DISCRIMINATION IN PUBLIC HOUSING UNDER THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974: A CRITIQUE OF THE NEW HAVEN EXPERIENCE

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The Housing and Community Development Act of 1974[1] (HCDA) sets as a major goal the establishment of communities composed of persons with a wide range of incomes.[2] Under the Act, each local public housing authority must agree in its contract with the Department of Housing and Urban Development (HUD) to pursue: "tenant selection criteria designed to assure that, within a reasonable period of time, the project will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious

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1. Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 5, 12, 15, 20, 31, 40, 42, 49 U.S.C. (Supp. V 1975)) [hereinafter cited as HCDA].

2. Specifically the Act calls for:

> [T]he reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income . . . .

HCDA § 101(c)(6), 42 U.S.C. § 5301(c)(6) (Supp. V 1975).

social problems."[3] This requirement can be implemented by two primary methods. First, local housing authorities can achieve income mix by altering their admissions criteria to favor higher income tenants with socio-economic characteristics different from those of current tenants. This approach has been used by housing authorities of several cities, including New Haven,[4] Wilmington,[5] and Kansas City.[6] The second approach, is to distribute new tenants among existing projects so that each project has a range of incomes and social characteristics. This second method of implementation would be furthered by construction of scatter-site, low-density public housing in neighborhoods where the existing population would provide a balance to the population of the public housing units, thus preventing the creation of neighborhoods with concentrations of deprived families. This Article argues that given the limited supply of public housing units, the latter method of implementing the income mix policy is more acceptable.[7] Following the former course, altering admissions criteria, creates direct conflict with two other major goals of the national housing policy: providing a remedy for "the acute shortage of decent, safe and sanitary dwellings for families of low income,"[8] and providing for "fair housing throughout the United States,"[9] to be implemented by the elimination of discrimination in the sale or rental of housing.[10] In addition, the first method may conflict with the equal protection clause of the fourteenth amendment insofar as it leads to impermissible discrimination on the basis of race, and possibly on the basis of sex, income level and source of income.[11]

3. HCDA § 201d(c)(4)(A), 42 U.S.C. § 1437d(c)(4)(A) (Supp. V 1975), *amending* 42 U.S.C. § 1401(g) (1937). The statute says specifically that pursuit of this policy "shall not permit the maintenance of vacancies to await higher income tenants when lower income tenants are available." *Id.*

4. *See* notes 42-61 and accompanying text *infra*.

5. Telephone interview with Mary Hitchener, Executive Director, Wilmington Housing Authority, April 21, 1975.

6. *See* Bradley v. Housing Auth., 512 F.2d 626,627 (8th Cir. 1975).

7. This Article will assume that the creation of balanced communities is a valid goal. This goal, however, has been attacked in sociological literature. *See, e.g.*, Gans, *The Balanced Community: Homogeneity or Heterogeneity in Residential Areas*, in HOUSING URBAN AMERICA 137 (Pynoos ed. 1973); Piven & Cloward, *The Case Against Urban Desegregation* in HOUSING URBAN AMERICA 100 (Pynoos ed. 1973).

8. HCDA § 201, 42 U.S.C. § 1437 (Supp. V 1975), *amending* 42 U.S.C. § 1401 (1937).

9. Fair Housing Act § 801, 42 U.S.C. § 3601 (1970).

10. *Id.* §§ 3603-04.

11. *See* notes 80-141 and accompanying text *infra*.

I. THE POLICY AND ITS RATIONALE

The Housing and Community Development Act of 1974 is devoted to fostering a pattern of "income mix" in public housing, leased housing and other forms of federally assisted housing.[12] To effect this, the Act prescribes changes in a number of specific areas.

First, the Act amends tenant selection criteria for public housing by adding new factors. It retains the old statutory preferences for certain categories of applicants, such as families displaced by urban renewal, veterans and disabled servicemen and requires that local housing authorities consider such factors as the applicants' age or disability, present housing conditions, urgency of housing need and source of income.[13] In addition, the Act requires that each housing authority use selection criteria to achieve income mix.[14]

Secondly, the Act redefines "low-income public housing" by replacing the requirement that dwellings in low income housing be available solely to families of low income[15] with the more general statement that "the term 'low income housing' means decent, safe, and sanitary dwellings within the financial reach of families of low income."[16] In the same section, it specifies that "at least 20% of the dwelling units in any project shall be occupied by very low income families."[17] Under the Act, a very low income family is defined as one whose adjusted income does not exceed fifty percent of the median family income for the area.[18] This means that a housing authority in New York City, where the median income was $9,862 in 1974,[19] need only fill twenty percent of its housing units with families having adjusted incomes

12. There is nothing in the Act itself or in the legislative history to indicate that Congress intended, when setting this new goal, to override the existing goal of providing decent homes for low income families. *See* notes 30-33 and accompanying text *infra*. This Article is concerned only with fully subsidized, low-income, public housing. For an analysis of income mix clauses relevant to other publicly assisted housing, leased housing and mortgage financing, *see* NATIONAL HOUSING AND ECONOMIC DEVELOPMENT LAW PROJECT, LAW PROJECT BULLETIN (Oct. 15, 1974, Berkeley, Cal.).

13. 42 U.S.C. § 1401(g)(2), *as amended*, HCDA § 201, 42 U.S.C. § 1437 (Supp. V 1975).

14. *See* note 3 and accompanying text *supra*.

15. 42 U.S.C. § 1402(1) (1970).

16. HCDA § 201a(1), 42 U.S.C. § 1437a(1) (Supp. V 1975).

17. *Id.* § 201a(1)(B), 42 U.S.C. § 1437a(1)(B).

18. *Id.* § 201a(2), 42 U.S.C. § 1437a(2) (Supp. V 1975), *amending* 42 U.S.C. § 1402(2) (1937).

19. NATIONAL HOUSING AND ECONOMIC DEVELOPMENT LAW PROJECT, LAW PROJECT BULLETIN (Oct. 15, 1974, Berkeley, Cal.).

under $4,841, and all of those families may be at the upper end of that range. Since the housing authority may charge higher rents to families with higher incomes,[20] there is a financial incentive to fill only the minimum number of units with "very low income families" and to choose those families from the upper end of the permissible income range. Furthermore, there is no requirement in the statute that housing authorities do otherwise. Therefore, these provisions may deny public housing to those applicants significantly below the "very low income" cutoff.

Third, the Act permits and encourages housing authorities to admit and retain tenants with much higher incomes by eliminating the continued occupancy rule, under which a family whose income had increased above the approved maximum was required to move from the project unless the public housing authority determined that the family could not find suitable housing elewhere.[21] Elimination of this clause permits families with increased incomes to stay in public housing.[22]

The legislative history reveals two major reasons for implementing an income mix policy. The primary argument as set forth by the House[23] and Senate[24] Committees was that income mix is an "essential ingredient in creating economically viable housing" since higher income tenants pay higher rents.[25] By 1973, members of Congress believed that public housing had reached a point of economic crisis[26] and prescribed income mix as a fundamental part of the solution.

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20. HCDA § 201a(1), 42 U.S.C. § 1437a(1) (Supp. V 1975), *amending* 42 U.S.C. § 1402(1) (1970).

21. 42 U.S.C. § 1410(g)(3) (1970). Where an "over-income" family was permitted to remain, the rent was raised accordingly. *Id. See also* HCDA § 201a(1), 42 U.S.C. § 1437a(1) (Supp. V 1975), *amending* 42 U.S.C. § 1402(1) (1970).

22. The old system was said to penalize those who worked to obtain higher incomes and to deprive those left behind of an example of a hard working family. *See* Cahn & Cahn, *War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1342 (1964).

23. H.R. REP. No. 1114, 93d Cong., 2d Sess. 23 (1974).

24. S. REP. No. 693, 93d Cong., 2d Sess. 40 (1974).

25. *See* note 20 and accompanying text *supra*.

26. The Committee [on Banking and Currency] is greatly disturbed over the widening gap between the revenues received and the costs incurred by local public agencies in administering the public housing program.

. . . [S]ome agencies are on the brink of bankruptcy, while for many others, essential property maintenance and tenant services must be indefinitely deferred. The committee believes the solution is not in merely providing more Federal subsidy dollars for these projects. What is also needed, in conjunction with statutory reform, is a greater assumption of responsibility by local agency management and by the tenants living in the project.

H.R. REP. No. 1114, 93d Cong., 2d Sess. 23 (1974).

The second argument was that income mix would create a "healthier social environment."[27] There was an unstated assumption that the mere presence of a tenant population mixed by income would by itself create a more socially viable housing project.

In support of this argument, Senator Buckley suggested that "social incentives are created when upward mobility can be observed within a community."[28] Senator Brock pointed out that when poor families are concentrated in one area, the local housing authority may not be able to provide the community services "to offer them an alternative to poverty and to disadvantaged circumstances."[29] Representative Harrington submitted a study of tenants in mixed income projects in Massachusetts that found that "mixed income tenants are happier than those in segregated housing."[30]

Some Congressmen criticized the policy of fostering income mix through the tenant selection process as being in conflict with the national goal of providing housing to those who are least able to obtain it in the private market.[31] HUD Secretary James Lynn recognized that the Administration did not know whether those persons excluded from public housing by the new bill would be able to find decent private housing.[32]

Senator Brooke criticized the policy on constitutional grounds. He argued that local housing authorities would pass over low income

27. S. REP. NO. 693, Cong., 2d Sess. 40 (1974).

28. 120 CONG. REC. 6168 (1974).

29. *Id.* at 6165 (1974).

