

THE INTERSECTION OF SOCIOECONOMIC CLASS AND GENDER IN HOSTILE HOUSING ENVIRONMENT CLAIMS UNDER TITLE VIII: WHO IS THE REASONABLE PERSON?

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Sexual Harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power.¹

—Catharine A. MacKinnon

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England may not enter; all his force dare not cross the threshold of the ruined tenement.²

—William Pitt the Elder

Sexual harassment is predicated on the imbalance of power. Landlords typically have significant power over their tenants, including the power to choose a tenant, to evict a tenant, to provide or withhold services, and to set the rent. Landlords have additional power because of the historical allocation of property in this society and widespread shortages of adequate rental housing in America's urban areas.³

The housing crisis in our nation's cities most seriously affects low-income Americans. During the past few decades, median monthly

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¹ CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 1 (1979).

² William Pitt the Elder, Address before the House of Commons in 1766 (quoted in NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION* 49-50 (1970)).

³ See *infra* notes 122-24 and accompanying text.

rental rates have increased more than double the rate of salary growth over the same period.⁴ Consequently, "poor families today . . . [have] never had a harder time trying to find a decent place to live."⁵ Poor tenants, as a result, are often in subordinate positions with respect to their landlords. Socialized norms further subordinate low-income women, who comprise the majority of tenants victimized by sexual harassment.⁶ An unequal power relationship involving a dominant male landlord thus provides an environment for sexual harassment of women.

Rental housing sexual harassment is particularly invasive because it violates the sanctity of the home: "The woman sexually harassed at work can go home to find peace and safety; the woman harassed by her landlord has no such safe haven. Sexually harassed tenants must be continually watchful; indeed, some women completely alter their living patterns to avoid contact with the harasser."⁷

In some jurisdictions,⁸ women who are sexually harassed by their landlords can now seek recourse through Title VIII of the Civil Rights Act, commonly known as the Federal Fair Housing Act ("Title VIII" or the "Fair Housing Act" or the "Act").⁹ The Fair Housing Act makes it unlawful to discriminate in the sale or rental of a dwelling on the basis of sex.¹⁰ Courts interpreting the Fair Housing Act have held that sexual harassment of tenants by landlords constitutes gender discrimination.¹¹ The United States Supreme Court, however, has yet to rule on the question.

The few courts that have addressed the issue of landlord sexual harassment have not agreed on a standard for determining whether

⁴ See Barbara Vobejda, *Low-Income Housing Crisis is Escalating*, *HUD Reports*, WASH. POST, Mar. 15, 1996, at A27; see also *infra* note 137.

⁵ Vobejda, *supra* note 4, at A27 (quoting Bob Adams, president of the National Low-Income Housing Coalition).

⁶ See *infra* note 146.

⁷ William Litt et al., *Sexual Harassment Hits Home*, 2 UCLA WOMEN'S L.J. 227, 234 (1992) (quoting Kathleen Butler, *Sexual Harassment in Rental Housing*, 1989 U. ILL. L. REV. 175, 181 (1989)).

⁸ See *infra* notes 42-45.

⁹ On April 11, 1968, Congress passed the Fair Housing Act of 1968. § 810, 82 Stat. 81, 85 (codified at 42 U.S.C. §§ 3601-3619 (1994 & Supp.)). Congress passed the Fair Housing Amendments Act of 1988 on September 13, 1988. 102 Stat. 1619 (codified as amended at scattered sections of 42 U.S.C.).

¹⁰ See 42 U.S.C. § 3604(b) (1994).

¹¹ See, e.g., *Beliveau v. Caras*, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995); *Abrams v. Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988); *Grieger v. Sheets*, 689 F. Supp. 835 (N.D. Ill. 1988); *Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending Cases ¶ 15,472, at ¶ 16,139 (W.D. Ohio Nov. 22, 1983); *Gnerre v. Massachusetts Comm'n Against Discrimination*, 524 N.E.2d 84 (Mass. 1988); *Chomicki v. Wittekind*, 381 N.W.2d 561 (Wis. Ct. App. 1985).

a landlord's conduct constitutes sexual harassment.¹² In a majority of rental sexual harassment cases, the victims are women.¹³ In other causes of action typically involving women victims, such as hostile work environment claims under Title VII of the Civil Rights Act ("Title VII")¹⁴ or claims of domestic violence or rape, there has been vigorous debate about which standard courts should apply to evaluate the offensive conduct.¹⁵ Although the reasonable person standard remains the majority rule, many courts and commentators suggest that where the majority of victims are women, determinations of whether conduct constitutes sexual harassment should be made from the perspective of the reasonable woman.¹⁶ Because of a continuing split in the federal

¹² See *infra* notes 94–101. Since 1983, when the *Shellhammer* court first addressed the issue, many scholars have discussed whether landlord sexual harassment is gender discrimination under Title VIII. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Nancy Blodgett, *Lusting Landlords: More Women Tenants Suing*, 73 A.B.A. J. 30 (1987); Susan Etta Keller, *Does the Roof Have to Cave in? The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663 (1988); Litt, *supra* note 7; Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061; Robert Rosenthal, Comment, *Landlord Sexual Harassment: A Federal Remedy*, 65 TEMP. L. REV. 589 (1992). Few, however, have reached the issue of the standard that should be applied, assuming a tenant did have a cause of action.

¹³ See *infra* note 143 and accompanying text.

¹⁴ 42 U.S.C. § 2000e-2(a)(1).

¹⁵ The debate focuses primarily on the reasonable person standard, which considers conduct from the perspective of the hypothetical average person, and the reasonable woman standard, which evaluates behavior from the perspective of a typical woman—a woman who reacts differently to situations than most men, but who, at the same time, is neither hypersensitive nor idiosyncratic. See generally Mary Ruffolo Rauch, *Rape—From a Woman's Perspective*, 82 ILL. B.J. 614, 618 (1994) (addressing standard in rape claims); Lynn Dennison, Note, *An Argument for the Reasonable Woman Standard in Hostile Environment Claims*, 54 OHIO ST. L.J. 473 (1993) (addressing standard in hostile work environment claims); Steffani J. Saitow, Note, *Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 329 (1993) (addressing standard in domestic violence claims). These three different forms of violence against women have been linked because "each symbolizes different forms of women's subordinated status." Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1400 (1992).

Some courts and commentators have advocated different variations of the reasonable person standard, including the reasonable victim standard, see, e.g., Rosenthal, *supra* note 12, at 593 n.38 (citing articles), and the reasonable battered woman standard, see, e.g., Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 129 (1992). One court recommended judging behavior from the perspectives of both the perpetrator and the victim. See *Lipsett v. University of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988). Finally, some commentators have suggested abandoning reasonableness altogether. See, e.g., Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

¹⁶ See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878–81 (9th Cir. 1991) (applying reasonable woman standard to a claim of hostile work environment); *State v. Wanrow*, 559 P.2d 548, 558–59 (Wash. 1977) (in a case involving a murder charge against a woman who shot and killed a man suspected

circuits on this issue in the employment context, judicial opinions, like scholarship, offer little guidance to courts addressing landlord sexual harassment and will probably not push the Supreme Court in any one direction when it is finally called upon to determine the standard in the housing context.

Neither the reasonable person nor the reasonable woman standard has been completely effective in sexual harassment claims under Title VII. Despite the importance of the debate, scholars have been unable to reach a consensus. Many commentators believe the seemingly neutral reasonable person standard actually reflects the male point of view.¹⁷ They believe the reasonable woman standard must be applied to take into account the female perspective. Others, however, suggest that the reasonable woman standard is inherently biased in favor of the victim and difficult to apply.¹⁸

The problems associated with the reasonableness standards are especially clear in Title VIII sexual harassment claims. The reasonable person standard views the world from the eyes of the middle-class, white male, a person often equated with power. The typical victim of landlord sexual harassment, however, is a poor, minority, and often powerless woman.¹⁹ The reasonable woman standard attempts to account for the woman's perspective but results in the false assumption that there is an "essential" woman. This assumption fails to account for differences among women.²⁰ Essentializing women is especially problematic in housing sexual harassment cases for two reasons. First, in addition to the problem of subordination of women by men, rental housing sexual harassment typically involves exploitation of poor people by those in positions of economic power. Second, a disproportionate number of victims of housing sexual harassment are minorities. Since poor women may face a different type of subordination than wealthy women, and because subordination is often different for minority women altogether, sweeping application of the reasonable woman standard to women of all socioeconomic classes and races would be too broad.

of child molestation, the court applied a reasonable woman standard to determine if the woman shot him in self defense); Rauch, *supra* note 15, at 618 ("A subjective reasonable woman standard should apply to the question of whether force was used in a particular rape case."); Dennison, *supra* note 15 (reasonable woman standard should apply in claims of hostile work environment); Saitow, *supra* note 15, at 356 ("The [reasonable woman] standard is essential [in a case in which a battered woman has killed] to explain the defendant's belief that serious harm was imminent.");

¹⁷ See *infra* note 53 and accompanying text.

¹⁸ See *infra* note 67 and accompanying text.

¹⁹ See *infra* notes 143-46.

²⁰ See *infra* notes 114-15 and accompanying text.

A tempting solution is to create a different standard for various groups with different experiences and perspectives. For example, if the victim is a poor black woman, the "reasonable low-income black woman" standard would apply. Under that approach, however, the standard would continue to decompose until it became completely individualized. Furthermore, courts would be forced to categorize individuals according to factors such as class, gender and ethnic make-up; specific characteristics would be applied to each group, thereby perpetuating existing stereotypes.

As long as the jurisprudence remains trapped in this circular debate between the reasonable person and reasonable woman standards, courts will never focus on the real problem associated with sexual harassment—power. Sexual harassment occurs when one person is in a position of power with respect to the other. Because of the historical allocation of property²¹ and the scarcity of adequate rental housing,²² landlords usually have some power over their tenants. When compounded with the fact that tenants are often poor minority women who are socially, politically and economically powerless, the power imbalance is complicated. The reasonableness standards are not designed to take specifically into account the unique power disparities often seen in the landlord-tenant relationship. This Article proposes that in claims of hostile housing environment under Title VIII, courts shift their focus from the perceptions of the victim, where they are forced to indulge in debate regarding the inherent differences between men and women or between poor people and rich people, to the conduct of the alleged harasser and the unequal balance of power that underlie the very construction of the landlord-tenant relationship.

Part I provides a background of the evolving law regarding hostile housing environment claims. It examines the "reasonable person" standard derived from judicial analysis in most hostile work environment claims under Title VII and the "reasonable woman" standard advocated by many commentators. Part II explores the limitations of both standards in the housing context and urges courts to abandon "reasonableness" as a paradigm completely. Part III evaluates the power imbalance that often exists between landlords and tenants.

This Article ultimately proposes a standard that focuses on the conduct of the harasser and on the distribution of power between the landlord and tenant, rather than the perceptions of the victim. I suggest shifting that focus in a two-step analysis. First, the court must

²¹ See *infra* note 122 and accompanying text.

²² See *infra* note 137.

evaluate the behavior of the alleged harasser, the landlord. Regardless of who the tenant is and what the tenant perceives, certain conduct by the landlord should constitute *per se* harassment. Second, the court must evaluate the relationship between the landlord and the tenant. Even if the conduct is not considered sexual harassment in all circumstances, it might still violate the Act if there is a significant disparity in power between the two parties. To analyze the power disparity, the court must first identify the power matrix between the parties, considering such factors as the gender, race and economic status of both the landlord and tenant, the housing market, and any other factors which contribute to an imbalance of power in the specific case at hand. The court must then determine whether the landlord has exploited his power over the tenant in an impermissible way.

Under this schematic, the court will not be forced to draw conclusions about membership in a particular group. It will not be necessary, for example, to assume that all women need protection or that all whites are empowered. Historical power imbalances between classes, races and other groups will become relevant, but not defining. Rather than asking whether the victim was reasonable in perceiving the defendant's conduct as harassing, the court will focus its inquiry on whether the defendant's conduct was proper in light of the power he exercised over the victim.

I. HOSTILE LIVING ENVIRONMENT CLAIMS UNDER TITLE VIII

A. *Background*

Sexual harassment by landlords²³ can take many different forms, such as unwanted sexual innuendos or physical advances, or the conditioning of rights of tenancy on sexual favors. Landlords, by the terms of most leases, maintain legal access to their tenants' apartments.²⁴ Although under those leases landlords are restricted to entry at reasonable times with the tenants' permission, many tenants still live with the fear that their landlords will enter without notice.²⁵ Often, victims fear taking legal action because they believe that if they do, they may not only lose the lawsuit, but their homes as well. Many of these tenants

²³ Since a large majority of victims of housing sexual harassment are women, *see infra* note 143, sexual harassment discussed in the abstract will refer to male landlords harassing female tenants, unless otherwise specified.

