Housing Discrimination Is as Dangerous as Defective Stairs: The Nondelegable Duty to Obey State and Local Housing Discrimination Laws

ARMEN H. MERJIAN*

There are no clearly defined criteria for identifying duties that are nondelegable. Indeed, whether a particular duty is properly categorized as "nondelegable" necessarily entails a sui generis inquiry, since the conclusion ultimately rests on policy considerations.

Kleeman v. Rheingold, 614 N.E.2d 712, 715 (N.Y. 1993).

Inevitably it becomes a matter of judgment, case by case, where to draw the line between so-called "delegable" tasks and "nondelegable" tasks and duties. In a given case, the policy question facing a court (the law of torts is largely judge-made) is whether on the facts presented the public interest warrants imposition upon a person who has delegated a task the duty to guard against risks implicit in the performance of the task.

Funk v. General Motors Corp., 220 N.W.2d 641, 645 (Mich. 1974).

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* Member, New York and Connecticut Bars. B.A. Yale University 1986; J.D. Columbia University 1990. The author is a civil rights and poverty lawyer at Housing Works, Inc., in New York.

I. INTRODUCTION

The vast majority of housing sales and rentals involve agents.[1] These range from management companies to real estate salespersons, lawyers to escrow agents.[2] They also include receptionists,[3] security guards,[4] office managers,[5] and building superintendents,[6] who may be called upon to provide information regarding available apartments, to give tours of the property, and to distribute housing applications. Agents are thus the gatekeepers of housing in the United States, distancing owners from potential buyers and renters while implementing the owners' policies, screening applicants, and deciding who is permitted to view and ultimately apply for the property in question.[7]

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[1] *See, e.g.*, ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 12B:2 (2023) ("Agents are an essential part of almost every housing transaction."); RESTATEMENT (SECOND) OF AGENCY § 1(3) (AM. L. INST. 1958) ("The one who is to act is the agent.").

[2] *See* SCHWEMM, *supra* note 1, at 1.

[3] *See, e.g.*, Williams v. S & S Servs., No. 8:21-cv-1425-WFJ-CPT, 2021 U.S. Dist. LEXIS 217713, at *2 (M.D. Fla. Oct. 25, 2021) ("Ms. Williams theorizes that the receptionist, who Ms. Williams asserts was 'Hispanic,' discriminated against Ms. Williams because the receptionist allowed another person, who Ms. Williams contends was 'more than likely a Hispanic woman,' to lease the property.").

[4] *See, e.g.*, Hicks v. Makaha Valley Plantation Homeowners Assoc., No. 14-00254, 2015 U.S. Dist. LEXIS 85101, at *28 (D. Haw. June 30, 2015) ("Defendants may also be vicariously liable for the allegedly discriminatory conduct of the on-site security guards.").

[5] *See, e.g.*, United States v. Matusoff Rental Co., 494 F. Supp. 2d 740, 743–44 (S.D. Ohio 2007) ("After being hired, they were told by Matusoff's office manager that, although it was illegal to discriminate on the basis of race, 'we' would prefer that you not rent to African-Americans.").

[6] *See, e.g.*, Long Island Hous. Servs., Inc. v. NPS Holiday Square LLC, No. 18-cv-03583, 2023 U.S. Dist. LEXIS 12330, at *122 (E.D.N.Y. Jan. 24, 2023) ("LIHS' race discrimination claims are premised on tester interactions with two of Defendants' on-site superintendents . . . .").

[7] *See, e.g.*, Fair Hous. Just. Ctr., Inc. v. Broadway Crescent Realty, Inc., 10 Civ. 34, 2011 U.S. Dist. LEXIS 24515, at *16–17 (S.D.N.Y. Mar. 9, 2011) ("[P]laintiffs argue that Defendant Celaj violated [the Fair Housing Act] by acting as a gatekeeper, encouraging white testers by providing them with easy access to the Superintendent and hindering African American testers by requiring them to locate the Superintendent without any help."); FDIC v. Prop. Transfer Servs., Inc., No. 12-80533, 2013 U.S. Dist. LEXIS 144663, at *45 (S.D. Fla. Oct. 7, 2013) ("The closing agent was the gatekeeper for these transactions . . . .").

Litigants seeking redress from these owners (principals)[8] for the discriminatory acts of their agents face two perennial roadblocks to securing justice. *First*, when sued, these gatekeepers are unlikely to inculpate their principals, whose directives they follow, but upon whom they rely for business.[9] In *Short v. Manhattan Apts.*,[10] for example, a real estate salesperson for Manhattan Apartments, Inc. (MA) informed Mr. Short, a homeless man with a full housing subsidy, that "the landlords with whom MA worked did not accept programs,"[11] a blatant violation of New York City's source of income law.[12] During discovery, Mr. Short's counsel sought screenshots from MA's database that included "'directions and directives' from landlords revealing discriminatory practices."[13] Despite three court orders to produce the documents, MA refused.[14] Instead, MA merely produced a spreadsheet indicating that various unnamed landlords had instructed that an applicant "MUST BE ESTABLISHED WORKING PERSON," or "MUST HAVE GREAT JOB,"[15] thereby excluding homeless, unemployed applicants with full housing subsidies such as Mr. Short.

MA explained to the court that it refused to produce the documents "because landlords or clients [would] 'take their business elsewhere' if MA were to disclose the relevant documents,"[16] forcing MA "to choose between following the Court's orders or going out of business."[17] The court imposed sanctions upon MA,[18] and Mr. Short ultimately prevailed at trial.[19] Ironically, however, MA went out of business after all,[20] depriving Mr. Short and his counsel of

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[8] RESTATEMENT (SECOND) OF AGENCY § 1(2) (AM. L. INST. 1958) ("The one for whom action is to be taken is the principal.").

[9] *See, e.g.*, United States v. Bisceglia, 420 U.S. 141, 150 (1975) ("Fiduciaries and other agents are understandably reluctant to disclose information regarding their principals, as respondent was in this case.").

[10] Short v. Manhattan Apartments, Inc., 916 F. Supp. 2d 375 (S.D.N.Y. 2012).

[11] *Id.* at 388–89.

[12] *Id.* at 399 ("Plaintiffs have proffered direct evidence of discrimination on the part of . . . MA . . . .").

[13] Short v. Manhattan Apartments, Inc., 286 F.R.D. 248, 251 (S.D.N.Y. 2012).

[14] *Id.*

[15] *Id.* at 252.

[16] *Id.* at 254.

[17] *Id.*

[18] *See Short*, 916 F. Supp. 2d at 396–97.

[19] *See id.* at 403.

[20] *See AC Lawrence Expands into Former Manhattan Apartments Space*, REAL EST. WKLY. (Dec. 19, 2012), https://rew-online.com/ac-lawrence-expands-into-former-manhattan-apartments-space/ [https://perma.cc/9JKD-DPM7] ("Manhattan Apartments has now ceased operations.").

hundreds of thousands of dollars in compensatory damages and attorneys' fees.[21]

Absent a willingness by agents to bite the hand that feeds them, then, it is exceedingly difficult to prove principal wrongdoing in housing discrimination.[22] And if owners have no fear of liability for the actions of their gatekeepers, they have no incentive to cease their discriminatory instructions, or to prevent discrimination through careful selection, training, and oversight of agents.[23] In addition, liability will fall upon those—from individual salespersons to building superintendents—who are unlikely to have deep pockets or valuable property upon which to compensate plaintiffs for the significant emotional distress and loss of housing opportunities they suffer,[24] as the *Short* example illustrates.[25]

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[21] Telephone Interview with Diane Houk, Partner, Emery Celli Abady Brinkerhoff Ward & Maazel LLP, counsel for Plaintiff Keith Short (June 23, 2023) (on file with author). Mr. Short did secure payment from one of the two defendants. *Id.*

[22] *See, e.g.*, Cabrera v. Jakabovitz, 24 F.3d 372, 389 (2d Cir. 1994) (imposing vicarious liability upon owners and noting that otherwise, "it would be too easy for the broker or owner to plead ignorance when an agent was caught and it would be unfair to only punish a manager or agent for what the owner or employer should have controlled and trained the employee to avoid") (citation and internal quotation marks omitted); Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R.-C.L. L. REV. 279, 317 (2001) ("When confronted with the evidence [of housing discrimination], however, the owner disavows knowledge of her employees' discriminatory actions and produces evidence that she repeatedly instructed them not to discriminate. The plaintiff is now in the difficult position of proving the employer's insincerity."); *see also* Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983) ("It is frequently difficult to develop proof in [housing] discrimination cases . . . ."); Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 243 n.44 (2009) ("[D]irect evidence of discriminatory intent is difficult to come by in housing discrimination cases . . . .").

[23] *See, e.g.*, Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 178 (2020) ("[T]he weak vicarious liability regime created incentives in the past to outsource excessively and to take insufficient precautions to avoid harm."); Moran, *supra* note 22, at 330 ("Even if employers do not want their agents to discriminate, they may lack proper incentives to take preventive measures if the probability that they will be found liable appears remote."); *see also* Ryan Montefusco, *Hospital Liability for the Right Reasons: A Non-Delegable Duty to Provide Support Services*, 42 SETON HALL L. REV. 1337, 1365–66 (2012) ("The application of a nondelegable duty directly incentivizes [oversight] because it is only through the avoidance of harm that such institutions might escape liability.").

[24] *See* discussion *infra* Part III.

[25] *See supra* notes 19–20 and accompanying text; Maloney v. Rath, 445 P.2d 513, 515 (Cal. 1968) ("[R]ecognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity . . . ."); Moran, *supra* note 22, at 317 ("Vicarious liability doctrine is extremely important in fair housing cases because the perpetrators of housing discrimination often are employees who lack the resources to pay punitive damages.").

Second, housing discrimination sounds in tort,[26] and although vicarious liability normally attaches for an agent's acts within the scope of authority,[27] where the individual in question is deemed an independent contractor,[28] vicarious liability may not apply.[29] Given that owners and real estate brokers commonly employ individuals classified as independent contractors for tax or employment purposes,[30] they routinely seek to invoke this exception. While courts have repeatedly rejected this argument in the context of housing discrimination,[31] owners and brokers continue to argue the point,[32] forcing courts and litigants to address this misplaced contention. Even worse, courts still get it wrong, ignoring or simply unaware of established precedent, as a recent decision of the Connecticut Supreme Court illustrates.[33]

There is, however, a largely untapped, applicable tort doctrine that would obviate the need to engage in an elusive search for proof of principal culpability,

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[26] *See* Meyer v. Holley, 537 U.S. 280, 285 (2003) ("[A]n action brought for compensation by a victim of housing discrimination is, in effect, a tort action." (citation omitted)).

[27] *See id.* at 285 ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." (citations omitted)).

[28] An independent contractor is one "who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2(3) (AM. L. INST. 1958).

[29] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 57 (AM. L. INST. 2012) ("Except as stated in §§ 58–65, an actor who hires an independent contractor is not subject to vicarious liability for physical harm caused by the tortious conduct of the contractor.").

[30] *See, e.g.*, NAT'L ASS'N OF REALTORS, REAL ESTATE PROFESSIONALS CLASSIFICATION AS INDEPENDENT CONTRACTORS 1 (June 2021), https://www.nar.realtor/advocacy/nar-issue-brief-real-estate-professionals-classification-as-independent-contractors [https://perma.cc/4U4E-VSMW] ("Of the 1.4 million members of the National Association of REALTORS (NAR), approximately 87 percent are classified as independent contractors."); Stephen Michael White, *How To: Hiring Independent Contractors as Property Managers*, RENTPREP (Apr. 27, 2021), https://rentprep.com/blog/property-maintenance/hiring-independent-contractors/ [https://perma.cc/26BW-BAEJ] ("[H]iring independent contractors in the rental industry is common practice."); Kimberly Leach Johnson & Amalia Levit Todryk, *Planning for the Payment of Estate Taxes for Illiquid Estates Owning Real Estate—The Code § 6166 Deferral*, 23 PROB. & PROP. 32, 34 (2009) ("In a real estate business it is common for day-to-day operations and activities to be performed by independent contractors, such as property management companies.").

[31] *See infra* notes 207–213 and accompanying text.

[32] *See* discussion *infra* Part II.A; Affidavit in Opposition to Motion and in Support of Cross Motion ¶ 16, Kennedy v. EXR Group Cos., No. 521039 (N.Y. Sup. Ct. Aug. 13, 2020) (on file with the *Ohio State Law Journal*) (alleging in housing discrimination case: "[The real estate salesperson who allegedly discriminated] was not an employee of [defendant company]. He was an independent contractor.").

[33] *See* discussion *infra* Part IV.B.

or a time-consuming, fact-intensive agency analysis:[34] the doctrine of nondelegable duty. Under established tort principles, where the activity in question is of great societal importance, and/or where it poses a danger to the public absent precautions, the duty to prevent harm is nondelegable.[35] Accordingly, principals are directly liable for the discriminatory actions of those they enlist, including independent contractors, even absent proof of principal involvement.[36]

Before the Supreme Court decision in *Meyer v. Holley*,[37] refusing to find a nondelegable duty under the Fair Housing Act (FHA),[38] numerous courts ruled that the duty not to discriminate in housing is nondelegable.[39] Since *Meyer*,

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[34] *See, e.g.*, United States v. Richardson, 607 F.3d 357, 364 (4th Cir. 2010) (explaining that the existence of agency relationship is "a fact-intensive inquiry"); Starling v. J Wales Home Sols. LLC, No. 4:21-cv-01261-O, 2022 U.S. Dist. LEXIS 71382, at *9 (N.D. Tex. Apr. 19, 2022) ("Whether an agency relationship exists is a fact-intensive question . . . ."); Freeman v. Suddle Enters., 179 F. Supp. 2d 1351, 1354 (M.D. Ala. 2001) ("Agency questions are fact intensive determinations . . . ."); Schmoll v. Hartford Cas. Ins., 290 S.W.3d 41, 50 (Ark. Ct. App. 2008) ("[T]he question of whether an agent is an independent contractor is fact intensive in nature.").

[35] *See* discussion *infra* Part II.B.

[36] *See, e.g.*, Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 395 (1982) ("The concept of a nondelegable duty imposes upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well-being of those persons to whom the duty runs. The duty is not discharged by using care in delegating it to an independent contractor." (citation omitted)).

[37] Meyer v. Holley, 537 U.S. 280, 290 (2003) (ruling that under the Fair Housing Act (FHA), the nondelegable duty to avoid housing discrimination does not attach to "individual officers or owners of corporations"); *accord id.* (refusing to hold "every corporate supervisor personally liable without fault"); *see* discussion *infra* Part IV.

[38] Fair Housing Act, 42 U.S.C. §§ 3601–3619.

[39] *See, e.g.*, Alexander v. Riga, 208 F.3d 419, 433 (3d Cir. 2000); Walker v. Crigler, 976 F.2d 900, 904 (4th Cir. 1992); Heights Cmty Cong. v. Hilltop Realty, Inc., 629 F. Supp. 1232, 1303 (N.D. Ohio 1983), *aff'd in part and rev'd in part on other grounds* 774 F.2d 135 (6th Cir. 1985); Green v. Century 21, 740 F.2d 460, 465 (6th Cir. 1984); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552 (9th Cir. 1980); Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974), *aff'd* 545 F.2d 554 (6th Cir. 1976); Mont. Fair Hous., Inc. v. Am. Cap. Dev., Inc., 81 F. Supp. 2d 1057, 1068 (D. Mont. 1999); Llanos v. Est. of Coehlo, 24 F. Supp. 2d 1052, 1061 (E.D. Cal. 1998); Chew v. Hybl, No. C 96-03459 CW, 1997 U.S. Dist. LEXIS 24547, at *32 (N.D. Cal. Dec. 9, 1997); Saunders v. General Svcs. Corp., 659 F. Supp. 1042, 1059 (E.D. Va. 1987); Davis v. Mansards, 597 F. Supp. 334, 344 (N.D. Ind. 1984); Harrison v. Otto G. Heinzeroth Mortg. Co., 430 F. Supp. 893, 896–97 (N.D. Ohio 1977); United States v. L & H Land Corp., Inc., 407 F. Supp. 576, 580 (S.D. Fla. 1976); Zuch v. Hussey, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977); United States. v. Real Est. Dev. Corp., 347 F. Supp. 776, 785 (N.D. Miss. 1972); discussion *infra* note 282 and accompanying text; *see also* Portee v. Hastava, 853 F. Supp. 597, 619 (E.D.N.Y. 1994) ("It is also possible that the duty not to discriminate [in housing] is non-delegable . . . . While the Second Circuit has not explicitly adopted this rationale in fair housing cases, we believe that it is a persuasive interpretation of the law."), *aff'd* 104 F.3d 349 (2d Cir. 1996).

courts and advocates have largely abandoned this doctrine, even under state and local law. This step backwards in housing discrimination jurisprudence is disconcerting given that, if anything, the trend nationwide is toward expanding rather than contracting vicarious liability and nondelegable duties.[40] This Article argues, moreover, that *Meyer* is in no way controlling, or even persuasive, under state and local law, to which litigants often turn for protection of their civil rights.[41] (All states—save Mississippi—and myriad localities have housing discrimination laws.)[42]

Meyer was not only flawed, but based upon the unique (and often inapposite) language of the FHA. In addition, the nondelegable duty doctrine is a common law doctrine, which requires courts to undertake their own sui generis *policy* analysis to determine whether the duty in question is so important to the community that compliance should not be delegated to others.[43] The Supreme Court erroneously eschewed this analysis, yet there is ample basis for determining that the crushing harm caused by housing discrimination triggers the duty. Indeed, housing transactions are as potentially dangerous, and foreseeably so, as many other transactions for which courts have established a nondelegable duty.[44]

Part II sets forth the relevant principles of agency law and discusses the history and the rationale of the nondelegable duty doctrine. Part III demonstrates that housing discrimination is as potentially dangerous as defective stairs—for which courts impose a nondelegable duty of safe repair—and that its prevention

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[40] *See, e.g.*, Dana Ohman, *Apparent Authority: Minnesota Finally Rejects Categorical Exemption for Independent Contractors in Hospital Emergency Rooms and Signifies Potential for Nondelegable Duty Doctrine*—Popovich v. Allina Health Sys.*, 946 N.W.2d 885 (Minn. 2020)*, 48 MITCHELL HAMLINE L. REV. 467, 494 (2022) ("While hospitals consider how to minimize liability, United States public policy becomes more receptive to nondelegable duty for hospital care."); Van Loo, *supra* note 23, at 147 ("[A]n expansive third-party liability is not only becoming commonplace but also consistent with the common law . . . ."); Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 648 (2005) ("[T]he tort doctrines, such as 'assumption of duty' and 'non-delegable duty,' have been widely expanded to provide relief in cases involving corporate groups.").

