be descriptive of the particular facts before them and may not be intended to limit or define the scope of the Thirteenth Amendment. But even if courts are simply being descriptive in some cases, it is also true that judges often seem to go out of their way to stress the labor component of involuntary servitude. In 1911, for example, the Supreme Court discussed the purposes underlying the Thirteenth Amendment: "*to make labor free*, by prohibiting that control by which the *personal service* of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."[238] Accordingly, there seems to be little doubt that current doctrine interpreting both the Thirteenth Amendment and its implementing federal legislation[239] equates the servitude component of "involuntary servitude" with traditional forms of labor.[240]

Accepting this interpretation at face value, I analyze below in Section IV.B whether sexual harassment as experienced by female tenants could reasonably be described as "servitude" under the Thirteenth Amendment. Nevertheless, it is questionable whether servitude in this context *should* properly be considered a synonym for labor. From a textual perspective, such an interpretation appears unnecessarily narrow. Servitude and labor are different, but perhaps related, concepts. Servitude may be more commonly understood as "a condition in which one lacks liberty to determine one's course of action or way of life."[241] That general definition is consistent with how the word "servitude" is interpreted in the related real property context. In that setting, a servitude is "a charge or burden on an estate for another's benefit."[242] Perhaps a more accurate way to envision servi-

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making contact with the outside world). *See also*, McConnell, *supra* note 177, at 214 (observing that the "typical involuntary servitude case involves an otherwise legitimate employer/employee relationship" and "frequently involve[s] immigrant and impoverished agricultural or domestic workers.").

238. Bailey v. Alabama, 219 U.S. 219, 241 (1911). *See* Pollock v. Williams, 322 U.S. 4, 17–18 (1944) (explaining that "[t]he undoubted aim of the Thirteenth Amendment was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States").

239. The Supreme Court has made clear that statutory prohibitions against involuntary servitude should be construed consistently with the original understanding of the Thirteenth Amendment. *See* United States v. Kozminski, 487 U.S. 931, 941 (1988) (explaining the need "to ascertain the precise definition of [the relevant federal statute] by looking to the scope of the Thirteenth Amendment prohibition of involuntary servitude").

240. As explained by the Third Circuit, the "prohibition against involuntary servitude has always barred forced labor through physical coercion." Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 998 (3d Cir. 1993).

241. Merriam-Webster Online, http://mw1.merriam-webster.com/dictionary/servitude. *But see* BLACK'S LAW DICTIONARY 1402 (8th ed. 2004) (defining "involuntary servitude" as "[t]he condition of one forced to labor—for pay or not—for another by coercion or improvement").

242. BLACK'S LAW DICTIONARY 1370 (8th ed. 2004).

tude is as a condition in which a person lacks liberty or free will and is, as a result, subject to the master's control for the master's benefit.[243]

As articulated by Professor Joyce McConnell in her critique of legal protections for battered women, equating involuntary servitude with forced work probably stems from a conception of African chattel slavery as primarily or even exclusively a system of compelled labor for southern planters.[244] In this view, slavery was essentially an economic institution limited to the "public sphere" or marketplace.[245] Although slaves provided an enormous amount of free labor to their masters, slavery as an institution included abusive and destructive private dimensions as well.[246] As discussed more fully in the following section, female slaves were subject to complete physical subjugation, including a loss of reproductive and sexual autonomy. This private sphere exploitation reinforced slavery's central pillars: domination of the slaveholder and the utter subjugation and inferiority of the slave.[247] In this light, slavery was about power and control, not just labor. And to the extent the Thirteenth Amendment's prohibition against involuntary servitude has been interpreted as proscribing similar conditions,[248] the legal application of involuntary servitude should stress control and subjugation, rather than merely the narrow concept of labor.

3. Sexual Subjugation and Abuse During Slavery

Life on the plantation was, fundamentally, a system of subordination based on race and gender.[249] The white patriarch exercised com-

243. This general definition is consistent with one provided by Akhil Reed Amar and Daniel Widawsky in their essay arguing for an application of the Thirteenth Amendment to cases of child abuse. *See* Amar & Widawsky, *supra* note 177, at 1365 (defining "slavery" for their purposes as "[a] power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons").

244. *See* McConnell, *supra* note 177, at 212–13.

245. *See id.* at 213–14.

246. *See id.* at 214 (explaining that "slavery was not simply an economic system of free labor, but was also a complex social system").

247. *See id.* at 219 (explaining that "[a]s important as legal ownership was, the slaveholders' belief in their moral right of ownership, in their natural superiority, and in the African-Americans' natural inferiority provided the justification for daily degradation and subjugation").

248. *See* Butler v. Perry, 240 U.S. 328, 332 (1916) (explaining that "involuntary servitude" was intended to prohibit all conditions "akin to African slavery").

