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An Implied Warranty of Freedom from Sexual Harassment: The Solution for Harassed Tenants Where the Fair Housing Act Has Failed

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AN IMPLIED WARRANTY OF FREEDOM FROM SEXUAL HARASSMENT: THE SOLUTION FOR HARASSED TENANTS WHERE THE FAIR HOUSING ACT HAS FAILED

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Although sexual harassment in the workplace is recognized as a problem, sexual harassment in housing has largely been ignored. When confronting sexual harassment in housing, courts have borrowed standards for sexual harassment in the workplace. Criticism of this practice exists; however, this Article examines the real source of the problem: bringing sexual harassment claims under the Fair Housing Act. Specifically, this Article shows how and why the Fair Housing Act fails to address the problem of sexual harassment in housing. To remedy this failure, this Article proposes an "implied warranty of freedom from sexual harassment" that both restores the tenant's loss of control and provides a non-judicial, self-help remedy to the tenant.

INTRODUCTION

Although sexual harassment in the workplace is recognized as a problem, sexual harassment in housing has largely been ignored. Several factors contribute to its invisibility. Most importantly, housing, as a civil rights issue, does not garner much attention;[1] as the United States Supreme Court has noted, there is no constitutional right to decent shelter.[2] Unlike harassment in the workplace, there has been no large-scale publicity surrounding the issue, such as there was with Supreme Court confirmation hearings of Clarence Thomas,[3] the Navy's Tailhook Scandal,[4] or Paula Jones's lawsuit

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1. Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 29–30 (1998).

2. Lindsey v. Normet, 405 U.S. 73, 74 (1972); *see also* Beverly Balos, *A Man's Home is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS U. PUB. L. REV. 56, 73–74 (2004).

3. *See* Erwin Chemerinsky, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings the View to and from Congress*, 65 S. CAL. L. REV. 1497 (1992); *see also* Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 ARIZ. L. REV. 1 (1992).

4. The Tailhook scandal involved sexual harassment as well as sexual assault. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1693–94 (1998). See J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL.

against President Bill Clinton.[5] Moreover, the nature of the problem itself and its disproportionate effect on women of lower economic means perpetuate its invisibility. Finally, from a legal standpoint, the majority of the claims for sexual harassment in housing brought thus far under the Fair Housing Act ("FHA")[6] have been unsuccessful. The FHA says nothing about sexual harassment. Therefore, in adjudicating claims of sexual harassment in housing, courts have "borrowed" Title VII's interpretation of what qualifies as sexual harassment in the workplace, presumably because Title VII and the FHA use similar "terms and conditions" language.[7]

This Article argues that because tenants who are sexually harassed by their landlords have no effective remedy, sexual harassment of tenants needs to be recognized as a breach of the implied warranty of habitability—the "implied warranty of freedom from sexual harassment" ("IWFSH"). The IWFSH reflects the power imbalance that exists between landlord and tenant and takes into account the loss of control the tenant feels when harassed. The IWFSH addresses the harm to the tenant affected and protects future tenants by serving as a deterrent.

Part I introduces the problem of sexual harassment in the housing context, describes how it arises, and explains why tenants do not usually bring claims. Part II provides an overview of sexual harassment as a form of sex-based discrimination under Title VII and describes the framework under which claims are brought. Part III discusses the original purpose behind the Fair Housing Act and its legislative history. Part IV details how and why courts adjudicating sexual harassment claims have looked to Title VII for guidance, beginning with the Sixth Circuit in *Shellhammer v. Lewallen*.[8]

Part V explores how applying Title VII to housing claims exacerbates problems like class bias that are already plaguing sexual harassment jurisprudence. It discusses differences between the

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L. REV. 1 (1993), for a Navy Lieutenant Commander's view of Tailhook and the Navy's response to the situation as well as whether substantive changes in military law are required to deal with sexual harassment.

5. Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998); *see* Barbara Palmer et al., *Low-Life-Sleazy-Big-Haired-Trailer-Park Girl v. The President: The Paula Jones Case and the Law of Sexual Harassment*, 9 AM. U. J. GENDER SOC. POL'Y & L. 283 (2001) (discussing the merits of Paula Jones' sexual harassment claim in contrast to the media's suggestion that the claim had no merit, the ways in which the case highlights the power imbalance inherent in sexual harassment cases, and the appropriateness of summary judgment to dismiss sexual harassment claims).

6. 42 U.S.C. §§ 3601–19 (2000).

7. *See* discussion *infra* Part IV.

8. No. 84-3573, 1985 WL 13505 (6th Cir. July 31, 1985). *See* discussion *infra* Part IV.

workplace and the home, such as how an employer has incentives to stop harassment, and how a harassed tenant not only must endure the pain of harassment but must also pay the harasser. Part V ultimately concludes that why, rather than where, the harassment occurs is most important.

Part VI discusses, but rejects, proposals to bring sexual harassment claims under those parts of the FHA that differ from Title VII. The FHA was never intended to address the problem of sexual harassment, but instead seeks to prevent exclusion by prohibiting the refusal to sell or rent a home to someone based on an individual's membership in a specific "group"—based on race, national origin, sex, or disability. Unlike the context that spawned the FHA, a landlord's motivation in sexually harassing a tenant is not to drive the tenant away, but to take advantage of a situation: to maintain a rent paying tenant while exerting additional control over her.[9]

Part VII introduces and discusses a three-part remedy for the harassed tenant centered on the IWFSH. First, leases should contain a sexual harassment provision explaining a tenant's right to be free from sexual harassment and the steps she can take if she is harassed. The inclusion of such a provision in the lease will also serve as a deterrent to the landlord, similar to the lead paint warnings currently found in leases. Second, the tenant must be able to assert her rights without risking eviction. This can be achieved by incorporating a requirement of a harassment-fee environment as part of the implied warranty of habitability—the IWFSH. The IWFSH will also enable a tenant to withhold rent to force a change in behavior without resorting to litigation. Additionally, a tenant can also assert a breach of implied warranty of habitability offensively. Either method provides a way to regain control over a situation in which the tenant has experienced a loss of control. Finally, the landlord's rental license should be suspended so that he cannot collect rent from any property for a period of time. Doing so not only recognizes sexual harassment as a societal harm, but also deters the landlord from harassing again. Additionally, suspending a landlord's ability to collect rent temporarily rather than revoking the rental license altogether does not compromise other tenants' housing.

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9. This Article occasionally uses "women" as a substitute for "tenant," since the majority of individuals facing sex-based harassment are women. Throughout this Article the term "landlord" also includes those employed by the property owner such as the building manager.

Finally, this Article concludes by noting that the failure to provide tenants with an adequate remedy under the FHA affects both tenants who bring claims under the FHA and those with claims under state law. State courts have used interpretations of the FHA to guide their own fair housing laws. This Article also posits that an effective remedy is lacking because there is neither an equality law prohibiting sexual harassment in general nor is there recognition that housing is, or should be, a basic human right.

I. THE PROBLEM

The exact number of tenants facing sexual harassment at home is unknown. The first and only nationwide survey of housing centers in 1987 detailed 288 incidents of sexual harassment.[10] However, due to the fact that the ninety-six responding centers answered the survey themselves and that sexual harassment in the workplace and academia is underreported, it is more likely that 288 incidents represented only two to four percent of the actual occurrences of sexual harassment.[11]

Women facing sexual harassment are often reluctant to bring claims against their harassers. In the housing context, this reluctance is even more pronounced. Unlike the workplace, in which women of all economic backgrounds can potentially suffer from harassment, sexual harassment in housing disproportionately affects women of lower economic means and women of color.[12] Women with greater economic means—who can purchase their own homes—do not have to worry about sexual harassment at home from a landlord. Furthermore, it is unlikely that a woman already facing economic difficulties in her life will be eager to confront her harasser.[13] If she challenges the landlord, he may stop

10. Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1066 (1987).

11. *Id.* at 1069. For example, in 2003, 13,566 workplace sexual harassment complaints were filed with the Equal Employment Opportunity Commission or with state and local fair employment agencies. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT CHARGES EEOC & FEPAs COMBINED: FY 1992–FY 2003 (2004), *available at* http://www.eeoc.gov/stats/harass.html (on file with the University of Michigan Journal of Law Reform). It has also been estimated that one in every two women will experience sexually harassing behavior at some point during their working career. Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCHOL. 401, 402 (1997).

12. Adams, *supra* note 1, at 30.

13. See Kathleen M. Ingram et al., *The Relationship of Victimization Experiences to Psychological Well-Being Among Homeless Women and Low-Income Housed Women*, 43 J. COUNSELING

making repairs, attempt to evict her, or blacklist her in the future.[14] A tenant with Section 8 housing, a federal government housing subsidy which assists people of low income with rent,[15] may also fear she will lose certification or be unable to quickly find alternative housing.[16] For a mother, the predicament is even worse, as finding low-income housing for families presents additional burdens.

Cases of harassment in housing can come to light either because (1) the landlord serves the victim with an eviction notice in retaliation for refusing to accede to his demands or (2) the victim stops paying rent in order to force the landlord to stop harassment and the landlord responds with an eviction notice. This second scenario puts harassed tenants in a terrible bind as it is the very failure to pay rent that gives the landlord a non-discriminatory reason to evict. A harassing landlord can simply claim that the sexual harassment allegations are untrue or irrelevant and that failure to pay rent is the real reason for the eviction.

Sexual harassment claims do not receive the widespread attention they deserve because of the traumatizing nature of the issue and the very limited legal services available to poor women. A woman of low economic means is likely to seek help from a local legal services organization because she cannot afford the services of a private attorney. Legal services can only represent a small fraction of the number of people who seek assistance.[17] A tenant who is

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PSYCHOL. 218 (1996), for a discussion of the impact of sexual harassment on low-income and homeless women and how sexual harassment affects those women already living under a high degree of stress.

14. Cahan, *supra* note 10, at 1067. Since 1980, the National Tenant Network has maintained a national "Tenant Performance Rating Service." Service subscribers can positively or negatively "rate" their current tenants and view past ratings of potential tenants in twenty-one states and Canada. *See* NATIONAL TENANT NETWORK website, *at* http://ntnnet.com/ (on file with the University of Michigan Journal of Law Reform).

15. In order to qualify for Section 8, a "family's income may not exceed 50 percent of the median income for the county or metropolitan area in which the family chooses to live." U.S. DEPT. OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHERS FACT SHEET, *at* http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm (on file with the University of Michigan Journal of Law Reform). Under the program, the tenant contributes 30 percent of the gross income for the household to the payment of rent while the government pays the landlord the remaining portion directly. *Id.* The tenant chooses the housing, subject to approval of the Housing Authority. *Id.*

16. *See, e.g.*, Grieger v. Sheets, No. 87 C 6567, 1989 WL 38707, at *2 (N.D. Ill. Apr. 10, 1989) (expressing tenants' fear that they would lose Section 8 certification if landlord evicted them after wife refused landlord's sexual advances).

17. For example, in Philadelphia, a city with a population of 1.6 million, Community Legal Services is the only organization in the city that handles housing problems for low-income people. CITY OF PHILADELPHIA, FREQUENTLY ASKED QUESTIONS: VITAL STATISTICS,

being harassed may not disclose the problem during a short telephone conversation or brief walk-in encounter. Furthermore, if housing problems are examined through the lens of structural habitability, sexual harassment may not immediately come to the attention of a legal services lawyer who is accustomed to dealing with the structural problems that can affect leased premises. This is especially true if the legal services lawyer is practicing in a state that does not have a specific statute outlawing sexual harassment in housing.[18] Furthermore, legal organizations that focus on "women's issues" tend to concentrate on high impact litigation; the individual claims of a tenant facing eviction due to sexual harassment will not likely appear on their radar screens unless the same problem affects a great number of women.[19] Therefore, a tenant being sexually harassed at her house may not receive the help she needs.

II. SEXUAL HARASSMENT JURISPRUDENCE: AN OVERVIEW

Beginning with *Williams v. Saxby* in 1976, courts have recognized sexual harassment as a form of sex discrimination under Title VII.[20] Sexual harassment claims generally fall into two categories—quid pro quo and hostile environment. However, the definitions of "quid pro quo" or "hostile environment" are elusive. Additionally, Title VII is concerned with injury to an individual based on his or her membership in a group; therefore, many criticize Title VII's ability to adequately address the personal harm the victim suffers.[21]

Catherine MacKinnon describes quid pro quo sexual harassment as the situation in which "an exchange of sex for economic

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at http://www.phila.gov/faqs/index.html (on file with University of Michigan Journal of Law Reform).

18. Michigan's Elliot Larsen Civil Rights Act categorizes landlord sexual harassment as a form of sex-based housing discrimination. MICH COMP. LAWS § 37.2103 (2003).

19. One notable exception is the National Organization of Women Legal Defense and Education Fund's legal resource kit for sexual harassment in housing. Although this kit recognizes the possibility of other avenues, it focuses on bringing a claim under the Fair Housing Act. NATIONAL ORGANIZATION OF WOMEN LEGAL DEFENSE AND EDUCATION FUND, LEGAL RESOURCE KIT: SEXUAL HARASSMENT IN HOUSING (2003), *at* http://www.legalmomentum.org/pub/kits/SexHarassinHousingLRK0120.pdf (on file with the University of Michigan Journal of Law Reform). Additionally, Marcia Greenberger of the National Women's Law Center in Washington, D.C. served as plaintiff's counsel in Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993).

20. 413 F. Supp. 654, 661 (D.D.C. 1976). This was the first case of what later came to be known as "sexual harassment" in which a female employee alleged her supervisor harassed and humiliated her after she spurned his advances.

