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Moving Beyond Two-Person-Per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards

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MOVING BEYOND TWO-PERSON-PER-BEDROOM: REVITALIZING APPLICATION OF THE FEDERAL FAIR HOUSING ACT TO PRIVATE RESIDENTIAL OCCUPANCY STANDARDS

Tim Iglesias*

What is crowded to some is exactly what is comfortable to others; what is comfortable to some is exactly what is lonely to others.[1]

New empirical evidence demonstrates that the two-person-per-bedroom standard (a common residential occupancy policy) substantially limits the housing choices of many thousands of families, especially Latinos, Asians, and extended families nationwide. The federal Fair Housing Act makes overly restrictive policies illegal, but promotion of the standard by housing providers, confusion in the courts and the enforcement practices of the U.S. Department of Housing and Urban Development (HUD) have enabled the two-person-per-bedroom standard to become dominant with a false veneer of legality. This article urges HUD to use its regulatory authority to remedy the situation and offers several solutions. And, if HUD fails to act, it encourages private plaintiffs to challenge the two-person-per-bedroom standard and provides guidance to courts in deciding these cases.

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*Professor of Law, University of San Francisco School of Law. The following people provided helpful comments on earlier drafts of this article for which I am very grateful: Michael Allen, Chris Brancart, Anne Houghtaling, Richard Marcantonio, Rigel C. Oliveri, Mike Rawson, Robert Schwemm, Jodi Short and members of the USF School of Law faculty, especially Tristin Green and Josh Davis. Also special thanks to Rick Sander, Rich Hertz, Don Dixon, Sara Pratt and numerous practitioners including Mike Hanley and Matthew Dietz. I owe a great debt to the following USF law students who provided excellent research and other assistance for this article: Brandy Hillman-Azevedo, Kate Chatfield, Gwendolyn Harre, Christie Moore, and Peter O'Hare. Of course, any errors in this article are solely the responsibility of the author.

1. Ellen Pader, *Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land*, 19 J. ARCHITECTURAL PLAN. RES. 300, 305 (2002).

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INTRODUCTION

A family living in a home will often contract and expand over time, depending on a variety of life circumstances. Children are born or added to the family by adoption or foster care. Or parents may divorce and establish separate households between which their children split time.[2] Sometimes children sleep three to a room, or an uncle sleeps in the basement. A variety of financial and other considerations inform decisions about who is and how many people are considered members of the family's household and who sleeps in what room. At a time when families struggle to make ends meet, allowing them to choose their living arrangements seems particularly

2. Other possibilities include the following: Children move away, but may want to return home after college. A divorced person with children may move back home. Someone with children from a prior marriage may remarry and establish a "blended household." Elderly people may want to live with their children or extended relatives, either to care for others or to receive care themselves.

important.[3] Even apart from economic concerns, many extended and intergenerational families desire to live together in one household.[4]

Families living in single family owner-occupied housing often "double up," but are rarely subject to enforcement of city housing codes. In contrast, renters are regularly subject to occupancy policies created and enforced by landlords and property management agencies. Many (perhaps most) landlords in the United States impose a maximum two-person-per-bedroom occupancy rule,[5] which often prevents families who want to live together from doing so. Owners of nicer housing in higher-end neighborhoods and property management agencies managing large numbers of units regularly impose this limitation.[6] Progressive housing advocates have argued for years that the bright line two-person-per-bedroom standard harms families of all kinds, particularly families of color.[7] However, landlords and landlord advocates have dug in, defending the two-person-per-

3. Landlords sometimes refer to these practices as "doubling up." "Census Bureau data released in September showed that the number of multifamily households jumped 11.7 percent from 2008 to 2010, reaching 15.5 million, or 13.2 percent of all households. It is the highest proportion since at least 1968, accounting for 54 million people." Michael Lou, *'Doubling Up' in Recession-Strained Quarters*, N.Y. TIMES, Dec. 28, 2010, at A1. "[T]he number of people in multigenerational households grew by 2.6 million between 2007 and 2008." Jennifer Ludden, *Boomerang Kids Drive Rise of Extended Family Living*, NPR.ORG, http://www.npr.org/templates/story/story.php?storyId=124787436 (Mar. 18, 2010).

4. Dozens of posts on blogs and community forums requesting information and advice on this issue attest to its importance in the daily lives of renters. *See, e.g.*, *How Many People Can Live in a 3 Bedroom House in Columbus[,] Ohio?*, GOFTP ANSWERS, http://www.goftp.com/qna/How_many_people_can_live_in_a_3_bedroom_house_in_columbus_ohio-qna324803.html (last visited Jan. 20, 2011). Interestingly, the city of Ames, Iowa attempts to make it easy for families who want to live under one roof to determine the city's regulations. *See Occupancy Laws for Rental Housing*, CITY OF AMES, IOWA, http://www.cityofames.org/index.aspx?page=188 (last visited Dec. 23, 2011).

5. *See infra* Part II.A. This article is a companion article to Tim Iglesias, *Clarifying the Federal Fair Housing Act's Exemption for Reasonable Occupancy Restrictions*, 31 FORDHAM URB. L.J. 1211 (2004) (clarifying the relationship between the FHAA and *governmental* residential occupancy standards and proposing solutions to the problem created by the ambiguous exemption from FHAA for "reasonable" governmental occupancy standards).

6. *See, e.g.*, Uludag v. Draper & Kramer, Inc., HUDALJ No. 06-047-FH, 2006 WL 2848628 (HUD Sept. 21, 2006) (where the company managed 574 units); Complaint at 2, Leather v. Florence Tollgate Condo. Ass'n, FHEO No. 02-06-0101-8 (HUD filed Feb. 11, 2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14495.pdf (where the company managed 320 units).

7. *See infra* Part I.B. In addition, Catholics and Mormons, who traditionally have larger families and who are also protected by the FHAA on the basis of religion, may also be strongly affected. However, statistics linking religion and housing are not available.

bedroom standard, citing their need for a clear rule and concerns about "overcrowding."[8]

Upon close examination, justifications for the two-person-per-bedroom occupancy standard are weak.[9] Moreover, new empirical studies demonstrate that application of a two-person-per-bedroom standard predictably results in prima facie discrimination against families in violation of the Federal Fair Housing Amendments Act (FHAA)[10] in many housing markets.[11] In the case of studio apartments, this standard discriminates in 44 states, and it discriminates as applied to one-bedroom apartments in every state except North Dakota.[12] Studio and one-bedroom apartments account for approximately 32% of all rental apartment units, and almost 50% of rental apartment units in larger buildings.[13] Latino and Asian families in every state suffer the greatest discriminatory effects of this standard because they tend to live in larger family groups.[14]

Despite its widespread discriminatory effects, however, the two-person-per-bedroom standard is widely perceived as the legally-compliant standard in most of the country.[15] Landlords and property management companies strongly prefer this traditional occupancy standard. And, the U.S. Department of Housing and Urban Development (HUD)—the agency charged with enforcing the Fair Housing Act—inadvertently aids and abets this perception of legality through the use of the two-person-per-bedroom standard as part of its occupancy enforcement policy contained in the "Keating Memo."[16]

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8. *See infra* notes 63–73 and accompanying text for a discussion of landlords' justifications for residential occupancy standards.

9. *See infra* Part I.B.

10. 42 U.S.C. §§ 3601–3608 (2006).

11. *See infra* Part I.C.

12. *See infra* note 117 and accompanying text.

13. *See* Author's Calculations Analyzing U.S. Census Bureau Data, 2008–2010 American Community Survey, 3-Year Estimates—Public Use Microdata Sample (PUMS), U.S. CENSUS BUREAU (data available at http://dataferrett.census.gov/) (last visited Jan. 23, 2012) (on file with author); *Characteristics of Rental Apartment Units, 2009, Quick Facts: Apartment Stock* NAT'L MULTI HOUSING COUNCIL, http://www.nmhc.org/Content/ServeContent.cfm?ContentItemID=141 (last visited Dec. 23, 2011) (reporting statistics from apartment units in structures with five or more units using U.S. Census Bureau's 2009 American Housing Survey).

14. Ludden, *supra* note 3.

15. *See infra* Part II.

16. Memorandum from Frank Keating, General Counsel, HUD to all Regional Counsel regarding

The Keating Memo provides that the two-person-per-bedroom standard is presumptively reasonable and articulates a multi-factor analysis to determine if any residential occupancy standard may violate the FHAA.[17] Under that policy, HUD usually refrains from investigating when landlords impose a two-person-per-bedroom limit. This practice lends an unjustified quasi-legal veneer to the two-person-per-bedroom standard. In the end, the under-enforcement of the FHAA in this area hurts many thousands of families nationwide that Congress intended to protect.

The application of the Fair Housing Act to private residential occupancy standards is an area ripe for examination.[18] Not only has the dominant status of the two-person-per-bedroom standard remained largely under cover, but until now no one has demonstrated its frequent discriminatory effects on families. This Article makes these two contributions. It exposes the two-person-per-bedroom standard as the dominant standard with a false aura of legal legitimacy, and it challenges the standard as an unfair and often illegal restriction on the housing choices of families protected by the FHAA. These findings pose an important and difficult problem for

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"Fair Housing Enforcement Policy: Occupancy Cases" (Mar. 20, 1991), *reprinted in* Fair Housing Enforcement—Occupancy Standards Notice of Statement of Policy, 63 Fed. Reg. 70,256, 70,256–57 (filed Dec. 18, 1998) [hereinafter Keating Memo]. The Keating Memo is extensively discussed *infra* Part II.B and Part III.B.2.

17. *See id.*

18. One commentator characterized the issue as one of "the most unsettled areas" in the FHAA and one that has created "significant controversy." Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. L. REV. AM. U. 297, 300, 310 (1995). Despite the importance and complexity of regulation of residential occupancy standards, there has been very little coverage of familial discrimination caused by restrictive residential occupancy standards in law reviews. *See* Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1266 (2005); Allen, *supra*; Daniel Barkley, *Beyond the Beltway: Familial Status Under the Fair Housing Act*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 93, 96 (1997); Harry J. Kelly, III, *Discrimination and Occupancy Limits: Finding a Middle Ground*, 4 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 51 (1994–95); James Morales, *Creating New Housing Opportunities for Families with Children: The Fair Housing Amendments Act of 1988*, 22 CLEARINGHOUSE REV. 744, 750–51 (1988); Jim Morales, *The Emergence of Fair Housing Protections Against Arbitrary Occupancy Standards*, 9 LA RAZA L.J. 103 (1996). In addition, many secondary sources are incomplete, confused, wrong, or unhelpful in their statement of the law and advice. *See, e.g.*, Jo Anne P. Stubblefield, *Regulating Occupancy Under the Fair Housing Act*, *in* ALI-ABA, DRAFTING AND (RE-DRAFTING) DOCUMENTS FOR CONDOMINIUMS AND PLANNED COMMUNITIES IN TROUBLED TIMES: PRACTICE AND PRINCIPLES (2009) (discussing the Keating Memorandum but omitting the case law applying disparate impact analysis).

HUD as the nation's primary enforcer of the FHAA. HUD Secretary Shaun Donovan has recently emphasized that "HUD has renewed its focus on research, data, and evidence-based policymaking."[19] Based upon this commitment and the combination of this Article's empirical evidence and argument, the Article encourages HUD to use its regulatory authority to move the country to a less restrictive standard and articulates several reasonable alternatives for HUD to consider.[20] This Article also seeks to enable private fair housing litigants to challenge the two-person-per-bedroom policy in appropriate cases, and it offers courts guidance for deciding these cases.[21]

This issue is particularly important now because the current mortgage and foreclosure housing crises have worsened our chronic affordable housing crisis. Plus, the expected increase in Latino and Asian households—whose larger families tend to be disproportionately excluded by the two-person-per-bedroom standard—makes proper enforcement of the FHAA an even more important issue for the future.

This Article is organized in three parts.[22] Part I introduces the FHAA and the problem of restrictive residential occupancy standards. It then critiques justifications proffered for the two-person-per-bedroom standard and presents substantial original empirical

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19. Shaun Donovan, *Message From the Secretary*, EVIDENCE MATTERS, Winter 2011, at 2.

20. *See infra* Part III.B. Note that Kelly, *supra* note 18, at 61–62 proposes a three part test described as "a modified version of the pragmatic test used in Mountain Side I": (1) Is the occupancy standard based on neutral standards?; (2) Is there actual evidence of familial discrimination or discrimination against other protected classes?; and (3) How has the owner actually applied the standard? In the author's view, Mr. Kelly's analysis and solution are inadequate because he construes the FHAA to only prohibit discrimination against "families as families," in effect limiting the scope of familial status coverage to intentional discrimination. *Id.* at 53, 54, 62.

21. *See infra* Part III.C–D.

22. This Article focuses on neutral residential occupancy standards that discriminate on the basis of familial status. They also can discriminate against people based upon their race, national origin, religion or disability. *See*, *e.g.*, Betsey v. Turtle Creek Assocs., 736 F.2d 983, 984 (4th Cir. 1984) (holding that plaintiff established a prima facie case of discriminatory impact under the Fair Housing Act with evidence that conversion to an all-adult rental policy in defendant's building had a substantially greater adverse impact on minority tenants). These dimensions of the problem are left for future scholarship. This Article also does not consider the application of the two-person-per-bedroom standard as applied in HUD-assisted properties, as challenged in *Head v. Cornerstone Residential Management, Inc.*, No. 05-80280, 2010 WL 326035, at *1 (S.D. Fla. Jan. 19, 2010), because that standard rests on a distinct legal basis.

evidence demonstrating that the two-person-per-bedroom standard is discriminatory as applied in a wide range of housing contexts and jurisdictions nationwide. It argues that the two-person-per-bedroom standard should not be considered presumptively compliant with the FHAA but rather should more properly be considered presumptively discriminatory. Landlords want and need a residential occupancy standard that can be easily applied and that provides assurance that the landlord is acting within the bounds of the law. However, the two-person-per-bedroom standard is not the appropriate standard. This conclusion sets the stage for a deeper investigation of how we got where we are and proposals for a new solution.

Part II takes a step back and explains how the two-person-per-bedroom rule became a dominant residential occupancy standard. It argues that the two-person-per-bedroom standard has become dominant *not* because it is a good standard or the right standard, but because of a lack of a clear liability standard, landlord advocacy, and dysfunctions in FHAA enforcement.

Drawing upon previous cases and the insights incorporated into HUD's existing enforcement guideline, Part III proposes innovative ways for HUD to better enforce the antidiscrimination goal of the FHAA by moving private housing providers to a less restrictive residential occupancy standard that also treats landlords fairly and reasonably. Moreover, it makes clear that HUD has the power to effect important social change without overstepping its bounds. In addition, Part III urges private fair housing enforcement and offers guidance to assist courts in case HUD fails to act.

I. STUCK IN THE WRONG PLACE: WHAT'S WRONG WITH THE TWO-PERSON-PER-BEDROOM STANDARD?

Part II argues that the two-person-per-bedroom standard has become the dominant standard unchallenged in many jurisdictions. However, is the status quo really a problem? In other words, is the two-person-per-bedroom standard a good stasis or a bad stalemate? From the standpoint of the housing industry, especially residential

management companies that operate in several states, the status quo (a predictable and clear two-person-per-bedroom standard) represents an achievement—a stable equilibrium in a complex issue that could have been rife with litigation.

Some regulators may agree with the housing industry on this point. They may argue that the two-person-per-bedroom standard reformed the housing market from some more restrictive standards that were common prior to the FHAA, and that therefore some reasonable progress has been made. Some might argue that even if it is a Gordian knot, then it is a valuable knot that ties plaintiffs, defendants, and courts together with the benefits of stability.[23]

But the mere fact that law is settled does not make it ideal. Nor should stability alone shield a law from examination. History is littered with stable but unjust laws; stability alone is not a compelling reason to continue using a legal rule. In particular, in the context of civil rights, widespread (and traditional) practice by the regulated community together with perceived "reasonableness" by that community is not a compelling basis for under-enforcement of a statute intended to rectify past injustices.

This part first presents background on the FHAA and explains the residential occupancy standard problem. It then demonstrates that under-enforcement of the FHAA in this area allows many discriminatory practices to go unaddressed, (i.e., rental refusals and evictions of larger families and especially families of people of color).

A. Background on the Federal Fair Housing Act and the Residential Occupancy Standard Problem

In 1968, on the heels of the assassination of Dr. Martin Luther King, Jr., Congress enacted the Federal Fair Housing Act (FHA).[24] The FHA was adopted to expand housing opportunities and to

23. The author thanks Chris Brancart for this insight. Telephone interview with Chris Brancart, Partner, Brancart & Brancart (July 25, 2010).

24. 42 U.S.C. § 3601 (2006).

promote integrated living patterns.[25] It prohibits discrimination against members of specified protected classes in a wide range of housing activities and transactions, including renting, selling, and finance.[26] The classes protected under the original FHA in 1968 were race, color, and religion.[27] In 1988, the FHA was amended to add familial status and disability as protected classes.[28] (The law is now typically referred to as the "FHAA" for "Fair Housing Amendments Act.") The term "familial status" is not used as in common parlance but is defined as a household which includes at least one minor child.[29] This new protected class was added based upon two HUD-sponsored studies that found widespread housing discrimination against the highly-valued social institution of the family and the use of "no children" policies as pretexts to discriminate based upon race.[30] "Congress expanded the Fair Housing Act to protect against

25. *See id.*

26. *Id.* § 3604.

27. *Id*. Sex was added as a protected class in 1973.

28. *Id.* § 3602(h).

29. "Familial status" refers to a household including a child under the age of eighteen and his or her legal guardian, regardless of age or number of children. Familial status also includes pregnant women, families that are planning to adopt, and families that have or are planning to have foster children (or to become guardians of children). *See id*. § 3602(k); *see also* Glover v. Crestwood Lake Section I Holding Corp., 746 F. Supp. 301, 309–10 (S.D. NY 1990) (FHAA protects single parents). Some people find the FHAA's use of the term "familial status" confusing or misleading. It does not include every household composition that might be called a "family" in everyday conversation. At the time of writing, HUD has issued a proposed regulation to expand the definition of "family" under the FHAA to include lesbian, gay, bisexual, and transgender families and couples. *See* Press Release, Brian Sullivan, HUD, HUD Proposes New Rule to Ensure Equal Access Housing Regardless of Sexual Orientation or Gender Identity (Jan. 20, 2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-006.

30. *See* JANE G. GREENE & GLENDA P. BLAKE, A STUDY OF HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN 3, 34 (1980) (research conducted for the Office of Policy Development and Research, HUD); ROBERT W. MARANS ET AL., MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY (1980) (prepared for the Office of Policy Development and Research, HUD); *see also* Doe v. City of Butler, 892 F.2d 315, 326 (3d Cir. 1989) (Roth, J., dissenting) (citing H.R. REP. NO. 100-711, at 32 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184); United States v. Branella, 972 F. Supp. 294, 297 (N.J. 1997) (citing reasons why Congress added "familial status" with citations to cases and legislative history: "Congress expanded the Fair Housing Act to protect against familial status discrimination in light of an express concern for the plight of single-parent families, young families with children, and poor families"); United States v. Lepore, 816 F. Supp. 1011, 1017 (M.D. Pa. 1991) (quoting 134 CONG. REC. H4611 (daily ed. June 22, 1988) (statement of Rep. Miller)). Congress intended to prohibit the exclusion of families with children from housing opportunities based on invidious discrimination and stereotypes. *See* H.R. REP. NO. 100-711, at 19 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2180; Sierra v. City of

familial status discrimination in light of an express concern for the plight of single-parent families, young families with children, and poor families."[31] Restrictive residential occupancy standards were one of the housing problems that Congress specifically targeted in the enactment of the 1988 amendments to the FHA.[32] In addition, "Congress noted racial segregation was exacerbated by the exclusion of families with children in the sale or rental of a dwelling."[33] "The Amendments were 'carefully crafted to protect American families, without placing an undue burden on owners and landlords.'"[34]

This Article focuses on cases in which plaintiffs challenge private neutral residential occupancy standards (such as a two-person-per-bedroom limitation) as discriminating based upon familial status.[35] Courts have recognized both disparate treatment and disparate impact claims under the FHAA in restrictive residential occupancy cases. In disparate treatment cases challenging neutral restrictive residential occupancy standards,[36] a plaintiff presents evidence that the standard is caused by intentional discrimination against families. If the plaintiff carries her burden, the burden shifts to the defendant to present a nondiscriminatory reason for its policy. If the defendant succeeds, a plaintiff can try to demonstrate that the proffered reason

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New York, 579 F. Supp. 2d 543 (S.D.N.Y. 2008).

31. *Branella*, 972 F. Supp. at 297; *see also City of Butler*, 892 F.2d at 326.

32. *United States v. Lepore,* 816 F. Supp. 1011 (M.D. Pa. 1991), was one of the first published cases applying the FHAA to a claim of familial status discrimination based upon a neutral restrictive occupancy standard. In its analysis of the legislative history, the court states: "Congress indicated that these amendments are intended to alleviate the squeeze on affordable housing stock for families with children and to protect such families from eviction or inability to find reasonably priced places to live." *Id.* at 1017. This statement is followed by a citation to Rep. Miller, 134 CONG. REC. H4611 (daily ed. June 22, 1988) (statement of Rep. Miller).

33. Blomgren v. Ogle, 850 F. Supp. 1427, 1429 (E.D. Wash. 1993) (citing H.R. REP. NO. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2180, 2182.).

34. *Ogle*, 850 F. Supp. at 1429 (citing 134 CONG. REC. H4687 (daily ed. June 23, 1988) (remarks by Rep. Pelosi)).

35. While this Article focuses on familial discrimination, sometimes landlords use a neutral residential occupancy standard to refuse to rent or evict a family because of its race or national origin. *See, e.g.*, Reeves v. Rose, 108 F. Supp. 2d 720 (E.D. Mich. 2000) (alleging familial status and racial discrimination). These cases may be brought as race/national origin claims.

36. *See, e.g.*, United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992) (disparate treatment); *Reeves*, 108 F. Supp. 2d at 720 (same); Complaint at 4, Interfaith Hous. Ctr. of the N. Suburbs v. Giarelli, FHEO No. 05-07-0669-8 (HUD filed Mar. 13, 2008), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14471.pdf (charging that one person per bedroom residential occupancy standard was used to exclude families).

is only pretextual. Under a disparate impact theory,[37] a plaintiff can challenge a neutral residential occupancy standard as a violation of the FHAA by demonstrating through statistics that the application of this limitation has the effect of excluding a substantial proportion of families from housing units compared to non-family households in the relevant geographical area.[38] If a plaintiff has sufficiently made out a prima facie case of discrimination, most courts require defendants to rebut the claim and defend their policy by producing some kind of a "legitimate business reason" or "business necessity."[39] Some courts require defendants to rebut the prima facie case by demonstrating that their policy is "the least restrictive means to achieve a compelling business purpose."[40]

The federal FHAA protects housing choice.[41] Housing is an important social need because having a decent, affordable, stable home is a fundamental building block of life.[42] Housing choice is important because each family or household has particular needs and preferences as well as a limited budget. While many factors affect the breadth of housing opportunities available, a restrictive residential occupancy standard is an important but frequently overlooked one. These standards represent an important area where fair housing law and concerns about housing affordability overlap.

A residential occupancy standard limits the number of persons who can legally occupy a particular residential space (e.g., two persons per bedroom).[43] Generally, a residential occupancy standard

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37. *See, e.g.*, Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243 (10th Cir. 1995) (disparate impact); United States v. Tropic Seas, Inc. 887 F. Supp. 1347 (D. Haw. 1995) (same). Even when a defendant rents to some families a court might still find a disparate impact violation because of refusal to rent to a larger family. *E.g.*, United States v. Hover, No. C 93-20061 JW, 1995 WL 55379 (N.D. Cal. 1995) (two parents and four children).

38. *See generally Tropic Seas*, 887 F. Supp. 1347.

39. *See, e.g.*, *id.*

40. *See, e.g.*, Fair Hous. Council of Orange Cnty., Inc. v. Ayers, 855 F. Supp. 315, 319 (C.D. Cal. 1994).

41. *See, e.g.*, *Badgett*, 976 F.2d at 1179 ("[T]he issue is not whether any housing was made available to Mayeaux, but whether she was denied the housing she desired on impermissible grounds.").

42. *See generally* Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511 (2007).

43. Most people are familiar with other types of *non-residential* occupancy restrictions, such as rules stating maximum allowable occupancy in elevators, pools, and meeting rooms, which are based solely on health and safety concerns. *See* Grider v. City of Auburn, 618 F.3d 1240 (11th Cir. 2010) (rare

may be set and enforced by governments or by private landlords. Usually governments set residential occupancy standards to protect public health and safety (fire safety, for example); these standards are generous, allowing more persons to occupy a given amount of space than occupancy standards set by private landlords.[44] Private landlords and property managers may have many different purposes for selecting and enforcing residential occupancy standards; their standards are typically more restrictive than those set by governments.

In the landlord–tenant context, restrictive residential occupancy standards commonly deny families housing choice through refusal to rent, refusal to renew a lease, or eviction.[45] These situations often arise when a child is added—or children are added—to the household by birth, foster care, adoption, or marriage to someone who already has children, and the added family member would put the household out of compliance with the residential occupancy standard.[46] Under a two-person-per-bedroom standard, a couple with one child would not be able to live in a studio apartment or a one-bedroom unit. A household of five would similarly be rejected from two-bedroom apartments and houses. The two-person-per-bedroom standard excludes many families from a large portion of available rental housing: 28% of families in the United States who are renters are

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litigation involving alleged disparate application of occupancy standards for commercial establishments).

44. Governmental occupancy limitations are intended to protect health and safety by ensuring adequate corridors and windows for fire escape, proper ventilation, etc. *See*, *e.g.*, Sierra v. City of New York, 579 F. Supp. 2d 543 (S.D.N.Y. 2008) (finding that a city housing maintenance code rule explicitly excluding children from single room occupancy units (SROs) did not violate FHAA on familial status grounds because of health and safety justifications). Note also that governmental occupancy standards are controversial because of their paternalistic origins and doubtful basis in science. *See, e.g.*, Iglesias, *supra* note 5, at 1214–16.

45. "There are numerous management policies and restrictions limiting the ability of families with children to find suitable rental housing. . . . [T]here are restrictions or limitations on . . . the maximum number of children or family members . . . ." MARANS ET AL., *supra* note 30, at 21. "[A]bout 40 percent of all [surveyed] properties . . . rejected applicants because the unit was too small for the number of people applying to live there." HOWARD SAVAGE, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, NO. H121/98-1, PROPERTY OWNERS AND MANAGERS SURVEY 5 (1998), *available at* http://www.census.gov/prod/3/98pubs/h121-9801.pdf.

46. *See, e.g.*, Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., No. 3:09-CV-1037, 2010 WL 2977143 (D. Conn. July 20, 2010) (married couple forced to move upon birth of first child); United States v. Tropic Seas, Inc., 887 F. Supp. 1347 (D. Haw. 1995) (same).

comprised of three to five members,[47] and 71% of the rental apartments in the United States are comprised of studios, one-bedroom, and two-bedroom units.[48] Of course, the situation is even worse for larger families.

The households of some racial groups, especially Latinos and Asians, tend to be larger than typical Caucasian households because they include more children, multigenerational and extended families, or a combination thereof.[49] These households and others would often prefer to live three to a bedroom or would like to use a room not designated by the landlord as a "bedroom" (such as a den/playroom, basement, office, living room or dining room) for sleeping.[50] Such preferences are not merely economically driven; some prefer living closely even when financial considerations would allow a less dense arrangement.[51] However, the two-person-per-bedroom standard prevents these households from living together as they desire.

While renters are the group most affected by restrictive occupancy standards, they are not the only ones subject to their limitations. Owners of condominiums and owners of units in the fast-growing sector of "common interest communities" are also subject to the residential occupancy standards adopted by their governing homeowners' associations.[52] Further, owners of mobile homes or

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47. According to the 3-Year Estimates, Public Use Microdata Sample (PUMS) of the 2008–2010 American Community Survey conducted by the U.S. Census Bureau, 28% of rental households comprise three to five persons. According to the same data, there are 10,175,965 family households who rent that contain three to five members. *See Author's Calculations Using 2008-2010 American Community Survey, supra* note 13.

48. *See id.* These units are concentrated in larger buildings. *Characteristics of Rental Apartment Units, supra* note 13 (92% of apartments in structures with five or more units are studios, one-bedrooms, or two-bedroom units).

49. The average household size when the householder is Hispanic is 3.54 people, the average household size when the householder is Asian is 2.95 people. And the average household size when the householder is white is only 2.56. *See Table AVG1. Family Status and Household Relationship of People 15 Years and Over, by Marital Status, Age, and Sex: 2010*, *America's Families and Living Arrangements: 2010*, U.S. CENSUS BUREAU, http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (follow "Excel" hyperlink or "CSV" hyperlink) (last visited Jan. 20, 2011).