²⁴ Rosenthal, *supra* note 12, at 592.

²⁵ *See id.* (citing *Gnerre v. Massachusetts Comm'n Against Discrimination*, 524 N.E.2d 84, 87 (Mass. 1988)).

become resigned to the fact their landlords will exploit their economic vulnerability by sexually harassing them. In several jurisdictions, however, these women can now seek recourse through the Fair Housing Act.

Title VIII of the Federal Fair Housing Act makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."²⁶ The Act does not, however, explicitly prohibit landlord sexual harassment of tenants.

Courts hearing Title VIII cases have drawn analogies to the similar provision in Title VII.²⁷ The language of the two statutes is virtually identical, as Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."²⁸ Judicial interpretations of Title VIII have closely paralleled decisions interpreting Title VII racial discrimination.²⁹ Although courts have explicitly held that sexual harassment is prohibited under Title VII as impermissible gender discrimination,³⁰ until recently courts interpreting Title VIII did not follow suit.

In 1983, the District Court for the Western District of Ohio recognized for the first time that sexual harassment in the context of rental housing constitutes sex discrimination under Title VIII.³¹ In *Shellhammer v. Lewallen*, the court liberally construed the Fair Housing Act, holding that Congress intended to prohibit discrimination, broadly defined, in the terms, conditions or privileges of a tenancy.³² The federal and state courts that have heard cases involving landlord sexual

²⁶ 42 U.S.C. § 3604(b) (1994).

²⁷ See *infra* notes 29 and 44.

²⁸ 42 U.S.C. § 2000e-2(a)(1).

²⁹ See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1037-38 (2d Cir. 1979).

³⁰ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986). Confining itself to the words of the statute, the Court stated that by the phrase "terms, conditions, or privileges of employment," Congress intended "to strike at the entire spectrum of disparate treatment of men and women." *Id.* at 64.

³¹ See *Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending Cases ¶ 15,472 (W.D. Ohio Nov. 22, 1983). In this landmark case, Thomas and Tammy Shellhammer claimed that their landlord, Norman Lewallen, had sexually harassed Tammy by asking her to pose for nude pictures and to have sex with him. See *id.* at 135. Lewallen ultimately evicted the couple in what he claimed was a dispute over who should buy a new refrigerator. See *id.* at 137-38. The court held that the Shellhammers' cause of action was viable under the Fair Housing Act but found that they were unable to show that the harassment created an offensive or hostile environment. *Id.* at 137.

³² *Id.* at 135-36.

harassment since *Shellhammer* have agreed that Title VII sexual harassment principles should govern Title VIII litigation.³³

Victims of landlord sexual harassment are often reluctant to report the harassment for fear of retaliation.³⁴ Retaliation in the housing context can present a serious risk to a tenant, since a landlord has the power to evict a tenant who refuses his sexual advances or to force the tenant to live in a substandard environment. Because of the widespread shortage of low-income housing, eviction can have particularly severe consequences for the poor, including homelessness.³⁵ Landlords who harass can make it even more difficult for women who report sexual harassment by blacklisting them, thereby preventing them from getting other low-income housing.³⁶ Instead of eviction, the landlord may also refuse to make repairs, enforce rules more rigidly or charge higher rent.³⁷ In addition, landlords frequently threaten violence toward the tenant or her family.³⁸ These threats of retaliation often cause victims to suffer sexual harassment in silence.

Because cases involving hostile housing environment are often unreported, lawsuits premised on sexual harassment in rental housing are scarce.³⁹ The United States Supreme Court has never addressed whether there is a cause of action for sexual harassment under Title VIII. Until recently, the Court of Appeals for the Tenth Circuit was the only circuit court to have recognized such a cause of action, and only tentatively.⁴⁰ In September 1996, the Court of Appeals for the Seventh

³³ See *infra* notes 43-44.

³⁴ For example, in *United States v. Presidio Investments, Ltd.*, after the tenant filed a complaint against her landlord, the landlord retaliated against her by, among other things, demanding entry into her apartment and threatening eviction if she did not comply. 4 F.3d 805, 806 (9th Cir. 1993). The landlord refused to activate her air conditioning and turned off the pilot light to her hot water heater. See *id.* Other deterrents to reporting sexual harassment include "silence as the preferred method of coping, aversion to the perceived stigma attached to victims of sexual harassment, the tendency of some victims to blame themselves for the harassment, anticipation of ridicule, and the desire to avoid further suffering." Litt, *supra* note 7, at 232.

³⁵ See *infra* note 137 and accompanying text.

³⁶ See Litt, *supra* note 7, at 232.

³⁷ See Cahan, *supra* note 12, at 1067.

³⁸ See Litt, *supra* note 7, at 233.

³⁹ See *id.* at 230 ("Victimized tenants rarely report instances of harassment by landlords or building managers, resulting in few rental housing sexual harassment lawsuits."); Cahan, *supra* note 12, at 1066 (after surveying 150 Fair Housing Agencies, Cahan concluded: "Taking into account the various reasons women are reluctant to report their harassment, it is likely the actual incidents of sexual harassment in housing number more than the 288 reported.").

For example, the American Bar Association reported that according to Shanna Smith, the director of Toledo's Fair Housing Center at the time the Shellhammers filed their claim of sexual harassment against Lewallen, twenty-seven other women in Lewallen's buildings admitted to being sexually harassed by him. See Blodgett, *supra* note 12, at 30. The other women were all on welfare, and none of them filed their own claims. See *id.*

⁴⁰ See *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993). In *Honce*, a woman who rented a lot in a

Circuit joined the Tenth Circuit in recognizing a hostile housing environment cause of action.⁴¹ Fewer than ten cases alleging sexual harassment in violation of Title VIII have been reported in federal district courts⁴² and only a handful of additional cases allege violations of state fair housing statutes.⁴³

B. *Current Standard for Determining Sexual Harassment*

In evaluating claims of sexual harassment in rental housing, courts have relied on the definitions and theories of sexual harassment developed in the employment context.⁴⁴ As in Title VII employment cases, there are two types of sexual harassment claims under Title VIII, the "quid pro quo" claim and the "hostile environment" claim.⁴⁵ Quid pro

mobile home park sued her landlord for sexual harassment under the Fair Housing Act. *Id.* at 1087. The landlord asked the tenant to accompany him socially on three occasions. *See id.* When she ultimately responded that she did not wish to go out with him at any time, he never asked her out again. *See id.* The offensive behavior did not include sexual remarks or requests, physical touching or threats of violence. *See id.* After the tenant moved in, she and the landlord had a series of disputes over the property, which the tenant attributed to sexual harassment. *See id.* at 1087-88.

The Tenth Circuit held that a hostile housing environment claim is actionable under Title VIII when "the offensive behavior unreasonably interferes with use and enjoyment of the premises" and is "sufficiently severe or pervasive" to alter the conditions of the housing arrangement. *Id.* at 1090. In that case, however, because the landlord's conduct was neither sexual nor directed solely at women, the court held it was not actionable under the hostile housing environment theory. *Id.*

⁴¹ *See* *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996). In *DiCenso*, on one occasion, the landlord "began caressing [the tenant's] arm and back," intimated that if she could not pay the rent she could take care of it "in other ways," and when she asked to leave, he called her names such as "bitch" and "whore." *Id.* at 1006. The Seventh Circuit held that a one-time proposition for sex unaccompanied by sufficiently egregious touching was insufficient to prove a hostile housing environment under the Fair Housing Act. *Id.* at 1009. The court noted that "DiCenso's comment vaguely invited Brown to exchange sex for rent, and while Dicenso caressed Brown's arm and back, he did not touch an intimate body part, and did not threaten Brown with any physical harm." *Id.* About the landlord's conduct, the court stated "while clearly unwelcome, [it] was much less offensive than other incidents which have not violated Title VII." *Id.* at 1008-09.

⁴² *See* *Beliveau v. Caras*, 873 F. Supp. 1393 (C.D. Cal. 1995); *Doe v. Maywood Hous. Auth.*, No. 93C 2865, 1993 U.S. Dist. LEXIS 9020 (N.D. Ill. June 25, 1993); *Bethishou v. Ridgeland Apartments*, No. 88C 5256, 1989 WL 122434 (N.D. Ill. Oct. 2, 1989); *Abrams v. Merlino*, 694 F. Supp. 1101 (S.D.N.Y. 1988); *Grieger v. Sheets*, 689 F. Supp. 835 (N.D. Ill. 1988); *Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending Cases ¶ 15,472 (W.D. Ohio Nov. 22, 1983).

⁴³ *See, e.g., Gnerre v. Massachusetts Comm'n Against Discrimination*, 524 N.E.2d 84 (Mass. 1988); *Chomicki v. Wittekind*, 381 N.W.2d 561 (Wis. Ct. App. 1985).

⁴⁴ *See, e.g., Shellhammer*, 1 Fair Housing-Fair Lending Cases at ¶ 16,135 (citing *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982)). The workplace sexual harassment cases in turn have relied on the Equal Employment Opportunity Commission's ("EEOC") Title VII Guidelines. *See, e.g., Henson*, 682 F.2d at 903 (citing EEOC Guidelines, 29 C.F.R. § 1604.11 (1981) (defining sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature")).

⁴⁵ *See generally Shellhammer*, 1 Fair Housing-Fair Lending Cases at ¶ 15,472.

quo sexual harassment occurs when "the landlord either conditions any of the terms, conditions or privileges of tenancy on submission to his sexual request or deprives the tenant of any of those terms, conditions or privileges because the tenant has refused to accede to his requests."⁴⁶ Conduct constitutes hostile environment sexual harassment if it "unreasonably interferes with use and enjoyment of the premises"⁴⁷ or it "makes continued tenancy burdensome and significantly less desirable than if the harassment were not occurring."⁴⁸

Courts have struggled with the standard for determining when tenancy becomes burdensome and significantly less desirable. In both the employment and the housing contexts, courts have been split as to whether to make that determination from the perspective of the reasonable person or the reasonable woman.⁴⁹ In the employment context, most courts have analyzed the claim of sexual harassment under the reasonable person standard.⁵⁰ Those courts have found sexual harassment if a "reasonable person" would have found the work environment burdensome and significantly less desirable.⁵¹ They reasoned that if a reasonable woman standard were used, "a claim [would] be predicated on the sensitivities and perceptions of the particular claimant. Thus, society [would] not have one uniform standard on which to base its conduct."⁵²

Several circuit courts, however, have applied the reasonable woman standard, asserting that the so-called neutral reasonable person standard actually contains unstated assumptions that are male-based.⁵³

⁴⁶ *Grieger*, 1989 WL 38707, at *2 (citing *Shellhammer*, 1 Fair Housing-Fair Lending Cases at ¶ 16,129); see EEOC Guidelines, 29 C.F.R. § 1604.11(a)(1)-(2) (1996) (describing quid pro quo sexual harassment as occurring when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment . . . [and] submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.").

⁴⁷ See *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993).

⁴⁸ *Shellhammer*, 1 Fair Housing-Fair Lending Cases at ¶ 16,128 (plaintiff in a hostile environment sexual harassment suit must show: (1) membership in a protected group; (2) unwelcome and extensive sexual harassment that the plaintiff finds undesirable or offensive; (3) that the harassment was based on sex; and (4) that the "harassment makes continued tenancy burdensome and significantly less desirable than if the harassment were not occurring") (citing EEOC Guidelines, 29 C.F.R. § 1604.11(a)(3) (defining hostile environment sexual harassment as "such conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"))).

⁴⁹ See generally *infra* notes 50, 53, 94 and 100.

⁵⁰ See generally Rosenthal, *supra* note 12, at 594 n.40 (citing cases).

⁵¹ See *id.*

⁵² *Id.* at 594; see, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) ("trier of fact . . . must adopt the perspective of a reasonable person's reaction to a similar environment"), *cert. denied*, 481 U.S. 1041 (1987).

