FAIR HOUSING FOR A NON-SEXIST CITY

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FAIR HOUSING FOR A NON-SEXIST CITY

Noah M. Kazis[*]

Sex discrimination is built into the American landscape. Zoning ordinances, building codes, restrictive covenants, and other housing laws reflect — and then entrench — the gender norms of an earlier era. These laws evict domestic violence victims from their homes, privilege stay-at-home parenting over paid child care, push men into homelessness by eliminating forms of low-cost housing on which they disproportionately relied, and create spatial patterns of development that systematically exacerbate women's secondary-earner status. This Article identifies the ways that gender disparities and sex stereotypes are built into our cities and suburbs — something few legal scholars have recognized — and for the first time shows that fair housing law provides the tools to confront this discrimination.

This Article also demonstrates that fair housing law has uniquely failed to tackle sex-discriminatory policies and structures. Neither litigants nor the Department of Housing and Urban Development, the agency responsible for administering the Fair Housing Act (FHA), has done so — unlike for other protected classes, including race or disability. Instead, the FHA has been used almost exclusively to attack individual, intentional acts of sex discrimination.

This Article proposes a new path forward, showing how the FHA can take on subtly sex-discriminatory housing policies. It identifies policies that are readily cognizable as sex discrimination under current law, including the FHA's unique mandate that governments "affirmatively further fair housing." Drawing on those examples, the Article advances a new understanding of "fair housing" for sex: one that seeks to dismantle the legacy of the gendered "separate spheres" ideology underlying so much of contemporary American urbanism.

INTRODUCTION

"What would a non-sexist city be like?" Architectural historian Dolores Hayden posed this question in a seminal 1980 article.[1] Forty years later, it is a question that American law has only rarely seen fit to ask, much less to answer. Women and men alike suffer from housing and land use laws that still reflect the gender norms of an earlier era: laws that deem paid child care incompatible with family life, laws that treat concentrations of single men as dangerous nuisances, and laws that spatially segregate home from work and systematically press couples

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[1] Dolores Hayden, *What Would a Non-sexist City Be Like? Speculations on Housing, Urban Design, and Human Work*, 5 SIGNS S170 (1980).

into a gendered breadwinner/homemaker division of labor. Civil rights law — specifically, the Fair Housing Act[2] (FHA) — provides the tools to take on these gender disparities. But for the most part, neither litigants nor the Department of Housing and Urban Development (HUD), the agency responsible for administering the FHA, has done so. This Article shows how the Fair Housing Act can be used to challenge those laws and, in the process, to construct a fuller understanding of the meaning of fair housing.

The FHA prohibits sex discrimination in housing. But since 1974, when sex was added as a protected class,[3] the FHA has, with one notable exception,[4] been used to attack only the most blatant forms of sex discrimination: a landlord's outright refusal to rent to men; a bank's refusal to consider a woman's income in giving a mortgage; or a landlord's conditioning a rental on sexual favors from tenants, for example. As this Article demonstrates, fair housing law has not been used to tackle sex discrimination at a structural level — even though sex stereotypes and disparities pervade American housing. Legal scholars, too, have failed to identify the gendered foundations of our housing system as a fair housing issue. Land use controls, and most other subtle, facially neutral policies, have escaped scrutiny for sex discrimination from scholars, advocates, and government officials alike.

By looking at a variety of sources, from published cases to HUD annual reports, this Article makes clear that sex discrimination claims under the FHA are overwhelmingly — and unnecessarily — limited to individual and intentional acts. Moreover, HUD has also ignored sex in implementing the FHA's unique requirement that governments "affirmatively further fair housing" (AFFH). As part of affirmatively furthering fair housing, HUD requires state and local governments to analyze and address obstacles to fair housing — even those they did not create — but HUD has not incorporated any analyses specific to sex discrimination into the AFFH process. The full force of the FHA has never been used to combat sex discrimination.

Substantial gender disparities remain in the housing market, even as the FHA's protections against sex discrimination provide a ready-made doctrinal framework to address them.[5] In some cities, between sixty and

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[2] 42 U.S.C. §§ 3601–3619.

[3] Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 109, 88 Stat. 633, 649.

[4] That exception, concerning evictions of domestic violence victims, is discussed in section I.C, pp. 1703–10.

[5] While "sex" and "gender" have distinct meanings, the terms have historically been conflated or used interchangeably in the law of sex discrimination. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2, 9–10 (1995). Following this precedent, this Article treats the terms "sex" and "gender" as rough legal equivalents.

seventy percent of evicted tenants are women.[6] As Professor Matthew Desmond has demonstrated, eviction plays a critical role in the lives of low-income women, especially women of color, and contributes to the ongoing structural disadvantages they face.[7] Women are also disproportionately likely to receive housing assistance. Three-quarters of households living in public housing are female headed, as are eighty-three percent of households receiving federal housing vouchers.[8] Men, meanwhile, are far more likely to be homeless.[9]

The effects of sex discrimination and sex stereotypes are not limited to vulnerable and low-income renters; they are foundational to the housing market and the American built environment more broadly. American urban planning reflects — and then entrenches — the gender roles of the eras when our housing and infrastructure were built and our zoning laws written. Historians uniformly identify the suburbs, where a majority of Americans now live,[10] as an "architecture of gender"[11] originally fashioned for "the needs of a bread-winning male and a full-time housewife."[12] Architects going back to the nineteenth century intentionally designed suburbs to embody an ideology of "separate spheres," with a female domestic sphere marked by uniformly single-family homes and pastoral, winding streets, kept far removed spatially and aesthetically from the male sphere of market activity.[13] Women

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[6] Deena Greenberg, Carl Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115, 120 (2016). This study assesses whether members of racial groups are more likely to be evicted because of their race, controlling for gender, but does not study the reverse. *Id.* at 121–22.

[7] MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 98 (2016) ("If incarceration had come to define the lives of men from impoverished black neighborhoods, eviction was shaping the lives of women. Poor black men were locked up. Poor black women were locked out.").

[8] Nat'l Low Income Hous. Coal., *Who Lives in Federally Assisted Housing?*, HOUS. SPOTLIGHT, Nov. 2012, at 1, 2, https://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf [https://perma.cc/JK36-FAAB].

[9] *See infra* notes 301–303.

[10] Jed Kolko, *America Really Is a Nation of Suburbs*, BLOOMBERG: CITYLAB (Nov. 14, 2018, 8:00 AM), https://www.citylab.com/life/2018/11/data-most-american-neighborhoods-suburban/575602 [https://perma.cc/4TAN-6B24] (describing federal survey data and alternative measures for defining "suburban").

[11] DOLORES HAYDEN, REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE 17 (1984).

[12] KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 300 (1985); *see also* GWENDOLYN WRIGHT, BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA 107–08 (1981).

[13] HAYDEN, *supra* note 11, at 22, 42–43; JACKSON, *supra* note 12, at 62–63, 136, 243; WRIGHT, *supra* note 12, at 107–08, 141, 247–56.

were meant to create a moral residential space to serve as a refuge for men returning from work and the city.[14]

Contemporary feminist analysis, and not just backward-looking scholarly critiques, likewise associated America's single-family neighborhoods with the enforcement of traditional gender norms. These are the postwar suburbs whose restless housewives Betty Friedan described in *The Feminine Mystique*,[15] just as Charlotte Perkins Gilman, a leading nineteenth-century feminist, denounced suburban "lace-curtain prisons" before her.[16] Pop culture, too, has long recognized and reflected the gendered nature of the American built environment. Think of classic suburban sitcoms like *Leave It to Beaver* or, with its telling title, *Father Knows Best*. The white-picket-fence suburb is aesthetically intertwined with the gender (and racial) dynamics of the breadwinner father and the homemaker mother, just as the urban settings of *The Mary Tyler Moore Show* and *Sex and the City* were inseparable from their politically or sexually liberated protagonists. That traditional gender roles are embodied in physical space — and particularly in that most intimate space, the home — is widely, if not always consciously, understood.[17] And while most would recognize that certain suburban communities are especially amenable to a breadwinner/homemaker vision of family life,[18] this Article demonstrates that sex discrimination pervades both urban and suburban land use planning and has systematic, aggregate effects at the regional and national level.

Legal scholars, however, have largely overlooked the ways that the American built environment systematically entrenches sex discrimination — and entirely failed to recognize fair housing's potential to uproot that discrimination.[19] Standard recitations of the harms of contemporary land use patterns focus on racial inequality and segregation,

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[14] Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 281–82 (2007); *see also* Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 11–12 (1988).

[15] BETTY FRIEDAN, THE FEMININE MYSTIQUE 57 (Kirsten Fermaglich & Lisa M. Fine eds., 2013).

[16] JACKSON, *supra* note 12, at 136.

[17] One critic has dubbed the genre of novel exploring miserable suburban couples the "Merritt Parkway novel" after the Connecticut highway on which its male characters commute to their unfulfilled stay-at-home wives. Gerald Howard, *Notes on the Merritt Parkway Novel*, 13 TIN HOUSE 51 (2012).

[18] The Supreme Court has described such locations as "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[19] Of course, fair housing law's potential is limited to those aspects of urban planning that involve housing. This encompasses much, but hardly all, of city life. *See, e.g.*, Daphne Spain, *Gender and Urban Space*, 40 ANN. REV. SOCIO. 581, 582 (2014) (describing historically gendered public accommodations like the department store and the saloon).

housing affordability, economic mobility and productivity, and environmental protection — critical issues, all.[20] But consistent with the lack of structural fair housing litigation over sex, legal scholarship's canonical description of American planning's flaws does not consider sex.[21] Even the few legal scholars who have analyzed specific aspects of American land use as gendered have not identified litigation as a solution — and have not mentioned the Fair Housing Act at all.[22]

This need not be so. For other protected classes, the FHA has been used creatively and at times aggressively both to root out discrete discriminatory policies and to attack regional patterns of inequality in housing. Courts have struck down large-lot zoning as racially exclusionary, along with a wide array of facially neutral lending and insurance underwriting standards.[23] Orthodox Jews have successfully attacked zoning codes burdening the construction of second kitchens needed to keep kosher.[24] In its constrained use, sex stands out among the FHA's protected classes. Yet nothing in the FHA's text or legislative history requires that sex be treated differently from race, religion, or other protected classes. No intervening judicial precedent or HUD action has indicated otherwise. Legally, the FHA addresses each protected

[20] *E.g.*, Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENV'T L. 217, 236–45 (2018) (reviewing legal, planning, and economic literature on housing and land use restrictions); John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 825–26 (2019) (describing national attention to zoning's effects "on housing supply and affordability, . . . regional and national economic growth, social mobility, economic equality, racial integration, and the environment").

[21] Recent scholarship has begun to reexamine the related question of how zoning laws define the "family." *See generally* Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1 (2020); Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401 (2015); Kate Redburn, Note, *Zoned Out: How Zoning Law Undermines Family Law's Functional Turn*, 128 YALE L.J. 2412 (2019). The forms of sex discrimination discussed in this Article stem from a similar history of zoning laws imagining and privileging the nuclear family. But given the FHA's restrictive definition of "familial status," 42 U.S.C. § 3602(k), few questions of how to treat "functional families" are cognizable as "familial status" discrimination under federal law, much less sex discrimination. *See* Oliveri, *supra*, at 1417–18 (listing cases where courts have rejected municipal policies as familial status discrimination).

[22] For three leading examples, see Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191 (2001); Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797 (2007); and Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169. In line with historians' greater emphasis on the role sex plays in shaping cities, *see supra* notes 11–12, legal historians generally are more attentive to these issues. *See* Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1657 (2021); Redburn, *supra* note 21.

[23] Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 364–72 (2013).

[24] Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead, 98 F. Supp. 2d 347, 355 (S.D.N.Y. 2000).

class in essentially the same way.[25] The Fair Housing Act is broader than its mandate to dismantle racial segregation and could be broader still if fully applied to sex, as this Article demonstrates. The same kind of wide-ranging impact suits brought by racial or religious minorities are available for men or women who are harmed by the policies of their state or local government, their homeowners' association, or their landlord. And while the integrationist goals traditionally at the heart of fair housing have little direct applicability to sex discrimination — men and women not only live in the same neighborhoods as each other, they live in the same homes — the Fair Housing Act leaves room for an expanded conceptualization of fair housing, one that encompasses sex discrimination.

This Article builds toward that new understanding through an examination of three specific areas where the Fair Housing Act already allows for new structural sex discrimination claims. These examples are meant to be illustrative, not exhaustive: to serve as sites for examining the variety of roles sex plays in land use planning and might play in fair housing law, not to lay out a roadmap for a systematic litigation campaign nor to suggest these are the three most urgent issues of sex discrimination in housing. Accordingly, this Article focuses on claims where, at least to some extent, a distinct effect of sex can be recognized apart from other bases of discrimination. Some gender disparities in housing are primarily statistical artifacts of discrimination against other protected classes — particularly family status, which the Fair Housing Act defines as the presence in the household of children under eighteen years old.[26] Women appear no more likely to be evicted than men after controlling for variables like the presence of children, for example.[27] Such disparities are critical for understanding the gendered experience of the housing market, but poorer starting points for describing how sex discrimination shapes the housing market and how the law might respond.[28]

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[25] There are certain class-specific provisions of the FHA, such as the "reasonable accommodation" provisions for disability discrimination, but those are not at issue here. 42 U.S.C. § 3604(f)(3); *see also id.* § 3607 (providing exceptions for religious organizations, private clubs, and senior housing).

[26] 42 U.S.C. § 3602(k).

[27] Matthew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors*, 62 SOC. SCI. RSCH. 362, 372 (2017).

[28] For similar reasons, this Article focuses on cisgender men and women and heterosexual couples, even as gay, transgender, and gender nonconforming people face significant housing challenges. Joseph J. Railey, *Married on Sunday, Evicted on Monday: Interpreting the Fair Housing Act's Prohibition of Discrimination "Because of Sex" to Include Sexual Orientation and Gender Identity*, 36–37 BUFF. PUB. INT. L.J. 99, 102–03 (2017–2019) (describing high rates of youth homelessness among LGBTQ teens and strong evidence of discrimination in rental process). In light of the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), it seems likely that prohibitions on discrimination "because of sex" apply to discrimination against LGBTQ people

But both men and women also suffer from housing discrimination on the basis of sex, per se. That discrimination will usually, if not always, be intersectional, based on a combination of multiple protected class statuses interacting in ways that are more than merely additive. In particular, family status is deeply interconnected with sex, and race suffuses nearly every important issue in housing and urban planning. In the early years of land use law's development, issues of immigration and nationality also played particularly outsized roles.[29] Sex discrimination never exists in pure isolation. Even so, given the underdeveloped jurisprudence of sex and fair housing, there is value in disentangling and spotlighting the specific causal roles of sex, as separately as possible.[30] In order to better establish the importance and distinctive role of sex for fair housing, this Article emphasizes cases where sex discrimination can be analyzed relatively (but only relatively) independently.[31]

This Article thus proceeds in three parts, moving from the status quo of sex as a category under fair housing law, to an examination of new factual contexts in which fair housing scrutiny could productively expose and remedy sex discrimination, to a potential doctrinal reconceptualization of sex and fair housing. Part I surveys fair housing law's current treatment of sex discrimination, cataloging the narrow scope of sex discrimination claims under the FHA to date. Part I further describes the major exception to this pattern — involving ordinances that impel the eviction of domestic violence victims — which provides proof-of-concept that sex-based FHA claims have a broader role to play in reforming the housing market.

Part II then identifies three concrete housing policies and practices that could be readily cognizable as sex discrimination under current law: restrictions on in-home child care, which disparately impact women; the

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under the Fair Housing Act, just as they do under Title VII. *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,058–59 (Sept. 14, 2016) (reaffirming HUD's position that the FHA "prohibits discrimination because of gender identity," *id.* at 63,058, based on reasoning similar to *Bostock*'s). But for now, this Article aims to start with a fuller conceptualization of the meaning of "sex" in fair housing law in better-established contexts.

[29] For two recent descriptions of the importance of intersectional analysis in fair housing, see Melvin J. Kelley IV, *Testing One, Two, Three: Detecting and Proving Intersectional Discrimination in Housing Transactions*, 42 HARV. J.L. & GENDER 301 (2019); and Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227 (2016).

[30] Among other things, from a litigant's perspective, sidestepping the complicated realities of intersectionality flattens claims but can also make them more cognizable in the short-term. *See, e.g.*, Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991 (2011) (providing empirical data in employment discrimination cases); Elengold, *supra* note 29, at 229 (analyzing tradeoffs in housing context).

[31] Future scholarship and advocacy need not be so limited. See *infra* note 109 for examples of factual contexts where sex discrimination plays an important role that is less susceptible to being isolated in this way.

near elimination of single-room occupancy (SRO) living, which disparately impacts men; and the effect of macro-level patterns of American regional development on the gender wage gap, which should be analyzed and addressed as part of the AFFH planning process. Part II closes with a brief discussion of what other issues of sex discrimination local governments might analyze through the AFFH process.

Finally, Part III explores how fair housing doctrine should — consistent with both the text and purpose of the statute — evolve to better address broader, policy-focused sex discrimination claims.[32] Most fundamentally, the Fair Housing Act needs an expanded theory of "fair housing" for sex. The FHA is interpreted broadly and purposively, and requires not only nondiscrimination but also the affirmative furthering of fair housing. Usually, this means integration, for tackling racial segregation is, and should remain, the most important function of the FHA.[33] But the FHA should not lose its special affirmative drive in the context of sex. This Article therefore offers a new understanding of "fair housing" derived from the concrete sex-discriminatory housing policies it has identified.

"Fair housing," in its fullest sense, should require a housing system designed free from sex stereotypes, particularly those rooted in the ideology of "separate spheres." That antiquated vision, which romanticized the home as a space under feminine control and protected from commerce, industry, and other masculine pursuits, underlies each of the new fair housing issues identified by this Article. Working toward separate spheres required removing market activity, including paid child care,

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[32] A world with more sex-based fair housing claims also has implications for scholars' understanding of sex discrimination. Existing sex discrimination scholarship has particularly "focused on employment discrimination, reproductive freedom, and equal protection under the Fourteenth Amendment." Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 83 n.16 (2019); *see also id.* at 85 n.22. Professors Elizabeth Sepper and Deborah Dinner's recent article on sex discrimination under public accommodations laws has, importantly, extended that literature to an additional statutory framework. *Id.* at 82. This Article continues that project of expanding the study of sex discrimination to the full range of civil rights statutes.

[33] Racial segregation was the chief ill the FHA was enacted to combat; the FHA passed Congress the week after the assassination of Martin Luther King, Jr. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516 (2015). And racial segregation remains severe and damaging, exacerbating inequalities in health, employment, education, and social mobility. *See* THE DREAM REVISITED: CONTEMPORARY DEBATES ABOUT HOUSING, SEGREGATION, AND OPPORTUNITY IN THE TWENTY-FIRST CENTURY 9–10 (Ingrid Gould Ellen & Justin Peter Steil eds., 2019). For a small sampling of the extensive literature on the harms of segregation, see, for example, David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 112 Q.J. ECON. 827, 828 (1997); 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, 856 (2016); Jorge De la Roca, Ingrid Gould Ellen & Justin Steil, *Does Segregation Matter for Latinos?*, 40 J. HOUS. ECON. 129 (2018); Robert J. Sampson, Patrick Sharkey & Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 PNAS 845, 845 (2008); and Ingrid Gould Ellen, *Is Segregation Bad for Your Health? The Case of Low Birth Weight*, 2000 BROOKINGS-WHARTON PAPERS ON URB. AFFS. 203 (William G. Gale & Janet Rothenberg Pack eds.).

from residential zones. It required ensuring that residential life would be organized around women's domestic leadership, and therefore stigmatizing and restricting commercialized shared living arrangements — especially those that were all male. Finally, separate spheres ideology demanded further distancing these newly created, exclusively residential zones from employment districts, forcing a choice between working for higher wages and working nearer to home. The gender norms of a century ago shape where and how we live today. By attacking the relics of separate spheres ideology, the Fair Housing Act can help reveal and rethink the Victorian gender stereotypes implicit in so much land use and housing law.

I. SEX AND FAIR HOUSING: THE STATE OF THE LAW

Although sex discrimination in housing is illegal, HUD, the Department of Justice (DOJ), and civil rights plaintiffs have made little use of sex-based fair housing claims to promote large-scale reforms. After briefly summarizing the most relevant provisions of the Fair Housing Act, as necessary background, this Part demonstrates that the law of sex-based fair housing claims remains undeveloped and underutilized. With one notable exception — policies affecting domestic violence victims — only intentional sex discrimination, directly against particular individuals, has been attacked under the FHA. This Part shows that the FHA's array of tools to combat institutional and structural discrimination, from disparate impact suits to the unique Affirmatively Furthering Fair Housing process, have not been brought to bear against sex discrimination. But as HUD's recent success in using the FHA to protect domestic violence victims shows, a broad new class of fair housing claims should be available, with little doctrinal innovation required.

A. The Fair Housing Framework

Sex is a protected class under the Fair Housing Act.[34] Thus, with exceptions not relevant here,[35] it is illegal to intentionally discriminate on the basis of sex in housing.[36] One may not refuse to sell to someone because of their sex or advertise a dwelling as limited to one sex.[37] As with other civil rights laws, intentional discrimination encompasses more than just facial distinctions between the sexes. Sexual harassment

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[34] 42 U.S.C. § 3604.

[35] *Id.* § 3603(b) (so-called "Mrs. Murphy exemption" for rentals in small, owner-occupied buildings); *id.* § 3607 (exceptions for religious organizations and private clubs).

[36] *Inclusive Cmtys.*, 135 S. Ct. at 2533 (Alito, J., dissenting) ("Everyone agrees that the FHA punishes intentional discrimination.").

[37] 42 U.S.C. § 3604(a), (c). One may, however, discriminate in the choice of a roommate. Fair Hous. Council of San Fernando Valley v. Roommate.com, 666 F.3d 1216, 1223 (9th Cir. 2012).

and other behaviors based on sex stereotyping are also prohibited under the FHA.[38]

The FHA also allows for disparate impact liability.[39] Disparate impact does not require a showing of discriminatory intent; rather, liability is imposed against policies that create a disproportionate and unjustified effect on a protected class.[40] The precise standard for such suits is somewhat in flux. In its 2015 decision *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[41] the Supreme Court affirmed the availability of disparate impact liability under the FHA but also appeared to impose new limitations on such claims.[42] Those new limitations are only beginning to be articulated in the lower courts.[43] Meanwhile, HUD promulgated disparate impact regulations under the Obama Administration[44] (prior to *Inclusive Communities*, and largely codifying existing case law) but reversed course under the Trump Administration, issuing new rules that would sharply reduce the availability of disparate impact claims.[45] Those rules are presently the subject of litigation and under a preliminary injunction, given their sharp departure from preexisting standards and the Supreme Court's description of disparate impact liability under the FHA.[46]

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[38] *See, e.g.*, Smith v. Avanti, 249 F. Supp. 3d 1194, 1200–01 (D. Colo. 2017) (applying sex stereotyping law to FHA); Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,058 (Sept. 14, 2016) (HUD endorsing application of stereotyping law to FHA); *see also* Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 WIS. L. REV. 771, 781–86 (describing sexual harassment case law under FHA as emerging in parallel to employment law).

[39] *Inclusive Cmtys.*, 135 S. Ct. at 2525.

[40] Another variant on effects-based liability are "perpetuation of segregation" claims. Perpetuation of segregation claims assess harms at a community level, such as the prevention of "interracial association." Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); *see also* Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 713 (2017). These suits, though important, are of limited relevance to sex-based claims, except to underscore the doctrinal importance of purpose under the FHA.

[41] 135 S. Ct. 2507.

[42] *Id.* at 2522–25. *See generally* Robert G. Schwemm, *Fair Housing Litigation After* Inclusive Communities*: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106 (2015).

[43] *See, e.g.*, Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 903–05 (5th Cir. 2019) (discussing whether Supreme Court instituted new "robust causation" requirement). Also unresolved is the strength of the justification that the government must offer at step two of the burden-shifting process. Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 100 (2017).

[44] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

[45] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (Aug. 19, 2019).

[46] Memorandum and Order Regarding Plaintiffs' Motion for Preliminary Injunction Under 5 U.S.C. § 705 to Postpone the Effective Date of HUD's Unlawful New Rule, Mass. Fair Hous. Ctr.

Regardless of the precise bounds of disparate impact liability, however, the Supreme Court has made clear that the FHA bars practices that have a "'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."[47] The Court further appeared to endorse the basic framework of a burden-shifting approach for adjudicating disparate impact claims.[48] Under such an approach, plaintiffs must make a prima facie showing that the challenged policy causes a discriminatory effect. The burden then shifts to defendants to justify their policy and show that it furthers a valid interest. At the third stage of the burden-shifting analysis, plaintiffs may still prevail if the challenged policy is not the least discriminatory means for achieving the defendant's interests.

