

UNLAWFUL EVICTIONS OF FEMALE VICTIMS OF DOMESTIC VIOLENCE: EXTENDING TITLE VII'S SEX STEREOTYPING THEORIES TO THE FAIR HOUSING ACT

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INTRODUCTION

On October 15, 2003, Quinn Bouley's husband assaulted her in their apartment. She fled the apartment, called the police, and applied for a re-

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straining order that night. She also pressed criminal charges to which her husband later pled guilty. Three days later, Bouley's landlord, Jacqueline Young-Sabourin, with whom Bouley had no previous problems, served her with an eviction notice requiring her to leave her apartment within 30 days.¹ The notice stated that Bouley had violated the following clause in her lease: "Tenant will not use or allow said premises or any part thereof to be used for unlawful purposes, in any noisy, boisterous or any other manner offensive to any other occupant of the building."² Before sending the eviction notice, Young-Sabourin visited Bouley to discuss what had happened between Bouley and her husband. When Young-Sabourin started questioning Bouley about her personal beliefs and family situation, Bouley got angry, allegedly yelled at Young-Sabourin, and refused to continue the conversation. From this incident, Young-Sabourin concluded that "the violence that ha[d] been happening in [Bouley's] unit would continue" unless she evicted her.³

Bouley sued Young-Sabourin, claiming that her eviction was based on her status as a female victim of domestic violence and therefore constituted sex discrimination in violation of the Fair Housing Act.⁴ The Vermont District Court, issuing a decision on cross-motions for summary judgment, found that Bouley had made a prima facie case of sex discrimination.⁵ The court held that Bouley's claim that "the termination was initiated because she was a victim of domestic violence . . . , if proven, could constitute unlawful discrimination under the Fair Housing Act."⁶ This marks the first time a federal court has suggested that a female victim of domestic violence may state a claim for intentional sex discrimination under the Fair Housing Act.⁷

Although *Bouley* is the first time a federal court has suggested that evictions of female domestic violence victims could constitute sex discrimination, evictions of female domestic violence victims are not a new phenomenon. These evictions, particularly when they result from the victim being physically attacked in her home, have been occurring across the country as a result of zero tolerance and one-strike policies. In 1988, in response to high levels of crime in public and low-income housing, Congress amended the National Housing Act, which governs public housing.⁸ This amendment allowed public housing authorities and landlords in federally assisted housing projects to evict tenants for the criminal activity of others

¹ *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677–78 (D. Vt. 2005).

² *Id.* at 677.

³ *Id.*

⁴ *Id.* at 678.

⁵ *Id.*

⁶ *Id.*

⁷ Danielle Pelfrey Duryea, *Court Recognizes Domestic Violence Survivor's Fair Housing Challenge to Eviction*, 35 HOUSING L. BULL. 181 (2005).

⁸ 42 U.S.C. § 11901(2) (2000).

on their lease, guests, and persons under their control.⁹ Eight years later, determined to fully root out crime from these areas, President Clinton urged Congress to strengthen this eviction power, announcing his support of a “one strike and you’re out” policy¹⁰ and creating incentives for public housing authorities (PHAs) and landlords to actively use their power to evict tenants based on the criminal activities of others on their lease, guests, and persons under their control. In 2002, the Supreme Court held the law and its regulations constitutional, affirming the broad discretion to institute eviction actions under this law conferred upon PHAs and, by extension, other public landlords.¹¹ As exemplified in *Bouley*, private landlords have emulated federal law, utilizing zero tolerance lease provisions that similarly allow them to evict tenants for the criminal actions of their guests or others under their control.¹²

Though not intended to combat domestic violence, these one-strike policies and zero tolerance lease provisions have been used by public and private landlords across the country to evict female domestic violence victims because of the criminal actions of their abusers. Congress recently found that “[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence.”¹³ Specifically, Congress determined that “legal service providers around the country . . . have responded to almost 150 documented eviction cases in the last year alone where the tenant was evicted because of the domestic violence crimes committed against her.”¹⁴ These numbers are probably lower than the actual eviction rates in these situations, because these “women may feel that they do not have cause to challenge strict liability evictions [since] these actions are portrayed as lawful,” making it “extremely likely that domestic violence-related evictions are under-reported.”¹⁵

Landlords defend their right to evict victims of domestic violence by citing the need to protect the health and safety of neighboring tenants and the right of these neighbors to peaceful living. In particular, “[p]roperty managers claim that fellow residents suffer by being forced to witness a violent act” and that victims of domestic violence “[do] not take steps to

⁹ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (1988).

¹⁰ President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), in 1 PUB. PAPERS 79, 83 [hereinafter Clinton, State of the Union Address].

¹¹ See *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

¹² *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677 (D. Vt. 2005); see also Brief for the National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents, *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781), 2001 WL 1663790, at *3 [hereinafter National Network to End Domestic Violence Brief] (providing information about evictions of domestic violence victims generally).

¹³ 42 U.S.C.A. § 14043e(3) (West Supp. 2006).

¹⁴ 42 U.S.C.A. § 14043e(4).

¹⁵ National Network to End Domestic Violence Brief, *supra* note 12, at *9.

prevent a recurrence of violent acts, subjecting other tenants to witness the scene play out time and time again.”¹⁶ Property managers also argue that victims of domestic violence allow a dangerous person onto the premises, thereby creating potential harm for their fellow residents.¹⁷ Finally, those who support the one-strike policy argue that tenants who are in any way responsible for crime do not deserve public housing when there are “good people” facing waitlists of several years to get into these homes.¹⁸

In response to this phenomenon, student scholars and domestic violence advocates have argued for legislative and administrative solutions, most of which focus on creating an exception in the federal one-strike housing law for victims of domestic violence.¹⁹ Indeed, the federal Department of Housing and Urban Development (HUD) initiated some policy changes in 2003 by including an entire section about domestic violence in its Public Housing Occupancy Guidebook.²⁰ However, HUD’s guidebook was not

¹⁶ *Id.* at *8.

¹⁷ *Id.*

¹⁸ President William J. Clinton, Remarks Announcing the “One Strike and You’re Out” Initiative in Public Housing (Mar. 28, 1996), in 1 PUB. PAPERS 582, 583 [hereinafter Clinton, Remarks at One Strike Crime Symposium] (noting that “there are three people . . . for every one person who has a slot in public housing” and the waiting list at that time could be up to four years in many places).

¹⁹ See Eliza Hirst, Note, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL’Y 131, 151–55 (2003) (arguing that public housing authorities should follow the example of some innovative local and state initiatives to work with victims of domestic violence, such as “issuing ‘No Trespass’ orders against abusive guests or household members, distributing literature on domestic violence, and creating safety plans” for domestic violence victims to use in case of emergency); Tara M. Vrettos, Note, *Victimizing the Victim: Evicting Domestic Violence Victims from Public Housing Based on the Zero-Tolerance Policy*, 9 CARDOZO WOMEN’S L.J. 97, 102 (2002) (arguing that “Congress should either amend [the federal housing law] to incorporate a standard of liability that takes into account the totality of the circumstances,” as opposed to the current no fault standard, “or create an exception for battered women in order to adhere to the policy of protecting domestic violence victims and properly serve justice” because the “strict liability standard is ultimately unfair and irrational in its application to domestic violence victims”); Veronica L. Zoltowski, Note, *Zero Tolerance Policies: Fighting Drugs or Punishing Domestic Violence Victims?*, 37 NEW ENG. L. REV. 1231, 1266–67 (2003) (advocating for several policy changes, including: “exempt[ing] domestic violence victims from strict liability standards,” Congressional removal of funding or incentives from public housing authorities when they use the one-strike policy to evict victims of domestic violence for being attacked, Congress requiring HUD to monitor “implementation of [a] policy prohibiting discrimination based upon domestic violence,” and Congress issuing a “directive to HUD to issue a no eviction policy for the actions of abusers against domestic violence victims, in spite of” Supreme Court precedent); American Civil Liberties Union, Women’s Rights Project, *New Federal Law Forbids Domestic Violence Discrimination in Public Housing*, <http://www.aclu.org/womensrights/violence/23929res20060125.html> (last visited Feb. 22, 2007) (noting that the ACLU “proposed and initially drafted” the changes made to the one-strike policy in the 2006 reauthorization of the Violence Against Women Act to help victims of domestic violence).

²⁰ HUD “strongly encourage[d] PHAs to exercise discretion in determining if domestic violence-related evictions are warranted as well as utilizing various tools, such as policies designed to transfer victims” and to “carefully review circumstances where victims of domestic violence may be evicted due to circumstances beyond their control,” stating that PHAs could exercise their discretionary authority to

binding, carrying neither carrots nor sticks for the PHAs, and did not apply to private landlords.

Most recently, in January 2006, Congress passed the Violence Against Women and Department of Justice Reauthorization Act (VAWA) in which it did indeed provide an exemption from the one-strike policy for victims of domestic violence.²¹ Public housing authorities, federally assisted housing projects, and private landlords who accept Section 8 vouchers can no longer evict tenants based on criminal activity directly related to domestic violence.²² However, these landlords may still terminate tenancy if they can show an “actual and imminent threat” to other tenants or housing employees.²³ Further, while these safeguards provide a defense to an eviction action based on the criminal actions of a victim’s abuser, VAWA does not provide an explicit private right of action.²⁴ Finally, although the VAWA protections help female victims of domestic violence who live in public or federally assisted housing, or use Section 8 vouchers, they do not help those who live in private housing, because VAWA amended the federal one-strike law, which is only applicable to public housing.

While the recent passage of VAWA goes a long way to help female victims of domestic violence living in public housing, there remains room and necessity for these victims to be able to affirmatively bring suit against a landlord who has discriminated against them. This Comment explores how a female victim of domestic violence, who has been evicted by a public or private landlord based solely on the criminal actions of her abuser, may state a claim for intentional (disparate treatment) sex discrimination under the Fair Housing Act. Public housing authorities, landlords for federally assisted housing projects, and private landlords who accept Section 8 vouchers²⁵ must comply with the federal one-strike law and VAWA’s recent amendments to it, whereas private landlords are not legally bound to utilize one-strike lease provisions but may do so on their own. Despite this difference, the arguments female victims of domestic violence living in public or private housing can make to challenge their evictions as discriminatory will

evict only the abuser. U.S. DEP’T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 216, 219 (2003).

²¹ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3041–49 (2006).

²² 42 U.S.C.A. § 1437d(l)(6)(A) (West Supp. 2006); 42 U.S.C.A. § 1437f(c)(9)(C)(i); 42 U.S.C.A. § 1437f(o)(7)(D)(i).

²³ 42 U.S.C.A. § 1437d(l)(6)(E); 42 U.S.C.A. § 1437f(c)(9)(C)(v); 42 U.S.C.A. § 1437f(o)(7)(D)(v).

²⁴ See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3041–49 (2006); *but see* American Civil Liberties Union, Women’s Rights Project, The Rights of Domestic Violence Survivors in Public and Subsidized Housing, <http://www.aclu.org/pdfs/subsidizedhousingdv.pdf> (last visited Apr. 18, 2007) (“[I]n some instances, [victims] may be able to file a lawsuit in court asserting [their] rights.”) (emphasis added).

²⁵ I will refer to these three types of landlords—public housing authorities, landlords for federally assisted housing projects, and private landlords who accept Section 8 vouchers—as public landlords.

be similar, because the Fair Housing Act is applicable to both public and private landlords.²⁶ The Fair Housing Act provides a variety of remedies for victims of housing discrimination who sue based on violations of the Act: Federal courts may grant actual and punitive damages, attorney's fees, and injunctive relief—including temporary restraining orders and orders enjoining the defendant from engaging in discriminatory actions in the future.²⁷ Additionally, if a plaintiff chooses to file an administrative action under the Fair Housing Act instead of going directly to federal court, the administrative law judge may grant actual damages as well as injunctive or equitable relief, and assess civil penalties.²⁸

The availability of a theory of intentional discrimination is important for female victims of domestic violence, because the alternative theory of disparate impact discrimination may be hard for some female victims of domestic violence to use. Under a disparate impact theory, the plaintiff argues that women are the majority of domestic violence victims and, therefore, the landlord's zero tolerance policy disproportionately harms women.²⁹ Despite some plaintiffs' success in using this theory,³⁰ several problems ex-

²⁶ 42 U.S.C. § 3603 (2000). This provision does exempt landlords who own a building that has four independent units when the landlord resides in one of those units.

²⁷ 42 U.S.C. § 3613(c) (2000). See JAMES A. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* §§ 9.02, 9.05–.06 (2d ed. 1995) (discussing the recent escalation in damage awards and the “broad discretion” trial judges have in making injunctive orders).

²⁸ 42 U.S.C. § 3612(g)(3) (2000). See KUSHNER, *supra* note 27, at § 8.05.