249. *See generally* HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 18 (Jean Fagan Yellin ed., Harvard Univ. Press 2000) (1861) (explaining her defiance in the face of her master's expression of dominance: "When he told me that I was made for his use, made to obey his command in *every* thing; that I was nothing but a slave, whose will must and should surrender to his, never before had my puny arm felt half so strong."); DOROTHY ROBERTS, KILLING THE BLACK BODY—

plete control over his plantation and everyone working and living there. This dominion included the realm of marital relations, where a wife's obedience and submission to her husband were expected and demanded.[250] The planter's control and dominance over all aspects of his wife's existence led some southern mistresses to analogize their lives to those of slaves.[251] The significant power imbalance in this context is reflected in Congressional debates on the Thirteenth Amendment, when Congressmen expressed fear that if the Amendment were enacted, "a woman would be equal to a man" and "[a] wife would be equal to her husband."[252] The planter's control over his realm was strengthened by the largely rural nature of southern society. The plantation was a freestanding unit of both production and reproduction, isolating those who lived and worked there from regular contact with the outside world.[253]

Of course, whatever hardships and disabilities white women experienced on the plantation paled in comparison to those suffered by slaves, whose status as property brought them under the complete do-

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RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 38 (1997) (recounting one slave's description of the institution: it meant "that I was never to consult my own will, but was, while I lives, to be entirely under the control of another"); KENNETH M. STAMPP, THE PECULIAR INSTITUTION—SLAVERY IN THE ANTE-BELLUM SOUTH 145 (Vintage Books 1964) (1956) (explaining that planters tried to "implant in the bondsmen themselves a consciousness of personal inferiority").

250. *See* Jane Turner Censer, *"Smiling Through Her Tears": Ante-Bellum Southern Women and Divorce*, 25 AM. J. LEGAL HIST. 24, 25 (1981) (recounting a study of southern men's attitudes toward women that stressed the benefits of "feminine, submissiveness, and dependence"). Divorce records from this time period also reflect the common sentiment that wives should be submissive to their husbands. *See id.* at 39 (citing one case where a southern judge refused to grant a divorce, noting the wife's "want of conformity to [her husband's] wishes") (emphasis omitted)).

251. *See, e.g.*, Nell Irvin Painter, *Introduction* to THE SECRET EYE—THE JOURNAL OF ELLA GERTRUDE CLANTON THOMAS, 1848–1889 34 (Virginia Ingraham Burr ed., 1990) (recounting that Ella Gertrude Clanton Thomas, a rich planter's wife, "saw gender hierarchy as natural and right" and "wrote approvingly of her husband as her 'master,' to whom she looked up, and of her 'woman's weakness protected by man's superior strength'"); DEBORAH GRAY WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 15 (1985) (explaining that "[s]o inhibitive were society's norms that many women's rights advocates likened the husband-wife relationship to that of master and slave"); Susan Hamilton, *Making History with Frances Power Cobbe: Victorian Feminism, Domestic Violence, and the Language of Imperialism*, 43 VICTORIAN STUDIES 437, 453 (2001) ("[B]ound and silent slave and the white woman argued for their shared position as property, as bodies that could be bought, sold, and owned. . . . Enslaved women's sexual vulnerability becomes a sign of what is understood but largely unarticulated in feminist communities: the inability of the free white woman to own her own body in marriage.").

252. CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Howard).

253. *See* ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD—BLACK AND WHITE WOMEN OF THE OLD SOUTH 38 (1988).

minion of their masters.[254] As part of this domination, slaves lost control of their bodies—both publicly, in terms of the labor they were required to undertake in the fields or in the kitchen and privately, in terms of their physical vulnerability.[255] In this latter area, as has been well documented, slaves were regularly subjected to beatings and physical punishment.[256] But for black females, life on the plantation was even worse.[257] As they lost their physical autonomy, slaves also lost all meaningful control over their reproductive freedom, leaving them vulnerable to sexual assault. In the words of one writer, "there is no slavery without sexual depravity."[258]

On a pragmatic level, slaves were money, which translated into status in southern society.[259] Their forced labor was considered an asset, and slave owners treated them like market commodities. Each slave was assigned a dollar value, and their births and deaths were recorded in the owner's ledger books as profits and losses.[260] Because

254. *See* STAMPP, *supra* note 249, at 141 ("Short of deliberately killing or maliciously maiming them, the owner did have almost absolute power over his chattels.").

255. Slaves' bodies were not just the focal point of the master's control; they were also used to express rebellion and independence, if only to limited degrees. For example, "outlaw slave parties" were occasionally held late at night and away from the eyes and ears of slave owners. *See* Stephanie M. H. Camp, *The Pleasures of Resistance: Enslaved Women and Body Politics in the Plantation South, 1830–1861, in* NEW STUDIES IN THE HISTORY OF AMERICAN SLAVERY 87, 87–114, 90 (Edward E. Baptist & Stephanie M. H. Camp eds., 2006) (describing how these parties allowed the body to become "an important site not only of suffering but also (and therefore) of resistance, enjoyment, and potentially transcendence").

256. *See, e.g.*, LAY MY BURDEN DOWN—A FOLK HISTORY OF SLAVERY 75 (B. A. Botkin ed., 1945) (recounting incidents of whippings, as well as the shooting of his own mother when she collapsed during a long walk with swollen and bloody feet: "Then Massa, he just take out he gun and shot her, and whilst she lay dying he kicks her two-three times and say, 'Damn a nigger what can't stand nothing.'"). Pregnant slaves were not exempt from physical punishment on the plantation. *See* ROBERTS, *supra* note 249, at 39–40 (providing one ex-slave's account of such punishment: "Dey . . . would dig a hole in de ground just big 'nuff fo' her stomach, make her lie face down an whip her on de back to keep from hurtin' de child"); STAMPP, *supra* note 246, at 171–77 (discussing the penalties meted out to disobedient slaves, including the use of chains, irons, stocks, and whippings).

257. *See* ANGELA Y. DAVIS, WOMEN, RACE, & CLASS 6 (Vintage Books 1983) (explaining that masters treated their female slaves expediently: requiring them to labor alongside men in the fields, but also to be available for exploitation, punishment, and repression "in ways suited only for women"); JACOBS, *supra* note 249, at 77 ("Slavery is terrible for men; but it is far more terrible for women. Superadded to the burden common to all, *they* have wrongs, and sufferings, and mortifications peculiarly their own.").

