Articles

KNOWING YOUR PLACE: THEORIZING SEXUAL HARASSMENT AT HOME

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INTRODUCTION

The word "home" signifies a fundamental presumption in American culture: that an individual can preserve this one place—and no other—as private, secure, and inviolable. Sexual harassment in the home represents an invasion of this quintessentially private space. Sexual harassment at home raises different issues from sexual harassment at work, both because the concept of "home" is unique in the American cultural imagination, and because "home" is inextricably linked to cultural constructs of gender identity. Neither judicial opinions nor legal scholarship, however, have addressed adequately the importance of these concepts in context when discussing sexual harassment at home.

This Article considers the laws relating to sexual harassment in the home and the cases addressing it, and argues that the courts that have addressed sexual-harassment-at-home cases (1) have failed to examine context in determining liability, and (2) have failed to examine context in awarding damages. As a result of these failures, the application of established legal principles to sexual-harassment-at-home cases is fatally flawed. Current law cannot serve its presumed purposes: to compensate plaintiffs appropriately and to punish and/or deter

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defendants adequately. We must develop a more sophisticated and nuanced understanding of sexual harassment at home by examining the context in which the harassment occurred. Furthermore, we must recognize the cultural history and continuing significance of that context by examining the culturally constructed meaning of "home." This Article is concerned with the sexual harassment of women by unrelated men that occurs in or around the home where a threat to a woman's home is an integral part of the harassing act. Thus, by "sexual harassment at home," I mean sexual harassment that occurs in the context of the rental market rather than, for example, between spouses or housemates. Given that reality, this Article explores the ramifications of the sexual harassment of female renters by landlords and/or other individuals who are purportedly responsible for providing them with a safe living environment and fail to do so.

The doctrine of sexual harassment in the housing context is based on a relatively small number of cases.[1] Compared to the large body of case law

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1. To date, only five cases have been reported by the United States courts of appeals. *See* Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997) (upholding administrative finding that landlord sexually harassed a tenant); DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996) (ruling that landlord's single incident of sexual harassment did not create a hostile environment); United States v. Presidio Invs., 4 F.3d 805 (9th Cir. 1993) (ruling that the Fair Housing Amendments Act of 1988 applied retroactively to a claim of landlord sexual harassment); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993) (rejecting tenant's claims of disparate treatment gender discrimination, hostile environment, and quid pro quo theories of sexual harassment); Shellhammer v. Lewallen, No. 84–3573, 1985 WL 13505 (6th Cir. July 31, 1985) (rejecting tenant's claims on a hostile environment theory, but upholding their quid pro quo claim against defendant landlords).

Likewise, relatively few United States district courts have addressed such cases. *See* Williams v. Poretsky Management, Inc., 955 F. Supp. 490 (D. Md. 1996) (denying defendant's summary judgment motion where plaintiff alleged that defendant's employee sexually assaulted her in an elevator); Woods v. Foster, 884 F. Supp. 1169 (N.D. Ill. 1995) (ruling that residents of homeless shelter stated a claim for sexual harassment under Fair Housing Act where shelter officials conditioned shelter and other housing benefits upon performance of sexual acts); Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995) (ruling that offensive touching of female tenant in her bathroom by resident manager stated a claim for sexual harassment); Doe v. Maywood Hous. Auth., No. 93–C–2865, 1993 WL 243384 (N.D. Ill. July 1, 1993) (mem.) (holding plaintiffs' claims that defendant Housing Authority conditioned tenancy privileges on submission to sexual requests may constitute a basis for relief under the Fair Housing Act); Bethishou v. Ridgeland Apartments, No. 88–C–5256, 1989 WL 122434 (N.D. Ill. Oct. 2, 1989) (mem.) (ruling that the property owner is directly responsible for acts of sexual harassment that take place on its property notwithstanding an agency relationship between the property owner and its managing agent); Grieger v. Sheets, No. 87–C–6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (mem.) (ruling that plaintiff's claims based on hostile environment and quid pro quo theories would survive defendant landlord's motion for summary judgment); New York v. Merlino, 694 F. Supp. 1101 (S.D.N.Y. 1988) (holding that sexual harassment can constitute sexual discrimination where a real estate broker subjects female customers to sexual harassment during the provision of services); Stewart v. Kaplan, No. 87–C–3720, 1988 WL 10883 (N.D. Ill. Feb. 8, 1988)

regarding sexual harassment in employment or in school, there are surprisingly few cases in which a plaintiff (almost always a tenant) asserts that a defendant (almost always a landlord)[2] demanded submission to his sexual advances as a condition of her continued tenancy, or made her home environment so hostile through his sexually charged remarks, propositions, or demands that it affected a term, condition, or privilege of her housing. To a certain extent, this is a developing area of the law. This does not mean, however, that sexual harassment at home occurs with any less frequency than sexual harassment at work.[3] Nor does it mean that plaintiffs are without a vehicle to challenge sexual harassment in housing. As in the employment context, plaintiffs may use a federal statute to vindicate their rights in this area. Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act") makes it unlawful 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...sex."[4] Indeed, a number of courts have ruled that sex discrimination under the Fair Housing Act includes conduct that would constitute sexual harassment actionable under Title VII if it occurred in the workplace.[5]

(mem.) (involving allegation that plaintiffs could either comply with defendants' sexual demands and receive a rent reduction or be evicted).

State court and administrative decisions are also few in number. *See* HUD v. Kogut, P-H: Fair Housing–Fair Lending Rptr. ¶ 25,100 (HUD Admin. Law Judge 1995), *available in* 1995 WL 225277 (Apr. 17, 1995) (ruling that reasonable cause existed to believe that sexual discrimination occurred where a landlord evicted a tenant after she rejected his sexual advances); Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84 (Mass. 1988) (upholding tenant's claims and ruling that even one sufficiently serious incident of sexual harassment may state a claim of sexual discrimination in the housing context); Chomicki v. Wittekind, 381 N.W.2d 561 (Wis. Ct. App. 1985) (termination of plaintiff's tenancy for refusal to submit to landlord's sexual advances was sexual harassment under state fair housing law).

2. I use the term "landlords" to refer to landlords as well as other building personnel such as superintendents, managing agents, and building porters.

3. *See* Regina Cahan, Comment, *Home Is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1065–70 (detailing the results of a Fair Housing Agency survey of sexual harassment in housing and arguing that sexual harassment at home is vastly underreported).

4. 42 U.S.C. § 3604(b) (1994); *see also id.* § 3604(a) (1994) (making it unlawful to refuse to sell or rent a dwelling on the basis of sex); *id.* § 3617 (1994) (making it unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of any right protected under the Fair Housing Act).

5. *See, e.g.*, *DiCenso*, 96 F.3d at 1007; *Honce*, 1 F.3d at 1088; *Shellhammer*, 1985 WL 13505, at *4. Sexual harassment litigation in this area has often involved the Fair Housing Act because it is quite comprehensive and because courts have interpreted it as analogous to Title VII of the Civil Rights Act of 1964, the primary cause of action in sexual-harassment-at-work cases. *See infra* Part II. This is not to suggest that Title VIII is the only legal standard under which plaintiffs may bring sexual-harassment-in-housing claims. Several commentators have explored statutory and common law theories beyond Title VIII that are available for use against alleged harassers. This body of literature has argued persuasively that plaintiffs can and should utilize these theories to their benefit and

The cases that have considered allegations of sexual harassment at home also demonstrate that low- and moderate-income women who are tenants have a significantly greater chance of experiencing sexual harassment in their rental housing than do female homeowners. An examination of the sexual-harassment-at-home cases will reveal two interrelated realities: (1) that sexual harassment at home is not simply a home-based variant of sexual harassment at work, but instead is conceptually distinct, and (2) that women who are renters face additional obstacles that compromise their ability to be "free" in the home because of who they are and what they earn.[6] Understood in this context, sexual harassment at home can be viewed as a distinct form of intimate violence that seeks to subjugate and control women's autonomy.

In Part I of this Article, I explore the concept of "home." Home has been mythologized in the American cultural imagination, and continues to reflect the relationship between women and their role in society. In this Part, I also examine structural constraints on women's choices caused by housing market failures and the racism and sexism endemic to the housing and employment markets. These constraints directly affect women's experience of the mythologized home by making it more likely that lower income women will experience sexual harassment at home. Part II of this Article examines the law of sexual harassment at home. In the cases that have considered the issue, courts have simply analogized sexual harassment at home to sexual harassment in employment, applying the doctrinal analysis developed in that setting. While the employment paradigm has some usefulness, its application is limited by the qualitative differences in women's experiences in the two settings. By failing to consider sexual harassment at home in context, courts have decided many cases wrongly and have failed to compensate plaintiffs appropriately. In Part III, I show that courts should reshape the analysis of sexual-harassment-at-home cases by explicitly examining the context in which harassment occurs. This new analytical framework will result in correct liability determinations and appropriate compensation awards.

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that greater attention should be paid to the problem of sexual harassment at home. Until now, however, no commentator has defined sexual harassment at home through a comprehensive examination of it in the context of legal, philosophical, economic, and cultural frameworks. *See* Kathleen Butler, *Sexual Harassment in Rental Housing*, 1989 U. ILL. L. REV. 175; Deborah Dubroff, *Sexual Harassment, Fair Housing, and Remedies: Expanding Statutory Remedies into a Common Law Framework*, 19 THOMAS JEFFERSON L. REV. 215 (1997); William Litt et al., *Recent Development: Sexual Harassment Hits Home*, 2 UCLA WOMEN'S L.J. 227 (1992); Robert Rosenthal, *Landlord Sexual Harassment: A Federal Remedy*, 65 TEMP. L. REV. 589 (1992); David G. Thatcher, *Real Property Survey*, 71 DENV. U. L. REV. 1041 (1994); Cahan, *supra* note 3. *But see* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who Is the Reasonable Person?*, 38 B.C. L. REV. 861, 865 (1997) (proposing a standard to evaluate hostile housing environment cases that would focus "on the conduct of the harasser and on the distribution of power between the landlord and tenant" because "tenants are often poor minority women who are socially, politically and economically powerless").

6. *See infra* Part I.B.

I. HOME

A. "Home, Sweet Home": Cultural Notions of Home

Sexually harassing activity, whether at home or at work, takes place in the context of market relations and manifests itself in familiar modes.[7] Conceptually, however, the two types of sexual harassment are in some ways opposites; at work, men protect the public sphere from female invasion, while at home, men invade the private sphere of women.[8] This key distinction is informed by our notions of home—both what it is and what it should be. Thus, sexual harassment at home differs in context; a context that is reflected in the richness and complexity of our notions of home and women's roles within that home.

In American culture, there is a dichotomy between the world of the home and the world of work.[9] By definition, work is the primary activity that occurs outside of the home.[10] It is the space that is ruled by competition and merit (or the fantasy of it). Work often connotes structure, discipline, and formality. Because the purpose of work in a capitalist economy is the production of some kind of product or service for profit, personal needs are sublimated to, and the workplace is designed to further, that goal. Work is structured to delay gratification, which is gained primarily through monetary compensation.[11] Because the worker is compensated, she endures the possibility of injury on the job, the possibility of layoff or dismissal, physical, psychological and emotional exertion and stress, productivity goals, time segmentation, invasions of privacy and the direction of the mind toward a mediated task. Moreover, work is public in the most basic sense.[12] Through efforts expended at work, the worker connects with a larger community beyond the immediate community of her family and self. In the classic

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7. *See infra* Part I.B.

8. *See infra* note 13; *see also* discussion *infra* Part II.B.2.a.

9. Christena E. Nippert-Eng has suggested that people respond to this duality in various ways, some by adopting behaviors that further enhance the distance between home and work, and others by adopting various strategies to transition more smoothly between the two cultures. *See* CHRISTENA E. NIPPERT-ENG, HOME AND WORK: NEGOTIATING BOUNDARIES THROUGH EVERYDAY LIFE (1995).

10. I define "work" here as paid compensation for work performed outside the home. In my discussion of the dichotomy between work and home, I recognize that much work is performed in the home, some of which is uncompensated, i.e., domestic work, and some of which is compensated.

11. *See, e.g.*, TERRY A. BEEHR, PSYCHOLOGICAL STRESS IN THE WORKPLACE 83–105 (1995) (describing various types of workplace-induced stresses, including: work overload, nonstandard work schedules, shiftwork, under- and overutilization of skills, machine pacing of work, perceived lack of control of job tasks, lack of job security, and lack of social support in the workplace).

12. Of course, a growing number of Americans work in their homes. However, as a general concept, work is still considered a public activity. *See also supra* note 10.

sense, work is a collective act, where shared efforts are necessary to produce a desired result.

Though feminist theorists and others have shown that drawing a clear demarcation between the public and private is no longer possible (if it ever was),[13] an assumed distinction in law and culture remains. Sexual harassment at work can be understood as an effort to curtail women's invasion of the male public space, the space of commerce, government, and industry—the male domains of power in a capitalist regime. In fact, sexual harassment at work has been described as an extension of occupational sexual discrimination, in that it furthers the goal of subordinating women.[14]

In contrast to work, home provides respite from the stress (and sometimes danger) of compensated activity. Though the responsibilities of family carry their own stresses,[15] home continues to be associated with comfort; leisure activities are undertaken there purely for the pleasure they provide.[16] The fundamental cultural assumption is that the home is privileged; it is revered by our law, culture, art, and history.[17] Part of its privileged status derives from the notion that the home is the

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13. There is a wealth of literature examining the nature of the public/private distinction. *See, e.g.*, MARTHA A. FINEMAN & ROXANNE MYKITIUK, THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE (1994); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (exploring the feminist critique of the dichotomy); Helena Z. Lopata, *The Interweave of Public and Private: Women's Challenge to American Society*, 55 J. MARRIAGE & FAM. 176 (1993) (suggesting that the "dual sphere" dichotomy justified a prohibition on women's political and economic participation and on men's reduced family role); Hanna F. Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327 (1981) (examining the polity's retreat from the public sphere); Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (various views). *But see* Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361 (1993) (suggesting that the public/private distinction still retains some vitality in the area of constitutional adjudication).

14. *See* CATHARINE MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 4 (1979) (asserting that sexual harassment on the job is a form of sexual discrimination); *see also* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 28–51 (1978) (describing sexual harassment as playing a critical role in the maintenance of female job segregation, unemployment, and the depression of women's wages).

15. *See* Arlie Russell Hochschild, *There's No Place Like Work*, N.Y. TIMES, Apr. 20, 1997, § 6 (Magazine), at 51 (describing how work can be an escape from the pressures of home).

16. *See generally* WITOLD RYBCZYNSKI, HOME: A SHORT HISTORY OF AN IDEA (1986) (examining the concept of "comfort" and its relation to home architecture and furnishings through several centuries and across various cultures).

17. The privileged position of the home is, of course, a rebuttable presumption highly dependent on the social and economic status of the home occupier. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (rejecting the notion that there is a fundamental right to engage in homosexual sodomy in the privacy of one's home); Wyman v. James, 400 U.S.

very essence of that which is private. Under criminal law, one can shoot an intruder to defend it.[18] Under tort law, one has a reasonable expectation of privacy within it.[19] Under constitutional law, one has a right to be free from unreasonable searches and seizures within it,[20] and a right of privacy to engage in certain activities and make certain decisions within the home.[21]

The home is a place of retreat to the (not always) protective sphere of family life, and it is reflective of, and a conduit for, familial and emotional

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309 (1971) (holding that a mandatory home visit by an AFDC caseworker was not an unreasonable search within the meaning of the Fourth Amendment).

18. A person may use deadly force to defend his home under certain circumstances, although there are several, progressively more stringent views on the issue. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.9(b) (2d ed. 1986). Notwithstanding the various views, however, the defense-of-habitation justification is based upon a "man's home is his castle" theory that privileges the use of deadly force within the dwelling because of the notion of the enhanced security, privacy, and sanctity that obtains. *See, e.g.*, J. David Jacobs, *Privileges for the Use of Deadly Force Against a Residence-Intruder: A Comparison of the Jewish Law and the United States Common Law*, 63 TEMP. L. REV. 31, 46 (1990) ("Defense of habitation stems from the law's early castle doctrine; defense of the home is considered equivalent to defense of life itself."). Moreover, in a majority of jurisdictions, there is also no duty to retreat from the home once an intruder has entered. *See* JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW CASES AND MATERIALS 842–43 (2d ed. 1991).

19. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) (describing the tort of intrusion upon seclusion as the form of invasion of privacy that may be violated by a "physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant...insists over the plaintiff's objection in entering his home"). Indeed, courts have held that the tort is completed even where the plaintiff was not at home at the time. *See, e.g.*, Ford Motor Corp. v. Williams, 132 S.E.2d 206 (Ga. Ct. App. 1963), *rev'd on other grounds*, 134 S.E.2d 32 (Ga. 1963).

20. U.S. CONST. amend. IV.

21. The United States Supreme Court has articulated a "right to privacy" and a concomitant freedom from governmental intrusion into certain kinds of decision making and intimate activities notwithstanding the nontextual basis of the articulation of that right. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that the "right to privacy" is a fundamental right that protects the ability of married persons to use contraceptives). Along these lines, the Supreme Court has suggested:

> The [Constitution] protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their...houses...shall not be violated."