30. *Id.* at 21320-21 (1974), *citing* Gallese, *Living Together—Massachusetts Tries Mixing Income Groups in Subsidized Housing*, Wall St. Journal, June 25, 1974, at 1, col. 1. Congressman Harrington failed to mention, however, that the study suggested the reasons for the tenants' satisfaction were the design and management of the buildings, not the social characteristics of the tenant population.

31. For example, the original language of the Senate version provided that income mix requirements would be unacceptable if they "have the effect of denying admission to any family on the basis that its income is too low." S. REP. NO. 693, 93d Cong., 2d Sess. 4 (1974). See also the remarks of Congressman Ashley emphasizing the importance of not losing sight of the "generally accepted national objectives: eliminating and preventing slums, blight and deterioration, providing lower income housing and improving community facilities and services." 120 CONG. REC. 20217 (1974); *see Hearings on H.R. 10036, 7277, 10688 and 10689 before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess., pt. 2, at 1200, 1203 (1973) (statement of James R. Harvey, Housing Task Force, Leadership Conference on Civil Rights).

32. *Hearings on S. 2490, 2507, 2508 before the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 48 (1973) (letter from Secretary Lynn to Senator Brooke).

families in the applicant pool and admit higher income applicants, thus postponing indefinitely the admission of the poorest families into public housing. This would violate the equal protection and due process clauses of the Constitution, he argued, because "it attaches additional burdens to the poorest applicants and because it will exclude an entire group, the very neediest, from new admissions in most cities."[33]

Senator Brooke was the only member of Congress to suggest that the income mix policy mandated by the Act might lead to constitutionally impermissible discrimination. No member of Congress addressed the possible impact of the provision requiring that the tenant selection process avoid "concentrations of low income families with serious social problems."[34] Nor was there any discussion of how this provision would be implemented on the local level.

The effect of the Act can be assessed most accurately by examining its implementation by local housing authorities. This is necessary because of the longstanding congressional policy of "vest[ing] in local public housing agencies the maximum amount of responsibility in the administration of their housing programs"[35] and because the policies of the Act rest on assumptions which should be susceptible to empirical verification.

The Housing Authority of the City of New Haven (New Haven) provides a useful case study of the implementation of the income mix program.[36] New Haven was chosen in 1972 to conduct a pilot project in the use of tenant selection criteria designed to create balanced communities in public housing under HUD's Housing Management Im-

33. 120 CONG. REC. 28143 (1974). *See also* notes 80-137 and accompanying text *infra*.

34. *See* note 3 and accompanying text *supra*.

35. HCDA § 201, 42 U.S.C. § 1437 (Supp. V 1975), *amending* 42 U.S.C. § 1401 (1937); *see also* [1949] U.S. CODE CONG. SERVICE 1551.

36. The Housing Authority of the City of New Haven manages a total of eleven low rent family housing projects, three middle income family projects and fifteen low income projects for the elderly comprising a total of 4,364 units of housing, or about 10% of the city's households. New Haven Housing Authority, Summary of NHHA Tenants, Nov. 1, 1974 (on file with the *Urban Law Annual*); BUREAU OF THE CENSUS, DEPT. OF COMMERCE, CENSUS TRACT REPORT, NEW HAVEN CONN. (No. PHC(1) 142, 1970).

This Article is concerned solely with the 1789 units of low income family housing, because the admissions procedures for the state administered moderate income and elderly projects have not significantly incorporated the controversial admissions criteria mandated by the Act. The eleven low income family projects were built between 1941 and 1973, and range from six high density highrise units housing 368 families in two blocks to scattered townhouses almost indistinguishable from the private homes surrounding them. They are concentrated primarily in four neighborhoods:

provement Program.[37] The city was chosen to perform a demonstration project because of the quality of its proposal, its good record in urban planning and the transferability of its results to housing authorities throughout the country.[38] HUD has now distributed a summary of all the Housing Management Improvement Program demonstration project results, including the New Haven project, to local authorities nationwide, suggesting that they consider the project results as possible models for their own efforts.[39]

In addition, there is evidence that New Haven had begun the use of similar guidelines, informally and on its own initiative, before the beginning of the pilot program.[40] As a result, New Haven had already substantially implemented the goals set by the Housing and Community Development Act before the Act became effective on January 1, 1975. Therefore, the situation in New Haven strongly suggests the patterns that will increasingly emerge in cities around the country as the Act is fully implemented.

Project	*Year Built*	*Neighborhood*	*Units*
Elm Haven	1941	Dixwell	487
Quinnipiac Terrace	1941	Fair Haven	248
Farnum Courts	1942	Wooster Square	300
Rockview	1951	West Rock	202
Elm Haven Extension	1955	Dixwell	368
County & Henry Sts.	1965	Dixwell	9
Riverview	1967	Fair Haven	12
Sheffield Manor	1970	Newhallville	36
Essex Townhouses	1971	East Shore	35
Valley St. Townhouses	1974	West Hills	40
Waverly St. Townhouses	1973	Dwight	52

37. NEW HAVEN HOUSING AUTHORITY, DESCRIPTION OF THE MANAGEMENT DEMONSTRATION PROJECT AND THE TENANT ORIENTATION PROGRAM 1, (Dec. 21, 1973) [hereinafter cited as NHHA DESCRIPTION] (on file with the *Urban Law Annual*).

38. Telephone interview with Julian Lowe, Director, Technical Memoranda Staff, Housing Management, Department of Housing and Urban Development, Jan. 23, 1977.

39. Telephone interview with William J. Monahan, Editor, Technical Memoranda Staff, HUD, Jan. 26, 1977; HUD, Housing Management Improvement Program, Project Summary and Index, Technical Memorandum No. 3, at i & 22 (Nov. 1976).

40. Interview with Cooper Winston, Assistant Director for Administration, New Haven Housing Authority, Jan. 22, 1975; *see also* notes 58 and 60 *infra* (note the change in characteristics of tenants and applicants to New Haven's public housing projects since 1965).

II. IMPLEMENTATION OF THE PROGRAM: GENERAL CONFLICTS WITH STATUTORY GOALS

A. *Background*

In 1971, citing concern over "excessively high operating costs" and the "deplorable deterioration of low-rent public housing projects," HUD issued a circular encouraging each local housing authority to create a "better economic and social cross section in its tenant body."[41] In response to this mandate, New Haven modified its tenant selection process.[42] In choosing tenants for units completed in 1971, New Haven informally used a series of indices including amount and source of income, sex of head of household and race.[43]

In 1973 New Haven began a management demonstration project to test the impact on projects of "mixed income tenancy" and "rigorous tenant selection." The experiment was undertaken as part of the HUD-funded Housing Management Improvement Program. Two new projects, comprising ninety-two units, were involved. The goal of the

41. HUD suggested that each local housing authority:

1. Review and analyze its application intake and pool and take steps to stimulate interest in and increase applications from more wage earner and two-parent families having greater potential for stability.

2. Renew income limits for admission and continued occupancy . . . .

3. Attempt, through all practicable means, to retain stable, eligible and over-income families in occupancy until such time as they are, in fact, able to obtain standard housing within their ability to pay.

Housing a Cross-Section of Low-Income Families in Low-Rent Public Housing (HUD Circular HM 7465.12, June 2, 1971).

42. Interview with Edward White, Executive Director, New Haven Housing Authority, Nov. 16, 1974; interview with Sheila Randall, Director, Tenant Application Office, New Haven Housing Authority, Nov. 14, 1974.

43. Interview with Winston, *supra* note 40. Prior to 1968, admission to the New Haven Housing Authority was based largely on the applicant's "suitability" as judged by a housing authority officer during an informal home visit. Interview with former housing authority employee, Oct. 31, 1974. Such factors as the tenant's arrest record, housekeeping habits or the presence of illegitimate children in the family might be taken into account. Interview with White, *supra* note 42.

In 1968, the housing authority shifted to a system of taking applicants only on the basis of the date of application, after taking into account the availability of appropriate apartments and the statutorily mandated preferences for veterans and displaced persons. NEW HAVEN HOUSING AUTHORITY, ANNUAL REPORT 5-6 (1968). Executive Director White attributed the shift to financial concerns and the New Haven Housing Authority's obligation to avoid de facto segregation; however it also coincided with the issuance of a HUD circular limiting the discretion a local housing authority could use in tenant selection. Admission and Continued Occupancy Regulations for Low Rent Public Housing (HUD Circular, Dec. 17, 1968). This policy led to a high concentration of black families in the authority's projects. Interview with White, *supra* note 42. The authority also felt that it led to the admission of a large number of "undesirable" tenants, including welfare mothers, female-headed households and muti-problem families. Interview with former employee of the New Haven Housing Authority, *supra*. The authority officially maintained the chronological selection procedure until approximately 1971. Interview with Randall, *supra* note 40.

program was to create a tenant population: (1) in which twenty percent of the families earned less than $4,000 a year, fifty percent earned between $4,000 and $8,000, and thirty percent earned more that $8,000; (2) in which only half the families were black; (3) in which three-fourths of the families were headed by males; and (4) in which three-fourths of the family heads were employed.[44] These last three quotas were apparently set "arbitrarily."[45] New Haven was relatively successful in reaching all but the racial goal.[46]

In October 1974, New Haven adopted for its overall tenant selection process the policies used in the demonstration projects.[47] According to the preamble of the housing authority's new regulations, they were adopted in accordance with the Housing and Community Development Act, although it was not yet in effect and HUD had not yet published implementing regulations.[48] Specifically New Haven's regulations state:

> An applicant will be offered an apartment after all families ahead of the applicant by reason of date of application and/or preference category . . . have been offered an apartment subject to the Authority's policy objective to achieve a balanced occupancy mix. That is, in selecting families for vacant apartments the Authority will make an effort to achieve a balanced occupancy mix in terms of income levels, . . . race, sex of head of household, and source of income.[49]

44. NHHA DESCRIPTION, *supra* note 37.

45. Interview with Winston, *supra* note 40.

46.

