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DiCenso v. Cisneros: An Argument for Recognizing the Sanctity of the Home in Housing Sexual Harassment Cases

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CASENOTE

DiCenso v. Cisneros: An Argument for Recognizing the Sanctity of the Home in Housing Sexual Harassment Cases

I. INTRODUCTION

Sexual harassment, commonly associated with the workplace or classroom, also frequently occurs in the home. Unlike in employment or academic settings, sexual harassment in housing is a relatively undeveloped area of jurisprudence. Only recently have the courts confronted a steadily increasing demand to address matters of sexual harassment in housing. Notably, every court that has been faced with the question of whether sexual harassment is actionable under Title VIII has answered affirmatively.[1]

Following this trend, in *DiCenso v. Cisneros*,[2] the United States Court of Appeals for the Seventh Circuit held that hostile environment sexual harassment claims are actionable under the Fair Housing Act.[3] The court further held, however, under the de novo standard of review, that this particular tenant's claim "was not sufficiently egregious."[4] The court relied on Title VII legal theories, as is common in Title VIII cases.

1. *See, e.g.*, Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997) (recognizing that housing sexual harassment violates the Fair Housing Act); Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993) (holding that sexual harassment hostile environment claims are actionable under the Fair Housing Act "when the offensive behavior unreasonably interferes with use and enjoyment of the premises"). *See also* Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 495 (D. Md. 1996) (noting "it is not difficult to conclude that this court should recognize sexual harassment as actionable under Title VIII"); Beliveau v. Caras, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995) (proclaiming "it is beyond question that sexual harassment is a form of discrimination"); Grieger v. Sheets, 689 F. Supp. 835 (N.D. Ill. 1988).

2. 96 F.3d 1004 (7th Cir. 1996).

3. *Id.*

4. *Id.* at 1009.

That is, the court treated this housing sexual harassment case as the equivalent of an employment sexual harassment case.

This comment reflects upon housing sexual harassment jurisprudence and ultimately questions the common practice of applying Title VII law to Title VIII cases. Part II sets forth the development of housing sexual harassment case law. Part III introduces the recent *DiCenso* decision, and Parts IV, V, and VI focus on the application of the "sanctity of the home" doctrine in the context of housing sexual harassment claims.[5]

II. HISTORICAL PERSPECTIVE ON HOUSING SEXUAL HARASSMENT CLAIMS

Title VIII, also known as the Fair Housing Act,[6] governs housing discrimination. Specifically, Title VIII makes it illegal to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[7] It is within this provision of the Fair Housing Act that courts have found a cause of action for sexual harassment.[8]

Instances of sexual harassment fall into two major categories: "quid pro quo" and "hostile environment."[9] The most blatant form of sexual harassment is quid pro quo, which involves tangible sexual demands from a superior and consequences for failing to meet those demands.[10] For example, an individual may be promised benefits such as promotions, raises, or in the housing context, rent reduction or forgiveness, in exchange for sexual favors. Quid pro quo forms of sexual harassment

5. Shortly before the publication of this article, Michelle Adams, an assistant professor at Seton Hall University School of Law, published an insightful article addressing similar concerns. *See* Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17. 18 (1998) (arguing for the development of "a more sophisticated and nuanced understanding of sexual harassment at home by examining the context in which the harassment occurred"). Professor Adams elaborates on the cultural and sociological factors that play a role in sexual harassment in the home, addresses the disparity between damage awards in employment and housing cases, and ultimately argues for recognizing the unique context of the home in housing sexual harassment analysis.

6. 42 U.S.C. §§ 3601-3631 (1994).

7. *Id.* § 3604(b).

8. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993); Shellhammer v. Lewallen, Equal Opportunity in Housing Rep. (P-H) P15, 472 (W.D. Ohio 1983), *aff'd without opinion*, 770 F.2d 167 (6th Cir. 1985). *See also* Shellhammer v. Lewallen, No. 84-3573, 1985 U.S. App. LEXIS 14205, at *1 (6th Cir. July 31, 1985).

9. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 62 (1986) (recognizing that both "harassment that involves the conditioning of concrete employment benefits on sexual favors [quid pro quo] and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment" violate Title VII).

10. *See* ANJA ANGELICA CHAN, WOMEN AND SEXUAL HARASSMENT: A PRACTICAL GUIDE TO THE LEGAL PROTECTIONS OF TITLE VII AND THE HOSTILE ENVIRONMENT CLAIM 6 (1994).

are not as frequent or as debatable as the hostile environment complaints of sexual harassment. "In the quid pro quo, the coercion behind the advances is clarified by the reprisals that follow a refusal to comply. Less clear, and undoubtedly more pervasive, is the situation in which sexual harassment simply makes the work environment unbearable."[11] Hostile environment sexual harassment may include both verbal, nonverbal, and physical forms of harassment.[12] Examples of hostile environment sexual harassment range from off-color jokes,[13] sexual comments, and love letters to "innocent" touching (pats, pinches, and hugs), sexual assault, and rape.

