

INTENTIONAL RACIAL DISCRIMINATION AND SEGREGATION
BY THE FEDERAL GOVERNMENT AS A PRINCIPAL
CAUSE OF CONCENTRATED POVERTY: A
RESPONSE TO SCHILL AND WACHTER

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Schill and Wachter's *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*¹ is a rich and stimulating article on a vitally important topic: the role of federal housing law and policy in creating the concentrations of poverty that devastate our society. The authors of this article and the organizers of this Symposium deserve great credit for addressing one of the most serious problems in United States society today: the extreme residential separation imposed on blacks and the concentrated poverty that results.

I have two general criticisms of the article. My first, and principal, criticism is that Schill and Wachter pay too little attention to the racial discrimination and segregation that pervade the federal housing programs. They begin by identifying several causes of concentrated poverty, including racial discrimination and federal housing policies, but do not discuss the conjunction of these two causes. Douglas Massey and Nancy Denton have shown that a fundamental way in which federal housing policies have concentrated poverty has been through racial discrimination and segregation in the administration of those programs.² The Civil Rights Commission has reported that of all the sources of residential segregation, "[t]he Federal Government . . . has . . . been most influential in creating and maintaining urban residential segregation."³ If we agree that residential segregation concentrates black poverty, then federal housing policy stands indicted as a principal

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¹ Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: The Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285 (1995).

² See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

³ U.S. COMM'N ON CIVIL RIGHTS, *TWENTY YEARS AFTER BROWN* 114 (1977).

cause of concentrating poverty.⁴ The bulk of my response addresses the issue of racial segregation in the federal housing programs.

My second criticism is that the language of Schill and Wachter's article creates confusion by often treating as synonyms the terms "black," "poverty," and "problem household" and the terms "low-income," "poor," and "welfare recipient." The non-equivalence of the first three terms should be obvious. The non-equivalence of the second three terms is a matter of statutory and administrative definition. Using national average figures, "low-income," for most federal housing programs, means an income of no more than \$28,000 per year for a family of four;⁵ "poor" means an income approximately half of that, or \$14,335 per year;⁶ and recipients of "welfare" or, as I prefer, public assistance, receive cash benefits of no more than approximately \$5200 per year, less than half the poverty-level income.⁷ Analysis of the issues is obscured when these concepts are not distinguished from one another.

In this response, I comment on four aspects of Schill and Wachter's article: (1) causes of concentrated poverty in the public housing program; (2) the relationship of large public housing developments to neighborhood poverty; (3) current policies that concentrate poverty in public housing; and (4) possible solutions to the concentration of poverty. Public housing must be considered in the context of the full array of federal housing laws and policies, including the Home Owners Loan Corporation (HOLC),⁸ the home

⁴ See David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 L. & SOC. INQUIRY 407, 409 (1994) (book review).

⁵ See Kathryn P. Nelson, *Whose Shortage of Affordable Housing?*, 5 HOUSING POL'Y DEBATE 401, 406-08 (1994). For many housing programs, "low income" in the context of low-income families is defined as "incomes [that] do not exceed 80 per centum of the median income for the area," 42 U.S.C. § 1437a(b)(2) (1988); the national average area median income was \$34,800 in 1989. See Nelson, *supra*, at 407.

⁶ See HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 2D SESS., OVERVIEW OF ENTITLEMENT PROGRAMS 1155 (Comm. Print 1994); U.S. DEP'T OF COMMERCE, WEIGHTED AVERAGE POVERTY THRESHOLDS IN 1993 (1994) (stating the 1993 weighted poverty threshold as \$14,763 for a family of four); U.S. DEP'T OF COMMERCE, Preliminary Estimate of Poverty Thresholds in 1994 (1995) (unpublished statistics, on file with author) (stating the estimated 1994 weighted poverty threshold as \$15,141 for a family of four).

⁷ See HOUSE COMM. ON WAYS AND MEANS, *supra* note 6, at 369 (reporting the median state AFDC maximum benefit for a four-person family as \$435 per month). Under current law, families receiving AFDC assistance are eligible for Medicaid coverage, and most are eligible for food stamp benefits as well. See *id.* at 333-34.

⁸ For a discussion of the segregatory impact of the HOLC, see KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 195-

mortgage loan insurance and guarantee programs of the Federal Housing Administration (FHA), the Department of Veterans Affairs (VA), and the Department of Agriculture;⁹ urban renewal and community development programs;¹⁰ tax programs, including the home mortgage interest deduction and the low-income housing tax credit; and the many demand- and supply-side subsidies of the public and assisted housing programs administered by HUD and the Department of Agriculture. In addition, it is important to take into

203 (1985).

⁹ For the segregatory effect of the FHA and VA programs, see *id.* at 203-18; Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. U. L. REV. 491, 590-95 (1979) (discussing studies concluding that FHA-assisted housing programs tend to maintain, if not exacerbate, existing segregative housing patterns).

The Department of Agriculture (DOA) has provided only partial and unsatisfactory information about the civil rights aspects of its housing programs. The 1987 Housing and Community Development Act requires HUD and DOA to file annual civil rights reports. See Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 562, 101 Stat. 1815, 1944 (1988). The DOA has filed only one, for fiscal year 1991. Although the DOA acknowledged that the report had "shortcomings" and promised improvements, no other report has been filed. FARMERS HOME ADMIN., U.S. DEP'T OF AGRICULTURE, THE BENEFICIARIES OF USDA HOUSING PROGRAMS IN RURAL AMERICA I (1992) (fiscal year 1991 annual report to Congress).