Payton v. New York, 445 U.S. 573, 589 (1980) (omissions in original) (quoting U.S. CONST. amend. IV); *see also* Stanley v. Georgia, 394 U.S. 557, 567 (1969) (ruling that the state may not regulate private possession of obscene material in the privacy of the home). *But see Bowers*, 478 U.S. 186.

intimacy.[22] Indeed, there is a strong connection in the law between the concept of privacy in the home and the marital relations that take place there. Perhaps the most private compartment of the home is the "marital bedroom," and the protection of the marital relation in that place is extensive.[23] The home is where the family resides and where physical and mental assault and/or battery upon family members may be undertaken and shielded from public view.[24] It is a place that purports to be outside of the prying eyes of the employer and the state.[25]

As cultural signifier and idealized symbol, "home" is the place in our unconscious memory to which we want to return. It evokes powerful associations. It is deeply idealized and cherished notwithstanding the reality that the home is also a place that many choose to leave.[26] But as Frederick Buechner has suggested, it is a place of the imagination and of dreams:

> What the word *home* brings to mind before anything else, I believe, is a place, and in its fullest sense not just the place where you happen to be living at the time, but a very special place with very special attributes which make it clearly distinguishable from all other places. The word *home* summons up a place—more specifically a house within that place—which you have rich and complex feelings about, a place where you feel...you belong and which in some sense belongs to you.... [Home is] the kind of place,

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22. Kenneth O. Doyle stresses the interdependency between the ideas of home and intimacy:

> The experience of *home* flows from the experience of intimacy. As people open themselves to each other and receive each other, they produce a spirit that is part of the ideal of the home experience. As they build a home together, each contributing a part of him or herself to the structure, appearance, and feel of the place, they in themselves and as captured symbolically in the house and home around them begin to interact to create what at its peak can be almost a holy experience.

Kenneth O. Doyle, *The Symbolic Meaning of House and Home: An Exploration in the Psychology of Goods*, 35 AM. BEHAVIORAL SCIENTIST 790, 795 (1992).

23. *See Griswold*, 381 U.S. at 485 (stating the marital bedroom is a "sacred precinct"); Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964) (stating eavesdropping device placed in the marital bedroom would be "offensive to any person of ordinary sensibilities").

24. *See infra* Part II.B.2.a.

25. This, of course, is not true for all Americans, and the protection that the home affords from government intervention varies with race, social, and economic status. *See supra* note 17.

26. *See generally* John D'Emilio, *Capitalism and Gay Identity*, *in* THE LESBIAN AND GAY STUDIES READER 467 (Henry Abelove et al. eds., 1993) (The author argues that the emergence of a lesbian and gay identity in the United States was made possible by the growth of capitalism and wage labor. The result was that individuals were able to earn a living outside of the household economic unit, and that many gays and lesbians invented and sustained a group life away from home in large cities and smaller urban areas.).

> perhaps a place inside yourself, that you spend the rest of your life searching for even if you are not aware that you are searching.[27]

Thus as an ideal, the home is the repository of all that has happened in one's life that is "good" or supposed to be good; it is the place where we imagine a life that is better than it ever was. The home is that rare location of nonintellectual knowledge ("homespun wisdom") that is appreciated and valued in an increasingly technological society. In advertising, film, and literature, home is a backdrop against which momentous events of the most intimate and familial kind occur, as well as the place to which the ailing, rejected, impoverished, disenchanted, cynical, and aged return. Robert Frost has written, "Home is the place where, when you have to go there, [t]hey have to take you in."[28] It is a place of commencement and closure.

Indeed it was once thought (and perhaps still is) that the perfect home would operate as a civilizing influence on its inhabitants, and that there was a kind of symmetry in women's role as "rulers" of the home and men's sovereignty outside of it.[29] Women's perceived influence on the home has contributed to the romanticized and idealized notion of the home. In large part, the home has become a mythical place of enhanced spiritual safety because of the comfort and familial feelings associated with it.[30] To the extent that women (and to a lesser extent children) symbolized that sense of safety and psychological and physical comfort, the home as an idea has achieved a level of cultural significance that is unmatched.

In 1903, Charlotte Perkins Gilman provided this assessment of the relationship between women and the home:

> The effect of the house upon women is as important as might be expected of one continuous environment upon any living creature. The house varies with the varying power and preference of the owner; but to a house of some sort the woman has been confined for a period as long as history. This confinement is not to be considered as an arbitrary imprisonment under personal cruelty, but as a position demanded by public opinion, sanctioned by religion, and enforced by law.[31]

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27. FREDERICK BUECHNER, *The Longing for Home*, *in* THE LONGING FOR HOME 7, 7–8 (1996).

28. *See* ROBERT FROST, *The Death of the Hired Man*, *in* THE POEMS OF ROBERT FROST 37, 41 (Random House 1946) (1930).

29. *See* GLENNA MATTHEWS, "JUST A HOUSEWIFE": THE RISE AND FALL OF DOMESTICITY IN AMERICA 27–33 (1987).

30. *See* DOLORES HAYDEN, REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING WORK, AND FAMILY LIFE 63 (1984) (exploring the ideal of home and asserting that in "American life, it is hard to separate the ideal of home from the ideals of mom and apple pie, of mother love and home cooking").

31. CHARLOTTE PERKINS GILMAN, THE HOME: ITS WORK AND INFLUENCE 206 (University of Ill. Press 1972) (1903).

More than ninety years later, the primary identification of women with the home continues in myriad ways, and conflicts between private duty and public life have come to define the working woman's experience.[32] For example, primary responsibility for child rearing and domestic chores still resides with women.[33] Moreover, women are still considered the caretakers of the family. They are expected to perform the "emotional" work necessary to smooth over disputes, pick up the pieces after a familial crisis, and provide care for extended family members such as elderly parents.[34]

Beyond the shelter that it provides, the home functions as a connection to particular and highly desired communities.[35] It provides status and is a symbol of the occupants' position and standing in the community.[36] Through neighborhood selection, design choice, home improvements, landscaping, and holiday decorations, the home stands as a highly visible manifestation of personal preferences.[37] In this way, it is a powerful message of one's identity made to the

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32. *See, e.g.*, DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN (1996).

33. Women's domestic responsibilities are strongly related to women's labor force participation outside of the home. Researchers refer to a "gender-based division of labor," of which labor stratification in the home is a principal part. The concept is that women and men perform different labor tasks and that those tasks are unequally valued in a market economy. Thus, women are responsible for "familial food preparation and usually for other tasks related to the maintenance of the family and domicile, while men's contribution to such work is variable." Janet Saltzman Chafetz, *The Gender Division of Labor and the Reproduction of Female Disadvantage*, *in* GENDER, FAMILY AND ECONOMY 74, 77 (Rae Lesser Blumberg ed., 1991); *see* ELLEN GALINSKY ET AL., THE CHANGING WORKFORCE: HIGHLIGHTS OF THE NATIONAL STUDIES 47 (1993) (finding that despite women's increased entrance into the paid work force, "[t]raditional divisions of responsibility for household labor and child care still prevail").

34. *See* GALINSKY ET AL., *supra* note 33, at 58–62 ("[W]omen devote significantly more time to caregiving [for elders] than men.").

35. *See, e.g.*, *The Richest Towns: Our Annual Listing of the Places Where Money Finds Company*, WORTH MAG., July–Aug. 1997, at 82 (The article describes the richest towns in the United States based upon real estate holdings because "home values represent a true, market-based assessment of worth. Home prices, in a sense, represent what it costs to join one of these communities.").

36. *See* David M. Hummon, *House, Home and Identity in Contemporary American Culture*, *in* HOUSING CULTURE AND DESIGN: A COMPARATIVE PERSPECTIVE 213 (Setha M. Low & Erve Chambers eds., 1989) (Dwelling places are "significant symbols of social rank and class identity in contemporary American society.").

37. Consumers are aggressively encouraged to manifest their home preferences through the acquisition of various "home" products. Sales of home furnishings, home decorating, and home improvement products are a major industry in this country. This industry utilizes marketing that mixes complicated psychological associations of wholesomeness, safety, and associated notions of the "good life" with sophisticated, up-scale design to stimulate commodity acquisition and status consciousness. This assertion is supported by dozens of home-oriented magazines such as *Martha Stewart Living*, television shows such as "Hometime" and "This Old House," and mass-produced direct sales

outside world.[38] For many, owning a home provides a sense of control and self-esteem.[39] Indeed, some commentators have argued that improving homeownership levels among low-income people will improve their sense of life satisfaction.[40] It has been suggested that the "home" functions to create "our" separate sense of personal identity as distinct from our roles in American community life.[41] And, as discussed earlier, notwithstanding women's movement into the work force in this century, women still tend to invest more of themselves in the home than men do, and continue to be identified (and identify themselves with) that home.[42] The home also delivers access to services, education, and jobs, and separation (for some) from crime, poverty, and decay.[43] It is a fundamental economic unit, exchanged as a commodity and used as a mode of wealth accumulation for those

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catalogues such as those promoting the wares of Pottery Barn, Crate and Barrel, and Williams Sonoma.

38. In a study of the relationship between housing and the psyche, one commentator concluded: "The house facade and the interior design seem often to be selected so that they reflect how a person views himself both as an individual psyche, and in relation to society and the outside world, and how he wishes to present his self to family and friends." Clare Cooper, *The House as Symbol of the Self, in* DESIGNING FOR HUMAN BEHAVIOR: ARCHITECTURE AND THE BEHAVIORAL SCIENCES 130, 136 (Jon Lang et al. eds., 1974).

39. *See* Doyle, *supra* note 22, at 793 (Certain individuals are described as experiencing the home as a symbol "of [that person's] effectiveness in dealing with the world.... *[H]ome* also means a place where he (or she) can exercise competence with little or no concern for politics, negotiation, or other distractions from their goal.").

40. *See* William M. Rohe & Michael A. Stegman, *The Effects of Homeownership on the Self-Esteem, Perceived Control and Life Satisfaction of Low-Income People*, 60 J. AM. PLAN. ASS'N 173 (1994).

41. *See* Hummon, *supra* note 36, at 213–15 (suggesting that "many contemporary Americans use dwelling places and household objects—the largest collection of personally controlled material objects—as the symbolic medium for the display of the self and its unique personhood").

42. *See id.* at 216 (suggesting that "women are more likely than men to define the home as an avenue of self-expression and a reflection of self").

43. john a. powell emphasizes the importance of housing as it relates to the "opportunity structure." For example, when poor whites, as well as poor blacks, are segregated and isolated from the middle class, their life opportunities are diminished. Isolated and concentrated communities lead to disconnection from the opportunity structure, including access to education, health care, and good jobs—all of which are necessary to succeed in society. When viewed in this manner, housing is much more than simply shelter. *See* john a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 758 (1996) [hereinafter powell, *Living and Learning*]; john powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337, 346–47 (1996) [hereinafter powell, *Segregation and Educational Inadequacy*]; *see also* WILLIAM A.V. CLARK & FRANS M. DIELEMAN, HOUSEHOLDS AND HOUSING: CHOICE AND OUTCOMES IN THE HOUSING MARKET 26 (1996) (describing housing not just as a physical structure but as a medium of access to "local education..., jobs, amenities..., and neighbors" and as an "economic good").

with resources sufficient to purchase it.[44] All told, the home—physical space, cultural icon, vehicle for wealth accumulation, and mode of access to desired communities—is an American symbol of unique power.

B. Economic Constraints: Is a Rented House a Home?

The dearth of cases in the developing area of sexual harassment at home can be explained in part by the fact that the power relationship between male landlords and female tenants has been less scrutinized than that between employer and employee. The power relationship, which I term a "power link," in employment and in school is well recognized due to many factors. These factors include the unprecedented entry of women into the paid labor force and higher education during this century;[45] the academic literature that has spurred, supported, and critiqued more than two decades of precedent-setting sexual harassment litigation;[46] the significant media exposure given to sensational sexual harassment incidents;[47] and popular representations of sexual harassment as a "war

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44. Homeownership is a widely shared American goal. It is a "core value" of the majority of American families. *See* Michael A. Stegman et al., *Home Ownership and Family Wealth in the United States*, *in* HOUSING AND FAMILY WEALTH: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 92 (Ray Forrest & Alan Murie eds., 1995). It is a powerful source of wealth accumulation for many American households, although this is not the case for all groups equally. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 136–51 (1995) (demonstrating that homeownership has failed to generate the same amount of wealth for black families as has been attained by white families).

45. These developments have taken place particularly since World War II. *See* BARBARA F. RESKIN & PATRICIA A. ROOS, JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS 9 (1990) ("Between 1940 and 1986 the percentage of American women 16 years of age and older who were employed doubled, from 27 to 55 percent."); *see also* BARBARA MILLER SOLOMON, IN THE COMPANY OF EDUCATED WOMEN (1985) (describing women's entry into higher education as a struggle in the context of constraint).

46. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Catharine MacKinnon is generally credited as being the leading intellectual architect of the movement to adopt sexual harassment as a form of sexual discrimination. Since her groundbreaking work, *The Sexual Harassment of Working Women*, other prominent commentators and theorists have written extensively and thoughtfully about this form of sexual discrimination. *See supra* note 14. Those writings are too numerous to list here, but see Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37 (1993).

47. During this decade, sexual harassment has come to the forefront of our cultural consciousness. Perhaps the defining moment was the 1991 Senate Judiciary Committee hearings confirming Clarence Thomas' appointment to the United States Supreme Court. *See, e.g.*, Larry Martz & Paul McKelvey, *Toppling the Last Taboos*, NEWSWEEK, Oct. 28, 1991, at 32 (suggesting that the public attention given to the Clarence Thomas confirmation hearings could help lift the taboo that has surrounded the issue of sexual harassment). *See generally* ANITA HILL, SPEAKING TRUTH TO POWER (1997); RACE-

between the sexes."[48] All of these trends and media moments have created a cultural recognition that sexual harassment is a significant problem, even while various cultural critics conveniently group women fighting their harassers into a "cult of victimization."[49]

However, sexual harassment at home has not been included in this general cultural awareness. To refer to sexual harassment in 1998 is still to invoke sexual harassment on the job and, to a lesser extent, at school. The lack of attention to sexual harassment at home (in contrast to the attention given to domestic violence) can also be linked to the failure to appreciate the importance of housing and the role the home plays in shaping our material realities.[50] Relative to other civil rights issues, less attention has been paid to the need for decent, safe, and affordable housing.[51] Housing has been the neglected child of the civil rights

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ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

48. There has been an explosion in media coverage of, and public interest in, allegations of sexual harassment since the Hill–Thomas episode. *See, e.g.*, Francis X. Clines, *The Senate, Embarrassed and Proud of It*, N.Y. TIMES, Sept. 10, 1995, § 4, at 1 (detailing the contents of Senator Robert Packwood's personal diaries, which ultimately led to his forced resignation for sexual and official misconduct); Eric Schmitt, *Pentagon Takes over Inquiry on Pilots*, N.Y. TIMES, June 19, 1992, at A20 (recounting the Pentagon Inspector General's investigation into a possible cover-up by naval officials of allegations of sexual harassment during the Tailhook convention); *see also* George J. Church et al., *The Start of the Deal; A Paula Jones v. Clinton Trial Would Be a Dive into a Sewer, So It May Not Happen. The Outlines of a Deal Are Emerging from Testy Exchanges*, TIME, June 9, 1997, at 20 (discussing President Clinton's potential legal strategies in connection with allegations of sexual harassment lodged against him). Moreover, Hollywood has also heightened the level of exposure to the issue through various depictions (often inflammatory) of sexual harassment. *See, e.g.*, MICHAEL CRICHTON, DISCLOSURE (1993) (describing the trials and tribulations of a man who almost loses his job because *he* refuses to accede to the sexual demands of his female boss); *see also* DAVID MAMET, OLEANNA (1993) (ambiguous portrayal of professor-student sexual harassment).

49. *See* CAMILLE PAGLIA, *Our Tabloid Princess: Amy Fisher*, *in* VAMPS & TRAMPS: NEW ESSAYS 133, 133–134 (1994) (asserting that mainstream feminists have done nothing but "portray[] life under 'patriarchy' as a...melodrama of lecherous male tyrants and passive female victims"); CAMILLE PAGLIA, *Symposium—In the Media, a Woman's Place*, *in* VAMPS & TRAMPS: NEW ESSAYS, *supra*, at 430, 431 (suggesting that the media explosion surrounding sexual harassment has been fueled by feminists causing mass hysteria on the subject); *see also* KATIE ROIPHE, SEX, FEAR, AND FEMINISM ON CAMPUS 85–112 (1993) (asserting that present laws and theories regarding sexual harassment are overinclusive, describing sexual harassment as a preoccupation based on "sexist assumptions about male-female relationships," and asserting that harassing looks or comments are harmful only if the receiver chooses to interpret them in that way).

50. *See* powell, *Living and Learning*, *supra* note 43; powell, *Segregation and Educational Inadequacy*, *supra* note 43.

51. *See, e.g.*, FLORENCE WAGMAN ROISMAN, NATIONAL SUPPORT CTR. FOR LOW INCOME HOUS., ESTABLISHING A RIGHT TO HOUSING: AN ADVOCATE'S GUIDE 1 (1991) (The author advocates that a governmental obligation to provide housing to poor people be

movement, notwithstanding its absolute centrality to our lives.[52] Moreover, there is often an economic rationale for the dearth of sexual-harassment-at-home cases. The lower damages available in such cases may tend to dissuade attorneys from taking them.[53] But perhaps the central explanation of why so few sexual-harassment-at-home cases have reached judgment is one fundamental fact: while all women who work outside the home may experience sexual harassment at work, only women of a particular socioeconomic level will experience sexual harassment at home.

Sexual harassment at home is almost entirely a landlord-tenant phenomenon. In every case,[54] the harasser is the property owner or landlord,[55] the property or resident manager or porter,[56] real estate agent or broker,[57] or an officer, administrator, or owner of a homeless shelter or some other form of subsidized tenancy.[58] The landlord-tenant relationship exists prior to the event or

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recognized as had been the case with respect to public assistance. Such a right to housing is a necessary part of "the cause of social justice.").

52. *See id.*; *see also* powell, *Living and Learning*, *supra* note 43; powell, *Segregation and Educational Inadequacy*, *supra* note 43.

53. *See* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 254, 256 (1997) (concluding that as a matter of "economic survival" civil rights lawyers favor cases where damage amounts are potentially higher than those with lower potential damage amounts).

54. "Case" here refers to sexual-harassment-at-home cases published in official reporters as well as those cases recorded but not otherwise included in official reporters. *See supra* note 1.

55. *See* Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997); DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993); Shellhammer v. Lewallen, No. 84–3573, 1985 WL 13505 (6th Cir. July 31, 1985); Grieger v. Sheets, No. 87–C–6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (mem.); HUD v. Kogut, P-H: Fair Housing–Fair Lending Rptr. ¶ 25,100 (HUD ALJ 1995), *available in* 1995 WL 225277 (Apr. 17, 1995); Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84 (Mass. 1988); Chomicki v. Wittekind, 381 N.W.2d 561 (Wis. Ct. App. 1985).