To establish a sexual harassment claim under the hostile environment theory, the victim must allege facts sufficient to prove four general criteria:

> (1) she belongs to a protected class, (2) she was subjected to unwelcome sexual harassment, (3) the harassment she complains of was based on sex, [and] (4) the harassment she complains of is sufficiently severe or pervasive so as to alter the terms and conditions of [housing] and create an abusive [housing] environment.[14]

Quid pro quo and hostile environment claims often overlap. For example, what begins as hostile environment harassment may evolve into quid pro quo harassment when the victim is fired or forced to leave as a consequence of rebuffing her harasser's advances.

Shellhammer v. Lewallen[15] was one of the earliest federal cases to recognize sexual harassment under the Fair Housing Act as a cause of action.[16] In *Shellhammer*, the landlord propositioned the female tenant by asking her to pose nude on one occasion[17] and to have sex with him on another occasion.[18] The tenants, the victim and her husband, sued under both the quid pro quo and hostile environment theories of discrimination.[19] Although the tenants prevailed on their quid pro quo claim, they were unsuccessful on their hostile environment claim.[20] The Sixth

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11. Catherine A. MacKinnon, *Sexual Harassment: The Experience*, *in* SEXUAL HARASSMENT: KNOW YOUR RIGHTS 18, 34 (Martin Eskenazi and David Gallen eds., 1992).

12. *See* 24 C.F.R. § 1604.11(a) (1992) (defining hostile environment sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct").

13. *See* MacKinnon, *supra* note 11, at 47 ("Jokes are another form that the social control over women takes. . . . Trivialization of sexual harassment has been a major means through which its invisibility has been enforced. Humor, which may reflect unconscious hostility, has been a major form of that trivialization.").

14. CHAN, *supra* note 10, at 7.

15. No. 84-3573, 1985 U.S. App. LEXIS 14205, at *1 (6th Cir. July 31, 1985).

16. *Id.*

17. *Id.*

18. *Id.* at *2.

19. *Id.* at *3.

20. *Id.* at *4.

Circuit agreed with the federal magistrate's opinion regarding the hostile environment claim:

> [I]t is clear that she has failed to satisfy the elements of this [hostile environment] claim. . . . She points to two requests during the three or four months of her tenancy. This does not amount to the pervasive conduct which is a predicate to finding that the sexual harassment created a burdensome situation which caused the tenancy to be significantly less desirable than it would have been had the harassment not occurred.[21]

Despite the fact that *Shellhammer* was decided more than a decade ago, reports of sexual harassment in the housing environment are still very infrequent. For example, in the state of Florida, only four sexual harassment claims were filed with the Fair Housing Enforcement Center since January 1, 1988.[22] "Victimized tenants rarely report instances of harassment by landlords or building managers, resulting in few rental housing sexual harassment lawsuits."[23]

A variety of reasons account for the paucity of sexual harassment reports in housing. "The factors that deter women from reporting sexual harassment are fear of retaliation, silence as the chosen form of coping, aversion to the stigma attached to victims of sexual harassment, anticipation of ridicule, and a desire not to prolong suffering."[24] Also, as one author notes, "there is a long history in this country of ignoring or downplaying injuries experienced by a woman on the notion that 'she asked for it.'"[25] The consequences—real or imaginary—of reporting sexual harassment keep many victims quiet. Victims prefer to disregard the harassing behavior, rather than risk losing their homes.

In light of the infrequency of reporting, the lack of case law on sexual harassment in housing is unsurprising. To date, only a few federal circuits have considered the issue of sexual harassment in the housing environment.[26] In contrast to the small body of Title VIII sexual harassment law, there is a well-developed body of Title VII sexual har-

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21. *Id.*

22. *See* Letter from Linda H. Allen, Liaison Officer, U.S. Department of Housing and Urban Development, to the author (Nov. 24, 1997) (on file with author).

23. William Litt et al., *Recent Development: Sexual Harassment Hits Home*, 2 U.C.L.A. WOMEN'S L.J. 227, 230 (1992).

24. Regina Cahan, *Home Is No Haven: An Analysis Of Sexual Harassment In Housing*, 1987 WIS. L. REV. 1061, 1067 (1987) (setting forth common reasons for women's failure to report sexual harassment).

