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A Man's Home Is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment

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A MAN'S HOME IS HIS CASTLE: HOW THE LAW SHELTERS DOMESTIC VIOLENCE AND SEXUAL HARASSMENT

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Violence against women is a pervasive problem in the United States.[1] Historically, however, society did not take violence against women seriously.[2] The law trivialized the abusive behaviors that led to harm against women.[3] For example, until relatively recently there was not a legally recognized term for what is now labeled sexual harassment.[4] It is now acknowledged that at work women are faced with the problem of sexual harassment.

While at work women are faced with the problem of sexual harassment; at home women are faced with the problem of domestic violence. There is ample research to demonstrate that domestic violence continues to be a persistent problem.[5] The overwhelming targets of domestic violence are women abused by their intimate male partner.[6] The conception of the risks of violence faced by women has been divided and categorized into separate areas leading to separate kinds of violence: domestic violence at home and sexual harassment at work.[7] Both sexual harassment at work and domestic violence at home have been the subject of much scholarly discussion. Both issues have also led

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1. *See* CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, at 1 (2002), *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf (finding that "[p]ersons age 12 or older experienced an average annual 140,990 completed rapes, 109,230 attempted rapes, and 152,680 completed and attempted sexual assaults between 1992 and 2000" and that "[f]emale victims accounted for 94% of all completed rapes, 91% of all attempted rapes, and 89% of all completed and attempted sexual assaults").

2. *See* Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993).

3. *Id.* at 518.

4. *See* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB xi (1978).

5. *See, e.g.*, CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1993-2001 (2003) *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf.

6. *Id.* at 1 (finding that while intimate partner violence made up 20% of non-fatal violence against women, it accounted for 3% of the non-fatal violence against men).

7. Bowman, *supra* note 2, at 519-20 (arguing that women are also targets of violence out in the public sphere in the form of street harassment and that there are a variety of current legal concepts that could be used to penalize this conduct).

advocates to organize legal reforms to make the civil and criminal justice systems more responsive to the needs of victims.[8]

The division of violence into these separate categories, however, has left some forms of violence largely hidden. Sexual harassment, not in the workplace, but in the home has been for the most part ignored. Although perhaps not yet acknowledged as a pervasive problem, the incidence of reported sexual harassment in housing is evidence of a serious problem.[9] There also is evidence that sexual harassment in housing may be greatly underreported.[10] Just as domestic violence and sexual harassment in the workplace were invisible until named, sexual harassment in housing is only now being uncovered and becoming more evident as an important societal issue.

This article examines the parallels between sexual harassment in housing and domestic violence in the home. Both domestic violence in the home and sexual harassment in the home are part of the continuum of violence against women.[11] This continuum of violence operates in two ways. First, although violence against women is divided into separate categories of violence, such as rape, domestic violence, and sexual harassment, once these different forms of violence are seen on the continuum, it becomes clear that the different forms of violence are interrelated and that one form of violence supports other forms of

8. Once legally recognized, sexual harassment in the workplace became a form of sex discrimination forbidden by Title VII of the Civil Rights Act of 1964. Various civil and criminal legal reforms have been initiated in states to address issues of domestic violence including the development of civil orders of protection and mandatory arrest policies. *See* BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION 223-235 (1994). On the federal level, the Violence Against Women Act has added penalties for interstate domestic violence and stalking. *See* Violence Against Women Act, 18 U.S.C. §§ 2261, 2261(A), 2262 (2000).

9. The only statistical study that gathered information specifically on sexual harassment in housing claims was a survey conducted in 1987 and sent to housing centers throughout the United States. The centers that responded reported 288 incidents of sexual harassment in housing. The author of the study suggested that because of various reasons, women are reluctant to report their harassment so that "it is likely that actual incidents of sexual harassment in housing number more than the 288 reported." *See* Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing,* 1987 WIS. L. REV. 1061, 1066 (1987). Cahan further suggested that if we analogize to research conducted with respect to sexual harassment in the workplace and academia, formal reporting is rare, with rates somewhere between two and four percent depending on the research study. Therefore, by analogy, the incidence of formal complaints of sexual harassment in housing may represent only "two to four percent of the actual occurrences ... [and] 6,818 to 15,000 cases of sexual harassment in housing may have occurred." *Id.* at 1069.

10. *See* Cahan, *supra* note 9.

11. *See* BALOS & FELLOWS, *supra* note 8 (explaining that violence operates on a continuum to inflict harm and constrain women's lives).

violence.[12] In addition, the continuum operates by disaggregating and dividing violence into separate, different categories to minimize the severity and pervasiveness of the violence.[13]

In Part I, this article will provide a historical analysis of the development of the claim of sexual harassment in housing. It traces the passage of the federal Fair Housing Act that prohibits discrimination in housing on the basis of sex and early cases recognizing sexual harassment in the workplace. Part I also examines how the two concepts of sexual harassment in employment and sex discrimination in housing intersected to lead to the acknowledgment of a claim for sexual harassment in housing.

Part II analyzes the appellate court cases that have interpreted claims for sexual harassment in housing pursuant to the Fair Housing Act and examines the judicially imposed requirements for bringing a successful claim. In determining the merits of these claims, courts have relied on jurisprudence developed in the sexual harassment in employment area. The resulting court imposed standard of "severe or pervasive" has limited the courts in finding that sexual harassment has occurred. Part II also demonstrates the parallels between current judicial treatment of sexual harassment in housing and the historical treatment of domestic violence. In sexual harassment in housing, the business exchange taking place in the market between landlord and tenant makes sex part of the rental transaction. The landlord's private exchange of sex in place of cash for rent takes on the appearance of a private business transaction not to be intruded upon. Similarly, in domestic violence cases, the privacy of the marital relationship and the right of the husband to control his wife in the private sphere of the home, even if by force, was not to be intruded upon.

Part III continues the exploration of the role of privacy begun in Part II, specifically focusing on the issue of privacy and domestic violence. Privacy has been used to shield the abuse of women in intimate relationships, what we now recognize as domestic violence. Two cases are examined that show the historical treatment by the courts of domestic violence. The reasoning in these decisions reveals that the reluctance to intervene in domestic situations confirms that some amount of violence in the private sphere of the home has been found to be acceptable by the courts. It also shows the courts' willingness to minimize the violence and to protect the "privacy" of the husband and the marital home over the safety of the wife.

The right to privacy in the home is further explored in Part IV. Privacy, although historically central to preserving the sanctity of the home, has been applied only selectively. While it has been used to protect the interest of the male in the home who is abusing his intimate partner, it has not been applied to

12. *Id.* at 183.
13. *Id.*

protect female tenants who are the targets of sexual harassment in housing by their landlords. In both these instances, the societal value placed on privacy has been used to protect the more powerful dominant party at the expense of the subordinate party. Protection of a zone of privacy expands and contracts depending upon the economic, social, and political power of the person claiming protection.

Part IV asks who are the targets of sexual harassment in housing? The most vulnerable women are targeted by landlords for abuse. Poor women of color and women already homeless or facing the prospect of being homeless who are desperate for housing for themselves and their children frequently are the objects of sexual harassment. Battered women attempting to leave abusive relationships can be faced with the prospect of homelessness. Fleeing domestic violence with few resources contributes to increased vulnerability. Studies demonstrate that a substantial portion of women and children in homeless shelters have fled domestic violence.[14] The failure of society to adequately protect battered women and their children within their own homes and the lack of adequate services for them means that there is a continuing supply of women and children in urgent need of housing and therefore exposed to the abusive behavior of unprincipled landlords.

Part IV also describes the individual and systemic obstacles to successfully litigating a sexual harassment in housing case by describing a case undertaken by the University of Minnesota Law Civil Practice Clinic. While recognizing that the courts have limited the usefulness of these suits by requiring severe or pervasive harassment before there is a recoverable harm, Part IV argues that even if courts were more sympathetic to this kind of litigation, it is still inadequate because such an individualized remedy does not address the scarcity of affordable housing and does not challenge the systemic class, gender, and race inequalities that sustain sexual harassment in housing.

I. THE FAIR HOUSING ACT AND SEXUAL HARASSMENT IN THE HOME

In 1968 Congress passed the Fair Housing Act ("Act").[15] This Act was passed with the promise of moving our segregated society toward the goal of integration and ending discrimination in housing. The Act, which is part of the civil rights statutes passed in the 1960s, embodied Congress's ambitious purpose to remove housing barriers for people of color.[16] The floor debate and

14. *See* Joan Zorza, *Woman Battering: A Major Cause of Homelessness,* 25 CLEARINGHOUSE REV. 421 (1991).

