NARROWING THE DEFINITION OF "DWELLING" UNDER THE FAIR HOUSING ACT

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The Fair Housing Act was enacted in order to protect certain groups against discrimination in housing. The Act extends this protection to any "dwelling," but its coverage is not well defined for nontraditional sleeping facilities such as homeless shelters, substance abuse treatment facilities, or tent cities. Courts have applied the Fair Housing Act to any residence—defined by one court as "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit." Courts have generally focused on occupants' length of stay as the determinative factor in examining the scope of the dwelling requirement in the Act.

Homeless shelters and battered women's shelters have long been operated on a single-sex basis, and some shelters place restrictions on familial status. However, current law is still unclear on whether such facilities are subject to the prohibition on familial status and sex discrimination under the Fair Housing Act. The Ninth Circuit recently declared a single-sex men's homeless shelter to be in violation of the Fair Housing Act. If adopted by other circuits, this holding would require the restructuring of many shelters to accommodate both sexes, expose shelters to costly litigation likely resulting in closures and reduced services to the homeless, and reduce further the privacy and security of shelter guests. In this Comment, I argue that courts' focus on length of stay is too narrow and present an alternative test for dwellings under the Fair Housing Act.

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INTRODUCTION

Approximately 2.5 to 3.5 million Americans experience homelessness each year.[1] On a given night, between two and five hundred thousand Americans are likely to find themselves in an emergency shelter or transitional housing.[2] These shelters[3] offer sleeping accommodations to the public, sometimes in conjunction with other benefits such as meals, job training, or counseling. Shelter programs provide valuable social services to disadvantaged members of our society. Because of concerns regarding the safety of women and children in a mixed-gender environment,[4] as well as the constraints of budgets and facilities, many of these establishments limit services to subsets of the population, such as men, women, families, or singles only.[5]

1. OFFICE OF CMTY. PLANNING & DEV., U.S. DEP'T OF HOUS. & URBAN DEV., THE ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 7 (2007), *available at* http://www.huduser.org/Publications/pdf/ahar.pdf.

2. *See id.* at iii (estimating between 235,000 and 434,000 homeless in shelters nightly). Transitional housing refers to housing provided by a social service establishment, often accompanied by mandatory classes and employment, with the goal that residents will become self-sufficient within six to twenty-four months. *See, e.g.*, Wake County Human Services, Transitional Housing, http://www.wakegov.com/humanservices/housing/supportivehousing/transitionalhousing.htm (last visited Feb. 28, 2009).

3. For convenience, I will use the term "shelters" to include social service establishments such as homeless shelters, battered women's shelters, and transitional housing for the homeless.

4. *See, e.g.*, SYLVIA NOVAC ET AL., NO ROOM OF HER OWN: A LITERATURE REVIEW ON WOMEN AND HOMELESSNESS 29 (1996), http://www.ginsler.com/documents/noroom.pdf.

5. *See* MARTHA R. BURT ET AL., URBAN INST., HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE: FINDINGS OF THE NATIONAL SURVEY OF HOMELESS ASSISTANCE PROVIDERS AND CLIENTS (1999), *available at* http://www.huduser.org/publications/homeless/homelessness/

However, the Fair Housing Act makes it unlawful "[t]o refuse to sell or rent . . . , or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, *sex*, *familial status*, or national origin."[6] The Act applies only to a "dwelling", which is defined as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for the sale or lease for the construction or location thereon of any such building, structure, or portion thereof."[7] Thus, if shelters that provide sleeping accommodations are classified as dwellings under the Fair Housing Act, their conduct in targeting only one sex or only families with children would subject the shelters to penalties under the Act.

The Fair Housing Act's legislative history suggests that the U.S. Congress passed the Act to stop housing discrimination based on prohibited classifications, including sex and familial status.[8] While Congress specifically carved out exceptions for owner-occupied homes and religious organizations, no such exception exists for social service housing providers.[9] According to the canon of statutory construction *expressio unius est exclusio alterius*—the expression of one thing excludes all others[10]—this omission should not be

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ch_4f.html (stating that housing programs tend to be specialized and that "43 percent serve two-parent families with children, 61 percent serve men by themselves, and 68 to 69 percent serve women by themselves and female-headed households with children," with some programs serving more than one group); COMM. ON HEALTH CARE FOR HOMELESS PEOPLE, U.S. INST. OF MEDICINE, HOMELESSNESS, HEALTH, AND HUMAN NEEDS 33 (1988) ("In most parts of the United States, shelter systems are organized exclusively to serve adult individuals; most are segregated by sex and are not appropriate places for children."); *see also* CITY OF MADISON, HOUSING AND SERVICES RELATED TO HOMELESSNESS (2004), *available at* http://www.ci.madison.wi.us/cdbg/docs/brochure_J.pdf (listing the respective numbers of beds or units available to single men, single women, and families in Dane County, Wisconsin); Emergency and Transitional Housing Providers, http://housingidaho.com/pdfs/ID_Southwest.pdf (last visited Mar. 9, 2008) (noting that eligibility for transitional housing in southwest Idaho is based on gender and family status); Phoenix Data Center: Shelter, http://www.phoenixdatacenter.org/shelter-transitional.lasso (last visited Mar. 9, 2008) (listing eligibility criteria for transitional housing in Santa Clara County, California, including single men, women, women with children, and families); Transition Resource Action Center: Housing, http://www.traconline.org/housing/housing.htm (last visited Mar. 9, 2008) (noting that eligibility for transitional living programs in Dallas, Texas is based on gender and family status).

6. 42 U.S.C. § 3604(a) (2006) (emphasis added). Familial status refers to persons with minor children. *See id.* § 3602(k).

7. *Id.* § 3602(b). Because the statute defines a dwelling as a residence, I will use the two terms interchangeably throughout this Comment.

8. *See id.* §§ 3601, 3604(a).

9. *See id.* §§ 3603(b)(2), 3607.

10. *See, e.g.*, Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992))). Under this canon, Congress' specific exemption of specified housing implies that other housing is not to be exempted from the Fair Housing Act.

treated lightly. Nevertheless, it is not clear that Congress considered whether institutions such as substance-abuse treatment facilities or homeless shelters might fall under the definition of dwelling and thus become subject to the Act's prohibitions.[11]

The most influential court opinion in determining the scope of the term dwelling is from a 1975 case involving the Fair Housing Act's applicability to a children's home. In that case, the court defined a residence as "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit."[12] No court has explicitly laid out a test for distinguishing a "temporary . . . dwelling place" from a place of "temporary sojourn or transient visit," but courts have generally looked to two factors in making their decision: (1) occupants' intended length of stay; and (2) whether occupants view the building as a place to which they will return.[13] Courts have excluded from this definition certain accommodations, including hotels, hospitals, and prisons.[14] With respect to fair housing cases involving shelters, however, most courts have held or assumed that shelters fall within the scope of the Act.[15] Many of these cases have involved protecting group homes in zoning or regulation disputes with local governments,[16] and one case dealt with the sexual harassment of homeless women by a shelter's directors.[17]

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11. *See* discussion *infra* Part I. In such a case, the canon *expressio unius est exclusio alterius* might not apply. *See* WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 855 (4th ed. 2007) ("Some judges have suggested that the maxim is unreliable and should be invoked with caution because it 'stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the [legislature].'" (quoting Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973))); *see also* Herman & MacLean v. Huddleston, 459 U.S. 375, 388 (1983); Director, Etc. v. Bethlehem Mines Corp., 669 F.2d 187 (4th Cir. 1982).

12. United States v. Hughes Mem'l Home, 396 F. Supp. 544, 549 (W.D. Va. 1975) (using language from *Webster's Dictionary*).

13. *See* United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990).

14. *See, e.g.*, Patel v. Holley House Motels, 483 F. Supp. 374, 381 (S.D. Ala. 1979) (excluding a motel from Fair Housing Act coverage); United States v. City of Boca Raton, No. 06-80879-CIV, 2008 WL 686689, *19 (S.D. Fla. Mar. 12, 2008) (distinguishing between a dwelling and a hospital); Garcia v. Condarco, 114 F. Supp. 2d 1158, 1163 (D.N.M. 2000) (finding that detention centers are not dwellings within the meaning of the Fair Housing Act).

15. However, one district court has recently held otherwise. *See City of Boca Raton*, 2008 WL 686689 (discussed *infra* notes 171–179).

16. *See, e.g.*, Gamble v. City of Escondido, 104 F.3d 300, 303–04 (9th Cir. 1997) (involving the denial of a permit to construct a facility for the physically disabled); Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285, 287 (6th Cir. 1996) (involving a challenge to adult foster care licensing requirements); Oxford House-C v. City of St. Louis, 77 F.3d 249, 250–51 (8th Cir. 1996) (involving a challenge to the application of residential zoning ordinances to group homes for recovering substance abusers); Bangerter v. Orem City Corp., 46 F.3d 1491, 1494 (10th Cir. 1995) (involving a challenge to permitting requirements for group homes for the handicapped); Familystyle of St. Paul, Inc. v. City

Although federal fair housing laws have prohibited sex discrimination in housing since 1974, and single-sex homeless shelters have existed as long as the Fair Housing Act has been in place, no court until recently had used the Fair Housing Act to rule against the practice of sex segregation in shelters.[18] In 2007, however, the Ninth Circuit ruled that the single-sex policies of a men-only shelter discriminated on the basis of sex in violation of the Fair Housing Act.[19] The court declined to "address[] the issue of whether all temporary shelters fit within the Act's definition of 'dwelling,'" focusing instead on the forty-nine transitional units that the court found clearly qualified at least part of the shelter as a dwelling under the Act.[20]

If courts continue to find that shelters are dwellings subject to the requirements and penalties of the Fair Housing Act, this classification would impose massive litigation and/or restructuring costs on shelters across the United States. The status of shelters under the Fair Housing Act is especially important, since occupants of shelters represent the most vulnerable members of our society. Many occupants are recovering from abusive relationships, whether that abuse is from a spouse, parent, or someone else.[21] Others have simply hit hard financial times.[22] In homeless shelters, children comprise a significant percentage of residents.[23] Although a variety of circumstances bring people to shelters, most are there because the shelter is society's last backstop for those who need a warm place to spend the night.