¹⁰ See CITIZENS' COMMISSION ON CIVIL RIGHTS, A DECENT HOME: A REPORT ON THE CONTINUING FAILURE OF THE FEDERAL GOVERNMENT TO PROVIDE EQUAL HOUSING OPPORTUNITY 13 (1983) [hereinafter A DECENT HOME] ("[Urban renewal] programs operated to push displaced minorities into overcrowded substandard, segregated neighborhoods, often creating more slums and blights."); see also *Pleune v. Pierce*, 765 F. Supp. 43, 47 (E.D.N.Y. 1991) (holding that agency failure to consider the effect of a mixed-use development project on the racial composition of surrounding low- and moderate-income neighborhoods violated Title VIII of the Civil Rights Act of 1968); *NAACP v. Kemp*, 721 F. Supp. 361, 370 (D. Mass. 1989) (holding that agency failure to require effective fair housing enforcement in its administration of the Urban Development Action Grants and Community Development Block Grants to Boston violated Title VIII of the Civil Rights Act of 1968); *Garrett v. City of Hamtramck*, 335 F. Supp. 16, 27 (E.D. Mich. 1971) (holding HUD and the City of Hamtramck liable under Title VIII of the Civil Rights Act of 1968 for approving an urban renewal project that did not include plans to provide new low-income housing developments for black residents displaced by the project's renovations); *CAROLYN ADAMS ET AL., PHILADELPHIA: NEIGHBORHOODS, DIVISION, AND CONFLICT IN A POSTINDUSTRIAL CITY* 106-10 (1991) (explaining how federal and state urban renewal plans failed to spur development in Philadelphia's inner-city low-income neighborhoods); *MARTIN ANDERSON, THE FEDERAL BULLDOZER* 7-8, 64-65, 217 (1964) (showing the disparate racial impact of a federal urban renewal program); *ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960*, at 273-75 (1983) (summarizing the role of Chicago's redevelopment program in displacing and segregating blacks); Marc A. Weiss, *The Origins and Legacy of Urban Renewal, in URBAN AND REGIONAL PLANNING IN AN AGE OF AUSTERITY* 68-72 (Pierre Clavel et al. eds., 1980).

account other federal policies that have a substantial role in concentrating poverty¹¹ and the shared responsibility of state and local government agencies for racial discrimination and concentrated poverty.¹²

¹¹ Federal and local highway and mass transit policies have had a substantial impact on housing segregation and concentrations of poverty. See Yale Rabin, *Federal Urban Transportation Policy and the Highway Planning Process in Metropolitan Areas*, 451 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 21 (1980) (noting "the isolation of central city transit-dependent minorities from suburban employment" as an adverse impact of highways). The federal interstate highway program alone displaced tens of thousands of minority, mostly black, people and destroyed neighborhoods, some of which were integrated. Mass transit policies also have perpetuated residential segregation patterns. See JACKSON, *supra* note 8, at 168-71 (discussing transportation and federal policies with regard to mass transit); Raymond A. Mohl, *Race and Space in the Modern City: Interstate-95 and the Black Community in Miami*, in URBAN POLICY IN TWENTIETH-CENTURY AMERICA 100 (Arnold R. Hirsch & Raymond A. Mohl eds., 1993). David James identifies another federal program whose powerful, although perhaps unintended, consequence was segregatory: "The implementation of the New Deal farm programs and succeeding farm policies that drastically reduced the acres devoted to cotton and tobacco in the South is the best example of a policy with unintended ghetto-building consequences." James, *supra* note 4, at 409 n.7.

¹² School policies, for example, have been a powerful cause of housing segregation, which in turn concentrates poverty. Segregation in public education creates segregated housing because only in desegregated school systems will whites remain in or move to neighborhoods of significant minority population. See Gary Orfield, *Ghettoization and Its Alternatives*, in THE NEW URBAN REALITY 161, 192 (Paul E. Peterson ed., 1985) [hereinafter Orfield, *Ghettoization*] ("[T]here is considerable evidence that metropolitan school desegregation plans produce more integrated residential areas over time, . . . since there is no fear of ghettoization of the local schools and no incentive to move to a whiter school elsewhere."); Gary Orfield, *Housing as a Justification for Resegregating Schools: Consequences of Changing Judicial Interpretations* 46-80 (April 1995) (unpublished manuscript, on file with author); see also JULIET SALTMAN, A FRAGILE MOVEMENT: THE STRUGGLE FOR NEIGHBORHOOD STABILIZATION 396 (1990) ("Unless racial balance is empirically present in a neighborhood's public schools, a majority of whites with children will not perceive that neighborhood as a desirable one and will not move into it.").

Other local decisions that cause segregation include the exercise of development controls, the provision of municipal facilities and services, and similar activities funded under the Community Development Block Grant program. See Yale Rabin, *The Roots of Segregation in the Eighties: The Role of Local Government Actions*, in DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 208, 212-24 (Gary A. Tobin ed., 1987) (discussing specific local government policies that have had a segregative effect); see also THOMAS L. PHILPOTT, THE SLUM AND THE GHETTO: IMMIGRANTS, BLACKS, AND REFORMERS IN CHICAGO, 1880-1930, at 304 (1991) ("Public officials . . . did their best to locate and administer clinics and dispensaries, parks and playgrounds, swimming pools and beaches, libraries, schools, and other facilities in a way that would hold the mingling of blacks and whites to a minimum.").

I. THE CAUSES OF CONCENTRATED POVERTY IN THE PUBLIC HOUSING PROGRAM

Schill and Wachter assert that the federal housing program that "has generated the most intense pattern of concentrated poverty" is the public housing program.¹³ This is true only in the narrow sense that public housing serves the largest number of poor people. More poor people live in public housing than in housing associated with any other government program because poor people generally are excluded from the other housing programs. Much to the credit of the public housing program, it has been open and hospitable to very poor people when every other government housing program has excluded or severely limited their participation.¹⁴

To some extent, very poor people are excluded from other programs because the programs provide only a shallow subsidy, so that very poor people would have to pay extremely high percentages of their incomes for rent. (This is true, for example, of the Low Income Housing Tax Credit program and interest-credit programs such as sections 221(d)(3)¹⁵ and 236.¹⁶) Some very poor people still would choose to live in those shallow-subsidy developments, preferring to pay high percentages of their income rather than live in terrible housing; others have Section 8 certificates or vouchers and would choose to use them in those shallow-subsidy developments. Many of these very poor families, however, are excluded from these developments by a series of devices: minimum income requirements, refusal to accept Section 8 certificate or voucher holders,¹⁷ refusal to accept public assistance recipients, or outright

¹³ Schill & Wachter, *supra* note 1, at 1291.

¹⁴ See Sandra J. Newman & Ann B. Schnare, *Last in Line: Housing Assistance for Households with Children*, 4 HOUSING POL'Y DEBATE 417, 434 (1993). Newman and Schnare conclude:

The most striking finding of this research is that the system of housing assistance channels different types of households with children into different housing programs. Households with the highest incomes, lowest welfare dependency rates, highest educational achievement, fewest children, and smallest concentration of female heads are most likely to end up in privately owned assisted stock. Households applying for assistance directly to PHAs are likewise sorted into groups, and the most disadvantaged end up in public housing.