Finally, the FHA contains a provision not found in other federal civil rights statutes. Under the FHA, all federal programs relating to housing and urban development must be administered "in a manner affirmatively to further the purposes" of the FHA.[49] Though this provision went essentially unenforced for decades, it is potentially a potent tool.[50] As then-Judge Breyer explained: "[A] statute that instructs an agency 'affirmatively to further' a national policy of nondiscrimination would seem to impose an obligation to do more than simply not discriminate itself. . . . [I]t reflects the desire to have HUD use its grant programs to assist in ending discrimination."[51] Thus, states and local governments that receive HUD funding, including popular Community Development Block Grants, must actively promote fair housing.[52]

As with disparate impact liability, precisely what is required to affirmatively further fair housing is unsettled. The statute itself leaves unspecified the exact contours of the AFFH obligation, leaving it open to the back-and-forth of administrative definition.[53] In recent years, the Obama Administration developed a new, more robust AFFH process; the Trump Administration first suspended that process, then solicited comments on a proposed replacement focused primarily on affordability, and in August of 2020 issued a different rule — outside normal notice-and-comment procedures — that would reduce all AFFH obligations to

v. HUD, No. 20-cv-11765 (D. Mass. Oct. 25, 2020); *see also* Complaint, Nat'l Fair Hous. All. v. Carson, No. 20-cv-07388 (N.D. Cal. Oct. 22, 2020); Complaint, Open Cmtys. All. v. HUD, No. 20-cv-01587 (D. Conn. Oct. 22, 2020).

[47] *Inclusive Cmtys.*, 135 S. Ct. at 2513 (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).

[48] *See id.* at 2514–15, 2522.

[49] 42 U.S.C. § 3608(d); *see also id.* § 3608(e)(5).

[50] Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUS. POL'Y DEBATE 85, 87, 101–02 (2019).

[51] NAACP v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 154–55 (1st Cir. 1987).

[52] 42 U.S.C. § 5304(b)(2).

[53] Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1225 (2011).

a minimal self-certification process.[54] As relevant for this Article, however, two broad features have long defined the AFFH process. Procedurally, the AFFH mandate has been implemented through a bottom-up planning process, and that approach — rather than one compelling local governments to adopt certain substantive policies — is likely to continue.[55] Since at least 1988, covered governments have been required to study, identify, and disclose the impediments to fair housing in their jurisdiction to comply with their AFFH obligations.[56] This process is meant to incorporate substantial citizen participation.[57] Each jurisdiction has considerable discretion over what fair housing issues to analyze and how to overcome the obstacles it identifies.[58] The AFFH process was at its most prescriptive under the Obama Administration, which required that governments investigate specific fair housing issues, provided standardized data, and developed meaningful enforcement mechanisms.[59] But even then, HUD kept a participatory and decentralized planning process at the core of AFFH.[60]

Substantively, because affirmatively furthering fair housing goes beyond mere antidiscrimination, AFFH analysis has understood "fair housing" broadly.[61] AFFH can involve increasing housing choice for households and promoting integration, but it can also include policies to improve opportunity within low-income neighborhoods, like improving

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[54] Steil & Kelly, *supra* note 50, at 101; Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14, 29–35 (D.D.C. 2018) (describing history of AFFH process); Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2,041 (proposed Jan. 14, 2020); Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020).

[55] Even the Trump Administration's first proposal for repealing and replacing the existing AFFH rules maintained a modified planning process. Affirmatively Furthering Fair Housing, 85 Fed. Reg. at 2,044 ("All program participants included in the consolidated plan process would be required to examine their own circumstances to determine how best to address their AFFH performance."). The more recent repeal effort essentially abandons HUD oversight altogether but is highly legally suspect on both procedural and substantive grounds. *See* Evan Weinberger, *Trump Administration Repeals Obama-Era Fair Housing Rule (1)*, BLOOMBERG L. (July 23, 2020, 3:46 PM), https://news.bloomberglaw.com/banking-law/trump-administration-repeals-obama-era-fair-housing-rule [https://perma.cc/45VU-V4LK].

[56] U.S. DEP'T OF HOUS. & URB. DEV., 1 FAIR HOUSING PLANNING GUIDE 1-3 (1996) [hereinafter HUD FAIR HOUSING PLANNING GUIDE], https://www.hud.gov/sites/documents/FHPG.PDF [https://perma.cc/KHZ4-J3JQ].

[57] *Id.* at 2-5 to -6.

[58] *See id.* at 2-16, 2-22.

[59] Steil & Kelly, *supra* note 50, at 87.

[60] Katherine M. O'Regan & Ken Zimmerman, *The Potential of the Fair Housing Act's Affirmative Mandate and HUD's AFFH Rule*, 21 CITYSCAPE 87, 90 (2019) (explaining reasons HUD retained planning-based process).

[61] *See* 24 C.F.R. § 5.152 (2020) (defining "affirmatively furthering fair housing" to include "foster[ing] inclusive communities free from barriers that restrict access to opportunity based on protected characteristics"); Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 299 F. Supp. 2d 952, 966 (E.D. Mo. 2004) (finding that housing authority met its AFFH obligations, in part because it provided "physical and social service infrastructure" to connect residents to jobs, education, health care, and transportation), *aff'd*, 417 F.3d 898 (8th Cir. 2005).

transportation connections to employment centers.[62] Additionally, while the AFFH process and case law have focused on race and segregation, the obligation to affirmatively further fair housing is not limited to either.[63] HUD has interpreted AFFH as requiring different substantive analyses for disability, in particular.[64]

Given the current tumult in fair housing law, this Article avoids analyses that rely on the particular standards for disparate impact or the precise data sets to be reviewed in the AFFH process. Any such analysis will quickly become outdated — and depends on political prognostications about who will control HUD and for how long. Instead, it assumes that disparate impact liability will be available roughly as the Supreme Court described it in *Inclusive Communities* and that the future of AFFH, like its present and past, will prioritize the analysis of fair housing conditions over any particular prescriptive measures while allowing for a broad understanding of fair housing. This assumption may not hold always and everywhere, but it seems a conservative enough description of the framework under which strategic advocates might advance sex-based fair housing claims.[65]

Furthermore, state and local governments have their own fair housing laws. Particularly given the uncertain state of federal fair housing law, sex-based fair housing claims may be first or best addressed subnationally. Every state but Mississippi has its own statute prohibiting housing discrimination, as do many local governments.[66] The forty-nine states (plus Washington, D.C.) include sex as a protected class.[67] These state statutes often allow for disparate impact liability,[68] and even the

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[62] 1 HUD FAIR HOUSING PLANNING GUIDE, *supra* note 56, at 2-27.

[63] *E.g.*, 24 C.F.R. § 5.152 (defining "fair housing issue" to include "ongoing local or regional segregation or lack of integration, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, disproportionate housing needs, and evidence of discrimination or violations of civil rights law").

[64] U.S. DEP'T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING RULE GUIDEBOOK 100 (2015) [hereinafter HUD AFFH RULE GUIDEBOOK], https://www.nhlp.org/wp-content/uploads/HUD-AFFH-Rule-Guidebook-Dec.-2015.pdf [https://perma.cc/37RK-PFFS]; 1 HUD FAIR HOUSING PLANNING GUIDE, *supra* note 56, at 1-1, 2-27, 3-8, 3-9. Even the Trump Administration's most recent substantive proposal (excluding its attempt to effectively repeal AFFH), which generally flattens the AFFH analysis into affordability and antidiscrimination, includes a distinct analysis of accessibility. Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2,041, 2,045 (proposed Jan. 14, 2020).

[65] If the availability of the FHA's protections is sharply limited, new sex-based claims will fail along with more established disparate impact claims, and jurisdictions' AFFH obligations will be ignored for all protected classes. But at some point, the political and legal climate may change again. The question for this Article is how sex-based fair housing claims should be analyzed when fair housing, more generally, is being meaningfully addressed.

[66] *State Fair Housing Protections*, POL'Y SURVEILLANCE PROGRAM (Aug. 1, 2019), http://lawatlas.org/datasets/state-fair-housing-protections-1498143743 [https://perma.cc/C55M-SM97]; *see, e.g.*, N.Y.C. ADMIN. CODE § 8-107(17) (2020).

[67] *State Fair Housing Protections*, *supra* note 66.

[68] *See, e.g.*, CAL. GOV'T CODE § 12955.8(b) (West 2020); N.C. GEN. STAT. § 41A-5(a)(2) (2020).

dissenters in *Inclusive Communities* expressly acknowledged that the states may create disparate impact liability.[69] A few states even have analogs to the AFFH process, albeit of varying strength.[70]

Thus, while this Article focuses on the federal FHA as a uniform point of study, advocates need not be so limited. Some state and local laws are substantially more protective than the federal FHA.[71] Some state courts will be friendlier to novel civil rights claims than the federal judiciary will be. Perhaps most importantly, the fifty states offer an opportunity for federalist experimentation and elaboration of the contours of sex-based fair housing claims.[72] The states offer an opportunity, not constrained by the back-and-forth of HUD rulemaking and circuit splits on particular doctrinal details, for creative thinking about what "fair housing" means with respect to sex.

B. Sex as a Protected Class: The Limits of Current Enforcement

The Fair Housing Act's powerful remedial tools — in particular, disparate impact suits and the AFFH process — protect against sex discrimination. As a textual matter, the FHA applies with equal force to sex as to race, the historic core concern of the FHA. The relevant prohibitions in the Act disallow taking certain acts "because of race, color, religion, sex, familial status, or national origin."[73] Each protected class stands on equal footing.[74] Likewise, the statutory AFFH obligation requires HUD "affirmatively to further the policies of" the entire Fair Housing Act.[75] It does not single out any particular aspects of fair housing, or limit the AFFH process to racial integration. Textually, there is no basis for treating sex differently from race under the Act. Nor have courts or HUD created any exceptions or alternative frameworks for sex-based FHA claims.[76]

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[69] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2550 (2015) (Alito, J., dissenting) ("[N]othing prevents States and local government from enacting their own fair housing laws, including laws creating disparate-impact liability.").

[70] *See, e.g.*, CONN. GEN. STAT. § 8-37ee (2020); LA. STAT. ANN. § 51:2610(D)(5) (2020); NEB. REV. STAT. § 20-323 (2020); 760 MASS. CODE REGS. § 47.01 (2017).

[71] *E.g.*, N.Y.C. ADMIN. CODE §§ 8-101 to -132.

[72] *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[73] 42 U.S.C. §§ 3604–3605 *passim*.

[74] *Compare* Bostock v. Clayton County, 140 S. Ct. 1731, 1765 (2020) (Alito, J., dissenting) (proposing different standard for discrimination against same-sex relationships under Title VII, as compared to interracial relationships, based on relationship of latter to racial subjugation), *with id.* at 1749 (majority opinion) (rejecting stricter standard for identifying some forms of discrimination, where distinction not based in statutory text).

[75] 42 U.S.C. § 3608.

[76] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

The force of the FHA's protections against sex discrimination is only underscored by a comparison to Title VII's protections against employment discrimination. Federal law allows employers to discriminate on the basis of sex if sex is a "bona fide occupational qualification"[77] but provides no such exception for race. The FHA includes no equivalent provision regulating sex discrimination more lightly than racial discrimination. While the drafters of the civil rights statutes knew how to distinguish sex and race, they did not do so for the FHA.

Despite the textual parity between sex- and race-based claims under the FHA, the full breadth of the FHA's protections has not been used for sex. In practice, only intentional sex discrimination has been attacked under the FHA, with issues around domestic violence (discussed below) the notable and recent exception.[78] Moreover, even the challenges to intentional sex discrimination have focused on discrete instances of discrimination against particular individuals, especially sexual harassment, rather than broader policies.[79]

For example, in 2016, HUD's annual report of fair housing enforcement actions listed three cases involving sex discrimination.[80] Two involved sexual harassment;[81] the third involved a landlord who denied a woman's rental application because he preferred to rent to "bachelors."[82] Compare this to the same year's seventeen cases concerning race or national origin discrimination, which used the Fair Housing Act to challenge a housing authority's inadequate response to toxic lead and arsenic pollution at a public housing site,[83] and took on banks that drew their

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[77] 42 U.S.C. § 2000e-2(e).

[78] *See* Michael Allen & Jamie Crook, *More than Just Race: Proliferation of Protected Groups and the Increasing Influence of the Act*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 57, 59–63 (Gregory D. Squires ed., 2018).

[79] *See id.*

[80] *HUD Charges 2016: Basis of Discrimination*, U.S. DEP'T OF HOUS. & URB. DEV. (July 20, 2018), https://www.hud.gov/sites/dfiles/FHEO/documents/2016.pdf [https://perma.cc/9WDG-XY6U]. As the last full year of the Obama Administration, 2016 was likely to show relatively vigorous enforcement of the FHA.

[81] Initial Decision and Consent Order, Sec., Dep't of Hous. & Urb. Dev. v. Goodsell, HUDOHA Case No. 15-JM-0122-FH-019 (Apr. 11, 2016), https://www.hud.gov/sites/documents/16-15-JM-0122-FH-019.PDF [https://perma.cc/H6YR-32BR]; Charge of Discrimination, Sec., Dep't of Hous. & Urb. Dev. v. Webb, HUDALJ FHEO No. 07-13-0454-8 (July 26, 2016), https://www.hud.gov/sites/documents/16BELVWEBB.PDF [https://perma.cc/KKW6-MJGV].

[82] Charge of Discrimination, Sec., Dep't of Hous. & Urb. Dev. v. Kelly, HUD ALJ FHEO No. 08-15-0186-8 (Sept. 14, 2016), https://www.hud.gov/sites/documents/FHEONO.08-15-0186-8.PDF [https://perma.cc/GED9-TFZ5].

[83] Preliminary Voluntary Compliance Agreement and Title VIII Conciliation Agreement Between the United States Department of Housing and Urban Development and East Chicago Housing Authority, FHEO Case Nos. 05-16-5210-8/6 et seq. (Nov. 2, 2016), https://www.hud.gov/sites/documents/ECHA_11032016.PDF [https://perma.cc/7L9C-KFEE]; *see also* Annie Ropeik, *Questions Linger for Public Housing Residents Who Lived at a Superfund Site*, NPR

service areas in ways that excluded predominantly African American neighborhoods.[84] The same HUD report for 2017 listed no cases at all related to sex discrimination.[85] Sex discrimination cases, when they happen at all, are far more limited in scope than cases involving other protected classes.[86]

Turning from HUD to the Department of Justice shows the same result. On its website, DOJ maintains a list of cases involving enforcement of the Fair Housing Act dating back to the 1990s; seventy-nine were classified as involving sex discrimination.[87] Of those, the overwhelming majority involve direct, intentional discrimination against particular individuals, almost always in the form of sexual harassment and occasionally in the form of a refusal to rent to individuals of a certain sex.[88]

Only four sex discrimination cases listed by DOJ involved policies affecting a general population. The first was a suit against Facebook for allowing advertisers, including landlords and brokers, to limit who would view advertisements based on sex, religion, familial status, and national origin. This case involved intentional and facial discrimination — though at an enormous scale — and discrimination against many protected classes.[89] The other three each involved lending discrimination: of these, each of the complaints alleged intentional discrimination and all involved discrimination against other protected classes as well (specifically, race and family status).[90] Thus, the only DOJ cases

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(Aug. 7, 2017, 7:25 AM), https://www.npr.org/2017/08/07/541983718/questions-linger-for-former-residents-who-lived-at-a-superfund-site [https://perma.cc/3EHY-ABVK].

[84] Title VIII Conciliation Agreement Between Metropolitan St. Louis Equal Housing and Opportunity Council, Legal Aid of Western Missouri, and First Federal Bank, FSB, FHEO Case Nos. 07-16-0013-8, 07-16-0014-8 (Feb. 24, 2016), https://www.hud.gov/sites/documents/16-1FEDEXECONCIL0224.PDF [https://perma.cc/7M9F-UD98].

[85] *HUD Charges 2017: Basis of Discrimination*, U.S. DEP'T OF HOUS. & URB. DEV. (July 20, 2018), https://www.hud.gov/sites/dfiles/FHEO/documents/2017.pdf [https://perma.cc/5RGG-3YKU].

[86] These are "quite ordinary forms of discrimination," in Professor Olatunde Johnson's words, as compared with "'second-generation' discrimination." Johnson, *supra* note 53, at 1192 (quoting Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462 (2001)).

[87] *Housing and Civil Enforcement Cases*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#sex [https://perma.cc/Q684-EFLX]. This total is current as of November 12, 2020. It excludes cases involving only the enforcement of a subpoena or a judgment and cases miscategorized by DOJ.

[88] For a recent analysis of sexual harassment cases brought under the FHA, see Elengold, *supra* note 29.

[89] *See* Statement of Interest of the United States of America at 2, Nat'l Fair Hous. All. v. Facebook, Inc., No. 18-cv-02689 (S.D.N.Y. Aug. 17, 2018), https://www.justice.gov/crt/case-document/file/1089231/download [https://perma.cc/R75K-L9SS].

[90] Complaint, United States v. Long Beach Mortg. Co., No. CV-96-6159 (C.D. Cal. Sept. 5, 1996), https://www.justice.gov/crt/about/hce/documents/longbeachcomp.php [https://perma.cc/V46V-5UHF]; United States v. Mortg. Guar. Ins. Corp., No. 11-882, 2012 WL 1606235 (W.D. Pa.

challenging large-scale policies as sex discrimination involved intentional discrimination and discrimination against other protected classes. DOJ listed no fair housing sex discrimination suits at all against local governments, whereas for FHA claims involving race or disability, local governments are common defendants.

The relative lack of policy-level, sex-based fair housing suits is not a new phenomenon. Early cases dealt with issues like landlords who would not rent to single women.[91] Where facially neutral policies were challenged, those policies were plainly and intentionally sex based, as with landlords who would not consider alimony or child support as income.[92] More to the point, suits of any kind were rare. As late as 1993, for example, the Tenth Circuit had never yet "addressed the issue of sexual discrimination in the context of fair housing."[93]

This is not to say that no doctrinal growth has taken place. FHA claims have incorporated new theories of sex discrimination developed in the context of employment discrimination. Sexual harassment, which was recognized as sex discrimination by the Supreme Court in 1986,[94] was prohibited under the Fair Housing Act thereafter.[95] And just as courts have found that Title VII's prohibition on sex discrimination prohibits discrimination against gay or transgender employees,[96] the same claims have been made under the FHA.[97] While important, however, these innovations remain focused on the treatment of individual tenants or homebuyers.

This leaves the Fair Housing Act unusually weak with respect to sex. While individual-level enforcement is only a partial solution in any antidiscrimination framework, Professor Olatunde Johnson has argued that individual enforcement is especially insufficient against housing

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Apr. 30, 2012); Complaint, United States v. Delta Funding Corp., No. 00-cv-01872 (E.D.N.Y. Mar. 30, 2000).

[91] Morehead v. Lewis, 432 F. Supp. 674, 677 (N.D. Ill. 1977), *aff'd*, 594 F.2d 867 (7th Cir. 1979).

[92] United States v. Reece, 457 F. Supp. 43, 48 (D. Mont. 1978). The question of how lenders measure women's income remains a live one, with recent attention on lenders who discount the income of women while they are on maternity leave, beyond appropriate and individual determinations of creditworthiness. *See Mortg. Guar. Ins. Corp.*, 2012 WL 1606235; Maureen R. St. Cyr, *Gender, Maternity Leave, and Home Financing: A Critical Analysis of Mortgage Lending Discrimination Against Pregnant Women*, 15 U. PA. J.L. & SOC. CHANGE 109, 113–22 (2011). In the lending context, many cases also arise under the Equal Credit Opportunity Act, 15 U.S.C. § 1691.

[93] Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993).

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

[95] *See Honce*, 1 F.3d at 1088. Notably, while courts generally do not analyze sexual harassment claims in these terms, the pattern of the underlying discrimination is — as ever — intersectional. Sexual harassment in housing is racialized and, for reasons of culture, economics, and law, a particular issue for Black women. Elengold, *supra* note 29, at 236–45.

[96] *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

[97] *See, e.g.*, Smith v. Avanti, 249 F. Supp. 3d 1194, 1197–98 (D. Colo. 2017).

discrimination.[98] Housing lacks the large, organized institutions that can translate the risk of damages into systemic change — a small landlord is very different from a corporate HR department — and features deeper connections between private behavior and public policy.[99] As a result, housing discrimination, in particular, must be addressed systemically in addition to individually.

The AFFH process represents an additional avenue for promoting fair housing systemically, but sex has been as absent from the AFFH process as from litigation. In HUD's guidance for how to complete an Analysis of Impediments (the planning document required pre– and post–Obama Administration), for example, HUD suggested jurisdictions consider specific issues related to race and disability, such as whether state housing policies overly concentrate public and affordable housing in segregated minority communities or whether group homes for people with disabilities are barred from residential neighborhoods.[100] But HUD never identified any specific practice or policy likely to pose an impediment to fair housing with respect to sex. Even the simple suggestion that "practices affecting the representation of all racial, ethnic, religious, and disabled segments of the community on statewide advisory boards, commissions, and committees" might constitute an impediment to fair housing conspicuously omitted the possibility (or probability) that women, though a protected class, might not be adequately represented in policymaking roles.[101] In HUD's AFFH guidance, sex discrimination is addressed only in catch-all statements listing all the FHA's protected classes.[102]

The Obama Administration's more robust AFFH process likewise omitted sex as a meaningful subject of inquiry. The Obama Administration provided state and local governments with targeted data sets and a fixed assessment tool that required analysis of particular issues around segregation and access to opportunity. Many required analyses specifically addressed racial and national origin discrimination, disability discrimination, and family status discrimination. Local governments had to identify, for example, "Racially or Ethnically Concentrated Areas of Poverty" and the factors contributing to racial segregation.[103] HUD provided innovative data tools and detailed guidance on how to calculate racial segregation.[104] Likewise, to assist in

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98 Johnson, *supra* note 53, at 1204.

99 *Id.* at 1204, 1211.

100 1 HUD FAIR HOUSING PLANNING GUIDE, *supra* note 56, at 2-19, 3-7 to -8.

101 *Id.* at 3-8.

102 *See, e.g.*, *id.* at 1-3.

103 U.S. DEP'T OF HOUS. & URB. DEV., ASSESSMENT OF FAIR HOUSING TOOL FOR LOCAL GOVERNMENTS 2–3 (2017), https://prrac.org/pdf/assessment_of_fair_housing_tool_for_local_governments_2017-01.pdf [https://perma.cc/ELH7-ZGNL].

104 HUD AFFH RULE GUIDEBOOK, *supra* note 64, at 58–68.

analysis of disability issues, HUD provided data on residential patterns disaggregated by type of disability: ambulatory, self-care, independent living, vision, hearing, or cognitive.[105] In contrast, HUD required no standalone analysis of data concerning sex.

Jurisdictions also had to analyze access to opportunity, including to good public schools, employment, and transportation. In doing so, however, HUD provided data only for race/ethnicity, national origin, and family status — and beyond a final, catch-all provision, required only that access to opportunity be analyzed "[f]or the protected class groups HUD has provided data."[106] HUD provided no specific instructions, and no data, to allow an analysis of women and men's differential access to opportunity. In HUD's 225-page guidebook, its most comprehensive discussion of this assessment process, the word "sex" is never mentioned apart from a full enumeration of the protected classes under the FHA, and the words "woman" and "women" are never used at all.[107]

Taken together, it is clear that sex discrimination plays only a very minor role in the enforcement of the Fair Housing Act and that only discrete acts of discrimination against individuals are targeted.[108] Even where HUD could be most expansive — the AFFH process — sex discrimination is all but absent. And needless to say, in the absence of deeply considering sex discrimination in housing, there can be no robust intersectional analyses of housing discrimination either.[109] This is a gap in the law waiting to be filled.

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[105] *Id.* at 101.

[106] U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 103, at 4–5; *see also* HUD AFFH RULE GUIDEBOOK, *supra* note 64, at 68.

[107] The word "gender" is used only once, in the phrase "gender identity." *See* HUD AFFH RULE GUIDEBOOK, *supra* note 64, at 129.

[108] The reasons for this are the subject of another article but include fair housing law's preexisting bias toward small, individual claims, Johnson, *supra* note 53, at 1204, the limited importance of fair housing for middle-class and professional women, the limited progress in fighting racial segregation, and the lack of a theory of sex and fair housing. This Article aims to address the latter factor.

[109] Many existing fair housing issues, which are primarily about racial discrimination and have been examined exclusively as such, might be enriched by incorporating a secondary sex discrimination angle. For example, fair housing claims concerning segregation and federally subsidized housing might beneficially note that public housing residents and voucher holders are overwhelmingly female-headed households. *Cf.* Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 37 (D. Mass. 2002) (observing that plaintiffs in a fair housing case involving Section 8 voucher holders were "racial minority, lower-income women" but analyzing the case solely as involving race). Similarly, discrimination based on criminal history arguably concerns the intersection of race and sex discrimination but has been analyzed primarily in terms of race to date. *See, e.g.*, U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE–RELATED TRANSACTIONS 3 (2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [https://perma.cc/F7JH-PRFV].

C. Proof of Concept: Domestic Violence and Chronic Nuisance Ordinances

That the Fair Housing Act applies to sex discrimination beyond intentional refusals to rent and sexual harassment is theoretically clear: no text or precedent limits such suits. Until recently, however, this claim was essentially only theoretical. Now, a wave of litigation and administrative action has provided proof of concept. This section details the successful advocacy, on fair housing grounds, against "nuisance ordinances," under which landlords are encouraged to evict tenants for being the victims of domestic violence. Notably, fair housing litigation challenging the eviction of domestic violence victims began with claims of individual, intentional discrimination, but it did not end there. Such success underscores the promise of using the Fair Housing Act to more broadly attack sex discrimination.