15. The Fair Housing Act, Pub. L. No. 90-284, title VIII, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601- 3619 (2000)) [hereinafter the Act].

16. *See* Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Acts's Most Intriguing Provision,* 29 FORDHAM URB. L.J. 187, 212 (2001).

statements of the Act's sponsors indicate that the intent in passing the Fair Housing Act was to "remedy segregated housing patterns and their attendant problems — segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and African-Americans."[17]

When passed in 1968, the Act prohibited discrimination in housing on the basis of race, color, religion, and national origin.[18] Sex as a category of prohibited discrimination was added in 1974.[19] The Act prohibits refusing to sell, rent, or negotiate for the sale or rental of or to otherwise make unavailable or deny, a dwelling to any person because of sex or other prohibited category.[20] It also prohibits discrimination "in the terms, conditions, or privileges of [the] sale or rental of a dwelling."[21] A third provision prohibits discriminatory notices, statements, and advertising, and the final relevant provision prohibits coercion, intimidation, threats, and interference with the rights guaranteed by the Act.[22] The first United States Supreme Court decision interpreting the Act occurred in 1972.[23] In *Trafficante v. Metropolitan Life Insurance Company,* white residents sued to prohibit their landlord's discriminatory actions against African Americans.[24] The United States Supreme Court concluded that that the Act should be broadly construed and that Title VII decisions prohibiting discrimination in the workplace can be used as an exemplar in interpreting the Act.[25]

In 1986 the United States Supreme Court for the first time recognized sexual harassment in the workplace as a form of sex discrimination pursuant to Title VII.[26] In *Meritor,* Mechelle Vinson sued her employer pursuant to the protections against discrimination in Title VII because her supervisor imposed sexual contact on numerous occasions.[27] Ms. Vinson was hired as a teller

17. *Id.*

18. The Fair Housing Act, 42 U.S.C. §§ 3604 - 3606, 3617 (2000) (originally codified in 1969).

19. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 729 (1974). There is very little legislative history explicating the addition of sex as a prohibited form of discrimination. Senator Brock, in commenting in the Senate on the provision stated that "in too many cases women are discriminated against in housing transactions." 120 CONG. REC. 6146 (1974). The categories of handicap and familial status were added in 1988. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

20. 42 U.S.C. § 3604(a) (2000).

21. *Id.* § 3604(b)

22. *Id.* §§ 3604(a)–(c), 3617.

23. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972).

24. *Id.* at 206-07.

25. *Id.* at 209–12. Title VII of the Civil Rights Act of 1964 makes it illegal to refuse to hire or to discharge an individual with respect to employment due to race or other categories. As with the Fair Housing Act, Title VII was initially proposed without inclusion of a protected category for sex. 110 CONG. REC. 2577-84 (1964).

26. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

27. *Id.* (all facts in this section are taken from pages 59-60 of the Court's opinion).

trainee and over the course of her employment was promoted to assistant branch manager. After her probationary period ended, her supervisor suggested they have sexual relations. Initially, Ms. Vinson refused, but out of fear of losing her job she eventually agreed. Her supervisor repeatedly demanded sexual favors, fondled her in front of other employees, followed her into the restroom, exposed himself to her, and forcibly raped her on several occasions.

The *Meritor* Court held that for sexual harassment to be actionable, it must be sufficiently "severe or pervasive" to alter conditions of employment and create an abusive working environment.[28] It also found that given the allegations, the supervisor's conduct amounted to not only pervasive harassment, but also criminal conduct of the most serious nature, and the allegations were clearly sufficient to state a claim.[29]

The conception of the right to be free of discrimination in housing and the right to be free of discrimination in the form of sexual harassment in the workplace intersected at the recognition of the right to be free from sexual harassment in housing. The first reported decision occurred in 1983.[30] In *Shellhammer,* the tenants sued their landlord for evicting them after Mrs. Shellhammer refused to pose for nude pictures or to have sex with the landlord.[31] In the lower court, the magistrate ruled that such claims did state a cause of action under the Act.[32] Relying on the judicial interpretation of Title VII for claims for sexual harassment in employment, the magistrate found that both quid pro quo and hostile environment claims were actionable under the Act.[33] The *Shellhammer* case set a precedent by relying on the parameters set out in Title VII employment cases in order to determine if sexual harassment occurred in housing.[34] Thus, if the claim were one involving the creation of a hostile environment, the complainant would need to establish that the landlord's actions were sufficiently severe or pervasive to change the terms and conditions of tenancy. If the claim asserted quid pro quo behavior, the complainant must demonstrate the causal connection between the refusal to engage in the behavior demanded by the landlord and the subsequent loss of housing or negative action by the landlord. It was not until ten years after the

28. *Id.* at 67.

29. *Id.*

30. Shellhammer v. Lewallen, No. 84-3573, 1985 WL 13505, *1 (6th Cir. July 31, 1985) (per curiam) (the magistrate entered his decision on Nov. 22, 1983).

31. *Id.*

32. *Id.*

33. *Id.*

34. Since *Shellhammer*, additional district courts have recognized that sexual harassment is a form of sex discrimination actionable under the Act. *See, e.g.*, New York *ex rel.* Abrams v. Merlino, 694 F. Supp. 1101 (S.D.N.Y. 1988); Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995).

lower court decision in *Shellhammer* that the imposition of these standards to find sexual harassment in housing was adopted by the federal courts in *Honce v. Vigil.*[35]

II. APPELLATE COURT CASES

The *Honce* case involved both quid pro quo and hostile environment claims.[36] The plaintiff, a single mother in dire financial straits, claimed that the landlord threatened to evict her after he asked her out socially on three occasions, and she refused. She ultimately decided to move. The court determined that she failed to show the requisite connection between her refusal to go out with the landlord and his interference with her tenancy. In analyzing the tenant's hostile housing environment claim, the court used as its standard the assumption that "[h]ostile environment claims usually involve a long-lasting pattern of highly offensive behavior."[37] Adopting the standard from Title VII cases, the court also found that the landlord's behavior in this case was not severe or pervasive. Because the landlord's behavior did not include sexual conduct or language and because "other tenants of both sexes endured similar treatment . . . [the conduct was] not actionable under the hostile environment theory."[38] Interestingly, the dissent, viewed the landlord's behavior in a less benevolent light. The dissenting opinion stated that the "evidence also supports an inference that . . . [the landlord] was selectively hostile to women."[39] The dissent also observed in a footnote that the tenant had described further incidences of violence and harassment when she spoke to a police officer.[40] Further, the dissent found that the "evidence indicates numerous women . . . felt compelled to move out as a result of . . . [the landlord's] behavior . . . ." [41] According to the dissent, the majority opinion

35. Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993). In 1993, the Ninth Circuit also ruled on a sex discrimination claim pursuant to the Act. The tenant was subjected to sexual assault by the building owner/manager. This decision, however, was a procedural determination that the 1988 amendments to the Act applied to cases pending at the time of the effective date of the Amendments. United States v. Presidio Invs. Ltd., 4 F.3d 805 (9th Cir. 1993). An earlier Third Circuit Fair Housing Act sex discrimination case did not involve sexual harassment but rather a claim by battered women who were prevented from establishing a shelter due to a restrictive zoning ordinance. The women contended that the zoning ordinance violated the Act because it was discriminatory on the basis of gender. The Court rejected this claim finding that the restrictive ordinance was facially neutral and applied to all transitional dwellings. *See* Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989).

36. *Honce*, 1 F.3d at 1085 (all facts in this section are taken from pages 1087-88 of the court's opinion).

37. *Id.* at 1090.

38. *Id.*

39. *Id.* at 1093.

40. *Id.* at 1095 n.2.