50. Iglesias, *supra* note 5, at 1211–13.

51. *Id.*

52. *See, e.g.*, Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., No. 3:09-CV-1037, 2010 WL 2977143 (D. Conn. July 20, 2010) (rejecting defendant's motion to dismiss where plaintiff unit owner claimed a two-person–per-bedroom association rule had a disproportionate impact on families with children). Covenants, conditions, and restrictions (CC&Rs) and/or homeowner association rules

manufactured housing located in mobile home parks are subject to the residential occupancy standard enforced by the park owner.[53] Homeowner associations and mobile home park owners also frequently adopt a two-person-per-bedroom occupancy standard, or sometimes even more restrictive ones.

The harms caused by an overly restrictive residential occupancy standard are numerous.[54] In the face of such restrictions on its housing choice, a household is left with few options. It can reconfigure its household composition—split up and deprive its members of their desired living situation. Splitting up the family can conflict with deeply held cultural preferences/norms to live closely as a way of life and to keep together the intergenerational family, the extended family, or both. Household reconfiguration also causes conflicts and stress because the "family" is not together. If the household does split up, this causes additional costs, in particular the need to rent two housing units instead of one.

If the household is not willing to reconfigure its composition, then it must do either one or some combination of the following:

(1) Buy or rent more housing than desired: If the household wants to stay together, it is forced to buy more housing than it wants (e.g., a family of three must rent a two-bedroom unit instead of one-bedroom; or a family of five must rent a relatively scarce three-bedroom unit instead of a two-bedroom).[55]

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establish residential occupancy standards which are enforced by the homeowners' association. *See, e.g.*, Complaint at 2, Leather v. Florence Tollgate Condo. Ass'n, FHEO No. 02-06-0101-8 (HUD filed Feb. 11, 2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14495.pdf (where the plaintiff owned five condo units as a small business and sued the condominium association). Common interest communities are a significant and growing percentage of home ownership stock. *See* David L. Callies, *Common Interest Communities: An Introduction*, 37 URB. LAW. 325, 327 (2005) (noting 36,000 such communities in California alone in 2004).

53. *See* Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243 (10th Cir. 1995); *see also* State, Civil Rights Comm'n v. Cnty. Line Park, Inc., 738 N.E.2d 1044 (Ind. 2000).

54. This is the primary subject of the HUD report on how restrictive practices affect families. GREENE & BLAKE, *supra* note 30.

55. *See, e.g.*, Snyder v. Barry Realty, Inc. 953 F. Supp 217, 221 (N.D. Ill. 1996) ("Barry's policy forces couples with more than one child to rent housing with a separate bedroom for each child. Many (if not most) families cannot afford to provide separate bedrooms for each of their children. The Snyders could afford to rent the unit in controversy, except that Barry's rigid occupancy policy prevents them from doing so. The discriminatory effect of Barry's policy along with its inflexible application raise a question about whether Barry intends to exclude families."); Complaint, United States v. Candlelight

(2) Accept inferior quality housing: Sometimes, households have to live in substandard or poorly maintained housing with its attendant health risks and difficulties because landlords of these housing units impose less restrictive residential occupancy standards, if any.[56]

(3) Accept an inferior location: Often the household must live in a less desirable neighborhood or in a nearby city, typically in an area with worse schools, more crime, and less access to jobs, transportation, shopping, and other amenities.[57] Cumulatively, movement to these inferior locations increases economic and racial segregation.[58]

In any of these cases, the household is certain to incur additional search time and costs for its housing. This time and these costs can be substantial because the family must either find and compete for a limited amount of available larger units or try to find landlords who do not impose the two-person-per-bedroom standard. Information about what residential occupancy standard a landlord imposes is not generally available in rental advertisements and may be difficult and costly to obtain. If the household is also low-income, these extra expenses (due to forced purchase and search costs) can be significant in terms of reducing money available for other needs, such as food,

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Manor Condo. Ass'n, No. 1:03:-CV-248 (W.D. Mich. Oct. 17, 2003), http://www.justice.gov/crt/about/hce/documents/candlecomp.php (son of original tenant and his wife purchased two-bedroom mobile home because of three person per unit occupancy restriction applied to previous home with mother; told by the condominium board that if they had another child, they would have to move again); *see also* GREENE & BLAKE, *supra* note 30, at 12 ("In some instances, respondents said they were told they would have to rent a larger, more expensive apartment than they either needed or desired . . . .").

56. *See* GREENE & BLAKE, *supra* note 30, at 2 ("Respondents complain that rental housing which accepts children is either too expensive or substandard, sometimes both.").

57. *Id.* at 3.

> When families cannot live in neighborhoods or housing of their choice, they may experience a variety of associated problems. Some have job related problems. They travel long distances to work or are unable to take a job in another city. Others are upset because their children cannot go to the schools of their choice.

Id. at 73. Further, "the incidence of exclusionary policies and restrictive practices was found to be greatest in high quality residential areas characterized by newly built units with high monthly rents and having a predominately white population." *Id.*

58. *Id.* at 13 ("Local studies done in Atlanta and Dallas found that minority areas of those cities were far less exclusionary toward families with children than the majority white areas.").

medical care, and transportation.[59] Of course, in any of these situations, there is increased family disruption and stress.

Finally, the denial of housing choice by the application of a restrictive residential occupancy standard may also constitute illegal discrimination. It is settled law that it is illegal for landlords to discriminate against tenants even through the imposition of *neutral* residential occupancy standards.[60] Therefore, restrictive occupancy standards also force tenants to suffer the harms of illegal discrimination.[61]

While the idea behind a residential occupancy standard is old[62] and conceptually simple, residential occupancy standards have surprisingly extensive and important public policy implications. For this reason, regulation of residential occupancy standards has been controversial and complex.[63] Governments regulate occupancy to prevent "overcrowding" as a health and safety regulation for housing residents and for their neighbors.[64]

Landlords sometimes frame regulation of occupancy standards as a property rights issue. On this view, the landlord, as the fee owner, has the rights to use, control, and exclude, while leaseholders only have the property rights defined contractually in the lease.[65] Landlords'

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59. *See, e.g.*, United States v. Badgett, 976 F.2d 1176, 1179–80 (8th Cir. 1992) ("The district court placed significant emphasis on the fact that Brittain did not refuse to rent Mayeaux a two-bedroom apartment. There are three problems with this reliance . . . . Second, there is a significant increase in cost between a one-bedroom and a two-bedroom apartment.").

60. *See, e.g.*, United States v. Tropic Seas, Inc., 887 F. Supp. 1347 (D. Haw. 1995) (facially neutral residential occupancy standard violated FHAA familial status provision); Fair Hous. Council of Orange Cnty., Inc. v. Ayers, 855 F. Supp. 315, 319 (C.D. Cal. 1994) (same).

61. *See, e.g.*, Sams v. HUD, 1996 WL 13810 (4th Cir. Jan. 16, 1996); United States v. Hover, No. C 93-20061 JW, 1995 WL 55379, at *2–3 (N.D. Cal. 1995) (reciting facts of denial); United States v. Lepore, 816 F. Supp. 1011, 1013–14 (M.D. Pa. 1991) (reciting facts of effects of threatened eviction); Complaint at 5–6, Link v. Trucksess, FHEO Nos. 03-10-0065-8, 03-10-0068-8 (HUD filed Apr. 9, 2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7530.pdf (alleging injuries from the discrimination, including loss of connections to siblings living in same/nearby apartment house).

62. Iglesias, *supra* note 5, at 1222 n.39; *see generally* Frank I. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207 (1970) (describing housing-related rights and freedoms derived from constitutional and statutory law).

63. *See infra* Part II.

64. *See* Edmonds v. Oxford House, Inc., 514 U.S. 725, 733 (1995).

65. Of course, the 1968 passage of the Federal Fair Housing Act and numerous common tenants' rights laws (e.g. implied warranty of habitability) directly conflict with this view of landlords' property rights. For a statement of landlords' general frustration with fair housing law, see Steven J. Edelstein, *Civil Rights and Wrongs: Fair Housing Isn't Always Fair*, APARTMENT PROFESSIONAL, Mar./Apr. 2004,

traditional arguments for imposing a residential occupancy standard include the following[66]: (1) to prevent a variety of economic costs[67] caused by "overcrowding," including concerns about future property value and profits,[68] increases in "wear and tear" costs (which are not reimbursable from security deposits),[69] extra expenses for utilities and garbage, increased (risk of) damage to the property,[70] increased insurance costs, and increased management costs; (2) to prevent nuisance-type harms to other tenants and neighbors from "overcrowding," including noise and increased demands for parking;[71] (3) to promote often paternalistic concerns about the habitability/quality of life of tenants, including the safety and appropriateness of facilities for children and purported psychological harm to tenants from living in "overcrowded" spaces;[72] and (4) to

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at 48, *available at* http://www.williams-edelstein.net/pdf/fair_housing_not_fair.pdf.

66. *See* MARANS ET AL., *supra* note 30, at 63–68.

67. *See* Fair Hous. Council of Orange Cnty., Inc. v. Ayres, 855 F. Supp. 315, 318–19 (C.D. Cal. 1994) (defendant argues that the occupancy restriction is designed "to keep the property in good repair and to reduce ongoing maintenance and eventual resale costs"). Landlords have had difficulty documenting these expenses as directly attributable to the occupancy standard except in extreme cases.

68. Some admit to higher profits that result from adults only rules. *See, e.g.*, United States v. Tropic Seas, Inc., 887 F. Supp. 1347, 1354 (D. Haw. 1995) (reciting Board resolution in which it is stated that reinstating a no children provision "would certainly increase and perhaps double the value of Tropic Seas Inc. apartments . . .").

69. *See* Kelly, *supra* note 18, at 61 ("Other task force members disagreed due to concerns about the 'wear and tear that increases with population density' and the management difficulties and tenant stress that increase with excessive population density." (citing PUB. & ASSISTED HOUS. OCCUPANCY TASK FORCE, REPORT TO CONGRESS AND TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 1-15 to -16 (1994))).

70. In principle, security deposits and other lease provisions should take care of this. *See, e.g.*, Snyder v. Barry Realty, Inc., 953 F. Supp. 217, 222 (N.D. Ill. 1996) ("Barry . . . seeks . . . to avoid the risk of damage caused by large numbers of students"); United States v. Grisham, 818 F. Supp. 21 (D. Me. 1993) (finding familial status discrimination where owner refuses to rent to a family because of fear of damage to prized possessions that he keeps in the unit).

71. *See The Fair Housing Act: Pro & Con*, 67 CONG. DIG. 189, 191 (1988) (the testimony of Scott Slesinger on behalf of the National Apartment Association opposing adding "familial status" as a protected class in the FHAA: "The prohibition of discrimination against families with children would result in the overcrowding of apartment buildings").

72. *See, e.g.*, Burnett v. Venturi, 903 F. Supp. 304, 313 (N.D.N.Y. 1995) (landlords claim apartment "too small" for the family, but no objective evidence of actual size entered into evidence); United States v. Tropic Seas, Inc., 887 F. Supp. 1347, 1361 (D. Haw. 1995) (child safety); Complaint at 4, Interfaith Hous. Ctr. of the N. Suburbs v. Giarelli, FHEO No. 05-07-0669-8 (HUD filed Mar. 13, 2008), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14471.pdf (alleging that while city's Certificate of Compliance allowed for two person occupancy, landlords enforced a one-person-per-bedroom occupancy policy because they thought that the apartment was too small for a mother and her child; alleging that landlords enforced a one-person-per-bedroom occupancy policy to exclude children

avoid overtaxing the carrying capacity of one or more systems of the housing unit (e.g., water or sewage).[73]

Landlords' views of what constitutes "overcrowding" are notoriously subjective. But, while often overstated, some landlord concerns may be legitimate in certain situations. Clearly, in some cases, landlords' economic interests directly conflict with tenants' preferences to reduce housing costs.[74] More subtly, but perhaps more importantly, these economic conflicts often mask profound cultural, class, and racial/ethnic differences between landlords and tenants regarding family values and appropriate living arrangements. Critics argue that restrictive residential occupancy standards force citizens and especially new immigrants to assimilate to a particular vision of America by imposing certain views of family, individualism, privacy, and property rights on them under the guise of health and safety or other benign justifications.[75] They prefer that America allow other

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in order to maintain a quiet apartment building); Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1265 (2005) ("Apartments and housing available to adults only were common, and justified by owners and landlords in the nature of peace and quiet, reduction of costs and damages, and for the prevention of harm to children."). Such concerns are not a defense to FHAA familial status liability. *See Tropic Seas*, 887 F. Supp. at 1361 ("Landlord who declined to rent to family, in part due to perception that the property was dangerous for children, had discriminated on the basis of family status in violation of the Fair Housing Act." (citing United States v. Grishman, 818 F. Supp. 21, 23 (D. Maine 1993))).

73. *See, e.g.*, Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1252 (10th Cir. 1995); United States v. Weiss, 847 F. Supp. 819, 822–23 (D. Nev. 1994).

74. *See The Fair Housing Act: Pro & Con*, 67 CONG. DIG. 189 (1988) (Scott Slesinger testified on behalf of the National Apartment Association and opposed adding the additional "familial status" as a protected class: "With regard to the extension of protection to families with children, the legislation is attempting to address an economic issue through the Civil Rights Laws."); *see also Snyder*, 953 F. Supp. at 221 (defending its occupancy standard because it "avoids the risk of having large groups of Northwestern students overpopulate units in an attempt to reduce their rental payments"); Kelly, *supra* note 18, at 60 ("Not surprisingly, owner groups oppose any relaxation of occupancy limits, which they perceive as likely to increase wear and tear on their properties, while tenant groups want more people to be able to occupy a given unit."). Apartment owners and their associations study the relationships between "doubling up" and demand for apartments. *See, e.g.*, Richard Levy, *Doubling Up or Coupling Up?*, MULTIFAMILY EXECUTIVE, July 2010, *available at* http://www.multifamilyexecutive.com/demographics/doubling-up-or-coupling-up.aspx.

75. Cultural differences include those regarding family, sexuality, child rearing practices, individualism and privacy. For example, who should decide if two children of different ages or sexes can share a room with each other or with their parents? *See* Kelly, *supra* note 18, at 61 ("These members believed that 'occupancy standards that recognize the tenant family's choice avoid imposing inappropriate cultural standards' with respect to the appropriate size of the family's housing unit.") (citing PUB. & ASSISTED HOUS. OCCUPANCY TASK FORCE, REPORT TO CONGRESS AND TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 1-15 (1994)). At least one study questions the

cultures' versions of these views to exist and, perhaps, modify the dominant "American" version. These concerns are particularly relevant now because important cultural and demographic shifts are occurring which impact our conceptions of "family."[76] Finally, residential occupancy standards also engage broader land use and environmental issues, including the efficiency of use of the existing housing supply and the extent of racial and economic residential segregation.[77]

B. Critiques of the justifications for the two-person-per-bedroom standard

The issue here is not whether there is a need or value for *some* widely-recognized and accepted private residential occupancy standard that prevents actual "overcrowding" and its attendant problems. Rather, the issue is: What is the strength of the justifications for the two-person-per-bedroom standard as *the* appropriate standard?

First, given its dubious origin explained in Part II *infra*, there is little reason to assume that the two-person-per-bedroom standard is the correct one. HUD's justifications for incorporating two-person-per-bedroom as the presumptively reasonable standard in its Keating Memo are weak. On HUD's own account, it was neither the result of a study nor of a standard notice and comment process.

Prior to Congress's consideration of the FHAA, HUD commissioned an exhaustive national study to determine the nature

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common assumption that doubling up is likely to be harmful to tenants' health. Sherry Ahrentzen, *Double Indemnity or Double Delight? The Health Consequences of Sharing Housing and "Doubling Up,"* 59 J. SOC. ISSUES 547, 547–68 (2003).

76. For example, our country is currently embroiled in debates about same-sex marriage. The continued prevalence of divorce and remarriage together with adults having children in a household without ever getting married also challenge "traditional" views of family.

77. *See generally* GREENE & BLAKE, *supra* note 30; MARANS ET AL., *supra* note 30. If most landlords are not willing to rent to large families and most of these are families of color, then they will cluster where landlords are willing to rent to them. They thus often cluster in larger and older housing stock in undesirable areas that have less restrictive residential occupancy standards. These buildings may be owned by landlords who are milking the property and not doing maintenance, so there are also numerous habitability problems. Further, the higher internal density mixes with physically sub-standard conditions and creates real health and safety concerns for residents, not just statistical overcrowding.

and extent of familial discrimination and a second study to analyze the findings.[78] HUD has performed both national statistical analyses of private residential occupancy standards (such as in *Mountain Side v. HUD*),[79] as well as local statistics in cases (e.g., in *Pfaff v. HUD*) for its enforcement activity of the familial status obligation since 1988.[80] However, on HUD's own account, the selection of the two-person-per-bedroom standard as the basis for its internal enforcement guidance was not based upon any of these studies, nor of any other study of housing markets, incidences of "overcrowding" in apartments, or the discriminatory effect of various occupancy standards. There is no objective evidence that the two-person-per-bedroom standard was calibrated in any way to be a standard which presumptively avoided discrimination.

Rather, HUD's selection of the two-person-per-bedroom standard as presumptively reasonable was based upon the internal policies and practices of HUD and the Department of Justice (DOJ).[81] However, reliance on DOJ consent orders is circular reasoning and weak.[82] Since consent orders are negotiated with and agreed to by the defendant, reliance on them begs the question: On what basis did the DOJ use this standard? The second part of the justification for the two-person-per-bedroom standard in the Keating Memo invokes HUD's own occupancy standards for public housing and HUD-assisted housing as a basis for selecting two-person-per-bedroom as a presumptively reasonable standard for private housing.[83] This justification directly contradicts what HUD had stated in the Preamble to the 1989 FHAA Regulations. The Preamble stated that

78. GREENE & BLAKE, *supra* note 30; MARANS ET AL., *supra* note 30.

79. Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1251 (10th Cir. 1995) ("Here, the Secretary relied on national statistics to establish a case of disparate effect.").

80. Pfaff v. HUD, 88 F.3d 739 (9th Cir. 1996) ("HUD statistics demonstrated that households of five overwhelmingly comprise families with children in Whatcom County.").

81. *See* Keating Memo, *supra* note 16, at 70,256.

82. In addition, relying on the DOJ's consent decree positions may be self-limiting—if HUD and the DOJ did not charge cases in which the residential occupancy standard was two-person-per-bedroom, then it would not make sense for them to require defendants to adopt a residential occupancy standard more liberal than that.

83. Keating Memo, *supra* note 16, at 70,256–57 (citing HUD, NO. 7465.1 REV-2, PUBLIC HOUSING OCCUPANCY HANDBOOK ch. 5, at 5-1 (1991)).

the two-person-per-bedroom was not a safe harbor for private, non-subsidized housing because, *inter alia*, rooms in private housing are often larger and floor plans are different than in public housing and HUD-assisted housing.[84] The Keating Memo provided no explanation for this substantial change of position.

Additionally, the well-documented housing industry pressure promoting the two-person-per-bedroom standard, discussed *infra* in Part II, raises the specter of regulatory capture. While two-person-per-bedroom might be the best standard for the industry Congress intended to regulate, there is no evidence that it is the best standard for promoting the public interest and FHAA goals.

Second, the two-person-per-bedroom standard *predates* the 1988 FHAA,[85] which was intended to be *remedial* legislation to address previous discriminatory practices against families.[86] As explained *infra*, the National Apartment Association endorsed two-person-per-bedroom as a maximum private occupancy standard as early as 1976.[87] A "Fair Housing Defense" blog entry entitled "Occupancy Standards—Why They Matter," posted in 2009 begins: "When dealing with occupancy standards, it used to be easy. The traditional rule of 'two heartbeats per bedroom' was perceived as the way to go."[88] Another entry referred to the two-person-per-bedroom standard it as "the old general rule."[89]

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84. Regarding occupancy guidelines for HUD-assisted housing programs, the Preamble stated: "[T]hese guidelines are designed to apply to the types and sizes of dwellings in HUD programs and they may not be reasonable for dwellings with more available space and other dwelling configurations than those found in HUD-assisted housing." Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3237 (Jan. 23, 1989) (codified at 24 C.F.R. § 100).

85. *See infra* Part II.A–B.

86. *See, e.g.*, Trafficante v. Metro. Ins. Co., 409 U.S. 205 (1972).

87. *See infra* note 134 and accompanying text.

88. Scott M. Badami, Occupancy Standards—Why They Matter, FAIR HOUSING DEFENSE BLOG (Sept. 3, 2009), http://fairhousing.foxrothschild.com/2009/09/articles/discrimination/occupancy-standard-why-they-matter/.

89. "The old general rule, which reflected a two person per bedroom standard, is only a guide and does not end the analysis." Scott M. Badami, *Just What is Familial Status?*, FAIR HOUSING DEFENSE BLOG (Oct. 25, 2010), http://fairhousing.foxrothschild.com/2010/10/articles/fha-basics/just-what-is-familial-status/. A recent case appears to exemplify treating the two-person-per-bedroom standard as tradition. Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., No. 3:09-CV-1037, 2011 WL 3489119 (D. Conn. June 23, 2011) (stating that the two-person–per-bedroom standard was included in the condominium occupancy policy but not offering any explanation or justification for this particular standard).

If two-person-per-bedroom was the "traditional" residential occupancy standard applicable *before* the 1988 amendments, and restrictive residential occupancy standards were one of the housing problems that Congress specifically targeted in the enactment of the 1988 amendments to the FHA, then this standard is contrary to the remedial intent of the statute. Research examining the historical origins of the two-person-per-bedroom standard has found that it was neither scientific nor otherwise objectively grounded, but merely the product of classist and ethnocentric paternalism.[90]

Third, the justifications for the two-person-per-bedroom standard as having legal force are weak. If the challenged residential occupancy standard is more restrictive than two-person-per-bedroom, the plaintiff/complainant might raise the two-person-per-bedroom standard as an argument against the more restrictive standard.[91] Or if the challenged residential occupancy standard is two-person-per-bedroom, the respondent/defendant might raise the two-person-per-bedroom standard from the Keating Memo as a defense to a claim of discrimination or suggest that the standard does not violate the FHAA because it is a "reasonable occupancy standard."[92] The assumption underlying these arguments is that the Keating Memo—or part of it—has established a liability rule for these cases. Indeed, several courts have referred to the Keating Memo (including that memo's description of the two-person-per-bedroom standard as presumptively reasonable) or used the phrase "reasonable occupancy standard."[93] While there is confusion in the case law, no court has ever held that the two-person-per-bedroom standard is a "safe harbor" from FHAA liability.[94] Rather, as Part III.A *infra* argues, the

90. *See supra* notes 1, 72 and accompanying text; *see also* Iglesias, *supra* note 5, at 1211–13.

91. *See, e.g.*, Reeves v. Rose, 108 F. Supp. 2d 720, 724–28 (E.D. Mich. 2000) (challenging a refusal to rent a two-bedroom apartment to a family of four); Burnett v. Venturi, 903 F. Supp. 304 (N.D.N.Y. 1995) (challenging a refusal to rent a three-bedroom house to a family of five).

92. *See, e.g.*, Pfaff v. HUD, 88 F.3d 739 (9th Cir. 1996) (reviewing landlord's limitation of two-bedroom house to four persons).

93. *See, e.g.*, CHRO *ex rel* Rowley v. J.E. Ackley, LLC, No. CV99550633, 2001 WL 951374, at *5 (Conn. Super. Ct. 2001). For a discussion about the liability standards in residential occupancy cases including cases that cite the Keating Memo, see *infra* Part II.C.1. For a discussion of the legal status of the Keating Memo, see *infra* Part III.A.

94. *See, e.g.*, *Burnett*, 903 F. Supp. at 304, 314 n.2 (refusing to rely on HUD's "rule of thumb"

legal status of the Keating Memo has always only been as HUD's internal enforcement guideline, and never as a liability rule. Finally, while Congress considered a two-person-per-bedroom national occupancy standard on several occasions, it never came close to passing one.[95]

Further, even if the Keating Memo was a liability rule or if "reasonableness" was a defense based upon the Keating Memo, then courts would have to apply the *whole* Keating Memo with all of its factors, not just the two-person-per-bedroom standard standing alone. The Keating Memo itself states: "[T]he reasonableness of any occupancy policy is rebuttable, and neither [the first Keating Memorandum] nor this memorandum implies that the Department will determine compliance with the Fair Housing Act based *solely* on the number of people permitted in each bedroom."[96] Certainly, the fair housing defense bar uses the two-person-per-bedroom standard with the guise of legal authority from the Keating Memo in negotiations with plaintiffs.[97] However, landlords' lawyers and sophisticated advocates have always understood the two-person-per-bedroom standard as only part of the Keating Memo in HUD's intake and investigation process and that within that analysis the standard is rebuttable.[98] Moreover, landlords, property management agencies, and the fair housing defense bar would probably not support courts treating the Keating Memo as having the force of law because of its

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two-person-per-bedroom standard as presumptively reasonable because, inter alia, "the HUD regulations are not binding here, and the Court declines to institute such a conclusive mechanical test" (citing United States v. Badgett, 976 F.2d 1176, 1179 (8th Cir.1992))); CHRO *ex rel* Rowley, 2001 WL 951374, at *4–6 ("HUD has determined that an occupancy policy of two persons in a bedroom as a general rule, is reasonable but the whole purpose of the policy statement represented by the 1998 report was to indicate this [two-person–per-bedroom] suggestion was only a guideline; the reasonableness of any occupancy policy is rebuttable and HUD will not determine compliance with the Fair Housing Act based solely on the number of people permitted in each bedroom." (internal quotation marks omitted)).

95. *See infra* notes 251–52 and accompanying text.

96. *See* Keating Memo, *supra* note 16, at 70,257.

97. Scott M. Badami, *Occupancy Standards—Why They Matter*, FAIR HOUSING DEFENSE BLOG (Sept. 3, 2009), http://fairhousing.foxrothschild.com/2009/09/articles/discrimination/occupancy-standards-why-they-matter/ ("Over the years, I successfully defended any number of cases based on the Keating Memorandum and the two person per bedroom guideline.").

98. *See Congress Directs HUD to Adopt Keating Memo for Occupancy Standards*, FAIR HOUSING INSTITUTE, http://www.fairhouse.net/library/article.php?id=33 (last visited Jan. 20, 2011).

uncertainty and because the application of its factors might often require landlords to allow more than two persons per bedroom.[99]

Fourth, some might argue that, whatever its origins, landlords and property managers now have a reasonable and justifiable reliance interest in the two-person-per-bedroom standard because of the longevity of its use by HUD as an enforcement guideline. It is true that HUD has used the two-person-per-bedroom standard more or less consistently since 1998 except for a brief period in 1995. However, it did so (or was supposed to do so) as a part of its holistic analysis using the Keating factors as an intake guideline. The fact that housing providers first pushed for the inclusion of the two-person-per-bedroom standard and intentionally stoked reliance upon it by their industry does not bolster their reliance and fairness argument. This self-serving reliance does not justify the two-person-per-bedroom standard because the intended beneficiaries of the FHAA protections for familial status cannot be said to share in this reliance.

Fifth, there is no evidence that the two-person-per-bedroom standard per se is uniquely necessary to prevent the effects of "overcrowding" that concern landlords or to meet any other legitimate concern of landlords. Previous attempts to document negative overcrowding effects from occupancy standards have been weak and usually consist of projections based upon extreme assumptions without any actual empirical study or objective peer review.[100] Even the extensive review of overcrowding literature authored by William C. Baer and commissioned by the National Multi Housing Council and the National Apartment Association failed to identify any objective studies supporting landlords' concerns

99. For a discussion of the Keating Memo factors, see *infra* Part III.A. Even if a court found that the Keating Memo has the force of law, the memo specifically limited its application "with respect to complaints of discrimination under the Fair Housing Act . . . *on the basis of familial status* which involve an occupancy standard established by a housing provider." Keating Memo, *supra* note 16, at 70,256 (emphasis supplied). Thus, by its clear terms, this provision would not apply to any cases where restrictive occupancy standards cause discriminatory effects on the basis of race or national origin rather than familial status. Therefore, those cases would still be litigated under a disparate impact theory of discrimination, presumably without any reference to the Keating Memo.

