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Cameron Roeback*

INTRODUCTION

"I oughta kill you, you f----g n-----," Raymond Endres shouted at his new apartment neighbor, Donahue Francis.[1] Francis could hardly escape the abuse; it followed him through his apartment complex, sometimes to his very door.[2] The Suffolk County Police Hate Crimes Unit investigated the matter and informed the apartment owner, Kings Park Manor Inc. (KPM). KPM did nothing.[3]

"Jews, f-----g Jews."[4] Endres continued his daily abuse driving Francis to call the police again.[5] This time, Francis sent his own letter to KPM detailing the incident and providing contact information for the police officers responsible for

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[1] Francis v. Kings Park Manor, Inc., 917 F.3d 109, 115 (2d Cir. 2019). This Note presents the facts as related by the Second Circuit panel, which construed them in the light most favorable to the plaintiff. *Id.* at 114.

[2] *Id.* at 115.

[3] *Id.*

[4] *Id.*

[5] *Id.*

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investigating Endres.[6] KPM did nothing.[7] The Police Department arrested Endres for aggravated harassment.[8] Francis sent KPM a second letter.[9] KPM did nothing.[10]

After Endres photographed the interior of Francis's apartment, Francis sent KPM a third and final letter notifying it about Endres's continued racial harassment.[11] Despite the fact KPM had intervened against other tenants regarding non-race-related violations of the law, it decided not to get involved.[12]

Francis commenced an action against KPM alleging that its refusal to intervene constituted racially discriminatory conduct in violation of Title VIII of the Civil Rights Act (the Fair Housing Act or FHA).[13] He fought not only for himself but for members of all protected classes who may be subjected to harassment in their own homes. Discriminatory harassment in housing is spiking; private housing organizations reported a twenty percent rise in complaints from 2017 to 2018.[14]

Francis's case proceeded to the Second Circuit, which had to determine whether the FHA imposes a duty on landlords to remediate harassment between tenants.[15] The court ruled in Francis's favor. It became the second circuit to find that a landlord can be held liable for tenant-on-tenant harassment, but the first circuit to establish a constructive notice standard.[16] It held that a cause of action could be established against a landlord for the acts of their tenants if (1) the third-party created a hostile environment for the plaintiff, (2) the housing provider knew or should have known about the conduct creating the hostile environment, and (3) the housing provider failed to take prompt action to correct and end the harassment while having

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 116, 124.

[13] *Id.* at 116.

[14] *See* NATIONAL FAIR HOUSING ALLIANCE, DEFENDING AGAINST UNPRECEDENTED ATTACKS ON FAIR HOUSING: 2019 FAIR HOUSING TRENDS REPORT 18 (2019), https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf.

[15] *Francis*, 917 F.3d at 109.

[16] *Id.* at 121; *see* Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 863 (7th Cir. 2018).

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the power to do so.[17] However, four months after Donahue Francis's big victory, the Second Circuit withdrew its opinion without comment.[18] During the initial drafting of this Note, it released a superseding opinion and announced its intention to rehear the case en banc.[19] As this Note went to press, it released a new opinion denying the existence of any such cause of action under the FHA.[20]

Title VIII Fair Housing law has borrowed heavily from Title VII employment discrimination law.[21] In its original opinion, the Second Circuit relied on the strength of this analogy as well as a HUD interpretive ruling to create a new standard for third-person liability under Title VIII.[22] Under Title VII, an employer is liable if it knew *or should have known* that its employee was impermissibly harassing another employee.[23] HUD interpreted the FHA to create such liability for landlords and tenants as well.[24]

In copying the Title VII constructive notice standard almost verbatim, the initial Second Circuit opinion did not adequately consider the differences that exist between the employer-employee relationship and the landlord-tenant relationship. Its reliance on Title VII may have spared it the trouble of wading through conflicting landlord-tenant doctrine, which is almost exclusively managed at the state level.[25] However, it missed an opportunity to properly consider the scope of a landlord's duty to monitor the interpersonal relationships of her tenants. Dissenters' most poignant criticisms centered around the fear of increased monitoring at home.[26] And the

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[17] *Francis*, 917 F.3d at 121.

[18] Francis v. Kings Park Manor, Inc., 920 F.3d 168 (2d Cir. 2019).

[19] Francis v. Kings Park Manor, Inc., 944 F.3d 370 (2d Cir. 2019). The superseding opinion adopts an actual notice theory, but like *Wetzel* does not explain why the choice of actual notice is doctrinally superior to the constructive notice standard. *Id.*

[20] Francis v. Kings Park Manor, Inc., 992 F.3d 67 (2d Cir. 2021).

[21] *See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015).

[22] Francis v. Kings Park Manor, Inc., 917 F.3d 109, 118 (2d Cir. 2019).

[23] Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[24] 24 C.F.R. § 100.7(a)(1)(iii) (2016).

[25] *See* Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO J. POVERTY L. & POL. 1, 25 (2015).

[26] *Francis*, 917 F.3d at 136 (Livingston, J., dissenting) ("But as a matter of societal reality, landlords have never monitored their tenants to the substantial degree that employers monitor employees, nor have they solicited and maintained information about tenants and their comings and goings in a similar fashion.").

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eventual en banc opinion similarly feared the "considerable uncertainty about the scope of a landlord's responsibility for tenant behavior."[27] While negligence laws increasingly pressure landlords to investigate and surveil their tenants, there is very little counterpressure from the threat of liability under the privacy torts protecting tenants from landlord intrusion.[28] The eventual en banc opinion rejected any use of Title VII analogy; it did so because it could distinguish a landlord from an employer.[29] But this, like the original opinion, oversimplifies the interplay between Title VII and Title VIII, which grants far more flexibility than either opinion attributes to it.

Tenants must be able to hold their landlords accountable for refusing to interfere with tenant-on-tenant harassment. Such a cause of action is critically important to further the goal of equality in housing. After watching the Second Circuit withdraw and reissue its opinion, it is clear that future courts may deny any such cause of action exists solely because they foresee the parade of horribles arising from a constructive notice standard. But such criticisms are offering a false choice. Equality need not come at the expense of privacy.

To date, the Seventh Circuit is the only other court to find landlords liable for third-party harassment under the FHA.[30] Like the original *Francis* decision, the Seventh Circuit, in *Wetzel v. Glen St. Andrew Living Community, LLC*, recognized that Title VII is relevant to interpreting Title VIII.[31] It did not use the functional differences between the employer-employee relationship and the landlord-tenant relationship as a means to completely avoid discussion of Title VII, as did the eventual en banc decision in *Francis*.[32] Rather, the Seventh Circuit analogized to Title VII doctrine but deviated from it by implementing an actual notice standard instead of a constructive notice standard.[33] Unfortunately, the opinion did very little

[27] Francis v. Kings Park Manor, Inc., 992 F.3d 67 (2d Cir. 2021).