56. Williams v. Poretsky Management, Inc., 955 F. Supp. 490 (D. Md. 1996); Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995).

57. New York v. Merlino, 694 F. Supp. 1101 (S.D.N.Y. 1988).

58. Woods v. Foster, 884 F. Supp. 1169 (N.D. Ill. 1995); Doe v. Maywood Hous. Auth., No. 93–C–2865, 1993 WL 243384 (N.D. Ill. July 1, 1993) (mem.). Charges of sexual harassment have surfaced recently at a New York City homeless shelter. *See* Lizette Alverez, *Many Felt Protected at Shelter*, N.Y. TIMES, Feb. 13, 1997, at B6; Nina Bernstein, *New York City Removes Staff at Women's Shelter*, N.Y. TIMES, Feb. 12, 1997, at A1; Richard Perez-Pena, *Security Company at Women's Shelter Was a Target of Complaints*, N.Y. TIMES, Feb. 13, 1997, at B6; Joe Sexton, *Embarrassed, Giuliani Promises Changes at a Shelter for Women*, N.Y. TIMES, Feb. 13, 1997, at A1 (all describing allegations that workers at a New York City shelter for battered women coerced sex from residents, stole their property, and allowed abusive husbands and boyfriends access to the facility).

Although city investigators found no evidence to substantiate these allegations for the purposes of filing formal charges, evidence of some abuses, such as exchanging sex for privileges, was found. *See* Rachel L. Swarns, *Bronx Shelter Inquiry Finds No Evidence of Sex Offenses*, N.Y. TIMES, Aug. 13, 1997, at A1. Additionally, several federal lawsuits have

events that give rise to the allegations of sexual harassment; it is the metarelationship through which sexual harassment at home can potentially (and often conveniently) take place. This transactional metarelationship exists in a market economy that approves of, and indeed promotes, the sale of residential living space for profit.[59]

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been filed charging civil rights violations in connection with these incidents. *See* J.A. Lobbia, *Shelter Hell Homeless Plaintiffs Sue, Charging Rampant Abuse*, VILLAGE VOICE, July 3, 1997, at 28; *see also* Lizette Alvarez, *Many in Battered Women's Shelter Say Life Was Mostly Humdrum*, N.Y. TIMES, Feb. 14, 1997, at B4 (suggesting that the size of the shelter makes it possible to hide abuse); Anne Connors, *Don't Dismiss Sex Abuse at Bronx Shelter*, N.Y. TIMES, Aug. 19, 1997, at A22 (responding to August 13, 1997 *New York Times* article by citing a report from the Department of Investigation that stated even consensual sexual relations between a shelter employee and a shelter resident should be considered "inherently coercive").

59. Proponents of the argument that it is socially good for rental property to be bought and sold as is any other consumer good in an open and unregulated market support that assertion by reference to economic efficiency. *See, e.g.*, Timothy J. Brennan, *Rights, Market Failure, and Rent Control: A Comment on Radin*, 17 PHIL. & PUB. AFF. 66, 66 (1988) (The basic argument against rent controls is that they "result in too little output and keep those willing to pay the marginal cost of obtaining a good or service from receiving it. In the case of rent control, apartments are undersupplied, some people may be unable to obtain rental housing at the competitive price, and apartments that are supplied may not be rented by those willing to pay the most for them."); *see also* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 761 (1988) (Rent control frustrates the social welfare, in part because apartment turnover is controlled by a particular apartment's "subjective" value to the tenant rather than by a pure "wealth test" that efficiently matches prospective financially eligible renters with available apartments.).

On the other hand, some commentators have argued that rental housing ought to be removed either in whole or in part from the market economy, that is, it ought to de-commodified. *See, e.g.*, Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 993–94 (1982) [hereinafter Radin, *Property and Personhood*] (arguing, inter alia, that the leasehold ought to be viewed as personal property, a view that would "tend to influence courts and legislatures to grant to all tenants entitlements intended to make an apartment a comfortable home—a perpetual and non-waivable guarantee of habitability"); Margaret J. Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 360 (1986) ("The intuitive general rule is that...[a] noncommercial personal use of an apartment as a home is morally entitled to more weight than purely commercial landlording."); *see also* Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431 (1996) (discussing the viability of a system that includes goods that are market-inalienable; that is, a market where not all goods are seen as property rights, but some goods, such as residential rental property, are seen as human rights). Notwithstanding the merits of this philosophical debate, recent trends in rent control laws suggest that the financial interests of landlords are being favored by legislatures at the expense of tenants and their need for stable, affordable housing. *See, e.g.*, Matthew Brelis, *Landlords, Tenants Clash on Rent Control*, BOSTON GLOBE, Oct. 12, 1994, at 19, *available in* 1994 WL 6004838 (arguing that rent control laws were repealed in Cambridge, Massachusetts at the expense of elderly individuals; young, struggling artists; and day care providers who were losing their homes because they could not afford the increased rents that were the inevitable result of the repeal); *see also* Clyde Haberman, *The Tenants, Full of*

As has been suggested elsewhere, the relationship between landlord and tenant in a market economy is necessarily one of unequal bargaining power.[60] This is the case for various systemic and interrelated reasons. Home, of course, is a place to live, and also offers a variety of attendant goods and services. Renters rely on landlords not only for their homes, but also for the services and safety that the apartment unit and building purport to provide. These services allow tenants to physically survive via the provision of heat and hot water for cooking and bathing, as well as the provision of safety barriers that allow tenants to bar outsiders from entry into their units. Moreover, these services allow tenants to take part in the public world of work.[61] To the extent that a female tenant's physical well-being and ability to provide support for her family is compromised by her landlord's sexual harassing actions, her rental unit is far less valuable because it ceases to carry with it one of the hallmarks of suitable housing: some modicum of protection from, and preparation for, the outside world.

There is a significant lack of affordable housing in this country for low-income renters: there is a far greater demand by low-income renters for affordable housing than there are habitable units to accommodate them.[62] In many

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Fear, Aim at Bruno, N.Y. TIMES, Apr. 8, 1997, at B1 (describing tenants' denunciation of a proposed rent regulation repeal because they would be forced out of their homes as a result).

60. An early and highly influential case, *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), cast aside the old notion of caveat lessee and ushered in the new concept of the warranty of habitability, which ensured that certain fundamental protections ran with the lease contract. In doing so, *Javins* explicitly recognized the inequality of bargaining power between the landlord and the tenant:

> Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.

Id. at 1079 (footnotes omitted); *see also* Susan Etta Keller, *Does the Roof Have to Cave In? The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663, 1664 (1988) (describing the disparity in landlord/tenant power relationship as based on an "amalgam of different, but interrelated factors," including the duration and intensity of their relationship, a tightening housing market that produces low vacancy rates and higher rents, high levels of dependency by tenants upon landlords who rent to lower income tenants because such tenants can be easily replaced, and the potential for the landlord to detrimentally affect the tenant's life by delaying repairs).

61. *See supra* notes 9–12 and accompanying text.

62. *See generally* William C. Apgar, Jr., *An Abundance of Housing for All but the Poor*, *in* HOUSING MARKETS AND RESIDENTIAL MOBILITY 99 (G. Thomas Kingsley & Margery Austin Turner eds., 1993). The supply of affordable housing for low- and lower-income individuals and families has declined drastically nationwide over the last decade, while at the same time the demand for such housing has risen. This can be explained by several factors including: a rise in poverty generally; the stagnation and decline in the incomes of many Americans, which has elevated the number of renter households; an

metropolitan areas, prospective tenants compete intensely for desirable apartments at the lower end of the rent spectrum.[63] Moreover, when the metarelationship between landlord and tenant is refined and translated in both gendered (and raced) terms, the multilayered nature of the inequality in bargaining power is revealed.[64]

The class of renters as a group is significantly poorer than the class of residential property owners as a group.[65] Even if we discount the number of

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increase in the median rent for unsubsidized housing units; a precipitous drop in the construction of affordable housing units; and the loss of older, existing units of affordable housing to upscale cooperative and condominium conversions. *See also* TRACY L. KAUFMAN, NATIONAL LOW INCOME HOUS. COALITION, OUT OF REACH: RENTAL HOUSING AT WHAT COST? 2–5 (1997) (The author examined 1990 census data on housing costs and household incomes and found that "[m]illions of renters, whether their income is from a job or assistance, simply do not have enough money to afford to pay their rent.... This is true for a surprisingly high percentage of renters in every state and metropolitan areas in all regions of the country.").

63. *See* Margery Austin Turner & John G. Edwards, *Affordable Rental Housing in Metropolitan Neighborhoods*, *in* HOUSING MARKETS AND RESIDENTIAL MOBILITY, *supra* note 62, at 153 (explaining that "[b]etween the mid-1970s and mid-1980s, the number of 'very low' cost units declined substantially, reducing the availability of rental housing affordable for 'very low' income households.").

64. *See, e.g.*, Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997) (plaintiff was Section 8 recipient); Honce v. Vigil, 1 F.3d 1085, 1094 (10th Cir. 1993) (plaintiff was in "severe financial straits"); Woods v. Foster, 884 F. Supp. 1169 (N.D. Ill. 1995) (plaintiffs were homeless); Grieger v. Sheets, No. 87–C–6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (mem.) (plaintiffs were Section 8 recipients); Doe v. Maywood Hous. Auth., No. 93–C–2865, 1993 WL 243384 (N.D. Ill. July 1, 1993) (mem.) (allegation that housing authority official threatened to terminate plaintiff's housing assistance eligibility unless she had sex with him).

The federal government provides various forms of housing assistance to low- and moderate-income individuals. For example, the Section 8 Existing "Certificate" Program provides housing assistance in the form of housing certificates to eligible tenants so that they can secure housing in the private market. *See* 42 U.S.C. § 1437f (1994). At present, the federal government also provides housing assistance to low- and moderate-income tenants through the public housing program, which is jointly administered with the states. *See* The United States Housing (Wagner–Steagall) Act of 1937, ch. 896, 50 Stat. 888. In order to qualify for either form of assistance the tenant must have a low or very low income and meet certain other eligibility requirements. *See* 42 U.S.C. § 1437f(d)(1)(A) (1994); *id.* § 1437a(a)(1) (1994); *see also infra* note 87.

65. For example, in 1993, the median gross income of homeowners was approximately $36,485, while renters' median income was approximately $18,957. *See* TIMOTHY S. GRALL, U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, OUR NATION'S HOUSING IN 1993, at 7, 10 (1995). Moreover, while only 3% of the homeowners received welfare or Supplemental Security Income payments, approximately 13% of all renters received such payments. *See id.* These figures, of course, compare incomes between renters and homeowners; the income disparity is even greater when the income of homeowners and homeless individuals are compared. One study estimated that homeless individuals had incomes of less than $100.00 per month, making homeless people the "poorest of the poor." PETER ROSSI, WITHOUT SHELTER 21 (1989).

people, such as students or the newly relocated, who rent their living spaces because of temporary circumstances or because they prefer the convenience of not owning, a large percentage of renters rent because homeownership is not a realistic economic option for them.[66] Women form a large portion of this market for rental housing,[67] and are "the fastest growing segment of the homeless and ill-housed in our nation."[68]

The economic transaction between landlord and tenant trades money for an ongoing service—a place to live for the balance of the lease term—and the parties are often familiar with each other as a result.[69] First, the tenant pays for her home on a periodic basis and at regular intervals. This means that in smaller buildings the tenant and the landlord will often have at least a passing familiarity with each other, if not more. Even if the tenant has little or no relationship with the landlord, she is often in regular contact with a superintendent, property manager, or other building employee who knows her daily routine. Similarly, that building superintendent may be aware of the presence or absence of other persons in the apartment who might discourage an unwelcome advance, and the tenant's presence in locations outside her apartment but within the building where an

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These figures also fail to reflect the significant way in which homeownership assists in wealth creation and generation. *See supra* note 44 and accompanying text.

66. Because renters spend such a high proportion of their income on rent, it is difficult for them to accumulate enough capital for a down payment for a home. *See* GRALL, *supra* note 65, at 10 ("[R]enters...pay[] a much larger proportion of their income for housing, because of their lower incomes," than do homeowners.); *see also* KAUFMAN, *supra* note 62, at 1–3.

67. Rebecca L. Smith and C. Lee Thomson detail the relationship between women and the rental housing market. Rebecca L. Smith & C. Lee Thomson, *Restricted Housing Markets for Female-Headed Households in U.S. Metropolitan Areas*, *in* HOUSING AND NEIGHBORHOODS: THEORETICAL AND EMPIRICAL CONTRIBUTIONS 278 (Willem van Vliet et al. eds., 1987). They assert that women face various problems in the housing market. Their research suggests:

> To a greater extent than is true for other household types, women who head households must rent their housing. In fact, female-headed households comprise the largest segment of the rental housing market in some cities. Second, female householders pay more, as a percent of their available income, than do male- or couple-headed households for comparable housing.... Third, women experience greater constraints in their choice of location and are more likely to reside in central cities rather than suburbs, regardless of whether they are raising children.

See id. at 287–88; *see also* AMERICAN HOUSING SURVEY FOR THE UNITED STATES IN 1995, at 4–9 (1997) (The survey showed that there were more than twice as many female householders living in rental units than male householders living in rental units. Female one-person households living in rental units also outnumbered male one-person households living in rental units.).

68. NATIONAL LOW INCOME HOUS. COALITION, 1997 ADVOCATE'S RESOURCE BOOK 19 (1997).

69. Susan E. Keller has suggested that the very fact that the landlord-tenant relationship continues over time tends to diminish the tenant's "power" in the context of that relationship. *See* Keller, *supra* note 60, at 1664.

unobserved advance (or assault) might be made.[70] Indeed, the landlord or his employee may also have unfettered access to her apartment through use of a passkey.[71]

The sexual-harassment-at-home cases can be defined by landlords' repeated attempts to compromise the safety value of female tenants' housing units, either through their use of passkeys to gain unauthorized entry to tenants' apartments in order to procure sex,[72] assaults on tenants in their showers,[73] assaults of female tenants in the building's elevators and in laundry rooms,[74] sexually explicit "come-on's" to tenants in front of their children,[75] and demands of sex in exchange for rent.[76] But the landlord's attempts to sexually harass and/or to coerce female tenants are experienced by those women not just as attempted solicitations of sex, but also as global threats to the psychological, physical, and emotional security of themselves and their children, as a challenge to their ability to provide for their families, and as a theft of the ideal of home as a site of identity formation and cultural signifier.

The inequality of bargaining power between female tenants and male landlords is exacerbated by aspects of those renters' lives that further diminish their chances of competing effectively for the relatively few affordable housing units that are available. These factors reduce bargaining power and increase the pressure on women to accede to a landlord's sexual demand or to remain in a hostile housing environment. One of those factors is race. Although it is difficult to determine with absolute certainty the racial background of the plaintiffs in the relevant cases,[77] several salient facts about them are known: they are women; many of these women are the sole financial support for their families; they are renters; and at least some of them are homeless or facing homelessness.[78]

Unquestionably, black and Hispanic apartment seekers' housing choices are constrained because of racism.[79] Race and ethnicity are powerful indicators of

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70. *See* Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 491 (D. Md. 1996) (plaintiff attacked in elevator and in the laundry room by building "porter").

71. *See* Krueger v. Cuomo, 115 F.3d 487, 490 (7th Cir. 1997) (landlord gained entry to tenant's apartment through use of some device such as a passkey).

72. *See id.*

73. *See* Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995).

74. *See Williams*, 955 F. Supp. 490.

75. *See* Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84 (Mass. 1988).

76. *See* DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996).

77. *See supra* note 1. *But see Krueger*, 115 F.3d at 490 (plaintiff is black).

78. *See Krueger*, 115 F.3d 487; Woods v. Foster, 884 F. Supp. 1169 (N.D. Ill. 1995).

79. *See* John Yinger, *Access Denied, Access Constrained: Results and Implications of the 1989 Housing Discrimination Study*, *in* CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 69, 105 (Michael Fix & Raymond J. Struyk eds., 1993) (The author examined a major research project sponsored by HUD, and found that "the vast majority of black and Hispanic households can expect to

the ability to enter freely a particular housing market.[80] As a general matter, the darker the skin color of the housing seeker, the more constrained that seeker's housing options will be.[81] Moreover, in the largely urban housing market in which most blacks participate, housing discrimination makes it more difficult (and expensive) for renters of color to secure a suitable place to live in the neighborhoods where they are most likely to reside.[82] In addition, blacks' real incomes have declined while housing costs have risen and low-income housing stock has declined, and the quantity and quality of available apartments where blacks are most likely to rent is diminished while the price for those apartments is relatively high.[83]

Now let us add gender and family composition to the picture. Women living in rental housing are more likely to be heads-of-households than are women who own their own homes.[84] If the renter is a female head-of-household, it may be more difficult for her to secure a suitable place to live because landlords often refuse to rent to families with children.[85] This disproportionately affects women,

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encounter housing discrimination at one time or another.") Yinger asserts that the incidents of housing discrimination exceed those represented in the study for several reasons, including: the fact that minority home seekers can expect to be totally excluded from all available housing much more often than their white counterparts; that minority homeseekers are recommended and shown fewer housing units than their white counterparts; and discrimination in housing availability is often accompanied by discrimination in the later stages of a housing market transaction. *Id.* at 103–05.

80. *See id.* at 103–07; JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 49 (1995) (asserting that "African Americans and Hispanic households are very likely to encounter discrimination when they search for housing," and that this "discrimination occurs throughout the country" and adds "annoyance, complexity, and expense to their housing search process").

81. *See supra* notes 79–80.

82. *See supra* notes 79–80.