Tailoring the Fair Housing Act to apply to housing that is truly residential would reduce the threat of costly litigation alleging discrimination against shelter providers who specialize in providing services to single men, single

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of St. Paul, Minn., 923 F.2d 91, 92–93 (8th Cir. 1991) (involving a group home's challenge to municipal spacing requirements); Cmty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs, 257 F. Supp. 2d 208, 214 (D.D.C. 2003) (involving a group home's challenge to the requirement to obtain a certificate of occupancy); United States v. City of Chicago Heights, 161 F. Supp. 2d 819, 832 (N.D. Ill. 2001) (involving a challenge to the city's denial of a special use permit); Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1493 (W.D. Wash. 1997) (involving a prohibition on children's group homes in residential areas); Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057 (N.D. Ill. 1996) (involving a challenge to the city fire department's refusal to certify a group home for the mentally ill).

17. Woods v. Foster, 884 F. Supp. 1169, 1171–72 (N.D. Ill. 1995).

18. *Cf.* Blumhorst v. Jewish Family Servs. of L.A., 24 Cal. Rptr. 3d 474 (Ct. App. 2005) (dismissing for lack of standing a challenge to a women's shelter's refusal to admit a male).

19. Cmty. House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007).

20. *Id.* at 1048 n.2.

21. For example, residents at a domestic violence shelter.

22. *See* Ross Colvin, *Family Homelessness Rising in the United States*, REUTERS, Nov. 12, 2008, http://www.reuters.com/article/newsOne/idUSTRE4AB18I20081112.

23. OFFICE OF CMTY. PLANNING & DEV., *supra* note 1, at 30 ("Nearly one-quarter of all sheltered homeless persons are age 17 or under.").

women, or families with children. Such specialization is important because of the limited resources available to these providers and because of the challenges of mixed-gender housing accommodations—especially where security and privacy issues are magnified by the public nature of the shelter. Many beneficiaries of social service housing have histories of criminal convictions, drug and alcohol addictions, and domestic violence.[24] Many are particularly vulnerable (or even dangerous) because of mental illness, depression, or prior abuse. Social service housing providers must balance the needs of all their clients, including maintaining the privacy rights of women and protecting women and children from harassment, intimidation, and abuse through separate areas for men and women. In order to comply with the Fair Housing Act's prohibition on sex discrimination and familial status discrimination, many shelters would be forced to integrate sex offenders, children, alcoholics, and battered women in the same facility. The goals of ensuring safety and aiding client recovery would thus be compromised.

Unlike traditional housing, such as single-family homes and apartment buildings, shelters often provide only temporary accommodations, and many shelters bundle job training, drug treatment, and/or counseling with the accommodations. Furthermore, the accommodations provided are usually restricted in ways not normally associated with a residence—occupants generally have no right to exclude others, privacy is limited, and accommodations are often available only at certain hours of the day. These factors weigh in favor of excluding shelters from the definition of dwelling under the Fair Housing Act.

This Comment argues that shelters should typically not be classified as dwellings under the Fair Housing Act. Instead, shelters should be treated as public accommodations subject to the more lenient restrictions of the Civil Rights Act of 1964.[25] By examining the scope of the Fair Housing Act with respect to shelters, I hope to provide a framework for courts addressing the definition of dwelling in the future.[26]

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24. *See* Editorial, *Addiction in the Homeless Shelters*, N.Y. TIMES, Feb. 20, 1992, at A24 ("New York City's Commission on the Homeless has produced startling documentation of the extent to which residents of homeless shelters suffer from drug or alcohol addiction and, to a lesser extent, mental illness.").

25. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 28 U.S.C. § 1447 (2006) and 42 U.S.C. §§ 1971, 1975a–1975d, 2000a–2000h-6 (2006)).

26. Some social service housing is provided by local governments. *See, e.g.*, Jacob H. Fries, *In Making Crowded Homeless Shelters Safer, Some View the Issue With a Sense of Security*, N.Y. TIMES, Jan. 10, 2002, at B3 (stating that New York City runs seven out of forty-four shelters for single adults). However, government agencies fall within the scope of the Equal Protection Clause, *see* U.S. CONST. amend. xiv (direction the equal protection mandate to states), and may be held to a higher standard than that proposed in this Comment. In addition, federal housing is also subject to

In Part I, I discuss the current scope of the dwelling requirement under the Fair Housing Act. As mentioned, the Fair Housing Act's prohibitions are limited to dwellings.[27] Courts have applied the Act to any residence—defined as "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit."[28] This definition involves consideration of both residents' length of stay as well as whether they return to the building.[29] Places such as nursing homes, children's homes, and drug rehabilitation centers have been held to be dwellings within the Act's scope.[30] Some courts have applied the Fair Housing Act to homeless shelters as well.[31] Moreover, the Department of Housing and Urban Development (HUD), charged with enforcing the Fair Housing Act as well as other laws dealing with fair housing, has also indicated, in the context of building requirements for disabled access, that shelters fall within the scope of the Fair Housing Act.[32]

In Part II, I argue that the broad application of the Fair Housing Act to shelters is at least partly a result of the differences between discrimination laws as applied to housing versus public accommodations. Unlike the Fair Housing Act, sex and familial status are not protected classes under public accommodations law, and the available remedies under public accommodations law are significantly more limited. For example, a plaintiff alleging discrimination in housing may seek monetary damages under the Fair Housing Act, whereas a plaintiff with a similar claim under public accommodations law could only seek injunctive relief.[33] However, the Fair Housing Act was never intended to apply to institutions such as shelters: The main purpose of the Act, as provided in the declaration of policy, is to provide for fair housing throughout the nation.[34] Amendments to the original Act sought equal housing opportunities for women, families with children, and persons

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the provisions of section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally funded housing. *See* 29 U.S.C. § 794 (2006).

27. 42 U.S.C. § 3604(a) (2006).

28. United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990) (quoting United States v. Hughes Mem'l Home, 396 F. Supp. 544, 549 (W.D. Va. 1975)).

29. *See Columbus Country Club*, 915 F.2d at 881.

30. *See, e.g.*, Lakeside Resort Enters., LP v. Bd. of Supervisors, 455 F.3d 154 (3d Cir. 2006) (involving a drug rehabilitation center); Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3d Cir. 1996) (involving a nursing home); *Hughes Mem'l Home*, 396 F. Supp. 544 (involving a children's home).

31. *See, e.g.*, Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1046–53 (9th Cir. 2007); Turning Point, Inc. v. City of Caldwell, 74 F.3d 941 (9th Cir. 1996); Red Bull Assocs. v. Best W. Int'l, Inc., 686 F. Supp. 447 (S.D.N.Y. 1988).

32. *See* 24 C.F.R. § 100.201 (2008).

33. *See* discussion *infra* Part II.B.

34. 42 U.S.C. § 3601 (2006).

with disabilities.[35] Throughout passage of the original Act and its subsequent amendments, the legislature's intent was clearly to protect transactions involving traditional housing such as single-family homes and apartments.

In Part III, I argue that the test for dwellings employed by courts in determining whether the Fair Housing Act applies is unsatisfactory because it is ill defined and contrary to public policy. While a person's length of stay in a building may be one indicator of its character, looking solely at length of stay can create results contrary to Congress' intent in passing the Fair Housing Act. Thus, I propose a more holistic, three-factor test that considers the totality of the circumstances: (1) the normal length of stay intended by the facility; (2) the institutional versus residential nature of the facility; and (3) whether the purpose of the facility is to provide housing, or whether housing is linked to some broader purpose.

Applying a narrower standard for determining whether a building is a dwelling under the Fair Housing Act will keep enforcement of the Act focused on the housing discrimination issues that still plague our society today. Housing discrimination has proven to be one of the most persistent problems among civil rights issues today, and the government's already limited resources should be used to eliminate discrimination in true housing rather than in shelters designed to serve victims of abuse, the mentally ill, and members of our society who are simply down on their luck. Under the current standard for a dwelling, shelters around the country would be vulnerable to costly litigation, which would likely result in closures and reduced services at a time when more and more people are in need of those services.

I. COVERED DWELLINGS UNDER CURRENT LAW

The Fair Housing Act makes it illegal "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling . . . because of race, color, religion, sex, familial status, or national origin,"[36] but provides for limited exemptions such as those for owner-occupied housing,[37] religious organizations, and private clubs.[38] The scope of the Fair Housing Act is thus confined to dwellings; but the distinction between dwellings and other buildings is not well defined.

35. The statute refers to discrimination on the basis of "handicap," but I will use the term disability here to mean the same thing.

36. 42 U.S.C. § 3604 (2006).

37. *Id.* § 3603(b).

38. *Id.* § 3607.

A. Buildings, Structures, and Vacant Land

The Fair Housing Act applies to dwellings, defined as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof."[39] The ambiguity of the term dwelling arises notably when buildings or structures do not fit traditional notions of a home.