[28] Eugene Volokh, *Tort Law vs. Privacy*, 114 COLUM. L. REV. 879, 902 (2014).

[29] *Francis*, 992 F.3d at 76.

[30] Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 863 (7th Cir. 2018).

[31] *Id.*

[32] *Compare id.*, *with Francis*, 992 F.3d at 76.

[33] *Id.* at 859. Within the dicta of the recent en banc *Francis* opinion, the Second Circuit discussed *Wetzel* suggesting that, even if it were to adopt a similar deliberate indifference standard, it would only apply in exceedingly narrow instances where the landlord exerts "unusual supervisory control" over their tenants. *Francis*, 992 F.3d at 77.

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to explain the court's ability to implement an actual notice standard or its justification for doing so.[34] This Note aims to provide answers to those questions in the hope that future courts will continue to hold landlords liable for discriminatory harassment subject to an actual notice standard.

Part I of this Note provides an overview of § 3604(b) of Title VIII, explaining how it creates liability for landlords who permit severe and impermissible harassment between tenants. Part II explains why courts are not bound to the constructive notice standard promulgated by HUD and established in Title VII case law. Rather, courts are well within their right to develop a standard more fitting to the landlord-tenant relationship, as the Supreme Court illustrated in its Title IX analysis. Part III suggests a standard borrowed from state landlord-tenant doctrine: The landlord is liable when she has actual knowledge of impermissible harassment between tenants and acts with deliberate indifference toward it. This Note argues this standard more appropriately balances the landlord's responsibility to protect her tenants from harassment against the tenant's right to privacy over his interpersonal relationships.

I. LANDLORDS CAN BE FOUND LIABLE FOR TENANT-ON-TENANT HARASSMENT UNDER THE FAIR HOUSING ACT

A. Textual Analysis

The broad statutory language of the Fair Housing Act encompasses tenant-on-tenant harassment. The FHA opens by asserting its intentional breadth and declares that it extends to the furthest reaches of the legislature's constitutional authority.[35] Courts have long embraced the Act's vast remedial purpose to "eliminate all traces of discrimination within the housing field."[36] Specifically, under 42 U.S.C. § 3604(b), it is 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."[37] Congress chose broad language, like "privileges,"

[34] *See Wetzel*, 901 F.3d at 866–67.

[35] 42 U.S.C. § 3601 (2018) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

[36] Cabrera v. Jakabovitz, 24 F.3d 372, 390 (2d Cir. 1994) (quoting Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974)).

[37] 42 U.S.C. § 3604(b) (emphasis added).

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instead of enumerating each foreseeable injustice.[38] Courts acknowledge that the intentionally broad use of "privileges" in issues of discrimination encompasses a "broad and inclusive panoply of rights, privileges, and immunities derived from a broad and inclusive set of sources."[39] The most natural and fundamental privilege arising from renting a building is the ability to reside in it.[40]

A statute requiring landlords to respect their tenant's rental privileges rings hollow if those landlords are free to selectively ignore complaints of harassment based on protected characteristics. Imagine a situation wherein multiple tenants harass the plaintiff, but no single offender's conduct rises to the level of severity and pervasiveness required to hold them individually liable. In such a situation, the landlord allows her existing tenants to deprive the protected party of a habitable living environment. If the tenant cannot hold his landlord responsible for her discriminatory property management, he is deprived of the privileges of renting a dwelling without any form of relief.

The statutory text forbids a landlord from interfering with a tenant enjoying the privileges of renting a dwelling.[41] In virtually all jurisdictions, a landlord is required to ensure their tenants live in habitable, or at least safe, conditions.[42] This guarantee is a privilege of ownership. In the case of severe harassment, the tenant is deprived of habitable living conditions based on his belonging to a protected class.[43] If a landlord selectively ignores complaints of habitability based upon severe racial or sexual harassment, that landlord affirmatively denies their tenant the privilege of enjoying their property.

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[38] *See id.*

[39] Comm'n on Human Rights & Opportunities v. Bd. of Educ. of Town of Cheshire, 855 A.2d 212, 226–27 (Conn. 2004); *see also* Davis v. City of New York, 902 F. Supp. 2d 405, 436 (S.D.N.Y. 2012) (concluding that the FHA prohibits post-acquisition discrimination while noting "[t]he inclusion of the word 'privileges' [in Section 3604(b)] implicates continuing rights, such as the privileges of quiet enjoyment of the dwelling").

[40] United States v. Koch, 352 F. Supp. 2d 970, 976 (D. Neb. 2004).

[41] 42 U.S.C. § 3617.

[42] *See generally* 43 AM. JUR. PROOF OF FACTS 3d 329 (1997).

[43] *See, e.g.*, Antonelli v. Gloucester Cty. Hous. Auth., No. 19-16962 (RBK/AMD), 2019 WL 5485449, at *7 (D.N.J. Oct. 25, 2019) (finding that a housing provider's failure to comply with the Violence Against Women Act could permit an inference that the housing provider discriminated on the basis of sex, in violation of the FHA).

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B. Functional Equivalent of Title VII

When interpreting Title VIII, the Court often analogizes to Title VII because both Acts share the same purpose—to promote equality in the essential functions of everyday life. This similarity justifies courts in finding that a cause of action exists against a landlord for allowing hostile living conditions. However, the Court has not always implemented Title VII standards verbatim. Thus, courts may interpret Title VIII through the lens of Title VII, but they are not bound to strictly apply all aspects of Title VII jurisprudence to claims arising under the Fair Housing Act, especially when it comes to aspects of Title VII that rely on the specifics of the employer-employee relationship.

Implementing a cause of action under 3604(b) by way of Title VII analogy is justified because Title VIII is the functional equivalent of Title VII. In *Texas Department of Housing & Affairs v. Inclusive Communities Project, Inc.*, the Court held that disparate-impact claims are cognizable under the FHA.[44] The Court imported disparate impact claims into the FHA from its employment counterpart in *Griggs* because the FHA's central purpose, like Title VII, is to eradicate discriminatory practices within a sector of the U.S. economy.[45] Congress passed the FHA only four years after Title VII. It was written under the same political climate to address the same problem—segregation.[46]

Substantially similar language further justifies the use of an analogy between Title VIII and its Title VII equivalent. In *Trafficante v. Metropolitan Life Insurance Co.*, two white tenants filed complaints against their landlord, alleging that his racial discrimination against nonwhites robbed them of their right to live in an integrated community and forced them to suffer "from being 'stigmatized' as residents of a 'white ghetto.'"[47] The Court held that white plaintiffs had a cause of action under Title VIII because they fit within Title VIII's definition of a "person aggrieved."[48] It reached this conclusion by analogizing the statute's language to a previous interpretation of a similar Title VII provision, which read "by a person claiming to

[44] 135 S. Ct. 2507, 2518 (2015).