258. GILBERTO FREYRE, THE MASTERS AND THE SLAVES 324 (1965).

259. *See* STAMPP, *supra* note 249, at 385–86.

260. *See* ROBERTS, *supra* note 249, at 24; STAMPP, *supra* note 246, at 326 (providing the following examples of planters' reactions to the deaths of their slaves, reactions that indicated grief mostly about their loss of property: "Dick died last night, curse such luck"; "Mary's son, Richard, died tonight. Oh! my losses almost make me crazy.").

children born to slaves were legally considered the property of the mother's owner,[261] the female slave held value measured both by her ability to work and her present and future reproductive capacity.[262] As explained by one pro-slavery source at the time, "[t]he most productive feature of slave property is the generative belly."[263] More slave children meant increased labor, greater profitability, and more wealth for the owner. Thomas Jefferson gave voice to what was surely a common sentiment at the time: "I consider a woman who brings a child every two years as more profitable than the best man on the farm."[264] By at least one account, planters expected sexual reproduction of their slaves to generate 5% to 6% of their annual profit.[265] Given the ban on the importation of slaves after 1808, slavery's sustainability literally depended on the reproductive capacity of existing slaves.[266] Whether they were cajoled,[267] pressured,[268] or forced into childbear-

261. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR—RACE & THE AMERICAN LEGAL PROCESS 44 (1978) (discussing a Virginia law providing that the status of a child born to an African-American mother depended on whether the mother was a slave); Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 198 (1988).

262. *See* DAVIS, *supra* note 257, at 6–7; ROBERTS, *supra* note 249, at 24, 34. A slave's offspring, even those not yet born, were considered assets owned by the master, which could be the subject of testamentary transfers. *See* STAMPP, *supra* note 249, at 205 (citing a North Carolina will that included a bequest to the testator's daughter of "the first child that . . . Charity [a slave] shal have" [sic]).

263. STAMPP, *supra* note 249, at 205. Because of this focus, female slaves being auctioned were often evaluated with an eye to their ability to bear children. *See* WHITE, *supra* note 251, at 32 (recounting slave buyers "knead[ing] women's stomachs in an attempt to determine how many children a woman could have," and private evaluations of slaves on the auction block by physicians to determine their reproductive abilities). Sales of infertile slaves were governed by rules similar to those covering sales of other damaged commodities. *See* ROBERTS, *supra* note 246, at 26–27.

264. ROBERTS, *supra* note 249, at 25.

265. *See id.* at 24.

266. *See* WHITE, *supra* note 251, at 31, 68 (explaining that "American slavery was dependent on natural increase of the slave population"). The fact that the slave population increased naturally without the addition of newly imported slaves reinforced the common libidinous image of black women. *See id.* at 31.

267. *See* ROBERTS, *supra* note 249, at 25 (recounting that some southern planters bestowed on slaves who bore children various rewards, including an extra weekly ration, a small pig, and small gifts such as calico dresses and hair ribbons); *see also* ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS—THE ECONOMICS OF AMERICAN NEGRO SLAVERY 127–28 (1974) (describing that slaves often received rewards and benefits for marrying, as marriage was seen as most conducive both to productive workers and increased fertility among slaves).

268. *See* ROBERTS, *supra* note 249, at 26 (arguing that female slaves often felt pressure to bear children because that made them more profitable and, as a result, less likely to be sold or traded away from their families); STAMPP, *supra* note 249, at 333 (explaining that female slaves "regarded the children [of their master or mistress] as security 'against their own banishment from the only home they knew, and separation from all ties of kindred and habit'").

ing, female slaves were expected to reproduce for their owners.[269] Those who "underperformed" were often sold, beaten, or sometimes even killed.[270]

Within this general context of subjugation marked specifically by a loss of physical and sexual autonomy, female slaves were often sexually victimized by their owners.[271] To a significant extent, such victimization was consistent with, and justified by, a common image of black women in the antebellum south that portrayed them as sexually promiscuous and governed largely by their libidos.[272] This image was reinforced in the otherwise culturally reserved south by the meager clothing that slaves often wore, the fact that many slave jobs required women to "reef up" their skirts and expose their bare legs, and the fact that female slaves were often stripped naked and physically handled on the auction block.[273] Some slaves were purchased for the purpose of satisfying their owners' sexual desires, while others simply fell victim to their masters during the course of their enslavement.[274] In all

269. *See* WHITE, *supra* note 251, at 68 ("Once slaveholders realized that the reproductive function of the female slave could yield a profit, the manipulation of procreative sexual relations became an integral part of the sexual exploitation of female slaves."). Dorothy Roberts reprints one slave's account of being forced, as a sixteen year-old girl, to share the same quarters with an older male slave. ROBERTS, *supra* note 249, at 22. After an initial period of confusion, the young girl was told by her master that he expected her to bear the older slave's children. In the slave girl's words, the master told her, "Woman, I's pay big money for you, and I's done dat for de cause I wants yous to raise me chillens. I's put you to live with Rufus for dat purpose." *Id.*

270. *See* ROBERTS, *supra* note 249, at 26 (recounting the story of a planter in North Carolina who ordered a group of female slaves who had not borne children in several months into a barn, explaining that he intended to flog them to death).