41. *Honce*, 1 F.3d at 1095 n.2.

applied an inappropriate standard by viewing the evidence in the light most favorable to the landlord.[42]

The Seventh Circuit, in 1996, also applied the Title VII employment sexual harassment standard to an unsuccessful sexual harassment in housing claim by a tenant.[43] In *DiCenso v. Cisneros*, the landlord showed up at the eighteen year-old female tenant's door to collect the rent.[44] While caressing her arm and back, the landlord told her that if she could not pay the rent, "she could take care of it in other ways."[45] When she slammed the door in his face, the landlord called her various epithets, including "bitch" and "whore."[46] The court found that the landlord's conduct was not sufficiently severe or pervasive to establish a hostile environment.[47] Although the landlord's conduct was harassing, it was construed as only a single incident that was not harassing enough. The majority decision stated that although the landlord "may have harassed her, he did so only once."[48] The majority decision did not address the landlord's shouting of gendered epithets, apparently discounting that behavior as additional harassment.[49] The court did concede that the landlord did make a statement that "vaguely invited [the female tenant] to exchange sex for rent."[50] Despite this acknowledgement, the court did not find that the landlord's behavior was sufficiently egregious because it only happened once, and "he did not touch an intimate body part and did not threaten [the tenant] with any physical harm."[51] The court went on to claim that the decision "should not be read as giving landlords one free chance to harass their tenants."[52] It is hard to see, however, how this decision does not establish exactly that standard. Despite the judicial protestations to the contrary, the *Honce* and *DiCenso* cases demonstrate that some amount of harassment is acceptable.[53]

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42. *Id.*

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

44. *Id.* (all facts in this section are taken from pages 1005-06 of the court's opinion).

45. *Id.* at 1006.

46. *Id.*

47. *Id.* at 1009.

48. *DiCenso*, 96 F.3d at 1008.

49. *Id.* at 1009.

50. *Id.*

51. *Id.*

52. *Id.*

53. *DiCenso*, 96 F.3d at 1009 (the majority opinion claimed that its decision did not give landlords "one free chance to harass their tenants"). A later Seventh Circuit decision also determined that the plaintiff tenant did not present sufficient evidence to sustain her sexual harassment claim against her landlord. The tenant claimed the landlord had called her "hole," berated her, and conducted surveillance of her sexual activity. Cavalieri v. L. Butterman & Assocs., Nos. 98-1569, 98-1724, 1999 WL 38103, at *1 (7th Cir. Jan. 21, 1999). Citing *DiCenso* for the proposition that a single incident or isolated and innocuous incidents do not support a finding of sexual harassment, the court affirmed the district court decision granting summary judgment to the landlord. *Id.*

Reiterating this same Title VII employment sexual harassment standard, the Ninth Circuit, in *Hall v. Meadowood Ltd. Partnership,* affirmed a grant of summary judgment to the landlord where the tenant's claims included an allegation that his apartment manager's gender-based comments and actions constituted sexual harassment pursuant to the Act.[54] The court found that the conduct "occurred only occasionally and was not severe, physically threatening or humiliating."[55]

These cases illustrate the limitations and constraints of importing the judicial interpretation of "severe or pervasive" from sexual harassment in the employment setting to sexual harassment in the home. By simply adopting the standard and its interpretation from the employment context, the courts do not seem to consider the different dynamics existing in the home setting. These decisions also do not acknowledge the increased feeling of vulnerability of being targeted for harassment in your own home. A number of commentators have remarked on the inappropriateness of the application of the "severe or pervasive" criteria to sexual harassment in the home and have suggested alternative standards.[56]

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54. Hall v. Meadowood Ltd. Partnership, No. 99-17122, 2001 WL 311320 *1 (9th Cir. Mar. 28, 2001).

55. *Id.*

56. Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 44-68 (1998) (suggesting that viewing harassment in housing in the context of the symbol of the home as a place of security and in light of the economics of the rental market and the intimate nature of the landlord tenant relationship will raise the perceived severity of incidents that might not meet the "severe and pervasive" standard in an employment context); Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of 3604(C)*, 2002 WIS. L. REV. 771, 789-93 (2002) (proposing that sexual harassment cases in the housing context be brought, not under FHA's § 3604(b) which uses the same language as Title VII and thus sets up a presumption of the same standard, but under § 3604(c) where the language is significantly broader than Title VII); 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, 885-93 (1997) (rejecting the reasonable person standard related to objective severity and proposing that harassment-in-housing cases be examined in light of the behavior of the landlord and specific power differentials in the landlord-tenant relationship); Cahan, *supra* note 9, at 1062–65 (outlining a subjective standard focused on the victim's perception, following *Shellhammer*, and based on FHA survey results where respondents described sexual harassment as including abusive remarks, unsolicited sexual behavior, solicitation of sexual behavior by promise or reward, coercion of sexual activity by threat or punishment, and punishment upon rejection of sexual overtures); Nicole A. Forkenbrock Lindemyer, Note, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Standards to Title VIII Housing Cases*, 18 LAW & INEQ. 351, 379-87 (2000) (noting the limitations of the standard currently applied and suggesting that courts should consider the unique context of the home and the perspective of the victim in evaluating what constitutes severe or pervasive harassment).

The one appellate case in which sexual harassment was found is the 1997 case of *Krueger v. Cuomo*.[57] In this case, the tenant, Debbie Maze, a single mother of two, had been seeking an apartment for a number of months.[58] Her Section Eight housing assistance voucher was due to expire shortly. When she found an apartment, the rent exceeded her voucher amount and her expected contribution. The landlord, Krueger, told her that she could make up the shortfall by paying money on the side or she could "fool around or something." Maze did not agree to this arrangement, but Krueger agreed to rent the apartment to her. Prior to moving into the apartment, Maze experienced harassing conduct from Krueger, including rubbing, touching, and statements that they "were going to be real close."[59] After Maze moved into the apartment, Krueger continued to harass her. Three or four times a week he would arrive at her apartment. Once inside, Krueger would grab and touch Maze, even in front of her children. He repeated his assertion that they would be "real close" and asked if they were "going to do good in bed."[60] Maze again would decline. In response, Krueger would tell Maze "he was losing money because of her and reminded her that he could have rented the apartment to someone else."[61] Maze observed Krueger outside on a number of occasions watching her apartment. She attempted to minimize any contact with Krueger and filed harassment charges against him. Eventually the tenancy was so unbearable, Maze was forced to move.

The Seventh Circuit affirmed the Administrative Law Judge's ("ALJ") ruling that because Maze was forced to move as a result of her rejection of the landlord's sexual demands, Krueger had engaged in quid pro quo sexual harassment.[62] The ALJ also found that Krueger had retaliated against Maze.[63] The appellate court affirmed the ALJ's monetary award to Maze and the imposition of a civil penalty against Krueger.[64]

The facts set out in *Krueger* illustrate a landlord's predatory behavior directed at a tenant that he knew could not afford the apartment he agreed to rent to her. His actions enhanced the vulnerability of a low-income, single mother who was anxiously seeking a home before her federal subsidy expired. His acknowledgment of her lack of sufficient income to meet the rental obligation and offer that she could either pay money on the side, which in effect would be fraud with respect to the requirements of the program subsidizing her rent, or in the alternative "fool around" to meet her rental

57. Krueger v. Cuomo, 115 F.3d 487 (9th Cir. 1997).
58. *Id.* (all facts in this section are taken from pages 489-91 of the court's opinion).
59. *Id.* at 490.
60. *Id.*
61. *Id.*
62. *Krueger*, 115 F.3d at 491.
63. *Id.*
64. *Id.* at 493.

obligation means that he viewed her as available for sexual exploitation. The sexual exploitation manifested itself as a market exchange for rent, in other words, he would take sex in the place of cash for rent. By renting to her without an agreement to lower the rent to an amount the tenant could afford, the landlord is making the exchange of sex for rent part of his entitlement as landlord. Similar assertions of landlord entitlement are described in *DiCenso* even though the plaintiff did not prevail on her sexual harassment in housing claim. While the court did not find sexual harassment in housing in *DiCenso,* the landlord, while caressing her, told the tenant that if she could not pay the rent she could take care of it in other ways.[65]

III. PRIVACY AND DOMESTIC VIOLENCE

Historically, social, political, and legal institutions have supported male control of women through violence.[66] One of the most powerful societal values that has reinforced the vulnerability of women to domestic violence has been the concept of the private, domestic sphere.[67] Physical abuse of a wife by her husband was deemed a private matter and therefore not appropriate for state intervention.[68] The privileging of privacy connected with the home resulted in a history of judicial decisions that refused to recognize the harm suffered by a victim of domestic violence and therefore a refusal to recognize a legal remedy.[69]

In *State v. Black*, an 1864 North Carolina decision, the defendant, who was living apart from his wife, threw her down and pulled her hair.[70] The court focused on the wife's behavior, finding that she had verbally abused him and provoked his conduct.[71] The court further found that because the husband was responsible for the behavior of his wife, he had the right to control her including the use of moderate chastisement.[72] As long as he inflicted no permanent damage, the court would not go beyond the curtain of privacy of the

65. *Dicenso*, 96 F.3d at 1004.

