

Fair Housing for a Non-Sexist Household

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Noah M. Kazis, [Fair Housing for a Non-Sexist City](#), 134 **Har. L. Rev.** 1684 (2021).

Noah Kazis opens his new article [Fair Housing for a Non-Sexist City](#) with an ambitious question: “What would a non-sexist city be like?”¹ (P. 1684). America’s “built environment,” Kazis explains, is a stubbornly sexist one. (P. 1687.) Examples abound. Women—as both child-care users and child-care workers—are economically burdened because of land use restrictions on in-home day care in residential areas. (Pp. 1710-20.) Men—as the predominant users of economically-desirable shared housing models—are rendered homeless because of building code and zoning restrictions on single room occupancy units. (Pp. 1720-35.) Women and men—as partners—fall into traditional sex roles (that redound to the financial detriment of both) because of land use restrictions that make it harder for a parent (traditionally the woman) to be at home for children in one area and at work for a high-paying job in another. (Pp. 1735-45.) Kazis uses these examples—among others—to illustrate the problem his article targets: the entrenchment of Victorian America’s separate spheres ideology in today’s material landscape.

[Fair Housing](#) is a treasure trove of facts that will interest scholars of family law and of gender relations, including the fact that “[t]en percent of the gender pay gap between husbands and wives without children can be attributed to commute variables” (P. 1739), and the fact that cities historically excluded apartment houses and boarding “hotels” from residential areas in order “to preserve the ‘character and quality of manhood and womanhood.’” (P. 1726.) However, one of the most interesting facts that [Fair Housing](#) unearths is that neither litigants nor enforcement agencies have used the Fair Housing Act—a federal law dedicated to ensuring *fair housing*, after all—to challenge our built environment’s housing and land use practices; nor have scholars dedicated much attention to sexism in our material and architectural ecosystem. Kazis’s aim in [Fair Housing](#) is not so much to explain why that is so as to elaborate on what role the FHA might play moving forward. To that end, [Fair Housing](#) offers concrete examples and explanations of the ways in which the FHA can facilitate “fair housing for a non-sexist city” through its relatively robust disparate impact theory of liability and its statutorily unique provision requiring state and local governments to “affirmatively further” fair housing (P. 1692.)

[Fair Housing](#) is right: sex discrimination in the American-built environment is a huge problem that the law has ignored, either because it is “too big to fail” or too big to apprehend. Complicit in this erasure, I rarely do a deep dive into the FHA in my family law course, using my property course instead to elaborate on the FHA’s meaning and applications. Thanks to Kazis, the FHA will now be required reading in both courses.

[Fair Housing](#) provokes as many questions as it answers, but one is whether the FHA could be used to bring more men into the caregiving space, a question that Kazis gestures at but never makes central to his inquiry. Rather than focus on how land use practices keep men outside the domestic sphere, Kazis’s primary focus in [Fair Housing](#) is on land use practices that keep women within it—not working. Consider the limits on in-home child care, which burden two classes of women: in-home child care providers, 95% of which are women (P. 1712), and in-home child care consumers, most of whom are mothers, who “still bear the primary responsibility for child care in most American families, even in an era when most mothers work” (P. 1711) and for whom “[a]ccess to good child care ... is essential for [their] ability to

enter and advance within the workplace.” (P. 1712.) Another is land use limits on urban size and density, whose sexist effects are more complicated but which ultimately keep a certain class of women closer to the domestic sphere (where the kids are) and far from the city center (where more lucrative work opportunities sit). As Kazis says, “[t]here 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.” (P. 1741.)

Kazis argues that the FHA is an under-utilized (indeed, unutilized) tool to challenge these restrictions, which disproportionately affect women and which are grounded in a Victorian gender ethos that modern anti-stereotyping jurisprudence—of which the FHA is an essential but unappreciated part—repudiates. I love the idea of applying the anti-stereotyping principle to new terrain, and would argue that the principle is capable of doing more work on this field than Kazis admits.

For example, Kazis maintains that property law has made it harder for women to enter the breadwinning sphere, both by restricting in-home day care (run by women) and by keeping mothers far from lucrative city employment. But if that is right, then property law has *also* made it harder for *men* to enter the caregiving space, either as paid caregivers or as fathers. If density restrictions mean that mothers will be the parents who respond to their children’s needs during the school day, then those same restrictions mean that fathers will not be the parents to do so, creating a gendered division of labor in (and outside) the household that “sticks” well after the work day is done. Lifting density restrictions—as Kazis suggests—could therefore have not just one effect but two: encouraging more women to work outside the home (which Kazis enthusiastically supports) *and* encouraging more men to work within it (which Kazis does not mention).

At the end of [Fair Housing](#), Kazis says that the FHA’s “integrationist intent with respect to race, color, and national origin” does not carry over to “sex discrimination” under the Act because “men and women live in the same neighborhoods—and in the same homes.” “If the Fair Housing Act is read always and only to demand integration, for each protected class,” he continues, “it will not adequately speak to sex discrimination.” (P. 1752.) For that reason, Kazis contends, “[a] *specialized theory* of fair housing for sex ... is needed” (P. 1753), by which I understand a theory that recognizes that “integration” means something different for sex than it does for race.

I respectfully disagree. On a macro level Kazis is of course right: our neighborhoods and external spaces remain woefully segregated by race but not by sex. But on a micro level Kazis is less correct: our homes and internal spaces remain as sex-segregated as ever, as Kazis himself persuasively shows throughout *Fair Housing*, with women as primary caretakers and men as primary breadwinners.² *Fair Housing* might not say so, but the FHA’s “integrationist intent” has as much application to the segregation inside our walls as it does to the segregation outside of it.

1. P. 1684 (quoting and citing Dolores Hayden, *What Would a Non-Sexist City Be Like? Speculations on Housing, Urban Design, and Human Work*, 5 **Signs** 170 (1980)).
2. That is, in the heterosexual households on which *Fair Housing* tends to focus.

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