²⁹ See Complaint at 11, *United States ex rel Alvera v. The C.B.M. Group, Inc.*, Civil No. 01-857-PA (D. Or. July 10, 2001), available at <http://www.legalmomentum.org/issues/vio/Alvera%20Complaint.pdf> (alleging that “[b]y adopting a policy of terminating the tenancy of and refusing to rent apartments to victims of domestic violence, the vast majority of whom are women, after an incident of domestic violence at the Creekside Village Apartments, Defendants engaged in a practice that has a disparate impact on women and therefore discriminates on the basis of sex in violation of the Fair Housing Act”) (citation omitted); Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 377, 381 (2003) (further explaining that “recognizing domestic violence as a form of gender subordination, and seeing it as a harm suffered predominantly by women” allows “the management company’s actions [to] be viewed as sex discrimination . . .”). See also Wendy R. Weiser & Geoff Boehm, *Housing Discrimination Against Victims of Domestic Violence*, 2002 J. POVERTY L. & POL’Y 708, 709–10 (arguing that “a plaintiff who shows that she was denied a housing opportunity because of a landlord’s policy that disproportionately harms women can make out a prima facie case of disparate impact discrimination”).

³⁰ In the first case brought in federal court using this theory, Tiffani Alvera, whose husband had physically assaulted her in their apartment, reached a favorable settlement agreement with the property management company of the apartment complex from which she was evicted after a HUD administrative law judge issued a charge of discrimination. The judge found that the property management company’s “policy of evicting the victim as well as the perpetrator of an incident of violence between household members has an adverse impact based on sex, due to the disproportionate number of female victims of domestic violence.” *Determination of Reasonable Cause, Alvera v. Creekside Village Apartments*, No. 10-99-0538-8, at 5, available at <http://www.legalmomentum.org/issues/vio/alveradeterm.pdf> (last visited Feb. 22, 2007). Based on this decision, the Attorney General filed a civil action in federal court on behalf of Alvera and she intervened, but before trial the parties entered into a consent decree under which the property management company agreed to stop applying its policy of

ist with the disparate impact theory. First, although most circuits have accepted the use of disparate impact theory generally under the Fair Housing Act, some uncertainty remains as to whether the theory can be used at all.³¹ In addition, because the Supreme Court has not addressed a case of disparate impact discrimination under the Fair Housing Act, the exact standards governing the theory are still unclear.³² Second, to prove disparate impact, a plaintiff would likely need to produce statistical evidence and expert testimony to show that women are the majority of domestic violence victims,³³ a potentially costly proposition. Third, some female victims of domestic violence may not be able to bring a disparate impact claim, because they may be unable to find other such victims in their apartment buildings who were similarly evicted and thus unable to fulfill the usual requirement for statistical analysis in disparate impact cases.³⁴ Although a plaintiff may not meet the requirements to bring a disparate impact claim, sex discrimination may nevertheless be present. Using a theory of disparate treatment discrimination will allow some women, who could not otherwise bring claims under a disparate impact theory, to bring claims against their landlords.

Traditionally, the Fair Housing Act has not recognized evictions of female victims of domestic violence as constituting sex discrimination, but this can change by borrowing from theories of sex stereotyping developed in Title VII employment cases. The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, prohibits landlords from “refus[ing] to sell or rent . . . or . . . 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” and from “discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling”

evicting innocent victims of domestic violence and to not otherwise discriminate against tenants because they are victims of domestic violence in all five states in which it owns or manages housing facilities.

A disparate impact theory was also used in state court to challenge a landlord’s refusal to rent to a victim of domestic violence under Wisconsin’s Fair Housing Law. *See Winsor v. Regency Property Management, Inc.*, No. 94 CV 2349 (Wis. Cir. Ct., Dade Co. Oct. 2, 1995) (Memorandum Decision and Order) (finding that “a facially neutral practice or policy[—]denying applications from victims of domestic violence, which selects applicants in a discriminatory pattern[—]has a far greater affect on women” and holding that if this policy is shown “plaintiffs have established their *prima facie* case of disparate impact . . .”). Additionally, the Attorney General of New York issued a Formal Opinion in response to questions from the Governor’s Commission on Domestic Violence in 1985, determining that “barring rentals to victims of domestic violence would . . . violate Executive Law . . . as it too would have a disproportionate effect on women and is not justified by business necessity.” Office of the Att’y Gen., State of N.Y., Formal Opinion No. 85-F15 (Nov. 22, 1985), 1985 WL 194069, at *3.

³¹ *See* KUSHNER, *supra* note 27, at § 3.02.

³² *See id.* (describing the different disparate impact tests that the circuits have adopted).

³³ Lapidus, *supra* note 29, at 381; Weiser & Boehm, *supra* note 29, at 710–11. *But see* Linda Kelly, *Disabusing the Definition of Domestic Abuse: How Women Batter Men and the Role of the Feminist State*, 30 FLA. ST. U. L. REV. 791 (2003) (arguing that the feminist legal movement has ignored data that show that men are victims of domestic violence just as often as women).

³⁴ *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (establishing a disparate impact theory under Title VII and describing its components).

based on the above-listed statuses.³⁵ The Fair Housing Act's jurisprudence on sex discrimination, however, is limited, focusing mostly on traditional forms of discrimination, such as complete exclusion of women, and more recently on sexual harassment by landlords.³⁶ Neither of these forms of discrimination provides a direct basis for a female victim of domestic violence to bring a claim of sex discrimination under the Fair Housing Act when she is evicted based on the criminal actions of her abuser. Because of this gap, and because courts have consistently recognized the relevance of Title VII's analytical framework in assessing Fair Housing Act cases,³⁷ the theories of sex stereotyping developed in employment cases under Title VII can be applied in the housing context to provide female victims of domestic violence with a cause of action to challenge their evictions.³⁸

This Comment argues that two theories of sex stereotyping developed in Title VII employment cases can be transferred to the housing context so that a female victim of domestic violence who is evicted based on the criminal actions of her abuser may show that her eviction constituted unlawful intentional sex discrimination. First, such a plaintiff can argue that her eviction was based on her landlord's stereotyped beliefs about how she will act as a female victim of domestic violence. This argument relies on what I call expectation stereotypes, based on a line of cases beginning with *Phillips v. Martin Marietta Corp.*³⁹ In these cases, courts have held that adverse employment actions taken because an employer expected a female employee to conform to outdated stereotypes about the proper role of women constituted sex discrimination in violation of Title VII.⁴⁰ This expectation stereotypes theory is transferable to the housing context. To evict a particular woman, a landlord might rely on sex-based stereotypical beliefs that female victims of domestic violence are submissive, precipitate the violence against them, and do not do anything to prevent future attacks. If a landlord does this instead of making an individualized assessment of the particular woman's situation and whether she actually poses a threat to other tenants or housing employees, the landlord may have impermissibly evicted her in violation of the Fair Housing Act's ban on sex discrimination.

Second, a plaintiff can analogize to *Price Waterhouse v. Hopkins*, in which the Supreme Court held that an employer could not punish a woman for failing to conform to the employer's stereotyped beliefs about how she ought to act.⁴¹ I call this non-conformist stereotyping. Lower courts have

³⁵ 42 U.S.C. § 3604(a)–(b) (2000).

³⁶ ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 11C:1–2 (2005).

³⁷ See *infra* Part IV.A.

³⁸ See generally KUSHNER, *supra* note 27, at §§ 3.02–03 (describing the disparate impact and disparate treatment tests under the Fair Housing Act, which borrow heavily from Title VII case law).

³⁹ 400 U.S. 542 (1971).

⁴⁰ See *infra* Part I.A.

⁴¹ 490 U.S. 228 (1989).

interpreted *Price Waterhouse* in different ways. Some lower courts utilize a formal approach, under which women must be able to do everything men can do and vice versa.⁴² Other lower courts have adopted a substantive approach, under which the different treatment of one sex, for the same conduct acceptable for the other sex, is unlawful only if this different treatment works to hurt women's participation in the workplace.⁴³ In the housing context, some female victims of domestic violence are evicted when they do not conform to their landlord's stereotyped expectations that they will act passively but instead take action, such as obtaining a restraining order.⁴⁴ This Comment argues that in these cases, a female victim of domestic violence may state a claim for sex discrimination by arguing that her landlord's decision to evict her for the criminal actions of her abuser places her in a catch 22: out of her house if she does nothing to prevent the violence against her and out of her house if she does. Simply put, a landlord who acts on the basis of sex-based stereotyped beliefs that a female victim of domestic violence cannot or must not be angry or assertive has unlawfully acted on the basis of gender. Relying on this substantive approach, the plaintiff can further argue that her eviction excludes her from the particular housing she was in and makes it more difficult for her to participate in the housing market generally in the future, which contradicts the purpose of the Fair Housing Act's ban on sex discrimination.

By borrowing from Title VII's jurisprudence to fill a gap in the Fair Housing Act's sex discrimination case law, a female victim of domestic violence who is evicted from her housing, whether public or private, based on the actions of her abuser may state a claim for sex discrimination under the Fair Housing Act. She may do so under one of two theories, depending on the facts of her case. First, she may argue that her landlord impermissibly evicted her based on sex-based stereotypes about how female victims of domestic violence will act. Alternatively, she may argue that her landlord impermissibly evicted her because she did not conform to sex-based stereotypes about how a female victim of domestic violence ought to act. The next Part outlines the two theories of sex stereotyping used in the employment context, which this Comment seeks to apply to the Fair Housing Act. Part II details the origin of one-strike policies and how they are used to evict female victims of domestic violence. Part III maintains that these policies were not intended to be used against such women and shows that

⁴² See *infra* notes 66–72 and accompanying text.

⁴³ See *infra* notes 73–76 and accompanying text.

⁴⁴ See, e.g., Brief for the American Civil Liberties Union as Amicus Curiae Supporting Plaintiff's Motion for and Opposition to Summary Judgment at 2, 17–19, *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. 2005), available at <http://www.aclu.org/FilesPDFs/amicus%201-12.pdf> and <http://www.aclu.org/FilesPDFs/amicus%2013-20.pdf> (last visited Feb. 20, 2007) [hereinafter ACLU Brief] (showing that Bouley's landlord did not believe she behaved as a victim of domestic violence should, particularly because she got a restraining order against her husband rather than trying to reconcile with him).

the application of these policies may result from sex-based stereotypes about female victims of domestic violence. Part IV argues that evicted female victims of domestic violence may rely on the federal courts' willingness to apply Title VII's analytical frameworks to Fair Housing Act claims in order to bring a sex discrimination claim. Finally, Part V applies the two sex stereotyping theories developed in Title VII employment cases to the housing context, showing how female victims of domestic violence can make claims of sex discrimination under the Fair Housing Act.

I. DISCRIMINATORY SEX STEREOTYPING UNDER TITLE VII

Although Congress enacted many antidiscrimination statutes, including Title VII and Title VIII (the Fair Housing Act), to combat categorical exclusion, today proscribed discrimination often occurs when employers or landlords treat certain subsets of men or women differently, such as the potentially discriminatory treatment of female victims of domestic violence discussed in this Comment. When this happens, proving that the discrimination was "because of sex," as required by both Title VII and Title VIII, becomes more complicated. While the Supreme Court and lower courts have addressed such forms of discrimination in the employment context,⁴⁵ the Fair Housing Act case law lacks development in this area. As a result, the sex stereotyping theories developed under Title VII for these newer forms of discrimination are relevant.

Two theories of sex stereotyping developed under Title VII's employment cases can be transferred to the housing context. The first theory finds that an employer's decision to take an adverse employment action against an employee, based on the assumption that the employee will engage in behavior stereotypically associated with her gender, is discrimination.⁴⁶ For example, an employer may decline to give certain work assignments to a female employee based on the assumption that women are too emotional for

⁴⁵ In particular, in *Price Waterhouse v. Hopkins*, the Court endorsed a theory of disparate treatment discrimination that involved a sex-plus claim: Ann Hopkins argued that she was not promoted because the partners evaluating her treated her differently because she was an aggressive woman, not just simply because she was a woman, and the Court held that, if proven, this could be an actionable form of sex discrimination. 490 U.S. 228, 251 (1989).

⁴⁶ See Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 181 (2004) ("Gender stereotyping sometimes refers to the erroneous attribution of traits and attributes to a particular individual because of that person's membership in a particular social group. For example, gender stereotyping may refer to the assumption that a particular woman is physically weak, uncommitted to her career in the long term, or emotionally vulnerable, because these are attributes associated with women as a group. Courts have . . . repeatedly prohibited gender stereotyping of this sort."). See also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 37, 40 (1995) (explaining what I call expectation stereotyping as discrimination based on "the assumption that individual members of the sex did" conform to gender stereotypes, such that "those making the employment decisions magnif[y] those gender characteristics seen as appropriate to the employee's sex and [filter] out those that [are] not, even if they [are] present in the employee and required for the job").

such work or to a male employee based on the assumption that men are likely to resort to violence to solve problems. I call this expectation stereotyping. The second theory finds that an employer's decision to take an adverse employment action against an employee, because the employee behaves in ways usually attributable to the opposite sex, is discrimination.⁴⁷ For example, an employer may not promote a female employee because her aggressive style, though helpful in bringing in new business, does not conform to the employer's belief that, as a woman, she ought to be more polite and deferential. Similarly, an employer might fire a male employee whose sensitivity and care appeal to clients, because such traits fail to meet the employer's belief that men should appear tough. I call this form of sex stereotyping, found illegal in *Price Waterhouse*, non-conformist stereotyping.