The first step in determining whether something is a dwelling is to determine if it is all or part of any building, structure, or qualifying vacant land. This inquiry is quite broad but on its face would exclude from coverage places such as streets, alleyways, and areas under bridges. Even though such places may be treated as a home by the homeless, these locations are not buildings or structures. Although a bridge might qualify as a structure, an area under a bridge should not. On the other hand, temporary shelters, such as those erected in Dome Village in downtown Los Angeles,[40] should qualify as structures, as could tents and other portable shelters.[41] Vacant land sold or leased for the location of residential buildings or structures is also covered as a dwelling.[42]

Even if something qualifies as a building, structure, or vacant land under the Fair Housing Act, it must be occupied or intended for occupation as a

39. *Id.* § 3602(b).

40. *See* Dome Village Homepage, http://www.domevillage.org (last visited Jan. 20, 2009). Dome Village consisted of twenty 314-square-foot dome-shaped structures housing up to thirty-four individuals and family members. *See id.*; Dome Village, About the Domes, http://www.domevillage.org/About_The_Domes.html (last visited Jan. 20, 2009). Dome Village was closed in 2006 because of the rising rent in the area. Dome Village Homepage, *supra*.

41. One example of such a portable shelter includes the EDAR shelter now being distributed in limited quantities to homeless persons. *See* EDAR (Everyone Deserves a Roof), http://www.edar.org (last visited Mar. 28, 2009); *CBS News: Edar Is Cart by Day, Camper by Night* (CBS television broadcast Feb. 16, 2009), *available at* http://cbs5.com/video/?id=46226.

42. One easy example involves mobile home parks. Under the language of the Fair Housing Act, a mobile home lot is vacant land offered for lease for the location of a residential structure, *see* 42 U.S.C. § 3602(b), and the Department of Housing and Urban Development (HUD) has made clear that it considers such lots to be dwellings within the meaning of the Fair Housing Act. *See* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3238 (Jan. 23, 1989). However, other examples of land used for housing may not come within the protection of the Fair Housing Act. Under the plain meaning of the statute, land that is not sold or leased, although used to erect residences, cannot be a protected dwelling under the Fair Housing Act. *See* 42 U.S.C. § 3604 (2006). Examples of vacant lands that are not protected dwellings under this plain meaning include parking lots made available to people living in their vehicles, and land on which tent cities are erected. Because the Act requires vacant land to be "offered for sale or lease" in order to qualify as a dwelling, 42 U.S.C. § 3602(b), land used to host a tent city likely would not qualify under the terms of the statute.

residence in order for it to qualify as a dwelling.[43] As discussed below, to determine whether a building or structure is occupied as a residence, courts have generally looked to (1) whether the occupants intend to remain for a significant period of time, and (2) whether they view the structure as a "place to return to."[44]

B. Current Case Law Defining a Residence

As previously stated, the Fair Housing Act makes it unlawful "[t]o refuse to sell or rent . . . , or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, *sex*, *familial status*, or national origin."[45] Courts have interpreted the phrase "otherwise make unavailable or deny" to be "as broad as Congress could have made it,"[46] capturing housing practices outside of sales and rentals.[47] In the context of a homeless shelter, one federal court has reasoned:

> [T]he FHA was, in part, a response to widespread racial segregation. . . . As such, there is no reason to conclude that the scope of the FHA should be limited to those who pay for their own housing, rather than extended to all victims of the types of discrimination prohibited by the Act.[48]

Despite the broad range of actions covered under the Fair Housing Act, the scope of the Act is limited with respect to the types of buildings or structures covered. The Act's prohibition on discrimination applies only to dwellings,[49] which are defined as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence."[50] Obviously, the Fair Housing Act covers traditional dwellings such as apartments and single-family homes. HUD has made clear that "mobile home parks, trailer courts, condominiums, cooperatives, and time-sharing properties" are also dwellings within the statutory definition.[51] However, properties such as

43. 42 U.S.C. § 3602(b).
44. *See* United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990); *infra* text accompanying note 78.
45. 42 U.S.C. § 3604(a) (emphasis added).
46. Woods v. Foster, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995).
47. *Id.* at 1174–75.
48. *Id.* at 1175.
49. 42 U.S.C. § 3603(a) (2006).
50. *Id.* § 3602(b).
51. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3238 (Jan. 23, 1989).

hotels and motels have generally been held to be public accommodations outside the scope of the Fair Housing Act.[52]

The main pressure point in the statutory definition of dwelling is the term "residence," which is not defined in the statute.[53] Courts, therefore, have been left to interpret what Congress meant to encompass in this term. The term dwelling may capture different types of buildings and structures, depending on the context of the situation. In *Garcia v. Condarco*,[54] the New Mexico District Court illustrated the relevance of context in examining whether a jail is a dwelling. The court noted that in telecommunications and criminal law contexts, a prison cell is a "private dwelling unit" and "qualifies as a dwelling," respectively.[55] However, in the context of the Fair Housing Act, the court held otherwise, noting that a jail is not a dwelling because it is "designed as a detention facility not a 'residence.'"[56]

A 1975 federal district court case, *United States v. Hughes Memorial Home*,[57] laid out a definition for residence that has largely been adopted by later courts addressing the issue.[58] In *Hughes Memorial*, the trustees of a charitable children's home felt bound by trust documents that specified that the home should be maintained as "an orphanage for the white children."[59] The district judge applied the definition of residence from Webster's Third New International Dictionary: "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit."[60] The court held that Hughes Memorial Home was "far more than a place of temporary sojourn to the children who live[d] there," and that the home was thus a dwelling under the Fair Housing Act.[61]

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52. *See, e.g.*, Patel v. Holley House Motels, 483 F. Supp. 374, 381 (S.D. Ala. 1979) ("The Palms Motel is a commercial 'public accommodation' . . . . The Palms Motel is not occupied, designed or intended for occupancy as a residence, and therefore is not a 'dwelling' to which the *Fair Housing Act* is applicable.").

53. United States v. Hughes Mem'l Home, 396 F. Supp. 544, 548–49 (W.D. Va. 1975); *see* 42 U.S.C. §§ 3600–3620 (2006); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 9:2 (2008) ("The greatest problem area in determining whether the Fair Housing Act applies to a particular form of property has been with temporary residences, such as nursing homes, homeless shelters, and child care institutions.").

54. 114 F. Supp. 2d 1158, 1159 (D.N.M. 2000).

55. *Id.* (quoting Sioux Falls Cable Television v. South Dakota, 838 F.2d 249, 255 (8th Cir. 1988) and People v. Nichols, 920 P.2d 901 (Colo. App. 1996)).

56. *Id.* at 1160.

57. 396 F. Supp. 544.

58. *See* SCHWEMM, *supra* note 53, § 9:2; *see also* Hernandez v. Ever Fresh Co., 923 F. Supp. 1305, 1308 (D. Or. 1996) ("The case often cited by courts interpreting a 'residence' under the FHA is *United States v. Hughes Memorial Home* . . . .").

59. *Hughes Mem'l Home*, 396 F. Supp. at 547 n.2.

60. *Id.* at 549.

61. *Id.*

The Third Circuit adopted this definition in ruling that a summer home was also a dwelling for purposes of the Fair Housing Act.[62] In *United States v. Columbus Country Club*,[63] only "annual members" were permitted to lease summer bungalows from the club.[64] The lawsuit arose when an associate member applied to become an annual member but was denied because she was a woman.[65] The defendant argued that the bungalows were not dwellings within the meaning of the Fair Housing Act because they could not be occupied year-round as residences.[66] In adopting the *Hughes Memorial* definition[67] of residence, the court considered that annual members spent up to five months in their bungalows and often returned year after year.[68] The court summarized: "[T]he central inquiry [arising from this test is] whether [occupants] intend to remain . . . for any significant period of time and whether they view [the accommodations] as a place to return to."[69] The court rejected the defendant's argument and concluded that because the annual members were not "mere transients," the bungalows fell within the ordinary meaning of residence.[70]

A more recent Third Circuit case dealing with a proposed substance-abuse treatment facility, *Lakeside Resort Enterprises, LP v. Board of Supervisors*,[71] examined the two elements in more detail. In *Lakeside Resort*, the court was unable to point to a specific standard for determining whether occupants intended to remain for a "significant period of time." The court instead skirted the issue by noting that some of the residents stayed for "extended periods, thereby satisfying with ease the significant-stay factor."[72] More helpful was the court's explanation that the "place to return to" requirement really was a requirement that occupants view their accommodations as homes.[73] The court referred to several factors that would indicate whether accommodations were viewed as homes: (1) repeatedly returning to the same unit (whether nightly or on an annual basis, as in the case of summer homes); (2) feeling "at home" in the accommodations; (3) eating meals in the facility; (4) receiving mail at the

62. United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990).
63. 915 F.2d 877.
64. *Id.* at 879.
65. *Id.* at 879–80.
66. *Id.* at 880.
67. *See id.* at 881.
68. *Id.*
69. *Id.*
70. *Id.*
71. Lakeside Resort Enters., LP v. Bd. of Supervisors, 455 F.3d 154 (3d Cir. 2006).
72. *Id.* at 159.
73. *Id.*

facility; (5) hanging pictures on the walls; (6) and having visitors.[74] Other courts have also found relevant whether occupants have "no other place to 'return to' or reside."[75]

Similarly, the First Circuit has followed the *Hughes Memorial* definition, noting that a live-in, elder-care facility could qualify as a dwelling.[76] Other district courts addressing the question of whether a particular type of housing is a dwelling within the meaning of the Fair Housing Act have also followed the *Hughes Memorial* definition.[77]

Generally, then, the test used by courts in considering whether a facility is a dwelling within the meaning of the Act involves looking at: (1) whether the occupants intend to remain in the facility for a significant period of time, and (2) whether the residents view the facility as "a place to return to."[78] Housing for migrant farmworkers[79] and nursing homes,[80] for example, have been held to fall within the scope of the Fair Housing Act under this test. Furthermore, since the statutory definition of a dwelling includes a "portion" of a building,[81] courts have held that not all occupants need remain for significant periods of time in order for a facility to qualify as a dwelling under the Fair Housing Act. One court recently held that a drug and alcohol

74. *Id.* at 159–60.