1. Chronic Nuisance Ordinances. — Local governments have long relied on the law of nuisance to regulate undesirable uses, from those that threaten public safety to those that challenge norms of public morality. As part of those efforts, local governments have codified and strengthened common law protections into statute.[110] In the 1980s, as part of the "war on crime" then underway, a new generation of nuisance ordinances spread.[111] These ordinances deem a property to be a nuisance if it generates a certain number of nuisance activities, which can extend far beyond traditional common law nuisances, within a certain time period.[112] In Cincinnati, Ohio — whose ordinance was provided as an example by a Department of Justice initiative[113] — nuisance activities include everything from assault to children skipping school.[114] In many jurisdictions, a property can be deemed a nuisance based only on generating too many calls to the police, potentially regardless of the substance of those calls. In Anchorage, Alaska, another DOJ-provided example, the local ordinance imposes a fee for every police response to a given residential unit after the eighth.[115] "Three-strikes" policies are common.[116]

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[110] *See* Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1184 (2008).

[111] Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 848 (2015).

[112] *See id.* at 849; Fais, *supra* note 110, at 1187.

[113] KATHLEEN GALLAGHER, LISC, CHRONIC NUISANCE ORDINANCES 2, https://www.lisc.org/media/filer_public/16/04/16046c59-6f06-45f7-89f9-274da3430edf/chronic_nuisance_ordinances.pdf [https://perma.cc/7MAQ-CWQC]. DOJ's guidance was published in partnership with LISC (Local Initiatives Support Corporation).

[114] *See* CINCINNATI, OHIO, MUN. CODE § 761-1-N (2020).

[115] ANCHORAGE, ALASKA, MUN. CODE §§ 8.80.010, 80.020 (2020); GALLAGHER, *supra* note 113.

[116] Amanda K. Gavin, Comment, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into "Nuisances" in the Eyes of Municipalities*, 119 PENN ST. L. REV. 257, 262 (2014).

To avoid consequences ranging from fines to forfeiture or criminal liability, landlords must "abate the nuisance" by either controlling their tenants' behavior or evicting them.[117] Because these ordinances enlist property owners into policing the behavior of residents, they are quite popular among local governments.[118] For a sense of scale, more than 100 municipalities in just the State of Illinois were found to have some variation on these laws.[119] Chronic nuisance ordinances have become a leading mechanism for local governments to regulate their residents.

2. The Application of Chronic Nuisance Ordinances to Domestic Violence. — Chronic nuisance ordinances, which are also criticized as tools for harassing or overpolicing poor, non-white, and disabled residents, have a particularly disastrous effect for victims of domestic violence.[120] Nuisance ordinances hold landlords and tenants responsible for chronic crime and disruption, not one-time events. And domestic violence is by its nature something both chronic and unusually place based: an individual tenant, in her own home, won't generally be burglarized repeatedly, but she may be attacked by an abuser over and over again.

It's no surprise, therefore, that domestic violence is one of the offenses most frequently cited under nuisance ordinances. In a study of Milwaukee's nuisance ordinance by Matthew Desmond and Nicol Valdez, domestic violence was the second most commonly specified nuisance activity, after noise violations.[121] Moreover, domestic violence was disproportionately cited as a nuisance compared to its share of 911 calls.[122] (These nuisance citations were also heavily concentrated in Black neighborhoods and especially in racially integrated Black neighborhoods.[123]) A Milwaukee property owner was issued a citation involving domestic violence under that city's nuisance ordinance every 4.6

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[117] Swan, *supra* note 111, at 848–49.

[118] *See* Fais, *supra* note 110, at 1182 & n.5.

[119] Mary Hansen, *"Crime-Free Housing" Rules Spread in Illinois*, NPR ILL. (Mar. 14, 2019), https://www.nprillinois.org/post/crime-free-housing-rules-spread-illinois [https://perma.cc/NZW9-JCVG].

[120] *See* Peter Edelman, *More than a Nuisance*, NEW REPUBLIC (Apr. 10, 2018), https://newrepublic.com/article/147359/nuisance-laws-making-poverty-crime [https://perma.cc/S87X-G56G]; Alisha Jarwala & Sejal Singh, Note, *When Disability Is a "Nuisance": How Chronic Nuisance Ordinances Push Residents with Disabilities out of Their Homes*, 54 HARV. C.R.-C.L. L. REV. 875, 883–84 (2019); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1498 (2019); *see also* Sarah Kroeger & Giulia La Mattina, *Do Nuisance Ordinances Increase Eviction Risk?*, 110 AEA PAPERS & PROC. 452, 452 (2020) (finding that enacting a nuisance ordinance causes a sixteen percent increase in eviction filings).

[121] Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 130 (2012). The most common citation was the catchall "trouble with subjects," which presumably included some number of domestic violence incidents as well. *Id.*

[122] *Id.* at 130–31.

[123] *Id.* at 130.

days.[124] Likewise, an investigation into New York State nuisance ordinances found that roughly half of all warnings issued under one city's ordinance involved domestic violence incidents.[125]

Victims of domestic violence are therefore confronted with a terrible choice: either call the police for assistance, risking eviction from their home, or acquiesce in their abuse. The risk of eviction is all too real. Desmond and Valdez found that Milwaukee landlords evicted their tenants in fifty-seven percent of cases where they responded to a nuisance citation involving domestic violence and threatened eviction in still more cases.[126] This choice plays into dangerous dynamics of domestic violence, enforcing silence and giving abusers another threat to wield against their victims.[127] It also drives domestic violence victims, directly and indirectly, into homelessness at staggering rates. According to the Department of Health and Human Services, between twenty-two and fifty-seven percent of homeless women report domestic violence as the immediate cause of their homelessness, and thirty-eight percent of domestic violence victims become homeless at some point in their lives.[128]

The story of Lakisha Briggs makes the impossible bind — and the danger — of these ordinances visceral. Briggs's ex-boyfriend was violent and abusive.[129] When, after the latest incident of assault, Briggs reported him to the police, the arresting officers notified Briggs that any further calls to the police would lead to eviction under the city's "three-strikes" policy for 911 calls.[130] With Briggs unable to call the police for help, her abuser took full advantage, escalating until he stabbed her in the neck.[131] Even then, Briggs would not call 911.[132] She fled her house, and when a neighbor saw her walking in the street, the neighbor called

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[124] *Id.* at 132.

[125] ACLU WOMEN'S RTS. PROJECT & SOC. SCI. RSCH. COUNCIL, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 2 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf [https://perma.cc/3JDT-2RWK].

[126] Desmond & Valdez, *supra* note 121, at 133.

[127] Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, 40 LAW & SOC. INQUIRY 908, 923 (2015) ("Battered women who are aware of the nuisance property law now face a situation in which they feel they must forfeit their right to access law enforcement by calling 911 or else be subject to potential fines and/or eviction.").

[128] *Domestic Violence and Homelessness: Statistics (2016)*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.acf.hhs.gov/fysb/fact-sheet/domestic-violence-and-homelessness-statistics-2016 [https://perma.cc/444B-7J9K].

[129] Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, THE GUARDIAN (Sept. 11, 2015, 6:45 AM), https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911 [https://perma.cc/2XTK-6548]; Complaint, Briggs v. Borough of Norristown, No. 13-cv-02191 (E.D. Pa. Apr. 24, 2013).

[130] Briggs, *supra* note 129.

[131] *Id.*

[132] *Id.*

for an ambulance.[133] The day that Briggs returned home from the hospital, she was served eviction papers.[134]

Overwhelmingly, it is women, like Lakisha Briggs, who suffer from chronic nuisance ordinances' application to domestic violence. Nationally, around eighty percent of domestic violence victims are women.[135] In Milwaukee, only four men, as compared to thirty-nine women, were evicted or threatened with eviction during the study period.[136] Nuisance ordinances therefore pose a stark fair housing issue: punishing a population that is overwhelmingly female, solely on the basis of having been victimized in their homes, with the likely consequence of eviction from their homes.

3. Fair Housing and Chronic Nuisance Ordinances. — The legal system has begun to recognize the fair housing implications of evicting domestic violence victims. The relevant reported law begins with the case *Bouley v. Young-Sabourin*.[137] In *Bouley*, a federal district court held, apparently for the first time, that evicting a tenant because she was the victim of domestic violence can violate the Fair Housing Act as a form of sex discrimination.[138] The case did not involve a nuisance ordinance — Bouley sued her landlord directly[139] — and offered relatively thin legal reasoning. Even so, *Bouley* has been favorably cited by other federal courts and demonstrated the legal sufficiency of FHA claims based on domestic violence.[140]

This appears to be an emerging consensus. As one court recently wrote, "district courts around the country have recognized that evicting female tenants who are victims of domestic violence can, in certain circumstances, constitute sex or gender discrimination under the FHA."[141]

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[133] *Id.*

[134] *Id.*

[135] *See* SHANNAN CATALANO, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., INTIMATE PARTNER VIOLENCE, 1993–2010, at 1 (2015), http://www.bjs.gov/content/pub/pdf/ipv9310.pdf [https://perma.cc/B7HK-ABLA].

[136] Desmond & Valdez, *supra* note 121, at 134–35. Because many evictees' sex could not be identified, and because some couples were evicted, these numbers are smaller than the total number of evictions and threatened evictions.

[137] 394 F. Supp. 2d 675 (D. Vt. 2005). HUD has cited the earlier cases of *Alvera v. CBM Group*, Civil No. 01-857-PA (D. Or. 2001), and *Warren v. Ypsilanti Housing Commission*, No. 02-cv-40034 (E.D. Mich. 2003), which settled, as relevant precedent for its administrative purposes.

[138] *Bouley*, 394 F. Supp. 2d at 678; Memorandum from Sara K. Pratt, Deputy Assistant Sec'y for Enf't & Programs, U.S. Dep't of Hous. & Urb. Dev., to Off. of Fair Hous. & Equal Opportunity Dirs. 6–8 (Feb. 9, 2011), https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF [https://perma.cc/T24X-DFYE].

[139] *Bouley*, 394 F. Supp. 2d at 676.

[140] Wilson v. Guardian Mgmt., LLC, 383 F. Supp. 3d 1105, 1109–10 (D. Or. 2019).

[141] *Id.*

Though no court of appeals has yet addressed the question,[142] those judges to address the issue agree that evicting a person because she was abused can violate the FHA. It is therefore no great leap to conclude that statutes that effectively require landlords to evict domestic violence victims likewise can violate the FHA (though questions of proof and causation remain for any particular claim[143]).

This is precisely what HUD itself has concluded. HUD began to systematically address the issue in 2011, issuing guidance to HUD's fair housing teams for claims by domestic violence victims.[144] Beginning with the conviction that the "double victimization" of domestic violence victims (first by their abuser and then by their landlord) "is unfair," HUD explained that it may also be illegal.[145] HUD's memorandum outlined possible FHA claims based on facially discriminatory policies, unequally enforced policies, or disparate impact. It also demonstrated the statistical connection between punishing domestic violence victims and punishing women: the predicate for disparate impact. But at the time, HUD went no further. Its guidance memo indicated only that an FHA claim might exist, were the facts to support it. The memo concluded by instructing HUD staff to investigate further.[146]

HUD did so for nuisance ordinances, bringing Secretary-initiated actions in Lakisha Briggs's case and against the city of Berlin, New Hampshire. Both settled in HUD's favor: the defendants repealed their ordinances or exempted domestic violence incidents.[147] HUD also brought cases directly against landlords who evicted domestic violence victims.[148] This sustained agency advocacy campaign built up a body of administrative precedent, factfinding, and expertise. Meanwhile, in the 2013 reauthorization of the Violence Against Women Act, Congress

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[142] *Cf.* Creason v. Singh, 650 F. App'x 462, 463 n.2 (9th Cir. 2016) (declining to reach question whether "evicting a tenant with a valid domestic violence defense could constitute discrimination on the basis of sex" under the FHA).

[143] *See* Metro. St. Louis Equal Hous. & Opportunity Council v. City of Maplewood, No. 17CV886, 2017 WL 6278882, at *5 (E.D. Mo. Dec. 8, 2017) (dismissing claim that city's nuisance ordinance discriminated on the basis of race, sex, and disability because plaintiffs failed to plead sufficient facts showing causation).

[144] Memorandum from Sara K. Pratt to Off. of Fair Hous. & Equal Opportunity Dirs., *supra* note 138.

[145] *Id.* at 2.

[146] *Id.* at 9.

[147] Conciliation Agreement Between U.S. Dep't of Hous. & Urb. Dev. and Municipality of Norristown, Secretary Initiated Complaint Nos. 03-13-0277-8 & 03-13-0277-9, at 2 (2014), http://nhlp.org/files/Briggs-HUD-Conciliation-Agreement.pdf [https://perma.cc/J5F3-EUJ3]; Conciliation Agreement Between U.S. Dep't of Hous. & Urb. Dev. and City of Berlin, N.H., Secretary Initiated Complaint No. 01-15-0017-8, at 3 (2015), http://nhlp.org/files/City-of-Berlin.pdf [https://perma.cc/WZA6-S2QW].

[148] *See, e.g.*, Charge of Discrimination, Sec'y, U.S. Dep't of Hous. & Urb. Dev. v. Southgate Apartment Co., LLP, FHEO No. 03-13-0007-8 (2014), http://nhlp.org/files/HUD-v-Southgate-(discrimination-charge).pdf [https://perma.cc/R9Y8-F9BW].

enacted a separate set of protections for domestic violence victims receiving housing assistance, further elevating the issue.[149] These developments paved the way for a more forceful general statement against applying nuisance ordinances to domestic violence victims.

In 2016 — urged on by twenty-nine U.S. Senators[150] — HUD issued new guidance for local governments, to help "ensure that the growing number of local nuisance ordinances and crime-free housing ordinances do not lead to" FHA violations.[151] In this guidance, HUD walked through the three-step disparate impact analysis, suggesting throughout that many nuisance ordinances could not survive scrutiny. While the first step, which requires complainants to show a statistical disparity caused by the practice, is ultimately a factual question, HUD indicated that complainants' burden would often be minimal in practice.[152] As HUD pointed out, millions of Americans are the victims of domestic violence every year, and eighty percent of them are women.[153] These national numbers, HUD suggested, could at least support a HUD investigation, if not ultimately prove a claim in court.[154]

At the second stage, HUD indicated that local governments will rarely be able to carry the "difficult burden" of proving a legitimate government interest in "cutting off access to emergency services for those in grave need of such services, . . . thereby potentially endangering their lives, safety and security."[155] While not ruling out that local governments could meet this burden, HUD strongly indicated that most nuisance ordinances that punished victims would never do so.[156] The import of this guidance is clear: such ordinances generally violate the Fair Housing Act.

HUD's analysis went beyond disparate impact claims as well. HUD adopted the case law stemming from *Bouley* suggesting that evictions

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[149] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 601-603, 127 Stat. 54, 101–10.

[150] Letter from Sen. Al Franken et al. to Julian Castro, Sec'y, U.S. Dep't of Hous. & Urban Dev. (Aug. 17, 2016), https://www.warren.senate.gov/files/documents/160817HUDNuisanceOrdinancesLetter%202.pdf [https://perma.cc/Z59S-YC4P].

[151] U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES 1 (2016), https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF [https://perma.cc/TE4G-BCAP].

[152] *Id.* at 7–8.

[153] *Id.* at 8.

[154] *See id.*

[155] *Id.* at 9.

[156] *Id.*

based directly on domestic violence can constitute intentional sex discrimination.[157] Additionally, HUD stated that repealing such discriminatory ordinances is part of a government's duty to affirmatively further fair housing.[158] This guidance — which was not repealed under the Trump Administration — is a strong and sweeping rejection of nuisance ordinances that punish domestic violence victims. HUD's effort to incorporate a domestic violence analysis into the AFFH process was operationalized only very briefly, however. The original AFFH assessment tool, from 2015, did not mention issues related to sex at all,[159] but in 2017 — one week before the end of the Obama Administration — it was amended to require that local governments analyze whether domestic violence and other forms of gender-based violence caused any protected group to experience disproportionate housing needs.[160]

This sequence of events illustrates the iterative process by which the FHA's protections on sex discrimination are likely to be reenergized. Between the first HUD action and the last, fifteen years went by. That period saw an ongoing conversation between courts, private plaintiffs, Congress, and multiple offices within HUD. HUD stepped in tentatively at first, offering a more decisive opinion only after additional rounds of adjudication. New sex-based fair housing claims will not be recognized as a matter of law, in one fell swoop. But litigation can push HUD to investigate and institutionalize new applications of the FHA, just as HUD action can influence judicial outcomes.

Litigation over nuisance ordinances, which remain widespread, is ongoing.[161] Where plaintiffs are motivated or practices particularly egregious, these ordinances may be struck down; elsewhere, they will remain on the books.[162] And there is critical work to be done to extend

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[157] *Id.* at 10–11 & n.62.

[158] *Id.* at 12–13.

[159] U.S. DEP'T OF HOUS. & URB. DEV., ASSESSMENT OF FAIR HOUSING TOOL, https://www.huduser.gov/portal/sites/default/files/pdf/Assessment-of-Fair-Housing-Tool.pdf [https://perma.cc/ZLW4-TMCA]. This version of the assessment tool was released in December 2015. *See Assessment Tools*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/explore-issues/policy-priorities/fair-housing/assessment-tools [https://perma.cc/74TD-S9MV].

[160] U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 103, at 6 & app. C; Affirmatively Furthering Fair Housing: Announcement of Renewal of Approval of the Assessment Tool for Local Governments, 82 Fed. Reg. 4388, 4395 (Jan. 13, 2017) (describing additions).

[161] *See I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, ACLU, https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime [https://perma.cc/6983-G6MA] (describing ACLU's campaign against nuisance ordinances). These ordinances are challenged on multiple legal grounds, of which the Fair Housing Act is not always prominent. These include the First Amendment right to petition, equal protection, due process, and the Violence Against Women Act. *Id.*

[162] Litigants have also extended their challenges to other housing policies that penalize domestic violence victims. *E.g.*, Press Release, The Legal Aid Soc'y, Legal Aid & Weil, Gotshal & Manges Secure HPD Policy Change to Provide Domestic Violence Survivors Due Process in Housing Hearings (Feb. 5, 2020), https://legalaidnyc.org/wp-content/uploads/2020/02/02-05-20-Legal-Aid-

HUD's theory from the domestic violence context to encompass the additional ways that chronic nuisance ordinances disparately impact people of color and people with disabilities.[163] But already, the domestic violence victims, litigators, and HUD officials who challenged nuisance ordinances on fair housing grounds have won an essential victory. They have demonstrated that the Fair Housing Act can be used for impact litigation even beyond the claims of segregation or exclusion common to race, religion, and disability discrimination. The FHA is available to challenge a wide array of housing policies that discriminate on the basis of sex.[164] The question now is not whether American cities have housing policies that unintentionally discriminate on the basis of sex, or whether the Fair Housing Act is the right tool to attack those policies. The question is what policies come next.

II. HOUSING POLICY AS SEX DISCRIMINATION

The campaign against chronic nuisance ordinances shows the potential for the Fair Housing Act to challenge sex discrimination beyond individual, intentional acts of discrimination. But to date, that campaign has been a one-off: the exception that proves the rule. This Part identifies three additional ways the American housing system perpetuates gender disparities — examining bans on in-home daycares, restrictions on single room occupancy housing, and the effects of density limits on women's employment — and how each is readily addressable by the FHA. In doing so, it spotlights specific, factual contexts that could be the basis for plausible litigation or administrative action and for the first steps in rethinking the fundamentals of the American landscape — including the single-family, exclusively residential neighborhood.

A. Land Use Regulation and Disparate Impact: Restrictions on In-Home Child Care

Home-based child care — in which a paid provider takes care of children in her own home, rather than in a stand-alone center or a nonresidential space like a church — is a major component of the country's child care system.[165] For forty percent of children with working mothers, in-home child care (also called "family child care") is their primary

Weil-Gotshal-Manges-Secure-HPD-Policy-Change-To-Provide-Domestic-Violence-Survivors-Due-Process-In-Housing-Hearings.pdf [https://perma.cc/P7VQ-2F2U].

[163] *See* sources cited *supra* note 120. Of course, given the racial disparities in nuisance ordinance enforcement, any reform focused on domestic violence is likely to especially protect women of color.

[164] *See* Allen & Crook, *supra* note 78, at 59–63.

[165] Unpaid child care by relatives, friends, or neighbors, or paid care by nannies, is also home based. When this Article refers to in-home child care, however, it generally refers to paid family child care.

form of child care.[166] Around one million providers care for around three million children under the age of five in a home.[167] In-home daycares play particularly important roles in providing care for infants and toddlers, children in rural communities, and non-English speakers.[168] By providing child care services that are more flexible in terms of hours and age ranges, and that are offered in a wider range of locations, home-based daycares serve critical functions that center-based care cannot.[169]

Local governments, landlords, and homeowners' associations alike bar or restrict the provision of child care in residential properties. These regulations affect women in two separate ways: they harm the women who overwhelmingly serve as in-home child care providers and the women who disproportionately rely on child care services. For the former, the consequences might be eviction; for the latter, a restricted set of housing opportunities. A fair housing analysis of in-home daycare restrictions thus brings sex discrimination claims to the heartland of fair housing: local land use regulation.[170]

Not all of these limitations, which are highly traditional use regulations that form the core of Euclidean zoning, violate the Fair Housing Act. But some probably do. In a narrow sense, regulations that single out in-home daycares, as compared with more disruptive but less traditionally female home occupations, have an illegal disparate impact on women. More fundamentally, though, fair housing litigation should demand new scrutiny of the very concept of "residential character," which as applied to child care appears to privilege stay-at-home parenting over otherwise identical paid child care, without any objective land use rationale.

1. Child Care as a Fair Housing Issue. — Although they have not historically been treated as such, policies limiting in-home child care are a fair housing issue. It is well understood that child care is a gender issue. Women still bear the primary responsibility for child care in most American families, even in an era when most mothers work. Mothers spend about twice as many hours on child care as fathers, on average.[171]

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[166] *Family Child Care*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Mar. 21, 2016), https://www.acf.hhs.gov/occ/family-child-care [https://perma.cc/V3WE-GGAT].

[167] *Id.*

[168] *Id.* at 2. Reflecting those various niches in the child care system, in-home daycares are widely used across racial groups. Nat'l Ctr. for Educ. Stat., *Status and Trends in the Education of Racial and Ethnic Groups: Early Childcare and Education Arrangements*, INST. OF EDUC. SCIS. (Feb. 2019), https://nces.ed.gov/programs/raceindicators/indicator_rba.asp [https://perma.cc/HJ7T-36CR].

[169] *Family Child Care*, *supra* note 166.

[170] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2521–22 (2015).

[171] PEW RSCH. CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 28 (2013), https://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family [https://perma.cc/R4TF-E8UJ].

Perhaps more importantly, when child care isn't available or something goes wrong, it is mothers who usually take time off work.[172] Access to good child care, therefore, is essential for women's ability to enter and advance within the workforce. One study, for example, found that mothers were forty percent more likely than fathers to feel a negative impact of child care issues on their careers.[173] A growing body of research has quantified the effect of motherhood on women's employment outcomes: given the unequal distribution of work within the family, both the actual demands of child care and employers' assumptions about those demands combine to reduce women's wages and career advancement.[174] Meanwhile, child care providers are overwhelmingly female. Over ninety-five percent of child care workers are female, according to one estimate.[175] Child care remains women's work, whether done for one's own family or for pay.

Less obviously, child care is also a housing issue. Again, this is true from the perspective of both consumers and providers. For families with young children and working parents, access to child care is nonnegotiable. As such, the availability of child care options can drive housing choices and mobility.[176] Some parents might limit their apartment searches to neighborhoods near family, in order to preserve babysitting

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[172] Kim Parker, *Women More than Men Adjust Their Careers for Family Life*, PEW RSCH. CTR. (Oct. 1, 2015), https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life [https://perma.cc/ES5G-T929].

[173] Leila Schochet, *The Child Care Crisis Is Keeping Women out of the Workforce*, CTR. FOR AM. PROGRESS (Mar. 28, 2019, 8:00 AM), https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467488/child-care-crisis-keeping-women-workforce [https://perma.cc/3EKL-TCR9].

[174] *See, e.g.*, Claire Cain Miller, *The Gender Pay Gap Is Largely Because of Motherhood*, N.Y. TIMES: THE UPSHOT (May 13, 2017), https://nyti.ms/2rbbHWP [https://perma.cc/EDX2-F296]. *See generally* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789 (2017).

[175] ELISE GOULD, ECON. POL'Y INST., CHILD CARE WORKERS AREN'T PAID ENOUGH TO MAKE ENDS MEET 1 (2015), https://www.epi.org/files/2015/child-care-workers-final.pdf [https://perma.cc/5YAA-HM2W]. Some discrimination against in-home child care is likely racial as well. A majority of child care workers are white, though child care workers are more non-white than the national average. *Id.* at 3.