	Goal	*Actual Achievement*
Income	30% high	33%
	50% medium	41%
	20% low	26%
Sex of Head of Household	75% male	73%
	25% female	27%
Employment Status	75% unemployed	77%
	25% employed	23%
Race	50% black	86%
	50% white or other	14%

NHHA DESCRIPTION, *supra* note 37, at 1-2.

47. NEW HAVEN HOUSING AUTHORITY, POLICIES FOR ADMISSION AND CONTINUED OCCUPANCY (1974) [hereinafter cited as POLICIES].

48. HUD did publish interim guidelines on admission to public housing. 40 FED. REG. 33445 (1975). The regulations required that admissions policies should not automatically deny admission to a particular category of applicants or attribute behavior to an applicant on the basis of a group of which he is a member. 24 C.F.R. § 860.204.

49. POLICIES, *supra* note 47, § 503.00. The "preference categories" referred to are those established by statute, e.g., displacees, veterans and servicemen, families in an

In apparent contradiction, the regulations provide that the authority shall not discriminate in the leasing of public housing against any applicant because of race, color, creed, sex, marital status or national origin and shall not deny to any eligible applicant the opportunity to lease housing.[50] In addition, the regulations provide that the authority may not deny admission to a family because its income is derived wholly or in part from public assistance.[51]

The actual admissions procedure does not mirror the regulations. In practice, the criteria used are within the discretion of the individual project managers.[52] It is also difficult to obtain compliance with the regulations because an applicant is not informed when his application is rejected by a project manager. Instead, the applicant remains on the waiting list[53] and long tenure on the waiting list has not been recognized as the legal equivalent of a rejection.[54]

B. *Effects of the Policy*

Assuming that New Haven's implementation is fairly representative, the income mix policy and the policy of disfavoring welfare recipients,

emergency situation, families with other serious housing needs and families wishing to transfer within public housing because of a change in family size. *Id.* §§ 402.01-05.

50. *Id.* § 203.00.

51. *Id.* § 206.00.

52. According to the regulations, the selection of tenants from among eligible applicants involves several steps. First a project manager notifies the Tenant Application Office (TAO) of a vacant apartment. *Id.* § 504.01. At this point, the project manager may indicate what kind of tenant he would like, according to race, sex of head of houshold, income range and/or source of income. Interview with Randall, *supra* note 42; interview with Mel Norfleet, Project Manager, New Haven Housing Authority, Dec. 10, 1974. Then the TAO forwards to the project manager the folder of "the first applicant in line for the appropriate size of apartment." POLICIES, *supra* note 47, § 504.02. Actually, the TAO sends over the folders of the next several applicants in line who meet the criteria set out by the project manager. Interview with Randall, *supra* note 42. The project manager either contacts the applicant to look at the apartment or, if he finds the applicant unacceptable, returns the file to the TAO and the applicant retains the same priority status. POLICIES, *supra* note 47, § 504.03.

53. Interview with Randall *supra* note 42.

54. A long tenure on the waiting list is equivalent to rejection but has not been so recognized by the housing authority. A rejected applicant is entitled to a hearing before a three-person grievance panel, to contest the decision and present further evidence. 42 U.S.C. § 1410(g)(4)(i) (1969), *as amended*, HCDA § 201(a), 42 U.S.C. § 1437d(c)(3)(i) (Supp. V 1975). Applicants who are placed on the waiting list, however, have no recognized statutory right to a hearing, even though they may remain on the waiting list for ten years or more. This problem was recognized in Holmes v. New York City Housing Auth., 398 F.2d 262, 265 (2d Cir. 1968):

> The possibility of arbitrary action is not excluded here, however, by the existence of this reasonable regulation. The "scoring system" scheme will hardly assure the fairness it was devised to promote if, as the plaintiffs allege, some applicants, but not others, are secretly rejected by the Authority, are not thereafter informed of their ineligibility and are thereby deprived of their opportunity to seek review of the Authority's decision.

female-headed families and black families conflict with the statutory goals in two respects. They conflict with the general goal of providing decent and safe housing for persons otherwise unable to afford it and they do not further the goal of establishing balanced communities. While these effects may appear obvious, they were not considered by Congress when the new Act was passed.

First, these policies effectively exclude from public housing those who need it most. New Haven's experience suggests that the very people who have the greatest difficulty finding adequate housing in the private market are being denied public housing.[55] According to a study released in 1975 by the United States Commission on Civil Rights, there is substantial discrimination against blacks and female heads of families in the private rental market.[56] Welfare recipients also face substantial discrimination as a class.[57] These are the people who are applying in New Haven but are being passed over in the allocation of public rental units.

55. The discussion of the impact of the housing authority's admissions policies on the applicants and on tenant population results from an analysis of the available data on the demographic characteristics of the tenants of New Haven's eleven low income housing projects and of the applicants for those units. The tenant data came from the housing authority's Monthly Project Files for Nov. 1974, and the applicant data came from the printout of the applicant list as of Oct. 31, 1974 (on file with the *Urban Law Annual*). Tenant data was available for 1,670 tenant families. For 39 families, no data was available. The other units were vacant at the time. For tenants, data was available as to race (black, white, Spanish, other); sex of head of household; source of income (employed, full welfare, partial welfare, other benefits, other); income levels (within $1,000 ranges); and number of children. The source of income category created some ambiguity because of the overlap between the persons categorized as employed, on partial welfare and receiving other benefits. Analysis of the tenant data included calculation of percentages of families which are white, headed by two parents, headed by an employed person, fully supported by welfare and in different income categories. These percentages were also examined for the total population of the five housing projects built between 1941 and 1955 and the six projects built since 1966.

The applicant data was separated according to size of apartment needed. The data on applicants seeking studio or one-bedroom apartments was not considered since applicants for those units are primarily elderly. The remaining applicant data covered 1,174 families. For 278 families, the data was incomplete with respect to income level, and for 64 others the data was incomplete in some other way. The compilations of data exclude only the latter 64. Information on each applicant included his race, veteran status, number of parents in the household, size of income, source of income and application date. The data as to size of income is likely to be inaccurate, since the TAO does not verify applicant incomes until the families are about to be placed. The large number of black applicants and tenants with low incomes, on welfare or in families headed by females is indicated in notes 58-61 *infra*. Such applicants are those needing public housing most.

56. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 137-67 (1975).

57. *See, e.g.*, New Haven Journal Courier, April 24, 1975, at 1, col. 7.

While more than ninety percent of the families on the waiting list are one-parent families, only forty-three percent of the families in the newer units and eighty-four percent of the families in the older units are headed by a single parent.[58] Similarly, only twenty-three percent of

58. Demographic Characteristics of Applicants to and Tenants in New Haven Low Income Family Housing

Project	Date Built	Total Families[a]	Percentage of Families Who Are: White[b] or Other	Two Parents	Working[c]	Full Welfare
Applicants		1234	12.2	6.0	20.8	79.2
All Tenants		1670	10.5	20.0	28.0	41.3
Tenants in older units		1492	8.5	15.6	24.3	43.8
Tenants in newer units (since 1965)		178	27.0	56.7	59.6	20.2
Elm Haven	1941	454	4.4	19.4	33.5	29.7
Quinnipiac Terrace	1941	225	21.8	17.3	26.7	48.0
Farnum Courts	1942	279	12.2	10.4	9.7	46.2
Rockview	1951	189	9.5	18.0	24.9	41.3
Elm Haven Extension	1955	345	1.7	12.5	22.0	58.8
County and Henry Streets	1965	8	25.0	50.0	62.5	12.5
Riverview	1967	12	33.3	16.7	50.0	8.3
Sheffield Manor	1970	33	27.3	54.5	45.5	18.2
Essex Townhouses	1971	33	48.5	69.7	57.6	15.2
Waverly St. Townhouses	1973	52	19.2	57.7	61.5	26.9
Valley St. Townhouses	1974	40	17.5	60.0	72.5	22.5

a. On whom data is available.
b. New Haven defines racial goals in terms of the ratio between the number of black tenants and the number of tenants of all other races. *See* note 44 and accompanying text *supra*.
c. For tenants this figure may include families who receive partial welfare assistance, while for applicants it probably does not.

The slightly closer correspondence between the tenants of the older projects and the applicants can be explained by two factors. First, the older projects were largely filled pursuant to a first-come, first-serve policy. Second, there has been only a relatively minor attempt to institute the new policy in filling vacancies in these projects since the housing authority does not believe it is possible. It believes that white, working families

the applicants are employed, as compared to sixty percent of the tenants in the newer units. Seventy-seven percent of the applicants are on full welfare, while only twenty percent of the residents in the newer housing receive welfare.[59]

The same pattern exists with respect to level of income.[60] While almost sixty percent of those applicants who reported income earn less than $4,000, fewer than twenty-five percent of the tenants in the new units have incomes under $4,000. In addition, while fewer than three percent of the applicants have incomes over $8,000, almost twenty percent of those in the new units have incomes over $8,000.

An examination of the time spent on the waiting list by applicants

simply will not move into a project like the Elm Haven Extension, an aging highrise, 60% of whose population is on welfare. Interviews with White and Randall, *supra*, note 42; interview with Norfleet, *supra* note 52.

59. *See* note 58 *supra*. In a sense, the tenant and applicant data is not precisely comparable, because the welfare tenants include persons who work part-time. As a result, the figure for welfare tenants is overstated. If welfare tenants were defined in the same manner as welfare applicants, public housing would display an even smaller percentage of welfare tenants.