66. *See* R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Vicitms of Marital Violence*, VICTIMOLOGY 1977-1978, at 426.

67. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 100-02 (1987) (suggesting that the sphere of privacy for women is a sphere of oppression). The United States Supreme Court has affirmed the right of privacy surrounding the marital relationship and the home. *See* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

68. *See* EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 31 (1990); Laurie Wermuth, *Domestic Violence Reforms: Policing the Private?*, 27 BERKELEY J. SOC. 27, 43 (1982).

69. *See, e.g.*, State v. Rhodes, 61 N.C. 453 (Phil. Law 1868); State v. Black, 60 N.C. 262 (Win. 1864).

70. *Black*, 60 N.C. at 263.

71. *Id.* at 264.

72. *Id.* at 263.

home.[73] This decision, although quite different in language and tone and over one hundred years earlier than the appellate sexual harassment in housing cases, presents similar reasoning and a similar outcome. Just as in *DiCenso,* the court minimized the violent acts and found some amount of violence acceptable.[74] Ultimately the person responsible for that violence is not held accountable.

In another nineteenth century domestic violence prosecution case, *State v. Rhodes*, the court again found that the violence was not severe enough to pierce the veil of privacy that surrounds the home of the husband.[75] The defendant husband was indicted for assault and battery upon his wife.[76] The jury found that he had "struck . . . [his wife], three licks, with a switch about the size of one of his fingers (but not as large as a man's thumb) without any provocation except some words uttered by her . . . ."[77] The judge concluded that the defendant had the right to whip his wife with a switch no larger than his thumb, and therefore, on these facts the defendant was not guilty.[78] The appellate court, in reviewing the judge's decision, found that while the husband did not have the right to whip his wife, the court will not interfere in the home in trifling cases.[79] The court declared that it would "no more interfere where the husband whips the wife, than where the wife whips the husband."[80] The court also emphasized that "however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber."[81] Unless the injury is permanent or malicious the law will not raise the curtain of privacy on the home.[82] The judgment in favor of the defendant was upheld.[83] Once again, as in *Black, Honce,* and *DiCenso*, the court found some amount of abuse or violence was acceptable and failed to hold the person responsible for the abuse accountable for his actions.[84]

Both nineteenth century decisions demonstrate that in dealing with cases of domestic violence, not only is some amount of violence permitted, but also that the privacy of the home will not be lightly invaded by the courts. In these

73. *Id.*

74. *Compare* Dicenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996), *with Black*, 60 N.C. at 262.

75. *Rhodes*, 61 N.C. at 453, 459.

76. *Id.* at 453.

77. *Id.* at 454.

78. *Id.*

79. *Id.* at 459.

80. *Rhodes*, 61 N.C. at 459.

81. *Id.* at 457.

82. *Id.*

83. *Id.* at 460.

84. *See* State v. Black, 60 N.C. 262 (Win. 1864); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993); Dicenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996).

cases, it is the husband's privacy and right of control being protected. The failure by the courts to intervene leaves the target of the violence, the wife, without recourse and with little security in her privacy. Thus, behind the rubric of privacy, male abusive behavior is protected, and the state's failure to intervene supports his control.[85]

Over the last thirty years, the battered women's movement has endeavored to lift the curtain of privacy and reveal the violence hidden in the home.[86] As a result of these efforts domestic violence is now more of a public issue.[87] However, even the progress that has been made in the development of civil and criminal law reform has not resulted in battering becoming a central issue on our political landscape. The continuing vitality of the concept of abuse in the home as a private matter means that finding solutions becomes an individualized responsibility and not a societal obligation to remedy subordination.

In domestic violence cases, the struggle has been to reveal the violence behind the curtain of privacy and encourage state intervention for the protection of the victim, at the expense of the privacy of the abuser. In the sexual harassment in housing context, the struggle also is to reveal the violence behind the curtain of privacy but with a divergent result. It is to encourage state intervention so that the right of privacy of the tenant is validated at the expense of control of the landlord.

IV. PRIVACY AND THE HOME

The protection of home is central in our culture. Rights viewed as property rights sometimes receive greater protection from government intervention than liberty rights.[88] The home and non-interference with the sanctity of home is

85. When the state did intervene in marital violence, investigations focused on the homes of the poor and working-class immigrants. *See* Jonathan L. Hafetz, *A Man's Home is His Castle?: Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 189 (2002)

86. For a history of the battered women's movement see generally SUSAN SCHECTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982).

87. *See* Elizabeth M. Schneider, *The Violence of Privacy, in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 42 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

88. *Compare* Ewing v. California, 123 S. Ct. 1179 (2003) (upholding California's three-strikes law in the sentencing of a defendant to twenty-five years to life for stealing three golf clubs finding that it did not violate the Eighth Amendment's proportionality principle and was not grossly disproportionate); *with* BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (finding that a punitive damage award of two million dollars against automobile manufacturer was grossly excessive). *See also* MARGARET JANE RADIN, REINTERPRETING PROPERTY 14 (1993) (suggesting that that the "American Supreme Court goes out of its way to protect people against what it perceives as threatened government invasion when the issue is property rights, yet

well established.[89] It is not just a physical place but is imbued with idealized characteristics. It is a place of respite from the commercial marketplace. It fosters intimate relationships and allows family life to flourish. It is also a place of safety and physical comfort. Beyond relational intimacy, the home also functions as a symbol for a feeling of belonging and a place where one can realize one's potential. "There is also the feeling that it would be an insult for the state to invade one's home, because it is the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there. The home is affirmatively part of oneself . . . ."[90]

While there is a tradition of protecting the home from state intervention, the extent of the protection is determined by the characteristics of the person making the request for protection.[91] Individualized private property and the protection of that property redound to the benefit of the powerful. Poor women tenants do not tend to reap the benefit of the protection of private property when they are subject to sexual harassment in their homes by the landlord. Rather, the landlord's right to engage in the private rental transaction, even if it includes a demand of sex for shelter, and his right to control his private property are protected at the expense of the privacy and security of the tenant.

A. *Castles for Some*

The phrase, "A Man's Home is His Castle" may have originated as long ago as the sixteenth century.[92] Long established traditions of the common law have upheld the inviolability of the home.[93] The judicial system has given effect to the special status of the home in numerous ways. For example, in criminal law, the doctrine of self-defense includes a requirement that, if

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often goes out of its way to side with the government against the claimant when the issue is liberty").

89. *See* United States v. Oliver, 466 U.S. 170 (1984); Payton v. New York, 445 U.S. 573, 603 (1980) (warrantless arrest in one's home impermissible because the sanctity of the home confers special protection); Frisby v. Schultz, 487 U.S. 474, 484 (1988) (finding that an ordinance prohibiting residential picketing was constitutional because the significant government interest in seeing that people could enjoy in their homes a feeling of "well-being, tranquility, and privacy" is a goal of the "highest order").

90. RADIN, *supra* note 88, at 57.

91. Hafetz, *supra* note 85, at 189.

92. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 MICH. L. REV. 547, 642 n.259 (1999) (noting that the doctrine embodied by the statement that a man's home is his castle traces back at least to the early sixteenth century).

93. *Id.* at 642. *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223 (1902). "And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity . . . ." *Id.*

possible, one safely retreat before taking action.[94] Based on the notion that a man's home is his castle, however, the requirement to retreat does not apply if one is in one's own home.[95] The home is also constitutionally protected from unreasonable searches and seizures.[96] Moreover, the constitutional right to privacy articulated by the U.S. Supreme Court is nowhere more visible than when exercised in the home.[97] In holding that warrantless arrests in public are constitutional, but warrantless arrests in the home are not, the Supreme Court explained:

> 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."[98]

Admittedly, greater protection has been afforded to privacy in the home in the context of criminal investigations rather than civil matters.[99] However, the notion of the special status of the home as a repository of an enhanced right to privacy was articulated by the Supreme Court when it found that the state could not regulate the private possession of obscene material in the privacy of one's own home.[100]

The tradition of attributing a unique status to privacy in the home has continued. The Supreme Court has acknowledged that protecting privacy of the home is of the highest order.[101] The Court has recognized the home as the "last citadel of the tired, the weary, and the sick"[102] and as the "one retreat to which men and women can repair to escape from the tribulations of their daily

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94. *See* 6 AM. JUR. 2D *Assault and Battery* § 60 (2003).