271. *See* DAVIS, *supra* note 257, at 25 (recounting with examples that "[v]irtually all the slave narratives of the nineteenth century contain accounts of slave women's sexual victimization at the hands of masters and overseers"); Burnham, *supra* note 261, at 198–200; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598–99 (1990). Sexual victimization of female slaves began as early as the voyages that brought them to America. *See* WHITE, *supra* note 251, at 63.

272. *See* Peter W. Bardaglio, *Rape and the Law in the Old South: "Calculated to Excite Indignation in Every Heart"*, 60 J. S. HIST. 749, 757 (1994). Consistent with this image, many southerners believed that "slave women were lewd and lascivious, that they invited sexual overtures from white men, and that any resistance they displayed was mere feigning." *See* WHITE, *supra* note 251, at 30.

273. *See* WHITE, *supra* note 251, at 31–32. The myth that black women were abnormally promiscuous made it possible for white owners to argue that they never had to use force or coercion to prompt sexual relationships with female slaves *See id.* at 38; *see also*, CATHERINE CLINTON, THE PLANTATION MISTRESS 208–09 (1982) (explaining that slaves were often nude around their mistresses with one foreign visitor commenting that "southern women openly tolerated slave nudity 'without any apparent embarrassment'").

274. For various reasons, including the fact that the law sanctioned such acts, it is difficult to quantify the problem of slave women being sexually assaulted by white men. *See* WHITE, *supra* note 251, at 152. Nevertheless, the census of 1860

cases, the slaves were largely powerless to resist.[275] Slave narratives recount both widespread incidents of sexual assaults against slaves and the beatings inflicted on slaves who mustered the courage to fight back.[276] Harriet Jacobs, a former slave, recounted her own suffering and powerlessness at the hands of her master. When she turned fifteen, her owner began his sexual advances towards her:

> He tried his utmost to corrupt the pure principles my grandmother had instilled. He peopled my young mind with unclean images, such as only a vile monster could think of. I turned from him with disgust and hatred. But he was my master. I was compelled to live under the same roof with him. . . I [was] subject to his will in all things. . . [W]here could I turn for protection?[277]

As perhaps suggested by Jacobs' experiences, sexual abuse endured by slaves was not always meted out through overt violence. Instead, masters often used the inherent power imbalance in the owner-slave relationship to manipulate and coerce female slaves into sexual relations.[278] This was a relatively easy task as owners controlled all aspects of the slaves' lives, including work assignments, allocations of clothing and food,[279] granting work breaks,[280] whom they would marry,[281] their ability to travel into town,[282] and even the remote pos-

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reported that 12% of blacks in the slave states were mulattoes, suggesting some dimension—though clearly an under-representation, since not all sexual assault resulted in mixed-race children—of the abuse. *See* STAMPP, *supra* note 249, at 351.

275. *See* Painter, *supra* note 251, at 66 ("The sexual availability of enslaved women was a function of their powerlessness in society.").

276. *See, e.g.*, JACOBS, *supra* note 249, at 51 (explaining that when a slave girl is "fourteen or fifteen, her owner, or his sons, or the overseer, or perhaps all of them, begin to bribe her with presents. If these fail to accomplish their purpose, she is whipped or starved into submission to their will."); ROBERTS, *supra* note 249, at 29; Saidiya Hartman, *Seduction and the Ruses of Power*, 19 CALLALOO 537, 545 (1996) (recounting one slave's response when asked if she knew that sleeping with someone other than her husband was a sin: "Oh, yes, missis, we know—we know all about dat well enough; but we do anything to get our poor flesh some rest from the whip; when he made me follow him into de bush, what use me tell him no? He have strength to make me.").

277. JACOBS, *supra* note 249, at 27.

278. *See id.* (noting that her master "was a crafty man, and resorted to many means to accomplish his [sexual] purposes. Sometimes he had stormy, terrific ways, that made his victims tremble; sometimes he assumed a gentleness that he thought must surely subdue. Of the two, I preferred his stormy moods.").

279. *See* A DOCUMENTARY HISTORY OF SLAVERY IN NORTH AMERICA 345–54 (Willie Lee Rose ed., 1976) (providing an excerpt of instructions provided by Gov. James Henry Hammond, owner of a large South Carolina plantation, to his overseer, including details on how much of which food should be provided to slaves, when allocations of their clothing should be made, and what kinds of religious worship they should be allowed).

280. *See id.* at 351 (establishing both the hours of slave labor and the "intermissions" provided slaves at various times during the year).

281. *See id.* at 352 (providing an excerpt of instructions from Gov. James Henry Hammond, a South Carolina planter, to his overseer, including that "[p]ermission

sibility that they would be freed from the bonds of slavery if they agreed to a sexual relationship with their owner.[283] One especially important area of control for many masters was their power over slave children. Although by most accounts, slave owners preferred to keep slave families intact to preserve harmony,[284] they retained the power to split up families—selling children or their mothers to another slave owner.[285] The fear of mistreatment of the victim's children or possible familial division helped keep female slaves under control and pliable to the master's wishes.[286] Harriet Jacobs recounted in her diary that she remained in a sexually abusive and harassing relationship with her master because of her strong desire to not abandon her own children.[287]

At least as important in this power imbalance, masters had constant and unfettered access to female slaves everywhere on the plantation.[288] As a result, female slaves could rarely if ever feel completely safe and unthreatened. Furthermore, although slave mar-

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must always be obtained from the master before marriage, but no marriage will be allowed with negroes not belonging to the master").

282. *See id.* at 352–53 (allowing each slave to go into town on one Sunday each year).

283. *See* WHITE, *supra* note 251, at 34–36. Of course, female slaves who began sexual relationships with their masters in the hopes of eventually gaining their freedom simply reinforced the popular conception of black women as sexually insatiable. *See id.* at 34.