21. *See* Joanna Stromberg, *Sexual Harassment: Discrimination or Tort?*, 12 UCLA WOMEN'S L.J. 317 (2003) (proposing a hybrid approach that combines Title VII and tort remedies).

benefit is proposed and job retaliation for refusal of a sexual advance often results."[22] For example, a supervisor asks a subordinate for dates, engages in unwanted touching, or propositions her for sex; if she refuses, she faces adverse employment consequences. In *Barnes v. Costle*,[23] Paulette Barnes's supervisor told her that her job classification would be "enhanced" if she went on a date with him. After refusing his advances, her job responsibilities were first curtailed, and eventually her position was eliminated altogether.[24]

By contrast, a hostile environment sexual harassment claim arises from a setting in which "sexually stereotyped insults and demeaning propositions . . . illegally poison[] th[e] environment."[25] The United States Supreme Court first recognized hostile environment claims in *Meritor Savings Bank v. Vinson* in 1986.[26] Hostile environment discrimination usually manifests itself in the form of crude language or sexually based epithets in an effort to make the woman feel unwelcome. For example, in *Ocheltree v. Scollon Productions, Inc.*,[27] male workers drove away Shari Ocheltree, the only woman in the production room of a costume shop.[28] They used daily sexual jokes and banter, showed her a picture of pierced genitalia, sang sexually explicit songs to her, and simulated sexual acts on mannequins in front of her.[29] One of Ms. Ocheltree's male coworkers who observed the activity testified it was done purposefully to bother her.[30]

Although the behavior created a hostile work environment for Ms. Ocheltree, its true purpose was to make the workplace so unpleasant as to drive her out of the production room. Carroll Brodsky proposes that hostile sexual harassment claims such as this should be viewed as "a means of competing for material resources"[31] and as a "mechanism for achieving exclusion and protection of privilege in situations where there are no formal mechanisms available."[32] Furthermore, as Joseph A. Rice of the Jury Research Institute notes, "[t]he rise in sexually hostile work envi-

22. Catherine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 823 (2002).
23. 561 F.2d 983 (D.C. Cir. 1977).
24. *Id.* at 985.
25. Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981).
26. 477 U.S. 57 (1986).
27. 308 F.3d 351 (4th Cir. 2002), *rev'd en banc*, 335 F.3d 325 (4th Cir. 2003).
28. *Id.* at 367 (Michael, J., dissenting).
29. *Id.* at 353–54.
30. *Id.* at 354.
31. Schultz, *supra* note 4, at 1700.
32. *Id.* (quoting CARROLL BRODSKY, THE HARASSED WORKER 4 (1976)).

ronment claims appears to parallel the increased contact between female employees in work settings that were predominantly male in nature."[33] In this way, sexual harassment reflects the desire to keep the workplace free of women and therefore is often perpetrated by a woman's co-workers or peers. Although the sexual harassment creates a hostile work environment, its ultimate purpose is to exclude someone who differs from the rest.[34] The most obvious case of this kind of exclusionary harassment occurs when a woman enters a field that has traditionally been the exclusive province of men, such as a firefighting, construction, or welding.[35]

However, in *Burlington Industries, Inc. v. Ellerth*, the Supreme Court altered the "quid pro quo" versus "hostile environment" framework.[36] The Court held that harassment should be divided between those instances in which tangible adverse employment action was taken (quid pro quo) versus those in which it was only threatened (hostile environment).[37] The Court defined "tangible employment action" as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[38] If action was threatened, but not taken, the plaintiff needed to prove the conduct was "severe or pervasive" in order to prevail with a hostile environment claim.[39] In doing so, the Court decreased the scope of what qualified as quid pro quo harassment, thus making it more difficult for plaintiffs to succeed with their sexual harassment claims.[40]

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33. Joseph A. Rice, *Defending Sexual Harassment Cases in the 90s*, *at* http://www.jri-inc.com/article1.htm (on file with the University of Michigan Journal of Law Reform).

34. *See* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002) (criticizing courts' failure to see sexual harassment as an attempt to exclude the "other").

35. *See, e.g.*, Berkman v. City of New York, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd*, 755 F.2d 913 (2d Cir. 1985) (finding sex discrimination where female firefighter applicants were not hired after the male firefighters denied femal applicants training opportunities, ostracized them, and failed to provide them with constructive criticism).

36. 524 U.S. 742, 753 (1998).

37. *Id.*

38. *Id.* at 761.

39. *Id.* at 754.

40. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 105–06 (2003) (criticizing this new approach of "broadening" what qualifies as hostile environment versus quid pro quo sexual harassment). Lower courts have supported this new differentiation. *See, e.g.*, Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 120 (3d Cir. 1999) (noting that *Ellerth*, "largely eliminated the distinction between hostile work environment claims and quid pro quo claims, focusing instead on the presence or absence of tangible adverse employment actions").

III. THE FAIR HOUSING ACT

It is not surprising that, by and large, tenants have been unsuccessful at bringing sexual harassment claims under the Fair Housing Act, because the FHA was never intended to address that problem. Instead, the FHA seeks to integrate the housing market by eliminating discrimination, particularly racial discrimination, in the sale or rental of properties. The overall purpose of the FHA, the intentions underlying amendments for the addition of "protected classes," and court interpretations of § 3604 are all consistent with the view that the FHA is concerned with how a seller or renter must not exclude potential customers based on their membership in a particular "group" or attempt to drive them away from the property on that basis.

From the beginning, the FHA's purpose was to remedy the segregated housing market. Though there is little legislative history for the bill because it was a floor amendment,[41] its introduction states that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[42] Additionally, referencing congressional remarks, the Supreme Court has noted that the FHA sought to "replace the ghettos 'by truly integrated and balanced living patterns'"[43] and to "eliminat[e] the adverse and discriminatory effects of past and present prejudice in housing."[44] Whether the FHA has accomplished its original goal of promoting racially integrated housing is subject to debate.[45]

Racial strife in the country during the 1960s influenced and ultimately led to passage of the FHA.[46] Senator Mondale introduced Title VIII as a floor amendment to H.R. 2516, a civil rights workers' protection bill in February 1968. Opponents stalled

41. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 n.29 (3d Cir. 1977) (explaining that the legislative history of Title VIII is limited because Senator Mondale introduced Title VIII as a floor amendment). In fact, there are no "committee reports [or] other documents usually accompanying congressional enactments." *Id.* at 147 n.29.

42. 42 U.S.C. § 3601 (2000).

43. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968)).

44. *Rizzo*, 564 F.2d at 147 n.30 (citing 114 CONG. REC. 228, 3421 (1968)).

45. *See* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998) (arguing that the Fair Housing Act has been the least effective of the civil rights laws).

46. See Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. LAW. 399 (2003) for a discussion of earlier attempts to attain fair housing in the 1950s.

the bill by continuing debate.[47] Senate rules provide for unlimited debate, which can only be ended by a vote of cloture calling for a vote on the bill.[48] From February until March 1, bill proponents unsuccessfully attempted cloture votes on four occasions.[49] The release of the Kerner Commission's report eventually prompted the Senate to act. The Commission noted that "[America] is moving toward two societies, one black, one white—separate but unequal" and noted that segregation in housing led to segregation in schooling.[50] Furthermore, the Commission recommended that the federal government take measures to end housing discrimination.[51] Three days later, the fourth cloture vote passed and the Senate finally passed the bill on March 11.[52] From the Senate, the bill traveled to the House for concurrence. It stalled once it reached the House Rules Committee.[53] Once more, it took outside events—the assassination of Martin Luther King, Jr. and the ensuing riots in the capital—to dislodge the bill.[54] The House passed it on April 10, and President Johnson signed it on April 11, 1968.

Furthermore, when the FHA was amended in 1974 to include "sex," the sponsor of the amendment, Senator Brock, reiterated the view that § 3604 related to the denial of property, whether by sale or rental, on the basis of a person's characteristics. He acknowledged "the assumption that men could perform these [home ownership] tasks while women could not is just the sort of discrimination based on sex that we are talking about."[55] An amendment that prohibited denying residential property mortgages on the basis of sex also reflects Congress' intent to tackle obstacles for individuals desiring to rent or purchase.[56]

Congress acted in a similar fashion when it amended the FHA in 1988 to prohibit discrimination against individuals with handi-

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47. *Id.* at 151.

48. At the time, Senate Rule XXII required two-thirds of those present and voting to invoke cloture. Today, only 60 votes are needed. Standing Rules of the Senate, S. Doc. No. 106-1, R. V, at 5 (2000).

49. Dubofsky, *supra* note 29, at 154–56.

50. National Advisory Commission on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 237 (1968).

51. *Id.* at 229.

52. Dubofsky, *supra* note 29, at 158–59.

53. *Id.* at 160.

54. Dubofsky, *supra* note 29, at 160.

55. *1973 Housing and Urban Development Legislation: Hearing on S. 1064 Before the Senate Comm. on Banking, Housing and Urban Affairs, Subcomm. on Housing and Urban Affairs*, 93d Cong. 1228 (1973) (Statement of Sen. Brock).

56. *See generally* Pub. L. No. 93-383, 88 Stat. 683 (1974).

caps.[57] As the Third Circuit noted in *Growth Horizons, Inc. v. Delaware County*, "the purpose of this statute [(section 3604(f)(1))] is to protect the housing choices of handicapped individuals who seek to buy or lease housing and of those who seek to buy or lease housing on their behalf."[58] Therefore, attempting to use the FHA to bring a sexual harassment claim will ultimately fail because the words "terms" and "conditions" more logically relate to aspects of the sale or rental such as the amount of rent, the purchase price for the sale, or mortgage terms. These terms do not relate to a sexual harassment situation in which a landlord's ultimate goal is to have the tenant remain on the premises and harasses her.

IV. HOW THE PROBLEM AROSE

Although the Supreme Court has never addressed the problem of sexual harassment in housing, lower courts, beginning with the Sixth Circuit in *Shellhammer v. Lewallen*,[59] have applied Title VII standards of evaluating sexual harassment in the employment context to harassment cases in the housing context. Presumably, this was done because Title VII and the FHA contain superficially similar provisions. The relevant portion of Title VII states that it is

> an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

57. Section 3604(f)(1) provides: "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter."

42 U.S.C. § 3604(f)(1) (2000).

58. 983 F.2d 1277, 1283 (3d Cir. 1993); *see also* Mich. Prot. & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 344 (6th Cir. 1994)(noting that "Congress intended § 3604 to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class").

59. No. 84-3573, 1985 WL 13505 (6th Cir. July 31, 1985).

> employment, because of such individual's race, color, religion, sex, or national origin,[60]

while the FHA makes it illegal to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[61]

Just as Title VII seeks to integrate the workforce, the FHA seeks to integrate the housing market. Recognizing this, courts have viewed the statutes in tandem. As the Second Circuit has noted, Title VII and the FHA are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination."[62] Therefore, if the statutes are generally viewed together, it is not a stretch to analyze sexual harassment within the two contexts in a similar fashion.

In the housing context, the importation of Title VII sexual harassment jurisprudence began in 1985, when the Sixth Circuit affirmed a magistrate's finding that a sexual harassment claim was cognizable under the FHA in *Shellhammer v. Lewallen*.[63] Drawing on Title VII's hostile work environment framework, the plaintiffs, Tammy Shellhammer and her husband, argued that the defendant had "created an offensive environment for their tenancy" prohibited under § 3604(b) of the FHA.[64]

Shortly after the couple moved in, Norman Lewallen asked Ms. Shellhammer to pose nude for pictures, which she refused.[65] A month later, the landlord asked for sex, noting that he would pay Ms. Shellhammer.[66] In July, a dispute arose after the plaintiffs claimed the landlords were responsible for providing a working refrigerator.[67] After the landlords refused to provide one, the Shellhammers paid their rent late, and the defendants commenced eviction proceedings.[68] The couple eventually moved out and filed a complaint under the FHA. In an unpublished decision, the Sixth Circuit rejected the sexual harassment claim, finding that "in light of the length of the . . . tenancy" no hostile environment

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60. 42 U.S.C. § 2000e-2(a) (2000).
61. 42 U.S.C. § 3604(b) (2000).
62. Huntington Beach NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1984).
63. *Shellhammer*, 1985 WL 13505, at *1.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

was created.[69] Since that time, other courts have imitated *Shellhammer*'s approach by looking to Title VII for guidance when adjudicating sexual harassment housing claims.[70]

Following *Shellhammer*, the Department of Housing and Urban Development ("HUD"), the agency responsible for the FHA, aggravated the housing sexual harassment issue by not providing any guidance. As the Seventh Circuit has highlighted, HUD did not address whether and under what circumstances the FHA applies to sexual harassment.[71] HUD's proposed, but never adopted, regulations acknowledge that courts have "looked to Title VII . . . and associated case law and regulations for guidance"[72] because the Fair Housing Act's regulations are silent on the issue. Despite this, HUD's proposed definitions of "quid pro quo" and "hostile environment" claims were in line with Title VII jurisprudence.[73]

HUD's failure has not only led to continued confusion when adjudicating sexual harassment housing claims, but it has also meant that courts are not bound by any legal conclusion that HUD makes with respect to such claims. For example, in *DiCenso v. Cisneros*, the Seventh Circuit rejected the HUD Secretary's determination that a hostile environment existed because the agency had not previously

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69. *Id.* at *3.

70. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) ("'[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept . . . .'") (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert.* denied, 406 U.S. 957 (1972)); Cavalieri-Conway v. L. Butterman & Assocs., 992 F. Supp. 995, 1002 (N.D. Ill. 1998) ("The elements of an action alleging housing discrimination parallel the elements for an action alleging employment discrimination under Title VII."); Beliveau v. Caras, 873 F. Supp. 1393, 1396 (C.D. Cal. 1995) ("[B]oth Title VII and Title VIII were 'designed to eradicate the effects of bias and prejudice. Their purposes are, clearly, the same; only their field of operation differs."); Ginger v. Sheets, No. 87 C 6567, 1989 WL 38707 at *4 (N.D. Ill. Apr. 10, 1989).