95. *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b)(ii)(1); People v. Riddle, 649 N.W.2d 30, 35 (Mich. 2002) (when a person is in his castle there is no duty to retreat); State v. Carothers, 594 N.W.2d 897 (Minn. 1999) (duty to retreat does not attach to defense of dwelling); State v. Thomas, 673 N.E.2d 1339 (Ohio 1997) (no duty to retreat from one's own home before resorting to self-defense).

96. U.S. CONST. amend. IV; *see also* RADIN, *supra* note 88, at 59-60.

97. Griswold v. State, 381 U.S. 479, 484 (1965).

98. Payton v. New York, 445 U.S. 573, 589 (1979).

99. *See, e.g.*, Frank v. Maryland, 359 U.S. 360 (1959) (finding that the Fourth Amendment did not apply to housing inspections because they were not criminal in nature), *overruled by* Camara v. Mun. Ct., 387 U.S. 523, 538 (1967) (requiring a warrant for administrative housing and fire inspections but lowering the standard to obtain the warrant from probable cause to reasonableness).

100. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (explaining that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch").

101. Carey v. Brown, 447 U.S. 455, 471 (1980).

102. Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring).

pursuits . . . ." [103] The privileged position of the home in American jurisprudence is tied to both the sanctity of property rights as well as the exercise of individual liberty.[104] As recently as 2003, the U.S. Supreme Court reaffirmed its commitment to the protection of persons from "unwarranted government intrusions into a dwelling or other private places."[105]

One characteristic of privacy in the home that has attracted the attention of the Court is the protection of the unwilling listener.[106] While commenting that there are many areas where an individual can expect simply to avoid speech they do not want to hear, the Court stressed that the home is different.[107] Rather, a special benefit of privacy within the home "which the State may legislate to protect, is an ability to avoid intrusions."[108] The pronouncements in numerous cases make clear that the home is viewed as a place of retreat for the flourishing of familial relationships, as a safe harbor from the marketplace, and as a place to develop individual personhood. Because of these unique characteristics imbued in the home, it is granted exceptional protection by the courts.

However, the application of the right to privacy in the home depends on who is asserting that right. Admittedly, the appellate decisions addressing sexual harassment in the home are articulated as decisions applying the standards for sexual harassment claims, and the issue of privacy is not directly addressed.[109] However, if we look behind the rhetoric of the severe or pervasive standard borrowed from employment discrimination jurisprudence, the result of these decisions is that the court protected the private property interest of the landlord at the expense of the tenant's interest in the private sanctity of her home.[110] The private interest of the more powerful was protected at the expense of the less powerful. In addressing the issue of privacy in the context of state action and the U.S. Constitution, Frances Olsen points out that:

> Privacy is most enjoyed by those with power. To the powerless, the private realm is frequently a sphere not of freedom but of uncertainty and

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103. *Carey*, 447 U.S. at 471.

104. Hafetz, *supra* note 85, at 198.

105. *See* Lawrence v. Texas, 123 S. Ct. 2472 (2003) (finding that the Texas sodomy law making it a crime to engage in consensual sodomy by two persons of the same sex violated the Due Process Clause and that liberty of the person encompasses both its spatial and more transcendent dimensions).

106. Frisby v. Schultz, 487 U.S. 474 (1988) (reversing the Court of Appeals decision that found an ordinance banning all residential picketing to be unconstitutional).

107. *Id.* at 485.

108. *Id.* at 484.

109. *See, e.g.*, Williams v. Porestsky, 955 F. Supp. 490 (D. Md. 1996); Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995).

110. *See, e.g.*, Transamerica v. KMS Patriots, 752 N.E.2d 777 (Mass. App. Ct. 2001).

> insecurity.... [T]he standard situation in which one enjoys privacy and freedom is not a situation of equality but one of hierarchy. We virtually never all enjoy privacy equally, and the pretense that equality is the norm, and situations of domination an exception, is simply another way of maintaining the status quo.[111]

The sphere of protected privacy is determined by one's dominant or subordinate position. Those in a position to exercise power have a greater zone of privacy protected than those who are in a subordinate position.[112] A telling example, illustrative of this point is the United States Supreme Court decision, *Wyman v. James.*[113] In *Wyman,* the plaintiff was the mother of a young son and a recipient of Aid to Families with Dependent Children ("AFDC").[114] Prior to her son's birth, James applied for assistance, and as part of the eligibility process a caseworker made a visit to her apartment. At that time there was no objection to the home visit. James was found to be eligible, and assistance was authorized. Two years later a caseworker wrote to inform James that another home visit was scheduled. James objected to the visit and agreed to supply any information that was reasonable and relevant to her need for assistance but insisted that any discussion occur outside her home. The caseworker then informed James that the home visit was required by law, and her refusal to agree to the visit would result in termination of her benefits. After an administrative hearing in which James continued to refuse to agree to a home visit but reiterated her willingness to cooperate and engage in visits elsewhere, her benefits were terminated.

The Court initially acknowledged that when a case involves a home and some sort of intrusion into that home, the issue of the protection of personal security in the home is raised.[115] It went on to find, however, that such protections did not apply here.[116] Further, even if arguably the Fourth Amendment did apply, the home visit was not an unreasonable search.[117] The Court listed a number of factors that led to its conclusion that James had no protectable right to privacy in her home.[118] For the Court, the fact that James was being assisted by tax dollars meant that the State had the right to ensure that the intended beneficiaries of the tax-produced assistance were in fact the

111. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction,* 10 CONST. COMMENT. 319, 325-26 (1993).

112. *Id.* at 325-26.

113. Wyman v. James, 400 U.S. 309 (1971).

114. *Id.* (all facts in this section are taken from pages 313-15 of the Court's opinion).

115. *Id.* at 316. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

116. *Id.* at 316.

117. *Id.* at 317.

118. *Wyman,* 400 U.S. at 318.

ones receiving the benefit.[119] The Court also contended that the home visit had a rehabilitative purpose, and the investigative aspects of the visit were overemphasized.[120] The process used, which included advanced notice of the visit and a prohibition on forcible entry or visits outside of working hours, minimized any burden on the homeowner's right against intrusion.[121] In enumerating the factors in support of its position, the Court scrutinized James herself, casting her actions and character in an unfavorable light.[122] The majority opinion characterized James as demanding "from the agency that provides her and her infant son with the necessities for life . . . the right to receive those necessities upon her own . . . terms . . . and to avoid questions of any kind."[123] It further portrays James as failing to

> ever really to satisfy the requirements for eligibility; . . . [making] constant and repeated demands; . . . [demonstrating] reluctance to cooperate; . . . evasiveness; and . . . occasional belligerency. There are indications that all was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite). The picture is a sad and unhappy one.[124]

The implications of this disapproving picture of a welfare recipient were not lost on Justice Douglas. In his dissent Justice Douglas asked "[i]f the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different?"[125] Justice Douglas went on to point out that "constitutional rights — here the privacy of the home — are obviously not dependent on the poverty or on the affluence of the beneficiary. It is the precincts of the home that the Fourth Amendment protects; and there privacy is as important to the lowly as to the mighty."[126] Justice Douglas was articulating the normative value that the application of constitutional rights not be determined by one's power and affluence.[127] However, the fact that the articulation of that goal was found in the dissent belies its attainment. Justice Marshall, in his dissent, questioned the basis for the majority opinion's assertion that even if deemed a search, the home visit would be reasonable.[128] Justice Marshall responded by pointing out that child abuse is not limited to

119. *Id.* at 318-24.
120. *Id.* at 318-19.
121. *Id.* at 317.
122. *Id.* at 321.
123. *Wyman*, 400 U.S. at 321-22.
124. *Id.* at 332 n.9.
125. *Id.* at 332.
126. *Id.* at 332–33.
127. *Id.* at 332.
128. *Wyman*, 400 U.S. at 341.

indigent households.[129] Justice Marshall went on to question the majority's reasoning by asking:

> Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children?[130]

Decisions such as *Wyman* make clear that the legal protection of privacy is determined by the economic power of the party asserting the privacy right. Here, James, a recipient of public assistance, had her right to privacy in her own home disregarded by the U.S. Supreme Court. Her dependence on public welfare for support for herself and her son resulted in her zone of privacy being contracted. The failure of the Court to recognize her privacy rights resulted in reinforcing her subordinate position.[131]

In the battering cases, the judicial recognition and validation of privacy in the home supported male violence against women and women's unequal status. Privacy justified the lack of state intervention to protect the target of the abuse. In both instances, where the court permitted intervention in the home of a recipient of public assistance and where the courts refused to intervene when a husband assaulted his wife, those with the most power and in a dominant position benefited from protective judicial decisions at the expense of the security and autonomy of the less powerful.[132]

Given the longstanding recognition of the special status of the home, as a place to be protected from unwanted intrusion, as a special sphere where the occupant has privacy from the rest of the world, and as a private domain controlled by the resident, the question arises as to why the appellate courts have been reluctant to recognize this principle in sexual harassment in housing cases. Perhaps we can begin to answer that question by looking at who are the targets of sexual harassment in housing. Who are the tenants who are trying to assert their rights to privacy and to be free of discriminatory intrusion by the landlord?