[176] OFF. OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & URB. DEV., BREAKING DOWN BARRIERS: HOUSING, NEIGHBORHOODS, AND SCHOOLS OF OPPORTUNITY 11–12 (2016), https://www.huduser.gov/portal/sites/default/files/pdf/insight-4.pdf [https://perma.cc/768R-DZLF] ("Transportation, economics, and access to childcare can limit the options available to low-income families . . . ." *Id.* at 12.); MEGAN GALLAGHER ET AL., WHAT WORKS COLLABORATIVE, MOVING TO EDUCATIONAL OPPORTUNITY: A HOUSING DEMONSTRATION TO IMPROVE SCHOOL OUTCOMES 7 (2013), https://www.urban.org/sites/default/files/publication/24271/412972-Moving-to-Educational-Opportunity-A-Housing-Demonstration-to-Improve-School-Outcomes.PDF [https://perma.cc/V4AV-36GG]; SUSAN J. POPKIN ET AL., U.S. DEP'T OF HOUS. & URB. DEV., FAMILIES IN TRANSITION: A QUALITATIVE ANALYSIS OF THE MTO EXPERIENCE 80 (2002), https://www.huduser.gov/publications/pdf/mtoqualf.pdf [https://perma.cc/5EZG-GZWJ] (evaluating the Moving to Opportunity demonstration qualitatively and finding that the residents chose housing based on proximity to family for assistance with child care).

options, or ensure that a nearby provider accepts child care vouchers.[177] Others will choose a neighborhood with high-quality daycares.[178] In either case, parents routinely take child care into account when choosing where to live.

From the provider perspective, in-home child care providers, by definition, work out of the home. For roughly one million providers, the laws regulating the use of their home are intimately tied to their ability to continue working as child care providers. Where local governments, homeowners' associations, or landlords restrict their ability to provide in-home child care, the consequences can be considerable. Limitations on in-home daycares can lead to eviction, or at least a difficult choice between one's preferred home and one's preferred livelihood.[179] For many women, therefore, these limits are an important frontier for fair housing law.

2. *Public and Private Restrictions on In-Home Child Care.* — For decades, in-home daycares have struggled with land use restrictions, both public and private, which either bar child care uses outright or impede their operation.[180] Such restrictions are most common in residential neighborhoods, where the operation of a business is treated as incompatible with family life — even where the business, that is, caring for children, closely resembles family life. In 1985, for example, the libertarian Cato Institute argued that "[t]he highest hurdle facing family providers is often the first — obtaining the approval of local zoning officials."[181] A leading child care advocate writing a decade later concluded that "outmoded local zoning ordinances have created major impediments to the development of an adequate family day care supply."[182]

The problem continues to today — and is not limited to quiet bedroom communities. In Des Moines, the city's renewed enforcement of

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[177] *See* Vicki Been & Leila Bozorg, *Spiraling: Evictions and Other Causes and Consequences of Housing Instability*, 130 HARV. L. REV. 1408, 1423 (2017) (reviewing MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016)).

[178] *See* RASHEED MALIK ET AL., CTR. FOR AM. PROGRESS, AMERICA'S CHILD CARE DESERTS IN 2018, at 3 (2018), https://cdn.americanprogress.org/content/uploads/2018/12/06100537/AmericasChildCareDeserts20182.pdf [https://perma.cc/EF4H-EXJA] (detailing geographic variability in child care access).

[179] Ken Dixon, *Day Care Bill Opposed as Expensive*, NEW HAVEN REG. (May 6, 2019, 5:15 PM), https://www.nhregister.com/metro/article/Expanded-daycare-enrollments-opposed-as-expensive-13822715.php [https://perma.cc/L2BP-69L8] (describing Connecticut legislation that would prohibit landlords from evicting tenants on this basis).

[180] These land use restrictions are independent from quality and safety regulations of the daycare operations such as student-to-teacher ratios or health standards.

[181] KAREN LEHRMAN & JANA PACE, CATO INST., DAY-CARE REGULATION: SERVING CHILDREN OR BUREAUCRATS? (1985), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa059.pdf [https://perma.cc/5JRS-DXC4].

[182] Abby J. Cohen, *Zoning for Family Day Care: Transforming a Stumbling Block into a Building Block*, 3 PLAN. COMM'RS J. 10, 12 (1992).

its zoning rules, which prohibit in-home daycares from caring for more than six children, recently threatened as many as 1,800 child care slots.[183] Supporters of Des Moines's zoning policies have emphasized the importance of "preserv[ing] the integrity of single-family neighborhoods."[184] In 2018, a Philadelphia councilwoman introduced legislation imposing onerous procedural requirements for opening new daycares in her district, specifically including in-home daycares.[185]

Nor are public officials the only ones obstructing the operation of in-home daycares. Homeowners' associations and restrictive covenants, as well as landlords, also limit or ban residents from providing child care in their homes.[186] State courts routinely adjudicate whether a particular in-home daycare violated a restrictive covenant.[187] The prevalence of these restrictions has led eighteen states to preempt local zoning of in-home daycares, and some to override private restrictions as well.[188]

Even where child care facilities are not banned outright, smaller details of the land use process can still pose serious obstacles to operating a child care facility. In Arlington, Virginia, for example, the county found that its methodology for calculating off-street parking requirements for family daycares was unnecessarily increasing child care costs.[189] In California, larger in-home daycares in one municipality might have to pay nearly a thousand dollars in fees and go through

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[183] Timothy Meinch, *D.M. Cracks Down on In-Home Day Cares*, DES MOINES REG. (Feb. 20, 2016, 12:25 AM), https://www.desmoinesregister.com/story/news/2016/02/19/des-moines-cracks-down—home-daycares/80314978 [https://perma.cc/6S7X-GEYT].

[184] Mel Pins, Letter to the Editor, *City Zoning Ordinances Preserve Integrity of Neighborhoods*, DES MOINES REG. (Feb. 28, 2016, 12:01 AM), https://www.desmoinesregister.com/story/opinion/readers/2016/02/28/city-zoning-ordinances-preserve-integrity-neighborhoods/80939186 [https://perma.cc/U5LX-5LHR] (letter from neighborhood association president).

[185] Bill No. 180751, City Council of Phila. (Sept. 13, 2018), https://thephiladelphiacitizen.org/wp-content/uploads/2018/09/Bill-No.-18075100.pdf [https://perma.cc/V5PA-NLZJ]; Editorial Board, Opinion, *Why Are Day-Care Centers Being Banned in One District?*, PHILA. INQUIRER (Sept. 20, 2018, 6:00 AM), https://www.inquirer.com/philly/opinion/editorials/cindy-bass-daycare-childcare-ban-zoning-philadelphia-20180920.html [https://perma.cc/NVP9-PHD7].

[186] ALL OUR KIN, CREATING THE CONDITIONS FOR FAMILY CHILD CARE TO THRIVE 32 (2019), http://www.allourkin.org/sites/default/files/PolicyReport-Oct2019-rev2_compressed%20%281%29.pdf [https://perma.cc/YUP9-922R] ("[T]oo often, restrictions imposed by zoning laws, landlords, and residential associations force child care providers to operate unregulated child care businesses or dissuade them from providing care altogether.").

[187] *See, e.g.*, Southwind Homeowners Ass'n v. Burden, 810 N.W.2d 714 (Neb. 2012); Metzner v. Wojdyla, 886 P.2d 154 (Wash. 1994); Martellini v. Little Angels Day Care, Inc., 847 A.2d 838 (R.I. 2004); *see also* Lewis-Levett v. Day, 875 N.E.2d 293, 296–97 (Ind. Ct. App. 2007) (distinguishing between unlicensed and licensed daycares).

[188] Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 308 & n.66 (2019).

[189] ARLINGTON DEP'T OF CMTY. PLAN., HOUS., & DEV., CHILD CARE IN ARLINGTON COUNTY: A LAND USE RESEARCH REPORT 19–20, 33 (2018) https://arlingtonva.s3.amazonaws.com/wp-content/uploads/sites/5/2018/12/Child-Care-Land-Use-Research-Report.pdf [https://perma.cc/C5FX-PZNT].

months of public hearings to open, while those in another part of the county can secure a permit in half an hour, for forty dollars.[190] These accumulated hurdles are often the most significant land use obstacles. As the American Planning Association has formally recognized, "[i]ncreased zoning barriers add to the cost of child care and the lowering of quality of care."[191]

3. In-Home Child Care Bans and the Fair Housing Act. — At least some of these land use restrictions violate the Fair Housing Act. While many limitations on in-home daycares can be justified as protecting residential character and preventing noise or traffic, others cannot. Where daycares are singled out for unfavorable treatment compared to other home businesses, or where the neighborhood impacts of the care are truly minimal, disparate impact suits should be available. And on a deeper level, where landlords or local governments treat in-home child care providers differently from large families, such judgments appear to rest not on legitimate land use considerations, but on impermissibly gendered conceptions of the proper home.

As a threshold matter, the use of a home for paid child care does not remove it from the protections of the Fair Housing Act. While the FHA's scope is limited to "dwellings," and it does not cover purely commercial properties,[192] a partly commercial property is covered when the alleged discrimination is "against a person or class of persons who reside or would reside in the dwelling absent the unlawful discrimination."[193] The key question is whether the victim of discrimination does or intends to reside in the property.[194] Thus, a family daycare operated in the provider's home is covered by the FHA, but a stand-alone facility in an otherwise residential unit is not.

Federal courts have, in fact, treated enforcement against in-home daycares as within the scope of the FHA. In a pair of recent cases, homeowners' associations enforced covenants barring the operation of in-home daycares unequally against non-white residents; the courts held

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[190] BUILDING CHILD CARE COLLABORATIVE, STRATEGIES FOR INCREASING CHILD CARE FACILITIES DEVELOPMENT AND FINANCING IN CALIFORNIA 15–16 (2007), http://www.buildingchildcare.net/uploads/pdfs/bcc-strategies-2007fullreport.pdf [https://perma.cc/3U2Y-E7SM]. Some of these disparities will be addressed by 2019 legislation extending existing state protections for in-home daycares to larger facilities. S.B. 234, 2019 Leg. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB234 [https://perma.cc/L86X-Q8YG].

[191] AM. PLAN. ASS'N, APA POLICY GUIDE ON THE PROVISION OF CHILD CARE (1997), https://www.planning.org/policy/guides/adopted/childcare.htm [https://perma.cc/2627-APT2].

[192] *See* Germain v. M&T Bank Corp., 111 F. Supp. 3d 506, 521 (S.D.N.Y. 2015) (collecting cases concerning plaintiffs who "purchase a residential property for commercial purposes only").

[193] Home Quest Mortg. LLC v. Am. Fam. Mut. Ins. Co., 340 F. Supp. 2d 1177, 1185 (D. Kan. 2004); *see* Lakeside Resort Enters. v. Bd. of Supervisors, 455 F.3d 154, 157–58 (3d Cir. 2006).

[194] Lunini v. Grayeb, 305 F. Supp. 2d 893, 914–15 (C.D. Ill. 2004), *rev'd on other grounds*, 395 F.3d 761 (7th Cir. 2005).

that the operators stated FHA claims.[195] While these cases involved intentional racial discrimination, not disparate impact or sex discrimination, they confirm that operating an in-home business does not remove a home from the coverage of the FHA.[196] Whether because a homeowners' association rule "creates a condition of sale" prohibiting in-home daycares,[197] or because a zoning requirement "otherwise make[s] unavailable" the housing unit,[198] if such a rule is discriminatory, the Fair Housing Act applies.

Under the FHA, any challenge to neutrally enforced bans on in-home daycares would have to be a disparate impact suit. Limitations on providing in-home daycares in residential areas are not facially discriminatory, nor generally motivated by discriminatory intent. They are enacted based on ideas about the separation of residential and commercial zones and fears of noise, traffic, and other neighborhood harms. Bans on commercial activity in residential zones certainly reflect gendered, Victorian-era ideas about the sanctity of the home,[199] but the connections are too tenuous to support a finding of intentional discrimination.

A disparate impact suit, in contrast, is much more plausible. Beginning with a plaintiff's prima facie case, it will be easy to demonstrate that the challenged policy disproportionately harms women. As already noted, around ninety-five percent of child care providers are women; presumably the numbers are roughly similar for the submarket of in-home providers. Policies that cause daycare providers to lose their homes, or that impose restrictive terms and conditions on the use of their homes, therefore disparately affect women. Moreover, the causal connection between the policy and the disparity is extremely clear. To take a simple case, if a landlord evicts a tenant for operating an in-home daycare in their apartment, that eviction decision (or the lease term upon which it was based) is the direct cause of the tenant's eviction.[200] This is enough for a prima facie case under the FHA.

Importantly, this prima facie case is described from the perspective of the child care provider, not the consumer. A case on behalf of consumers would be much more difficult, even at the prima facie stage. A bedroom community that is entirely zoned residential and does not allow in-home daycare as a residential use certainly excludes parents who need

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[195] Effendi v. Amber Fields Homeowners Ass'n, No. 10-cv-1383, 2011 WL 1225147, at *1 (N.D. Ill. Mar. 31, 2011); Fielder v. Sterling Park Homeowners Ass'n, 914 F. Supp. 2d 1222, 1228–29 (W.D. Wash. 2012).

[196] They also underscore that discriminatory enforcement of in-home daycare bans remains a pressing concern, and so lifting these bans may also advance racial equity (and will almost certainly help low-income women of all races).

[197] *Effendi*, 2011 WL 1225147, at *1 (citing 42 U.S.C. § 3604(b)).

[198] 42 U.S.C. § 3604(a).

[199] Garnett, *supra* note 22.

[200] *E.g.*, Diament v. Isaacs, 209 N.Y.S. 2d 406, 407 (Mun. Ct. 1960).

to live close to their child's daycare (perhaps they don't have a car); in theory, a case could be available. But issues of causation (among others) would prove thorny in practice. A plaintiff might struggle to show that a daycare would, in fact, open in the neighborhood if allowed and that, if it did, she would use it. This distinction underscores the importance of sex as a protected class, apart from family status. In-home daycare customers are all parents, but have no easy claim; in-home daycare providers are overwhelmingly women, and do.

Consistent with this reasoning, one state court has held that discrimination against in-home daycare operators constitutes a prima facie case of disparate impact. In *Sisemore v. Master Financial, Inc.*,[201] a California appellate court permitted a disparate impact suit against a bank that refused to grant mortgages based on the income from a home daycare.[202] Observing that home daycares are disproportionately operated by women, the court found that plaintiffs had made out a prima facie case. Notably, the court interpreted the state statute to mirror the federal FHA and relied on federal precedent;[203] this case did not turn on unusually plaintiff-friendly state law.[204] Two federal court decisions have further shown that this theory might spread to the federal FHA as well, although in each case the opinion falls far short of a robust holding.[205] While of less precedential or persuasive force than *Sisemore*, these cases represent the seeds of a disparate impact theory on behalf of child care operators — though still only with respect to a plaintiff's prima facie case.

The difficult questions in a disparate impact claim over in-home daycare regulations, however, do not involve the plaintiff's prima facie case but the issues of justification and tailoring. There is little dispute that such regulations disproportionately affect women — they do. The question is whether public or private defendants nevertheless have sufficient reason to exclude child care operations and whether less discriminatory

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[201] 60 Cal. Rptr. 3d 719 (Ct. App. 2007).

[202] *Id.* at 747.

[203] *Id.* at 746.

[204] Federal courts have often been particularly unwilling to intervene in land use matters, however, so there may still be a divergence between state and federal practice. *See, e.g.*, River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal courts are not boards of zoning appeals."); Dodd v. Hood River County, 136 F.3d 1219, 1230 (9th Cir. 1998) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards . . . .'" (quoting Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989))).

[205] Vance v. Bakas, No. C 05-3385, 2006 WL 496053, at *2–3 (N.D. Cal. Mar. 1, 2006) (holding that plaintiff had stated an FHA claim against a landlord who refused to rent to her because she ran an in-home daycare, but limiting decision only to present facts); Rana v. Gu, 220 F. Supp. 3d 989 (N.D. Cal. 2016) (granting preliminary injunction against eviction of tenant operating an in-home daycare, but declining to resolve whether legal analysis was based on federal or state law).

means are available to further those reasons. Existing cases — precedential or otherwise — have not resolved these ultimate questions of liability.[206]

Given the traditional importance of preserving residential neighborhoods in American land use law, defendants will often carry their burden to show a nondiscriminatory justification for restricting in-home daycares. A city, homeowners' association, or landlord has an interest in limiting commercial activity in residential areas: a daycare might generate additional traffic during drop-off and pick-up, bring additional noise from playing or screaming children, and, more diffusely, affect the "character" of the neighborhood or the building.[207]

Indeed, the strict separation of the home from any sort of business is one of American land use law's most distinctive features. As Professor Sonia Hirt has demonstrated, American land use stands out from all other industrialized countries in rigidly excluding even the most low-impact commercial activities from residential zones.[208] This separation has the imprimatur of the highest state courts.[209] As the Michigan Supreme Court stated in 1926, and reaffirmed in the context of child care in 2002, "[t]he right, if it has been acquired, to live in a district uninvaded by stores, garages, business and apartment houses is a valuable right."[210]

But not all in-home daycare bans or limitations can be justified based on these interests. Daycare centers are sometimes treated unfavorably, even compared to analogous commercial institutions. Zoning codes may allow "professional" uses, like insurance offices, while prohibiting uses associated with lower-income residents, including child care.[211] One example comes from Butte County, California, which requires that home daycares be located on paved streets, while providing

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[206] *Sisemore* and *Vance v. Bakas*, No. C 05-3385, 2006 WL 496053, each involved only the plaintiff's prima facie case, and *Sisemore* expressly noted that the defendant could raise important defenses later in litigation. 60 Cal. Rptr. 3d at 749. *Rana v. Gu*'s, 220 F. Supp. 3d 989, analysis of justification was limited to the facts of the landlord's pretextual reason for the eviction. *Id.* at 994.

[207] Garnett, *supra* note 22, at 1198; Lemar, *supra* note 188, at 309 ("If anything, home-based day cares are more likely than other home businesses to impose on their neighborhoods [certain] negative externalities . . . ."). *But see* Zasloff, *supra* note 43 (arguing that many government justifications in the land use context, including traffic and parking, should not survive scrutiny under the FHA).

[208] SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 13–15 (2014).

[209] Garnett, *supra* note 22, at 1204–05.

[210] Terrien v. Zwit, 648 N.W.2d 602, 611 (Mich. 2002) (alteration in original) (quoting Signaigo v. Begun, 207 N.W. 799, 800 (Mich. 1926)).

[211] Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1980 (2015).

no equivalent requirement for home occupations including dog groomers, professional offices, and repair shops.[212] To the extent that a plaintiff could, for example, demonstrate that a permitted home office generated more traffic than a prohibited in-home daycare, she could show that the prohibition on in-home daycare was not, in fact, based on legitimate interests. Similarly, if daycares are banned but schools or even churches are permitted — both care for children — those could prove relevant comparators.

A comparison to ordinary family life — that is, the noncommercial provision of child care — reveals the deeper gender stereotypes underlying bans on in-home daycares. There is no meaningful difference between the noise generated by a four-child in-home daycare and a family with four children and a stay-at-home parent. The daycare may generate a marginal amount of traffic at drop-off and pick-up, but those few trips per day are hardly significant, especially given that customers are likely to live in the neighborhood.[213] As compared to a grandmother or aunt caring for children from multiple nuclear families, there may not even be any difference in traffic. In the Supreme Court's words, bans on the smallest-impact in-home daycares may be "artificial, arbitrary, and unnecessary barriers."[214]

What really distinguishes small daycares from large families, from this standpoint, is the regulator's perception that a woman caring for children for money (a prohibited commercial activity) is different from a woman caring for children based on love or family obligation (a permitted residential activity). Nothing else makes the one activity consistent with "residential character" and the other a threat to it. That distinction ultimately rests on impermissible claims about women's proper role in society and in the family — not on legitimate land use planning concerns.[215] Where the impacts of ordinary family life and commercial child-care operations are equivalent, the FHA should not permit land use restrictions to distinguish the two. Just as racialized conceptions of community character cannot justify discrimination,[216] neither can gendered conceptions.

Even where defendants can cite substantial interests justifying their discrimination against in-home daycares — and regardless of whether a

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[212] BUTTE CNTY. CODE, §§ 24-159(E)(3), 24-162 (2020). In a rural community, this is a costly requirement.

[213] *Cf.* Sam Richards, *Pittsburg Changes Rules for Home Daycare, and Wants More of Them*, E. BAY TIMES (Feb. 27, 2017, 11:28 AM), https://www.eastbaytimes.com/2017/02/24/pittsburg-tightens-rules-for-home-daycare-but-wants-more-of-them [https://perma.cc/XQ5H-FQZM] ("[P]olice Chief Brian Addington told the council that, in 23 years on the force, he can't recall a single instance in which a daycare business caused any sort of a traffic or disturbance issue.").

[214] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[215] Legal historian Kate Redburn has demonstrated the continuing importance of outdated conceptions of the family in other aspects of land use law. *See* Redburn, *supra* note 21.

[216] Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 608–12 (2d Cir. 2016).

definition of "residential character" that excludes in-home daycares is considered nondiscriminatory — plaintiffs may still prevail at the third stage in the burden-shifting framework. An outright prohibition will rarely be the least discriminatory alternative available for mitigating the impact of a small in-home daycare. Rather than banning in-home daycares, governments, homeowners' associations, and landlords can target the actual harms at issue. They might prohibit commercial signage or require that parking be secured for parents' use. They could exclude only large operations not comparable to ordinary family life. Notably, banning in-home daycares altogether seems hard to justify based on observable externalities like noise or traffic. Instead, the idea that homes must be protected from proximity to the very act of paid child care, as opposed to its objective impacts, seems necessarily to rest on outdated ideas about women, the family, and the (gendered) domestic sphere.

In sum, many in-home daycare operators have promising FHA claims. Their prima facie case is relatively easy to establish, as a few courts have recognized. Where daycares are treated worse than other home occupations, operators should prevail on their larger disparate impact claims as well — without any doctrinal or theoretical leaps required for the courts. At the same time, the disparate impact framework also suggests that in-home daycare bans are impermissible where the impacts of the daycare are minimal compared to traditional residential use. Fair housing law allows residential life to be kept apart from noise, traffic, and incompatible uses; it should not privilege stay-at-home parenting as a land use.

B. Sex Stereotyping and Discrimination Against Men: Restrictions on Single Room Occupancy Housing

The Fair Housing Act's prohibition on sex discrimination protects men just as it protects women. And it is men who have borne the brunt of a sustained attack on a particular form of historically low-quality, low-cost housing: the single room occupancy, or SRO. SROs are housing units — often provided as short-term rentals or hotel rooms — that provide individual sleeping quarters but shared bathrooms and shared or no kitchens.[217] These units, overwhelmingly occupied by men in the second half of the twentieth century,[218] were largely destroyed by the 1980s. Many of the men living in them ended up homeless, in shelters or on the streets. While policymakers have belatedly come to appreciate the value of SROs as housing-of-last-resort, many laws still impede or outright prohibit their operation, leaving the lowest rung on the housing

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[217] Brian J. Sullivan & Jonathan Burke, *Single-Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, 17 CUNY L. REV. 113, 115 (2013).

[218] Note, *No Room for Singles: A Gap in the Housing Law*, 80 YALE L.J. 395, 397 (1970) [hereinafter *No Room for Singles*] ("[Single Room Occupants] are a unique class within American society. They are predominantly males.").

ladder missing. The Fair Housing Act could be used to attack the most restrictive of these laws.

A disparate impact challenge to SRO regulations would uncover how arbitrary regulations rooted in sex stereotypes underlie many building and zoning code provisions, constraining and homogenizing the forms of housing available today. Governments can cite important, nondiscriminatory interests in regulating and even banning SROs, even though those bans disproportionately harm men. SROs were often run-down, unhealthy, and unsafe. But those legitimate concerns were shot through with gendered notions about the proper home — single-family, separated, suburban, and under the domesticating control of a woman — and the pathologies of single, unattached men. This section begins with the history of shared living arrangements to illustrate how gender stereotypes led reformers, quite intentionally, to regulate SROs nearly out of existence, and far beyond what health and safety require. Governments eliminated the SRO based on a combination of legitimate concerns over unsafe conditions, hazy stereotypes about family life, and intentional discrimination against concentrated male populations, which were deemed blight-causing nuisances. As such, plaintiffs will often be able to demonstrate that SRO regulations are not the least discriminatory alternative available. Through disparate impact scrutiny, essential health and safety regulations can be disentangled from those motivated by stereotype and bias — and a new generation of safe SROs can be built.[219]

1. Gender, the Home, and Precursors to the SRO. — The story of the SRO begins in the mid-nineteenth century, when contemporary, moralized conceptions of the "home" first took root in American culture.[220] Before then, the household and the workplace were not understood as separate: market and household activity overlapped spatially.[221] As the century progressed, ideals of the home as a space protected from public life, and especially from the market, grew dominant, ultimately driving housing policy through the twentieth century.[222] But this idealized home — safe from market forces — was only an ideal, especially in the country's fast-growing cities.