75. Woods v. Foster, 884 F. Supp. 1169, 1174 (D. Ill. 1995); *see also* Conn. Hosp. v. City of New London, 129 F. Supp. 2d 123, 134 (D. Conn. 2001).

76. Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 257 n.6 (1st Cir. 1993).

77. *Conn. Hosp.*, 129 F. Supp. 2d at 132 n.16 ("Most courts use the analysis of the *Hughes* court in defining a residence . . . ."). *Compare Lakeside Resort.*, 455 F.3d at 157–60 (finding that a drug rehabilitation facility was a dwelling), *and* Lauer Farms, Inc. v. Waushara County Bd. of Adjustment, 986 F. Supp. 544, 558–59 (E.D. Wis. 1997) (determining that structures used to house migrant farm workers for four to five months a year were dwellings), *and* La. Acorn Fair Hous. v. Quarter House, 952 F. Supp. 352, 358–60 (E.D. La. 1997) (holding that timeshare units were dwellings), *and* Hernandez v. Ever Fresh Co., 923 F. Supp. 1305, 1307–09 (D. Or. 1996) (finding that temporary farm worker housing were dwellings), *and* Villegas v. Sandy Farms, Inc., 929 F. Supp. 1324, 1327–28 (D. Or. 1996) (determining that temporary cabins for farm workers were dwellings), *and Woods*, 884 F. Supp. at 1173–74 (holding that a homeless shelter for families was a dwelling), *with* Machacek v. Bustamante, No. 99-1082, 2000 U.S. Dist. LEXIS 20126, at *4–7 (D.N.M. May 3, 2000) (finding that a detention center was not a dwelling), *and* Tara Circle, Inc. v. Bifano, No. 95 Civ. 6522 (DLC), 1997 U.S. Dist. LEXIS 10153, at *39–43 (S.D.N.Y. July 15, 1997) (determining that a dormitory used by plaintiff for twenty-one days in eighteen months was not a dwelling).

78. United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990). One court has pointed out: "Although the cases always refer to an intent to return, . . . with respect to some structures falling within the meaning of 'dwelling' under the FHA, *i.e.*, nursing home, AIDS hospice, and children's home, it is more appropriate to speak of an intent to remain, rather than an intent to return." Garcia v. Condarco, 114 F. Supp. 2d 1158, 1160 n.10 (D.N.M. 2000). Like this court, I will use the term "return" to refer to both returning to and remaining at.

79. *See, e.g.*, *Lauer Farms*, 986 F. Supp. at 558–59; *Hernandez*, 923 F. Supp. at 1307–09; *Villegas*, 929 F. Supp. at 1328.

80. Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1102 (3d Cir. 1996).

81. 42 U.S.C. § 3602(b) (2006).

treatment facility with average stays of 14.8 days was a dwelling, finding relevant that at least some rooms in the facility were used by residents for extended periods and that other residents would have stayed longer absent funding restrictions.[82]

At least one court has specifically addressed whether a homeless shelter is a residence for the purposes of the Fair Housing Act. In *Woods v. Foster*,[83] former residents brought a Fair Housing Act claim against operators of a shelter for homeless families, alleging sexual harassment by the executive director and the chairman of the Board of Directors.[84] Citing to the *Hughes Memorial* definition of dwelling, and recognizing that "the FHA should be given a 'generous construction' to effectuate its 'broad and inclusive' language,"[85] the *Woods* court held that the shelter in question was in fact a dwelling.[86] It reasoned:

> [T]he homeless are not visitors or those on a temporary sojourn in the sense of motel guests. Although the Shelter is not designed to be a place of permanent residence, it cannot be said that the people who live there do not intend to return—they have nowhere else to go. . . . [T]he length of time one expects to live in a particular place . . . is not the exclusive factor in determining whether the place is a residence or a "dwelling." Because the people who live in the Shelter have nowhere else to "return to," the Shelter is their residence in the sense that they live there and not in any other place.[87]

The court found that the women's residence at the shelter, which permitted residents to remain for up to 120 days, was "not so short-lived or transient that the Shelter [could] be considered a mere public accommodation," such as a motel.[88] Other courts considering Fair Housing Act claims involving shelters have either assumed the applicability of the Fair Housing Act, or else have refrained from answering the question.[89]

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82. *Lakeside Resort*, 455 F.3d at 158–59.

83. 884 F. Supp. 1169 (N.D. Ill. 1995).

84. *Id.* at 1171–72.

85. *Id.* at 1173 (quoting Metro. Hou. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1011 (7th Cir. 1980)).

86. *Id.*

87. *Id.* at 1173–74.

88. *Id.* at 1174.

89. *See, e.g.*, Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1048 n.2 (9th Cir. 2007) (declining to address whether all temporary shelters are dwellings, but concluding that the transitional units used by residents for up to eighteen months qualified at least part of the facility as a dwelling); Turning Point, Inc. v. City of Caldwell, 74 F.3d 941, 944–45 (9th Cir. 1996) (applying the Fair Housing Act to a homeless shelter without analysis of the dwelling question); United States v. Montgomery, 23 F.3d 1130 (7th Cir. 1994) (affirming a conviction under the Fair Housing Act's criminal provisions for defendant's act of burning a cross in front of a homeless shelter, without

However, despite the widespread use of the *Hughes Memorial* definition of dwelling by district courts, the U.S. Supreme Court has not endorsed this definition, and most of the circuit courts, outside of the First and Third Circuits, have not ruled on the issue. For example, in *Community House v. City of Boise*,[90] the Ninth Circuit explicitly declined to answer whether all temporary shelters are dwellings under the Fair Housing Act.[91] It noted that the Community House shelter "generates up to $125,000 in rent per year from forty-nine transitional housing units in which the tenants reside for up to a year and a half."[92] Without citing the *Hughes Memorial* definition, the court nevertheless had "little trouble concluding" that the transitional housing units qualified the facility as a dwelling.[93]

C. HUD Interpretations

HUD is the executive agency charged with enforcing fair housing laws.[94] In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[95] the Supreme Court held that an administrative agency charged with administering a statute is entitled to deference in interpreting that statute when the language itself is unclear.[96] Under the *Chevron* doctrine, HUD's interpretations of the Fair Housing Act, if based on a reasonable construction of the statute, are entitled to deference.[97] However, HUD has refused to articulate a bright-line definition of a dwelling, stating instead that "on balance, the need to leave open the extent and scope of the terms defined in the Fair Housing Act outweighs

analysis of the dwelling question); Johnson v. Dixon, 786 F. Supp. 1, 4 (D.D.C. 1991) (refusing to rule on whether the Fair Housing Act applies to overnight emergency housing).

One point to note about *Woods* is that, while the court found sex discrimination in violation of the Fair Housing Act because of the sexual harassment claims, the court did not have the opportunity to rule on the shelter's apparent discrimination on the basis of familial status. *Woods*, 884 F. Supp. at 1175. Obviously, as former residents who were admitted along with their children, *id.* at 1171, the plaintiffs would not have had standing to sue for discrimination on the basis of familial status. It would have been interesting to see whether the court would have come out differently on the dwelling issue or accepted a justification for the discrimination under such a claim. Another interesting point to note is that the shelter in question was partially funded by HUD, *id.*, which suggests that HUD does not object to shelters with facially discriminatory policies with respect to family status.

90. 490 F.3d 1041 (9th Cir. 2007).

91. *Id.* at 1048 n.2.

92. *Id.*

93. *Id.*

94. 42 U.S.C. § 3608 (2006).

95. 467 U.S. 837, 843 (1984).

96. *Id.* at 842–43.

97. *See id.* at 843 (stating that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

the need to provide comprehensive examples in connection with this rulemaking."[98] At the same time, HUD has specifically addressed shelters on several occasions.

HUD's regulations prohibiting discrimination on the basis of disability define a "[d]welling unit" as

> a single unit of residence for a family or one or more persons. Examples of dwelling units include: a single family home; an apartment unit within an apartment building; and in other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep. Examples of the latter include dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons.[99]

In addition, Fair Housing Accessibility FIRST, a website supported by HUD, claims that "transitional housing, and SROs (single room occupancy units) designed for more than overnight stays, dormitory rooms, homeless shelters used as a residence, cooperatives, [and] hospices" are all types of housing covered by the access requirements of the Fair Housing Act.[100] In both of these examples, HUD specifically includes shelters as dwellings subject to the accessibility requirements of the Fair Housing Act.[101]

In reviewing model building codes, HUD issued a final report discussing "transient" housing.[102] Some of the model codes employed a thirty-day measurement in determining whether a building was nontransient and thus subject to accessibility requirements for dwellings.[103] HUD opposed this measure, stating that "length of stay is only *one* factor in determining whether a building is a 'covered multifamily dwelling.'"[104] HUD instead endorsed six additional factors:

> (1) Whether the rental rate for the unit will be calculated based on a daily, weekly, monthly or yearly basis; (2) Whether the terms and

98. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3238 (Jan. 23, 1989). For purposes of other prohibited discrimination, however, HUD deliberately has not adopted a bright-line rule.