Id.

¹⁵ 12 U.S.C. § 1715l(d)(3) (1988).

¹⁶ 12 U.S.C. § 1715z-1 (1988).

¹⁷ In general, discrimination on the basis of income source is not prohibited. There are two federal exceptions. First, landlords who already rent to Section 8 tenants are prohibited from discriminating against other Section 8 applicants. See 42

racial, ethnic or other illegal discrimination. Even more telling, there are other federal housing programs that offer deep subsidies and that are, in theory, as available to very poor people as public housing. The Section 8 program, for example, has essentially the same income eligibility and preference requirements as does public housing, but the incomes of Section 8 residents are higher than the incomes of public housing residents.¹⁸ This is because very poor people often are excluded from Section 8. Similarly, the Section 202 program for the elderly and handicapped is deeply subsidized and can serve very poor people, but the income levels in Section 202 housing are above the levels in public housing.¹⁹ We need to ask not what it is about public housing that makes it open to very poor people, but what it is about the other federal housing programs that keeps very poor people out of them.

*A. Racial Discrimination and Segregation in Public
and Other Housing Programs as a Cause
of Concentrated Poverty*

The first and most important point to make is that public housing and the other federal housing programs have been used to create and maintain racial discrimination and rigid segregation which, as Massey and Denton show, concentrates poverty.

U.S.C. § 1437f(t) (1988). Second, Low Income Housing Tax Credit sponsors are prohibited from discriminating against Section 8 certificate holders under I.R.C. § 42(h)(6)(B)(iv) (Supp. V 1993). Even in the few jurisdictions in which it is illegal to discriminate on the basis of source of income, such discrimination is common. *See, e.g.,* SHAUN DONOVAN, JOINT CENTER FOR HOUSING STUDIES, MOVING TO THE SUBURBS: SECTION 8 MOBILITY AND PORTABILITY IN HARTFORD 33 (Working Paper W94-3, 1994) (discussing Section 8 discrimination in Hartford, Connecticut). On occasion, such discrimination has been invalidated as a pretext for discrimination on the basis of race or gender. *See* HUD v. Ross, No. HUDALJ 01-92-0466-8, Fair Hous.-Fair Lending (P-H) ¶ 25,075 (HUD Office of Admin. Law Judges July 7, 1994).

¹⁸ Public housing and Section 8 applicants may not have incomes above 80% of the median income in the geographic area, and most may not have incomes above 50% of the median. *See* 42 U.S.C. §§ 1437a(b)(2), 1437(n) (Supp. V 1993); C.F.R. §§ 913.103-913.105 (1991). In 1989, median household income for public housing tenants was \$6571; for certificate/voucher holders it was \$7060; and for private, project-based subsidized tenants it was \$8074. *See* CONNIE H. CASEY, U.S. DEP'T OF HOUS. & URBAN DEV., CHARACTERISTICS OF HUD-ASSISTED RENTERS AND THEIR UNITS IN 1989, at 10 (1992). Newman and Schnare report a similar disparity: average household income for public housing tenants is \$9142; for certificate and voucher holders, \$9609. *See* Newman & Schnare, *supra* note 14, at 422. Furthermore, "observed income patterns may also reflect an ongoing tendency to channel the upper end of the eligible population into privately owned assisted stock." *Id.* at 424.

¹⁹ *See* CASEY, *supra* note 18, at 2, 10.

The federal government intentionally established the public housing program on a *de jure* racially segregated basis.²⁰ Schill and Wachter note that the federal public housing program gave considerable authority over siting decisions to local communities, enabling some to exclude public housing altogether and allowing others to confine public housing to high-density developments on small sites.²¹ The historical and legal literature establishes that the single most powerful explanation for this exclusion and confinement of family public housing has been hostility to people of color, particularly blacks;²² and the historical and legal literature also

²⁰ See *Gautreaux v. Romney*, 448 F.2d 731, 739 (7th Cir. 1971) (holding HUD liable for intentional racial segregation in Chicago's public housing); *Young v. Pierce*, 628 F. Supp. 1037, 1043-51 (E.D. Tex. 1985) (describing HUD's involvement in the creation and perpetuation of segregated public housing in east Texas and nationally); *A DECENT HOME*, *supra* note 10, at 6 ("Only one program, public housing, explicitly recognized a right of participation by minorities and then only on a segregated basis."); LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 123-24 (1968) (commenting on the open, explicit nature of public housing race discrimination and segregation); ALEXANDER POLIKOFF, *HOUSING THE POOR: THE CASE FOR HEROISM* 11-15 (1978) (describing the federal role in segregating public housing); ROBERT C. WEAVER, *THE NEGRO GHETTO* 157-77 (1948) (explaining early administrative policies that promoted racial segregation). Indeed, when Congress was considering the legislation that became the 1949 Housing Act, an amendment to desegregate the public housing program was defeated by the liberals, such as Senator Paul Douglas, on the ground that they thought the program could not survive were it not segregated. See NATHANIEL S. KEITH, *POLITICS AND THE HOUSING CRISIS SINCE 1930*, at 93 (1973) (explaining that "they had the difficult choice of voting for nondiscrimination and assuring defeat of the legislation, or voting against desegregation and saving the bill"). A timely illustration of intentional segregation is provided in a suit recently filed in Baltimore, Maryland, challenging the intentional and continued segregation in the public housing program there. A federal report on McCulloh Homes, the "colored housing project," recites that adjacent projects were planned to "offer a splendid barrier against the encroachment of colored" people into a "good white residential neighborhood." See *Class Action Complaint* at 17, *Thompson v. HUD* (D. Md. filed Jan. 31, 1995) (No. MJG 95-309).

²¹ The U.S. Housing Act restricted the placement of public housing to communities that would enter into "cooperation agreements" with local public housing authorities. 42 U.S.C. § 1437c(e)(2) (1988). The "cooperation agreement" requirement has been a principal tool of white communities that wish to exclude public housing. See POLIKOFF, *supra* note 20, at 12 ("By simply refusing to make [a cooperation agreement], local officials could veto a proposed project . . . [and] had the power to decide whether public housing was to be built at all in their communities . . ."). See generally Richard M. Gervase, *Remedy or Not?: Public Housing Segregation and Suburban Exclusion* (Feb. 9, 1994) (unpublished manuscript, on file with author).