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[219] *Cf. Inclusive Cmtys.*, 135 S. Ct. at 2522 (noting that disparate impact "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment").

[220] WENDY GAMBER, THE BOARDINGHOUSE IN NINETEENTH-CENTURY AMERICA 1–2 (2007).

[221] Apprentices lived with their employers, for example. *Id.* at 2–3; *see also* Garnett, *supra* note 22, at 1191.

[222] HAYDEN, *supra* note 11, at 41–42.

In the nineteenth century, the boardinghouse — where a landlady (almost always a lady) provided boarders with a bedroom and communal meals — was the primary alternative to single-family living. As many as one-half of nineteenth-century urban Americans either boarded or took in boarders.[223] The boardinghouse was a fraught institution, understood to upend the proper relationship between the sexes. By freeing individuals from the supervision of the family, the boardinghouse posed the threat of sexual freedoms and impropriety: the boardinghouse was seen as the path to "moral ruin."[224] Even for married couples, the boardinghouse challenged proper gender relations. As Chicago judge John A. Jameson wrote in 1883, "[b]oarding-house life is especially fatal to permanence of the marital relation."[225] Because the women's work of cooking and furnishing a home was outsourced, boarding constituted "wifely insubordination."[226]

The boardinghouse would soon be replaced by institutions even less amenable to Victorian gender norms (indeed, turn-of-the-century observers looked back fondly on the boardinghouse as having "something of the home element"[227]). For the middle classes, the rooming house — where unlike the boardinghouse, there were no shared meals and no landlady overseeing tenants' social lives — took its place.[228] Rooming houses were cheaper for owners and offered residents more autonomy.[229] As such, the transition from boardinghouse to rooming house was rapid: in San Francisco, for example, boardinghouses provided forty percent of commercial housing in 1875, but only ten percent by 1900 and one percent by 1910.[230] The era's moral concerns over the boardinghouse applied doubly to the rooming house. Here, neither parents nor landladies provided oversight, creating a transient world that facilitated informal relationships.[231] Economist Albert Benedict Wolfe, describing Boston's rooming house districts, bemoaned the "contamination of

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[223] GAMBER, *supra* note 220, at 3.

[224] *Id.* at 104. Both sex-segregated and mixed-sex boardinghouses were suspect. In New York City, the terms "female boardinghouse" and "lady boarder" referred to prostitution, *id.* at 102, while mixed-sex boardinghouses were termed "promiscuous," *id.* at 15.

[225] *Id.* at 116.

[226] *Id.* at 122.

[227] *Id.* at 170 (quoting ALBERT BENEDICT WOLFE, THE LODGING HOUSE PROBLEM IN BOSTON 46 (1913)).

[228] Arnold M. Rose, *Living Arrangements of Unattached Persons*, 12 AM. SOCIO. REV. 429, 433 (1947).

[229] PAUL GROTH, LIVING DOWNTOWN: THE HISTORY OF RESIDENTIAL HOTELS IN THE UNITED STATES 126–27 (1994).

[230] *Id.* at 93.

[231] *Id.* at 216; *see also* Lillian Cohen, *Los Angeles Rooming-House Kaleidoscope*, 16 AM. SOCIO. REV. 316, 316 (1951) ("In rooming-houses are collected individuals who are, for the most part, outside the pale of regulated monogamous living."); 1 JAMES FORD, SLUMS AND HOUSING, WITH SPECIAL REFERENCE TO NEW YORK CITY 428 (1936).

young men, the deterioration in the modesty and morality of young women, the existence of actual houses of prostitution in the guise of lodging-houses, the laxity of landladies, the large number of informal unions, [and] the general loosening of moral texture."[232]

These fears were widespread, mainstream, and highly influential. Wolfe, for example, was a leading intellectual: a future president of the American Economic Association and in close conversation with top housing officials nationwide.[233] A Census Bureau publication attacked the trend of married women living in rooming houses as an abrogation of women's responsibility to contribute to "the permanence and stability of civic life through the maintenance of homes."[234] There were other, less gendered objections to rooming house life as well: it lacked the conservative virtues of ownership and rootedness, and reformers had legitimate concerns about health and fire safety.[235] On the West Coast, where lodging houses were associated with Asian American residents, race drove the opposition to shared living.[236] But gender roles and relations were at the heart of the turn-of-the-century critique of the rooming house.[237] Indeed, feminists like Charlotte Perkins Gilman fundamentally shared critics' analysis, disagreeing only over whether the "feminist apartment hotel" was desirable.[238]

Poor urban Americans, who could not afford rooming houses, relied on different forms of shared living, but these too threatened turn-of-the-century gender norms. For better paid workers, lodging houses resembled more sparsely furnished rooming houses, but with rooms usually rented by the night.[239] More common was the "cubicle hotel," in which large lofts were subdivided into dozens of stalls as small as five by seven

[232] Joanne Meyerowitz, *Sexual Geography and Gender Economy: The Furnished Room Districts of Chicago, 1890–1930*, 2 GENDER & HIST. 274, 275 (1990) (quoting WOLFE, *supra* note 227, at 171).

[233] GROTH, *supra* note 229, at 235; *Past Presidents*, AM. ECON. ASSOC., https://www.aeaweb.org/about-aea/leadership/officers/past-officers/presidents [https://perma.cc/4X8R-3XLV].

[234] GROTH, *supra* note 229, at 209–10 (quoting BERTHA M. NIENBURG, DEP'T OF COM. & BUREAU OF THE CENSUS, THE WOMAN HOME-MAKER IN THE CITY 9 (1923)).

[235] *Id.* at 222–30.

[236] Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1251 & n.102 (2005). The country's first lodging house ordinance was enacted in 1870 in San Francisco, at the behest of the Anti-Coolie Association. It was enacted alongside, and enforced by, an ordinance that required shaving the braids of Chinese offenders, and while the forced-shaving ordinance was ruled unconstitutional, the lodging house ordinance was not. *Id.*

[237] *See* CHARLES HOCH & ROBERT A. SLAYTON, NEW HOMELESS AND OLD: COMMUNITY AND THE SKID ROW HOTEL 20–22 (1989); Meyerowitz, *supra* note 232, at 283; GROTH, *supra* note 229, at 216.

[238] DOLORES HAYDEN, THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN HOMES, NEIGHBORHOODS, AND CITIES 189 (1981); JACKSON, *supra* note 12, at 136.

[239] GROTH, *supra* note 229, at 141–43.

feet, with partitions running partway to the ceiling and topped with chicken wire.[240] Cheaper still were open dormitories.[241] Here, individuals rented just a bed, not a room. The poorest would sleep in flophouses — which offered no beds at all, just a dry floor and perhaps some mattresses — or pay to sleep in a private hallway, theater, or bar.[242] While some of these institutions were merely spartan, most were crowded, filthy, unventilated, vermin-infested firetraps.[243] Tuberculosis rates were four times higher than normal in Chicago's lodging-house districts.[244]

Unlike the middle-class rooming house, which was a mixed-sex institution,[245] the low-end lodging house was "overwhelmingly a male workers' realm."[246] On the Bowery in New York City, for example, of sixty-three cheap hotels, only three were for women.[247] Many of these men were unskilled laborers paid day by day.[248]

As with the rooming house, the cheap lodging house was a target of reformers, whose core critique "was a moral one, rooted in the fact that it did not fit Victorian middle-class concepts for home, family, and community."[249] Sophonisba Breckinridge and Edith Abbott, two founders of the modern profession of social work and influential Chicago reformers, described lodging house neighborhoods as "given over to miserable, unemployed men"[250] who "demoraliz[e]" families.[251] For Progressive Era reformers, the lodging house combined all the rooming house's undomestic faults with the perceived dangers of a concentrated male population.

2. *Gender and Legal Attacks on Single-Room Living.* — Over the course of the twentieth century, this gender-based distrust of shared housing was inscribed into law. The legal attack on single-room living came in many forms and was tied into a broader attack on so-called congregate living: anything short of single-family life in a detached

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[240] *Id.* at 143–45.
[241] *Id.* at 144.
[242] *See id.* at 147–48.
[243] HOCH & SLAYTON, *supra* note 237, at 48–50.
[244] *Id.* at 49.
[245] *Id.* at 19.
[246] GROTH, *supra* note 229, at 137; *see also* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1208 (1996); HOCH & SLAYTON, *supra* note 237, at 46 ("Tenants were usually men only.").
[247] GROTH, *supra* note 229, at 138.
[248] *Id.* at 134–35.
[249] HOCH & SLAYTON, *supra* note 237, at 73.
[250] Sophonisba P. Breckinridge & Edith Abbott, *Chicago's Housing Problem: Families in Furnished Rooms*, 16 AM. J. SOCIO. 289, 292 (1910).
[251] *Id.* at 307.

house.[252] It would be impossible to catalog the full set of policies, enacted city by city and state by state, that inhibited the construction and operation of SROs. But lawmakers repeatedly invoked gender as they slowly constrained and destroyed shared forms of housing.[253]

In 1910, for instance, a model tenement house law was published by Lawrence Veiller, a New York City official and perhaps the most influential housing policy expert of the era.[254] One section of that code prohibited the use of any space in a tenement house to — in this order — hold livestock, serve as a lodging house, or store rags.[255] Veiller's commentary explained why lodging houses were placed between pigs and volatile rags as a prohibited nuisance: "It is highly undesirable to permit any part of a tenement house which is occupied by families and little children to be used as a common lodging house for homeless men."[256] Put differently, a concentration of poor, single men posed a danger to family life on par with fire and disease. At least forty cities enacted legislation based on this model.[257]

Building codes intervened in other ways as well: some more salutary, some more discriminatory. California prohibited the construction of new cubicle hotels in 1917; the same law also demanded all lodging houses provide separate toilets and separate showers for each sex, evidencing a continued concern with improper contact between the sexes.[258] By the 1920s, both generally applicable and lodging-house-specific building code requirements increased the quality — and cost —

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[252] Sullivan & Burke, *supra* note 217, at 120; GROTH, *supra* note 229, at 238–39. Many of the fiercest attacks were against what was commonly known as the "lodger evil": the practice of a private family renting space in their apartment to a tenant. *See* Ellen Pader, *Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land*, 19 J. ARCHITECTURAL & PLAN. RSCH. 300, 307 (2002); Sophonisba P. Breckinridge & Edith Abbott, *Housing Conditions in Chicago, III: Back of the Yards*, 16 AM. J. SOCIO. 433, 456–58 (1911); David T. Beito & Linda Royster Beito, *The "Lodger Evil" and the Transformation of Progressive Housing Reform, 1890–1930*, 20 INDEP. REV. 485 (2016). Here, too, sex and gender roles were at the center of the critique.

[253] The breadth of "shared living" arrangements is helpfully illuminated by Professor Lee Anne Fennell's description of the spatial and temporal scale of the home. Spatially, the home can expand or contract from a space that is limited to a bed or a room, to an apartment with a bathroom and kitchen, to a house, perhaps with green space, a swimming pool, and a gym inside the scope of private property. Temporally, housing might be sliced by the hour, the night, the month, the year, or as a permanent property interest. Lee Anne Fennell, *Property in Housing*, 12 ACADEMIA SINICA L.J. 31, 56–57 (2013). Reform pushed the favored form of housing toward larger spatial and temporal scales.

[254] Judith A. Gilbert, *Tenements and Takings:* Tenement House Department of New York v. Moeschen *as a Counterpoint to* Lochner v. New York, 18 FORDHAM URB. L.J. 437, 496 (1991).

[255] LAWRENCE VEILLER, A MODEL TENEMENT HOUSE LAW § 94 (1910).

[256] *Id.* As Professor Paul Groth has argued, it is notable that such men were commonly referred to as "homeless," given that a person living in a lodging house was by definition housed, at least for the night. The use of the term "homeless" reveals the early twentieth century sentiment that such housing could not constitute a proper "home." GROTH, *supra* note 229, at 16–17.

[257] Gilbert, *supra* note 254, at 496.

[258] GROTH, *supra* note 229, at 243.

of new construction past the point where the private sector would construct low-income housing without subsidy.[259] Few new SRO units were built after this point.

Comprehensive zoning laws, which spread quickly throughout the country after New York City passed its zoning code in 1916, also contributed to the demise of rooming and lodging houses. By separating residential and commercial activities, zoning made it infeasible to provide sleeping quarters without kitchens — there would be nowhere in walking distance to eat.[260] Moreover, the broad and fast-growing swaths of cities now zoned as residential districts often excluded "commercial" forms of housing, precisely in order to preserve proper gender roles.[261] The California Supreme Court, in upholding the constitutionality of a zone limited to one- and two-family homes, explained that such zoning was necessary to preserve the "character and quality of manhood and womanhood."[262] Notably, the court expressly mentioned residential "hotels" in addition to apartments as a threat to proper manhood and womanhood.[263] For these jurists, gender was not a subtext. It was the express reason for regulating shared housing.

3. The Rise and Fall of the Postwar SRO and the Creation of the Homelessness Crisis. — Building and zoning codes halted the construction of new SROs, but existing units remained profitable for decades longer. The Depression increased demand for the cheapest urban housing stock, as did the industrial mobilization of World War II.[264] After 1945, however, the fates of middle- and low-income shared housing diverged. The rooming house districts (many of which had been converted from single-family homes in the first place) largely became working-class family neighborhoods: middle-class Americans had less need for rooming houses thanks to the GI Bill and a booming economy increasingly organized around large companies and stable jobs.[265]

Poor lodging house districts, in contrast, became Skid Rows. With able-bodied men gone, primarily old and hard-to-employ men remained, and the areas' reputation for deviance only increased. In Seattle, for example, Skid Row residents were described on a spectrum from "fading, balding, watery men" to "petty thieves, bootleggers, drug peddlers,

[259] HOCH & SLAYTON, *supra* note 237, at 64.

[260] GROTH, *supra* note 229, at 248–51.

[261] As Professor Frank Alexander has argued, the very distinction between "commercial" and "non-commercial" housing is conceptually problematic. The rental of a single-family apartment is generally not treated as a business use, whereas the rental of a room is. This distinction "may represent a fundamental desire to control relationships between residents" and not a meaningful economic distinction. Alexander, *supra* note 236, at 1244.

[262] Miller v. Bd. of Pub. Works, 195 Cal. 477, 493 (1925).

[263] *Id.* at 494.

[264] GROTH, *supra* note 229, at 265; Sullivan & Burke, *supra* note 217, at 120.

[265] HOCH & SLAYTON, *supra* note 237, at 89.

perverts, alcoholics and fugitives from the law."[266] These descriptions were stereotypes: in fact, most Skid Row residents in the 1950s were still employed, albeit at low wages, and only a minority of residents were heavy drinkers (outright alcoholics made up seventeen percent of residents in one study).[267] What Skid Row residents were was poor, single, and male: ninety-six percent male in Chicago.[268] That demographic profile was enough to stigmatize the areas, leading to their ultimate destruction.

The most serious blow came from urban renewal, which directly destroyed tens, if not hundreds, of thousands of SRO units. The seeds for this policy were planted early. A conference on housing convened by President Hoover, which presaged federal urban renewal policies, declared SROs to be "degenerate" — a term itself linked to sex and gender — and a primary cause of blight.[269] In describing the "slum," the conference report portrayed families as relatively innocent and merely "marooned" in bad neighborhoods.[270] The single (male) population, however, included "the queer, the unadjusted, the radical, the 'Bohemian' and the criminal": a set of malign figures personally responsible for transforming mere blight into an irremediable slum.[271] The identification of SROs with blight ran in parallel to contemporary planning orthodoxies that saw racial and ethnic minorities, and racial integration, as sources of blight; through the 1950s, the SRO and Skid Row

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[266] Jonathon Arthur Rusch, Single Room Occupancy Hotels, Historic Preservation, and the Fate of Seattle's Skid Road 75 (Jan. 28, 2013) (M.A. thesis, Cornell University), https://ecommons.cornell.edu/handle/1813/33865 [https://perma.cc/RE6H-KCVE] (first quoting MONICA SONE, NISEI DAUGHTER 15 (1993); and then quoting *id.* at 9).

[267] HOCH & SLAYTON, *supra* note 237, at 94–99; *No Room for Singles*, *supra* note 218, at 398 ("SRO's are often stereotyped as 'drunks,' but, in fact, only a relatively small proportion are alcoholics."). The residents of SROs would become poorer and less employed in the 1960s and 1970s as SRO conditions deteriorated and deinstitutionalization created a new population of residents. There is extensive academic debate about the health, independence, and stability of SRO populations during this period. Erin Mifflin & Robert Wilton, *No Place Like Home: Rooming Houses in Contemporary Urban Context*, 37 ENV'T & PLAN. 403, 404–05 (2005).

[268] HOCH & SLAYTON, *supra* note 237, at 97. In the immediate postwar period, Skid Row residents were also still largely white. *Id.* Not every SRO was all male. *See* Joan H. Shapiro, *Single-Room Occupancy: Community of the Alone*, 11 SOC. WORK 24, 28 (1966). In mixed-sex SROs, however, observers worried about "matriarchal quasi-families," *id.* at 30, an idea that was highly stigmatized and understood as part of a "tangle of pathology" purported to characterize the Black community, *see* Tonya L. Brito, *What We Talk About When We Talk About Matriarchy*, 2013 MICH. ST. L. REV. 1263, 1270 (quoting DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LAB., THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 47 (1965), https://web.stanford.edu/~mrosenfe/Moynihan%27s%20The%20Negro%20Family.pdf [https://perma.cc/MG6J-JKNZ]).

[269] THE PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, SLUMS, LARGE-SCALE HOUSING, AND DECENTRALIZATION 43 (John M. Gries & James Ford eds., 1932).

[270] *Id.* at 31.

[271] *Id.* at 32.

populations were overwhelmingly white in most cities, though by the 1970s they had become disproportionately non-white.[272]

Once urban renewal was underway, it devastated the remaining SRO stock.[273] A single redevelopment project in Chicago destroyed sixteen SRO buildings containing a total of 2,849 housing units.[274] The construction of San Francisco's Yerba Buena Center destroyed more than 4,000 units of housing;[275] ninety-seven percent of the displaced population lived in SROs and hotels.[276] New Haven, Connecticut, lost eleven of its twelve residential hotels by 1970.[277] Planners were well aware that they were wiping out the SRO housing stock; for many, that was the purpose.[278] To make matters worse, SRO residents were until 1970 excluded from federal relocation assistance programs, and even then, many received assistance on unfavorable terms.[279]

Even where not bulldozing SROs, many cities continued to work to shut down those that existed. In New York City, the city government provided tax incentives and mandates for converting SRO units to apartments; rewrote its building and zoning codes to discourage SROs; and banned the construction of new SRO units in most circumstances.[280] As intended, these programs devastated the stock of SROs.[281] By one

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[272] HOCH & SLAYTON, *supra* note 237, at 97; Harvey A. Siegal & James A. Inciardi, *The Demise of Skid Row*, 19 SOCIETY 39, 43–44 (1982).

[273] In all but one city surveyed in 1967, officials understood that Skid Rows were disappearing, even while the population who lived in them was not. Howard M. Bahr, *The Gradual Disappearance of Skid Row*, 15 SOC. PROBS. 41, 43–45 (1967).

[274] HOCH & SLAYTON, *supra* note 237, at 120.

[275] STAFF OF S. COMM. ON AGING, 95TH CONG., SINGLE ROOM OCCUPANCY: A NEED FOR NATIONAL CONCERN, at iv (Comm. Print 1978).

[276] GROTH, *supra* note 229, at 283.

[277] *No Room for Singles*, *supra* note 218, at 402 n.36; *see also* Adrien A. Weibgen, There Goes the Neighborhood: Slums, Social Uplift, and the Remaking of Wooster Square 41 (2013) (unpublished manuscript), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1024&context=student_legal_history_papers [https://perma.cc/WWB7-GYW4] (observing that majority of SRO residents on one New Haven street were single men by 1950s).

[278] That the elimination of SROs was a considered choice is highlighted by the case of Sacramento, which attempted to build a new SRO district — complete with hotels, pawnshops, cafeterias, and public lockers — as part of urban renewal. As an agricultural center, Sacramento felt it needed to support transient, single male workers. It retained national figures like modernist architect Richard Neutra and Catherine Bauer, the architect of the 1937 Housing Act, to develop its plans. James Michael Williams, West End Boys: Urban Redevelopment and the Elimination of Sacramento's Skid Row 34–47 (2013) (M.A. thesis, California State University, Sacramento), http://csus-dspace.calstate.edu/bitstream/handle/10211.9/2238/WestEndBoys_JWilliams_2013.pdf?sequence=5 [https://perma.cc/8BK7-4CF8].

[279] *No Room for Singles*, *supra* note 218, at 403, 411–13; *see also* James H. Scheuer et al., *Disposition of Urban Renewal Land — A Fundamental Problem in the Rebuilding of Our Cities*, 62 COLUM. L. REV. 959, 969 n.60 (1962) (asking, in connection with relocation, "What is to be done with the homeless men when the cheap hotels, rooming houses, and missions are demolished?").

[280] Sullivan & Burke, *supra* note 217, at 121–22.

[281] *See* Charles G. Bennett, *Council Puts Ban on Rooming House: Conversion to "Single Room Occupancy" Halted as Result of Building Inspections*, N.Y. TIMES, May 5, 1954, at 33 (identifying

estimate, 100,000 New York City SRO units were eliminated after 1960.[282] In just the five-year period between 1976 and 1981 (already well into the loss of SROs), two-thirds of SRO units in the city disappeared.[283] Nationwide, as many as a million rooms were lost during the 1970s alone.[284]

Without these units, people went homeless. "There is an uncontested relationship between the availability of SRO housing and homelessness."[285] The individuals who previously lived in SROs had to go somewhere, and there was nowhere lower cost.[286] While some could afford to upgrade their housing, and others ended up in new, illegal SROs,[287] many ended up on the street. As one homeless advocate put it: "[T]here were laws passed to push the private sector out of the SRO business on the theory that SROs were inhumane . . . . Consequently, people sleep on grates outside."[288] In New York City, a 1980 survey of homeless men in the shelter system found that about half had previously lived in an SRO.[289] Courts grappling with the new homelessness crisis concluded similarly.[290] While rising homelessness rates had many causes, "the destruction of SRO housing is a major factor in the growth of homelessness in many cities."[291]

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legal changes as "doom[ing] the old-fashioned rooming house"); *see also Mayor Urges Law to Ban Crowded One-Room Flats*, N.Y. TIMES, Apr. 11, 1954 (noting ban proposed in part because SRO conditions "break down morals").

[282] Malcolm Gladwell, *N.Y. Hopes to Help Homeless by Reviving Single Room Occupancy Hotels*, L.A. TIMES (Apr. 25, 1993, 12:00 AM), https://www.latimes.com/archives/la-xpm-1993-04-25-mn-27098-story.html [https://perma.cc/2LXK-TEHW].

[283] Sullivan & Burke, *supra* note 217, at 122.

[284] GROTH, *supra* note 229, at 286.

[285] Sullivan & Burke, *supra* note 217, at 118; *see also* Jack Kemp, Opinion, *SROs Are an Important Part of the Affordable-Housing Picture*, CHI. TRIB. (Apr. 24, 1991), https://www.chicagotribune.com/news/ct-xpm-1991-04-24-9102060347-story.html [https://perma.cc/EU2C-GARP]; Christopher Jencks, *Housing the Homeless*, N.Y. REV. BOOKS (May 12, 1994), https://www.nybooks.com/articles/1994/05/12/housing-the-homeless [https://perma.cc/3B7W-KEUV].

[286] Bahr, *supra* note 273, at 44–45.

[287] Leslie Kaufman & Manny Fernandez, *Illegal Boarding Houses Pit City's Laws Against Lack of Alternatives*, N.Y. TIMES (Jan. 22, 2008), http://www.nytimes.com/2008/01/22/nyregion/22homeless.html [https://perma.cc/LTF9-K2DD].

[288] Gladwell, *supra* note 282.

[289] *Id.*

[290] Buck v. Moran, 485 N.Y.S.2d 421, 426, 430 (N.Y.C. Civ. Ct. 1984) (finding that SRO residents, who were "almost entirely . . . single men," *id.* at 426, would end up in "men's shelters" or "living on the street," *id.* at 430, if anti-SRO laws were enforced), *rev'd*, 133 Misc. 2d 626 (App. Term 2d Dep't 1986).

[291] NAT'L COAL. FOR THE HOMELESS, WHY ARE PEOPLE HOMELESS? 5 (2007), http://www.nationalhomeless.org/publications/facts/Why.pdf [https://perma.cc/NYX3-P5TT]. This took place across many cities. Los Angeles lost half its downtown SROs during this period; Denver lost sixty-four percent of its SROs; and Chicago had its once-plentiful cubicle hotels totally eliminated. *Id.*

Confronted with this crisis, many cities reversed course, imposing new policies to preserve existing SROs, including moratoria on the conversion of buildings away from SRO status.[292] The federal government, too, revised its policies to attempt to preserve and rehabilitate SROs.[293] In general, though, this was "too little, too late."[294] No meaningful replacement for the million rooms lost was ever provided.[295]

4. Fair Housing Act Liability for Anti-SRO Policies. — This history illustrates how, across two centuries, American housing policy rejected and then eradicated shared housing models precisely because they threatened Victorian gender roles and ideals of the family. SROs were destroyed because of stereotypes about, and discrimination against, concentrations of single men.[296] Where SROs are limited because of those sex stereotypes, rather than health and safety concerns, this violates the Fair Housing Act.