83. *See* Dowell Myers & Jennifer R. Wolch, *The Polarization of Housing Status*, *in* 1 STATE OF THE UNION: AMERICA IN THE 1990S, at 269, 276–77 (Reynolds Farley ed., 1995); *see also* THE STATE OF THE NATION'S HOUSING 1997, at 20–21 (Harvard Univ., Joint Ctr. for Hous. Studies 1997) ("[M]inority households are much more likely to live in structurally inadequate housing than white households. Some 20.2 percent of very low-income blacks and 14.3 percent of very low-income Hispanics live in inadequate units, compared with 10.1 percent of very low-income whites.").

84. *See* Smith & Thomson, *supra* note 67, at 282–83; *see also* BUREAU OF THE CENSUS, STATISTICAL BRIEF, HOUSING IN METROPOLITAN AREAS—SINGLE-PARENT FAMILIES 1–2 (1994) (finding that most single parents are women and that "unlike married couples, most single parents were renters").

85. In 1988, the Fair Housing Act was amended to prohibit residential discrimination on the basis of familial status. Fair Housing Amendments Act of 1988, Pub. L. No. 100–430, § 6(b)(2), 102 Stat. 1619, 1622 (codified at 42 U.S.C. § 3604(a) (1994)); *see also* United States v. Hayward, 36 F.3d 832, 834 (9th Cir. 1994) (stating amendment was propelled by Congress' finding of extensive discrimination against families with children); Massaro v. Mainlands Section 1 & 2 Civic Ass'n Inc., 3 F.3d 1472, 1475 (11th Cir. 1993) (recognizing that Congress enacted the amendment because studies showed that families with children encountered adversity in acquiring housing); Michael P. Seng,

since female heads-of-household substantially outnumber their male counterparts.[86] Moreover, a female renter who receives some form of federal rental assistance such as "Section 8"[87] may also be subject to discrimination by potential landlords because of the source of her rental payments.[88] But the final gloss on all of these factors is the relationship between gender and poverty.[89] Whether one wishes to label the problem the "feminization of poverty" or not,[90] women clearly earn less income and possess less wealth than men and thus are

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Discrimination Against Families with Children and Handicapped Persons Under the 1988 Amendments to the Fair Housing Act, 22 J. MARSHALL L. REV. 541, 541–51 (1989) (examining the need for the amendment based on a disproportionately high number of families with children facing difficulties acquiring housing, especially minority families).

86. *See* HARRELL R. RODGERS, JR., POOR WOMEN, POOR CHILDREN: AMERICAN POVERTY IN THE 1990'S, at 4 (3d ed. 1996) (explaining that the number of female-headed households as a proportion of all households grew dramatically between 1970 and 1993, and that by 1993 almost 25% of all American families with children were headed by a woman as compared to one in ten in 1960); *see also* BUREAU OF THE CENSUS, *supra* note 84, at 2 (finding that "[m]ore than 8 in 10 single-parent families in [metropolitan areas] were maintained by women").

87. The Section 8 Existing Housing Program provides low-income families with rental assistance in the form of certificates which allow them to secure housing in the private rental market. *See* 42 U.S.C. § 1437f (1994). Under the program, the Department of Housing and Urban Development establishes the "fair market rent" or maximum amount that may be charged by the landlord, and the recipient pays 30% of their income toward the rental amount. *See id.* The rental assistance provided by the Section 8 certificate program represents the difference between the tenant's rental payment and the fair market rent. *See id.*

88. *See* Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.–C.L. L. REV. 155 (1996) (proposing an amendment to the Fair Housing Act to prohibit landlord discrimination against Section 8 certificate holders).

89. There is a strong correlation between gender and poverty. "The vast majority of poor people in the United States are women and their children and the number of women living in conditions of poverty of low income is increasing." SUSAN L. THOMAS, GENDER AND POVERTY 16 (1994).

90. The "feminization of poverty" is a term that describes the growing number of women and their children living in poverty, and ascribes that fact to widespread sex discrimination in the labor market (which keeps women's wages low). In addition, women's role as the primary caretaker of children tends to depress women's wages given the large number of female-headed households. *See* Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB. & SOC. CHANGE REV. 28, 29–30 (1983); *see also* Barbara Ehrenreich & Frances F. Piven, *The Feminization of Poverty: When the 'Family-Wage System' Breaks Down*, 31 DISSENT 162 (1984). The feminization-of-poverty approach has been attacked by voices on both the left and right. *See* THOMAS, *supra* note 89, at 14–15 (suggesting that leftist critiques' "talk about women's poverty deflects attention from issues of class and race, the *real* cause's of women's poverty" and that the right's attack is grounded in the theory's failure to see that "women's poverty is due to the instability of 'the' family, the causes of which are located within individual women").

poorer as a class,[91] and women who head households with dependent children have extremely high poverty rates.[92] If, as Susan L. Thomas has suggested in her exploration of the relationship between women and poverty, women as a "gender class" are especially vulnerable to poverty,[93] then I would argue that women as a gender class are also particularly vulnerable to sexual harassment at home.

When we consider the skewed nature of the landlord-tenant metarelationship in which the harassment occurs, the overall decline in the number of affordable housing units, and the repeated possibilities for discrimination against women who rent, we see that the harassing landlord does not operate in a vacuum. Instead, he acts against a background of cultural assumptions about the nature of home, market forces, and tenant vulnerabilities that aid his ability to harass and that undermine her ability to refuse or withstand his advances. For these reasons, terms of art used in sexual-harassment-in-employment-cases such as "quid pro quo" and "hostile housing environment" must be revisited with an understanding of both the idealized concept of home and the compromised nature of the home experienced by low- and moderate-income women. These terms, as we will see, are somewhat problematic when they are simply transported to sexual-harassment-at-home cases without a recognition of the unique issues raised in those cases.

II. SEXUAL HARASSMENT AT HOME: DOCTRINAL UNCERTAINTY

In the relatively few cases that have dealt with sexual harassment in the home, courts have applied the categories of sexual harassment developed in the employment context under Title VII: "quid pro quo" and "hostile environment."[94]

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91. *See generally* ANDREW HACKER, MONEY: WHO HAS HOW MUCH AND WHY 185–202 (1997) (explaining that "American women are still far from economic parity" with men).

92. For example, Harrell R. Rodgers, Jr., explains that in "1993 over 46 percent of all families with children headed by a single woman lived in poverty." RODGERS, *supra* note 86, at 4. Indeed, we also know there is a positive correlation between domestic violence and homelessness, and that "most battered women who become homeless are also poor." *See* Diana M. Pearce, *Beyond the Shelter Door: Assessing Barriers and Bridges to Post-Shelter Housing for Battered Women*, POLICY ANALYSIS EXERCISE 1 (John F. Kennedy Sch. of Gov't ed., 1995).

93. Thomas asserts that women as a group, regardless of their economic class background, are especially vulnerable to poverty because of their "relegation to the home, domestic labor and motherhood." THOMAS, *supra* note 89, at 77. In this way the notion of a "gender class" cuts across economic class lines because of women's labor market participation and marital and child care responsibilities. It is the confluence of women's public and private roles that make them uniquely vulnerable as a class. *Id.* at 88.

94. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993); Shellhammer v. Lewallen, No. 84–3573, 1985 WL 13505 (6th Cir. July 31, 1985); Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995); Grieger v.

This importation of Title VII categories into Title VIII[95] sexual harassment in housing cases seems logical because the objectives of the two statutes are quite similar. Indeed, it has been suggested that both Title VII and Title VIII are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination."[96] The cases reveal a difficulty, however, with such casual importation. First, there is little agreement in the doctrine as to what actually constitutes sexual harassment in housing. More fundamentally, the application of categories developed in the employment context is problematic because housing and employment are conceptually distinct, and the differences between them have rarely been acknowledged or explored by the courts.

A. Doctrine of Sexual Harassment in Employment—Title VII

1. Quid Pro Quo

The first judicial recognition of sexual harassment as a form of sexual discrimination came in the context of workplace litigation alleging violations of Title VII.[97] Early cases interpreting Title VII to include sexual harassment claims recognized that workplace sexual harassment is prohibited discrimination on the basis of sex because of a woman's sex (the fact of being a woman and therefore potentially sexually desirable to a particular man) and her subordinate position in the labor regime.[98] Courts began to rule that Title VII was violated because

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Sheets, No. 87–C–6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (mem.); New York v. Merlino, 694 F. Supp. 110 (S.D.N.Y. 1988). Title VII prohibits discrimination in the workplace on the basis of sex. The Civil Rights Act of 1964, Pub. L. No. 88–352, Title VII, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e–17 (1994)). Section 703(a)(1) of Title VII makes it an "unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* Title VII, § 703(a)(1), 78 Stat. at 255 (codified at 42 U.S.C. § 2000e–2(a)(1) (1994)).

95. The Fair Housing Act, Pub. L. No. 90–284, Title VIII, 82 Stat. 73, 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3631 (1994)).

96. NAACP v. Huntington, 844 F.2d 926, 935 (2d Cir. 1989), *aff'd in part per curiam*, 488 U.S. 15 (1988); *see also* United States v. Starrett City Assocs., 840 F.2d 1096, 1101 (2d Cir. 1988); Smith v. Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982).

97. The first federal district court to hold that sexual harassment was a form of actionable sex discrimination under Title VII was Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) (holding that retaliatory termination for refusal to submit to employer's sexual advances was sex discrimination under Title VII), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); *see also* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

98. The first federal appellate court to hold that sexual harassment was an actionable form of sex discrimination reasoned:

> But for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because

submission to a sexual act was made a condition of employment for a woman but not for a man; consequently, sexual harassment was understood to be sexual discrimination "because of" a woman's gender.[99] These cases implicitly recognized that quid pro quo harassment was a method of extorting sexual compliance from an employee by forcing her to choose between acceding to sexual demands and losing her job.[100] Over time, courts presented with quid pro quo factual situations established certain requirements for plaintiffs to establish a cause of action under Title VII. Quid pro quo sexual harassment requires conduct on the part of the discriminator that is unwelcome, and sexual in nature. In addition, the performance of the unwelcome sexual demand must be made a condition of the job such that refusal results in an adverse employment action.[101]

The Equal Employment Opportunity Commission and some courts have also recognized a cause of action for "implied" quid pro quo sexual harassment.[102]

> she was a woman subordinate to the inviter in the hierarchy of agency personnel.

Barnes, 561 F.2d at 990.

99. *See* Henson v. Dundee, 682 F.2d 897, 903–04 (11th Cir. 1982); *Williams*, 413 F. Supp. at 659.

100. Catharine MacKinnon defined "quid pro quo" sexual harassment as occurring when "sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity." MACKINNON, *supra* note 14, at 32; *see, e.g.*, Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990); Highlander v. KFC Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986) ("Quid pro quo sexual harassment is anchored in an employer's sexually discriminatory behavior which compels an employee to elect between acceding to sexual demands and forfeiting job benefits...."); *Henson*, 682 F.2d at 910 ("In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo."); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 (3d Cir. 1977) (Tompkins' continued success and advancement were dependent upon agreeing to her supervisor's sexual demands and were a condition of her employment.); Sowers v. Kemira, 701 F. Supp. 809, 823 (S.D. Ga. 1988).

101. EEOC guidelines define quid pro quo sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual....

29 C.F.R. § 1604.11(a) (1997); *see also Henson*, 682 F.2d at 911–13.

102. *See* 24 CFR § 1604.11(a)(1); *see also Spencer*, 894 F.2d at 658–59 (holding quid pro quo harassment can be proven by showing that acceptance of the harassment was an "express or implied condition to receipt of a job benefit"); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987) (holding plaintiff failed to prove quid pro quo sexual harassment because she did not show—either implicitly or explicitly—that a job benefit was conditioned on her acceptance of harassment.); Jones v. Flagship Int'l, 793 F.2d 714, 722 (5th Cir. 1986) (holding that in order to create liability for sexual harassment, plaintiff must show that a tangible job benefit was denied as the result of an implied or express

Lynn T. Dickinson defines this type of harassment as occurring in situations in which the "employer merely implies that the plaintiff's submission to sexual advances is a condition of receiving tangible job benefits."[103] Courts evaluating implied quid pro quo causes of action in the employment context, however, have had difficulty finding for the plaintiff. Courts have required such a strong causal connection between the sexual advance and the adverse job action that this type of harassment is virtually indistinguishable from explicit quid pro quo sexual harassment.[104] Some commentators have urged adoption of a "reasonable person" standard into the implicit quid pro quo evaluation, and the Ninth Circuit has applied this standard.[105] An objective reasonable person standard would require the court to ask whether a "reasonable employee would perceive that her benefit is conditioned upon sex."[106] As we will see, the application of the reasonable person standard is important in both implied quid pro quo and hostile environment causes of action.

2. Hostile Environment

The legal definition of sexual harassment has evolved to better recognize the reality of women's lives as they experience them in the workplace.[107] In 1986,

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sexual demand); *Henson*, 682 F.2d at 909 (holding compliance with sexual demands must be an express or implied condition of job benefit).

103. Lynn T. Dickinson, *Quid Pro Quo Sexual Harassment: A New Standard*, 2 WM. & MARY J. WOMEN & L. 107, 110 (1995).

104. *See, e.g.*, *Spencer*, 894 F.2d at 658–59 (despite stating that quid pro quo harassment could be proven implicitly, finding that the plaintiff failed to meet her burden of production in rebutting defendant's proffered nondiscriminatory reasons for termination); *see also Hicks*, 833 F.2d at 1414 (stating that the plaintiff failed to prove either explicitly or implicitly that her termination was the result of her refusal to tolerate sexual touching despite proffered evidence that defendant had engaged in such behavior); *Jones*, 793 F.2d at 717, 722 (finding no evidence of implicit quid pro quo sexual harassment despite fact that plaintiff was terminated from defendant company after filing a complaint with the EEOC).

105. *See* Nichols v. Frank, 42 F.3d 503, 511–12 (9th Cir. 1994) (applying a reasonable person standard and going on further to state that if the plaintiff is a woman, a reasonable woman standard is used, and if the plaintiff is a man, a reasonable man standard is used); Dickinson, *supra* note 103, at 113–16. However, some courts seem to use an objective standard to rule against plaintiffs but fail to specifically articulate and adopt that standard. *See* Chamberlain v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (discussing the importance of the "perspective of the factfinder" in determining liability); *Highlander*, 805 F.2d at 650 (using a "reasonable person" standard to find for the defendant); *see also* discussion *infra* Part II.B.2.b.

106. *See, e.g.*, Dickinson, *supra* note 103, at 115.

107. For example, in 1980 the EEOC issued guidelines interpreting sexual discrimination under Title VII to include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1997).

the Supreme Court in *Meritor Savings Bank v. Vinson*[108] recognized that a second broad category of sexual harassment, termed "hostile environment," could constitute discrimination under the law. While commentators have suggested that *Meritor Savings Bank* was something of a qualified victory,[109] the Court did hold that severe or pervasive sexual harassment that alters the "conditions of the [victim's employment] and create[s] an abusive working environment" is actionable under Title VII.[110] In hostile environment at work cases, courts have struggled to determine whether and when the alleged harassing actions are so severe or pervasive that Title VII is violated.[111]

The Supreme Court has determined that the appropriate standard in evaluating employment-based hostile environment cases is an objective reasonableness test. In *Harris v. Forklift Systems*,[112] the Court adopted a two-pronged "objective/subjective" standard: the conduct must be severe or pervasive enough to create an "objectively hostile or abusive work environment," and the victim must "subjectively perceive" that the environment is hostile.[113] Thus a hostile work environment exists where "the environment would reasonably be perceived, and *is* perceived, as hostile or abusive."[114] *Harris* did not explicitly resolve, however, the question of whether "reasonable person" means "reasonable woman" for the purposes of determining the objective reasonableness of the conduct.[115]

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108. 477 U.S. 57 (1986).

109. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 825–33 (1991) (asserting that the Supreme Court's ruling in *Meritor* carried several "significant" reservations, including the requirement that a plaintiff show "unwelcomeness" of the conduct); Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 53–63 (1990) (suggesting that *Meritor* Court undermined its own holding).

110. *Meritor*, 477 U.S. at 67 (first alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

111. The EEOC has provided some guidance in this area. For example, EEOC guidelines suggest several factors in determining whether there is a hostile work environment:

> (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.

EQUAL EMPLOYMENT OPPORTUNITY COMM'N, SEXUAL HARASSMENT: EEOC POLICY GUIDANCE (March 19, 1990), *reprinted in* 3 FAIR EMPLOYMENT PRACTICES 365:4071, 365:4078 (Warren, Gorham & Lamont 1994).

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

113. *Id.* at 21.

114. *Id.* at 22 (emphasis added).

115. *See* BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 615 (2d ed. 1996) (asserting that the "issue was not fully litigated [before the court] because Teresa Harris's lawyers conceded...in her final

B. Development of Sexual Harassment in Housing—Title VIII

1. Application of Employment Law Paradigms to Sexual Harassment at Home

Title VIII of the Civil Rights Act of 1968 prohibits discrimination in housing on the basis of various protected categories, including race, religion, and national origin.[116] In 1974, Title VIII was amended to include sex as a protected classification under its terms,[117] and sexual discrimination in the sale, rental, terms, and/or conditions of housing is prohibited conduct under the statute.[118] In 1985, *Shellhammer v. Lewallen*[119] was the first reported case to hold that sexual harassment constitutes sexual discrimination under the Fair Housing Act.[120]

Cases evaluating allegations of sexual harassment at home have imported the concept of quid pro quo into an entirely different factual setting. In the housing context, quid pro quo usually takes the form of "conditioned tenancy;" that is, where the landlord "either (1) condition[s] any of the terms, conditions or privileges of tenancy on submission to his sexual requests or (2) deprive[s] a tenant of any of the terms, conditions or privileges of tenancy because she refuse[s] to accede to those requests."[121] This importation has posed few difficulties in cases that present fairly egregious factual allegations. *Shellhammer v. Lewallen* is a typical example.[122] In *Shellhammer*, Thomas and Tammy Shellhammer alleged that their landlord asked Ms. Shellhammer to pose nude for him, and on another occasion, that Mr. Lewallen approached Ms. Shellhammer asking her for sex in exchange for money.[123] Shortly thereafter, the parties had a dispute over the rent in connection with the Lewallens' failure to provide a refrigerator for their apartment; the Lewallens maintained that they were not responsible for providing the unit.[124] The Shellhammers refused to pay the rent and the Lewallens instituted eviction proceedings.[125] On appeal, the Sixth Circuit ruled that Title VIII could support an assertion of "tenancy subject to sexual

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brief...that unwelcome workplace conduct should be considered from the viewpoint of a reasonable person in the position of the plaintiff").