²² See, e.g., *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 910-12 (N.D. Ill. 1969) (finding no criterion other than race that could plausibly explain the location of public family housing sites in overwhelmingly segregated communities). Suburbs have accepted multifamily subsidized housing when it has been designated for elderly

establishes that the federal government has been fully complicit with the local agencies in that discrimination.²³ Segregation in public housing and other federal programs continues.²⁴ A recent HUD report confirms that "most African Americans living in public housing live in a largely African-American and poor community, whereas whites, living in elderly housing, typically live in areas with large numbers of whites who are not poor."²⁵ The federal government never has performed its constitutionally mandated duty to

white occupancy and protected by rules that give preferences to residents of suburbs. *See Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994). Cities have sited family public housing in predominantly minority neighborhoods, rejecting sites in white areas of the cities.

²³ For contemporary indictments of federal segregative activities in public housing, see *supra* note 20; see also *Clients' Council v. Pierce*, 711 F.2d 1406, 1423-25 (8th Cir. 1983) (holding that, despite findings of noncompliance, agency permitted Texarkana public housing program to discriminate illegally); *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1246-47 (6th Cir. 1974) (holding that HUD violated Title VIII of the Civil Rights Act of 1968, Title VI of the Civil Rights Act of 1964, and the Fifth Amendment by approving a housing project that discriminated against African-Americans); *Graves v. Romney*, 502 F.2d 1062, 1063-64 (8th Cir. 1974) (leaving undisturbed the district court's unchallenged holding that HUD violated Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968 by not considering the impact of a public housing project on the racial concentration and potential urban blight on the neighborhood), *cert. denied*, 420 U.S. 963 (1975); *Gautreaux*, 448 F.2d at 739-40 (holding HUD liable for playing a significant role in constructing and maintaining Chicago's segregated public housing system); *Young*, 628 F. Supp. at 1056-57 (holding that agency knowingly created, promoted, and funded racially segregated housing in 36 counties of east Texas in violation of the Fifth Amendment, Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, and the Civil Rights Act of 1866); *Hicks v. Weaver*, 302 F. Supp. 619, 623 (E.D. La. 1969) (holding that agency violated Title VI of the Civil Rights Act of 1964 by controlling and directing the Bogalusa Housing Authority's segregated housing program).

²⁴ See Craig Flournoy & George Rodrigue, *Separate and Unequal: Illegal Segregation Pervades Nation's Subsidized Housing*, DALLAS MORNING NEWS, Feb. 10, 1985, reprinted in *Discrimination in Federally Assisted Housing Programs: Hearings Before the Subcomm. on Hous. and Community Dev.*, 99th Cong., 1st & 2d Sess. 22-57 (1986).

The fact that segregation has not been disestablished is evident in federal litigation in which the duty to desegregate has been imposed explicitly for particular geographic areas and yet has not been satisfied. See, e.g., *Clients' Council*, 711 F.2d at 1426 (holding that evidence in HUD's own files clearly indicates that HUD officials acted in discriminatory manner); *Sanders v. HUD*, 872 F. Supp. 216, 223 (W.D. Pa. 1994) (approving consent decree); *Walker v. HUD*, 734 F. Supp. 1231, 1234 (N.D. Tex. 1989) (ruling that consent decree was violated); *Young*, 628 F. Supp. at 1060 (addressing discrimination in 36 counties in east Texas); HUD's Responses to Plaintiffs' Requests for Admissions at 24, *Walker v. HUD*, 734 F. Supp. 1231 (N.D. Tex. 1989) (No. 3:85-CV-1210-R) [hereinafter HUD's Responses].

²⁵ JOHN GOERING ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., *THE LOCATION AND RACIAL COMPOSITION OF PUBLIC HOUSING IN THE UNITED STATES: AN ANALYSIS OF THE RACIAL OCCUPANCY AND LOCATION OF PUBLIC HOUSING DEVELOPMENTS 1* (1994).

undo that segregation, to eliminate its vestiges "root and branch."²⁶

Racial discrimination in other federal housing programs has helped to confine blacks to public housing. The Section 8 Existing Housing Assistance Program is administered in a racially discriminatory way, with HUD's complicity:²⁷ blacks in public housing or on the public housing waiting list are told that they cannot apply for Section 8 without losing their place on the public housing list; they are refused access to Section 8 subsidies in the suburbs through the employment of residency preferences and other discriminatory mechanisms.²⁸ Why are Section 202 projects predominantly white? Why do black elderly and handicapped people more often live in public housing than in Section 202 housing? Very poor whites have options that very poor blacks lack. While whites are only 35% of the public housing population, they hold 45% of the certificates/vouchers and reside in 57% of the subsidized, project-based housing.²⁹ The HUD-assisted programs' affirmative marketing regulations are ignored.³⁰ The federal government's largest contemporary subsidized housing production program—the Low

²⁶ *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968). The obligation is imposed in the school cases, notably *Green*, 391 U.S. at 437-38, and is extended to housing by *Hills v. Gautreaux*, 425 U.S. 284, 305-06 (1976). See also Roberta Achtenberg, *Keynote Address*, 143 U. PA. L. REV. 1191, 1193 (1995) (stating that "successive administrations . . . have repeatedly missed opportunities to combat discrimination").

²⁷ Minority recipients of and applicants to public housing assistance in Buffalo have filed a class action against HUD and the Buffalo housing authorities alleging racially discriminatory administration of the Section 8 Existing Housing Program. See *Comer v. Cisneros*, 37 F.3d 775, 785-86 (2d Cir. 1994); see also *Glover v. Crestwood Lake Section 1 Holding Co.*, 746 F. Supp. 301 (S.D.N.Y. 1990); GEORGE E. PETERSON & KALE WILLIAMS, *URBAN INST., HOUSING MOBILITY: WHAT HAS IT ACCOMPLISHED AND WHAT IS ITS PROMISE?* 18-20 (1994) (acknowledging the existence of a Section 8 submarket); Philip D. Tegeler et al., *Transforming Section 8 into a Regional Housing Mobility Program 5* (1994) (unpublished manuscript, on file with author).

²⁸ See *Comer*, 37 F.3d at 789-92.