100. *See* Az. Multihousing Ass'n., Answers to Some Common Questions About "Occupancy Standards," 10 (Nov. 1994) (unpublished report) (on file with author).

about most issues, including wear and tear costs.[101] Moreover, landlords' commitment to the two-person-per-bedroom standard as the necessary bulwark against the evils of overcrowding eases considerably when a profitable business model requires higher levels of internal density. Owners of vacation rental housing commonly allow residential occupancies of three to five persons per bedroom.[102] And, in at least one published case, such an owner argued that the city "incorrectly calculated occupancy by allowing only bedrooms to be used for sleeping."[103]

In conclusion, the two-person-per-bedroom standard lacks any substantial objective justification. While some residential occupancy standard may be needed, there is certainly some room—perhaps substantial room—to liberalize beyond the restrictive two-person-per-bedroom standard.[104]

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101. WILLIAM C. BAER, RENTAL CROWDING AND OCCUPANCY STANDARDS: A LITERATURE REVIEW AND POLICY ANALYSIS (1996) (study commissioned by the National Multi Housing Council and National Apartment Association, among others). The study was commissioned to counter HUD General Counsel Nelson Diaz's short-lived substitute for the Keating Memo. It indirectly attempts to "defend" the two-person-per-bedroom standard through a strained argument which relies on use of the "overcrowding" standard of one-person-per-bedroom, which is used as one factor in defining housing needs. Dr. Baer found only one Ph.D. thesis (submitted, but not clear if accepted and definitely not peer-reviewed or published) finding "[d]epreciation rates increase noticeably with family size." *Id.* at 49. Dr. Baer commented on this study: "The study by no means provides a definitive test of the matter—more study is clearly indicated—but it is the only one uncovered in the research." *Id*. The following is Dr. Baer's summary of his review of the crowding literature in the Executive Summary:

> Current findings from the literature suggest that objective crowding is only mildly linked to subjective perceptions or feelings of crowding. These subjective perceptions, however, often result in at least mild yet deleterious effects to many persons. But exactly who will be harmed and in what circumstances cannot be predicted before the event. It is cultural and contextual. Virtually no research has been done on the effects of crowding on the wear and tear and depreciation of housing. The only related study found that "depreciation rates increase noticeably with family size." . . . Since subjective perceptions of crowding are more important than objective measures, there is a dilemma in establishing a standard for crowding.

Id. at i (emphasis omitted).

102. *See, e.g.*, United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 777 A.2d 950 (N.J. Super. Ct. App. Div. 2001); *Now Booking Summer by the Sea in Cape Canaveral*, VACATIONRENTALS.COM, http://www.vacationrentals.com/vacation-rentals/3732.html (last visited Jan. 20, 2011) (advertisement for a one-bedroom vacation rental that sleeps four, equivalent to a four-person-per-bedroom residential occupancy standard).

103. *United Prop. Owners Ass'n of Belmar*, 777 A.2d at 951, 958 (finding, *inter alia*, that a local government ordinance provision "making it unlawful for number of adults in summer rental unit between 1:30 a.m. and 8:30 a.m. to exceed maximum permitted occupancy was an overbroad intrusion on tenants' privacy rights and violated substantive due process").

104. For example, California has long effectively had a two-person-per-bedroom plus one for the unit

C. Empirical evidence demonstrates that the two-person-per-bedroom standard constitutes a prima facie case of discrimination in many housing contexts

Fair housing advocates and commentators believe that the antidiscrimination and pro-integration goals of the FHAA have been stymied in this area. FHAA advocates believe that restrictive residential occupancy standards, including the two-person-per-bedroom standard, are likely to cause discriminatory impacts on members of protected classes in many situations. And, to the degree that restrictive residential occupancy standards limit the housing choices of people of color to housing in areas in which people of color are already concentrated, they believe restrictive residential occupancy standards constitute a separate FHAA violation because they perpetuate segregation.[105]

Yet, even if the two-person-per-bedroom standard has dubious origins and is not strongly supported by objective evidence, this alone would not prove that it is the "wrong" standard or a bad standard. More is needed. Yet, to date only one published district court decision has found the two-person-per-bedroom standard to discriminate.[106] And this case has not been cited by any other later

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standard. The author was unable to find any reports finding that California has more overcrowding problems than other states due to this standard. Interestingly, the housing industry in California has attempted to procure legislation that would lock-in the more liberal "two persons per bedroom plus one" guideline as an enforcement standard by California's Department of Fair Employment and Housing. *See* State Assemb., 1703, 1993–1994 Leg., Reg. Sess. (Ca. 1993). The California Apartment Association was the bill's sponsor.

105. Fair housing advocates also believe that neutral residential occupancy standards are often used by landlords intentionally to restrict for race and national origin reasons. *See, e.g.*, Asbury v. Brougham, 866 F.2d 1276, 1281 (10th Cir. 1989) (in a case alleging racial discrimination against an African-American family, defendants used neutral residential occupancy standards as their defense); Reeves v. Rose, 108 F. Supp. 2d 720 (E.D. Mich. 2000) (a race and family status case); Burnett v. Venturi, 903 F. Supp. 304 (N.D. N.Y. 1995) (same).

106. United States v. Tropic Seas, Inc., 887 F. Supp. 1347 (D. Haw. 1995) (finding that a two-person-per-bedroom residential occupancy standard applied to studio and one-bedroom apartments violated the FHAA). A recent case was won on summary judgment: Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., No. 3:09-CV-1037, 2010 WL 2977143 (D. Conn. July 20, 2010). The author also has records of several cases challenging a two-person-per-bedroom standard which settled. *e.g.*, Memorandum of Points and Authorities in Support of Motion for Summary Adjudication, Padilla v. 86 Pioneering Assocs., No. 26-19690 (Ca. Sup. Ct. filed Aug. 8, 2003) (two-person-per-bedroom standard used in a one-bedroom apartment); Minutes of Settlement Conference, Dominguez v. Holsclaw, CIV-S-02-1329 WBS GGH (E.D. Cal. Nov. 12 2003) (two-person-per-bedroom standard applied in twelve unit

case to challenge a two-person-per-bedroom residential occupancy standard. So, what is the basis for fair housing advocates' concern?[107] Until now, there has not been a general demonstration of the discriminatory effect of the two-person-per-bedroom standard on households with children.

This section reports the results of original empirical analyses that demonstrate that the imposition of a two-person-per-bedroom standard is sufficient to make out a prima facie case of familial status discrimination in housing markets nationwide. While courts have not coalesced around the particular standards that should be applied in disparate impact litigation challenging neutral private residential occupancy standards, they have affirmed that the disparate impact theory is appropriate to prove discrimination in this type of case.[108] And several courts have made findings that a plaintiff challenging a neutral residential occupancy standard has made a prima facie case of familial status discrimination.[109] Because of the uncertainty in the law regarding the appropriate standards for defendants' rebuttal, the analysis only extends to demonstration of prima facie cases of discrimination. Depending upon the standard for defendants' burdens to justify their occupancy standards, the types of justifications that are deemed acceptable, and other issues in each case, violations could be found in some instances but not others.

Richard Sander, a law professor and economist at U.C.L.A., has recently collaborated with the author on a set of statistical analyses

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apartment complex).

107. It is possible that landlords and property management agencies have adopted strategies to settle any case challenging a two-person-per-bedroom standard in which there is distinct chance of a court finding liability in order to avoid bad precedent. Many of HUD's "special circumstances" cases that challenged two-person-per-bedroom or less restrictive residential occupancy standards settled. *See* cases cited *infra* note 245. These cases were nationally identified as a threat to the stability of the two-person-per-bedroom standard. *See Occupancy Policies and the "Keating Memo" Resurface in a Chicago Case*, FAIR HOUSING INSTITUTE, http://www.fairhouse.net/library/article.php?id=56 (last visited July 27, 2010) [hereinafter *Chicago Case*].

108. *See* Pfaff v. HUD, 88 F.3d 739, 749 (9th Cir. 1996); Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1250–51 (10th Cir. 1995).

109. *See,* e.*g.*, *Tropic Seas*, 887 F. Supp. 1347; Fair Hous. Council of Orange Cnty., Inc. v. Ayers, 855 F. Supp. 315, 319 (C.D. Cal. 1994).

aimed at measuring how housing access for families with children has changed over the past forty years:[110]

These analyses used a more sophisticated but conservative methodology than that typically employed by plaintiffs in disparate impact cases.[111] Among other things, we examined how families with children in the rental market currently match up with units of various sizes. By comparing them with other rental households, we could examine how different types of households would be affected by an across-the-board application of a two-person-per-bedroom occupancy limit in rental housing. We could thus examine the disparate impact of such an occupancy limit on families with children, on children themselves, and on individual racial groups.

First, consider national patterns of disparate impact upon families with children. The research found that if a two-person-per-bedroom had been applied uniformly to all one-, two-, and three-bedroom rental units in the United States between 2007 and 2009:

- Roughly 94.5% of all units would be in compliance with the standard, but only 84% of all units occupied by families with children would be in compliance, compared to over 99% of all non-family households. To put it differently, families with children would run afoul of the standard more than ten times as often as other households. Or to put it yet another way, more than one child in five living in rental housing between 2007 and 2009 was living in a unit that

110. Richard Sander and Tim Iglesias are working on a paper for future publication which will present a demographic assessment of discrimination against children in the American rental market. The data collection and calculations behind the results presented in this article were made by Richard Sander. The findings were made by Tim Iglesias. Richard Sander & Tim Iglesias, *Discrimination Against Children in the American Rental Market: A Demographic Assessment* (UCLA Working Paper Series, Working Paper No. XX, 2011).

111. The analyses were sophisticated because of the data sets and methodology employed.

> The data in these tables come from the American Community Survey, which is conducted by the United States Census and which interviews about half a million households each year. Since these data are based on sampling methods that aim to produce a representative national sample, the raw numbers presented here give a fairly accurate picture of national housing patterns . . . .

Id at 6. In contrast, many plaintiffs' statistical evidence was derived from cross-tabulated data published by the U.S. Census. Tabulated census data is less flexible because it aggregates data on certain predetermined categories.

would have violated the two-person-per-bedroom occupancy limit.

- These patterns vary, predictably, across units of different sizes. In general, as smaller units are considered, the absolute number of families drops (since relatively few families live in very small units) but the likelihood of those families being in violation of the two-person-per-bedroom standard increases. Thus, in the national data sample, less than 10% of families with children lived in one-bedroom units, but nearly three-quarters of those families exceeded the two-person-per-bedroom standard. Nearly half of families with children lived in two-bedroom units, of which nearly 15% violated the standard. About 40% of families with children lived in three-bedroom apartments, but only 4.2% of those families exceeded the two-person-per-bedroom standard. Yet across units of all sizes, the overwhelming proportion of households affected by the two-person-per-bedroom limit are families with children. Regardless of how one analyzes these numbers, the "displacement burden" of the occupancy limit falls very disproportionately on families with children.[112]

Importantly, these findings likely underestimate the discrimination caused by imposition of the two-person-per-bedroom standard because the analyses were conservative in that they only used households actually living in one- and two-bedroom units as the sampling universe. This means that the results do not include the likely "demand" from family households of three persons (e.g., a couple and one child) who would want to live in a one-bedroom, but are not currently doing so.

There is some conflict regarding the use of national statistics versus local statistics to prove housing discrimination. All of the cases in which a court has made a finding on the merits of prima facie discrimination have been found using local statistics. However, there are persuasive statistical reasons to expect that national

112. *Id.* All findings are based upon the analyses of the data (on file with the author).

statistics accurately represent the discriminatory effects of the two-person-per-bedroom standard with regard to familial status.[113] Using local statistics makes great sense when talking about racial discrimination, because racial composition varies enormously across various parts of the country and even within metropolitan areas. However, the patterns discussed here—the relative distribution of families and other households across units of various sizes—hold with remarkable uniformity across the United States. Except in the most affluent sections of metropolitan areas, each of the disparities described here holds in the essential details, whether one considers the South, the Midwest, the suburbs, or the central cities.[114]

The two-person-per-bedroom standard also has a strong disparate impact across racial lines. There are three broad reasons for this. First, non-Hispanic whites are far more likely to live alone when they are elderly or when they are young and unmarried; people of other races, especially Asians and Hispanics, are more likely to live with their families at these stages of the life cycle. Second, non-Hispanic whites have fewer children per household than other races do; the average is a bit higher for African-Americans, significantly higher for Asians, and highest for Hispanics. Third, Hispanics and African-Americans have higher poverty rates than the other groups, and this leads to a higher percentage of renters and smaller units.[115]

Taken together, these patterns mean that the two-person-per-bedroom standard has a disparate impact across racial lines, regardless of the type of unit to which it is applied. National statistics show that the proportion of African-Americans excluded by this occupancy standard is statistically significantly higher than for whites; the proportion of Asians excluded is higher than the proportion of blacks; and the proportion of Hispanics excluded is highest of all. Indeed, more than one-third of all Hispanic children living in one-, two-, or three-bedroom apartments in the United States

113. *Id.*; *see* E.C. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (approving reliance on nationwide statistics in discrimination cases where there is "no reason to suppose" that regional statistics will differ markedly from national statistics).

114. *See Sander & Iglesias*, *supra* note 110.

115. *Id.*

in 2007-09 would have been displaced by rigorous application of the two-person-per-bedroom standard.[116]

Hertz Consulting conducted a separate and independent analysis of U.S. Census housing data (specifically the 2007 American Community Survey) to compare the effect of a two-person-per-bedroom standard on households that include children versus households that do not include children for each unit size on a state-by-state basis.[117] Using this data, the analysis determined the "qualification rate" for households with children—that is, the likelihood that such households would qualify for a unit (i.e., not be excluded by the occupancy standard). As a general rule of thumb, courts find that if the qualification rate for the protected class is less than 80% of the rate for non-class members, a prima facie case of discrimination is established.[118]

The results of the study demonstrate that the two-person-per-bedroom standard is discriminatory on the basis of familial status as applied to studio apartments in all but seven states. In Idaho, Kentucky, Nebraska, New Hampshire, West Virginia and Wisconsin, families with children had an equal chance of being excluded as families without children. And in Connecticut, families without children had a slightly better chance of being excluded by the occupancy standard.[119] And the study found the two-person-per-bedroom standard discriminatory on the basis of familial status as applied to one-bedroom units in every state of the United States except North Dakota, where which families with children had an equal chance of being excluded as families without children.[120] The qualification rate for one-bedroom units ranged from a low of 11.3% in Idaho to a high of 49.2% in Kentucky, with an average of

116. *Id.*

117. A separate and independent investigation conducted by Hertz Consulting analyzed Three-Year Public Use Microdata Sample (PUMS) Census data for the years 2005–2007 to compare the effect of a two-person-per-bedroom standard on households which include children versus households that do not include children for each unit size on a state by state basis (on file with author).

118. This measure is the "four fifths rule" from employment discrimination cases. EEOC Uniform Guidelines on Employee Selection Procedures, C.F.R. § 1607.4(D) (2011).

119. *Hertz Consulting*, *supra* note 117.

120. *Id.*

25.6%.[121] The qualification rates for two-bedroom units was more variable, with eight states hovering around or less than 80%,[122] suggesting a discriminatory effect, and an average of 85.5% for all states.[123]

The Hertz analysis demonstrates that the two-person-per-bedroom standard is discriminatory on the basis of familial status as applied to studios and/or one-bedroom units in 49 states.[124] The analysis further shows that, even applying the conservative "four fifths rule," the two-person-per-bedroom standard is likely to be discriminatory as applied to two-bedroom units in eight states.[125] Two of these states, California and Texas, have very large populations.

What is the significance of the fact that the application of a two-person-per-bedroom standard in studio, one- and two-bedroom units causes a prima facie case of discrimination in so many jurisdictions? First, because the vast majority of rental housing in the U.S. is comprised of studios, one-bedroom and two-bedroom units,[126] this finding means that the effect is extensive and substantial across the rental housing industry. 13% of rental households with minor children have three persons.[127] Twenty-eight percent of households with minor children have three to five persons, which represents more than ten million families.[128] It is likely that a large proportion of these families seek housing in studios, one- and two-bedroom units. However, the studies demonstrate that when a two-person-per-bedroom standard is applied, large percentages of families with children will be excluded from the majority of the rental units available in the U.S.

One might argue that families, particularly larger families, should rent three- and four-bedroom units. However, three- and four-

121. *Id.*
122. *Id*. (AK (83.3%), AZ (79.9%), CA (73.6%), HI (80.1%), NM (83.1%), NV (80.5%), SD (83.6%), and TX (82%)).
123. *Id.*
124. *Hertz Consulting*, *supra* note 117.
125. *Id.*
126. *See supra* note 48 and accompanying text.
127. *See supra* note 47 and accompanying text.
128. *See supra* note 48 and accompanying text.

bedroom rentals are relatively rare. Many of these larger units are owner-occupied. And, among those available for rent, there is some evidence that families have not been welcome as renters in these larger units.[129] Larger families are not welcome in smaller units, but they may also have a hard time accessing these larger units. Second, while the quantitative effects of such discrimination—the extent and distribution of financial costs, etc., caused by the restriction of housing choice—would be difficult to measure, they are likely to be substantial. Third, qualitatively, a finding that the two-person-per-bedroom standard is frequently and extensively discriminatory means that this standard is likely to cause the effects described in Part I, *supra*, including family disruption, stress, living in inferior housing and inferior neighborhoods, interference with deep cultural norms, and substantial financial consequences.

In conclusion, while only one published case has found the two-person-per-bedroom standard to discriminate, several empirical studies demonstrate that the application of this standard will regularly result in a prima facie case of discrimination in most jurisdictions. Considering the questionable origin of this standard and these empirical findings together, there is no good reason to treat the two-person-per-bedroom standard as presumptively compliant with the FHAA. Rather, all of the evidence suggests just the opposite

129. *See, e.g.*, Complaint at 3, Baity v. Serio, FHEO Nos. 02-09-0659-8, 02-09-0660-8 (HUD filed May 18, 2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7523.pdf (where a landlord owns a four-bedroom but allegedly does not rent to families with children); Complaint at 3, Link v. Trucksess, FHEO Nos. 03-10-0065-8, 03-10-0068-8 (HUD filed Apr. 9, 2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7530.pdf (alleging that when viewing the apartment, the landlord stated that she had previously advertised the three-bedroom unit as a two-bedroom unit so as to avoid inquiries from families with children); Complaint at 4, HUD v. During, FHEO No. 09-090598-8 (HUD filed Dec. 10, 2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7526.pdf (refusal to rent a four-bedroom house to family of seven persons); Complaint at 3, Colon v. Brill, FHEO No. 01-08-0312-8 (HUD filed July 8, 2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7504.pdf (refusal to rent a three-bedroom apartment to a family); Complaint at 2, Miles v. Golombek, FHEO No. 02-04-0666-8 (HUD filed Sept. 27, 2007), http://www.hud.gov/offices/fheo/enforcement/miles.pdf (landlord's three-bedroom was not available to families); Complaint at 2–3, Andrew v. Boettcher, FHEO Nos. 05-03-0030-8, 05-03-0031-8 (HUD filed June 27, 2005), http://www.hud.gov/offices/fheo/enforcement/boettcher.pdf (refusal to rent a three-bedroom to a couple with three children).

conclusion: the two-person-per-bedroom standard should be considered presumptively discriminatory.[130]

This Part laid bare the weak defense for the two-person-per-bedroom standard and demonstrated that it results in many families suffering discrimination without apparent recourse. The next Part explains how the two-person-per-bedroom standard has become the national dominant standard.

II. THE ORIGIN AND ENTRENCHMENT OF TWO-PERSON-PER-BEDROOM AS OUR NATIONAL STANDARD: HOW WE GOT HERE AND HOW WE GOT STUCK HERE

This Part argues that with some exceptions, the two-person-per-bedroom standard has become a dominant national maximum residential occupancy standard applied by private landlords. Next, it tells the story of how this standard became dominant. It then explains why this standard has remained dominant. This Part concludes that the two-person-per-bedroom standard achieved and retains dominance because of confusion in the courts, dysfunctions in FHAA enforcement, and landlord advocacy.

A. Two-Person-Per-Bedroom: Our National Standard?

With some notable exceptions, the two-person-per-bedroom standard has become a dominant national maximum residential occupancy standard applied by landlords. While no comprehensive database of landlords' residential occupancy standards exists, numerous reliable sources combine to confirm this conclusion.

First, national statistics: A 1994 study sponsored by the Arizona Multi Housing Association stated: "[M]ost states have adopted official or informal statewide occupancy standards, the majority of which use a standard equivalent to two-person-per-bedroom."[131] This

130. Even the less restrictive "two-person-per-bedroom plus one" standard will sometimes be discriminatory. This position was expressed by HUD's Assistant Secretary for Fair Housing and Equal Opportunity, Roberta Achtenberg, in a March 24, 1994 letter to the Honorable Paul Newman. *See* Kelly, *supra* note 18, at 60 n.51.

131. *Id.* at 58 n.38 (citing Gary Witt, The Controversy Over Occupancy Standards for Rental Property

assertion appears to be based in large part on the effects of state fair housing enforcement guidelines agencies on the practices of private landlords.[132] Arizona is one example of a state that has made an official adoption; its state code makes two-person-per-bedroom the maximum residential occupancy standard, ostensibly on health and safety grounds.[133]

Second, since at least 1976, landlord and apartment/property management manuals, guides, and trainings, as well as the public positions of apartment owner representatives, commonly recommend two-person-per-bedroom as the appropriate maximum residential occupancy standard. In 1976, the National Apartment Association, a leading national association for apartment owners and managers, published THE ENCYCLOPEDIA OF APARTMENT MANAGEMENT. This work was written by Roland Freeman, the Chairman of the National Apartment Management Accreditation Board. The second paragraph of Chapter Twelve, entitled "Resident Selection" reads: "The first step is to determine your criteria . . . #2. How many adults are you going to allow in each type of unit? How many children? (If any!) It's suggested you never allow more than 2 people per bedroom."[134] Numerous contemporary websites for landlords repeat the same advice. For example, rental-housing.com states: "[T]he 2-person per bedroom standard is generally accepted as the most sensible throughout the industry and reflects standards which allow residential units to be properly operated and maintained."[135] The National Multi Housing Council's analysis of occupancy standards states: "For many years, owners of public, assisted and conventional housing have relied on a two person per bedroom occupancy standard when

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9 (Nov. 8, 1994) (unpublished report) (on file with author)). The author greatly appreciates the assistance of Mr. Kelly in procuring a copy of this unpublished study.

132. These state enforcement guidelines mimic or are derived from the Keating Memo. Keating Memo, *supra* note 16.

133. *See* ARIZ. REV. STAT. ANN. § 33-1317 (2010); OKLA. STAT. tit. 41, § 117 C (2010).

134. ROLAND D. FREEMAN, THE ENCYCLOPEDIA OF APARTMENT MANAGEMENT III-9 (1976). Different landlords may have distinct reasons for promoting the two-person-per-bedroom standard: some to actually impose this limit while fending off potential legal liability; others to create room for their exercise of discretion.

135. *Occupancy*, RENTAL HOUSING ON LINE, http://rhol.org/rental/occupancy.htm (last visited Jan. 20, 2011).

adopting habitability policies for their units . . . . This standard has bec[o]me widely accepted . . . ."[136] And an article in *The Landlord Times* states: "A standard industry . . . occupancy limit is two people per bedroom, regardless of the age or sex of the occupants."[137] Fox Rothschild, LLP, a national firm which represents many apartment owners and property management agencies, publishes a blog named "Fair Housing Defense." Referring to the "two person per bedroom guideline" blog editor Scott Badami wrote: "Many professional apartment management companies, including those I represent, adopted that standard."[138] It is reasonable to assume that users of these guides implement the advice provided in them and clients follow the advice of their attorneys, especially owners or property managers of large numbers of units seeking to conform to the "norms" of professional property management.[139]

While the two-person-per-bedroom standard is a dominant maximum private residential occupancy standard, there are four distinct situations where it is not employed: (1) a small minority of states, (2) a few rent control jurisdictions, (3) some vacation rentals, and (4) very low end housing.

Some states and localities endorse a more liberal standard. In both California and Austin, Texas, two-person-per-bedroom-*plus-one* is the dominant standard.[140] This has occurred through a similar process

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136. *Occupancy Standards: Regulatory and Legislative History*, NAT'L MULTI HOUSING COUNCIL, (Dec. 1, 1997), https://www.nmhc.org/Content/ServeContent.cfm?IssueID=151&ContentItemID=1344&siteArea=Topics.

137. Jo Becker, *Occupancy Standards May Violate Fair Housing Laws*, LANDLORD TIMES, Oct. 10, 2008, http://www.thelandlordtimes.com/?q=story/all-regions/occupancy-standards-may-violate-fair-housing-laws.

138. Badami, *supra* note 97.

139. *See* Charge of Discrimination at 3 n.2, Uludag v. Draper & Kramer, Inc., HUDALJ No. 06-047-FH (HUD Sept. 21, 2006) (citing Draper and Kramer, Inc.'s "Residential Selection Criteria Guidelines for Draper and Kramer Managed Properties" ("guidelines")); *Occupancy, supra* note 135. Additional anecdotal evidence supports the conclusion. While it is not currently common practice to include the residential occupancy standard in an advertisement, some ads do include it. With assistance from National Fair Housing Association, the author performed an informal national survey of fair housing advocates during November and December of 2009 in which many respondents reported that the two-person-per-bedroom standard was the maximum residential occupancy standard applied in the jurisdictions in which they work. Tim Iglesias, Informal Survey of Fair Housing Advocates (unpublished study) (on file with author).

140. Austin, Texas, has "two plus one per bedroom" as their informal enforcement guidance

as the dominant two-person-per-bedroom standard—the agency charged with enforcement of fair housing has announced its enforcement guideline leading landlords, attorneys who advise them, and others to adopt and enforce it, even though it is not the actual liability standard.[141] In addition, Hawaii's own state fair housing act may also be somewhat more liberal than two-person-per-bedroom.[142]

A few cities that have rent control ordinances in place (e.g., San Francisco, California, and Los Angeles, California) require that landlords of properties covered by their regulations rent to any family that would be allowed to live in the housing unit under a Uniform Housing Code (UHC) analysis.[143] Generally, as applied, the UHC will allow more persons to occupy a dwelling than the two-person-per-bedroom standard.

Also, owners of property who offer vacation rentals frequently advertise a residential occupancy standard of three- and even four-persons-per-bedroom.[144] In fact, an association of landlords that rent housing for summer vacation use sued a city in part to protect its members' right to allow occupancy levels higher than two-persons-per-bedroom.[145] Presumably, these landlords have calculated that a

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according to Badami, *supra* note 97. While the origin of California's informal standard is obscure, it may have been intended to allow a couple with a baby to occupy a one-bedroom apartment. Telephone interview with Chris Brancart, Partner, Brancart & Brancart (July 25, 2010) (notes on file with author).

141. California's Department of Fair Employment and Housing applies a disparate impact analysis to determine if a neutral private occupancy standard violates California's fair housing act. The Department endorsed the disparate impact analysis for private occupancy standards cases in its precedential decision, *Department of Fair Employment & Housing v. Merribrook Apartments*, No. FCR85-86 B3-0110 L-38857 88-19, 1988 WL 242651, at *12 (Cal. Fair Emp't & Hous. Comm'n Nov. 9, 1988). This practice is confirmed in the recent article Ann M. Noel & Phyllis V. Cheng, *Through Struggle to the Stars: A History of California's Fair Housing Law*, CAL. REAL PROP. J., Fall 2009, at 3, 5. Phyllis Cheng serves as Director of DFEH and Ann Noel as Executive and Legal Affairs Secretary.

142. *See* HAW. CODE R. §12-46-307 (LexisNexis 2011) (providing, in part: "Example: House rules (e.g. 'two person limit to a bedroom') which have the effect of discriminating ('adverse impact') against persons with children (because the overall square footage is large enough under housing code for three persons) are unlawful unless the rule can be justified by establishing a business necessity"). This statute was cited in *United States v. Tropic Seas, Inc.*, 887 F. Supp. 1347, 1355 n.5 (D. Haw. 1995).

143. TERRY B. FRIEDMAN, DAVID A. GARCIA & MARK HAGARTY, CALIFORNIA PRACTICE GUIDE: LANDLORD-TENANT §§ 2:287.1, 2:592 (2010).

144. *See, e.g.*, *Now Booking Summer by the Sea in Cape Canaveral*, *supra* note 102 (advertisement for a one-bedroom vacation rental that sleeps four, equivalent to a four-person-per-bedroom residential occupancy standard).

145. *See, e.g.*, United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 777 A.2d 950 (N.J. Super. Ct. App. Div. 2001).

more liberal residential occupancy standard fits their business model and maximizes their profits on these properties.

Finally, landlords who rent low-quality properties at the bottom of the housing market are less likely to have a clear and consistent residential occupancy standard policy and are likely to allow more than two persons per bedroom. The business model of some of these landlords—sometimes called "slumlords"—has been described as "milking the property."[146] The availability of such housing directs many families to those units and those inferior neighborhoods, often resulting in high concentrations of low-income people of color in these neighborhoods. Therefore, the fact that it is these types of landlords who are not likely to enforce a two-person-per-bedroom occupancy standard is not a solution to the problem, but rather compounds it.