⁵³ See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Andrews v. City of Phila.*, 895

In cases involving violence against women, the reasonable woman standard serves to change the woman's subordinated status by "increas[ing] the potential for effective enforcement of laws against subordinating behavior."⁵⁴ Specifically, the reasonable woman standard includes women's experiences "in a system with asymmetrical power relations that has historically excluded women's participation."⁵⁵

Studies show that because women have not historically held power positions,⁵⁶ men and women often have different perspectives regarding what conduct constitutes sexual harassment.⁵⁷ According to a joint survey by *Redbook* magazine and the *Harvard Business Review* on sexual harassment in the workplace, "[m]ost people agree on what harassment is. But men and women disagree strongly on how frequently it occurs."⁵⁸ The study showed that actions deemed harassment by women were often perceived as harmless by men.⁵⁹ The report concluded that "[f]rom the comments in the returns, a visitor from another planet might conclude that men and women work in separate

F.2d 1469, 1482-83 (3rd Cir. 1990) (utilizing "minority employee" standard); *Yates v. Avco Corp.*, 819 F.2d 630, 636-37 (6th Cir. 1987). See also *Stingley v. Arizona*, 796 F. Supp. 424, 429 (D. Ariz. 1992) (utilizing the "reasonable person of the same gender and race or color" standard); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1516 n.12 (D. Me. 1991), *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991) (utilizing the "reasonable person from the protected group of which the alleged victim is a member" standard). In addition, many commentators argue that the definition of sexual harassment should take into account the perceptions of the particular victim; Rosenthal, *supra* note 12, at 593 n.33 (citing articles).

⁵⁴ Cahn, *supra* note 15, at 1400.

⁵⁵ *Id.* at 1401.

⁵⁶ See *infra* note 140 and accompanying text.

⁵⁷ See Rosenthal, *supra* note 12, at 593. For example, in a study by the New York Task Force on Women in the Courts, 16% of women but only 3% of men believed that judges subjected women attorneys to unwanted verbal or physical sexual advances. See Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817, 833 (1991) (citing New York Task Force on Women in the Courts Report (1986), *reprinted in* 15 FORDHAM URB. L.J. 11 (1986-87)). Conversely, 82% of men, but only 47% of women, believed it never happened. See *id.* at 833-34.

⁵⁸ Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See it . . . Some Won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 76, 77; see also Sally A. Piefer, Comment, *Sexual Harassment from the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85, 86 (1993).

⁵⁹ For example, nearly two-thirds of the men, compared with about half of the women surveyed, agree with the statement, "the amount of sexual harassment at work is greatly exaggerated." See *id.* at 78. One-third of the men surveyed, compared to a full half of the women, had witnessed or heard of a case where a man starts each day with a sexual remark that he insists is a social comment. See *id.* at 82. In the situation where a man eyes a woman up and down, 24% percent of all women, compared with 8% of all men, think it is harassment. See *id.* at 81.

Conversely, in reaction to a scenario where a man kisses a woman co-worker every time they meet, more men than women, proportionately, rated the action objectionable. See *id.* Likewise, where the man offers to drive the woman home and where the married man and the woman have dinner together and go to a nightclub while on a business trip, more men than women also thought those incidents were possibly harassment. See *id.*

organizations."⁶⁰ The reasonable person standard fails to reflect women's perceptions of what constitutes sexual harassment.

The Court of Appeals for the Ninth Circuit was the first to apply the reasonable woman standard in a Title VII sexual harassment case.⁶¹ In *Ellison v. Brady*, the court held that under the reasonable woman standard, "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."⁶² The *Ellison* court adopted the "perspective of a reasonable woman primarily because . . . a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."⁶³ Recognizing the value of maintaining an objective standard,⁶⁴ the court reasoned that it was more appropriate to analyze the harassment from the viewpoint of a reasonable victim because women will be protected from actions that are acceptable to men but which offend reasonable women.⁶⁵ Following *Ellison*, several other courts have applied the reasonable woman standard.⁶⁶

Some courts and commentators have criticized the reasonable woman standard as unfair to the accused and difficult for the trier of fact to administer.⁶⁷ Critics assert that courts should act as an unbiased and disinterested forum—by taking the perspective of the victim or reasonable woman, they suggest, the court inevitably takes a side.⁶⁸ In

⁶⁰ See *id.*

⁶¹ See *Ellison v. Brady*, 924 F.2d 872, 878–79 (9th Cir. 1991).

⁶² *Id.* at 879.

⁶³ *Id.*

⁶⁴ Other courts have added a subjective component to the test requiring a plaintiff to show that the discrimination adversely affected her. See, e.g., *Andrews*, 895 F.2d at 1480–81, 1482–83.

⁶⁵ *Ellison*, 924 F.2d at 878. Likewise, in a dissent in *Rabidue*, Judge Keith picked up on the idea that there is no homogeneous consensus in society regarding appropriate behavior toward the opposite sex. 805 F.2d at 626 (Keith, J., dissenting). Accordingly, claiming the court's supposedly neutral analysis actually gave the male perspective, Judge Keith argued that the reasonable woman standard would have been more appropriate. See *id.* (Keith, J., dissenting).

⁶⁶ See *supra* note 53.

⁶⁷ See, e.g., *Fowler v. Kootenai County*, 918 P.2d 1185, 1189 (Idaho 1996); *Radtko v. Everett*, 501 N.W.2d 155, 165–66 (Mich. 1993); *Garcia v. Andrews*, 867 S.W.2d 409, 412 (Tex. Ct. App. 1993); Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.* 773 (1993); Paul B. Johnson, *The Reasonable Woman Standard in Sexual Harassment Law: Progress or Illusion?*, 28 *WAKE FOREST L. REV.* 619, 626 (1993); Walter Christopher Arbery, Note, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 *GA. L. REV.* 503 (1993); Robert Unikel, Comment, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 *Nw. U. L. REV.* 326 (1992).

⁶⁸ See Johnson, *supra* note 67, at 639–40.

addition, authorities have alleged that it is not fair to hold a man to a standard that he cannot understand.⁶⁹ These authorities reason that under the reasonable woman standard, innocent men will be legally liable for behavior that unintentionally offends a woman.⁷⁰

Finally, it would be difficult for a male judge or jury member to accurately understand the female viewpoint. A male trier of fact applying the reasonable woman standard will necessarily resort to gender stereotyping.⁷¹ The reasonable woman standard assumes that the point of view of a woman is alien to men.⁷² Yet, after making this assumption, it requires men who are not expected to understand the woman's perspective to apply the standard.⁷³ Opponents of the reasonable woman standard thus consider it antithetical to the sex-blind principle of Title VII.⁷⁴

In 1993, without specifically rejecting the reasonable woman standard, the United States Supreme Court applied the reasonable person standard in *Harris v. Forklift Systems, Inc.*⁷⁵ Although the lower courts had applied the reasonable woman standard,⁷⁶ the Supreme Court did not directly address the debate.⁷⁷ The Court held simply that abusive work environment sexual harassment requires no concrete psychological harm to the victim—it need only be so severe or pervasive that a “reasonable person” would find it, and the plaintiff did find it, hostile or abusive.⁷⁸ The standard of review issue was not fully litigated, however, because the parties agreed that “unwelcome workplace conduct

⁶⁹ See Adler & Pierce, *supra* note 67, at 825–26.

⁷⁰ See *id.*

⁷¹ See Unikel, *supra* note 67, at 367.

⁷² See Johnson, *supra* note 67, at 635.

⁷³ See *id.* at 642.

⁷⁴ See Arbery, *supra* note 67, at 506.

⁷⁵ 510 U.S. 17, 21 (1993). This case involved a claim of sexual harassment by a woman manager of an equipment rental company whose president insulted her with comments in front of others such as, “You’re a woman, what do you know?” *Id.* at 19. The president also subjected her to unwanted sexual innuendos, such as suggesting in jest that they negotiate her raise in a motel room. *Id.*

⁷⁶ The district court found that “a reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person’s work performance.” *Harris v. Forklift Sys., Inc.*, No. 3:89-0557, 1990 U.S. Dist. LEXIS 20115, at *17 (M.D. Tenn. Nov. 28, 1990). The court of appeals affirmed the district court’s opinion in an unpublished decision. *Harris v. Forklift Sys., Inc.*, 976 F.2d 733, 733 (6th Cir. 1992).

⁷⁷ The Supreme Court granted certiorari solely on the issue of whether conduct must “seriously affect [an employee’s] psychological well-being” to be considered sexual harassment. *Harris*, 510 U.S. at 20.

⁷⁸ *Id.* at 21–22. The Court explained that sexual harassment claims should be evaluated with a two-prong test. *Id.* First, a court should consider whether a reasonable person would find the conduct offensive. See *id.* at 21. If so, the court must then determine whether the particular

should be considered from the viewpoint of a reasonable person in the position of the plaintiff."⁷⁹

Despite the Court's ruling in *Harris*, several circuit courts have continued to apply the reasonable woman standard. For example, in *Hixson v. Norfolk Southern Railway Co.*,⁸⁰ the Court of Appeals for the Sixth Circuit held that a constructive discharge due to sexual harassment occurs if "working conditions are so difficult or unpleasant that a reasonable woman in the employee's shoes would feel compelled to resign."⁸¹ Likewise, in *Mullins v. Campbell Soup Co.*,⁸² the Ninth Circuit relied upon *Ellison* in holding that conduct constituted sexual harassment if "a reasonable woman in Mullins' position would find her supervisor's conduct 'sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.'"⁸³ These courts cited *Harris* for its primary holding that to create a hostile work environment, conduct need not seriously affect an employee's psychological well-being,⁸⁴ but failed to consider the *Harris* case as precedent for the reasonable person standard. Other courts, however, have interpreted *Harris* as mandating the reasonable person standard.⁸⁵

In *Fuller v. City of Oakland*,⁸⁶ the Ninth Circuit took an interesting approach. The court cited *Harris* for the proposition that under a hostile work environment theory, the working environment must "both subjectively and objectively be perceived as abusive."⁸⁷ The court then added, however, that whether the workplace is objectively hostile must be determined "from the perspective of a reasonable person *with the same fundamental characteristics*."⁸⁸ Because the victim in that case was a woman, the court adopted the reasonable woman standard, basing its determination on whether "a reasonable woman would . . . find the

plaintiff actually found the behavior offensive. *See id.* at 21-22. Thus, there is an objective and a subjective component to the test. *See id.*

⁷⁹ Reply Brief of Petitioner at 9 n.4, *Harris*, 510 U.S. at 17 (No. 92-1168).

⁸⁰ No. 94-5832, 1996 U.S. App. LEXIS 15421 (6th Cir. June 10, 1996).

⁸¹ *Id.* at *15 (citing *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987)).

⁸² No. 93-56492, 1995 U.S. App. LEXIS 11918 (9th Cir. May 18, 1995).

⁸³ *Id.* at *12 (quoting *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)); *see Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1462-63 (9th Cir. 1994).

⁸⁴ *See Hixson*, 1996 U.S. App. LEXIS 15421, at *11 (citing *Harris*, 510 U.S. at 21); *Mullins*, 1995 U.S. App. LEXIS 11918, at *11 (citing *Harris*, 510 U.S. at 22).

⁸⁵ *See, e.g., Bunch v. Shalala*, No. 94-2269, 1995 U.S. App. LEXIS 27275, at *25 (4th Cir. Sept. 25, 1995); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir. 1995).

⁸⁶ 47 F.3d 1523 (9th Cir. 1995).

⁸⁷ *Id.* at 1527 (citing *Harris*, 510 U.S. at 21-22).

⁸⁸ *Id.* (citing *Ellison*, 924 F.2d at 879) (emphasis added).

incidents . . . sufficiently severe and pervasive to alter her work environment.”⁸⁹

The Seventh Circuit held similarly in *Dey v. Colt Construction & Development Co.*,⁹⁰ stating: “[w]e thus consider not only the actual effect of the harasser’s conduct on his victim, but also the effect similar conduct would have had on a reasonable person in the plaintiff’s position.”⁹¹ The court then adopted the EEOC’s Guidelines on Discrimination Because of Sex,⁹² which defined the reasonable person standard as including “consideration of the perspective of persons of the alleged victim’s race, color, religion, gender, national origin, age or disability.”⁹³

Some courts reconcile *Harris* and *Ellison* by defining the reasonable person standard to include such characteristics as gender, while others simply cite *Harris* as authority for the reasonable person standard. The debate thus remains exactly where it was prior to the Supreme Court’s decision in *Harris*.

In the landlord-tenant context, the few courts addressing the issue have likewise disagreed on a standard. Notably, the lower courts hearing landlord-tenant sexual harassment cases have not consistently adopted the reasonable person standard derived from *Harris*. At least two courts have taken the view that the definition of sexual harassment should take into account the perceptions of the particular victim.⁹⁴ In *Shellhammer v. Lewallen*, the court held that the perspective of the tenant was relevant in analyzing whether the landlord sexually harassed the tenant.⁹⁵ The court reasoned that the tenancy was personal to the tenant, hence the tenant’s reaction to the landlord’s conduct was probative of whether the landlord harassed her.⁹⁶ The court specifically rejected the reasonable person standard.⁹⁷ Likewise, in *Beliveau v. Caras*,⁹⁸ decided after *Harris*, the United States District Court for the Central District of California applied the reasonable woman standard

⁸⁹ *Id.* at 1528.