71. DiCenso v. Cisneros, 96 F.3d 1004, 1007 (7th Cir. 1996):

> HUD has not even enacted guidelines regarding hostile housing environment sex discrimination. Rather, as the HUD Secretary's Designee acknowledged, a determination of what constitutes a hostile environment in the housing context requires the same analysis courts have undertaken in the Title VII context. Such a determination does not require deference to an administrative agency.

Id. Ironically, HUD acknowledged the Seventh Circuit's frustration in its proposed regulations. "One court has expressed concern about the Department's lack of published standards concerning sexual harassment as a violation of the Act." Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67,666 (Nov. 13, 2000) (to be codified at 24 C.F.R. pt. 100).

72. Standards Governing Sexual Harassment Cases, 65 Fed. Reg. at 67,666.

73. *Compare* Standards Governing Sexual Harassment Cases, 65 FED. REG. at 67,660, *with* 42 U.S.C. § 2000e-2 (2000).

"considered the matter at issue in a detailed and reasoned fashion."[74]

In *DiCenso,* eighteen year old Christina Brown alleged that her landlord made several advances towards her; made unauthorized entries into the apartment she shared with her boyfriend and daughter; and on one occasion, while caressing her arm and back, stated that she could take care of the rent in other ways if she was unable to pay.[75] Although the administrative law judge found the landlord responsible for the last incident, the judge did not believe it created a hostile environment and dismissed Brown's complaint.[76] HUD then sought a review, and the Secretary of HUD reversed the administrative law judge's legal finding that that one incident could not qualify as a hostile environment.[77] In adjudicating the landlord's appeal, the Seventh Circuit refused to defer to HUD because it had failed to enact guidelines for sexual harassment.[78]

V. HOUSING VERSUS EMPLOYMENT

The extension of Title VII standards to housing is flawed for three reasons. First, and most importantly, the policies behind Title VII and the FHA are incompatible when applied to sexual harassment problems. Second, unlike an employment relationship, the underlying nature of the relationship between landlord and tenant is not strictly pecuniary; therefore, the employment standards under hostile environment of "severe and pervasive" and the "reasonable person" are unworkable. Third, and finally, the biases that pervade Title VII sexual harassment jurisprudence are amplified in the housing context.

74. *DiCenso,* 96 F.3d at 1007.

75. *Id.* at 1005–06 n.1.

76. *Id.* at 1006 n.1, 1007.

77. *Id.* at 1007. For a more in-depth discussion of the decision, see Carloota J. Roos, Comment, *DiCenso v. Cisneros: An Argument for Recognizing the Sanctity of the Home in Housing Sexual Harassment Cases,* 52 U. MIAMI L. REV. 1131 (1998) (arguing that sexual harassment in the home should not be measured using Title VII standards).

78. *DiCenso,* 96 F.3d at 1007.

A. Sexual Harassment's Non-congruence with Title VII and the FHA's Policies

Both Title VII and the FHA seek to eliminate barriers to gaining employment or entering the housing market; however, neither adequately addresses sexual harassment in housing once the landlord-tenant relationship is formed. As the Court explained in *Meritor Savings Bank v. Vinson,* little legislative history exists for the provisions dealing with sex discrimination in Title VII because "prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives"[79] in an effort to "kill the bill."[80] In *Khan v. Shevin,* the Supreme Court acknowledged that "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs" and noted there were "efforts under way to remedy this situation . . . [such as] Title VII."[81] Nevertheless, the Supreme Court has characterized Title VII as a remedial measure to "eradicate . . . invidious employment practices"[82] and as a "broad rule of workplace equality."[83] Therefore, the purpose of Title VII was to level the playing field and open up opportunities for individuals who, because of their race, ethnicity, religion, or gender, had been discriminated against in employment. Similarly, the FHA's purpose was to "ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics."[84] In this way, neither Title VII nor the FHA addresses the problem of sexual harassment in housing because landlords who harass do not seek to exclude women; they prefer to have them as tenants.

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79. 477 U.S. 57, 63 (1986).

80. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 767 n.1 (1998) (Thomas, J., dissenting) (citing Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977)).

81. 416 U.S. 351, 353 (1974).

82. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 381 (1977) (Marshall, J., concurring in part, dissenting in part).

83. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

84. United States v. City of Parma, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *aff'd,* 661 F.2d 562 (6th Cir. 1981).

B. Title VII's "Severe or Pervasive" and "Reasonable Person" Standards

Instead of evaluating whether the landlord's behavior qualifies as quid pro quo or hostile environment sexual harassment, courts have assumed that quid pro quo harassment only exists if the threat to evict is explicitly stated. This is most evident in the way some courts have adopted the label of "conditioned tenancy" as a substitute for "quid pro quo."[85] To prove a "conditioned tenancy" exists, a tenant must demonstrate that "the landlord either (1) conditioned any of the terms, conditions or privileges of tenancy on submission to his sexual requests or (2) deprived a tenant of any of the terms, conditions or privileges of tenancy because she refused to accede to those requests."[86] In doing so, courts have interpreted quid pro quo or conditioned tenancy to require eviction. However, once a landlord propositions a tenant, the nature of the rental agreement is changed. Instead of paying money, the landlord is now asking the tenant to pay with herself. The landlord knows that the tenant is vulnerable to the terms of her housing and is trying to take advantage of the situation. Therefore, the power dynamic between the parties makes explicitly stating the threat unnecessary.[87]

Furthermore, courts have taken behavior that otherwise qualifies as quid pro quo or conditioned tenancy harassment and analyzed it under a hostile environment framework. For example, in *DiCenso*

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85. The magistrate's opinion in Shellhammer was the first to use the term "conditioned tenancy." *Shellhammer v. Lewallen*, Fair Hous./Fair Lend. (P-H) ¶ 15,472, 16,129 (N.D. Ohio Nov. 22, 1983). However, in affirming the magistrate's decision that a hostile environment did not exist, the Sixth Circuit did not use the term. Shellhammer v. Lewallen, 770 F.2d 167 (6th Cir. 1985). Both decisions are unpublished. Nevertheless, the Northern District of Illinois cited the "conditioned tenancy" language in a magistrate opinion. Grieger v. Sheets, No. 87 C 6567, 1989 WL 38707, at *3–4 (N.D. Ill. Apr. 10, 1989) (explaining the two kinds of sexual harassment claims as "a 'conditioned tenancy' or 'quid pro quo' claim, where the landlord either conditions any of the terms, conditions or privileges of tenancy on submission to his sexual requests or deprives the tenant of any of those terms, conditions or privileges because the tenant has refused to accede to his requests") (quoting Shellhammer v. Lewallen, Fair Hous./Fair Lend. (P-H) ¶ 15,472, 16,129 (N.D. Ohio Nov. 22, 1983)). Later, the same court again used the "conditioned tenancy" language. Cavalieri-Conway v. Butterman, 992 F.Supp. 995, 1007 (N.D. Ill. 1998) (using the term "conditioned tenancy" and stating that "the court's research reveals that [conditioned tenancy] applies only when a defendant demands sexual favors in exchange for favorable treatment"); *see also* Beliveau v. Caras, 873 F.Supp. 1393, 1396 (C.D. Cal. 1995) (citing Shellhammer's term "conditioned tenancy").

86. *Grieger*, 1989 WL 38707, at *3.

87. Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 LAW & INEQ. J. 351, 389 (2000).

v. Cisneros, while rubbing the eighteen year old tenant's arm and back, the landlord proposed that "if she could not pay the rent, she could take care of it in other ways."[88] Despite this proposal of sex in lieu of rent, the administrative law judge used the hostile environment framework, which the Seventh Circuit affirmed.[89] Ironically, the Seventh Circuit found that a hostile environment did not exist. Similarly, in *Brown v. Smith*, the landlord told tenant Stephanie Brown that he wanted to have sex with her and that he would not increase the rent as planned if she would meet him "for fifteen, twenty minutes a week" for sex.[90] The Court analyzed the behavior under a hostile environment theory.[91]

Although a majority of courts have analyzed sexual harassment claims under a theory of hostile environment,[92] Title VII's "severe or pervasive" hostile environment framework requirement is impractical in the housing context. In *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that for sexual harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[93] In determining whether an environment qualifies as severe or pervasive, the Supreme Court in *Harris v. Forklift* stated that the following factors may be considered: "whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[94] The Court further explained that "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . Title VII is violated."[95] As the Court noted, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."[96]

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88. 96 F.3d 1004, 1006 (7th Cir. 1996).

89. *Id.* at 1007, 1008–09.

90. Brown v. Smith, 64 Cal. Rptr. 2d 301, 305 (Ct. App. 1997).

91. *Id.* at 311. Even though Brown's claim was under the California Fair Employment and Housing Act, because the Court interpreted its meaning using the Fair Housing Act, the claim's use is still relevant here. By contrast, in *Krueger v. Cuomo*, 115 F.3d 487, 490 (7th Cir. 1997), the tenant prevailed on a quid pro quo/conditioned tenancy claim; however, this is likely because tenant Debbie Maze reported the proposal of sex for rent immediately after it happened to an employee of the local Housing Authority and the employee continued to stay involved in the situation by forwarding Maze's rent checks to her landlord.

92. *See* discussion *infra* Part V.B.

93. 477 U.S. 57, 67 (1986) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

94. 510 U.S. 17, 23 (1993).

95. *Id.* at 21 (quoting *Meritor*, 477 U.S. at 65).

96. *Id.* at 23.

In assessing severity and pervasiveness, courts tend to measure the severity or seriousness of the harassment and the frequency of the incidents. In the employment context, a woman whose boss harasses her can expect to encounter the boss on a daily basis, while a tenant has no way of anticipating when she will she be subject to an encounter with the landlord. Although the landlord may have potentially unlimited access, unlike in a work environment, the contact between tenant and landlord is less predictable and therefore more difficult for the tenant to prepare for. Finally, "the unequal power relationship that is inherent in harassment cases is generally more pronounced in a landlord-tenant situation than in an employment setting."[97]

Unlike job performance, which can be measured, it is much more difficult to objectively assess how the conditions of one's tenancy change. Unlike work, where a woman could take sick or vacation days, a tenant will always need to use her home. Measuring "severe or pervasive" in housing does not work because severity and pervasiveness are ultimately reflections of how the workplace conditions have been altered; instead, the very act of implying or asking for sexual favors in exchange for rent instantaneously changes the terms or conditions of the rental. In essence, the landlord is asking for an addendum to the lease that the tenant is no longer in the position to "bargain" for.[98] Therefore, courts should first consider whether sexual harassment of a tenant is quid pro quo/conditioned tenancy harassment.

Women facing workplace harassment are also more likely to have institutional support because of the potential liability an employer faces. If a supervisor takes tangible employment action against a subordinate after she refuses his advances, the employer is strictly liable. If the woman reports the behavior before the supervisor takes action, the employer is liable, subject to an affirmative defense.[99] The employer's two part affirmative defense is that (1) it took "reasonable care to prevent and correct promptly" the behavior and that (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."[100] The employer can point to the existence of an "antiharassment policy with complaint procedure"

97. 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, 786 (2002).

98. Unlike the employment context, in which harasser attempts to bribe the victim with a promotion or other "benefit," there is nothing a housing sexual harassment victim can receive.

99. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753 (1998).

100. *Id.* at 765.

under the first prong.[101] For this reason, employers have an incentive to combat harassment or, at the very least, promote policies and procedures for reporting harassment. Therefore, employees are more likely to be aware of their rights and how to pursue enforcement of them. By contrast, a landlord acting as both owner and day-to-day manager of a property has no similar impetus for change.

In addition, the workplace itself can have an "institutional memory" that can facilitate bringing a sexual harassment claim. With a complaint procedure in place, the employer will have a record of any past complaints about a particular employee. There will also be a greater chance of witnesses to the offensive behavior. In the housing context, there is no complaint procedure. Furthermore, because the harassment is more likely to occur within the confines of the women's home, witnesses are less likely to exist. For a harassed tenant living in the same building as the landlord, this situation is even worse.[102] Finally, a woman who has been harassed is more likely to eventually move rather than to provide an institutional memory for the building about the problem behavior.

Another problematic aspect of importing Title VII's standards is that the measure of what qualifies as a hostile environment is gauged from the perspective of the "reasonable person." In *Harris v. Forklift*, the Supreme Court stated that to qualify as an "objectively hostile or abusive work environment" under Title VII, the "victim [must not only] subjectively perceive" the environment to be so, but a "reasonable person" must as well.[103] How a "reasonable person" should be defined—as a person or as a "reasonable woman"—has been the subject of much debate.[104] As Deborah Zalense points out, the "as a person" standard reflects middle-class white male views, while using the "reasonable woman" standard results in the false assumption that there is an "essential" woman.[105]

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101. *Id.*

102. *See* discussion *infra* Part IV.B.

103. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

104. *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1214–33 (1990) (evaluating arguments for a reasonable woman standard); William Litt, et al., *Recent Development: Sexual Harassment Hits Home*, 2 UCLA WOMEN'S L.J. 227, 241 (1992) (arguing that "Title VIII litigation would benefit if courts applied the 'reasonable woman' standard"). *But see* Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 362 n.116 (1990) (arguing against adopting the "reasonable woman" standard as making sexual harassment claims by men more difficult).

105. Deborah Zalense, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 864 (1997).

Therefore, transporting either standard into the housing context is particularly problematic because a disproportionate number of renters affected by sexual harassment are poor women of color.[106]

Courts' assumption that housing sexual harassment claims should be analyzed under the hostile environment framework rather than first considering whether a quid pro quo/conditioned tenancy exists is misguided because it ignores the power landlords wield over tenants. Moreover, even if a claim is more appropriately categorized as a hostile environment claim, Title VII's measurement of what qualifies as a "severe or pervasive" hostile environment according to the "reasonable person" is ill-suited for the housing context. It too ignores the power dynamic between the parties and the reason the relationship was formed in the first place.