284. *See* FOGEL & ENGERMAN, *supra* note 267, at 127 (explaining that planters believed fertility rates among slaves would be highest if families were strong and intact). Slave owners also often encouraged their slaves to marry, which they hoped would lead to greater stability and more frequent slave births. *See* A DOCUMENTARY HISTORY OF SLAVERY, *supra* note 279, at 352 ("Marriage is to be encouraged as it adds to the comfort, happiness & health of those who enter upon it, besides insuring a greater increase.").

285. *See* LAY MY BURDEN DOWN, *supra* note 256, at 154–55 (recounting the pain and difficulty accompanying the splitting up of slave families by their masters); Burnham, *supra* note 258, at 201–02.

286. *See* Angela Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, 3 THE BLACK SCHOLAR 3, 13 (1971) (explaining that female slaves were easily manipulable "if the master contrived a ransom system of sorts, forcing her to pay with her body for food, diminished severity in treatment, the safety of her children, etc.").

287. JACOBS, *supra* note 249, at 89–90 ("Though the boon [of freedom] would have been precious to me, above all price, I would not have taken it at the expense of leaving [my children] in slavery. Every trial I endured, every sacrifice I made for their sakes, drew them closer to my heart, and gave me fresh courage to beat back the dark waves that rolled and rolled over me in a seemingly endless night of storms."); *see also* WHITE, *supra* note 251, at 70–71 (describing that female slaves ran away less frequently than male slaves because "women tended to be more concerned with the welfare of their children, and this limited their mobility").

288. *See, e.g.*, ROBERTS, *supra* note 249, at 32 (relating the story of James Odom, a slave owner from Georgia who sexually harassed one of his female slaves by "invad[ing] her bedroom despite numerous tactics to evade him, including bringing her children to bed with her, threatening to scream, and nailing up her windows").

riages were encouraged, slave women could not, for obvious reasons, rely on their husbands for any meaningful protection against sexually coercive or abusive owners.[289] In this context, female slaves were utterly at the mercy of their owners.

Sexual assault and harassment of female slaves did more than simply satisfy the sexual urges of planters; such abuse "was primarily a weapon of terror that reinforced whites' domination over their human property."[290] Even if forced sex had the short-term effect of interfering with the victim's productivity on the plantation, the long-term effect on the victim,[291] her powerless spouse,[292] and the broader slave population was to emphasize and strengthen the planter's dominance and control.[293] In this way, the sexual exploitation of slaves by their masters reinforced the very power imbalance that facilitated both slavery[294] and this specific abuse in the first place.[295]

289. *See* STAMPP, *supra* note 249, at 343 (explaining that "[t]he slave husband . . . was not the head of the family, the holder of property, the provider, or the protector"); WHITE, *supra* note 251, at 153 (describing that slave women "could not depend on their husbands for protection against whippings or sexual exploitation").

290. DAVIS, *supra* note 257, at 23–24 (explaining that sexual assault "was a weapon of domination, a weapon of repression, whose covert goal was to extinguish slave women's will to resist, and in the process, to demoralize their men"); ROBERTS, *supra* note 249, at 29.

291. One scholar has traced the sexual violence meted out by masters to their slaves back to the feudal "right of the first night," according to which the feudal lord demonstrated his dominance over the serfs by having sexual intercourse with all of the females. Davis, *supra* note 286, at 13.

292. *See id.* at 13–14 (arguing that sexual assault of female slaves was intended to destroy any desire to resist in both the victim and her spouse, who "was struck by his manifest inability to rescue his women from sexual assaults of the master").

293. *See* ROBERTS, *supra* note 249, at 29. Exerting this power and control was critical to maintenance of the master-slave relationship. *See* STAMPP, *supra* note 249, at 146 (explaining the need for masters to "awe [slaves] with a sense of their master's enormous power," and that "[t]he only principle upon which slavery could be maintained . . . was the 'principle of fear'").

294. *See* STAMPP, *supra* note 249, at 147 (discussing the importance of creating a "habit of perfect dependence" on the part of slaves, to impress them with their helplessness).

295. Sexual harassment and violence directed at black women did not end with the abolition of slavery. In fact, some of the very techniques used by masters were implemented by white supremacist groups in the years following the Civil War. *See* Lisa Cardyn, *Sexualized Racism / Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 686 (2001–2002). In particular, the Ku Klux Klan used rape, sexual assault, simulated intercourse, and sexualized beatings to establish the continued subjugation of blacks after their emancipation. *See id.* at 692, 704–16, 736–44, 745–62.

B. Involuntary Servitude in the Landlord-Tenant Relationship

In analyzing whether residential sexual harassment constitutes involuntary servitude—that is, labor compelled by the perpetrator's threat or use of physical force or legal action[296]—a reasonable question might be raised as to whether the victim has actually performed labor for the abuser. In the vast majority of sexual harassment cases, the explicitly stated goal of the abuser is to force the victim into having sexual relations.[297] Where that end result is not explicit, we can reasonably assume that the same goal is implicit, and that all of the other harassing conduct—including repeated and unsolicited requests for dates, sexually explicit comments and innuendo, and physical groping—is intended by the harasser to lay the groundwork for what he hopes will ultimately be sex.[298] Assuming that the end goal of sexual harassment is compelled sexual conduct, the question remains whether such harassment constitutes servitude or labor under the Thirteenth Amendment.