[45] *Id.* at 2517; *see* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[46] Cassia Pangas, *Making the Home More Like a Castle: Why Landlords Should Be Held Liable for Co-Tenant Harassment*, 42 U. TOL. L. REV. 561, 581 (2011).

[47] 409 U.S. 205, 205 (1972).

[48] *Id.* at 208.

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be aggrieved."[49] The Court stated that both statutes showed the same congressional intent to define standing broadly.[50] Section 3604(b), like the statute in *Trafficante*, utilizes nearly identical language to its Title VII counterpart.[51] While Title VII prohibits employers from discriminating in the "terms, conditions, or privileges of employment," 3604(b) of Title VIII prohibits property owners from discriminating in the "terms, conditions, or privileges of sale or rental of a dwelling."[52]

The Court's reasoning in creating a cause of action for abusive work environments under Title VII applies directly to Title VIII. In *Meritor Savings Bank v. Vinson*, the Supreme Court recognized that a bank employee had a cause of action against her employer after sexual relations with her supervisor created a hostile work environment.[53] The Court argued that

> the phrase 'terms, conditions or privileges of employment' in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.[54]

Likewise, one can readily envision an apartment complex so polluted with discrimination that protected classes are effectively driven out, thereby defeating Title VIII's entire purpose to desegregate housing.[55] For example, victims of sexual harassment explain that they are often targeted because of their race.[56] In *Reeves*, the white neighbor of a Black woman repeatedly threatened to rape and lynch her.[57] And

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[49] *Id.* at 209 (citing Hackett v. McGuire Bros., 445 F.2d 442 (3d Cir. 1971)).

[50] *Id.*

[51] *See* 42 U.S.C. § 3604(b) (2018).

[52] *Id.*

[53] 477 U.S. 57, 73 (1986).

[54] *Id.*

[55] *See* Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227, 233 (2016).

[56] *See id.* at 240–41.

[57] Reeves v. Carrollsburg Condo. Unit Owners Assoc., No. CIV. A. 96-2495RMU, 1997 WL 1877201, at *7 (D.D.C. Dec. 18, 1997).

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harassment in any form is particularly threatening when it occurs in someone's own home because victims have nowhere else to run.[58]

However, imposing a constructive notice standard on landlords regarding the personal relationships of their tenants applies the Title VII analogy too strictly. The Court does not always defer to a Title VII analogy when practical differences between housing and employment necessitate deviation.[59] In *Curtis v. Loether*, the Court held that damages awarded under the FHA require a jury if demanded by either party.[60] This ruling came even though Title VII claims do not require an action for reinstatement and back pay.[61] The Court reasoned that employment back pay could be viewed as requiring the defendant to disgorge funds wrongfully withheld, while Title VIII merely authorizes an action for actual and punitive damages.[62] Much like housing damages are functionally distinct from employment damages, the landlord-tenant relationship is functionally distinct from the employer-employee relationship.[63]

C. The Legislative History of the Fair Housing Act

The legislative history of the Civil Rights Act of 1968 suggests that the legislature intended the Act to facilitate racial integration. The Johnson Administration introduced the Fair Housing Act during a period of significant racial tension in the nation.[64] Mass uprisings and violent reprisals took physical and human tolls across major U.S. cities.[65] Johnson's predecessor, John F. Kennedy, labeled

[58] Regina Cahan, Comment, *Home Is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1073.

[59] *See* Curtis v. Loether, 415 U.S. 189 (1974).

[60] *Id.* at 197.

[61] *Id.*

[62] *Id.*

[63] *See infra* Part III.

[64] Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 223 (2006).

[65] Thomas J. Sugrue, *2020 Is Not 1968: To Understand Today's Protests, You Must Look Further Back*, NAT'L GEOGRAPHIC (June 11, 2020), https://www.nationalgeographic.com/history/article/2020-not-1968.

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racial discrimination "a moral issue."[66] The federal government stepped in, enacting civil rights legislation that forced desegregation.[67] Housing proved to be the most contentious aspect of everyday life to desegregate because the civil rights coalition lost critical support from northern democrats: "White northerners could look down their noses at segregated lunch counters and widespread disenfranchisement. But fair housing quite literally hit them where they lived."[68]

Though the House of Representatives passed an early version of the Fair Housing Act in 1966, fierce opposition resulted in two years of amendments, tabling, and overall delay.[69] While the debate continued, the National Advisory Commission on Civil Disorders (known as the Kerner Commission) released a report, which provided the impetus to actively pursue the bill.[70] This report warned that the nation was heading toward a "separate and unequal" society.[71] The Commission recommended open and enforceable housing laws. The Senate passed House Bill 2516 only ten days later.[72]

Soon after House Bill 2516 returned to the House of Representatives, Dr. Martin Luther King Jr. was assassinated,[73] and civil unrest ensued.[74] National Guard troops waited beneath the basement of the Capitol Building, preparing for possible riots. Within the week, the House passed House Bill 2516.[75] It held only one

[66] John F. Kennedy, President of the United States, Radio and Television Report to the American People on Civil Rights (June 11, 1963), https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/civil-rights-radio-and-television-report-19630611.

[67] RICHARD ROTHSTEIN, THE COLOR OF THE LAW 177 (2017).

[68] Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 255 (2016).

[69] *Id.*

[70] NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

[71] *Id.*

[72] Short, *supra* note 64, at 224.

[73] ROTHSTEIN, *supra* note 67, at 177.

[74] *See* Peter B. Levy, *The Dream Deferred: The Assassination of Martin Luther King, Jr., and the Holy Week Uprisings of 1968*, *in* BALTIMORE '68: RIOTS AND REBIRTH IN AN AMERICAN CITY 5–6 (Jessica Elfenbein, Thomas Hollowak & Elizabeth Nix eds., 2011).

[75] Short, *supra* note 64, at 224.

