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Remediating Racism for Rent: A Landlord's Obligation Under the FHA

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NOTE

REMEDIATING RACISM FOR RENT: A LANDLORD'S OBLIGATION UNDER THE FHA

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The Fair Housing Act (FHA) is an expansive and powerful piece of legislation that furthers equal housing in the United States by ferreting out discrimination in the housing market. While the power of the Act is well recognized by courts, the full contours of the FHA are still to be refined. In particular, it remains unsettled whether and when a landlord can be liable for tenant-on-tenant harassment. This Note argues, first, that the FHA does recognize liability in such a circumstance and, second, that a landlord should be subject to liability for her negligence in such a circumstance. Part I illustrates how the purpose and text of the FHA and analogous civil rights provisions suggest that a landlord should be held liable for her response to tenant-on-tenant harassment. Part II analyzes the standards of liability for tenant-on-tenant harassment that currently exist in the context of the FHA. Part III argues that a negligence standard of liability best accounts for the special status of the home and the unique nature of the landlord-tenant relationship.

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† Please note that direct quotations with derogatory language in the original have been altered and identified with an explanatory parenthetical. These quotations appear in the Introduction and Part II.

INTRODUCTION

In 2010, Donahue Francis, a Black man, signed a rental lease agreement with Kings Park Manor (KPM).[1] The quiet suburban community of Kings Park, New York, represented a change for Francis: he came there "in search of a better housing situation" after years of living in neighborhoods with higher crime rates.[2] In many ways, Francis's tenancy in Kings Park—a predominantly white community in which nearly eight out of ten residents owned their homes[3]—neatly aligned with the goals of the Fair Housing Act (FHA), which was passed for the express purpose of furthering racial integration.[4]

But Francis did not find the peace he sought. By February 2012, Francis's next-door neighbor Raymond Endres, a white man, began harassing

1. Francis v. Kings Park Manor, Inc. (*Francis I*), 944 F.3d 370, 373 (2d Cir. 2019), *vacated en banc*, 992 F.3d 67 (2d Cir. 2021).

2. *Id.*

3. As of 2019, Kings Park was 87.3% white and 1.1% Black. *QuickFacts: Kings Park CDP, New York; New York*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/kingsparkcdpnewyork,NY/INC110219 [https://perma.cc/CL7R-84ED]. Kings Park was 79.7% owner-occupied and skewed much whiter and wealthier than New York as a whole. *Id.*

4. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545–47 (2015).

him.[5] Over several months, Endres called Francis a "fucking [n-word]," a "fucking asshole," a "fucking lazy, god-damn fucking [n-word]," and he called out to Francis in the common areas or while Francis was within his own apartment with the door open.[6] Endres even threatened Francis, saying "I oughta kill you, you fucking [n-word]."[7] Francis contacted KPM and the property manager about Endres's harassment four times.[8] KPM took no action to address the harassment, despite the police having also notified KPM of the allegations and charging Endres with aggravated harassment.[9] When KPM's property manager contacted KPM's owners seeking instruction, they "told her not to get involved."[10]

Ultimately, the harassment continued up until Endres's lease expired in January 2013 and he left the complex.[11] Francis sued both Endres and KPM for violating various provisions of New York state laws, the Civil Rights Act of 1866, and the FHA.[12] The Eastern District of New York dismissed the FHA claims, holding that the FHA only prohibited intentional discrimination and could not hold a landlord liable for a tenant's harassment.[13] Francis then appealed to the Second Circuit.

Francis's case against KPM presented novel questions for the Second Circuit: could a landlord be held liable for tenant-on-tenant harassment under the FHA and, if so, when?[14] This question had only been addressed explicitly by one other federal court of appeals, the Seventh Circuit, which in 2018 held that a landlord can be liable when she is deliberately indifferent to tenant-on-tenant harassment.[15] But in its March 2021 en banc opinion, the

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5. *See* Plaintiff's Memorandum of L. in Opposition to Defendants' Motion to Dismiss Pursuant to Fed. Rule of Civ. Proc. 12(b)(6) at 2, Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420 (E.D.N.Y. 2015) (No. 14-cv-3555) [hereinafter Plaintiff's Memorandum of L.].

6. *Id.* at 2–4 (quotes have been altered to omit a racist slur and to avoid publication of oppressive language).

7. *Id.* at 3 (quotes have been altered to omit a racist slur and to avoid publication of oppressive language).

8. *Id.* at 2.

9. *Id.* at 2–4.

10. *Id.* at 4.

11. *Id.*

12. Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420, 425 (E.D.N.Y. 2015), *aff'd*, 992 F.3d 67 (2d Cir. 2021).

13. *Id.* at 433.

14. Francis v. Kings Park Manor, Inc. (*Francis I*), 944 F.3d 370, 378–79 (2d Cir. 2019), *vacated en banc*, 992 F.3d 67 (2d Cir. 2021).

15. *See* Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 862–64 (7th Cir. 2018), *cert. dismissed per stipulation*, 139 S. Ct. 1249 (2019) (mem.). The Eighth Circuit has held that a landlord could be liable for harassment inflicted by tenants, but it did not detail the circumstances under which the landlord would be held liable. *See* Neudecker v. Boisclair Corp., 351 F.3d 361, 362–63 (8th Cir. 2003). The Ninth Circuit may soon determine whether a landlord can be liable for tenant-on-tenant harassment. *See* Morris v. W. Hayden Ests. First Addition Homeowners Ass'n, No. 19-35390 (9th Cir. argued June 5, 2020); *see also* Appellants' Re-Reply Brief, *Morris*, No. 19-35390 (9th Cir. Feb. 3, 2020) (asking the Ninth Circuit to find that

Second Circuit took the opposite position, holding that a landlord could not be held liable for tenant-on-tenant harassment.[16]

Other courts of appeals who have yet to answer these questions should not follow suit. Liability in this context has great individual and national import. Reported instances of housing discrimination and hate crimes are on the rise.[17] And harassment is especially invidious when it occurs in the victim's home.[18] A home is one's castle: the space historically and culturally recognized as where one should have ultimate dominion.[19] The home is particularly important to the most oppressed persons in society as a site necessary to their survival and liberation.[20] Unlike work or school, there can be no escape and no reprieve when one suffers harassment within the home.

Homes are the building blocks of any community, and courts need to pay careful attention to their collective composition. The United States remains extremely residentially segregated: the average white person lives in a neighborhood that is only 8percent Black and the average Black person lives

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the district court committed reversible error, in part by instructing the jury not to consider evidence of neighbor-on-neighbor harassment in determining whether the homeowners association violated the FHA).

16. Francis v. Kings Park Manor, Inc. (*Francis II*), 992 F.3d 67, 70 (2d Cir. 2021). The *Francis* case's procedural history reflects the difficulty the Second Circuit had answering the question of a landlord's liability for tenant-on-tenant harassment. Having heard oral argument in 2016, a panel of the Second Circuit issued an opinion years later in March 2019, holding that a landlord could be liable for her negligence in responding to tenant-on-tenant harassment. *See* Francis v. Kings Park Manor, Inc., 917 F.3d 109, 120–21 (2d Cir. 2019). Surprisingly, it then withdrew that opinion barely a month after issuing it. Francis v. Kings Park Manor, Inc., 920 F.3d 168 (2d Cir. 2019). Then, on December 6, 2019, it issued a new opinion in which it held that a landlord could be liable if her response or inaction to known complaints of tenant-on-tenant harassment rose to the level of intentional discrimination. *Francis I*, 944 F.3d at 379. But the court "express[ed] no view regarding" a landlord's liability rule for her negligence in her response to tenant-on-tenant harassment. *Id.* at 379 n.7. The court heard oral argument en banc on September 24, 2020, a rarity for the Second Circuit. Adam Leitman Bailey & John Desiderio, *Third-Party Tenant Harassment Poses Dilemma for Landlords*, LAW.COM: N.Y. L.J. (Apr. 7, 2020, 1:14 PM), https://www.law.com/newyorklawjournal/2020/04/07/third-party-tenant-harassment-poses-dilemma-for-landlords (on file with the *Michigan Law Review*). The Second Circuit en banc then changed course again, determining that a landlord would not be liable for tenant-on-tenant harassment. *Francis II*, 992 F.3d at 74–76.

17. LINDSAY AUGUSTINE, CATHY CLOUD, SHERRILL FROST-BROWN, DEBBY GOLDBERG, LISA RICE, JORGE SOTO & MORGAN WILLIAMS, NAT'L FAIR HOUS. ALL., DEFENDING AGAINST UNPRECEDENTED ATTACKS ON FAIR HOUSING: 2019 FAIR HOUSING TRENDS REPORT 8 (2019), https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf [https://perma.cc/7V4J-R8ZE].