²⁹ See 1992 HUD Civil Rights Report 3. Newman and Schnare further conclude that:

The most dramatic difference between public housing residents and certificate and voucher holders relates to race. According to our estimates, 72 percent of all households with children in public housing are African American, compared with 44 percent in the certificate and voucher programs and 45 percent in privately owned assisted stock.

Newman & Schnare, *supra* note 14, at 424-25.

³⁰ See Laura Lazarus, *Affirmative Fair Housing Marketing Regulations: HUD's Failed Attempt to Implement a Good Idea 14-23* (1993) (unpublished manuscript, on file with author).

Income Housing Tax Credit—operates without any civil rights regulations and without information about the race of residents and the extent of segregation in or near project sites.³¹ Both HUD and the President have acknowledged the federal government's failure affirmatively to advocate measures to promote fair housing.³²

I consider that the single most important reason why poor people are concentrated in conventional public housing is that racial discrimination continues to move poor people out of federally aided housing other than public housing. I proceed, however, to consider the other suggestions made by Professors Schill and Wachter.

B. *Bad Physical Conditions in Public Housing as a Cause of Concentrated Poverty*

I completely agree with Schill and Wachter that bad physical conditions in public housing promote concentrated poverty. When public housing is substandard, people who have options other than public housing will live elsewhere.³³ The factors that create bad physical conditions, therefore, encourage poverty concentration. Those factors include: the systemic omission of a capital-replacement reserve from the public housing program; consistently inadequate funding for major repair and rehabilitation, whether termed modernization or comprehensive improvement;³⁴ inadequate definition and funding of operating subsidies; and deplorable management and shirking of responsibility by several public housing authorities (PHAs), with HUD refusal to use its statutory authority to correct the conditions.³⁵ The poor physical conditions in

³¹ See Jarrett T. Barrios, *Federal and State Fair Housing Obligations Administering the Low-Income Housing Tax Credit 16* (Aug. 31, 1994) (unpublished manuscript, on file with author).

³² See Achtenberg, *supra* note 26, at 1194-95; see also Exec. Order No. 12892, 59 Fed. Reg. 2939 (1994) (establishing the President's Fair Housing Council, a group headed by the Secretary of HUD, which is to coordinate and oversee the implementation of federal fair housing programs); HUD's Responses, *supra* note 24, at 76 (admitting that HUD "did not fulfill HUD's obligations under 42 U.S.C. § 3608(e)(5) of the Civil Rights Act of 1968").

³³ See Newman & Schnare, *supra* note 14, at 426-27 ("[P]rivately owned assisted stock is in better shape than public housing or the stock of privately owned housing occupied by certificate and voucher holders.").

³⁴ See MICHAEL A. STEGMAN, *MORE HOUSING, MORE FAIRLY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON AFFORDABLE HOUSING, BACKGROUND PAPER ON THE LIMITS OF PRIVATIZATION 54-55* (1991); see also Rachel G. Bratt, *Public Housing: The Controversy and Contribution*, in *CRITICAL PERSPECTIVES ON HOUSING* 335, 340 (Rachel G. Bratt et al. eds., 1986).

³⁵ HUD has the statutory authority to take over housing authorities that default

predominantly minority public housing projects are both the results of racial discrimination and an effective barrier to desegregation.

*C. Federal Income Eligibility, Preference Requirements,
and Rent Regulations as Causes of Concentrated
Poverty in Public Housing*

1. Income Eligibility

Contrary to Schill and Wachter's suggestion, federal income eligibility limits do not explain the extreme poverty concentrations that exist in public housing. The income limits are set at 80% and 50% of HUD's adjusted area median family income (HAMFI): "low income" is defined as 80% of HAMFI and "very low income" is defined as 50% of HAMFI.³⁶ The national average HAMFI in 1989 was \$34,800. The very-low-income level, 50% of HAMFI, was \$17,400. The median household income of public housing residents was approximately \$6571, one-third of the very-low-income eligibility level.³⁷ Public housing incomes fall far below not only the income eligibility limit but also the incomes in other programs with similar eligibility standards.³⁸ Thus, something other than income eligibility explains why the very poorest people live in public housing, rather than in other housing that has the same or similar income eligibility requirements.

on their obligations, including the obligation to maintain decent conditions. HUD, however, has been very reluctant to use this authority, leaving the courts to impose receiverships. *See, e.g., Velez v. Cisneros*, 850 F. Supp. 1257, 1278-79 (E.D. Pa. 1994) (holding that public housing tenants had a private right of action against HUD as the operator of a local housing authority that engaged in de facto demolition of public housing projects); *Perez v. Boston Hous. Auth.*, 400 N.E.2d 1231, 1254 (Mass. 1980) (upholding the imposition of receivership on the board of a city housing authority after the board failed to perform its duties properly). HUD has generally refused to exercise its statutory authority to take over PHAs that were failing in their obligations to residents.

³⁶ For the definition of "low income," see *supra* note 5.

³⁷ See *CASEY*, *supra* note 18, at 10-11. It is important to emphasize that many of these very poor people are elderly. Forty-seven percent of the public housing residents in 1989 depended upon Social Security or pensions for income; only 45% depended upon AFDC or SSI. Stegman found that 38% of public housing residents were elderly and only 42% of the households included a wage earner. See *STEGMAN*, *supra* note 34, at 52.

³⁸ See *supra* note 18.

2. Preferences

Federal preferences may play a role in bringing more very poor people into public housing. The preferences are designed for persons who have been displaced by government action, who live in substandard housing, or who pay more than 50% of their income for rent.³⁹ Eligibility for federal preferences—that is, worst-case housing need—is much more common among households at approximately 35% of area median income than among those households with incomes between 35% and 50%.⁴⁰ If PHAs follow the law, most people who are admitted into public housing will be those who hold federal preferences.⁴¹

Nonetheless, there are several reasons why it is unlikely that the preference scheme has had substantial responsibility for concentrating extremely poor people in public housing. First, federal preferences apply only to some new admissions, not to all public housing units.⁴² Second, PHAs are allowed to “rank” preferences, as well as to define the categories, and are able to use verification requirements to reduce the likelihood that very poor people will be able to gain admission.⁴³ Thus, for example, “PHAs may give top

³⁹ See NATIONAL HOUS. LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 2.3.22 (2d ed. 1994). Federal preferences for applicants who live in substandard housing, who are displaced, or who are overburdened by rent are set forth in 42 U.S.C. §§ 1437d(c)(4)(A)(i) and 1437f(d)(1)(A)(i) (1988 & Supp. V 1993). The HUD regulations implementing the preferences are set forth at 24 C.F.R. §§ 880.613, 881.613, 882.219, and 960.211 (1994).