A. Expectation Stereotyping

Expectation stereotyping occurs when an employer "erroneous[ly] [attributes] group-associated traits to individual group members."⁴⁸ In many of these cases, employers either fire or refuse to hire or promote a female employee based on their belief that a woman's family role as child-bearer and caretaker will prevent her from doing her job effectively. The Supreme Court addressed such stereotypes in *Phillips v. Martin Marietta Corp.*⁴⁹ In that case, Marietta Corporation told Mrs. Ida Phillips it would not accept applications from women with preschool-age children, although the corporation employed men with preschool-age children.⁵⁰ The Supreme Court reversed the district court's grant of summary judgment to Marietta, finding that "permitting one hiring policy for women and another for men—each having pre-school-age children"—violated Title VII.⁵¹ While the court agreed that Marietta did not evince a bias towards women as a group—because 75% to 80% of those hired for the position to which Phillips applied were women⁵²—the Court refused to accept without proof the notion that women's family obligations were more relevant to their job performance than men's family obligations were to their job performance, suggesting that permitting a hiring policy based solely on this stereotypical notion constituted unlawful discrimination against a subset of women.⁵³

⁴⁷ See Yuracko, *supra* note 46, at 181–82 (understanding *Price Waterhouse*'s holding to "protect individuals from adverse employment actions resulting from their possession of attributes that would be acceptable to the employer if possessed by individuals of the other sex"); Case, *supra* note 46, at 37, 41 (describing the discrimination outlawed in *Price Waterhouse* as "individuals [impermissibly] penalized because their gender behavior did not conform to stereotypical expectations").

⁴⁸ Yuracko, *supra* note 46, at 181.

⁴⁹ 400 U.S. 542 (1971).

⁵⁰ *Id.* at 543.

⁵¹ *Id.* at 544.

⁵² *Id.* at 543.

⁵³ *Id.* at 544.

Following *Phillips*, many courts have held that employers impermissibly discriminated based on sex because the employers relied on stereotyped beliefs similarly born out of traditional notions about the proper role of women. The stereotype that women cannot work successfully if they have children is particularly ubiquitous.⁵⁴ In these cases, as in *Phillips*, the courts found discrimination when an employer took an adverse employment action against a particular woman based on the employer's stereotypical beliefs about the abilities of women with children in general.⁵⁵ These courts held that basing employment decisions on such stereotypes, rather than an individualized assessment, is discriminatory.

B. Non-conformist Stereotyping

In *Price Waterhouse*, the Supreme Court announced, "we are beyond the day when an employer could evaluate employees by assuming or insist-

⁵⁴ See, e.g., *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 341-42 (10th Cir. 1986) (employer demoted the plaintiff, relying on the belief that women could not achieve their career goals with children at home); *EEOC v. Nw. Mem'l Hosp.*, 858 F. Supp. 759, 766 (N.D. Ill. 1994) (plaintiff's supervisor believed that women with children should stay at home and that the positions of women who had children should be eliminated); *Eslinger v. U.S. Cent. Credit Union*, 866 F. Supp. 491, 497-98 (D. Kan. 1994) (plaintiff's supervisor suggested that "women were better workers before having children"); *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 981-82 (W.D. Wis. 2003) (plaintiff's supervisor thought she would not want a promotion that involved moving because of her family); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004) (plaintiff's supervisors questioned how dedicated she would be to her job if she had another child).

⁵⁵ See, e.g., *Derr*, 796 F.2d at 341-42 (affirming the trial court's determination that the plaintiff's demotion was based not on a decline in business but on input from a non-immediate supervisor who had "scolded Ms. Derr for attempting to achieve her career goals while having two small children at home" and "commented repeatedly that problems arise if a woman gets too much education"); *Nw. Mem'l Hosp.*, 858 F. Supp. at 766-67 (denying summary judgment for the employer because the plaintiff's supervisor's comments that "women with babies should stay at home," that a woman's position should be "eliminated when she had a baby[,] and that she would be more 'comfortable' at home with the child" constituted "evidence of the employer's discriminatory attitude" such that "a reasonable trier of fact [could] infer that the defendant's stated reasons for its decisions [to offer plaintiff a less prestigious position or severance package when she wanted to return from maternity leave] were mere pretext for discrimination"); *Eslinger*, 866 F. Supp. at 497-98 (holding that the plaintiff's supervisor's comments about his "doubts regarding the likelihood that women who give birth to a second child return to work" and his belief that "women were better workers before having children" could "reasonably be interpreted as evidence of a personal bias toward women with children in the workplace" and could be proof that the stated reason for the plaintiff's termination was pretextual); *Lust*, 277 F. Supp. 2d at 977, 981-83 (refusing to enter judgment as a matter of law for the employer after the jury found Sealy liable for sex discrimination, because the plaintiff's supervisor's belief that she would not want to move for a promotion because of her family and his inquiry into why the plaintiff's husband was not taking care of her evidenced that his decision not to promote her was based on impermissible sex stereotypes); *Back*, 365 F.3d at 115, 115-22 (holding that the plaintiff's supervisor's comments about when she planned to have a second child, not getting pregnant again until after her first child was in kindergarten, whether she could do the job if family was her priority, and her not working as many hours as she should because of her family evidenced impermissible gender-based notions that "mothers are insufficiently devoted to work . . . and . . . work and motherhood are incompatible" and, thus, reversing the district court's summary judgment in favor of those supervisors).

ing that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁵⁶ Though this holding was broad, the case focused on a particular set of facts. Ann Hopkins had been a successful senior manager at Price Waterhouse when she was nominated by the partners in her office to be considered for partnership. The only woman in the group of eighty-eight candidates up for partnership, Hopkins was ultimately told she would be held over for consideration in the following year. As part of its process for making partnership decisions, Price Waterhouse’s Admissions Committee considered input from partners before making a recommendation to the Policy Board, which made the final decision about whether to promote a candidate to partner, hold the candidate over for consideration, or reject the candidate.⁵⁷ Partners praised Hopkins for her intelligence, productivity, and ability to get along with clients, as well as her success in landing a \$25 million contract with the State Department—a feat unrivaled by any other candidate that year.⁵⁸

Ultimately, however, these partners, and others who did not support her candidacy, looked beyond her accomplishments, deciding instead that Hopkins’ aggressiveness and lack of interpersonal skills “doomed her bid for partnership.”⁵⁹ The district court found that these partners “reacted negatively to Hopkins’ personality because she was a woman,” citing comments that Hopkins was “macho,” “overcompensated for being a woman,” and needed to “take ‘a course at charm school.’”⁶⁰ The partner who informed Hopkins of the Board’s decision to hold her over told her that “in order to improve her chances for partnership, . . . [she] should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’”⁶¹ The district court held that “Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners’ comments that resulted from sex stereotyping.”⁶²

The Supreme Court affirmed, holding that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁶³ For the Court, the issue was not whether Hopkins actually had

⁵⁶ 490 U.S. 228, 251 (1989) (citing *Los Angeles Dep’t. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

⁵⁷ *Price Waterhouse*, 490 U.S. at 232.

⁵⁸ *Id.* at 233–34.

⁵⁹ *Id.* at 234.

⁶⁰ *Id.* at 235.

⁶¹ *Id.*

⁶² *Id.* at 237.

⁶³ *Id.* at 250.

personality problems, but whether the partners who criticized Hopkins' personality problems in sex-based terms would have done so if she were a man.⁶⁴ The Court thus held that sex stereotypes impermissibly played a part in Price Waterhouse's decision to put Hopkins' candidacy on hold, and remanded the case to the Court of Appeals to determine whether Price Waterhouse had proven by a preponderance of the evidence that it would have made the same decision if it had not taken Hopkins' sex into account.⁶⁵

Since *Price Waterhouse*, two analytical approaches have emerged in the lower courts as they apply its sex stereotyping holding: a formal equality approach and a substantive approach. Under the formal equality approach, courts essentially understand *Price Waterhouse* to mean that women must be able to behave and exhibit characteristics in every way that men can, in a literal sense, and vice versa.⁶⁶ For example, if a woman can wear a dress to work, a man must be able to wear a dress to work,⁶⁷ and if a man can date a woman without being harassed, a woman must be able to date a woman without being harassed.⁶⁸ In so holding, these courts have relied on assumptions that the behavior forming the basis of the employee's punishment would have been acceptable for a person of the other sex—that is, the courts took judicial notice of the comparison. For example, in *Doe v. City of Belleville*, the Seventh Circuit held that harassment of a 16-year-old boy by his co-workers, because he appeared and acted in what they considered to be an effeminate manner, was sex-based harassment.⁶⁹ The court

⁶⁴ *Id.* at 258.

⁶⁵ *Id.* at 256–58.

⁶⁶ Yuracko, *supra* note 46, at 177–79.

⁶⁷ *Smith v. City of Salem*, 378 F.3d 566, 568, 574 (6th Cir. 2004) (holding that a transsexual male fire department employee who began expressing a feminine appearance at work and was suspended under threat of termination because of his changing appearance had an actionable claim for sex discrimination, because “employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, [since] the discrimination would not occur but for the victim’s sex”).

⁶⁸ *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (holding that a supervisor’s harassment of her employee because the employee acted too masculinely and dated women could constitute impermissible sex discrimination, noting “a jury could find that [the supervisor] harassed (and ultimately discharged) [the plaintiff] because [she] did not conform to [the supervisor’s] stereotype of how a woman ought to behave”). For more examples of the formal equality approach, see *Doe v. City of Belleville*, 119 F.3d 563, 566, 581 (7th Cir. 1997) (holding that verbal and physical abuse by male co-workers of 16-year old twin brothers working as lawn mowers for the city constituted sexual harassment, because “a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his co-workers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex” and “[j]ust as in *Price Waterhouse*, then, gender stereotyping establishes the link to the plaintiff’s sex that Title VII requires”); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (holding that relentless verbal harassment of a food server because his co-workers thought he acted femininely constituted sexual harassment, because “the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act” and thus “occurred because of sex”).

⁶⁹ *Doe*, 119 F. 3d at 581–82.

explained: “[o]ne need only consider for a moment whether H.’s gender would have been questioned for wearing an earring . . . if he were a woman rather than a man. It seems an obvious inference to us that it would not.”⁷⁰ Similarly, in *Heller v. Columbia Edgewater Country Club*, an Oregon district court held that a supervisor’s harassment of her gay employee could constitute unlawful sex discrimination, because “a jury could find that [the supervisor] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.”⁷¹ Finally, in *Smith v. City of Salem*, the Sixth Circuit held that a male cross-dressing fire department employee could state a claim for sex discrimination for being suspended, because he alleged that he would not have been suspended “on account of his non-masculine behavior . . . had he been a woman instead of a man.”⁷²

In contrast to the formal equality approach, other courts use a substantive approach when applying *Price Waterhouse*. These courts rely on the Supreme Court’s determination that “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not” and the Court’s conclusion that “Title VII lifts women out of this bind.”⁷³ Under this approach, courts assess whether the conduct the employer prohibits one sex from doing is something that will reinforce the traditional sex hierarchy and make it more difficult for individuals of one sex to participate in the workplace. This assessment thus grounds the focus of the substantive approach in Title VII’s intent to create equality in the workplace.⁷⁴ For example, in *Oiler v. Winn-Dixie Louisiana, Inc.*, the court held that a cross-dressing, transvestite male who had been fired for appearing as a woman in public during off-duty hours could not state a claim for sex discrimination using a theory of sex stereotyping based on *Price Waterhouse*.⁷⁵ The court reasoned that this case was “not a situation where the plaintiff failed to conform to a gender stereotype” or exhibited “characteristics associated with the opposite sex.” Rather, the case was “a matter of a person of one sex assuming the role of a person of the opposite sex,” which fell outside Title VII’s ban on discrimination based on biological sex.⁷⁶

⁷⁰ *Id.*

⁷¹ *Heller*, 195 F. Supp. at 1223.

⁷² *Smith*, 378 F.3d at 570.

⁷³ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

⁷⁴ See Yuracko, *supra* note 46, at 225.

⁷⁵ 2002 WL 31098541 (E.D. La. Sept. 16, 2002).

⁷⁶ *Id.* at *5–6.