116. *See* 42 U.S.C. §§ 3601–3631 (1994).

117. *See* Housing and Community Development Act of 1974, Pub. L. No. 93–383, 88 Stat. 633 (codified at 42 U.S.C. §§ 3601–3619 (1994)).

118. *See* 42 U.S.C. § 3604(a)–(e) (1994).

119. No. 84–3573, 1985 WL 13505 (6th Cir. July 31, 1985).

120. *See id.* at *2.

121. Grieger v. Sheets, No. 87–C–6567, 1989 WL 38707, at *3 (N.D. Ill. Apr. 10, 1989) (mem.).

122. *Shellhammer*, 1985 WL 13505.

123. *Id.* at *1; *see also infra* Part III.A.

124. *Shellhammer*, 1985 WL 13505, at *1.

125. *Id.*

consideration" if the Shellhammers were evicted "because Mrs. Shellhammer had rebuffed Mr. Lewallen's sexual advances."[126]

As a conceptual matter, the analogy between quid pro quo in the work environment and conditioned tenancy at home works adequately to the extent that the employment cases have recognized that the nature of the employment hierarchy permits the supervisor to "punish[] that subordinate for refusing to comply."[127] In the conditioned tenancy cases, the relationship of subordination is that between the landlord and tenant and what is at stake is similar in value to a job.[128] Indeed, courts evaluating allegations of sexual harassment at home have been particularly open to this recognition where there is a very clear demarcation of economic power between the harasser and the victim. For example, in *Woods v. Foster*,[129] three female residents of a homeless shelter alleged that they were subjected to sexual advances, unwanted touching and requests for sexual favors by the executive director and chairman of the board of directors of the shelter in which they resided.[130] The court denied the defendants' motion to dismiss their allegation that Title VIII did not reach homeless shelters and therefore did not apply to the complained of actions because plaintiffs did not "rent" their abode.[131]

2. Limits of Application of Employment Law

a. Failure to Understand Context: Sexual Harassment at Home as "Intimate Violence"

While the application of employment law principles to sexual harassment at home is somewhat useful, it fails to address central issues raised in the sexual-harassment-at-home cases. The intimacy of the relationship between landlord and tenant make sexual harassment at home different from sexual harassment at work. Sexual harassment at home can, I believe, be understood as a form of "intimate violence," particularly given the economic and cultural backdrop described herein.[132] I focus on the concept of intimate violence here to emphasize the links

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126. *Id.*; *see also* Doe v. Maywood Hous. Auth., No. 93-C-2865, 1993 WL 243384, at *1 (N.D. Ill. July 1, 1993) (mem.) ("Where a landlord has conditioned any of the terms, conditions or privileges of tenancy on submission to his sexual requests, an action for sexual harassment in violation of the Fair Housing Act will be found."); Chomicki v. Wittekind, 381 N.W.2d 561, 563 (Wis. Ct. App. 1985) (upholding jury verdict in favor of tenant on state law conditioned tenancy theory where the landlord "gave her an ultimatum either to have sex with him or vacate her apartment").

127. Lipsett v. University of P.R., 864 F.2d 881, 897 (1st Cir. 1988) (analogizing Title IX to Title VII).

128. *See supra* Part I.B.

129. 884 F. Supp. 1169 (N.D. Ill. 1995).

130. *Id.* at 1171.

131. *Id.* at 1175.

132. Various researchers refer to "family violence" or "intimate violence" as a wide range of abusive behaviors that take place within the home. Such behaviors include:

between some of the behaviors observed in the sexual-harassment-at-home context and various types of violence that occur within the home.[133]

Not all of the practices constituting sexual harassment at home are characterized by physical "violence" as that term is used in common parlance. Commentators have critiqued the use of all-purpose terms like "violence against women" because by labeling all acts of male aggression against women as "violence," the phrase loses its descriptive power and we risk becoming mired in incoherence and a dangerous relativity.[134] I choose "intimate violence" first because several of the cases demonstrate that landlords have engaged in objectively violent acts in an effort to force women to conform to their sexual desires. Second, I believe it is useful to describe the factual circumstances presented by the sexual-harassment-at-home cases along a continuum of sexually aggressive acts that escalate toward the objectively violent.

I do not use "intimate violence" here to equate a sex for rent demand with an escalating cycle of battering that results in a husband killing his wife. Those two acts are not the same, and I do not suggest that the relative intimacy of the landlord-tenant relationship and a familial relationship are equivalents. I suggest, instead, that female tenants may experience landlord-tenant sexual harassment as a form of intimate violence, that is, as a form of abuse that occurs "because it can."[135] Sexual harassment at home, then, is like other forms of intimate violence because of the relative privacy of the home space and the structural inequality that exists between

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wife battering, physical and sexual abuse of children, incest, marital rape, and domestic homicide. *See* HANDBOOK OF FAMILY VIOLENCE 3 (Vincent B. Van Hasselt et al. eds., 1988). Julie Blackman describes "intimate violence" as wife abuse, child abuse, and sexual assaults within and without families. Her view is that intimate violence, once seen as a personal problem, has emerged in the past two decades to be more accurately viewed as a social problem, as well as the focus of vigorous political action. *See* JULIE BLACKMAN, INTIMATE VIOLENCE: A STUDY OF INJUSTICE 1–27 (1989).

133. Indeed Richard J. Gelles and Murray A. Straus define "intimate violence" even more broadly to include acts such as emotional abuse of loved ones, elder abuse, and sibling abuse. *See* RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE: THE DEFINITIVE STUDY OF THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY 59–69 (1988).

134. *See, e.g.*, VIKKI BELL, INTERROGATING INCEST: FEMINISM, FOUCAULT AND THE LAW 58–59 (1993). Vikki Bell suggests that including less overt forms of sexual aggression along a "continuum" of violence is problematic because such use tends to obscure the relationship between violence and power. *Id.* This is the case because "violence is often unnecessary; powerful groups or individuals do not need to resort to violence." *Id.* at 59; *see also* LIZ KELLY, SURVIVING SEXUAL VIOLENCE 74–137 (1988) (describing a "continuum" of sexual violence against women as the "abuse, intimidation, coercion, intrusion, threat and force men use to control women").

135. *See* RICHARD J. GELLES & CLAIRE PEDRICK CORNELL, INTIMATE VIOLENCE IN FAMILIES 116 (1990). Gelles and Cornell suggest that intimate violence occurs because the cost of being violent is less than its reward. Factors that tend to increase the rewards of being violent are the private nature of the household and the structural inequality that exists within the family. *See id.* at 116–19.

a landlord and tenant.[136] This central insight is useful in understanding sexual harassment at home and assigning appropriate damages.[137] Moreover, it assists us in viewing the activity as part of a pattern of sexual aggression that occurs within particular relationships and in particular locales. Understood this way, sexual harassment at home is unique given the nature of the landlord-tenant relationship, the symbolic concept of the home, and women's traditional and continued roles within it. These differences starkly delineate sexual harassment at home from sexual harassment at work.

Sexual harassment at home is defined by a misuse of authority by an individual in a trusted position of power and his exploitation of certain opportunities, both made possible by the structure of the landlord-tenant metarelationship. It is within that relationship that the landlord abuses his position of power in an effort to ensure sexual compliance. Women experience the landlord's acts as an invasion of their space and as violation of their privacy within the home. The landlord wields power over the tenant, which manifests itself in acts of sexual aggression that range from shouting explicit "come-on's" in front of a female tenant's children;[138] to menacing behavior in and around the home;[139] to demanding sex for rent; to threatening eviction; to interfering with valuable housing assistance;[140] to sexual battery and assault.[141]

Research confirms that "women are more likely to be attacked, raped, injured, or killed by current or former male partners than by any other type of assailant."[142] Sexual harassment at home is another form of intimate violence not because the landlord is identical or analogous to an intimate partner. Rather, like husbands and other male figures in the home, there tends to be an ongoing relationship between the landlord or other building personnel and the tenant, and the closeness or intimacy of that relationship facilitates the landlord's ability to engage in sexually aggressive behavior toward the tenant. Additionally, researchers have noted that one of the reasons for the greater likelihood and severity of acts of aggression carried out against women by intimate partners is that "intimates are readily

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136. *See id.* at 116–19; *see also supra* Part I.B (discussing inequality in landlord-tenant relationship).

137. *See infra* Part III.B.2.

138. *See, e.g.*, Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84, 86 (Mass. 1988).

139. *See, e.g.*, Krueger v. Cuomo, 115 F.3d 487, 490 (7th Cir. 1997); DiCenso v. Cisneros, 96 F.3d 1004, 1006 (7th Cir. 1996); Honce v. Vigil, 1 F.3d 1085, 1087 (10th Cir. 1993); Beliveau v. Caras, 873 F. Supp. 1393, 1395 (C.D. Cal. 1995); *Gnerre*, 524 N.E.2d at 86; Chomicki v. Wittekind, 381 N.W.2d 561, 563 (Wis. Ct. App. 1985).

140. *See, e.g.*, Grieger v. Sheets, No. 87–C–6567, 1989 WL 38707, at *1 (N.D. Ill. Apr. 10, 1989) (mem.); *Chomicki*, 381 N.W.2d at 563.

141. *See, e.g.*, Williams v. Poretsky Management, Inc., 955 F. Supp. 490 (D. Md. 1996); *Beliveau*, 873 F. Supp. at 1398 n.3.

142. MARY P. KOSS ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 41 (1994).

available, the amount of time at risk is high, and assaults can be carried out in private."[143]

A review of the sexual-harassment-at-home cases reveals tenants' frequent availability in and around their apartments and the private nature of the landlord-tenant relationship. For example, in many instances landlords have entered a female tenant's apartment in order to perform a repair[144] or for the purposes of obtaining rent payments.[145] Once inside, building personnel and the tenant are often alone; other individuals (except perhaps the tenant's children), who might discourage a harassing act, are rarely present.

A continued examination of the sexual-harassment-at-home cases suggests that on other occasions landlords do not wait for an invitation, but instead utilize passkeys or other forms of access to gain entry to the female tenant's apartment.[146] Here is another useful parallel to intimate violence. Those in an intimate relationship are presumed to be in a trusting position. Keys are often shared among family and friends, and the landlord's use of the passkey to gain entry is a perversion of that trust and an exercise of unadulterated power over the tenant. Landlords or other building personnel can also readily observe female tenants during periods of relaxation when their guards are down or when they are preoccupied with other activities, such as entering or exiting the building,[147] riding in elevators,[148] or working in laundry rooms.[149] Each of these examples suggest that the landlord or other building personnel has personal access to a female tenant in a way that is not possible in more public situations. In public, women often have more choices; for example, they may choose to forego shopping at a particular store where they have been harassed in the past. This is not the case in the privacy of the home.

The sexual-harassment-at-home cases are unique to the extent that landlords manipulate deeply held notions of physical and psychological safety that we expect in the home in an effort to coerce women to engage in sexual encounters. For example, in *Chomicki v. Wittekind*, the landlord told a female tenant that she must "either have sex with him or vacate her apartment."[150] She refused his demands.[151] He then engaged in several harassing activities such as

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143. *Id.*

144. *Beliveau*, 873 F. Supp. at 1395; *Grieger*, 1989 WL 38707, at *1; *Gnerre*, 524 N.E.2d at 86.

145. DiCenso v. Cisneros, 96 F.3d 1004, 1006 (7th Cir. 1996); *Gnerre*, 524 N.E.2d at 86.

146. Krueger v. Cuomo, 115 F.3d 487, 490 (7th Cir. 1997).

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

148. *Krueger*, 115 F.3d at 490; Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 491 (D. Md. 1996).

149. *Williams*, 955 F. Supp. at 491.

150. Chomicki v. Wittekind, 381 N.W.2d 561, 563 (Wis. Ct. App. 1985).

151. *Id.*

serving her with a notice to vacate and cursing at her over the phone.[152] When these avenues of persuasion failed, he then "roamed through her apartment building at all hours of the night accompanied by his guard dog."[153] The act of roaming the apartment building's halls with a guard dog would seem to be calculated to do more than simply harass the tenant, that is, to somehow alter the conditions of her housing arrangement thereby making them less valuable. The act communicated something more complicated (and terrifying). Roaming the halls with a guard dog even outside of the home space generates extremely menacing associations. One need only reflect on images of guard dogs utilized to control (if not kill) protesters, trespassers, and, more generally, the "other."[154] But when contextualized in the home space, roaming the halls with a guard dog communicates the reality that one cannot be safe in her home and its surrounding environment, the place that should ordinarily afford protection from just this type of menacing fear.

Now consider how a female tenant may experience such an act by adding to this analysis the continued identification of women with the home. By bringing the guard dog within the apartment building's walls, the landlord pierced the notion of the building as a protective sphere, an act that a female tenant may experience as a psychological and physical invasion of her space intended specifically to disturb her sense of safety, security, and personhood. The clear message is, Even though you think you should be safe here, I can take that away; I can have access to you whether you are inside or out, in the public spaces of the apartment building such as common area or perhaps even within the interior of your home. With such an act, the home as status signifier, as insulator from the public, and as safety creator is destroyed. Indeed, there is another message here, one that transcends the notion that the landlord invaded a woman's private space. Beyond merely destroying a woman's insulation from the public world, such an act serves to arrogate her space to the landlord. Consequently, he takes her space, and he does so in private, out of the public eye, much as an abusive spouse perpetrates an attack within the home and out of public view.[155]

b. Limits of Application: Liability

The inability of courts to take the nature and importance of the home into sufficient consideration has resulted in doctrinal confusion in the sexual-harassment-at-home cases. Moreover, courts have made incorrect determinations with respect to assigning liability at least in part because they have failed to examine this context when applying the reasonable person standard to determine

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152. *Id.*

153. *Id.*

154. *See, e.g.*, JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–1965, at 185 (1987) (depicting scene of police dogs utilized to break-up civil rights demonstration).

155. *See* KOSS ET AL., *supra* note 142, at 41.

liability. I suggest that application of the reasonable person standard must include reference to context. That is, we cannot understand how the plaintiff would experience sexual harassment at home without a probing, nuanced and sophisticated understanding of the nature and impact of her circumstances, and the significance that race, class, gender, and the housing market have upon those circumstances.

Our most persistent attempt to define a standard of uniform application in the law is the reasonable person standard. The reasonable person has been referred to as the "man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves."[156] Much has been written on the relative merits and failings of the reasonable person versus the "reasonable woman" standard in the context of hostile environment sexual harassment cases. Some feminists have argued that in evaluating instances of hostile work environment, the courts should use a "reasonable woman" standard to determine whether the conduct was so severe or pervasive as to create an abusive working environment.[157] Others have critiqued that argument as being grounded in the "difference" approach to feminist theory,[158] and because the reasonable woman standard places too much emphasis on the character of the victim and increases sex stereotyping.[159]

Because the reasonable person/woman debate has arisen in connection with the evaluation of hostile environment cases, much of the discussion has understandably turned on the proper way to interpret a plaintiff's perceptions of her work environment. The question has been, How does the factfinder evaluate whether the complained of conduct is actionably hostile?[160] Here, the answer

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156. *See* Hall v. Brooklands Auto Racing Club, 1 K.B. 205, 224 (1933).

157. *See* Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005 (1992); Deborah B. Goldberg, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 CARDOZO WOMEN'S L.J. 195 (1995); Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411 (1992). The reasonable woman standard has been described as including "either a subjective (what did this reasonable woman think at the time?) and/or an objective (how would other reasonable women react?) element or both. Accordingly, it requires both an individualized inquiry and a 'community norm' inquiry." Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1407–08 (1992); *see also* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the perspective of a reasonable woman "primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women").

158. *See* Cahn, *supra* note 157, at 1413 ("As a theoretical construct, the reasonable woman standard accords nicely with difference feminism because it focuses on similarities among women and differences with men.").

159. Brief for the NOW Legal Defense and Education Fund, as Amici Curiae, at 21–22, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (No. 92–1168); Cahn, *supra* note 157, at 1402 (The reasonable woman standard "further stereotypes and disempowers.").

160. The contours of the reasonable person/reasonable woman question are very similar in implied quid pro cases. The issue there is, How do we know with any degree of

provided by some feminists is that we must look to the woman's understanding of the event(s), and ask the question, Would a reasonable woman have perceived the environment as hostile?[161] As we have seen, the standard courts will apply in hostile environment cases involves a two-pronged objective/subjective test.[162] But even in applying the objective part of the test, that is, whether the conduct created an objectively "abusive and hostile work environment,"[163] the question still remains, How do we determine the objective reasonableness of that conduct? The answer is that we must look to the context in which the complained of actions occurred.

Whether we use a reasonable person or reasonable woman standard, we still need to appreciate the circumstances in which the alleged harassment takes place. This means we must know and understand the "power link" between the woman's economic status and the housing market. We must appreciate the metarelationship between the landlord and the tenant,[164] as well as the full spectrum of the symbolic and emotional weight of the concept of home.[165] Home is a source of personal solitude, privacy, and respite from a workaday, male-dominated world;[166] home is where women raise their children and support extended families;[167] home is a site of sexual abuse;[168] for most women, home is also another workplace;[169] and, for renters as well as owners, home is a place where women invest so much of themselves that they are emotionally connected to

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certainty that the implied request truly made sex a condition of employment, or in the sexual-harassment-at-home cases, housing? The plaintiff believes it was; the defendant typically takes the position that it was not. Like the hostile environment cases, the outcome of this issue depends upon the standard the fact finder uses. A reasonable woman might have found that the implied request was a condition of employment (housing), though a reasonable person would have found that it was not a condition. *See also* Dickinson, *supra* note 103, at 123–25.

161. *See Ellison*, 924 F.2d at 878–79.

162. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

163. *See id.* at 21.

164. *See supra* Part I.B. Indeed, Zalesne argues that there is substantial inequality in the landlord-tenant relationship, and that this power imbalance (and others related to it) decreases the effectiveness of both the "reasonable woman" and the "reasonable person" standards in Title VIII fair housing cases. *See* Zalesne, *supra* note 5, at 881–85. Her conclusion is that unless courts recognize such power imbalances, "sexual harassment jurisprudence will remain caught in a truly unreasonable conundrum." *Id.* at 902.

165. *See supra* Part I.A.

166. *See supra* Part I.A.

167. *See supra* Part I.A.

168. *See supra* Part I.A.

169. *See* ARLIE HOCHSCHILD & ANN MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989) (examining the reality that many women put in a second day of work at home).

that place.[170] As we have seen, the home is a highly protected space under both our common law and our constitutional law.[171]

This view—that context matters—is supported by doctrinal development in many areas of the law. For instance, the basic inquiry in the law of negligence asks how might a reasonable person behave under the circumstances?[172] In criminal law, we see that knowledge and appreciation of the social context[173] in which people act has allowed evidence of the battered women's syndrome[174] to be introduced by women in order to justify or excuse certain criminal acts.[175] And indeed, the question of the plaintiff's personal circumstances has arisen in some hostile environment in employment cases.[176]

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170. *See supra* Part I.A; *see also* Radin, *Property and Personhood*, *supra* note 59, at 991–96.

171. *See supra* Part I.A.

172. *See* RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("[T]he standard of conduct to which [an actor] must conform to avoid being negligent is that of a reasonable man under like circumstances.").

173. *See* Lawrence S. Lustberg & John V. Jacobi, *The Battered Woman as Reasonable Person: A Critique of the Appellate Division Decision in* State v. McClain, 22 SETON HALL L. REV. 365, 365–66 (1992) (arguing that *State v. McClain*, 591 A.2d 652 (N.J. App. Div. 1991), "perverted" notions of objective reasonableness as applied to the battered women's syndrome as reflected in *State v. Kelly*, 478 A.2d 364 (N.J. 1984)).

174. The "battered woman's syndrome" has been defined as "a pattern of psychological symptoms that develop after somebody has lived in a battering relationship." California v. Aris, 215 Cal. App. 3d 1178, 1194 (Ct. App. 1989) (quoting Dr. Lenore Walker, a psychologist and nationally recognized authority on battered women), *overruled on other grounds by* People v. Humphrey, 13 Cal. 4th 1073 (1996). One such symptom is a heightened sensitivity toward danger. This causes the victim to react more quickly to situations she may perceive as being dangerous than someone who has not been so victimized. *Id.*

175. *See* State v. Kelly, 478 A.2d 364 (N.J. 1984) (allowing defendant to present exculpatory expert testimony regarding battered woman's syndrome on both the objective and subjective prongs of passion/provocation manslaughter).

176. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) ("[A] proper assessment or evaluation of an employment environment...would invite consideration of...the background and experience of the plaintiff [(other factors concerning working environment listed)]...coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment."). Several commentators have criticized the *Rabidue* court's application of the above stated standard. *See, e.g.*, Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After* Harris v. Forklift Systems, Inc.*?*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 376–77 (1994–95) (asserting that the majority's opinion in *Rabidue* is too harsh and makes it nearly impossible to affect any positive change in terms of sexually discriminatory behavior in the workplace); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1199–1200 (1990) (The author asserts that *Rabidue* suggested that the plaintiff could have ignored the situation and that she had "assumed the risk of harassment." Consequently, the majority in *Rabidue* ignored "economic realities" and "structural inequalities in society."); Goldberg, *supra* note

The sexual-harassment-at-home cases, however, have failed to import such a contextualized understanding into their determinations. In *Honce v. Vigil*,[177] for example, the plaintiff's implied quid pro quo and hostile housing environment claims were incorrectly rejected by the court.[178] *Honce* concerned a series of disputes that occurred after the plaintiff rented a lot in a mobile home park;[179] Mr. Vigil owned the park.[180] After she signed a rental agreement for a lot in the park, but before completely moving into her mobile home, Mr. Vigil asked Ms. Honce out socially on three occasions.[181] Ms. Honce declined each time.[182] After Ms. Honce moved into the mobile home, there were a number of disputes about the property concerning plumbing, certain stepping stones, and the construction of a fence for Ms. Honce's dog.[183] A confrontation occurred in connection with the construction of the dog run during which Ms. Honce and Mr. Vigil engaged in a shouting match and Mr. Vigil threatened to evict her.[184] The incident culminated in Mr. Vigil's revving the engine of his truck as Ms. Honce's dog ran in front of the vehicle.[185] Later that night, Ms. Honce went to the sheriff's department for advice; she was told that she should fear for her safety.[186] Ms. Honce left the trailer park the next day and moved out permanently the following month.[187]

Ms. Honce argued that Mr. Vigil became unreasonable after she rejected his advances and that as a result she was forced to leave her home.[188] The Tenth

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157, at 200–01 (suggesting that the majority's opinion in *Rabidue* ignored the fact that the reasonable person standard really means reasonable man and it should be replaced by the dissent's conclusion that a reasonable woman standard is more appropriate in the sexual harassment context).

Several courts have accepted the *Rabidue* court's statement that the victim's personal background should be taken into account when deciding sexual harassment cases. Specifically, these courts have applied a two-prong objective/subjective test to determine whether a reasonable person would have been offended by the complained of conduct and whether the victim was actually offended. *See* Andrews v. Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) (under *Rabidue's* subjective/objective standard, finding the subjective inquiry to be "crucial" in upholding jury's finding for plaintiffs in sexual harassment case); Steward v. Cartessa Corp., 771 F. Supp. 876, 880–81 (S.D. Ohio 1990) (using *Rabidue's* subjective/objective standard to find that plaintiff was subjected to actionable sexual harassment in her workplace). What is noteworthy about these cases is that courts are beginning to recognize the importance of the victim's perspective.

177. 1 F.3d 1085 (10th Cir. 1993).

178. *See id.* at 1085–91. Plaintiff's disparate treatment claim was also rejected by the court. *See id.* at 1088–89.

179. *Id.* at 1087–88.

180. *Id.* at 1087.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1088.

Circuit ruled that Ms. Honce had rejected Mr. Vigil's advances *before* moving into the trailer park, and, therefore, Mr. Vigil made "no quid pro quo threat based on sexual favors."[189] Consequently, the court affirmed the denial of the plaintiff's quid pro claim because she failed to "provide any evidence of a connection" between the landlord's adverse actions and her refusal of his advances.[190] The court ruled that Ms. Honce had failed to prove that Mr. Vigil retaliated against her for failing to see him socially and that his positions regarding the housing matters were justified, that is, there was a legitimate, nondiscriminatory reason for Mr. Vigil's behavior.[191]

Moreover, the *Honce* court also rejected the plaintiff's hostile environment claim because the three requests for dates did not include "sexual remarks or requests, physical touching, or threats of violence."[192] Thus, the court ruled that the "conduct was neither sexual nor directed solely at women."[193]

First, *Honce* failed to import the applicable law in a manner most beneficial to the plaintiff. While the unwelcome conduct needs to be "because of sex," it need not be sexual in nature as the *Honce* court suggested.[194] Part of the problem, explicitly noted by the *Honce* court, is the fact that the Department of Housing and Urban Development has failed to provide guidance to courts seeking to define the term "hostile housing environment" by promulgating appropriate regulations.[195] As will be discussed later, a more subtle reading of the court's decision reveals that it underestimated the importance of the location in interpreting the severity and pervasiveness of the complained of conduct. These

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189. *Id.* at 1089.

190. *Id.*

191. *See id* at 1088–89.

192. *Id.* at 1090.

193. *Id.*

194. *See* Andrews v. Philadelphia, 895 F.2d 1469, 1485 n.6 (3d Cir. 1990). In 1993, the EEOC proposed sexual harassment guidelines pursuant to which several forms of nonsexual conduct, including conduct that "[h]as the purpose or effect of creating an intimidating, hostile, or offensive work environment," could be actionable sexual harassment. *See* Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266, 51,267 (1993). The EEOC withdrew these guidelines because of controversy surrounding their application to religious harassment. *See also* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 786 (American Bar Ass'n 1996).

195. *See* 24 CFR §§ 100.50 to 100.90 (1997) (failing to define sexual harassment as a discriminatory housing practice). EEOC guidelines suggest that conduct creates a hostile environment in the workplace where it is "(1) severe enough to alter the complainant's workplace experience, even though the conduct occurs only once or rarely,...or (2) pervasive enough to become a defining condition of the workplace." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT, *reprinted in* 8 Fair Employment Practices 405:6689, 405:6690 to 405:6691 (Warren, Gorham & Lamont 1994); *see also* DiCenso v. Cisneros, 96 F.3d 1004, 1007 (7th Cir. 1996).

requests were made on Ms. Vigil's home turf, site of the private part of the much analyzed public/private dichotomy.[196]

Moreover, while courts have recognized that hostile housing environment is actionable under Title VIII, there has been much confusion as to what that really means. For instance, the Tenth Circuit held that a claim for hostile housing environment "is actionable when the offensive behavior unreasonably interferes with use and enjoyment of the premises. The harassment must be 'sufficiently severe or pervasive' to alter the conditions of the housing arrangement."[197] But the courts have had some difficulty applying this formulation. The court in *Shellhammer* essentially ignored the concept that the same facts can support both a cause of action under quid pro quo and a hostile environment theory.[198] Instead, *Shellhammer* upheld the trial court's denial of the hostile environment claim because "two requests during the three or four months of her tenancy...[do] not amount to the pervasive and persistent conduct which is a predicate to finding that the sexual harassment created a burdensome situation which caused the tenancy to be significantly less desirable."[199] This was the case notwithstanding the fact that those two requests solicited sex in exchange for money and requested that Ms. Shellhammer pose for nude photographs for her landlord.[200] She refused and after a dispute over an apartment repair and an untimely rent payment, the landlord initiated eviction proceedings.[201]

A recent Seventh Circuit case is consistent with *Shellhammer's* decontextualized emphasis on the quantity, rather than the quality, of the harassing incidents. *DiCenso v. Cisneros*[202] overturned an administrative appellate determination finding in favor of a plaintiff on a hostile housing environment theory.[203] In *DiCenso*, the landlord stood at the tenant's door and "asked about the rent and simultaneously began caressing her arm and back...[stating] that if she could not pay the rent, she could take care of it in other ways."[204] After the plaintiff slammed the door in the landlord's face, he called her a "bitch" and a "whore."[205] The majority viewed this single incident of sexual harassment as insufficient to rise to the level of creating a hostile housing environment because "isolated and

196. *See supra* note 13.

197. *Honce*, 1 F.3d at 1090 (quoting Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987)).

198. *See* BARBARA LINDENMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 52–53 (1992). The *Shellhammer* court did uphold plaintiffs' quid pro claim. Shellhammer v. Lewallen, No. 84–3573, 1985 WL 13505, at *2–*3 (6th Cir. July 31, 1985).

199. *Shellhammer*, 1985 WL 13505, at *2 (citing the magistrate's determination).

200. *Id.* at *1.

201. *Id.*

202. 96 F.3d 1004 (7th Cir. 1996).

203. *Id.* at 1007–09.

204. *Id.* at 1006.

205. *Id.*

innocuous incidents do not support a finding of sexual harassment."[206] For the majority, the dispositive facts were the landlord's failure to touch an "intimate" body part, and the notion that this was a single incident that only "vaguely" invited the plaintiff to exchange sex for rent.[207] Indeed, in ruling against the plaintiff, the *DiCenso* court explicitly declined to defer to the HUD Secretary Designee's determination that a single incident of sexual harassment could amount to a hostile housing environment.[208] It did so because "HUD has not even enacted guidelines regarding hostile housing environment sex discrimination" and instead merely invoked Title VII hostile employment doctrine to determine Title VIII sexual harassment cases.[209] Consequently, the court ruled that it was not constrained by the agency's determination.[210]

c. Limits of Application: Damages

Even where courts have found defendants liable in sexual-harassment-at-home cases, plaintiffs have not received compensation commensurate with their harms given the nature and severity of an invasion of one's home and the landlord's abuse of power within it.

Recall, for instance, plaintiffs' successful quid pro quo claim in *Shellhammer v. Lewallen*.[211] That claim, however, was valued at only $7410 although that amount was intended to compensate plaintiffs for their landlord's "request" that Ms. Shellhammer pose for nude pictures, and his "request" that she have sex with him in exchange for money; and the eviction of the plaintiff and her family when she refused his demands.[212] There is no sense that the court in *Shellhammer* evaluated the reality of what it means and how it feels to be asked to pose for nude pictures, to be solicited for sex in exchange of money in your home environment, to have your landlord brazenly exercise power over you, and to lose your home if you do not agree to a landlord's demands.[213] Beyond the question of whether such an award was sufficient to cover the costs of moving and securing another suitable apartment, an award of $7410 was surely insufficient compensation for the loss of plaintiffs' home given its meaning and value in the culture.

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206. *Id.* at 1008.

207. *Id.* at 1009. In dissent, Judge Flaum suggested that the HUD Secretary Designee's determination was entitled to considerable weight and that the "sex for rent" offer and verbal attack provided the agency with support for its conclusion. *See id.* at 1010 (Flaum, J., dissenting).

208. *Id.* at 1007.

209. *Id.*

210. *Id.*

211. No. 84–3573, 1985 WL 13505 (6th Cir. July 31, 1985).

212. *See id.* at *1–*2.

213. *See id.* Mr. Lewallen asked Ms. Shellhammer to pose nude and to have sex in exchange for money while she was cleaning vacant apartments for him. *Id.* at *1.

In *Gnerre v. Massachusetts Commission Against Discrimination*,[214] the plaintiff was subjected to various harassing comments, one of which occurred in front of her son.[215] In that case, the plaintiff complained of "severe and prolonged emotional distress," and that she felt "terribly embarrassed," "degraded," "cheap," and "low" after the comments.[216] The plaintiff also became "terrified" because she was unsure of what her landlord would do to her, and she changed her behavior patterns to prevent contact with him.[217] While the *Gnerre* court upheld the plaintiff's claims, she was awarded damages of only $1000 plus interest at a rate of twelve percent per year from the time of the filing of the complaint.[218]

Moreover, if we compare damage awards in the housing area to damage awards in the employment area, it is clear as a relative matter that women who experience sexual harassment in the home are undercompensated with respect to economic and emotional harm and in the awarding of punitive damages. A finding of liability under the Fair Housing Act entitles the plaintiff to any or all of the following: an award of actual damages, an award of punitive damages, or any equitable relief the court deems appropriate.[219] Damage awards for economic injury in the housing context are based upon actual injury for economic loss suffered as the result of an unlawful housing practice.[220] Such damages are often very low because they are limited to the costs of moving and storage, and to the incremental difference in rental values between the housing denied to the plaintiff and the housing obtained by the plaintiff after the discriminatory act has taken place.[221] Along those lines, consider *Chomicki v. Wittekind*, where damages were awarded to the plaintiff for the expenses incurred "as a result of the abrupt termination of her tenancy."[222] The total amount awarded for her economic loss was $1500.[223]

In contrast, plaintiffs in sexual-harassment-in-employment cases receive higher damage awards because salaries and benefits, for the most part, tend to be higher than the costs of moving, storage, and the difference in rental values. For example, in sexual-harassment-in-employment cases, damages often include awards for back pay and front pay as well as compensation for mental and

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214. 524 N.E.2d 84 (Mass. 1988).

215. *See id.* at 86.

216. *See id.*

217. *See id.* at 86–87. Indeed, plaintiff's desire to change behavior patterns in order to avoid landlord contact is echoed in *Krueger*. *See* Krueger v. Cuomo, 115 F.3d 487, 490 (7th Cir. 1997).

218. *See Gnerre*, 524 N.E.2d at 87.

219. *See* 42 U.S.C. § 3613(c) (1994).

220. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 25.3(2)(a), at 25–13 (West Group 1997).

221. *See id.* § 25.3(2)(b), at 25–18.

222. 381 N.W.2d 561, 565 (Wis. Ct. App. 1985).

223. *Id.*

emotional distress.[224] When we compare, "front-pay" awards in employment cases to awards obtained for actual damages in housing cases, we see that sexual-harassment-in-employment plaintiffs receive higher damage awards. In employment cases, awards for front pay can continue until the plaintiff has reached the level of pay and responsibility that she had attained at her former place of employment.[225] The reality is that "[m]ost fair housing cases do not involve major economic losses."[226]

Perhaps the most striking difference is the disparity between damages awarded for mental and emotional distress in the employment and housing contexts.[227] Mental and emotional distress awards are far higher in sexual-harassment-in-employment cases than in sexual-harassment-at-home cases. Recent compensatory damage awards in the employment area have approached $300,000 per plaintiff.[228] Returning to *Chomicki*, for example, the plaintiff in that case was awarded $7500 for emotional harm stemming from discrimination in the home.[229] The $25,000 emotional distress award made in *HUD v. Kogut*[230] represents the highest such award ordered in the area of sexual harassment at home, yet the damages there were lower than those produced in a typical sexual-harassment-in-

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224. Back pay and front pay in the employment context are similar to actual damages in the housing area. That is, back pay is typically awarded where the plaintiff can demonstrate an economic loss suffered as the result of an unlawful discharge. *See* LINDENMANN & KADUE, *supra* note 198, at 612. Back pay is not limited to salary alone, but can include fringe benefits such as cost-of-living increases, vacation, sick pay, and bonuses. *See id.* at 613 nn.13–23. Front pay represents an "award of future lost earnings to make a victim of discrimination whole." *Id.* at 621. Thus, back pay in the employment scenario is similar to the cost of moving and storage expenses in a housing scenario, while front pay is similar to the incremental difference in rental values.