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hour of debate, and President Johnson signed the Civil Rights Act of 1968 the very next day.[76]

The tremendous social unrest during which the Fair Housing Act was passed suggests that the language of the statute was subjected to less meticulous consideration than otherwise might be expected.[77] The Supreme Court has complained that this legislative history is "not too helpful."[78] But the Court later acknowledged that the proximity of the Senate passing House Bill 2516 and the issuance of the Kerner Commission Report creates an inference that the Senate sought to eliminate de facto segregation in housing.[79] It emphasized the FHA's significant role in creating an equal society.[80]

Congress intended to create a broad prohibition on discriminatory practices in housing. Notably absent from the legislative debate is any mention of specific changes to the landlord-tenant relationship.[81] Compare this with the legislative history of Title VII, wherein great debate took place regarding its fundamental reshaping of employment relationships.[82] While a constructive notice standard suggests a fundamental change in the relationship between a landlord and her tenants, an actual notice standard merely forbids a landlord from selectively permitting threats of racial or sexual violence in their buildings.[83] This interpretation falls squarely within the duty of safety a landlord is already expected to provide her tenants. It is thus plainly covered by the broad prohibition on discriminatory practices contemplated by the FHA.

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[76] *Id.*

[77] *Id.* at 224–25.

[78] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972).

[79] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 546–47 (2015) ("The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.' . . . The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.") (internal citations omitted).

[80] *Id.*

[81] *See, e.g.*, 112 CONG. REC. INDEX 1183 (1966); 114 CONG. REC. 23,019-45 (1968); H.R. 5700 & S. 1026, 90th Cong. (1967); 113 CONG. REC. 17,975 (1967) (reporting bill).

[82] Jacqueline Louise Williams, *The Flimsy Yardstick: How Many Employees Does It Take to Defeat A Title VII Discrimination Claim?*, 18 CARDOZO L. REV. 221, 232–33 (1996) (discussing the debate that took place in implementing the requirement that employers must have 25 employees in order to be subjected to Title VII requirements).

[83] *See infra* Section III.A.

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The history and purpose of the FHA demonstrate Congressional intent to provide broad tools for promoting integration and equality in the housing market. Under the black letter text of § 3604(b), landlords are liable for permitting severe discriminatory harassment in their buildings. Courts have already found such liability in nearly identical provisions of the Title VII statute. While imposing a constructive notice standard on landlords for the personal relationships of their tenants is too foreign to landlord-tenant doctrine, an actual notice standard respects the lack of agency inherent in the relationship. It holds landlords liable for *their* actions, intentional or otherwise, in operating an impermissibly hostile housing environment.

II. THE COURT IS NOT OBLIGATED TO ADOPT A CONSTRUCTIVE NOTICE STANDARD

The Second Circuit's initial opinion relied heavily on analogizing to Title VII case law to find a landlord liable for harassment under the FHA. The court's decision to incorporate the Title VII standard verbatim was an unnecessary shorthand. Citing Title VII did not require courts or agencies to import an identical standard. Because this analogy was the only substantive point the United States Department of Housing and Urban Development (HUD) raised in creating its interpretive ruling, courts are not bound by it. The Supreme Court has expressly stated that "when conducting statutory interpretation, the Court must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[84]

A. The HUD Interpretive Ruling Is Not Binding on the Courts

Courts should not follow HUD's interpretive rule. Before either the Seventh Circuit or the Second Circuit addressed the matter, HUD issued interpretive ruling 24 C.F.R. § 100.7(a)(1)(iii), which states that a landlord is directly liable for failing to "take prompt action to correct and end a discriminatory housing practice by a third party" if the landlord "knew or should have known of the discriminatory conduct and had the power to correct it."[85] The HUD regulation defines its guidance as

[84] Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 174 (2009) (citing Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

[85] 24 C.F.R. § 100.7(a)(1)(iii) (2016).

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interpretive.[86] In such a case, its interpretation of the FHA is not sufficiently persuasive to warrant deference.[87]

Courts have already recognized that HUD did not provide the necessary justification for 24 C.F.R. § 100.7(a)(1)(iii). The Seventh Circuit, which first recognized a landlord's potential liability for tenant-on-tenant harassment, dismissed HUD's analysis out of hand, writing, "more analysis than HUD was able to offer is necessary [to] take that step."[88] The Second Circuit, which initially adopted the same constructive notice standard as HUD, felt compelled to note, "we need not and do not rely on [the HUD rule] to resolve this appeal."[89]

The case law HUD cites does not establish grounds for implementing a constructive notice standard. Courts are not permitted to simply implement rules applicable under one statute to another without subjecting the statute to its own "critical examination."[90] HUD originally proposed a rule establishing a "duty" to prevent harassment.[91] After a substantial number of comments pointed out the confusion this may cause, HUD implemented a constructive notice standard instead.[92] HUD argued such a standard is interpretative and that the FHA already obligated housing providers to take prompt action to correct and end discriminatory housing practices by third parties.[93] In coming to this conclusion, HUD cited *Neudecker v. Boisclair Corp.*[94] In *Neudecker*, the Eighth Circuit found a landlord liable after the landlord's employees and their children, who lived in the apartment

[86] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63054 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100) [hereinafter Quid Pro Quo and Hostile Environment Rule].

[87] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944). Some have argued 24 C.F.R. 100.7(a)(1)(iii) is correctly viewed as a legislative rule. Distinguishing between agency test application is out of scope for this Note. *See* Francis v. Kings Park Manor, Inc., 917 F.3d 109, 128 (2d Cir. 2019) (Livingston, J., dissenting).

[88] Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 866 (7th Cir. 2018).

[89] Francis v. Kings Park Manor, Inc., 944 F.3d 370, 379 n.7 (2d Cir. 2019).

[90] Gross v. FBL Fin. Servs., 557 U.S. 167, 174 (2009) (citing Federal Express Corp. v. Holowecki, 552 U.S. 389, 393)).

[91] Quid Pro Quo and Hostile Environment Rule, *supra* note 86, at 63067.

[92] *Id.*

[93] *Id.*

[94] *Id.*

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complex, harassed a disabled man.[95] Neudecker alleged that tenants, including children of Boisclair's management team, constantly harassed and threatened him based on his disability.[96] He repeatedly complained to management about the harassment to no avail and eventually moved from his apartment out of concern for his health stemming from the harassment.[97] By holding a landlord liable for his employees' children, *Neudecker* complies with traditional notions of agency and common law tort liability.[98] It does not blanketly extend a landlord's third-party liability over their tenant's actions.[99] Furthermore, the plaintiff in *Neudecker* complained to his landlord repeatedly, giving the landlord actual notice of the impermissible harassment.[100] Thus, *Neudecker* in no way supports HUD's contention that a landlord is vicariously liable for tenant behavior about which it had only constructive notice.[101]

HUD argues that landlords have an obligation to act deriving from existing legal responsibilities.[102] To support this proposition, HUD inexplicably relies on *Wilstein v. San Tropai Condominium Master Ass'n*.[103] In *Wilstein*, a disabled plaintiff sought to compel evidence from members of a condo association for alleged discriminatory retaliation after he brought an FHA action against the association.[104] In such a case, the condo association would be held liable for its own agents' conduct.[105] *Wilstein* does not hold the condo association liable for a third party, much less an unrelated tenant whose conduct it *should* have known about.[106]

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[95] 351 F.3d 361, 364 (8th Cir. 2003).