25. CHAN, *supra* note 10, at 29.

26. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993); Shellhammer v. Lewallen, Equal Opportunity in Housing Rep. (P-H) P15, 472 (W.D. Ohio 1983), *aff'd without opinion*, 770 F.2d 167 (6th Cir. 1985).

assment law.[27] As a result, the courts are tempted to apply readily available Title VII doctrines to Title VIII claims.

One reason courts are willing to apply Title VII analysis to Title VIII cases may be that, on the surface, many similarities apparently link the two acts. The statutes use nearly identical language: For example, they both prohibit discrimination "because of sex," and they were both "enacted to ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics."[28] As one court put it, "the purposes underlying Titles VII and VIII are sufficiently similar so as to support discrimination claims based on sexual harassment regardless of context. Indeed, it is the behavior that the law seeks to eradicate."[29]

In *United States v. Starrett City Associates*,[30] the United States Court of Appeals for the Second Circuit recognized the parallels between Title VIII and Title VII. The court determined that "the Supreme Court's analysis . . . under provisions of federal law with goals similar to those of Title VIII provides a framework for examining" discrimination claims under Title VIII.[31] In *Asbury v. Brougham*,[32] the United States Court of Appeals for the Tenth Circuit continued this trend of analysis. There, the court held that Title VII burdens of proof, established by *McDonnell Douglas Corp. v. Green*,[33] apply to Title VIII discrimination claims.[34] Similarly, in *Honce v. Vigil*,[35] the Tenth Circuit recognized that although "[t]his circuit has not yet addressed the issue of sexual discrimination in the context of fair housing under Title VIII. . . . we will look to employment discrimination cases for guidance."[36]

The Fourth Circuit has also determined that Title VII law is applicable to Title VIII cases. In *Pinchback v. Armistead Homes Corp.*,[37] the court held that the "futile gesture" doctrine[38] applies in housing discrim-

27. *See* Litt, *supra* note 23, at 229 (noting the "dearth of lawsuits premised on sexual harassment in rental housing" compared to the abundance of workplace sexual harassment cases).

28. Cahan, *supra* note 24, at 1077.

29. Beliveau v. Caras, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995).

30. 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988).

31. *Id.* at 1101. *See also* Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988) (analogizing to Title VII and holding that disparate impact claims are actionable under Title VIII).

32. 866 F.2d 1276 (10th Cir. 1989).

33. 411 U.S. 792 (1973).

34. 866 F.2d at 1279.

35. 1 F.3d 1085 (10th Cir. 1993).

36. *Id.* at 1088.

37. 907 F.2d 1447 (4th Cir. 1990).

38. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977) (clarifying that "[w]hen a person's desire for a job is not translated into a formal application solely

ination cases.[39] "Fair employment concepts are often imported into fair housing law. . . . Although fair employment and fair housing statutes create and protect distinct rights, their similarities have traditionally facilitated the development of common or parallel methods of proof when appropriate."[40]

Since courts faced with Title VIII discrimination claims are turning to Title VII case law for guidance, it is important to understand the analytical parameters established by Title VII cases. The most relevant and frequently cited Title VII sexual harassment cases are *McDonnell Douglas Corp. v. Green*,[41] *Meritor Savings Bank, FSB v. Vinson*,[42] and *Harris v. Forklift Systems, Inc.*[43] Courts faced with housing sexual harassment claims generally turn to these three cases for direction.

In *McDonnell Douglas Corp. v. Green*,[44] the Supreme Court set forth the analytical framework for employment disparate treatment cases.[45] First, the plaintiff must establish her prima facie case.[46] The burden then shifts to the defendant to demonstrate a legitimate basis for the action taken.[47] If the defendant meets this burden, the plaintiff must then prove an existing pretext.[48]

In *Meritor*,[49] the Supreme Court held that hostile environment sexual harassment claims are actionable under Title VII.[50] Relying on *Henson v. Dundee*,[51] the Court explained that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment. . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.'"[52] In *Harris*,[53] the Supreme Court further explained that hostile environment claims must be analyzed under a

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because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application").

39. *See* 907 F.2d 1447, 1451-52 (4th Cir. 1990) (rejecting the defendant's argument that "differences between typical housing and employment cases make an extension of the futile gesture doctrine unworkable").

40. *Id.* at 1451.

41. 411 U.S. 792 (1973).

42. 477 U.S. 57 (1986).

43. 510 U.S. 17 (1993).

44. 411 U.S. 792 (1973).

45. *Id.*

46. *Id.* at 802.

47. *Id.* at 802-03.

48. *Id.* at 804.

49. 477 U.S. 57 (1986).