⁹⁰ 28 F.3d 1446 (7th Cir. 1994).

⁹¹ *Id.* at 1454.

⁹² See 58 Fed. Reg. 51,266, 51,269 (1993) (proposed 29 C.F.R. § 1609.1(c), withdrawn, 59 Fed. Reg. 51,396 (1994)).

⁹³ *Dey*, 28 F.3d at 1454 n.8 (quoting EEOC proposed regulations, 58 Fed. Reg. 51,266. In October 1994, the EEOC withdrew the proposed guidelines on harassment. See 59 Fed. Reg. 51,396.

⁹⁴ See *Beliveau v. Caras*, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995); *Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending Cases ¶ 15,472, at ¶ 16,128 (W.D. Ohio Nov. 22, 1983).

⁹⁵ 1 Fair Housing-Fair Lending Cases at ¶ 16,128.

⁹⁶ *Id.*

⁹⁷ *Id.* at ¶ 16,127.

⁹⁸ 873 F. Supp. at 1397-98.

to find that a landlord's unpermitted and intentional sexual touching of a tenant constituted sexual harassment. The court noted:

Women remain disproportionately vulnerable to rape and sexual assault, which can and often does shape women's interpretations of words or behavior of a sexual nature, particularly if unsolicited or occurring in an inappropriate context. . . . The net result of the disparate experiences of women and men concerning harassment . . . is that a single standard *perpetuates* inequalities ⁹⁹

The Supreme Judicial Court of Massachusetts in *Gnerre v. Massachusetts Commission Against Discrimination*, on the other hand, imposed the reasonable person standard.¹⁰⁰ The court held that a plaintiff need not show that the harassment affected her emotional well-being, only that the harassment would have rendered the tenancy significantly less desirable to a reasonable person in her position.¹⁰¹

Several other cases did not address the debate between the reasonable person and reasonable woman standards. In fact, many courts do not use that terminology at all in their opinions. For example, in *Honce v. Vigil*, the Court of Appeals for the Tenth Circuit held that a claim is actionable "when the offensive behavior unreasonably interferes with the use and enjoyment of the premises."¹⁰² In *Grieger v. Sheets*, the District Court of the Northern District of Illinois stated that the harassment must be "sufficiently severe or pervasive" to alter the conditions of the housing arrangement¹⁰³ and make the "continued tenancy burdensome and significantly less desirable than if the harassment were not occurring."¹⁰⁴ When courts do not specifically turn their attention to the perception of the victim, the presumption is that they will decide whether the tenancy was burdensome based on societal norms or expectations, in effect applying the reasonable person standard. Even when courts do not employ the reasonableness language, as in the above cases, the implication is that the landlord's conduct would be considered sexual harassment if a "reasonable person" would consider it such.

⁹⁹ *Id.* at 1397.

¹⁰⁰ 524 N.E.2d 84, 88 (Mass. 1988).

¹⁰¹ *Id.* There is no indication that the court took into account such factors as her gender and race when considering the reasonable person *in her position*.

¹⁰² 1 F.3d 1085, 1090 (10th Cir. 1993).

¹⁰³ No. 87C 6567, 1989 WL 38707, at *2 (N.D. Ill. Apr. 10, 1989) (quoting *Shellhammer*, 1 Fair Housing-Fair Lending Cases at ¶ 16,128).

¹⁰⁴ *Id.*

Thus, in hostile housing environment cases, the lower courts have not yet agreed on a standard. Since the issue is also unresolved in the employment context, it remains uncertain what direction the Supreme Court will take when called upon to determine a standard in rental sexual harassment cases.

II. WHO IS THE REASONABLE VICTIM IN HOUSING CASES?: LIMITATIONS OF EXISTING STANDARDS

Legitimate criticisms exist of both the reasonable person and the reasonable woman standards as applied to sexual harassment cases. Courts have not been able to agree on a standard because both alternatives tend to perpetuate stereotypes and overgeneralize about how a reasonable person should act. The reasonableness standards are especially problematic when applied to housing sexual harassment cases.

Women disproportionately suffer the brunt of sexual harassment, and gender bias still pervades the legal system.¹⁰⁵ Accordingly, the legal system needs to account for the woman's perspective regarding appropriate behavior. The reasonable person standard is ineffective because it fails to reflect women's perceptions of what constitutes sexual harassment. The reasonable woman standard evaluates the conduct from the woman's perspective and thus minimizes the risk of reinforcing the prevailing level of sexual harassment in society.¹⁰⁶ The reasonable woman standard, however, does not go far enough and in fact creates new problems. Just as society perceives the reasonable person as male, it also assumes this mythical person is a white, middle-class heterosexual. While the reasonable woman standard takes a positive step by turning the attention to women, it risks addressing only the perspective of the white, middle-class woman,¹⁰⁷ often failing the unique cross-section of society most often confronted with landlord sexual harassment—low-income minority women.¹⁰⁸

Just as a reasonable woman might consider certain incidents sexual harassment, while a reasonable man might not, there are instances

¹⁰⁵ See Deborah S. Brenneman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281, 1294, 1299 (1992); Piefer, *supra* note 58, at 99.

¹⁰⁶ Because the reasonable woman standard would not permit a highly sensitive woman to prevail, the standard retains the objective element of reasonableness. Brenneman, *supra* note 105, at 1296; Piefer, *supra* note 58, at 99.

¹⁰⁷ See ELIZABETH V. SPELMAN, *INESSENTIAL WOMEN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 4 (1989).

¹⁰⁸ See *infra* notes 144–46.

where a reasonable low-income woman might react differently from a reasonable affluent woman. One commentator has noted that "[l]ow income tenants are more vulnerable to economic intimidation than are their wealthier counterparts. They are also less likely to know their rights and how to negotiate the legal system, and are more likely to believe that they cannot avoid harassment."¹⁰⁹ Take, for example, a landlord who constantly bothers his tenant—he telephones her, invites her to dinner, asks her personal questions, makes insinuating comments about visitors to her apartment and questions her about her sex life. Susan, a financially secure tenant living in an area where rental housing is abundant, has the option of suing the landlord for sexual harassment or merely moving out and finding a new apartment. Sharon, however, a single mother who lives with her two children in subsidized housing in the city, does not have such clear options. Sharon waited four years to get her subsidized apartment. The waiting list for subsidized housing in the city is now as long as eight years.¹¹⁰ Even if she sues her landlord for sexual harassment and wins, she might still be forced to move out of the apartment if she remains uncomfortable around her landlord after suing him. Because the consequences to Sharon of giving up her apartment are much graver than to Susan, her perception of her living environment might be different from Susan's.

In the above vignette, the reasonable woman standard would be too narrow. The reasonable woman standard is based on the notion that a paradigm exists that reflects the common experiences of all women.¹¹¹ Women are not a homogenous group. By assuming that there is an "essential" woman, the reasonable woman standard ignores the realities of differences among women¹¹² and fails to protect the

¹⁰⁹ Litt, *supra* note 7, at 234–35.

¹¹⁰ In most urban areas, long waiting lists exist for a limited number of Section 8 certificates and vouchers. In Washington, D.C., for example, the waiting list includes 15,683 people. In Philadelphia, the figure is 16,620. See Vobejda, *supra* note 4, at A27. For many families, that means waiting as long as eight years or more. See *id.*; see also Theodore C. Taub, *The Future of Affordable Housing*, 22 URB. LAW. 659 (1990). See generally Deborah Kenn, *Fighting the Housing Crisis with Underachieving Programs: The Problem With Section 8*, 44 WASH. U. J. URB. & CONTEMP. L. 77, 81–82 (1993) ("Because demand far exceeds supply, the application process in most jurisdictions is only open for short periods each year. . . . Once on a waiting list, a tenant has little hope of receiving a certificate or voucher unless he or she falls into one of the preference categories established by HUD. . . . The few families who manage to acquire Section 8 certificates or vouchers face several hurdles in obtaining affordable, decent housing. Within sixty days of receiving the certificate, the eligible family must . . . find an apartment that qualifies for the program and a landlord willing to accept a Section 8 certificate or voucher.").

¹¹¹ See Johnson, *supra* note 67, at 626.

¹¹² See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 582, 591–92 (1990); Katharine T. Bardett, *MacKinnon's Feminism: Power on Whose Terms?*, 75 CAL. L. REV. 1559, 1566 (1987) (book review).

majority of landlord sexual harassment claimants who do not conform to the norms of the "reasonable woman." Proponents of the reasonable woman standard assert that there is no consensus between men and women regarding what behavior constitutes sexual harassment.¹¹³ Applying the reasonable woman standard, however, necessarily implies that there is consensus among women over how the sexes should relate to each other. Such an assumption ignores the complexities of a victim's situation.¹¹⁴ How one perceives a particular interaction, such as an alleged act of sexual harassment, will be a function of more than just one's sex—it will be a function of one's "personal psychological makeup and of social factors, such as one's race, sex, class, *etc.*"¹¹⁵ Therefore, just as the reasonable person standard perpetuates inequalities based on gender, the reasonable woman standard may perpetuate

¹¹³ See, e.g., Kathryn Abrams, *Gender Discrimination and Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1210 (1989); Brenneman, *supra* note 105, at 1293–95; Piefer, *supra* note 58, at 86.

¹¹⁴ This problem operates on a larger theoretical level in feminism as illustrated by "essentialist" theory. Catharine MacKinnon has asserted that men have their feet on the necks of all women, regardless of race or class. CATHARINE MACKINNON, *Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED* 32, 45 (1987). Many believe, however, that MacKinnon fails to take into account social, cultural and historical circumstances. Under MacKinnon's view, white women become the norm, or pure, "essential" women. See Harris, *supra* note 112, at 595. An essentialist approach seeks to isolate a uniform "essential" woman's experience, described independent of other characteristics such as race, class and sexual orientation. See *id.* at 584. The attention of essentialist theory is turned to white, middle-class women, confusing the condition of one group for the condition of the whole. See SPELMAN, *supra* note 107, at 4. By assuming that there is an "essential" woman, the theories ignore the realities of differences among women. See Harris, *supra* note 112, at 591–92; Bartlett, *supra* note 112, at 1566.

¹¹⁵ Ehrenreich, *supra* note 15, at 1194. For example, the reasonable woman standard does not recognize the interactive effect of discrimination, which can affect African-American women much differently than it affects African-American men or white women. See Abrams, *supra* note 113, at 1214 & n.124. For black women, two statuses (black and female) are combined and create a condition that is worse than the sum of the two parts. See Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 9 (1989). African-American women have a dual stigma of being black and being women, see *id.* at 12, and are more vulnerable to both race and gender discrimination. See Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 797 (1991). "In order to support this degraded status, society has created a system of mythology and misinterpretations about black women which further limits the life opportunities of black women." Scales-Trent, *supra*, at 13; see BELL HOOKS, *AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM* 51–86 (1981). Myths still prevail that African-American women are promiscuous, hot-blooded and unabashed in their desire to achieve sexual fulfillment. See Winston, *supra*, at 785–86. "The myth of the unvirtuous Black woman remains, only now her alleged lack of virtue is reason to justify the boss's sexual harassment of her." Peggy R. Smith, *Separate Identities: Black Women, Work and Title VII*, 14 HARV. WOMEN'S L.J. 21, 74 (1991). See, e.g., Brief for Respondent Michelle Vinson, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No.84–1979). See also MACKINNON, *supra* note 1, at 53–54. As a result, women of color have different perceptions of the world than black men or white women.

existing inequalities based on race, class, sexual orientation and other factors when it fails to consider the point of view of subordinated groups other than women.¹¹⁶

Of course, the reasonable woman standard could be altered to take into account factors such as race, class and sexual orientation. This seemingly natural extension of the reasonable woman standard, however, is quickly complicated when taken to the extreme. That is, if every distinctive characteristic defining a person is taken into account, the standard will eventually become completely individualized. For example, the reasonable Hispanic lesbian woman standard might be workable, but what about the reasonable thirty-seven-year-old obese single woman living on Main Street? Eventually, the standard becomes purely subjective, leaving the landlord no clear standard by which to evaluate his own conduct.

In addition, using membership in a particular group to define the manner in which an individual will react to a particular situation leads to the perpetuation of stereotypes. A person may belong to many categories (i.e. race, gender and economic class), but no one category controls how a person interprets every event that person experiences in life. Rather, one category may shape a person's outlook in some contexts, and another category or union of categories may shape a person's perception in other contexts.¹¹⁷ Consequently, labeling someone by his or her gender or race does not automatically define how that person will perceive the world. Reasonable people of the same gender and race might react differently depending on other factors such as class, religion or sexual orientation or according to a combination of several of these categories.