Considered together, these exceptions only amount to a small proportion of the nation's housing stock. Therefore, on current evidence available, it appears that the majority (or at least a substantial portion) of decent rental housing in the United States is governed by a maximum two-person-per-bedroom standard.

B. How the Two-Person-Per-Bedroom Became the Dominant National Occupancy Standard

The two-person-per-bedroom standard became the national occupancy standard through a complex series of conflicts between Congress, HUD, lobbyists representing landlords and multifamily housing investors, state and local government lobbyists, and tenant advocates. The following is a brief history of the how the two-person-per-bedroom standard became dominant.[147]

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146. *See* Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 489 (1987).

147. This article makes no claim to apportioning responsibility or blame between HUD, Congress and housing industry advocates on the selection of two-person-per-bedroom standard or on the reaffirmation of it when HUD later attempted to move off of it. The purposes for presenting this history are: (1) to identify as objectively as possible the origin of two-person-per-bedroom standard in FHAA matters, and (2) to demonstrate its weak pedigree from the standpoint of appropriate law and policy making.

1. Landlords' Fear of Familial Status Liability

In 1988, it became clear that Congress would adopt the FHAA, which included "familial status" as a new protected class. State and local government representatives as well as lobbyists representing landlords and multifamily housing investors were deeply concerned about potential legal liability under FHAA and tort law because of the effects of residential occupancy standards on families.[148] Each group lobbied Congress for amendments to the bill.

In response to this lobbying, Congress included a vague exemption from liability for "reasonable" *governmental* occupancy standards in the final bill.[149] This revision did not completely address landlord and multifamily housing investors' concerns because it did not directly state whether private owners could set their own occupancy standards, and, if so, how the FHAA would regulate them.[150]

After the FHAA's enactment, landlords' pressure focused on HUD as it drafted regulations to implement the new provisions.[151] HUD's 1989 regulations disappointed landlords. HUD found "no basis" for a national occupancy standard.[152] While HUD opined in the Preamble to the regulations that it believed, in principle, private landlords could impose "reasonable" residential occupancy standards without incurring FHAA liability, it failed to adopt a regulation pertaining to private residential occupancy standards. And it failed to provide much guidance as to what standards would be acceptable.[153] At the

148. Iglesias, *supra* note 5, at 1226 n.58.

149. 42 U.S.C. § 3601 (2006); *see also* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 735 (1995) (reviewing legislative history of the amendment). For an analysis of this exemption, see Iglesias, *supra* note 5.

150. Landlords were concerned that this exemption might be interpreted to mean that only governments could lawfully impose occupancy restrictions, and landlords could only do so in accordance with governmental restrictions. *See* Norville v. Dept. of Human Rights, 792 N.E.2d 825, 827 (Ill. App. Ct. 2003) ("Petitioner reasons that [exemption for reasonable governmental occupancy restrictions] excludes a landlord's right to regulate occupancy in the absence of a 'local prescription . . . .'").

151. *See* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3237 (Jan. 23, 1989) (codified at 24 C.F.R. pts. 14, 100, 103, 104, 105, 106, 109, 110, 115, & 121) (HUD's responses to public comments in the Preamble to the final rule on the FHAA in 1989).

152. *Id.* at 3237 (where HUD explained that it had "no basis to conclude that Congress intended that an owner or manager of dwellings would be unable in any way to restrict the number of occupants who could reside in a dwelling").

153. *Id.* For example, the opinion referred to "sleeping areas" as well as "bedrooms." *Id.* The specific

same time, the Preamble also frightened landlords with a warning. HUD stated: "In this regard, it must be noted that, in connection with a complaint alleging discrimination on the basis of familial status, the Department will carefully examine any such *non-governmental* restriction to determine whether it operates unreasonably to limit or exclude families with children."[154]

Taken as a whole, the Preamble explained why HUD did not take a position on either the meaning of the "reasonable" standard for governmental occupancy limits or the FHAA-compliant standard for privately-imposed residential occupancy standards. Not by intent, but in effect, the Preamble deepened the landlords' predicament because it clearly provided some support for private landlords to set residential occupancy standards but because of its lack of clarity, simultaneously created regulatory uncertainty.[155]

During 1989–1991,[156] HUD, DOJ, and private litigants brought the first cases charging familial status violations based upon restrictive residential occupancy standards. Unexpected complications arose in the review of potentially discriminatory private occupancy standards in ownership situations, particularly with mobile home parks and condominium associations.[157] No clear legal standard emerged from

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origin of "reasonable" in this usage is unknown. It may reflect the exemption for governmental occupancy restrictions. And, of course, reasonableness is a legal standard throughout common law and in the FHAA, e.g. "reasonable accommodation" for persons with disabilities.

154. *Id.* (emphasis added).

155. *See* Kelly, *supra* note 18, at 59 (describing HUD as articulating "a standard hard to enunciate and harder to put in practice").

156. *See* United States v. Lepore, 816 F. Supp. 1011 (M.D. Pa. 1991) (the first published federal district court case); *see also* United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992) (the first published federal appellate case).

157. Many mobile home parks had been "adult only" before the FHAA, or had at least separated the "adult only" park from an adjacent "family park." In addition, water and septic/sewage limitations, which purportedly justified restrictive occupancy standards, arose in the mobile home park situation more frequently than in the context of traditional rental apartments. To complicate matters further, HUD had set an occupancy standard for its own mobile homes in 1976 that was fairly restrictive, probably because of the relatively small size of HUD mobile homes. In California, the complexity of applying the FHAA to mobile homes was recognized immediately after the passage of the amendments. A resolution, Senate Joint Resolution Number One, was introduced in the California legislature in 1989 to urge Congress to clarify the application of the FHAA to mobile homes. S.J. Res. 1, 1989–1990 Leg., Reg. Sess. (Ca. 1989); *see also* Morales, *Creating New Housing Opportunities for Families with Children*, *supra* note 18, at 747–48 (noting that mobile home parks are covered dwellings and commenting on the ambiguity of exemptions from FHAA liability). In the condominium context, owners of units who wanted to sell, as well as their prospective purchasers, found themselves in conflict with condominium

this litigation. Most cases were resolved or settled without a published decision, offering no precedential authority to later courts. Yet, the law was being enforced, so landlords' fear of liability persisted.

2. HUD's Inclusion of the Two-Person-Per-Bedroom Standard in the Keating Memo

On February 21, 1991, Frank Keating (HUD's General Counsel under the first Bush administration) adopted internal guidance under HUD's enforcement authority for its investigators and lawyers to determine which residential occupancy cases would be investigated. He was at least in part responding to the concerns of landlords and property managers.[158] The initial version of this guidance, "Keating Memorandum I," specified that only private residential occupancy standards more restrictive than "one person per bedroom plus one" would be investigated by HUD.[159] According to the memo, this standard was derived based upon General Counsel Keating's review of "a significant number of Fair Housing cases involving challenges to occupancy standards."[160]

Despite the fact that this memorandum was clearly specified as internal guidance for HUD's use, not intended as a national occupancy standard, and not intended to affect the legal standard in suits by private parties, this restrictive standard provoked a furor among fair housing advocates against HUD. In response, on March 20, 1991—only a month after he had distributed the initial memo—General Counsel Keating issued "Keating Memorandum II"[161] which

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association rules limiting occupancy. There was no clear justification in the statutory language or legislative history to treat mobile homes or condominiums differently or, more generally, to apply different standards to different types of housing, forms of tenure, or locations (e.g. urban, small city, suburban, or rural).

158. *See* Memorandum from Frank Keating, General Counsel, HUD to all Regional Counsel regarding "Fair Housing Enforcement Policy: Occupancy Standards" (Feb. 21, 1991) (on file with author) ("There has been considerable concern on the part of landlords and managers about what occupancy standard they may impose without running afoul of the ban in the Fair Housing Act, as amended, of discrimination against families with children.").

159. *Id.* at 1.

160. *Id.* Apparently at this time, General Counsel Keating was reviewing occupancy cases himself.

161. The March (1991) version of the memorandum is referenced throughout this Article as the

identified two-person-per-bedroom as presumptively reasonable.[162] According to the memorandum, the source of the two-person-per-bedroom standard was twofold: (1) the DOJ had "incorporated it into consent decrees and proposed orders"; and (2) it was "consistent with the guidance provided to housing providers in the HUD [Occupancy] handbook."[163] The memorandum provided that the presumption was rebuttable. It also specified a list of factors HUD would consider before determining if any particular residential occupancy standard might violate the FHAA so that a further investigation should be conducted and, depending upon the results of the investigation, that a charge would be issued.[164]

A few years later HUD appointed a special task force to analyze the problem of identifying a workable occupancy standard.[165] However, the task force was unable to agree on a specific policy.[166]

On July, 12, 1995, Nelson Diaz (HUD's General Counsel under the first Clinton Administration) issued a Memorandum from HUD withdrawing the Keating Memo and substituting guidance that only occupancy standards that were based on the model code published by the Building Officials and Code Administrators (BOCA) would be guaranteed safe harbor.[167] This memorandum was considerably more

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"Keating Memo."

162. Keating Memo, *supra* note 16. Although it was an "internal memo," HUD gave copies of the Keating Memo freely to anyone who requested one. *Congress Directs HUD to Adopt Keating Memo for Occupancy Standards*, *supra* note 98 ("Since 1991, HUD has routinely distributed the Keating Memo to anyone who asked for a copy.").

163. Keating Memo, *supra* note 16, at 70,257. While the memo does not provide a specific reference to the HUD Occupancy Handbook, General Counsel Keating was probably referring to HUD, NO. 4350.3 REV-1, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS (2009).

164. Keating Memo, *supra* note 16, at 70,257. The factors listed are: (1) size of bedrooms and unit (e.g. other living areas), (2) age of children, (3) configuration of unit (e.g. other possible sleeping spaces), (4) other physical limitations of housing (e.g. capacity of septic, sewer, or other building systems), (5) applicable residential occupancy standard from state and local law, and (6) other relevant factors (including discriminatory statements, discriminatory rules governing use of common facilities, taking steps to discourage families with children, and enforcing its occupancy standards only against families with children). Keating Memo I had only identified the following factors: "the number and size of bedrooms and the overall size of the dwelling unit."

165. Kelly, *supra* note 18, at 60–61.

166. *See* PUB. & ASSISTED HOUS. OCCUPANCY TASK FORCE, REPORT TO CONGRESS AND TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (1994).

167. Memorandum from Nelson Diaz, General Counsel, HUD, to all Field Assistant General Counsel (July 12, 1995), *available at*

objective than previous guidance because, in principle, it would allow landlords and property managers to calculate the exact minimum occupancy standard required under the FHAA for each unit or house. It also specifically stated that it was offering "safe harbor" to housing providers who abided by it. This memo provoked a strong negative reaction from landlords and their advocates at least in part because "in certain situations [it] allow[ed] for nontraditional sleeping areas, such as living and dining rooms" to be included in the calculation for the minimum number of occupants required to be allowed under the FHAA.[168] In response, a coalition of national housing organizations commissioned a countrywide study to challenge the proposal.[169] In the end, the Diaz memo was short-lived. On September 25, 1995, Elizabeth K. Julian, HUD's Acting Deputy Assistant Secretary for Policy and Initiatives, issued a memorandum to the Fair Housing Enforcement Directors and others that ordered them not to follow the Diaz Memorandum and reinstated the Keating Memo as operative guidance.[170]

Under Henry Cisneros (the Secretary of HUD under the second Clinton administration), HUD prosecuted several alleged violations of FHAA in the area of restrictive residential occupancy standards, applying the disparate impact theory of discrimination. In some of

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http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_hudguid6. [hereinafter Diaz Memorandum].

168. *Occupancy, supra* note 135; *see also e.g.*, *NMHC Comments on Fair Housing Initiative Program,* NAT'L MULTI HOUSING COUNCIL, http://www.nmhc.org/Content/ServeContent.cfm?IssueID=149&ContentItemID=1336 (last visited Dec. 30, 2011) (On December 19, 1997, The National Multi Housing Council submitted the comments on behalf of itself and seven other national organizations: "In 1995, Nelson Diaz, former General Counsel of HUD, issued a new memorandum rescinding the Keating Memorandum. However, after housing providers complained that the Diaz Memorandum's requirements were too restrictive, the Keating Memorandum was soon reinstated." In addition, the housing industry charged that the memorandum was confusing because it used an out-of-date version of the BOCA code.); Letter from Kenneth Schoonover, Vice President of Codes and Standards, Bldg. Officials & Code Adm'rs Int'l, Inc. (BOCA), to Clarine Nardi Riddle, Nat'l Multi Hous. Council (Aug. 2, 1995) (on file with author).

169. Baer, *supra* note 101. This study defends the two-person-per-bedroom standard as the status quo and argues that the HUD proposal would cause "overcrowding." *Id.*

170. Memorandum from Elizabeth K. Julian, Acting Deputy Assistant Sec'y for Policy & Initiatives, HUD, to Fair Housing Enforcement Directors, Investigation Divisions Directors, FHAP and FHIP Divisions (Sept. 25, 1995), *available at* http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_hudguid8 [hereinafter Julian Memorandum].

these cases HUD argued that courts should apply the "compelling business necessity" standard as defendants' rebuttal burden.[171] Landlords and their advocates pushed back.[172] While courts accepted the use of disparate impact analysis in neutral private residential occupancy standards cases,[173] two circuits have refused to adopt a "compelling business necessity" standard as defendants' rebuttal burden.[174]

In 1996, Congress enacted an appropriations bill requiring HUD to use the Keating Memo in enforcing the FHAA during the 1996 Fiscal Year.[175] In 1998, Congress passed the Quality Housing and Work Responsibility Act. This law included a provision directing HUD to use the Keating Memo as its policy for evaluating occupancy restrictions in familial status cases and to publish it in the Federal Register.[176] HUD complied with the directive in late 1998 by issuing

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171. *See, e.g.*, Pfaff v. HUD, 88 F.3d 739, 743–47 (9th. Cir. 1996); Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1254 (10th. Cir. 1995).

172. *See generally* Steve Edelstein, *What's Really Wrong With Fair Housing*, APARTMENT PROFESSIONAL, Mar./Apr. 2005, at 70–74, *available at* http://www.williams-edelstein.net/pdf/apartment_professional_april_2005.pdf.

173. *See, e.g.*, *Pfaff*, 88 F.3d 739; *Mountain Side*, 56 F.3d 1243.

174. *See Pfaff*, 88 F.3d at 747; *Mountain Side*, 56 F.3d at 1254-55. *See generally* Reinhart v. Lincoln Cnty., 482 F.3d 1225 (10th. Cir. 2007) (reaffirming *Mountain Side*).

175. Sec. 224.

> None of the funds provided in this act ma[]y be used to take any enforcement action with respect to a complaint of discrimination under the Fair Housing Act on the basis of familial status and which involves an occupancy standard established by the housing provider except to the extent that it is found that there has been discrimination in contravention of the standards provided in the March 20, 1991 Memorandum from the General Counsel of the Department of Housing and Urban Development to All Regional Counsel or until such time that HUD issues a final rule in accordance with Section 553 of Title 5, United States Code.

H.R. REP. NO. 104-134, at 291 (1996) (Conf. Rep.) (citation omitted) (only applies to federal government's enforcement activities and only for that year's appropriations). In the same year as this Act, Congress came close to enacting a statutory definition of a reasonable residential occupancy standard that would have adopted the Keating memo's "two-persons-per bedroom" approach. *See* H.R. 3385, 104th Cong. (1996); H.R. 2406, 104th Cong. (1996). H.R. 2406 passed in the House but failed in the Senate.

176. Sec. 589. TREATMENT OF OCCUPANCY STANDARDS.

> (a) Establishment of Policy.—Not later than 60 days after the date of the enactment of this Act, the Secretary of Housing and Urban Development shall publish a notice in the Federal Register for effect that takes effect upon publication and provides that the specific and unmodified standards provided in the March 20, 1991, Memorandum from the General Counsel of the Department of Housing and Urban Development to All Regional Counsel shall be the policy of the Department of Housing and Urban Development with respect to complaints of discrimination under the Fair Housing Act on

a "Policy Statement" adopting the Keating Memo as its enforcement policy for residential occupancy cases.[177] Pursuant to Congress's directive, this Policy Statement was published in the Federal Register to advise the public on how HUD would review compliance with the FHAA's familial status provisions for residential occupancy cases.[178] Since 1998, neither Congress nor HUD has done anything to change this situation.

During all of these periods, HUD's use of the Keating Memo with its characterization of the two-person-per-bedroom standard as presumptively reasonable gave legitimacy, prominence, and significance to the standard no matter what HUD's intent was and no matter what the actual liability standard was.

3. The Use of the Two-Person-Per-Bedroom Standard by HUD and FHAPs in Enforcement Activities

A person who believes she has suffered housing discrimination has numerous institutional means for redress.[179] One of the most common is filing an administrative complaint with HUD or a state or local fair housing enforcement agency for processing and prosecution. The governmental enforcement mechanisms for the FHAA include not only HUD and the Department of Justice, but also "Fair Housing Assistance Program" (FHAP) agencies which are administrative enforcement agencies in thirty-nine states and a substantial number of counties and cities that have federal fair housing "equivalency" status.[180] Part of the regulations authorizing FHAPs requires them to

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> the basis of familial status which involve an occupancy standard established by a housing provider.

Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 589, 112 Stat. 2461, 2651 (1998) (citation omitted). The Fair Housing Institute attributed Congress's action to the rebuke by the *Pfaff* court. *Congress Directs HUD to Adopt Keating Memo for Occupancy Standards*, *supra* note 98.

177. *See Keating Memo*, *supra* note 16 (HUD Statement of Policy Implementing the requirements of section 589 of the Quality Housing and Work Responsibility Act of 1998). See *infra* Part III.A for a discussion of the legal effect of this statute on the Keating Memo.

178. See *infra* Part III.A for a discussion of the scope of HUD's regulatory authority after this statute.

179. *See* 42 U.S.C. § 3601 (2006).

180. *Fair Housing Assistance Program (FHAP) Agencies*, U.S. DEPARTMENT HOUSING & URB. DEV., http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm (last visited Jan. 20, 2011). The state and local fair housing enforcement agencies are called FHAPs, an acronym based on the name of the

enforce fair housing law that provides at least as many rights to protected classes as the FHAA provides.[181] Apparently, following HUD, many FHAPs apply the Keating Memo as an intake guideline in residential occupancy cases.[182]

Since 1989, dozens of claims have been filed with HUD and FHAPs alleging violation of the familial status provision through overly restrictive private residential occupancy standards. A 1991 survey conducted by the Institute of Real Estate Management reported:

> Of survey respondents who reported problems resulting from the [Fair Housing] Act, 26 percent said they had received a claim of discriminatory occupancy policies or of discrimination on the basis of familial status. Familial status and discriminatory occupancy standards represent 56 percent of the threats of a claim made to survey respondents.[183]

Once a complaint is filed, HUD has 100 days to complete an investigation and decide whether "reasonable cause exists to believe that a discriminatory housing practice has occurred."[184] In some cases after applying the Keating Memo as an intake guideline, HUD decided to investigate a complaint and then, based upon the results of the investigation, file a charge. In the vast majority of the cases that were charged and litigated before an administrative law judge (ALJ)

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program by which they are funded, the Fair Housing Assistance Program.

181. *Id.* Moreover, if HUD receives a complaint alleging a violation in one of these states, HUD is required by its own regulations to refer such claims to the FHAP in that state.

182. *See supra* note 131 and accompanying text. Excluding California, the remaining thirty-eight states encompass 80.18% of the total U.S. population and jurisdiction over 78% of its total rental housing units. This article excludes California from this calculation because of its state fair housing enforcement guideline of "two-person-per-bedroom-plus-one." *See supra* note 104 and accompanying text. These figures are the result of calculations made using PUMS data from the 2007 American Community Survey conducted by the U.S. Census Bureau. *See also* NAT'L COUNCIL ON DISABILITY, RECONSTRUCTING FAIR HOUSING 50–51 (2001), *available at* http://www.ncd.gov/publications/2001/Nov62001.

183. Martha Schindler, *How Many is too Many? The Need for Occupancy Guidelines*, ALLBUSINESS.COM, http://www.allbusiness.com/government/business-regulations/329274-1.html (last visited July 11, 2011).

184. 42 U.S.C. § 3610 (2006).

or in federal court, HUD articulated an FHAA violation under a disparate impact theory or a disparate treatment theory.[185] But HUD was inconsistent. Sometimes in its administration of these claims, HUD blurred and apparently merged the "reasonable" designation for intake under the Keating Memo with a legal designation of "nondiscriminatory" under the FHAA in its adjudicatory work.[186] HUD sometimes referenced the Keating Memo in its residential occupancy case charges to ALJs, and sometimes (when briefs were required) in hearings before ALJs.[187] Making "reasonable" under the Keating Memo functionally equivalent to "nondiscriminatory" under the FHAA supported the view that as "presumptively reasonable," the two-person-per-bedroom standard was also presumptively compliant with the FHAA. Incorporating the "reasonable" language into its charges increased the likelihood that ALJs and courts would consider the Keating memo and its two-person-per-bedroom standard as a liability standard or (more usually) a defense. These mistakes helped provide a veneer of legal authority to the Keating Memo.

4. HUD's and DOJ's Incorporation of the Standard in Proposed Orders and Consent Decrees

HUD also sometimes used the two-person-per-bedroom standard in consent decrees in its ALJ adjudications. And, according to the

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185. *See* cases cited *infra* Part II.C.1; *see also* Memorandum from Roberta Achtenberg, Assistant Sec'y for Fair Hous. & Equal Opportunity, HUD, to All Regional Directors, Office of Fair Hous. and Equal Opportunity (Dec. 17, 1993), http://fairhousing.com/index.cfm?method=page.display&pageID=260. (stating "[c]ases which have been brought under the Fair Housing Act should now be analyzed using a disparate impact analysis, to the extent this theory is applicable to a particular case" and citing the *Mountain Side* case as an example).

186. *See* cases cited *infra* Part II.C.1. HUD also sometimes used the "reasonable" language in response to requests for guidance from individual housing providers. *See* United States v. Tropic Seas, Inc., 887 F. Supp. 1347, 1354 n.3 (D. Haw. 1995) (reciting communications between HUD and VP of defendant Co-op board).

187. *See, e.g.*, Guvenilir v. Riverbend Club Apartments, HUDALJ No. 04-89-0676-1, at 20 (HUD Oct. 15,1991), http://www.hud.gov/offices/oha/oalj/cases/fha/files/HUD%2004-89-0676-1.pdf (initial decision) (applying disparate impact and disparate treatment analyses but finding, as a conclusion of law, that the apartment complex's occupancy policy operated unreasonably to limit or exclude families with children and that "[b]y enforcing an unreasonable occupancy standard, [Riverbend Club Apartments] have discriminated against families with children in the terms and conditions of rental of apartments in violation of the provisions of the Fair Housing Act").

Keating Memo itself, one source of the two-person-per-bedroom presumptively reasonable standard for HUD's enforcement activities was that the Department of Justice had "incorporated [it] in[to] consent decrees and proposed orders."[188] Both of these practices also supported the broader use of this standard by landlords and property management companies.

During the period of 1989–2010, the practice in HUD ALJ adjudications has been inconsistent.[189] Some orders only required the respondent to follow the law without additional direction or specificity,[190] or to adopt "objective and nondiscriminatory standards."[191] Some orders directed the respondent to adopt an occupancy standard not more restrictive than two-person-per-bedroom but without any reference to the Keating Memo.[192] Some ordered the housing provider to adopt a residential occupancy standard consistent with the Keating Memo.[193] Some directed the

188. Keating Memo, *supra* note 16, at 70,257.

189. The author was not able to collect every relevant case.

190. *See, e.g.*, Beard v. Concord Apartments, HUDALJ No. 05-91-1345-1 (HUD Sept. 22, 1992), 1992 WL 672901 (enjoining defendants from "enforcing any occupancy rules which prohibit any individual from occupying a unit based upon familial status"); Weigand v. Foxcroft Condo. Apartments, Inc., HUDALJ No. 04-93-0492-8 & HUDALJ No. 04-93-2091-8 (HUD April 17, 1996), at *3 (ordering respondent to "amend its occupancy policy to eliminate any adverse impact on families with children in the future"); Link v. Trucksess, FHEO Nos. 03-10-0065-8, 03-10-0068-8 (HUD Sept. 21, 2010), at *4 http://portal.hud.gov/hudportal/documents/huddoc?id=FHEOtrucksess.pdf (initial decision and consent order) ("[Owners] shall create a written rental policy of nondiscrimination to be approved by HUD."); *see also* Press Release, Fair Hous. Council of Suburban Phila., Bucks County Landlords to pay $40,000 for Illegally Evicting Mom and Adopted Son (Sept. 29, 2010), *available at* http://www.fhco.org/pdfs/news/NEWS_PennLLsPay40KforEvictingMomAndAdoptedSon_09292010.pdf; Press Release, Shantae Goodloe, HUD, HUD Charges Philadelphia-Area Landlords with Discriminating Against Adoptive Mom (Apr. 15, 2010), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-080.

191. *See, e.g.*, Carson v. Bowen, HUDALJ No. 07-93-0867-8 (HUD July 25, 1995), 1995 WL 454029, at *2 (enjoining defendant to "establish and uniformly apply objective and nondiscriminatory standards and occupancy requirements in determining whether to rent a dwelling").

192. *See, e.g.*, Guvenilir v. Riverbend Club Apartments, HUDALJ No. 04-89-0676-1, at 20 (HUD Oct. 15, 1991), http://www.hud.gov/offices/oha/oalj/cases/fha/files/HUD%2004-89-0676-1.pdf (initial decision) (instructing apartment owners to adopt and enforce an occupancy policy no more restrictive than two-persons-per-bedroom at all properties they own or control within the jurisdiction of the Atlanta HUD regional office).

193. *See, e.g.*, Holman v. Melco Prop., HUDALJ No. 05-98-1047-8 (HUD Feb. 25, 2002), 2002 WL 321955, at *2 (ordering respondents to "change their policies with regard to renting one bedroom units to people with a child so as to come into compliance with HUD's regulations as reflected in the Keating memo, a copy of which is attached as Exhibit A").

respondent to adopt a reasonable policy.[194] A few required the housing provider to adopt a residential occupancy standard not less restrictive than the local governmental occupancy standard.[195]

To the degree defendants' lawyers researched these orders or communicated among themselves, the practice of specifying "not more restrictive than two-person-per-bedroom" or an indirect or direct incorporation of the Keating Memo in consent orders supported continued use of the two-person-per-bedroom standard. Further, given the regulatory uncertainty and the role of the two-person-per-bedroom standard as a focal point (discussed *infra*), arguably the more vague orders to "follow the law" also supported the two-person-per-bedroom standard.

The terms of settlement agreements are reached by negotiation between the litigants. They may require more or less of the parties than a court would if the case went to trial. For these reasons, settlements and consent decrees do not become binding law for third parties, only for the parties to the settlement. Advocating for a two-person-per-bedroom standard in consent decrees is consistent with the position of the fair housing defense bar. The fair housing defense bar pays attention to HUD's and DOJ's enforcement practices.[196]

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194. *See, e.g.*, Bridges v. Ineichen, HUDALJ No. 05-93-0143-1 (HUD April 4, 1995), 1995 WL 152740, at *9 ("Respondent and other housing providers . . . have a duty to ensure that their occupancy policies are reasonable."). These cases could be understood to refer to the Keating Memo indirectly because of the reference to "reasonable."

195. *See, e.g.*, Martin v. Almeida, HUDALJ No. 01-93-0276-8 (HUD Apr. 26, 1994), 1994 WL 680959 ("At a minimum, the standards for occupancy shall be no more restrictive than the standards set forth in section 45-24.3-11 of the Rhode Island . . . code."); Suburban Md. Fair Hous., Inc. v. Krupp Realty, Inc., HUDALJ No. 03-90-0392-1 (HUD Nov. 8, 1993), 1993 WL 668339 ("Respondents may modify this policy in the future, but shall not adopt an occupancy policy for rental units in The Point Apartments more restrictive than the applicable local occupancy code."); *see also* United States v. Candlelight Manor Condo. Ass'n, No. 1:03:-CV-248 (W.D. Mich. Oct. 17, 2003), http://www.justice.gov/crt/about/hce/documents/candlesettle.php (providing in "Affirmative Relief" that defendant will revise master lease to provide "occupancy of any unit or any mobile home situated [on any Condominium site] *shall not exceed* the limitations that may be established from time to time by the City of Holland, the County of Allegan, or the State of Michigan . . . and [that defendant] further agrees that the occupancy standards as applied at the condominium development *will not be more restrictive than* the requirements of the City of Holland, the County of Allegan, or the State of Michigan" (emphasis added)). On my analysis, this would only be appropriate if the governmental standard were demonstrated to be "reasonable" under the FHAA statutory exemption. *See infra* notes 332–44 and accompanying text.