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129. *Id.* at 342.

130. *Id.*

131. *See* Hafetz, *supra* note 85, at 223-24. Hafetz argues that the social reforms of the late eighteenth and early nineteenth centuries in the area of child protection, mother's pension programs, and tenement housing, led to a retreat from traditional values of domestic privacy and autonomy for certain marginal members of society and to state intervention in the homes of the poor, single mothers and immigrants. *Id.* at 228-29.

132. *Wyman*, 400 U.S. at 313; State v. Rhodes, 61 N.C. 453 (Phil. Law 1868).

B. *Who Are the Targets of Sexual Harassment in Housing?*

The U.S. Supreme Court decided that there is no fundamental right to housing or to any specific quality of housing.[133] Thus, while the notion of "a man's home is his castle" is fully entrenched in our law and culture, only those who can afford a home reap the benefit. Although "a man's home is his castle," no one has the right to or is owed a "castle."

While no one is entitled to housing, it is also accurate to point out that the respective rights of landlords and tenants have evolved over the last thirty years. Reforms have given tenants rights that under the common law property framework did not exist. For example, reform efforts include the right of tenants to habitable residences, to defenses from evictions for nonpayment of rent by raising the landlords' breaches, local housing codes that have established minimum standards of habitability, and protection from retaliatory eviction.[134]

These changes, however, did not give rise to a recognized right to adequate housing. The question remains as to how effective these reforms are with respect to the systemic difference in power between those who are seeking to obtain and keep a home and those who have control over the resource sought. The need for reforms to provide some protections for tenants perhaps points out the difficulty of low-income renters who do not have sufficient power to "effectively bargain for these rights in the market."[135] Even for those renters who are not low-income, the nature of the real estate market may make it difficult to bargain effectively. For example, it is problematic to make comparisons between apartments because features of particular apartments and neighborhoods differ. It is complicated and expensive for the tenant to attempt to move out once occupying an apartment even if a better bargain is found.[136]

By definition, if one owns a home, one is not subject to sexual harassment by a landlord. Home ownership, however, is an unattainable goal for many low-income persons.[137] Faced with a market place in which they have little bargaining power, low-income tenants' vulnerability is exacerbated by a market in which affordable housing is declining while the demand for it is increasing.[138] The U.S. Department of Housing and Urban Development ("HUD"), the federal agency responsible for administering federal housing

133. Lindsey v. Normet, 405 U.S. 56, 73–74 (1972).

134. *See* RADIN, *supra* note 88, at 172–73 (arguing that the law of residential tenancy has undergone a revolution).

135. *Id.* at 92.

136. *Id.*

137. Adams, *supra* note 56, at 34 (noting that renters are significantly poorer than residential property owners).

138. *See* William C. Apgar, Jr., *An Abundance of Housing for All but the Poor, in* HOUSING MARKETS & RESIDENTIAL MOBILITY 99 (G. Thomas Kingsley & Margery Austin Turner eds., 1993).

programs, has recognized the increasing difficulty faced by low-income persons attempting to find affordable housing.[139] HUD acknowledges that "crisis rent levels have swelled the number of households with worst case housing needs, which now stands at a record 5.3 million. These households . . . pay more than half of their meager incomes for rent or live in substandard housing."[140]

Being a low-income tenant or experiencing poverty is a key factor in being vulnerable to sexual harassment in housing. Moreover, women experience poverty at a disproportionate rate in our society. For example, in 1998 the U.S. Census Bureau reported that 12.7% of the general population was living in poverty while 29.9% of female-headed households were living in poverty.[141] Women experience higher rates of poverty than do men and women who are heads of households with dependent children "have extremely high poverty rates."[142] Looking at the descriptions of the plaintiffs in the reported federal cases reveals that they are poor women, often providing the only support for their families and often facing homelessness.[143]

It is clear that victims of sexual harassment in housing are low-income renters with few options and that those renters are women and significantly women of color.[144] Racial discrimination limits housing opportunities.[145] For renters of color, discrimination makes housing more difficult to obtain and more costly.[146]

The entitlement expressed by landlords' actions in the described cases is constitutive of the business exchange taking place in the market between landlord and tenant. Targeting low-income women for sex in exchange for

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139. U.S. DEP'T OF HOUS. & URBAN DEV., ABOUT HOUSING (Sept. 2002), *at* http://www.hud.gov./offices/hsg/hsgabout.cfm.

140. U.S. DEP'T OF HOUS. & URBAN DEV., 1999 THE STATE OF THE CITIES ix (1999); *see also* Cahan, *supra* note 9, at 1067 (finding 98% of harassment victims in the survey had annual incomes of less than $20,000 and 75% had incomes under $10,000).

141. U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES v, vi (1998).

142. Adams, *supra* note 56, at 37–38.

143. *See* Kreuger v. Cuomo, 115 F.3d 487 (7th Cir. 1997) (describing plaintiff as an African American woman who was also a recipient of Section eight housing assistance); Doe v. Maywood Hous. Auth., No. 93 C 2685, 1993 WL 243384 (N.D. Ill. July 1, 1993) (describing plaintiff as recipient of Section eight housing assistance); Grieger v. Sheets, No. 87 C 6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (describing plaintiff as recipient of Section eight housing assistance); Woods v. Foster, 884 F. Supp. 1169 (N.D. Ill. 1995) (noting that plaintiffs were homeless women staying in shelter); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993) (describing plaintiff as a single mother in severe financial difficulty).

144. *See* Adams, *supra* note 56, at 35; Deborah Zalesne, *supra* note 56, at 886. "In employment discrimination cases, the victim of sexual harassment is usually a woman and often a minority. When sexual harassment occurs in the housing context, however, the typical victim is not only a minority woman but a poor minority *woman*." *Id.*

145. Adams, *supra* note 56, at 35–36.

146. *Id.* at 36.

shelter becomes part of the rental transaction.[147] Just as prostitution is considered a private market exchange, albeit an illegal one, here the landlord's private exchange of sex in place of cash for rent takes on the facade of a private business transaction not to be intruded upon.[148] The reluctance to intervene in the private actions of citizens with respect to domestic violence and to minimize the violence finds a parallel here demonstrated by the reluctance of the courts to intervene in the private business matters of landlords, unless there is a sufficient cause, defined by the courts as severe or pervasive harassment and interpreted by them to require substantial abusive behavior.[149] By minimizing the severity of the violence and labeling what are sexual assaults as "harassment," the violent and illegal conduct of the landlord is obscured. The solicitation by landlords of sex in exchange for rent is arguably soliciting illegal prostitution. However, once the behavior is labeled sexual harassment, the criminal nature of the act is concealed. By protecting the landlord's private business dealings, the courts have diminished the privacy rights of the tenant and helped to disguise sexual violence.

In the sexual harassment in housing appellate decisions, it is the landlord's right to control his premises and to conduct his business free of interference being protected at the expense of the tenant's right to privacy in her home. Although the sexual harassment in housing appellate decisions are recent cases, they bear a striking resemblance to mid-nineteenth century judicial decisions determining guilt or non-guilt in domestic violence cases. While the domestic violence cases involve criminal prosecutions, the reasoning used by the courts in minimizing the violence and in protecting the perceived entitlement of the more powerful by the use of the screen of privacy is echoed in the appellate sexual harassment in housing decisions.

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147. *See, e.g.,* Kreuger, 115 F.3d at 489 (describing the landlord's suggestion that while he knew the plaintiff could not afford the apartment she could pay money on the side or "fool around or something" to meet the rental payments); DiCenso v Cisneros, 96 F.3d 1004, 1006 (7th Cir. 1996); *Doe*, 1993 WL 243384 at *1 (describing plaintiff as recipient of Section eight housing assistance and noting that the defendant an employee of the housing authority, stated that he would certify the plaintiff if she had sex with him); *Grieger*, 1989 WL 38707 at *1 (describing plaintiff as recipient of Section eight housing assistance and describing demand that plaintiff have sex with landlord once a month if she wanted to keep her house and landlord's threats to make life difficult with the Section eight people if plaintiff did not agree).