⁴⁰ See Kathryn P. Nelson & Jill Khadduri, *To Whom Should Limited Housing Resources Be Directed?*, 3 HOUSING POL'Y DEBATE 1, 3 (1991) (citation omitted).

⁴¹ It is by no means clear to what extent PHAs do follow the federal preference rules. The rules themselves have changed substantially, and HUD regulations have not kept up with the statutory changes. See Barbara Sard, *The Massachusetts Experience with Targeted Tenant-Based Rental Assistance for the Homeless: Lessons on Housing Policy for Socially Disfavored Groups* (pt. 2), 1 GEO. J. ON FIGHTING POVERTY 182, 199 n.27 (1994) [hereinafter Sard, *Socially Disfavored Groups*]. HUD's most recent preference regulations are at 59 Fed. Reg. 36,616 (public housing and Section 8 noncertificate and voucher) and 59 Fed. Reg. 36,662 (certificate and voucher) (July 18, 1994). Moreover, PHAs often have been hostile to the federal preference requirements and have ignored them. See, e.g., *Paris v. HUD*, 843 F.2d 561, 562 (1988) (stating that the scheme “approved by HUD, seeks to provide for a broad economic mix of tenants by allowing certain higher income families to ‘skip’ over ‘very low income’ families that are senior to them on the waiting list”). At least one experienced advocate suspects that “there may be widespread violation of the federal preference regulations.” Barbara Sard, *Housing the Homeless Through Expanding Access to Existing Subsidized Housing Programs*, 36 VILL. L. REV. 1113, 1130 (1991) [hereinafter Sard, *Housing the Homeless*].

⁴² See Sard, *Socially Disfavored Groups*, *supra* note 41, at 184.

⁴³ See *id.* at 187; Sard, *Housing the Homeless*, *supra* note 41, at 1141; see also Gary

preference to those deemed homeless through no fault of their own—for example, as a result of natural disaster, domestic violence despite judicial restraining orders, or court-ordered eviction where the rent exceeded some substantial percentage of household income.⁴⁴ While applicants with legal representation may be successful in overcoming some such barriers, few applicants will have such aid.⁴⁵ Perhaps most importantly, communities have been permitted to give highest preference to the federal preference holders who also have local preferences. Thus, persons who satisfy local residency preferences are admitted before people from other areas.⁴⁶

Third, and perhaps conclusively, the Section 8 projects and the Section 8 certificate and voucher programs, which have substantially the same preference requirements as the conventional public housing program, have average and median income levels that are much higher than those in public housing.⁴⁷ Plainly, the agencies and sponsors administering those programs are finding higher-income residents who satisfy the federal preference system. The preference requirements, therefore, do not fully explain why most very poor people are admitted into public housing.

3. Rent Regulation

Rent standards may contribute to concentrating poverty in public housing. From 1969 to 1981, public housing rents were limited, in general, to 25% of household income. In 1981, Congress directed an increase to 30% of household income.⁴⁸ This change, to some degree, made it more attractive for those with other options to leave, thus concentrating poverty in public housing. To some extent, this has been offset by the authorization to public housing agencies to apply rent ceilings and allow higher-income

L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591, 592-93 (1987-1988).

⁴⁴ Sard, *Socially Disfavored Groups*, *supra* note 41, at 187.

⁴⁵ *See id.* at 187.

⁴⁶ *See* Sard, *Housing the Homeless*, *supra* note 41, at 1129; *see also* *Comer v. Cisneros*, 37 F.3d 775, 792 (2d Cir. 1994) (stating that under the U.S. Housing Act, HUD may assist a family which lives in a jurisdiction before a family which does not, subject to constitutional limits).

⁴⁷ Until the July 18, 1994 regulations, private landlords were required to take *more* federal preference holders than must PHAs, but the private landlords' tenants had higher incomes than do the PHA's. *See supra* note 18.

⁴⁸ *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357.

people to stay.⁴⁹ HUD economists, however, hypothesize that increasing rent charges from 25% to 30% of income "probably had greater effect" on inducing higher-income residents to leave public housing than did the 1981 limitation of admission to those with 50% of area median income.⁵⁰

D. *Procedural Rights as Causes of Concentrated Poverty*

Since the 1960s, federal, state, and local courts, legislatures, and agencies have accorded public housing applicants and residents a variety of procedural and substantive "rights."⁵¹ Schill and Wachter assert that "the resulting loss of PHA freedom to select and evict tenants has contributed to the concentration of poverty within public housing."⁵² They offer no empirical support for this assertion; what theoretical justification they offer is deficient for the reasons that follow.⁵³

⁴⁹ See Schill & Wachter, *supra* note 1, at 1292-96.

⁵⁰ See Nelson & Khadduri, *supra* note 40, at 2.

⁵¹ I put the word "rights" in quotation marks to question whether the "rights" are real or illusory. In this area, as with respect to preferences, there is reason to doubt the extent to which tenants' "rights" are recognized in practice. See, e.g., *Samuels v. District of Columbia*, 770 F.2d 184, 199-202 (D.C. Cir. 1985) (challenging the D.C. PHA's failure to implement grievance procedure regulations). In general, unless public housing applicants and residents have counsel, which seldom is the case, they are unlikely to know what "rights" they theoretically possess and are unlikely to be able to enforce those "rights."

Public housing applicants and residents have many rights "on paper," including of course the "right" not to be subject to discrimination on the basis of race, color, or national origin. We know that discrimination on the basis of race, color, and national origin occurs now at housing authorities; only recently, the New York City Housing Authority settled a case in which the U.S. Department of Justice accused it of discrimination on the basis of race, color, and national origin, assigning white applicants to "white only" projects. See *Davis v. New York City Hous. Auth.*, 839 F. Supp. 215, 217-18 (S.D.N.Y. 1993). When we know that this kind of racial discrimination was occurring in New York in 1990, can we doubt that applicants and residents are deprived of many other "rights" in public housing programs through the country?

⁵² Schill & Wachter, *supra* note 1, at 1299. This is an instance of the fallacious identification of poverty with behavior. "Problem" tenants are not necessarily very poor tenants. Poor elderly people, for example, are not considered "problem" residents. There is no rational or empirical support for the proposition that very poor families will be "problem" residents.