60. Percentage of Tenants and Applicants* at Various Income Levels

Project	Annual Income		
	Under $4000 "Low"	$4000 to $8000 "Middle"	Over $8000 "High"
Applicants	62.5	35.2	2.3
All Tenants	54.1	36.3	9.7
Tenants in older units	57.7	33.8	8.4
Tenants in newer units (since 1965)	23.6	56.7	19.7
Elm Haven	56.4	35.0	8.6
Quinnipiac Terrace	62.7	27.1	10.2
Farnum Courts	67.0	27.2	5.7
Rockview	47.6	41.3	11.1
Elm Haven Extension	54.2	38.0	7.8
County and Henry Streets	12.5	50.0	37.5
Riverview	16.7	83.3	0
Sheffield Manor	27.3	63.6	9.1
Essex Townhouses	21.2	66.7	12.1
Waverly St. Townhouses	30.8	44.2	25.0
Valley St. Townhouses	17.5	52.5	30.0

* On whom data was available. Of the 283 applicants on whom no income data was available, 87.4% were welfare recipients. This suggests that if the data were complete, the income levels of the applicants would be pushed even further downwards.

with different social characteristics yields similar conclusions.[61] There were only three two-parent families applying before 1970 that had not yet been placed by September 1974. Fifty-four one-parent families that applied at the same time were still waiting in 1974.[62] There was only one white family on the waiting list in 1969 that was not placed by October 1974. More that twenty-five percent of the families that applied in 1974 were headed by a working person. Yet, of the families who applied in 1972 or earlier and were still not placed by September 1974, only about ten percent were headed by a working person. This implies that working applicants were placed in New Haven's units more quickly than non-working applicants.[63]

A recent study outlined the effects of this discrimination against female heads of household receiving welfare assistance in Connecticut. About forty-five percent of the families receiving Aid to Families with Dependent Children (AFDC) paid more for rent than is allotted

61. Demographic Characteristics of Applicants by Year of Application, as of Oct. 31, 1974.

		Black				White or Other			
		1-parent		2-parent		1-parent		2-parent	
Year	Total	Not Working	Working	Not Working	Working	Not Working	Working	Not Working	Working
1974	394	230	67	10	21	48	11	4	3
1973	518	345	103	10	11	40	4	1	4
1972	178	134	15	3	2	24	0	0	0
1971	46	35	5	0	0	6	0	0	0
1970	27	19	4	1	1	2	0	0	0
1969	7	6	0	1	0	0	0	0	0
1968	12	10	2	0	0	0	0	0	0
1967	11	10	0	0	0	1	0	0	0
1966	2	2	0	0	0	0	0	0	0
1965	5	5	0	0	0	0	0	0	0
Earlier	18	13	3	1	1	0	0	0	0
No Date	16	14	0	0	0	2	0	0	0

62. The only other possible explanation for the discrepancy between the percentage of two-parent applicants and tenants is that the rate of applications from such families has fallen in the last few years. There is no evidence that this has occurred. But if this were so and if no preference system had been in force, then there would be more two-parent families still waiting to be placed which had applied in 1968-1972. However, there are very few two-parent families which applied before 1973 and have still not been placed. *See* note 61 *supra*. Therefore, it is possible to conclude that two-parent families are significantly favored.

63. This, too, is not likely to be attributable to a change in the application rate of working persons. *See* note 62 *supra*.

under the welfare system.[64] As a result, these families had to dip into part of their subsistence grant which is intended for utilities and other necessities in order to pay rent.[65] In New Haven rents have been higher than the statewide average. Thus, in order to rent a unit that was not substandard, an AFDC mother with two children in 1974 had to pay $59 per month more than she was allocated in her assistance grant.[66]

In addition, there is a severe housing shortage in New Haven. Approximately twenty percent of New Haven's available rental stock is substandard.[67] As of 1970, about 15,000 families were inadequately housed.[68] Most of these families earned less than $6,000 per year.[69] It is very difficult, therefore, for very low income families to find decent

64. CONN. ASS'N FOR HUMAN SERVICES, INFLATION AND WELFARE ALLOWANCES, INFORMATION BULLETIN NO. 5 (1975). All Connecticut welfare recipients of a given family size receive a "flat grant award" of a given amount which depends solely on the family size and the area of the state. The rate is based on the assumption that the family will pay the median rental for apartments in that region of the state. CONN. ST. DEP'T OF WELFARE, 1 WELFARE MANUAL § 5020 (1966). Welfare recipients in public housing would never be assessed a rental higher than is permitted by their budget since the rental rate is set by statute. 42 U.S.C. § 1437a(1) (Supp. V 1975), *amending* 42 U.S.C. § 1402(1) (1969). All the welfare recipients who pay excessive rents, therefore, live in private housing.

65. Families paying excess rents paid an average of $41 per month above what is allotted to them for rent. Thus, a family of three receiving a monthly grant of $295.44 of which $101.65 is allotted for rent, would be likely to spend $142 per month for rent, leaving only $153 for utilities and all other needs. CONN. ASS'N FOR HUMAN SERVICES, INFLATION AND WELFARE ALLOWANCES INFORMATION BULLETIN NO. 5 (1975); CONN. ST. DEP'T OF WELFARE, 1 WELFARE MANUAL § 5020 (1966).

66. A study based on newspaper advertisements for private rental units in New Haven suggests that the median rental price of a two-bedroom apartment in the city in 1974 was $165 per month, which was $60 per month more than the maximum a Connecticut AFDC family of three was allocated for rent, and $25 per month more than the average rental paid by those recipients who were paying above the maximum rent. The Housing Information Service estimated that it was necessary to pay the median rent to obtain an apartment of standard quality. Housing Information Service, Community Housing Inc., Monthly Summary of Rental Units (1974) (unpublished study on file with the *Urban Law Annual*); *see also* CONN. ASS'N FOR HUMAN SERVICES, INFLATION AND WELFARE ALLOWANCE INFORMATION BULLETIN NO. 5 (1975). According to cost data in NEW HAVEN CITY PLAN COMM'N, COMMUNITY DEVELOPMENT ACTION PLAN FOR THE CITY OF NEW HAVEN, WORKING PAPER NO. 7 at 26 (1970), it appears that the present flat grant assistance award would not have been sufficient even in 1967 to permit the rental of a standard apartment for a family of three.

67. CITY OF NEW HAVEN HOUSING ASSISTANCE PLAN, Appendix I at 7 (1974). As used by the city, "substandard" means failure to comply with local housing codes.

68. NEW HAVEN CITY PLAN COMM'N, COMMUNITY DEVELOPMENT ACTION PLAN FOR THE CITY OF NEW HAVEN, WORKING PAPER NO. 7 at 45 (1970). This figure included families living in substandard housing, in crowded conditions, and paying more than 25% of their income for rent.

69. *Id.* at 5.

private housing, especially if they are very large or very small families.[70]

Accordingly, a major impact of New Haven's admission policy is that the people who are excluded from public housing live in substandard private housing with rents disproportionate to their incomes. If the housing authority admitted people on a first-come, first-serve basis according to the date of application, probably all of the families that applied before 1969 would have been admitted by September 1974. In turn, some of the higher income people now in public housing would have been excluded but they would have had less difficulty in finding housing they could afford. Although this would not solve the financial problems of the housing authority, it would certainly further the statutory goal of providing a "decent home . . . for every American family" by providing housing for those least able to obtain it in the private market and by putting back into the private market tenants better able to pay.

Furthermore, it is not clear that the goal of establishing balanced neighborhoods has been achieved. While the current policy as implemented in New Haven results in relatively "balanced" populations within the newer housing projects,[71] it leaves untouched the high concentrations in substandard private housing of black families, welfare recipients or those below the poverty line, and families headed by a woman. Almost forty percent of the city's black population lives in private housing in three census tracts that contain only sixteen percent of the city's population.[72] Five census tracts house a disproportionate percentage of the city's female-headed families.[73] Almost seventeen percent of the families with incomes below the poverty level live in neighborhoods that house only six percent of the city's total population.[74] Finally, almost all New Haven AFDC recipients live within a

70. According to the housing plan, there is a serious shortage of units available for low and moderate income households with one member or more than five members. CITY OF NEW HAVEN HOUSING ASSISTANCE PLAN, Appendix II at 9-10 (1974).

71. *See* notes 58 & 60 *supra*.

72. The three census districts are numbers 5 (Hill), 6 (Hill) and 15 (Newhallville). There are only 36 units of low income family public housing in these three neighborhoods. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS TRACT REPORT, NEW HAVEN, CONN. (No. PHC(1)142, 1970).

73. Census tracts number 1 (Central Business District), 3, 5, 6 (Hill), and 15 (Newhallville) house 18.8% of the city's families and 26.5% of the city's female-headed families. There are no large, low income family public housing units within these neighborhoods. *Id.*

74. The Bureau of the Census defines the poverty level as an annual income of $3,743

mile of downtown, primarily in three neighborhoods.[75] Thus, while a return to the first-come, first-serve selection process might shift the mix of tenants in public housing further from the ideal espoused by the local housing authority, it might also decrease the concentrations of black families, poor families and welfare recipients in the neighborhoods where they now live.

Implicit in the authority's method of implementation is an assumption that housing projects are huge self-contained structures that dominate the neighborhoods around them. This is not the case, however, with regard to the newest housing units in New Haven where the policies have been implemented most thoroughly.[76] These projects are small, low density units with a maximum of fifty-four families, so their impact on the demographic character of the neighborhood in which they are located is minimal.[77] Most housing authorities are planning to follow New Haven's lead and build smaller units.[78] The policy, therefore, is not necessary to establish balanced neighborhoods so long as a project is located within an area already having a varied population.