[96] *Id.* at 365.

[97] *Id.*

[98] *See id.*

[99] *See id.*

[100] *Id.*

[101] *See id.*

[102] Quid Pro Quo and Hostile Environment Rule, *supra* note 86, at 63067 ("Even if the lease does not expressly create such obligations, the power to act may derive from other legal responsibilities or the operation of law.").

[103] *Id.* at 63067 n.30.

[104] Wilstein v. San Tropai Condo. Master Ass'n, 189 F.R.D. 371, 374 (N.D. Ill. 1999).

[105] *See id.* at 381.

[106] *See id.*

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HUD next relies on *Bradley v. Carydale Enterprises*, arguing that the case finds that a landlord's "failure to address one tenant's racial harassment of a neighboring tenant" is actionable under 42 U.S.C. §§ 1981, 1982.[107] The court in *Bradley* did not find a landlord liable for its tenants' behavior.[108] The opinion explicitly states a landlord "is not the keeper of its tenants."[109] Though the court contemplated such liability was possible, it specifically noted that the defendant was given actual notice, thereby separating such liability from general third-party liability.[110] After being notified of the harassment, the defendant "had a responsibility to investigate and attempt to resolve the dispute."[111]

Even reaching for district court opinions thirty years old, HUD failed to find case law to support its finding that constructive notice could impute third-party liability from tenant to landlord.[112] Instead, it demonstrated that landlords could be liable for their discriminatory management of the property, including ignoring actual notice of tenant-on-tenant harassment.

B. Title IX Case Law Demonstrates that Courts Have the Flexibility to Implement an Actual Notice Standard

Title IX education case law sets a clear precedent for implementing actual notice standards in civil rights statutes. Title IX, like Title VIII, does not textually extend liability to a defendant for the acts of third-party agents. Nonetheless, courts are not foreclosed from holding school districts liable for the discriminatory acts of third parties.[113] Rather, such liability is limited to instances of actual notice.[114]

The lack of a traditional agency relationship does not foreclose the extension of third-party liability between landlords and tenants.[115] In *Davis v. Monroe County Board of Education*, the Court found a school district liable for student-on-student harassment because the school exercised substantial control over the harasser and the

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[107] Quid Pro Quo and Hostile Environment Rule, *supra* note 86, at 63068 n.30.

[108] *See* Bradley v. Carydale Enters., 730 F. Supp. 709, 720 (E.D. Va. 1989).

[109] *Id.*

[110] *Id.* at 719.

[111] *Id.*

[112] *See* Quid Pro Quo and Hostile Environment Rule, *supra* note 86, at 63068.

[113] Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 653 (1999).

[114] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

[115] *See Davis*, 526 U.S. at 653.

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premises on which the misconduct took place.[116] While the original *Francis* dissent and later en banc opinion argued that liability could not be extended to tenant-on-tenant harassment,[117] the Court has already expressly rejected the strict application of agency principles to impute liability to a school district for the acts of its students.[118] Much like a school, a landlord exercises substantial control over the premises.[119] They may be the only party who can effectively incorporate remedial measures before the courts are forced to get involved.

The Court has the power and flexibility to implement an actual notice standard under Title VIII and has already demonstrated such ability under Title IX education law.[120] It held that school districts had to receive actual notice about discrimination and remain deliberately indifferent to it to be found liable for the acts of third parties.[121] In *Gebser*, the plaintiff sued her school district after suffering harassment from her teacher. The Court held the plaintiff could not maintain a Title IX cause of action against her school district because she failed to report the abuse to school officials.[122] The school district did not have actual notice and did not behave with deliberate indifference.[123] In its analysis, the Court discussed both why it was not bound by Title VII's use of constructive notice and why it chose to implement an actual notice standard.[124]

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[116] *Id.* at 644.

[117] Francis v. Kings Park Manor, Inc., 917 F.3d 109, 135 (2d Cir. 2019) ("[T]here are 'well-known legal distinctions between the employer-employee relationship and the landlord-tenant relationship—including, that an employee is considered an agent of the employer while the tenant is not considered an agent of the landlord.'"); Francis v. Kings Park Manor, Inc., 992 F.3d 67, 76 (2d Cir. 2021).

[118] *Davis*, 526 U.S. at 643.

[119] *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 480 (D.C. Cir. 1970) ("[T]his risk in the greater part could only be guarded against by the landlord. No individual tenant had it within his power to take measures to guard the garage entranceways, to provide scrutiny at the main entrance of the building, to patrol the common hallways and elevators, to set up any kind of a security alarm system in the building, to provide additional locking devices on the main doors, to provide a system of announcement for authorized visitors only.").

[120] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

[121] *Id.*

[122] *Id.* at 290.

[123] *Id.* at 290–91.

[124] *Id.* at 284–90.

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The Court's explanation as to why it was not bound to Title VII's use of constructive notice—why it could instead establish a different remedial scheme under Title IX—is applicable to Title VIII as well. The Court noted that while Title VII statutorily defined an employee as "any agent," Title IX did not contain a comparable reference to an educational institution's "agents," so the statute did not expressly call for the application of agency principles.[125] Additionally, while Title VII contained an express cause of action, the cause of action in Title IX is judicially implied.[126] This judicially implied cause of action gave the Court more flexibility to determine its own "sensible remedial scheme."[127] Similarly, the FHA does not textually extend liability to "agents" or "tenants." A tenant's ability to enforce their Title VIII rights by holding their landlord liable would be judicially implied. Such judicial implication grants the Court the same flexibility to determine its own "sensible remedial scheme" under Title VIII that it had when interpreting Title IX.[128]

The Court's justification for implementing an actual notice standard instead of a constructive notice standard in Title IX applies to Title VIII. The Court chose an actual notice standard, in part, because harassment within a school constitutes non-conformance with a condition necessary for federal funding.[129] Typically, school districts are informed with actual notice by administrative agencies when non-conformance threatens their funding.[130] The Court could not assume Congress intended to create harsher penalties for private actions with a lower notice standard.[131] In other words, the Court did not wish to disturb or circumvent the notice standard that a school had come to rely upon. Similarly, a landlord would expect actual notice in the situation of tenant-on-tenant harassment.[132] Traditional agency principles do not exist between landlords and tenants.[133] Rather, landlords are

[125] *Id.* at 283 (citing 42 U.S.C. § 2000e–2(a)).

[126] *Id.* at 283–84 (citing 42 U.S.C. § 2000e–5(f)).

[127] *Id.* at 284.

[128] *See id.*

[129] *Id.* at 289.