18. *See* Frisby v. Schultz, 487 U.S. 474, 484–85 (1988). When this Note discusses tenant-on-tenant harassment, it only discusses harassment between tenants who do not live together, as the cohabitation context implicates other legal complications. But tenant-on-tenant harassment does not only refer to harassment that takes place in common areas, as Francis's plight illustrates.

19. Miller v. United States, 357 U.S. 301, 307 & n.7 (1958).

20. *See* Margaret E. Johnson, *A Home with Dignity: Domestic Violence and Property Rights*, 2014 BYU L. REV. 1, 15–16.

in a neighborhood that is 35percent white.[21] While rates of residential segregation show that the United States is becoming less segregated, Black Americans are more segregated than any other discrete racial or ethnic group.[22] Research around housing choice points to fear of racial backlash as a factor preventing further integration.[23] Clarifying a landlord's duty under the FHA both not to discriminate in the renting of her properties and to ensure a harassment-free environment might quell some of the fear impeding further integration.[24]

This Note will address two open questions: (1) whether landlords *can* be liable when a tenant harasses another tenant on the basis of a protected characteristic and (2) *when* landlords will be liable when a tenant harasses another tenant on the basis of a protected characteristic. The purpose of this Note is to argue that courts should recognize a negligence liability rule for landlords who fail to respond to tenant-on-tenant harassment. Such a rule fits

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21. SOLOMON GREENE, MARGERY AUSTIN TURNER & RUTH GOUREVITCH, URB. INST., RACIAL RESIDENTIAL SEGREGATION AND NEIGHBORHOOD DISPARITIES 1 (2017), https://www.mobilitypartnership.org/publications/racial-residential-segregation-and-neighborhood-disparities [https://perma.cc/G2EK-29X3].

22. *Id.*

23. *Id.* at 3. Individual housing preference is just one component of the housing landscape. In addition to individual animus, from exclusive zoning to racial covenants to redlining, the government's role in racially segregating housing in the United States cannot be understated. *Id.* at 1–2; *see* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, at viii (2017) ("Without our government's purposeful imposition of racial segregation, the other causes—private prejudice, white flight, real estate steering, bank redlining, income differences, and self-segregation—still would have existed but with far less opportunity for expression.").

24. To argue that integration is a social good is beyond the scope of this Note. To do justice to such a question would take more space than available here, so to be brief: spatial integration matters most obviously because resources like education, healthcare, community safety, social capital, and political voice are predominantly allocated along geographic lines. Studies have shown that integration improves education outcomes, economic outcomes, and public health outcomes. *See, e.g.*, R.A. Hahn, B.I. Truman & D.R. Williams, *Civil Rights as Determinants of Public Health and Racial and Ethnic Health Equity: Health Care, Education, Employment, and Housing in the United States*, 4 SSM - POPULATION HEALTH 17 (2018) ("[H]ealth care, education, employment, and housing[] . . . show substantial benefits when civil rights are enforced. Discrimination and segregation in housing persist because anti-discrimination civil rights laws have not been well enforced."). But it is important to note that integration is "valuable" in those respects in part *because of* how racial segregation continues to lock out communities of color from those resources. Professor Sheryll Cashin writes critically and personally about the continued need to integrate:

> I come to this as a scholar but also as a black woman who values black institutions and communities even as I advocate for race and class integration. . . . Ultimately, I argue that unless and until we complete the unfinished business of the civil rights movement, meaningfully integrating our public and private realms in a way that gives all Americans, especially those who have been most marginalized, real choices and opportunities, we will not solve the conundrum of race and class inequality . . . .

SHERYLL CASHIN, THE FAILURES OF INTEGRATION, at xix (2004).

into the regulatory scheme of the FHA, accords with other civil rights statutes, and furthers the policy goals of the Act.

Part I of this Note will answer the first question: the FHA should be interpreted to accommodate a landlord's liability for tenant-on-tenant harassment because of the structure of the Act and because of how similar civil rights statutes make analogous harassment actionable against authority figures. Part II will examine the answers that have been presented so far with respect to the second question, namely the Department of Housing and Urban Development's (HUD) negligence rule, the Seventh Circuit's deliberate indifference rule, and the Second Circuit's recent opinion in *Francis II* holding that landlords are not liable for tenant-on-tenant harassment. Part III will then explain why a negligence standard of liability is most proper for the housing context, arguing that such a rule best reflects the special status of the home and already aligns with the duties a landlord owes her tenants.

I. INTERPRETING THE FHA TO BAR TENANT-ON-TENANT HARASSMENT

Since the scope of the private cause of action in the FHA is a statutory-interpretation question, this Part uses the analytical tools courts usually employ when tackling such questions to uncover the doctrinal foundation of a landlord's liability for tenant-on-tenant harassment under the Act. For example, when the Supreme Court decided in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* that disparate impact claims were cognizable under the FHA, it looked to the text of the FHA, congressional intent, and analogous civil rights statutes that had already been held to impose disparate impact liability.[25] This Part proceeds similarly, beginning with an analysis of the history, text, and purpose of the FHA and exploring the parallel liability rules in analogous contexts.

Many civil right statutes hold authority figures such as employers, schools, or prison guards liable for harassment, even under circumstances where they did not commit the harassment themselves. Comparing analogous civil rights provisions reveals that courts should also interpret the FHA to impose liability on a landlord for tenant-on-tenant harassment. While a few courts in addition to the Second Circuit have already held that landlords cannot be liable for tenant-on-tenant harassment,[26] those courts misunderstand the doctrinal foundation of this liability rule. This Note argues that the FHA prohibits tenant-on-tenant harassment and that a landlord can be liable for such conduct.

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25. 576 U.S. 519, 529–43 (2015).

26. *See, e.g.*, Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1146–47, 1149 (S.D. Fla. 2004) (refusing to import analogous liability for third-party harassment from the employer context to the housing context); Morris v. W. Hayden Ests. First Addition Homeowners Ass'n, 382 F. Supp. 3d 1093, 1102 n.6 (D. Idaho 2019) ("In spite of *Wetzel* and *Francis*, I continue to believe that West Hayden cannot be held liable for the actions of non-Board Member homeowners."), *argued*, No. 19-35390 (9th Cir. June 5, 2020).

A. *The FHA: Providing for Housing Access and Security*

The FHA's history, text, purpose, and interpretive relationship to analogous civil rights statutes form the statutory foundation upon which a landlord can be found liable for tenant-on-tenant harassment. In order for the FHA to prohibit such harassment, the statute first must be interpreted to protect a tenant in situations other than the acquisition of a home. The best reading of the FHA's plain text and purpose is a broad one, under which the Act also protects tenants from harassment during their occupancy. The FHA fits into a patchwork of other civil rights causes of action that already recognize a defendant's liability for action or inaction in response to harassment.[27]

1. The FHA's Origins

In response to the summer race riots of 1967,[28] President Lyndon B. Johnson established what became known as the Kerner Commission to investigate the root causes of racial unrest in the United States and offer potential solutions.[29] The Commission's report, published in March 1968, was bleak. It described the country as "moving toward two societies, one black, one white—separate and unequal."[30] The Commission pointed to housing inequity as one of the causes of the widespread strife: Black Americans were more likely to live in housing that cost more than white Americans' housing despite being three times more likely than white Americans to live in "overcrowded and substandard" housing.[31]

To quell racial violence and afford "common opportunities for all within a single society,"[32] the Commission suggested a range of economic and social initiatives.[33] One suggestion was for the government to "[e]nact a comprehensive and enforceable Federal open-housing law to cover the sale or rental of all housing, including single-family homes."[34] Roughly a month after the report's publication, on April 4, 1968, Dr. Martin Luther King, Jr. was assas-

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27. Tenant-on-tenant harassment as discussed herein is a form of third-party harassment. Third-party harassment describes harassment committed by a party that is not the hypothetical defendant but for which that defendant may be responsible. Third-party harassment would not include instances of harassment committed by a landlord's employee for which the landlord would be vicariously liable under traditional agency principles. Meyer v. Holley, 537 U.S. 280, 285 (2003); *see also Vicarious Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

28. For a more detailed and visceral account of that summer, see *The Week*'s photo blog by Kelly Gonsalves, *The 'Long, Hot Summer of 1967': Fifty Years Ago, a Wave of Violent Riots Exposed the Dark Reality of America's Race Problem*, WEEK, https://theweek.com/captured/712838/long-hot-summer-1967 [https://perma.cc/6AKG-VPK4].

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

30. *Id.*

31. *Id.* at 4.

32. *Id.* at 1.

33. *Id.* at 11.