[41] *See, e.g.*, Leonore F. Carpenter & Ellie Margolis, *One Sequin at a Time: Lessons on State Constitutions and Incremental Change from the Campaign for Marriage Equality*, 75 N.Y.U. ANN. SURV. AM. L. 255, 271 (2020) (examining the "turn away from a hostile Supreme Court and attempt to expand rights protections in state court"); Matthew R. Segal, *Civil Rights and State Courts in the Trump Era*, 12 HARV. L. & POL'Y REV. 49, 66 (2018) ("For as long as Donald Trump is president, and perhaps for as long as his nominees populate the federal judiciary, state courts may need to be incubators of freedom and liberty."); Patricia A. Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 MONT. L. REV. 99, 127–28 (2003) ("An increasing number of civil rights lawyers, fighting for the expansion of individual rights, have been turning to the state courts over the last 20 years, heeding Justice Brennan's advice that state courts might prove more supportive.").

[42] *See* Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 HARV. L. REV. 1683, 1696 (2021).

[43] *See* discussion *infra* Part II.B.

[44] *See* discussion *infra* Part III.

and deterrence are just as important to the community as stair safety. Part IV examines the Supreme Court's decision in *Meyer*, flagging several issues that cast doubt upon the Court's analysis of the duty, and that distinguish it from any analysis under state and local law. Part V examines the recent decision of the Connecticut Supreme Court in *Lopez v. William Raveis Real Est., Inc.*,[45] a case that highlights the difficulties for courts, practitioners, and aggrieved parties in establishing the vicarious liability of owners in housing discrimination cases. Part VI examines the continued vitality of the nondelegable duty doctrine under state and local law, providing an in-depth analysis of New York City's housing discrimination law as an exemplar. This analysis suggests that notwithstanding the Supreme Court's decision under the FHA, the doctrine provides a viable alternative theory of liability in state and local forums. A brief Conclusion follows.

II. AGENCY INDEPENDENT CONTRACTORS, AND THE NONDELEGABLE DUTY EXCEPTION

A. *Agency and Independent Contractors*

Under the common law, to demonstrate an agency relationship, a plaintiff must show three factual elements: (1) the manifestation by the principal that the agent shall act for the principal, (2) the agent's acceptance of the undertaking, and (3) the understanding by the parties that the principal is to be in control of the undertaking.[46] "[T]he right of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he [or she] acts, or at both times."[47] Such control, however, "need not 'include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective.'"[48] This determination "is highly factual," and it "can turn on a number of factors,

[45] Lopez v. William Raveis Real Est., Inc., 272 A.3d 150 (Conn. 2022).

[46] RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b (AM. L. INST. 1958).

[47] Cleveland v. Caplaw Enters., 448 F.3d 518, 522 (2d Cir. 2006) (quoting RESTATEMENT (SECOND) OF AGENCY § 14 cmt. a (AM. L. INST. 1958)).

[48] *Id.*; *accord* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. L. INST. 2006) ("[A] person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment."); Johnson v. Bechtel Assocs. Pro. Corp., 545 F. Supp. 783, 785 (D.D.C. 1982) ("While the principal's right to control is essential, the degree of control exercised need not be great. It is only necessary that the principal retain 'some measure of control' over the agent's activities." (quoting Nat'l City Development Co. v. Fadeley, 148 A.2d 306, 307 (D.C. 1959)), *aff'd* 717 F.2d 574 (D.C. Cir. 1983), *rev'd sub nom.* Wash. Metro. Area Transit Auth. v. Johnson, 467 U.S. 925 (1984); Fat Brands, Inc. v. PPMT Cap. Advisors, Ltd., 19-CV-10497, 2021 U.S. Dist. LEXIS 1018, at *24 (S.D.N.Y. Jan. 5, 2021) ("Significantly, the requirement is generally applied flexibly, requiring only some measure of control by the principal over the agent. This minimal level of required control does not need to be formal or direct." (citations and internal quotation marks omitted)).

including: the situation of the parties, their relations to one another, and the business in which they are engaged; the general usages of the business in question and the purported principal's business methods; the nature of the subject matters and the circumstances under which the business is done."[49]

Vicarious liability normally attaches for an agent's tortious acts within the scope of authority,[50] for "'he who acts through another acts through himself.'"[51] As noted, however, where the individual in question is deemed an independent contractor rather than an agent, the principal may not be liable,[52] although the exceptions have long threatened to swallow this rule.[53] As Dean Prosser observed over a half-century ago, courts "have continued to repeat the 'general rule' of non-liability [for independent contractors] with exceptions, whose very number is sufficient to cast doubt upon the validity of the rule."[54] One of those exceptions—the subject of this Article—is that where the duty is deemed nondelegable, a principal cannot escape liability through the use of an independent contractor.[55]

B. *The Nondelegable Duty Exception*

The nondelegable duty doctrine, a "basic tort-law principle,"[56] arose early in the common law, with the concept applied to public service providers as early

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[49] *Caplaw Enters.*, 448 F.3d at 522 (quoting Columbia Broad. Sys., Inc. v. Stokely–Van Camp, Inc., 522 F.2d 369, 375–76 (2d Cir. 1975)).

[50] *See* Meyer v. Holley, 537 U.S. 280, 285 (2003) ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.").

[51] 1 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 7:2 (2d ed. 2023) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 417 (Oxford 1768)).

[52] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 57 (AM. L. INST. 2012) ("Except as stated in §§ 58–65, an actor who hires an independent contractor is not subject to vicarious liability for physical harm caused by the tortious conduct of the contractor.").

[53] *See, e.g.*, Kleeman v. Rheingold, 614 N.E.2d 712, 715 (N.Y. 1993) ("[I]t has been observed that the general rule 'is now primarily important as a preamble to the catalog of its exceptions.'" (quoting Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937)); Marek v. Pro. Health Servs., Inc., 432 A.2d 538, 542 (N.J. Super. Ct. 1981) ("The Reporter's notes for the *Restatement* observe that the exceptions 'are so numerous, and they have so far eroded the "general rule" that it can now be said to be "general" only in the sense that it is applied where no good reason is found for departing from it.'" (quoting RESTATEMENT (SECOND) OF TORTS § 409, cmt. b (AM. L. INST. 1965))); Misiulis v. Milbrand Maint. Corp., 218 N.W.2d 68, 70 (Mich. 1974) ("[T]he recitation of this general rule serves merely as a prelude to a discussion of why it does not apply.").

[54] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 468 (4th ed. 1971).

[55] *See* discussion *infra* Part II.B.

[56] RESTATEMENT (THIRD) OF AGENCY § 7.06 cmt. a (AM. L. INST. 2006).

as 1345.[57] The doctrine in fact predates that of respondeat superior.[58] Under the doctrine, a principal remains responsible for the conduct of an independent contractor despite having delegated the duty in question.[59] The term "nondelegable duty" is thus a misnomer: the duties in question can be and, *perforce*, are delegated, but liability cannot be.[60] In reality, then, the doctrine is one of "nondelegable liability."

As New York's high court has explained, "[t]here are no clearly defined criteria for identifying duties that are nondelegable. Indeed, whether a particular duty is properly categorized as 'nondelegable' necessarily entails a sui generis inquiry, since the conclusion ultimately rests on policy considerations."[61] "It is

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[57] *See* Bouziden v. Alfalfa Elec. Coop., 16 P.3d 450, 462 n.6 (Okla. 2000) ("The earliest cases that address themselves to nondelegable duties by public service providers date back to 1345.").

[58] *See id.* at 462 ("Before the tort rule of respondeat superior was ever crafted, public calling operators bore liability that could not be shared with anyone hired to do work integral to their public calling." (emphasis omitted)).

[59] *See, e.g.*, Renown Health, Inc. v. Vanderford, 235 P.3d 614, 616 (Nev. 2010) ("An absolute nondelegable duty is essentially a strict liability concept, where, despite delegation of a duty to an independent contractor, the principal remains primarily responsible for improper performance.").

[60] *See, e.g.*, Simmons v. Tuomey Reg'l Med. Ctr., 533 S.E.2d 312, 317 (S.C. 2000) ("The term 'non delegable duty' is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains *liable* for that breach. It actually is the liability, not the duty, that is not delegable.").

[61] Kleeman v. Rheingold, 614 N.E.2d 712, 715 (N.Y. 1993); *see also* Defries v. Yamaha Motor Corp., 300 Cal. Rptr. 3d 670, 680 (Cal. Ct. App. 2022) ("[T]he nondelegable duties developed in vicarious liability doctrine are based on public policy decisions that do not depend on an independent showing of the elements of agency."); Afoa v. Port of Seattle, 421 P.3d 903, 915–16 (Wash. 2018) ("I begin by looking closer at the history of the nondelegable duty doctrine, which reflects a policy-based expansion of traditional vicarious liability principles recognized in the 'master-servant' relationship in agency law."); Machado v. City of Hartford, 972 A.2d 724, 730 (Conn. 2009) ("Nondelegable duties generally are imposed . . . in recognition of 'the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them.'" (quoting 41 AM. JUR. 2D *Independent Contractors* § 43, p. 518 (2005))); Breeden v. Anesthesia W., P.C., 656 N.W.2d 913, 920 (Neb. 2003) (quoting *Kleeman* for proposition that finding of nondelegable duty is based upon policy considerations); Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 147 n.4 (Ind. 1999) ("A non-delegable duty is one that public policy holds to be so important that one party should not be permitted to transfer the duty (and its resultant liability) to another party."); Carroll v. Federal Express Corp., No. C-93-4243-SC, 1995 U.S. Dist. LEXIS 12026, at *10–11 (N.D. Cal. Aug. 15, 1995) ("It is the great importance to the public of performance of the particular duty at issue that determines whether the statutory mandate rises to a level of a non-delegable duty." (citations and internal quotation marks omitted)); Nave v. Harlan Jones Drilling, 827 P.2d 1239, 1240 (Mont. 1992) (explaining that in finding a nondelegable duty, the court "reviewed the important public policy concerns involved"); Saiz v. Belen Sch. Dist., 827 P.2d 102, 115 (N.M. 1992) ("The liability for a nondelegable duty that we impose directly upon the employer of an independent contractor is grounded in a special public policy to protect third persons in an

difficult to suggest any criterion by which the non-delegable character of such duties may be determined," Prosser and Keeton famously observed, "other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[62] Not surprisingly, then, "[a]pplication of this doctrine depends in large part on the social importance attached to the underlying activity that gave rise to the action in tort."[63] In other words, it is "the gravity of the public policies that are implicated" that triggers the duty.[64]

A nondelegable duty may be imposed by statute, contract, or common law.[65] This formulation is, however, somewhat misleading. Where a statute expressly states that liability cannot be delegated, for example, the common law doctrine

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area of inherent danger and to encourage conscientious adherence to standards of safety where injury likely will result in the absence of precautions."); Woodson v. Rowland, 407 S.E.2d 222, 235 (N.C. 1991) ("Imposition of this nondelegable duty of safety reflects 'the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them.'" (citing Royal v. Dodd, 98 S.E. 599, 600–02 (1919))); Blum v. Airport Terminal Servs., 762 S.W.2d 67, 76 (Mo. App. Ct. 1988) ("The general rule that an independent contractor is alone liable for injuries resulting from its or its employees negligence does not apply if the owner fails to perform a duty . . . which would gravely violate paramount requirements of public interest."); Feliberty v. Damon, 527 N.E.2d 261, 264 (N.Y. 1988) ("In large part, whether a duty—or, perhaps more accurately, whether liability—is 'nondelegable' turns on policy considerations."); Rob-Mac, Inc. v. Dep't of Motor Vehicles, 196 Cal. Rptr. 398, 400 (Cal. Ct. App. 1983) ("Among the policy considerations which have led courts to impose liability on employers under the nondelegable duty theory is the great importance to the public of performance of the particular duty at issue."); Misiulis v. Milbrand Maintenance Corp., 218 N.W.2d 68, 73 (Mich. 1974) (alluding to the "policy considerations which underly the concept of a nondelegable duty").

[62] W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 512 (W. Page Keeton ed., 5th ed. 1984) [hereinafter, PROSSER & KEETON ON TORTS].

[63] Montefusco, *supra* note 23, at 1361.

[64] *Kleeman*, 614 N.E.2d at 716; *accord* Jackson v. Power, 743 P.2d 1376, 1384 (Alaska 1987) (imposing a nondelegable duty based upon "the importance to the community of a hospital's duty to provide emergency room physicians"); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 57, Reporter's Note b (AM. L. INST. 2012) ("Often, nondelegable duty seems to be the label that courts apply to a policy-based conclusion that a hirer in a certain context should be subject to vicarious liability for the contractor's negligence."); Ohman, *supra* note 40, at 492 ("[I]mposing a nondelegable duty often depends on the underlying activity's social importance."); Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. REV. 431, 454 (1996) ("Put another way, nondelegable duties established by common law are reflections of particularly significant public policy, as perceived by the courts.").

[65] *See, e.g.*, *Machado*, 972 A.2d at 730 (nondelegable duties imposed "most often by statute, contract or common law"); Ft. Lowell-Nss Ltd. P'ship v. Kelly, 800 P.2d 962, 967 (Ariz. 1990) ("This duty may be imposed by statute, by contract, by franchise or charter, or by the common law.").

is not implicated. Liability cannot be delegated, not as a result of the doctrine, but upon the express terms of the statute at issue.[66] Where a statute does not expressly so provide, courts must determine whether to find a nondelegable duty to comply with the statute's mandate. The key to this determination is the social importance of the statute in question, since the seminal rationale for imposing a nondelegable duty is "that the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[67] If, for example, the statute imposes an obligation upon named parties for the protection of others, a nondelegable duty is often imposed.[68]

Courts have long imposed nondelegable duties—even absent express statutory directive—in a variety of compelling circumstances.[69] These include the duty of common carriers to transport passengers safely;[70] the duty of hospital emergency rooms to ensure the safety of medical care;[71] the duty of railroads to

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[66] *See, e.g.*, N.Y. LAB. LAW § 240(1) (McKinney 2023) (expressly imposing a nondelegable duty to erect protective scaffolding upon "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work . . .").

[67] PROSSER & KEETON ON TORTS, *supra* note 62, at 512; *see also* Springer v. City & Cnty. of Denver, 13 P.3d 794, 804 (Colo. 2000) ("*The core principle behind all nondelegable duties* is 'that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.'" (citation omitted) (emphasis added)).

[68] *See* 41 AM. JUR. 2D, *Independent Contractors* § 48 (1995) ("Generally, if a statute . . . requires one to do a certain thing or to take certain precautions for the protection of persons . . . such person cannot delegate that duty to an independent contractor and be released from liability in case the contractor fails to perform it.").

[69] *See, e.g.*, Hosmer v. Kubricky Constr. Corp., 931 N.Y.S.2d 738, 740 (N.Y. App. Div. 2011) ("Although a nondelegable duty is often imposed by regulation or statute, 'the class of duties considered nondelegable" is not limited to statutorily imposed duties . . . [and] examples of nondelegable common-law duties abound.'" (alteration in original) (quoting *Kleeman*, 614 N.E.2d at 712)).

[70] *See, e.g.*, Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 925–26 (Alaska 1977); Doe v. Sanchez, 52 N.E.3d 618, 630 (Ill. App. Ct. 2016); Gamboa v. Conti Trucking, Inc., 23 Cal. Rptr. 2d 564, 565 (Cal. Ct. App. 1993); Roberts v. Gonzalez, 495 F. Supp. 1310, 1317 (D.V.I. 1980); Knutson v. Macy's W. Stores, Inc., 406 P.3d 683, 684 (Wash. Ct. App. 2017); *see also* Stropes *ex rel.* Taylor v. Heritage House Childs. Ctr. of Shelbyville, Inc., 547 N.E.2d 244, 254 (Ind. 1989) (finding, in the context of a nursing home for disabled children, "that [the home] assumed a non-delegable duty to provide protection and care so as to fall within the common carrier exception").

[71] *See, e.g.*, Jackson v. Power, 743 P.2d 1376, 1384 (Alaska 1987); Noel v. Lawrence & Mem'l Hosp., 53 Conn. Supp. 269, 289 (Conn. Super. Ct. 2014); Newbold-Ferguson v. AMISUB (North Ridge Hosp.), Inc., 85 So. 3d 502, 505 (Fla. Dist. Ct. App. 2012); *see also* Bishop v. Wexford Health Sources, Inc., No. 1:17-cv-60, 2019 U.S. Dist. LEXIS 203919, at *25 n.6 (W.D. Pa. Nov. 25, 2019) ("A hospital may be held directly liable for its own 'institutional' negligence if it fails in its nondelegable duty to uphold the proper standard of care it owes to a patient." (citing Thompson v. Nason Hosp., 591 A.2d 703, 707 (Pa. 1991))); Ponzini v. Monroe Cnty., 789 Fed. Appx. 313, 314 (3d Cir. 2019) ("It is now firmly established that a hospital may be held directly, not merely vicariously, liable for failure to oversee all persons providing patient care as well as for failing to adopt/enforce rules and

safely maintain tracks and crossings;[72] and the duty of municipalities to safely maintain their streets and sidewalks.[73] The doctrine has also been applied to landowners for well over a century, imposing a nondelegable duty to ensure against injuries sustained on the property.[74] Thus, for example, landlords have a nondelegable duty to maintain staircases in a reasonably safe condition.[75]

There are several rationales for imposing this duty upon owners, including the importance of the responsibility to the community[76] and the principle that

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policies adequate to ensure quality care. Those are all non-delegable duties owed directly to the patient."). Note that following the Alaska Supreme Court's decision in *Jackson*, "the Alaska Legislature modified this holding, passing a law that allows hospitals to rebut the nondelegable duty by proving it was unreasonable for the patient to assume that the hospital provided care because the patient had notice of the doctor's independent contractor status. Alaska Stat. § 09.65.096 (2008)." Renown Health, Inc. v. Vanderford, 235 P.3d 614, 617 (Nev. 2010).