50. *Id.*

51. 682 F.2d 897 (11th Cir. 1982).

52. 477 U.S. at 67 (footnote omitted) (quoting Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982)).

53. 510 U.S. 17 (1993).

totality of circumstances test.[54] These cases provide the point of departure for sexual harassment analysis.

Last term, the Supreme Court decided three landmark employment sexual harassment cases which are also likely to impact housing sexual harassment litigation. First, in *Oncale v. Sundowner Offshore Services, Inc.*,[55] the Court put an end to a heated debate by holding that same-sex harassment is actionable.[56] Based on *Oncale*, it is likely that courts will find same-sex harassment actionable within the context of housing discrimination. Next, in *Burlington Industries, Inc. v. Ellerth*[57] and *Faragher v. City of Boca Raton*,[58] the Court chipped away at the traditional distinctions between quid pro quo and hostile work environment claims.

Traditionally, in sexual harassment cases, vicarious liability has only applied to quid pro quo harassment claims. In *Burlington Industries, Inc. v. Ellerth*,[59] the Court held that agency principles, rather than the categorization of the claim as quid pro quo or hostile environment, control the determination of whether an employer will be subject to vicarious liability.[60] Then, in *Faragher v. City of Boca Raton*,[61] the Court held that a public employer was vicariously liable for hostile environment sexual harassment despite the fact that the employer had no actual knowledge of the alleged misconduct.[62] The *Burlington Industries* and *Faragher* cases are significant in the housing sexual harassment context because, based on their rationales, even an off-site property manager or owner, someone who generally has little involvement with the daily operations of the housing unit, may be subject to liability for quid pro quo or hostile environment harassment by his on-site manager.

III. HIGHLIGHTS FROM THE DICENSO OPINION

The *DiCenso*[63] case illustrates the problematic nature of a court's blind application of Title VII standards in Title VIII cases. *DiCenso* involved a hostile environment claim under Title VIII.[64] Christina Brown, the tenant, alleged that her landlord, DiCenso, showed up at her

54. *Id.*
55. 118 S. Ct. 998 (1998).
56. *Id.*
57. 118 S. Ct. 2257 (1998).
58. 118 S. Ct. 2275 (1998).
59. 118 S. Ct. 2257 (1998).
60. *Id.* at 2265.
61. 118 S. Ct. 2275 (1998).
62. *Id.*
63. DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996).
64. *Id.* at 1004-05.

door, seeking to collect rent or, in lieu of rent, sexual favors.[65] DiCenso, while caressing Brown's arm, told her "she could take care of [the rent] in other ways."[66] Brown refused and slammed the door on DiCenso.[67] DiCenso continued to shout obscenities at Brown through the closed door.[68]

The administrative law judge dismissed Brown's complaint on the grounds that "DiCenso's conduct did not rise to the level of severity required to create a hostile housing environment."[69] On administrative review, the Department of Housing and Urban Development (HUD) Secretary's designee reversed,[70] finding DiCenso liable for creating a hostile housing environment.[71] Ultimately, however, the Seventh Circuit disagreed with HUD's findings.[72]

The Seventh Circuit, unwilling to defer to HUD's holding, reviewed the case de novo.[73] The court reasoned that, according to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[74] the court is required to give deference to executive agency decisions only "where the agency has a particular expertise in the conflicting policy considerations that underlie a statute, or where the agency previously has considered the matter at issue in a detailed and reasoned fashion."[75] The court further reasoned that, unlike the Equal Employment Opportunity Commission (EEOC), HUD has not enacted guidelines, and the court is therefore not required to defer to HUD's findings.[76]

The Seventh Circuit began its substantive analysis by recognizing a cause of action for hostile environment sexual harassment in the housing context.[77] The court noted that "a determination of what constitutes a hostile environment in the housing context requires the same analysis

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65. *Id.* at 1006.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1007.

70. Review by the HUD secretary's designee is provided for in 42 U.S.C. § 3612(h)(1) (1994). "The Secretary may review any finding, conclusion, or order issued [by the administrative law judge] under subsection (g) of this section. Such review shall be completed not later than 30 days after the finding, conclusion, or order is so issued; otherwise the finding, conclusion, or order becomes final."

71. *See* 96 F.3d at 1007.

72. *Id.* at 1009.

73. *Id.* at 1008. Under the de novo standard of review, the court treats the claim "as if it had not been heard before and as if no decision had been previously rendered." BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

74. 467 U.S. 837, 865 (1984).

75. 96 F.3d at 1007.

76. *Id. But see* DiCenso v. Cisneros, 96 F.3d 1004, 1009 (Flaum, J., dissenting) (arguing for limited review of HUD's holding).