99. 24 C.F.R. § 100.201 (2008).

100. Fair Housing Accessibility FIRST, Frequently Asked Questions (FAQ), http://www.fairhousingfirst.org/faq/mfhousing.html (last visited March 2, 2009).

101. These accessibility requirements include constructing new dwellings with doors wide enough for wheelchairs, light switches in accessible locations, ramps where necessary, and other measures to increase access for disabled persons. *See* 42 U.S.C. § 3604(f)(3)(C) (2006).

102. Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. 15,739, 15,746 (Mar. 23, 2000).

103. *Id.*

104. *Id.*

> length of occupancy will be established through a lease or other written agreement; (3) What amenities will be included inside the unit, including kitchen facilities; (4) How the purpose of the property will be marketed to the public; (5) Whether the resident possesses the right to return to the property; and (6) Whether the resident has anywhere else to which to return.[105]

HUD distinguishes between dwellings subject to the antidiscrimination provisions of the Fair Housing Act and "covered multifamily dwellings" subject to the accessibility requirements of the Act.[106] However, HUD's report has left ambiguities as to whether it would consider the above factors for determining covered dwellings only under the Act's accessibility requirements or also for purposes of the Act's antidiscrimination provisions.[107]

Even if HUD were to clearly articulate a categorical rule that classified shelters as dwellings under the Fair Housing Act, it is not clear what amount of deference should be afforded to HUD under the *Chevron* doctrine. Because HUD is charged with enforcing fair housing violations but not discrimination in public accommodations, HUD's interpretations of the types of buildings covered by the Fair Housing Act represent interpretations about the scope of its own jurisdiction. The Court in *Chevron* did not address whether or not agency interpretations should be afforded deference in setting the bounds of their own jurisdiction, but at least some scholars have argued *Chevron* to be inapplicable in such a scenario.[108]

Although the statute is silent with respect to the definition of a residence in the Fair Housing Act, and although case law and HUD seem to favor a broad interpretation of "residence," much of this may be motivated by dissatisfaction with the protections against discrimination in places of public accommodations. In the next Part, I discuss the differences between antidiscrimination laws that apply to public accommodations and those that apply to housing.

II. THE COVERAGE GAP (OR OVERLAP) BETWEEN THE FAIR HOUSING ACT AND PUBLIC ACCOMMODATIONS LAWS

One possible motivation for HUD's and the courts' broad interpretations of dwelling is that establishments offering sleeping facilities but not

105. *Id.* at 15,746–47.

106. *Id.* at 15,746.

107. *Id.* (initially listing the factors in discussing "covered multifamily dwellings"); *id.* at 15,747 ("endors[ing]" the factors "for determining whether a dwelling is not transient").

108. *See generally* Nathan Alexander Sales & Jonathan H. Adler, The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences (Mar. 30, 2009) (unpublished manuscript), *available at* http://works.bepress.com/jonathan_adler/2.

classified as housing would likely be classified instead as public accommodations subject to the more lenient provisions of Title II of the Civil Rights Act of 1964.[109] It is true that undesirable outcomes may result from excluding shelters from the protection of the Fair Housing Act. For example, in *Woods v. Foster*,[110] the plaintiffs alleged that a shelter's director and chairman of the board had demanded a quid pro quo, attempting to obtain sexual favors in return for providing accommodations at the shelter.[111] Classifying the shelter as a dwelling allowed the court to recognize the claim under the sex discrimination provisions of the Fair Housing Act. Unfortunately, federal law offers no such protection for sexual harassment in public accommodations.

While dwellings and public accommodations are not necessarily mutually exclusive, it is logical to see the two classifications fitting together as mathematical complements.[112] In this Part, I outline how these two laws came into being, some of the major differences between the two laws as they might apply to shelters, and possible policy goals justifying the differences in treatment. I then suggest in Part III that most shelters fit better into the public accommodations framework than into a general housing classification.

A. The Scope of Antidiscrimination Laws in Housing and Public Accommodations

Under current law, even if an establishment is not considered a residence under the Fair Housing Act, patrons may still be protected under Title II of the Civil Rights Act of 1964.[113] This Act barred racial discrimination in

109. My thanks goes to Chris Brancart for this observation. Public accommodations are defined in 42 U.S.C. § 2000a(b) (2006) and include, for purposes of this discussion, "any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence . . . ."

110. 884 F. Supp. 1169 (N.D. Ill. 1995).

111. *Id.* at 1171.

112. Mathematical complements are sets of values which are both mutually exclusive and occupy the entire universe of values. *See* Complement (Set Theory), Wikipedia, http://en.wikipedia.org/wiki/Complement_(set_theory) (last visited Mar. 30, 2009). Here, one could see dwellings and public accommodations as encompassing the entire set of buildings or structures that are used to provide sleeping accommodations, while also being mutually exclusive. Said another way, any given building or structure which is used to provide a place to sleep could be classified as either a dwelling or a public accommodation, but not both. Although not adopted by HUD, this idea is not original. The Architectural and Transportation Barriers Compliance Board, in interpreting the Americans with Disabilities Act, has stated that "dwelling unit[s]" and "transient lodging" are mutually exclusive. Final Rule, 69 Fed. Reg. 44,084, 44,089 (July 23, 2004).

113. *See* 42 U.S.C. § 2000a. However, plaintiffs suing under public accommodations laws may be limited to equitable relief, while plaintiffs suing under the Fair Housing Act may sue for actual and punitive damages. *Compare id.* §§ 2000a-3, 2000a-6, *with id.* § 3613(c)(1).

public accommodations,[114] defined to include "any inn, hotel, motel, or other establishment which provides lodging to transient guests."[115]

In 1968, Congress passed the Civil Rights Act of 1968,[116] which included the federal Fair Housing Act.[117] The Fair Housing Act banned discrimination in housing transactions on the basis of race, color, religion, and national origin[118] and was intended to "eliminate housing discrimination . . . and [to] achieve residential integration."[119]

In 1974, Congress added a prohibition on sex discrimination in housing transactions to prevent discriminatory housing practices based on sexual stereotypes.[120] Senator William Brock, the bill's sponsor, explained that the addition of sex as a prohibited classification was necessary because of the discriminatory treatment of women in rentals, home sales, and mortgage lending.[121]

With the Fair Housing Amendments Act of 1988 (FHAA), Congress added families with children and persons with disabilities to the list of groups protected by the Fair Housing Act.[122] However, the question of the Fair Housing Act's application to shelters or other temporary housing was not raised in any of the legislative proceedings.

In the 1960s, when these laws were initially passed, both Title II and the Fair Housing Act prohibited discrimination on the basis of race, color, religion, or national origin.[123] Subsequent amendments to the Fair Housing Act afforded additional protections in housing to women,[124] families with children, and the handicapped,[125] while the Americans with Disabilities Act of 1990 provided additional protection in places of public accommodation for

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114. 42 U.S.C. § 2000a.

115. *Id.*

116. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, & 42 U.S.C.).

117. *See* SCHWEMM, *supra* note 53, § 5:2. Thus, the Fair Housing Act is sometimes referred to as Title VIII of the Civil Rights Act of 1968, or simply Title VIII.

118. *Id.* § 1:1.

119. *Id.* § 11A:4.

120. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 728–29 (1974).

121. *1973 Housing and Urban Development Legislation: Hearings on S. 1604 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 93d Cong. 1227, 1232 (1973) [hereinafter *Hearings*] (statement of Sen. Bill Brock, Member, S. Comm. on Banking, Housing and Urban Affairs).

122. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 1619–23 (1988) (codified as amended 42 U.S.C. §§ 3601-02, 3604-07 (2006)).

123. *See* Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, & 42 U.S.C.).

124. *See* 88 Stat. 633.

125. *See* 102 Stat. 1619.

individuals with disabilities.[126] As a result, two classes remain covered by the Fair Housing Act but excluded from protection in public accommodations: sex and familial status.[127]

B. Remedies Under Fair Housing and Public Accommodations Law

Aside from the lists of covered classes, the primary differences between classifying a shelter as a dwelling rather than as a public accommodation lie in the enforcement of the laws and the available remedies. Under the Fair Housing Act, complaints may be initiated by the government through HUD or the Department of Justice (DOJ) based on individual cases of discrimination in addition to cases involving a pattern or practice of discrimination.[128] However, the DOJ may only initiate a lawsuit alleging discrimination in public accommodations where there is reason to believe a pattern or practice of discrimination exists or where discrimination against a group of persons "raises an issue of general public importance."[129] The DOJ may also undertake cases involving individual acts of discrimination referred by HUD.[130]

Furthermore, plaintiffs suing under the Fair Housing Act may extract monetary damages, including punitive damages.[131] On the other hand, in cases involving public accommodations, only injunctive relief is available.[132]

C. Special Treatment for Housing?

One might question what policy interests support allowing greater remedies for housing discrimination than for discrimination in public accommodations.

The 1988 amendments to the Fair Housing Act removed the cap on punitive damages.[133] The House Judiciary Committee Report's section-by-

126. *See* 42 U.S.C. § 12182 (2006). The ADA Technical Assistance Manual specifically provides that social service establishments, including homeless shelters, are places of accommodation subject to the requirements of the ADA. U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT: ADA TITLE III TECHNICAL ASSISTANCE MANUAL § III-1.2000 (1992), *available at* http://www.ada.gov/taman3.html.