Instead, as the Supreme Judicial Court of Massachusetts proposed in *Gnerre v. Massachusetts Commission Against Discrimination*, housing sexual harassment claims should be evaluated according to "whether the landlord's actions have rendered a tenancy less desirable."[107] In *Gnerre*, the Court found that landlord Antonio Gnerre's sexual harassment of single mother Barbara Silverstein interfered with her ability to fully "use and to enjoy the leased premises."[108] The Court pointed to the fact that Silverstein "became reluctant to have Gnerre enter her apartment to make repairs," "did not use fully the facilities of her apartment," such as her back porch and the laundry because she feared encountering Gnerre, and stayed inside or did not return home right away if she saw Gnerre's truck parked in the driveway.[109] Silverstein also did not invite guests over because she feared Gnerre would make sexual comments to her in their presence.[110]

C. Title VII's Biases Amplified

In an effort to address plaintiffs' failure to meet Title VII's "severe or pervasive" requirement, commentators, beginning with Regina Cahan, have argued that landlord-tenant harassment is more traumatic because it occurs in the victim's home.[111] Unlike the workplace, the tenant has no escape if the landlord harasses

106. *Id.*
107. 524 N.E.2d 84, 88 (Mass. 1988).
108. *Id.* at 89.
109. *Id.* at 89–90.
110. *Id.* at 90.
111. *See, e.g.*, Cahan, *supra* note 10, at 1073; Lindemyer, *supra* note 87.

her, as the harassment constitutes a "complete invasion in her life."[112] However, proposing that courts recognize harassment at home as more egregious than the workplace does not ultimately benefit harassed tenants. Instead, it has the potential to perpetuate already existing biases within sexual harassment jurisprudence. First, emphasizing the "context" of the home could backfire because it invites courts to consider the victim's economic class. Second, it ignores the special place of "home" in the law in general. Therefore, courts should first focus on the nature of the relationship between the parties and why it exists rather than the setting in which the harassment occurs.

In extending Title VII to cover same sex sexual harassment in *Oncale v. Sundowner Offshore Services Inc.*, the Supreme Court explained that the "inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."[113] As an example, the Court cited how a football coach smacking a player on the behind is different than the coach acting the same way toward a secretary.[114] As Justice Scalia remarked, the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[115]

If read literally, *Oncale* bolsters the arguments of Cahan and others by treating the harassment as more egregious because of the setting—the home versus the workplace. However, there is a greater danger that emphasizing context invites courts to impose a different standard for tenants based on class, as this has often been true in employment cases.[116] For example, when assessing a hostile work environment, courts have tended to impose a higher burden of proof on women who work in blue-collar positions as compared to those in the white-collar world.[117] Accordingly, it would be no surprise that women from a low socio-economic class have their housing sexual harassment claims largely ignored by the courts.

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112. Cahan, *supra* note 10, at 1073.

113. 523 U.S. 75, 81 (1998).

114. *Id.*

115. *Id.* at 82.

116. See Rebecca Brannan, Note, *When the Pig is in the Barnyard, Not the Parlor: Should Courts Apply a "Coarseness Factor" in Analyzing Blue-Collar Hostile Work Environment Claims?*, 17 GA. ST. U. L. REV. 789 (2001), for a discussion of how courts treat hostile work environment claims by blue collar women.

117. *Id.* at 823–24.

In support for the argument that harassment at home should be considered more offensive, some commentators have emphasized the separate sphere the home has occupied in other areas of the law.[118] For example, Nicole A. Forkenbrock Lindemyer cites the law's different treatment of self defense as it relates to an intruder, the protected sphere under Fourth Amendment search and seizure laws in the home,[119] and picketing outside one's residence.[120] Additionally, in objecting to the FHA, Senator Sparkman supported the right to control one's property by stating that "attempts to dictate the conditions under which a person can sell or rent his own property . . . accomplish[] very little other than a deprivation of important property rights in the conventional field to which every landowner is entitled."[121] Therefore, the argument stressing that sexual harassment at home is more egregious because of the special place the home holds in the law may lead courts to instead weigh the landlord's property ownership more heavily than the tenant's rights.

Similarly, Beverly Balos argues that this notion of "home" and its privacy implications cause tenants to lose sexual harassment claims.[122] In her opinion, courts side with the party possessing more economic power.[123] They favor the landlord's privacy in conducting his business operations over the tenant's privacy rights in feeling safe and secure in her home.[124] Courts are ultimately reluctant to invade the privacy of the home to stop this form of intimate violence, just as they turned a blind eye to domestic violence cases in the mid-nineteenth century.[125]

Arguing that sexual harassment in the home is more egregious than in the workplace because of where it takes place is undoubtedly true, but doing so invokes comparisons to Title VII's framework for sexual harassment claims. Instead, sexual harass-

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118. *See, e.g.*, Zalesne, *supra* note 105, 886–88; Lindemyer, *supra* note 87, at 369.

119. Lindemyer, *supra* note 87, at 369 n.89 (citing Payton v. New York, 445 U.S. 573, 603 (1980) ("[W]arrantless arrests in one's home violate the Fourth Amendment, even though the same warrantless arrest in public may be permissible, because the sanctity of the home confers special protection.")).

120. *Id.* at 369 (citing Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding an "[o]rdinance that prohibited picketing outside one's home in light of First Amendment challenge.")).

121. David A. Thomas, *Fixing Up Fair Housing Laws: Are We Ready for Reform?*, 53 S.C. L. REV. 7, 13 (2001) (quoting 114 CONG. REC. 920 (1968)).

122. Balos, *supra* note 2.

123. *Id.* at 92–93.

124. *Id.* at 98.

125. *Id.* at 88. Other commentators have discussed how "the concept of 'home' . . . reflect[s] the relationship between women and their role in society." Adams, *supra* note 1, at 20.

ment in the home needs its own standard because the situations are so factually dissimilar,[126] the purposes behind Title VII and FHA are not congruent, and the biases and prejudices present in Title VII are transported and amplified in the housing context.

VI. MOVING AWAY FROM TITLE VII: ALTERNATIVE USES FOR THE FHA

In recognition of the FHA's failure to provide relief to sexually harassed tenants, Professor Robert G. Schwemm and Department of Justice attorney Rigel C. Oliveri instead propose that sexual harassment claims be brought under those sections of the FHA, namely § 3604(c), that differ from Title VII.[127] Although their solution may work for some tenants, the FHA is ultimately an inadequate remedy because, as discussed earlier, its underlying policy is ill-suited to address the problem of sexual harassment and because the FHA excludes those tenants who are most vulnerable.[128]

A. Using § 3604(c)

Schwemm and Oliveri argue that the FHA offers broader protection to plaintiffs who cannot meet the "severe or pervasive"

126. Similarly, courts have recognized that applying Title VII sexual harassment employment standards to the education context under Title IX is not ideal. *E.g.*, Bruneau v. S. Kortright Cent. Sch. Dist., 935 F. Supp. 162, 170 (N.D.N.Y. 1996) (rejecting plaintiff's argument for wholesale importation of Title VII's "hostile work environment" as the basis for a "hostile learning environment" and instead observing that "a Court must determine the appropriate segments and the proper extent to which the law of Title VII applies to a given Title IX analysis. Title VII jurisprudence is a guide, and a Court should not blindly apply Title VII to determine the issues raised in a Title IX case").

127. Schwemm & Oliveri, *supra* note 97, at 790–91.

128. Alternatively, others have suggested using § 3617 of the FHA to bring sexual harassment claims. Section § 3617 makes it:

> unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by sections 3603, 3604, 3605 or 3606.

42 U.S.C § 3617 (2000). *See* Robert Rosenthal, Note, *Landlord Sexual Harassment: A Federal Remedy*, 65 TEMP. L. REV. 589, 597 (1992) (describing the Fair Housing Act as "the most promising avenue" for sexual harassment claims).

requirement of employment based sexual harassment[129] or because the "defendant's behavior was not egregious enough to warrant a 'terms and conditions' violation."[130] Therefore, claims should move away from subsection (b) of the FHA, which has "terms and conditions" language similar to Title VII, to subsection (c), which is entirely different from Title VII.

Section 3604(c) states that it is unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on ... sex ... or an intention to make any such preference, limitation, or discrimination."[131] Schwemm and Oliveri single out the words "statement ... with respect to the ... rental ... that indicates ... discrimination" to argue that verbal harassment fits under subsection (c). However, given that the word "statement" is placed between "notice" and "advertisement," it is more likely this reflects the legislative intent to not only restrict official, public, and permanently visible announcements expressing an intent to only sell or rent to a certain kind of person, but also to attack the more subtle kinds of bias a seller or renter might have. Furthermore, Schwemm and Oliveri argue that "rental" covers not only the negotiation for the rental, but also the ongoing enjoyment of the premises after the signing of the lease because the most popular dictionary at the time when the FHA was enacted defined "rental" in this way.[132] Yet, given that the next clause is "with respect to sale or rental," this particular section seems to be speaking to what is inappropriate behavior concerning the rental or sale, not to the aftereffects of a purchase or the enjoyment of it. In this way, subsection (c) concerns a potential seller or renter who does not want to sell or rent to a certain "kind" of person.

Schwemm and Oliveri acknowledge that § 3604(c)'s purpose was not to address sexually harassing statements, yet they contend that as remedial legislation, the FHA can, and should, be read broadly to prohibit them.[133] In doing so, they cite *Oncale v. Sundower Offshore Serv. Incorp.* for support.[134] In *Oncale*, the Supreme Court extended

129. Schwemm & Oliveri, *supra* note 97 at 783, 786.

130. *Id.* at 773.

131. 42 U.S.C. § 3604(c) (2000).

132. Schwemm & Oliveri, *supra* note 97, at 799.

133. *Id.* at 799 n.140 (citing City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995); Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972)).

134. 523 U.S. 75, 79 (1998).

Title VII's prohibition of sexual harassment to include male-on-male sexual harassment. However, *Oncale*'s extension of Title VII is distinguishable from the way in which Schwemm and Oliveri attempt to extend protection of the FHA to sexually harassed tenants.

Even if remedial legislation should be interpreted broadly, it must still be read consistently with its underlying purpose. Although sexual harassment protection under Title VII had not previously been afforded in cases where the harasser was of the same sex, its extension in *Oncale* was still consistent with the underlying policy of Title VII: to prevent workplace discrimination and exclusion based on an individual's membership in a particular group. By contrast, the rationale of trying to prevent exclusion of certain individuals as property owners or renters is different in sexual harassment cases because landlords not only want to keep tenants; some may deliberately solicit female tenants and those of low economic means. For example, in May of 2004, a Kansas jury assessed $1.1 million in damages against a landlord who sexually harassed eleven of his young, female tenants over the period of a decade.[135] In one particularly egregious situation, defendant Bobby Veal forced a tenant to have sex with him in front of her young children.[136] All of the women renting from Veal received federal housing assistance.[137] The DOJ has brought several other claims against landlords accused of repeatedly harassing their female tenants.[138]

> [M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Schwemm & Oliveri, *supra* note 97, at 810 (quoting Oncale, 523 U.S. at 79). Given Justice Scalia's plain meaning approach, it is more likely that in *Oncale* he was searching for a way to provide coverage for an egregious example of rape of one man by another than he was seeking to broaden the scope of Title VII. For a discussion of how Oncale may affect (and hurt) future claimants as well as how the decision ignores harassment of gays and lesbians in general, see David D. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

135. Mark Morris, *Tenants Win $1.1 Million in Sex Case; Landlord Preyed on Vulnerable Women*, KAN. CITY STAR, May 14, 2004, at 1, *available at* 2004 WL 78445856.

136. *Id.*

137. *Id.*

138. *See, e.g., Landlord Pays $100,000 to Settle Justice Department Housing Bias, Sexual Discrimination Lawsuit*, STATES NEWS SERV., Apr. 19, 2004, at A4 *available at* 2004 WL 76674824 (settling a sexual harassment suit by thirteen tenants, landlord agrees to pay them $92,500 as well as a civil penalty of $7,500 to the federal government); *Come-Ons to Tenants*

B. FHA Exclusions

Even if the FHA could be read to include sexual harassment, its coverage explicitly exempts situations in which tenants are most vulnerable. Like Title VII, which does not cover businesses employing fewer than fifteen people,[139] the FHA contains the notorious "Mrs. Murphy exception"[140] to exclude a landlord who lives in the same building with the tenants. This section, 3603(b)(2), exempts "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence"[141] Hence, the exceptions to FHA's coverage aggravate the situation in which the landlord is ever present.

Similarly, small scale renters are also not covered. Section 3603(b)(1) excludes a "single-family house ... rented by an owner" who does not own "more than three such single-family houses at any one time."[142] In this way, a harassed tenant who is the only person occupying the premises is more vulnerable because it is unlikely there will be witnesses to the offensive behavior. However, the FHA does include the small owner who uses professional real estate services or facilities or who violates § 3604(c), which prohibits statements or advertisements indicating a preference, or an intent to prefer, based on race, color, religion, sex, handicap, familial status, or national origin.[143]

It is admirable to seek a new solution in the FHA, but the Fair Housing Act does not address the severity of the problem of sexual harassment. Schwemm and Oliveri resort to subsection (c) because tenants have failed in their attempts to have harassment fit under subsection (b), which echoes the sentiment of Title VII. Instead, they propose that § 3604(c) "is applicable in virtually every sexual harassment case."[144] However, § 3604(c) is not likely to offer addi-

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Cost Landlord $451,000, 24 NAT'L L.J. 40 (2004), at B3 (finding landlord liable to twenty-two female tenants in the amount of $451,000 for sexual harassment based on sexual remarks and sexual demands in exchange for better conditions or in lieu of rent).

139. 42 U.S.C. § 2000e(b) (2000).

140. Conservatives created the fictional widow, "Mrs. Murphy," who owned a boarding house and did not wish to rent to African Americans. Although the exception became part of the FHA, it was originally introduced as part of the public accommodation act of Title II. For a more in depth discussion, see James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605 (1999).