[72] *See, e.g.*, Penn Cent. Co. v. Youngstown Sheet & Tube Co., 253 N.E.2d 704, 707 (Ind. Ct. App. 1969); Reyes v. CSX Transp., Inc., 796 N.Y.S.2d 606, 609 (N.Y. App. Div. 2005); Choctaw, O. & W. Ry. v. Wilker, 84 P. 1086, 1090 (Okla. 1906); Missouri-Kansas-Texas R.R. Co. of Tex. v. Bruton, 290 S.W.2d 282, 288 (Tex. 1956); Walton, Witten & Graham v. Miller's Adm'x, 63 S.E. 458, 462 (Va. 1909).

[73] *See, e.g.*, Wiggs v. City of Phoenix, 10 P.3d 625, 626 (Ariz. 2000); Jauma v. City of Hialeah, 758 So. 2d 696, 698 (Fla. Dist. Ct. App. 2000); Spiker v. City of Ottumwa, 186 N.W. 465, 467 (Iowa 1922); City of Laurel v. Upton, 175 So. 2d 621, 626 (Miss. 1965).

[74] *See, e.g.*, Curtis v. Kiley, 26 N.E. 421, 421 (Mass. 1891); Salmon v. Kansas City, 145 S.W. 16, 31 (Mo. 1912) ("[I]t has been settled that such responsibility on the part of the owner is nondelegable, and no case has been presented in this state wherein he was permitted to divest himself of that duty by letting the work to another person."), *overruled by* Mallory v. La. Pure Ice & Supply Co., 6 S.W.2d 617 (Mo. 1928); Stevens v. United Gas & Elec. Co., 60 A. 848, 853 (N.H. 1905) ("The duty imposed by law upon the defendant, as the owner and occupier of the premises, for the reasonable protection of its invitee, is not performed by an attempted delegation of it to a third party. It is a nondelegable duty, arising from the proprietor's control of the premises . . . ."); Paltey v. Egan, 93 N.E. 267, 269 (N.Y. 1910) ("The respondent's duty to protect his tenants from disturbance in the course of his building operations was of a personal character and he could not discharge it by delegating those operations even to a competent independent contractor."); Wilber v. Follansbee, 72 N.W. 741, 742 (Wisc. 1897) (landlord cannot escape duty "by placing the work with an independent contractor").

[75] *See, e.g.*, Garcia v. Cohen, 253 A.3d 46, 51 (Conn. App. Ct. 2021) (finding nondelegable duty to maintain stairs); Blow v. Martin Bros. Co., No. 1-036 / 00-0817, 2001 Iowa App. LEXIS 459, at *7–8 (Iowa Ct. App. July 18, 2001) (finding nondelegable duty to maintain stairway); Kroeker v. Stecken, 31 S.W.2d 229, 230 (Mo. Ct. App. 1930); Stein v. Nider, No. A-99-1083, 2000 Neb. App. LEXIS 319, at *10 (Neb. Ct. App. Oct. 17, 2000); Russo v. Watson, 292 N.Y.S. 249, 250 (N.Y. App. Div. 1936).

[76] Montefusco, *supra* note 23, at 1361–62 (noting that the areas of the law in which nondelegable duties are imposed are "factually dissimilar," but all "are considered so important to the community that the responsibility for their execution cannot be transferred to another entity"); *see, e.g.*, Valenti v. NET Props. Mgmt., Inc., 710 A.2d 399, 401 (N.H. 1998) ("When these entities invite the public onto their premises for business purposes, policy concerns counsel against allowing them to shield themselves from liability by hiring independent contractors.").

an owner should not be permitted to delegate liability for activities (stair construction and maintenance) that pose a potential threat of danger to others.[77] The latter rationale has many variations, whether it be that the activity in question is likely to create "a peculiar risk of physical harm to others;"[78] that it carries "special risks or dangers;"[79] or that the principal must "take certain precautions for the protection of persons."[80] The underlying concept, however, is consistent: where the activity poses a distinct risk of danger or harm to the public absent precautions, a nondelegable duty may be imposed under common law.

III. HOUSING DISCRIMINATION IS AS DANGEROUS AS DEFECTIVE STAIRS, ITS PREVENTION AND DETERRENCE AS IMPORTANT TO THE COMMUNITY

Housing discrimination is a scourge on the nation. Each year, Americans experience literally *millions* of incidents of housing discrimination,[81] and the situation is getting worse. Housing discrimination complaints actually *increased* by 8.7 percent from 2020 to 2021,[82] reaching the highest number of documented complaints in 25 years.[83] This figure is likely far higher, moreover, since the "overwhelming number of housing discrimination cases goes undetected and/or unreported,"[84] and the number of reporting agencies decreased in 2021.[85]

As the following discussion demonstrates, housing discrimination poses very real, foreseeable, and potentially lethal dangers to the public. The dire consequences may be grouped into two broad categories: emotional distress and

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[77] *See, e.g.*, Eastlick v. Lueder Constr. Co., 741 N.W.2d 628, 635 (Neb. 2007) (nondelegable duty applies where "the independent contractor's work involves special risks or dangers"); *Salmon*, 145 S.W. at 31 ("[T]he owner cannot delegate his responsibility for ordinary care on the part of the contractor employed to perform work which is 'attended with danger to others.'" (emphasis omitted)).

[78] RESTATEMENT (SECOND) OF TORTS § 416 (AM. L. INST. 1965); *see also id.* § 427 (imposing nondelegable liability for "work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work"). The *Restatement (Third)* combines these concepts into a single section dealing with "a peculiar risk." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 59 (AM. L. INST. 2012).

[79] *Eastlick*, 741 N.W.2d at 635.

[80] 41 AM. JUR. 2D *Independent Contractors* § 48 (1995).

[81] LINDSAY AUGUSTINE ET AL., NAT'L FAIR HOUS. ALL., 2022 FAIR HOUSING TRENDS REPORT 3, 7 (2022) [hereinafter NFHA 2022 REPORT], https://nationalfairhousing.org/wp-content/uploads/2022/11/2022-Fair-Housing-Trends-Report.pdf [https://perma.cc/25ZS-LMJM] (noting the "millions of incidents of illegal housing discrimination that occur each year").

[82] *Id.* at 7.

[83] *Id.* at 6.

[84] *Id.* at 3.

[85] *Id.* at 7.

loss of housing opportunity. They are, moreover, inextricably bound, since loss of housing opportunity fuels and exacerbates emotional distress.

A. *Emotional Distress*

Emotional distress stemming from discrimination manifests itself in various and often profoundly deleterious ways:

> Emotional distress can include humiliation, depression, embarrassment, frustration, anger, shock, and a host of other emotional or psychic harms, including trauma, lack of self-esteem, social isolation, loss of confidence, and diminished relationships. Emotional distress can also give rise to physical manifestations, including sleeplessness, nightmares, loss of appetite and weight loss, headaches, forgetfulness, tearfulness, stomach and chest pains, hives and skin rashes, hair loss, and even suicidal ideation and hopelessness.[86]

Those experiencing housing discrimination, moreover, are typically already wrestling with the weight of prejudice and discrimination.[87]

In *HUD v. Raimos*,[88] for example, Ms. Wells, a single mother caring for a severely disabled daughter living with cerebral palsy,[89] sought to rent her first home.[90] Most of the rentals within her budget could not accommodate her daughter's mobility needs, but Respondent Raimos' home was "'almost perfect,' would greatly improve her and her daughter's material living

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[86] Armen H. Merjian, *Nothing "Garden Variety" About It: Manifest Error and Gross Devaluation in the Assessment of Emotional Distress Damages*, 70 SYRACUSE L. REV. 689, 692 (2020); *see, e.g.*, Victor M. Goode & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 FORDHAM URB. L.J. 1143, 1156–57 (2003) ("The effects of emotional harm in housing discrimination cases may also lead to increased anger, frustration, depression, resentment, or shame. Fear that the discriminatory event will reoccur may lead to withdrawal from contact with others or diminished social involvement with friends or family. Physical symptoms may also accompany the psychological trauma. These may include indigestion, ulcers, nervousness, loss of appetite, loss of sleep, impotence, nausea, and intensified allergic reactions." (footnotes omitted)).

[87] *See* Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 140 (2013) ("Any concept of 'normal emotional distress' needs to take into account the cumulative impact of discrimination over a lifetime."); Michael D'Ambrosio, Note, *The Psychotherapist-Patient Privilege in Prison Litigation: How Can You Claim "Garden Variety" Emotional Distress When the Flowers Are Made Out of Steel?*, 43 FORDHAM URB. L.J. 915, 958 (2016) ("Any concept that accounts for 'normal' mental or emotional distress must account for the accumulated experiences of discrimination and oppression.").

[88] HUD v. Raimos, No. 21-JM-0160-FH-022, 2022 HUD ALJ LEXIS 19 (HUD ALJ June 22, 2022).

[89] *Id.* at *18, *24.

[90] *Id.* at *18.

conditions and would grant her the dignity of living independently."[91] It was also closer to her daughter's school and to one of Ms. Wells' jobs.[92] Raimos agreed to rent to Ms. Wells and accepted her security deposit, but when he learned that Ms. Wells had a disabled daughter, he repeatedly delayed the move-in date, offering "an unsubstantiated and pretextual reason" each time, and then withdrew the offer, "even though it would not require any modifications to the Property" to allow Ms. Wells and her daughter to move in.[93] Raimos "was particularly callous in declaring 'Yeah, sucks right?' when denying Complainant the opportunity to rent the Property."[94] As a result, Ms. Wells and her daughter were forced to spend six months with Ms. Wells' cousin in "significantly inferior" housing.[95] Among other things, there was no bus access for her daughter's school, the wooden floors "made crawling difficult for her disabled daughter who could not walk," and there was no bed for Ms. Wells.[96] Ultimately, "due to her drastically increased transit time, Ms. Wells lost her job as a caretaker to three children."[97]

In *Wilson v. Phoenix House*,[98] to take but one more example, Ms. Wilson, a homeless transgender woman, agreed to live at Phoenix House, a residential drug treatment facility, as an alternative to prison.[99] Phoenix House subjected Ms. Wilson to egregious discrimination, among other things forcing her to room with men; refusing to allow her to wear a wig or heels although cisgender women enjoyed this right; forcing her to sit with the men in gender-segregated meetings; and kicking her out of the women's support group based upon her transgender status.[100] Thirty-eight residents signed a petition asking Phoenix House to reconsider, to no avail.[101] Ultimately, despite her excellent progress in the program—after a few weeks, she was even asked to serve as a "Resident Structure Senior Coordinator"—she was denied advancement and informed, "[w]e can't suit your needs as a transgender in our program."[102] Phoenix House then informed Ms. Wilson that if it could not locate another program for her, she would be sent to prison.[103] Angry and frustrated at the discrimination to which Phoenix House subjected her, and with incarceration looming (Phoenix House failed to locate another program for her), Ms. Wilson "left Phoenix

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[91] *Id.* at *5.
[92] *Id.* at *6.
[93] *Id.* at *14–15.
[94] *Raimos*, 2022 HUD ALJ LEXIS 19, at *18.
[95] *Id.* at *6.
[96] *Id.*
[97] *Id.* at *11.
[98] Wilson v. Phoenix House, 978 N.Y.S.2d 748 (N.Y. App. Div. 2013).
[99] *Id.* at 751.
[100] *Id.* at 751–52.
[101] *Id.* at 752.
[102] *Id.* at 751–52.
[103] *Id.* at 752.

House without permission. She was ultimately resentenced to 2½ years in prison."[104]

As these examples and myriad more attest, it is entirely reasonable to posit that "[t]he emotional damage caused by housing discrimination . . . produces 'a feeling of inferiority . . . unlikely to ever be undone.'"[105]

B. *Loss of Housing Opportunity*

In addition to the emotional distress wrought by housing discrimination, victims suffer a loss of housing opportunity that can affect them and their families in numerous ways, and for generations to come.[106] By denying applicants the ability to move into their neighborhood of choice, housing discrimination perpetuates and reinforces segregation.[107] "Furthermore, housing discrimination has a ripple effect, discouraging the actual victims as well as their friends, colleagues, and family members from seeking housing in areas from which people have been deterred."[108]

In turn, housing discrimination and residential exclusion give rise to a concatenation of harmful consequences. *First*, housing discrimination forces individuals and families to remain in, or, in desperation, to accept inferior living spaces. This can include, for example, "infestations of rats, mice, roaches, and bedbugs; serious sewage back-ups and plumbing leaks; lack of operating heaters; pervasive mold, especially in bathrooms; dangerous electrical problems; unsecured locks on the doors; inadequate lighting, and loose railings

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[104] *Wilson*, 978 N.Y.S.2d at 752.

[105] Brian Hale, *Discrimination in Housing: The Effects of Emotional Distress and Its Remedies*, 23 L. & PSYCH. REV. 167, 177 (1999) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

[106] *See* Peter Christensen & Christopher Timmins, *Sorting or Steering: The Effects of Housing Discrimination on Neighborhood Choice* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24826, 2021), https://www.nber.org/system/files/working_papers/w24826/w24826.pdf [https://perma.cc/XKU9-C4UB] ("Impacts can even accumulate across generations."); Jane Kim, *Black Reparations for Twentieth Century Federal Housing Discrimination: The Construction of White Wealth and the Effects of Denied Black Homeownership*, 29 B.U. PUB. INT. L.J. 135, 165 (2019) ("Perpetrated merely one generation ago, the damaging effects of twentieth century federal housing discrimination continue to devastate black-American communities and families today."); Roshanak Mehdipanah, Jessica Ramirez, Shanti Abedin & Sherrill F. Brown, *Housing Discrimination and Health: Understanding Potential Linking Pathways Using a Mixed-Methods Approach*, 7 SOC. SCIS. 194, 200 (2018) ("These studies ultimately show that disinvestment in these segregated neighborhoods, including limited opportunities for economic and social growth, can have negative health effects on residents for generations to come.").

[107] Moran, *supra* note 22, at 286, 292 ("Among the most serious consequences of housing discrimination is the perpetuation of residential segregation.").

[108] *Id.* at 292–93.

and rotting . . . walkways."[109] It may also lead to lead poisoning, asthma, and other disorders in children.[110]

For the disabled, the failure to provide reasonable accommodations causes lack of equal access, physical pain, and injury.[111] For those unhoused, it can mean months without a home, whether for an individual living with AIDS[112] or for a grandmother who "suffers from diabetes, congestive heart failure, high blood pressure, vision impairment, and . . . difficulty walking and balancing," forced to spend months "living out of her car" with her daughter and four-year-old granddaughter.[113] It can lead, finally, to additional consequences ranging

[109] Jimenez v. Tsai, No. 5:16-cv-04434-EJD, 2017 U.S. Dist. LEXIS 180545, at *4–5 (N.D. Cal. Oct. 30, 2017).

[110] *See, e.g.*, Edwards v. Alexander Cnty. Hous. Auth., 2021 U.S. Dist. LEXIS 5482, at *5 (S.D. Ill. Jan. 12, 2021), *overruled in part on other grounds by* Monroe v. Columbia Coll. Chi., 990 F.3d 1098 (7th Cir. 2021).

[111] *See, e.g.*, CNY Fair Hous., Inc. v. Welltower Inc., 588 F. Supp. 3d 282, 288–89 (N.D.N.Y. 2022) (finding that landlord's refusal to provide designated parking spot caused physical difficulties as a result of walking longer distances, including significant chest pain akin to that of a heart attack); Metro. St. Louis Equal Hous. Opportunity Council v. Lighthouse Lodge, LLC, No. 2:09-cv-04019-NKL, 2009 U.S. Dist. LEXIS 47046, at *3–4 (W.D. Mo. June 4, 2009) (alleging 34 deficiencies for the disabled, including "stairways with no wheelchair ramps, thresholds exceeding three quarter inches, thermostats and kitchen cabinets too high off the floor, inadequate floor space for wheelchair maneuvering, a lack of accessible parking spaces, failure to install grab bars in public restrooms, and grading from the units to boat slips that is too steep for wheelchairs"); Wright v. Giuliani, 99 Civ. 10091, 2000 U.S. Dist. LEXIS 8322, at *7–8 (S.D.N.Y. June 14, 2000) ("[P]laintiff Simon Vargas describes how one unnamed DASIS client with prosthetic legs was forced to walk up five flights of stairs to his room because the [homeless housing] did not have an elevator."), *aff'd* 230 F.3d 543 (2d Cir. 2000); United States v. Freer, 864 F. Supp. 324, 325 (W.D.N.Y. 1994) ("Without a wheelchair ramp, Ms. Soper needs to be carried (or otherwise attended) up the steps and into her home. Recently, while being assisted into her home, Ms. Soper fell and was injured.").

[112] *See generally* Short v. Manhattan Apartments, 916 F. Supp. 2d 375 (S.D.N.Y. 2012) (Plaintiff Short approached defendant for assistance in October 2010 and did not secure housing until June 2011).