34. *Id.* at 13.

sinated.[35] A week later, on April 11, 1968, Congress passed the FHA as Title VIII of the Civil Rights Act of 1968.[36]

Like Title VII of the Civil Rights Act of 1964,[37] the FHA was designed to remedy the worsening racial divide in the United States.[38] The FHA transformed the landscape of housing law by introducing a federal enforcement mechanism to root out overt and covert discrimination in housing.[39] The Act sought to bring all Americans within "a single society and a single American identity."[40]

2. The FHA's Antidiscrimination Mandate

The FHA ferrets out discrimination in the housing market by prohibiting categories of conduct, which should include harassment that occurs during one's tenancy. The three enumerated categories most relevant to this Note are (1) refusing to sell, rent, or negotiate housing, (2) making housing unavailable, or (3) "discriminat[ing] against any person in the terms, conditions, or privileges" of housing on the basis of a protected characteristic.[41] The first category, which covers actions like refusing to sell to a person because of her protected characteristic, prohibits disparate treatment or conduct that treats a person less favorably on account of her protected characteristic.[42] Such conduct is typically proven by the defendant's discrim-

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35. Jeff Wallenfeldt, *Assassination of Martin Luther King, Jr.*, ENCYC. BRITANNICA (Mar. 28, 2021), https://www.britannica.com/topic/assassination-of-Martin-Luther-King-Jr (on file with the *Michigan Law Review*).

36. Fair Housing Act, Pub. L. 90-284, §§ 801–819, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601–3631).

37. Civil Rights Act of 1964, Pub. L. 88–352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17); *see infra* Section I.B.1.

38. *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd in part*, 488 U.S. 15 (1988) (per curiam) ("The [FHA and Title VII] are part of a coordinated scheme of federal civil rights laws enacted to end discrimination; the Supreme Court has held that both statutes must be construed expansively to implement that goal.").

39. *See* 42 U.S.C. §§ 3612, 3614; *see also Fair Housing Act*, HISTORY (Jan. 28, 2021), https://www.history.com/topics/black-history/fair-housing-act [https://perma.cc/8KSE-CA2A].

40. KERNER COMMISSION REPORT, *supra* note 29, at 11.

41. Section 3604 makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) 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. . . .

42 U.S.C. § 3604. The FHA also extends its protections to persons with disabilities. *Id.* § 3604(f).

42. *See, e.g.*, Hill v. River Run Homeowners Ass'n, 438 F. Supp. 3d 1155, 1173 (D. Idaho 2020).

inatory animus.[43] The second category, which covers actions like zoning decisions, prohibits conduct that has the effect of discriminating against a person because of her protected characteristic, even where no showing of discriminatory animus can be made.[44]

Circuit courts differ on the reach of the third category of conduct: discrimination in the "terms, conditions, or privileges" of housing. If, as the Seventh, Ninth, and Tenth Circuits have held, the "terms, conditions, or privileges" of one's housing preserve the enjoyment of one's housing, then the FHA prohibits harassment.[45] But if that phrase relates only to acquiring housing, as the Fifth Circuit has held, then the FHA likely does not prohibit harassment.[46] Although the Supreme Court has yet to directly answer the question of the FHA's post-acquisition applicability,[47] the Court has interpreted similar language in 42 U.S.C. § 1981, which prohibits racial discrimination in contracts, as evincing Congress's intention to prohibit harassment *after* contract formation and preserve an employee's enjoyment of the contract.[48] The Court's decision in that analogous context is a thumb on the scale for the Tenth, Ninth, and Seventh Circuits' broad interpretations of the FHA's post-acquisition applicability.

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43. *See, e.g.*, United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir. 1992) (applying the three-part *McDonnell Douglas* framework to prove disparate treatment in housing cases).

44. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539–40 (2015).

45. *See, e.g.*, Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 861–62, 866–67 (7th Cir. 2018) (holding that "privileges" may extend to use and quiet enjoyment of one's home, not just occupancy); Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009); Honce v. Vigil, 1 F.3d 1085, 1088, 1090 (10th Cir. 1993). The Sixth and Eighth Circuits have held that hostile housing environment claims are cognizable under the FHA, although it's not clear if the Eighth Circuit would entertain the claim under § 3604 or § 3617. *See* Shellhammer v. Lewallen, No. 84-3573, 1985 WL 13505, at *1–3 (6th Cir. July 31, 1985); Quigley v. Winter, 598 F.3d 938, 946–47 (8th Cir. 2010).

46. *See, e.g.*, Cox v. City of Dallas, 430 F.3d 734, 745–47, 745 n.32 (5th Cir. 2005). In other words, the FHA would only reach conduct related to the acquisition of housing or a tenant's actual or constructive eviction from that housing. *Cox*, 430 F.3d at 746. The Second Circuit did not interpret the FHA's post-acquisition scope in its *Francis* en banc decision. Francis v. Kings Park Manor (*Francis II*), 992 F.3d 67, 80 n.50 (2d Cir. 2021).

47. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972) (holding that a Black and a white tenant had standing to challenge their landlord's discriminatory renting, depriving them of the opportunity to live in an integrated community). Further, Congress amended the FHA in 1988 and did not affect any changes related to the Act's post-acquisition applicability, signing onto the Court's application of the FHA in *Trafficante* de facto. *See* Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 40 (2008).

48. *See* CBOCS W., Inc. v. Humphries, 553 U.S. 442, 450 (2008); En Banc Opening Brief of Appellant Donahue Francis at 25, Francis v. Kings Park Manor, Inc. (*Francis II*), 992 F.3d 67 992 (2d Cir. 2021) (No. 15-1823-cv) (arguing same); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1985) ("[T]he 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." (alteration in original) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971))).

Another key provision of the FHA is codified at 42 U.S.C. § 3617. It prohibits any retaliation against, interference with, or intimidation of a person seeking to exercise their fair housing rights.[49] Circuit courts have differed on the reach of this section as well, with the Third, Sixth, Seventh, and Eighth Circuits holding that § 3617 applies to post-acquisition conduct regarding the enjoyment of one's tenancy and the Fifth Circuit holding that § 3617 must apply only to acquisition conduct regarding the sale or rental of housing.[50]

Viewed alongside § 3604, § 3617 supports the interpretation of the FHA as prohibiting hostile housing environments.[51] Courts have held that § 3617 can be violated absent a violation of § 3604.[52] So the FHA prohibits conduct that does not rise to the level of a § 3604 violation but might be comparable to such a violation. For example, while a typical violation of § 3604 might concern a person of color being told that an apartment is unavailable for rent because of her race, a violation of § 3617 might arise from a landlord threatening to evict a tenant after learning that her roommate is a person of color.[53] In other words, § 3617 prohibits conduct that threatens a tenant's hold on her home even if it does not fully deprive her of it. Together, § 3604 and § 3617 should prohibit discrimination, intentional or unintentional, that interferes with a tenant's enjoyment of her home, such as tenant-on-tenant harassment.[54]

3. The FHA's Reach: Access and Beyond

While courts of appeals have disagreed on the FHA's reach, the congressional purpose of the Act should counsel in favor of interpreting the FHA to

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49. 42 U.S.C. § 3617 ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.").

50. *Compare* Revock v. Cowpet Bay W. Condo. Ass'n, 853 F.3d 96, 112–13 (3rd Cir. 2017), Mich. Prot. & Advoc. Serv., Inc. v. Babin, 18 F.3d 337, 347 (6th Cir. 1994), *Wetzel*, 901 F.3d at 861, *and Quigley*, 598 F.3d at 948, *with* Reule v. Sherwood Valley I Council of Co-owners Inc., 235 Fed. App'x 227, 227 (5th Cir. 2007) (per curiam).

51. *See* Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case Out of It?*, 61 CASE W. RSRV. L. REV. 865, 930 (2011) (arguing "a § 3617 violation requires no more than that a neighbor's invidiously motivated harassment hamper the target family's peaceful enjoyment of their home").

52. *See, e.g.*, Bloch v. Frischholz, 587 F.3d 771, 781–82 (7th Cir. 2009); Hidden Vill., LLC v. City of Lakewood, 734 F.3d 519, 528 (6th Cir. 2013).

53. *See Bloch*, 587 F.3d at 781; *Hidden Vill.*, 734 F.3d at 528; *see also* Stern v. Michelangelo Apartments, Inc., No. 97-CV-9532, 2000 WL 33766107, at *12–13 (S.D.N.Y. Jan. 24, 2000) (finding a violation of § 3617 where the condo board refused to renew a sublease of a white woman because her Black boyfriend had moved in with her).