141. 42 U.S.C. § 3603(b)(2) (2000).

142. 42 U.S.C. § 3603(b)(1) (2000).

143. 42 U.S.C. § 3604(c) (2000).

144. Schwemm & Oliveri, *supra* note 97, at 774.

tional assistance to harassed tenants because the plain meaning of the text needs to be stretched to cover sexual harassment, making it unlikely a court will grant a plaintiff relief. More importantly, § 3604(c) is concerned with preventing exclusion, not the exertion of power in an already existing relationship. The subsection focuses on the words themselves as a harm rather than how the words change the nature of the rental relationship itself.

VII. NEED FOR A NEW REMEDY

Sexual harassment harms both the individual tenant and society as a whole; therefore, in devising a remedy, policymakers need to address both concerns. The woman who has been harassed should be put back, as much as possible, in the position she would have been but for the harassment. This should include a provision of safe housing as well as compensation for the costs of moving and searching for alternative housing. The harasser should also be penalized so the harassment does not recur. The remedy must take account of how the relationship between landlord and tenant is framed and address the fact that the woman both suffered sexual harassment and paid for safe housing that she did not receive.

Although tort law might allow poor women to bring a case if they are accepted on a contingency fee basis, it does not necessarily follow that the defendant has the economic means to pay the damage award. The landlord may not necessarily be of a much higher economic class than the tenant, and the tenant may receive nothing, even after a long trial.[145] In this way, the tort remedy is more theoretical than practical as it ultimately fails to provide relief to tenants. This in turn could make attorneys less willing to take the case.[146] Therefore, tort options, such as intentional infliction of

145. In *Brown v. Smith*, 64 Cal. Rptr. 2d 301, 306 (Ct. App. 1997), the Court noted that only a partial transcript was available from below because neither party could afford the $420 a day for a court reporter.

146. In several instances, district courts have granted summary judgment for insurance companies on the grounds that the landlord's insurance did not cover acts of sexual harassment. *See, e.g.*, American Nat'l Gen. Ins. Co. v. Jackson, 203 F. Supp. 2d 674 (S.D. Miss. 2001) (granting insurance company's motion for declaratory judgment that it did not have to provide legal representation for a landlord accused of sexual harassing numerous women because the acts were intentional harms and therefore, not covered under the rental owner's policy); Armed Forces Ins. Exch. v. Transamerica Ins. Co., 966 P.2d 1099 (Haw. Ct. App. 1998).

emotional distress, should be additional routes to recovery rather than the sole means.[147]

The tenant needs a remedy that is immediate, does not require going to court, and allows her to regain some of her lost sense of power or control. Two property doctrines may give rise to such a remedy: the covenant of quiet enjoyment and the implied warranty of habitability. Given the disruption the landlord causes to the tenant's life, claiming breach of quiet enjoyment might seem a more obvious choice. However, quiet enjoyment's historical roots in conveyance limit its usefulness within the harassment context: to succeed on an action for a breach of the covenant of quiet enjoyment, a tenant must vacate the premises.

The implied warranty of habitability does not suffer from quiet enjoyment's conveyance-based handicaps. Born of contract, the implied warranty of habitability allows the tenant to withhold rent and remain on the premises. Therefore, in the proceeding sections, this Article proposes broadening the implied warranty of habitability to include cases of sexual harassment—termed here the "implied warranty of freedom from sexual harassment" ("IWFSH").

A. Quiet Enjoyment

Pursuing a breach of quiet enjoyment claim is a risky and unrealistic option for tenants.[148] Although the Restatement (Second) of Property states that a tenant does not have to vacate in order to claim breach,[149] in sexual harassment claims brought on a theory of quiet enjoyment, courts have regarded the tenant's abandonment as an indication of both her credibility as well as the severity of the harassment. For example, in *Beliveau v. Caras*, the court dismissed the plaintiff's breach of quiet enjoyment claim because she still resided on the premises.[150] Linda Beliveau alleged that in the process

147. Moving away from the FHA towards property and tort law options is also consistent with criticism of Title VII's failure to address the personal nature of the harm that sexual harassment victims face in the employment context. *See* Paul, *supra* note 104; Joanna Stromberg, *Sexual Harassment: Discrimination or Tort?*, 12 U.C.L.A. WOMEN'S L.J. 317 (2003).

148. In order to avoid the risk of moving out and then losing on a breach of quiet enjoyment claim, a commercial tenant brought a declaratory judgment asking if the conditions qualified as breach before moving out. *See* Charles E. Burt, Inc. v. Seven Grand Corp., 163 N.E.2d 4 (Mass. 1959). This is unrealistic for a residential tenant, especially one with little economic resources.

149. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 6.1 cmt. h (1977).

150. 873 F. Supp. 1393, 1395 (C.D. Cal. 1995).

of fixing her leaky shower, the building manager put his arm around her while commenting on her attractiveness and noting that "he would like to keep her company anytime."[151] After Ms. Beliveau pushed him away, he "grabbed her breast, and, after being pushed away again, grabbed her buttock as she walked away from him."[152] In *Honce v. Vigil*, the Tenth Circuit stated that abandonment is not required to claim breach of quiet enjoyment, yet it failed to find the landlord's behavior as sufficiently hostile, describing it instead as "erratic."[153]

The Court ignored the landlord's three solicitations for dates post-lease signing because Ms. Honce still moved in, and, after her refusals, the landlord did nothing to prevent her from moving in.[154] Recognizing the economic realties of the situation, Judge Seymour dissented:

> The majority seemingly believes that a single mother of a young child who has just borrowed money to buy a mobile home and has signed a rental agreement for the lot onto which she has moved it somehow is completely free to abandon the lease and leave the premises upon finding the conduct of her new landlord offensive.[155]

By contrast, the Seventh Circuit emphasized that Debbie Maze, a single mother with two children, eventually moved out of her Section 8 housing to live with her mother to avoid the landlord after he constantly solicited sex from her.[156] It found for Ms. Maze in her sexual harassment claim under the FHA.

For the reasons explained above, requiring that a tenant move out, force the landlord to evict her, or initiate proceedings in courts are unrealistic and unfair demands from the harassed tenant's point of view.[157] The proposed remedy means nothing if the

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151. *Id.*

152. *Id.* Ironically, the court found for Ms. Beliveau on her Fair Housing claim.

153. 1 F.3d 1085 (10th Cir. 1993).

154. *Id.* at 1091.

155. *Id.* at 1093.

156. Krueger v. Cuomo, 115 F.3d 487, 491 (7th Cir. 1997) (recounting the administrative law judge's finding of breach of quiet enjoyment where landlord's sexual harassment of tenant forced her to vacate the premises).

157. *But see* Deborah Dubroff, *Sexual Harassment, Fair Housing, and Remedies: Expanding Statutory Remedies Into a Common Law Framework*, 19 T. JEFFERSON L. REV. 215, 235 (1997) (arguing that a landlord's sexual harassment of a tenant be viewed as a breach of a quiet enjoyment with the possibility that there be an exception to the move out requirement).

only way to enforce it is through court proceedings. Instead, as this Article will show, the only practical solution is rent abatement.[158]

B. Breach of IWH

Sexual harassment of a tenant constitutes an unsafe condition of the leased premises and therefore should be considered a breach of the implied warranty of habitability ("IWH").[159] Under the implied warranty of habitability, the landlord is responsible for delivering and maintaining premises that are safe and habitable for the tenant.[160] The implied warranty of habitability is the centerpiece of the agreement between landlord and tenant. A breach occurs when the defect is not simply inconvenient or unattractive, but "of such a substantial nature as to render the premises unsafe or unsanitary, and thus unfit for occupancy."[161] In effect, "[t]he condition complained of must be such as to truly render the premises uninhabitable in the eyes of a reasonable person."[162] In situations where the landlord has breached, the tenant may either stop paying rent or reduce payments by the amount of the defect—the "difference in value" or the "percentage reduction in use"—subtracting the value of the apartment with the defect from the rental cost.[163]

Holding the landlord's sexual harassment of a tenant to be a breach of the IWH is consistent with the policy behind the original imposition of the IWH on leases as well as with the expectations of

158. Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571, 645 n.246, (1985), ("It does the tenant no good to be told that he has a substantive right to habitable premises if the only way he can enforce that right is by costly proceedings in a higher court. The ideal remedy from the tenant's point of view, granted the substantive right, is a self-help remedy . . . .") (citing Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242, 245 (1974))).

159. Plaintiffs in employment and education settings have argued that the sexual harassment they faced created an unsafe environment; however, in these instances, the courts did not address the issue because they were considering summary judgment motions. *See* Kelley v. Worley, 29 F. Supp. 2d 1304, 1313 (M.D. Ala. 1998) (deciding defendant's motion for summary judgment, "assum[ing] without deciding" that sexual harassment qualifies as an unsafe work condition, while noting the novelty of the theory); Bruneau v. S. Kortright Cent. Sch. Dist., 935 F. Supp 162, 176 (N.D.N.Y. 1996) (dismissing the defendant's motion for summary judgment regarding whether peer behavior at school qualified as sexual harassment and made a sixth grader feel "unsafe").

160. RESTATEMENT (SECOND) OF PROPERTY § 5.5 (1) (1977).

161. *Glascoe v. Trinkle*, 479 N.E. 2d 915, 920 (Ill. 1985).

162. *Id.*

163. Cazares v. Ortiz, 168 Cal. Rptr. 108, 113 (App. Dep't Super. Ct. 1980); *Glascoe*, 479 N.E.2d at 921.

the tenant when signing the rental agreement. Furthermore, it is a logical extension of the courts' move away from defining "safe" in terms of the property's structural aspects to include landlord liability for the foreseeable criminal behavior of third parties as well as the presence of lead paint. Accordingly, if a landlord is liable for the criminal behavior of third parties over whom he has little or no control, it is logical that he should be accountable for his own behavior, which is completely under his control.[164]

1. Background: Policy Behind IWH—Recognizing that the nature of the lease has changed over time and that there is a power imbalance between landlord and tenant, courts have imposed an implied warranty of habitability on residential leases.[165] When imposing the IWH, courts have noted that the conception of the lease was outdated. Historically, leases concerned the conveyances of real property premised on a business relationship between landowners and farmers.[166] Accordingly, the "value of the lease to the tenant [was] the land itself."[167] Today, the landlord still generates a profit through rentals, but the importance of a residential lease for the tenant is to obtain a habitable dwelling.[168] It is "more than mere delivery of possession and the fixing of rent."[169] As the D.C. District Court explained in Javins v. First National Realty,

> When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services[,] a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable

164. While some leases have exculpatory clauses limiting the landlord's liability for injury to the tenant, a discussion about their impact is beyond the scope of this Article. For an examination of exculpatory provisions in residential leases as violative of public policy, see Karen A. Read, *Public Policy Violations or Permitted Provisions?: The Validity of Exculpatory Provisions in Residential Leases*, 62 MO. L. REV. 897 (1997).

165. Unlike residential leases, a warranty of habitability is not implied in commercial leases according to the law of most states. *See, e.g.*, B.W.S. Invs. v. Mid-Am Rests., Inc., 459 N.W.2d 759 (N.D. 1990); Hong v. Estate of Graham, 70 P.3d 647 (Haw. 2003); J.B. Stein & Co. v. Sandberg, 419 N.E.2d 652 (Ill. App. Ct. 1981)(finding that the implied warranty of habitability does not extend to commercial leases); Russell-Stanley Corp. v. Plant Indus., Inc., 595 A.2d 534 (N.J. Super. Ct. Ch. Div. 1991). However, one Texas court of appeals has imposed the implied warranty of habitability on commercial leases. Parts Indus. Corp. v. A.V.A. Servs., Inc., 104 S.W.3d 671 (Tex. App. 2003).

166. Javins v. First Nat'l Realty, 428 F.2d 1071, 1074 (D.C. Cir. 1970).

167. *Id.*

168. Kline v. Burns, 276 A.2d 248 (N.H. 1971).

169. King v. Moorehead, 495 S.W.2d 65, 70 (Mo. Ct. App. 1973).

plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[170]

Furthermore, the unequal bargaining power between the parties mandated a better remedy. Although legislatures provided tenants with some protection through housing codes,[171] as the New York Court of Appeals observed, "until development of the [implied] warranty of habitability in residential leases, the contemporary tenant possessed few private remedies and little real power, under either the common law or modern housing codes, to compel his landlord to make necessary repairs or provide essential services."[172] Therefore, consistent with the expectations of the parties, courts have reasoned that the common law basis for regarding a lease as a conveyance is outdated.[173] Instead, a lease should be interpreted more in line with contract principles in order to "reflect contemporary community values and ethics."[174]

2. "Safe" Under Criminal Acts and Lead Paint—Recognizing a landlord's sexual harassment of a tenant as a breach of the implied warranty of habitability is consistent with the IWH's policy that the landlord provide a "safe" living environment, including protection from the criminal acts of third parties and the absence of lead paint.

Under negligence theory, courts have imposed liability on landlords who failed to protect tenants from the criminal acts of third parties where the landlord had control over the premises or where the landlord created the danger that led to the tenant's injury. In *Kline v. 1500 Massachusetts Avenue Apartments Corp.*, the D.C. Circuit Court first imposed liability upon a landlord for the criminal acts of a third party after Sarah Kline was robbed and criminally assaulted in the common hallway of the 585-unit apartment building.[175] Although conceding that the "landlord is no insurer of

170. *Javins*, 428 F.2d at 1074. When imposing the IWH into leases, other states have cited *Javins*'s language. *E.g.*, *King* 495 S.W.2d at 70 (imposing the IWH on Missouri leases); Marini v. Ireland, 265 A.2d 526 (N.J. 1990) (imposing the IWH on New Jersey residential leases).

171. Reste Realty Corp. v. Cooper, 251 A.2d 268, 272 (N.J. 1969) (noting that "an awareness by legislatures of the inequality of bargaining power between landlord and tenant in many cases, and the need for tenant protection, has produced remedial tenement house and multiple dwelling statutes").