II. LANDLORDS' USE OF ONE-STRIKE POLICIES TO EVICT FEMALE VICTIMS OF DOMESTIC VIOLENCE

A. *The Origin of One-Strike Policies*

1. *Legislation.*—In 1988, Congress passed the Anti-Drug Abuse Act in response to the “rampant drug-related [and] violent crime” in “public and other federally assisted low-income housing.”⁷⁷ The Act amended federal housing law to include a zero tolerance policy, stating, “a public housing tenant, any member of the tenant’s household, or a guest or other person under the tenant’s control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.”⁷⁸ This law, and the amendments that would follow in later years, applied only to public landlords, but the initiation of the zero tolerance policy on a federal level led many private landlords to use similar lease provisions.

Despite the law’s passage, public housing authorities did not fully enforce the provision, and violent and drug-related crime continued to be rampant in public and low-income housing.⁷⁹ Eight years later, as part of his “challenge . . . to take our streets back from crime and gangs and drugs,” President Clinton urged housing authorities and tenant associations to use federal housing law provisions allowing evictions for criminal activity more actively: “From now on, the rule for residents who commit crime and peddle drugs should be ‘one strike and you’re out.’”⁸⁰ To implement this goal, Clinton directed the Secretary of Housing and Urban Development to issue guidelines that would “spell out with unmistakable clarity how to enforce [the] one strike and you’re out [policy]” and “tell public housing authorities the steps they must take to evict drug dealers and other criminals.”⁸¹ More importantly, the HUD guidelines provided penalties for housing projects that did not enforce the one-strike policy, and increased funding and provided greater flexibility for those that did.⁸²

⁷⁷ 42 U.S.C. § 11901(2) (2000).

⁷⁸ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (1988).

⁷⁹ See Renai S. Rodney, Comment, *Am I My Mother’s Keeper? The Case Against the Use of Juvenile Arrest Records in One-Strike Public Housing Evictions*, 98 NW. U. L. REV. 739, 744 (2004) (“[While] PHAs have had the authority to evict tenants on this basis since the passage of the Anti-Drug Abuse Act of 1988, up until the mid-1990s PHAs had not fully enforced this provision.”); see also Clinton, State of the Union Address, *supra* note 10, at 83 (noting, eight years after the passage of the Anti-Drug Abuse Act, that crime and drugs still plagued public housing).

⁸⁰ Clinton, State of the Union Address, *supra* note 10, at 83.

⁸¹ Clinton, Remarks at One Strike Crime Symposium, *supra* note 18, at 583.

⁸² *Id.*

Clinton also worked with Congress to pass the Housing Opportunity Program Extensions Act of 1996, which broadened the power of public housing authorities to use a one-strike policy. Federal law now requires that “[e]ach public housing agency . . . utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”⁸³ Similar provisions also apply to federally assisted housing projects and Section 8 voucher housing.⁸⁴

HUD’s guidelines mirror the law.⁸⁵ HUD defines “guest” as “a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent . . .”⁸⁶ HUD defines “person under the tenant’s control” as a “person . . . [who] is, or was at the time of the activity in question, on the premises . . . because of an invitation from the tenant or other member of the household who has express or implied authority to so consent . . .”⁸⁷ Landlords who evict female victims of domestic violence based on the criminal actions of their abusers often do so because they view the abusers as “guests” or persons under the control of the woman.⁸⁸ As demonstrated in *Bouley*, private landlords have incorporated the one-strike policy and HUD’s accompanying definitions into their leases, holding tenants responsible for the criminal activities of their guests.

2. *Supreme Court Approval of the Federal One-Strike Law.*—In 2002, the Supreme Court upheld the one-strike laws in *Department of Housing & Urban Development v. Rucker*.⁸⁹ In that case, four public hous-

⁸³ 42 U.S.C.A. § 1437d(l)(6) (West Supp. 2006).

⁸⁴ 42 U.S.C.A. §§ 1437f(d)(1)(B)(iii), 1437f(o)(7)(D). The major difference between these provisions and those for public housing is that the drug-related criminal activity must be “on or near such premises,” as opposed to “on or off” the premises.

⁸⁵ Leases for public housing tenants must obligate the tenant to “assure that no tenant, member of the tenant’s household, or guest engages in . . . [a]ny criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or . . . [a]ny drug-related criminal activity on or off the premises” and to “assure that no other person under the tenant’s control engages in” such activities. 24 C.F.R. § 966.4(f)(12)(i)–(ii) (2006). Federally-funded housing projects are subject to the same guidelines. 24 C.F.R. § 5.851(b) (2006).

Additionally, landlords who rent to Section 8 voucher holders may terminate tenancy for the same criminal and drug-related activity, though that activity must be “on or near the premises,” not “on or off the premises.” 24 C.F.R. § 982.310(c)(1)–(2) (2006).

⁸⁶ 24 C.F.R. § 5.100 (2006).

⁸⁷ *Id.*

⁸⁸ See American Civil Liberties Union, Women’s Rights Project, The Rights of Domestic Violence Survivors in Public and Subsidized Housing, <http://www.aclu.org/pdfs/subsidizedhousingdv.pdf> (last visited Apr. 18, 2007).

⁸⁹ 535 U.S. 125, 130 (2002).

ing tenants of the Oakland Housing Authority (OHA) brought suit against OHA and HUD after OHA instituted eviction proceedings against them because the plaintiffs' children, grandchildren, or guests were caught using or in possession of drugs inside or nearby their respective apartments.⁹⁰ The four plaintiffs argued that the federal housing law, as amended in the Housing Opportunity Program Extensions Act of 1996, did not require public housing leases to authorize evictions for "innocent" tenants (those who had no knowledge of the activity for which they are being evicted).⁹¹ In the alternative, the plaintiffs argued that if federal law authorized evictions of "innocent" tenants, the law was unconstitutional.⁹²

The Court held that "42 U.S.C. Sec. 1437d(1)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."⁹³ In doing so, the Court rejected the plaintiff's so-called "innocent" defense, finding that the statute's plain language indicated that a tenant may be evicted for "any drug-related criminal activity engaged in by the specified persons . . . , not just drug-related activity that the tenant knew, or should have known, about."⁹⁴ Further, the Court agreed with HUD's argument that the statutory phrase "other person under the tenant's control" meant "control in the sense that the tenant has permitted access to the premises."⁹⁵

Thus, the Court endorsed "no-fault" evictions, reasoning that "[s]trict liability maximizes deterrence and eases enforcement difficulties."⁹⁶ At first blush, the holding may seem narrow; after all, it "merely affirms the authority of Congress to require public housing authorities (and, by implication, subsidized housing landlords) to use lease terms giving them discretion to evict a tenant whether or not the tenant knew, or should have known, of a household member's or guest's drug-related activity."⁹⁷ The apparent modesty of the holding, however, is misleading as "the unrestrained exercise of that discretion can have devastating consequences for innocent poor families."⁹⁸ It is also not limited to drug-related crime, as § 1437d(1)(6) encompasses criminal activity in general.⁹⁹

⁹⁰ *Id.* at 128.

⁹¹ *Id.* at 129.

⁹² *Id.*

⁹³ *Id.* at 130.

⁹⁴ *Id.* at 131.

⁹⁵ *Id.* at 130.

⁹⁶ *Id.* at 134.

⁹⁷ Fred Fuchs, *Defending Against Eviction from Public and Federally Subsidized Housing*, CLEARINGHOUSE REV., Sept.–Oct. 2005, at 321.

⁹⁸ *Id.*

⁹⁹ Vrettos, *supra* note 19, at 115.

B. One-Strike Policies Applied to Female Victims of Domestic Violence and Congress' Recent Response

One of the devastating consequences of the Supreme Court's broad interpretation of the one-strike law for innocent poor families has been the use of the zero tolerance, "no-fault" evictions to evict female victims of domestic violence based on the criminal actions of their abusers, most notably for attacks they suffer in their own homes. Congress officially recognized this problem in the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA), noting that a recent study found that legal services providers had responded to 150 such evictions in the last year.¹⁰⁰ The *Bouley* case discussed in the Introduction provides one such example.¹⁰¹

In addition to the *Bouley* case, another case that recently ended in settlement provides an example of a public housing authority using the one-strike law to evict a female domestic violence victim based solely on the actions of her abuser. In *T.J. v. St. Louis Housing Authority*, T.J.¹⁰² lived with her two children in public housing in St. Louis and never lived with her ex-boyfriend, M.G.¹⁰³ In September 2003, M.G. hit T.J. in the face with his fist, fracturing a bone in her face.¹⁰⁴ T.J. called the police, cooperated with the prosecutor's investigation, and broke up with M.G.¹⁰⁵ After that, M.G. began stalking and harassing T.J., even threatening to get her evicted. In January 2004, after T.J. would not allow M.G. into her apartment, M.G. threw a brick through T.J.'s window.¹⁰⁶ T.J. called the police immediately and reported the incident to her property manager the next day, at which point the property manager issued a lease violation.¹⁰⁷ T.J. asked to be transferred to another unit so that M.G. would not know where she lived, but the property manager told her that she was "responsible for her own domestic situation" and would have to pay for the damage.¹⁰⁸

Several months later, M.G. again threw an object through T.J.'s window. T.J. received another lease violation, requested a transfer, and was

¹⁰⁰ 42 U.S.C.A. § 14043e(4) (West 2005 & Supp. 2006).

¹⁰¹ See *supra* notes 1–7 and accompanying text.

¹⁰² The plaintiff wanted to remain anonymous, so she is referred to as T.J. throughout the citations to the memorandum of law filed in support of her motion for a temporary restraining order and preliminary injunction.

¹⁰³ Memorandum of Law in Support of Plaintiff's Motion for a Temporary Restraining Order/Preliminary Injunction at 1–2, *T.J. v. St. Louis Hous. Auth.* (on file with the author). This memorandum was never filed in court because the case settled before the plaintiff filed her case. See also American Civil Liberties Union, Press Release, Following ACLU Action, Public Housing Agency Agrees to Treat St. Louis Women Fairly, Oct. 6, 2005, <http://www.aclu.org/womensrights/gen/20152prs20051006.html>.

¹⁰⁴ Memorandum, *supra* note 103, at 2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

denied a second time. T.J. then sought and received a civil order of protection against M.G. and presented it to her property manager, who refused to keep a copy, saying that T.J. had to pay for the damage.¹⁰⁹ A month later, M.G. threw an object through T.J.'s window a third time. After issuing a lease violation and demand of payment, the property management company sent T.J. a 30-day notice of termination and instituted an eviction action three months later.¹¹⁰ When attempts to settle failed, T.J. filed an administrative complaint with HUD, alleging sex discrimination. The defendants explained that they terminated T.J.'s lease because she "had failed to pay the cost of repair of the windows broken by her 'guest' in full . . . [as] required by her lease."¹¹¹

Congress created an exception to the one-strike laws for victims such as T.J. in the recent VAWA amendments. In doing so, Congress acknowledged and disapproved of the practice among public housing authorities, federally assisted housing project landlords, and Section 8 voucher landlords of evicting domestic violence victims based on the criminal actions of the victims' abusers. While these public landlords still retain the one-strike power, VAWA now forbids them from evicting a victim based on "criminal activity directly relating to domestic violence . . . engaged in by a member of a tenant's household or any guest or other person under the tenant's control."¹¹² Furthermore, VAWA specifically allows public landlords to "bifurcate a lease . . . in order to evict, remove, or terminate assistance to any individual who is a tenant or lawful occupant and who engages in criminal acts of physical violence against family members or others, without evicting . . . the victim of such violence who is also a tenant or lawful occupant."¹¹³ These landlords, however, can evict such victims if they "can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant's tenancy is not terminated."¹¹⁴ In short, public landlords cannot use the one-strike law to evict victims of domestic violence based solely on the domestic violence unless they can show that continued tenancy poses an actual and imminent threat to other tenants or housing employees.

¹⁰⁹ *Id.* at 3.

¹¹⁰ *Id.* at 3–4.

¹¹¹ *Id.* at 5.

¹¹² 42 U.S.C.A. § 1437d(l)(6) (West 2005 & Supp. 2006); 42 U.S.C.A. § 1437f(c)(9)(C)(i); 42 U.S.C.A. § 1437f(o)(7)(D)(i).

¹¹³ 42 U.S.C.A. § 1437d(l)(6)(B); 42 U.S.C.A. § 1437f(c)(9)(C)(ii); 42 U.S.C.A. § 1437f(o)(7)(D)(ii). Additionally, while these landlords can evict tenants for "serious or repeated violation of the terms or conditions of the lease," they cannot construe "an incident or incidents of actual or threatened domestic violence . . . as a serious or repeated violation of the lease by the victim or threatened victim of that violence" in order to terminate the "tenancy or occupancy rights of the victim of such violence." 42 U.S.C.A. § 1437d(l)(5) (West 2006); 42 U.S.C.A. § 1437f(c)(9)(B) (West 2006); 42 U.S.C.A. § 1437f(o)(7)(C) (West 2006).

¹¹⁴ 42 U.S.C.A. § 1437d(l)(6)(E); 42 U.S.C.A. § 1437f(c)(9)(C)(v); 42 U.S.C.A. § 1437f(o)(7)(D)(v).