54. *See, e.g.*, *Wetzel*, 901 F.3d at 861–62, 866–67 (explaining that together, and likely separately, § 3604(b) and § 3617 prohibit hostile housing environments); *cf.* 24 C.F.R. § 100.600(a)(2) (2020) (defining hostile environment harassment by borrowing key phrases from § 3604 and § 3617).

apply post-acquisition.[55] The stated purpose of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States."[56] In its original proposed purposive language, Congress made its antidiscrimination plan explicit: "to prevent . . . discrimination . . . in the purchase, rental, lease, financing, use and occupancy of housing throughout the Nation."[57] The inclusion of the word "occupancy" evidences a reach beyond the point of housing access. The final purposive language, "to provide . . . for fair housing," is broader and captures both the affirmative and preventative functions of the FHA.[58] It would be incoherent for Congress to enact legislation to realize the dream of an integrated society only to halt the application of that legislation once a person acquires the keys to her home. An integrated society is one that remains integrated.[59]

4. Persons Subject to Suit Under the FHA

The language of the FHA allows for liability against a person even when she is not the one discriminating or harassing because the FHA does not identify defendants subject to suit. The FHA allows anyone who has suffered or believes she soon will suffer injury "by a discriminatory housing practice" to vindicate her rights, regardless of the perpetrating party.[60] The FHA's text details categories of prohibited discriminatory practices, defining "*what* is prohibited, not *who* is subject to those prohibitions."[61] In this way, the FHA is unlike its employment and education complements, which identify for whom it is illegal to engage in prohibited conduct.[62] Congress has shown it

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55. HUD has interpreted (and continues to interpret) the FHA to apply post-acquisition. Brief of the U.S. as Amicus Curiae in Support of Neither Party, Francis v. Kings Park Manor, Inc. (*Francis II*), 992 F.3d 67 (2d Cir. 2021) (No. 15-1823-cv); Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,059 (Sept. 14, 2016) [hereinafter Hostile Environment Harassment] (to be codified at 24 C.F.R. pt. 100).

56. 42 U.S.C. § 3601.

57. 112 CONG. REC. 9396 (1966).

58. 42 U.S.C. § 3601; *see also* 42 U.S.C. § 3604 (prohibiting discrimination); 42 U.S.C. § 3608 (stating that the Secretary of Housing and Urban Development must publish certain reports and "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter"). The FHA's preventative function prohibits discrimination in housing and its affirmative function obligates HUD to "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." NAACP v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 155 (1st Cir. 1987).

59. For a fuller discussion of the applicability of FHA to post-acquisition discriminatory conduct, see generally Oliveri, *supra* note 47, and Aric Short, *Post-acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006).

60. 42 U.S.C. §§ 3602(i)(1), 3613(a).

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

62. *See* Oliveri, *supra* note 47, at 40 ("[U]nlike Title VII, the FHA does not define who is a proper defendant. Instead, it lists 'discriminatory housing practices,' and anyone who is capable of engaging in such practices is a proper defendant." (quoting 42 U.S.C. § 3602(f))). *Compare* 42

knows how to limit liability by limiting the defendants subject to suit in other civil rights statutes. Because its language is purposefully "broad and inclusive,"[63] the FHA is even better suited than analogous civil rights statutes (which *do* recognize liability for third-party harassment) for imposing liability on defendants based on harassment by and of third parties.

B. *Liability for Third-Party Harassment in Other Civil Rights Contexts*

When faced with questions of first impression in interpreting a civil rights statute, courts often use rules established under other civil rights statutes as guideposts due to their similar phrasing and shared purposes. On the question of a landlord's liability for tenant-on-tenant harassment, civil rights causes of action including Title VII, the Americans with Disabilities Act (ADA), Title IX, *Bivens*, and § 1983 are useful analogies. Each holds authority figures liable for their action or inaction in response to third-party harassment. Liability for third-party harassment is recognized across the different contexts of work, schools, and prisons because in each of these contexts the employees, students, or prisoners have relinquished some kind of control over their environment to these institutions and these institutions owe them some protection in return.[64] Because tenants—like employees, students, and prisoners—cede control over their environment to an authority figure, namely their landlord, it would be inconsistent within this patchwork of civil rights enforcement mechanisms for the FHA not to similarly protect the home by recognizing a landlord's liability for tenant-on-tenant harassment.

1. Title VII, the ADA, and Negligence

With language strikingly similar to the FHA,[65] Title VII and the ADA hold an employer liable when an employee or a customer harasses another employee and the employer's negligence was a cause of the harm to the harassed employee.[66] In other words, an employer's liability turns on the rea-

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U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . ."), *and* 20 U.S.C. § 1681(a)(1) ("[T]his section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."), *with* 42 U.S.C. § 3604 ("[I]t shall be unlawful . . . .").

63. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

64. *Cf. infra* Section III.A.

65. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534–36 (2015).. *Compare* 42 U.S.C. § 3604(b) ("To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . ."), *and* 42 U.S.C. § 2000e-2(a)(1) ("[T]o discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ."), *with* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual . . . in regard to . . . other terms, conditions, and privileges of employment.").

66. Examples of cases in the employer context include, but are not limited to, *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726, 755 (10th Cir. 2014), and *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1110 (8th Cir. 1997). Though the Supreme Court has never directly held

sonableness of her use of, or her failure to use, means within her control to remediate the prohibited conduct of which she knew or should have known.[67]

Title VII and the ADA impose liability on an employer when he has constructive knowledge, not actual knowledge.[68] An employer has constructive knowledge where the employer has enough information that would suggest that harassment is occurring.[69] With a constructive notice and negligence standard, an employer has an affirmative duty to take steps to discover and remedy the prohibited acts.[70]

For example, in *Dunn v. Washington County Hospital*, the Seventh Circuit held that the defendant-hospital was liable for the sexual harassment that a doctor, an independent contractor with the hospital, inflicted on the plaintiff-nurse, an employee.[71] Initially, the district court threw out the suit because the hospital could not be liable for an independent contractor's actions under agency principles.[72] The Seventh Circuit reversed the district court, holding that the employer's liability for the harassment of an employee did not turn on the relationship between the hospital and the harasser.[73] The hospital would be just as liable for its negligence if the harasser were a patient or even "a macaw."[74] The court reasoned that, for the purpose of lia-

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that an employer will be liable for its negligence, the Court relied on this assumption in *Vance v. Ball State University*, 570 U.S. 421 (2013). *See* Samuel R. Bagenstos, *Formalism and Employer Liability Under Title VII*, 2014 U. CHI. LEGAL F. 145, 147–48. For an example of a case in the ADA-employment context, see *Benavides v. City of Oklahoma City*, 508 F. App'x 720, 723 (10th Cir. 2013).

67. *See* May v. Chrysler Grp., LLC, 716 F.3d 963, 973 (7th Cir. 2013) (holding that an employer's liability for coworker-on-coworker harassment turned on whether the employer "t[ook] steps reasonably calculated to end the harassment").

68. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998) ("[E]mployers may be held liable [for both co-worker and customer harassment] . . . if they 'fail[] to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known.'" (quoting Hirschfeld v. N.M. Corr. Dep't, 916 F.2d 572, 577 (10th Cir. 1990))); Folkerson v. Circus Circus Enters., 107 F.3d 754, 756 (9th Cir. 1997) ("[A]n employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct."). *Compare Constructive Notice*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . . ."), *with Actual Notice*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Notice given directly to, or received personally by, a party.").

69. Kunin v. Sears Roebuck & Co., 175 F.3d 289, 294 (3d Cir. 1999).

70. *Cf.* Huston v. Procter & Gamble Paper Prods. Corp., 568 F.3d 100, 104–05, 109 (3d Cir. 2009) (rejecting a finding of constructive knowledge where the employees who observed the harassment were not responsible for correcting it, had no duty to report, and had no basis from which knowledge could be imputed to management).

71. 429 F.3d 689, 690–91 (7th Cir. 2005).

72. *Dunn*, 429 F.3d at 690; *see Respondeat Superior*, BLACK'S LAW DICTIONARY (11th ed. 2019).

73. *Dunn*, 429 F.3d at 691.

74. *Id.*

bility, the identity of the harasser does not matter; what matters is how an employer responds to the harassment.[75]

2. Title IX, § 1983, *Bivens*, and Deliberate Indifference

Similar to the employment context, authority figures like school officials and prison guards can be liable for student-on-student harassment or prisoner-on-prisoner harassment.[76] In those contexts, the authority figures are liable for their deliberate indifference to the harassment.

In order to be held liable for damages under Title IX for third-party harassment, the defendant must have been (1) *deliberately indifferent* to (2) *known* acts of harassment and mus (3) *exert substantial control* over the harasser and the environment of harassment.[77] For example, in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the plaintiff sued a school on behalf of her minor daughter who had suffered repeated sexual harassment from a classmate.[78] Both the plaintiff and the minor daughter reported the harassment to the school, but the school took no action.[79] The Court held that because Title IX is Spending Clause legislation and a recipient of federal funds must be put on notice of the conditions Title IX attaches to federal funding, a school could only be liable under Title IX if it displays deliberate indifference to known acts of harassment.[80] The Court interpreted the language of Title IX and its enforcement scheme to place schools on notice that they could be liable for their own *intentional* conduct.[81] Because of this intent requirement, which differentiates Title IX from Title VII, and Title IX's language, the Court held that for a school to be liable it must exert substantial control over both the harasser and the context where the harassment took place.[82]

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75. *Id.*

76. Landlords are authority figures similar to employers, school officials, and prison guards in that they assume more relative and relevant control over the housing environment than tenants.

77. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643–45 (1999).

78. *Id.* at 633–34.

79. *Id.*

80. *Id.* at 640–43.

81. *Id.* at 640–42.

82. *Id.* at 644–46 ("These factors combine to limit a recipient's damages liability . . . . Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's programs." (quoting select words from Title IX)). In other words, a school's liability turns on the identity of a harasser (i.e., student or visitor) and where the harassment took place (i.e., in school during school hours or off campus). *See id.* at 646. Note that negligence is not *intentional* conduct. *Cf.* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 967 (1993) (defining "negligent discrimination" under Title VII as when "[e]mployers are held liable not because they have engaged in intentional wrongs, but because they have failed to conform their conduct to the standard of reasonableness required by their special relationship with their employees, which requires them to use great care in protecting employees from harassment").

Similar to Title IX, claims of third-party harassment are cognizable under § 1983 and *Bivens* causes of actions when authority figures are deliberately indifferent to harassment. Section 1983 and *Bivens* causes of actions allow individuals to mount damages suits against individual government officials, federal or local, that deprive them of their constitutional rights.[83] In order for a government official to be liable for third-party harassment that deprives individuals of their constitutional rights, the official must have had actual notice of the harassment.[84] For example, a federal, state, or municipal corrections officer will be liable for prisoner-on-prisoner harassment which deprives a plaintiff of her Eighth Amendment protections where the officer had actual notice of the harassment.[85] And while the Supreme Court has not directly answered the question of when a state or municipal official of a public school can be liable for her deliberate indifference to student-on-student harassment in violation of the Equal Protection Clause,[86] circuit courts have imported the actual notice requirement from Title IX.[87]

Title IX, § 1983, and *Bivens* causes of action differ from Title VII, the ADA, and the FHA in important ways. While Title IX is a piece of Spending Clause legislation that covers conduct of schools receiving federal funds,[88] the FHA—not unlike Title VII—was passed pursuant to Congress's authority under the Commerce Clause to regulate the housing market.[89] And in the case of

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83. *See* 42 U.S.C. § 1983 (stating that state and municipal officials can be liable for damages for causing constitutional injuries); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that federal officials can be liable for damages for causing constitutional injuries).

84. This liability rule does not detail when a government supervisor or entity may be liable for the constitutional injury caused by a government employee harassing an individual; there, something less than actual notice will suffice. *Compare* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 412–13 (1997) ("[W]e must ask whether a full review of Burns' record reveals that Sheriff Moore *should have* concluded that Burns' use of excessive force would be a *plainly obvious* consequence of the hiring decision." (emphasis added)), *with* Farmer v. Brennan, 511 U.S. 825, 841 (1994) (denying that the deliberate indifference of a prison official with respect to prisoner-on-prisoner harassment could be "premised on obviousness or constructive notice" rather than actual, subjective awareness).

85. *See, e.g.*, *Farmer*, 511 U.S. at 837.

86. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256–58 (2009) (noting that a public entity's liability for student-on-student harassment will be established differently under Title IX than § 1983 but not discussing the implications of such parallel suits against individual officials).

87. *See, e.g.*, Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 852 (6th Cir. 2016) ("The deliberate indifference standard used for proving a § 1983 equal protection violation in peer harassment cases is 'substantially the same' as the deliberate indifference standard applied in Title IX cases." (quoting Williams *ex rel.* Hart v. Paint Valley Loc. Sch. Dist., 400 F.3d 360, 369 (6th Cir. 2005))). *But see* Feminist Majority Found. v. Hurley, 911 F.3d 674, 703 (4th Cir. 2018) (citing *Stiles* with approval but also requiring a showing of discriminatory intent in addition to deliberate indifference to establish an equal protection violation).

88. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999).

89. *See* Seniors C.L. Ass'n v. Kemp, 965 F.2d 1030, 1033–34 (11th Cir. 1992) (upholding the constitutionality of the FHA as a piece of Commerce Clause legislation); *see also* 42 U.S.C. § 2000e (containing the requisite "affecting commerce" language in Title VII).

§ 1983 and *Bivens* actions, the underlying injuries are constitutional injuries, and "[m]ere negligent governmental conduct . . . cannot constitute a constitutional violation."[90] Despite these differences among the different civil rights causes of action, they all recognize some form of liability for an authority figure's action or inaction in response to acts of harassment between equals. The FHA should be read similarly.

II. CURRENT ARTICULATIONS OF A TENANT-ON-TENANT LIABILITY RULE

While the FHA's text, purpose, and relationship to other civil rights statutes support holding a landlord liable for tenant-on-tenant harassment in certain circumstances, the FHA on its face does not state what those circumstances should be. Where liability rules have been articulated—by Department of Housing and Urban Development (HUD) agency rulemaking, by the Seventh Circuit, and by the Second Circuit—these rules have differed significantly from one another. Borrowing from Title VII, the HUD Rule envisions a negligence standard of liability; borrowing from Title IX, the Seventh Circuit establishes a deliberate indifference standard of liability; and the Second Circuit forecloses such liability in the standard housing context. The HUD Rule is the most doctrinally justified rule and is best suited to furthering tenant protections.

A. *The HUD Rule: Negligence Liability*

In 2016, HUD promulgated a regulation clarifying in relevant part that a person could be directly liable for a third party's prohibited conduct, which would include harassment.[91] According to HUD, this rule clarified its interpretation of the FHA rather than creating new or additional theories of lia-

90. Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 689–90 (2019).

91. Hostile Environment Harassment, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100). This Note focuses on cases in which courts decide the issue of a landlord's liability for tenant-on-tenant harassment without deferring to HUD's interpretation of the FHA despite it being the role of both courts and agencies to determine the scope of statutory causes of actions. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 94–95 (2005). Court decisions are stickier than agency regulations. Precedential decisions control lower courts and Supreme Court decisions get stare decisis, whereas agency regulations interpreting ambiguous statutes can change so long as they remain reasonable. *Cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (explaining the interaction of *Chevron* and stare decisis doctrine). As relevant here, HUD has already flip-flopped on its willingness to commit to this regulation: under the Obama Administration, HUD published the tenant-on-tenant harassment regulation; under the Trump Administration, HUD moved to publish a notice of proposed rulemaking to withdraw the tenant-on-tenant harassment regulation; and just one day into the Biden Administration, HUD withdrew the prior notice of proposed rulemaking to withdraw the regulation, recommitting the agency to supporting the tenant-on-tenant harassment regulation. *See* Amicus Curiae U.S.' Notice Under Fed. Rule of App. Proc. 28(j), Francis v. Kings Park Manor, Inc. (*Francis II*), 992 F.3d 67 (2d Cir. 2021) (No. 15-1823-cv).

bility.[92] HUD wanted to clarify its position to account for the added intrusiveness of harassment in the home as compared to the workplace.[93]

HUD borrows much of its landlord-liability rule from Title VII.[94] Like employers who allow a hostile workplace, landlords will be liable for their negligence in the face of a third party's discriminatory conduct, including for creating a hostile housing environment.[95] To make out a claim under the HUD Rule, a tenant must demonstrate that (1) a third party subjected her to a hostile housing environment; (2) her landlord knew or should have known about the hostile housing environment; and (3) the landlord did not act to end the harassment, though she could have.[96]

The Rule's second element amounts to a constructive notice requirement. Despite criticism on this point during the notice-and-comment period, HUD retained the "knew or should have known" standard to account for situations in which an uninvolved party might report observed harassment.[97] HUD uses this standard to make clear its expectation that a landlord take affirmative steps to provide a welcoming and harassment-free home.[98] In this way, like Title VII, the FHA obligates landlords to employ a variety of tools to protect their tenants from harassment, up to and including eviction.[99]

B. *The Seventh Circuit Rule: Deliberate Indifference*

Two years after the HUD Rule was promulgated, the Seventh Circuit became the first court of appeal to decide when a landlord would be held liable for tenant-on-tenant harassment. In *Wetzel v. Glen St. Andrew Living Community, LLC*, Marsha Wetzel described the plight she faced as a gay woman living in a senior living facility.[100] A few months into her tenancy and until

92. Hostile Environment Harassment, 81 Fed. Reg. at 63,055.

93. *Id.* at 63,054–55. Notably, the HUD Rule refuses to import the affirmative defenses available to employers for supervisory harassment of employees into the housing context. 24 C.F.R. § 100.600(a)(2)(ii) (2020).

94. *See supra* Section I.B.1.

95. 24 C.F.R. § 100.7(a)(iii) (2020).