196. *See, e.g.*, Badami, *supra* note 97 ("Over the years, I successfully defended any number of cases based on the Keating Memorandum and the two person per bedroom guideline."); Lori Irish Bauman,

And so, while these HUD and DOJ practices did not give actual legal authority to the two-person-per-bedroom standard, they did support its use.

5. Mention of Two-Person-Per-Bedroom Standard from the Keating Memo by Some Courts

Another reason the two-person-per-bedroom standard has gained national currency is that several published court decisions refer to it and some even appear to use it in their analyses.[197] HUD is the federal agency charged with administration and enforcement of the FHAA. Because of this, HUD regulations and, in some instances, enforcement activity, are sometimes entitled to deference by courts. For this reason, courts' discussion of HUD statements and policy are relevant. However, courts are not required to defer to every action or statement by federal agencies charged with the responsibility of enforcing federal statutes. And there are different levels of deference. While these references in published cases are arguably dicta or the product of poor legal reasoning,[198] their presence both enables and encourages parties in future cases to treat the two-person-per-bedroom standard as having a legal status that it does not have. Moreover, this view is likely to be transmitted to landlords or property management agencies who consult lawyers on the issue of what are "legal" private residential occupancy standards.[199]

Legal Update on Familial Status, J. PROP. MGMT., July-Aug. 1992, at 29 (summarizing recent cases); *Chicago Case*, *supra* note 107; *see also Occupancy*, *supra* note 135.

197. These cases are discussed *infra* Part II.C.1.

198. Certainly courts would be required to defer to the Keating Memo as HUD's own internal enforcement guidance. In other words, a court could not order HUD to use some other standard as its internal enforcement guidance. However, no court has ever performed the appropriate legal analysis to determine if the law requires courts to defer to the Keating Memo as a liability rule. *See* discussion *infra* Part III.A.

199. *See* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 444 (1998) (citing Jaret Seiberg, *A Trailer Park Case Worries Bank Lawyers*, AM. BANKER, Mar. 29, 1995, at 4) (regarding the *Mountain Side* case).

6. Promotion of Two-Person-Per-Bedroom By the Rental Housing Industry

Throughout the entire period—from the time Congress considered adding familial status as a protected class to the FHAA to the present day—landlords and organizations representing landlords and property management agencies have actively and consistently promoted two-person-per-bedroom as the best and ought-to-be-legal standard.[200] These groups sponsored two major studies used in lobbying for legislation at the state and federal levels to promote the standard.[201] Moreover, two-person-per-bedroom was the standard that the landlord and multifamily housing investors' lobby promoted to HUD.[202] Indeed, the National Multi Housing Council (NMHC), one of the primary national organizations representing landlords to Congress, unabashedly claims credit for HUD's adoption of the two-person-per-bedroom standard in the Keating Memo. This claim is asserted on its website in a document entitled "An Overview of the activities that led to HUD's 12/18/1998 occupancy standards guidance." On the same website, the Keating Memo is posted with the following description: "Long-sought guidance confirming that a two persons per bedroom occupancy is 'as a general rule' reasonable for purposes of determining familial status discrimination under the Fair Housing Act."[203] The National Apartment Association and the NMHC appear to be the primary sources of the two-person-per-bedroom standard in the apartment owner industry.[204]

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200. Referring to two-person-per-bedroom and the slightly more relaxed standard of two-persons-per-bedroom-plus one, one report states: "These are the standards usually called for by the apartment owners." Baer, *supra* note 101, at 32. Further, "the predil[e]ction of landlords everywhere [is] not to rent to more than 2 persons per bedroom." *Id.* at 35. Referring to the Diaz Memorandum, *supra* note 167, the rental-housing.com website states: "Rental housing groups were disappointed and discouraged with HUD's interim guidance since the 2-person per bedroom standard is generally accepted as the most sensible throughout the industry and reflects standards which allow residential units to be properly operated and maintained." *Occupancy*, *supra* note 135.

201. Baer, *supra* note 101; *see also* Witt, *supra* note 131; *Occupancy*, *supra* note 135.

202. *See Occupancy Standards: Regulatory and Legislative History*, *supra* note 136.

203. *Occupancy Standards*, NAT'L MULTI HOUSING COUNCIL, http://www.nmhc.org/Content/ContentList.cfm?NavID=238 (last visited Jan. 21, 2011).

204. *Occupancy Standards: Regulatory and Legislative History*, *supra* note 136. Under the subtitle "NAA/NMHC Position," these two organizations explicitly endorse the two-person-per-bedroom standard as "presumptively reasonable." Arguably, the other eleven groups comprising the "Industry

In November 1994, the Arizona Multihousing Association produced and distributed a document entitled *Answers to Some Common Questions About "Occupancy Standards."* The final item in the document is entitled "What Actions Does the Multifamily Housing Industry Recommend?" The final sentence of this section reads: "The multihousing industry believes that HUD should reaffirm its presumptively reasonable *minimum* occupancy guideline of two persons per bedroom."[205]

Though the Keating Memorandum was only issued as internal guidance, it quickly became public and was of particular interest to landlords and the property management industry. Because HUD is the primary administrative agency charged with implementing the FHAA, it was expected to lead enforcement efforts.[206] The pressure exercised by the housing industry, chronicled *supra*, in favor of this standard fairly raises the specter of its regulatory capture of HUD. After the Keating Memo was issued in 1991, these organizations often explicitly based this advocacy for the standard upon the Keating Memo, encouraging their audiences to treat the informal guidance as a "safe harbor" from FHAA liability.[207] This advocacy sometimes articulated the standard without reference to the numerous special circumstances or factors that the Keating Memo itself identified as qualifiers on its reasonableness.[208] And sometimes this

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Coalition" (which included local governments, public housing agencies, the building industry, senior citizens advocacy groups, and affordable housing developers) have a different position.

205. Arizona Multihousing Association, *supra* note 100, at 10 (emphasis in original). In the context of the remainder of the document, it is clear that the adjective "minimum" really means maximum.

206. 42 U.S.C. §§ 3608, 3614(a) (2006).

207. Landlords also pointed to HUD's own manuals for public housing and HUD subsidized housing as support for the two-person-per-bedroom standard because these manuals recommended a two-person-per-bedroom residential occupancy standard. However, HUD stated in the Preamble to its FHAA regulations that residential occupancy standard appropriate for these kinds of housing might not be appropriate for private market housing because HUD assisted dwellings are often smaller and differently configured than private market units. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3237 (Jan. 23, 1989) (codified at 24 C.F.R. pts. 14, 100, 103, 104, 105, 106, 109, 110, 115, & 121).

208. Some legal practice guides contribute to this misperception. To their credit, many lawyers representing landlords and property management agencies tried to educate their clients to keep the whole Keating Memo with its special circumstances factors in mind. *See* Badami, *supra* note 97; *see also* Cathy L. Lucrezi, *The Fair Housing Corner— Two People per Bedroom?*, EVICT.COM (Aug. 2005), http://www.evict.com/newsletters/newsletter_aug05.htm.

advocacy failed to convey that a two-person-per-bedroom standard could be found to violate the FHAA.[209]

Notably, one HUD General Counsel and one HUD Secretary complained about the misuse of the Keating Memo by the apartment industry. HUD General Secretary Nelson Diaz complained about this misinterpretation of the Keating Memo:

> [The Keating Memo] has frequently been misinterpreted to set a 'bright line' standard of two persons per bedroom, but in fact required consideration of a variety of factors in determining whether a maximum occupancy standard [discriminated] against families with children, including bedroom size and configuration, and the age and sex of children.[210]

In an April 1994 letter to Arizona's Governor Fife Symington, HUD Secretary Henry Cisneros complained that the Keating Memo had

> sometimes been misinterpreted to allow housing providers to set two person per bedroom occupancy standards in *every* situation, [when] it does not in fact authorize such action. There are a number of circumstances where the availability of particularly large bedrooms, use of space other than that denominated as 'bedrooms' (such as dens or living rooms), or other factors could result in revision upward of a two person per bedroom guidance.[211]

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209. HUD has recommended a guideline of two persons per bedroom as a safe policy for providers. *For policies which are more restrictive*, HUD will take into account such factors as the size of the bedrooms and dwelling unit, capacity of sewer, septic and other building systems, and any city or state occupancy requirements governing the property to determine if discrimination against families with children is occurring.

Occupancy, supra note 135 (emphasis added).

210. Diaz Memorandum, *supra* note 167.

211. Arizona Multihousing Association, *supra* note 100, at 3.

C. Why We Have Been Stuck at the Two-Person-Per-Bedroom Standard

1. Lack of a Clear Liability Standard

Since 1998, there have only been a handful of published cases on the merits regarding FHAA familial status claims against neutral residential occupancy standards. Sometimes a paucity of litigation can be attributed to clear and settled legal rules known to all relevant parties. However, the jurisprudence of residential occupancy standards has been anything but clear and settled. It is a testament to the importance, complexity and politically-charged nature of the issue that the courts' jurisprudence is unclear.

Twenty-two years after the FHAA was enacted, federal courts that have decided residential occupancy standard discrimination cases have failed to agree on the standard for legal liability.[212] There is no U.S. Supreme Court decision directly on point.[213] There are published appellate cases in only three federal circuits: the Eighth Circuit (*United States v. Badgett*),[214] the Ninth Circuit (*Pfaff v. HUD*),[215] and the Tenth Circuit (*Mountain Side Mobile Estates v. HUD*).[216] Each circuit articulates a somewhat different liability

212. *See infra* cases in notes 213–16. Of course, some published cases do not even reach the issues on the merits. *See, e.g.*, DeBolt v. Espy, 47 F.3d 777, 777 (6th Cir. 1995) (plaintiff lacked standing); Midpeninsula Citizens for Fair Hous. v. Arco Mgmt. Co., 168 F.R.D. 647, 649 (N.D. Cal. 1996) (denying class certification).

213. *See* Edmunds v. Oxford House, 514 U.S. 725 (1995) (interpreting the exemption from FHAA liability for "reasonable" governmental occupancy standards).

214. United States v. Badgett, 976 F.2d 1176, 1179–80 (8th Cir. 1992) (finding one-person-per-bedroom policy for a one-bedroom apartment with a living space of 636 square feet violated the FHAA). The *Badgett* opinion is the first published federal appellate case in which the plaintiff challenged a neutral occupancy standard with statistical evidence of discriminatory impact and presented some evidence of intent to discriminate.

215. Pfaff v. HUD, 88 F.3d 739, 749 (9th Cir. 1996) (finding landlords' refusal to rent two-bedroom house to family of five did not violate FHAA).

216. Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1257 (10th Cir. 1995) (finding mobile home park occupancy policy of no more than three persons per mobile home did not violate the FHAA). The *Mountain Side* court applies a version of disparate impact burden-shifting test in which the defendant's burden of proving a legitimate business justification was that "the defendant must demonstrate that the discriminatory practice has a manifest relationship to the housing in question." *Id.* at 1254. It rejected a "compelling business necessity" requirement and found that a mobile home park occupancy policy of no more than three persons per mobile home did not violate the FHAA because the defendant park owner's occupancy limits were justified by sewer system limitations and the owner's

standard. As discussed *infra*, decisions by district courts and state courts are all over the map.

HUD uses the Keating Memo to evaluate administrative complaints alleging that neutral private residential occupancy standards violate the FHAA, but it has employed a disparate impact or disparate treatment theory of liability when litigating these cases. This inconsistency or disjunction between the analysis used to decide whether to further investigate cases and the legal liability theory applied in cases that are actually brought has been the primary source of confusion in the cases.

All three federal circuit courts have affirmed the application of disparate impact or disparate treatment analysis to such cases.[217] And most courts do apply some version of disparate treatment or disparate impact using the traditional burden-shifting tests.[218] However, several courts discuss "reasonableness" based upon either HUD's Preamble to the FHAA regulations or the Keating Memo. And, while no case has treated the Keating Memo as a complete substitute for disparate treatment or disparate impact analysis, some courts appear to use "reasonableness" to modify the disparate treatment or disparate impact standards.[219]

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concern over quality of life in the mobile home park. *Id*. at 1254–57.

217. *Pfaff*, 88 F.3d at 739; *Mountain Side Mobile Estates*, 56 F.3d at 1243; *Badgett*, 976 F.2d at 1176.

218. *See, e.g*., Hous. Opportunities Project for Excellence, Inc. v. Key Colony No. 4 Condo. Ass'n, Inc., 510 F. Supp. 2d 1003 (S.D. Fla. 2007) (upholding both disparate impact and disparate treatment claims on motion to dismiss); Snyder v. Barry Realty, 953 F. Supp. 217 (N.D. Ill. 1996); United States v. Hover, No. C 93-20061 JW, 1995 WL 55379 (N.D. Cal. Feb. 16, 1995); United States v. Weiss, 847 F. Supp. 819 (D. Nev. 1994); Fair Hous. Council of Orange Cnty., Inc. v. Ayres, 855 F. Supp. 315 (C.D. Cal. 1994); CHRO *ex rel* Rowley v. J.E. Ackley, LLC, No. CV99550633, 2001 WL 951374 (Conn. Super. Ct. 2001) (unpublished); Indiana Civil Rights Comm'n v. Cnty. Line Park, 738 N.E.2d 1044 (Ind. 2000) (applying burden-shifting of *Komorczy v. Sec'y of HUD*, 53 F.3d 821 (7th Cir. 1995)); Human Rights Comm'n v. LaBrie, Inc., 668 A.2d 659 (Vt. 1995) (acknowledging but not addressing disparate impact claim because it upholds the trial court's decision on disparate treatment).

219. *Pfaff*, 88 F.3d at 747–49 (granting judgment for the defendant because of HUD's conduct, but discussing the Keating Memo and "reasonableness" in dicta); *Badgett*, 976 F.2d at 1176 (applying the *McDonnell Douglas* burden-shifting analysis, but discussing the Keating Memo and "reasonableness" in dicta); Reeves v. Rose, 108 F. Supp. 2d 720, 727–28 (E.D. Mich. 2000) (applying disparate treatment burden-shifting analysis, but discussing "reasonableness" in dicta); *Snyder*, 953 F. Supp. at 222 (applying a disparate impact analysis and misconstruing the *Badgett* court as establishing a "reasonableness" standard); Burnett v. Venturi, 903 F. Supp. 304, 312 (N.D.N.Y. 1995) (applying disparate treatment burden shifting analysis and misconstruing HUD's Preamble to its FHAA regulations to have adopted "reasonableness" as defendant's burden); United States v. Lepore, 816 F. Supp. 1011 (M.D. Pa. 1991) (applying disparate treatment analysis and inappropriately considering the

Two of the appellate decisions exemplify this problem. The *Badgett* court applied the *McDonnell Douglas* burden-shifting test (a disparate treatment analysis). However, while explicitly recognizing that the Keating Memo is only HUD's "rule of thumb," the court appears to evaluate the plaintiff's prima facie case using the Keating Memo as a "totality of the circumstances" test.[220]

The *Pfaff* court held that a neutral residential occupancy standard could be challenged under a disparate impact burden-shifting test, but found for the defendant because of HUD's unacceptable conduct in the litigation.[221] The *Pfaff* court rejected a HUD ALJ's application of "compelling business necessity" as defendants' burden in that case and declined to decide if it was the proper standard in general for disparate impact cases.[222] The court stated its view that "reasonableness" was HUD's original standard for defendant's

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statutory exemption for reasonable *governmental* occupancy standards as a defense for private housing provider's occupancy standard); Glover v. Crestwood Lake Section 1 Holding Corp., 746 F. Supp. 301, 309–10 (S.D.N.Y. 1990) (opining in dicta that reasonable occupancy limitations have been held sufficient to rebut prima facie cases of discrimination). Similar minor references can be found in Sams v. HUD, No. 94-1695, 1996 U.S. App. LEXIS 449 (4th Cir. Jan. 16, 1996) (per curiam); Milsap v. Cornerstone Residential Mgmt., Inc., No. 05-60033-Civ-MARRA/SELTZER, 2005 U.S. Dist. LEXIS 1147 (S.D. Fla. Jan. 28, 2005); United States v. Towers, No. 93-4260, 1994 U.S. Dist. LEXIS 10012 (E.D. La. July 15, 1994); Norville v. Dep't of Human Rights, 792 N.E.2d 825 (Ill. App. Ct. 2003).

220. *Badgett*, 976 F.2d at 1178–80.

221. "We first consider the prima facie case and decline to reach the merits. We then turn to the rebuttal and find that the Pfaffs have met their burden to rebut any prima facie case against them. HUD's reprehensible conduct in this case renders any other result unfair." *Pfaff*, 88 F.3d at 745. "Because HUD acted arbitrarily and capriciously in bringing the present enforcement action against the Pfaffs under 42 U.S.C. § 3604(a), we reverse the order of the ALJ and direct that the Charge of Discrimination be dismissed." *Id.* at 750. For example, the Northern District of Illinois interprets *Pfaff* as follows:

> In *Pfaff v. Secretary of the Dept. of Housing & Urban Dev.*, the Ninth Circuit abandoned the *Mountain Side* standard in favor of a "reasonableness" standard for purposes of determining whether defendant's non-discriminatory reasons are legitimate. Rather than requiring defendants to use the least restrictive practices possible, the Ninth Circuit now requires that they use "reasonable" practices to achieve their non-discriminatory goals.

Snyder, 953 F. Supp. at 222 (N.D. Ill. 1996) (citation omitted). The *Snyder* court also misinterpreted the *Badgett* court as establishing a "reasonableness" standard. *Id.*

222. We hold that the ALJ erred in applying the *Mountain Side* test in this case. Even if the appropriate standard of rebuttal in disparate impact cases normally requires a compelling business necessity, the record in this case leads us to the conclusion that it would be fundamentally unfair to hold the Pfaffs to this standard given HUD's truly appalling conduct in this matter.

Pfaff, 88 F.3d at 747 (footnote omitted).

rebuttal of a prima facie case and briefly applied this standard to the facts in the case.[223]

Many courts' references to "reasonableness" in these cases should be treated as mere dicta.[224] Others can be criticized as inadequate legal analysis.[225] However, these cases have been interpreted by some lower courts as grafting "reasonableness" from the Keating Memo into the disparate treatment and disparate impact burden-shifting standards as either a plaintiff's burden to prove a prima facie case or a defendant's burden to defend an occupancy standard.[226]

As demonstrated by the empirical studies presented in this article, enforcement of the "presumptively reasonable" two-person-per-bedroom standard will often lead to at least a prima facie case of discrimination. Thus it is likely that application of the reasonableness analysis in the Keating Memorandum and a disparate impact or disparate treatment analysis will often come to different results. And, in any case, they require different types of legal analysis. The ambiguity caused by the occasional importing of "reasonableness" combined with the general lack of clarity in disparate treatment or disparate impact analysis jurisprudence causes uncertainty at every stage of the analysis in these cases, including what is required to make out a prima facie case of disparate impact discrimination,[227] the standard for the defendant's rebuttal burden,[228] the kinds of reasons that are acceptable to justify a residential occupancy standard which has a disparate impact,[229] the types of evidence that would be

223. *Id.* at 748–49.

224. *See* cases cited *supra* note 219.

225. For example, a careful reading of the *Pfaff* case demonstrates these statements are dicta because the actual holding rests on the court's frustration with HUD's conduct. Further, the court's interpretation of "reasonableness" as HUD's original standard is flawed because it treats language in the Preamble to HUD's FHAA regulations as if it were HUD's authoritative interpretation of the statute establishing a liability rule with only a perfunctory analysis.

226. *See* cases cited *supra* note 219.

227. In several cases in which the adequacy of the plaintiff's statistics were considered, the court avoided deciding this issue. *See, e.g.*, *Pfaff*, 88 F.3d at 739.

228. *See* U.S. v. Badgett, 976 F.2d 1176 (8th Cir. 1992); Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243 (10th Cir. 1995).

229. Business-related problems with tenant applicants, including insufficient income, lying on applications, bad credit, weak references, or a history of disturbing other tenants or evictions, will always suffice. Most courts find that objective evidence of system carrying capacity can justify a relatively restrictive residential occupancy standard. *E.g.*, United States v. Weiss, 847 F. Supp. 819 (D.

required to ground those justifications,[230] and what burden (or opportunity) plaintiffs might have to rebut a defendant's defense.

Nev. 1994) (where each four-plex in defendant's units was heated by one water heater that defendants claimed could only serve 11 residents, and the court relied on the water heater information to conclude that the defendants showed a compelling business necessity to justify limiting the number of occupants per unit, as it would cost $1.63 million to fix the problem); *see also* United States v. Lepore, 816 F. Supp. 1011 (M.D. Pa.1991) (systems issue defense, but not objective evidence); CHRO *ex rel* Rowley v. J.E. Ackley, LLC., No. CV99550633, 2001 WL 951374 (Conn. Super. Ct. 2001) (systems issue defense but not objective evidence); Human Rights Comm'n v. LaBrie, Inc., 668 A.2d 659 (Vt. 1995) (where the plaintiffs had minor children, including a newborn, and when defendants argued that the septic system and water supply were insufficient for more residents, the court agreed with the lower court in finding that these arguments were not credible and were merely a pretext for discrimination against families with children). Further, landlord economic interests, such as management and other costs or profits, have also been set forth. *See, e.g.*, Fair Hous. Council of Orange Cnty., Inc. v. Ayres, 855 F. Supp. 315, 318–19 (C.D. Cal. 1994) (where defendant argued that the restriction was designed "to keep the property in good repair and to reduce ongoing maintenance and eventual resale costs," the court held that the defendant's rationale was not backed by evidence); *see also Pfaff*, 88 F.3d at 742 (describing a similar business model justification); Snyder v. Barry Realty, 953 F. Supp. 217, 222 (N.D. Ill. 1996) (where defendant claimed that its residential occupancy standard was enforced "to avoid the risk of damage caused by large numbers of students living in its apartments," the court found such reasoning to be insufficient, in part because it was applied inflexibly, as in the case of a married couple (one a student) with 3 minor children). Defendants often claim a governmental regulation defense, arguing that their residential occupancy standard does not violate the FHAA because it is consistent with and/or required by a state or local governmental residential occupancy standard. *See* Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., No. 3:09-CV-1037, 2010 WL 2977143 (D. Conn. July 20, 2010); Reeves v. Rose, 108 F. Supp. 2d 720, 724–28 (E.D. Mich. 2000); United States v. Tropic Seas, Inc., 887 F. Supp. 1347 (D. Haw. 1995); *J.E. Ackley, L.L.C.*, 2001 WL 951374. For more, see discussion *infra* Part III.B.

230. For cases requiring objective evidence, see *Badgett*, 976 F.2d 1176 (defendant argued occupancy restriction was because there was a lack of parking at the apartment complex, but the court said that the standard was not a reasonable way to deal with the lack of parking because infants cannot drive, and thus it was pretext for discrimination); *Gashi*, 2010 WL 2977143 (defendants offered no objective justification for the two person per bedroom occupancy standard); *Tropic Seas*, 887 F. Supp. 1347 (defendants argued that the property was unsafe for children and that the child living there was young, but court was not persuaded by this subjective paternalism and indicated that a child safety argument, even if valid, does not preclude a finding of discrimination); United States v. Hover, No. C93-200061 JW, 1995 WL 55379 (N.D. Cal. Feb. 8, 1995) (where defendant argued that it needed an occupancy standard because other mobile home park tenants would suffer if the density of the park population increased, but the court ruled that relying on the number of bedrooms, rather than their square footage, was not the least restrictive means of achieving the goal, as well as that the park had never actually reached maximum capacity and that it actually had a pending application to increase the number of mobile homes); *Ayres*, 855 F. Supp. at 318–19 (defendant argued that the restriction was designed "to keep the property in good repair and to reduce ongoing maintenance and eventual resale costs," but court held that the defendant's rationale was not backed by evidence and, even if it was, it is not the least restrictive means to achieve the goal); *Lepore*, 816 F. Supp. 1011 (defendant offered septic system limits but lacked sufficient evidence because there seemed to be no objective basis for these limits); *J.E. Ackley, L.L.C.*, 2001 WL 951374 (defendants argued that the mobile park's septic system required limiting occupancy, and that local ordinances required the restriction, but the court said that the defendants' study of the septic system was insufficient to prove a business necessity and that the local ordinances did not apply). For cases not requiring objective evidence, see Carlson v. HUD, No. 95-2980, 1996 U.S. App. LEXIS 6381 (8th Cir. Apr. 5, 1996) (defendant said apartment was "small"); Milsap v. Cornerstone Residential Mgmt., Inc., No. 05-60033-CIV-MARRA/SELTZER, 2005 U.S.

Thus, in the majority of the circuits, plaintiffs cannot predict what precise legal standards a court will apply.

The author believes the best interpretation is that the traditional disparate treatment and disparate impact burden-shifting standards apply. Further, courts' references to "reasonableness" are the mistaken and unfortunate consequences of their failure to appreciate that HUD's mention of reasonableness in the Preamble to the FHAA regulations did not represent its authoritative interpretation of the statute, and that the Keating Memo does not provide a liability rule but only an internal enforcement guideline.[231]

HUD or the DOJ has brought most of the cases that were litigated to judgment and published.[232] With few exceptions,[233] the cases that are brought and litigated to a judgment are "easy cases" that challenge residential occupancy standards more restrictive than two-person-per-bedroom.[234] Several courts have held that a residential occupancy standard more restrictive than two-persons-per-bedroom

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Dist. LEXIS 1147 (S.D. Fla. Jan. 28, 2005) (where one plaintiff had "two young boys" and the other lived with three children, the court relied only on the defendants' stated occupancy restrictions); Burnett v. Venturi, 903 F. Supp. 304 (N.D.N.Y. 1995) (landlords said that the unit was "too small" but had no objective evidence of actual size, so court noted it would have been better to have it); United States v. Towers, No. 93-4260, 1994 U.S. Dist. LEXIS 10012 (E.D. La. July 15, 1994) (defendants argued that the building was in poor condition and not suitable for children, that the insulation was insufficient for children, and that the poor construction exacerbates noise from children). For mixed cases, see *Pfaff*, 88 F.3d at 749 (defendants argued that "the house on Basin View Court was very small, as were its yard and its bedrooms for children," and that they were concerned about property values and deterioration of property; defendants' expert witness also testified to the "reasonableness" of the residential occupancy standard in light of local practices, and the court agreed that they were reasonable); *Mountain Side*, 56 F.3d 1243 (defendants argued that the restriction was necessary because of the limited sewer capacity and low water pressure at the park, as well as to maintain the quality of life in the park; the court gave very little weight to the defendants' census figures because they were national statistics rather than local, but still accepted the sewer and quality of life/overcrowding arguments in finding that the plaintiffs failed to establish a violation of the FHAA).

231. *See infra* Part III.A. However, as discussed *infra* Part III.B, the Keating Memo might provide a useful basis for a liability standard for these cases if it were more carefully and deliberately developed with such an end in mind.

232. This confirms Professor Schwemm's expectation that HUD would be primary enforcer. Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745 (1993). Schwemm expected more litigation but also recognized it would be difficult and so expected that HUD and DOJ would take the lead. *Id.*

233. *See* HUD "special circumstances" cases, *infra* note 247.

234. These cases still exist. *See* Milsap v. Cornerstone Residential Mgmt., No. 05-60033-CIV, 2010 WL 427436 (S.D. Fla. Feb. 1, 2010) (challenging "one couple per bedroom" and "one heartbeat per bedroom" policies).

violates the FHAA.[235] Most of these cases involve a plaintiff seeking to include one or a few more persons in her household than the landlord will accept. In the few published cases in which plaintiffs sought to include substantially larger numbers, plaintiffs have lost.[236]

Regarding the two-person-per-bedroom standard, one district court found it discriminatory as applied to studio and one-bedroom apartments.[237] No published appellate case has found this standard discriminatory. A few HUD cases have challenged two-person-per-bedroom occupancy policies. These cases were brought based upon HUD's application of the Keating Memo's "special circumstances" or other factors to find that there was reasonable cause to charge defendants with discrimination.[238] At least two governmental enforcement agencies[239] and some private attorneys have brought a few cases challenging a two-person-per-bedroom standard with mixed results.[240] Most of these cases settled.

Neither plaintiffs, nor defendants, nor courts have clarity on the liability standard in this important area. Meanwhile landlord advocates promote the view that the Keating Memo—and especially

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235. *See, e.g.*, *Badgett*, 976 F.2d 1176; Snyder v. Barry Realty, 953 F. Supp. 217 (N.D. Ill. 1996); *Ayres*, 855 F. Supp. 315.