It is too early to fully assess the effects of VAWA's amendments to the one-strike law. The amendments significantly improve the housing rights of female victims of domestic violence who live in public housing. In particular, the exemption of domestic violence from the one-strike law provides a defense to a victim of domestic violence evicted from public housing. Yet, it is unclear how courts will interpret the exception granted to public landlords¹¹⁵—whether landlords can speculate about an actual and imminent threat or whether they must produce direct evidence. Furthermore, VAWA does not include a private right of action allowing evicted domestic violence victims to affirmatively bring suit against their landlords. Finally, because the federal one-strike law is not applicable to private landlords, the new protection granted in VAWA also does not apply, leaving female victims of domestic violence living in private housing with less protection against landlords who utilize lease provisions with zero tolerance clauses. Although VAWA lacks a private cause of action, female victims of domestic violence evicted from public or private housing can bring suit against their landlords for illegal sex discrimination under the Fair Housing Act. In such a suit under the Fair Housing Act, VAWA's recognition that evictions of female victims of domestic violence based on the criminal actions of their abusers are widespread can bolster their Fair Housing Act claims.

III. DISCRIMINATORY SEX STEREOTYPES AS MOTIVATION FOR LANDLORDS TO EVICT FEMALE VICTIMS OF DOMESTIC VIOLENCE

Despite these recent amendments, the reality is that female victims of domestic violence will likely continue to be evicted based on the criminal actions of their abusers, particularly when they are attacked in their own homes. Private landlords do not have to comply with VAWA's protections, as the one-strike law does not apply to them, and public landlords might simply refuse to comply with the amendments, or believe that they can show an actual and imminent threat to others such that the domestic violence protection does not apply. Some public and private landlords will likely make these eviction decisions based on impermissible sex stereotypes, as they have in the past.

In both T.J.'s and Bouley's cases, the plaintiffs' lawyers pointed to sex stereotypes to argue that the evictions were discriminatory.¹¹⁶ T.J.'s claim relied on an expectation stereotyping theory, while Bouley's claim relied on the non-conformist stereotyping theory in *Price Waterhouse*. In T.J.'s case, which was a suit to obtain a temporary restraining order to prevent T.J.'s

¹¹⁵ The ACLU Women's Project noted that this exception is "narrow, but potentially troubling." American Civil Liberties Union, Women's Rights Project, New Federal Law Forbids Domestic Violence Discrimination in Public Housing (Jan. 25, 2006), <http://www.aclu.org/womensrights/violence/23929res20060125.html>.

¹¹⁶ ALCU Brief, *supra* note 44; Memorandum, *supra* note 103.

eviction, her lawyers argued that the eviction action constituted sex discrimination in violation of the Fair Housing Act. They alleged that the defendants (the St. Louis Housing Authority, the property management company for T.J.'s apartment complex, and her property manager) evicted T.J. because they believed she would act as they expected based on their stereotyped understanding of female victims of domestic violence.¹¹⁷ In particular, they argued, the defendants thought that T.J. was responsible for the violence against her, that she was untrustworthy and dishonest, and that she had the power to prevent the abuse against her.¹¹⁸ The defendants, therefore, insisted on characterizing M.G. as T.J.'s "guest," expressly treating T.J. as responsible for M.G.¹¹⁹ Before the case got to court, T.J. and the defendants settled. The St. Louis Housing Authority agreed to relocate T.J. to a different unit, refund the money she did pay for the damaged windows, ban M.G. from the property where she lived, and send its employees to domestic violence awareness training.¹²⁰

In contrast to T.J.'s claim that her landlords impermissibly expected her to conform to sex-based stereotypes about how female domestic violence victims act, Bouley and her lawyers argued that Young-Sabourin unlawfully discriminated against Bouley because she failed to conform to sex-based stereotypes about victims of domestic violence.¹²¹ The night she was attacked, Bouley left her apartment and first went to her apartment manager's unit. The apartment manager, Young-Sabourin's daughter-in-law, observed that Bouley "was not in shock, . . . was still able to function and . . . didn't appear concerned about her husband or interested in reconciling with him and resolving the violence within the privacy of the family."¹²² She concluded that Bouley had not actually experienced domestic violence that night.¹²³ Because Bouley called the police, pressed charges against her husband, had a male visitor shortly after the attack, "did not express interest in her husband's motivation for assaulting her, did not show concern for her husband, . . . and expressed an intention to get a divorce," the apartment manager concluded that Bouley "'didn't fit the role of a victim of domestic violence.'"¹²⁴ In a deposition, Young-Sabourin said she did not believe Bouley acted "normal for a woman who had been victimized."¹²⁵ Thus,

¹¹⁷ See Memorandum, *supra* note 103, at 7–14.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 12–13.

¹²⁰ American Civil Liberties Union, Victim of Domestic Violence Who Faced Eviction Reaches Settlement With St. Louis Housing Authority (Oct. 6, 2005), <http://www.aclu.org/WomensRights/WomensRights.cfm?ID=19223&c=33>.

¹²¹ ACLU Brief, *supra* note 44, at 2.

¹²² *Id.* at 17–18.

¹²³ *Id.* at 17.

¹²⁴ *Id.* at 18 (citing the deposition of Windee Young, the apartment manager).

¹²⁵ *Id.* at 19.

Bouley argued, her landlord discriminated against her because she did not act as her landlord believed she should as a victim of domestic violence.

Both arguments—that T.J.’s landlords evicted her because they expected her to conform to stereotypes about female victims of domestic violence and that Bouley’s landlord evicted her because she did not conform to stereotypes about female victims of domestic violence—rely on common stereotypes about female victims of domestic violence that courts have recognized in other contexts. The two stereotypes most relevant to the eviction context are, first, that female victims of domestic violence are passive and submissive and, second, that they also precipitate the violence committed against them. The first posits a “powerless” woman who “lack[s] self-esteem” and whose “primary emotion is fear.”¹²⁶ This image, which “further promotes many cultural stereotypes,” is “focus[ed] on victimization that is understood as passivity or even pathology on the part of the woman.”¹²⁷ The second stereotypical image builds on the notion of pathology: “the victim precipitates her own assault, . . . she is masochistic and either ‘likes’ or ‘deserves’ to be beaten, . . . she is ‘crazy,’ . . . even if she leaves one abusive relationship, she will just find another, and . . . she is free to end her victimization at any time without assistance.”¹²⁸ While these stereotypes may seem at odds, they both reflect an underlying belief that these women do not deserve support.

Courts have recognized these stereotypes in holding that differential police treatment of female victims of domestic violence may constitute sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.¹²⁹ In *Smith v. City of Elyria*, the police refused to remove a woman’s abusive ex-husband from her house, despite her calls to the police out of fear that he would attack her, because she had allowed him to move into her guest bedroom a week earlier.¹³⁰ After the police left, he killed her.¹³¹ The court for the Northern District of Ohio found that the city’s policy for handling domestic violence evidenced differential treatment of women that “was intended to ‘accomplish the collateral goal of keeping women in a stereotypic and predefined place,’”¹³² because the policy assumed that “the dispute [would] be occurring in [the man’s] home” and “the woman [would] be upset and irrational and . . . probably later refuse to cooperate in

¹²⁶ Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 38 (1991).

¹²⁷ *Id.* at 42.

¹²⁸ Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 27 (1998).

¹²⁹ See, e.g., *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 700 (9th Cir. 1990); *Smith v. City of Elyria*, 857 F. Supp. 1203, 1212 (N.D. Ohio 1994); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1526–29 (D. Ct. 1984).

¹³⁰ *Smith*, 857 F. Supp. at 1206.

¹³¹ *Id.* at 1207.

¹³² *Id.* at 1212 (citing *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979)).

the prosecution.¹³³ Moreover, the court found that the police officers' assumption that the woman's ex-husband "had a right to stay in the house against [her] will" demonstrated "a sexually discriminatory assumption that [the abuser] had a right to exercise dominion and control over his ex-wife and her home," which could constitute impermissible discriminatory intent.¹³⁴

Similarly, in *Balistreri v. Pacifica Police Department*, the Ninth Circuit refused to uphold dismissal of the plaintiff's equal protection claim, finding that a police officer's statement that he "did not blame plaintiff's husband for hitting her, because of the way she was 'carrying on' . . . strongly suggest[ed] . . . animus against abused women."¹³⁵ Finally, in *Thurman v. City of Torrington*, another case in which a female victim of domestic abuse was murdered despite many pleas to the police for help, the district court of Connecticut also refused to dismiss a claim for sex discrimination.¹³⁶ In reaching its decision, the court pointed to the differential treatment of domestic violence (as compared to other kinds of violence) that overwhelmingly affected women and was based on notions "of a husband's prerogative to physically discipline his wife."¹³⁷ The court declared that such notions "must join other 'archaic and overbroad' premises which have been rejected as unconstitutional."¹³⁸ Thus, as these three examples show, courts have recognized impermissible stereotypes about female victims of domestic violence and have been willing to use them as evidence of unlawful sex discrimination.¹³⁹

IV. EXPANDING THE FAIR HOUSING ACT'S SEX DISCRIMINATION JURISPRUDENCE TO INCORPORATE SEX STEREOTYPING AS A THEORY FOR PROVING THAT DISCRIMINATION WAS BECAUSE OF SEX

The Fair Housing Act's sex discrimination jurisprudence provides a limited baseline from which female victims of domestic violence who are evicted because of the criminal actions of their abusers can state a claim for intentional sex discrimination. Most of the Fair Housing Act's sex discrimination case law involves traditional, fully exclusionary discrimination dissimilar to the discrimination at issue in the domestic violence context. Though the case law does not include a developed line of sex stereotyping cases, it does establish two important trends on which female victims of domestic violence can build their cases. First, the case law indicates that

¹³³ *Smith*, 857 F. Supp. at 1212.

¹³⁴ *Id.*

¹³⁵ *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990).

¹³⁶ 595 F. Supp. 1521 (D. Conn. 1984).

¹³⁷ *Id.* at 1528.

¹³⁸ *Id.* (citing *Crawford v. Cushman*, 531 F. 2d 1114 (2d Cir. 1976)).

¹³⁹ See also *Hynson v. City of Chester*, 731 F. Supp. 1236 (E.D. Pa. 1990); *Williams v. City of Montgomery*, 21 F. Supp. 2d 1360 (M.D. Ala. 1998).

courts are willing to strike down discriminatory policies that are based on sex stereotypes. Second, it shows that courts are already comfortable borrowing analytical frameworks established under Title VII to assess Fair Housing Act claims,¹⁴⁰ making it likely that courts will apply Title VII's sex stereotyping theories to Fair Housing Act sex discrimination claims. Finally, federal courts' recent willingness to establish a cause of action for sexual harassment under the Fair Housing Act suggests that at least some courts are amenable to expanding the Fair Housing Act's sex discrimination jurisprudence. This Part will show how federal courts' willingness to expand the scope of sex discrimination claims actionable under the Fair Housing Act can extend to claims of sex discrimination based on sex stereotypes made by female victims of domestic violence.

A. *The Fair Housing Act's Sex Discrimination Jurisprudence*

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, was first enacted without a ban on sex discrimination,¹⁴¹ but the Act was amended in 1974 through a provision of the Housing and Community Development Act to include such a prohibition.¹⁴² Although the legislative history of the original Act is sparse,¹⁴³ the Supreme Court has determined that the "language of the [Fair Housing] Act is broad and inclusive."¹⁴⁴ Following this standard, lower courts have concluded that the Act must be "construed expansively" in order to fulfill its goal as "part of a coordinated scheme of federal civil rights laws enacted to end discrimination."¹⁴⁵ With respect to the 1974 amendment, the intent was "to end housing practices based upon sexual stereotyping."¹⁴⁶

From the beginning, courts have comfortably utilized analytical frameworks first established under Title VII, which bans discrimination in employment, to address sex discrimination claims under the Fair Housing Act,¹⁴⁷ citing the two statutes' similar purposes.¹⁴⁸ For example, the Second

¹⁴⁰ KUSHNER, *supra* note 27, at § 3.01.

¹⁴¹ Fair Housing Act, Pub. L. 90-284, 82 Stat. 81, 83-84 (1968).

¹⁴² Housing and Community Development Act of 1974, Pub. L. 93-383 § 808(b), 88 Stat. 633, 728-29 (1974); *see* 42 U.S.C.A. §§ 3604(a)-(b). In addition, evicting tenants because of their sex is now a prohibited action under HUD's rules promulgated pursuant to the Fair Housing Act. 24 C.F.R. § 100.60(b)(5).

¹⁴³ SCHWEMM, *supra* note 36, at § 5:2 ("[S]ince Title VIII was enacted substantially unchanged from the way it was first introduced by Senator Dirksen on the floor of the Senate, its legislative history does not include the committee reports and other documents that usually accompany major legislation.").