77. 96 F.3d at 1008.

courts have undertaken in the Title VII context."[78] The court applied typical Title VII analysis, and relying on *Meritor*[79] and *Harris*,[80] refused to find the landlord liable:

> In this context, the problem with Brown's complaint is that although DiCenso may have harassed her, he did so only once. Moreover, DiCenso's conduct, while clearly unwelcome, was much less offensive than other incidents which have not violated Title VII. 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. There is no question that Brown found DiCenso's remarks to be subjectively unpleasant, but this alone did not create an objectively hostile environment.[81]

Judge Flaum's dissent illustrates the central problem with the court's reasoning: "Although the majority may very well be correct in stating that DiCenso's conduct would not be sufficient to give rise to a claim for sexual harassment under our Title VII precedent, the majority provides no basis for doubting the reasonableness of the Secretary's interpretation of the FHA."[82] Judge Flaum's dissent begs the question, whether the analysis under the Fair Housing Act should be limited by Title VII precedents.

IV. THE SANCTITY OF THE HOME

For many individuals, the home is arguably the most private sphere. Our homes serve as the forum for our most intimate activities, including reproduction, consumption, and socialization.

> Even if it is conceded that the home in America has lost some of its sanctity as a castle for its occupants, the normative ethic surrounding the castle doctrine—the image of the home as the center of family life, a retreat, a sanctuary, a repository of an inhabitant's dreams and a manifestation of his or her sheer identity—is far too important and deeply rooted in American political and jurisprudential thought to easily dismiss the castle doctrine and all that it implies.[83]

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78. 96 F.3d at 1007.

79. 477 U.S. 57 (1986). *See also supra* notes 44-46 and accompanying text.

80. 510 U.S. 17 (1993). *See also supra* note 47 and accompanying text.

81. 96 F.3d at 1008-09.

82. *Id.* at 1010 (Flaum, J., dissenting).

83. Thomas Katheder, *Criminal Law—Lovers And Other Strangers: Or, When Is A House A Castle?—Privilege Of Non-Retreat In The Home Held Inapplicable To Legal Co-Occupants—State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982), 11 FLA. ST. U. L. REV. 465, 482 (1983). Katheder discusses the right to use deadly force in self-defense within one's home and argues that "[t]o ignore the privilege to stand one's ground in the home . . . is to say to the victim that, as far as shelter from external violence is concerned, *you have no home*"). *Id.* at 484.

The often heard cliches, "sanctity of the home" and "one's home is one's castle," reflect and reinforce the unique importance given to the concept of home in our society.

The sanctity of the home doctrine is well ingrained in our society and jurisprudence. Accordingly, legislatures and courts commonly protect individual rights that are exercised within or related to the home to a higher degree than other rights.

As early as 1886, the Supreme Court recognized the special features of the home that merited heightened protection.[84] In *Boyd v. United States*,[85] the Court held that the search and seizure of Boyd's personal papers[86] were unreasonable in light of a person's right to be secure in his home and effects.[87] The Court pronounced that the protections of the Fourth and Fifth Amendments "affect the very essence of constitutional liberty and security. . . . They apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."[88]

In the years since *Boyd*, the Supreme Court has revisited the sanctity of the home issue in a variety of contexts. In its Fourth Amendment[89] case law, the Court has consistently afforded a higher degree of protection to individual rights exercised within the confines of the home. In *Payton v. New York*,[90] for example, the Court struck down a state statute that allowed warrantless felony arrests in the home.[91] The Court noted the importance of the home within the context of the Fourth Amendment: "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of

84. *See* Boyd v. United States, 116 U.S. 616 (1886).

85. *Id.*

86. Notably, *Boyd* involved a forfeiture action against Boyd's personal papers, a quasi-criminal action, and the Court went on to apply analysis based on the Fourth and Fifth Amendments.

87. 116 U.S. at 627.

88. *Id.* at 630. *See also* Payton v. New York, 445 U.S. 573, 596-97 (1980) ("The common law sources display a sensitivity to privacy interests that could not have been lost on the Framers. . . . [T]he adage that a 'man's house is his castle,' made it abundantly clear that . . . 'the freedom of one's house' was one of the most vital elements of English liberty.") (footnotes omitted).

89. The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches 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.

90. 445 U.S. 573 (1980).