The reasonable woman standard and its progeny evaluate conduct from the perspective of the victim, creating the additional problem of false consciousness. If the defendant creates a hostile environment but the "victim" does not perceive the conduct as improper or is not bothered by it, then the conduct will not be actionable. False consciousness allows improper behavior to go unremedied if groups are socialized to think that certain forms of the behavior are acceptable. For example, Asian-American women are often perceived as "subservient, obedient, passive, hardworking, and exotic."¹¹⁸ As a result "Asian-American women themselves become convinced that they should be-

¹¹⁶ See Ehrenreich, *supra* note 15, at 1218.

¹¹⁷ See generally Joan Chalmers Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 307.

¹¹⁸ Esther Ngan-Ling Chow, *The Feminist Movement: Where are all the Asian-American Women?*, in MAKING WAVES 362, 367 (Asian Women United of Cal. ed., 1989).

have in accordance with these stereotyped expectations.”¹¹⁹ Some Asian-American women might therefore perceive certain harassing behavior as acceptable. Behavior considered inappropriate by a great part of society will thereby be permissible when directed at those Asian-American women. As amici in *Harris*, the NAACP Legal Defense and Education Fund and the National Council of Jewish Women explained this effect in the context of racial discrimination:

The day is long past when this Court would entertain any suggestion that some forms of racial abuse are legal because “reasonable” blacks would not be offended; the right to equal treatment . . . does not ebb and flow with popular or judicial notions of what forms of discrimination a “reasonable” black would find tolerable or “merely annoying”; no woman should have to endure “derogatory or unwelcome sexual remarks” as a “condition of her job.”¹²⁰

Both the reasonable person and the reasonable woman standards create problems when applied in the housing context. Neither standard has been uniformly used and neither can be agreed upon. The reasonable person standard is inflexible in its definition of how people should behave, while the reasonable woman standard perpetuates stereotypes and fails to consider differences among women. As Catharine MacKinnon noted in an Amicus Curiae brief to the Supreme Court in *Harris*:

[r]easonableness, whether couched in the language of a reasonable person or a reasonable woman, operates as a vehicle for the introduction of sex stereotyping, diverts the otherwise straightforward Title VII inquiry into the defendant’s conduct, and devolves into an inquiry about the character of the victim in light of societal norms.¹²¹

A standard is needed that takes into account the particular characteristics and circumstances of the parties that comprise any specific situation, without perpetuating stereotypes and inflexible categories.

¹¹⁹ *Id.* at 367.

¹²⁰ BARBARA A. BARCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY* 616 (2d ed. 1996) (quoting Brief Amici Curiae of the NAACP Legal Defense and Education Fund and the National Council of Jewish Women in support of Petitioner at 21–24, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92–1168)).

¹²¹ Brief of Amici Curiae NOW Legal Defense and Education Fund, Catharine MacKinnon, et al. 21–22, 15–22, *Harris* (No. 92–1168).

III. THE POWER RELATIONSHIP BETWEEN LANDLORD AND TENANT

Rental sexual harassment specifically involves victims who are often subordinated to white middle-class men in our society. Usually these victims are socially, politically and economically powerless. Understanding the connection between sexual harassment and tenant powerlessness might help to explain the relative actions of the harasser and the victim.

Like sexual harassment in the workplace, sexual harassment in rental housing rests upon the imbalance of power. Landlords, almost by definition, have significant power over their tenants. An unequal power relationship in which a man has the upper hand often leads to sexual harassment of women. The power matrix between a landlord and tenant, however, is not only a function of gender. A landlord's power also derives from economic dominance due to housing shortages or from other factors, such as race or class.

Historically, the allocation of property in society has led to the economic dominance of the landlord over the tenant. The systematic domination of tenants by landlords arises from the economic and social inequalities between the two groups, based on "centuries of culture regarding landowning and its centrality to 'worth.'"¹²² The relationship between landlord and tenant therefore not only "condition[s] how the people relate to each other, but to an important extent define[s] the constitutive terms of the relationship."¹²³

Landlords may have additional power over their tenants due to more accidental circumstances, such as the exact configuration of the housing market. When housing is scarce, the disparity in bargaining power between landlords and tenants is greatest. At such times, landlords generally have a greater ability to affect the low-income tenants' lives than the reverse.¹²⁴ To influence tenants, landlords can threaten to evict or refuse to make necessary repairs to the dwelling. A landlord's threat of eviction can be devastating to a tenant who has meager alternative housing options. A landlord's failure to make repairs can be equally damaging when the housing does not meet basic standards of health and safety.

Tenants, in contrast, have fewer and less powerful options when dissatisfied with a landlord's behavior. Tenants can threaten to vacate

¹²² Bezdek, *supra* note 12, at 540.

¹²³ *Id.* at 540 n.24 (quoting Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103 (1984)).

¹²⁴ See Keller, *supra* note 12, at 1668-69.

the premises or withhold rent. When faced with a shortage of housing, however, a tenant's threat to vacate the premises is likely to be met with inaction. The same reasons that heighten a tenant's need or desire to stay in a particular unit contribute to the landlord's indifference to that tenant's staying in the unit.¹²⁵ Vacating an apartment is a weak option when the landlord is effectively guaranteed a replacement tenant. The tenant's strongest weapon—withholding rent—is often ineffective when the rental income is needed for building maintenance.¹²⁶ In addition, the law may permit an eviction on the basis of failure to pay rent alone, even if the tenant has a legitimate grievance against the landlord.¹²⁷ Moreover, the more tenants a landlord has, the less the economic effect on the landlord of one tenant's withholding of rent. Finally, the low-income tenant's personal attachment to the physical unit as her home and her place in the neighborhood is likely to be much greater than the landlord's attachment to any particular tenant living in the unit.¹²⁸ "To cause a disruption in the landlord's life equivalent to the disruption a landlord would cause by simply 'omitting' to fix a leaky ceiling would require positive action on the tenant's part."¹²⁹ Thus, tight housing markets exacerbate the power imbalance between landlord and tenant.

During the past few decades, the availability of low-income housing has steadily declined.¹³⁰ In the 1970s and 1980s, a series of socioeconomic conditions arose in American urban areas which heavily impacted housing availability.¹³¹ While the rest of the country was seeing economic revitalization in the 1980s, low-income Americans were experiencing a serious housing crisis.¹³² Many credit this low-income housing crisis to budget cuts directed at welfare programs and to inflation.¹³³ Between 1970 and 1983, the median monthly rental rates for housing in American cities increased more than double the rate of salary growth over the same period.¹³⁴ Simultaneously, urban housing built earlier in the century became increasingly dilapidated.

¹²⁵ See *id.* at 1667.

¹²⁶ See *id.* at 1672.

¹²⁷ In many jurisdictions, a landlord's breach of covenant is independent of the tenant's duty to pay rent. See generally ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 3:4, 96 & n.58 (1980 & Supp. 1997) (citing cases).

¹²⁸ See Keller, *supra* note 12, at 1668.

¹²⁹ *Id.* at 1669.

¹³⁰ See *infra* notes 131–36 and accompanying text.

¹³¹ See Rosenthal, *supra* note 12, at 590–91.

¹³² See *id.* at 591.

¹³³ See *id.*

¹³⁴ See *id.* (citing ARLENE ZAREMBKA, *THE URBAN HOUSING CRISIS* 2 (1990)).

"In addition, as the United States economy became more service oriented, urban areas, formerly the location for vast industries, lost large numbers of blue-collar jobs."¹³⁵ "The dearth of urban housing alternatives and jobs forced many families to live in shelters or seek other housing alternatives."¹³⁶ Because most cities now face a shortage of low-income housing, the power imbalance between a landlord and a low-income tenant is likely to be greatest.¹³⁷

Other factors, such as race and gender, can add to a tenant's subordinate position.¹³⁸ For example, people are socialized into equating power with whiteness and masculinity. As a result, black women often experience a feeling of powerlessness, leading to increased vulnerability to sexual harassment.¹³⁹

As a result of the traditional subordination of minority women and the current rental housing shortage, low-income minority women are most susceptible to domination by their landlords. Low-income minority women also comprise a disproportionate number of renters. The standard applied to housing sexual harassment cases must address the subordinated status of these women who fail to conform to traditionally white, middle-class male standards of conduct.

¹³⁵ *Id.*

¹³⁶ Rosenthal, *supra* note 12, at 591.

¹³⁷ In Philadelphia, for example, the number of housing units costing \$150 per month decreased from 89,062 to 22,554 during the 1980s while the median monthly rent increased from \$165 to \$365. See ZAREMBKA, *supra* note 134, at 2-7. Similarly, in Baltimore, between 1979 and 1987, the number of renters with incomes under \$10,000 increased by 7%, but the number of low rent units renting at the federal affordability standard of 30% of income, or \$250 per month, had declined by 32%. See Bezdek, *supra* note 12, at 544 n.36 (citing SCOTT BARANCIK & MARK SHEET, A PLACE TO CALL HOME: THE CRISIS IN HOUSING FOR THE POOR—BALTIMORE MARYLAND 9 (1991)). In Dallas-Fort Worth, studies show that 81,000 low-income families pay more than half of their income for rent. See Craig Flournoy, *Study Reports Lower-Income Families Caught in Housing Crisis*, DALLAS MORNING NEWS, June 23, 1995, at 1D. See generally EDWARD B. LAZERE ET AL., A PLACE TO CALL HOME, THE LOW INCOME HOUSING CRISIS CONTINUES (1991); Kenn, *supra* note 110; Taub, *supra* note 110, at 659 ("In the wake of significant cutbacks in federal funding of housing, the availability of affordable housing for low-income persons has become an issue of national concern.").

¹³⁸ "In a highly industrialized society run by a hierarchical bureaucracy and based on individualistic competition, many socially constructed markers of group membership are used to allocate power." Aida Hurtado, *Relating to Privilege: Seduction and Rejection in the Subordination of White Women and Women of Color*, 14 SIGNS 833, 833 (1989).

¹³⁹ For an in-depth discussion of gender and race powerlessness issues, see generally Scales-Trent, *supra* note 115, at 33-34. See also Angel, *supra* note 57 (noting that because judges possess a position of power in our society, women are discouraged from resisting improper advances from judges, and sexual harassment by judges has gone unremedied).

IV. A PROPOSED STANDARD

Power is the root of sexual harassment.¹⁴⁰ The "reasonableness" standards do not account for the unique power relationship that often exists between a landlord and a tenant. Because most landlords have some, if not significant, power over their tenants, I propose a standard which recognizes the powerlessness of sexual harassment victims. Rather than focusing on people's inherent similarities or differences, the law should focus on relations between the oppressor and the oppressed¹⁴¹ and question the defendant's actions in light of the power differentials between the parties. This shift in focus requires abandoning the reasonableness standards altogether.¹⁴²

A. *Title VII Reasoning Inappropriate for Situations Involving the Home*

As discussed above, the debate over the reasonable person and reasonable woman standards in the employment context has not yet been resolved. Several circuit courts continue to apply the reasonable woman standard despite the Supreme Court's ruling in *Harris*. Regardless of how that issue plays out in the employment context, it would be a mistake for courts to follow suit in the housing context without separate analysis and discussion.

Because of some fundamental differences between the work environment and rental housing, serious problems can arise if courts too closely equate the effects of workplace sexual harassment with the effects of rental housing sexual harassment. The majority of Title VIII sexual harassment cases involve a different cross-section of society from

¹⁴⁰ One study of sexual harassment in the workplace shows that in over 80% of cases examined, the harasser occupied a more powerful position in the organization than the victim. See Ronni Sandroff, *Sexual Harassment: The Inside Story*, in *WORKING WOMAN*, June 1992, at 47, 48; see also Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOL. 497, 497 (1991) (citing several studies concluding that "[w]omen with low power and status, whether due to lower age, being single or divorced, or being in a marginal position in the organization, are more likely to be harassed").

¹⁴¹ Angela Harris urges that we focus on "relationships, not essences." Harris, *supra* note 112, at 612.

¹⁴² Several commentators have suggested the abandonment of reasonableness as an evaluating tool, recognizing the harm inherent in the very concept of reasonableness. See, e.g., Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005, 1026 (1992) ("To fully address the concerns of women (and racial and cultural minorities) courts must abandon the notion that law embodies an objective, neutral viewpoint and explore a subjective standard of harm."); Ehrenreich, *supra* note 15, at 1232 ("the homogeneous image of society that results from the traditional equation of reasonableness with societal consensus is simply too harmful, excluding all but the dominant elite, to justify retention.").