[130] *Id.*

[131] *Id.*

[132] *See infra* Section III.A.

[133] Bradley v. Carydale Enters., 730 F. Supp. 709, 720 (E.D. Va. 1989) ("A landlord . . . is not the keeper of its tenants.").

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traditionally informed by tenants about the habitability of their living space.[134] Here again, the Court should not assume Congress intended for landlords to be liable for the acts of their tenants under a lower notice standard under Title VIII than would otherwise be expected. Just as the legislature intended to maintain the currently expected notice between a school district and its agency funding, it intended to maintain the currently expected notice between landlords and their tenants.[135]

III. AN ACTUAL NOTICE STANDARD SATISFIES THE BROAD GOALS OF THE FHA WITHOUT OFFENDING EXISTING NOTIONS OF THIRD-PARTY LIABILITY

The Fair Housing Act sought to protect individuals from impermissible harassment but did not detail a fundamental reshaping of the landlord-tenant relationship. Comparing Title VII and Title IX harassment claims demonstrates that the Court is willing to consider third-party liability in such ways as to effectuate the broad remedial purposes of the civil rights statutes.[136] In doing so, it looks to traditional notions of tort liability.[137] Landlord-tenant law is almost exclusively state law; therefore, it is impossible for Federal courts to adopt a Title VIII standard that conforms completely to each state's current expectations.[138] The actual notice standard seems far and away the most prevalent in comparable state law claims. Its adoption would effectuate the broad remedial purpose of Title VIII without offending traditional notions of third-party tort liability.

This Note proposes a standard that would impose third-party liability upon a landlord when she has actual knowledge of impermissible harassment between tenants and acts with deliberate indifference to it. Actual notice is a basis for imputing liability to a landlord when they did not affirmatively create a defective

[134] *See infra* Section III.A.

[135] *See id.*

[136] *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 653 (1999); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59 (1986).

[137] *Cf. Meritor*, 477 U.S. at 72 (citing RESTATEMENT (SECOND) OF AGENCY §§ 219–237 (AM. LAW INST. 1958)); Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274, 289 (1998) (citing administrative agency and school district funding), *and Davis*, 526 U.S. at 653–54 (finding schools liable for students given the level of control they exert).

[138] Dickinson, *supra* note 25, at 25.

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condition on the property, but they received notice that such a condition existed.[139] The receipt of actual notice triggers a duty to remedy the defective condition in order to ensure the property is reasonably safe for persons whose future presence is reasonably foreseeable.[140] Failure to correct a condition allows for the imposition of liability for breach of the owner's duty of care.[141]

A. Modern Landlord-Tenant Law Supports Finding Notified Landlords Liable for Hostile Living Conditions

Modern property law recognizes that landlords owe duties to their tenants. The landlord-tenant relationship has greatly evolved over the past two hundred years.[142] Formerly, the law treated lease agreements as a conveyance of land.[143] A landlord transferred their rights and obligations over the property to the tenant for the duration of the lease, protecting them from liability over the property, absent fraudulent misrepresentation.[144] Over time, courts developed exceptions to the no-duty-to-tenant rule, including a landlord's duty to properly maintain common areas.[145] Courts now increasingly view lease agreements as contracts, which contain implied warranties of habitability and impose liabilities and duties on the landlord.[146] In justifying tort liability, some argue the nature of reliance and control inherent in a landlord-tenant relationship approximates an innkeeper-guest relationship.[147] In other words, a tenant relies on their landlord's control and care of the property for their personal safety.[148]

A Title VIII violation approximates the existing state law doctrine of implied warranty of habitability. This widely accepted doctrine supposes that a landlord

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[139] Hon. Mark C. Dillon, *Breaking the Ice: How Plaintiffs May Establish Premises Liability in "Black Ice" Cases Where the Dangerous Condition Is by Definition Not Visible or Apparent to Property Owners*, 43 HOFSTRA L. REV. 691, 695–97 (2015).

[140] *Id.* at 696.

[141] *Id.* at 697.

[142] Corey Mostafa, Comment, *The Implied Warranty of Habitability, Foreseeability, and Landlord Liability for Third-Party Criminal Acts Against Tenants*, 54 UCLA L. REV. 971, 972 (2007).

[143] *Id.* at 975.

[144] *Id.*

[145] *Id.*

[146] *Id.* at 984–85.

[147] *Id.* at 985.

[148] *Id.*

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impliedly warrants at the outset of the lease that there are no latent defects in facilities that are vital to the use of the premises and that these essential features will remain in such condition during the entire lease term.[149] Most courts hold that to establish a breach of the implied warranty of habitability, the tenant must prove that he gave notice of the defects to his landlord and that his landlord had a reasonable time to make repairs but did not.[150] The tenant must give the landlord affirmative and timely notice of the alleged defect, must request its correction, and must allow the landlord a reasonable period of time to make the repair or replacement.[151] Holding a landlord liable for the discriminatory acts of their tenants approximates a violation of the implied warranty of habitability because the tenant is denied the safe and habitable property to which they are entitled under Title VIII.[152] In light of the wide adoption of an implied warranty of habitability among states, holding landlords liable for uninhabitable conditions would not offend their expectations regarding the nature of their relationship.

Third-party liability under Title VIII also resembles a state law claim of constructive eviction. Courts typically find that constructive eviction occurs when the acts or omissions of a landlord or someone acting under his authority render the premises unfit for the purposes for which they were leased.[153] Many courts have found landlords liable for constructive eviction after the conduct of one tenant deprived another tenant of the beneficial enjoyment or use of his premises.[154] Courts

[149] Jack v. Fritts, 457 S.E.2d 431, 439 (W. Va. 1995).

[150] 43 AM. JUR. PROOF OF FACTS 3d 329 (2020) (citing King v. Moorehead, 495 S.W.2d. 65 (Mo. Ct. App. 1973); Marini v. Ireland, 265 A.2d 526 (N.J. 1970); Pugh v. Holmes, 405 A.2d 897 (Pa. 1979)).

[151] *See* Berzito v. Gambino, 308 A.2d 17, 22 (N.J. 1973).

[152] *See Jack*, 457 S.E.2d at 436 ("[A] duty will be imposed if a landlord's affirmative actions or omissions have unreasonably created or increased the risk of injury to the tenant from the criminal activity of a third party.") (internal citations omitted); Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980) (holding that that the landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises).

[153] 42 AM. JUR. PROOF OF FACTS 2d 317 (2020) (citing Groh v. Kover's Bull Pen, Inc., 34 Cal. Rptr. 637, 639 (Cal. Ct. App. 1963)).