At first, an intentional discrimination claim seems auspicious: policymakers attacked shared living because of its sexual politics and often made their gendered objections explicit. Even so, such a suit would likely not succeed. One particularly difficult bar to clear involves causation. Under the Fair Housing Act, the "same decision" defense allows a discriminatory defendant to prevail by showing that it would have acted the same way based on alternative, nondiscriminatory rationales.[297] Given how many different features of American housing policy

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[292] *E.g.*, SAN FRANCISCO ADMIN. CODE ch. 41 ("Residential Hotel Unit Conversion and Demolition Ordinance"); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1062 (N.Y. 1989) (striking down New York City moratorium as unconstitutional taking).

[293] McKinney-Vento Homeless Assistance Act, Pub. L. 100-77, § 441, 101 Stat. 482, 508 (1987).

[294] Sullivan & Burke, *supra* note 217, at 124.

[295] It is difficult to estimate exactly how many SROs exist, even in a single jurisdiction like New York City, much less nationwide. Eric Stern & Jessica Yager, 21st Century SROs: Can Small Housing Units Help Meet the Need for Affordable Housing in New York City? 5–6, 5 n.17 (Feb. 20, 2018) (citing Jake Wegmann & Sarah Mawhorter, *Measuring Informal Housing Production in California Cities*, 83 J. AM. PLAN. ASS'N 119 (2017)), https://furmancenter.org/files/Small_Units_in_NYC_Working_Paper_for_Posting_UPDATED.pdf [https://perma.cc/8TLB-2JBC]. But it is clear that the number of units is dramatically less than at mid-century.

[296] In some cases, this discrimination included concerns about homosexuality in SROs and rooming houses. Some rooming houses — most famously the YMCA — were important centers of gay life. *See* GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940, at 152–55 (1994). Around sixty percent of gay men jailed in New York City in the late 1930s gave rooming houses as their addresses. *Id.* at 152. However, in most cases, gay men were able to use the presumption of heterosexuality to avoid scrutiny in rooming houses and SROs, and reformers were far more concerned with policing female sexuality — especially prostitution — in rooming houses than with homosexuality. *Id.* at 176. To the extent particular regulations involved anti-gay animus, this may provide another ground for a Fair Housing Act challenge. *See* Smith v. Avanti, 249 F. Supp. 3d 1194, 1197–98 (D. Colo. 2017); *supra* note 31.

[297] Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 613 (2d Cir. 2016). This defense was abrogated by statute for Title VII.

commingled to make single-family living the standard — not just sexism, but racism and anti-immigrant prejudice, Jeffersonian norms of private property and independence, and the incentives of local government structures for "fiscal zoning," among others — that defense seems difficult to overcome in theory and insuperable in practice.[298] An intentional discrimination suit would be bracing, in forcing a court to grapple with the history of sex and single-family zoning, but disparate impact provides the more plausible path forward.[299]

SRO plaintiffs — operators seeking to open a facility, perhaps, or residents of an illegal SRO facing sanction — should generally be able to make out a prima facie case of disparate impact. Government limitations on SRO operation disproportionately affect men. When still prevalent, SROs served a population that was primarily male, and when they were eliminated, it was those men who ended up homeless (unlike when SROs were first targeted for elimination, however, today's homeless population — the most important beneficiaries of any potential SRO legalization — is disproportionately Black and Native American[300]). The gender disparities of eliminating SROs remain visible in the homeless population today. Men make up seventy percent of the individual homeless population (as opposed to the homeless family population).[301] Among unsheltered individuals, men constitute a slightly higher share.[302] These gender disparities, which have remained stable over the past decade, are particularly striking because men are actually underrepresented among individuals living in poverty.[303]

Moreover, strong evidence suggests legalizing SROs would mitigate homelessness. Financial modeling shows that in New York City, where

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[298] As Richard Rothstein has discussed in the context of racial segregation, intentional, de jure housing discrimination may be illegal, but "it does not follow that litigation can remedy this situation." RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, at xi (2017).

[299] Evidence of discriminatory intent does strengthen disparate impact claims. *See* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1292 (7th Cir. 1977) ("[T]he equitable argument for relief is stronger when there is some direct evidence that the defendant purposefully discriminated . . . .").

[300] *Racial Inequalities in Homelessness, by the Numbers*, NAT'L ALL. TO END HOMELESSNESS (June 1, 2020), https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers [https://perma.cc/27ET-BSV6].

[301] U.S. DEP'T OF HOUS. & URB. DEV., THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 22 (2018), https://www.huduser.gov/portal/sites/default/files/pdf/2018-AHAR-Part-1.pdf [https://perma.cc/Z6H4-9E6J].

[302] *Id.* at 23. Disparities in shelter use involve a larger array of factors, including the allocation of shelter beds for men, women, and families and different willingnesses to use shelter.

[303] U.S. DEP'T OF HOUS. & URB. DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 2: ESTIMATES OF HOMELESSNESS IN THE UNITED STATES 1-8, 2-8 (2018), https://www.huduser.gov/portal/sites/default/files/pdf/2017-AHAR-Part-2.pdf [https://perma.cc/P6UY-2H94].

high rent is a major driver of homelessness, new efficiency units built with shared kitchens and bathrooms could be provided at rents just over half that of a small studio.[304] If legal, such units could provide more housing at lower cost — and allow public subsidies to stretch further. These units would be particularly well suited for homeless men: SROs are designed to serve single individuals, and men are less likely to have family obligations than are women. Thus, plaintiffs' prima facie case is relatively clear. Postwar SROs overwhelmingly served male residents, and many of those male residents were turned out onto the street when they shut down. Even today, liberalizing SRO regulations can provide new housing options for those at risk of homelessness.[305]

This analysis of the prima facie case does not extend to every policy affecting SROs, of course. Higher-rent SROs, often branded as "micro-units," may not serve the same disproportionately male population — and certainly don't serve otherwise homeless individuals.[306] Some SROs may provide housing that is so impermanent that it falls outside the scope of the FHA.[307] Plaintiffs must also identify the precise regulations that combine to preclude SRO construction in their jurisdiction, which may be a meaningful challenge.[308] Still, many plaintiffs should succeed at this initial stage of litigation.

Defendants' burden, in turn, is probably even easier to carry. Local and state governments can put forward legitimate, nondiscriminatory interests served by almost all their anti-SRO policies. The conditions of

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[304] Stern & Yager, *supra* note 295, at 11.

[305] Bans on SROs may also allow illegal SROs, whose tenants face unsafe conditions and a lack of basic legal protections, to continue operating illicitly. Sullivan & Burke, *supra* note 217, at 139–40.

[306] *See, e.g.*, David Neiman, *How Seattle Killed Micro-Housing*, SIGHTLINE INST. (Sept. 6, 2016, 6:30 AM), https://www.sightline.org/2016/09/06/how-seattle-killed-micro-housing [https://perma.cc/ZN93-68YS]; John Infranca, *Spaces for Sharing: Micro-Units amid the Shift from Ownership to Access*, 43 FORDHAM URB. L.J. 1, 9–10 & n.41 (2016) (comparing SROs and micro-units). That said, higher-rent micro-units may still appeal to other disproportionately male populations, like temporary workers or recently divorced spouses without custody of children. Stern & Yager, *supra* note 295, at 2.

[307] In determining whether short-term housing constitutes a "dwelling" subject to the FHA, courts look to whether the residents intend to return to the housing or whether it is for transient guests. United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990). Thus, a motel is not usually considered a dwelling, *id.*, but is where it provides housing for otherwise homeless individuals. *See* Red Bull Assocs. v. Best W. Int'l, Inc., 686 F. Supp. 447 (S.D.N.Y.) (assuming FHA covers motel housing otherwise homeless individuals), *aff'd*, 862 F.2d 963 (2d Cir. 1988). Accordingly, SROs are generally treated as dwellings. *E.g.*, N.J. Coal. of Rooming & Boarding House Owners v. Mayor of Asbury Park, 152 F.3d 217, 219 (3d Cir. 1998). In the context of disability discrimination, HUD has expressly defined "dwelling" to include facilities with shared bathrooms and kitchens. 24 C.F.R. § 100.201 (2020).

[308] *See* Stern & Yager, *supra* note 295, at 9–21, 35–36 (identifying many policies precluding SRO construction, including interactions between policies).

SROs were often genuinely squalid. In addressing those conditions, governments had important interests related to health and safety, and perhaps also to crime and neighborhood planning more broadly.

In some rare cases, the government might fail to meet this burden, particularly where it relies on stereotypes about the harms of a concentrated male population.[309] For example, in recent litigation over a local law prohibiting children from living in SROs (which was challenged as family status discrimination), the City of New York attempted to argue that SROs were unhealthy for children because they were disproportionately "inhabited by single male households."[310] The court rightfully chastised the City for relying on "speculation and on impermissible stereotypes" in making such an argument[311] — but proceeded to uphold the policy based on other safety and sanitary interests.[312] Even where governments employ crude sex stereotypes, therefore, the plethora of alternative, legitimate justifications will allow defendants to carry their burden.

Accordingly, disparate impact challenges should turn on the third stage of the burden-shifting analysis: the existence of less discriminatory alternatives. This is doctrinally appropriate. To the extent that limits on SROs truly protect residents, rather than forcing men into still worse conditions, they are legitimate and important tools of housing policy. If sex stereotypes pushed those regulations beyond the demands of public health, however, they should be struck down.

Outright bans on SRO construction will be difficult to defend as the least discriminatory option. These bans continue to multiply. Santa Monica, California, enacted a ban on private sector SROs in 2019, for instance.[313] Likewise, in New York City, local law prohibits the creation of new unsubsidized private-sector SROs, but allows SRO construction by the government or nonprofits, with the permission of the housing

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[309] For this reason, discriminatory zoning denials against men's homeless shelters may also be vulnerable to a fair housing challenge. Many communities prefer women's shelters to men's shelters due to fears about concentrated (poor) male populations, and the government often accedes to those discriminatory preferences. *See, e.g.*, Gregg McQueen, *Shelter Will Now House Women Instead of Men, City Says*, MANHATTAN TIMES (July 18, 2019), https://www.manhattantimesnews.com/shelter-will-now-house-women-instead-of-men-city-saysrefugio-ahora-albergara-mujeres-en-lugar-de-hombres [https://perma.cc/H5GA-EG9J]; Ryan Brady, *Women, Not Men, to Live at College Point Homeless Shelter*, QUEENS CHRON. (Sept. 30, 2019), https://www.qchron.com/editions/north/women-not-men-to-live-at-college-point-homeless-shelter/article_e907cfe2-e3b5-11e9-9844-efde95673666.html [https://perma.cc/Y6HV-DPZG].

[310] Sierra v. City of New York, 579 F. Supp. 2d 543, 548 (S.D.N.Y. 2008).

[311] *Id.*

[312] *See id.* at 549–50, 554.

[313] Cailley Chella, *Council Votes to Permanently Ban Micro Apartments*, SANTA MONICA MIRROR (May 17, 2019), https://smmirror.com/2019/05/council-votes-to-permanently-ban-mirco-apartments [https://perma.cc/BRK9-EPS7]; *see also Ogden Bans People from Living in Hotels*, KSL.COM (Aug. 9, 2005, 7:24 AM), https://www.ksl.com/article/92292/ogden-bans-people-from-living-in-hotels [https://perma.cc/5QEP-3F2D].

commissioner.[314] Shouldn't the administrative approval process provide the necessary safeguards against unsafe conditions in private SROs as well — especially in combination with modern building code protections? In contrast, health and safety mandates will be more easily upheld. So too will generally applicable limits on density, which can hit small units harder as a financial matter.[315] Local governments are permitted to prevent overcrowding, as they define it, or mitigate risks from fire or disease.

But even core building code provisions might be susceptible to an FHA challenge. As the story of San Diego's experiment with SRO liberalization reveals, there is ample room to permit SRO construction while protecting health and safety. In the 1980s, a private sector developer pitched San Diego on waiving a slew of building and zoning code provisions to allow him to build a new SRO, the city's first in decades.[316] Under San Diego's program, SROs could build smaller rooms than otherwise permitted and use sprinklers instead of expensive fireproof doors.[317] SROs were exempted from parking requirements, which, given the small per-unit size, would have required more space be built for cars than for people, despite the low vehicle ownership rates of the target residents.[318] In total, average construction costs were driven down to $20,000 per unit, as compared with $50,000 for an ordinary studio.[319]

The year after San Diego's code revisions took effect, four new SROs were built and fifteen more rehabilitated, for a total of 565 rooms.[320] The first project to open, the Baltic Inn, offered private kitchenettes and

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[314] N.Y.C. ADMIN. CODE § 27-2077(a) (2020). New York City law also carves out narrow exceptions for hospitals and certain charitable institutions. *Id.*

[315] For examples of the building and zoning code requirements that prevent SRO development in different cities, see Stern & Yager, *supra* note 295 (New York City); Alan Durning, *Emancipating the Rooming House*, SIGHTLINE INST. (Dec. 3, 2012, 12:26 PM), https://www.sightline.org/2012/12/03/emancipating-the-rooming-house [https://perma.cc/P59V-KUP8] (Seattle); and POLK CNTY. HOUS. TRUST FUND, COMBATING HOMELESSNESS: SINGLE ROOM OCCUPANCY HOUSING 22 (2013), https://www.pchtf.org/upl/downloads/landing-page/homelessness-in-the-des-moines-metro-document5.pdf [https://perma.cc/4PJL-WCVP] (Des Moines).

[316] Robert Reinhold, *In San Diego, the Developers Profit as Homeless Get Low-Cost Housing*, N.Y. TIMES (Sept. 6, 1988), https://nyti.ms/29mQp55 [https://perma.cc/P3NV-4W4T].

[317] *Id.*

[318] *Id.*; Jason Deparle, *San Diego Sees Too Much of Success in Building Hotels to House the Poor*, N.Y. TIMES (July 13, 1993), https://nyti.ms/29jpaoD [https://perma.cc/5WU4-862G]; Lisa Halverstadt, *Looming SRO Closure Sets Off Another Round of Soul-Searching over Housing's Bottom Rung*, VOICE OF SAN DIEGO (Mar. 21, 2019), https://www.voiceofsandiego.org/topics/government/looming-sro-closure-sets-off-another-round-of-soul-searching-over-housings-bottom-rung [https://perma.cc/H35N-3H5D]; Andrew R. Long, *Urban Parking as Economic Solution*, INT'L PARKING INST. (Dec. 2013), https://www.parking-mobility.org/2016/01/19/tpp-2013-12-urban-parking-as-economic-solution [https://perma.cc/XM2A-LW7J].

[319] Reinhold, *supra* note 316.

[320] *Id.*

toilets, with shared showers, and at eighty dollars per week was affordable to residents living on Social Security. A different model, without private kitchens or toilets, might have made the project affordable to the poorest of the poor.[321] In all, 2,700 new units — mostly unsubsidized — were opened in just a few years, until local opposition forced the city to abandon its reforms.[322] Given the evident success of San Diego's experiment — which won national recognition and appears not to have resulted in unsafe conditions[323] — plaintiffs might have room to demonstrate that even broadly applicable code requirements are not the least discriminatory alternative available.[324] Governments can achieve their health and safety goals while still allowing an SRO market to provide badly needed very-low-income housing.

The death of the SRO is the result of over a century of antipathy to shared living, an antipathy deeply rooted in sex stereotypes and gendered ideals of the home. Prescribing stereotypical sex roles was at the heart of the legal attack on SROs — it was foremost in the minds of top housing officials and even the California Supreme Court — and led to a disproportionate impact on men who couldn't fit into those roles. Where men still remained in SROs, those concentrations were pathologized and ultimately eliminated. These discriminatory motives are intertwined with laudable health and safety purposes, however. It is the job of disparate impact litigation to scrutinize where the limits on SRO construction and operation are arbitrary, rooted only in the gender norms of the past. It may turn out that far more of those limits are unjustified and discriminatory than currently thought.

C. Regional Planning and Affirmatively Furthering Fair Housing: Restrictive Zoning and the Spatial Components of the Gender Wage Gap

So far, this Article has suggested sex-based fair housing claims that target relatively discrete policies at the margins of land use policy. While limits on in-home daycares and SROs are important, they affect only a small share of the population. In contrast, issues like exclusionary zoning or mortgage underwriting standards — classic targets of FHA scrutiny for racial discrimination — affect the foundations of the housing market. This section explores the broadest claims that sex, like race, shapes the very landscape of American land use.

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[321] *Id.*

[322] *See* Deparle, *supra* note 318.

[323] *See id.*

[324] Again, the facts will matter. In New York City, for example, the City Council Speaker reputedly rejected code changes proposed in the 1990s meant to allow for SRO-type smaller housing units to be built in the face of homeowners' association resistance. Mariana Ionova, *The $80-a-Week, 60-Square-Foot Housing Solution that's Also Totally Illegal*, NEXT CITY (June 3, 2013), https://nextcity.org/features/view/the-80-a-week-60-square-foot-housing-solution-thats-also-totally-illegal [https://perma.cc/LG5Y-46QK]. The existence of such an alternative, rejected for political rather than technical reasons, would be powerful evidence for plaintiffs.

Our system of urbanism — and suburbanism — encodes and entrenches traditional and unequal gender roles into physical space. Originally designed for the (white) nuclear family of a breadwinner husband and a homemaker wife, the suburbs where most Americans live continue to reflect, and favor, that distribution of labor across the household. These aren't claims readily susceptible to litigation. But the Fair Housing Act need not be silent with respect to them. The Affirmatively Furthering Fair Housing process — a planning process in which state and local governments identify the obstacles to fair housing in their own jurisdictions and develop their own plans for overcoming those obstacles — is ideally suited to help rethink gendered patterns of regional development.

While the feminist critiques of suburbanization are many, this section focuses on one set of issues: wage and employment effects related to differential mobility patterns for men and women.[325] Because men and women show different commuting behaviors and different economic responses to long-distance moves, land use reforms that allowed for more growth downtown would increase women's wages and employment levels. Women's frequent secondary-earner status plays out not just economically, but also spatially.

These issues of density and mobility are appealing from an FHA perspective for two reasons. First, social scientific research provides empirical confirmation and quantification of the harms to women. Second, these harms can be addressed through deregulatory mechanisms, which the Supreme Court has indicated are favored under the FHA.[326] Loosening land use limits on urban size and density can help address the gender wage gap and women's continued secondary economic status. Even so, these broad, structural effects of suburbanization are not easily addressed through litigation. As such, this section focuses on a different piece of the Fair Housing Act: its AFFH planning mandate. The AFFH process is designed to investigate and address segregation: another deeply entrenched, multicausal, and cross-jurisdictional issue. It is a promising tool for addressing the spatial components of the gender wage gap as well.

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[325] In the legal literature, many of these dynamics have been ably described by Professors Katharine Silbaugh (via antidiscrimination law and work-family balance) and Naomi Schoenbaum (via employment and labor law), but they have not received broad attention. *See* sources cited *supra* note 22; *cf.* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 110–11 & n.139 (2017) (stating, in large study of law and economics of mobility, that claims of gender disparities remain speculative). Neither Silbaugh nor Schoenbaum identifies the FHA as an avenue for redress.

[326] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015) ("[D]isparate-impact liability . . . has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances . . . .").

1. Urban Size, Urban Density, and the Gender Wage Gap. — Given that the American pattern of suburban development was designed to separate the domestic sphere from commercial life,[327] it should come as no surprise that women now struggle to bridge the physical divide between home and work. Restrictions on urban residential development harm women in (at least) two ways, each stemming from the fact that women are still, on average, likely to earn less than their male partners and play a greater role in managing the household. First, limits on urban (and inner ring suburban) development push growth into more distant suburbs. The increased cost of commuting disproportionately harms women and entrenches their status as secondary earners. Second, limits on urban development push growth into other metro areas, diminishing agglomeration effects and thinning out job markets, again to the disproportionate detriment of women, whose career and mobility choices are often a function of their male partners' choices. This section discusses each effect in turn.

Men, on average, commute longer and farther than women.[328] Indeed, it is a "universal" empirical finding that women's commutes are significantly shorter.[329] This effect persists across racial lines, though there is important variation: Black workers tend to have longer commutes across the board and a smaller gender gap in commute length, and Hispanic workers' commute behaviors are more sensitive to household structure.[330] There are three primary economic theories offered for the gender gap in commuting: (1) because women earn less than men,

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[327] *See supra* note 14 and accompanying text.

[328] All things being equal. There are important differences in commuting decisions based on race, income, and region. *See* Seyoung Kim, *Gender Differences in Commuting: An Empirical Study of the Greater Los Angeles Metropolitan Area* 1–3 (Univ. Cal. Transp. Ctr., Working Paper No. 190, 1994), https://escholarship.org/uc/item/2n60d857 [https://perma.cc/GTB8-2PMQ]; Selima Sultana, *Effects of Married-Couple Dual-Earner Households on Metropolitan Commuting: Evidence from the Atlanta Metropolitan Area*, 26 URB. GEOGRAPHY 328, 347 (2005).

[329] Janice F. Madden & Lee-in Chen Chiu, *The Wage Effects of Residential Location and Commuting Constraints on Employed Married Women*, 27 URB. STUD. 353, 353 (1990); *see* Philipp M. Lersch & Sibyl Kleiner, *Coresidential Union Entry and Changes in Commuting Times of Women and Men*, 39 J. FAM. ISSUES 383, 384 (2018) ("One of the most consistent patterns found in the mostly North American and European literatures on commuting and gender is a gender difference in commuting times, with women commuting significantly less than men." (citation omitted)). Women also make more chained trips, combining commutes with errands or drop-offs. *See* Melanie A. Rapino & Thomas J. Cooke, *Commuting, Gender Roles, and Entrapment: A National Study Utilizing Spatial Fixed Effects and Control Groups*, 63 PRO. GEOGRAPHER 277, 279 (2011).

[330] *See, e.g.*, Ibipo Johnston-Anumonwo, *Persistent Racial Differences in the Commutes of Kansas City Workers*, 31 J. BLACK STUD. 651, 660, 662 (2001); Lingqian Hu, *Gender Differences in Commuting Travel in the U.S.: Interactive Effects of Race/Ethnicity and Household Structure*, TRANSPORTATION 16 (2020) (examining commute distance, not time). Again, there is meaningful variation across regions. In New York City, for example, Black men commuted for roughly the same amount of time as Black women in 2010. Valerie Preston & Sara McLafferty, *Revisiting Gender, Race, and Commuting in New York*, 106 ANNALS AM. ASS'N GEOGRAPHERS 300, 303 (2016).

the return to commuting is lower, so women have less incentive to commute; (2) because women have more household responsibilities, they work closer to home to be able to flexibly and quickly perform household tasks; and (3) women work in industries, especially the service sector, that are spatially organized near residences rather than in downtowns or far-flung factories.[331] Cultural perceptions of breadwinner/homemaker gender roles also contribute.[332] These theories are not independent. Women might cluster in lower-paid, geographically dispersed jobs because they need the flexibility to pick up a sick child, or because they anticipate needing that flexibility upon having children.[333]

Social science has produced mixed findings as to which theories best explain the gender gap in commuting.[334] Some more suggestive research designs, however, underscore the importance of gender roles and household obligations. For example, one study found that men increase their commuting times after moving in with a partner, while women reduce their commuting times if they are mothers but not otherwise.[335] Similar effects exist when measuring change after childbirth; the commuting gap grows over the course of the first ten years after a couple has a child.[336] Another study used same-sex couples as a quasi–control group; it found that heterosexual married men and both women and men in same-sex partnerships had similar commuting times, but married or cohabiting heterosexual women had shorter commutes.[337] The leading qualitative research found that women had intentionally limited their job search to be close to home, sacrificing pay and prestige to do so.[338] As one woman explained, "[t]here's a certain convenience to being close to home — less commuting time and easier to handle family responsibilities between and around the job."[339]

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[331] Pnina O. Plaut, *The Intra-household Choices Regarding Commuting and Housing*, 40 TRANSP. RSCH. PART A 561, 563 (2006).

[332] Lersch & Kleiner, *supra* note 329, at 384, 402.

[333] Rapino & Cooke, *supra* note 329, at 278.

[334] Early research was often of low quality, making conclusions about causation more difficult. Tracy Turner & Debbie Niemeier, *Travel to Work and Household Responsibility: New Evidence*, 24 TRANSPORTATION 397, 417 (1997) (providing literature review, identifying methodological errors, and determining that "not all of the conclusions are well supported"); *see also* Rachel Weinberger, *Men, Women, Job Sprawl, and Journey to Work in the Philadelphia Region*, 11 PUB. WORKS MGMT. & POL'Y 177, 179 (2007) (describing contrary findings in literature).

[335] Lersch & Kleiner, *supra* note 329, at 395–97. The gender commuting gap still exists for singles, however. *Id.* at 385.

[336] Robert Joyce & Agnes Norris Keiller, *The "Gender Commuting Gap" Widens Considerably in the First Decade After Childbirth*, INST. FOR FISCAL STUD. (Nov. 7, 2018), https://www.ifs.org.uk/publications/13673 [https://perma.cc/T5YN-MKXT].