¹⁴⁴ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

¹⁴⁵ *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988).

¹⁴⁶ *Dep't of Hous. & Urban Dev. v. Baumgardner*, 2A Fair Hous.-Fair Lending ¶ 25.006, ¶ 25.096 (HUD ALJ Nov. 15, 1990).

¹⁴⁷ KUSHNER, *supra* note 27, at § 3.01; *see* *Sassower v. Field*, 752 F. Supp. 1182, 1187-89 (S.D.N.Y. 1990) (applying the *McDonnell Douglas* burden shifting framework first established under Title VII); *Braunstein v. Dwelling Managers, Inc.*, 476 F. Supp. 1323, 1326-27 (S.D.N.Y. 1979) (requir-

Circuit has recognized the “relevance of the methodology used in Title VII litigation” to Title VIII cases, because the two are parallel statutes that were part of a coordinated civil rights scheme.¹⁴⁹ Most of the other circuits also have determined that Title VII and Title VIII have “parallel objectives” and therefore apply Title VII analysis to Title VIII cases.¹⁵⁰

The ban on sex discrimination in the housing context, however, has not been used nearly as much as it has in the employment context,¹⁵¹ resulting in case law focusing primarily on traditional forms of discrimination in which landlords categorically discriminated against one sex or the other.¹⁵² For example, in *Braunstein v. Dwelling Managers, Inc.*, four single parents, each with a child of the same sex as them, challenged a federally-subsidized housing complex’s policy requiring a single parent with a child of the same sex to rent a one bedroom apartment, while a single parent with a child of the opposite sex could rent a two bedroom apartment.¹⁵³ The court for the Southern District of New York refused to find that the policy constituted sex discrimination as applied to the plaintiffs, because the case was not factually similar to the only two federal cases on point in which “members of one sex were denied housing accommodations available to members of the opposite sex.”¹⁵⁴ Instead, the court held that the “defendants’ housing allocation procedure [was] gender-neutral” because a “mother and daughter who reside together receive the same treatment as a father and son.”¹⁵⁵ The court reasoned that, “[s]ince the essence of sex discrimination is the differ-

ing the discrimination to “involve disparate treatment” as required in Title VII cases) (internal citation omitted).

¹⁴⁸ Both statutes were “enacted to end discrimination”—in employment for Title VII and in housing for Title VIII. *Huntington*, 844 F.2d at 935.

¹⁴⁹ *Id.* at 934–35. See also *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir. 1988) (recognizing the “parallel between the antidiscrimination objectives of Title VIII and Title VII”).

¹⁵⁰ *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987 (4th Cir. 1984) (“We and other courts of appeal have recognized the parallel objectives of Title VII and Title VIII.”); *Larkin v. State of Mich. Dep’t of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996) (“Most courts applying [Title VIII], as amended . . . , have analogized it to Title VII. . . .”); *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) (“We apply Title VII discrimination analysis in examining Fair Housing Act . . . discrimination claims.”). See also *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977).

¹⁵¹ SCHWEMM, *supra* note 36, at § 11:C1 (noting that there are “only a handful” of reported Fair Housing Act cases based on sex discrimination).

¹⁵² Categorical exclusion of women from the housing market is what the Fair Housing Act first aimed to eradicate. See SCHWEMM, *supra* note 36, at § 11C:1 (citing *Hearings on S. 1604 before the Senate Subcommittee on Housing and Urban Affairs 1228*, 93d Cong., 1st Sess. (1973)) (Senator Brock, the principal sponsor of the amendment adding a prohibition on sex discrimination to the Fair Housing Act, said, “The assumption that men could perform these [home ownership] tasks while women could not is just the sort of discrimination based on sex that we are talking about.”).

¹⁵³ 476 F. Supp. 1323, 1325 (S.D.N.Y. 1979).

¹⁵⁴ *Id.* at 1326 n. 7 (referring to *U.S. v. Reece*, 457 F. Supp. 43, 48 (D. Mont. 1978) and *Morehead v. Lewis*, 432 F. Supp. 674, 676 (N.D. Ill. 1977)).

¹⁵⁵ *Id.* at 1327.

ence in treatment of the individual based on gender, and males and females receive similar treatment from the defendants, there is no sex discrimination.”¹⁵⁶ Similarly, but more recently, in *Baumgardner v. HUD*, the Sixth Circuit upheld an administrative law judge’s determination that Baumgardner discriminated against Blanton Holley, on whose behalf HUD brought the case, because Baumgardner “refused to negotiate for the rental of the house in question [since] it was to be rented by males,” but “allowed females to examine it” and ultimately rent it.¹⁵⁷

Early cases, however, importantly recognized sex discrimination when the differential treatment was based on impermissible stereotypes about both men and women. In *United States v. Reece*,¹⁵⁸ the district court of Montana held that Cleone Reece’s policy of refusing to rent apartments to single women without cars because the apartments were in a dangerous area constituted sex discrimination, because “a similarly situated male, *i.e.*, a single man without a car, would not be disqualified on that basis.”¹⁵⁹ Further, the court rejected Reece’s safety justification, because the “allegedly benign motivation” was “paternalistic and overbroad.”¹⁶⁰ In other words, Reece was assuming these women could not determine for themselves whether they should live in the area and what sorts of precautions they would need to take for their own protection. *Baumgardner* can also be read as a rejection of generalizations about one sex as justification for differential treatment, because the court refused to find Baumgardner’s concern that men were “messy and unclean”¹⁶¹ a legitimate reason to not rent to them. Thus, in cases of categorical exclusion of one sex, courts recognized and rejected sex stereotypes as justifications for differential treatment of men and women, which suggests they will be amenable to claims of sex stereotyping made by female victims of domestic violence.

B. Applying Title VII’s Evolving Sex Discrimination Jurisprudence to the Housing Context To Protect Women from New Forms of Discrimination

Additionally, the Fair Housing Act sex discrimination jurisprudence shows that courts readily borrow Title VII analytical frameworks to assess Title VIII claims. In recent years, several federal courts have expanded the Fair Housing Act’s sex discrimination jurisprudence by recognizing a cause of action for sexual harassment.¹⁶² Plaintiffs bringing these claims did so

¹⁵⁶ *Id.*

¹⁵⁷ 960 F.2d 572, 579 (6th Cir. 1992).

¹⁵⁸ 457 F. Supp. 43 (D. Mont. 1978).

¹⁵⁹ *Id.* at 48.

¹⁶⁰ *Id.*

¹⁶¹ *Baumgardner*, 960 F. 2d at 574 (internal quotations omitted).

¹⁶² See *Beliveau v. Caras*, 873 F. Supp. 1393 (C.D. Cal. 1995); *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993); *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir.

under two theories. First, under a quid pro quo theory, they argued that their landlords instituted eviction because they refused to engage in sexual acts with the landlords.¹⁶³ Second, under a hostile environment theory, they argued either constructive eviction based on the sexually-charged environment¹⁶⁴ or simply an impermissible hostile environment that altered the conditions of their housing.¹⁶⁵ In deciding these cases, the courts turned to Title VII case law for guidance about the framework under which to analyze the claims and, more broadly, the legitimacy of such claims.¹⁶⁶ For example, as early as 1985, the Sixth Circuit upheld a magistrate judge's application of Title VII's conceptual framework to a claim of sexual harassment under the Fair Housing Act.¹⁶⁷ The Tenth Circuit, the next circuit to address the issue of whether sexual harassment could constitute impermissible sex discrimination under the Fair Housing Act, applied Title VII's standards for quid pro quo harassment.¹⁶⁸ It also analogized to Title VII's hostile work environment requirements to create a hostile housing environment standard, noting simply, "we will look to employment discrimination cases for guidance."¹⁶⁹ A district court in Maryland decided to apply Title VII's sexual harassment framework to Fair Housing Act claims, because its circuit "has been willing to import doctrines or interpretations of language accepted under Title VII to Title VIII claims."¹⁷⁰

Importantly, in recognizing a cause of action for sexual harassment under the Fair Housing Act, these courts have accepted that discrimination comes in many forms and that causes of action created to deal with different forms of discrimination may be imported across contexts because the harm is just as great. For example, a district court in Maryland explained that it would find sexual harassment actionable under the Fair Housing Act, because it is actionable under Title VII, and "Title VII and Title VIII share the same purpose—to end bias and prejudice."¹⁷¹ In a later case, a district court in California held that "it is beyond question that sexual harassment is a form of discrimination," reasoning that "the purposes underlying Titles VII and VIII are sufficiently similar so as to support discrimination claims

1997); *Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir. 1985), 1985 WL 13505; *Williams v. Poretzky Mgmt., Inc.*, 955 F. Supp. 490 (D. Md. 1996).

¹⁶³ See *Shellhammer*, 1985 WL 13505; *Krueger*, 115 F. 3d 487.

¹⁶⁴ See *Honce*, 1 F.3d 1085; *Williams*, 955 F. Supp. 490.

¹⁶⁵ See *Beliveau*, 873 F. Supp. 1393; *DiCenso*, 96 F.3d 1004; *Krueger*, 115 F. 3d 487.

¹⁶⁶ *Beliveau*, 873 F. Supp. at 1396–97; *DiCenso*, 96 F.3d at 1008; *Honce*, 1 F.3d at 1089–90; *Krueger*, 115 F.3d at 491; *Shellhammer*, 1985 WL 13205, at *1; *Williams*, 955 F. Supp. at 494.

¹⁶⁷ *Shellhammer*, 1985 WL 13505.

¹⁶⁸ *Honce*, 1 F.3d at 1089–90.

¹⁶⁹ *Id.* at 1088, 1090. See also *DiCenso*, 96 F.3d at 1008 (determining that the court would "recognize a hostile housing environment cause of action, and begin [its] analysis with the more familiar Title VII standard").

¹⁷⁰ *Williams*, 955 F. Supp. at 495.

¹⁷¹ *Id.*

based on sexual harassment regardless of context” and that “it is the behavior that the law seeks to eradicate.”¹⁷² Thus, federal courts have been willing to, when needed, recognize new causes of action under the Fair Housing Act that were first established under Title VII. Female victims of domestic violence who have been evicted based on the criminal actions of their abusers, therefore, may be able to rely on this willingness to state a claim for sex discrimination using theories of sex stereotyping first developed in Title VII jurisprudence.

V. FEMALE VICTIMS OF DOMESTIC VIOLENCE MAY STATE A CLAIM FOR SEX DISCRIMINATION BASED ON SEX STEREOTYPING UNDER THE FAIR HOUSING ACT

Building on Fair Housing Act sex discrimination jurisprudence and borrowing from the sex stereotyping theories used under Title VII, a female victim of domestic violence who has been evicted based on her abuser’s criminal actions may state a claim for sex discrimination under the Fair Housing Act. She can argue that her landlord impermissibly evicted her based on sex-based stereotypes about female victims of domestic violence. Depending on their own particular circumstances, plaintiffs may base their claim against their landlord on either the expectation or non-conformist theory of sex stereotyping. Employers impermissibly take adverse employment actions against women both because of expectations that women will conform to sex stereotypes and because women do not conform to sex stereotypes. Similarly, landlords evict female victims of domestic violence both because they expect them to conform to sex stereotypes and because, in other cases, the women do not conform to these stereotypes. The particular theory of sex stereotyping a plaintiff uses will depend on the specific circumstances of her eviction and the evidence available.

Under Title VII’s analytic framework, no matter which theory the plaintiff uses to allege sex discrimination, the plaintiff must prove that sex was a motivating factor in the employer’s decision to take an adverse employment action.¹⁷³ If the plaintiff does so, the burden of proof shifts to the employer to prove that it would have taken the action even without the impermissible consideration of the plaintiff’s sex.¹⁷⁴ Assuming that courts are willing to transfer this Title VII framework to Title VIII—and analogous case law indicates that they would be—a female victim of domestic violence may use one of the two sex stereotyping arguments to prove that her eviction was because of her sex. The landlord could then rebut her claim by arguing that he would have evicted the plaintiff anyway. This Part de-

¹⁷² *Beliveau v. Caras*, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995).

¹⁷³ *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

¹⁷⁴ *Id.*

scribes how a plaintiff may prove her claim and then addresses the arguments a landlord would likely use to defend his decision to evict her.

A. Proving that Sex Was a Motivating Factor in the Plaintiff's Eviction

1. Expectation Stereotyping.—Under the expectation sex stereotyping theory, courts have held that “the assumption that individual members of the sex” would conform to stereotypes about their sex group constituted unlawful sex discrimination.¹⁷⁵ In the case of female victims of domestic violence evicted based on the criminal actions of their abusers, stereotyped expectations regarding a woman’s proper response to abuse may underlie the landlord’s actions. In the employment context, courts have held that an employer’s reliance on stereotypical beliefs about the inabilities of women with children, in denying a job to or firing a particular woman without an individualized assessment of her true abilities, constituted impermissible sex discrimination.¹⁷⁶ Here, a female victim of domestic violence may state a claim for sex discrimination by alleging that her landlord based the decision to evict her on sex-based stereotypes about how she would act in the future, rather than an individualized assessment of her efforts to stop the violence, her lack of involvement in committing the crime for which she is being evicted, and its effects on other tenants.