172. Park West Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1292 (N.Y. 1979).

173. *Javins*, 428 F.2d at 1074–75.

174. *Id.* (quoting Whetzel v. Jess Fisher Mgmt. Co., 282 F.2d 943, 946 (D.C. Cir. 1960)).

175. 439 F.2d 477 (D.C. Cir. 1970) (MacKinnon, J. dissenting). As B.A. Glesner notes, Sarah Kline "was not the first to advance the common premises theory as the basis of a landlord's liability for criminal activities, only the first to succeed." B.A. Glesner, *Landlords as*

his tenants' safety,"[176] the court found the defendant liable because criminal activity was "entirely predictable."[177] Tenants, including Kline, had notified the landlord of previous, similar criminal attacks on tenants, yet the landlord did nothing.[178] Furthermore, the landlord, having exclusive control over the common areas, was the only one in a position to change security measures,[179] while the tenants' ability to "provide for [their] own protection ha[d] been limited in some way by [their] submission to the control of the" landlord.[180] Therefore, the court found that the leases implied the duty to "provide those protective measures which are within [the landlord's] reasonable capacity"[181] so as to "minimize the risk to his tenants."[182]

Courts have also imposed liability where the landlord creates the danger or places the tenants at greater risk than they would normally face. In *Kendall v. Gore Properties, Inc.*, the D.C. Circuit Court found a landlord could be held liable for his failure to perform a background check on a worker who later strangled a tenant while painting her apartment.[183] Although recognizing that a landlord is not the "guarantor of the safety of his tenant," the Court acknowledged that the landlord had a duty "not to create an unsafe condition in the premises either permanent or temporary by any affirmative action on his part."[184]

Similarly, the Supreme Court of Missouri found that a landlord could be held liable after an intruder used the fire escape to enter the third floor apartment of a tenant and sexually assault her.[185] The tenant had previously explained to the landlord that the latch on her window was broken and that she feared for her safety.[186] The Court emphasized that the landlord was the only one with control over the fire escape and that such a risk was foreseeable.[187] The landlord was therefore guilty of "active negligence" by creating a risk "which would not otherwise have existed by causing the fire

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Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises, 42 CASE W. RES. L. REV. 679, 689 n.36 (1992).

176. *Kline*, 439 F.2d at 481.
177. *Id.* at 480.
178. *Id.* at 479.
179. *Id.* at 480, 482.
180. *Id.* at 483.
181. *Id.* at 485.
182. *Id.* at 484.
183. 236 F.2d 673 (D.C. Cir. 1956).
184. *Id.* at 680 (quoting Bailey v. Zlotnick, 149 F.2d 505, 506 (D.C. Cir. 1945)).
185. Aaron v. Havens, 758 S.W.2d 446 (Mo. 1988).
186. *Id.* at 447.
187. *Id.* at 448.

escape to be constructed in such a way to make the tenant more vulnerable to attack from a person unlawfully entering the apartment than she would have been otherwise."[188]

Likewise, in *Stubbs v. Panek*, the Missouri Court of Appeals reversed a lower court's grant of summary judgment to a landlord who refused to repair a defective door lock or to allow the tenant to do so.[189] The defect allowed an intruder to enter, abduct the tenant's child, and eventually assault and murder the child.[190] In finding for the tenant, the Court stressed the tenant's "obvious special vulnerability . . . combined with the landlord's obstinate refusal to allow the tenant to repair the lock."[191]

Unlike the neighborhood or other external factors not within the landlord's direct control, the landlord's behavior towards the tenant is completely within his control. Some commentators have described a landlord's sexual harassment as a criminal act similar to solicitation for prostitution[192] or extortion.[193] Therefore, if the landlord is obligated to protect tenants from the criminal acts of third parties in the building as an extension of his duty to provide safe premises,[194] it is logical to extend this duty to behavior that is entirely under his control and sufficiently analogous to a criminal act. Furthermore, as the courts in *Kline* and *Stubbs* recognized, a tenant surrenders some loss of control over the premises by signing the lease. In sexually harassing a tenant, a landlord abuses this loss of control.

Additionally, by sexually harassing a tenant, a landlord creates danger. Even in cases that reject negligence claims against landlords because the harm was not foreseeable, some courts still recognize liability for danger the landlord creates. For example, in *Kopoian v. George W. Miller & Co.*, the Missouri Court of Appeals denied a tenant's argument that the landlord's negligence in failing to provide adequate lighting, to trim overgrown bushes near the front entrance, and to provide a deadbolt lock caused a robber

188. Kopoian v. George W. Miller & Co., 901 S.W.2d 63, 69 (Mo. Ct. App. 1995) (Kennedy, J., dissenting).

189. 829 S.W.2d 544 (Mo. Ct. App. 1992).

190. *Id.* at 546.

191. *Kopoian*, 901 S.W.2d at 70 (explaining the court's holding in *Stubbs*).

192. Adams, *supra* note 1, at 60.

193. *See generally* Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213 (1994) (arguing that quid pro quo sexual harassment is a form of extortion).

194. It should be noted, however, that in both New Hampshire and Virginia, landlords were not held liable for attacks strangers perpetrated on female tenants or guests in complex parking lots. Deem v. Charles E. Smith Mgmt., Inc., 799 F.2d 944 (4th Cir. 1986); Walls v. Oxford Mgmt. Co., 633 A.2d 103 (N.H. 1993).

to assault him.[195] Instead, the Court reasoned that the attack was not foreseeable.[196] Still, the Court noted that a duty may exist "when the misfeasance of the landlord creates a circumstance of extraordinary danger or enhances the risk of the tenant's victimization beyond the risk of crime victimization generally."[197] Similarly, in *Cooke v. Allstate Management Corp.*, the tenant claimed negligence against the landlord for leaving a ladder near her apartment that an intruder used to climb into her balcony and stab her several times in an attempt to rape her.[198] Ultimately, a landlord who sexually harasses a tenant does more than enhance the risk to the tenant: he causes immediate harm.

Although courts have imposed a duty on the landlord to provide safe premises under negligence theories, a tenant could, building on a New Jersey Supreme Court decision, argue that a failure to protect from foreseeable criminal acts is a per se violation of the implied warranty of habitability. In *Trentacost v. Brussel*,[199] the New Jersey Supreme Court held a landlord negligent for failing to secure the front entrance of an apartment building after an intruder mugged a sixty-one year old female tenant in the hallway.[200] The court proposed breach of the implied warranty of habitability as an alternative theory.[201] The court noted that tenants reasonably expect they will receive "quarters suitable for living purposes"[202] and "facilities vital to the use of the premises."[203] Moreover, echoing the reasoning in *Kline*, the court noted the impracticality of requiring a tenant to provide such security measures because no individual tenant has control over common areas and, in a mobile society, no tenant should be required to invest the money required.[204] Therefore, the doctrine of IWH "obliges [the landlord] to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises."[205]

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195. 901 S.W.2d 63 (Mo. Ct. App. 1995).

196. *Id.* at 74.

197. *Id.* at 67.

198. 741 F. Supp. 1205, 1206 (D.S.C. 1990).

199. 412 A.2d 436 (N.J. 1980).

200. *Id.* at 438.

201. *Id.* at 443.

202. *Id.* at 442 (quoting Marini v. Ireland, 265 A.2d 526, 533 (1970)).

203. *Id.* (quoting *Marini*, 265 A.2d at 534 (imposing the IWH on New Jersey residential leases)).

204. *Id.* at 442.

205. *Id.* at 443. Although the court later limited *Trentacost* to dangers the landlord was aware of, this poses no problem for a harassed tenant because the landlord would have engaged in the behavior himself. Ruiz v. Kaprelian, 731 A.2d 118, 122 (N.J. Super. Ct. App. Div. 1999).

Moreover, courts that have narrowly defined "safe" to be about structural defects rather than overall tenant safety have done so in the context of determining landlord liability for the criminal acts of third parties where the conduct was not foreseeable.[206] These courts limit "safe" to concern health and safety codes and sanitary conditions. In doing so, these courts ignore the overall purpose behind the regulations: to protect the general health and well-being of tenants who are unable to individually bargain for these goods themselves. A tenant depends upon a landlord to act in her interest so as to protect her from unknown dangers, whether those dangers are a leaky roof or an unlocked door. Structural defects relate to safety and in some cases are interchangeable. Faulty wiring is illegal not because it is unsightly, but because it presents a fire risk that can lead to lost lives as well as property damage. Narrowly defining "safe" in this way may reflect more of a reluctance to impose responsibility for overall "crime control" upon landlords[207] and a concern with higher rental costs ultimately being passed on to the tenant.[208]

In addition to requiring landlords to provide "safe" premises by preventing the foreseeable criminal acts of third parties or by not creating dangers themselves, landlords must also not provide housing that they know contains lead paint.[209] Although lead paint poses health risks, especially to young children, the presence of lead paint in and of itself is not a structural defect in the same sense as a faulty wire. The tenant could still reside in the premises, unlike premises with a defective sanitation system, because lead paint does

206. *See, e.g.*, Deem v. Charles E. Smith Mgmt., Inc., 799 F.2d 944, 946 (4th Cir. 1986) ("The Virginia Residential Landlord and Tenant Act does not define a 'safe condition' . . . or 'safety'. . . . We believe, however, that those terms refer to the protection of the tenant from injuries caused by failures of the building—collapsing stairs, faulty walls, dangerous windows."); Williams v. William J. Davis, Inc., 275 A.2d 231, 232 (D.C. 1971) ("The terms 'safe' and 'safety' when used in the Regulations refer to safety from structural defects, unsanitary conditions, fire hazards, and the like, and have no application to safety from criminal acts of third parties."); Walls v. Oxford Mgmt. Co., 633 A.2d 103, 104, 107 (N.H. 1993) ("We hold that the warranty of habitability implied in residential lease agreements protects tenants against structural defects, but does not require landlords to take affirmative measures to provide security against criminal attack.").

207. For a more detailed discussion, see Glesner, *supra* note 158 (criticizing what the author feels is a trend toward increasing liability on landlords instead of what should be more appropriately dealt with by the police).

208. *Deem*, 799 F.2d at 946 ("If landlords face such liability, tenant safety might be greater, but rents may be higher, and apartment units, especially in urban centers, may become more scarce.").

209. 42 U.S.C. §§ 4852d(2)(1)(B) (2001) (requiring that landlords provide notice to renters about the presence of any known lead paint in properties). For an overview of federal and state legislation concerning lead paint, see Shana R. Cappell, *Lead Paint Poisoning and the Resource Conservation and Recovery Act: A New Partnership for the Twenty-First Century*, 35 COLUM. J.L. & SOC. PROBS. 175, 178–80 (2002).

not compromise the safety or health of anyone else not living in the unit.

Imposing liability on landlords for the foreseeable criminal behavior of third parties and the presence of lead paint in the home not only indicates a growing recognition that housing means "safe" housing, but it is also consistent with the trend away from the general principle of "caveat emptor," or, in this case, "caveat rentor." A tenant is no longer expected to be aware of hidden defects in the premises and can no longer waive the implied warranty of habitability in the majority of jurisdictions.[210] Therefore, the expansion of the IWH to include the freedom from sexual harassment is consistent with the recognition that housing is not merely four walls and a ceiling, but must also be a home that does not threaten the tenant's health or safety.

3. The Implied Warranty of Freedom from Sexual Harassment—Extending the implied warranty of habitability to include an environment free of sexual harassment is consistent with the policy behind the IWH. Although many courts require a housing code violation for a tenant to claim breach of the IWH, this conflicts with general contract principles. It is also symptomatic of the confusion within landlord-tenant law surrounding the dual conveyance/contract nature of a lease.[211]

According to Edward Chase and E. Hunter Taylor, Jr., even though courts originally defined implied warranty of habitability as a contractual matter, many analyze it less stringently than they would a contract.[212] As they note, "property analysis imposes a more demanding standard of material breach than does contract law."[213] In their opinion, the doctrine's growth has been retarded because the IWH is still within the context of property thinking.[214] To illustrate their point, Chase and Taylor claim that the IWH could have developed in three ways. First, courts could have treated a lease like any other contract and extended the abatement remedy to any material breach of the contract.[215] Second, abatement could be available only for material breaches affecting the habitability, based on the circumstances surrounding the lease and the parties'

210. *But see* Bedell v. Los Zapatistas, Inc., 805 P.2d 1198 (Colo. Ct. App. 1991); Holmes v. Rosner, 346 S.E.2d 37 (S.C. Ct. App. 1986).

211. Chase & Taylor, *supra* note 158, at 693.

212. *Id.* at 642–65.

213. *Id.* at 615.

214. *Id.* at 642.

215. *Id.* at 644.

expectations of what habitability of the premises included.[216] Third, the IWH could cover only bare minimum standards, so that abatement can only be used in cases where such minimums do not exist.[217] As Chase and Taylor note, courts have by and large chosen the third route.[218]

In evaluating a breach of contract, the starting point for the remedy should be the expectations of the parties. Landlord and tenant receive and expect different things. While the landlord views the rental as a business transaction, the tenant sees the lease as a promise to maintain a home.

To the landlord, renting is a financial transaction within a larger investment. The landlord earns profits and receives tax breaks, such as the ability to deduct "wear and tear" costs of the building over twenty-seven-and-a-half years as depreciation.[219] Additionally, if the landlord borrowed money to purchase the property, any amount of money he spends to pay off the interest can count as a deduction.[220] Finally, the landlord may be entitled to a mortgage interest deduction if he lives in the building and may face no tax on income from its sale.[221]

The tenant, on the other hand, gains none of these advantages. She cannot deduct interest from mortgage payments as a homeowner can. Although the landlord risks that the property investment might fail, an especially grave consequence if the landlord depends on the property to make a living, it is still a business transaction. By contrast, the lease is about a combination of goods and services for the tenant and is ultimately about a home, not simply a physical structure that temporarily changes hands.