127. One could consider whether it is desirable to protect against discrimination based on sex and familial status in public accommodations. If so, the legislature would need to consider whether to make exceptions for certain establishments whose existence seems to be accepted in society, for example, adult bars or single-sex health clubs. These questions require an analysis outside the scope of this Comment, but the issue is worth raising for future discussion.

128. 42 U.S.C. §§ 3610, 3614 (2006).

129. *Id.* § 3614(a).

130. *Id.* § 3614(b).

131. *Id.* § 3613(c).

132. *Id.* §§ 2000a-3, 2000a-5(a), 2000a-6(b).

section analysis explained "that the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law."[134] By contrast, civil rights advocates have been unable to expand the injunctive remedies available for discrimination in public accommodations under the original Civil Rights Act of 1964.[135]

One possible reason for this discrepancy is simply the political backdrop of the passage of the respective laws.[136] However, another reasonable explanation is "that housing discrimination has longer-term consequences for individual tenants than does discrimination at a place of temporary lodging, and thus stiffer penalties are appropriate for the former rather than the latter."[137]

Furthermore, the idea of fair housing for all Americans is an integral part of the American dream. In 1628, Sir Edward Coke penned the famous phrase: "For a man's house is his castle, *et domus sua cuique est tutissimum refugium* [and each man's home is his safest refuge]."[138] The Restatement (Second) of Conflict of Laws, quoted in a fair housing case, states that a home "'is the center of [a person's] domestic, social and civil life.'"[139] Clearly, the home represents a special place of protection in American law. For example, federal antidiscrimination laws are limited to housing, employment, and education;[140] homes are given special protection under the Fourth

133. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 1619–23 (1988) (codified as amended 42 U.S.C. §§ 3601-02, 3604-07 (2006)).

134. Ruth Colker, *ADA Title III: A Fragile Compromise*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 293, 299 (Leslie Pickering Francis & Anita Silvers eds., 2000).

135. *Id.* at 300.

136. *See id.* (explaining that "[t]he Civil Rights Act [of 1964] was passed after . . . a lengthy filibuster . . . . [and] at a time when civil rights advocates had serious reservations about jury trials for victims of race discrimination" whereas "the Fair Housing Act Amendments of 1988 were passed by a bipartisan Congress" when the "emerging social consensus" was that discrimination justified greater remedies).

137. *Id. But see id.* (arguing that a lack of accessibility in public accommodations represents a severe impairment on individuals with disabilities).

138. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, ch. 73, at 161 (1797) (1628). Although Coke is a Briton, this quote has been adopted into American society and law. *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 115 (2006), ("We have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's house is his castle . . . .'"); James Otis, *A Man's House Is His Castle* (Feb. 24, 1761), *in* THE PENGUIN BOOK OF HISTORIC SPEECHES 69, 70 (1997).

139. Keys Youth Servs. v. City of Olathe, 248 F.3d 1267, 1272 (10th Cir. 2001) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12 (1971)).

140. *See* Chicago Bar Association, Federal Civil Rights Laws, http://www.chicagobar.org/AM/NavigationMenu/Public/GeneralLegalInformation/DialLaw/Discrimination/FederalCivilRightsLawsHousingCreditEducationPublicAccomadationsAndFederalFundedPrograms/default.htm (last visited Mar. 31, 2009); Chicago Bar Association, Federal Civil Rights Laws—Employment and the Aged,

Amendment;[141] and state landlord-tenant laws provide protection for residential tenants unavailable to either transient hotel guests or business tenants.[142] In addition, several government programs are designed to help make housing available to as many Americans as possible through programs such as Section 8 housing,[143] the American Dream Downpayment Act of 2003,[144] and the provision of FHA loans.[145]

Assuming that the policies justifying the differences in remedies for discrimination in housing and public accommodations are real and legitimate, the question then becomes whether shelters are deserving of enhanced protection. In the next Part, I discuss characteristics of shelters that might support the classification of a particular shelter as a place of public accommodation rather than as housing.

III. AN ALTERNATIVE TEST FOR DWELLINGS

Although the *Hughes Memorial* definition for dwelling has served as an important part of the case law (at least with regard to the First and Third Circuits, and numerous district courts), not all of the federal circuits have jumped on board. At the same time, courts from around the country have relied on the determinations of other courts, without separate analysis, to find that nursing homes, migrant farmworker camps, and other temporary accommodations are dwellings under the Fair Housing Act.[146] This has resulted in overbroad coverage never intended by Congress and unsupported by the plain meaning of the statute.

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http://www.chicagobar.org/AM/Template.cfm?Section=64_Federal_Civil_Rights_Laws_Employment_and_the_Aged&Template=/CM/HTMLDisplay.cfm&ContentID=2406 (last visited Mar. 31, 2009).

141. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

142. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.5 (1977) (citing a "growing number of recent cases commenting upon the landlord's duties under housing codes and implied warranties of habitability").

143. *See infra* note 158.

144. 42 U.S.C. § 12821 (2006).

145. *See* Let FHA Loans Help You, http://www.fhasecure.gov/buying/loans.cfm (last visited June 21, 2009).

146. *See, e.g.*, Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285, 289 (6th Cir. 1996) ("It is well-settled that the FHAA applies to the regulation of group homes."); United States v. Lorantffy Care Ctr., 999 F. Supp. 1037 (N.D. Ohio 1998) (stating that the Fair Housing Act covers "admission of residents to a nursing home," without further analysis, based on the holding of *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3d. Cir. 1996)).

A. Problems With Current Case Law

The case law dealing with the analysis of whether a particular building falls within the scope of the Fair Housing Act is problematic. The *Hughes Memorial* test is too broad, covering buildings that should not be covered from a public policy perspective, and too abstract, leading to inconsistency in courts' analyses of the issue.

First, no court has articulated an explanation of or a standard for the "significant amount of time" element. Instead, courts rely on the facts of prior cases to find that this element has been met. While there is nothing wrong with looking to prior cases, this approach can (and arguably has) resulted in an expansion of the Fair Housing Act's scope without an analysis of where the line should be drawn.[147] Furthermore, courts often refer to the distinction between whether a stay is "transient" or "temporary," attaching labels without describing what they mean.[148]

Second, the "place to return to" element is vague, and has resulted in inconsistent application. For example, some courts have basically collapsed this analysis into the first element,[149] holding that this element is met if residents return nightly, while other courts have treated this element as whether or not the occupants treat the building as their "home."[150]

Third, from a functional perspective, the treatment of shelters as dwellings is too broad. Shelters do not implicate the Act's "core protected activities, the rental or sale of housing."[151] As far as the legislative history indicates, Congress never considered the application of the Fair Housing Act to shelters, but was instead focused on commercial activities. Ensnaring shelters within the definition of dwelling does not further the goals of the Fair Housing Act to promote integration within neighborhoods and give protected classes equal opportunities to purchase or rent a home.[152]

Finally, from a public policy perspective, applying the Fair Housing Act to shelters would unnecessarily tax shelters with the burden of integrating

147. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1215 (11th Cir. Fla. 2008) ("[T]heir stays far exceed the 14.8 day average stay of the residents in Lakeside Resort.").

148. *See, e.g.*, Baxter v. Belleville, 720 F. Supp. 720, 731 (S.D. Ill. 1989) ("Although the length of the residence may vary, the persons who will reside at Our Place will not be living there as mere transients."); Patel v. Holley House Motels, 483 F. Supp. 374 (S.D. Ala. 1979) ("It is clear that the Palms Motel is an establishment which provides lodging to 'transient' guests.").

149. *See, e.g.*, Lauer Farms v. Waushara County Bd. of Adjustment, 986 F. Supp. 544, 559 (E.D. Wis. 1997); *Baxter*, 720 F. Supp. at 731.

150. *See, e.g.*, Lakeside Resort Enters., LP v. Bd. of Supervisors, 455 F.3d 154, 159–60 (3d Cir. 2006).

151. La. Acorn Fair Hous. v. Quarter House, 952 F. Supp. 352, 360 (E.D. La. 1997).

152. *See, e.g.*, *Hearings*, *supra* note 121, at 1227–28.

what are now single-sex shelters or shelters for families. Single-sex shelters and family shelters provide privacy and security which might otherwise be unavailable in the shelter system. In institutional settings such as shelters, guests have less security and privacy than they would in homes with locked doors. Guests often sleep together in a large room, and even if they are fortunate enough to have a private room, the room likely will not have locking doors. This can be a problem when safety is a concern, as it is in shelters.[153] The rule as currently employed leaves shelters vulnerable to costly litigation, and the costs of litigating or restructuring would likely be enough to force the closure of many shelters, thus resulting in fewer shelters and services. Furthermore, shelters are distinctly different from the homes intended to fall under the Act, as I describe later.[154]

B. Legislative History and Recent Case Law Support a Narrow Definition of Dwelling

It is conceivable that Congress intended for the protection against discrimination in housing in the Civil Rights Act of 1968[155] to overlap with the protection against discrimination in public accommodations found in the Civil Rights Act of 1964[156]—that is, for facilities on the border between the two laws to be subject to the provisions of both. However, since the prohibited bases of discrimination were identical at the time of passage, a more likely interpretation of the Civil Rights Act of 1968 is that Congress merely intended to extend the antidiscrimination protection from public accommodations to housing. The Civil Rights Act of 1964 covered lodgings for "transient guests," while the Civil Rights Act of 1968 covered permanent housing. Even the *Hughes Memorial* definition differentiates residences from places of "transient visit."[157] The Fair Housing Act's legislative history does not mention temporary accommodations such as nursing care facilities or homeless shelters. Senator Walter Mondale, the bill's sponsor, originally

153. *Cf.* David Abel, *Many Sex Offenders End Up at Shelters; Some Say State Should Help House Ex-Inmates*, BOSTON GLOBE, June 18, 2007, at B1 ("[S]ex offenders released from prison now often end up in homeless shelters, where it is difficult to track them, and a range of potential victims sleep nearby.").