148. *See* Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1222 n.3 (1999) (recognizing prostitution as the market exchange of sex for money that encompasses not only money but also the exchange of money's worth so as not to exclude situations in which sex is exchanged for shelter); Radin, *supra* note 88, at 14 (noting that property rights are more carefully protected from government invasion than liberty rights).

149. *See infra* pages 8-14.

C. *Battered Women and Homelessness*

Women in abusive relationships have been faced with the question, "Why do you stay?" Perhaps one response to this question is, "Where am I to go?" Battered women who are attempting to leave abusive relationships are often faced with nowhere to go.

Battered women encounter many obstacles when attempting to leave an abusive relationship. Sometimes economically dependent on the abuser or unable to access joint assets, women of all economic classes face the prospect of homelessness when fleeing an abusive relationship. Additionally, battered women are often isolated. One aspect of the dynamics of domestic violence is the abuser's exercise of control by restricting the contacts the victim/survivor has with friends or relatives. Abusers also may threaten friends and family members so that there is no prospect of refuge with friends or family even on a temporary basis. Opportunities for employment also may be negatively affected by abuse. As part of the abuser's efforts to control his partner and continue her dependence, abusers undermine their partners' attempts at employment by harassing them at work, making them late, causing absences, and inflicting violence. Maintaining economic power contributes to and is part of the abuser's control over his partner.[150]

While there are many contributing factors to the problem of homelessness, a recent survey of twenty-five cities found that domestic violence was identified by eleven cities as a primary cause of homelessness.[151] Earlier studies indicate that a high percentage of homeless families identify domestic violence as the cause of their homelessness.[152] Although not always identified as such, a significant portion of the population of homeless shelters are battered women and their children.[153] A research study that examined the lives of sheltered homeless and low-income housed mothers found that 91.6% of the homeless mothers had experienced physical or sexual assaults and that 63% were committed by an intimate male partner.[154] The research shows that victims of domestic violence suffer both the physical, economic, and emotional consequences attendant to battering as well as potential homelessness as they attempt to leave an abusive relationship.[155]

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150. Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 243 (1994).

151. *See* U.S. CONF. OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 2002: A 25-CITY SURVEY 82 (2002), *at* http://www.usmayors.org/uscm/hungersurvey/2002/onlinereport/HungerAndHomelessReport2002.pdf.

152. *See* Zorza, *supra* note 14, at 420-21.

153. *Id.*

154. Ellen Bassuk et al., *The Characteristics and Needs of Sheltered Homeless and Low-Income Housed Mothers*, 276 JAMA 640 (1996).

155. *See* Charlene K. Baker et al., *Domestic Violence and Housing Problems*, 9 VIOLENCE AGAINST WOMEN 754, 754–55 (2003).

In a recent study analyzing housing problems and homelessness of 110 women who had experienced domestic violence, the researchers found that 38% experienced homelessness immediately after separating from their abusers.[156] Interestingly, the women acknowledged that if the justice system had been responsive to their needs and arrested their abusers or forced them to stay away; they would not have needed to leave their homes.[157] Obtaining safe, secure housing is often a key element in planning for the safety of a battered woman and her children. While reform efforts have resulted in the development of shelters for victims of domestic violence, shelters are frequently filled and cannot house all the women and children who request shelter.[158] Moreover, shelters, even when available, do not provide permanent, affordable housing. They are a response to a crisis situation and are generally available only on a short-term basis. Faced with shelters at capacity, low-income women experience great difficulty in finding affordable housing. Federal programs designed to provide rental assistance to low-income renters may have waiting lists as long as two years.[159] Additionally, changes in federal housing policy have resulted in fewer low cost housing units.[160]

Victims of domestic violence not only experience the complex social and economic difficulties of separating from an abuser, they also are faced with the grim reality of a housing marketplace that has an ever shrinking supply of affordable housing at the same time that there is an ever increasing number of women and children seeking shelter.[161] The decreasing availability of affordable housing and the increasing need for low cost housing contribute to the difficult predicament experienced by poor homeless women seeking shelter for their families. This predicament is exacerbated by the failure of society to adequately meet the needs of victims of domestic violence so that experiencing domestic violence becomes a marker for potential homelessness.[162]

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156. *Id.* at 766. The study also found that "[a]pproximately half of the women left their homes . . . ; the other half stayed while their partners left . . . ." *Id.* at 767.

157. *Id.* at 767.

158. *See* U.S. CONF. OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 1998 62 (1999), *at* http://www.usmayors.org/uscm/homeless/hunger98.pdf (stating that an estimated 30% of requests for shelter by homeless families were denied in 1998 due to lack of resources); Baker, *supra* note 155, at 755 (noting that many women cannot be housed at a battered women's shelter when they leave their abusive partners because many shelters consistently operate at capacity).

159. Baker, *supra* note 155, at 755.

160. AMY CORREIA & JEN RUBIN, HOUSING AND BATTERED WOMEN (2003), *at* http://www.vaw.umn.edu/documents/vawnet/arhousing/arhousing.html.

161. *See* NATIONAL COALITION FOR THE HOMELESS, RESEARCH ON HOMELESSNESS; HANDOUT 2, *at* http://www.nwrel.org/cfc/frc/pdf/Handout2.pdf (last visited on Jan. 6, 2004).

162. In addition to the loss of affordable housing units affecting the ability of battered women to obtain safe housing for their families when leaving a violent relationship, the so-called "one-strike" policy has created an additional barrier for victims of violence in their effort to maintain

D. *The Clinic Experience*

There is no question that litigation in the area of sexual harassment in housing presents many obstacles. The judicially imposed legal standard adopted from the employment context creates barriers to successfully obtaining legal remedies for victims. The belief existent in the domestic violence arena that some amount of abuse is acceptable maintains its vitality in sexual harassment litigation.[163] Clients face particularized vulnerabilities due to societal biases based on race, class, and gender. Their own past experience of abuse creates additional challenges in conducting the litigation so that the possibility of recovery is maximized, yet the past abuse experienced by the client is not exploited by the defense.

It is important to recognize, however, that even if the judicial interpretation of the standards needed to prove sexual harassment in housing were not so narrow; a private right of action to vindicate the privacy and security rights of tenants would be inadequate. An individualized private solution in the form of a lawsuit leaves unchallenged the systemic inequalities of race, class, and gender that make a class of persons particularly vulnerable to being targeted for sexual harassment in housing. Despite these shortcomings, one way to obtain relief and to support the right of tenants to have a private sphere of safety and security in their own homes, at least on an individual basis, i.e., to have a "castle," is to persevere in bringing these cases.

The statistics describing the targets of sexual harassment in housing conform to my own experience representing plaintiffs in Fair Housing Act claims against landlords. In the Civil Practice Clinic at the University of Minnesota Law School, law students under my supervision have represented a number of plaintiffs who had been the targets of sexual abuse by their landlords.[164] The plaintiffs in our cases were low-income women of color struggling to support themselves and their families and desperate to find affordable housing. They also had suffered domestic or sexual abuse in their past, either as adults or as children.

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housing. This policy, authorized by the Cranston-Gonzalez National Affordable Housing Act of 1990 and enhanced by the Housing Opportunity Program Extension Act of 1996, permits public housing authorities to deny housing or evict tenants based on criminal behavior. Advocates have reported that victims of domestic violence are faced with the threat of eviction as this policy holds them accountable for the criminal acts of family members, including their abusers. *See* Claire M. Renzetti, *One Strike and You're Out: Implications of a Federal Crime Control Policy for Battered Women,* 7 VIOLENCE AGAINST WOMEN, 685, 685-98 (2001).

163. *See infra* text accompanying notes 30-89.

164. Cases on file in the Civil Practice Clinic, University of Minnesota Law School. Not all of the cases were formally filed in court. Some were filed as complaints with HUD and settled early in the administrative process. The settled cases that were filed in court contained confidentiality clauses as part of the settlement.