96. Hostile Environment Harassment, 81 Fed. Reg. at 63,068–69.

97. *Id.* at 63,066–67.

98. *Id.* at 63,067.

99. *Id.* at 63,071. Even where a housing provider may not be able to control the harasser, HUD still interprets its rule as obligating a landlord to respond effectively to a tenant's complaint. *See id.*

100. 901 F.3d 856, 859 (7th Cir. 2018). It is unclear how much of the Seventh Circuit's reasoning turned on the fact that Ms. Wetzel's abuse was covered by a Tenant's Agreement obligating all tenants to refrain from disturbing their cotenants' enjoyment of the community, that Ms. Wetzel's abuse occurred predominantly in common areas, or that the living facility limited Ms. Wetzel's access to common areas to cure the harassing behavior. *Wetzel*, 901 F.3d at 859–60; *see also Francis I*, 944 F.3d 370, 391 (2d Cir. 2019) (Livingston, J., dissenting) (emphasizing management's breach of the Tenant's Agreement as a distinguishing factor of Wetzel's case). However, since the Seventh Circuit frames its holding expansively, this Note will not confine this holding to the opinion's specific facts. *Id.* at 859 ("[The FHA] creates liability

she commenced suit, Wetzel was subjected to cotenant verbal harassment ("fucking [d-word]," "fucking [f-word]," "homosexual bitch"), threats (a resident said he would "rip [Wetzel's] tits off"), and violence (a resident struck her so hard in the back of the head that she fell off the motorized scooter she depended on for mobility).[101] The Seventh Circuit held that defendants would be liable if they had actual knowledge of the harassment and were deliberately indifferent to it.[102]

In developing that liability test, the court looked to Title VII and Title IX as blueprints, ultimately concluding that Title IX was the more appropriate guideline.[103] In so doing, the Seventh Circuit failed to account fully for the similarities of the parallel Title VII context and overestimated the similarities of the parallel Title IX context. Examining the employer context, the Seventh Circuit pointed to the Supreme Court's decision in *Burlington Industries, Inc. v. Ellerth*, a case where a supervisor harassed an employee and the Court looked to agency principles to determine when to apply vicarious liability to an employer.[104] Despite finding no textual basis for applying different liability rules in the FHA than in the Title VII context, the Seventh Circuit declined to apply the Title VII rule to the FHA because of the differences between the workplace and the home.[105] In the workplace, agency principles counsel for imputing liability vicariously to an employer for the acts of her employee based on the scope of that employee's duty and her relationship to the employer.[106] Tenants neither have such a clear duty to their landlords nor represent their landlords in the housing context.

This difference between the employment and the housing context also led the Seventh Circuit to decline to apply the HUD Rule because the Rule borrowed too much from Title VII principles.[107] However, the Seventh Circuit neglected to consider the Title VII contexts unrelated to agency principles in which an employer is directly, not vicariously, liable for his employ-employee's discriminatory conduct. Such is the case, for example, where an employer is liable for its negligence in failing to prevent or remediate a customer's harassment of an employee.[108]

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against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment.").

101. *Wetzel*, 901 F.3d at 860 (quotes have been altered to omit homophobic slurs and to avoid publication of oppressive language). The court deemed sexual-orientation discrimination sex-based discrimination under the FHA, a point uncontested by the parties. *Id.* at 862.

102. *Id.* at 864.

103. *Id.* at 863–64.

104. 524 U.S. 742, 759–65 (1998); *see supra* note 27; *see also supra* Section I.B.1.

105. *Wetzel*, 901 F.3d at 863.

106. *See Burlington Indus.*, 524 U.S. at 743 (citing RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. INST. 1958)).

107. *Wetzel*, 901 F.3d at 866. The Seventh Circuit also said that HUD's analysis was too underdeveloped to adopt yet. *Id.*

108. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998).

The Seventh Circuit then turned to the Title IX context and adopted the Supreme Court's holding in *Davis*, where a school board could only be liable if it was deliberately indifferent to known student-on-student harassment in schools.[109] The Seventh Circuit imported the Title IX standard for liability into the FHA despite the fact that Title IX—but not the FHA—is Spending Clause legislation and thus requires intentional conduct for liability.[110] The Supreme Court, however, has already held that a finding of intent is not necessary for liability in the context of the FHA.[111] As a result, the Seventh Circuit introduced an incongruity into FHA doctrine.

C. *The Second Circuit Rule: No Liability Without Discriminatory Intent*

In its first opinion (later withdrawn), the Second Circuit was guided by the text, history, and jurisprudence of the FHA, as well as the HUD Rule, when it held a landlord liable for her negligence in responding to tenant-on-tenant harassment.[112] In its en banc opinion, however, the Second Circuit stated that a landlord cannot be liable for failing to respond to tenant-on-tenant harassment.[113] Specifically, the Second Circuit held that a landlord does not violate the FHA absent discriminatory intent.[114] The court assumed that a landlord could be liable for her deliberate indifference to complaints of harassment but only where the landlord "exercised substantial control over the context in which the harassment occurs and over the harasser."[115] Something more than the standard landlord-tenant relationship would be necessary for a landlord's deliberate indifference to give rise to liability under the Second Circuit's rule.

The en banc opinion rejected analogy to the Title VII employment context because of the lack of agency relationship in the housing context and the degree of control employers have over their agents.[116] Like the Seventh Circuit, the Second Circuit seems to have ignored those cases in which employers are liable for their negligence in responding to employees or customers who harass other employees with whom they do not have an agency relationship.[117]

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109. *Wetzel*, 901 F.3d at 863–64 (citing Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999)); *see also supra* Section I.B.2.

110. *Wetzel*, 901 F.3d at 864.

111. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 534 (2015). It is an open question whether disparate-impact claims are cognizable under Title IX. *See, e.g.*, Doe v. Univ. of Denver, 952 F.3d 1182, 1193 n.8 (10th Cir. 2020); *see also* Poloceno *ex rel.* A.I. v. Dall. Indep. Sch. Dist., 826 Fed. App'x 359, 362–63 (5th Cir. 2020) ("[O]nly *intentional* discrimination, not disparate impact, is actionable under Title IX.").

112. Francis v. Kings Park Manor, Inc., 917 F.3d 109, 120–21 (2d Cir.), *withdrawn*, 920 F.3d 168 (2d Cir. 2019).

113. Francis v. Kings Park Manor, Inc. (*Francis II*), 992 F.3d 67, 70 (2d Cir. 2021).

114. *Id.* at 73–74.

115. *Francis II*, 992 F.3d at 75.

116. *Id.* at 76.

117. *See supra* Section I.B.1.

The en banc court omitted any real discussion of the text, history, or purpose of the FHA, quickly setting aside similarities between the FHA and Title VII based on their similar verbiage.[118] Instead, its reasoning for foreclosing liability turned on the practical difficulties of asserting control in the housing context. Though the court acknowledged that other laws may compel landlords to control third parties,[119] it denied that the power to evict is sufficient to hold a landlord liable when he fails to protect a tenant from another tenant.[120] But this is wrong on two key grounds. First, the case the Second Circuit cited for this proposition revolved around whether the power to evict gave the landlord a general duty to protect clients from purely *personal* disputes.[121] Such conduct is not prohibited by the FHA,[122] but the FHA does impose additional duties on landlords to keep their housing free from discrimination.[123] Second, landlords have much more than just eviction at their disposal. They can put up antiharassment signage, write a letter, threaten eviction, assess fines, restrict access to common areas and services like parking and laundry, offer to relocate either party, cover the costs associated with the harassed tenant's move, or refer the dispute to a city civil agency with relevant expertise.[124] Any of these actions might remedy the harm from tenant-on-tenant discriminatory harassment.

The court puzzlingly said that because the landlord owes a contractual duty that makes her liable for the acts of third parties in some circumstances, tenants may already have avenues to seek contractual remedies such as rent abatement.[125] This is incorrect because it misses the very work that the FHA is doing. For one, the FHA offers remedies unavailable in most housing court actions.[126] Additionally, the court wrongly suggests that a landlord's liability for tenant-on-tenant harassment is anomalous with tort principles.[127] However, the Restatement (Second) of Torts recognizes circumstances under which one can be liable for a third party's criminal or tortious conduct without any agency relationship.[128] This is critical because, as the

118. *Francis II*, 992 F.3d at 76.

119. *See infra* Section III.C.

120. *Francis II*, 992 F.3d at 77 & n.38 (citing Blatt v. N.Y.C. Hous. Auth., 506 N.Y.S.2d 877, 878–79 (App. Div. 1986)).

121. *Blatt*, 506 N.Y.S.2d at 879.

122. *See, e.g.*, Bloch v. Frischholz, 587 F.3d 771, 780 (7th Cir. 2009).

123. 42 U.S.C. §§ 3604, 3617.