225. *See id.* at 622; *see, e.g.*, Pease v. Alford Photo Indus., 667 F. Supp. 1188, 1203 (S.D. Ga. 1988) (awarding front pay for a one-year period); Arnold v. Seminole, 614 F. Supp. 853, 873 (E.D. Okla. 1985) (awarding front pay until plaintiff is physically and psychologically ready to return to work).

226. SCHWEMM, *supra* note 220, § 25.3(2)(b), at 25–19.

227. Since the Civil Rights Act of 1991, compensatory damages for emotional distress have been allowed in sexual-harassment-in-employment cases. *See* 42 U.S.C. § 1981a(b) (1994).

228. According to recent literature, the average compensatory damage award in a sexual-harassment-in employment-suit (which includes damages for emotional distress) is $250,000. *See* Elizabeth Larson, *Shrinking Violets in the Office: Why Take a Letter When You Can Take Your Boss to Court?*, WOMEN'S Q., Spring 1996, at 7.

229. Chomicki v. Wittekind, 381 N.W.2d 561, 565, 567 (Wis. Ct. App. 1985).

230. P-H: Fair Housing–Fair Lending Rptr. ¶ 25,100 (HUD Admin. Law Judge 1995), *available in* 1995 WL 225277 (Apr. 17, 1995).

employment case.[231] Moreover, few sexual-harassment-at-home cases have awarded punitive damages in order to deter and punish prohibited conduct.[232]

Given the nature of the harm, sexual-harassment-at-home plaintiffs are entitled to a higher level of damages.[233] However, it is apparent that the judges and juries reviewing these cases do not have a sound understanding of the harm. Without such an understanding, it is difficult to assess the emotional trauma suffered by the plaintiffs. But in order for this understanding to exist, sexual harassment at home must be viewed in context, that is, with an appreciation of the home and women's roles within and outside of it, and with an understanding of the metarelationship between landlord and tenant.

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231. *See, e.g.*, Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1439 (10th Cir. 1997) (affirming jury verdict awarding plaintiff $102,500 for emotional distress and battery); Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Ohio 1988) (awarding $65,000 for emotional distress to plaintiff sexually harassed in employment); Gilardi v. Schroeder, 672 F. Supp. 1043 (N.D. Ill. 1986) (awarding compensatory damages of $50,000 for civil battery and intentional infliction of emotional distress to plaintiff in suit brought for sexual harassment at work), *aff'd*, 833 F.2d 1226 (7th Cir. 1987). Plaintiffs suing under the Fair Housing Act for discrimination in housing have received damages for intangible injuries such as emotional distress in the $20,000 to $100,000 range. *See* SCHWEMM, *supra* note 220, § 25.3(2)(c), at 25–29 to 25–32. *Kogut*, the highest damage award for sexual harassment in the home, falls on the low end of that scale.

232. The 1988 amendments to the Fair Housing Act removed the $1000 cap on punitive damages, "thereby making possible unlimited punitive awards." SCHWEMM *supra* note 220, § 25.3(1), at 25–10 to 25–11. Notwithstanding the change, however, few sexual-harassment-at-home cases have seen fit to award punitive damages. *But see* Williams v. Poretsky Management, Inc., 955 F. Supp. 490 (D. Md. 1996) (determining not to preclude an award of punitive damages at the summary judgment stage); Bethishou v. Ridgeland Apartments, No. 88–C–5256, 1989 WL 122434 (N.D. Ill. Oct. 2, 1989) (mem.) (awarding $1000 in punitive damages against each of two defendants); *Chomicki*, 381 N.W.2d at 563 (awarding $10,000 in punitive damages).

233. Damage awards gained by settlement are similarly low. *See, e.g.*, Barbara Deane, *At His Mercy: Sexual Harassment*, REDBOOK, May 1992, at 98 (The article details allegations of molestation, sexual coercion, and sexual threats made by 21 low-income women against the owner of an apartment complex. These charges resulted in two lawsuits, one brought by a group of private plaintiffs and the other by the United States Department of Justice, which settled for $575,000 and $342,000, respectively); Daniel J. Lehmann, *Landlord Warned to Honor Pact in Harassment Case*, CHICAGO SUN-TIMES, Dec. 10, 1994, at 15 (reporting landlord's resistance to a payment of $180,000 that settled a lawsuit brought by six former residents alleging unwanted sexual advances).

III. CONCEPTUALIZING A THEORY OF SEXUAL HARASSMENT AT HOME

A. The Courts' Struggle Toward an Analysis of Context

Some courts have struggled to address context in sexual-harassment-at-home cases, but have been unable to synthesize an analytical framework. For example, in *Gnerre v. Massachusetts Commission Against Discrimination*,[234] a single mother of a young son alleged that on several occasions her landlord made statements to her such as: "How many times did you get laid this week?"; "I got a big sausage, you want?" (pointing to his fly); "Well, you can get a picture of a naked man there right over your bed—you can get a nice picture"; and in front of her son, "Nice pair of tits, honey."[235] The landlord argued that these "isolated" remarks did not meet the pervasiveness requirement because they occurred over a two-year period.[236] In upholding the rulings below for the plaintiff, the court determined that the touchstone in hostile housing environment cases is whether the tenancy is made "significantly less desirable to a reasonable person in the plaintiff's position."[237] In contrast to *Shellhammer* and *DiCenso*, the court rejected a strict numerical evaluation because even one incident of sufficient seriousness can make the tenancy less desirable.[238] The standard applied in the *Gnerre* case invites an assessment of the nature and context of the comments rather than a fixation on their frequency.

The text of *Shellhammer* does not articulate exactly what standard the court utilized to come to the conclusion that only two requests over a three to four month period could not be enough to establish a hostile housing environment claim under Title VIII notwithstanding the nature of those requests. The emphasis does appear to be on the small number of requests rather than their content.[239] *Gnerre* nods toward a reasonable woman standard by suggesting that it would view the evidence of harassment from the perspective of a "reasonable person in the plaintiff's position."[240] *DiCenso*, decided after *Harris v. Forklift*, is clearer. The majority in *DiCenso* ruled that the plaintiff failed the objective prong of the two-part test. The court viewed the complained-of conduct from the perspective of a reasonable person rather than a reasonable woman.[241]

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234. 524 N.E.2d 84 (Mass. 1988).
235. *Id.* at 86.
236. *Id.* at 87.
237. *Id.* at 88.
238. *Id.* at 89.
239. *See* Shellhammer v. Lewallen, No. 84–3573, 1985 WL 13505, at *2–*3 (6th Cir. July 31, 1985).
240. *Gnerre*, 524 N.E.2d at 88.
241. DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996). Indeed, the plaintiff fulfilled the second prong of the standard. As the dissent suggested, there is "no

Moreover, in many situations where the landlord's demands have not been explicit, courts have failed to appreciate the gravity of the implicit demands. Many of these cases feature some sort of a veiled rent-for-sex demand or sex-in-exchange for refraining from terminating valuable housing assistance.[242] Courts have failed to understand that such demands look and feel very much like solicitations for prostitution, and have failed to appreciate how it feels to be solicited for a sex act within your home and to face potential eviction or curtailment of valuable housing assistance if you do not comply. This is a failure to contextualize quid pro quo demands for sexual compliance given the expectation of safety and privacy associated with the home.

The court that has utilized the most expansive and explicit understanding of the import of the location and its effect on the gravity of the sexual harassment is *Beliveau v. Caras*.[243] In *Beliveau*, the resident manager of the building in which the plaintiff lived stared at the plaintiff while she was wearing a bathing suit and made "off-color, flirtatious and unwelcome remarks."[244] Later, while in plaintiff's apartment to repair the shower, the resident manager called the plaintiff into the bathroom, placed his arm around her and referred to her breasts as "headlights."[245] When the plaintiff pushed the resident manager away, he grabbed her breast; plaintiff pushed him away again at which time he grabbed her buttocks as she moved away from him.[246]

On one level, *Beliveau* is a straightforward case because of the allegation that the defendant physically touched the plaintiff. If proven, such conduct would have amounted to a "sexual battery" under state law,[247] and cases in which a physical touching occurred have formed the basis of many successful hostile environment actions in the employment context.[248] Not surprisingly, the court

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question that Brown found DiCenso's remarks to be subjectively unpleasant, but this alone did not create an objectively hostile environment." *Id.* at 1009.

242. *See, e.g., id.* at 1006; *Shellhammer*, 1985 WL 13505; Woods v. Foster, 884 F. Supp. 1169, 1171–72 (N.D. Ill. 1995); Grieger v. Sheets, No. 87–C–6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (mem.).

243. 873 F. Supp. 1393 (C.D. Cal. 1995).

244. *Id.* at 1395.

245. *Id.*

246. *Id.*

247. *Id.* at 1398.

248. Several courts have found that even a single touching incident meets the severity requirement to sustain a prima facie case of hostile environment. In this way, the severity of one touching outweighs the need for plaintiff to show pervasiveness of the conduct. *See* Huitt v. Market St. Hotel Corp., 62 Fair Empl. Prac. Cas. (BNA) 538, 543 (D. Kan. 1993) ("[E]ven a single incident of rape...constitutes sexual harassment of a type sufficiently severe to support a claim of hostile work environment sexual harassment."); *see also* Barrett v. Omaha Nat'l Bank, 584 F. Supp. 22 (D. Neb. 1983) (where plaintiff alleged that coworker touched and rubbed her thighs, breasts, and crotch area while in a car traveling to a conference, court held that the harassment was serious enough to meet prima facie case of hostile environment sexual harassment), *aff'd*, 726 F.2d 424 (8th Cir. 1984); Radtke v. Everett, 501 N.W.2d 155 (Mich. 1993) (where plaintiff alleged that defendant

ruled that if the plaintiff could show that her version of the facts were true, then the defendant would be found to have created a hostile housing environment.[249] What is notable is the attention paid to the contours and meaning of that home environment, and the court's reasoning in coming to its conclusion is instructive. According to the court, defendant's conduct would clearly amount to sexual harassment in this context because "the alleged battery was committed (1) in plaintiff's own home, where she should feel (and be) less vulnerable, and (2) by one whose very role was to provide that safe environment."[250] The reasoning in *Beliveau* also suggests that the court utilized the context of the harassment as a lens through which to gauge its severity and pervasiveness.[251]

Beliveau is rare, however, in the explicit attention it gives to the meaning of the home and its relation to the effect sexual harassment within it will have on the plaintiff. The only other court to recognize explicitly the import of home in determining liability with respect to sexual harassment that occurs there is *Williams v. Poretsky Management, Inc.*,[252] where a female tenant was sexually assaulted by a porter in her building's elevator and, later the same night, in the building's laundry room.[253] In dismissing defendant's motion for summary judgment, the court cited *Beliveau* for the proposition that "although courts have looked to employment cases to determine housing claims, the settings are not completely analogous. [*Beliveau*] has recognized that sexual harassment in the home may have more severe effects than harassment in the workplace."[254]

While some courts, most notably *Beliveau*, have attempted to contextualize sexual harassment at home, no analytical framework has been developed to assist courts in reviewing these cases. In order to deal with the inconsistencies that the sexual-harassment-at-home cases present, we must develop such a framework. Consequently, we need to provide a counternarrative that explicitly takes the impact and import of the location of the harassment into account.

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forcefully restrained her, caressed her neck, and attempted to kiss her, court held "single incidents may create a hostile environment").

249. *Beliveau*, 873 F. Supp. at 1397.

250. *Id.* at 1398.

251. *See id.* The court rejected the defendants' argument that the conduct was neither severe nor pervasive enough to alter the conditions of tenancy. The court stated that such arguments were "not well taken" given the context and observed that the California Civil Code had recently been amended to authorize a specific cause of action for allegations by tenants of sexual harassment by landlords or property managers. *See id.* at 1398 & n.4.

252. 955 F. Supp. 490 (D. Md. 1996).

253. *See id.* at 491.

254. *Id.*

B. Sexual Harassment at Home in Context

1. Solving the Liability Problem

If courts explicitly review and analyze both the idealized notion of home and the plaintiff's experience of sexual harassment in that home, the outcome of many of the cases discussed herein would have been different. Imagine, for instance, a reading of the facts in *Honce* that contextualizes the harassing activities given the nature and importance of home in the American cultural imagination. When viewed in this manner, the requests for dates, the refusal to comply, the altercation about the construction of the dog run that escalated into a situation where Mr. Vigil "revved" his engine as Ms. Honce's dog ran in front of his truck, taken together with his testimony at trial,[255] take on a different meaning than that ascribed to them by the *Honce* court. Suddenly this is not a case where the facts are so plain that no reasonable jury could come to a different conclusion.[256] Instead, the jury should have been entitled to draw its own conclusions from the facts presented because all of these events happened in close proximity to Ms. Honce's home space, from which she had few avenues of retreat. As contrasted with the sexual-harassment-at-work situation, she could not repair to her home to shield herself from the harassment of a boss or a coworker. Eventually she "chose" to leave the trailer park, her home, as a result of Mr. Vigil's actions and incurred a cost of $1000 to move the mobile home, a result that the dissent suggested would support an inference of a "constructive or actual eviction."[257]

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255 Honce v. Vigil, 1 F.3d 1085, 1087 (10th Cir. 1993). At trial Mr. Vigil was asked: "Do you have the same problem with males in your mobile home subdivison as you do the females?" Mr. Vigil's response was:

> On the accusations, normally they've been with the women. It's a routine situation. Somebody gets evicted the plan is to go make a report at the police station and include sex. But they're not bright enough to even come up with it themselves. I'm the one that told them years ago that that's what I'm going to be accused of, that someday I was going to be sitting in a court because they can't get to me through money, through law. The only way they can get to me is through false sexual allegations.

Id. at 1093.

256. *Honce* was an appeal of a judgment as a matter of law entered against the plaintiff. *Id.* at 1087.

257. *Id.* at 1093 (Seymour, J., dissenting). Most residential leaseholds include a covenant of quiet enjoyment that is either express, implied, or required by statute. 2 RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 16B.03[1], at 16B–33 to 16B–34 (1997). Under the covenant of quiet enjoyment, the landlord must refrain from interfering with the tenant's possession of the premises during the lease term. *Id.* A substantial interference by the landlord can amount to a constructive eviction, which entitles the tenant to terminate the lease. *Id.* § 16B.03[1], at 16B–34 to 16B–35, § 16B.03[3], at 16B–38.

Indeed, the dissent in *Honce* took issue with the majority's understanding of the law and its version of the facts; it perceived a different story, which was revealed by a contextualized version of the facts of the case. The dissenting opinion noted, for instance, Mr. Vigil's belief that female tenants were "dupes of a conspiracy against him by police and sheriff personnel," and disputed the timing of Ms. Honce's move into the trailer park.[258] According to Mr. Vigil's testimony, Ms. Honce signed the rental agreement in August and took possession of the mobile home lot at that time.[259] Mr. Vigil's three social invitations to Ms. Honce took place after she signed the rental agreement.[260] For the dissent, the fact that she had not moved all of her *belongings* to the park until *after* she refused Mr. Vigil's advances was not relevant. Instead, the dissent explicitly recognized Ms. Honce's life circumstances and economic reality:

> 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. This inference, adversely drawn by the majority against Ms. Honce, is belied by Mr. Vigil's insistent testimony that Ms. Honce was in severe financial straits, and by the fact that she ultimately was required to borrow $1,000 from her parents to pay the cost of moving the mobile home. It also defies common sense regarding the economic realities of single working mothers such as Ms. Honce.[261]

The dissent in *Honce* is useful on two related levels: First, it recognized, at least implicitly, the importance of home in coming to the conclusion that the majority was incorrect in upholding the directed verdict. I suggest that this notion informed the dissent's appreciation of the difficulty that Ms. Honce would face in leaving her mobile home. Second, the dissent based its conclusion upon its observations of a plaintiff who is quite typical of the plaintiffs who bring sexual-harassment-at-home cases, plaintiffs who belong to a subset of the larger group of women who potentially experience sexual harassment at work.[262] In this way, the dissent explicitly recognized that the kind of plaintiff who is often involved in these types of cases, a "single mother of a young child,"[263] will face certain

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258. *Honce*, 1 F.3d at 1093–94 (Seymour, J., dissenting).

259. *Id.* at 1093 (Seymour, J., dissenting).

260. *Id.* (Seymour, J., dissenting).

261. *Id.* at 1094 (Seymour, J., dissenting).

262. *See supra* Part I.B.

263. *Honce*, 1 F.3d at 1087; *see also* Woods v. Foster, 884 F. Supp. 1169, 1171 (N.D. Ill. 1995) (plaintiffs were single mothers seeking refuge in a homeless shelter); Doe v. Maywood Hous. Auth., No. 93–C–2865, 1993 WL 243384 (N.D. Ill. July 1, 1993) (mem.) (plaintiff alleged that housing authority employee threatened to terminate her housing assistance eligibility if she refused to have sex with him); Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84, 86 (Mass. 1988) (plaintiff was a single mother of a young son).

financial constraints that will adversely affect her decision-making process in the rental market.[264] Thus, the import of the dissent's notion is that the majority's view "defies common sense regarding the economic realities of single working mothers."[265] These conditions—a compromised economic position, single head-of-household status, and the rental market—are factors that appear in most of the sexual-harassment-at-home cases.[266]

A review of *DiCenso v. Cisneros*[267] within this framework shows that the demand for rent in exchange for sex was clear. The landlord's "request" suggested that the tenant sell sexual access to herself in exchange for a release from rental payments owed to him for her apartment.[268] This action was tantamount to solicitation for prostitution.[269] When the plaintiff in *DiCenso* refused her landlord by slamming the door to her apartment and thereby excluding him from her space, his attempt to reassert power and control over the situation was typical and ironic—she was labeled a "bitch" and a "whore."[270] "Bitch" is an effective pejorative because it economically combines the relative lowness of the dog with an emphasis on women's particular reproductive capacities (the thing men cannot do). "Whore," of course, is a colloquialism for the more formal term "prostitute"—a woman who performs "indiscriminate sexual activity for hire."[271] The irony here is that the plaintiff refused the solicited request for her sex.[272] It was her refusal to trade sexual access to herself for rent that subjected her to be called a "whore."