Title VII sexual harassment cases. In employment discrimination cases, the victim of sexual harassment is usually a woman,¹⁴³ and often a minority.¹⁴⁴ When sexual harassment occurs in the housing context, however, the typical victim is not only a minority woman,¹⁴⁵ but a *poor* minority woman.¹⁴⁶ In addition to the problem of subordination of women by men and discrimination based on race, rental housing sexual harassment also involves exploitation of poor people by those in positions of economic power. This typically subordinated cross-section of society often needs protection on the multiple grounds of sex, race *and* class discrimination.

Rental housing sexual harassment is particularly invasive because it violates the sanctity of the home:

When sexual harassment occurs at work, at that moment or at the end of the work day, the woman may remove herself from the offensive environment. She will choose whether to resign from her position based on economic and personal considerations. In contrast, when the harassment occurs in a woman's home, it is a complete invasion in her life. Ideally, home is the haven from the troubles of the day. When home is not a safe place, a woman may feel distressed and, often, immobile.¹⁴⁷

As one commentator has noted, "[w]ithout understating the seriousness of sexual harassment in the workplace, judges and juries must recognize that conduct which may be a mere annoyance at work can be a nightmarish violation of privacy and personal autonomy when it takes place in one's home."¹⁴⁸

The home is a "moral nexus between liberty, privacy, and freedom of association."¹⁴⁹ Accordingly, it is not uncommon for the law to pro-

¹⁴³ See MACKINNON, *supra* note 1, at 28 (stating that women are disproportionately the victims of sexual harassment); NANCY DODD McCANN & THOMAS A. MCGINN, HARASSED: 100 WOMEN DEFINE INAPPROPRIATE BEHAVIOR IN THE WORKPLACE 73 (1992) (stating that 85-95% of reported sexual harassment is directed toward women).

¹⁴⁴ Black women make up a disproportionate number of plaintiffs in sexual harassment cases. Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1470 (1992).

¹⁴⁵ See *id.* By way of illustration, a study in Baltimore showed that 71% of tenants appearing in court were women. See Bezdek, *supra* note 12, at 540 n.21.

¹⁴⁶ In a 1986 survey assessing the incidence of residential sexual harassment nationwide, results indicated that 75% of the tenants who had been sexually harassed had annual incomes under \$10,000 and only 2% earned over \$20,000 per year. See Litt, *supra* note 7, at 233 n.25 (citing Cahan, *supra* note 12, at 1067); see also Bezdek, *supra* note 12, at 542 n.30 (Baltimore).

¹⁴⁷ Cahan, *supra* note 12, at 1073.

¹⁴⁸ Litt, *supra* note 7, at 238-39.

¹⁴⁹ MARGARET JANE RADIN, REINTERPRETING PROPERTY 56 (1993).

vide greater protections to situations involving the home. Several constitutional provisions provide special protection for the home,¹⁵⁰ and the sanctity of the home has consistently been protected by the United States Supreme Court.¹⁵¹ A clear example is *Stanley v. Georgia*, in which the Supreme Court held that a state may not prosecute a person for possessing obscene materials in her home.¹⁵² Although the Court rested its holding on the "philosophy of the First Amendment,"¹⁵³ it was influenced by "an appreciation of our society's traditional connection between one's home and one's sense of autonomy and personhood."¹⁵⁴

The privacy aspect of sanctity of the home is of particular importance. Home is a place where "intimate things are kept from prying eyes, and intimate relationships are carried on away from prying

¹⁵⁰ For example, the Third Amendment states "[n]o Soldier shall be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner prescribed by law." U.S. CONST. amend. III. The Fourth Amendment states that:

the right of the people to be secure in their person, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

¹⁵¹ See, e.g., *Payton v. New York*, 445 U.S. 573 (1980) (holding that while warrantless arrests in public are constitutional, warrantless arrests in the home are not); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the Fourth Amendment to the states); *Boyd v. United States*, 116 U.S. 616 (1886) (holding unconstitutional an act that authorizes the federal courts to take the allegations as true in revenue cases, where the Government's attorney moves to compel a defendant to produce private papers, books or invoices).

Distinctions are often made in property law between residential and commercial properties. For example, anti-discrimination laws do not apply to how owner-occupants pick their tenants. See *Fair Housing Act of 1968*, 42 U.S.C. § 3603(b)(2) (1994). Also, the implied warranty of habitability, a law in most states requiring landlords to maintain rental premises in a condition fit for human habitation, applies to all residential leases. See, e.g., *Green v. Superior Ct.*, 517 P.2d 1168, 1176 (Cal. 1974); *Pole Realty Co. v. Sorrells*, 417 N.E.2d 1297, 1299-1300 (Ill. 1981); *Delamater v. Foreman*, 239 N.W. 148, 149 (Minn. 1931); *Marini v. Ireland*, 265 A.2d 526, 534 (N.J. 1970); *Pugh v. Holmes*, 405 A.2d 897, 900 (Pa. 1979); *Kamarath v. Bennett*, 568 S.W.2d 658, 660-61 (Tex. 1978); *Foisy v. Wyman*, 515 P.2d 160, 164 (Wash. 1973); *Teller v. McCoy*, 253 S.E.2d 114, 123 (W. Va. 1978). The implied warranty of habitability, however, does not apply to commercial leases. See generally ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 6.38, at 309 (2d ed. 1993); Thomas M. Flemming, Annotation, *Implied Warranty of Fitness or Suitability in Commercial Leases—Modern Status*, 76 A.L.R.4th 928, 933 (1990).

Likewise, under the homestead exemption in bankruptcy law, see, e.g., KY. REV. STAT. ANN. § 427.060 (Baldwin 1995); LA. REV. STAT. ANN. § 20:1 (West 1979 & Supp. 1997); N.D. CENT. CODE §§ 28-22-02(7), 47-18-01 (1991 & Supp. 1995); OKLA. STAT. ANN. tit. 31, § 1 (A) (West 1991); VT. STAT. ANN. tit. 27, § 101 (1989 & Supp. 1996), property that is occupied by the owner as a home is exempted from a levy or judicial sale. See 40 AM. JUR. 2d *Homestead* § 1 (1968).

¹⁵² 394 U.S. 557, 568 (1969).

¹⁵³ *Id.* at 566.

¹⁵⁴ RADIN, *supra* note 149, at 57.

ears."¹⁵⁵ As noted by one court, the principal object to be effectuated by granting special protection to the home is "to preserve the home to the family, even at the sacrifice of just demands, for the reason that the preservation of the home is deemed of paramount importance."¹⁵⁶ Because of these fundamental differences between workplace and housing sexual harassment, rote application of Title VII reasoning to Title VIII harassment cases would be a mistake.

B. *The Logic of Adopting a Standard from Property and Contracts Principles for Landlord-Tenant Cases*

Neither Title VII nor Title VIII mandates that harassing behavior be evaluated under a reasonableness standard.¹⁵⁷ The language of both Acts simply instructs inquiry into the defendant's conduct.¹⁵⁸ In fact, prior to 1986, neither Title VII nor Title VIII sex or race discrimination cases required proof that a plaintiff had acted in accord with "someone else's notion of reasonable behavior."¹⁵⁹ The Court of Appeals for the Sixth Circuit, in *Rabidue v. Osceola Refining Co.*, was the first court to require a reasonable person standard in sexual harassment cases.¹⁶⁰ Judge Keith's dissent criticized the reasonable person standard and suggested the reasonable woman standard as an alternative.¹⁶¹ Since then, courts and commentators have "unquestionably accepted the inevitability of having a 'reasonableness' screen"¹⁶² and have seized on the familiar feminist debate between "woman" and "person."¹⁶³

The *Rabidue* court adopted the reasonableness standard from tort law. Current landlord-tenant law, however, is largely adopted from contract law.¹⁶⁴ Traditionally, landlord-tenant law was governed completely by property law. A lease conveyed an interest in land—the landlord conveyed possession of the property in exchange for rent, and the tenant became the owner of the estate for the term of the lease. Accordingly, the transaction was governed by the principle of caveat emptor,¹⁶⁵ and any problems which arose during the course of

¹⁵⁵ *Id.* at 60.

¹⁵⁶ *McPhee v. O'Rourke*, 15 P. 420, 423 (Colo. 1887); *see also* *Hammond State Bank & Trust Co. v. Broderick*, 154 So. 739, 741 (La. 1934); *Grace v. Grace*, 104 N.W. 969, 971 (Minn. 1905).

¹⁵⁷ *See supra* text accompanying notes 26–27.

¹⁵⁸ *See id.*

¹⁵⁹ *See* BABCOCK, *supra* note 120, at 617.

¹⁶⁰ 805 F.2d 611, 620 (6th Cir. 1986) ("trier of fact . . . must adopt the perspective of a reasonable person's reaction to a similar environment"), *cert. denied*, 481 U.S. 1041 (1987).

¹⁶¹ *See id.* (Keith, J., dissenting).

¹⁶² BABCOCK, *supra* note 120, at 617.

¹⁶³ *See id.*

¹⁶⁴ *See* SCHOSHINSKI, *supra* note 127, § 1:1.

¹⁶⁵ The lessee took the premises as he or she found them. *See id.* § 2.

the tenancy belonged to the tenant. There were no implied warranties, and the landlord had no implied duty to repair.¹⁶⁶

During the last several decades, however, there has been a shift in the law—courts and state legislatures have re-analyzed the underlying concepts of landlord-tenant law and injected contract principles to provide extra protections to tenants. Legislation has significantly modified the traditional landlord-tenant relationship,¹⁶⁷ and courts have begun to treat leases like contracts rather than conveyances of property rights, adopting contract doctrines to protect tenants from unequal bargaining power.¹⁶⁸ For example, most states have adopted laws requiring landlords to mitigate damages¹⁶⁹ and have adopted the contract doctrine of breach by anticipatory repudiation.¹⁷⁰ Most states also have implied warranties of habitability guaranteeing minimum safety standards, and the principles of illegality of contract have been applied to the letting of premises whose condition substantially violates municipal housing regulations.¹⁷¹ Because landlord-tenant law is now governed by both property and contract law, it makes sense for courts to follow this trend and adopt a standard for landlord sexual harassment from those areas of the law rather than from tort law.

C. *Shifting the Focus Away From the Victim: Implied Warranty of Habitability and Unconscionability Law as Models*

The reasonableness standards improperly focus the analysis on the perceptions of the victim. I propose a standard that shifts that focus in a two-step analysis. First, I suggest courts evaluate the behavior of the alleged harasser, the landlord. Regardless of who the tenant is and what the tenant perceives, certain conduct by the landlord should be considered per se harassment. I borrow the idea for this component of the standard from the property concept of implied warranty of habitability, where the standards for compliance are quite precise and do not depend on the factual context. Second, courts must evaluate the relationship between the landlord and the tenant. Even if the conduct is not considered sexual harassment per se, it still may violate Title VIII if there is a significant disparity of bargaining power between the two

¹⁶⁶ See *id.*

¹⁶⁷ "Probably the most comprehensive of the statutory developments is the Uniform Residential Landlord and Tenant Act [URLTA] which in many respects views a residential lease as a bilateral contract rendering performance of many of its obligations interdependent." See *id.* § 1.1, at 4 (citing URLTA § 1.101 cmt.).

¹⁶⁸ See generally *id.* § 1.1, at 3.

¹⁶⁹ See E. ALLAN FARNSWORTH, *CONTRACTS* § 12.12, at 896 n.2. (2d ed. 1990).

¹⁷⁰ See *id.* § 8.20, at 655–56.

¹⁷¹ See generally SCHOSHINSKI, *supra* note 127 § 1:1, at 3.

parties. I adopt this component of the standard in part from the contracts principle of unconscionability. Using the above legal doctrines as models seems particularly appropriate given that each doctrine attempts to protect powerless parties from forced submission to onerous conditions.¹⁷²

1. Does the Landlord's Conduct Constitute Per Se Sexual Harassment?

Landlords must know that certain behavior toward their tenants is impermissible in all circumstances. To define the scope of impermissible conduct for the first inquiry of my proposed two-step analysis, I suggest a standard whereby certain conduct, regardless of who the parties are and how they are affected, will presumptively create a hostile environment in violation of Title VIII. Prohibited conduct will include all criminal acts directed at the tenant, such as assault and battery,¹⁷³ and will specifically include the petty misdemeanor of "harassment."¹⁷⁴ This standard will protect "the interest in individual dignity against offensive contact with one's person."¹⁷⁵

Section 250.4 of the Model Penal Code (harassment) states:

A person commits a petty misdemeanor if, with purpose to harass another, he: (1) makes a telephone call without purpose of legitimate communication; or (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively course language; or (4) subjects another to an offensive touching; or (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.¹⁷⁶

The specific types of actions listed in subsections (1)-(4) are often the subject of hostile environment cases, and courts have not come to a consensus regarding whether such bothersome, but not necessarily intolerable, actions should constitute sexual harassment. Notably, to constitute a crime, the enumerated types of conduct must

¹⁷² In fact, the landmark decision regarding unconscionability, *see Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965), and the landmark decision regarding implied warranties of habitability, *see Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), were authored by the same judge, Skelly Wright.