[113] Sanders v. SWS Hilltop, LLC, 309 F. Supp. 3d 877, 879–80 (D. Or. 2018).

from a lack of heat and hot water[114] to separation or isolation from healthcare[115] and childcare providers.[116]

Second, housing discrimination markedly limits the educational opportunities of applicants and their children. In the United States, the quality of education is determined by the wealth of the community's tax base.[117] In *Brown v. Board of Education*,[118] a unanimous Supreme Court ruled that education "is a right which must be made available to all on equal terms."[119] Nineteen years later, however, in *San Antonio Independent School District v. Rodriguez*,[120] "the Court refused to follow this noble pronouncement, permitting grossly unequal public education based solely upon the wealth of the neighborhood in which a student was born."[121] As Justice Thurgood Marshall thundered in his dissent, "[t]he Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside."[122]

By preventing families from moving into neighborhoods with higher tax bases, housing discrimination relegates children of color in particular to schools with significantly less funding than those serving predominantly white students.[123] Indeed, despite serving the same number of students, predominantly

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[114] *See, e.g.*, 273 Lee Ave. Tenants Ass'n *ex rel.* Sanchez v. Steinmetz, 330 F. Supp. 3d 778, 792 (E.D.N.Y. 2018) (alleging that "Hispanics were being discriminated against because they began to suffer from a lack of heat, hot water, and no repairs"); McMillon v. Hawaii, 261 F.R.D. 536, 539 (D. Haw. 2009) (alleging, inter alia, "leaking and bursting plumbing" and "an almost total lack of hot water").

[115] Liddy v. Cisneros, 823 F. Supp. 164, 168–69 (S.D.N.Y. 1993) (alleging that Section 8 program's refusal to grant reasonable accommodation of transfer to Manhattan from outer boroughs caused significant problems owing to mobility limitations, including inability to secure specialized treatment; lack of access to nearby drug store to secure medication; and difficulty attending medical appointments with treating physician).

[116] *See, e.g.*, Kelly v. Secretary, United States Dep't of Hous. & Urb. Dev. *ex rel.* Staples, 97 F.3d 118, 120 (6th Cir. 1996) (as a result of discrimination, plaintiff forced to rent "another apartment, which was not as convenient, increasing her commute to work and creating other transportation and child care problems").

[117] *See infra* notes 118–123 and accompanying text.

[118] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[119] *Id.* at 491.

[120] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[121] Armen H. Merjian, *Relitigating* Plessy *in the 21st Century: Separate and Unequal Education in California*, 16 TEX. HISP. J. L. & POL'Y 1, 6 (2010); *see also Rodriguez*, 411 U.S. at 56–58.

[122] *Rodriguez*, 411 U.S. at 70 (Marshall, J., dissenting).

[123] *Classroom Segregation: History and Current Impact on Student Education*, AM. UNIV. SCH. OF EDUC. (Aug. 19, 2020), https://soeonline.american.edu/blog/classroom-segregation/ [https://perma.cc/92KU-ZP3T] ("From their inception, schools serving students of color received significantly less funding than schools serving white students . . . ."); BRUCE D. BAKER, MATTHEW DI CARLO & PRESTON C. GREEN III, ALBERT SHANKER INST., SEGREGATION AND SCHOOL FUNDING: HOW HOUSING DISCRIMINATION REPRODUCES

nonwhite school districts receive $23 billion less funding nationwide than majority white districts.[124] As a result, among other things, students of color often face inferior and inadequate school facilities, overcrowding, a lack of sufficient instructional materials and supplies, and less-qualified, insufficiently paid teachers.[125] As Richard Rothstein explains in his Pulitzer-Prize-winning *The Color of Law*, "[h]igh average achievement is almost impossible to realize in a low-income, segregated school, embedded in a segregated neighborhood."[126] And housing discrimination unequivocally fuels this injustice. One study found, for example, that "[m]inority testers are (relative to their white counterparts) recommended homes in school attendance zones with considerably lower test scores and lower school ratings."[127]

Third, housing discrimination limits mobility into areas with greater employment opportunities:

> Mobility leads to improved employment opportunities for a variety of reasons. More employment opportunities are in the suburbs, so that moves to the suburbs make jobs more accessible . . . . Also, moving from the inner cities offers an opportunity to escape the "place discrimination" practiced by

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UNEQUAL OPPORTUNITY 1 (Apr. 2022), https://www.shankerinstitute.org/sites/default/files/2022-05/SEGreportfinal.pdf [https://perma.cc/4AK4-UPD3] ("It is difficult to overstate the importance of segregation for race- and ethnicity-based school funding disparities in the United States. In many respects, unequal educational opportunity depends existentially on segregation.").

[124] Lynette Guastaferro, *Why Racial Inequities in America's Schools Are Rooted in Housing Policies of the Past*, USA TODAY (Nov. 2, 2020), https://www.usatoday.com/story/opinion/2020/11/02/how-redlining-still-hurts-black-latino-students-public-schools-column/6083342002/ [https://perma.cc/8FQS-29HC].

[125] *See, e.g.*, Alicia L. Mioli, Note, Sheff v. O'Neill*: The Consequence of Educational Table-Scraps for Poor Urban Minority Schools*, 27 FORDHAM URB. L.J. 1903, 1904 (2000) ("The combination of both racial segregation and poverty has a strong negative impact on the quality of education in segregated and poverty-stricken schools. Consequently, low-income minority students attending urban schools are subjected to inferior education. Indicators of inferior education include less-qualified teachers, insufficient supply of books for students, crumbling and poorly maintained buildings and lack of valuable learning tools such as science labs." (footnotes omitted)); Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 349 (2007). *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

[126] RICHARD ROTHSTEIN, THE COLOR OF LAW 197 (2017).

[127] Christensen & Timmins, *supra* note 106, at 2; *accord* Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for an Old Injury Arising from Housing Discrimination*, 77 WASH. U. L.Q. 1153, 1157 (1999) ("When discrimination prevents parents from relocating to communities with quality schools, their children often become trapped in inferior city school systems.").

> employers, who refuse to hire people whose homes are in "ghetto" neighborhoods.[128]

Fourth, housing discrimination exposes those refused entry into the neighborhood of their choice to higher incidences of violence and crime.[129] Fair housing tests demonstrate, for example, that "[m]inority testers are significantly more likely to be steered towards neighborhoods with . . . higher rates of assault . . . ."[130] Housing discrimination thus makes it more likely that those denied and deterred will be victims or witnesses to crime, and will suffer the accompanying stress and trauma of surviving such circumstances.[131] In addition, housing discrimination increases the likelihood of repeated (and potentially dangerous) police interactions: segregation "both concentrates African Americans in 'high crime areas' in which entire communities are criminally suspect and makes African Americans 'out of place' and thus suspicious when they are not in predominantly black areas."[132]

Fifth, housing discrimination limits the ability to accumulate wealth, not only by restricting employment and educational opportunities, but through the

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[128] Wagman Roisman, *supra* note 125, at 349–50; s*ee, e.g.*, Moran, *supra* note 22, at 293 (housing discrimination and "[t]he resulting concentration of minorities in urban neighborhoods . . . narrows employment opportunities").

[129] In the face of persistent, bigoted tropes, it is important to note that "in fact crime in impoverished neighborhoods of color is a product of concentrated poverty, overcrowding, and the dearth of services and amenities." George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1760 (2012); *accord* Patrick Sharkey & Alisabeth Marsteller, *Neighborhood Inequality and Violence in Chicago, 1965–2020*, 89 U. CHI. L. REV. 349, 349–50 (2022) ("Violence is not evenly distributed across the communities of a city but rather is concentrated in neighborhoods that experience multiple forms of disadvantage, from poverty to segregation to joblessness. The spatial concentration of violence is driven by long-term patterns of disinvestment in core community institutions that provide the foundation for collective life." (footnotes omitted)).

[130] Christensen & Timmins, *supra* note 106, at abstract, 19.

[131] *See, e.g.*, Christopher C. Ligatti, *Max Weber Meets the Fair Housing Act: "Life Chances" and the Need for Expanded Lost Housing Opportunity Damages*, 6 BELMONT L. REV. 78, 80, 89 (2018) ("The basic fact of where one lives has a substantial impact on . . . the probability of becoming a victim of or witness to violent crime . . . ."); *id.* at 87 ("[A] neighborhood in which violent crime is an everyday phenomenon could have significantly negative consequences, ranging from the tangible (injury or death) to intangible (anxiety or fear)."); *see also* United States v. Hylton, 944 F. Supp. 2d 176, 185 (D. Conn. 2013) (family forced by housing discrimination to remain in a neighborhood with a higher crime rate, "particularly as to violent crime, which is 10 times greater per person"), *aff'd* 590 F. App'x 13 (2d Cir. 2014).

[132] Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 163 (2016).

denial of opportunities to secure valuable housing assets, assets more likely to appreciate over time.[133]

> Housing is the primary conduit to accessing opportunity and building wealth and economic stability in the U.S. Housing location is the critical leverage point to determining access to education, employment, childcare and health care or in determining the likelihood of developing assets/wealth through home equity. Housing can be either an impediment or a conduit to opportunity depending on its location.[134]

Studies confirm that moving into higher-opportunity areas fosters income mobility and significantly increases a child's total lifetime earnings.[135]

Finally, housing discrimination poses a severe health risk to those excluded, trapping them in often dangerous areas and depriving them of access to quality healthcare. Several studies indicate that

> racial/ethnic minority segregation can be devastating to health and functioning across the life course. For example, research suggests that various indicators of racial/ethnic segregation are associated with higher rates of mortality, infant

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[133] *See, e.g.*, KIMBERLY QUICK & RICHARD D. KAHLENBERG, CENTURY FOUND. ATTACKING THE BLACK-WHITE OPPORTUNITY GAP THAT COMES FROM RESIDENTIAL SEGREGATION 2 (June 2019), https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation [https://perma.cc/BY3R-YZZN] ("Because homes are typically the largest financial asset for most Americans, segregated markets significantly reduce the accumulated wealth of blacks."); Michelle Y. Ewert, *Things Fall Apart (Next Door): Discriminatory Maintenance and Decreased Home Values as the Next Fair Housing Battleground*, 84 BROOK. L. REV. 1141, 1163 (2019) ("In sum, banks have harmed homeowners in Black and Latinx neighborhoods by . . . lowering the value of property belonging to homeowners of color through discriminatory housing practices in violation of the FHA."); Kim, *supra* note 106, at 161 ("[T]he black-white wealth gap continues to be fueled in each generation as black-Americans have been largely excluded from the 'best' or most profitable housing markets.").

[134] JASON REECE & SAMIR GAMBHIR, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, THE OHIO STATE UNIV., THE GEOGRAPHY OF OPPORTUNITY: REVIEW OF OPPORTUNITY MAPPING RESEARCH INITIATIVES 5 (2008); *see* Christensen & Timmins, *supra* note 106, at abstract ("Growing evidence indicates that neighborhoods affect human capital accumulation, raising concern that the exclusionary effects of housing discrimination could contribute to persistent inequality.").

[135] *See, e.g.*, Christensen & Timmins, *supra* note 106, at 2–3 ("We interpret our results on families in light of recent evidence that suggests that access to low poverty neighborhoods may be important for narrowing the racial gap in intergenerational income mobility."); Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 859–60 (2016) ("We estimate that moving a child out of public housing to a low-poverty area when young (at age 8 on average) using an MTO-type experimental voucher will increase the child's total lifetime earnings by about $302,000.").

> mortality and low birth weight, overall poor health, nutrition and obesity, and access to health care.[136]

Segregation has even been linked to cancer and decreased cancer survival rates.[137]

In addition, those in protected categories are more likely to be steered to areas with greater exposure to the hazards of pollution. For example, one study found that "African American mothers are 52.6% more likely than their white counterpart to receive a recommendation within 2 km of a Superfund site"[138] and a 38% higher level of exposure to "air toxics."[139] Among other things, close

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[136] Kathryn Freeman Anderson, *Racial Residential Segregation and the Distribution of Health-Related Organizations in Urban Neighborhoods*, 64 SOC. PROBS. 256, 256 (2017) (citations omitted); Ligatti, *supra* note 131, at 80–81 ("In children, environmental factors associated with low-income neighborhoods have been found to have a profound effect on health, including differences in brain development."); *How Does Your Housing Impact Your Health?*, FAIR HOUS. CTR. FOR RTS. & RSCH. (May 19, 2022) [hereinafter, FHCRR], https://www.thehousingcenter.org/how-does-your-housing-impact-your-health [https://perma.cc/32K7-BD4N] ("Research shows that residents living in formerly redlined or racially segregated neighborhoods experience worse health outcomes.").

[137] *See, e.g.*, Yuhong Zhou, Amin Bemanian & Kirsten M.M. Beyer, *Housing Discrimination, Residential Racial Segregation, and Colorectal Cancer Survival in Southeastern Wisconsin,* 26 CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION 561, 564 (2017) ("[R]acial bias in mortgage lending (when measured as a binary variable) was related to poorer colorectal cancer survival among blacks, but not among whites . . . ."); FHCRR, *supra* note 136 ("Residents of formerly redlined neighborhoods are at increased risk of health issues like preterm birth, cancer, tuberculosis, and maternal depression."); Hope Landrine et al., *Residential Segregation and Racial Cancer Disparities: A Systematic Review*, 4 J. RACIAL & ETHNIC HEALTH DISPARITIES 1195, at abstract (2016) ("Segregation contributed significantly to cancer and to racial cancer disparities in 70% of analyses, even after controlling for socioeconomic status and health insurance.").

[138] Christensen & Timmins, *supra* note 106, at 22. A Superfund site is a site wherein hazardous waste has been dumped, left out in the open, or otherwise been improperly managed, including manufacturing facilities, processing plants, landfills and mining sites. *See What Is Superfund?*, EPA (Oct. 30, 2023), https://www.epa.gov/superfund/what-superfund [https://perma.cc/4KX9-TWEE]. The Comprehensive Environmental Response Compensation and Liability Act implemented Superfund to allow the EPA to clean up contaminated sites. *Id.*

[139] Christensen & Timmins, *supra* note 106, at 22; *see, e.g.*, LESLEY FLEISCHMAN & MARCUS FRANKLIN, FUMES ACROSS THE FENCE-LINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES 6 (2017) ("The racial disparities among communities impacted by environmental pollution in the United States are stark. African Americans are exposed to 38 percent more polluted air than Caucasian Americans, and they are 75 percent more likely to live in . . . communities that are next to a company, industrial, or service facility and . . . directly affected in some way by the facility's operation (e.g. noise, odor, traffic, and chemical emissions)."); Dayna Bowen Matthew, *Structural Inequality: The Real COVID-19 Threat to America's Health and How Strengthening the Affordable Care Act Can Help*, 108 GEO. L.J. 1679, 1702 (2020) ("Racial discrimination in housing concentrates minority populations in geographic spaces that are structurally harmful to health . . . . Black Americans are significantly more likely to

proximity to toxic sites has been shown to cause lower birth weights, and children conceived to mothers living in close proximity to toxic sites are more likely "to repeat a grade, to be suspended from school . . . [to] have lower test scores, and to be diagnosed with a cognitive disability."[140]

In short, housing discrimination and the resulting segregation severely limit the opportunities and damage the lives of those affected in myriad ways:

> Today, the policy to provide fair housing nationwide announced in the FHA remains as important as ever. While "many cities have become more diverse" after "the passage of the [FHA] and against the backdrop of disparate-impact liability in nearly every jurisdiction," housing segregation both perpetuates and reflects this country's basic problems regarding race relations: educational disparities, police-community relations, crime levels, wealth inequality, and even access to basic needs such as clean water and clean air. In this country, the neighborhood in which a person is born or lives will still far too often determine his or her opportunity for success.[141]

As the foregoing makes abundantly clear, housing discrimination is as dangerous as defective stairs, and thus housing transactions are as potentially dangerous as staircases. Housing discrimination causes humiliation and trauma; nightmares and suicidal ideation; lead poisoning and asthma in children; inferior educational opportunities and limited job prospects; greater exposure to violence and crime; decreased earnings and lower wealth accumulation; low birth weights and higher infant mortality; increased exposure to toxins and increased risk of cancer.[142] This risk of tremendous harm squarely satisfies the criteria for finding a nondelegable duty. It is, moreover, entirely foreseeable. As one court observed, "[i]t takes no great measure of prescience to recognize that housing discrimination will present grave and harmful consequences if allowed to continue."[143]

For those who have never experienced housing discrimination, it may be difficult to appreciate the danger, and the harm.[144] But for the myriad Americans

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live within a mile of a polluting facility. Black children are more likely than white children to attend schools located near polluting facilities resulting in poorer student health and academic performance." (footnotes omitted)); Eric Jantz, *Environmental Racism with a Faint Green Glow*, 58 NAT. RES. J. 247, 249 (2018) ("People of color are often subject to housing discrimination and discriminatory zoning, which leads minority neighborhoods to disproportionately host undesirable land uses such as polluting industries.").

[140] Christensen & Timmins, *supra* note 106, at 4–5.

[141] Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493, 503 (9th Cir. 2016) (citations omitted).

[142] *See supra* notes 86–140 and accompanying text.

[143] Yarborough v. City of Warren, 383 F. Supp. 676, 691 (E.D. Mich. 1974).

[144] *See, e.g.*, Anderson, *supra* note 87, at 140 ("What is the 'intrinsic effect' of discriminatory behavior? It is likely much more severe than judges, especially those from privileged backgrounds, usually imagine."); Goode & Johnson, *supra* note 86, at 1177 ("[P]roving the elements of emotional harm in the damages phase of a housing

each year who do[145]—the single parent trying to escape the shelter system with a housing voucher, the disabled tenant seeking a reasonable accommodation for equal access, and the African American family seeking greater opportunities for themselves and their children—the threat of harm looms large, even at times existential.

As we have seen, the finding of a nondelegable duty depends upon "the gravity of the public policies that are implicated."[146] The overarching need to root out housing discrimination implicates the gravest of public policies and likewise justifies imposition of the duty. Prior to the Supreme Court's decision in *Meyer*, courts expressly recognized the fundamental social importance of combatting housing discrimination in finding a nondelegable duty to comply with the law. In *Walker v. Crigler*,[147] for example, the Fourth Circuit cited "the overriding societal priority of the provision of 'fair housing through out [sic] the United States'" as justification for imposing the duty,[148] and explained that "we must hold those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law if the goal of equal housing opportunity is to be reached."[149] The Ninth Circuit in *Meyer* also relied upon the compelling social importance of the FHA's anti-discriminatory mandate in finding a nondelegable duty,[150] only to see the Supreme Court jettison this core consideration entirely, as the following discussion reveals.