The clearest situation in which a plaintiff can make this claim is if her landlord has made statements that reflect that his decision to evict was based on stereotyped beliefs. In the employment cases cited above, the plaintiffs’ supervisors all made comments to the plaintiffs or others about their beliefs that women with children could not perform their jobs as well as women without children or men could.¹⁷⁷ As *Bouley* demonstrates, landlords sometimes make statements about how they think female victims of domestic violence will act.¹⁷⁸ If a landlord states directly or otherwise suggests through comments that his decision to evict a tenant was based upon his belief that female victims of domestic violence are passive, precipitate the violence against them, and will not do anything to stop the violence, the landlord has acted discriminatorily, just as the supervisors did in the employment cases.

a. Plaintiffs in public housing.—In the public and federally assisted housing context, a plaintiff’s claim is bolstered by the recent amendments VAWA made to the one-strike housing law.¹⁷⁹ Under these

¹⁷⁵ Case, *supra* note 46, at 37–38.

¹⁷⁶ See cases cited *supra* notes 54–55 and accompanying text.

¹⁷⁷ See cases cited *supra* note 54 and accompanying text.

¹⁷⁸ ACLU Brief, *supra* note 44, at 17–18.

¹⁷⁹ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3041–49 (2006).

amendments, landlords cannot base an eviction on “criminal activity directly relating to domestic violence” committed by a “member of a tenant’s household or any guest or other person under the tenant’s control,” unless there is an “actual and imminent threat” to others.¹⁸⁰ Therefore, if a public housing landlord bases the eviction on a stereotyped belief that female victims of domestic violence are passive, submissive, and precipitate the violence against them, thereby making it likely that the violence will continue, this constitutes an unlawful eviction without proof that the particular situation poses a threat to others. Public housing landlords also cannot construe “an incident or incidents of actual or threatened domestic violence . . . as a serious or repeated violation of the lease by the victim or threatened victim of that violence,” and such incidents cannot “be good cause for terminating the tenancy or occupancy rights of the victim of such violence.”¹⁸¹ Under this standard, T.J.’s landlord may not have been able to hold her responsible for her ex-boyfriend’s criminal actions or use these incidents as cause for her termination.¹⁸² The VAWA amendments to the one-strike law implicitly reflect an understanding that female victims of domestic violence are often unjustly held responsible for the actions of their abusers.

b. Plaintiffs in private housing.—For a female victim of domestic violence evicted by a private landlord, the theory is the same: a decision to evict based on the stereotyped belief that female domestic violence victims precipitate the violence committed against them, are submissive, and will not prevent such violence in the future, without an individualized assessment, may constitute impermissible discrimination. Because the one-strike law and the recent VAWA amendments are not applicable to private landlords, a plaintiff here will have to tailor her argument to her specific lease. Private landlords may use zero tolerance provisions similar to the one at issue in *Bouley*. There, the lease stated, “Tenant will not use or allow said premises or any part thereof to be used for unlawful purposes, in any noisy, boisterous or any other manner offensive to any other occupant of the building.”¹⁸³ The provision has the same effect as the one-strike rule in public housing: the landlord views an assault in the apartment as an unlawful purpose and claims that the domestic violence bothers other occupants in the building. Other landlords may directly incorporate language from the federal one-strike law. In either situation, the plaintiff could argue that she did not allow her apartment to be used for unlawful purposes, as she did not consent to being beaten. Further, she could present evidence that no other occupants have actually complained. These arguments would provide circumstantial evidence that the landlord did not conduct an individualized as-

¹⁸⁰ 42 U.S.C.A. §§ 1437d(l)(6)(A), (6)(E); 42 U.S.C.A. §§ 1437f(c)(9)(C)(i)–(v); 42 U.S.C.A. §§ 1437f(o)(7)(D)(i)–(v).

¹⁸¹ 42 U.S.C.A. § 1437d(l)(5); 42 U.S.C.A. § 1437f(c)(9)(B); 42 U.S.C.A. § 1437f(o)(7)(C).

¹⁸² See Memorandum, *supra* note 103.

¹⁸³ *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677 (D. Vt. 2005).

assessment but, instead, evicted her based on stereotypical presumptions that she precipitated the violence against her and would not do anything to prevent it in the future. Nevertheless, the most convincing evidence for any plaintiff with a private landlord is if her landlord has made statements that reflect that his decision to evict was based on such stereotyped beliefs.

Without such statements, however, a plaintiff may still make her argument by describing why she did not deserve to be evicted. The plaintiff's goal is to show that, had her landlord actually done an individualized assessment, he should have concluded that the situation did not warrant eviction based on circumstantial evidence of discrimination. Just as courts have held that an employer who looks to beliefs about women with children in general, rather than to a particular woman's qualifications, when deciding whether to hire, promote, demote, or fire a woman constitutes unlawful sex discrimination,¹⁸⁴ courts here, the plaintiff can argue, should find that a landlord who does not engage in an individualized assessment, but instead relies on sex stereotypes, should be found to have discriminated. A particular plaintiff may point to any combination of factors to show that she did not deserve to be evicted and that her landlord's decision was based on his stereotyped beliefs about the plaintiff, as opposed to an individualized assessment. For example, a plaintiff may argue that she got a restraining order, refused to let her abuser into her apartment, and notified her landlord each time her abuser tried to get into her apartment, but that her landlord refused to help her enforce the restraining order by filing a criminal complaint against her abuser for trespassing. In such a situation, the plaintiff has in fact taken action to get rid of the violence, defying the stereotype that she will not stop it. Moreover, the lease may state that it holds the tenant responsible for any criminal activity in her apartment in order to protect other tenants' peaceful enjoyment of the premises, as Bouley's lease did. The plaintiff could therefore argue that her eviction is unwarranted if there are no actual complaints from neighbors but merely her landlord's supposition that her personal situation will bother other tenants. She could further argue that she took all reasonable steps to prevent disturbance to her neighbors and that her landlord's refusal to file a trespassing complaint thwarted her efforts.

2. *Non-Conformist Stereotyping.*—Landlords might also evict female victims of domestic violence when they do *not* conform to stereotypes concerning how a victim of abuse should act. In making this argument, the plaintiff, whether she is evicted from public or private housing, should rely on the substantive approach that some of the lower courts have utilized in applying *Price Waterhouse*.¹⁸⁵ These courts look to the catch 22 the Su-

¹⁸⁴ See cases cited *supra* note 55.

¹⁸⁵ See *Oiler v. Winn-Dixie Louisiana, Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002); see also *Yuracko*, *supra* note 46, at 225 (arguing for a "power-access approach" to Title VII that, like the substantive approach of some lower courts, "treats as actionable sex discrimination

preme Court described in *Price-Waterhouse*,¹⁸⁶ as well as the purpose of Title VII, in order to find impermissible sex discrimination when the conduct the employer prohibits one sex from doing effectively excludes women from the workplace, thus perpetuating the traditional hierarchy.¹⁸⁷ In the housing context, a female victim of domestic violence may state a claim for sex discrimination under the Fair Housing Act by arguing that her landlord has placed her in a similar catch 22: out of her house if she does nothing to prevent the violence against her and out of her house if she does.¹⁸⁸ This claim recognizes that there may be occasions when a landlord evicts a female victim of domestic violence precisely because she has taken action to end her abuse, and by extension any criminal activity taking place in her apartment, by kicking her abuser out of the apartment, obtaining a restraining or protective order, or cooperating with police and prosecutors to bring charges against her abuser. Price Waterhouse penalized Ann Hopkins for acting in ways that were critical for her and other women to act in order to succeed in the business, because these behaviors did not conform to the partners' stereotyped beliefs about how a woman ought to act. Similarly, a landlord sometimes evicts a female domestic violence victim for acting in ways that are necessary for her to preserve her housing, because she does not conform to the landlord's stereotyped views about how she ought to act as a female victim of domestic violence. Statements from the landlord or his agents may reveal that the landlord viewed the plaintiff's actions as uncharacteristic of the stereotypical female domestic violence victim. This was the case in *Bouley*, where the landlord evicted Bouley because she did not conform to the stereotype—rather than being a passive victim, she showed anger and acted assertively.¹⁸⁹ Just as the Supreme Court held in *Price Waterhouse* that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender,”¹⁹⁰ a landlord who acts on the basis of a belief that a female victim of domestic violence cannot

only those forms of sex-specific trait discrimination that are based on gender norms or scripts that inhibit the ability of individuals of a particular sex to participate successfully in the work world”).

¹⁸⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.”).

¹⁸⁷ See *Oiler*, 2002 WL 31098541, at *5.

¹⁸⁸ Feminist scholars have recognized a more general catch 22, or double bind, that female victims of domestic violence face. See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 120, 171 (2000) (describing a “double bind” placed on female domestic violence victims who are “strong, capable, and assertive” and thus “bucking the common stereotype of the battered woman” in the specific context of juries refusing to believe the self-defense claims of female victims of domestic violence who have killed their abusers and courts taking away custody of their children because of the “propensity of violence” they showed in defending themselves against an abusive husband or boyfriend).

¹⁸⁹ ACLU Brief, *supra* note 44, at 17–18.

¹⁹⁰ *Price Waterhouse*, 490 U.S. at 250.

be angry or assertive, or that she must not be, has acted on the basis of her gender, because, as discussed above, the stereotypes this landlord holds are linked to the victim's gender.¹⁹¹ This eviction further works to exclude the plaintiff from her particular housing and makes it more difficult for her to participate in the housing market in the future,¹⁹² which contradicts the purpose of the Fair Housing Act's ban on sex discrimination.¹⁹³ Additionally, the landlord likely perpetuates exclusion from the housing market of low-income women, a subset of women who have historically been subjected to disproportionate discrimination in housing.¹⁹⁴

Building on the substantive approach that courts like the *Oiler* court have taken in applying *Price Waterhouse*, the plaintiff should focus her argument on the gendered nature of domestic violence as compared to violence committed by strangers and her landlord's differential treatment of each. In *Oiler*, the court implicitly determined that a man wearing a dress was far different than a woman wearing a dress, and that exclusion of men who wear dresses from the workplace did not make it harder for men or women to fully participate in the work world, thereby not violating Title VII.¹⁹⁵ Here, the plaintiff can argue that the court should recognize that domestic violence is different than other kinds of violence, in part because of its gendered undertones—many scholars agree that domestic violence is “historical[ly] root[ed]” in “gender subordination” and is both served by and serves to perpetuate a sex hierarchy based on male dominance.¹⁹⁶ The

¹⁹¹ See *supra* notes 126–28 and accompanying text.

¹⁹² If the plaintiff was in any form of public or subsidized housing, an eviction usually means she will not be able to move into other public or subsidized housing. In any case, no matter what the kind of housing, she will be at a disadvantage in finding new housing, because poor women are more likely to be the victims of domestic violence. LAWRENCE A. GREENFIELD, BUREAU OF JUSTICE STATISTICS, VIOLENCE BY INMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 14 (1998) (women who have a household income of \$7500 or less are seven times as likely as women with a household income of over \$75,000 to be the victims of domestic violence).

¹⁹³ See Dep't of Hous. & Urban Dev. v. Baumgardner, 2A Fair Hous.-Fair Lending ¶ 25,006, ¶ 25,096 (HUD ALJ Nov. 15, 1990) (explaining that the prohibition on sex discrimination in housing was intended “to end housing practices based upon sexual stereotyping”). The prohibition on sex discrimination was meant to ensure that women could own homes just as men could. SCHWEMM, *supra* note 36, at § 11C:1.

¹⁹⁴ See Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 LAW & INEQ. 351, 372–73 (noting that “the majority of renters are low-income persons” and that the “overwhelming majority” of low-income people “are women”); Zoltowski, *supra* note 19, at 1237 nn.52–55 (providing information suggesting women are the victims of domestic violence far more often than men).

¹⁹⁵ *Oiler v. Winn-Dixie Louisiana, Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541, at *5–6 (E.D. La. Sept. 16, 2002).

¹⁹⁶ See SCHNEIDER, *supra* note 188, at 12–13, 28; see also Joanne Belknap & Heather Melton, *Are Heterosexual Men Also Victims of Intimate Partner Abuse?*, APPLIED RESEARCH FORUM: NATIONAL ELECTRONIC NETWORK ON VIOLENCE AGAINST WOMEN, Mar. 2005, http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_MaleVictims.pdf (reviewing studies on the rates of domestic violence and concluding that they show domestic violence is gendered); Alexander Detschelt,

plaintiff can further argue that, unlike the negligible effect of excluding the few men who wear dresses from the workplace in *Oiler*, the difference in treatment of violence in general as compared to domestic violence *does* work to exclude women¹⁹⁷ from the housing market in contravention of the Fair Housing Act. Therefore, a plaintiff should, if evidence exists, point to her landlord's differential treatment of domestic violence victims compared to victims of violence committed by strangers to make the sex-based stereotyped treatment even clearer.