¹⁷³ *See generally* Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. REV. 119 (1946).

¹⁷⁴ *See* MODEL PENAL CODE § 250.4 (1962).

¹⁷⁵ *Id.* § 250.4 cmt. 4.

¹⁷⁶ *Id.* § 250.4.

have been done "with purpose to harass another."¹⁷⁷ Requiring intent to harass should result in less disagreement.

Subsection (5) prohibits any conduct which is so alarming as to serve "no legitimate purpose of the actor."¹⁷⁸ This purposely general section was meant to "proscribe forms of harassment that cannot be anticipated and precisely stated in advance,"¹⁷⁹ adding some ambiguity regarding what conduct constitutes harassment. The section is not, however, an "open-ended catch-all."¹⁸⁰ It requires "unarguably reprehensible instances of intentional imposition on another."¹⁸¹ Conduct will be per se harassment if it is knowingly offensive or so alarming as to be obviously objectionable.

Prohibiting a prescribed set of conduct will divert attention away from who is renting from whom, toward what tenants are entitled to expect when they enter into a leasehold, without regard to race, gender or class. This style of analysis is consistent with the direction most courts have taken in landlord-tenant law. For example, in most states, pursuant to the implied warranty of habitability, the landlord has an obligation to convey habitable premises.¹⁸² In analyzing whether housing conditions are in breach of the implied warranty of habitability, courts do not consider how the tenant perceives the conditions or whether the tenant is willing to live in substandard housing conditions for the opportunity to pay lower rent. The obligation is usually predicated on municipal housing codes, where the standards for compliance are quite precise.¹⁸³ The law protects tenants from "choosing" to endure harsh living conditions simply because they are poor.¹⁸⁴

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* § 250.4(5).

¹⁷⁹ MODEL PENAL CODE § 250.4 cmt. 5.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² As noted in *Javins*, the landmark decision dealing with the implied warranty of habitability: "When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." 428 F.2d at 1074.

¹⁸³ See SCHOSHINSKI, *supra* note 127, § 3:17. Where housing regulations are not in effect, the implied warranty of habitability may simply require conformance with general community standards of suitability for occupancy. In those cases, a breach of the implied warranty must be determined in the light of the particular circumstances of each case. See *id.*

¹⁸⁴ The implied warranty of habitability has received a lot of scholarly attention. Many commentators criticize the implied warranty of habitability as overly simplistic and paternalistic. See, e.g., Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983). They suggest that if landlords are forced to comply with housing standards, they will simply pass their increased costs on to the tenant or take their property off the rental market altogether, thereby decreasing the housing stock available to low-income tenants. See Daniel P. Schwallic, *The*

The rationale for protecting tenants' legitimate expectations of quality is based in large part on the unequal relationship between the landlord and the tenant:

the inequality in bargaining power between landlord and tenant has been well documented. 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.¹⁸⁵

When tenants are not in a position to bargain for better living conditions, they should not be forced to submit to living conditions that we as a society have deemed unlivable. If the conduct is not sufficiently pervasive or egregious to satisfy the first prong, then courts must proceed to the second prong to determine whether the power the landlord has over the tenant elevates his conduct, which might be acceptable in some circumstances, to the level of sexual harassment.

2. Does the Landlord's Conduct Constitute Sexual Harassment in Light of the Power He Has over the Tenant?

The per se violations are the easier cases. A landlord should not be permitted continually to attack a tenant in a sexual way, verbally or physically, without her consent. What if, however, a landlord makes comments about a tenant's appearance, persists in telephoning her without intent to harass, enters her apartment uninvited, or continually touches his tenant in a non-sexual manner? Many courts and theorists have debated whether these "milder" versions of behavior should be considered sexual harassment.¹⁸⁶

Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy, 40 CASE W. RES. L. REV. 525, 537-43 (1990). Proponents of the implied warranty of habitability suggest, however, that it is necessary to require the compliance and ultimately provide more or better housing subsidies to tenants. See, e.g., Rachel Camber, Note, *The Incorporation of the Implied Warranty of Habitability in Public Housing Programs*, 38 WASH. U. J. URB. & CONTEMP. L. 205 (1990); C. Stephen Lawrence, Survey, *George Washington University v. Weinraub: Implied Warranty of Habitability as a (Ceremonial?) Sword*, 33 CATH. U. L. REV. 1137 (1984).

¹⁸⁵ *Javins*, 428 F.2d at 1079.

¹⁸⁶ See, e.g., *Abrams*, *supra* note 113; *Adler & Pierce*, *supra* note 67; *Ehrenreich*, *supra* note 15.

It is no surprise that lawyers cannot come to a consensus about such behavior, not only because men and women cannot agree about what constitutes sexual harassment, but because it depends on the context and circumstances. In the unlikely event that a landlord and tenant are on equal footing, the milder types of behavior listed above, although annoying, probably would not be considered sexual harassment. Where the landlord has no power over his tenant, the tenant can probably make the "bad" behavior stop. Where a tenant is afraid of losing her apartment, however, she might not want to anger her landlord. Tenants who are in a subordinate position to their landlords should not have to tolerate even such "mild" harassment just because the landlord knows he can get away with it. In those types of cases, the landlord's conduct would constitute sexual harassment.

My proposed standard would hold landlords to a heightened standard where they have significant power over their tenants. "In any situation of power, the powerful have a moral obligation to see the world from the point of view of those they govern or control, and to exercise power in the interests of the governed."¹⁸⁷

The idea of evaluating alleged improper behavior through the construct of power hierarchies is seen in contract law, where courts examine the power imbalances between contracting parties to determine if resulting agreements are unconscionable. Because the landlord-tenant relationship is a contractual one, a similar paradigm can be used to evaluate landlord sexual harassment.¹⁸⁸

a. *Unconscionability Defined*

"The concept of unconscionability was developed to prevent unjust enforcement of onerous contractual terms which one party is able to impose on another because of significant disparity in bargaining power"¹⁸⁹ The term unconscionability has been labeled "incapable of precise definition."¹⁹⁰ The Uniform Commercial Code ("UCC"), where the term originated,¹⁹¹ does not define the term, and the comments to UCC § 2-302 only give some general guidance as to the meaning of the term: "the basic test is whether, in light of the general commercial background and the commercial needs of the particular

¹⁸⁷ Adler & Pierce, *supra* note 67, at 826 (citing Deborah A. Stone, *Race, Gender, and the Supreme Court*, THE AM. PROSPECT, Winter 1992, at 63, 69).

¹⁸⁸ Although unconscionability law is useful as a model, it does not suggest a precise standard for sexual harassment law. The standard I construct for hostile housing environment cases will be based only in part on unconscionability law.

¹⁸⁹ 17A AM. JUR. 2D *Contracts* § 295 (1991).

¹⁹⁰ FARNSWORTH, *supra* note 169, at 327.

¹⁹¹ See U.C.C. § 2-302 (1995).

trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."¹⁹²

Although difficult to define precisely, "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."¹⁹³ The bargaining defect or "absence of meaningful choice" has been labeled "procedural" unconscionability, and the evils in the resulting contract or "unreasonably favorable terms" have been labeled "substantive" unconscionability;¹⁹⁴ both are usually necessary for a finding of unconscionability.¹⁹⁵

Whether a party has a meaningful choice is determined on a case-by-case basis.¹⁹⁶ A contracting party is considered to have no meaningful choice when the economic position of that party is so poor that the party is vulnerable to a grossly unequal bargain or when the disparity in education or sophistication levels of the parties is so great that one party is able to persuade the other to enter an agreement she might not agree to if she fully understood the terms.¹⁹⁷ When such gross disparities exist, courts will examine the resulting contract terms to see if they are so grossly unfair as to "shock the conscience of the court." If such a substantive defect exists, courts will invoke the unconscionability doctrine to protect the powerless party.¹⁹⁸

The goal of the unconscionability doctrine is to prevent oppression. The determination is not dependent solely on the perceptions of the victim. Rather, courts look at the sophistication of the parties *relative to each other* to determine if there is a disparity in bargaining power in the particular situation. The victim's level of education or status plays a role only to the extent it adds to the defendant's power.

The landmark unconscionability decision of *Williams v. Walker-Thomas Furniture Co.*¹⁹⁹ presents a useful illustration of the benefits of

¹⁹² *Id.* § 2-302 cmt. 1.

¹⁹³ *Williams v. Walker-Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

¹⁹⁴ For the origin of these terms, see Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

¹⁹⁵ See *id.* Normally both procedural and substantive unconscionability must be present in order for a court to hold a contract or a clause unenforceable. See *Carboni v. Arrospe*, 2 Cal. Rptr. 2d 845, 849 (Cal. Ct. App. 1991). "However, there is a sliding-scale relationship between the two concepts: the greater the degree of substantive unconscionability, the less degree of procedural unconscionability that is required to annul the contract or clause" and vice versa. *Id.*

¹⁹⁶ See *Williams*, 350 F.2d at 449.

¹⁹⁷ See *People's Mortgage Co. v. Federal Nat'l Mortgage Ass'n*, 856 F. Supp. 910, 927 (E.D. Pa. 1994); *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 871 (E.D. Pa. 1966).

¹⁹⁸ See, e.g., *Williams*, 350 F.2d at 445.

¹⁹⁹ *Id.*

focusing on power hierarchies. In *Williams*, a furniture store, Walker-Thomas, sold Williams a \$514 stereo on credit, knowing that Williams received only a \$218 monthly government check for herself and seven children and that Williams already owed the store \$164 for other items she had bought under similar contracts.²⁰⁰ During the five years prior to the purchase of the stereo, Williams had made purchases valued at a total of \$1,800.²⁰¹ She had made payments totaling \$1,400.²⁰²

Under the terms of the contract, the seller reserved a security interest in the stereo, with the right to repossess if Williams defaulted.²⁰³ The controversy centered on the following clause:

[T]he amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; *and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts due the Company by [purchaser] at the time each such payment is made.*²⁰⁴

The clause spread her payments pro rata over all her outstanding accounts until she paid her entire debt, in effect allowing the seller to repossess every item she ever purchased from the store in the event she defaulted on one payment.²⁰⁵ Shortly after Williams purchased the stereo, she defaulted on a payment and Walker-Thomas sought to repossess all the items she had bought during the previous five years.²⁰⁶

The *Williams* court held that enforcement of the contract could be refused if the terms were "so extreme as to appear unconscionable according to the mores and business practices of the time and place."²⁰⁷ The court asserted that the terms of the contract must be considered in light of the circumstances existing when the contract was made,²⁰⁸ explaining that even where a plaintiff reads the terms of a contract and

²⁰⁰ *Id.* at 447 & n.1.

²⁰¹ *See id.* at 447 n.1.

²⁰² *See id.*

²⁰³ *See Williams*, 350 F.2d at 447.

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ *Id.* at 450 (quoting 1 CORBIN, CONTRACTS § 128 (1963)).

²⁰⁸ *Williams*, 350 F.2d at 450.

fully consents to them, the court should not hold her to them if her consent was a result of a gross disparity in bargaining power:

Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.²⁰⁹

In effect, the court said that where the terms of an agreement are so grossly unfair that a party with the true power of choice would never consent to them, it can be assumed that the plaintiff's consent was the direct result of her subordinate position.²¹⁰

Rather than questioning whether Williams acted reasonably in agreeing to the terms of the agreement, the court directed its attention to the behavior of the store to determine if the store's conduct was improper in light of the disparity in bargaining power. If the court had instead asked whether a reasonable person would have signed such a contract, or even whether a reasonable woman would have, the case probably would have come out differently. Economic duress aside, a reasonable person presumably would not have entered into a contract with such oppressive terms. Although Williams might not fit the definition of a "reasonable" woman, she should still prevail because Walker-Thomas took advantage of her economic vulnerability. The *Williams* decision illustrates how applying the unconscionability standard instead of the reasonableness standards can result in a more just outcome in contracts cases.