IV. *MEYER V. HOLLEY*

In *Meyer v. Holley*,[151] the Holley family—an African American mother and a white father, along with their son—filed suit under the FHA after an agent of

discrimination case . . . involves getting judges to understand the case from the perspective of the plaintiff even though emotional harm from discrimination is probably far removed from both their experience and their knowledge."); Moran, *supra* note 22, at 290 ("Fact finders also may have difficulty relating to the harm suffered by victims.").

[145] *See supra* note 81 and accompanying text.

[146] *See supra* note 64 and accompanying text.

[147] Walker v. Crigler, 976 F.2d 900 (4th Cir. 1992).

[148] *Id.* at 904 (quoting 42 U.S.C. § 3601).

[149] *Id.* at 905; *see, e.g.*, Alexander v. Riga, 208 F.3d 419, 433 (3d Cir. 2000) (finding a nondelegable duty not to discriminate in order "[t]o effectuate the Fair Housing Act's mandate"); Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052, 1061 (E.D. Cal. 1998) ("To effectuate the specific mandates of anti-discrimination law, [the property owners] must be held responsible for all the discriminatory practices practiced by Del Monte's rental agents."); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 95 (1995) ("The duty not to discriminate is nondelegable because of the important national policy of providing fair housing throughout the United States."); *see also* Harrison v. Otto G. Heinzeroth Mortg. Co., 430 F. Supp. 893, 897 (N.D. Ohio 1977) (observing, in finding a nondelegable duty under the FHA, that "great evils require strong remedies").

[150] *See infra* notes 152–156 and accompanying text.

[151] Meyer v. Holley, 537 U.S. 280 (2003).

Triad Realty (Triad) named Crank denied them the opportunity to buy a house.[152] Crank "allegedly used racial invectives in referring to the Holleys," stating that "he did not want to deal with those [N-words]" and calling them "a 'salt and pepper team.'"[153] The district court ruled that Crank's discriminatory acts could be imputed to Triad but not to the owner of Triad, individually.[154] Reversing, the Ninth Circuit explained that "the duty to obey the laws relating to racial discrimination under the FHA is non-delegable."[155]

In reaching this decision, the court relied upon policy considerations. In particular, the court stressed the compelling social importance of the FHA's anti-discriminatory mandate, which, as we have seen, is the "core principle behind all nondelegable duties."[156] The court found that imposing liability was "a matter of furthering the compelling policy of the FHA."[157] It was consistent with "the purposes of the FHA,"[158] the court explained, and with "[t]he overriding societal priority of the FHA."[159] The court accordingly agreed with the "policy discussion" of both the Fourth and Seventh Circuits that "we must hold those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law if the goal of equal housing opportunity is to be reached."[160]

The Supreme Court, while upholding the imposition of vicarious liability under the FHA pursuant to "traditional vicarious liability rules,"[161] reversed on the issue of nondelegable duty, essentially based upon statutory construction. "The Ninth Circuit identifies nothing in the language or legislative history of the [FHA] to support the existence of this special kind of liability,"[162] the Court observed. The Court refused to "conclude that Congress intended, through silence, to impose this kind of special duty of protection upon individual officers or owners of corporations—who are not principals . . . ."[163] Further, the Court opined that assessing which of two innocent individuals should suffer, and when, "is a complex matter," and "courts ordinarily should determine that matter in accordance with traditional principles of vicarious liability— unless, of course, Congress, better able than courts to weigh the relevant policy

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[152] Holley v. Crank, 258 F.3d 1127, 1129–30 (9th Cir. 2001), *vacated sub nom.* Meyer v. Holley 537 U.S. 280 (2003).

[153] *Id.* at 1130.

[154] *Id.*

[155] *Id.* at 1131 (citing Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552 (9th Cir. 1980)).

[156] Springer v. City & Cnty. of Denver, 13 P.3d 794, 804 (Colo. 2000).

[157] *Holley*, 258 F.3d at 1131.

[158] *Id.* at 1134.

[159] *Id.* at 1132.

[160] *Id.* at 1132 (quoting City of Chicago v. Matchmaker Real Est. Sales Ctr., Inc., 982 F.2d 1086, 1096 (7th Cir. 1992)); *see also id.* ("We also agree with this policy.").

[161] Meyer v. Holley, 537 U.S. 280, 290–91 (2003).

[162] *Id.* at 290.

[163] *Id.*

considerations, has instructed the courts differently."[164] The Court therefore dismissed as unhelpful the Ninth Circuit's characterization of the FHA's objective "as an 'overriding social priority.'"[165]

It is beyond the scope of this Article to fully critique this decision, but it is important to note several issues that cast doubt upon the Court's analysis of nondelegable duty, and that distinguish it from any such analysis under state or local law. *First*, the Court's admonition that vicarious liability should be determined "in accordance with traditional principles"[166] presents a false dichotomy. The doctrine of nondelegable duty *is* in fact a "traditional" principle of vicarious liability,[167] dating to at least the 14th century.[168] Unlike the Ninth Circuit, the Court simply refused to consider and invoke this traditional principle.

Second, under traditional tort principles, it is the province of the judiciary to determine the duties and liabilities of the parties.[169] As Oliver Wendell

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[164] *Id.* at 290–91.

[165] *Id.* at 290 ("Neither does it help to characterize the statute's objective as an 'overriding societal priority.'" (quoting Holley v. Crank, 258 F.3d 1127, 1132 (9th Cir. 2001))).

[166] *Id.* at 290–91.

[167] *See, e.g.*, Civ. Rts. Educ. & Enf't Ctr. v. Hosp. Prop. Tr., 867 F.3d 1093, 1105 (9th Cir. 2017) ("Nondelegable duty is a tort concept associated with vicarious liability theories."); Casler-Tyrrell v. Auburn Cmty. Hosp., 5:18-CV-0892, 2021 U.S. Dist. LEXIS 177099, at *35–36 (N.D.N.Y. Sept. 17, 2021) ("[W]hether a defendant is liable for the acts of an independent contractor due to the existence of a nondelegable duty is an issue of vicarious liability, not direct liability."); Farrar v. Dillard's Props., No. 1:19-616, 2021 U.S. Dist. LEXIS 202481, at *52 (D. N.M. May 18, 2021) ("the non-delegable duty doctrine is a form of vicarious liability"); Reid v. Berkowitz, 315 P.3d 185, 193 (Colo. App. 2013) ("[T]he concept of nondelegable duty is a species of vicarious liability."); Saiz v. Belen Sch. Dist., 827 P.2d 102, 117 (N.M. 1992) ("[A] nondelegable duty is a traditional tort concept."); Srithong v. Total Inv. Co., 28 Cal. Rptr. 2d 672, 673 (Cal. Ct. App. 1994) ("[T]he nondelegable duty doctrine is a form of vicarious liability.").

[168] *See* Bouziden v. Alfalfa Electric Coop., 16 P.3d 450, 462 n.6 (Okla. 2000).

[169] *See, e.g.*, El Chico Corp. v. Poole, 732 S.W.2d 306, 314 (Tex. 1987) ("The creation of new concepts of duty in tort is historically the province of the judiciary."); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 387 (2011) ("The severity of a harm usually counsels *in favor* of its appropriateness for judicial attention in tort . . . ."); John C. P. Goldberg, Lecture, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1270 (2008) ("First, the sources of tort law's rules and standards are preeminently judicial. In most American jurisdictions, the tort of negligence exists not by virtue of statute, but because of its recognition in judicial opinions. Second, courts still bear primary responsibility for developing and applying tort law, and they tend to do so using the techniques and norms associated with the idea of common law reasoning, an idea that encompasses not only reasoning from precedent, but the conception that a judge's task in a tort case is that of articulating, refining, and developing norms of right conduct that track to some degree ordinary ('common') judgments about responsibility."); Michael A. Mogill, *Misconceptions of the Law: Providing Full Recovery for the Birth of the Unplanned Child*, 1996 UTAH L. REV. 827, 912 (1996) ("Tort law has generally remained the province of the judiciary, which has been largely responsible for

Holmes observed: "The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not."[170] The notion that the legislature, rather than the judiciary, should exclusively assess the relevant policy issues upends rather than upholds vicarious liability jurisprudence. Indeed, a policy assessment of which of two innocent parties should bear the loss lies at the heart of vicarious liability: "The true basis of [] vicarious liability is one of policy . . . there is a deliberate allocation of a risk."[171]

In determining whether to impose a nondelegable duty, "the policy question facing a court (*the law of torts is largely judge-made*) is whether on the facts presented the public interest warrants imposition upon a person who has delegated a task the duty to guard against risks implicit in the performance of the task."[172] Unlike the Supreme Court in *Meyer*, the Fourth Circuit had no hesitation in resolving that question in favor of imposing a nondelegable duty with respect to housing discrimination:

> We are not unmindful of the arguable incongruity of applying liability to Whitesell, and others similarly situated, who are apparently non-culpable in a housing discrimination instance, but must still bear the burden of liability. The central question to be decided in a case such as this, however, is which innocent party, the owner whose agent acted contrary to instruction, or the potential renter who felt the direct harm of the agent's discriminatory failure to offer the residence for rent, will ultimately bear the burden of the harm caused. It is clear that the overriding societal priority of the provision of "fair housing through out the United States" clearly set out in the Fair Housing Act, indicates that the one innocent party with the power to control the acts of the agent, the owner of the property or other responsible superior, must act to compensate the injured party for the harm, and to ensure that similar harm will not occur in the future.[173]

Basing the doctrine of nondelegable duties exclusively upon express statutory language would essentially eliminate the common law doctrine, no matter how

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creating its governing principles."); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 1 (1988) ("The common law . . . is that part of the law that is within the province of the courts themselves to establish. In some areas of law, like torts and contracts, common law rules predominate.").

[170] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 79 (1881).

[171] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 472 (1941); *see also* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972) ("When a state court alters the law of products liability . . . its action is rarely attacked as 'undemocratic.'").

[172] Funk v. Gen. Motors Corp., 220 N.W.2d 641, 645 (Mich. 1974) (emphasis added).

[173] Walker v. Crigler, 976 F.2d 900, 904–05 (4th Cir. 1992); *accord* Harrison v. Otto G. Heinzeroth Mortg. Co., 430 F. Supp. 893, 897 (N.D. Ohio 1977) (observing, in finding a nondelegable duty: "great evils require strong remedies, and the old rules of the law require that when one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden of it").

great the danger and the importance to the community, rendering nondelegable duties a matter solely for legislatures.[174]

Third, the FHA states that "it shall be unlawful"[175] to commit prohibited acts without identifying, e.g., the "owner" or "landlord" or "real estate broker."[176] The FHA focuses "on prohibitions, not parties."[177] This is in contrast to many state and local housing discrimination statutes, which specifically identify the parties to whom the mandate applies.[178] Similarly, the FHA contains a single sentence describing the importance of combatting housing discrimination, proclaiming: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[179] By contrast, state and local anti-discrimination statutes typically contain far more substantive statements regarding the statute's importance to the community.[180]

Fourth, the Supreme Court saw nothing in the legislative history of the FHA to support the existence of a nondelegable duty.[181] Perhaps this is because it did not look. The Ninth Circuit did not cite the relevant history, and neither did counsel for the Holleys, instead arguing that Meyer, the officer/broker in question, had a legal duty to supervise Crank under California law and thus sufficient control to impose vicarious liability without resort to the nondelegable duty doctrine.[182] The question whether there is a basis to impose a nondelegable duty requires a *sui generis* evaluation, however, since it is based upon policy considerations and the importance of the duty to the community.[183] The Supreme Court did not conduct this essential inquiry.[184]

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[174] *See* Meyer v. Holley, 537 U.S. 280, 290–91 (2003) (refusing to find a nondelegable duty under the FHA because of Congress' "silence" on the question, i.e., because Congress did not expressly indicate "in the language or legislative history of the Act," and announcing that the Court would only find otherwise if Congress "instructed the courts differently").

[175] *See, e.g.*, 42 U.S.C. § 3604.

[176] *See, e.g.*, Holley v. Crank, 258 F.3d 1127, 1130 (9th Cir. 2001) ("The FHA itself, however, does not limit or define who can be sued for discriminatory housing practices.").

[177] Joshua W. Dixon, *The Case Against a Nondelegable Duty on Owners to Prevent Fair Housing Act Violations*, 69 U. CHI. L. REV. 1293, 1306 (2002); *accord Meyer*, 537 U.S. at 285 (the FHA "focuses on prohibited acts").

[178] *See, e.g.*, *infra* note 291 and accompanying text.

[179] 42 U.S.C. § 3601; *see* Dixon, *supra* note 177, at 1313 (arguing that the FHA "contains a nebulous sentence describing the importance of ending housing discrimination"). As the following section indicates, the legislative history of the FHA is anything but "nebulous," and makes powerfully clear the importance of ending housing discrimination. *See infra* notes 1847–91 and accompanying text.

[180] *See, e.g.*, *infra* notes 264–66 and accompanying text.

[181] *Meyer*, 537 U.S. at 290.

[182] *See* Brief for Respondents, Meyer v. Holley 537 U.S. 280 (2003) (No. 01-1120) 2002 WL 31190162, at *34; *id.* at *43 ("[T]his case does not even raise the issue whether the FHA itself imposes a nondelegable duty not to discriminate.").

[183] *See supra* notes 60–63 and accompanying text.

[184] In General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 392 (1982), the majority found no nondelegable duty for a union under Section 1981 of Title VII of the Civil

If it had done so, it would have found ample evidence in the legislative history regarding both the social importance of the duty to the community and the great danger that housing discrimination poses. The FHA was passed in the wake of the 1968 assassination of Dr. Martin Luther King, Jr. and the release of the Kerner Commission Report, which warned that for nonwhite families, "condemned by segregation and poverty to live in the decaying slums of our central cities, the goal of a decent home and suitable environment is as far distant as ever."[185] Senator Walter Mondale, in sponsoring the bill, announced: "We face today what may be the most grave social crisis confronting the United States in all its history."[186] He added that "there is an urgency to this effort transcending most other domestic concerns. We are in a time of major social disaster."[187] It is difficult to imagine an issue of greater social importance than arguably "the most grave social crisis confronting the United States in all of its history," an issue implicating a "major social disaster."[188] The Supreme Court

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Rights Act 42 U.S.C.S. § 1981. In his dissent, Justice Thurgood Marshall similarly complained that the "majority does not really analyze the question whether petitioners should be held injunctively liable because § 1981 imposes upon them a nondelegable duty." *Id.* at 416 (Marshall, J., dissenting). Marshall concluded that, "in light of the importance attached to the rights § 1981 is intended to safeguard, the duty to abide by this statute must be nondelegable . . . ." *Id.* It is also noteworthy that the majority found that the defendants "did not delegate to the Union any hiring functions which they otherwise would have performed themselves." *Id.* at 397 (majority opinion). In contrast, landlords who utilize independent contractors to assist with the sale or rental of their property unequivocally delegate functions that they otherwise would have performed themselves.

[185] OTTO KERNER, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 257 (1968); *see* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 529 (2015) ("[T]he Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest."); *id.* at 546–47 ("The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.' The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.").

[186] 113 CONG. REC. 22,841 (1967) (statement of Sen. Walter Mondale).

[187] *Id.*

[188] *Id.*; *see also* 113 CONG. REC. 22,848 (1967) (statement of Sen. Tydings) ("The presence of residential ghettos—in effect, restricted areas in which all members of a minority group are forced to reside no matter where they desire or can afford to live—brings gravely damaging social consequences to our country, particularly in our urban areas."); *id.* at 22,844 (statement of Sen. Case) ("[U]nequal housing, resulting from discriminatory and closed housing policies, contributes to the intolerable conditions of life in many of this Nation's greatest urban areas."); *id.* (these conditions include "segregated overcrowding living conditions, inherently unequal schools, unemployment and underemployment, appalling mortality and health statistics"); *id.* at 22,845 (statement of Sen. Mondale) (Housing segregation "forces millions of Americans to live on top of one another in abject poverty in the ghettos and slums . . . ."); *id.* at 22,844 (statement of Sen. Case) ("The impacted racial ghetto, with its segregated overcrowded living conditions, inherently unequal schools, unemployment and underemployment, appalling mortality and health statistics, inevitably gives rise to hopelessness, bitterness, and, yes, even open rebellion of those imprisoned

in *Meyer* ignored this legislative history, but an examination of the general purpose clauses and the legislative history of state and local housing discrimination laws may well reveal support for both the profound dangers that housing discrimination poses and the social importance of the laws.[189]

Finally, the Court's decision in *Meyer* was limited to "individual officers or owners of the corporation."[190] The question remains, even under the FHA, whether *Meyer* applies only to corporate officers or owners, and at least some federal courts have continued to announce a nondelegable duty for others under the FHA.[191]

V. *LOPEZ V. WILLIAM RAVEIS REAL ESTATE, INC.*: A DOUBLY FLAWED TAKE ON VICARIOUS LIABILITY FOR OWNERS

A recent decision by the Connecticut Supreme Court (Court) perfectly illustrates the pitfalls of litigating against principals in housing discrimination cases, and the need for a nondelegable duty under state and local housing law.