This analysis does not apply to the larger housing projects built in the early years of public housing. It seems clear that the character of these projects does have a major impact on its neighborhood. However, New Haven's experience suggests that little can be done to create balanced communities in these projects, since it is difficult to induce white, male-headed, working families to move into such projects.[79]

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for a family of four. Under this definition, there are 712 families below the poverty level in census tracts number 2 (Long Wharf - Church St. South), 3 (Hill) and 6 (Hill) and a total of 4,276 families below the poverty level in the city. There are no large units of low income family public housing in these neighborhoods. *Id.*

75. Telephone interview with David Matthews, Benedict Associates, Hamden, Conn., Nov. 27, 1974. *See* BENEDICT ASSOCIATES, STUDY OF RENTAL HOUSING COST—FINAL DRAFT: AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM, STATE OF Connecticut, 1973-1974 (1974).

76. Interview with Winston, *supra* note 40.

77. Only two of the newer, low-density housing projects in New Haven have been built in neighborhoods already containing low-income family public housing. *See* note 36 *supra*.

78. It appears that New Haven plans to continue this pattern. NEW HAVEN HOUSING AUTHORITY, ANNUAL REPORT (1974).

79. Interview with White, *supra* note 42. In January 1975 the housing authority did attempt a massive but unsuccessful eviction effort, largely in these older projects, which was alleged to have been intended to clear out enough welfare families to make it possible to admit a balanced population. New Haven Tenants' Representative Council, Inc. v. New Haven Housing Auth., 390 F. Supp. 831 (D. Conn. 1975) (granting temporary restraining order).

III. "RATIONALITY" OF THE NEW HAVEN SELECTION CRITERIA: LAW AND POLICY

The New Haven Housing Authority has implemented the policies of the Housing and Community Development Act by selecting tenants on the basis of income, source of income, race, sex of the head of the household and the number of parents in the household. While the only selection criterion explicitly authorized by the statute is income mix, the Act also authorizes the use of tenant selection criteria that will "avoid concentrations of low-income and deprived families with serious social problems."[80] Local housing authorities can argue that criteria such as those used in New Haven are justified because they would avoid such concentrations.[81]

Local agencies have traditionally been given broad deference in housing matters.[82] Although courts have overruled the policies of local

80. HCDA § 201d(c)(4)(A), 42 U.S.C. § 1437d(c)(4)(A) (Supp. V 1975), *amending* 42 U.S.C. § 1410(g) (1937).

81. If the housing authority does not jusify its priorities concerning race, sex and source of income on the tenant selection language in the Act, it could be charged with acting ultra vires in imposing criteria for admission to public housing not specifically authorized by its enabling legislation. Generally, an administrative regulation cannot stand if it is based on a justification exceeding the scope of its statutory authority. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (Secretary of Transportation may not exceed scope of his authority when authorizing use of federal funds for construction of expressway); Kent v. Dulles, 357 U.S. 116, 128 (1958) (Secretary of State did not have authority to promulgate regulations which had effect of denying passports to Communists). In particular, a state agency may not impose eligibility criteria not authorized by Congress when dispensing a federally funded benefit. Shea v. Valpiando, 416 U.S. 251 (1974) (state may not adopt a standardized allowance for work-related expenses and refuse to allow recipient to deduct expenses beyond the standard); Rosado v. Wyman, 397 U.S. 397 (1970) (New York may not set standard of need in manner not in accord with social security statute); King v. Smith, 392 U.S. 309 (1968) (welfare benefits may not be denied to eligible children if their mother "cohabits" with man).

Since imposition of priorities based on race, sex of head of household and source of income is not authorized in the Act unless by the tenant selection clause, any practice of using such priorities is invalid as an imposition of eligibility criteria not created by Congress. The Sixth Circuit relied in part on a similar line of reasoning to invalidate tenant selection criteria based on income which were being used by the Louisville Housing Authority before the passage of the Act. Fletcher v. Housing Auth., 491 F.2d 793, 803 (6th Cir. 1974), *vacated and remanded in light of Act*, 419 U.S. 812 (1974), *judgment reinstated*, 525 F.2d 532 (6th Cir. 1975).

82. Since the creation of public housing programs in 1937, enabling legislation has stated:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several

authorities when they have interfered with civil or constitutional rights of tenants or applicants,[83] the courts have generally given deference to the determinations of local authorities as long as their practices bear a reasonable relationship to the low-rent housing program and are devoid of illegal discrimination.[84] Thus, a housing authority can claim that its policies of establishing communities balanced by race, sex of head of household and source of income are permissible even though not specifically mandated.

A. *Race*

By choosing to construct tenant populations in which the black and other minority population is limited[85] relative to the number of such families seeking access to public housing,[86] New Haven has clearly drawn discriminatory lines on the basis of race. The question becomes, then, whether such discrimination can be sustained against equal protection attacks on the ground that the discrimination is ultimately intended to benefit the minority group, as well as other segments of society, by promoting integration. Unlike most other "benign" discrimination cases,[87] in which lines were drawn to provide blacks in-

States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income and, consistent with the objectives of this Act, *to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs*.

42 U.S.C. § 1401 (1937), *amended*, HCDA § 201, 42 U.S.C. § 1437 (Supp. V 1975) (emphasis added). *See also* S. REP. NO. 84, 81st Cong., 1st Sess. (1949).

83. King v. New Rochelle Municipal Housing Auth., 442 F.2d 646 (2d Cir. 1971) (five-year residency requirement invalidated for public housing as denial of equal protection); Escalera v. New York City Housing Auth., 425 F.2d 853 (2d Cir. 1970) (tenants of public housing may not be evicted without adequate procedural safeguards); Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968) (selection of tenants for public housing must be made in accordance with ascertainable standards and in a reasonable manner so as not to deny due process).

84. *See, e.g.*, Pearsall v. Housing Auth., POV. L. REP. (CCH) ¶ 18,436 (D. Conn. 1974) (relief denied to public housing applicant who alleged discrimination because she was not accorded priority, even though she was being evicted from uninhabitable premises); McDougal v. Tamsberg, 308 F. Supp. 1212 (D.S.C. 1970) (local authority may not arbitrarily exclude applicant only because of presence of illegitimate children in family; relief denied because of failure to show existence of discriminatory policy).

85. *See* notes 44-47 and accompanying text *supra*.

86. *See* note 61 *supra*.

87. *E.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974); Bakke v. Regents of Univ. of Calif., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted*, 97 S. Ct. 730 (1977). *See also* notes 92-100 and accompanying text *infra*.

creased access to a government benefit, perhaps at the expense of whites, the discrimination by New Haven deprives blacks and other minorities of a benefit, allegedly for their own good as well as for the good of society.

A state may not discriminate on the basis of race unless the discrimination serves a compelling state interest.[88] When, however, discrimination has been intended to benefit minorities, it has sometimes been upheld as "rational"; that is, having the "effect and objective of reducing discrimination and segregation."[89] The appropriate standard to be applied is less clear when steps aimed at promoting integration are not in the immediate interest of minority group members. This question was not squarely addressed by any member of Congress during the debates on the 1974 Act, although it follows inevitably from the conflicting imperatives of the Fair Housing Act and the 1937 Housing Act as amended.[90] The judicial answers are as yet tentative. In the Second Circuit, at least, it appears that the state must sustain a heavy burden to justify racial discrimination designed to promote eventual integration which operates to deny an immediate benefit to non-whites.[91]

Integration is certainly a valid state goal.[92] In most situations, however, where a court has ordered that a state promote integration, the state was providing an unlimited benefit, such as primary or secondary

88. Hunter v. Erickson, 393 U.S. 385, 391-92 (1969); Loving v. Virginia, 388 U.S. 1 (1964); Brown v. Board of Education, 347 U.S. 483 (1954); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Korematsu v. United States, 323 U.S. 215 (1944); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 410 U.S. 1010 (1971).

89. Pride v. Community School Bd., 488 F.2d 321, 326-27 (2d Cir. 1973); Hart v. Community School Bd., 383 F. Supp. 699, 741 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); *see* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968); Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 61 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Springfield School Comm. v. Barksdale, 348 F.2d 261, 266 (1st Cir. 1965).

90. *Compare* Fair Housing Act § 801, 42 U.S.C. § 3601 (1970) ("It is the policy of the United States to provide . . . for fair housing throughout the United States."), *with* HCDA § 101(c)(1)-(7), 42 U.S.C. § 5301(c)(1)-(7) (Supp. V 1975) (listing specific objectives to further the primary purpose of "development of viable urban communities").

91. *See* Trinty Espiscopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds and remanded*, 523 F.2d 88 (2d Cir. 1975); Otero v. New York City Housing Auth., 484 F.2d 1122 (2d Cir. 1973). *See also* Note, *Benign Quota-Fair Housing—Affirmative Action Permits the Granting of Preference to Whites in Public Housing to Insure Racial Integration:* Otero v. New York City Housing Authority, 20 WAYNE L. REV. 1109 (1974).

92. Brown v. Board of Educ., 347 U.S. 483 (1954).

education,[93] parks[94] or fair housing.[95] When the state is attempting to promote integration among recipients of a scarce benefit, such as housing or state-supported university education, the criteria for distributing the benefit can be defined to create racial balance among the recipients. When the benefit has historically been distributed primarily to whites, the criteria would be defined to favor the minority group. This has become a common practice in admission to public higher education.[96]

Most recipients of public housing, unlike those of public higher education, have been members of minority groups; promoting integration thus requires favoring whites at the expense of minority applicants. At the same time, however, minorities are significantly disadvantaged in obtaining housing generally.[97] Use of an admissions policy which favors white applicants, therefore, would tend to promote integration but would not serve the compensatory function of such integration.[98]

In two cases on the use of racial quotas in public housing, the agencies were required to meet a strict standard of proof to justify their policies.[99] Although the intent is to create integrated housing, the

93. *Id. See* DeFunis v. Odegaard, 416 U.S. 312, 336 n.18 (1974) (Douglas, J., dissenting).