⁵³ The author of this Paper is proud to have been one of the legion of legal services, civil rights, and civil liberties advocates who worked to secure and maintain these procedural rights. This certainly affords her particular knowledge of the subject. Readers will have to determine for themselves whether the association affects the author's judgment on this issue.

Applicants' procedural rights are essentially the same for all HUD housing programs; the procedural rights cannot be the reason why more very poor people are in public housing.⁵⁴ Applicants for all the HUD-assisted housing programs are entitled to have their applications measured against known "ascertainable standards" and to have their applications considered "in some reasonable manner."⁵⁵ Applicants who are rejected are entitled to be given notice stating the reasons for the rejection.⁵⁶ All applicants are entitled to some form of review of the rejection.⁵⁷ When an application for federal preference, which often will determine admissibility, is denied, the applicant is entitled only to notice and an opportunity to meet with some person, who may even be a subordinate of the person who made the original denial.⁵⁸ These procedures are not very substantial.

Schill and Wachter assert that "the ability of PHAs to screen out potentially troublesome tenants has been reduced as has their power to evict those harmful to the community."⁵⁹ In fact, however, PHAs retain ample authority to screen and to evict persons "harmful to the community." The procedural protections for tenants threatened with eviction are eliminated for tenants accused of conduct harmful to others. So long as a due process court proceeding is available, no grievance procedure is required for evictions premised on alleged drug-related criminal activity on or near the premises or other criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or PHA employees.⁶⁰

⁵⁴ These rights are grounded in constitutional due process requirements. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Caulder v. Durham Hous. Auth.*, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); *Escalera v. New York City Hous. Auth.*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

⁵⁵ *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 264-65 (2d Cir. 1968); see also *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982) (Section 8); *Colon v. Tomkins Square Neighbors, Inc.*, 294 F. Supp. 134 (S.D.N.Y. 1968) (subsidized housing).

⁵⁶ See HUD HOUSING PROGRAMS, *supra* note 39, § 2.15.5.

⁵⁷ See *id.* § 2.15.6. The review takes different forms for different programs.

⁵⁸ See *id.* § 2.15.6.4; 24 C.F.R. 882.219(k) (1994).

⁵⁹ Schill & Wachter, *supra* note 1, at 1299.

⁶⁰ See 42 U.S.C. § 1437d(k) (1988 & Supp. V 1993); 24 C.F.R. § 966.51(a)(2)(i) (1994) (providing that a PHA may exclude from its administrative procedure any grievance involving eviction based on either "criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other residents or employees of the PHA" or "drug-related criminal activity"); see also HUD HOUSING PROGRAMS, *supra* note 39, § 13.2.4.2, at 13/5 to 13/7 (discussing these exceptions to ordinary PHA grievance procedure).

There are substantive constraints on admissions and evictions. PHAs are not permitted to condition admission or continued occupancy upon per se status standards. Thus, PHAs are not permitted to exclude an applicant for being an unwed mother or a single parent.⁶¹ These standards apply by handbook or by contract to most of the other housing programs.⁶² “[S]o long as status discrimination and Fair Housing Act violations are avoided and applicable federal preferences are applied,”⁶³ however, PHAs and other landlords have broad discretion to condition admission and continued occupancy upon satisfaction of “desirability” standards.⁶⁴ PHAs may deny admission or evict tenants for “poor housekeeping,”⁶⁵ nonpayment of rent,⁶⁶ prior criminal activity or record,⁶⁷ or other evidence of “undesirability.”⁶⁸

⁶¹ See HUD HOUSING PROGRAMS, *supra* note 39, § 2.6. These per se standards are illegal because they are irrational. An intensive evaluation of Boston public housing between 1969 and 1975 concluded that “for every single-parent family identified as a problem tenant, 16 were causing no trouble. Race, size of family, length of occupancy, source of income, and age of children all proved to be equally irrelevant.” *Id.* § 2.9 (citation omitted). A fuller discussion of the irrationality of associating status or poverty with behavior is warranted but not possible within the constraints of this Paper.

HUD’s new regulations authorize employment as a selection preference. See 24 C.F.R. 260.205(a) (1994). The fiscal year 1995 Appropriations Act allows a preference for working families for public housing and project-based Section 8 housing. See Pub. L. No. 103-327, 108 Stat. 2298 (1994) (to be codified at 42 U.S.C. §§ 1437d(c)(4)(A)(ii), 1437f(d)(1)(A)(ii)).

⁶² See HUD HOUSING PROGRAMS, *supra* note 39, § 2.6.1, at 2/28 n.315 (listing HUD handbook provisions and program contracts which ban the automatic exclusion of applicants based on class membership).

⁶³ *Id.* § 2.8.4, at 2/38.

⁶⁴ *Id.* § 2.9, at 2/39 (explaining that “[d]esirability standards can be justified . . . if reasonably related to sheltering the poor”).

⁶⁵ *Id.* § 2.9.1, at 2/40 to 2/41.

⁶⁶ See *id.* § 2.9.2, at 2/41; see also *id.* § 14.2.4.7, at 14/18 to 14/19 (regarding absence of tenant fault).

⁶⁷ See *id.* § 2.9.3, at 2/42 to 2/43.

⁶⁸ See *id.* § 14.2.7.4 (noting vague standards for undesirability). Other tenant actions which may constitute grounds for eviction include damage to unit and creating a disturbance. See *id.* §§ 14.2.7.5-.11.

An experienced tenant advocate who studied the issue recently reported that “regardless of the unproven merits of tenant suitability screening, it is lawful and encouraged in public housing and tends to exclude members of socially disfavored groups.” Sard, *Socially Disfavored Groups*, *supra* note 41, at 204 n.68. Sard described a recent Greater Boston Legal Services (GBLS) client who was denied eligibility by the Boston Housing Authority (BHA) “because her criminal record information showed an unresolved arrest for prostitution 22 years ago.” *Id.* at 204 n.65. Sard reports that her office worked to get this denial reversed at a BHA administrative appeal and explained that it was “one of the few reversals of a tenant suitability denial” the GBLS

Eviction from subsidized housing involves loss of two important interests: a home and a financial contribution to the cost of housing. The importance of the interests is the basis for requiring notice and an opportunity for a minimal due process hearing before these interests can be lost. Lesser protections have been accorded applicants. The protections are strongest where government involvement is greatest.