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within its confines."); *id.* at 22,846 (statement of Sen. Hart) ("If we want to upgrade the Nation's educational level, fair housing is a most important step."); 113 CONG. REC. 22,848 (1967) (statement of Sen. Tydings) ("Such exclusion unjustly denies many Americans the freedom to gain access on equal terms with other Americans to good housing and good schools for their children and proximity to good jobs."); 114 CONG. REC. 3421 (1968) (statement of Sen. Mondale) ("Jobs can move to the suburbs, but housing discrimination prevents Negroes from following."); *id.* at 2282 (statement of Sen. Brooke) ("[I]f Negroes are able to live where they want, then they will be able to get these jobs."); *id.* at 3422 (statement of Sen. Mondale) ("It is impossible to gage [sic] the degradation and humiliation suffered by a man in the presence of his wife and children when he is told that despite his university degrees, despite his income level, despite his profession, he is just not good enough to live in a white neighborhood."); *id.* at 2281 (1968) (statement of Sen. Brooke) ("I can testify from personal experience, having lived in the ghetto, what it does to the inside of a man to live in such shameful conditions, to be in an area which has been marked for second-class citizens, in an area which few are able to escape."); Ewert, *supra* note 133, at 1175 ("The drafters of the FHA recognized the intangible, psychological harm that stemmed from discrimination and intended that the legislation would stop that harm.").

[189] *See* discussion *infra* Part VI.

[190] Meyer v. Holley, 537 U.S. 280, 290 (2003); *accord id.* (refusing to hold "every corporate supervisor personally liable without fault").

[191] *See, e.g.*, May v. Martin Fein Int. Ltd., No. 5:21-CV-83-M, 2021 U.S. Dist. LEXIS 144674, at *22 (E.D.N.C. June 17, 2021); Blackington v. Quiogue Fam. Tr., No. 11-CV-1670, 2013 U.S. Dist. LEXIS 55901, at *15 (S.D. Cal. Apr. 18, 2013) ("The duty not to discriminate under the [FHA] is nondelegable." (citations omitted)); Whyte v. Alston Mgmt., Case No. 10-81041-CIV-DIMITROULEAS/Snow, 2011 U.S. Dist. LEXIS 158389, at *17 (S.D. Fla. Nov. 1, 2011) ("[A]n owner of property has a non-delegable duty to not violate the [FHA].") (citation omitted); *see also* Jane v. Patterson, Case No. 1:16 CV 2195, 2017 U.S. Dist. LEXIS 55952, at *10 (N.D. Ohio Apr. 12, 2017) ("[T]he [FHA's] 'nondelegable duty' not to discriminate imposed on a principal does not extend to an officer."). *But see* SCHWEMM, *supra* note 3, § 12B:2 n.23 (positing that the Court's rationale in *Meyer* "is sufficiently broad to support the view that the *Meyer* Court intended to eliminate the use of the nondelegable duty theory for all types of Fair Housing Act claims").

In *Lopez v. William Raveis Real Est., Inc.*,[192] plaintiff Carmen Lopez, a single mother of two children,[193] sought a new apartment for "the safety of herself and her children."[194] The apartment she located, owned by the Vaccaros, was "in a better neighborhood."[195] It was "near her work and her kids' bus stop, and seemed to be in a safer area than her current apartment."[196] The Vaccaros had entered into an exclusive listing contract with William Raveis Real Estate, Inc. (Raveis), which utilized salesperson Sarah Henry (Henry) to rent the apartment.[197]

Ms. Lopez submitted an offer for the apartment through her own real estate agent, Sarah Becker (Becker), which Henry forwarded to owner Mr. Vaccaro.[198] The next day, after speaking with Mr. Vaccaro, Henry indicated that things were all set and that she would forward the lease to Becker.[199] When Becker conveyed that Ms. Lopez would be utilizing a Section 8 housing voucher, however, Henry protested that Becker had not previously shared that information, and repeatedly stated that she would have to check with Mr. Vaccaro.[200] Henry added, "I'm not sure if [he] would want to wait . . . through the [Section 8] process."[201] Ultimately, Henry informed Becker that the owners decided to go with another offer.[202]

Ms. Lopez sued both Raveis and the Vaccaros for violation of Connecticut's law prohibiting discrimination based upon lawful source of income, i.e., her Section 8 voucher.[203] Ms. Lopez alleged that Henry was the agent of Raveis and the Vaccaros and thus both were vicariously liable for her discriminatory conduct, through agency principles and the nondelegable duty doctrine.[204] Because the trial court ruled that the statements in question were not discriminatory, however, it did not address the question of vicarious liability. Accordingly, on appeal, the defendants argued that the record was incomplete as to agency, analysis of which required the Court to "engage in a fact-intensive inquiry," examining "the parties' conduct under all the circumstances."[205] The Court nonetheless proceeded to rule on the issue,

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[192] Lopez v. William Raveis Real Est., 272 A.3d 150 (Conn. 2022).

[193] Brief of Plaintiff-Appellant, Lopez v. William Raveis Real Est., Inc. (Conn. July 16, 2020) No. SC 20574, 2020 CT S. CT. BRIEFS LEXIS 277, at *1 [hereinafter, Plaintiff's Brief].

[194] *Id.* at *2.

[195] *Id.* at *1.

[196] *Id.* at *2.

[197] *Lopez*, 272 A.3d at 154.

[198] *Id.* at 154–55.

[199] *Id.* at 155.

[200] *Id.* at 155–56.

[201] *Id.* at 156.

[202] *Id.*

[203] CONN. GEN. STAT. §§ 46a-64(c)(a)(1), (a)(3) (2022).

[204] *Lopez*, 272 A.3d at 167.

[205] Brief of Defendants-Appellees, Lopez v. William Raveis Real Est., Inc., 272 A.3d 150 (Conn. 2022) No. SC 20574, 2021 CT S. CT. BRIEFS LEXIS 78, at *42–43 (Conn.

agreeing that Raveis was vicariously liable for Henry's conduct, but finding that the Vaccaros, as owners, were not.[206] In so doing, the Court made a hash of both the relevant agency principles and the nondelegable duty doctrine.

A. *Agency*

"Henry had an independent contractor relationship with [the Vaccaros] for purposes of their vicarious liability," the Court concluded.[207] For this proposition, the court relied almost entirely upon the listing contract between Raveis and the Vaccaros. Since the lower court never developed the record with respect to the question of agency, there was little else to assess. "[T]he listing contract Henry executed between Raveis and Vaccaro stated that 'Raveis will use reasonable efforts to lease the rental apartment,'" the Court explained.[208] "This provision does not state or imply that the Vaccaros had the right to intervene as to the means or methods by which to lease the listed property," and thus there was no agency relationship.[209]

The Court was undaunted by the fact that this argument—that the real estate salesperson was merely an independent contractor, most often wielded by brokers—"has consistently been rejected in Fair Housing Act cases."[210] As the

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Mar. 15, 2021); *see also* Brief of Defendant-Appellee, Lopez v. William Raveis Real Est., Inc., 272 A.3d 150 (Conn. 2022) No. SC 20574, 2021 CT S. CT. BRIEFS LEXIS 65, at *53 (Conn. Mar. 15, 2021) ("[T]he vicarious liability claims are not ready for appellate review and there is no record for the appellate court to consider.").

[206] *Lopez*, 272 A.3d at 167.

[207] *Id.* at 168. Note that the Vaccaros did not contract with Henry at all. They contracted with Raveis, which utilized Henry as its salesperson. *See supra* note 198 and accompanying text.

[208] *Id.* at 168.

[209] *Id.*

[210] Heights Cmty. Cong. v. Hilltop Realty, Inc., 774 F.2d 135, 141 (6th Cir. 1985); SCHWEMM, *supra* note 1, § 12B:2 ("this argument was consistently rejected"); *see, e.g.*, Cleveland v. Caplaw Enters., 448 F.3d 518, 523 (2d Cir. 2006) (refusing to dismiss fair housing claim based upon conclusory contractual language); City of Chicago v. Matchmaker Real Est. Sales Ctr., Inc., 982 F.2d 1086, 1097 (7th Cir. 1992) ("It is not enough, as defendants argue, that Matchmaker's sales agents were described in their employment agreement as independent contractors. The magistrate judge found, and we agree, that the relationship between Matchmaker and its four agents . . . was an agency relationship."); Northside Realty Assocs., Inc. v. United States, 605 F.2d 1348, 1354 (5th Cir. 1979) (rejecting independent contractor argument); Bradley v. John M. Brabham Agency, Inc., 463 F. Supp. 27, 31 (D.S.C. 1978) (rejecting independent contractor argument and holding: "Though a person cannot be an independent contractor and a servant, he can be an independent contractor and an agent."); A-1 Realty Corp. v. State Div. of Hum. Rts., 35 A.D.2d 843, 844 (N.Y. App. Div. 1970) ("Ferraro, a real estate salesman for petitioner A-1 Realty Corporation, was guilty of discrimination against the complainant in the rental of the subject premises, because of her race or color. Whether he was acting in behalf of the corporation as employee or independent contractor, Ferraro was its agent and consequently the corporation was responsible for his acts under the doctrine of Respondeat superior.").

Second Circuit explained, "[s]lavish deference to contractual language is inappropriate in the highly-factual and often nuanced agency analysis."[211] Indeed, "where the public interests or the rights of third parties are involved, the relationship between contracting parties must be determined by its real character rather than by the form and color that the parties have given it."[212] Accordingly, courts have refused "to rely upon conclusory contractual language to dismiss a fair housing claim for lack of agency."[213]

In addition, as the Second Circuit found in analogous circumstances, "the cited clause does not preclude [the owner] from directing the *manner* by which [the broker or salesperson] deals with tenants."[214] Likewise, in *Lopez*, the avowedly "limited terms of the listing contract"[215] shed no light on the question whether the Vaccaros provided directives to Raveis/Henry regarding the manner by which they dealt with applicants, e.g., by indicating which application forms to use, which credit scores or other criteria might be acceptable, how to present or describe the apartment, etc.

"Outside of the limited terms of the listing contract," the *Lopez* Court concluded, "there is no evidence to suggest that Vaccaro had the right to control anything other than the result, namely, the terms of the lease and which offer he accepted."[216] *First*, it is highly disingenuous to cite a lack of evidence of the owners' control when those very owners avowed that the record regarding agency was never developed.[217] *Second*, the fact that the Vaccaros could control "the desired amount of rent,"[218] along with the other "terms of the lease and which offer would be accepted,"[219] could have sufficed to show the requisite control for a finding of agency.[220] Courts have held, for example, that a real

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[211] *Caplaw Enters.*, 448 F.3d at 523 .

[212] *In re* Shulman Transport Enters., Inc., 744 F.2d 293, 295 (2d Cir. 1984).

[213] *Caplaw Enters.*, 448 F.3d at 23 (citing *Matchmaker*, 982 F.2d at 1097–98; *Northside*, 605 F.2d at 1353–54).

[214] *Id.* at 523.

[215] Lopez v. William Raveis Real Est., Inc., 272 A.3d 150, 168 (Conn. 2022).

[216] *Id.*

[217] *See supra* note 205 and accompanying text.

[218] *Lopez*, 272 A.3d at 168.

[219] *Id.*

[220] *See, e.g.*, Dixon v. Muchnik, 11-CV-30S, 2011 U.S. Dist. LEXIS 145724, at *19 (W.D.N.Y. Dec. 19, 2011) ("Here, it is undisputed that the [owners] asked Ziskind to assist them in renting or selling the property and that Ziskind agreed to do so. There is further no dispute that [the owners], as the principals, retained the ultimate authority to rent or sell the property and directed Ziskind to make offers on their behalf. This is sufficient to show that Ziskind acted as the [owners'] agent."); Ally Gargano/MCA Advert., Ltd. v. Cooke Props., Inc., No. 87 Civ. 7311, 1989 U.S. Dist. LEXIS 12245, at *56–57 (S.D.N.Y. Oct. 13, 1989) ("[U]nder the Lease Cooke does effectually function as MCA's principal with respect to sublease transactions by virtue of (a) retaining the principal economic interest in the sublease, (b) retaining the right to approve the subtenant, and (c) retaining control over the subleasing price."); Ragin v. Kahan & Kahan Realty, Ltd., No. 79 Civ. 484, 1979 U.S. Dist. LEXIS 10546, at *8 n.3 (S.D.N.Y. Aug. 7, 1979) (In support of a possible finding of agency, the

estate listing alone suffices to create an agency relationship.[221] After all, control may be both minimal and attenuated, and the principal need not control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment.[222] In the event of any uncertainty, moreover, the Court should have remanded the case for development of the record on this issue, and possibly trial. Agency is only "a question of law for the court where the material facts from which it is to be inferred are not in dispute, the question of agency is not open to doubt, and only one reasonable conclusion can be drawn from the facts in the case."[223] That was not the case in *Lopez*.

Additionally, the court's narrow view of agency was entirely contrary to the principles that govern the construction of remedial, anti-discrimination statutes. As the Court has observed, with respect to the very statute at issue in *Lopez*, "[t]he principles of statutory construction direct us to construe remedial statutes liberally in order to effectuate the legislature's intent."[224] The court could have, for example, simply adopted the broad definition of "agent" under the FHA, as set forth in the Federal Regulations: "Broker or Agent includes *any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings*, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions."[225] Instead, the Court took an extremely limited approach to agency that allows owners an easy avenue of escape for the actions of their gatekeepers.[226]

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court observed: "It also appears that rentals arranged by [the salesperson] were subject to the owners' approval.").

[221] *See, e.g.*, Smith v. H.C. Bailey Cos., 477 So. 2d 224, 235 (Miss. 1985) ("A real estate listing creates an agency relationship between the broker and the owner."); Charles V. Webster Real Est. v. Rickard, 98 Cal. Rptr. 559, 561 (Cal. Ct. App. 1971) ("A real estate listing creates an agency between the broker and the owner."); *see also* Moss v. Ole S. Real Est., Inc., 933 F.2d 1300, 1312 (5th Cir. 1991) (favorably citing *Smith* and *Charles V. Webster Real Est.* for this proposition); Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975) ("That Mrs. Townsend [the owner] was responsible for the actions of her sales agent, Mrs. Melnick, cannot be gainsaid.").

[222] *See supra* note 48 and accompanying text.

[223] Cabrera v. Jakabovitz, 24 F.3d 372, 386 n.14 (2d Cir. 1994) (quoting 3 C.J.S. AGENCY § 547 (1973)); *see also id.* at 386 ("Unless the facts are insufficient to support a finding of agency or there is no dispute as to the historical facts, the question of agency should be submitted to the jury . . . .").

[224] Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs., 739 A.2d 238, 250 (Conn. 1999) (citations and internal quotation marks omitted).

[225] 24 C.F.R. § 100.20(b) (emphasis added).

[226] *See, e.g.*, *Sullivan Assocs.*, 739 A.2d at 250 ("[W]e should not read into a remedial statute an unstated exception that would undermine the legislature's manifest intent to afford low income families access to the rental housing market. The principles of statutory construction direct us to construe remedial statutes liberally in order to effectuate the legislature's intent." (citations and internal quotation marks omitted)).

The Court also announced that Ms. Lopez "did not provide any support for holding an owner liable for the wrongful acts of a real estate salesperson."[227] This is just wrong. Ms. Lopez in fact cited *Cabrera v. Jakobovitz*,[228] the leading case on this very issue. In *Cabrera*, the court directly addressed the question whether landlords may be found liable for the wrongful acts of real estate salespersons, finding two different landlords vicariously liable under analogous circumstances:

> Here, there was ample evidence from which the jury could have inferred that the landlords had manifested a desire to have AM Realty act on their behalf in renting their apartments, and that AM Realty had accepted this agency. The landlords provided AM Realty with listings of their apartments and their criteria for acceptable tenants. AM Realty engaged in the business of renting these apartments and in "screening" the applicants to make sure that they met Breitman's and Jakabovitz's specifications. There was sufficient evidence also to indicate that the landlords controlled AM Realty's activities in referring candidates for these apartments. Both landlords had the power to deny further listings to AM Realty if the brokerage referred unacceptable applicants for the apartments.[229]

This decision, the court observed, "will actually further the purposes of the Fair Housing Act."[230]

In *Lopez*, the Vaccaros similarly provided Raveis with the listing of their available apartment under an exclusive agreement. It appears that the Vaccaros also discussed with Raveis/Henry their criteria for acceptable tenants: Henry *repeatedly* informed Becker that she would have to consult with Mr. Vaccaro regarding whether Ms. Lopez was an acceptable tenant,[231] and the Vaccaros ultimately made the decision to reject Ms. Lopez.[232] Raveis/Henry engaged in the business of renting the apartment and dealt with or "screened" those applicants before consulting with Mr. Vaccaro.[233] Finally, the Vaccaros had the final say on candidates referred to them by Raveis/Henry, and it is quite possible that they had the right to deny Raveis/Henry further listings if they referred

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[227] Lopez v. William Raveis Real Est., Inc., 272 A.3d 150, 168 n.20 (Conn. 2022).

[228] *Cabrera*, 24 F.3d 372 (2d Cir. 1994); *see* Plaintiff's Brief, *supra* note 193, at 36–38.

[229] *Cabrera*, 24 F.3d at 387; *accord* Hughes v. Lillian Goldman Fam., LLC, 153 F. Supp. 2d 435, 451 (S.D.N.Y. 2001) (examining numerous facts adduced by the plaintiff which raised "a genuine issue for trial with respect to the existence of an agency relationship between" a real estate salesperson and defendant owners).

[230] *Cabrera*, 24 F.3d at 388.

[231] *See Lopez*, 272 A.3d at 155 ("I wasn't aware that this was a [s]ection 8 tenant. I have to speak with [Vaccaro] today."); *id.* ("I will speak with [Vaccaro] later today to make a decision about the rental."); *id.* at 156 ("I have to present that to [Vaccaro]. [I'm] not sure if [he] wants to [wait] through the process. It is up to my client."); *id.* ("It's up to Vaccaro what he would like to do with the offers as well as the waiting.").

[232] *See supra* note 202 and accompanying text.