91. *Id.*

an individual's home. . . ."[92] In contrast to the Court's review of warrantless arrests in the home, the Court has upheld warrantless arrests in public forums.[93]

Another Fourth Amendment case that exemplifies the Court's traditional protection of the sanctity of the home is *Oliver v. United States*.[94] In *Oliver*, the Supreme Court addressed warrantless searches and distinguished between "open fields"[95] and "curtilage."[96] The Court's inquiry centered on a person's "reasonable expectations of privacy."[97] The Court reaffirmed its holding in *Hester v. United States*[98] that warrantless searches are permissible in open fields because there is no reasonable expectation of privacy in an open field.[99] The curtilage of one's home, however, receives a higher degree of protection: "[C]ourts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage . . . by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private."[100]

In *Pratt v. Chicago Housing Authority*,[101] the federal district court granted injunctive relief to public housing tenants whose homes were searched without warrants as part of a "sweep" of public housing buildings.[102] One author, particularly concerned with the sanctity of the home, commented on the *Pratt* decision: "The home, be it a public housing apartment or a modern home in an exclusive suburban neighborhood, is the one place where people have the right to shut out the rest of the world and be master of their own domain."[103]

Court decisions interpreting the First Amendment[104] also support

92. *Id.* at 589.

93. *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976) (holding that warrantless arrests made in public do not violate the Fourth Amendment so long as there is probable cause to believe that the arrested person has committed a felony).

94. 466 U.S. 170 (1984).

95. An open field is an "unoccupied or undeveloped area outside of the curtilage." BLACK'S LAW DICTIONARY 1091 (6th ed. 1990).

96. Curtilage refers to "any land or building immediately adjacent to a dwelling, and usually it is enclosed some way by a fence or shrubs." BLACK'S LAW DICTIONARY 384 (6th ed. 1990).

97. 466 U.S. at 181.

98. 265 U.S. 57 (1924).

99. *See* 466 U.S. at 181.

100. *Id.* at 180.

101. 848 F. Supp. 792 (N.D. Ill. 1994).

102. *Id.* at 793.

103. Andrew Byers, *The Special Government Needs Exception: Does It Allow for Warrantless Searches of Public Housing?*, 41 WAYNE L. REV. 1469, 1491 (1995).

104. The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

the proposition that one's home is a sacred place, within which the rights of the individual are protected to a higher degree than in other settings. In *Stanley v. Georgia*,[105] the Supreme Court struck down a Georgia obscenity statute prohibiting private possession of obscene material.[106] The Court reasoned that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[107]

The "captive audience"[108] doctrine reflects the Court's willingness to protect individuals in their homes from unwanted speech. In *Frisby v. Shultz*,[109] the Supreme Court determined that residents are "figuratively, and perhaps literally, trapped within the home. . . ."[110] Accordingly, the Court restated that the government has a "substantial and justifiable interest" in protecting unwilling listeners when they are in their homes.[111]

Similarly, the Court has been very protective of expression from within one's home. For example, in *City of Ladue v. Gilleo*,[112] the Court struck down an ordinance prohibiting the display of signs on residential property.[113] The Court reasoned that the government's interest in keeping a neighborhood free from clutter is not compelling enough, vis-à-vis the traditional sanctity of the home, to justify restricting such expression.[114]

Additional examples of judicial respect for the sanctity of the home can be found within the area of civil forfeitures. In *United States v. James Daniel Good Real Property*,[115] the Court held that the Due Pro-

105. 394 U.S. 557 (1969).

106. *Id.*

107. *Id.* at 565.

108. A "captive audience" describes "[a]ny group subject to a speaker or to a performance and which is not free to depart without adverse consequences." BLACK'S LAW DICTIONARY 212 (6th ed. 1990).

109. 487 U.S. 474 (1988) (upholding a ban on residential picketing).

110. *Id.* at 487.

111. *Id.* at 488. *See also* Carey v. Brown, 447 U.S. 455, 471 (1980) ("Preserving the sanctity of the home, the one retreat to which men and women can . . . escape from the tribulations of their daily pursuits, is surely an important value . . . . The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order. . . ."); South Suburban Housing Center v. Greater South Suburban Board of Realtors, 935 F.2d 868 (7th Cir. 1991) (upholding a statute prohibiting realtors from contacting a resident for the purpose of listing her home for sale once the realtor has been notified of the resident's decision not to sell).

112. 512 U.S. 43 (1994).

113. *Id.*

114. *Id.* at 54. *See also* Stan M. Weber, *Constitutional Law—Freedom of Speech—Home Owner Wins in Battle to Limit City Government's Power to Ban Residential Signs*: City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994)., 18 U. ARK. LITTLE ROCK L.J. 157 (1995).