[154] *See, e.g.*, Home Life Ins. v. Breslerman, 5 N.Y.S.2d 272 (N.Y. App. Div. 1938) (continual noises and disturbances generated by family living over complaining tenant in commercial apartment building); Bruckner v. Helfaer, 222 N.W. 790 (Wis. 1929) (repeated instances of loud and excessive noises, profane and foul language, and radio and recorded music emanating from adjoining apartment in residential apartment building); Colonial Ct. Apartments v. Kern, 163 N.W.2d 770 (Minn. 1968) (conduct of young tenants in residential apartment building in holding parties twice a week, running water early in morning,

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that have held landlords liable for their tenants in such a way have only done so in instances when the landlord was given ample notice and took no effective steps to abate the nuisance or condition.[155] These courts also inquire about whether the landlord had the power to correct the problem that the tenant complained about.[156] In this way, a landlord's failure to take sufficient measures to protect their tenants from neighboring tenants may thus constitute a material act by the landlord.[157]

A majority of courts have found that a landlord is liable for injuries caused by the attack of a tenant's dog where the landlord had actual knowledge of the dangerous propensities of the dog.[158] The landlord does not have an affirmative duty to inspect the premises for the existence of a tenant's dangerous animal.[159] Only when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises, does a duty of care arise.[160] One court justified the use of an actual notice standard by explaining that landlords are responsible for failing to act against certain known, unreasonable risks; however, as a general rule, tenants enjoy a level of privacy in their rental premises.[161]

Third-party liability cases have been extended in some jurisdictions to find landlords liable for the criminal acts of their tenants.[162] In *Dean v. St. Paul Union Depot Co.*, a defendant-landlord leased a train depot to a tenant even though he knew the tenant had an employee with a "vicious temper."[163] The court held the landlord

operating dishwasher late at night, and subjecting other tenants in building to insulting and abusive language).

[155] *See id.*

[156] *See id.*

[157] Gottdiener v. Mailhot, 431 A.2d 851, 854 (N.J. Super. Ct. App. Div. 1981).

[158] Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 126–27 (2005).

[159] Plowman v. Pratt, 684 N.W.2d 28, 32 (Neb. 2004).

[160] *Id.*

[161] *Id.*

[162] B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 709 (1992).

[163] 43 N.W. 54, 55 (Minn. 1889).

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liable after that employee assaulted the plaintiff in large part because the landlord had actual knowledge of the dangerousness of the tenant's employee.[164]

By contrast, *Gill v. New York City Housing Authority* held that a landlord was not liable after one tenant attacked and stabbed a cotenant.[165] The landlord had no duty to protect the tenant because the landlord could not have anticipated the violent attack.[166] The landlord did not have a duty to investigate a tenant's background because such a duty would intrude on the tenant's privacy.[167] The landlord had only received one complaint in the seven years that the aggressor lived there.[168] The court distinguished a landlord's duty to provide secure locks; here, the court stated, "a landlord is not competent to assess the dangerous propensities of his mentally ill tenants, nor does he have the resources, or control over his tenants necessary to avert the sort of tragedy presented by this case."[169] Furthermore, a landlord is not permitted to evict a tenant for "non-desirability" unless the tenant's repeated behavior indicated a propensity for future harm.[170]

While a majority of courts refuse to extend a landlord's liability to encompass criminal acts by their tenants,[171] comparing state court opinions informs legal scholars about the modern understanding of the landlord-tenant relationship. Namely, courts rely on a landlord's actual knowledge of the danger posed and her ability to control it.[172] It is a landlord's superior knowledge that creates an obligation for her to warn or otherwise take actions to protect tenants.[173] In the case of interpersonal relationships between cotenants, it is the tenant who has superior knowledge about the harassment.

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[164] *Id.*

[165] 519 N.Y.S.2d 364 (N.Y. App. Div. 1987).

[166] *Id.* at 370.

[167] *Id.* at 369.

[168] *Id.* at 367.

[169] *Id.* at 370.

[170] *Id.* at 371.

[171] Glesner, *supra* note 162, at 709.

[172] *See* Dean v. St. Paul Union Depot Co., 43 N.W. 54, 54 (Minn. 1889); *Gill*, 519 N.Y.S.2d at 364.

[173] *See Dean*, 43 N.W. at 54; *Gill*, 519 N.Y.S.2d 364.

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B. An Actual Notice Standard Balances Protection from Discrimination Against Privacy Concerns

Ensuring the livable condition of a property is part of the modern residential lease; monitoring tenant interactions is not. The new standard should avoid creating a duty to monitor personal relationships between neighbors. While negligence laws increasingly pressure landlords to investigate and surveil their tenants, there is very little counterpressure from the threat of liability under the privacy torts protecting tenants from landlord intrusion.[174] If a landlord knows that they can face tort liability for tenant relationships they should have known about, it creates an incentive for them to gather potentially sensitive information about the relationships of their tenants.[175] Such steps may include installing surveillance in common areas or requesting disclosure of personal relationships.[176] "[T]he pressure is growing, as technology makes surveillance and other information gathering more cost effective and thus more likely to be seen as part of defendants' duty to take 'reasonable care.'"[177] Such monitoring would likely be an unwelcome intrusion if placed in a person's full-time home.[178]

A landlord's ability to control her tenants has not evolved proportionally with her duties to police those tenants.[179] Employers have latitude in their ability to investigate claims.[180] They then have a wide variety of remedial tools available to them, such as administering employee training or separating the victim and harasser.[181] Landlords do not have this level of control.[182] They often have two blunt

[174] Volokh, *supra* note 28, at 902.

[175] *Id.* at 904.

[176] *Id.*

[177] *Id.* at 879.

[178] *See, e.g.*, Trulia, *How Often Should Your Landlord Visit Your Unit?*, FORBES (Dec. 8, 2014), https://www.forbes.com/sites/trulia/2014/12/08/how-often-should-your-landlord-visit-your-unit/#2ebd381d7f11.

[179] Glesner, *supra* note 162, at 682.

[180] Vance v. Ball State University, 570 U.S. 421, 449 (2013) ("Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant.").

[181] *See* Francis v. Kings Park Manor, Inc., 917 F.3d 109, 136 (2d Cir. 2019) (Livingston, J., dissenting).

[182] *Id.*

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tools—the threat of eviction and eviction.[183] Such tools carry their own threats of liability from the affected party.[184] Given the limited and extreme options most landlords have available to them, it is only fair to expect that they are given notice before holding them liable.[185] In this way, the landlord is guaranteed evidence to support their decision to take action against the offending tenant.