[337] Rapino & Cooke, *supra* note 329, at 288–92.

[338] Susan Hanson & Geraldine Pratt, *Job Search and the Occupational Segregation of Women*, 81 ANNALS ASS'N AM. GEOGRAPHERS 229, 243, 247 (1991).

[339] *Id.* at 242.

As this research indicates, women's traditional role as homemaker encourages women to choose work near home. This is intuitive. If both parents have hour-long commutes, no one is available to quickly pick up a sick child or deal with domestic emergencies.[340] Because American suburbia physically separates home and work, spouses must trade off between access to one and access to the other. In some instances, as in regions where employment is highly dispersed through the suburbs, or where a household decides where to live and work relatively independently, those tradeoffs may not be so significant, but where high-wage jobs are concentrated in a traditional downtown, the tradeoff can be acute. Within the household, men and women make that choice differently.

The cost to women is substantial — even for couples without children. Ten percent of the gender pay gap between husbands and wives without children can be attributed to commute variables, according to one study, and twenty-three percent of the "child wage penalty" is attributable to commuting patterns.[341] Other research estimates that each additional minute in average regional commute time translates to a 0.3 percentage point reduction in labor force participation among married high school–educated women; again, the effect is greater for women with children but present for women without children as well.[342] Notably, these studies show independent but interconnected effects of gender and family status.[343]

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[340] This simplified description assumes a two-parent nuclear family. Many families use nannies or extended family to manage these situations, but these choices are neither universally available nor costless.

[341] Federico H. Gutierrez, Commuting Patterns, the Spatial Distribution of Jobs and the Gender Pay Gap in the U.S. 3 (Nov. 25, 2018) (unpublished manuscript), https://cdn.vanderbilt.edu/vu-my/wp-content/uploads/sites/368/2019/04/14093840/draft2.pdf [https://perma.cc/8BYA-9XQT].

[342] Dan A. Black et al., *Why Do So Few Women Work in New York (and So Many in Minneapolis)? Labor Supply of Married Women Across US Cities*, 79 J. URB. ECON. 59, 67 (2014). These findings have been corroborated — with even larger effects — in more recent research. *See* Lídia Farré et al., *Commuting Time and the Gender Gap in Labor Market Participation* 13 (Institut d'Economia de Barcelona, Working Paper 2020/03, 2020) (finding that a ten minute increase in commuting decreases childless married women's labor force participation rate by 3.35 percentage points, increasing to 4.25 percentage points for women with one child, 5.8 percentage points for women with three or more children, and 6.7 percentage points for women with children younger than five, and that the effect of longer commutes on men's labor force participation was statistically insignificant for most of the groups studied).

[343] These same effects exist in European contexts as well. *See* Thomas Le Barbanchon et al., *Gender Differences in Job Search: Trading Off Commute Against Wage*, 136 Q.J. ECON. 381, 383–84 (2021) (attributing fourteen percent of French wage gap to differences in willingness to pay for commute, with effects smaller but present for women without children); Aline Bütikofer et al., *Building Bridges and Widening Gaps: Wage Gains and Equity Concerns of Labor Market Expansions* 3–4 (IZA Inst. of Lab. Econ., Discussion Paper No. 12885, 2020), http://ftp.iza.org/dp12885.pdf [https://perma.cc/3Q8V-EPAY] (finding that transportation infrastructure that promoted long-distance commuting increased gender wage gap in Sweden); Sydnee Caldwell & Oren Danieli, Outside Options in the Labor Market 2 (Nov. 7, 2018) (unpublished manuscript),

Unequal gender roles drive mobility decisions not just within regions, but across them. A growing literature shows that couples choose where to locate largely based on the male partner's employment prospects, with far less weight given to the woman's.[344] Women are described as "tied movers," who follow rather than lead.[345] In broad strokes, families tend to move to secure a promotion for the man, with the woman only then finding whatever job she can in their new home. Accordingly, long-distance moves tend to help married men's careers, while married women have lower employment rates and lower earnings growth post-move.[346]

This is, in part, a function of the limits on agglomeration created by restrictions on urban growth.[347] In a thick job market, a trailing spouse has better job prospects, with more openings and better matches for their particular skills and preferences, whereas in a smaller location their options are fewer.[348] Accordingly, there is some evidence that so-called "power couples" opt to live in larger regions to mitigate these co-location problems.[349] In the aggregate, economic research has shown that increasing city size can cut the gender wage gap significantly. One estimate found that increasing a region's population by one million increased married men's wages by 1.3–1.5% but married women's wages by 2.4–2.7%.[350] If everyone lived in a region the size of the New York City area, 17% of the wage gap would be eliminated.[351] Scholars have found similar results in Germany and the United Kingdom.[352]

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https://scholar.harvard.edu/files/danieli/files/danieli_jmp.pdf [https://perma.cc/FW4N-Z9U8] (attributing thirty percent of German gender wage gap to commuting costs).

344 Natascha Nisic & Stefanie Kley, *Gender-Specific Effects of Commuting and Relocation on a Couple's Social Life*, 40 DEMOGRAPHIC RSCH. 1047, 1049 (2019).

345 Janice Compton & Robert A. Pollak, *Why Are Power Couples Increasingly Concentrated in Large Metropolitan Areas?*, 25 J. LAB. ECON. 475, 478 (2007); *see* Juan Pablo Chauvin, Gender-Segmented Labor Markets and the Effects of Local Demand Shocks 3 (Nov. 20, 2017) (unpublished manuscript), https://scholar.harvard.edu/files/chauvin/files/jpchauvin_jmp.pdf [https://perma.cc/YM7T-2SWV].

346 Kimberlee A. Shauman & Mary C. Noonan, *Family Migration and Labor Force Outcomes: Sex Differences in Occupational Context*, 85 SOC. FORCES 1735, 1735, 1758 (2007).

347 David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1558.

348 Dora L. Costa & Matthew E. Kahn, *Power Couples: Changes in the Locational Choice of the College Educated, 1940–1990*, 115 Q.J. ECON. 1287, 1288 (2000).

349 *Id.* *But see* Compton & Pollak, *supra* note 345, at 477 (finding that these results are driven only by location demands of husbands).

350 Haim Ofek & Yesook Merrill, *Labor Immobility and the Formation of Gender Wage Gaps in Local Markets*, 35 ECON. INQUIRY 28, 29 (1997).

351 *Id.* at 45.

352 *See* Natascha Nisic, *Smaller Differences in Bigger Cities? Assessing the Regional Dimension of the Gender Wage Gap*, 33 EUR. SOCIO. REV. 292 (2017) (Germany); Euan Phimister, *Urban Effects on Participation and Wages: Are There Gender Differences?*, 58 J. URB. ECON. 513 (2005) (United Kingdom).

These effects will frequently cut in different directions due to congestion and distance effects. For example, because the New York metropolitan area combines a large, dense, high-wage core with an immense commuter shed extending into Connecticut and Pennsylvania, many residents of its suburbs have a particularly heightened choice between working in Manhattan and remaining available near home. As a result, New York's long commute times contribute to the region's unusually low employment rates for married white women.[353] Density downtown is not sufficient to address mobility-based gender wage gaps across the region. Both a thick labor market and fast and flexible commutes are necessary.

Still, in many regions, increasing density near the central business district can help secondary earners through both improved commuting options and improved agglomeration effects. A couple that has ample options to live close to downtown does not need to designate one spouse to stay near home and another to commute further for higher wages. And a "tied move" to Manhattan offers ample employment prospects for both partners. Contemporary zoning laws, which restrict density in high-demand urban areas, will often serve to constrain women's economic opportunities.

2. The Gender Wage Gap and the Fair Housing Act. — Suits to reshape the broad pattern of suburbanization to promote more gender-egalitarian patterns of commuting and relocation are not likely to succeed. The obstacles are daunting. While there is a deep reservoir of intentional discrimination sitting underneath the design of modern suburbia — an intent to cordon off a female, domestic sphere through physical distance from the city center — it is nearly impossible to imagine a court willing to condemn more than a century of American residential development, in its holistic entirety, as intentionally discriminatory. Even beyond the questions of causation and proof that would doom such a suit,[354] the Supreme Court has historically expressed a fondness for suburban life. From referring to apartment buildings as "mere parasite[s]" that "utterly destroy[]" the desirability of a residential neighborhood,[355] to commending developments built around "family values, youth values, and the blessings of quiet seclusion and clean air,"[356] the Court has endorsed the single-family bedroom community.[357]

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[353] Black et al., *supra* note 342.

[354] *See supra* p. 1731.

[355] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

[356] Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[357] *See* City of Memphis v. Greene, 451 U.S. 100, 127 (1981) (endorsing residential interest in "comparative tranquility" and quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1). These opinions come from the Court's most conservative members (Justice Sutherland in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365) and its most liberal (Justices Douglas and Stevens in *Belle Terre* and *City of Memphis v. Greene*, 451 U.S. 100, respectively).

A disparate impact challenge would fare no better. Disentangling the many public policies that created current mobility patterns — from land use to transportation to tax policies — would be difficult enough, even before accounting for private, intrahousehold decisions about where to live and family responsibilities. Redressability poses another set of issues: any remedy would need to cross many jurisdictional boundaries, and in a sprawling region, existing infrastructure may preclude easy densification. There is no obvious comparator, or fixed baseline, for what local governments should be doing that a court could use to avoid wading into complex, multifactor policymaking outside its competence. Moreover, as Professor Sarah Schindler has demonstrated, courts "often fail to recognize urban design as a form of regulation at all," thereby placing the built environment outside judicial scrutiny altogether.[358] Suburban sprawl imposes well-established harms on women, but this is not an issue for courts, at least not yet.[359]

It is, however, precisely the kind of issue for which the Affirmatively Furthering Fair Housing process was designed. Substantively, the AFFH planning process — even under the timid pre-Obama framework — requires an all-in examination of the "conditions, both public and private, affecting fair housing choice for all protected classes."[360] This necessitates looking beyond the simple availability of housing and also to whether that housing provides equal access to opportunity. AFFH planning is meant to incorporate issues from well outside the housing market, including "jobs, schools, transportation, and social services."[361] In fact, the geographic relationship between housing and employment — as disaggregated for protected classes — is expressly identified by HUD guidance as an important topic for fair housing planning.[362] And procedurally, unlike in litigation, the AFFH process does

[358] Schindler, *supra* note 211, at 1939.

[359] An additional basis for judicial disapproval could come from dicta in *Inclusive Communities*, which appear to limit the applicability of the Fair Housing Act to broad questions of urban form. According to Justice Kennedy's majority opinion, "[t]he FHA does not decree a particular vision of urban development." Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015). Taken at face value, this statement would seem to doom any effort to reshape regional growth on fair housing grounds. However, if taken at face value, this observation is plainly false. At a minimum, the FHA mandates that urban development be integrated, and as that same majority opinion recognized, this may often require the construction of multifamily rentals. *Id.* at 2522. Each of these mandates constitutes a rejection of the dominant visions of urban development for much of the twentieth century. Moreover, the FHA requires that housing programs "affirmatively" further fair housing; by definition, this must mean something more than simply ceasing to discriminate. Thus, *Inclusive Communities* is better read to suggest that where there are multiple nondiscriminatory options available, as was arguably true under the facts of that case, the FHA does not require a choice between them. Put differently, the FHA may not require a single, fixed version of urban development, but it surely precludes some paths and favors others.

[360] 1 HUD FAIR HOUSING PLANNING GUIDE, *supra* note 56, at 2-7.

[361] *Id.* at 2-11.

[362] *Id.* at 2-27.

not require that analysis be narrowed to a specific policy of a specific defendant that can be redressed with a specific remedy. A state or local government — or better yet, a regional consortium[363] — could identify the gender disparities related to their region's built environment and articulate some feasible steps toward mitigating them.

While a planning process is less forceful a tool than are litigation and injunctive relief — the AFFH process is light on both carrots and sticks[364] — it is still potentially powerful. The AFFH process is best understood as a "federal nudge," forcing communities to pay attention to often neglected fair housing issues; gather and publicize data; and perhaps most importantly, engage with constituencies committed to fair housing.[365] Just as the National Environmental Policy Act proved transformative simply by requiring agencies to analyze and disclose environmental impacts, the AFFH process could become a potent tool for uncovering sex discrimination.[366] The process also helps HUD better define civil rights issues, develop new structural policy solutions, and leverage its other bureaucratic powers.[367] Ideas that begin in the AFFH process could one day end up in HUD guidance or a judicial opinion.

Indeed, the AFFH process overcomes the legal obstacles other scholars have identified as protecting structural and architectural discrimination from legal intervention. For example, Sarah Schindler has argued that "no laws currently force local governments to reconsider or reconfigure their exclusionary infrastructures," but that is precisely what the AFFH process uniquely demands.[368] Professor Katharine Silbaugh closed her excellent analysis of the ways that urban planning exacerbates work-family conflicts by asking only for "discussion" and "simple consciousness raising."[369] The AFFH process provides a structure for that discussion, but one backed by federal law and, in extreme cases, sanction.[370] The mandate to affirmatively further fair housing will not fully eradicate the myriad ways that gender, broadly, and the homemaker/breadwinner dichotomy, specifically, have been built into

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[363] *See* Justin P. Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUS. POL'Y DEBATE 736, 749 (2019).

[364] *See* Elizabeth Julian, *The Duty to Affirmatively Further Fair Housing: A Legal as Well as Policy Imperative*, *in* A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY 268, 271 (Christopher Herbert et al. eds., 2018).

[365] *See* Michael Allen, *Speaking Truth to Power: Enhancing Community Engagement in the Assessment of Fair Housing Process*, *in* A SHARED FUTURE, *supra* note 364, at 252, 253.

[366] *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 904–05 (2002).

[367] *See* Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1789 (2017).

[368] Schindler, *supra* note 211, at 2018.

[369] Silbaugh, *supra* note 22, at 1851.

[370] *See* Steil & Kelly, *supra* note 363, at 740, 742 (noting that under Obama-era regulations, HUD refused to accept some AFFH submissions as complete, but had not progressed to withholding funds).

the nation's housing system. But it is a unique tool among civil rights statutes that can be brought to bear.

As HUD reimagines the AFFH process — perhaps under an administration more sympathetic to fair housing — it can and should integrate gender into the planning process, including issues of mobility. Jurisdictions should be asked to evaluate land use patterns, transportation infrastructure, and the geography of employment to analyze how their regional layout — and in particular limitations on density near the highest-wage job centers — affects secondary earners. Such an analysis should investigate not only how these patterns skew the housing choices available to two-earner households, but also whether they diminish the prevalence of two-earner households in the first place.

The analysis should also be disaggregated by race and ethnicity. Given entrenched residential segregation and employment discrimination, as well as differential patterns of marriage and household formation, these answers may vary significantly by race, and across racialized geographies.[371] Racial segregation also creates powerful spatial mismatches;[372] how the racialized and gendered geographies of work and home interact varies regionally, as well as at the neighborhood and household levels.[373]

The answers to these questions will also vary regionally, as will the solutions proposed in response. In a high-demand city like Seattle or Boston, upzoning for dense infill development near downtown could address both commuting and agglomeration issues; that calculus may not hold in a declining city like St. Louis. In cities with highly decentralized employment,[374] there may be few locations where new housing can meaningfully ease the locational challenges facing dual-earner households. One city might pursue transit-oriented development as a solution; another town might add social services to its schools to mitigate mothers' need to return home; a third region might shift its transit system

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[371] *See, e.g.*, Sarah Jane Glynn, *Breadwinning Mothers Continue to Be the U.S. Norm*, CTR. FOR AM. PROGRESS (May 10, 2019, 5:17 PM), https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm [https://perma.cc/FX46-2WR5] (describing differential patterns of female breadwinner status, including by race); Pierre-André Chiappori et al., *Partner Choice, Investment in Children, and the Marital College Premium*, 107 AM. ECON. REV. 2109, 2116–21 (2017).

[372] *See generally* John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUS. POL'Y DEBATE 371 (1992) (reviewing extensive scholarly debate over spatial mismatch of suburbanizing employment for Black workers living in central cities).

[373] *See* sources cited *supra* note 330.

[374] *See* ELIZABETH KNEEBONE, BROOKINGS INST., JOB SPRAWL REVISITED: THE CHANGING GEOGRAPHY OF METROPOLITAN UNEMPLOYMENT 8 (2009), https://www.brookings.edu/wp-content/uploads/2016/06/20090406_jobsprawl_kneebone.pdf [https://perma.cc/P22X-RZBW].

from a "commuter rail" model focused on long-distance rush-hour trips to a "regional rail" model more similar to rapid transit.[375]

Nor need the interventions be radical, even those that pursue residential redevelopment. American land use is, at present, uniquely committed to exclusively residential neighborhoods and provides uniquely large houses on uniquely large lots. Even the New York region is three to five times less dense than European peers like Berlin, Paris, or London, to say nothing of a Chicago, Atlanta, or Phoenix.[376] The size of that gap leaves room for a great deal of densification before even approaching the housing types common in other wealthy societies.

AFFH planning is not a very prescriptive process, for better and for worse.[377] Its promise lies in asking the question with which this Article began — what would a non-sexist city look like — and demanding that states and local governments begin to provide an answer.

3. Further Avenues for Analyzing Sex Under the Affirmatively Furthering Fair Housing Process. — AFFH planning provides an opportunity for a broader reimagination of the meaning of sex discrimination in housing. The AFFH process is bottom-up. This is a particular strength with respect to sex. Unlike with race, there is not a well-established, common understanding of the most important obstacles to fair housing with respect to sex. The AFFH process allows state and local governments to identify their own issues and propose their own solutions. This Article has offered mobility issues as one relatively well-defined, and potentially quantifiable, place where urban planning has affected housing choices in a gendered way, but there are more.[378]

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[375] *See* Yonah Freemark, *Make the Effort, and Commuter Rail Can Be as Effective as Rapid Transit*, TRANSP. POLITIC (Jul. 28, 2014), https://www.thetransportpolitic.com/2014/07/28/make-the-effort-and-commuter-rail-can-be-as-effective-as-rapid-transit [https://perma.cc/RN25-96HX].

[376] HIRT, *supra* note 208, at 23–24.

[377] One advantage is that the variety of responses available preserves the benefits of Tieboutian specialization and sorting. *See generally* THE TIEBOUT MODEL AT FIFTY (William A. Fischel ed., 2006).

[378] Much of the literature on feminist planning involves questions of design and architecture. *See generally* Joan Rothschild & Victoria Rosner, *Feminisms and Design: Review Essay*, *in* DESIGN AND FEMINISM: RE-VISIONING SPACES, PLACES, AND EVERYDAY THINGS 7 (Joan Rothschild ed., 1999) (reviewing literature). Many of these issues are too abstract to be cognizable at law: how open versus closed kitchens reflect various gender roles, for example, is a rich question but difficult to pin down and not desirable to write into law. *Compare* WRIGHT, *supra* note 12, at 109–12 (analyzing Victorian homes' mantelpieces and kitchens), *with* Gwendolyn Wright, *Women's Aspirations and the Home: Episodes in American Feminist Reform*, *in* GENDER AND PLANNING: A READER 141, 142 (Susan S. Fainstein & Lisa J. Servon eds., 2005) (rejecting possibility of a single feminist design of the home). Other design issues embraced by feminist scholars and activists, when analyzed under the framework of the FHA, turn less on sex and more on family status, such as how public housing can be designed to accommodate child care needs. *See* HAYDEN, *supra* note 11, at 4, 165–67 (describing public housing projects better designed for mothers); Patricia A. Seith, *Congressional Power to Effect Sex Equality*, 36 HARV. J.L. & GENDER 1, 72–87 tbls. 2 & 3 (2013) (studying feminist legislative agenda in 1980s and 1990s and identifying bills to improve child care availability in public and transitional housing).

First, other issues identified in this Article, such as child care and homelessness, could be studied through AFFH.[379] Another potentially fruitful subject of inquiry is accessory dwelling units (ADUs): small apartments located on single-family lots.[380] Accessory dwelling units are commonly called "granny flats" or "mother-in-law apartments,"[381] which certainly suggests a gendered slant to their use. If so, cities might investigate liberalizing regulations to allow more accessory units, and states might consider following California and preempting local obstacles to their construction.[382] Lending standards that disfavor ADU development could also be evaluated.[383]

Different jurisdictions will explore different issues, based on local conditions but also local politics. More conservative jurisdictions might see violent crime as limiting women's housing choices because women are afraid to walk certain streets at night or because they avoid some first-floor apartments.[384] Their solutions might emphasize designing defensible space.[385] A more liberal jurisdiction thinking about criminal justice might analyze ex-offenders' housing outcomes. HUD has issued guidance on when criminal history–based restrictions constitute racial discrimination.[386] Adding sex to the analysis could prove generative when analyzing the extremely strict limitations on where registered sex offenders can live, especially where those limitations are based on stereotypes about a particular form of male sexuality rather than empirical evidence.[387]

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[379] Studying these through AFFH has advantages. For example, governments could consider obstacles to in-home and center-based child care simultaneously, from the perspective of clients rather than providers. Moreover, while a disparate impact suit generally could not challenge a state's failure to preempt local regulation of daycares, the AFFH process could ask why other states have not followed the eighteen states that have enacted such preemptive laws. Lemar, *supra* note 188, at 308.

[380] *Accessory Dwelling Units*, AM. PLAN. ASS'N, https://www.planning.org/knowledgebase/accessorydwellings [https://perma.cc/XR5A-KXH7].

[381] Lisa Patterson, *Not Your Average Granny Flat*, S. SOUND MAG. (Oct. 6, 2020), https://southsoundmag.com/not-your-average-granny-flat [https://perma.cc/4GL9-W739].

[382] Liam Dillon, *How Lawmakers Are Upending the California Lifestyle to Fight a Housing Shortage*, L.A. TIMES (Oct. 10, 2019, 5:00 AM), https://www.latimes.com/california/story/2019-10-10/california-single-family-zoning-casitas-granny-flats-adus [https://perma.cc/MPN2-BMFS].

[383] Allison Bisbey, *In Tight Housing Market, Lenders Get Creative to Finance Garage Apartments*, ASSET SECURITIZATION REP. (Nov. 16, 2018, 11:48 AM), https://asreport.americanbanker.com/news/in-tight-housing-market-lenders-get-creative-to-finance-garage-apartments [https://perma.cc/HLR9-RXW2].

[384] *See generally* GERDA R. WEKERLE & CAROLYN WHITZMAN, SAFE CITIES: GUIDELINES FOR PLANNING, DESIGN, AND MANAGEMENT (1995); Spain, *supra* note 19, at 588 (reviewing feminist literature on urban planning and crime).

[385] *See generally, e.g.*, Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

[386] U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 109.

[387] *See generally* James F. Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, 25 DEVIANT BEHAV. 215 (2004).

Over time, through this repeated and decentralized process, new ideas about sex and fair housing will be developed (and old ideas rediscovered). These ideas will spread, iteratively, through communication between jurisdictions, HUD, and fair housing advocates. Common problems and solutions will be identified and elevated. Some might even migrate into litigation, if susceptible of judicial resolution. HUD can jumpstart a discursive process that provides a sharper definition of fair housing simply by underscoring that, because sex is a protected class under the Fair Housing Act, it must be a meaningful part of affirmatively furthering fair housing.

III. SEX AND THE FUTURE OF FAIR HOUSING DOCTRINE

While fair housing law is sufficient to address many sex-discriminatory policies, existing doctrine — developed as it was outside the sex discrimination context — is not a perfect fit for sex-based claims. This Part shows how fair housing law needs to change to most effectively attack sex discrimination, which often operates through stereotypes and "benign" or protective policies, not through outright animus, and through the legacies of "separate spheres" ideology, not through residential segregation. Sex-based claims require their own theory of what "fair" housing demands.

A. *Scrutinizing Protective Housing Legislation*

In housing, as elsewhere, most public policies harming women are motivated not by outright animus. They are ostensibly benign, rooted in sex stereotypes and meant to protect women. Antidiscrimination law, under Title VII and the Equal Protection Clause alike, has developed tools to address these subtler forms of bias. Under the Fair Housing Act, however, courts have, if anything, taken the opposite approach, developing extratextual doctrines to defer to seemingly benign protective public policies. If the Fair Housing Act is to meaningfully address sex discrimination, these excuses for discrimination must be abandoned or cabined.