124. *See Francis II*, 992 F.3d at 94–96 (Lohier, J. dissenting in part and concurring in part).

125. *Id.* at 76 n.34 (majority opinion).

126. The FHA offers relief injunctions, punitive damages, and attorney's fees. See 42 U.S.C. § 3613(c). Such remedies are not always available in housing actions. *See, e.g.*, 43 AM. JUR. PROOF OF FACTS 3D 329, § 17 (1997); 25 SAMUEL WILLISTON ET AL., WILLISTON ON CONTRACTS § 66:88 (4th ed. 2019).

127. *Francis II*, 992 F.3d at 76.

128. *See* RESTATEMENT (SECOND) OF TORTS §§ 302B, 449 (AM. LAW INST. 1965).

Second Circuit pointed out, Congress passed the FHA intending to incorporate background tort principles.[129]

Moreover, the nature of compensatory damages makes them insufficient here by definition. Compensatory damages aim to make an injured person whole by compensating them for lost value.[130] Here, compensation in the form of a rent abatement means that the only harm being compensated is the value the tenant lost in the apartment.[131] The only harm recognized by the protected-characteristic harassment, then, is an individual one to the tenant's property and not to the tenant's person, the entire building, the community, or the statutory scheme as a whole. It cannot constitute "fair housing" when a suffering tenant turns to her landlord and is given a coupon to compensate the value she lost by living in a place where her dignity was compromised and her safety threatened. The FHA requires more to acknowledge the full scope of harms it seeks to redress.

III. NEGLIGENCE AND THE SPECIAL STATUS OF THE HOME

The HUD Rule for landlord liability for tenant-on-tenant harassment, a negligence standard adapted from the Title VII context, is the best liability rule to apply to landlords when there is tenant-on-tenant harassment. It is supported by the text and history of the FHA and consistent with similar liability rules in other civil rights contexts. Even further, a negligence standard is preferable to any other available standard of liability because it better aligns with analogous civil rights schemes, accounts for the special status of the home, and reflects the common law landlord-tenant relationship.

A. *The Space Between VII and IX*

The text and purpose of the FHA protect a tenant against third-party harassment. Other civil rights statutes, including Title VII and Title IX, have recognized liability for third-party harassment either for an authority figure's negligence or for their deliberate indifference. Unlike a negligence standard, in which a lapse in duty leads to liability, deliberate indifference requires a finding of a mental state—specifically, a "[c]onscious disregard of the harm that one's actions could do to the interests or rights of another."[132] The FHA is more similar to civil rights statutes requiring negligence than those requiring deliberate indifference. The FHA, like Title VII, is a piece of Commerce Clause legislation and not Spending Clause legislation like Title IX, under which the Supreme Court held schools liable for their *intentional* discriminatory conduct.[133] The Supreme Court has also already recognized

129. *Francis II*, 992 F.3d at 76 & n.35 (citing Meyer v. Holley, 537 U.S. 280, 285 (2003)).

130. RESTATEMENT (SECOND) OF TORTS § 903 (AM. L. INST. 1979).

131. *See* 43 AM. JUR. PROOF OF FACTS 3D 329, § 18.

132. *Deliberate Indifference*, BLACK'S LAW DICTIONARY (11th ed. 2019).

133. *See supra* note 89; *see also supra* notes 81–82 and accompanying text.

that defendants can be liable under the FHA without the plaintiff showing intentional discriminatory conduct.[134] Also, unlike § 1983 or *Bivens*, the FHA does not aim to cure unconstitutional conduct, so merely negligent violations of the FHA should be cognizable.

The choice of liability rule has a real impact on litigation outcomes by defining a plaintiff's evidentiary burden.[135] Although harassment is more invidious in the home than at work or school,[136] the FHA is closer to Title VII than it is to Title IX and should borrow its liability rule from the former. There is no reason to add to an injured tenant's burden by adopting a deliberate indifference standard.

B. *A Negligence Standard Fosters Change*

Because of the added invidiousness of harassment in the home, a negligence standard is preferable to a deliberate indifference standard because such a standard is more likely to incentivize landlords to take affirmative steps to protect tenants. Under the deliberate indifference standard adopted by the Seventh Circuit based on Title IX, a party is liable under the FHA if her response to known circumstances was clearly unreasonable.[137] Defendants are not liable for circumstances they failed to investigate.[138] Thus, under the Seventh Circuit's deliberate indifference rule, a landlord might have no obligation to affirmatively investigate when she overhears a racial slur, gets a complaint from a tenant about the harassment of another tenant, or gets a vague

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134. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 534 (2015).

135. A negligence standard is easier for a plaintiff to prove than a deliberate indifference standard. *Cf.* Estelle v. Gamble, 429 U.S. 97, 106 (1976); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1606 (2003) (describing a deliberate indifference standard as defendant friendly).

136. Unlike in these contexts, there often can be no physical separation from the harassment in the home:

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

Regina Cahan, Comment, *Home Is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1073. Also, unlike in the context of the workplace, a school, or prison, renters *buy* their rights from their landlords, so landlords are even more deserving of liability.

137. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999) ("School administrators . . . are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."); 1 MARY A. LENTZ, LENTZ SCHOOL SECURITY § 4:13 (2019–2020 ed. 2019) (collecting cases).

138. *See, e.g.*, Doe v. Galster, 768 F.3d 611, 617–18 (7th Cir. 2014).

complaint from the harassed tenant herself. [139] In contrast, under a negligence standard, a court evaluates what action the landlord could have taken in addition to what action was taken in evaluating liability.[140] Such an evaluation encourages landlords to proactively and reasonably respond to complaints.

The HUD Rule defines the reasonableness of the landlord's action in response to tenant-on-tenant harassment based on its likely effectiveness at correcting the wrong.[141] This definition "encourages housing providers to create safe, welcoming, and responsive housing environments by regularly training staff, developing and publicizing anti-discrimination policies, and acting quickly to resolve complaints once sufficient information exists that would lead a reasonable person to conclude that harassment was occurring."[142] By encouraging responsiveness, a negligence standard does more to actually root out discrimination in housing than other standards of liability, furthering the purpose of the FHA.

C. *Negligence Reflects the Landlord-Tenant Relationship*

A landlord's liability for tenant-on-tenant harassment originates not only from the FHA but also from the common law landlord-tenant relationship. As Cassia Pangas argues, liability for tenant-on-tenant harassment is a natural offshoot of the duties a landlord already owe her tenants.[143] In its first question during oral argument, the Second Circuit en banc panel remarked that a landlord's duty to respond to tenant-on-tenant harassment does not seem to comport with the landlord-tenant relationship.[144] This assertion neglects the arc of the landlord-tenant relationship, which, at its

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139. *Cf.* Hostile Environment Harassment, 81 Fed. Reg. 63,054, 63,066–67 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100).

140. *See* 1 LENTZ, *supra* note 137, § 4:13, at 529.

141. *See* Hostile Environment Harassment, 81 Fed. Reg. at 63,071.

142. *Id.* at 63,067.

143. *See* Cassia Pangas, Comment, *Making the Home More like a Castle: Why Landlords Should Be Held Liable for Co-tenant Harassment*, 42 U. TOL. L. REV. 561, 583–86 (2011) (arguing that landlord liability for failing to remediate tenant-on-tenant harassment "naturally flows from the landlord-tenant relationship" (cleaned up)).

144. Chief Judge Livingston asked counsel for Francis:

> You draw an analogy, you mentioned it today and also in your brief, to cases like to *Davis* and *Zeno* which involve school boards being held liable for student-on-student harassment and the theory in these cases is . . . deliberate indifference. . . . And in *Davis* the language is pretty stark, I mean we talk about . . . the custodial authority that the state has over schoolchildren. *Davis* even goes even further, "this degree of supervision and control could not be exercised over free adults." That doesn't seem to me the way we usually think about the relationship between a landlord and tenant. So help me understand how that analogy works, how a landlord could have that degree of control over [a] tenant so that it's fair to hold the landlord liable for the conduct of [the] cotenant.

Oral Argument at 6:28, Francis v. Kings Park Manor, Inc., 992 F.3d 67 (2d Cir. 2021) (No. 15-1823-cv), https://www.courtlistener.com/audio/71872/francis-v-kings-park-manor-in. Note that Francis's counsel responds by stressing that *Davis* does apply in the context of free adults, namely the university context.

foundation, is composed of overlapping tort, contract, and property principles.[145] These overlapping doctrines ensure that the landlord-tenant legal relationship changes alongside evolving socioeconomic reality.