Here is one way to read the *DiCenso* incident that stresses its severity. If the incident could be represented in a storyboarded fashion, and if we could read what each character in the storyboard was thinking or might somehow know, then our "thought balloon" might go something like this. The landlord's perspective can be boiled down to an "if, then" statement:

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264. *See, e.g., Woods*, 884 F. Supp. 1169; Grieger v. Sheets, No. 87–C–6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (mem.) (plaintiffs alleged that landlord threatened to have their Section 8 status removed if Mrs. Grieger did not comply with landlord's sexual demands).

265. *Honce*, 1 F.3d at 1094.

266. *See supra* Parts II.B.1, II.B.2.a, II.B.2.b.

267. 96 F.3d 1004 (7th Cir. 1996).

268. *Id.* at 1005–06.

269 For example, the Model Penal Code makes it a violation to "patronize prostitutes." *See* MODEL PENAL CODE § 251.2(5) (1980). Under the Code, "[a] person commits a violation if he hires a prostitute to engage in sexual activity with him, or if he enters or remains in a house of prostitution for the purpose of engaging in sexual activity." *Id.*

270. *DiCenso*, 96 F.3d at 1006.

271. A "prostitute" is one who "permits common indiscriminate sexual activity for hire, in distinction from sexual activity confined exclusively to one person. A person who engages or agrees or offers to engage in sexual conduct with another person in return for a fee." BLACK'S LAW DICTIONARY 1222 (6th ed. 1990).

272. *DiCenso*, 96 F.3d at 1006.

> If you can't afford to pay the rent for the apartment that I own with money, and if you don't want to leave your home, then you can pay the rent by fulfilling my sexual desires.

Not surprisingly, a representation of the female tenant's perspective is more complicated. This is what she may understand or "hear" in the landlord's demand:

> If you can't afford to pay me with money (which I may not have because I am renting; and because it is likely that I am a woman of color, a single head-of-household, and working in a comparatively low paid, sex-segregated job in order to support my family), and if you don't want to leave your home (because I know that you want to stay in the apartment so that you can continue to have "protection" from the competition in the (un)affordable rental market that is deeply segregated, overpriced, and constrained because of racial and/or familial status discrimination, and can be identified as your place in the world and your shelter from it), then you can pay me with the "money" you have, which is your sex. It is your choice.

Now consider several sexual-harassment-at-home cases where landlords have explicitly recognized that recipients' housing assistance is a highly valuable medium of exchange and attempt to utilize that fact to their advantage. In these cases, it is the woman's economic background and the housing market that determine the extent to which either the withdrawal or refusal to accept housing assistance is a credible means for extorting sexual compliance. The reality is that there is a high level of sexual coercion or landlord solicitation of prostitution in the context of women who are eligible to receive housing rental assistance. Illustrative is *Grieger v. Sheets*,[273] where a landlord told his tenant that if she wanted to keep the house that she had obtained with a Section 8 certificate, she would have to have sex with him once a month.[274] He also suggested that if she did not comply, he "could cause her to lose her Section 8 Certificate,"[275] a threat that he later reiterated by suggesting that he "had a lot of pull with the Section 8 people and could make things difficult for her."[276]

Krueger v. Cuomo[277] presents an even more egregious example. In *Krueger*, the rental agreement and the sexual demand were so intertwined as to make them inseparable. The plaintiff was living with her two young children and her sister's family in her sister's two bedroom apartment (i.e., plaintiff had doubled-up); there were a total of nine persons living in the apartment.[278] The

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273. No. 87–C–6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (mem.).
274. *Id.* at *2; *see also supra* note 87 (describing the Section 8 program).
275. *Grieger*, 1989 WL 38707, at *2.
276. *Id.*
277. 115 F.3d 487 (7th Cir. 1997).
278. *See id.* at 489. The fact that plaintiff had doubled-up is not insignificant. Anthropologist Anna Lou Dehavenon describes doubling-up as a part of the social condition of family homelessness. *See* Anna L. Dehavenon, *Doubling-Up and New York*

plaintiff was searching for her own apartment as her Section 8 housing voucher was set to expire.[279] During the rental negotiations it became clear that the apartment she sought rented for more than the fair market rent.[280] At that time, the landlord refused to rent to the plaintiff, understanding that her rental assistance would not cover the rent he sought.[281] At a second rental negotiation meeting, however, the landlord changed his mind and told the plaintiff that she "could pay money on the side or 'fool around or something' to make up the $100 shortfall."[282] Although the plaintiff declined the landlord's "offer," she agreed to rent the apartment.[283] As the landlord drove the plaintiff home from that meeting, he rubbed her thigh and told her that "we're going to be close."[284] Later, in the elevator on the way to sign the rental agreement, the landlord touched, rubbed, and tried to kiss the plaintiff.[285] The plaintiff told the landlord to stop and this refusal was greeted with laughter.[286] After the lease was signed, the landlord again told the plaintiff that they would "be real close."[287] Although the plaintiff did not want to move into the apartment because of the landlord's actions, she felt she had no alternative but to do so.[288]

After she moved in, the landlord's unwelcome advances continued.[289] Approximately three to four times per week, the landlord would arrive at the apartment, knock on the door, enter before she could respond and climb the internal staircase.[290] Once the landlord had gained entry, he would grab and touch

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City's Policies for Sheltering Homeless Families, *in* THERE'S NO PLACE LIKE HOME: ANTHROPOLOGICAL PERSPECTIVES ON HOUSING AND HOMELESSNESS IN THE UNITED STATES 51 (Anna Lou Dehavenon ed., 1996). In response to the lack of affordable housing, many families have doubled-up with relatives or close friends as an alternative to submission to the homeless shelter system. *See id.* at 51–52. These families, like the plaintiff in *Krueger* are homeless, although they are less visibly so. *See id.*

279. *Krueger*, 115 F.3d at 489. The Housing Voucher Program was very similar to the Section 8 Existing Housing "Certificate" Program. *See* Rental Rehabilitation and Development Grants, Pub. L. No. 98–181, Title III, § 301, 97 Stat. 1153, 1196 (1983) (repealed 1991); *supra* note 64. The principal difference between the two programs is that the voucher program allows eligible recipients to pay *more* than thirty percent of their income in rent and to secure apartments renting in excess of the fair market rent. *See* FRED FUCHS, LEGAL AID SOC'Y OF CENT. TEX., INTRODUCTION TO HUD PUBLIC AND SUBSIDIZED HOUSING PROGRAMS: A HANDBOOK FOR THE LEGAL SERVICES ADVOCATE 304 (1993).

280. *Krueger*, 115 F.3d at 489; *see supra* note 87 (discussing "fair market rent" imposed on landlords by Section 8 Existing Housing Program).

281. *Krueger*, 115 F.3d at 489.

282. *Id.*

283. *Id.*

284. *Id.* at 490.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

the plaintiff, doing so at least once in front of her children.[291] He also continued to suggest that he and the plaintiff would be "real close," asked if he and the plaintiff were "going to do good in bed," and suggested that she send her children away so that they "could go away together."[292] When the plaintiff refused, the landlord told her that "he was losing money because of her and reminded her that he could have rented the apartment to someone else."[293] The plaintiff also observed the landlord watching her apartment, and she began to seek ways to minimize contact with him.[294] At a later point, the plaintiff, who was black, informed her landlord that she did not date white men.[295] Eventually she filed harassment charges against him, and the landlord attempted to evict her.[296]

Krueger is notable because both the plaintiff and the landlord had knowledge of, and operated within, the context of a highly constrained housing market. The plaintiff's experience of the landlord's advances was marked by her knowledge of her constructive homelessness (she was living "doubled-up"); the difficulty of securing a suitable apartment that rented at or below the fair market rent; and the fact that even if she could locate such a unit, she would also have to convince a landlord to accept that voucher.[297] From the landlord's perspective he was operating in a seller's market; he knew that there were more Section 8 voucher holders than there were suitable apartments to rent to them.[298] He wanted more in rent for his apartment than federal housing assistance would provide, so he suggested that she sweeten the pot by complying with his sexual demands.

Now let us examine the situation from the tenant's perspective, and assess her resistance to the landlord's demands in the context of the housing market. First, the plaintiff accepted the apartment with the knowledge that the landlord's sexual advances were likely to continue and perhaps escalate. One way to view the plaintiff's actions in *Krueger* is as a product of rational decision making within a context of housing constraint. That is, she made a choice to accept the apartment and endure his advances given the reality of the relatively few housing options available to her and her family, but when those advances became unbearable she

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291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *See supra* note 279.
298. *See* WILLIAM C. APGAR & CHRISTOPHER E. HERBERT, JOINT CTR. FOR HOUS. STUDIES, FAIR ACCESS TO HOUSING ASSISTANCE RESOURCES: AN EXAMINATION OF THE ALLOCATION PROCESS FOR SECTION 8 VOUCHERS AND CERTIFICATES 2,4 (John F. Kennedy Sch. of Gov't ed., Working Paper Series, 1994) (finding that a "large share of eligible households" were unserved by federal housing assistance and that the allocation process "tends to limit the access to vouchers and certificates of blacks and other racial/ethnic minorities who disproportionally live in central locations").

sought protection by moving out and within the context of a civil lawsuit and was successful in that regard.[299]

On the other hand, plaintiffs' avenues of resistance have been more constrained in other factual situations. Recall *Woods v. Foster*,[300] which concerned three female residents of a Chicago area homeless shelter who alleged that shelter officials told them that they could not continue to reside at the shelter if they did not comply with their sexual demands.[301] All three plaintiffs had their children with them at the shelter.[302] Such demands were often made in connection with promises to assist a resident in obtaining permanent housing or with threats that failure to comply would result not only in removal from that shelter but prevention of admission at any other area homeless shelter as well.[303] In *Woods*, two of three plaintiffs had sex with shelter officials because they feared loss of housing if they refused and because they were lead to believe that they might obtain permanent housing if they complied.[304] The third plaintiff, who was grabbed and kissed by a shelter official, did not comply with his demands and experienced a period of homelessness after she left the shelter.[305]

Woods, like *Krueger*, illustrates the deeply constrained housing market for low- and moderate-income women. Both cases reveal that landlords and tenants, shelter officials and residents, are keenly aware of the lack of affordable and suitable housing opportunities and how that scarcity profoundly affects behavior. But *Woods* tells us even more than *Krueger*. In *Krueger*, the plaintiff was constructively homeless—she was living doubled-up with another family and in an extremely difficult situation—but she had not yet (as far as we know) sought refuge in the homeless shelter system. By contrast, *Woods* takes place within the homeless shelter system, where avenues of resistance differ.[306]

2. Solving the Damages Problem

The analytical framework I have articulated would serve equally well to solve the problem of plaintiff's undercompensation in these cases. If the goal of a

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299. *See Krueger*, 115 F.3d at 491–93.

300. 884 F. Supp. 1169 (N.D. Ill. 1995).

301. *Id.* at 1171.

302. *Id.* at 1171–72. The three plaintiffs ranged in age from 23 to 34 and had three, four, and five children, respectively. *Id.* at 1171.

303. *Id.* at 1171–72.

304. *Id.*

305. *Id.* at 1172.

306. *See, e.g.*, Jean Calterone Williams, *Geography of the Homeless Shelter: Staff Surveillance and Resident Resistance*, 25 URB. ANTHROPOLOGY 75, 80–81 (1996) (describing homeless shelters as "institutional spaces for government intrusion and surveillance" and suggesting that opposition to such intrusion is manifested either in "small, daily acts of resistance" or by refusing to live in the shelter system at all); *see also supra* note 58 (discussing sexual harassment charges that surfaced at New York City shelter for battered women).

damage award is to place the plaintiff in the position that she would have occupied absent the discriminatory conduct, then damage awards in the sexual-harassment-at-home cases have failed on this count.[307] Reference to context would assist judges and juries in constructing a proper framework from which to gauge an appropriate damage award. This is the case particularly with respect to awards for emotional distress and punitive damages, two areas where sexual-harassment-at-home damages have sorely lagged.

Robert Schwemm suggests that "the court's authority to award damages for emotional distress under [U.S.C.] § 3613(c) is clear, [but] the problem of how to set a dollar value on these injuries is not."[308] One mechanism for increasing clarity in determinations regarding intangible injury is a fuller understanding of the context in which the harm occurred. Indeed, the courts that have granted larger awards for emotional distress in housing discrimination cases have focused on the egregiousness of the defendant's conduct and the plaintiff's reaction to that conduct.[309] Higher awards in housing cases have gone to "plaintiffs whose job or family situation makes them particularly susceptible to being injured by discrimination or particularly sympathetic to the court."[310]

Women who are sexually harassed at home are by definition "particularly susceptible" to discrimination, yet the nature and complexity of that susceptibility has rarely been recognized. As I have demonstrated, women who are sexually harassed at home are renters and therefore have lower incomes than those who own their homes. A larger proportion of them are black or Hispanic, and are single parents; and they stand a good chance of being discriminated against on any or all of these bases. Moreover, they are particularly susceptible to discrimination because of the housing market for rental units and the sexism, racism, and inequality of bargaining power defining that market.

When we shift to how plaintiffs experience and react to the landlord's conduct, again we see that plaintiffs have not been compensated appropriately.[311] Recall that plaintiffs have become terrified for fear of what their landlord may do to them, and often attempt to change their daily patterns of behavior in order to avoid contact with the landlord or other building personnel.[312] Part of the reason that plaintiffs are terrified and attempt to change daily patterns is because landlords have invaded their private space and often have unimpeded access to

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307. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES 281 (2d ed. 1993) (Damages as a method of compensation are "an instrument of corrective justice, an effort to put the plaintiff in his or her rightful position.").

308. SCHWEMM, *supra* note 220, § 25.3(2)(c), at 25–26.

309. *See id.* § 25.3(2)(c), at 25–27 to 25–28.

310. *See id.* § 25.3(2)(c), at 25–29.

311. *See* Shellhammer v. Lewallen, No. 84–3573, 1985 WL 13505 (6th Cir. July 31, 1985) (plaintiffs awarded $7410).

312. *See* Gnerre v. Mass. Comm'n Against Discrimination, 524 N.E.2d 84, 86–87 (Mass. 1988).

them in their homes.[313] Unless this reality is explicitly recognized by judges and juries, women who are sexually harassed at home will continue to be undercompensated.

The same analysis obtains with respect to punitive damages, damages awarded expressly to deter and punish the prohibited conduct.[314] In housing discrimination cases, a determination on an award of punitive damages will turn on an evaluation of the nature of the conduct in question,[315] that is, whether the defendant's discriminatory acts were intentional.[316] As it stands, very few of the reported sexual-harassment-at-home decisions have awarded punitive damages.[317] Yet it is hard to believe that many of the landlords and building personnel did not intend to engage in the conduct or that they did not appreciate that much of their conduct was discriminatory.

Recall that one of the hallmarks of the sexual-harassment-at-home cases is a demand for sex in exchange for rent or in exchange for either providing or refraining from eliminating valuable housing assistance.[318] Such demands can hardly be described as accidental. The determination to impose punitive damages against a landlord for the purposes of punishing the defendant hinges on the fact finder's appreciation of the significance of the conduct. As with damages for emotional distress, large punitive damages will only come about where the context is taken into consideration. For instance, an appreciation of sexual harassment at home as a variant of intimate violence might well assist the fact finder in awarding punitive damages against a particular defendant.[319] Moreover, the imposition of punitive damages in such instances would carry significant deterrence value, as large punitive awards would help to spread the word in the real estate and leasing community that such conduct will not be tolerated.

CONCLUSION

In this Article, I have proposed an analytical framework for examining sexual-harassment-at-home cases. The relatively few courts that have reviewed such cases have merely taken legal theories developed in the employment context and transported them to the housing context. While the sexual-harassment-in-

313. *See* Krueger v. Cuomo, 115 F.3d 487, 490 (7th Cir. 1997) (landlord); Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 492 (D. Md. 1996) (building custodian given access by management).

314. *See* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 7 (West Publ'g Co. 1991) (1988).

315. *See* Jeanty v. McKey & Poague, Inc., 496 F.2d 1119, 1121 (7th Cir. 1974).

316. *See* SCHWEMM, *supra* note 220, § 25.3(3)(b), at 25–38 to 25–38.3.

317. *See supra* note 232.

318. *See* DiCenso v. Cisneros, 96 F.3d 1004, 1006 (7th Cir. 1996); Woods v. Foster, 884 F. Supp. 1169, 1171–72 (N.D. Ill. 1995); Grieger v. Sheets, No. 87–C–6567, 1989 WL 38707, at *1 (N.D. Ill. Apr. 10, 1989) (mem.); Chomicki v. Wittekind, 381 N.W.2d 561, 563 (Wis. Ct. App. 1985).

319. *See supra* Part II.B.2.a.

employment framework is a logical starting point, its application to sexual-harassment-at-home cases is limited. Because courts have failed to consider the ways in which sexual harassment at home is unique, cases have been wrongly decided—in terms of both determining liability and assessing damages.

I propose that courts must contextualize sexual-harassment-at-home cases. This requires a recognition of the culturally constructed meaning of home in the American imagination, and an understanding of the continuing iconography of the home as a powerful symbol of safety and security. Contextualization also requires an analysis of the market forces that shape women's lives in a capitalist economy, including constraints in market choice such as race, gender, and social status. Contextualization requires an awareness of sexual harassment at home as a type of intimate violence that is conceptually distinct from sexual harassment in employment. In furtherance of this assertion, I would call on HUD to promulgate regulations that define hostile housing environment as a form of actionable sex discrimination under the Fair Housing Act. I would recommend that such regulations explicitly take context into consideration in defining the nature of the harm. HUD regulations would simultaneously provide guidance to the courts and would help to propel the doctrine of sexual harassment at home into a more mature state of development.

Sexual harassment at home must be recognized and understood as a distinct and significant civil rights issue. If courts apply the analysis I propose to sexual-harassment-at-home cases, the doctrine of sexual harassment at home will develop in a more coherent and intellectually rigorous fashion. Moreover, if courts apply this analysis, plaintiffs will be compensated for their unique harms, and defendants will be deterred from continuing to harass women in their homes.