The judicial solicitude for benign laws under the FHA is clearest in the treatment of facially discriminatory statutes. Facial discrimination against protected classes is illegal under the plain text of the FHA, of course, subject only to enumerated exceptions.[388] Even so, some circuits have offered defendants an escape valve where the discrimination appears justifiable, especially when the protected class is not a racial

[388] 42 U.S.C. § 3604; *see also* Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1530 (7th Cir. 1990) (stating that an act is discrimination where "it is treating people differently on account of their race").

group. The Eighth Circuit is a particular outlier.[389] In one FHA case, it subjected a local ordinance that facially discriminated on the basis of disability (by governing how many unrelated people with disabilities could live together in a group home) to only rational basis review.[390] In doing so, the court collapsed the FHA's prohibition of disability discrimination into the constitutional equal protection standard, where disability is not even a suspect classification.[391] This is plainly erroneous, as it nearly nullifies the Fair Housing Act's substantive protections with respect to disability.[392] Congress surely would not have added disability to the FHA if it was satisfied with the preexisting level of constitutional protection for the disabled.[393]

Without going so far as the Eighth Circuit, many circuits have still invented new permissions for housing discrimination.[394] In the Sixth, Ninth, and Tenth Circuits, facially discriminatory treatment is permissible if it "benefits the protected class" or "responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes."[395] The Ninth Circuit, like the Sixth and Tenth, justified permitting these forms of facial discrimination based on the Supreme Court's analysis of Title VII in *International Union, UAW v. Johnson Controls, Inc.*[396] In *Johnson Controls*, the Court held that a company

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[389] *See* Diane M. Pisani, Comment, *Determining the Proper Approach to Discriminatory Statutes Within the Scope of the Fair Housing Act*, 47 DUQ. L. REV. 375, 376–77 (2009) (describing circuit split).

[390] Oxford House-C v. City of St. Louis, 77 F.3d 249, 251–52 (8th Cir. 1996); *see also* Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285, 290 (6th Cir. 1996) (describing Eighth Circuit's decision in *Oxford House-C v. City of St. Louis*, 77 F.3d 249, as holding that "discriminatory statutes are subject to a rational basis scrutiny").

[391] *Oxford House-C*, 77 F.3d at 252. The Eighth Circuit also cited *Village of Belle Terre*, a constitutional, rational basis case. *Id.*

[392] *See* Hum. Res. Rsch. & Mgmt. Grp., Inc. v. County of Suffolk, 687 F. Supp. 2d 237, 256 (E.D.N.Y. 2010) ("Applying the more deferential rational basis level of scrutiny would plainly undermine the FHA, which extends explicit housing protections to the disabled."). In this particular case, the outcome may not have been affected, as the ordinance in question facially discriminated in favor of people with disabilities. In another case, however, rational basis review would provide no more protection than the constitutional baseline.

[393] Disability was added to the FHA in the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620, after the Supreme Court's determination that disability was not a constitutionally protected class in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985).

[394] *But see* Cmty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 177 (3d Cir. 2005) (holding that facial discrimination violates the FHA, even where it is not "malicious or invidious" or where its motive was "benign or paternalistic").

[395] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1050 (9th Cir. 2007); *see also Larkin*, 89 F.3d at 290; Bangerter v. Orem City Corp., 46 F.3d 1491, 1503–04 (10th Cir. 1995).

[396] 499 U.S. 187 (1991); *Cmty. House*, 490 F.3d at 1049.

could not exclude women who might bear children from a job that required exposure to toxic conditions.[397] The Court's opinion turned primarily on whether, under a statutory exception to liability in Title VII, being unable to become pregnant was a "bona fide occupational qualification."[398] By analogy, the Ninth Circuit reasoned that *Johnson Controls* stood for the proposition that "[s]ome differential treatment may be objectively legitimate" and that justifiable discrimination under the Fair Housing Act must be legal.[399]

Again, this is faulty legal reasoning. Congress expressly included the bona fide occupational qualification exemption in Title VII.[400] It did not include that exemption, or any analogue, for the Fair Housing Act. Thus, the relevant portion of *Johnson Controls* for the FHA is its unanimous holding that sex-specific protective policies are illegal sex discrimination, unless an express exemption applies.[401] *Johnson Controls* did not create a freestanding exemption to antidiscrimination laws for protective policies; it held precisely the opposite. Yet for housing, some courts have granted discriminatory policies broad license, so long as they appear beneficial.

A case involving SROs and family-status discrimination is particularly illustrative. New York City, among its many anti-SRO regulations, prohibits families with children from living in SROs.[402] This is, on its face, family-status discrimination under the Fair Housing Act, and a family challenged this local law in *Sierra v. City of New York*.[403] The court, relying on the Ninth Circuit's *Johnson Controls* analysis, asked whether the provision was passed "with the intent of protecting children from unsafe and unsanitary living conditions" and whether it actually did so.[404] Thus, the case proceeded to a bench trial over whether keeping or overturning the statute "best protects the interests of families and children."[405] The statute was upheld, primarily based on the court's

[397] *Johnson Controls*, 499 U.S. at 206.
[398] *Id.* at 200.
[399] *Cmty. House*, 490 F.3d at 1050.
[400] *See* 42 U.S.C. § 2000e-2(e).
[401] *Johnson Controls*, 499 U.S. at 200 ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a [bona fide occupational qualification]."); *id.* at 211 (White, J., concurring in part and concurring in the judgment) ("The Court properly holds that Johnson Controls' fetal-protection policy overtly discriminates against women, and thus is prohibited by Title VII of the Civil Rights Act of 1964 unless it falls within the bona fide occupational qualification (BFOQ) exception.").
[402] N.Y.C. ADMIN. CODE § 27-2076(b) (2020).
[403] 552 F. Supp. 2d 428, 429 (S.D.N.Y. 2008).
[404] *Id.* at 431.
[405] Sierra v. City of New York, 579 F. Supp. 2d 543, 544 (S.D.N.Y. 2008).

determination that single-room living was inherently unhealthy for children.[406] Moralized and stereotyped notions of family were also important. The court reasoned that — notwithstanding the plaintiff's preference to the contrary — it was better for the family to "double[] up" with the plaintiff's sister than to share bathrooms with non-family members.[407] Rather than strike down the statute as facially discriminatory, the court adjudicated a policy dispute about what is good for children and substituted its own judgment for that of a parent.[408]

Sierra points to the challenges that these deferential doctrines pose to sex discrimination claims. Sex discrimination is generally not rooted in animus. As Justice Brennan explained in an early constitutional case, sex discrimination is often "more subtle,"[409] rooted in "an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[410] Notably, Justice Brennan wrote this one year before sex was added to the Fair Housing Act, indicating that such concerns were known to the statute's drafters. And appropriately so, as "romantic paternalism" is widespread in housing as well. The separate spheres ideology underpinning suburban development, for instance, was not articulated as an attempt to subordinate women but rather to venerate them: a part of the "cult of domesticity."[411] Furthermore, any housing policy enacted through zoning or building codes will always be intertwined with health, safety, and aesthetic justifications that give courts broad latitude to recast discrimination as protective. Courts may be tempted to engage in their own weighing of the policy merits and preserve what they see as important protections for vulnerable groups.

These deference doctrines could be extended from facial discrimination to disparate impact claims as well. Doctrinally, courts might grant this deference at the second step of the burden-shifting approach, by defining a defendant's acceptable justifications exceedingly broadly,[412] or through a stand-alone doctrinal carve-out for beneficial policies. Indeed, in *Inclusive Communities*, the Supreme Court expressed its own

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[406] *Id.* at 554.

[407] *Id.* at 552.

[408] *Sierra* does not suggest that litigation over sex-based fair housing issues is doomed, or even that fair housing litigation over SROs should be. It is readily distinguishable: paternalism has particular force with respect to children, and the plaintiffs in *Sierra* were unable to offer evidence of an increased risk of homelessness caused by the policy, among other things. *See id.*

[409] Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).

[410] *Id.* at 684; *see also* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) (identifying sexism as commonly operating through "subtle discrimination" and "mutually reinforcing stereotypes").

[411] Garnett, *supra* note 22, at 1200 & n.42 (quoting Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1093 (1994)).

[412] *See* Zasloff, *supra* note 43.

hesitation about imposing disparate impact liability on purportedly beneficial policies, cautioning that zoning officials must be permitted to protect a community's "quality of life."[413] Whatever the doctrinal path, sex discrimination claims could be thwarted by judicially imposed doctrines not rooted in the text of the Fair Housing Act.

Hopefully, however, a renewed attention to sex discrimination will have the opposite effect: spurring the reinvigoration of fair housing law. Under both Title VII and the Equal Protection Clause, sex discrimination cases forced the creation of new doctrinal devices — in particular, the prohibition on sex stereotyping[414] — that were targeted at the "particular institutions and social practices that perpetuate inequality in the context of sex."[415] As Professor Cary Franklin has argued, antistereotyping doctrines were developed to "smoke out" separate spheres ideologies and other sex-specific forms of discrimination.[416] As such, antistereotyping doctrines have played an essential role in sex discrimination law generally.[417]

The sex stereotyping jurisprudence under the Fair Housing Act, in contrast, is barely developed (understandably, given the limited law concerning sex-based fair housing claims generally).[418] In particular, there is no guidance for how to evaluate sex stereotypes where a challenged policy directly regulates housing itself, rather than the individuals living in a home.[419] As the regulation of SROs illustrates, stereotypes can drive

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[413] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

[414] *See* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978); Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (plurality opinion).

[415] Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010).

[416] *Id.* at 146; *see also* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1356 (2012) (describing origins of antistereotyping doctrines in Title VII context).

[417] *See* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000).

[418] Antistereotyping frameworks have been applied to domestic violence in constitutional cases, including those that have subsequently been cited in FHA cases. *See* Smith v. City of Elyria, 857 F. Supp. 1203, 1212 (N.D. Ohio 1994). However, in the FHA context, this line of cases remains undertheorized. *See, e.g.*, Bouley v. Young-Sabourin, 394 F. Supp. 2d 675, 678 (D. Vt. 2005) (citing *Smith v. City of Elyria*, 857 F. Supp. 1203, but not mentioning stereotyping). *But see* Elizabeth M. Whitehorn, Comment, *Unlawful Evictions of Female Victims of Domestic Violence: Extending Title VII's Sex Stereotyping Theories to the Fair Housing Act*, 101 NW. U. L. REV. 1419, 1447 (2007) (offering theoretical framework).

[419] Employment and housing are quite distinct in this respect. A firm generally need not change its business practices to offer more low-wage jobs likely to be filled by non-white workers, but a town might need to allow more low-rent housing likely to be filled by non-white residents. *But see* Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 490 (3d Cir. 1999) (exploring a theory of discrimination based on stereotypes in job requirements rather than stereotypes about individual job applicants); *see also* Maxine N. Eichner, Note, *Getting Women Work that Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988) (same).

both forms of regulation, to discriminatory ends. In the long run, courts and plaintiffs may have to translate antistereotyping doctrines to the particular context of sex discrimination in housing.[420] As a first step, though, housing law needs to stop excusing "benign" housing discrimination. Courts should not import inapplicable doctrines from constitutional and Title VII jurisprudence to fair housing law without a statutory basis. If Congress had wanted to place women on a protective pedestal in the context of housing, it could have.

B. Beyond Segregation: Sex and the Meaning of "Fair Housing"

"Fair housing," in many contexts, means residential integration. The Fair Housing Act has a clear, integrationist intent with respect to race, color, and national origin. In the context of a segregated society, the FHA is meant, in the Supreme Court's description, "to replace the ghettos 'by truly integrated and balanced living patterns.'"[421] The Act's purpose is similarly clear for disability discrimination. It reflected a "national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream" by promoting "independent living."[422] These integrationist goals have little relevance to sex discrimination, however. Except in unusual circumstances, men and women live in the same neighborhoods — and in the same homes.[423] Residential segregation by sex is just not a widespread problem. If the Fair Housing Act is read always and only to demand integration, for each protected class, it will not adequately speak to sex discrimination.

The poor fit of the FHA's integrationist aims puts sex discrimination claims at a marked disadvantage. In interpreting the FHA, courts have heeded the statute's "'broad and inclusive' compass" to construe the Act generously to plaintiffs.[424] Judicial recognition of "perpetuation of seg-

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[420] *See* Sepper & Dinner, *supra* note 32, at 143–44 (describing unique qualities of sex discrimination in public accommodations and suggesting doctrinal responses).

[421] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (statement of Sen. Mondale)); *see also* Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) (explaining that the goal of the FHA is "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat").

[422] Bronk v. Ineichen, 54 F.3d 425, 428 (7th Cir. 1995) (quoting H.R. REP. NO. 100-711, at 18 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2179).

[423] Exceptions include predominantly gay or lesbian neighborhoods and institutional settings. Even here, however, these population patterns will rarely constitute segregation, as opposed to mere separation. *See* Monica C. Bell, *Anti-segregation Policing*, 95 N.Y.U. L. REV. 650, 659 (2020) (defining segregation as involving separation, concentration, subordination, and domination).

[424] City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (quoting *Trafficante*, 409 U.S. at 209).

regation" suits, for example, follows from the statute's integrationist purposes.[425] Likewise, *affirmatively* furthering fair housing seems to contemplate some end state of fair housing toward which HUD and its grantees must endeavor. Indeed, through the AFFH provision, the drafters essentially wrote a purposivist approach into the text of the statute.[426] Without an expanded vision of what constitutes "fair housing," sex-based claims will not benefit from the fullest force of the FHA.

Put differently, while the analogy between race and sex is fraught and imperfect in other antidiscrimination contexts, it is essentially inapposite in housing.[427] The prevalence of the heterosexual family renders sex discrimination in housing fundamentally distinctive.[428] A specialized theory of fair housing for sex, therefore, is needed. Moreover, developing a specialized theory for sex is appropriate. The meaning of "fair housing" has been adapted to treat disability distinctively from race; the same could be done for sex.[429] Indeed, the statute arguably demands doing so: HUD cannot effectively "affirmatively further fair housing" with respect to sex without an understanding of what "fair housing" means.

This is not to say that such an updated understanding of fair housing is strictly necessary for the resolution of any particular legal claim. As Part II demonstrated, important, sex-based fair housing claims can be litigated solely on the basis of existing disparate impact doctrine, or inserted into the AFFH process, all without a theory of what constitutes sex discrimination. Even so, the history of fair housing law makes clear the overriding importance of statutory purpose, and of an understanding of what constitutes "fair housing," in interpreting and pushing forward the law.

This section offers one foundational principle for developing that theory. Fair housing requires breaking down the "separate spheres" created between commercial spaces, historically imagined as masculine, and feminine homes and attacking the artificial limitations on what constitutes an appropriate residential environment that separate spheres ideology has created.

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[425] Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir. 1988) (noting that recognizing perpetuation of segregation claim "advances the principal purpose of Title VIII to promote" integration).

[426] This distinguishes the Fair Housing Act from Title VII, though the two are often read in parallel. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020) (taking textualist approach to interpreting Title VII).

[427] *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 2–6 (2011) (describing prevalence and limitations of race-sex analogy under Title VII); *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 954–56 (2002) (discussing potential differences between race and sex discrimination).

[428] Even in families with same-sex parents, children may be of the opposite sex.

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

Traditional tools of statutory interpretation leave ambiguous the meaning of "fair housing" for sex. The text of the Fair Housing Act simply includes "sex" in its list of protected classes.[430] It imposes no lesser obligations for sex than for race or other protected classes — thereby clearly authorizing disparate impact litigation — but does not reveal its animating principles or offer meaningful guidance as to the scope of HUD's affirmative obligations.

The Act's legislative history provides only a little more instruction, leaving room for a sex-specific theory of fair housing, but not itself providing any such theory. Sex was added to the Fair Housing Act in 1974, six years after the FHA was originally enacted, as part of the Housing and Community Development Act.[431] That larger statute transformed federal housing policy, creating programs like the Community Development Block Grant and the Section 8 voucher program; this revision of the FHA was a minor provision. As such, the legislative history has been deemed "sparse"[432] and the addition of sex to the FHA "barely debated."[433] The primary source of legislative intent is a statement by Senator Bill Brock, the provision's sponsor.[434] Brock's main concern was mortgage discrimination: lenders would refuse to consider a woman's income, assuming that she would get pregnant and stop working, or charge a woman extra presuming she couldn't properly maintain her house.[435] He also noted direct refusals to rent to single women or men as an issue.[436] Brock stated that the bill would have "other comprehensive effects" but did not specify what those effects would be.[437] Brock's legislation was quickly agreed to by the committee and eventually incorporated into law.[438]

This history suggests that the sex discrimination provisions of the FHA are meant to have real effect and arguably to be treated distinctly

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[430] *See* 42 U.S.C. § 3604(b).

[431] Pub. L. No. 93-383, § 808(a), 88 Stat. 633, 728–29 (1974).

[432] ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 11C:1 (July 2020 update).

[433] Tracey McCartney & Sara Pratt, The Fair Housing Act: 35 Years of Evolution 3 (2002) (unpublished manuscript), https://www.yumpu.com/en/document/view/19658155/the-fair-housing-act-35-years-of-evolution-by-tracey-mccartney [https://perma.cc/2HHY-NKTB].

[434] Given the lack of other legislative history, this statement is relatively authoritative. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982).

[435] *1973 Housing and Urban Development Legislation: Hearings Before the Subcomm. on Hous. & Urb. Affs. of the S. Comm. on Banking, Hous. & Urb. Affs.*, 93d Cong. 1227–33 (1973) (statement of Sen. Bill Brock). Some banks went so far as to demand proof of birth control or sterility before counting a woman's income. *Id.* at 1229–30.

[436] *Id.* at 1228.

[437] *Id.* at 1232.

[438] *Id.* at 1232–33.

from race.[439] The drafters of the FHA did not unthinkingly copy the list of protected classes from Title VII. Had they done so, it could be argued that sex should be read to closely track race and that integration should be the sole purpose of the Fair Housing Act — and if sex segregation is not a problem, so be it. By first excluding sex from the Fair Housing Act and adding it separately only later, Congress had something else in mind.[440] Moreover, Congress thought that adding sex as a protected class would have "comprehensive effects," even if it failed to anticipate or explain what those might be. As the Supreme Court recently held in *Bostock v. Clayton County*,[441] in interpreting another prohibition on sex discrimination, the breadth of a statutory provision is not limited by its drafters' failure to imagine the specific consequences of their enactment.[442]

Congress created a space for a meaningful, sex-specific understanding of fair housing to be elaborated: by litigants, by courts, and by HUD. Though none has filled this statutory gap in the intervening half-century, it remains within their power to do so. With respect to affirmatively furthering fair housing, HUD in particular has an important role to play; the modern AFFH process is primarily a HUD creation,[443] so HUD can continue refining AFFH to properly encompass sex discrimination.

Ultimately, history suggests that this interpretive gap will be filled bottom-up, by advocates and administrators alike. When the EEOC was first tasked with remedying sex discrimination under Title VII, it found itself adrift, acting "without the benefit of the guidelines, the legislative history and the court decisions" that it could rely on to attack racial discrimination.[444] As historian Katherine Turk has demonstrated, that "initial ambiguity"[445] created a "productive opening of ideological space" that allowed for "robust and experimental conceptions of equality and related activism,"[446] a space that only closed over decades of internal and external struggles between activists, courts, and administrative

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[439] *Cf.* Bostock v. Clayton County, 140 S. Ct. 1731, 1752 (2020) (analyzing Title VII's prohibition on sex discrimination and noting that "nothing in the meager legislative history of this provision suggests it was meant to be read narrowly").

[440] *Cf.* Sepper & Dinner, *supra* note 32, at 144 (arguing that because "sex" was added to public accommodations statutes in the 1970s, after their original enactment, such statutes should be read in light of feminist demands from that era).

[441] 140 S. Ct. 1731.

[442] *Id.* at 1737 ("[T]he limits of the drafters' imagination supply no reason to ignore the law's demands.").

[443] *See* Johnson, *supra* note 53, at 1225 ("[T]he specific duty of AFFH is open-ended . . . .").

[444] KATHERINE TURK, EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE 21 (2016) (quoting statement of EEOC chair Franklin Delano Roosevelt Jr.).

[445] *Id.* at 4.

[446] *Id.* at 9.

agencies.[447] The same will be true for fair housing — and probably more so. The AFFH process makes this kind of iterative, discursive approach particularly likely, and likely to be particularly generative. Because the AFFH process requires local governments, in dialogue with HUD, to study what fair housing means in their jurisdictions,[448] it provides a decentralized and participatory opportunity to define sex discrimination outside the strictures of litigation.[449]

This Article, though, demonstrates that any theory of sex and fair housing must, at a minimum, take on the legacy of "separate spheres." Sex discrimination in housing is profoundly connected to the separation of the (feminized) home from (masculine) market activity.[450] Arguably, the *primary* mechanism for inscribing gender roles into the built environment was this "separate spheres" ideology[451] — just as residential segregation built racial hierarchy into the city. Our system of planning and zoning built around "single-family home design reflects an ideology of domesticity for mothers," as Katharine Silbaugh and many others have demonstrated.[452]

Separate spheres ideology is shot through the examples of potential sex-based fair housing claims identified in this Article. Separate spheres ideology drives bans on commercial activity in residential areas — the mechanism for excluding in-home child care. Indeed, separate spheres theorists of the nineteenth century worked hard to distinguish between commercial and familial labor, even if both took place in the home, and it is precisely this distinction that is at the heart of in-home daycare bans. The separate spheres ideology also motivated reformers to demand that single-family homes dominate the landscape and that boarding houses, rooming houses, SROs, and other forms of shared living be excluded. Finally, it drove the creation of bedroom communities in the suburbs, the distancing of work from home, and the physical entrenchment of the breadwinner/homemaker dichotomy. As Sonia Hirt has

[447] *See* Franklin, *supra* note 416 (tracing the narrowing and fixing of the meaning of sex discrimination under Title VII).

[448] O'Regan & Zimmerman, *supra* note 60, at 90 (observing that AFFH process is meant to be "locally driven" and leverage community engagement).

[449] *See* Letter from Vicki Been & Katherine O'Regan, Fac. Dirs., NYU Furman Ctr., to HUD (Mar. 6, 2018), https://furmancenter.org/files/NYUFurmanCenter_CommentsAFHDelay_6MAR2018.pdf [https://perma.cc/57KT-Y88Q] (describing legal mechanisms for, and quantifying, increased participation in Obama-era AFFH process); Angela Glover Blackwell, *A Call to Action to Embrace and Enforce the AFFH Rule*, *in* THE DREAM REVISITED, *supra* note 33, at 222, 224 (describing the "collaborative AFFH process" as "the catalyst that spurred the assessments, discussion, and convening of local stakeholders").

[450] *See* Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1248 (2008) (summarizing historical scholarship).

[451] *See supra* notes 10–16 and accompanying text.

[452] Silbaugh, *supra* note 22, at 1851.

demonstrated, the extreme separation of homes from work makes the American land use pattern an outlier among developed countries, even more than our culture of homeownership.[453] This is telling evidence that this aspect of American zoning is not driven by land use planning necessity but by the powerful, deeply rooted, and culturally specific ideology of separate spheres.[454] The legacy of separate spheres is not the only way sex discrimination has been entrenched in housing policy — its connection to the domestic violence context is more attenuated, for example, and the separate spheres metaphor never truly extended to Black women — and removing that legacy need not be the only goal of fair housing law for sex.[455] But it is foundational.

If nothing else, "fair housing" should mean uprooting this pillar of American land use planning. Separate spheres ideology was famously used by the Supreme Court to uphold Myra Bradwell's exclusion from the legal profession in 1872. "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood," explained Justice Bradley.[456] Such patently sexist notions are now rightfully rejected.[457] They should be rooted out of our housing as well.

CONCLUSION

Cities are durable things. Our homes, offices, and highways materially embody — in wood and brick, asphalt and steel — the choices of the eras in which they were planned and built, and carry those values decades, sometimes centuries, into the future.[458] Law also creates persistent, physical effects. The legacies of de jure racial discrimination — from redlining to restrictive covenants — remain visible in city and suburb alike.[459] So too with sex discrimination. Ideologies of domestic space developed in the nineteenth century were written into zoning and planning laws at the turn of the twentieth century; those laws governed

[453] HIRT, *supra* note 208, at 14–15.

[454] *Id.* at 12 ("U.S. zoning is at its base a cultural institution . . . .").

[455] Domestic violence is connected with the related, but distinct, set of stereotypes concerning the public/private distinction, in which the home is deemed private and therefore outside the proper realm of policing. *See, e.g.*, Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976–77 (1991). With respect to race, there were some attempts to promote the separate spheres ideology to Black women, *see* Kerber, *supra* note 14, at 25–26, but an ideology built around women eschewing wage labor never had much applicability to the social realities of Black women, *see* Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 130–31 (1993).

[456] Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring in the judgment).

[457] Miller v. Albright, 523 U.S. 420, 442 (1998) (plurality opinion).

[458] *But see generally* STEWART BRAND, HOW BUILDINGS LEARN: WHAT HAPPENS AFTER THEY'RE BUILT (1994) (describing how buildings change over time).

[459] *See generally* ROTHSTEIN, *supra* note 298.

the postwar construction of many of the single-family, exclusively residential neighborhoods we live in today. The physical legacy of sex discrimination is less pernicious than the poison of racial segregation, but it is no less deeply embedded.

The Fair Housing Act offers a chance to investigate, expose, and ultimately expunge the legacies of discrimination from the built environment. The Act's efficacy with respect to racial segregation has been woefully incomplete.[460] Even so, it remains the essential legal mechanism — bringing to bear the full force of the federal government — for ending housing discrimination and building a new, more open housing market. Sex discrimination, beyond the most direct and intentional acts, must no longer escape scrutiny under the Fair Housing Act. The recent campaign against chronic nuisance ordinances offers hope for change. This Article shows there is much more to be done.

[460] *See* Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 248–49 (2016) (describing criticism of FHA's weakness).