By suggesting sex in exchange for rent or taking advantage of a tenant, a landlord commits an illegal act, changes the entire nature of the transaction, and yet expects the harassed tenant to uphold her original agreement. Not merely incidental, the IWH is the centerpiece of the transaction.[222] A rental space means little if it is

216. *Id.*

217. *Id.*

218. *Id.* at 646.

219. 26 U.S.C. § 168(c) (2002).

220. 26 U.S.C. § 163(a) (2002).

221. 26 U.S.C. §§ 121(a), 163(h)(3)(A) (2002) (providing that up to $250,000 for individuals and $500,000 for couples filing jointly on the sale of a primary residence may be excluded from gross income for federal tax income purposes).

222. Critics of the implied warranty of habitability argue that requiring base line housing standards can ultimately hurt low income tenants by removing housing options from the market; instead, tenants should be free to negotiate for lower rents in exchange for renting housing that is not perfect. *See, e.g.*, Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 889 (1975). However, unlike a broken window or a leaky faucet, sexual harassment is outside of the market. *But see* Anthony T. Kronman,

unsafe and uninhabitable. Therefore, allowing a harassed tenant to use the IWFSH provides her with non-judicial recourse to stop the behavior. Also, unlike a breach of the covenant of quiet enjoyment, the IWFSH does not require that the harassed tenant leave the premises.

C. Using IWH Offensively

In addition to providing a tenant with a shield— a source of protection against unfair landlord actions— the implied warranty of habitability also serves as a sword that the tenant may use offensively to sue for damages.[223] Courts have allowed the offensive use of the IWH by finding that since the lease is a contract, damages are available for breach.[224] As the Appellate Court of Illinois recognized, "[i]t would be an anomalous result to deny a tenant a remedy when he has paid his rent where, on the other hand, he could use the breach of the implied warranty as a defense in a suit for rent brought by the landlord."[225] In this way, the IWH is a flexible remedy. It presents the tenant with several options: withhold rent to force the landlord to change his behavior, employ the IWH as a counterclaim to the landlord's eviction action, or use the IWH offensively to sue the landlord for breach of the IWH and to obtain damages. However, several courts have noted that the tenant must choose either rent abatement or sue for breach.[226]

Most courts require a tenant to notify the landlord with actual or constructive notice of the defect and provide some reasonable time to repair before claiming breach of the IWH.[227] Courts are

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Paternalism and the Law of Contracts, 92 YALE L.J. 763, 766 (1983) (acknowledging the implied warranty of habitability as a "paternalistic restriction on contractual freedom," but arguing for its necessity on the basis of economic efficiency and distributive justice).

223. George Washington Univ. v. Weintraub, 458 A.2d 43, 46 (D.C. 1983) (noting that "the implied warranty of habitability may be used as a sword [as well as a shield]"). For a more in-depth discussion of this case, see C. Stephen Lawrence, George Washington Univ. v. Weintraub*: Implied Warranty of Habitability As a (Ceremonial?) Sword*, 33 CATH. U. L. REV. 1137 (1984).

224. *Weintraub*, 458 A.2dat 46; Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Fair v. Negley, 390 A.2d 240 (Pa. 1978).

225. Jarrell v. Hartman, 363 N.E.2d 626, 628 (Ill. App. Ct. 1977).

226. *E.g.*, *Weintraub*, 458 A.2d at 46.

227. *See Id.* at 48; *see also* Copeland v. People's Sav. Bank, No. CV87-23-90-76-5, 1993 WL 55284 (Conn. Super. Ct. Feb. 16, 1993) (holding that tenant must prove landlord has actual or constructive notice of presence of lead paint); Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972) (finding that tenant must give landlord notice of the defects); Dwyer v. Skyline Apartments, Inc., 301 A.2d 463 (N.J. Super. Ct. App. Div. 1973), *aff'd* 311 A.2d 1 (N.J. 1973)

reluctant to impose strict liability upon a landlord for a condition that he may not know exists, whereas a tenant living in the premises is in the best position to see such defects and communicate them to the landlord. Unlike a tenant, a landlord may not be intimately aware of structural changes in the apartment, such as a ceiling that begins to leak. However, this additional requirement upon tenants is inconsistent with contract principles. As the court in *Jarrell* noted, "[i]t would be strange indeed to require a tenant to give a landlord notice of what the law is with reference to the landlord's duty or duties . . . we are unaware of any common law contract principle which requires the nonbreaching party to fulfill such conditions precedent prior to suit against the breaching party."[228] Therefore, the imposition of notice is another example, as Chase and Taylor claim, of courts categorizing a residential lease as a contract but then imposing different, non-contractual requirements upon the tenant.

Unlike a defective pipe or peeling paint, a harassing landlord is aware of sexual harassment because he is the one creating the defect. However, given that sexual harassment cases are fact-sensitive, often requiring the fact-finder to decipher the evidence cast in "he said, she said" terms,[229] the harassed tenant should notify her landlord of the unwelcome conduct. This will serve to deter such behavior from recurring or escalating. Also, notice helps the tenant combat a problem of proof at court; a certified letter to the landlord (with a copy kept for herself) or a third-party witness would surely prove persuasive.

(denying recovery to tenant injured by defective hot water faucet because landlord had no knowledge of the latent defect); Winston Props. v. Sanders, 565 N.E.2d 1280 (Ohio Ct. App. 1989) (holding that landlord needs to have actual or constructive knowledge of the presence of lead paint, not just peeling paint); Fair v. Negley, 390 A.2d 240 (Pa. Super. Ct. 1978) (stating that tenant must give landlord notice of defective conditions); State Farm Fire & Casualty Co. v. Home Ins. Co., 276 N.W.2d 349 (Wis. Ct. App. 1979) (allowing tenant to recover damages for personal property losses caused by frozen plumbing where landlord had notice of the defective condition).

228. Jarrell v. Hartman, 363 N.E.2d 626, 628 (Ill. App. Ct. 1977) (finding that tenant does not need to give the landlord notice and the chance to repair before claiming a breach of the IWH); *see also* Bencosme v. Kokoras, 507 N.E.2d 748, 749 (Mass. 1987) (finding that the landlord does need to be aware of the presence of lead paint, but can be held strictly liable for its presence when children under six live at the premises).

229. For court treatment of "he said, she said" dilemmas in employment cases, see Casiano v. AT&T Corp., 213 F.3d 278, 285 (5th Cir. 2000) ("In this evenly balanced, no-other-evidence, 'he said/she said' case, either party could prevail at trial, depending solely on which one the trier of fact believes after hearing the testimony and observing the demeanors of the protagonists on the witness stand."); Kunin v. Sears Roebuck & Co. 175 F.3d 289, 292 (3d Cir. 1999) ("Although stating that the evidence supporting Kunin's claims did not appear 'overwhelming,' the court found that because many of the issues boiled down to 'he said, she said' disputes, the entry of summary judgment was inappropriate.").

D. IWFSH as Per Se Intentional Infliction of Emotional Distress

Sexual harassment as a breach of the implied warranty of habitability should also qualify as per se intentional infliction of emotional distress ("IIED"). The prima facie elements of a claim for intentional infliction of emotional distress are "(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress."[230] In discussing a breach of the implied warranty of habitability, courts have found landlords liable for intentional infliction of emotional distress where they had knowledge of the defect and did nothing to correct it or where they abused their position of power over the tenant. Furthermore, landlords have been held liable for IIED for general harassment of a tenant. One court has also suggested the use of IIED in sexual harassment claims.[231] Therefore, combining courts' treatment of IIED in harassment claims with the possibility that a breach of implied warranty can constitute IIED means that a landlord's sexual harassment of a tenant qualifies as per se intentional infliction of emotional distress.

Not only have some courts allowed damages for intentional infliction of emotional distress when the landlord abused his or her position of power over the tenant, but others have found IIED based on a breach of the implied warranty of habitability where the landlord knew of a defect and failed to remedy it. In *Fair v. Negley*, the Pennsylvania Superior Court recognized that a breach of the IWH may qualify as IIED due to the power imbalance between landlord and tenant.[232] Pointing to the Restatement (Second) of Torts, the court noted that the commentary to section 46 states that the "extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."[233] The Restatement then cites

230. Newby v. Alto Riveria Apartments, 131 Cal. Rptr. 547 (Ct. App. 1976), *rev'd on other grounds, by* Marina Point Ltd. v. Wilson, 180 Cal. Rptr. 496 (Ct. App. 1982) (overruling *Newby*'s treatment of California's Unruh Act).

231. *See* text accompanying notes 238–41.

232. 390 A.2d 240, 246 (Pa. Super Ct. 1978).

233. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965).

landlords as an example of such a position.[234] Finally, the Court noted that a landlord had been held liable for intentional infliction of emotional distress for wrongful eviction after tenants complained of needed repairs and the landlord responded by raising the rent by an unreasonable amount.[235] Similarly, in *Grundberg v. Gill*, the Massachusetts Appeals Court found for tenants claiming breach of the IWH and IIED after the landlord refused to repair a septic tank that had flooded into the house and prevented the tenants from being able to use water.[236] The trial judge described the situation as "abominable" and "outrageous" and the cause of emotional distress to the tenants because the landlord knew of the situation for over seventeen months and did nothing to remedy it.[237]

Landlords have also been held liable for intentional infliction of emotional distress for harassment. For example, in *Newby v. Alto Riviera Apartments*, two building managers threatened a tenant with eviction after she gathered other tenants' signatures for a petition calling for a meeting with the owner to discuss a proposed rent increase.[238] One manager gave Ms. Newby three days to vacate the premises.[239] Although noting that "mere insulting language, without more, [did] not constitute outrageous conduct" under the Restatement, the Court still found the harassment qualified as intentional infliction of emotional distress due to the nature of the landlord-tenant relationship.[240] The Court defined outrageous behavior under the IIED as when "a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress."[241] The Court found that the "insulting language was part of a course of harassing, humiliating, and intimidating conduct."[242] It also regarded the behavior as outrageous because the defendants

234. *Id.*

235. *Fair*, 390 A.2d at 246 (citing Aweeka v. Bonds, 97 Cal. Rptr. 650 (Cal. Ct. App. 1971)).

236. No. 99-P-1390, 2002 WL 31834779 (Mass. App. Ct. Dec. 18, 2002).

237. *Id.* The Court granted treble damages for both the IWH breach and the IIED. *Id.*

238. 131 Cal. Rptr. 547, 550 (Ct. App. 1976).

239. *Id.* at 553.

240. *Id.* (citing RESTATEMENT (SECOND) OF TORTS, § 46(d) (1965)).

241. *Id.* at 553, (citing PROSSER, LAW OF TORTS, 57–58 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS, § 46(e), (f) (1965)).

242. *Id.* at 554.

"acted knowingly and unreasonably with the intention to inflict mental distress."[243]

More specifically in the sexual harassment context, the tenant in *Raune v. Murray* alleged intentional infliction of emotional distress on the basis that the landlord knew she suffered from psychological problems and that he used this knowledge to take advantage of her.[244] Upon entering the plaintiff's apartment to collect rent one month, the landlord made sexual advances to Ms. Raune. In response to the stress, Ms. Raune entered a "disassociate state" that the landlord used as his opportunity to sleep with her.[245] After the incident, the landlord continued to harass Ms. Raune and even used his master key to enter her apartment.[246] Eventually Ms. Raune called the police for assistance.[247] In reversing summary judgment for the landlord, the South Dakota Supreme Court hinted that another possible basis for an IIED claim was the landlord's abuse of his position of power under the Restatement, rather than his knowledge of the plaintiff's mental state.[248]

A landlord's sexual harassment of a tenant qualifies as per se intentional infliction of emotional distress because, like *Grinberg* and *Newby*, it is done with the landlord's personal knowledge. The landlord's sexual harassment qualifies as both outrageous and extreme because the landlord abuses his position of power over the tenant. The threat of eviction over a tenant is great. Finally, the landlord's actions are intentional. The landlord knows that threatening eviction or even significantly changing the tenant's living circumstances by not making repairs will have immediate and important effects upon the tenant. In addition, pursuing a claim of IIED under breach of the IWH allows for the possibility of punitive damages based on breach of contract.[249]

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243. *Id.* at 553.

244. 380 N.W.2d 362 (S.D. 1986), *overruled by* Bass v. Happy Rest. Inc., 507 N.W.2d 317 (S.D. 1993) (determining what qualifies as intentional infliction of emotional distress).

245. *Id.* at 363.

246. *Id.*

247. *Id.*

248. *Id.* at 364.

249. Miller v. C.W. Myers Trading Post, Inc., 355 S.E.2d 189, 195 (N.C. Ct. App. 1987) (rejecting claim for punitive damages based on implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct); H & R Bernstein v. Barrett, 421 N.Y.S.2d 511, 513 (N.Y. Civ. Ct. 1979) (holding that damages for breached warranty of habitability cannot include damages for embarrassment or anxiety); Hilder v. St. Peter, 478 A.2d 202, 210 (Vt. 1984) (finding that damages may be awarded for the tenant's discomfort or annoyance caused by the breach and that punitive damages may be appropriate when there is a willful and wanton or fraudulent breach, demonstrated "by conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or

E. Lease Notice Provision

To inform tenants of their rights as well as to put landlords on notice, all leases should state that sexual harassment is a violation of the lease, in a manner similar to the current requirement that landlords disclose the dangers of lead paint.[250] This notice would provide a tenant with a list of options she can pursue if she is being harassed. The notice would also contain the contact information of where a tenant may call if she faces a sexual harassment problem, such as a local legal services organization that is well-informed regarding housing sexual harassment and prepared to handle questions and complaints.[251] The sexual harassment addendum would be a separate part of the lease, thereby calling special attention to it, in a manner similar to the current lead paint disclosure statement.[252]

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even by conduct manifeseting . . . a reckless or wanton disregard of [one's] rights"); *cf.* Allen v. Simmons, 394 S.E.2d 478 (N.C. Ct. App. 1990) (denying tenant's claim for intentional infliction for emotional distress because she failed to make out a cause of damages). In *Allen*, the tenant argued that she suffered emotional distress as a result of being "trapped in [a] situation with malfunctioning plumbing, no heat, rats and dangerously defective wiring." *Id.* Furthermore, the landlord intended to cause distress because he continued to demand rent even after three city orders condemned the property. *Id.* at 484.