To make the comparison most strongly, the plaintiff should use evidence of actual situations of stranger violence in her building and her landlord's differential treatment of those victims—presumably those victims were not evicted. The plaintiff also may be able to simply make hypothetical arguments, essentially asking the court to take judicial notice of differential treatment, as the *City of Belleville*, *Heller*, and *Smith* courts did.¹⁹⁸ She can ask: Did the woman next door whose door was broken down in the middle of the night, who was raped at gunpoint, get evicted because of the criminal activity in her apartment? Did the man across the hall whose window was broken in the course of a robbery get evicted because he refused to pay for damage caused by his "guest"? More likely than not, the answer to these questions is no. This argument also builds on the police cases, discussed above, in which courts have recognized that police departments' differential treatment of victims of domestic violence, as opposed to victims of random violence, may constitute sex discrimination because the differential treatment is based on stereotypes about female victims of domestic violence.¹⁹⁹

B. *The Landlord's Arguments*

The landlord will undoubtedly argue that he had legitimate, nondiscriminatory reasons for evicting the plaintiff and would have made the same decision even if impermissible stereotypes were not a factor. Admittedly, in some circumstances, a landlord will be justified in evicting a female victim of domestic violence. But there are counterarguments that such a plaintiff can make in order to maintain her claim that her landlord discriminated based on sex.

Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation, 12 KAN. J.L. & PUB. POL'Y 249, 250–52 (2003) (discussing the role that stereotypes based on traditional gender norms play in treatment of male victims of domestic violence); Malcolm J. George, *Riding the Donkey Backwards: Men as the Unacceptable Victims of Marital Violence*, 3 J. MEN'S STUD. 137, 137 (1994) (same).

¹⁹⁷ While this article is focused on female victims of domestic violence, a male victim of domestic violence could make a similar claim if his eviction is based on stereotypes about how he should react to the violence. Such an eviction could also force him out of the housing market.

¹⁹⁸ See *supra* notes 70–72 and accompanying text.

¹⁹⁹ See *supra* cases cited in notes 129–39 and accompanying text.

1. *Public Housing Landlords.*—Public housing authorities, federally assisted housing project landlords, and private landlords accepting Section 8 vouchers can now only defend the eviction by using the right under law to evict a tenant for “an actual and imminent threat to other tenants or those employed at or providing service to the property.”²⁰⁰ The landlord may point to statistics that show that once a domestic violence victim takes action to end the abuse, the abuser becomes even more aggressive in his harassment.²⁰¹ However, a plaintiff can argue that the landlord cannot rely on such speculative evidence but must prove through actual complaints or incidents with other tenants or employees that there is an actual and imminent threat to others.²⁰² Further, a plaintiff can argue that even if the abuser becomes more aggressive, he will almost certainly target only the plaintiff and no one else in her building.²⁰³

2. *Private Housing Landlords.*—Private landlords, however, have more defenses at their disposal, because the VAWA amendments to the one-strike law protecting domestic violence victims do not apply to them. Thus, they will point to several legitimate, non-discriminatory reasons for eviction. First, if the abuser lives with the plaintiff, the landlord may argue that the abuser is a dangerous and violent person who threatens the safety of other tenants and, as such, should not be allowed to live on the premises anymore. Alternatively, if the abuser does not live with the plaintiff, the landlord may argue that he does not want this dangerous, violent person coming on the premises and needs to evict the plaintiff in order to make sure this person does not enter the premises in the future.

These arguments can be countered in two ways. First, the premise shows a lack of understanding of the nature of domestic violence, because the domestic abuser is unlikely to focus his violence on anyone but his chosen victim.²⁰⁴ Second, the plaintiff can argue that she should be allowed to

²⁰⁰ 42 U.S.C.A. § 1437d(l)(6)(E) (West 2005 & Supp. 2006); *id.* § 1437f(c)(9)(C)(v); *id.* § 1437f(o)(7)(D)(v).

²⁰¹ Zoltowski, *supra* note 19, at 1234–35 (“When a woman attempts to end an abusive relationship or separate from her abuser, she may be in the most danger,” because “most abusers attempt to reestablish their power over their partner by increasing the use of threats or violence.”).

²⁰² American Civil Liberties Union, Women’s Rights Project, *The Rights of Domestic Violence Survivors in Public and Subsidized Housing* (Mar. 21, 2006), http://www.aclu.org/pdfs/subsidizedhousingdv.images/asset_upload_file17_24326.pdf (“Because VAWA has become law so recently, it is not yet clear how this language will be interpreted At the very least . . . the law appears to require the PHA or landlord to put forward specific evidence proving that there is a real threat to other tenants or to staff if the victim of domestic violence is not evicted or her voucher is not terminated. Presumably, a PHA or landlord would not be permitted to rely on mere stereotypes or assumptions about domestic violence or battered women in making this showing.”).

²⁰³ Emily J. Martin and Naomi S. Stern, *Domestic Violence and Public and Subsidized Housing: Addressing the Needs of Battered Tenants Through Local Housing Policy*, CLEARINGHOUSE REV., Jan.–Feb. 2005, at 551, 560 (“[D]omestic violence typically is highly targeted toward specific intimate partners or family members, not at random tenants or individuals.”).

²⁰⁴ *Id.*

stay in exchange for an agreement to bar the abuser from the premises, as is allowed under federal housing law.²⁰⁵ A private landlord could easily agree to such an agreement, and a court could order such an agreement if the landlord is found to have illegally discriminated.²⁰⁶ Because abusers often do not follow restraining and protective orders, this option may pose logistical difficulties, but with cooperation from the landlord in enforcing such an agreement it can work. If the plaintiff can point to other situations in which a male victim of violence was allowed to bar his assailant from the premises in exchange for staying in his housing, she may be able to prove she was impermissibly evicted based on stereotypes about female victims of domestic violence.

Second, a private landlord may argue that even if the abuser poses no direct threat to other tenants, the other tenants expect to live in a community in which they and their children do not hear loud arguments through the walls, see broken windows in their building, or otherwise witness violence. Though these are strong arguments for the landlord because he is not subject to the VAWA amendments limiting the reasons for which he may lawfully evict a victim of domestic violence, the landlord is nevertheless still subject to the Fair Housing Act's prohibition on discrimination. The plaintiff can counter the landlord by gathering as much circumstantial evidence as possible that leads to the conclusion that the landlord discriminated against her based on her sex because he based his decision to evict her on sex-based stereotypes about female victims of domestic violence, as discussed above.²⁰⁷

Third, a private landlord will likely argue that he treats or would treat a male victim of domestic violence similarly, because he simply wants to rid the property of any and all violence. This is a problematic argument for both the landlord and the plaintiff, however, because less is known about male victims of domestic violence.²⁰⁸ The best counterargument for the

²⁰⁵ Fuchs, *supra* note 97, at 322 (“[Housing authorities] may be willing to settle an eviction based on a household member or guest’s criminal . . . conduct short of evicting the entire family . . . [by agreeing] to allow the family to remain in exchange for an agreement to bar the offending guest from the premises or an agreement that the responsible household member move.”).

²⁰⁶ See KUSHNER, *supra* note 27, at § 9.06.

²⁰⁷ See *supra* Part V.A.1.b.

²⁰⁸ While the Department of Justice reported in 1998 that women were five to eight times more likely than men to be the victims of intimate violence and about 840,000 women had been victims of intimate violence as compared to about 150,000 men in 1996, for the last 30 years national surveys have reported that women abuse their male spouses or significant others just as often as men abuse their female spouses or significant others. Compare GREENFIELD, *supra* note 192, at 2–4, with Richard Gelles, *The Missing Persons of Domestic Violence: Male Victims*, EVERYMAN, Apr.–May 2002, at 6 (criticizing the Department of Justice statistics) and Kelly, *supra* note 33, at 794–800 (describing various national surveys, the most recent of which found that “wives engaged in intimate violence at rates comparable to husbands” but that “while severe assaults by wives remained fairly steady, the rate of severe abuse perpetuated by husbands decreased between 1985 and 1992 by almost 37%). Whatever the numbers, it would be hard for a landlord or plaintiff to make claims about male victims because the phe-

plaintiff would be if she could point to an actual male victim of domestic violence who was not evicted by her landlord despite the criminal actions of his abuser, but this real comparator may be hard to produce.²⁰⁹ The plaintiff could instead take her cue from the *City of Belleville*, *Heller*, and *Smith* courts in order to allege hypothetically that a male victim of domestic violence would not be similarly evicted, because a male victim showing anger and assertiveness in taking action to end the violence committed against him would be acceptable to the landlord, even applauded.²¹⁰ Still, courts may be unwilling to take judicial notice to conclude that a landlord's treatment of a male victim of domestic violence would be different since courts may be wary of making assumptions about such an unfamiliar topic.

Instead, the plaintiff should move away from such a formalistic approach. If the landlord argues that he would treat male and female victims of domestic violence equally, by evicting both, the plaintiff could respond by arguing that evictions of male victims of domestic violence might also be impermissibly based on sex-based stereotypes about such victims and that equally discriminatory treatment of male and female domestic violence victims is impermissible. Male victims of domestic violence who actually report their abuse tend to be perceived as "sissies" and inadequate in fulfilling their familial role,²¹¹ and the landlord might base his decision to evict such men on impermissible sex-based stereotypes.²¹² The plaintiff could also use evidence, if available, of her landlord's differential treatment of victims of domestic violence and victims of stranger violence to argue that this different treatment is impermissibly grounded in stereotypes created by the gendered nature of domestic violence. In other words, her landlord did not evict the victim of stranger violence because he did not believe that the victim caused the violence or could do anything to stop it in the future, whereas her landlord may have evicted her because he believed precisely

nomenon has been ignored or denied for so long. *See id.*; Ferrel Christensen, *Balancing the Approach to Spouse Abuse*, EVERYMAN, Summer 1992, at 4 ("Whether overt or implied, the message is always the same: abuse of men by their female partners either doesn't exist or doesn't matter."); Gelles, *supra*, at 6 (describing his own experience in denying that men can be victims).

²⁰⁹ Abused men are highly unlikely to report their abuse, so it is less likely that landlords will find out about such abuse. *See* David Fontes, *The Hidden Side of Domestic Violence*, EVERYMAN, May–June 2000, at 48; Gelles, *supra* note 208.

²¹⁰ *Cf.* Belknap & Melton, *supra* note 196, at 5 ("[A] significant amount of research reports that women suffer more negative consequences as a result of violence from a current or former male partner than men do from a current or former female partner.").

²¹¹ Fontes, *supra* note 209; *see* Detschelt, *supra* note 196, at 250–52. If the landlord's decision to evict reflects such stereotypes, that eviction can also constitute impermissible sex discrimination under a sex stereotyping theory. *But see* Belknap & Melton, *supra* note 196, at 5 ("While women are more likely than men to use force to resist violence *initiated* by their intimate partners, men are more likely than women to use force in order to control and exercise power over their partners.").

²¹² Male victims of domestic violence may be able to use the same arguments outlined in this Comment as female victims of domestic violence, but a discussion of the details of these arguments is beyond the scope of this Comment.

the opposite about her—that, as a female victim of domestic violence, she precipitated the violence against her and will not prevent future attacks. While the comparison does not directly prove discrimination, it provides strong circumstantial evidence that the landlord would need to rebut.

CONCLUSION

The *Bouley* decision has been interpreted as an endorsement of an intentional discrimination theory, though the court provided little explanation for its decision.²¹³ This Comment examined in more depth and with optimism the possibility that women who are victims of domestic violence and are evicted from their homes based on the criminal actions of their abusers—particularly physical attacks—can state claims for sex discrimination under the Fair Housing Act. They may do so by using two theories of sex stereotyping first developed under Title VII jurisprudence: first, they may argue that their landlords impermissibly evicted them based on sex-based stereotypes about how female victims of domestic violence will act, and, second, they may argue that their landlords impermissibly evicted them because they did not conform to sex-based stereotypes about how female victims of domestic violence ought to act. If these theories succeed, they can provide individual women with a remedy under law and, importantly, further the goal of the Fair Housing Act to “end housing practices based upon sexual stereotyping.”²¹⁴

²¹³ Duryea, *supra* note 7, at 183 (noting that the court applied the *McDonnell Douglas* burden-shifting analysis used only in disparate treatment cases and cited a case in which an Ohio district court held that a police department’s policy about domestic disputes could be found to have been impermissibly motivated by intent to discriminate against women based on stereotyped statements from police officers).

²¹⁴ Dep’t of Hous. & Urban Dev. v. Baumgardner, 2A Fair Hous.-Fair Lending ¶ 25,006, ¶ 25,096 (HUD ALJ Nov. 15, 1990).