154. I might advocate a different policy if social service providers were invidiously trying to favor one group over another, leaving certain groups disparately underserved. However, I suspect that simply raising public awareness would do much to shift resources of charities who are looking for ways to serve those most in need.

155. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, & 42 U.S.C.).

156. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 28 U.S.C. § 1447 (2006) and 42 U.S.C. §§ 1971, 1975a–1975d, 2000a–2000h-6 (2006)).

157. United States v. Hughes Mem'l Home, 396 F. Supp. 544, 549 (W.D. Va. 1975).

proposed three stages of coverage for the Act: federally-assisted housing (such as Section 8 housing[158]), multi-unit housing, and single-family residences.[159] Thus, it is clear that the primary focus of the Fair Housing Act in 1968 was on the sale and rental of traditional housing, such as single-family homes and apartments (whether privately owned or administered by HUD).[160]

When the protections for women and families with children were added to the Fair Housing Act in 1974[161] and 1988,[162] respectively, the impetus for those additions also stemmed from transactions involving the sale and rental of homes. Senator Brock, the sponsor of the 1974 amendment that added sex as a suspect classification, stated: "This legislation is needed not only to assure that women have access to mortgage credit, but that women are not subtly denied opportunities to purchase homes or rent dwellings."[163] In the mortgage-lending context, Senator Brock gave an example of a woman in her forties who was unable to qualify for a mortgage without the signature of her seventy-year-old father.[164] He also discussed stereotypes that affected

158. Section 8 is a housing subsidy program, which is administered by HUD and designed to give low-income households the opportunity to rent private housing through the use of vouchers. U.S. Department of Housing and Urban Development, Section 8 Rental Voucher Program, http://www.hud.gov/progdesc/voucher.cfm (last visited Oct. 9, 2008).

159. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 149–50 (1969).

160. *See* Player v. Ala. Dep't of Pensions and Sec., 400 F. Supp. 249, 266 (M.D. Ala. 1975), *aff'd mem.*, 536 F.2d 1385 (5th Cir. 1976) ("It is unquestionable that the principal focus of the Fair Housing Act is the commercial housing market. Most of the Act's provisions relate to the 'sale or rental' of housing, and the cases construing the 'otherwise make unavailable' clause deal with activities related to the commercial housing market: zoning, mortgage financing, real estate associations and multiple listing services, etc. It is also clear from a survey of the debates on the Act that Congress had commercial housing as its focus in passing the Act."); *see also* Dubofsky, *supra* note 159, at 153–54 ("The pressure not to *sell* or *rent* to blacks comes not from the occupant who is leaving the house or apartment . . . ." (emphasis added)); *id.* at 152 (describing one argument that supporters of the bill advanced as "the increasing need by blacks for *standard housing* in convenient locations" (emphasis added)). Federally-assisted housing, such as Section 8 housing, generally fits into the categories of single-family homes and apartments.

While standard housing may have been at the heart of the fair housing debate in 1968, I recognize that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that same-sex harassment claims fall within the coverage of Title VII). However, in this Comment I nevertheless contend that since the law applies only to "residences," both functional and formalist interpretations of the Act point toward construing the term dwelling more narrowly than courts have done thus far.

161. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 728–29 (1974).

162. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 1619–23 (1988) (codified as amended 42 U.S.C. §§ 3601-02, 3604-07 (2006)).

163. *Hearings*, *supra* note 121, at 1227–28.

164. *Id.* at 1229.

the ability of women to rent or qualify for mortgages, including ideas that women could not perform the necessary repairs to maintain a home and that young, married women were likely to become pregnant and stop working.[165]

In 1988, the Senate testimony again focused on transactions involving the sale and rental of homes.[166] Even though supporters of the bill blamed housing discrimination for the increasing homelessness of families with children, they made no mention of the need for more homeless shelters for these families.[167]

Nevertheless, the failure of Congress to consider the application of a statute to a particular situation does not preclude such application. Since, in this situation, the statute does not define a residence and the legislative intent is inconclusive, courts should look to the spirit of the Act as well as to policy reasons in fashioning the definition of a residence or dwelling.[168]

In the 1988 Senate debate on the Fair Housing Amendments Act, one senator explained his support for the bill, saying:

> There is nothing more fundamental than the right to choose one's home. . . . A home is where we seek our refuge from life's burdens, where we raise our children, greet our grandchildren, and welcome our neighbors. It is the symbolic center of our lives. America's promise of equality is a lie unless every American can seek a home without the fear of encountering arbitrary discrimination. The dream of fair housing must be kept alive.[169]

While not every home is as idyllic as the senator described, his statement goes to the heart of what the Fair Housing Act stands for: providing equal opportunities for Americans to seek a home. This goal can be adequately addressed through a broad interpretation of activities[170] that might violate the Fair Housing Act, without expanding the definition of a residence. This idea

165. *Id.* at 1228–30.

166. *See* 134 CONG. REC. S10,547 (1988). The discussion actually focused more on rental housing. *See, e.g.*, *id.* at S10,555 ("According to a [1980 study], 26 percent of rental housing in the United States banned children and another 50 percent placed restrictions on the age and number of children allowed.").

167. "Members of Congress determined the need for such legislation based on studies and hearings indicating that families with children were having difficulty securing housing because of age limitations." Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1476 (11th Cir. 1993) (citing 134 CONG. REC. S10,547 (statement of Sen. Hatch)).

168. *See* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 963 (Vt. 2006) ("Where there is uncertainty about legislative intent, 'we must consider the entire statute, including its subject matter, effects and consequences, as well as the reason for and spirit of the law.'" (quoting *In re* Hinsdale Farm, 858 A.2d 249, 251 (Vt. 2004))).

169. 134 CONG. REC. S10,558 (1988) (statement of Sen. Metzenbaum).

170. Besides the actual sales and rentals of dwellings, these activities include mortgage lending, real estate advertisements, and zoning.

of a home does not include such places as psychiatric wards, prisons, and hospitals, which are institutional in nature and for which housing is merely incidental to some broader purpose, such as rehabilitation or medical care. Although people may live in these places for extended periods of time, they differ significantly from the homes intended by Congress to be protected by the Fair Housing Act.

In March 2008, a Florida district court considered in *United States v. City of Boca Raton*[171] the question of when a substance-abuse treatment facility (SATF) falls under the scope of the Fair Housing Act. The City had prohibited SATFs from operating in residential neighborhoods.[172] Three types of SATFs provided some type of housing possibly implicating the Fair Housing Act: intensive inpatient treatment facilities, residential treatment facilities, and day-and-night treatment facilities.[173] The court found that intensive inpatient treatment facilities, "which combine treatment and housing in the same location, are less like dwellings and more akin to hospitals."[174] Thus, such facilities were determined to fall outside the scope of the Fair Housing Act.[175] On the other hand, both residential treatment facilities and day-and-night treatment facilities provide housing and treatment in separate locations, although both housing and treatment are "facilitated by the same provider."[176] The residential treatment facility might provide transportation, medication and visits by health professionals on an as-needed basis, and supervision by nonresident house managers; however, treatment primarily occurs at another site.[177] In a day-and-night treatment facility, "'no treatment takes place in the housing where the clients live[,] and . . . the housing is utilized solely for the purpose of assisting clients in making a transition to independent living.'"[178] The court ruled that the Fair Housing Act did apply to the separate housing provided as part of the residential treatment and day-and-night treatment programs.[179]

Although the district court in *City of Boca Raton* did not fully explain its reasoning for treating intensive inpatient treatment facilities as hospitals

171. No. 06-80879-CIV, 2008 WL 686689 (S.D. Fla. Mar. 13, 2008).
172. *Id.* at *1.
173. *Id.* at *6.
174. *Id.*
175. *Id.*
176. *Id.* at *7. It is unclear whether both the housing facilities and the treatment facilities are always operated, as opposed to facilitated, by the same provider, but the court mentions at least one residential treatment facility which operated both. *See id.* at *3.
177. *Id.* at *3.
178. *Id.* at *4 (quoting FLA. ADMIN. CODE ANN. r. 65D-30.0081(1) (1998)).
179. *Id.* at *7.

(considered public accommodations outside the scope of the Fair Housing Act) and treatment facilities with separate housing facilities as dwellings covered by the Fair Housing Act, the court seemed to draw a distinction based on the level of treatment provided at the housing facility. In this way, the court was on the right track in looking beyond the length-of-stay factor in classifying a facility as a residence.

C. A New Way to Define Dwelling

In light of the ambiguity surrounding the classification of temporary housing as dwellings under the Fair Housing Act, I propose a three-factor test which incorporates the *City of Boca Raton* level of treatment distinction as well as other differences between a dwelling and a public accommodation.[180] In considering whether a facility falls outside the scope of the Fair Housing Act, a court should consider the totality of the circumstances, including: (1) the normal length of stay intended by the facility; (2) the institutional versus residential nature of the facility; and (3) whether the purpose of the facility is to provide housing, or whether housing is linked to some broader purpose. I analyze each of these factors separately below.