[233] *See Lopez*, 272 A.3d at 154–55.

unacceptable clients.[234] *Cabrera*, then, provides ample support "for holding an owner liable for the wrongful acts of a real estate salesperson,"[235] as does, ironically, another Connecticut case.[236] In *United States v. Hylton*,[237] the court found an agency relationship where the individual in question discussed the actions he was taking in renting a house with the owner, and the owner "signed the lease . . . indicating her approval and agreement."[238]

Cabrera and *Hylton* are not, moreover, the only relevant authorities. As noted, even without further development of the record, there were sufficient grounds for finding that Raveis was the agent of the Vaccaros, whether by virtue of the exclusive listing; the Vaccaros' power to control the desired amount of rent, the other terms of the lease, and which offer would be accepted; or by application of the broad federal definition of agent in the housing context.[239] And where an agent (Raveis) appoints a subagent (Henry) to rent an apartment, the subagent serves as an agent of *both* the agent and the principal (the Vaccaros), as the *Restatement (Third) of Agency* expressly provides: "The relationships between a subagent and the appointing agent and between the subagent and the appointing agent's principal are relationships of agency . . . ."[240] The *Restatement* in fact directly addresses the very

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[234] *See id.* at 156.

[235] *Id.* at 168 n.20. The *Lopez* court similarly opined that there was no authority "for the proposition that real estate salespersons who are hired as independent contractors under circumstances similar to those in the present case are deemed to be agents." *Id.* This is highly misleading: as noted, there is indeed authority for finding that real estate salespersons are agents of owners under analogous circumstances, and Ms. Lopez even cited *Cabrera* to the court. Plaintiff's Brief, *supra* note 193, at 36–38. There is no authority that those hired as *independent contractors* are agents in these circumstances precisely because the courts have found these individuals to be agents, and not independent contractors, under these circumstances. *See supra* notes 210–213, 220 and accompanying text.

[236] United States v. Hylton, 944 F. Supp. 2d 176, 190 (D. Conn. 2013).

[237] *Id.*

[238] *Id.* at 191.

[239] *See supra* notes 216–223 and accompanying text.

[240] RESTATEMENT (THIRD) OF AGENCY § 3.15(1) (AM. L. INST. 2006); *accord* Zeus Constr. Servs., LLC v. Fame Constr., Inc., 78 N.Y.S.3d 864, 869 (N.Y. App. Div. 2018) ("[A]n action taken by a subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent." (quoting 2A N.Y. JUR. 2D *Agency* § 178 (2023)); *In re* Parmalat Sec. Litig., 474 F. Supp. 2d 547, 553–54, 554 n.28 (S.D.N.Y. 2007) ("The Restatement states with pristine clarity that the rules applicable to the liability of a principal for the acts of agents, are applicable to his liability for subservants and other subagents insofar as their conduct has relation to the principal's affairs." (quoting RESTATEMENT (SECOND) OF AGENCY § 255 (1957))); Moss v. Ole S. Real Est., Inc., 933 F.2d 1300, 1312 (5th Cir. 1991) ("[A]nyone employed by Ole South [the broker] in the ordinary course of performing its duties to Kwikway [the owner] is also an agent of Kwikway, unless the parties agree otherwise."); Wolfson v. Beris, 295 N.W.2d 562, 565 (Minn. 1980) ("Smith [a real estate agent] acted as an agent for Silvis [real estate broker of the owner] in accord with the custom of the real estate sales industry and therefore as a subagent for Beris [the property owner].").

circumstances at issue in *Lopez*: "P retains A, a real-estate broker, to sell Blackacre. P knows that A employs salespeople to show property to prospective purchasers and to state the terms on which the property is for sale. The salespeople are A's employees, not P's employees. *The salespeople are also P's subagents*."[241]

B. *Nondelegable Duty*

The *Lopez* Court could have undone some of the damage from its faulty agency analysis by finding a nondelegable duty on the part of the Vaccaros. Instead, after acknowledging the doctrine under Connecticut law, the Court perfunctorily dismissed this argument in a single sentence: "The United States Supreme Court, however, has ruled that the duty not to discriminate under the federal act is not nondelegable in nature because a conclusion to the contrary would extend vicarious liability beyond the ordinary tort principles imposed by the federal act."[242] To label this a desultory treatment of this important doctrine is to heap too much credit upon the Court.

Ms. Lopez did not advance a claim under the FHA; her claim arose under the Connecticut human rights law.[243] The Court did not explain how a federal decision interpreting an inapplicable federal statute was somehow binding or definitive with regard to Connecticut statutory and tort law. It is true that the Connecticut housing discrimination statute was adopted in 1990 to conform to the FHA.[244] Indeed, the law in question was entitled, "An Act Adopting a Comprehensive Connecticut Fair Housing Statute Conforming to the Federal Fair Housing Act."[245] It is established, however, that where, as here, there is no express guidance otherwise in the statute itself, "[i]t is assumed that all legislation is interpreted in light of the common law *at the time of enactment*."[246]

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[241] RESTATEMENT (THIRD) OF AGENCY § 3.15 cmt. c, illus. 4 (AM. L. INST. 2006) (emphasis added); *see also id.* at cmt. c, illus. 5 ("Same facts as Illustration 4, except that P tells A that no one other than A may work on the Blackacre project. A employs S to work on the sale of Blackacre. S is unaware of P's direction to A and has no reason to believe that P wishes that A do the work alone. It is customary, as P and S know, for real-estate brokers like A to employ salespeople. S is P's subagent."); *id.* at cmt. d ("As between a principal and third parties, it is immaterial that an action was taken by a subagent as opposed to an agent directly appointed by the principal. In this respect, subagency is governed by a principle of transparency that looks from the subagent to the principal and through the appointing agent. As to third parties, an action taken by a subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent.").

[242] Lopez v. William Raveis Real Est., Inc., 272 A.3d, 150, 169 (Conn. 2022) (citing Meyer v. Holley, 537 U.S. 280, 286 (2003)).

[243] *Id.* at 153–54.

[244] *See* Comm'n on Hum. Rts. v. Litchfield Hous. Auth., 978 A.2d 136, 142–43 (Conn. App. Ct. 2009).

[245] *Id.* at 143.

[246] State v. Miranda, 715 A.2d 680, 686 n.13 (Conn. 1998) (quoting Hunte v. Blumenthal, 680 A.2d 1231 (1996)) (emphasis added); Conn. Nat'l Bank v. Giacomi, 659

At the time of enactment of the Connecticut law, thirteen years before the Supreme Court decision in *Meyer*, the consensus in the federal courts was that the duty not to discriminate was nondelegable.[247] Hence, not only was the Court not bound by subsequent Supreme Court precedent, but under the operative rules of construction, the Court should have found in favor of a nondelegable duty "in light of the common law at the time of enactment."[248]

In addition, and perhaps even more importantly, whether to find a nondelegable duty requires a *sui generis* inquiry, rooted in policy considerations.[249] The Court has recognized this principle, observing that "[n]ondelegable duties generally are imposed . . . in recognition of 'the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them.'"[250] Accordingly, in determining whether to apply the doctrine, the Court was required to undertake its own inquiry, examining the relevant Connecticut statute, its legislative history, and the fundamental policy considerations at issue.[251] In fact, the Court has expressly recognized the need to provide broader civil rights protections to its citizens than under federal law: "[U]nder certain circumstances, federal law defines the beginning and not the end of our approach to the subject . . . . Consequently, on occasion, we have interpreted our statutes even more broadly than their federal counterparts, to provide *greater* protections to our citizens, especially in the area of civil rights."[252] Ironically, moreover, the Court has explained that "[w]hen, as in the present case, the issue to be decided is largely policy driven, it seems highly appropriate to consider the soundness of the policy rationale supporting the Supreme Court's decision."[253]

A.2d 1166, 1174 (Conn. 1995) ("Because Professor Loss employed the language of [the federal rule] in [drafting the Connecticut law], it is instructive to consider the accepted interpretations of [the federal rule] at that time. Put another way, it is likely that [the Connecticut law] was meant to include aiders and abettors if [the federal rule] had been interpreted, at that time, to include such persons."), *rev'd in part* 699 A.2d 101 (Conn. 1997); *see* Hartford Elec. Light Co. v. Sullivan, 285 A.2d 352, 356 (Conn. 1971) ("In interpreting statutes which adopt other statutes, the rule of construction which is applied assumes that the statute which is adopted is taken as it existed at the time of adoption, unless there is language expressing or implying an intent to the contrary.").

[247] *See* sources cited *supra* note 39 (listing numerous cases finding a nondelegable duty to obey the FHA prior to 1990).

[248] *Miranda*, 715 A.2d at 686 n.13.

[249] Kleeman v. Rheingold, 614 N.E.2d 712, 715 (N.Y. 1993); *see supra* notes 61–64 and text accompanying.

[250] Machado v. City of Hartford, 972 A.2d 724, 730 (Conn. 2009) (quoting 41 AM. JUR. 2D, *Independent Contractors* § 43 (2005)).

[251] *Id.*

[252] Comm'n on Hum. Rts. & Opportunities v. Savin Rock Condo. Ass'n, 870 A.2d 457, 464 n.11 (Conn. 2005) (citations omitted).

[253] State v. Purcell, 203 A.3d 542, 561 (Conn. 2019).

In *Lopez*, the Court failed to undertake any analysis whatsoever, or to "consider the soundness" of the Supreme Court's rationale in *Meyer*, notwithstanding the fact that the decision whether to find a nondelegable duty "is policy driven."[254] Instead, the Court left it to the Supreme Court to determine whether the duty in question was "so important to the [*Connecticut*] community" that the owners should not be permitted to delegate liability to another.[255] When the Connecticut statute was enacted—and for thirteen years thereafter—the consensus was that the duty is indeed so important as to be nondelegable.[256] If the Court believed that that conclusion had changed for the citizens of the state, it should have said so expressly, with analysis.[257] As the Oregon Supreme Court has announced in analogous circumstances, "State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law."[258]

Connecticut courts have established, for example, that the duty to ensure the safety of stairs is nondelegable.[259] The Court in *Lopez* essentially decided, *sub silentio*, that the duty to comply with Connecticut's housing discrimination laws is not "of such importance that owners should not be able to escape liability merely by hiring others to perform them,"[260] and thus that the potential risk of harm caused by housing discrimination is not as compelling and foreseeable as that of defective stairs. Perhaps when the Court finally does conduct its own inquiry, it will reach a different conclusion. Indeed, the legislative history of the very provision in question in *Lopez*—prohibiting discrimination in housing based upon lawful source of income—demonstrates the compelling need for protection of low-income renters utilizing a Section 8 voucher like Ms. Lopez:

> In introducing to the legislature the bill that enacted the ban on source of income discrimination, Representative Lynn Taborsak . . . emphasized that "[o]ur assistance disadvantages the people that we are trying to shelter without the protections of this bill. Housing opportunities especially for low and moderate income families are severely limited in Connecticut. The families we assist need an equal chance in the rental housing market." Representative Taborsak specifically noted that "rent subsidies under federal [S]ection 8

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254 *Id.*; *see supra* notes 61–64 and accompanying text.

255 Prosser & KEETON ON TORTS, *supra* note 62, at 512.

256 *See supra* note 39 and accompanying text.

257 *See Purcell*, 203 A.3d at 562 ("[W]e consider whether the underpinnings of the Supreme Court's decision are so flawed or inconsistent with this state's case law or public policies that the decision should not be followed as a matter of state law.").

258 State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983).

259 *See, e.g.*, Garcia v. Cohen, 253 A.3d 46, 48, 51 (Conn. App. Ct. 2021); Kwoczala v. Wilde Wood Condo. Ass'n, No. CV095013657, 2010 WL 2682333, at *11–12, 15 (Conn. Super. Ct. May 19, 2010); Del Vecchio v. La Porta, No. CV055000256S, 2005 WL 2857519, at *5 (Conn. Super. Ct. Oct. 7, 2005).

260 Machado v. City of Hartford, 972 A.2d 724, 730 (Conn. 2009) (quoting 41 AM. JUR. 2D *Independent Contractors* § 43 (2005)).

> programs" were among the lawful sources of income that the bill would protect. Representative Taborsak's statements were echoed by Representative Walter S. Brooks, who stated that low income people were being denied housing because "landlords consistently say that 'I don't want you in this housing because, not that you don't have enough money, but because I disagree with your source of money. And I don't care if that source of money is the state or the federal government, I don't want it.' And consequently, across this state, we have many people who cannot find accommodation."[261]

With housing opportunities for low and moderate-income families "severely limited in Connecticut," with landlords "consistently" discriminating, and thus with many across the state "who cannot find accommodation,"[262] the Court may well conclude that "the gravity of the public policies that are implicated" triggers a nondelegable duty to obey the law.[263] The Court may also come to realize that allowing owners to escape liability merely by labelling their gatekeepers as "independent contractors" would render the law essentially meaningless vis-à-vis owners and thwart the intended purpose of the law. As the Court explained in analogous circumstances:

> The legislative history of § 46a-64c demonstrates that the legislature intended to prohibit landlords from denying rental opportunities to people whose source of income included federal or state housing assistance. Interpreting § 46a-64c as the trial court has, to allow an exception to its antidiscrimination provisions for those landlords who refuse to use the required section 8 lease, would eviscerate the basic protection envisioned by the statute. It would lead to the unreasonable result that . . . landlords might avoid the statutory mandate by refusing to accede to a condition essential to its fulfillment. Such a result is untenable. "Statutes are to be construed in a manner that will not thwart [their] intended purpose or lead to absurd results . . . ."[264]

VI. THE NONDELEGABLE DUTY TO OBEY STATE AND LOCAL HOUSING DISCRIMINATION LAWS

"[U]nmistakably," Supreme Court Justice William Brennan observed, "a high state court judge and a United States Supreme Court Justice must often look at the same case with different eyeglasses."[265] This is certainly true of cases raising the nondelegable duty under state and local law, for the doctrine requires an inquiry into the importance of the duty to the particular community in

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[261] Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs., 739 A.2d 238, 248 (Conn. 1999) (citations omitted).

[262] *Id.*

[263] Kleeman v. Rheingold, 614 N.E.2d 712, 716 (N.Y. 1993).

[264] *Sullivan Assocs.*, 739 A.2d at 248 (quoting Coley v. Camden Assocs., Inc. 702 A.2d 1180 (1997)).

[265] William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 227 (1966).

question, together with an examination of the state or local statute at issue.[266] Word limitations render it impossible to conduct such an inquiry under the many state and local housing discrimination laws. For the sake of brevity, then, and as an exemplar, this article will conduct an inquiry under the New York City Human Rights Law (NYCHRL), which governs discrimination in the largest city in the United States. As the discussion reveals, there are ample grounds for departing from the Supreme Court's decision in *Meyer* and imposing a nondelegable duty to comply with the NYCHRL's housing discrimination provisions.

The NYCHRL indicates that its anti-discriminatory mandate represents the gravest of public policies. Indeed, the New York City Council (Council) expressly codified its position within the NYCHRL that "there is no greater danger to the health, morals, safety and welfare of the city" than discrimination,[267] and that prejudice, discrimination, and the "disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state."[268]

In expanding the NYCHRL in 1991, the Council again codified its position that discrimination "poses a substantial threat to, and inflicts significant injury upon, the city that is economic, social and moral in character;" that discrimination "impedes the optimal efficiency of the housing market and retards private investments in certain neighborhoods by causing decisions to lease or sell housing accommodations to be based upon discriminatory factors and not upon ability and willingness to lease or purchase property"; that "the reduction in the efficiency of the . . . housing . . . market[] has a detrimental effect on the city's economy, thereby reducing revenues and increasing costs to the city"; and that discrimination "demoralizes its inhabitants and creates disrespect for the law, thereby frustrating the city's efforts to foster mutual respect and tolerance among its inhabitants and to promote a safe and secure environment."[269]

Again in 2005, in the face of what it perceived as a judicial erosion of civil and human rights protections, the Council passed the Restoration Act,[270] explicitly amending the NYCHRL to require an independent construction of the law, and indeed the most liberal interpretation available:

> The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws

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[266] *See supra* notes 61–68 and accompanying text.

[267] N.Y.C. ADMIN. CODE § 8-101 (2023).

[268] *Id.*

[269] *Id.* § 8-401.

[270] Local Civil Rights Restoration Act of 2005, N.Y.C., N.Y. LOCAL LAW, 85 § 1 (2005) ("It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.").

> with provisions comparably-worded to provisions of this title, have been so construed.[271]

Accordingly, the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[272]

Of equal importance, the Council provided that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City Human Rights Law cannot fall, rather than a ceiling above which the local law cannot rise."[273] Hence, the NYCHRL must be construed independently, and even more liberally than federal statutes such as the FHA:

> [T]he City HRL now explicitly requires an independent liberal construction in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's "uniquely broad and remedial" purposes, which go beyond those of counterpart State or federal civil rights laws.[274]

In 2016, finally, the Council reaffirmed these principles:

> In 2016, the City Council again amended the construction provision of the NYCHRL to provide additional guidance, identifying cases, including *Albunio*, that had "correctly understood and analyzed the liberal construction requirement . . . and that have developed legal doctrines accordingly that reflect the broad and remedial purpose of this [law]."[275]

In addition, the Council amended the law "to add a provision directing that exceptions and exemptions 'shall be construed narrowly in order to maximize deterrence of discriminatory conduct.'"[276]

While the Supreme Court in *Meyer* found it unhelpful "to characterize the [FHA's] objective as an 'overriding social priority,'"[277] the New York Court of Appeals has repeatedly instructed that the conclusion to impose a nondelegable

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[271] N.Y.C. ADMIN. CODE § 8-130(a) (2023).

[272] Albunio v. City of New York, 947 N.E.2d 135, 137 (N.Y. 2011); *see* Bumpus v. N.Y.C. Transit Auth., No. 3512/07, slip op. at 3 (N.Y. Sup. Ct. Feb. 13, 2008) ("The New York City Human Rights Law sets forth a broad purpose. The legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation."), *aff'd* 883 N.Y.S.2d 99, 110 (N.Y. App. Div. 2009).

[273] Local Civil Rights Restoration Act of 2005, N.Y.C., N.Y. LOCAL LAW, 85 § 1 (2005).

[274] Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 31 (N.Y. App. Div. 2009).

[275] Chauca v. Abraham, 89 N.E.3d 475, 480–81 (N.Y. 2017) (quoting N.Y.C. ADMIN. CODE § 8-130(c) (2023)), *vacated on other grounds* 888 F.3d 122 (2d Cir. 2018).