The costs associated with increased monitoring will likely be borne by tenants in one form or another. And raising a tenant's rent carries the foreseeable effect of increasing the risk of housing loss among vulnerable populations.[186] Additionally, incorporating a new duty to monitor tenant relationships may incentivize landlords to sell or abandon the property or to use it for purposes other than rental housing.[187] Increased maintenance costs associated with the implied warranty of habitability cannot always be passed on to tenants, and in such cases, the landlord sometimes abandons the property.[188] Increased responsibility to monitor the relationships of cotenants would likely cause a similar economic reaction.

The tenant is in the best position to label the behavior in question "harassment." We accept the fact that we must put on a face at work and behave in socially agreeable ways.[189] But this causes psychological stress.[190] Typically, we "recoup" at home,[191] so it would likely be an unwelcome intrusion to be monitored there as well. While insults are exceedingly common in friendship,[192] a landlord may be forced to

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[183] *See* Gill v. New York City Hous. Auth., 519 N.Y.S.2d 364, 371 (N.Y. App. Div. 1987).

[184] *See id.*

[185] Torre v. Paul A. Burke Constr., 661 N.Y.S.2d 145, 146 (N.Y. App. Div. 1997).

[186] Francis v. Kings Park Manor, Inc., 992 F.3d 67, 79 (2d Cir. 2021).

[187] Glesner, *supra* note 162, at 784.

[188] Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 138–53 (1979).

[189] Elizabeth Garone, *Why We're Different People at Work and at Home*, BBC (May 17, 2017), https://www.bbc.com/worklife/article/20170518-why-were-different-people-at-work-and-at-home.

[190] Lisa Evans, *Do You Have a Different Personality at Home and Work?*, FAST COMPANY (Sept. 7, 2018), https://www.fastcompany.com/90227347/should-you-hide-your-personality-at-work.

[191] Garone, *supra* note 189.

[192] Emily McDiarmid, Peter Richard Gill, Angus McLachlan & Lutfiya Ali, *That Whole Macho Male Persona Thing: The Role of Insults in Young Australian Male Friendships*, 18 PSYCHOL. MEN & MASCULINITIES 352, 353 (2017) ("It has become clear that playful derogation among males, an apparently aggressive form of exchange, has a principal aim of reinforcing close affiliation.").

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interrogate any such instances. An actual notice standard allows tenants the freedom and comfort to dictate the nature of their own personal relationships while giving them the option to demand relief when they are made to feel uncomfortable or unwelcome.

An actual notice standard avoids the "deputization" of the landlords.[193] Vigilantism creates its own significant risks of discrimination and overreaching.[194] If a landlord is potentially liable for a tenant's behavior they *should have known* about, it may unintentionally incentivize them to discriminate against mentally ill applicants.[195] Any tenant applicant with a history of mental health or anger issues may find it exceedingly difficult to find housing.[196] A constructive notice standard incentivizes landlords to proactively research and exclude potential offenders, which may effectively bar previous offenders from a fundamental aspect of human life, like housing.

Typical policy arguments against an actual notice standard are not persuasive in a harassment context. Critics of the actual notice standard suggest that it is less effective than a constructive notice standard because it allows "one free assault" before a landlord is expected to interfere.[197] However, harassment claims already require that the harassment is sufficiently severe or pervasive to deny the tenant enjoyment of the property.[198] In other words, multiple incidents of impermissible harassment are already incorporated into the harassment claim; the addition of an actual notice standard does not create this roadblock to relief.[199] Some criticize the actual notice standard in instances of physical defects because it disincentivizes important landlord activities, such as visiting the premises and inspecting locks.[200]

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[193] Glesner, *supra* note 162, at 785.

[194] *See* WILLIAM TUCKER, VIGILANTE: THE BACKLASH AGAINST CRIME IN AMERICA 341–42 (1985) (discussing community-based methods of fighting crime and the safer feeling derived from these united, participation efforts).

[195] *See* Gill v. New York City Hous. Auth., 519 N.Y.S.2d 364, 371 (N.Y. App. Div. 1987).

[196] *See* Richard B. Simring, Note, *The Impact of Federal Anti-Discriminations Laws on Housing for People with Mental Disabilities*, 59 GEO. WASH. L. REV. 413, 440 (1991) ("[T]he FHAA . . . exclude[s] from coverage individuals with handicaps who would constitute a direct threat to the health or safety of other residents.").

[197] Mostafa, *supra* note 142, at 989.

[198] Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 862 (7th Cir. 2018).

[199] *See id.*

[200] Mostafa, *supra* note 142, at 989.

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However, this criticism is less persuasive in a social context. Physical defects are distinguishable from interpersonal relationships. The landlord is not equipped to deal with social relationships.[201] Attempting to monitor them is far more likely to impose on tenants' privacy than a regular inspection of physical property.[202]

CONCLUSION

The Fair Housing Act of 1968 sought to save the nation from becoming a "separate and unequal" society.[203] The Act provides broad remedial measures, one of which prohibits a landlord from interfering with a tenant's ability to enjoy the privileges of renting property. The landlord-tenant relationship is not one that could reasonably require a property management company, like KPM, to actively monitor the behavior of its tenants, Donohue Francis and Raymond Endres. However, if the company received actual notice from Francis and the Suffolk County Police Hate Crimes Unit about the severity of Endres's harassment and acted with deliberate indifference to it, the company denied Francis a safe apartment based upon his race.

A similar statute under Title VII employment law uses a constructive notice standard holding employers liable for harassment between employees that it *should have* known about.[204] While an analogy to Title VII can be persuasive, it is not controlling.[205] The Court looks to functional differences between employment and housing.[206] Here, the landlord-tenant relationship is functionally distinct from the employer-employee relationship. HUD did not adequately consider these distinctions when it passed its constructive notice interpretive ruling; thus, it does not merit deference. The Court demonstrated under Title IX education law that it has the flexibility to implement its own sensible remedial scheme when interpreting civil rights statutes.[207] It chose an actual notice standard.

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[201] Francis v. Kings Park Manor, Inc., 917 F.3d 109, 136 (2d Cir. 2019) (Livingston, J., dissenting) ("But as a matter of societal reality, landlords have never monitored their tenants to the substantial degree that employers monitor employees, nor have they solicited and maintained information about tenants and their comings and goings in a similar fashion.").

[202] *See* Glesner, *supra* note 162, at 708–09.

[203] NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

[204] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

[205] *See* Curtis v. Loether, 415 U.S. 189 (1974).

[206] *See id.*

[207] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998)

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An actual notice standard is more fitting in housing law as well. It conforms to both parties' expectations of the relationship because states have widely adopted actual notice standards in various landlord-tenant disputes. It more efficiently balances a protected tenant's right to a habitable apartment with his right to privacy. KPM knew that its property had become unsafe for Donahue Francis because he was Black. If it is found to have acted with deliberate indifference to that fact, the FHA should empower Donahue Francis to hold his landlord accountable.

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