94. Evans v. Newton, 382 U.S. 206 (1966).

95. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

96. *See* DeFunis v. Odegaard, 416 U.S. 312, 348 (1974) (Brennan, J., dissenting). *See generally* Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723 (1974).

97. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 137-67 (1975).

98. *See* DeFunis v. Odegaard, 82 Wash. 2d 11, 30, 507 P.2d 1169, 1181 (1973), *dismissed as moot*, 416 U.S. 312 (1974) ("the denial of a 'benefit' on the basis of race is not necessarily a per se violation of the Fourteenth Amendment, if the racial classification is used in a compensatory way to promote integration").

99. In Otero v. New York City Housing Auth., 484 F.2d 1122 (2d Cir. 1975), former occupants of the site of a new public housing project, all members of a minority group, challenged the New York City Housing Authority's refusal to grant them priority in the new units despite its regulation giving priority to former site occupants. Defendants maintained that adhering to their regulation would lead to the creation of a non-white "pocket ghetto" and the eventual non-white ghettoization of the area. The Second Circuit held that, although it may be permissible under some circumstances to disadvantage some members of a minority group in the short run for the sake of promoting integration, the housing authority had failed to show that adherence to its facially neutral rule would lead to segregation. The court placed a heavy burden of proof on the housing authority. The court was concerned that:

> [t]o permit the Authority to take race, among other eligibility criteria, into consideration in selecting tenants for public housing would, in the absence of a standard or

effect of such quotas is to deny admission to public housing to many black applicants.[100]

In New Haven, there is no evidence that the guidelines established by the authority are related to some calculated tipping point or are essential to promote a racially balanced community. The process does not appear to have included any explicit consideration of the relevant neighborhood in terms of racial balance, the existence of community services and the attitudes of majority residents, as would appear to be required by the decisions in *Otero v. New York City Housing Authority*[101] and *Trinity Episcopal School Corp. v. Romney*.[102] Even if this

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regulation, allow it to engage in social engineering, subject only to general undefined control through judicial supervision. . . . [T]he Authority's denial of housing to a family because of its race could, whether or not labelled a "benign" quota, constitute a form of unlawful racial discrimination in violation of the family's constitutional rights.

Id. at 1135-36. In conclusion, the court stated that the housing authority could limit the admission of members of minority groups "where it can show that such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community." *Id.* at 1140.

The lower court was advised on remand to hear evidence and make findings with respect to the relevant community to be considered with respect to racial balance, the impact of adherence to the regulation on the white population of the community, estimates of the racial composition of the urban renewal area upon completion and the racial composition of the population eligible for public housing. *Id.* at 1137. On remand, the case was settled. POV. L. REP. (CCH) ¶ 118,640.

The holding of *Otero* was applied in Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds and remanded*, 523 F.2d 88 (2d Cir. 1975), in which a private school and a group of middle-income residents challenged changes in the West Side Urban Renewal Plan which would have increased the low-income population of the area. The focus of the litigation was whether the changes in the plan would cause the community to reach a racial tipping point; that is, the point "at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of instability which result in the deterioration of the neighborhood environment." *Id.* at 1065. The court emphasized that the plaintiff, like the defendant housing authority in *Otero*, must meet a stringent burden of proof on the issue of tipping since "the proposed racial and economic classifications while intended to preserve the area, would clearly result in a denial of public housing, given the citywide need for such housing and the scarcity of alternative sites within the City." *Id.* at 1066.

The opinion set out and discussed three criteria for determining whether a tipping point had been reached: the absolute number of minority families, the quality of community services and the attitude of majority group residents. *Id.* at 1065-73. After considering these factors, the court concluded that the plaintiffs had failed to prove that tipping was likely and the court found for the defendants. This holding was affirmed by the court of appeals. 523 F.2d 88 (2d Cir. 1975).

100. The evidence in New Haven is clear that black applicants have been passed over in the application process. *See* notes 58 & 61 *supra*.

101. 484 F.2d 1122 (2d Cir. 1975); *see* note 99 *supra*.

102. 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds and remanded*, 523 F.2d 88 (1975); *see* note 99 *supra*. According to the New Haven

were to be done, it is unlikely that the population of units as small and scattered as the newest projects would measurably affect the neighborhood as a whole. If there is such an effect, it would have to be established with great certainty to justify the imposition of quotas under the holdings of *Otero* and *Trinity*, especially given the scarcity of low-rent housing otherwise available.[103]

On the other hand, it is almost impossible to use the tipping theory as a rationale for limiting black applicants in order to desegregate huge, antiquated and almost entirely black housing projects.[104] In these projects, there is no danger of chasing out white residents since there are so few.[105] The justification here must be the high value placed on an integrated environment by the national housing policy. But the likelihood of a significant amount of integration in these units is small, because of the reluctance of white residents to move in.[106] The social benefit to be gained from such minimal integration is probably marginal, since non-white families are not per se more likely than white families to be problem tenants.[107]

Since the present admissions policy, as exemplified by New Haven's implementation of income mix, tends to make it more difficult for a non-white family to be placed than a white family, the allegedly benign policy is in fact an impermissible exclusionary device, especially when the housing authority has not shown that the quota system is essential to prevent increased segregation.

B. *Sex of Head of Household, Source of Income and Level of Income*

Distinctions made among applicants for public housing on the basis of sex of the head of the household,[108] source of income or level of

Housing Authority's statement describing tenant selection in HUD-funded programs, the racial guidelines were established "as a result of the general consensus of the management staff" on the importance of racial mix for the manageability of the project. NHHA DESCRIPTION, *supra* note 37, at 1. More baldly, one official claimed that the racial quotas were set "arbitrarily." Interview with Winston, *supra* note 40.

103. *See* notes 67-70 and accompanying text *supra*.

104. It may, in fact, be that the only way to deal with these units in a manner consistent with the 1974 Act is to raze them.

105. *See* note 58 *supra*.

106. Interviews with White and Randall, *supra* note 42.

107. R. SCOBIE, PROBLEM TENANTS IN PUBLIC HOUSING 9, 99 (1975) [hereinafter cited as R. SCOBIE].

108. There is some ambiguity as to whether the housing authority is concerned about a balance of one- and two-parent families, or of male- and female-headed families. The

income can be upheld under the equal protection clause of the fourteenth amendent if they are rationally related to a valid objective of the local housing authority.[109] It is the position of this Article that the criteria adopted by New Haven do not effectuate the primary goals of the income mixing provisions of the Act—the preservation of solvency of local authorities and the creation of "healthier" neighborhoods.[110] This will be demonstrated through the use of empirical data. The receptivity of a court to the use of such data as the basis of a legal attack under the equal protection clause is unclear because of the broad deference given to defendants when the rational relationship test is used. Plaintiffs must show that there is no such relationship.[111] Meeting the burden of proof becomes more difficult in the face of the likely arguments of housing authorities that income mixing[112] and

authority's description of New Haven's Housing Management Improvement Program uses the latter categories but the computer printout of the applicants uses the former. From conversations with officials of the authority, it appears that New Haven is chiefly concerned about the presence of a male adult in the home.

It has been argued that sex, like race, should be a suspect classification. The Supreme Court edged toward doing so in Frontiero v. Richardson, 411 U.S. 677 (1973), but has since continued to evaluate sex-based classifications on a rationality test. *See* Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974).

It could be argued that the Court's refusal to use a standard of strict scrutiny in *Kahn* did not indicate a rejection of that standard but rather a modification of it where the statutory classification benefits women. If this was the rationale, then strict scrutiny should be applied in cases involving sexual classifications employed to the detriment of women. For the purposes of this Article, it will be assumed that a mere rationality test is appropriate in sex discrimination cases. *See generally* Note, *Sex Discrimination in Welfare Legislation*, 12 URBAN L. ANN. 125 (1976).

109. Traditionally, courts have held that a legislative classification scheme does not deny equal protection of the laws so long as the scheme is rationally related to some valid state objective; that is, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See* Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970). When the classification is suspect, courts have subjected it to close scrutiny, and required that it be justified by a compelling state interest. Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. U.S., 323 U.S. 214 (1944) (racial classification).

110. Congress did not define its notion of social health in the debates preceding passage of the Act. *See* notes 23-30 and accompanying text *supra*. The meaning of the term "healthy" is therefore unclear. For the purposes of this Article, a healthy community will be defined as one without a high rate of vandalism, social conflict or "problem areas," as defined by housing authority officials. *See* notes 126-35 and accompanying text *infra*.

111. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

112. It is possible to argue that discriminations based upon wealth that lead to an absolute deprivation of a desired benefit should be subject to strict scrutiny in an equal protection framework. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1

avoiding "concentrations of low-income and deprived families with serious social problems" are themselves valid state goals because of their inclusion in the Act.[113]

A local authority concerned about solvency is likely to rely on the conventional wisdom that poor families, including welfare recipients, and female-headed families are more expensive to house because they are more likely to get behind in rent payments and to cause excessive maintenance costs.[114] But conventional wisdom is not evidence and courts have invalidated housing authority regulations that have discriminated against welfare recipients on this basis.[115]

(1974), sets out criteria under which a classification based on wealth may be subjected to strict scrutiny.

> The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

Id. at 20. The problem with such broad language is that the cases cited by the Court all involved fundamental rights. Bullock v. Carter, 405 U.S. 134 (1972) (access to ballot); Tate v. Short, 401 U.S. 395 (1971) (incarceration of indigents unable to pay fine); Williams v. Illinois, 399 U.S. 235 (1970) (incarceration because of inability to pay fine); Griffin v. Illinois, 351 U.S. 12 (1956) (access to transcript in criminal appeals). Housing, however, has never been held to be a funamental right under the constitution.