Under the unconscionability framework, the problem of essentialism is more manageable. In *Williams*, the court did not focus on the gender or race of the plaintiff. In fact, the race of the victim is unclear from the opinion. Rather, under the circumstances of that case, it was the economic status of the plaintiff which created the power imbalance. If given a true choice, Williams probably would not have agreed to such unfair terms. But presumably, given her economic situation

²⁰⁹ *Id.* at 449–50 (citations omitted).

²¹⁰ *Id.*

and her likelihood of defaulting, most stores would be reluctant to sell her a stereo on credit, and of course she would not be able to afford to pay for the stereo outright. Her only choice, if she wanted a stereo, was to agree to oppressive terms.

b. *Unconscionability Theory Applied to Landlord Sexual Harassment*

Williams' dilemma was not unlike the situation encountered by many low-income tenants who are faced with landlord sexual harassment. Had Williams been on equal footing with Walker-Thomas, the court probably would not have interfered with the contract. The same analysis could be applied in rental sexual harassment cases. Consider again the scenario involving Sharon and Susan.²¹¹ Under the reasonableness standards, neither Sharon nor Susan is likely to prevail. Phone calls and off-color personal remarks, while potentially annoying if unsolicited, can be and have been viewed as harmless.²¹² After all, the landlord never touched the tenant or asked her for sex.²¹³ Notably, the outcome in both cases is likely to be the same because it is based on whether an objective person would have found that the conduct (which is the same in both cases) created a hostile environment.²¹⁴

What makes the environment hostile, however, is the context. Sharon, because her landlord has more power over her, is more vulnerable to economic intimidation than Susan. Sharon feels she has no choice but to indulge her landlord so as not to be evicted. Thus, to her, the same environment might be hostile.²¹⁵ In effect, Sharon is forced to live in conditions she, and probably others in her position, would find hostile, because she is unable to simply move to a new apartment. The result is acceptance of a form of abuse that a "reasonable" woman would find tolerable or merely annoying. Sharon is less likely to suffer the same consequences under a power-related analysis because she would be more likely to prevail on a hostile environment claim.

²¹¹ See *supra* text accompanying note 111.

²¹² See, e.g., *supra* note 41.

²¹³ This hypothetical example is not meant to address what type of conduct should constitute sexual harassment. It is meant only to show the potential difference between the reasonableness standards and the unconscionability standard.

²¹⁴ Although the reasonableness standards call for an evaluation of conduct "under the circumstances," a review of hostile environment cases reveals no evidence that courts consider factors such as race or class in the determination.

²¹⁵ It is not my intention here to emphasize the likelihood that a court would consider the landlord's conduct to be sexual harassment. I mean only to note that the two situations should be analyzed separately based on the individual relationships at hand.

It does not follow from the above example that it would be impossible for a landlord to sexually harass a white, middle-class tenant. In fact, there are two different analyses which could lead to a conclusion that Susan was sexually harassed. As in unconscionability law, the analysis should include a balancing of procedural and substantive defects.²¹⁶ That is, the greater the power imbalance (analogous to a procedural defect), the less offensive the conduct need be (analogous to a substantive defect).²¹⁷ The worse the conduct, the less conspicuous the power imbalance need be. I analogize the power relationship in Susan's situation to contracts cases involving adhesion contracts.²¹⁸ There is always some power differential between parties who enter into contracts of adhesion. One party has drafted the contract and is familiar with all the terms and the other party is presented with a "take it or leave it" situation—she must either accept the contract as it is, or not enter into the deal.²¹⁹ Despite the power imbalance, adhesion contracts are enforceable and are in fact used often in every day sales.²²⁰ Because of the power imbalance, however, adhesion contracts are presumptively suspect.²²¹ Evidence of additional bargaining defects such as fine print and convoluted terms is likely to result in an unenforceable bargain (at least theoretically).²²²

²¹⁶ See *supra* notes 194–95 and accompanying text.

²¹⁷ Note that although the inquiries in sexual harassment law and unconscionability law are analogous, they are not perfectly parallel: the "substantive defect" in sexual harassment is not an actual defect in the contract, but rather unfairness in the landlord's behavior toward the tenant.

In *quid pro quo* cases, a more exact parallel can be drawn to unconscionability law. If *quid pro quo* is analyzed as effecting a modification of the lease, where sexual favors become required terms of the lease, then any imbalance of power between the landlord and the tenant constitutes a "procedural" defect, and the amended onerous terms of the lease constitute a "substantive" defect.

²¹⁸ "Adhesion contract" means a standardized contract drafted by a party with superior bargaining power and imposed directly upon the other party on a take it or leave it basis. See *Neal v. State Farm Ins. Co.*, 10 Cal. Rptr. 781, 784 (Cal. Ct. App. 1961). See generally FARNSWORTH, *supra* note 169, § 4.26.

²¹⁹ See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

²²⁰ Kronman, *supra* note 184, at 771 ("Many contracts are contracts of adhesion in the general sense that one party is able to dictate terms to the other, but this alone does not make an agreement objectionable.").

²²¹ In recent years, for example, courts and legislatures have intervened in the exchange process by implying warranty terms that increase the consumer's rights under the contract and even making the implied warranty non-disclaimable, in attempts to correct the imbalance of bargaining of power that adhesion contracts typically involve. See generally Kessler, *supra* note 219, at 633–36.

²²² See, e.g., *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1574 (D. Kan. 1986) (holding that an adhesion contract was unconscionable where "the term in question was in minute print on the back of the lease, and was in such light grey type as to be illegible" and there

In Susan's case, there is probably at least a slight power imbalance based on the very nature of the landlord-tenant and gender relationships.²²³ Susan's case also involves some "inappropriate" conduct. The power imbalance and improper behavior together, like with many adhesion contracts, might not be sufficient to warrant court intervention. If the conduct were worse, or additional evidence were presented showing a greater power imbalance, however, a finding of sexual harassment would be justified. In Sharon's case, because of the significant disparity in power, the landlord's conduct need not rise to the same level of egregiousness as in Susan's case to constitute sexual harassment.

Alternatively, even if the landlord and Susan are on equal footing, if the landlord's conduct falls within the explicit category of prohibited conduct,²²⁴ it will be considered per se harassment. Accordingly, whether certain behavior will be considered harassment toward both Sharon and Susan, *depends on the conduct* and not on the parties. The "power" inquiry is only called into play when the conduct does not constitute per se harassment. Both Sharon and Susan are protected against what in recent history has been viewed by a majority of courts as sexual harassment. My standard provides additional protection to Sharon against conduct which is harassment only because of her lack of choices or the imbalance of power.

Several of the housing sexual harassment cases might have been decided differently under my proposed standard. Many courts, applying the reasonable person standard, found some of the "milder" conduct discussed above to be acceptable, either because the landlord did not touch a tenant's intimate body part or because the harassment only occurred once. For example, in *DiCenso v. Cisneros*, the court conceded that the landlord "may have harassed" the plaintiff.²²⁵ The defendant "vaguely invited Brown to exchange sex for rent" and caressed her arm and back while asking about the rent. He also called her names such

was a disparity in the bargaining power between the parties); *Colonial Leasing Co. of N. Eng., Inc. v. Best*, 552 F. Supp. 605, 607 (D. Or. 1982) (holding that the forum selection clause was unconscionable where it was contained in a form contract, in fine print, at the bottom of the page, and was not understood by the unsophisticated defendant when he signed the lease); *In re Hamby*, 19 B.R. 776, 779, 781 (Bankr. N.D. Ala. 1982) (holding that the waiver clause was unconscionable where it was contained within 73 lines of small print on the back of adhesion contract).

²²³ It is conceivable that in a different time, with a different housing market, a tenant might have some power over her landlord. In most urban settings today, however, landlords generally have at least some power over their tenants. See *supra* notes 122-39 and accompanying text.

²²⁴ See *supra* notes 175-82 and accompanying text.

²²⁵ 96 F.3d 1004, 1008 (7th Cir. 1996).

as "bitch" and "whore."²²⁶ The court concluded, however, that although the landlord's conduct was "clearly unwelcome," it did not constitute sexual harassment because he did not "touch an intimate body part" or "threaten [her] with any physical harm" and there was only one isolated incident.²²⁷

Likewise, in *Honce v. Vigil*, the landlord invited his tenant to accompany him socially on three occasions and persistently asked her when they could "go out," among other things.²²⁸ The court found that the conduct was not sufficient to constitute a hostile living environment because it was not sexual in nature.²²⁹ In *Honce* and *DiCenso*, the landlords most likely had substantial economic power over their tenants. Applying my proposed test, if evidence were presented indicating a significant imbalance of power between the parties, both cases might have been decided differently.

More compelling examples of "harassing" conduct which went unpunished can be found in hostile work environment cases. In *Saxton v. AT & T*, for example, the defendant on one occasion put his hand on the plaintiff's leg and kissed her until she pushed him away.²³⁰ Three weeks later, the defendant lurched at the plaintiff from behind some bushes and unsuccessfully tried to grab her.²³¹ Although there was more than one incident, the court held that the incidents, though "subjectively unpleasant," were not frequent or severe enough to create a hostile environment.²³² Under a power-based analysis, the challenged behavior would be considered sexual harassment because the actor was a supervisor with significant power over his employee.

The court's first inquiry, then, should be whether the landlord's conduct is per se violative of the Act. If not, the court must assess what type of power the landlord has over the tenant, based on any unequal social conditions and seemingly inherent and unalterable characteristics that affect the tenant's relationship with the landlord. The court must then determine whether the alleged harasser improperly took

²²⁶ See *id.* at 1006.

²²⁷ *Id.* at 1008-09.

²²⁸ 1 F.3d 1085, 1087 (10th Cir. 1993).

²²⁹ *Id.* at 1090.

²³⁰ 10 F.3d 526, 528 (7th Cir. 1993).

²³¹ See *id.*

²³² *Id.* at 535; see also *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993). In *Weiss*, the defendant asked the plaintiff for dates on repeated occasions, placed signs which read "I love you" in her work area and twice attempted to kiss her. 990 F.2d at 337. Again, the court held that these incidents were too isolated and insufficiently severe to create a hostile work environment. *Id.*

advantage of that imbalance of power.²³³ As in unconscionability law, this determination should be made on a case-by-case basis.²³⁴

V. CONCLUSION

Contemporary society is characterized by systematic and significant inequalities between individuals. Identities are hierarchized in relationships of domination and submission. "[P]art of the definition of class identity involves contrasting oneself with other social classes."²³⁵ Sexual harassment is in part a reaction to this socioeconomic structure that empowers one individual or group at the expense of another.

Power hierarchies are especially visible in landlord sexual harassment cases. Landlords often have power over their tenants by virtue of their property ownership and because of serious housing shortages. Additionally, minority women, who comprise a majority of tenants victimized by sexual harassment, can be further subordinated by socialized norms. Focusing on whether the power is specifically gender-based or race-based, however, simply sidetracks the analysis. Courts must look at each individual situation to assess the power hierarchy and then must evaluate the defendant's conduct in light of any imbalance of power.

I am not proposing a standard in which no categories or generalizations exist at all. Rather, the standard should be based on multiple consciousness.²³⁶ As Angela Harris suggests, "we [should] make our categories explicitly tentative, relational, and unstable,"²³⁷ to account for "a world in which people are not oppressed only or primarily on

²³³ This theory may have implications well beyond the housing context. For example, it could be applied in the employment context as well. Application of this theory to other areas of the law, however, is beyond the scope of this Article.

²³⁴ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

²³⁵ Ehrenreich, *supra* note 15, at 1224.

²³⁶ See Harris, *supra* note 112, at 584-86. Harris uses "multiple consciousness" to identify all the voices of the speaker. Harris writes:

[W]e are not born with a "self," but rather are composed of a welter of partial, sometimes contradictory, or even antithetical "selves." A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright. Thus, consciousness is "never fixed, never attained once and for all"; it is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated. A multiple consciousness is home both to the first and the second voices, and all the voices in between.

Id. at 584 (quoting Teresa de Lauretis, *Feminist Studies/Critical Studies: Issues, Terms, and Contexts*, in *FEMINIST STUDIES/CRITICAL STUDIES* 1, 8 (T. de Lauretis ed., 1986)). See generally discussion *supra* notes 112-17 and accompanying text.

²³⁷ Harris, *supra* note 112, at 586.

the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs."²³⁸ Because factors such as gender and race historically and statistically contribute to power imbalances, those factors may be relevant to the analysis. But courts must only draw on those factors in order to understand the power matrix. The factors cannot be used as a presumptive basis for determinations. Until courts recognize power differences as the root of sexual harassment, housing sexual harassment jurisprudence will remain caught in a truly unreasonable conundrum.

²³⁸ *Id.* at 587.