236. *See, e.g.*, Norville v. Dep't of Human Rights, 792 N.E.2d 825 (Ill. App. Ct. 2003). One would expect that families who do find landlords willing to accept more than two-person-per-bedroom are not likely to sue on the basis of a restrictive occupancy standard, especially if they perceive two-person-per-bedroom as the market norm. In these situations, tenant claims against landlords are more likely to be for inadequate and inhabitable conditions. Alternatively, these leasing situations are more likely to be disrupted by city enforcement of housing codes, sometimes in a discriminatory way.

237. United States v. Tropic Seas, Inc., 887 F. Supp. 1347 (D. Haw. 1995). Some courts and commentators mistakenly read *Lepore* as also finding a two-person-per-bedroom standard as violating the FHAA. However, in that disparate treatment case, plaintiffs who lived in a two-bedroom mobile home challenged a "two person per mobile home unit" occupancy restriction, which in their circumstances amounted to a one-person-per-bedroom limitation. United States v. Lepore, 816 F. Supp. 1011 (M.D. Pa.1991).

238. *See* cases cited *infra* note 247.

239. *See, e.g.*, Brief &Argument for Complainants-Appellees, Campbell v. Brown, No. 95-0288 (Ill. App. Ct. filed Nov. 12, 1996) (brought by Chicago Commission on Human Relations). California's Department of Fair Employment and Housing has also brought such cases, but importantly the informal standard in California is two-persons-per-bedroom-plus one.

240. *See, e.g.*, Head v. Cornerstone Residential Mgmt., Inc., No. 05-80280, 2010 WL 326035, at *1 (S.D. Fla. Jan. 19, 2010); Milsap v. Cornerstone Residential Mgmt., Inc., No. 05-60033-Civ-MARRA/SELTZER, 2005 U.S. Dist. LEXIS 1147 (S.D. Fla. Jan. 28, 2005); Gashi v. Grubb & Ellis Prop. Mgmt. Servs., No. 3:09-CV-1037, 2011 WL 3489119 (D. Conn. June 23, 2011) (finding liability); Memorandum of Points & Authorities in Support of Motion for Summary Adjudication, Padilla v. 86 Pioneering Assocs., No. 26-19690 (Ca. Super. Ct. Aug. 8, 2003) (settled).

its two-person-per-bedroom standard—provides a safe harbor from FHAA liability. In principle, more litigation could resolve the ambiguity in the legal standard, but the operation of two-person-per-bedroom as a de facto standard inhibits such litigation.

2. The two-person-per-bedroom standard has become a focal point

Over the years since the initial issuance of the Keating Memo, the two-person-per-bedroom standard has become a focal point for landlords and professional property management companies.[241] The combination of the legal uncertainty left by HUD's regulation, HUD's role as primary enforcer of the FHAA, the failure of courts to agree upon a clear standard and analysis (discussed *supra*), landlords' continuing demand for a "safe harbor," the housing industry's endorsement of the two-person-per-bedroom standard, and HUD's seeming embrace of it in the Keating Memo, made two-person-per-bedroom a national "focal point" for residential occupancy standards. In addition, to the degree two-person-per-bedroom was an actual traditional standard in the rental housing industry prior to the enactment of the FHAA, it should be expected that it would be hard to change a tradition firmly grounded in industrial social norms.[242] As described *supra*, the industry then created substantial reliance upon it.[243] Even though the identification of the two-person-per-

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241. *See* Andrew B. Whitford & Justin Tucker, *Focal Points in Public Policy: Evidence from Voluntary Regulation*, 29 REV. POL'Y RES. (forthcoming 2012), *available at* http://ssrn.com/abstract=766145; *see also* Lior Jacob Stravilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835 (2006) (discussing focal points regarding the FHAA, exclusionary vibes, and exclusionary amenities).

242. The standard also became a social norm among housing providers:

> We know from the recent scholarly exploration of social norms that norms and customs may be so widespread and so powerful that they have the practical force of law, or indeed may even override the formal law. When nudged along by judicial recognition, norms *become* law, in the formal as well as the informal sense.

Carol Rose, *Property Stories:* Shelly v. Kraemer, *in* PROPERTY STORIES 218 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009) (citing ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES, 52–62 (1991) and Ghen v. Rich, 8 F. 159 (D.C. Mass. 1881)).

243. Housing industry lawyers knew that it was not the applicable legal standard. Fair Housing Institute articles written by lawyers regularly representing landlords demonstrate the understanding that the special circumstances factors always qualify the "reasonableness" of any private occupancy standard. *See Congress Directs HUD to Adopt Keating Memo*, *supra* note 98; *Chicago Case*, *supra* note

bedroom standard as "presumptively reasonable" was only intended by HUD as an internal enforcement guideline, it became widely used.[244] With widespread practice comes broad expectations, a sense of legitimacy, a perception of normativity, and then a force of fairness behind the standard—a self-reinforcing process.[245] This focal point in turn promotes what is experienced as justifiable reliance that is more self-reinforcing the longer it goes on. Now, landlords and professional property management companies reassure each other that, in the midst of uncertainty, this is a reliable legal safe harbor.

The two-person-per-bedroom standard as a focal point likely has four effects: (1) cases brought challenging residential occupancy standards that are more restrictive than two-person-per-bedroom tend to settle and to be resolved at two-person-per-bedroom;[246] (2) most cases in which a landlord enforces a two-person-per-bedroom standard are not charged by HUD and are not litigated by private parties;[247] (3) most cases in which a landlord enforces a residential

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244. For one expression of the housing industry reliance on the two-person-per-bedroom standard and ongoing concern about this issue, see *Chicago Case*, *supra* note 107. In view of HUD's enforcement of "special circumstances" cases, "properties that adopted a two per bedroom occupancy policy may not be as safe as they once thought." *Id.*

245. An expert witness in *Pfaff v. HUD*, 88 F.3d 739, 749 (9th Cir. 1996), testified to the "reasonableness" of defendant's residential occupancy standard in light of local practices. But local practices might be overly restrictive and are arguably irrelevant to potential discriminatory effects on tenants.

246. *See* Milsap v. Cornerstone Residential Mgmt., No. 05-60033-CIV, 2010 WL 427436 (S.D. Fla. Feb. 1, 2010); *see also* Telephone Interview with Chris Brancart, Partner, Brancart & Brancart (Feb. 17, 2011) and Telephone Interview with Anne Houghhtaling, Director of Enforcement, National Fair Housing Alliance (Aug. 19, 2010) (on file with author).

247. A recent HUD exception charging a landlord who denied a three-bedroom house to a family of seven with discrimination based upon familial status is Complaint at 2–4, *Jones v. Mercker*, FHEO No. 04-07-0030-8 (HUD filed June 24, 2011), http://portal.hud.gov/hudportal/documents/huddoc?id=11HUDvMercker.pdf. Memorandum of Points & Authorities in Support of Motion for Summary Adjudication, *Padilla v. 86 Pioneering Assocs.*, No. 26-19690 (Ca. Super. Ct. filed Aug. 8, 2003) (which settled) and Gashi v. Grubb & Ellis Prop. Mgmt. Servs., No. 3:09-CV-1037, 2011 WL 3489119 (D. Conn. June 23, 2011) (in which liability was found) are recent private party exceptions. It may also be true that landlord attorneys counseled settling the "special circumstances" cases to avoid making law that the two-person-per-bedroom standard could ever violate the FHAA. Since at least 2006, HUD has charged a few "special circumstances" cases against landlords with a two-person-per-bedroom residential occupancy standard (e.g., that extra room required two additional occupants). *See* Uludag v. Draper & Kramer, Inc., HUDALJ No. 06-047-FH, 2006 WL 2848628 (HUD Sept. 21, 2006); Complaint at 4, HUD v. During, FHEO No. 09-090598-8 (HUD filed Dec. 10, 2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7526.pdf; Complaint at 2, Leather v. Florence Tollgate Condo. Ass'n, FHEO No. 02-06-0101-8 (HUD filed Feb. 11, 2009),

occupancy standard less restrictive than two-person-per-bedroom are unlikely to be brought at all, or, if they are, they also tend to settle at two-person-per-bedroom; and, (4) because of all of the above, few cases are litigated to judgment or appealed, and therefore few cases are published. As this analysis would predict, since 1998, the year when Congress required HUD to adopt and publish the Keating Memo, only a few FHAA cases challenging residential occupancy standards have been published.[248]

The rental housing industry continues to monitor the application of the FHAA to private residential occupancy standards, fair housing trainings for property managers include residential occupancy standards as a topic,[249] and national publications regularly report lawsuits and settlements of fair housing cases, including familial status cases.[250] Now landlords resist any movement away from the two-person-per-bedroom standard, fearing that any move off of this focal point will lead to a proverbial slippery slope and open them up to FHAA liability unless they permit the maximum amount of persons allowed under comparatively liberal governmental residential occupancy standards.

Finally, there have been no significant changes in Congress or at HUD on this issue since 1998. Indeed, Congress has been divided, ambivalent, or both. Some bills would strengthen state governments' authority to set occupancy standards along "federalism" lines.[251] Still others would establish a default national occupancy standard of two-

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http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14495.pdf; Complaint at 1–3, Michelbach v. Chavez, FHEO No.06-08-0968-8 (HUD filed Jan. 9, 2008), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14496.pdf. However, there are no published cases of this kind.

248. *See, e.g.*, Norville v. Dep't of Human Rights, 792 N.E.2d 825 (Ill. App. Ct. 2003).

249. The "Fair Housing and Beyond" (FHS-201) training offered by Institute of Real Estate Management (IREM) and the National Apartment Association Education Institute (NAAEI) for professional property managers includes a section on occupancy standards under the "Fair Housing and Property Operations" part of the training. *See* Course Descriptions, Fair Housing and Beyond, WWW.IREM.ORG (Select "Education," click "Course Descriptions," then select "FHS201 – Fair Housing and Beyond" in "Search by Topic" dropdown menu) (training information on file with author).

250. *See, e.g.*, *Chicago Case*, *supra* note 107.

251. *See, e.g.*, H.R. 2406, 104th Cong. § 508 (1996); S. 1397, 104th Cong. § 1 (1995).

persons-per-bedroom if states do not act to set their own.[252] None of these bills have come close to being enacted as law.

3. The Lack of Litigation Challenging Landlords Employing the Two-Person-Per-Bedroom Residential Occupancy Standard

Despite broad concern by fair housing advocates about restrictive residential occupancy standards, relatively few cases challenging them have been brought, and even fewer have been brought to challenge landlords who employ a two-person-per-bedroom or less restrictive residential occupancy standard. This lack of legal challenges contributes to the two-person-per-bedroom standard's apparent stability and dominance. The lack of litigation stems in part from lack of clarity in the decided cases and other reasons, discussed *supra*, not from any particular merit of this standard itself.

There may be many reasons for the relative dearth of *private* lawsuits in these cases. First, legal uncertainty and the apparent de facto legal status of the two-person-per-bedroom standard operate as a strong deterrent to bringing these cases. The paucity of published cases in each circuit fails to provide sufficient guidance for plaintiffs. Second, to an extent, under-enforcement regarding this fair housing problem is part of the larger problem of under-enforcement of the FHAA more generally.[253] The numerous reasons why any potential fair housing violation is unlikely to be pursued are shared by these cases (e.g., tenants' lack of knowledge of rights, lack of incentive to bring a case, etc.). Third, there are particular obstacles from the standpoint of a private attorney approached by a potential client, such as the expense of hiring an expert to perform statistical analysis.[254]

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252. *See, e.g.*, H.R. 2, 105th Cong. (1997); H.R. 3385, 104th Cong. § 2 (1996).

253. *See* NAT'L FAIR HOUS. ALLIANCE, A STEP IN THE RIGHT DIRECTION: 2010 FAIR HOUSING TRENDS REPORT 3 (2010).

254. One fair housing attorney with broad experience in this area, Chris Brancart, estimated that it would cost $10,000 to hire an expert to perform the statistical analysis necessary for a prima facie case and to submit an affidavit or testify. Telephone Interview with Chris Brancart, Partner, Brancart & Brancart (Feb. 17, 2011) (notes on file with author). Another possible reason for the dearth of cases challenging restrictive occupancy standards under a disparate impact theory is that some of these cases can be charged as violations of the FHAA prohibition against making discriminatory statements under 42 U.S.C. § 3604(c) (2006), which might be easier to prove. *See, e.g.*, White v. HUD, 475 F.3d 898 (7th Cir. 2007) (reversing an ALJ's finding that landlord's statements did not indicate preference, limitation,

Finally, successes in cases challenging two-person-per-bedroom standards may not be well known, because when these cases settle there is no published judgment or opinion with precedential authority.

This Part has argued that the two-person-per-bedroom standard has become and remained dominant for three principal reasons: HUD's enforcement policy, lack of clarity in the courts, and landlord advocacy. And it has argued that none of these reasons reflects an analysis of its merits as the right standard. Consequently, apart from challenging residential occupancy standards more restrictive than two-person-per-bedroom, the promise of the FHAA to eliminate discrimination has become almost a dead letter in this area.

III. BEYOND THE TWO-PERSON-PER-BEDROOM STANDARD: OPTIONS FOR HUD, PLAINTIFFS, AND COURTS

This Article has posed a serious and complex problem to HUD as the nation's primary enforcer of the FHAA. The two-person-per-bedroom standard regularly causes discriminatory impact, yet it is a dominant residential occupancy standard nationwide and enjoys a veneer of legal authority. After exploring the scope of HUD's current regulatory authority in residential occupancy enforcement, this Part proposes several potential solutions that HUD could pursue.[255] First,

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or discrimination based on prospective tenant's familial status); Jancik v. HUD, 44 F.3d 553 (7th Cir. 1995) (upholding ALJ's finding that landlord's advertisement and statements expressed tenant preference based on family status); Martin v. Palm Beach Atl. Ass'n, Inc., 696 So.2d 919 (Fla. Dist. Ct. App. 1997) (upholding claim based upon publication of rules prohibiting occupancy by children under twelve years old); Complaint at 4, Interfaith Hous. Ctr. of the N. Suburbs v. Giarelli, FHEO No. 05-07-0669-8 (HUD filed Mar. 13, 2008), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14471.pdf (charging that landlords' expressions of one-person-per-bedroom residential occupancy standard were discriminatory statements in violation of 42 U.S.C. § 3604(c)).

255. This article does not propose Congressional action as a solution, except as necessary to enable or facilitate appropriate action by HUD. On an institutional competency analysis, Congress is not well-suited to resolve this problem. Rather, HUD, with its institutional expertise as the agency charged with administering and enforcing the FHAA, is best suited to do so. In addition to the options identified in this article, HUD should follow NFHA's recommendation to bar funding for any grantee found to have violated the FHAA because of restrictive occupancy standards and recapture funds that were used to support any units that are not available on a non-discriminatory basis. *See* NAT'L FAIR HOUS. ALLIANCE, *supra* note 253, at 9.

assuming it has the necessary authority, HUD could adopt a regulation. Three variants on a regulation are proposed: (1) adopting a regulation defining the appropriate disparate impact analysis and standards; (2) adopting a regulation which employs the *form* of the Keating Memo analysis—a presumptively reasonable standard combined with a multi-factor test—together with an explicit "safe harbor" guarantee to landlords that use the standard; or (3) adopting a regulation which would generate locally-compliant residential occupancy standards. Second, short of adopting a regulation, HUD could issue additional internal guidance to improve its application of the Keating Memo enforcement guideline. At the very least, in the face of the evidence and argument presented by this Article, HUD ought to conduct studies to investigate, *inter alia*, whether the two-person-per-bedroom standard contributes to discrimination. This Part explains each option in detail along with its likely costs and benefits. Recognizing that HUD has struggled with this issue and has been pulled in many different directions, it is only realistic to assume that HUD may not act.[256] Therefore, this section also suggests options for private plaintiffs and courts in the absence of action by HUD.

A. The Scope of HUD's Current Regulatory Authority

Congress specifically granted HUD "[t]he authority and responsibility for administering" the FHAA.[257] One possible solution to the problem posed by this Article would be that HUD could conduct a regular (or negotiated regulation) rule-making process with the goal of adopting a liability rule applicable to private residential occupancy policies. HUD representatives have promised to develop such a regulation at least three times.[258] The Omnibus Consolidated

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256. There are numerous facts demonstrating that internal discussions within HUD about the residential occupancy standard issue were ongoing and difficult. *See supra* Part II.

257. 42 U.S.C. § 3608(a) (2006). As the Ninth Circuit stated in *Pfaff v. HUD*:

> It is one of HUD's functions to develop expertise on the problem of housing discrimination, 42 U.S.C. § 3608(e) (duty to study and report), and, on the basis of this expertise, to exercise its broad powers of enforcement and regulation. 42 U.S.C. §§ 3608(a), (b) (HUD's authority to administer the FHA); [§] 3614a (rulemaking authority).

Pfaff v. HUD, 88 F.3d 739, 749 (9th Cir. 1996).

258. *See* Diaz Memorandum, *supra* note 167 ("The Department will be issuing official guidance in

Rescissions and Appropriations Act of 1996 explicitly held out this option for HUD.[259] However, in light of the 1998 legislation, there is some uncertainty about the current scope of HUD's regulatory authority regarding occupancy standards in familial status cases.[260] Essentially, the issue is: Does HUD currently have regulatory authority to establish a liability rule for occupancy standards in familial status cases? Or, stated differently, did the 1998 legislation establish the Keating Memo as the liability rule for occupancy standards in familial status cases? This Article argues that while HUD's current authority is unclear, the better argument is that HUD continues to have such authority because the legal status of the Keating Memo has always only been an internal enforcement guideline and never a liability standard.

The case for arguing that the Keating Memo does not provide the liability rule for occupancy standards in familial status cases is strong. The text of the Keating Memo itself clearly identifies it as an internal enforcement guideline. It is addressed to HUD's Regional Counsel. [261] And, the second Keating Memo on its face states, in reference to the first Keating Memo:

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the future on this subject."); *see also* Julian Memorandum*, supra* note 170 ("The July 12 memorandum described a 'safe harbor' occupancy standard drawn from the BOCA Code and announced that rule-making on this subject of occupancy standards would be forthcoming. Considerable confusion has arisen about the interpretation of the July 12 memorandum, and the rule-making process has been expedited."); Letter from Henry Cisneros, HUD Secretary, to Rep. Lazio (May 17, 1996) (stating that HUD was considering negotiated regulation) (on file with author); *Occupancy Standards: Regulatory and Legislative History*, *supra* note 136.

259. Omnibus Consolidated Rescissions and Appropriations Act of 1986, Pub. L. No. 104-134, § 224, 121 Stat. 1321, 1321-291. The law required HUD to refrain from using appropriations under the Act to enforce a complaint of discrimination under the FHA "except to the extent that it is found that there has been discrimination in contravention of the standards provided in [the Keating Memo] or until such time that HUD issues a final rule in accordance with Section 553 of Title 5, United States Code." § 224, 121 Stat. 1321, 1321-291.

260. Because both the Keating Memo itself and the 1998 legislation only specifically refer to occupancy standards in "familial status" cases, there is no doubt that HUD continues to have regulatory authority to establish a liability standard for occupancy standards in race and national origin cases. Currently, the disparate treatment and disparate impact standards provide the liability rules in those cases, and the Keating Memo has no application.

261. The first Keating memorandum is addressed to "All Regional Counsel," and the subject line reads: "Fair Housing Enforcement Policy: Occupancy Standards." Memorandum from HUD General Counsel Frank Keating on Fair Housing Enforcement Policy: Occupancy Standards, *supra* note 158. The second Keating memorandum bears the same address and subject line. Keating Memo, *supra* note 16.

> The memorandum . . . was intended to constitute internal guidance to be used by Regional Counsel in reviewing cases involving occupancy restrictions. *It was not intended to create a definitive test for whether a landlord or manager would be liable in a particular case, nor was it intended to establish occupancy policies or requirements for any particular type of housing*.[262]

HUD's formal position has always been that the Keating Memo is an internal enforcement guideline and that it does not articulate a liability rule.[263] Importantly, HUD has never adopted a regulation declaring that statements of policy published in the Federal Register would constitute a rule, regulation, or interpretation for purposes of FHAA's application to residential occupancy standards.[264] And, HUD's own enforcement practice, which employs either a disparate treatment or disparate impact theory of liability or both when it brings residential occupancy cases, demonstrates that HUD does not consider the Keating Memo to provide a liability rule.[265]

The primary argument that the Keating Memo should be interpreted as a liability rule is that Congress expressed this intention in its 1998 legislation. However, the most reasonable reading of the provisions of a 1998 Congressional statute does not support this argument.[266] There are two relevant provisions in the statute. In the first provision, under the subsection title "Establishment of Policy," Congress directs HUD to publish a notice in the Federal Register that provides that "the specified and unmodified standards" of the Keating Memo "shall be the policy of the Department of Housing

262. Keating Memo, *supra* note 16, at 70,256 (emphasis added). The memorandum further states: "In order to assure that the Department's position in the area of occupancy policies is fully understood, I believe that it is imperative to articulate more fully the Department's position on reasonable occupancy policies and to describe the approach that the Department takes in its review of occupancy cases." *Id.*

263. *See* Kelly, *supra* note 18, at 60 ("Since the issuance of the March Memorandum [Keating Memo], HUD has insisted that it should not be interpreted as establishing a national occupancy standard.").

[255]In contrast, see 24 C.F.R. § 3500.4(a)(1)(ii) (2011), a HUD regulation stating that a "statement of policy" published in the Federal Register constitutes "a rule, regulation or interpretation" for purposes of the Real Estate Settlement Procedures Act.

265. See *supra* notes 186–87 for some exceptions to this practice.

266. Quality Housing & Work Responsibility Act of 1998, Pub. L. No. 105-276, § 589, 112 Stat. 2461.

and Urban Development with respect to complaints of discrimination under the Fair Housing Act (42 U.S.C. 3601 et seq.) on the basis of familial status which involve an occupancy standard established by a housing provider."[267] On its face, by this statute Congress is only addressing this requirement to HUD and requiring HUD to publicize it to all concerned.[268] In 1998, Congress was clearly aware that HUD, the DOJ, and private plaintiffs had been using disparate impact and disparate treatment theories in litigation since 1991. Therefore, if Congress had wanted to establish the Keating Memo as the liability rule for courts and for litigation brought by private parties, it would have used other language. Instead, the legal consequence of this provision was to lock in the Keating Memo as HUD's internal enforcement guideline.[269]

The actions of HUD, the DOJ, courts, and the fair housing bar since the passage of the law in 1998 support this understanding. As directed by Congress, HUD continues to employ the Keating Memo as an enforcement guideline. Yet, when HUD brings an administrative complaint, it continues to use disparate impact or disparate treatment theories of liability, or both, not one based in the Keating Memo's "reasonableness" language.[270] And, when the DOJ or a private party brings an action, they make similar claims.[271] While some courts have referred to the Keating Memo or used the term "reasonable" in sloppy ways,[272] no court has ever adopted the

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267. *Id*.

268. See *Congress Directs HUD to Adopt Keating Memo for Occupancy Standards*, *supra* note 98, for a slightly more ambiguous interpretation by a fair housing defense group. "Following years of vague and challenging policy announcements, HUD has now been ordered by Congress to adopt the so-called 'Keating Memo' from 1991 as the basis for investigation and enforcement of fair housing complaints involving occupancy standards of private housing providers." *Id.*

269. Interestingly, there have been similar attempts by the housing industry in California to procure legislation that would lock in the "two persons per bedroom plus one" guideline as an enforcement standard by California's Department of Fair Employment and Housing. *See, e.g.*, A.B. 1703, 1993-1994 Cal. State Assemb., Reg. Sess. (Cal. 1993). These attempts have been unsuccessful.

270. *See* cases brought by HUD since 1998 cited *supra* in Part II.C.1.

271. *See* cases brought by DOJ since 1998 cited *supra* in Part II.C.1.

272. In *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), the court was angry because it appeared HUD was using a different defendant burden ("compelling business necessity") instead of its traditional "legitimate business purpose" in its disparate impact analysis. *Id.* at 747–49. The *Pfaff* court granted judgment for the defendant because of HUD's conduct. However, in the opinion, the court discusses the Keating Memo and "reasonableness" in dicta. *Id.* In *United States v. Badgett*, 976 F.2d 1176 (8th Cir.

Keating Memo in its entirety as a liability rule. To date, no court has cited to this statute for that proposition. Moreover, if the 1998 statute had raised this informal guidance to the level of a legally binding rule, the fair housing defense bar surely would have cited to the statute to this effect in order to steer courts away from applying a disparate impact analysis in these cases.[273] There is no evidence in the cases of defendants having done so. At least some landlord advocates directly articulate this position. Referring to the Keating Memo after it had been published in the Federal Register pursuant to the 1998 statute, the landlord website "rental-housing.com" wrote: "This is a policy . . . . not a rule or law."[274]

The second provision of the 1998 statute is entitled "Prohibition of National Standard" and reads in its entirety: "The Secretary of Housing and Urban Development shall not directly or indirectly establish a national occupancy standard."[275] The meaning of this provision and its effect on HUD's regulatory authority is unclear. On its face, it appears to have changed nothing. HUD statements in the Preamble to FHAA regulations and the related memoranda consistently state HUD's self-understanding that it does not have authority to "establish a national occupancy standard."[276] Congress can be understood here as reinforcing that the Keating Memo is only an enforcement guideline and that HUD's use of it is not meant to

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1992), the court applied the *McDonnell Douglas* burden-shifting analysis, but appeared to use the Keating Memo as part of the prima facie case. In *Reeves v. Rose*, 108 F. Supp. 2d 720 (E.D. Mich. 2000), the court referred to "reasonableness" of residential occupancy standards but applied disparate treatment burden-shifting analysis in a case denying summary judgment to defendants. The court in *Burnett v. Venturi*, 903 F. Supp. 304, 312 (N.D.N.Y. 1995), purported to treat a "reasonable occupancy limitation" as fulfilling a defendant's burden to establish a "legitimate, nondiscriminatory business reason" in a disparate treatment burden-shifting analysis, citing *Glover v. Crestwoood Lake Section 1 Holding Corps*., 746 F. Supp. 301, 309–10 (S.D.N.Y. 1990) and the Preamble to HUD's FHAA regulations.

273. *See supra* notes 198–209 and accompanying text. As noted, landlords, property management agencies and the fair housing defense bar would probably not support courts treating the Keating Memo as having the force of law because of its uncertainty, and because the application of its factors might often require more than two persons per bedroom.

274. *Occupancy, supra* note 135.

275. Quality Housing & Work Responsibility Act of 1998, Pub. L. No. 105-276, § 589(b), 112 Stat 2461.

276. *Id*.; Memorandum from HUD General Counsel Frank Keating on Fair Housing Enforcement Policy: Occupancy Standards*, supra* note 158; Keating Memo, *supra* note 16, at 1.

directly or indirectly establish a national occupancy standard of two-persons-per-bedroom because HUD has no authority to do so.[277] However, the provision presents a problem for assessing the scope of HUD's current regulatory authority because it begs the question of whether establishing "a national occupancy standard" is different from adopting a liability rule for occupancy standards.[278]

In the author's view, developing a liability rule for deciding discrimination claims under the FHAA is not the same as setting a "national occupancy standard." In this context, a "national occupancy standard" to best understood to refer to a specific standard, such as "two-persons-per-bedroom." In contrast, a "liability rule" could take many forms, including, *inter alia*, specifying a range of acceptable residential occupancy standards or a set of factors that housing providers would be required to use to set an acceptable residential occupancy standard. In addition, Congress has expressed, and HUD has echoed, a concern for federalism in this context that supports the view that Congress did not want HUD to establish a specific national occupancy standard.[279] In conclusion, while the 1998 legislation requires HUD to use the Keating Memo as its internal enforcement guideline, HUD continues to have regulatory authority to establish a liability rule for these cases, but not a specific national occupancy standard.

B. HUD's Options

1. Clarifying Disparate Impact Analysis and Standards

If HUD decided to promulgate a regulation, the regulatory process would likely be complex and contentious. Extensive studies would be needed to prepare for the effort. Of course, to be effective, this process must include substantial and appropriate participation by all the key stakeholders. And the process must be perceived as fair and

277. This view is consistent with the argument, *supra* in Part I.B., that the two-person-per-bedroom standard is not the law.

278. Unfortunately, the provision has never been cited by or interpreted by any court.

279. *See, e.g.*, 54 Fed. Reg. 3232, 3237 (Jan. 23, 1989).

thorough. While landlords might fear that a revised standard would be too liberal, the revision may not need to be substantial to make a significant difference.[280]

If HUD decided to promulgate a regulation, it would need to decide the form of the liability rule. There are two primary options: the disparate treatment and disparate impact shifting burdens analysis or the Keating Memo's form of a presumptively reasonable standard combined with a factor test.