The degree to which the present system results in absolute deprivation for the lowest income applicants can be shown by a comparison with an alternative allocative mechanism that Congress could have chosen. If Congress had chosen to allocate places in public housing by setting the rental in all public housing units at some flat rate, such as $50 per month below the market rate, then most low-income families would not have been absolutely deprived of public housing since they could choose to spend a greater portion of their income on housing. In contrast, under the Act, a family denied a place in public housing because of its indigency does not have the option of offering to pay more of its income for rent and thus obtaining housing; instead, it is absolutely excluded.

113. For a discussion of the problems inherent in defining the legislative purpose for the rational relationship test, see Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

> It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it. . . . The nature of the burdens or benefits created by a statute and the nature of the chosen class's commonality will always suggest a statutory purpose—to so burden or benefit the common trait shared by members of the identified class. A statute's classifications will be rationally related to such a purpose because the reach of the purpose has been derived from the classifications themselves. Legislative purpose so defined is nearly tautological but it is also the purpose suggested by the plain terms of the statute.

Id. at 128.

114. *See, e.g.*, Starr, *Which of the Poor Shall Live in Public Housing?*, 23 THE PUB. INTEREST 116 (1971).

115. In Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968), a suit challenging the policy of a city housing authority to exclude welfare

Moreover, empirical studies tend to discredit these assumptions. A recent study of public housing tenants in Wilmington, Delaware, found that sex of the head of household, number of parents in the home, source of income or size of income were not good indicators of whether a family would cause excessive costs.[116] These costs were defined by a formula that included rent delinquency and maintenance charges resulting from abuse of property.[117] This study suggests that

recipients, the court noted:

> Regarding the welfare recipients' reliability as to payment of the monthly rent, it would seem that some welfare recipients may have a history of delinquency in their payments whereas others may be dependable. . . . [W]here the welfare recipient has been known to be reliable and where his application for tenancy has been approved by the Department of Social Services as being compatible with his support budget, it would be an arbitrary classification in violation of the Equal Protection Clause of the Fourteenth Amendment to reject that applicant, despite whatever personal qualities he may possess, solely on the basis of the applicant's status as a recipient of welfare funds.

Id. at 138.

In a similar suit challenging a rental agent's refusal to admit welfare recipients to a private apartment complex which was part of an urban renewal project, the Second Circuit declared that "the state or its alter egos may not relegate welfare recipients to second-class citizenship solely because they receive welfare subsistence." Male v. Crossroads Assocs., 469 F.2d 616, 622 (2d Cir. 1972). *See* Battle v. Municipal Housing Auth., 53 F.R.D. 423 (S.D.N.Y. 1971) (requirement that leases of tenants who are welfare recipients must be cosigned by the Westchester County Department of Social Services is not rationally related to the goal of maintaining the local housing authority's solvency and invidiously discriminates against welfare recipients).

116. HOUSING MANAGEMENT IMPROVEMENT PROGRAM, HUD, WHA'S APPLICANT PREDICTION MODEL 28, 69-70 (1975). What makes the contrast between this study and the Starr article so striking is the difference in the support they offer for their conclusions. Starr cites no support for his contention that "[i]t is the fatherless households that cause the most vandalism," Starr, *supra* note 114, at 117-18, and he infers from Sternlieb's study of New York housing that welfare tenants cause housing to deteriorate, even though Sternlieb does not believe his data supports such a connection, and notes that social science research on the subject has been "permeated with folklore rather than clear findings." G. STERNLIEB & B. INDIK, THE ECOLOGY OF WELFARE: HOUSING AND THE WELFARE CRISIS IN NEW YORK 11-12, 72 (1973). Sternlieb did find a statistical correlation between substandard housing and the presence of welfare recipients as noted by Starr, *id.* at 75, but expressly declined to draw a causal connection. *Id.* at 64, 66-67, 89.

In contrast, the Wilmington study was the result of a detailed analysis of the social characteristics of tenants who caused excessive costs to the housing authority. The study was funded by HUD's Housing Management Improvement Program as the first step in the development of a prototype applicant prediction model which could be used by other housing authorities as well. HOUSING MANAGEMENT IMPROVEMENT PROGRAM, HUD, WHA'S APPLICANT PREDICTION MODEL 40 (1975). Ironically, the Wilmington Housing Authority has disregarded totally the results of its own study and has adopted tenant selection criteria which closely parallel those of the New Haven Housing Authority. Telephone interview with Mary Hitchener, Executive Director, Wilmington Housing Authority, April 21, 1975.

117. The study defined excessive cost by means of a formula including rent delinquency and excessive maintenance costs. Rent delinquency was computed as the prod-

discrimination against public housing applicants for the reasons given above is not rationally related to the goal of maintaining an authority's solvency through seeking to decrease maintenance costs and rent delinquency.

Since continued solvency is a valid state goal, however, a local housing authority may discriminate on the basis of wealth in a way that is rationally related to that goal. An authority is permitted to charge higher rents to higher income tenants.[118] Admitting higher income applicants leads to greater rent receipts and decreases the likelihood of insolvency. The problem with this selection criterion, at least from a policy standpoint, is that there is nothing in the Act to require that a local authority admit only enough higher income tenants to prevent its insolvency. Thus, an authority might subsidize its own inefficiency with the rentals of higher income tenants, to the detriment of the other basic social objective of providing low-income housing.[119] Fostering inefficiency in government agencies is not a valid state interest. To the contrary, each local housing authority is required to show, as a condition for receiving an annual subsidy, that it is following "sound management practices . . . in the operation of the project."[120] A local housing authority with a preference for higher income tenants should be required to show that its policy is rationally related to the legitimate interest of remaining solvent, that the authority is operating its units according to good management principles and is still failing to remain solvent, and that it is favoring higher income tenants only to the extent necessary to avoid insolvency. A recent study of fourteen local housing authorities shows that many of them operate inefficiently and that application of sound management principles would significantly decrease reliance on HUD subsidies.[121] One source of inefficiency would

uct of the number of months the tenant was in arrears, the average monthly rental paid by delinquent tenants and a constant, representing the likelihood that the tenant will pay off his rental arrears debt. This constant depended on whether the tenant had signed and was honoring a repayment agreement. The excessive maintenance factor was computed as the sum of two dollar amounts: the actual dollar value of maintenance fee in arrears, multiplied by a constant, representing the likelihood that the debt would be repaid; and the estimated expenditure or saving to be incurred by the housing authority when the tenant moves out based on the tenant's treatment of the premises. HOUSING MANAGEMENT IMPROVEMENT PROGRAM, HUD, WHA'S APPLICANT PREDICTION MODEL, 16-23 (1975).

118. HCDA § 201a(1), 42 U.S.C. § 1437a(1) (Supp. V 1975), *amending* 42 U.S.C. § 1407(1) (1937).

119. *See* notes 7-9 and accompanying text *supra*.

120. HCDA § 201d(c)(4), 42 U.S.C. § 1437d(c)(4) (Supp. V 1975).

121. GOV'T ACCOUNTING OFFICE, LOCAL HOUSING AUTHORITIES CAN IMPROVE THEIR OPERATIONS AND REDUCE DEPENDENCE ON OPERATING SUBSIDIES (1975).

be eradicated if local authorities were to establish more equitable rent schedules since over-income tenants are now being charged a lower percentage of their incomes as rent than are lower-income tenants.[122] For example, if the New York City Housing Authority charged over-income tenants a rent that would cover operating costs, it could recover an additional nine million dollars per year and still be within the twenty-five per cent maximum.[123] This would have increased its rental income by ten per cent annually and would have decreased its need for a HUD subsidy by more than twenty per cent.[124] Similarly, inefficiencies resulting from inadequate rent collection procedures and inadequate attention to vacancies cause substantial financial losses to local authorities.[125] If these inefficiencies were eliminated, it would be possible to maintain a housing authority's solvency without weighting the admissions process too heavily in favor of higher-income applicants.

The alternative justification advanced for discrimination on the basis of amount and source of income, and sex of head of household is that neighborhoods are socially healthier if they do not have concentrations of female-headed families and poor people, including welfare recipients.[126] This theory has never been ratified in housing legislation.[127] Case law has not addressed the constitutionality of discrimination against female-headed families. At least one case has specifically disapproved discrimination against welfare recipients when they were absolutely denied acess to a subsidized housing project.[128] Other cases have held discrimination on the basis of welfare recipiency and poverty to be improper when plaintiffs argued that persons should be ex-

122. *Id.* at 19.

123. *Id.* at 15.

124. *Id.*

125. *Id.* at 31, 45.

126. Interview with White, *supra* note 42; *see* notes 27-30 and accompanying text *supra* for views of members of Congress.

127. The Act does not state that local housing authorities should avoid tenants who are welfare recipients or in which the family is headed by a female; rather it says that authorities should avoid "concentrations of low-income and deprived families with serious social problems." HCDA § 201d(c)(4), 42 U.S.C. § 1437d(c)(4) (Supp. V 1975). While Congress might have said that there is a state interest in creating projects integrated according to sex of head of household and source of income, it did not do so. It did attempt to create projects integrated by wealth. *But see* notes 117-19 and accompanying text *supra*.

128. Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968). The court noted that it was a legitimate goal for the apartment complex to seek tenants who would cooperate with one another. But it rejected this as a rationale for excluding welfare recipients: "It appears clear to this Court that a welfare recipient need not be an uncooperative tenant and indifferent occupant or an inconsiderate neighbor." *Id.* at 138.

cluded on the basis of those factors.[129] In New Haven, however, there is no absolute bar to welfare recipients and the very poor, although admission of such groups is limited. On the empirical level there is little factual support for the contention that limiting the number of poor persons, including welfare recipients, and female-headed families in public housing creates "healthier" communities.[130] A recent study of the Boston Housing Authority indicated no correlation between problem areas, as defined by housing authority officials, and concentrations of either female-headed families or welfare recipients.[131] The study also found no correlation between the sex of the head of household or source of income and the existence of conflict[132] or aggressive antisocial behavior. [133] To the extent that property abuse would be considered a sign of an unhealthy community, the Boston findings are reinforced by the Wilmington study which also noted a lack of correla-

129. Nucleus of Chicago Homeowners v. Lynn, 372 F. Supp. 147 (N.D. Ill. 1973), *aff'd*, 524 F.2d 225 (7th Cir. 1975); Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd in part, rev'd in part on other grounds and remanded*, 523 F.2d 88 (2d Cir. 1975) (The Second Circuit specifically affirmed the opinion of the district court as to discrimination against poor people.)

In *Nucleus of Chicago Homeowners*, a community organization contended that HUD had to file an environmental impact statement before building a public housing project on the theory that low-income tenants would be more likely to be criminal and violent, and have little regard for property and hard work. 372 F. Supp. at 148-49. In rejecting plaintiff's position, the court refused to rely on the testimony of plaintiff's expert witnesses, two social scientists, who contrasted the probable behavior of public housing tenants and the probable behavior of the plaintiffs. *Id.* at 150.

In *Trinity Episcopal School Corp.*, plaintiffs argued that permitting an increased number of low-income residents in their neighborhood would lead to neighborhood deterioration. The court rejected this argument. 387 F. Supp. at 1079. The court also rejected plaintiffs' argument that an increased poor population would lead to "tipping" analogous to "ghettoization" which allegedly accompanies over-concentration of black families in a particular neighborhood. *Id.* at 1065.

130. *See, e.g.*, Starr, *supra* note 114, at 116. Starr provides no more statistical support for his contention that concentrations of welfare families have adverse social effects, than for his contention that they cause property damage, *see* note 116 *supra*; nor do the congressional hearings provide any factual analysis of the social characteristics of "healthy" neighborhoods, *see* notes 27-30 *supra*.

131. R. SCOBIE, *supra* note 107, at 59, 63, 96-97, 101, 106. In this study, "problem areas" were defined by asking several public housing project managers to mark on maps those areas which they considered to be, or which were generally known to be, problem areas. Typically, the areas were associated with a high incidence of vandalism or the presence of derelicts, were used as teenage hangouts, or had very large and disruptive families in them. Scobie found that the only common characteristic of problem areas was their design. *Id.* at 55, 63, 70, 73, 96, 97. Scobie did not treat income level as a variable in his study.

132. *Id.* at 70, 73. A complaint log was kept for a period of ten weeks to record inter-tenant conflict.

133. *Id.* at 60.

tion between social characteristics and excessive maintenance cost.[134] Thus exclusion of female-headed families, poor persons and welfare recipients from public housing does not appear to be an effective way to create "healthy" communities.[135]

Furthermore, even if it could be shown that communities composed of persons with varied incomes that also contain a balance of welfare recipients, working families and of one- and two-parent families were socially desirable, it would still not prove that exclusionary housing authority admissions policies are an effective means of achieving this goal. Some neighborhoods dominated by private housing have extremely high concentrations of poor persons, welfare recipients and female-headed families.[136] Given this fact, following the policy in public housing may be not only ineffective but counterproductive.[137]

IV. A Permissible Method of Implementing Income Mix Policy

The goal of creating balanced communities within public housing would clearly cause no problems if there were enough subsidized housing available for all families who might be deemed eligible. But even given the shortage of such housing, less offensive means than discriminatory admissions criteria are available. Some of these techniques are suggested by the Act itself. Housing authorities could allow over-income tenants to remain in public housing, charge them rental rates commensurate with their incomes and the operating costs of the

134. *See* notes 116-117 and accompanying text *supra*.

135. Scobie concludes:

> [T]his study of problem tenants and of the process through which they are identified gives no support to the arguments that by screening out problem families or dependent families, or any other general category, we might be able to produce relatively problem-free residential areas.

R. Scobie, *supra* note 107, at 75.

136. *See* notes 72-75 and accompanying text *supra*.

137. The fear that the policy would in fact be counterproductive was expressed during the hearings on the Act by Anthony Henry, President, National Tenants Organization, who objected to:

> [the] desire to make "model communities" of public housing enclaves at the expense of the outside community by keeping down the number of very poor residents. While this may perhaps aid the public housing project, it works severe hardships on the very poorest who cannot afford housing in the private market and are condemned to cold, overcrowded vermin-infested slums that shorten their lives and kill their morale and initiative.

Hearings on S. 2490, 2507, 2508 Before the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. at 191 (1973).

unit, and eliminate other sources of inefficiency.[138] Eligibility limits could be raised, thereby opening public housing to a population representing a broader income range. To be effective, this step would have to be accompanied by improvements in existing projects to attract such applicants.[139] In addition, in cities where public housing tenants now have a range of incomes but tend to live in units segregated by income, families could be transferred to create mixtures within a given unit.[140]

For the future, scatter-site housing is a necessary element of any long-term, meaningful solution since it can effectively create mixed neighborhoods. If a small unit of public housing of no more than thirty or forty units is placed in a neighborhood of primarily private housing, it need not change the demographic character of the whole neighborhood causing tipping problems. If the applicant pool of the housing authority tends to have homogeneous characteristics, whether of race, income or sex, then a balanced community can be created by placing the units in neighborhoods with a different mix of characteristics.

The idea of building low density, low-income housing units is not new.[141] Increasingly, housing authorities are moving away from high-rise construction to small developments scattered over a large region. These have met with less resistance from communities since the latter need not fear that their unique characteristics will be altered by an influx of a large new population.[142] In fact, communities have no

138. *See* notes 121-25 and accompanying text *supra*; Supp. Brief for Appellants on Remand at 13, Fletcher v. Housing Auth., 491 F.2d 793 (6th Cir. 1974), *vacated and remanded*, 419 U.S. 812 (1974), *judgment reinstated*, 525 F.2d 532 (6th Cir. 1975).

139. Supp. Brief for Appellants on Remand at 13, Fletcher v. Housing Auth., 491 F.2d 793 (6th Cir. 1974), *vacated and remanded*, 419 U.S. 812 (1974), *judgment reinstated*, 525 F.2d 532 (6th Cir. 1975).

140. *Id.*

141. *See, e.g.*, Navasky, *The Benevolent Housing Quota*, 6 How. L.J. 30, 66-68 (1960). The first units built by the New Haven Housing Authority in 1941 were low-density structures of no more than three stories, scattered over several city blocks. *See* NEW HAVEN HOUSING AUTHORITY, ANNUAL REPORT 15 (1968); note 36 *supra*. Although many public housing units in New Haven and around the country fit the public stereotype of crowded highrises, at least 80% of the nation's public housing units do not. In fact, only in the largest cities with populations of more than 500,000 are highrise buildings common for family units. *Hearings on H.R. 10036, 7227, 10688 and 10689 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess., pt. 2, 1301 (1973), *reprinting* NAT'L ASS'N OF HOUSING AND REDEV. OFFICIALS, MYTHS/REALITIES OF URBAN RENEWAL, *summarized in* 30 J. OF HOUSING 170 (April 1973).

142. Hearings on H.R. 10036, 7227, 10688, and 10689 *Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess., pt. 2, 1085 (1973), *reprinting* NAT'L ASSOC. OF REGIONAL COUNCILS, STRAIGHT TALK ABOUT HOUS-

reason to fear that a small low-income housing project will hurt their neighborhoods.[143] Thus, scatter-site housing provides an acceptable way to create balanced communities, not only within public housing but in the larger neighborhood, without requiring invidious discrimination.

Scatter-site housing does not address the goal of making public housing economically self-sufficient. If, however, a major goal of the national housing policy is to remain that of "remedying the acute shortage of decent, safe and sanitary dwellings for families of low income,"[144] there are only a few realistic options for limiting subsidies to present levels. One possibility would be to provide public housing units to the most needy. Since this policy would of necessity not be self-supporting, it would require limiting the number of units to the number that current subsidies could support. A second alternative would be to permit persons with higher incomes to apply for public housing and to build enough units so that all applicants could be accepted at a sufficient range of rentals to make the program self-supporting.

If neither of these solutions is politically or economically feasible, then Congress and the courts must come to grips with the irony that low-income housing authorities, created to house the poor, are being pressured by economic constraints to close their doors to the poor. The national housing policy, as implemented in New Haven and elsewhere, may have lost sight of the basic human need it was intended to serve.

ING YOUR REGION 7 (1973). *But see* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S. Ct. 555 (1977) in which a suburb of Chicago refused to rezone a tract within its boundaries to accommodate proposed racially integrated low- and moderate-income housing. The suburbs action was challenged as having a racially discriminatory effect and thus violating the equal protection clause. The Supreme Court found no constitutional violation, but did not decide whether the refusal to rezone violated the Fair Housing Act. A refusal to rezone for low-income housing might have a substantial effect on scatter-site housing. *But, cf.* City of Hartford v. Towns of Glastonbury, West Hartford and East Hartford, 45 U.S.L.W. 2339 (D. Conn. Jan. 1977) (town ineligible for federal community development grant until it submits accurate assessment of housing needs of low income persons expected to reside there).

143. For example, a study of the Boston Housing Authority showed that the only characteristics consistently associated with "problem areas" in public housing were high density projects with a high concentration of large apartments and a correspondingly large number of children. R. SCOBIE, *supra* note 107, at 63.

144. HCDA § 201, 42 U.S.C. § 1437 (Supp. V 1975), *amending* 42 U.S.C. § 1401 (1937).