Despite the traditional rule that a landlord would not be liable for tortious injury to her tenant, the law has increasingly recognized that a landlord may be liable to her tenant for her negligence.[146] This evolution began with court recognition of the implied warranty of habitability in *Javins v. First National Realty Corp*.[147] There, the D.C. Circuit imported into the landlord-tenant relationship an implied warranty of quality common in the context of contracts, products liability, and even real property sales.[148] The court said that landlords, too, should be held responsible for the quality of housing stock they lease and that they have an obligation to repair their apartments regardless of the terms of their leases.[149] The court did so in part because the old standard, which disclaimed a landlord's responsibility for preserving the habitability of an apartment, did not align with modern urban conditions.[150] The legal transformation announced in *Javins* has evolved even further—a landlord now owes *a duty of care* to her tenant.[151] Thus, a landlord's liability for failure to remediate harassment of a third party, while an innovation in the law, is not an incongruity.[152]

For example, some courts recognize that a landlord has an affirmative duty to protect against third-party criminal acts in their building, a similar duty to the one proposed by this Note.[153] In the landmark case *Kline v. 1500*

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145. *See* Hostile Environment Harassment, 81 Fed. Reg. at 63,060, 63,067; *see also* Olin J. Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 99 (1982). For another perspective on the relationship between landlords, tenants, and antidiscrimination mandates, illustrating the unique patchwork of overlapping doctrinal obligations that create housing law, see Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1438–42 (2016) (describing discrimination as antithetical to property law principles, not just state or federal equality mandates).

146. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT ch. 17 intro. note (AM. L. INST. 1977).

147. 428 F.2d 1071 (D.C. Cir. 1970); *see also* Browder, *supra* note 145, at 109. Today, the District of Columbia and four states have recognized the implied warranty of habitability as a matter of common law, and every state except for Arkansas has codified the implied warranty of habitability. Memorandum from Alice Noble-Allgire, Rep., to Members of the URLTA Drafting Comm. (Feb. 12, 2012), https://www.nhlp.org/wp-content/uploads/Research-Memo-re-50-State-Survey-of-the-Warranty-of-Habitability.pdf [https://perma.cc/Z6UN-74G6].

148. *Javins*, 428 F.2d at 1075–77.

149. *Id.* at 1079.

150. *Id.* at 1077.

151. 4 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS § 14:76 (Monique C.M. Leahy ed., 2015); *see also* Browder, *supra* note 145, at 155 (concluding that the result of the evolving landlord-tenant relationship in property, contract, and tort has found "a resting place in the traditional law of negligence").

152. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35 (Harvard Univ. Press 2009) (1881) ("[Law] will become entirely consistent only when it ceases to grow.").

153. *See generally* Browder, *supra* note 145, at 145–51 (describing how this rule has developed or has not developed in various state courts). In *Blatt*, discussed *supra* note 121, the

Massachusetts Avenue Apartment Corp., a tenant sued her landlord after suffering an assault and robbery at the hands of an unknown assailant in the hallway of her building.[154] The D.C. Circuit held that a landlord has "the duty of taking protective measures guarding the entire premises and the areas peculiarly under the landlord's control against the perpetration of criminal acts."[155] The court concluded that a landlord's control over a building's common areas, the changing urban environment, and equitable principles counseled in favor of this affirmative duty.[156] Rather than holding that a safe apartment building was part and parcel of a rental lease's implied warranty of habitability, the court built upon its reasoning in *Javins* to extend landlord liability to an additional context.[157] Namely, because the tenant has submitted some relevant power or control to the landlord as a term of his lease, the landlord will be liable for failing to act in a way that decreases reasonably anticipated harm to the tenant.[158]

Both *Javins* and *Kline* exemplify instances of negligence proliferating beyond the traditional landlord-tenant relationship and a landlord's liability growing to accommodate third-party conduct.[159] The same logic undergirding these opinions should lead courts to again recognize a landlord's liability for their negligence in the face of third-party conduct. Just as the changing housing environment led the *Javins* and *Kline* courts to update the common

court recognized a landlord's general duty to protect against "reasonably foreseeable criminal activities of third parties on the landowner's premises" but rejected imposing a greater duty to protect tenants against the criminal activities of other tenants. Blatt v. N.Y.C. Hous. Auth., 506 N.Y.S.2d 877, 877 (App. Div. 1986). Other courts seem not exonerate the landlord based on the identity of the attacked. *See, e.g.,* Tenney v. Atl. Assocs., 594 N.W.2d 11, 15–18, 21 (Iowa 1999).

154. 439 F.2d 477, 478 (D.C. Cir. 1970). While the identity of the assailant was unknown, it was assumed to have not been a tenant; however, it does not seem that the D.C. Circuit majority would have cabined liability based on the identity of the intruder. *Compare Kline*, 439 F.2d at 483 ("[A] duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated."), *with id.* at 489 (MacKinnon, J., dissenting) ("Plaintiff's evidence did not negate that it was a tenant, guest or person properly on the property who committed the offense . . . . So plaintiff's evidence failed to prove a nexus between the alleged deficiencies of the appellee and the cause of any damage to appellant.").

155. *Id.* at 482 (majority opinion); *see also* B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RSRV. L. REV. 679, 690 (1992) ("[The *Kline*] approach to landlord liability has gained widespread acceptance, even in jurisdictions that allow only the narrowest exceptions to general landlord immunity.").

156. *Kline*, 439 F.2d at 481–82.

157. *Id.* at 482.

158. *Id.* at 483.

159. For another example of landlord-tenant law recognizing a landlord's liability for third-party conduct, see RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 6.1 cmt. c (AM. L. INST. 1977) (stating a landlord can be liable to a tenant for the conduct of a third person to whom the landlord also leases that interferes with permissible use of land). There is a growing recognition that a landlord can be liable where a tenant interferes with another tenant's quiet enjoyment. JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, PROPERTY LAW 872 (7th ed. 2017).

law landlord-tenant relationship, the increasing number of hate crimes and instances of housing discrimination counsel further adaptation of that relationship.[160] Like the assault in *Kline*, the harassment in both *Francis*[161] and *Wetzel*[162] took place in common areas, which are the exclusive domain of the landlord. But in addition to lacking control over common areas or entryways, renters agree to live next to whomever the landlord or co-op board selects. Tenants cede control in deciding who their neighbor will be from lease term to lease term.[163] Such a transfer of power counsels for imposing an affirmative duty to remediate conflict that compromises an individual's rights under the FHA.[164]

Contrary to the Second and Seventh Circuits' opinions, a negligence standard of liability for tenant-on-tenant harassment is most consistent with the evolving landlord-tenant relationship at common law. It was particularly important to the *Kline* court that the landlord had actual or constructive notice of the threat that crimes had occurred in the common spaces prior to Kline's attack.[165] The notice requirement is a crucial difference between the Seventh Circuit's deliberate indifference standard, requiring actual notice, and the HUD negligence rule, requiring constructive knowledge.[166] A constructive knowledge requirement is more consistent with the duties a landlord owes her tenant at common law than an actual notice requirement.[167] It is this backdrop that Congress sought to incorporate into the FHA.[168] For this reason, this Note argues for the adoption of a negligence standard with a constructive knowledge requirement as well.

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160. *See supra* note 17.

161. Francis v. Kings Park Manor, Inc. (*Francis I*), 944 F.3d 370, 373 (2d Cir. 2019), *vacated en banc*, 992 F.3d 67 (2d Cir. 2021).

162. Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 860–61 (7th Cir. 2018).

163. After all, Francis's neighbor also harassed him while Francis was within his own apartment. Plaintiff's Memorandum of L., *supra* note 5, at 3.

164. *See* Hostile Environment Harassment, 81 Fed. Reg. 63,054, 63,069 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100) ("We are long past the time when racial harassment is a tolerable price for integrated housing; a housing provider is responsible for maintaining its properties free from all discrimination prohibited by the Fair Housing Act.").

165. Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 483–84 (D.C. Cir. 1970) ("In the instant case, the landlord had notice, both actual and constructive, that the tenants were being subjected to crimes against their persons and their property in and from the common hallways."). Were *Kline* to have required actual notice alone for liability, its inclusion of constructive notice in the cited language would have been superfluous.

166. *See supra* note 68 (distinguishing actual and constructive notice).

167. *See, e.g.*, RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 17.1(1)(b) (AM. L. INST. 1977); *see also* Browder, *supra* note 145, at 132–33 ("It has been seen that the notice requirement has been assumed by some courts to invoke ordinary negligence as the governing theory of liability.").

168. Meyer v. Holley, 537 U.S. 280, 285 (2003).

CONCLUSION

The FHA provided Donahue Francis the right to more protection than he received from his landlord. The purpose and expansiveness of the FHA, covering parties that do not act with discriminatory intent and covering conduct that occurs post-acquisition, accommodates holding landlords liable for negligently failing to remediate tenant-on-tenant harassment of which they knew or should have known. Courts should adopt a negligence standard of liability, as articulated by HUD, because it best comports with existing civil rights doctrine, accounts for the need for heightened protection of the home, and reflects the evolving landlord-tenant relationship.