1. Courts Should Consider the Length of Stay Intended by the Facility

First, courts should always consider the occupants' normal length of stay intended by the facility. We might think differently about month-to-month tenancies in an apartment building if most of the tenants only rent for one month, instead of two years. However, while length of stay sheds light on the temporary or permanent nature of housing, this factor does not by itself address the nature of a stay. For example, a home on Cape Cod, occupied for three months out of the year, might be considered a residence if used as the yearly summer home for a wealthy New England family, but the same home might not be considered a residence if used to run a summer program for disadvantaged teens.

Further, any inquiry into length of stay should focus on normal practice, or else on the intended length of stay from the housing provider's perspective rather than that of the occupant. The statute does specifically include intent in its definition of dwelling, covering a building or structure "occupied as, or designed or intended for occupancy as, a residence."[181] However, this language

180. Because shelters can differ so drastically in their operations, I do not go so far as to advocate for shelters to be categorically excluded from the Fair Housing Act under the current statute.

181. 42 U.S.C. § 3602(b) (2006).

does not make clear whose intent should be determinative. Shifting the focus away from the occupants' intentions makes the inquiry more objective; in determining intent, courts may want to rely on occupancy data and written policies rather than anecdotal testimony. This focus is also in line with the Act's purposes—a housing provider or seller should be able to ascertain whether or not the property in question is a dwelling covered by the Fair Housing Act based on what the housing provider intends to offer. Thus, to take an extreme example, a person selling a used sport utility vehicle would not be liable under the Fair Housing Act for discrimination solely because the purchaser intended to live in the car.[182] As a more practical matter, motels that are paid by local governments to house homeless persons should not solely by virtue of its clientele be classified as housing rather than as a place of public accommodation. On the other hand, where a motel owner deliberately rents a room to guests as long-term tenants, as evidenced by accepting monthly payments, giving reduced rates, or simply by allowing the guest to stay in the same room for an extended period of time, then just as local law treats the owner as a landlord,[183] the room should be counted as a dwelling.

2. Courts Should Consider the Institutional Versus Residential Nature of the Facility

Second, courts should consider the institutional versus residential nature of the facility. Indicators of the institutional nature of a facility include the extent to which occupants are subject to supervision and the degree to which occupants control their individual living units.

One shelter resident has said that "home mean[s] 'the freedom to do what you want, like have friends over and cook food.'"[184] However, the lives of residents at many shelters are closely monitored and regulated.[185] Residents of emergency overnight shelters often must leave the shelter by a specified time every morning and cannot return until evening.[186] Longer-stay arrangements

182. This example assumes that a sport utility vehicle could fall under the "building, structure, or portion thereof" requirement of Fair Housing Act. *See id.*

183. *See, e.g.*, California Courts: Self-Help Center, What If the Tenant Lives in a Residential Hotel?, http://www.courtinfo.ca.gov/selfhelp/other/landtenqa-gen13.htm (last visited Apr. 1, 2009) ("If you live in a residential hotel that has 6 or more rooms for 30 days or more and the hotel is your primary residence, you have the same legal rights as a tenant.").

184. ROBERT DESJARLAIS, SHELTER BLUES: SANITY AND SELFHOOD AMONG THE HOMELESS 38 (1997).

185. *See, e.g.*, *id.* at 38–39; JEAN CALTERONE WILLIAMS, "A ROOF OVER MY HEAD": HOMELESS WOMEN AND THE SHELTER INDUSTRY 62–63, 67–68, 76, 78 (2003).

186. *See* Joan Whitlow, Editorial, *Obama Holds Most Promise to Help Inner Cities*, STAR-LEDGER, Jan. 23, 2009, at 19 ("Many of the regulars come from homeless shelters where the rules say

often include curfews, visitor restrictions, and prohibitions on drug and alcohol use.[187] These impositions on the freedom and independence of the occupants are characteristic of institutions rather than residences and should weigh against classifying such facilities as dwellings under the Fair Housing Act.

The issue of control can be analogized to the concept of property. Property is often described as a bundle of rights, which includes such privileges as the right to use or possess, the right to transfer, and the right to exclude.[188] Whereas tenants hold rights under property law to use a property and to exclude even a landlord from the property, occupants of public accommodations have no such rights under property law (although they may have rights under contract, hospitality, or other laws). Beyond property law, the nonlegal rights of occupants could also be considered. For example, a homeless camp on public land could offer residents rights to certain spaces that are protected by the community.[189] However, shelters do not generally offer even nonproperty rights to occupants' living units. Homeless-shelter overnight guests often sleep in large, communal rooms lined with beds or cots.[190] There is no privacy to speak of, and guests have no legal right even to their own bed. Even in transitional housing programs where participants have a private room, rules often allow random inspections, prohibit guests, or require that doors be kept open during the day.[191] This lack of property rights, then, implies a public nature, and not a private dwelling.

3. Courts Should Consider the Broad Purpose of the Facility

Third, courts should consider whether the purpose of the facility is to provide housing, or whether housing is linked to some broader institutional goal. On point, the New Mexico district court in *Garcia v. Condarco*[192] recognized that a facility's purpose is crucial to whether or not it is intended

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you have to leave early in the morning, can't come back until evening, but have to be in before curfew . . . .").

187. *See, e.g.*, Yin-Ling Irene Wong et al., *Homeless Service Delivery in the Context of Continuum of Care*, 30 ADMIN. SOCIAL WORK 67, 82 (2006) (listing a curfew policy as one common requirement in homeless residential programs); Betty Reid Mandell, *Homeless Shelters: A Feeble Response to Homelessness*, NEW POL., Summer 2007, *available at* http://www.wpunj.edu/%5C%5C~newpol/issue43/BMandell43.htm.

188. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4–5 (2007).

189. For an example of such a homeless camp, see WILLIAMS, *supra* note 185, at 82–85.

190. *See* LEONARD C. FELDMAN, CITIZENS WITHOUT SHELTER: HOMELESSNESS, DEMOCRACY, AND POLITICAL EXCLUSION 96 (2004).

191. *See* Mandell, *supra* note 187.

192. 114 F. Supp. 2d 1158 (D.N.M. 2000).

for occupancy as a residence.[193] In *Garcia*, the court held that a detention facility was not a dwelling under the Fair Housing Act despite its "superficial similarities . . . [with] other structures found to be 'dwellings.'"[194] The court noted that "[e]ssential to the distinction between a home and a detention facility is purpose."[195] The jail in *Garcia* was "not designed or intended as a 'residence' for detainees; rather, it [was] designed and intended to be a penal facility."[196]

When a facility provides extensive services, the provision of housing might be seen as merely incidental. One extreme example that clearly falls outside the scope of the Fair Housing Act involves inpatient hospital treatment. In this context, hospitals provide services to patients, including medical treatment, on-call access to doctors and nurses, meals (or intravenous therapy), and maid service; actual accommodations are merely incidental to the hospital's primary purpose. Similarly, though not necessarily medical in nature, shelters often offer services to their clients, including meals, counseling, job training, and transportation to and from the shelter.[197] In *City of Boca Raton*, the intensive inpatient treatment facilities were held to be outside the scope of the Fair Housing Act because of the treatment services provided at the housing facility.[198] As the *City of Boca Raton* court suggested, the fact that housing and services are combined in the same location weighs against the facility being covered by the Fair Housing Act.[199]

Obviously, a profit motive would not be sufficient to remove a facility from under the scope of the Act if the primary means of making profit is the provision of housing. However, where the provision of housing is secondary to a broader social purpose, such housing is less likely to be a dwelling. Examples of such broader purposes might be substance abuse treatment, job- and life-skills training, or safety from abusive partners.

Courts should use these factors in determining whether or not a building is covered by the Fair Housing Act because this comports more closely with

193. *See id.* at 1161.
194. *Id.*
195. *Id.*
196. *Id.*
197. *See* RALPH DA COSTA NUNEZ, THE NEW POVERTY: HOMELESS FAMILIES IN AMERICA 69 chart 3.1 (1996) (listing the services provided by American Family Inns, which include case management, domestic violence counseling, job training, and substance abuse treatment); WILLIAMS, *supra* note 185, at 61 (explaining that parents meet with a case worker upon first entering the family shelter); Los Angeles Homeless Services Authority, Year Round Shelter Program & Transportation Schedule, http://www.lahsa.org/year_round_shelter.asp (last visited Mar. 22, 2008) (listing pick-up points available for various shelters).
198. United States v. City of Boca Raton, No. 06-80879-CIV, 2008 WL 686689, at *6 (S.D. Fla. Mar. 13, 2008).
199. *Id.* at *6 & n.5.

Congress' intent. The Fair Housing Act was designed to eliminate the discrimination that prevented the integration of American society and to afford all Americans the equal opportunity to establish a home. Put simply, the Fair Housing Act was not designed to apply to institutions for which permanent residence is not the primary concern.

CONCLUSION

The Fair Housing Act has been applied too broadly to facilities that are not dwellings within the meaning of the statute. Courts should recognize that Congress did not contemplate the application of the Fair Housing Act to shelters, and that the Fair Housing Act is ill equipped to deal with the additional considerations raised by social-service housing providers. As such, in order to more accurately and categorically determine which residences are covered, a new test is necessary to distinguish dwellings from other housing facilities. In order to accomplish this, then, courts should look at the three proposed simple and easily-discernable factors: (1) the normal length of stay intended by the facility; (2) the institutional or residential nature of the facility; and (3) whether the purpose of the facility is to provide housing, or whether housing is linked to some broader purpose. Using these factors will allow shelters the freedom to provide safety and security to guests through single-sex or child-friendly facilities and will ensure that fair housing resources are expended on real residential discrimination rather than social service provider policies.