All three federal circuits that have heard these cases have verified that disparate impact or disparate treatment analyses are appropriate liability theories in these cases.[281] If HUD decided that a disparate impact standard is appropriate, it could select or modify the best one for this area based upon courts' experience to date. HUD would need to clarify each part of the burden-shifting process: the requirements for a prima facie case, the defendant's burden, and the plaintiff's burden if defendant meets his burden.[282] For example, if the regulation specified that the defendant must prove a "sufficient business necessity," it should specify which kinds of justifications meet the standard, and what kind of evidence would be required to show that the standard was met.[283] Such specifics are beyond the scope of this Article.[284]

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280. Most published cases do not reference very large households. Rather, the cases contain families that are larger than the average, such as five- or six-person households. An exception is *Norville v. Dept. of Human Rights*, 792 N.E.2d 825, 826 (Ill. App. Ct. 2003), where a household of eleven—a couple and their nine children—occupied a three-bedroom unit containing a 91-square foot bedroom, a 108-square foot bedroom, and a 144-square foot bedroom with a total size of 1,082 square feet.

281. *See* Pfaff v. HUD, 88 F.3d 739 (9th Cir. 1996); Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243 (10th Cir. 1995). While the *Pfaff* court adopted a disparate impact analysis, the basis for it decision was the finding that HUD acted arbitrarily and capriciously in pursuing a new standard for defendant's burden, not the actual application of a burden-shifting standard. *Pfaff*, 88 F.3d at 750; *see also* United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992) (applying disparate impact analysis). Further, statements on the floor of Congress and HUD's Preamble to the FHAA regulations also express concern over occupancy standards that "operate to discriminate." 54 Fed. Reg. at 3237.

282. HUD, No. 8024.01, CHG-1, TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK ch. 2, at 2-27 (1998). In addition, HUD would need to clarify the relevant geographical unit and other issues. One such unresolved issue is whether national statistics are sufficient to ground a prima facie case. Some courts have questioned whether local statistics are required. *See, e.g.*, *Pfaff*, 88 F.3d at 745–46.

283. *See* United States v. Weiss, 847 F. Supp. 819, 830–31 (D. Nev. 1994) (discussion of post-hoc evidence and subjective/objective evidence).

284. However, a recent paper concerning the application of disparate impact analysis in the FHAA

The primary benefit of utilizing the disparate impact analysis form would be that it most directly serves the FHAA's integration objective. The primary risk of utilizing the disparate impact analysis form would be that even a revised and clarified disparate impact analysis would fail to give notice or serve as a focal point to any party of what residential occupancy standard violates the FHAA.[285] In order to know what would make them liable, landlords would need to perform their own disparate impact analysis (which may be expensive and complex). Even with a clarified test, some degree of uncertainty would likely remain regarding which geographical unit the court would be using for comparison or what business justifications would be sufficient to rebut a prima facie case of discrimination.

While a disparate impact rule would probably supply notice sufficient to meet constitutional requirements (for example, in a due process case), better notice to landlords of what they are required to do may be necessary as a practical matter to resolve this contentious problem. As discussed *supra*, the Keating memo provides some, albeit imperfect, notice.[286] Since the enactment of the FHAA, landlords have sought specific guidance on this issue.[287] And,

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context by Professor Robert Schwemm and Sara Pratt would be a useful starting point. *See* ROBERT G. SCHWEMM & SARA K. PRATT, NAT'L FAIR HOUS. ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH (2009), *available at* http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf.

285. The following is the *Pfaff* court's complaint against HUD's failure to clarify what the FHAA requires in this area:

> HUD should spare a thought for the law-abiding property owner, because the familial status amendment presents particularly difficult questions of compliance. Accepting arguendo that larger households tend disproportionately to include families with children, it would seem that any facially neutral, numerical occupancy restriction above a certain threshold number will exclude large families in significant degree. Where may landlords like the Pfaffs safely draw the line?

Pfaff, 88 F.3d at 749.

286. The Diaz Memorandum, *supra* note 167, sought to give notice using a square footage measure. California's informal enforcement guideline of two-person-per-bedroom plus one also serves this purpose.

287. A background paper issued by the California Apartment Association concludes: "The type of analysis necessary for an individual housing provider to identify a 'safe' or lawful 'occupancy standard' is not readily available within state law. The type of process and documentation necessary for most housing providers to defend an 'occupancy standard' by showing it to be 'essential' is often cumbersome and difficult. Therefore, until a 'bright line' is established, occupancy standards will be

Congress and some courts have acknowledged the importance of and need for notice in this arena.[288]

As an experienced fair housing attorney wrote:

> [Disparate impact analysis] is most useful when assessing the discriminatory effects of neutral practices that do not lend themselves to standard-based assessments (e.g., a decision to demolish public housing or exclude multifamily housing or to convert subsidized housing). [Residential occupancy] restrictions are capable of justification and control through the use of objective, study-based health and safety standards.[289]

Because notice is very valuable to all parties in this arena, because residential occupancy standards are, in principle, amenable to objective standards, and because of the costs in bringing a case based upon disparate impact analysis, the author disfavors this option.

2. Transforming the Keating Memo into a Liability Standard

HUD could propose a liability standard based upon the Keating Memo form. The Keating-type standard includes two parts: a presumptive but rebuttable standard, and the factors for rebuttal. This is a relatively uncommon form of legal rule because it explicitly combines a "bright line rule" dimension with factors allowing for flexibility. The Keating-type standard may be a superior form of legal liability rule for residential occupancy cases because it provides

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challenged as discriminatory and will be the subject of increased litigation." CAL. APARTMENT ASS'N, OCCUPANCY STANDARDS: FEDERAL, STATE, AND LOCAL (2006), *available at* http://caa.atsol.org/WorkArea/DownloadAsset.aspx?id=688.

288. *See Pfaff*, 88 F.3d at 747–50; Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1256–57 (10th Cir. 1995). Similarly, some courts appear to have a concern for the "innocent law-abiding landlord" in that they are reluctant to find liability under disparate impact analysis unless there is some evidence of discriminatory intent. For example, Kelly argues that the compelling business necessity burden may have been applied weakly in *United States v. Weiss*, 847 F. Supp. 819 (D. Nev. 1994), because there was no evidence of discriminatory intent. Kelly, *supra* note 18, at 64 n.27. This issue is part of a much broader conflict concerning the use of a disparate impact liability theory.

289. E-mail from Michael Rawson, Co-Director, Pub. Interest Law Project, to author (July 29, 2010, 01:06 PST) (on file with author). The comment continues: "See *Marina Point v. Wolfson*, 640 P.2d 115 (1982), and other public accommodation cases finding that arbitrary admission standards can be justified by written, objective, research based on health and safety standards." *Id.*

the desired notice and focal point while also incorporating flexibility by taking into account other objective relevant factors. The Keating-type standard also makes sense in the residential occupancy standard context because of the complexity of the accompanying issues. A simple absolute bright line rule would not work well because it would not take into account variances in bedroom sizes nor allow use of other "habitable spaces" for sleeping purposes. A factor test alone would not work because it would not provide sufficient certainty or notice to landlords or to tenants and could lead to inconsistent results by courts. However, the combination makes sense because it provides both a focal point and some flexibility. Here, HUD deserves credit for fashioning an appropriate form of analysis in the initial design of the Keating Memo.

As discussed *supra*, Congress has endorsed the Keating Memo to some extent, though short of giving it the force of law. Neither the courts nor HUD's practice has developed the full potential of the Keating Memo form.[290] The guidance is far from complete from the housing providers' point of view.[291] Therefore, in its current form as a rough enforcement guideline, it would need substantial refinement to serve as a liability rule.

There are three primary tasks HUD would need to perform to transform the Keating Memo into a workable liability rule: (1) define a presumptively compliant standard; (2) define and operationalize the

290. With some exceptions, HUD has not consistently applied the entire Keating Memo with all of its factors to cases.

291. Notably, landlords have groused at the lack of clarity of the Keating Memo: "HUD has never elaborated on any of these factors. Nor has the agency offered any objective guidance on specifically how these ambiguous factors should be applied in setting a 'reasonable' occupancy standard." Arizona Multihousing Association, *supra* note 99, at 3. Housing providers and their advocates have complained that the Keating Memo is unclear and have requested more guidance from HUD. One post on Landlord.com reviews each factor and concludes that each is "a matter of judgment, that is, uncertain." *The Last Word on Occupancy Policies and HUD*, LANDLORD.COM, http://www.landlord.com/last_word_occupancy.htm (last visited Jan. 20, 2011). In reference to the Keating Memo when it was first issued, the landlord website Rental-housing.com states: "[HUD] acknowledged that its 1991 standards of occupancy of two persons per bedroom has been the source of a great deal of confusion and misinterpretation." *Occupancy, supra* note 134. *AllBusiness*, a publication of the Institute of Real Estate Management, also criticized several aspects of the Keating Memo. Schindler, *supra* note 182.

relevant factors; and (3) provide guidance to courts on how to apply the test.

Defining a presumptively compliant standard is the first task. This task would require two steps. First, HUD would need to determine if the presumptive compliant standard should be expressed in terms of the number of bedrooms in a housing unit or by the number of approved sleeping areas.[292] The use of bedrooms as a measure helps provide a useful focal point and would appear to help compliance because of its familiarity. However, HUD would need to consider if these values are outweighed by the potential problems. From the beginning of HUD's analysis of residential occupancy standards, it has always had both bedrooms and other sleeping areas in view because both types of rooms are relevant.[293] The problem with a residential occupancy standard based only upon the number of bedrooms is that it gives landlords too much discretion in light of the FHAA's demonstrated concern for familial discrimination because landlords and property management agencies can manipulate occupancy by which rooms it designates as "bedrooms."[294] An important consequence of Congress's enactment of the original FHA is that when property owners decide to use their property as rental housing, they accept a reduced scope of some of the traditional rights associated with ownership.[295] Several courts have demonstrated in residential occupancy standard cases a willingness to override landlords' designations of bedrooms as the only allowable spaces for sleeping.[296] In addition, the category of bedrooms does not fit well

292. Note that the Diaz Memorandum, *supra* note 166, sought to use square footage as an objective alternative to bedrooms.

293. *See* 54 Fed. Reg. 3232 (Jan. 23, 1989); *see also* Keating Memo, *supra* note 16.

294. *See* Complaint at 2, Leather v. Florence Tollgate Condo. Ass'n, FHEO No. 02-06-0101-8 (HUD filed Feb. 11, 2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14495.pdf (charging that Condominium Association characterized units as "Deluxe One Bedrooms" with two rooms in which one "bedroom" was the same size but additional room was designated as a "den"); *see also* Complaint at 3, Fair Hous. Council of Suburban Phila. v. Trucksess, FHEO Nos. 03-10-0065-8, 03-10-0068-8 (HUD filed Apr. 9, 2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7530.pdf (where a landlord advertised a three-bedroom as a two-bedroom to avoid renting to families with children).

295. *See* United States v. Grisham, 818 F. Supp. 21 (D. Me. 1993) (finding familial status discrimination where owner refused to rent to family because of fear of damage to his prized possessions which he kept in the unit).

296. *See, e.g.*, Pfaff v. HUD, 88 F.3d 739 (9th Cir. 1996).

with studio apartments. Also, many contemporary residential buildings, especially in urban areas, are configured as "lofts," using floor plans without any identified "bedrooms." Keying an occupancy standard to bedrooms fails to provide guidance in these contexts.

Second, if HUD determines that "bedroom" is an appropriate measure to use in the standard, it should conduct a study to determine the *right* presumptively compliant standard. The empirical results of the study in this Article suggest that two-person-per-bedroom is not likely to be the right standard, at least not for all unit sizes and building types.[297] Prior to issuing a proposed rule, HUD should perform a comprehensive study by which it would determine the appropriate presumptively compliant standard based upon relevant facts about the housing stock, household composition, and housing supply and demand.[298]

HUD's second task in transforming the Keating Memo—defining and operationalizing the relevant factors—would require several steps. First, HUD would need to review the factors identified in the Keating Memo and in the cases to determine which ones should be included. The factors identified in the Keating Memo are: (1) size of bedrooms and unit; (2) age of children; (3) configuration of unit; (4) other physical limitations of housing; (5) state and local law; and (6) other relevant factors.[299]

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297. If it is to be a "safe harbor," it should be set to ensure a generous margin between it and what would otherwise violate the law. The two-person-per-bedroom standard is too restrictive. As an analogy, if the legal rule was that everyone must wear "professional attire," you would not set the "safe harbor" at allowing anyone who has a shirt, a pair of pants, and shoes; you would set it at a suit and tie.

298. Given the diversity of housing stock, housing supply and demand, and family sizes, it is not clear whether a single national presumptively compliant standard could be identified. If HUD comes to this conclusion, this Article proposes an alternative, locally-compliant residential occupancy standard regulation, *infra* Appendix.

299. Keating Memo, *supra* note 16. The "other relevant factors" were defined in some detail:

> Other relevant factors supporting a reasonable cause recommendation based upon the conclusion that the occupancy policies are pretextual would include evidence that the housing provider has: (1) made discriminatory statements; (2) adopted discriminatory rules governing use of common facilities; (3) taken other steps to discourage families with children from living in its housing; or (4) enforced its occupancy standards only against families with children.

Id. In addition to identifying the factors, the Keating Memo elaborated to some degree on what each entails by offering some examples. *Id.*

There is substantial overlap between the Keating Memo factors and the considerations courts have used as justifications for defendant rebuttal in disparate impact cases.[300] In this sense, courts may be seen as having developed and further elaborated on the factors. These include governmental occupancy standards,[301] bedroom size,[302] the availability of other sleeping areas,[303] and other physical limitations of housing (e.g., capacity of septic, sewer, or other building systems).[304] In some cases, courts appear to include other considerations for defendants' rebuttal, such as landlords' profits or business model[305] or landlords' perceptions of "quality of life" for tenants.[306] HUD would need to decide if it should include these considerations as relevant factors. HUD should also consider whether the type of housing—such as mobile homes in mobile home parks or condominium units—would be a significant additional factor based upon the cases and their relevant differences.[307] Finally, HUD should reconsider whether to continue to include the age and gender of children as a factor, and, if so, how.[308] This issue is complex

300. *See* cases discussed and cited *supra* Part II.C.1.

301. *See, e.g.*, United States v. Tropic Seas, Inc., 887 F. Supp. 1347 (D. Haw. 1995).

302. *Id.*; *see also* Pfaff v. HUD, 88 F.3d 739 (9th Cir. 1996).

303. *See, e.g.*, *Pfaff*, 88 F.3d 739.

304. *Id.*; *see also* Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243 (10th Cir. 1995); United States v. Weiss, 847 F. Supp. 819 (D. Nev. 1994).

305. *E.g.*, *Pfaff*, 88 F.3d 739; *Weiss*, 847 F. Supp. 819.

306. *E.g.*, *Pfaff*, 88 F.3d 739.

307. Mobile homes located in parks have been a particular focus of litigation for three reasons: (1) the widespread practice of separating "family parks" from "adult parks" and exclusion of children from "adult parks" before 1988; (2) the distinct ownership relationship of a household owning their mobile home and renting a pad from the park owner; and (3) distinct sewage, water and utility issues arising in mobile home parks, especially those on septic systems. *See Mountain Side*, 56 F.3d 1243; United States v. Lepore, 816 F. Supp. 1011, 1017 (M.D. Pa. 1991); Human Rights Comm'n v. LaBrie, Inc., 668 A.2d 659 (Vt. 1995).

308. Some existing and proposed residential occupancy standards include the age of children. "Arizona has a state occupancy standard of two persons per bedroom plus all children under the age of 24 months, enacted in 1994. The provision regarding children under 24 months is scheduled to be removed from statute in July 1995." Witt, supra note 130, at 8. "Phoenix, for example, uses an occupancy standard of '250 square feet for the first two occupants, and at least 150 square feet for every additional occupant, but children under 13 shall not be counted.'" *Id.* at 12 (emphasis omitted). Some proposed federal bills also included such a factor. *See, e.g.,* Housing Opportunity and Responsibility Act of 1997, H.R. 2, 105th Cong. § 702(c) (1997) ("ABSENCE OF STATE STANDARD: If a State fails to establish an occupancy standard, an occupancy standard of 2 persons per bedroom *plus infants* that is established by a housing provider shall be presumed reasonable for the purpose of determining familial status discrimination in residential rental dwellings.") (emphasis added).

because infants and young children typically need less room than older children. Yet, specifying ages and genders of children in the regulation could run afoul of the anti-discrimination norm animating the statute.[309]

HUD would then need to operationalize each factor it selects. Ideally, HUD would sharpen the factors by providing objective standards. Each factor presents distinct challenges, but most are amenable to some further specification.

a. Governmental Occupancy Standards

The Keating Memo explains the "State and local law" factor as follows: "If a dwelling is governed by State or local governmental occupancy requirements, and the housing provider's occupancy standards reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to indicate that the housing provider's occupancy policies are reasonable."[310] As discussed *supra*, Congress included an exemption from liability for familial status discrimination claims for "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[311] Clarifying the relationship between *governmental* residential occupancy standards exemption and the "State and local law" factor in the Keating Memo is critical. There are two distinct issues. First, what is the legal standard and analysis courts should use to determine

309. *See* Morales, *Creating New Housing Opportunities for Families with Children*, *supra* note 18 (arguing that inclusion of this factor is discriminatory). HUD General Counsel Nelson Diaz agrees: "I also believe that consideration by a housing provider of the sex of the children in establishing occupancy standards violates the provisions of the Fair Housing Act with respect to sex discrimination." Diaz Memorandum, *supra* note 166.

310. Keating Memo, *supra* note 16.

311. 42 U.S.C. § 3607(b)(1) (2006). In its 1989 regulations, HUD punted on the issue of identifying what constitutes a "reasonable" governmental restriction by merely repeating the statutory language in the regulation. Most states have adopted maximum residential occupancy standards based upon health and safety. Most of these are quite liberal. There are a few exceptions: Arizona's two-persons-per-bedroom standard, and standards in localities such as Richmond Heights, Illinois. The previous companion article focused on the application of the FHAA to governmental occupancy restrictions. It argued that HUD still has the regulatory authority to adopt a regulation defining a "reasonable" governmental occupancy restriction and should adopt one. At this time, such a regulation would still be valuable, but distinct from the option discussed in the text. Iglesias, *supra* note 5.

if the statutory exemption applies to a particular governmental policy or rule? Second, what is the relationship between a reasonable governmental standard and a claim that a *private* residential occupancy standard is discriminatory?

A previous article attempted to clarify the application and scope of the governmental exemption. Briefly, the article argued that: (1) only governmental residential occupancy standards adopted for health and safety objectives could be eligible for the exemption,[312] (2) only "reasonable" governmental residential occupancy standards are eligible, and (3) "reasonable" must mean something more than passing mere rational basis review. It further argued that if a private housing provider seeks to use a governmental residential occupancy standard as a defense against a claim of familial status discrimination, it must show that: (1) the governmental standard was adopted for health and safety objectives, (2) the governmental standard is "reasonable,"[313] and (3) the housing provider is required by law to apply that standard to the housing unit at issue.

The relationship between a reasonable governmental occupancy standard and a more restrictive private occupancy standard is controversial. Some argue that private housing providers do not have any legal authority to set residential occupancy standards more restrictive than the applicable reasonable governmental standards. On this view, if a landlord imposes such a residential occupancy standard with the effect that it excludes a family, all a plaintiff must do to

312. Iglesias, *supra* note 5, at 1234–35; *see also* Sierra v. City of New York, 579 F. Supp. 2d 543 (S.D.N.Y. 2008) (finding city housing maintenance code rule explicitly excluding children from SROs did not violate FHAA on familial status because of health and safety justifications).

313. The same article argued that in *Fair Housing Advocates Association,* the Sixth Circuit correctly held that the mere fact that an occupancy restriction is part of a municipal ordinance "does not remove [it] from the reasonableness inquiry," and that the party claiming the exemption under 42 U.S.C. § 3607(b)(1) bears the burden of proving that the occupancy restriction is reasonable. *See* Fair Hous. Advocates Ass'n v. City of Richmond Heights*,* 209 F.3d 626, 633–34, 636 (6th Cir. 2000). This view appears to be consistent with Mr. Kelly's characterization of this factor as offering a "soft" safe harbor to owners. Kelly, *supra* note 18, at 66 n.48. Unfortunately, that court failed to articulate an appropriate and workable test to determine if a governmental standard is "reasonable." My article proposed two alternative tests for "reasonable" standards. Iglesias, *supra* note 5, at 1250–59. At this time, the author believes a better solution would be "enhanced rational basis review," requiring facts in evidence at time of passage that reasonably support the health and safety goals identified in the legislation. Such heightened rational basis scrutiny has been applied in other cases and proposed by other commentators for similar situations.

make an adequate prima facie case for discrimination would be to demonstrate this gap between the number of occupants that the applicable reasonable governmental standard would allow and the number of occupants allowed by the private landlord's policy. HUD Secretary Nelson Diaz's guidance on private residential occupancy standards,[314] at least one DOJ consent decree,[315] and some cases offer support for this view.[316]

An alternative view is that even if the applicable governmental standard would allow more occupants in the subject unit, a plaintiff still bears the burden of making some additional showing that the residential occupancy standard discriminates. In practice, this means that the governmental standard would set a *maximum* number of occupants that could legally occupy a unit, the FHAA sets a required *minimum* number of persons that must be allowed to occupy a unit to avoid discriminating against families, and the FHAA could not require more occupants than the governmental standard unless the governmental standard failed the "reasonable" test. In other words, the governmental maximum is not the same as the FHAA-required minimum.[317] On this view, the FHAA only requires that landlords not discriminate; it does not require landlords to allow occupants up to the health and safety limit. Therefore, under the FHAA, landlords must provide a legitimate business justification not for *any* residential

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314. The [Keating Memo], in my opinion, created more problems than it resolved. . . . [T]here have been situations where housing providers have applied a two person per bedroom standard which has disproportionately excluded families with children, and, in some cases, . . . application of the standard has allowed occupancy by fewer persons than would have been allowed under state or local occupancy standards.

Diaz Memorandum, *supra* note 166. Indeed, the Diaz Memorandum guidance provided a governmental standard (BOCA) as the safe harbor.

315. United States v. Candlelight Manor Condo. Ass'n, No. 1:03:-CV-248 (W.D. Mich. Oct. 17, 2003), http://www.justice.gov/crt/about/hce/documents/candlesettle.php (providing in "Affirmative Relief" that defendant will revise master lease to provide "occupancy of any unit or any mobile home situated [on any Condominium site] shall not exceed the limitations that may be established from time to time by the City of Holland, the County of Allegan, or the State of Michigan . . . and further agrees that the occupancy standards as applied at the condominium development will not be more restrictive than the requirements of the City of Holland, the County of Allegan, or the State of Michigan").

316. Literally read, an "example" stated in Hawaii's fair housing statute cited in *Tropic Seas* suggests this interpretation, but the court did not apply it in that way. United States v. Tropic Seas, Inc., 887 F. Supp. 1347, 1355 n.5 (D. Haw. 1995).

317. In principle, any difference between the governmental maximum and the FHAA-mandated minimum creates room for potential bargaining between a landlord and a tenant.

occupancy standard that is more restrictive than the governmental one, but only for a residential occupancy standard which discriminates. Initially, plaintiffs bear the burden of proof to show that a landlord's residential occupancy standard would discriminate. This understanding finds support in several cases, including *Tropic Seas*,[318] and in the only U.S. Supreme Court decision to address the issue.[319]

These issues regarding the application of the FHAA to *governmental* occupancy standards must be resolved for any solution regarding *private* residential occupancy standards to work; otherwise, any solution regarding *private* residential occupancy standards could be undermined by governmental residential occupancy standards and a court's review of them. If HUD adopted a regulation regarding private residential occupancy standards without providing sufficient other guidance regarding *governmental* occupancy standards, representatives of apartment owners and property management companies could be expected to lobby all levels of government to adopt the two-person-per-bedroom standard (or one more restrictive) and rely on the statutory exemption from FHAA familial status liability for "reasonable" standards to defend them.[320]

b. Larger Bedrooms

HUD's Preamble, the first Keating Memorandum, and the second Keating Memorandum all identify the size of a bedroom as a factor that could justify an occupancy standard either more restrictive or less restrictive than the presumptively reasonable two-person-per-bedroom standard.[321] One example suggests that if an apartment had

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318. *See Tropic Seas*, 887 F. Supp. 1347; *see also* Laurenti v. Water's Edge Habitat, Inc., 837 F. Supp. 507, 509–11 (E.D.N.Y. 1993).

319. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 735 (1995).

320. This suggestion has already been made. "Hediger [President of Hediger Enterprises, Inc.] says that the situation could be greatly improved if individual states or municipalities would adopt uniform standards." Schindler, *supra* note 182. For more, see Morales, *The Emergence of Fair Housing Protections Against Arbitrary Occupancy Standards*, *supra* note 18, at 124–25.

321. The Preamble's mention is incorporated into the Keating Memo. Keating Memo, *supra* note 16 ("Thus, the Department believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy standards based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit."). The first Keating Memorandum had also

"two large bedrooms and spacious living areas," it might be a violation for the landlord to exclude a five-person family by enforcing a two-person-per-bedroom policy.[322] A second example suggested that a housing provider could lawfully limit a two-bedroom mobile home in which "one bedroom is extremely small" to two persons.[323] HUD has issued charges in a few cases on this basis.[324] Some courts have attended to this factor.[325]

Logically, this Keating factor assumes some implicit "standard" bedroom size to be the basis of comparison, but the Keating Memo does not identify it. In order to operationalize this factor, HUD would need to identify the "standard" bedroom size (or a range) and set a standard for what counts as a legally relevant variation from that standard so that parties could agree whether or not any specific bedroom is a "standard" bedroom size. Building codes typically provide a minimum square footage size for a room to be considered a "bedroom." These range from 100 square feet to 120 square feet.[326] Building codes also typically provide an objective measure of what additional square footage is necessary to increase occupancy for health and safety reasons, (e.g., an additional fifty to seventy square feet per additional occupant).[327] HUD could use these numbers as a benchmark from which to articulate an objective standard for a bedroom that is substantially smaller or larger than the standard to justify a more or less restrictive occupancy standard.

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identified "the number and size of bedrooms and the overall size of the dwelling unit" as relevant factors. One justification for inclusion of this factor is that landlords regularly charge higher rents for larger bedrooms. Memorandum from HUD General Counsel Frank Keating on Fair Housing Enforcement Policy: Occupancy Standards, *supra* note 157

322. Keating Memo, *supra* note 16. A justification for including this factor is that landlords regularly charge higher rents for units with additional living areas, such as dens, studies and "bonus rooms."

323. *Id.*

324. *E.g.*, Norville v. Dep't of Human Rights, 792 N.E.2d 825, 827 (Ill. App. Ct. 2003).

325. *See* Pfaff v. HUD, 88 F.3d 739, 749 (9th Cir. 1996); Burnett v. Venturi, 903 F. Supp. 304, 306–07 (N.D.N.Y. 1995).

326. *See* Morales, *The Emergence of Fair Housing Protections Against Arbitrary Occupancy Standards*, *supra* note 18, at 107–08. Unfortunately, national statistics regarding average bedroom sizes are not available from the U.S. Census.

327. *Id.*

c. Additional Sleeping Areas

The Keating Memo identified the "configuration of unit" as a factor. The Keating Memo provided an illustration of this factor in which an occupancy standard applied to "a unit consisting of two bedrooms plus a den or study" might violate the FHAA if it excluded a family of five.[328] The phrase "configuration of unit" has been understood by HUD to include the availability of additional areas not designated as "bedrooms" that would be appropriate for sleeping and therefore justify additional occupants.[329] HUD has issued charges in few cases on this basis.[330] Courts' consideration of this factor is consistent with HUD practice. Courts that have attended to this factor did not defer to the landlord's designation of a "bedroom" as the only legitimate "sleeping area" where application of an applicable governmental housing code would specifically allow this use.[331]

In operationalizing this factor, the following issue arises: What space counts as a legitimate "other sleeping area"? The Keating Memo's illustration identifies "a den or study" as possible additional sleeping areas, but is not exclusive. It is not clear whether other places such as basements, dining rooms, or living rooms could also qualify. One possible basis for resolving this issue is using "building codes" or "property maintenance codes." Residential occupancy standards adopted by governments for health and safety purposes are generally part of more extensive building codes or property

328. Keating Memo, *supra* note 16. Interestingly, this exactly describes the facts in the *Pfaff* case.

329. Indeed, HUD's own 1986 regulations for its Section 8 program made this distinction. *See* Zakaria v. Lincoln Prop. Co. No. 415, 185 Cal. App. 3d 500, 506 n.4 ("Section 882.109(c)(2) provides in pertinent part: . . . 'The dwelling unit shall contain at least one bedroom or living/sleeping room of appropriate size for each two persons.'").

330. *See, e.g.*, Complaint at 2, Leather v. Florence Tollgate Condo. Ass'n, FHEO No. 02-06-0101-8 (HUD filed Feb. 11, 2009), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14495.pdf.