From a Lockean perspective, each victim of sexual harassment enjoys a property interest in her body, and her use of her body to satisfy the demands of her landlord reasonably constitutes labor.[299] This view of sex as labor appears potentially objectionable only from the perspective that sexual conduct may not traditionally be considered a commodity traded on the open market. Instead such conduct arguably occurs within the confines of consensual, reciprocal, usually loving relationships and should not, as a result, be classified as labor.[300] That

296. *See supra* Subsection IV.A. *See also* United States v. Kozminski, 487 U.S. 931, 953 (1988) (determining that "compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude").

297. *See, e.g.*, Krueger v. Cuomo, 115 F.3d 487, 490 (7th Cir. 1997) (including allegations that the victim's landlord asked her whether they were "going to do good in bed"); Woods v. Foster, 884 F. Supp. 1169, 1171 (N.D. Ill. 1995); Veal Transcript of Record, *supra* note 1, at 130–31 (recounting incident where landlord pressed himself against tenant's backside and groaned).

298. *See, e.g.*, Richards v. Bono, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *1 (M.D. Fla. May 2, 2005) (alleging that the defendant grabbed the plaintiff, "pulled her toward him, tried to kiss her, and asked [her] to touch his genitals").

299. *See* JOHN LOCKE, ON POLITICS AND EDUCATION 88 (Walter J. Black, Inc. 1947) (explaining that "every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labor' of his body and the 'work' of his hands, we may say, are properly his."). While the tenant's labor in this context is certainly coerced—an aspect of this analysis is discussed below—the element of coercion does not undercut her conduct as "labor." *See also* McConnell, *supra* note 177, at 231 (explaining in a related context that "[s]ex is frequently the most significant service in the battering relationship").

300. *But see* Allison Moore & Paul Reynolds, *Feminist Approaches to Sexual Consent: A Critical Assessment*, *in* MAKING SENSE OF SEXUAL CONSENT 29, 29 (Mark Cowling & Paul Reynolds eds., 2004) (presenting and then critiquing one feminist per-

criticism, however, ignores several realities. First, as is well known, sexual conduct is a commodity that is freely traded on the market in some areas. In Nevada, for example, any county with fewer than 400,000 residents may license brothels.[301] For legal prostitutes, sex is their work; it is a commodity they trade for money, not out of love for their customers.[302] In this way at least some sexual conduct is clearly commodified within the open market and properly termed labor.[303]

Second, even sexual conduct in consensual, reciprocal relationships may have a somewhat coercive element to it. In particular, sex often forms part of the overall bargains and exchanges typical in consensual relationships.[304] Social norms often dictate that men and women offer in exchange sets of "reciprocal services" that frequently include, for women, "love, affection, sex and reproduction."[305] Furthermore, even if one considers all sexual conduct in consensual relationships to be noncoercive and freely given, and as a result, something other than labor, context has to be seen as critical to that determination. What might be considered a gratuitous expression of affection when occur-

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spective that even apparently consensual sexual relationship may "den[y] the possibility of meaningful consent under the conditions of hetero-patriarchy").

301. *See* NEV. REV. STAT. § 244.345 (2007). Furthermore, in Rhode Island, state law does not prohibit prostitution in brothels and other indoor locations. *See* Amanda Milkovits, *Legislators Drop Bid to Outlaw Brothels*, PROVIDENCE J., June 16, 2005, at A01, *available at* http://www.projo.com/news/content/projo_20050616_prost16.2376e31.html.

302. *See* Berta E. Hernandez-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391, 424 (2005–2006) ("[T]he bottom line for any woman in the sex trade is economics. However a woman feels when she finally gets into the life, it always begins as survival . . ." quoting Amber Hollibaugh, *On the Street Where We Live*, 5 WOMEN'S REVIEW OF BOOKS 1, 1 (1988) (book review). *But see* KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 37 (1995) (describing sexual contact with a prostitute as "sex that is disembodied, enacted on the bodies of women who, for the men, do not exist as human beings"); Barbara Sullivan, *Prostitution and Consent: Beyond the Liberal Dichotomy of "Free or Forced," in* MAKING SENSE OF SEXUAL CONSENT, *supra* note 300, at 127 (arguing that legal prostitution is inherently coercive).

303. That there is a distinction between the labor and private components of sex may be reflected in the fact that for some prostitutes, there are certain intimate acts that they will not undertake outside of relationships with their boyfriends, husbands, or significant others. *See* BARRY, *supra* note 302, at 40 (describing one prostitute's view that "[w]e don't allow kissing, because this is what you can only do at home") (citation omitted)).

304. *See* LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS—THE POLITICS OF SEX 23–28 (1988). As explained by Hirshman and Larson, all sexual relationships—from traditional sex between husband and wife to rape—includes some degree of bargaining and consent. *See id.* at 257–64. Furthermore, all of the other components typically found as part of the consensual, loving, noncoercive relationship can be and frequently are bought on the open market: cooks, nannies, cleaning services, and babysitters can all be hired. *See* Hernandez-Truyol & Larson, *supra* note 301, at 427.