250. The Residential Lead-Based Paint Hazard Reduction Act of 1992 requires landlords to inform tenants of any "known" dangers of lead paint in the unit, and provide any inspection records concerning the presence of lead paint and an EPA approved pamphlet detailing the dangers of lead paint. 42 U.S.C. § 4851 (1992).

251. *See, e.g.*, Charles Laszewski, *Minnesota, U.S. Agencies are Faulted in Tenant-Harassment Cases*, ST. PAUL PIONEER PRESS, Aug. 26, 2002, at B1 *available at* 2002 WL 26062259 (noting specific examples of legal services attorneys in Minnesota who have experience, or work exclusively with tenants facing sexual harassment at home).

252. The federal lead paint disclosure addendum to the lease provides:

> Addendum to Lease Agreement between parties signed on _____ *[date]*, pertaining to the lease of property at _____ *[address]*, _____ *[city]*, _____ County, _____ *[state]*.
>
> LEAD WARNING STATEMENT
>
> Housing built before 1978 may contain lead-based paint, paint chips, and dust, which can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre- 1978 housing, landlords must disclose the presence of known lead-based paint and/or lead-based paint hazards in the dwelling. Tenants must also receive a federally-approved pamphlet on lead poisoning prevention.
>
> LANDLORD'S INITIAL DISCLOSURE
>
> (a) Presence of lead-based paint and/or lead-based paint hazards (check one below):

A sample IWFSH notice statement might provide:

"Sexual harassment of a tenant by a landlord, building manager, or any other agent(s) of the property owner is a material breach of this lease. It interferes with the enjoyment of the property and the ability of the tenant to feel safe in the home. A tenant who feels he or she has been harassed has three options:

1. withhold rent to stop the behavior and give reason(s) for the lack of rent payment(s);

[ ] Known lead-based paint and/or lead-based paint hazards are present in the housing.

[ ] Landlord has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

(b) Records and reports available to the landlord (check one below):

[ ] Landlord has provided the tenant with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing. List documents: _____.

[ ] Landlord has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

TENANT'S INITIAL ACKNOWLEDGMENT

(c) [ ] Tenant has received copies of all information listed under (b) above.

(d) [ ] Tenant has received the pamphlet "Protect Your Family from Lead in Your Home."

REAL ESTATE LICENSEE'S INITIAL ACKNOWLEDGMENT

(e) [ ] Real estate licensee has informed the landlord of the landlord's obligations under the Residential Lead-Based Paint Hazard Reduction Act of 1992, and is aware of licensee's responsibility to ensure compliance.

CERTIFICATION OF ACCURACY

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information provided by the signatory is true and accurate.

[*Signatures*]

11B AM. JUR. 2D *Leases of Real Property* § 161:1089 (2003).

2. sue the landlord for breach of the lease to recover damages; or

3. notify the landlord that if the situation is not corrected within a reasonable amount of time, a termination of the lease without any further obligations will result.

This should be done as soon as possible, preferably in writing.

A tenant who feels he or she is being harassed may contact the following agencies for assistance."

Finally, the tenant could also be provided with an informational pamphlet discussing sexual harassment in more detail.[253]

The very act of providing notice alerts a landlord that a tenant is aware that sexual harassment is a breach of the lease. Therefore, it may discourage the landlord from sexually harassing tenants. Additionally, the notice aspect of the implied warranty of freedom from sexual harassment (IWFSH) educates the public about the existence of the problem. As a result, if a tenant sees the landlord sexually harassing a fellow tenant, the neighbor can assist by acting as a witness or by telling the harassed tenant where she can get help. By publicly condemning sexual harassment of tenants by landlords, written notice could help to remove some of the shame sexual harassment victims feel. It may encourage those who are being sexually harassed to challenge the landlord or, at the very least, to no longer suffer in isolation. This "community awareness" aspect could also help expose landlords who harass more than one tenant.

Some may argue that providing notice defeats the "implied" nature of the IWFSH. Although in theory the freedom from sexual harassment, as it is an implied warranty, should not have to be stated, the addendum does not defeat the implied nature of the warranty. Instead, notice of the IWFSH gives information about the expected behavior of the parties, in a similar fashion to the current practice of leases stating that a landlord must provide adequate heat. In this way, the notice works in tandem with, rather than defeats, the "implied" nature of the implied warranty.

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253. For an example of a guide to further resources and general information about sexual harassment, see LEGAL MOMENTUM (formerly NOW Legal Defense & Educ. Fund), LEGAL RESOURCE KIT: SEXUAL HARASSMENT IN HOUSING (2003), *at* http://www.legalmomentum.org/issues/vio/FactsheetPage.shtml (on file with the University of Michigan Journal of Law Reform).

F. Future Deterrence

An effort must be made to deter landlords from sexually harassing tenants. Although criminalizing sexual harassment recognizes it as a societal harm and may provide more exposure to the problem, a better option is the temporary suspension of a landlord's rental license.

Having a criminal sanction involves the state as an advocate for the tenant and provides the tenant with a guide through the legal system; however, this potential solution may solidify the loss of control the tenant feels because she will have no control over the direction of the prosecution. From a practical standpoint, criminalizing harassment will depend on the police and local prosecutor for enforcement. In comparison to violent crimes like murder, sexual harassment may likely be low on the enforcer's list of priorities, especially in a "high crime" area. Police sensitivity and educational training would also be necessary, similar to that needed for other "sensitive" crimes such as rape and domestic violence. Finally, any fine that results from a criminal charge goes to the state, not the victim. Ultimately, the victim is left with having possibly lost rent money she already paid for a place of no value along with now having no place to live.

Currently, an approach under civil law better serves the harassed tenant. Once a court finds that the landlord sexually harassed a tenant, the landlord's ability to collect rent from all of the properties should be temporarily suspended for a period of one to three months. Other tenants should be notified of the finding of harassment.[254] However, in determining the amount of time, the court should consider how suspending the landlord's power to collect rent might compromise his ability to compensate the harassed tenant, which would be the primary goal.

Ultimately, the temporary rental license suspension approach serves three purposes. First, it will deter the landlord from engaging in such behavior again. Second, it sends a message to other landlords that sexual harassment will not be tolerated and could have serious financial consequences.[255] Third, suspending

254. A discussion of the possible due process implications this might raise is beyond the scope of this Article.

255. Although several states have provisions revoking the licenses of professionals for sexual harassment, none concerns property owners. *See, e.g.*, OKLA. STAT. tit. 59, § 1370(A)(6) (Supp. 1994) (relating to psychiatrists); S.D. Codified Laws Ann. § 36-4-29, -30 (1992) (revoking a physician's license for sexual harassment); Vt. Stat. Ann. tit. 26, § 541

the landlord's ability to collect rent from all properties, rather than just the harassed tenant, emphasizes that sexual harassment is a societal harm.

Revoking the landlord's license temporarily, rather than permanently, recognizes the importance of deterrence while at the same time does not compromise other tenants' housing. The landlord who sexually harasses a tenant needs to be punished for violating that tenant's right to safe housing. Nevertheless, this needs to be balanced with other tenants' rights to safe housing. If a landlord's rental license were revoked altogether, the landlord could not collect rent and would most likely stop maintaining the premises. If a harassed tenant knew this would be the likely consequence of raising a sexual harassment complaint, the tenant might choose to suffer harassment in silence rather than risk hurting her neighbors. This potential negative effect on neighbors as innocent third parties also defeats the overall purpose of emphasizing sexual harassment as a societal harm.

CONCLUSION

Tenants enduring sexual harassment must have an immediate remedy that does not require litigation. The FHA fails this test. Some may argue that a shift away from bringing sexual harassment claims under the Fair Housing Act is not only too late, but that doing so may deprive tenants of any remedy the FHA may potentially provide. Although it is true that several jurisdictions recognize a cause of action for sexual harassment under the FHA, the simple fact remains that few individual tenants have *successfully* brought claims.[256] Additionally, courts have rejected tenants' attempts to have their sexual harassment claims evaluated independently of the Title VII framework.[257] Tenants lose because the FHA is inade-

(Supp. 1993) (disciplinary proceedings or revocation possible penalties for chiropractor); D.C. Code Ann. § 2-3305.14 (1994) (revoking health care professional's license for sexual harassment). For further discussion of possible penalties to professionals for harassment, see Baker, *supra* note 193.

256. *See* Laszewski, *supra* note 251, at 5 (noting that of the 214 fair housing cases the Department of Justice filed from 1997 to 2002, only nine concerned sexual harassment and noting that HUD resolves tenants claims in their favor 47 percent of the time).

257. *See, e.g.*, Grieger v. Sheets, No. 87 C 6567, 1989 WL 38707, at *5 n.4 (N.D. Ill. Apr. 10, 1989) ("*Sheets* argues that it is inappropriate to rely on Title VII cases like *Meritor* for the standards to apply in this Title VIII case. *See* Def.'s Reply at 3 n.1. However, both Title VII and Title VIII have the purpose of outlawing discrimination based on race, religion, national origin, and sex.").

quate and ill-suited to deal with the problem of sexual harassment. It neither addresses the problem nor provides an adequate remedy.

Sexual harassment in housing needs to be re-evaluated because the FHA also affects state claims. To date, thirty-four states currently have fair housing laws that are "substantially equivalent to Title VII."[258] Although state law pre-empts the FHA whenever there is a state statute that provides remedies that are equal to or greater than the federal remedy,[259] state courts have often looked to the federal courts' interpretation of the FHA in order to construe state laws with similar provisions. For example, in evaluating whether the Illinois Human Relations Act prohibits sexual harassment, the Illinois Court of Appeals first noted that the state law "closely parallels" § 3604 (b) of the FHA and then used the framework for evaluating sexual harassment claims begun in *Shellhammer.*[260] Similarly, the California Court of Appeals looked to § 3604 of the FHA to interpret the state's Fair Employment and Housing Act (FEHA).[261] In this way, it is likely that whichever remedy a tenant pursues—either under the FHA or a state statute—she will encounter the same way of evaluating the issue. Therefore, sexual harassment jurisprudence in the context of housing needs to be re-evaluated.

In adjudicating sexual harassment housing claims, the need to rely on Title VII arose from the fact there is no general law prohibiting sexual harassment. As Catherine MacKinnon has noted, sexual harassment is "a woman's common law" that developed from the courts rather than from a mobilized social consciousness.[262] By concentrating on crafting specific sexual harassment rules for different contexts rather than having an overall rule, society, and women in particular, are dependent on the judiciary to transfer sexual harassment jurisprudence from one

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258. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION app. C, at 1 (Supp. 2004) (listing Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia as those states with similar statutes).

259. 42 U.S.C.A. §§ 3610(d), 3612(a) (2000).

260. Szkoda v. Ill. Human Rights Comm'n, 706 N.E.2d 962, 968 (Ill. App. Ct. 1998).

261. Brown v. Smith, 64 Cal. Rptr. 2d 301, 305 (Ct. App. 1997) ("Although FEHA forbids sexual discrimination in housing, it does not enumerate sexual harassment as a type of discrimination subject to FEHA .... Since FEHA is remedial legislation which should be broadly construed to accomplish its stated purposes, and which should be read in conformity with federal housing law, we conclude the trial court did not err in making that determination.").

262. MacKinnon, *supra* note 22, at 815, 817.

context to another. This "borrowing" comes with disadvantages, as the imperfections in existing interpretations are transferred and thereby perpetuated. When a sexual harassment framework is transferred wholesale from one context to another—from the workplace under Title VII to the home under Title VIII to education under Title IX—existing biases are transferred as well. Nor does such wholesale transfer recognize the factual differences between the situations. Therefore, society would benefit from a law that prohibits sexual harassment in all contexts on the basis of equality.[263]

In the meantime, defining sexual harassment as a breach of the implied warranty of habitability—the implied warranty of freedom from sexual harassment ("IWFSH")—provides one promising avenue for relief. It gives the tenant the option to withhold rent or assert the breach offensively. In this way, it attempts to restore some of the lost sense of control the tenant experiences. Additionally, given the egregious and malicious nature of sexual harassment, it also qualifies as per se intentional infliction of emotional distress. Finally, by including a separate lease provision and removing the landlord's ability to collect rent from the rental properties for a period of time in the event of a finding of liability, it demonstrates to landlords that society will not tolerate such behavior.

The courts' failure to acknowledge sexual harassment in rental housing exposes society's reluctance to address issues of equality for those whom the problem affects most: women, the poor, and people of color. Additionally, any argument advancing a tenant's right to live free from sexual harassment evokes notions of what right, if any, to housing exists. Thus far, the United States has been reluctant to recognize housing as a civil or human right, but instead has focused on the problem of homelessness.[264] Therefore, in order for tenants to be successful in promoting their right to live free from sexual harassment, the best course of action at present is to rely on the implied warranty of habitability in those jurisdictions that have already recognized that housing is more than four walls and a ceiling and that landlords have responsibilities beyond conveying living space.

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263. For a discussion of Israel's recent adoption of a sexual harassment law and how it differs from that of United States, see Tzili Mor, *Law as a Tool for a Sexual Revolution: Israel's Prevention of Sexual Harassment Law—1998*, 7 MICH. J. GENDER & L. 291 (2001).

264. Curtis J. Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315 (1991) (arguing that proactive efforts need to be made in the United States to provide affordable housing rather than simply reacting to the problem of homelessness and proposing that affordable housing be seen as a fundamental right).