115. 510 U.S. 43 (1993).

cess Clause of the Fifth Amendment[116] prohibits the government from seizing real property via civil forfeiture proceedings without affording the owner notice and an opportunity to be heard.[117] The Court reasoned that "[a]t stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it."[118]

The sanctity of the home doctrine is also championed in reproductive rights cases. In *Griswold v. Connecticut*,[119] the Supreme Court struck down a state statute prohibiting married couples from using contraceptives.[120] In its reasoning, the Court recognized a "zone of privacy created by several fundamental constitutional guarantees."[121] The Court was particularly concerned with the fact that enforcing such a law would require entering the private home: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[122]

Notably, the state of Florida recognizes the sanctity of the home via its homestead exemption.[123] The Florida Constitution provides:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted . . . for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead. . . .[124]

In accordance with this provision, the Florida Supreme Court has held that homestead property may not be seized pursuant to state forfeiture proceedings.[125] Similarly, the Florida courts have abolished the doctrine of caveat emptor[126] in the sale of residential real estate, but not in com-

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116. The Due Process Clause of the Fifth Amendment states: "No person . . . shall be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend V.

117. *See* 510 U.S. at 62.

118. *Id.* at 61.

119. 381 U.S. 479 (1965).

120. *Id.*

121. *Id.* at 485.

122. *Id.* at 485-86.

123. *See* FLA. CONST. art. X, § 4 (amended 1984).

124. *Id.*

125. *See* Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992). *See also* Jonathan D. Colan, *You Can't Take That Away from Me: The Sanctity of the Homestead Property Right and Its Effect on Civil Forfeiture of the Home*, 49 U. MIAMI L. REV. 159 (1994) (advocating the limitation of state and federal forfeiture actions). *But cf.* United States v. 18755 North Bay Road, 13 F.3d 1493, 1498 (1994) (holding that the state homestead exemption is preempted in federal forfeiture proceedings).

126. Caveat emptor literally means "let the buyer beware" and refers to the general rule that the buyer "must examine, judge, and test for himself." BLACK'S LAW DICTIONARY 222 (6th ed. 1990).

mercial real estate transactions.[127] That is, only sellers of residential property have a duty to disclose latent defects.[128]

Homestead exemptions are also found in other contexts. For example, under federal bankruptcy statutes, a "debtor's aggregate interest . . . in real property or personal property that the debtor or dependent of the debtor uses as a residence . . ." is exempt.[129] Thus, creditors cannot seek payment via sale of the debtor's home. The foregoing examples illustrate the historical significance of the sanctity of the home doctrine.

V. IGNORING THE SANCTITY OF THE HOME UNDER TITLE VIII

Despite the widespread acceptance of the sanctity of the home doctrine in a variety of contexts, the courts largely ignore the doctrine in the context of Title VIII. This oversight is particularly ironic in view of the fact that Congress enacted Title VIII "to provide, within constitutional limitations, for fair housing throughout the United States."[130] The most logical setting for the application of the sanctity of the home doctrine would seem to be in fair housing cases. However, when courts apply Title VII legal standards to Title VIII cases, they effectively dismiss sanctity of the home reasoning by treating discrimination in the private sphere of the home as the equivalent of discrimination in the public sphere of the workplace.

For a number of reasons, the courts should apply separate legal analysis to these two types of discrimination. First, "[r]ental housing sexual harassment is particularly invasive because it violates the sanctity and safety of the home."[131] When the workday is over, an employee can leave the office. Conversely, when a victim is harassed at home, there is no readily available means to escape. Such entrapment is especially inescapable for working class victims; working class women and their children are most vulnerable.[132] It is difficult for such victims to find affordable housing on short notice. In addition, moving may require the victim's children to change schools and may force the victim to lose

127. *Compare* Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (abolishing the doctrine of caveat emptor in sales of residential property), *with* Green Acres, Inc. v. First Union Nat'l Bank of Florida, 637 So. 2d 363 (Fla. 4th DCA 1994) (refusing to extend the seller's duty to disclose latent defects to sales of commercial property). *But cf.* Haskell Co. v. Lane Co., 612 So. 2d 669 (Fla. 1st DCA 1993) (abolishing the doctrine of caveat emptor in certain sales of commercial real estate).

128. *See* 480 So. 2d at 629.

129. 11 U.S.C. § 522(d)(1) (1994).

130. 42 U.S.C. § 3601 (1994).

131. Litt, *supra* note 23, at 234.

132. *Id.* at 234-35 ("Low 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.").

contact with a hard-to-duplicate support network, including persons with whom to barter child care and other services.

Escape by slamming the door or ignoring the discrimination is often not effective in the housing context. In most cases, the landlord-harasser holds a master key to the victim's home. The victim will almost invariably hesitate before admonishing the landlord, both out of fear of eviction and in an effort to avoid escalation of tension. In virtually all such cases, the victim feels particularly powerless because she feels alone and without a clear avenue for appealing her situation.