305. *See* McConnell, *supra* note 177, at 230.

ring between a tenant and her boyfriend might be properly viewed as a commodity, compelled in a nonconsensual relationship between that same tenant and her landlord. In essence, the context makes this sexual conduct coerced servitude.[306]

Without question, victims subjectively consider their enduring of sexual harassment as compelled service to the landlord for the purposes of maintaining desperately needed shelter.[307] Sheila McClenton, whose story of sexual harassment at the hands of her landlord Bobby Veal began this Article, explained exactly why she endured his harassment: "I desperately needed a place to stay. I didn't have anywhere to go, and my Section VIII was about to expire." Another victim of sexual harassment, Kali Underwood, was abused by her landlord John Koch. After repeated requests and pestering, Underwood reluctantly agreed to raise her shirt for Koch, and he proceeded to fondle her breasts and masturbate for fifteen minutes.[308] When asked why she gave in to the harassment, Underwood explained, "I just thought that's what I had to do to get the house, and he made it quite clear that there was someone else who was willing to do lots of things. . . . [In addition,] I only had a few days left on my voucher, and me and my niece really needed to move out of . . . the house we were in."[309]

Whether or not the harassment these and other victims endure is legally considered *quid pro quo*, it is clear that they understand themselves to be trading their bodies for shelter. They are, in essence, compelled to provide a service to the landlord in exchange for continued occupation of their dwellings. Such behavior does not simply constitute "servitude"; it is also properly qualified as "involuntary," to the extent they have no meaningful choice[310] other than to endure the

306. *See id.* at 231 (explaining that although reciprocal services are voluntarily traded in consensual intimate relationships, such services are coerced and forced in the context of battering relationships).

307. *See* Veal Transcript of Record, *supra* note 1, at 271–72 (explaining that one victim refused to report the abusive conduct because of a fear that she would lose her housing: "[S]he felt that Mr. Veal would retaliate, and she didn't have anywhere else to go. She was in the process of . . . finding a place or moving, and she had children, and she was expecting at the time, and she did not want to be retaliated against."). Refusing the sexual advances of her landlord often brings threatened or actual negative consequences on the tenant. *See, e.g.*, Grieger v. Sheets, No. 87 C 6567, 1989 WL 38707, at *1 (N.D. Ill. Apr. 10, 1989) (alleging that the landlord stopped making repairs in the victim's apartment when she rejected his physical advances).

308. *See* Transcript of Record at 12–14, United States v. Koch, 352 F. Supp. 2d 970 (D. Neb. 2004) (No. 8:03CV406) [hereinafter "Koch Transcript of Record"] (Testimony of Kali Underwood).

309. *Id.* at 15, 20 (Testimony of Kali Underwood).

310. The issue of choice in this context is somewhat troubling. It is true, of course, that unless the victim of sexual harassment is literally kept under lock and key (and most are not), she always has the "choice" to leave her home or apartment

harassment or risk losing their homes and, as they often fear, governmental housing assistance. In particular, predatory landlords prey on the overwhelming fear that many mothers feel about not protecting their children. In the words of one victim who was sexually harassed by her landlord, "I kept thinking, 'If I'm nicer to him, I could stay, because he said, "We can work on it."' . . . He touched my body parts. I did it for my kids."[311]

As discussed earlier,[312] despite the powerful manipulative effect of purely psychological or economic coercion, current Supreme Court doctrine recognizes only the threatened or actual use of force or legal coercion as valid means of establishing involuntary servitude.[313] Accordingly, while many victims of sexual harassment unquestionably feel compelled to endure abusive conduct for the well being of their families,[314] they would receive Thirteenth Amendment protection only if the abuser's conduct can be wedged into the category of coercion established by the Court. Overall, that should not prove to be an insurmountable burden. In many, if not most cases of sexual harassment, the landlord intertwines harassing conduct with threats that the victim's housing may be lost if she resists.

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and thus end the abuse. Taken one step further, this argument might posit that the victim of residential sexual harassment is actually maximizing her utility by consenting to the abuse in exchange for housing, perhaps larger or more comfortable housing than she might otherwise be able to afford. However, especially vulnerable victims of sexual harassment in housing consent to their harassment only in the extraordinarily limited way that all victims of sexual violence may theoretically bargain with their abusers—to the extent that "a concession made under threat of death or violence [is] consent." HIRSHMAN & LARSON, *supra* note 304, at 259. Such limited consent has to be viewed as largely meaningless. Furthermore, federal doctrine on involuntary servitude makes clear that the focus should be not on whether the victim could have walked away, but on whether her will was subjugated. *See, e.g.*, United States v. Bibbs, 564 F.2d 1165, 1167–68 (5th Cir. 1977) (concluding that "[v]arious combinations of physical violence and of threats of physical violence for escape attempts are sufficient" to satisfy the standard of involuntary servitude). As a result, any nominal "choice" that victims may have in this context is legally irrelevant.

311. Laszewski, *supra* note 94.

312. *See supra* Subsection IV.A.1.

313. *See* United States v. Kozminski, 487 U.S. 931, 953 (1988). If, instead, the inquiry were whether servitude is rendered involuntary by any means, victims of residential harassment would have little difficulty satisfying this standard.

314. *See, e.g.*, Veal Transcript of Record, *supra* note 1, at 324 (providing victim's account that "I felt like once again I had let my kids down, because if I had just went with the flow, they would still have everything . . . . [I]t was my fault that they had to start from scratch . . ."); *id.* at 491 (explaining that "I didn't want to be homeless anymore, and I didn't want to have to be separated from my children again. . . . [I] just was contemplating just killing myself, because I didn't know what to do. I didn't want to be homeless, and I didn't want . . . to get put out because I didn't . . . have sex with Mr. Veal.").