331. *See, e.g.*, United States v. Tropic Seas, Inc., 887 F. Supp. 1347 (D. Haw. 1995); *see also* United States v. Hover, No. C93-20061JW, 1995 WL 55379, at *4 (N.D. Cal. Feb. 8, 1995) (Mobile home contained three bedrooms; court ruled that relying on the number of bedrooms, rather than their square footage, was not the least restrictive means of achieving their goal); Laurenti v. Water's Edge Habitat, Inc., 837 F. Supp. 507, 509 (E.D.N.Y. 1993) (plaintiffs argued the living and dining rooms could be considered sleeping rooms). Even the *Pfaff* court did not appear to defer to the landlords' prerogative. In describing the subject housing unit, the court states: "By way of sleeping space, the house had a master bedroom, another 10' x 10' bedroom, and a 'den' opening directly into the main living area, which could also have been used as a bedroom." Pfaff v. HUD, 88 F.3d 739, 742 (9th Cir. 1996).

maintenance codes. These codes distinguish between "bedroom" and "other sleeping area" or "other habitable space."[332] They typically define allowable occupancy based upon a combination of number of persons per "bedroom" (using a technical definition)[333] and number of persons per other "sleeping areas" or "habitable space" (again using technical definitions).[334] From the standpoint of health and safety alone, both types of rooms or areas are appropriate for sleeping purposes. The codes clearly exclude kitchens, hallways, closets, and bathrooms from consideration as other sleeping areas.[335]

Unfortunately, building code authors and publishers fail to provide completely operational definitions, useful explanations, or commentary on these issues. This lack of clarity leaves room for multiple interpretations and resulting conflicts.[336] HUD would need to resolve this issue by providing an objective and practical definition for "other sleeping area" for the purposes of determining if more persons must be allowed to occupy a unit which has other rooms or habitable space not designated as a "bedroom." The Appendix provides one means of combining the number and size of bedrooms and the availability of other sleeping areas into a user-friendly standard.[337]

d. Other Physical Limitations of Housing

The Keating Memo identifies "limiting factors identified by housing providers, such as the capacity of septic, sewer, or other building systems" as issues to consider when determining whether any particular residential occupancy standard is FHAA-compliant.[338]

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332. *See* Morales, *The Emergence of Fair Housing Protections Against Arbitrary Occupancy Standards*, *supra* note 18, at 107–08.

333. *Id.*

334. *Id.*

335. *Id.*

336. For example, landlords could argue that "other sleeping area" means that the space can be used like a "bedroom" for naps or overnight/weekend guests but not regularly/permanently. This interpretation seems weak because of the lack of temporal limiting language defining "other sleeping areas" in building codes, but the building codes do not include other language that would resolve the conflict.

337. *See* Appendix: *Sample Keating-Form Liability Standard*.

338. Keating Memo, *supra* note 16.

HUD and courts have struggled with the "carrying capacity" of various building systems in several cases, especially in the context of mobile home parks.[339] This factor is, to some extent, amenable to determination by experts using engineering analyses applying industry standards. Of course, this raises the risk of the familiar "battle of the experts" problem. Courts are familiar with these types of conflicts. After appropriate studies, HUD may be able to improve the analysis by endorsing certain industry standards.

e. Clarifying How the Test Should Be Applied

The third and final task for making the Keating Memo into a liability standard would be for HUD to clarify how the test should be applied. The Keating Memo provided some illustrative examples, but it does not provide sufficient direction for a court to apply it as a liability standard. The *Badgett* court correctly understood the Keating Memo as articulating a "totality of circumstances" test.[340] Such a test necessarily invests the court with some discretion. However, some useful guidance may be provided, especially when the factors are operationalized and defined in as objective a manner as possible. Following are several initial suggestions. First, the regulation should emphasize that, based upon application of the factors, *any* residential occupancy standard that is presumptively compliant could potentially violate the FHAA. Second, the regulation could provide a "safe harbor" for a private landlord who applies a residential occupancy standard derived from applying the Keating factors.[341] The regulation could state that courts should presume that such a residential occupancy standard is nondiscriminatory or at least give substantial deference to it. In contrast, if a private housing provider's occupancy policy is more restrictive than that which would come from the analysis, it would be presumptively noncompliant. Third, the regulation should clarify the plaintiff's burden to overcome the

339. *See, e.g.*, Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243 (10th Cir. 1995); United States v. Weiss, 847 F. Supp. 819 (D. Nev. 1994).

340. *See* United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992).

341. In a few jurisdictions, there is a clearly applicable governmental FHAA-compliant standard (e.g., Arizona's two-person-per-bedroom) that landlords will also adopt.

presumption in situations where the challenged residential occupancy standard is equal to or more generous than the presumptively compliant one. Presumably, if the challenged residential occupancy standard is more restrictive than the presumptively compliant one, the plaintiff's burden would be light. Fourth, the regulation should clarify the defendant's burden if the plaintiff overcomes the presumption, providing a proper analysis and balancing of the relevant factors. HUD may decide that some factors are more important than others. For example, a defendant's showing that the occupancy standard is one that is mandated by government, applicable to this unit, and "reasonable" could constitute a complete defense in a case where there is no other evidence of discrimination.

A reformed Keating standard that emerged from the foregoing analysis would serve the FHAA's anti-discrimination objective.[342] Such regulation fits HUD's role, expertise, and authority. The Keating-type standard would take into account the housing unit itself—its space and configuration—and a number of other factors long-recognized as relevant by both HUD and courts. This standard provides clear and transparent reasoning, which gives better guidance to landlords, tenants, and courts. This approach meets landlords' need for notice, certainty, and a legal safe harbor. Just as HUD's use of the two-person-per-bedroom as its enforcement guideline in the Keating Memo fostered widespread "compliance" with that standard, HUD's articulation and publication of the new FHAA-compliant standard together with the regulation promising a safe harbor would promote low-cost and widespread compliance.[343] This approach would end the disjunction between HUD's enforcement guidance and the liability

342. In addition, serving the anti-discrimination objective would contribute to reducing residential segregation in the aggregate. Advocates concerned with the FHAA's integration goal should use other means to serve it, such as applying the FHAA in land use and zoning, including the duty to affirmatively further fair housing.

343. Initially this approach reduces the costs of litigation to both plaintiffs and defendants compared to a disparate impact standard because they would not need to commission statistical studies. By itself, this cost reduction would tend to increase litigation. However, with proper promulgation, the approach will increase compliance because it provides a new focal point with objective criteria and thus would tend to reduce litigation.

theories (disparate treatment and disparate impact) that it and the DOJ employ in their residential occupancy cases.[344]

Some landlords might argue that this approach is too indeterminate and gives courts too much discretion in applying the factors. However, under any of its formulations, the burden-shifting framework gives substantial discretion to courts, albeit not explicitly. In contrast, the Keating-type standard arguably gives explicit discretion, but allows for more specific direction on how courts should exercise such discretion regarding the appropriate factors to consider and how to consider them.

Landlords might complain that this revised Keating-type standard is too complex to administer or too costly.[345] However, it would actually be relatively easy to administer once the initial determinations and measurements for a unit were made.[346] Notably, many landlords already provide square-foot measurements and floor plans to prospective tenants.[347] Furthermore, HUD could create and provide guidance materials, which would make this measurement standardized and not burdensome. Absent substantial rehabilitation of units, each unit would only need to be measured once. Tenant advocates would point out the potential for landlords to "manipulate" occupancy by changing sizes or shapes of rooms to avoid the specified size requirements. However, this is a risk of all "black letter" type rules and would be mitigated by clear standards for the other available sleeping areas.

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344. This approach is consistent with the HUD-appointed Public and Assisted Housing Occupancy Task Force recommendation that HUD establish some sort of maximum occupancy standard, based on the square footage of the apartment or its sleeping area, or devise some other "safe harbor" mechanism to protect landlords from litigation. PUB. & ASSISTED HOUS. OCCUPANCY TASK FORCE, REPORT TO CONGRESS AND TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 1-14, 1-15, 1-16 (1994).

345. There may be practical implementation problems with needing whole numbers (e.g. three-person-per-bedroom) instead of fractions (e.g. 2.5 person-per-bedroom). The regulation would have to provide a rule for rounding up or down, such as the traditional rule of "if less than half, round down, and if equal to or more than half, round up."

346. For an admirably clear (if legally incorrect) explanation of how to apply the Keating Memo factors, see *How to Abide by the Federal Occupancy Standard*, EHOW, http://www.ehow.com/how_2170464_abide-federal-occupancy-standard.html (last visited May 16, 2011) (on file with author).

347. *See*, *e.g.*, APARTMENTS.COM, http://www.apartments.com (last visited Jan. 20, 2011) (featuring advertised units on a national rental website).

f. Safe Harbor Requires Transparency

Most people are familiar with signs in elevators, public meeting rooms, and swimming pools that state the allowable number of persons who may occupy that space for its designated purpose. HUD could combine the new liability standard with a "safe harbor" provision, offering landlords who comply with the new liability standard a safe harbor from FHAA enforcement. Safe harbors serve the useful goal of encouraging compliance at low enforcement cost. If HUD were to create such a safe harbor as a complementary provision, it should require in the regulation that in order to take advantage of the safe harbor, landlords must publicly post the residential occupancy standard that they apply to a specific unit, include this information in their marketing efforts, and disclose square footage and floor plan information upon request.[348] In combination with other measures described in this section, these requirements would increase compliance and decrease litigation by reducing tenants' and tenant advocates' information costs and by facilitating consideration of the space-related factors in the Keating-type test.

Such disclosure would not be overly burdensome. At least one national organization serving landlords has arrived at the same conclusion—that it would be in landlords' interest to make their occupancy standard policy publicly available. Landlord.com recommends that landlords perform necessary research to formulate a legally defensible residential occupancy standard, write it down, incorporate it into the general rental standards policy, and make it "available to anyone who has a reason to see it."[349] The national rental housing marketing website Apartments.com already includes floor plans and square footage in the information provided for apartments for rent.[350] Advertisements for vacation homes often

348. It would need to be a violation of the FHAA to post and subsequently not use the residential occupancy standard or to post false standards.

349. *See The Last Word on Occupancy Policies and HUD*, *supra* note 290.

350. *See* APARTMENTS.COM, *supra* note 346.

include residential occupancy limits. In addition, there is precedent for such disclosure in FHAA familial status litigation.[351]

3. Creating Locally Compliant Residential Occupancy Standards

Any national liability rule will necessarily fail to account for any significant differences among and within states of housing stock, household composition, and housing supply and demand.[352] Based upon its studies, HUD may decide that due to substantial variation in regional or local factors, it would not be feasible or wise to establish one national, presumptively compliant, residential occupancy standard. This section offers an alternative to address these potential problems. It might be possible to calibrate the Keating-type standard to the relevant housing markets.[353]

HUD could develop a methodology using the relevant geographical unit's household composition, housing stock, and housing supply and demand to identify "local FHAA-compliant

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351. *See, e.g.*, United States v. Hover, No. C 93-20061 JW, 1995 WL 53379, at *5 (N.D. Cal. Feb. 16, 1995) (part of an order requiring the defendant publish its residential occupancy standard in a newspaper); Guvenilir v. Riverbend Club Apartments, HUDALJ No. 04-89-0676-1, at 20 (HUD Oct. 15,1991), http://www.hud.gov/offices/oha/oalj/cases/fha/files/HUD%2004-89-0676-1.pdf (initial decision) (same). There may also be an apartment analogy to HUD certifications for manufactured housing here. *See supra* note 156 and accompanying text. Harry J. Kelly, III, another commentator on occupancy standards, agrees: "An occupancy standard should be made available to prospective tenants. . . ." Kelly, *supra* note 18, at 62.

352. At least one major landlord representative views the Keating Memo as inappropriate because of its national scope:

> In 1991, HUD's chief counsel wrote a memorandum for the guidance of the bureaucrats charged with enforcement of the Fair Housing Law, setting out what he thought would be reasonable standards for occupancy from Orono, ME, to San Diego, CA, and Vancouver, WA, to Miami, FL. This inevitably crass, one-size-fits-all memo was incorporated formally into a HUD policy in 1999.

The Last Word on Occupancy Policies and HUD, *supra* note 290.

353. An experienced fair housing attorney, Chris Brancart of Brancart & Brancart has identified another version of locally compliant standards. HUD could require jurisdictions that receive Community Development Block Grants or similar funds to include an analysis of private residential occupancy standards in the Analysis of Impediments to Fair Housing section of their Consolidated Plan. Such jurisdictions are required to take measures to reduce or eliminate identified impediments. Alternatively, HUD funding for the Fair Housing Assistance Program could require program recipients to review private residential occupancy standards in relationship to the Keating Memo and develop locally appropriate enforcement standards. In both cases, HUD would specify that the Keating Memo would be the minimum amount of protection provided for the fair housing rights of protected classes. Telephone Interview with Chris Brancart, Partner, Brancart & Brancart (Feb. 17, 2011).

residential occupancy standards" for local jurisdictions.[354] For example, based upon an analysis of the relevant factors, the FHAA-compliant residential occupancy standard for City A might be two-persons-per-bedroom plus one person per additional sleeping area of a specified size, while the FHAA-compliant residential occupancy standard for City B might be two-persons-per-bedroom plus two persons per specified size sleeping area.

HUD would publicize and distribute to all jurisdictions a set of numbers for the locally compliant residential occupancy standards which landlords, tenants and tenant advocates could understand and follow. The standard could be expressed in the three-digit sample form (described in the Appendix). As in the previously proposed solution, landlords using these standards would enjoy safe harbor from familial status discrimination challenges.

Even if HUD determined that it did not have the regulatory authority to replace the Keating Memo with a liability rule for its own use, HUD could use the Consolidated Plan guidelines or FHAP grant requirements to enable FHAPs to study and to adopt locally appropriate residential occupancy standard enforcement guidelines while maintaining the Keating Memo as the mandatory floor. Several FHAPs already employ an enforcement guideline that is less restrictive than the Keating Memo.[355]

This idea is realistic because HUD has substantial experience in applying a federal law that takes into account regional and local housing conditions, for example computing the annual Section 8 Fair Market Rents using American Housing Survey data.[356] Due to the dynamism of housing supply and demand, this analysis may need to

354. The methodology would define how the "relevant housing market" would be delineated. Under the methodology, the target could be to set residential occupancy standards to give households with children in the relevant housing market an 80% "qualification rate" relative to households without children for the existing and expected housing stock.

355. *See* Badami, *supra* note 96.

356. The Fair Market Rents are used in the Housing Choice Voucher, the Moderate Rehabilitation, the project-based voucher, and other programs that require location-specific economic data. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., FAIR MARKET RENTS FOR THE SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM 1 (2007), *available at* http://www.huduser.org/portal/datasets/fmr.html.

be redone with some frequency (such as every five years or ten years), possibly resulting in changed standards.

This approach shares most of the same benefits, costs, and risks as the Keating strategy. However, if studies revealed that one national presumptively compliant occupancy standard would be inappropriate, this alternative would help establish better standards. While the legal standard would vary from jurisdiction to jurisdiction, it would be fair because there would be proper and adequate notice. If HUD does this, it could do so with the knowledge that each "local FHAA-compliant residential occupancy standard" would likely become the actual standard in each jurisdiction by the same process as the two-person-per-bedroom standard became established.

4. Supplementing the Keating Memo with Additional Guidance

HUD may determine that under the 1998 statute it does not have the regulatory authority to adopt a regulation. Even under such an interpretation, HUD's current authority regarding the Keating Memo would arguably include providing *gap-filling* guidance to improve upon how the Keating Memo is applied. Short of adopting a regulation, HUD could supplement its enforcement guidance (for example, the Keating Memo) with an eye towards making it function as a liability standard and then publish the supplementary guidance in the Federal Register.[357]

Clearly, under this alternative, HUD would not have authority to change the two-person-per-bedroom standard as the presumptively reasonable residential occupancy standard or to change the factors considered under the Keating Memo analysis.

However, assuming that HUD has authority to issue supplementary guidance, ideally, such additional guidance would clarify each of the elements of the Keating Memo and its application as discussed *supra*. HUD could conduct some studies to ground the

357. If HUD were to pursue this option, it would be useful for it to negotiate a Memorandum of Understanding with the DOJ to coordinate their enforcement activities. There is precedent for this. *See* U.S. DEP'T OF HOUS. & URBAN DEV. AND U.S. DEP'T OF JUSTICE, JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE: REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT (May 14, 2004).

supplemental guidance. The supplemental guidance could include information such as the bedroom size that HUD would consider to be the "average" and the minimum size of a room before it would be considered an additional sleeping area.

This approach would provide for better enforcement while giving more complete notice to potential defendants about which residential occupancy standards HUD is likely to spend resources investigating. The difference would be that, unlike the regulation approaches discussed *supra*, the supplemented enforcement guideline would not have the force of law. However, if HUD did this, it could do so in the knowledge that its new standard would likely become the new dominant standard by the same process as before, even if no courts adopt it as the actual liability rule. At bare minimum, it would be widely known that HUD could and would regularly apply all of the Keating factors to determine the "reasonableness" of any residential occupancy standard, including a two-person-per-bedroom standard. Such an understanding would likely encourage people to file administrative complaints with HUD and FHAPs in cases where landlords were applying two-person-per-bedroom occupancy policies and other factors (such as large bedrooms) were present.

5. *Conducting Studies*

Two national studies preceded the 1988 amendment to add "familial status" as a protected class to the Fair Housing Act.[358] At a minimum, HUD's Policy Development and Research division should conduct new studies to update and extend the analysis of those studies either as a precursor to other recommended actions or to inform a decision about which action(s) to take. Important research questions include: (1) What range of residential occupancy standards do governments apply, and with what justifications?; (2) What range of residential occupancy standards do private housing providers apply, and with what justifications? In particular, what is the extent of the application of the two-person-per-bedroom standard?; and (3)

358. GREENE & BLAKE, *supra* note 30; MARANS ET AL., *supra* note 30.

To what degree and in what typical demographic situations and housing markets is the application of particular private residential occupancy standards (for example, two-person-per-bedroom) likely to discriminate based upon familial status, race, or national origin?

C. Plaintiffs' Options in the Face of HUD Inaction

Given the political and legal mess so far in the area of residential occupancy standards, even if any of the options described above could advance the FHAA and be workable in principle, there is still a substantial possibility that HUD will not act. While Congress has directed HUD to employ the Keating Memo as its enforcement policy, HUD has not always applied the entire Keating Memo with all of its factors.[359] In this case, the opportunity for action moves to the fair housing plaintiff's bar—including the enforcement divisions of FHAPs. This section briefly suggests some options.

Most of the enforcement in this area occurs through the HUD and FHAP administrative complaint process, which typically employs the Keating Memo. In cases in which complainants are being excluded by two-person-per-bedroom residential occupancy standard policies, fair housing advocates and attorneys could ensure that complaints include sufficient facts, or at least allegations, to trigger the "special circumstances" factors of the Keating Memo (and appropriate fact investigations) that are likely to merit a complete investigation. This would increase the possibility that HUD would make a reasonable cause finding and charge the defendant with an FHAA violation.

Private attorneys, in conjunction with fair housing agencies, could bring more cases challenging two-person-per-bedroom residential occupancy standard policies using disparate impact theory. They should allege facts in complaints and conduct discovery likely to support such claims. They could continue to share information about what statistical analysis provides a persuasive prima facie case and how to challenge subjective and inappropriate attempted justifications.[360]

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359. *See supra* note 289 and accompanying text.
360. Fair housing attorneys may need training in working with statistical evidence.

If defendants refer to the Keating Memo for purposes of defending a two-person-per-bedroom residential occupancy standard policy, plaintiffs' attorneys could challenge the legal authority of the Keating Memo and especially the two-person-per-bedroom policy standing alone as discussed *supra*. Moreover, if a court were inclined to incorporate the Keating Memo into its analysis, plaintiffs could ensure that the court considers all of the factors and does not privilege the "presumptively reasonable" two-person-per-bedroom standard as if it were an actual liability standard.[361] If a trial court relied on the Keating Memo to allow a defendant to use the two-person-per-bedroom standard as a defense without thorough consideration of the other factors, plaintiffs should consider appealing the issue.

It also might be possible for fair housing lawyers to collaborate on one or more large national cases that would erode the dominance of the two-person-per-bedroom standard. For example, they might bring one or several cases against large, interstate, multi-family housing management companies that employ a two-person-per-bedroom standard in all of their units of various sizes across several jurisdictions.[362] They could use local statistics to demonstrate that the two-person-per-bedroom practice violated the FHAA in numerous states and localities and that its use constitutes systemic discrimination. If successful, such a case would become a model for litigation by others all over the nation, and might pressure HUD to initiate a regulatory process to create a new focal point to reduce landlords' uncertainty. Finally, in some states, there may be other state law provisions that fair housing advocates can use to challenge private residential occupancy standards.[363]

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361. Representatives of the defense bar were noticeably concerned when HUD charged a few special circumstances cases.

362. This option is modeled upon the litigation in *Nat'l Fair Hous. Alliance v. A.G. Spanos Constr., Inc.*, 542 F. Supp. 2d 1054 (N.D. Cal. 2008). This case settled on favorable terms for the plaintiffs. A recent case challenging a two-person-per-bedroom standard against a well-known property management company, Grubb & Ellis, was successful on summary judgment in part because Grubb & Ellis did "not have any information regarding the occupancy policy, including why it was adopted." Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., No. 3:09-CV-1037, 2011 WL 3489119, at *2 (D. Conn. June 23, 2011).

363. *E.g.*, Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2006); N.Y. REAL PROP. LAW § 235 (McKinney 2006); state constitutional protections for privacy; other anti-discrimination laws.

D. Courts' Options in the Face of HUD Inaction

If HUD fails to act, courts could address the problem in several ways. First, they could converge on a clarified disparate impact standard. Any court in which a residential occupancy standard case is filed could take the opportunity to clarify and help promote convergence around one disparate impact standard. Of course, district courts in the circuits that have adopted a version of the disparate impact standard would be bound by their circuit's rule. Nevertheless, they could suggest how to improve the disparate impact standard applicable to FHAA residential occupancy standard cases, including by clarifying which types of justifications are legitimate and what evidence is required to prove them.[364]

Given courts' failure to coalesce around a clear disparate impact standard in fair housing law generally over the last twenty-two years, this option is very unlikely. A more likely potential role for courts would be to clarify the legal status of the Keating Memo and, in particular, the two-person-per-bedroom standard. As discussed *supra*, while several courts have referred to and arguably used the Keating Memo, none has performed the appropriate analysis to clearly specify its legal status as merely a HUD intake guideline.

If courts nonetheless found that the Keating Memo was useful, they should work with it to improve it in a common law fashion. Assuming *arguendo* that a court could not change the two-person-per-bedroom presumptively reasonable standard incorporated into the Keating Memo, these improvements would be, as discussed *supra*, to clarify the factors and how they should be applied. This would include defining a "bedroom," making clear that courts need not defer to a landlord's designation of a "bedroom," and defining other "sleeping areas" where a state's housing code would specifically allow this use.

364. The proposal by Professor Robert Schwemm and Sara Pratt would be useful guidance if courts were inclined toward this effort. *See* Schwemm & Pratt, *supra* note 283.

CONCLUSION

Challenging the two-person-per-bedroom standard is necessary to increase housing choices for families as the FHAA promises. Empirical evidence demonstrates that the common and dominant two-person-per-bedroom standard is frequently discriminatory in many jurisdictions across the United States. Additionally, landlords who do not enforce restrictive residential occupancy standards often do not provide the best housing in good neighborhoods. HUD's Keating Memo impliedly endorses the two-person-per-bedroom standard as "presumptively" compliant with the FHAA, contributing to the current stalemate at a restrictive and frequently discriminatory residential occupancy standard. HUD should disassociate itself from this discriminatory standard.

Any proposed solution should be better than the status quo. As argued in this article, the status quo is a two-person-per-bedroom dominant residential occupancy standard combined with an uncertain liability standard, and the Keating Memo is generally not fully applied. Together, these last two elements function as an unintended support for the two-person-per-bedroom standard's veneer of legal authority. "Better" means serving the FHAA's anti-discrimination and pro-integration goals with high compliance rates and fairness to landlords, property management agencies, and tenants.

The solutions proposed in this Article seek to serve the FHAA's objectives while recognizing the mutual need for a focal point (which aids fairness and compliance), respecting legitimate property rights, and offering practical solutions. There is a mutual interest in some certainty. On the part of landlords, there will be a continuing need for certainty and the strong demand for a focal point which is a legal safe harbor. Prosecutors and fair housing advocates also have a strong interest in some measure of certainty in this arena because of the high costs and uncertainty of litigation. In addition, landlords and tenants generally agree that a residential occupancy standard should depend to some extent on actual dimensions and the spatial configuration of a specific building. Furthermore, they generally agree that any limits

should have a legitimate basis, but they disagree on what should count as a legitimate reason and what evidence should be required to demonstrate whether a justification is legitimate.

Any solution must consider the stakes of key stakeholders: Congress, HUD, the DOJ, the housing industry (especially the National Apartment Association and National Multi Housing Council), fair housing/civil rights advocates, and the tenants whom those advocates represent. Any solution must also take into account the diversity of housing supply and demand, composition of housing stock, and size and composition of families. The array of options presented in this article is intended to be responsive to current legal authority and to considerations about proper institutional choice. Of course, each alternative has its benefits, costs, and risks.

It is possible that only relatively small changes in expanding the standard residential occupancy standard beyond two-person-per-bedroom would make a significant difference in increasing housing choice for members of protected classes.[365] Yet, moving away from it requires a complex and delicate balancing of the rights and interests of landlords and tenants. This article suggests several ways that HUD could move from the overly restrictive two-person-per-bedroom standard to a new, less restrictive standard that makes it sufficiently certain that high rates of compliance would be achieved. Implementation of these proposals would substantially increase decent housing and good neighborhoods available to families.

365. California's two-person-per-bedroom-plus-one standard opens up one-bedroom apartments to families of three persons and two-bedroom apartments to families of five persons. It is worth noting that the two-person-per-bedroom-plus-one standard is only marginally less restrictive than the dominant two-person-per-bedroom standard. However, it can have a significant effect on families' housing choices.

APPENDIX: A SAMPLE KEATING-FORM LIABILITY STANDARD: THE THREE-DIGIT RESIDENTIAL OCCUPANCY STANDARD

This version of a Keating-type occupancy standard incorporates two of the most important factors: the potential for increased numbers of persons permitted per bedroom based upon the size of the bedroom, and additional persons based upon the availability of appropriately sized other sleeping areas. Instead of the familiar single-digit residential occupancy standard, two-person-per-bedroom, or the less common two-digit form, two-person-per-bedroom-plus-one,[366] this form of a revised Keating-type standard would consist of three digits. The first digit would express the number of persons allowed to occupy each room designated as a regular-size "bedroom" under the regulation; the second digit would express the number of additional persons who would be required to be permitted in rooms designated as "bedrooms" which are *substantially* larger than traditional size under the regulation's definition of "substantial;" and the third digit would express the number of additional persons who would be permitted in rooms which met the regulation's definition of "other available sleeping areas" (for example, minimum additional square footage). The occupancy number established by adding the three digits as applied to a particular unit would be the "presumptively FHAA-compliant" residential occupancy standard for that unit.

For example, suppose the regulation provided for two-person-per-bedroom in standard bedrooms of 100 to 120 square feet, one additional person per additional 75 square feet in a room designated as a "bedroom," and two persons per other additional "sleeping area" measuring at least 100 square feet. Suppose an apartment contains two bedrooms (one measuring 100 square feet and the other measuring 175 square feet) and a den which meets the regulation's definition of an additional sleeping area and measures 100 square

366. The California and Austin, Texas, informal standards are two digits: two-person-per-bedroom-plus-one. *See supra* note 139 and accompanying text.

feet. The presumptively FHAA-compliant residential occupancy standard for this apartment would be 4+1+2 = 7, meaning that the landlord would need to allow a family of seven persons to occupy the unit. (Four would be allowed because it's a two-bedroom unit, an additional occupant would be allowed because one of the bedrooms is substantially larger than normal, and two additional occupants would be allowed because the den meets the requirement for an additional sleeping area.) Pursuant to the regulation, this presumptive standard could be rebutted either by the landlord (as too high for a particular unit) or by a tenant (as too low for a particular unit) applying the other specified factors.

The numbers of persons required under the second and third digits could be open-ended or, in other words, merely a function of the additional size of the bedrooms and the number and size of additional sleeping areas. Alternatively, the second and third digits could be capped at a specified number (for example, not exceeding a total of four), no matter how much larger the bedrooms are and no matter how many and how large the additional "sleeping areas" are beyond the specified minimum size. Of course, any resulting residential occupancy standard would be required to be less than the health and safety maximum.