In strong contrast, most workplaces today have human resource personnel to whom the victim can turn for assistance in dealing with a harasser. The victim in the workplace can distance herself from the harasser more easily than in the housing scenario; she may be able to work independent of the harasser, or with someone else as an intermediary. However, in the case of housing harassment—a setting generally lacking a disinterested intermediary—a victimized tenant is often expected to direct her complaint to close associates of the harasser—the landlord or housing manager—or even to the harasser himself.

Harassment within the home raises unique problems which are not adequately addressed by Title VII case law. In particular, the ramifications of housing sexual harassment are often more frightening than workplace harassment. Arguably, "the landlord who harasses a tenant may create a stronger and more real sense of personal danger than the employer who harasses an employee. . . ."[133] In addition, what constitutes sexual harassment in the office may differ from what constitutes sexual harassment in the home.

The same factual scenario may have very different implications depending on whether the incident occurred in the home or in the office. For example, imagine a scenario in which a supervisor approaches an employee at the office and kisses the employee on the neck. This one incident may not be "severe or pervasive" enough to constitute a hostile environment within the employment context. On the other hand, imagine the same scenario, but this time the harasser is the landlord who comes to collect his rent and forces a kiss on one of his tenants. It seems probable that the threat, fear, and intimidation may well be more severe for the sexual harassment victim when the harassment occurs in her own home. The contrast between these two very different settings illustrates the need for separate legal analysis.

Contemporary Title VIII sexual harassment cases also illustrate the need for independent standards of liability for harassment in the home.

133. Kathleen Butler, Note, *Sexual Harassment in Rental Housing*, 1989 U. ILL. L. REV. 175, 204 (1989).

In general, Title VIII plaintiffs do not find relief under Title VII analysis. For example, recall the Seventh Circuit's decision in *DiCenso v. Cisneros*[134] that the landlord's caressing of the tenant's arm and back, while offering sexual intercourse in lieu of rent, was not sufficient to violate Title VIII.[135]

For similar reasons, the court in *Shellhammer v. Lewallen* failed to find the landlord liable for hostile environment sexual harassment, despite the fact that the landlord had propositioned the tenant to pose nude[136] and to have sex.[137] Further, in *Honce v. Vigil*,[138] the court refused to find the landlord liable under a hostile environment claim, noting that "[h]ostile environment claims usually involve a long-lasting pattern of highly offensive behavior."[139] Notably, the courts and HUD disagree with respect to what constitutes sexual harassment in the home.[140] The results in these cases underline the inherent failure of Title VII precedents to protect adequately the individual's right to freedom from harassment in the home.

VI. CONCLUSION

Title VII protects against instances of discrimination in the public sphere of the workplace. Conversely, Title VIII protects against instances of discrimination within the sanctity of one's home. While both acts are generally aimed at eliminating discrimination, they apply in very different contexts.

The sanctity of the home doctrine provides a legitimate, long-honored basis for distinguishing between the work and home environments. However, the refusal of courts to recognize the distinction between Title VII and Title VIII continues to deprive many victims of their sanctuary.[141] Title VIII cannot live up to its name, the Fair Hous-

134. 96 F.3d 1004 (7th Cir. 1996).

135. *Id.* at 1008-09.

136. *Id.*

137. *Id.* at *1-*2.

138. 1 F.3d 1085 (10th Cir. 1993).

139. *Id.* at 1090.

140. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1009 (7th Cir. 1996) (refusing to defer to the HUD Secretary's finding that the landlord had created a hostile environment and applying straightforward Title VII analysis). *See also* Williams v. Poretsky, 955 F. Supp. 490, 496 (D. Md. 1996) (rejecting the plaintiff's argument that HUD's interpretation of housing sexual harassment under Title VIII should apply and, instead, applying Title VII employment sexual harassment standards).

141. Throughout history, "the sanctity of the home" doctrine has acted as a double-edged sword. For example, the doctrine has been used to keep the public, including police and courts, out of the private home in instances of domestic violence. *See* Margaret C. Hobday, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1285 (1994) (recognizing that "society has largely ignored

ing Act, until courts recognize the unique setting of the home and protect victims of housing sexual harassment accordingly.

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domestic abuse due to the traditional view that violence in the home constitutes a 'private matter' "). *But cf.* Linda C. McClain, *The Sacred Body in Law and Literature: Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 216 (1995) (arguing that the image of home as "sanctuary for women and their families, a haven free from violence. . . . [and] the imagery of inviolability familiar from privacy jurisprudence may serve goals helpful to women").