[276] Golston-Green v. City of New York, 123 N.Y.S.3d 656, 665 (N.Y. App. Div. 2020) (quoting N.Y.C. ADMIN. CODE. § 8-130(b) (2023)).

[277] Meyer v. Holley, 537 U.S. 280, 290 (2003) (quoting Holley v. Crank, 258 F.3d 1127, 1132 (9th Cir. 2001)).

duty in fact "rests on policy considerations," with "reference to the gravity of the public policies that are implicated."[278] And while the Supreme Court saw "nothing in the language or legislative history of the [FHA] to support the existence of this special kind of liability,"[279] the same cannot be said of the NYCHRL, as the foregoing discussion makes clear.[280] As a New York appellate court explained, "the existence of discrimination—a profound evil that New York City, *as a matter of fundamental public policy*, seeks to eliminate—demands that the courts' treatment of such claims maximize the ability to ferret out such discrimination, not create room for discriminators to avoid having to answer for their actions before a jury of their peers."[281]

In fact, in a series of decisions that predate *Meyer*, New York courts and human rights tribunals repeatedly ruled that the duty not to discriminate under New York's human rights laws is nondelegable, and specifically with regard to housing discrimination.[282] As the New York City Human Rights Commission (Commission) explained:

> The public policy rationale underlying this nondelegability doctrine is derived from the necessity of promoting the legislative intent for which the regulatory statute was enacted, i.e., to eliminate housing discrimination. Such a purpose would be clearly frustrated if corporations or employers could avoid their statutory obligations through a variety of smokescreen defenses such as those asserted by the Respondents in this case, for example, that the challenged act committed by the alleged agent was unauthorized.[283]

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[278] Kleeman v. Rheingold, 614 N.E.2d 712, 715–16 (N.Y. 1993); *accord* Brothers v. N.Y. State Elec. & Gas Corp., 898 N.E.2d 539, 543 (N.Y. 2008); Feliberty v. Damon, 527 N.E.2d 261, 264 (N.Y. 1988).

[279] *Meyer*, 537 U.S. at 290. "The FHA contains a nebulous sentence describing the importance of ending housing discrimination," a pre-*Meyer* commentator asserted. Dixon, *supra* note 177, at 1313. The NYCHRL is decidedly on the other end of the spectrum in this regard.

[280] *See supra* notes 267–271 and accompanying text.

[281] Bennett v. Health Mgt. Sys., Inc., 936 N.Y.S.2d 112, 119 (N.Y. App. Div. 2011) (emphasis added).

[282] *See* State Comm'n for Hum. Rts. v. Suburban Assocs., Inc., 286 N.Y.S.2d 733, 737 (N.Y. Sup. Ct. 1967) (examining the State Human Rights Law's housing provisions and ruling: "[t]he statute imposes a duty which is nondelegable"), *aff'd and modified on other grounds* 310 N.Y.S.2d 1019 (N.Y. App. Div. 1970); Comm'n Hum. Rts. v. Hardenbrook Realty Corp., 292 N.Y.S.2d 775, 777 (N.Y. Sup. Ct. 1968) ("The statute [NYCHRL] imposes a duty which is nondelegable."); Manning v. Chimenti, 1983 NYC HRC LEXIS 3, at *29 (N.Y.C. Hum. Rts. Comm'n Aug. 31, 1983) ("Because the duty to obey the law is non-delegable, [Respondent] must also answer for the acts of his agent-wife. New York case law on this issue is settled."); Rosa v. Brusco Fuel Oil Co., 1978 NYC HRC LEXIS 1, at *21–22 (N.Y.C. Hum. Rts. Comm'n Oct. 4, 1978) (respondents liable under respondeat superior doctrine and because the NYCHRL imposes a duty that is nondelegable).

[283] *Rosa*, 1978 NYC HRC LEXIS 1, at *23. As the agency responsible for investigating and adjudicating claims under the NYCHRL, the Commission is entitled to "great deference"

Likewise, given the frequency with which owners employ agents to rent or sell their property,[284] if owners could evade liability for discrimination through "smokescreen defenses" such as labelling agents as independent contractors, the NYCHRL would be rendered largely meaningless vis-à-vis owners. The nondelegable duty doctrine provides that owners cannot evade responsibility for preventing discrimination in the sale or rental of their properties, "a profound evil that New York City, as a matter of fundamental public policy, seeks to eliminate."[285] "New York case law on this issue," the Commission has concluded, "is settled."[286]

The NYCHRL itself is silent on the question of the vicarious liability of property owners.[287] The statute does impose strict liability upon employers in housing for the acts of agents and employees.[288] This sheds no light, however, on the question of whether and when to impose vicarious liability upon owners for the acts of employees or agents (although ordinary principles of vicarious liability apply to a statute such as this sounding in tort),[289] or of independent contractors. The question thus arises whether, by expressly imposing strict vicarious liability only upon employers, the New York City Council intended to abrogate the doctrine of nondelegable duty for property owners. Under established principles of law, it did not.

New York case law prior to the enactment of the provision in question established that the duty to obey the NYCHRL in housing is nondelegable.[290] "The legislature is presumed to be aware of the common law when it enacts

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in its interpretations of the NYCHRL. Arif v. N.Y.C. Taxi & Limousine Comm'n, 770 N.Y.S.2d 344, 346 (N.Y. App. Div. 2004) ("[A]n administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference."); *accord* Samiento v. World Yacht Inc., 883 N.E.2d 990, 995 (N.Y. 2008); Howard v. Wyman, 271 N.E.2d 528, 529 (N.Y. 1971); Cain v. Fernandez, 595 N.Y.S.2d 181, 183 (N.Y. App. Div. 1993) ("[A]n administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight."). Accordingly, the Commission's construction of the NYCHRL, if not irrational or unreasonable, should be upheld. *See, e.g.*, *Samiento*, 883 N.E.2d at 995 ("The construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." (citation and internal quotation omitted)); *Howard*, 271 N.E.2d at 529 ("It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld.").

[284] *See supra* notes 1–7 and accompanying text.

[285] *Bennett*, 936 N.Y.S.2d at 119.

[286] *Manning*, 1983 NYC HRC LEXIS 3, at *29.

[287] *See* N.Y.C. ADMIN. CODE § 8-107(5).

[288] *See id.* § 8-107(13)(a).

[289] *See supra* notes 26–27 and accompanying text.

[290] The strict liability provision was enacted in 1991, after the nondelegable duty in housing was established under New York law. *See* Zakrzewska v. New Sch., 928 N.E.2d 1035, 1039 (N.Y. 2010) (noting that the Council adopted section 8-107(13) in 1991), *aff'd* 620 F.3d 168 (2d Cir. 2010) (per curiam); *see supra* note 282 and accompanying text (citing New York cases, which predate 1991).

statutes."[291] If the legislature wishes to abrogate the existing common law, it must do so expressly.[292] The NYCHRL does not address the vicarious liability of owners at all, much less expressly revoke the nondelegable duty doctrine, and thus does not abrogate the common law.

The NYCHRL "explicitly requires an independent liberal construction in all circumstances, even where State and federal civil rights laws have comparable language,"[293] and the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[294] Affirming the nondelegable duty to obey the NYCHRL's housing discrimination provisions is not merely possible, but entirely consistent with federal, state, and city rulings other than *Meyer*, a case that failed to even examine the relevant policy issues under federal, much less New York City,

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[291] Pac. Ins. Co. v. Champion Steel, LLC, 146 A.3d 975, 986 n.8 (Conn. 2016); *accord* Arbegast v. Bd. of Educ., 480 N.E.2d 365, 371 (N.Y. 1985).

[292] *See, e.g.*, Bird v. Dennison, 7 Cal. 297, 299–300 (Cal. 1857) ("The common law can never be annulled, except by express provision of the statute; unless the new rule expressly repeals the old one, or is wholly incompatible with it, both must stand."); *Pac. Ins. Co.*, 146 A.3d at 982 ("It is fundamental that if the legislature wishes to abrogate the common law, it must do so expressly."); Watson v. Brown, 686 P.2d 12, 15 (Haw. 1984) ("A statutory remedy is, as a rule, merely cumulative and does not abolish existing common law remedy unless so declared in express terms or by necessary implication."); Drake *ex rel.* Drake v. Mitchell Cmty. Schs., 649 N.E.2d 1027, 1029–30 (Ind. 1995) ("Absent express declaration or unmistakable implication, statutes will not be interpreted as changing the common law."); People v. Davis, 116 N.E.2d 372, 373 (Ill. 1953) ("It is axiomatic that in those areas where the common law applies, the common-law principles obtain unless they are expressly revoked."); *Arbegast*, 480 N.E.2d at 371 ("The Legislature is, however, presumed to be aware of the decisional and statute law in existence at the time of an enactment, and to have abrogated the common law only to the extent that the clear import of the language used in the statute requires." (citations omitted)); Jensen v. General Elec. Co., 623 N.E.2d 547, 556 (N.Y. 1993) (Smith, J., dissenting) ("It is settled that the rules of 'common law [are] never abrogated by implication [but, rather,] must be held no further changed than the clear import of the language used in a statute absolutely requires. Thus, absent an unequivocal expression of the will of the Legislature to abrogate the common-law . . . ." (alteration in original) (citation omitted)); Sims v. Sims, 930 P.2d 153, 158 (N.M. 1996) ("We adopt a strict rule that the common law must be expressly abrogated by a statute because, when determining the meaning of a statute, courts will often construe the language in light of the preexisting common law. The common law fills in gaps not addressed by a statute." (citation omitted)); *In re* Oncor Elec. Delivery Co. LLC, 630 S.W.3d 40, 52 (Tex. 2021) ("The Legislature does not abrogate the common law in silence."); King Cnty. v. Vinci Constr. Projects, 398 P.3d 1093, 1098 (Wash. 2017) (en banc) ("[W]e will not deviate from the common law unless the language of a statute be clear and explicit for this purpose." (citation and internal quotation marks omitted)).

[293] Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 31 (N.Y. App. Div. 2009).

[294] Albunio v. City of New York, 947 N.E.2d 135, 137 (N.Y. 2011); *see* Bumpus v. N.Y.C. Transit Auth., 859 N.Y.S.2d 893, 893 (N.Y. Sup. Ct. 2008), *aff'd*, 883 N.Y.S.2d 99, 110 (N.Y. App. Div. 2009) ("The New York City Human Rights Law sets forth a broad purpose. The legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation." (citations omitted)).

law.[295] In short, there is ample basis for New York courts to reaffirm that compliance with the housing provisions of the NYCHRL is too important to the community to be delegated to others. To hold otherwise is to conclude that housing discrimination is not as potentially dangerous, absent precautions, as stairs, ensuring the safety of which cannot be delegated under New York law.[296] As the discussion in Part III *supra* makes clear, such a conclusion is at best myopic and at worst callously indifferent to the potential dangers of housing discrimination.

A final note is warranted regarding the relative costs of training and prevention versus noncompliance. Early critics of the nondelegable duty under the FHA argued that "because compensatory damage awards under the FHA are typically small, owners have little incentive to monitor their agents acting without authority."[297] If this was true at the time, it is certainly not the case now. Defendants have repeatedly paid six figures, and often well into the six figures, just to settle housing discrimination cases.[298] In addition to compensatory

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[295] In addition, unlike the FHA, the NYCHRL law expressly imposes its nondiscriminatory mandate upon "the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or approve the sale, rental or lease of a housing construction . . . or any agent or employee thereof." N.Y.C. ADMIN. CODE § 8-107(5) (2023).

[296] *See, e.g.*, Russo v. Watson, 292 N.Y.S. 249, 250 (N.Y. App. Div. 1936).

[297] Dixon, *supra* note 177, at 1315; *accord* Corina R. Caplan, Note, *The Decline and Recent Revival of Absolute Vicarious Liability Under the Fair Housing Act*, 48 RUTGERS L. REV. 581, 614 (1996) (positing that the nondelegable duty doctrine "is an economically inefficient deterrent").

[298] *See, e.g.*, *Settlement Reached in Voucher-Holder Lawsuit: Property Owner/Manger, Realty Firm, Agents to Pay $450,000*, FAIR HOUS. JUST. CTR. (Apr.14, 2023), https://fairhousingjustice.org/enforcement/settlement-reached-in-voucher-holder-lawsuit/ [https://perma.cc/J952-PQPH]; *Settlement Reached in Accessibility Case: Defendants Will Pay $700,000 and Make Extensive Retrofits at Long Island City Rental Building*, FAIR HOUS. JUST. CTR. (Nov. 2, 2022), https://fairhousingjustice.org/enforcement/opening-acts-november-2-2022/ [https://perma.cc/C6LR-GFMJ]; *FHJC Reaches Disability Discrimination Settlement Against Adult Care Facilities: Decision Marks Another Significant Victory for People Who Use Wheelchairs*, FAIR HOUS. JUST. CTR. (Dec. 29, 2021); https://fairhousingjustice.org/enforcement/opening-acts-december-29-2021/ [https://perma.cc/7RMW-ZHD9] ("The Yorks have agreed to pay the FHJC $317,500 for damages and attorneys' fees and costs, while VillageCare will pay $287,007. VillageCare will also pay the Estate of Jane Doe, who was a VillageCare resident, $112,993 in damages."); *Settlement Announced in Borough Park Race Discrimination Lawsuit: Court-Ordered Agreement Includes Injunctive Relief and $120,000 Recovery*, FAIR HOUS. JUST. CTR. (Oct. 20, 2021), https://fairhousingjustice.org/enforcement/opening-acts-october-20-2021/ [https://perma.cc/MW8K-L8FC]; *FHJC Resolves Racial Discrimination Lawsuit Against Westchester Community*, FAIR HOUS. JUST. CTR. (May 28, 2021), https://fairhousingjustice.org/enforcement/opening-acts-june-1-2021/ [https://perma.cc/37FE-KG4C]; *Settlement Reached in Source-of-Income Discrimination Lawsuit: Defendants Pay $207,500 to Resolve Fair Housing Case*, FAIR HOUS. JUST. CTR. (Aug. 18, 2020), https://fairhousingjustice.org/enforcement/opening-acts-august-17-2020/ [https://perma.cc/72Y5-TQ8U]; *Race Discrimination Lawsuit Settles: Court-Ordered Agreement Includes Extensive*

damages, moreover, defendants must consider the fees and costs paid to their defense counsel, and the fees and costs that may be awarded to plaintiffs' counsel. The attorneys' fees and costs awarded to Mr. Short over a decade ago alone totaled over $500,000.[299]

Meanwhile, "[i]mplementing monitoring and preventive measures is neither complicated nor expensive."[300] Issuing nondiscriminatory directives to employees and agents is essentially free. And annual fair housing training for employees and agents can be accomplished for a relatively nominal amount of $2,000 a year,[301] a small price to pay for helping to ensure compliance and, more importantly, to prevent injustice and harm.

VI. CONCLUSION

Where a court stands on this issue may well depend upon where it sits, or indeed where it sleeps. But it should not. Those who have not experienced housing discrimination need only consult the overwhelming evidence, which reveals that the entirely foreseeable consequences of housing discrimination are devastating, and even lethal.[302] Preventing housing discrimination is thus an axiomatic example of a responsibility "so important to the community that the employer [or owner] should not be permitted to transfer it to another."[303]

This social importance is the established basis for finding a nondelegable duty. Yet, in rejecting the duty, the Supreme Court in *Meyer* refused to even undertake the requisite policy inquiry. As the foregoing indicates, the Court's

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Injunctive Relief and $300,000 Monetary Recovery, FAIR HOUS. JUST. CTR. (Mar. 9, 2020), https://fairhousingjustice.org/enforcement/opening-acts-march-9-2020/ [https://perma.cc/3PE6-RXPF]; *FHJC Settles Race Discrimination Case: Court-Ordered Agreement Provides Broad Injunctive Relief and $272,000 Monetary Recovery*, FAIR HOUS. JUST. CTR. (Sept. 5, 2019), https://fairhousingjustice.org/enforcement/opening-acts-september-5-2019/ [https://perma.cc/83M9-TLPQ].

[299] Short v. Manhattan Apartments, Inc., No. 11-cv-5989, 2013 U.S. Dist. LEXIS 83347, at *20–21 (S.D.N.Y. June 10, 2013) (awarding $507,031.65 in attorneys' fees and costs).

[300] Moran, *supra* note 22, at 328. One commentator argues that compliance carries with it "the opportunity cost of losing the business of segregation-preferring customers." Caplan, *supra* note 297, at 603. Setting aside the question whether this is a legitimate consideration, the same commentator admits that "[a]s the scope of vicarious liability increases, it becomes more costly to discriminate than to comply with the statute." *Id.* at 605. The nondelegable duty helps to accomplish this expanded liability.

[301] *See, e.g.*, Stipulation of Settlement at 6, Hoffmaster v. Renaissance Equity Holdings LLC, No. 16 Civ. 01934 (E.D.N.Y. Oct. 6, 2016) (on file with author) ("Defendant shall pay the reasonable costs associated with the [annual antidiscrimination] training, including the location, materials distributed at the training, reasonable travel costs for the trainer, and a fee of (1) $2,000 for the trainer, in the event that Defendant elects Mr. Cremin . . . ."); Stipulation of Settlement at 3, Goode v. Goldfarb Properties, Inc., No. 7913/2015 (N.Y. Sup. Ct. Nov. 13, 2015) (on file with author) ("Defendant shall pay the trainer, Kevin Cremin, a fee of $2,000 for the [antidiscrimination] training, which shall include materials and travel.").

[302] *See supra* Part III.

[303] *See* Prosser & KEETON ON TORTS, *supra* note 62, at 511–12 and accompanying text.

flawed ruling under the FHA is in no way binding upon state courts examining state and local law. Those courts have a duty to their citizens to undertake this inquiry and to explain precisely why housing discrimination is not as inherently dangerous, and of equal social importance, as the many grounds upon which courts have already imposed the duty. They will be hard-pressed to identify a principled basis upon which to do so.