Sometimes those threats are explicit. Ebony Dishmon, for example, fell behind on rent she owed to her landlord, John Koch.[315] Koch repeatedly offered to forgive the outstanding balance in exchange for "oral or regular sex."[316] After Dishmon refused those offers, Koch finally threatened eviction: "He told me that if I didn't come up with something soon, that—which was either me paying him some money within the next week or two, or me having sex with him within the next week or two, that he was going to draw up eviction papers."[317] The coercive impact of Koch's harassment was clear to Dishmon: "I felt like he was taking advantage of the situation to where if I didn't have the money, I would feel like I had to do whatever he sexually wanted me to do for me to be able to keep a house for my children."[318] Other times, the landlord conveys the same message implicitly, such as when the tenant falls behind in rent and the landlord offers alternative ways to "pay." Lisa Carroll, another victim of John Koch, testified that when she could not keep up with her monthly rent, her landlord told her, "[Y]ou know what we could do—what you could do to get this rent paid."[319] Although the two did not expressly discuss sex for rent, Carroll understood that one way to keep her house was to engage in sex with her landlord.[320]

In all of these cases, the abusing landlord made either explicit or implicit threats that if the victims did not give in to his demands, they would lose their housing. That dangling threat of eviction constantly hangs over the heads of poor, desperate tenants and is, in fact, what makes the coercive nature of the landlord's conduct so compelling. But the important aspect of this analysis for Thirteenth Amendment purposes is that the landlord can evict the tenant in one of only two ways: by using self-help himself to lock her out or by instituting eviction proceedings in the appropriate local court.[321] If he locks her out, he has used a degree of force against her by physically blocking her access to the house or apartment. Some courts have found even the most apparently non-violent instances of self-help to be nonpeace-

315. Koch Transcript of Record, *supra* note 308, at 12 (Testimony of Ebony Dishmon).

316. *Id.* at 13.

317. *Id.* at 18.

318. *Id.*

319. Koch Transcript of Record, *supra* note 308, at 7 (Testimony of Lisa Carroll). *See also id.* at 11 (Testimony of Anita Thomas) (testifying that Koch told her "there were things [she] could do for [him]" to assist with inspection problems).

320. *Id.* at 7 (Testimony of Lisa Carroll).

321. *See* Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process A Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 764 (1994) (explaining that the national trend is to discourage use of lockouts by landlords in favor of reliance on summary eviction proceedings).

able.[322] If, alternatively, the landlord chooses formal eviction proceedings, that by definition is a legal process, involving the filing of a complaint and the taking of evidence during a trial.[323] Either way, the landlord's sexual harassment has behind it, ultimately, either the threat of force—by way of physical eviction and locking out the victim—or the threat that the legal system will be utilized to remove the tenant through summary eviction proceedings. Those underlying threats fall squarely within the Supreme Court's cramped view of "involuntary servitude" as requiring "the use or threatened use of physical or legal coercion."[324]

V. CONCLUSION

Sexual harassment in the rental context reasonably constitutes involuntary servitude under the Thirteenth Amendment. For victims, their servitude is their endurance of crude, sexually explicit comments and innuendo, repeated requests for dates or sexual encounters, and even physical assaults and rape. In exchange for their servitude, victims hope to protect their children and avoid becoming homeless. Predatory landlords know those weaknesses, and they exploit them, targeting the most desperate and vulnerable victims. Once the abuse begins, the victim is slowly worn down over time by the degrading and constantly sexual nature of her environment and the always present threat—stated or not—that if she does not relent, she and her children will lose their home. When the victim gives in to her exploitation, her will has been subjugated.

The Thirteenth Amendment might be considered an unlikely source of protection for female renters suffering sexual harassment in this context. Indeed, in the present judicial and political climate—where federal courts are rolling back traditional FHA protections and HUD has stalled the publication of final rules governing residential sexual harassment claims for over seven years—legal arguments grounded in progressive interpretations of the Thirteenth Amendment might appear to be long-shots at best. Nevertheless, for at least two reasons, the arguments contained in this Article should be advanced.

First, they are historically and textually justified. The Thirteenth Amendment is not simply a relic of history, relevant today only to better understand the past. Instead, the Thirteenth Amendment was

322. *See, e.g.*, Berg v. Wiley, 264 N.W.2d 145, 148, 150 (Minn. 1978) (concluding that lockout was not conducted in a peaceable manner where the tenant was not present at the time that landlord entered the premises with an accompanying locksmith and police officer).

323. *See* Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 157–58 (2000) (discussing both the development and current procedures of summary evictions).

324. United States v. Kozminski, 487 U.S. 931, 953 (1988).

drafted and intended to abolish not just African chattel slavery, but all forms of involuntary servitude. Through cramped and narrow judicial decisions and careful advocacy, that promise of equality and protection has been stifled. This Article joins others before it in arguing for an expansive but accurate application of the Thirteenth Amendment to realize its true liberating potential. Even if courts today are unwilling to embrace the Thirteenth Amendment in contexts outside African chattel slavery or traditional forms of forced labor, these arguments should continue to be made with the hope that one day courts may listen.

Second, casting arguments in terms of the Thirteenth Amendment is important for the victims. Society has a tendency to overlook residential sexual harassment, most likely because it disproportionately affects poor, single, and nonwhite women. But their plight is real. Victims of residential sexual harassment find themselves in a form of bondage, trapped in a cycle of sexual violence and degradation. Their poverty, family responsibilities, and desperation for housing make them easy prey for controlling and abusive landlords looking to exploit their weaknesses. When they endure sexual harassment to keep a roof over their children's heads, they risk both physical injury and extreme psychological trauma. As the victim accounts discussed in this Article reflect, sexual harassment that invades the home can have devastating and long-term consequences for the victim and her family. By describing such abuse as "involuntary servitude," the physical and mental anguish of victims will hopefully resonate with courts struggling to define the scope of the law's protections.