In one of the Clinic cases that settled relatively early through the HUD administrative process, the Clinic represented a woman who was a single mother raising a teenage daughter.[165] The client suffered sexual harassment by her landlord, an older man. The client learned of an available apartment through relatives and made an appointment to see it. When the client went to see the apartment, the landlord asked who would be living there. The client said she and her teenage daughter would be the occupants. In response, the landlord asked where the client's husband was and wondered why the daughter's father would ever leave a woman as beautiful as the client. The client did not think much of these comments at the time; she assumed the landlord was just being friendly and making small talk. When the client and her daughter moved in, the landlord again made comments similar to those he had made when the client first looked at the unit.

Not long after moving in, the client lost her primary job. While she continued to work part-time, her income was not sufficient to cover the rent. When the landlord called about the late rent and the payment of a late rent fee, he also told the client that he helps out a few of his tenants and that he would like to help the client.

Also at this time, the landlord started sending letters expressing his desire for sex with the client. He also started calling and appearing at the apartment without notice. He told the client he would like to have a sexual relationship with her and have a child with her, and if she agreed, she would not have to pay rent. Later, the landlord said that if his wife died, he would like to marry her.

The client declined, but the landlord continued to send letters containing sexual demands, to make increasingly explicit phone calls, and to enter the apartment when the client was away. This continuing, aggressive behavior caused the client to stay at home to guard the door, and she found herself staying up all night, fearing that the landlord would appear at the apartment or call. The landlord also made pre-textual entries into the apartment, claiming a need to repair something or inspect a repair that had been completed.

The landlord sexually assaulted the client on several occasions. The assaults included restraining the client, kissing her, and sexually touching her. He continued to write numerous letters to her, repeatedly and explicitly stating he wanted a sexual relationship and could help her financially. He also made comments about the physical appearance of the client's daughter.

The pattern of behavior described here is not unlike the federal cases previously cited. The landlord who possessed and controlled a commodity in short supply used his dominant position to exploit the tenant in a subordinate

165. The summary factual description of the client's experience that follows is part of the case file at the University of Minnesota Law Clinic. I have omitted names to protect the privacy and confidentiality of the client.

position. His predatory behavior targeted a vulnerable tenant with little or no resources. The action of sexually using the tenant became part of the private business exchange of collecting rent. His private market transaction and exercise of control over his property resulted in placing the tenant in the position of being subjected to sexual demands and the fear of losing her home.

These cases may also give rise to various kinds of state law claims. For example, facts such these may encompass a state law claim for coercion into prostitution.[166] This is a state cause of action that recognizes the harms caused to persons who are coerced into prostitution.[167] In Minnesota, the statute broadly defines coercion, and the court is directed to look at the totality of the circumstances.[168] Evidence of coercion includes the exchange of sex for shelter.[169] The act allows for the recovery of economic and emotional damages.[170]

Pleading this cause of action requires extensive discussion with the client. Clients who come forward to risk the difficulties of a lawsuit alleging sexual harassment may decide that the stigma attached to including this cause of action is too severe. Often, they have suffered physical and/or sexual abuse in the past and pursuing a lawsuit for sexual harassment in housing requires that they describe, yet again, how they have been targeted for sexually abusive behavior. The ongoing proceedings of the litigation occur at the same time that they continue to struggle economically to provide for themselves and their families. Even if the facts fall within the definition and required elements of the statute, to include a cause of action for coercion into prostitution means that the client risks being labeled a prostitute, with all of the indignity and shame attached to that label. While the client is faced with the stigma of being labeled a prostitute, no one seems inclined to label the landlord a "john."

If clients have experienced past sexual and physical abuse, these issues may re-emerge and be exacerbated by the type of discovery that takes place in the context of this kind of litigation. Depositions, interrogatories, and requests for medical records will be made by the landlord's counsel and will focus not

166. *See* MINN. STAT. §§ 611A.70 – 87 (2002). A number of courts have found that the refusal to engage in sexual intercourse with a supervisor at work amounts to refusing to engage in prostitution and therefore can be the basis for an abusive discharge claim as one means to vindicate the public policy against prostitution. *See* Insignia Residential Corp. v. Ashton, 755 A.2d 1080 (Md. 2000); Harrison v. Edison Bros. Apparel Stores, Inc., 924 F.2d 530 (4th Cir. 1991); Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984) (declaring that a "woman invited to trade herself for a job is in effect being asked to become a prostitute"). Complaints can also include common law claims of assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and trespass.

167. *See* MINN. STAT. § 611A.81 (2002). A few other states have enacted similar statutes. *See, e.g.*, HAW. REV. STAT. §§ 663J-1–9 (1999); FLA. STAT. § 796.09 (2003).

168. MINN. STAT. § 611A.80(2) (2002).

169. MINN. STAT. § 611A.80(2)(23) (2002).

170. MINN. STAT. §§ 611A.81(2)(1) - (2) (2002).

only on the incidents that are the subject of the pending litigation, but also on the past abuse. There is the potential for plaintiffs to face extremely harsh questioning about abuse issues that perhaps were never fully resolved.

The reality of the life circumstances faced by clients raises additional challenges in proceeding to litigate sexual harassment in housing cases. After eviction by the abusive landlord or being forced to move due to the sexually harassing conduct, clients sometimes face homelessness. If not forced into a shelter due to a lack of other alternatives, clients often stay with relatives or friends until they are able to find affordable housing. Needless to say, these are short-term strategies which result in the client frequently moving. Frequent moving often makes continuing contact with the client difficult. The importance of a lawsuit may pale in comparison to the survival issues clients face. Further, because of the clients' often precarious economic position, settlement sooner, rather than later, becomes attractive. When advocating for clients in these lawsuits, one may believe that an offer to settle severely under values the client's claim. However, the prospect of years of litigation when the client is again confronted with the possibility of homelessness, may make the offer one that cannot be refused. Careful consultation with the client is necessary to discuss the consequences of accepting an offer that may be of less monetary value but meets an immediate need.

The difficulties that adhere to this litigation are both individual and systemic. Each client comes to the proceedings with their own individual experiences and claims. Yet, each client is faced with the obstacle of inadequate affordable housing and structural class, gender and race inequalities that create and support a category of women who are targeted for sexual harassment in their homes. While clients face these systemic barriers, litigation, if successful, provides a valuable but limited remedy.

V. CONCLUSION

There has been a continuing effort to obtain recognition for the right of victims of domestic violence to state protection. It is not acceptable for the court to hide behind the veil of privacy and affirm the right of the husband to control his wife through violent means as long as the violence is not too severe. The practice of affirming his privacy rights at the expense of her safety is no longer deemed an appropriate response to domestic violence. While there are still instances of minimizing domestic violence in the home and the effort to obtain services and resources to provide an adequate remedy for victims continues, the struggle to have courts intervene in the private sphere has produced numerous law reforms designed to make the criminal and civil justice systems more responsive to the needs of victims of domestic violence.

Even as progress has been made in state intervention into the home in the area of domestic violence, the concept of privacy in the home continues to occupy a revered place in our society. Yet, in the area of sexual harassment in

housing, courts have not effectuated the privacy rights of the tenant experiencing sexual harassment by the landlord. By applying the jurisprudential requirements developed from sexual harassment in employment cases, the courts have limited the viability of the sexual harassment in housing cause of action. While imposing judicial constraints that bind plaintiffs, the courts have continued to privilege the privacy of the more powerful landlord at the expense of the less powerful tenant. Targeting the most vulnerable tenants, predatory landlords exploit the scarcity of affordable housing and make the exchange of sex for rent a part of their private business transaction. The façade of the private business exchange makes courts reluctant to intervene, just as courts were reluctant to intervene in the private martial relationship in the home. The lack of sufficient affordable housing coupled with class, gender, and racial inequalities means that even if courts were more amenable to finding sexual harassment in housing by abandoning the judicial requirement of "severe or pervasive," the remedy would be inadequate. Private lawsuits are an incomplete device to fully respond to sexual harassment because structural inequalities remain unchallenged and will continue to sustain sexual harassment in housing.

Recognizing the right of the tenant to safety and privacy in her home, however, is a first step to effectuating the goal of a housing market free of discrimination. Courts should acknowledge that the landlord is not entitled to construct a business transaction that is an exchange of sex for shelter and that such a transaction, even if veiled as a private market exchange, deserves the intervention of the court. The most vulnerable tenants, including victims of domestic violence attempting to flee abusive relationships, should not be placed in the position of choosing between sexual abuse and a home. Courts have now recognized that privacy should not shield the perpetrator of domestic violence. It is also time for the doctrine of privacy to stop sheltering perpetrators of sexual harassment in the home.

DECONSTRUCTING THE "IMAGE" OF BATTERED WOMEN