These protections cannot explain why more poor people are in public housing than in other kinds of subsidized housing. First, the fundamental notions of notice, fair consideration, and rational standards apply to all the programs. Second, the more elaborate provisions that govern PHA decisions, especially eviction, are inapplicable to allegations of criminal conduct, which in any event is not synonymous with poverty. Third, the substantive constraint—the requirement of good cause for action—allows PHAs broad discretion in admission and evictions. If there were no procedural and substantive protections, if PHAs could reject and evict with complete arbitrariness, public housing still would have the greatest concentrations of very poor people, because people of color, who disproportionately are poor, are excluded from other subsidized housing programs.

II. THE RELATIONSHIP BETWEEN PUBLIC HOUSING AND NEIGHBORHOOD POVERTY RATES

Schill and Wachter seek to suggest that large public housing developments for families cause neighborhood blight. They show that in Philadelphia such projects are located in neighborhoods with undesirable conditions. In response, I make two observations.

First, as Schill and Wachter emphasize, the public housing about which they write is large, multi-unit developments, and it is housing for families with children, not for elderly persons. Thus, their discussion does not pertain to low-rise, garden apartments or single-family housing, which together comprise 73% of total public housing.⁶⁹ Nothing in the Schill and Wachter article would

homelessness unit actually obtained. *Id.*; see also *id.* at 188 (stating that “PHAs . . . [may legally] reject potential tenants based on any type of criminal record, problems with misbehaving children, poor landlord references, history of difficulties in paying rent, or even allegations of messy housekeeping”).

⁶⁹ See STEGMAN, *supra* note 34, at 51 (“[J]ust 27 percent of all public housing developments are high-rise buildings; 32 percent are garden apartments; 16 percent are low-rise, walk-up apartments; and 25 percent are single-family or townhouse struc-

support those who oppose placing single-family scattered-site public housing units in better-served communities.⁷⁰

Second, Schill and Wachter demonstrate that in Philadelphia the location of large public housing developments for families strongly correlates with undesirable neighborhood conditions, but they do not prove that those public housing developments *cause* the undesirable neighborhood conditions. HUD and local governments put large public housing family developments into minority neighborhoods that lacked the political power to prevent being the object of municipal "dumping." For the same reasons, minority neighborhoods also suffer from diminished and degraded public services. The presence of large public housing developments and poor neighborhood conditions stem from the same cause; one does not cause the other.⁷¹

The Schill and Wachter regression analysis shows that many more poor families reside in Philadelphia census tracts with large numbers of public housing units than in Philadelphia census tracts without much public housing.⁷² This is entirely consistent with the hypothesis that public housing placement and high poverty are effects of another cause. Massey and Denton suggest racial segregation as a principal cause,⁷³ while economists George Galster and Ronald Mincy suggest that job growth and location are others.⁷⁴ HUD's recent report strongly suggests racial discrimina-

tures.")

⁷⁰ See, e.g., *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1193-94 (2d Cir. 1987) (describing the ability of "white" neighborhoods to exclude public housing), *cert. denied*, 486 U.S. 1055 (1988); see also *Forcing "Balance" Upsets Freedom*, OMAHA WORLD-HERALD, May 17, 1994, at 6 (opposing forced desegregation of low-income housing); Josh Kovner, *Third Arson Hits Morris Cove*, NEW HAVEN REG., Oct. 27, 1992, at 1 (detailing third arson of home targeted for low-income housing program); Mitch Raab, *Kindness Breaks Through Discord*, NEW HAVEN REG., Aug. 23, 1993, at 1 (noting neighborhood resistance to scattered-site housing).

⁷¹ See *Walker v. HUD*, No. 3:85-CV-1210-R (N.D. Tex. Feb. 7, 1995) (remedial order affecting DHA), at 1, 7 (acknowledging that a vestige of past discrimination pervades the Dallas Housing Authority (DHA) public housing projects in that 92% of black, nonelderly households are in segregated areas where the poverty rate exceeds 40%, and these units, projects, and neighborhoods are "substantially inferior to the conditions in which low income whites receive HUD assistance").

⁷² See Schill & Wachter, *supra* note 1, at 1306.

⁷³ See MASSEY & DENTON, *supra* note 2, at 84-88 (discussing the relationship between racial segregation and socioeconomic segregation).

⁷⁴ See George C. Galster & Ronald B. Mincy, *Understanding the Changing Fortunes of Metropolitan Neighborhoods: 1980 to 1990*, 4 HOUSING POL'Y DEBATE 303, 343-45 (1993) (discussing how job growth and the location of manufacturing employment affect neighborhood poverty along racial lines).

tion as the cause: “[T]he majority of African Americans living in public housing projects in the United States are living in poverty-concentrated areas, while the majority of public housing white tenants—both families and the elderly—are living in neighborhoods with substantially lower poverty rates.”⁷⁵

Large public housing developments for families need not cause neighborhood blight. The architecture is not at fault: many upper-income people, predominantly white, including families with children, live comfortably in large, high-rise buildings in upper-scale neighborhoods of New York and other cities. Concentration of poverty is not the crucial element: very poor people can live decently in large, high-rise buildings without blighting their neighborhoods—so long as the very poor people are white and elderly. Public housing for families does not necessarily blight surrounding neighborhoods: as Schill and Wachter report, studies show that the presence of public housing does not diminish surrounding property values.⁷⁶ In Montgomery County, Maryland, when public housing units were incorporated into high-income subdivision developments, property values in those developments increased more than in comparable developments without the public housing units.⁷⁷ What is crucial in Montgomery County is that the housing is racially and economically integrated. In general, neighborhood blight becomes an issue only when the public housing development is very large and the residents are all nonwhite, very poor families with children.

III. CURRENT POLICIES: THE ONE-FOR-ONE REPLACEMENT REQUIREMENT

Schill and Wachter attack the statutory requirement of one-for-one replacement for any public housing units demolished.⁷⁸ “The effects of the one-for-one replacement requirement,” they write, “have been pernicious for many inner-city communities. PHAs, lacking the money to build new units or renovate existing developments, have often been forced to retain deteriorated or vacant projects rather than demolish them.”⁷⁹ I want to offer a gloss on that: it is not the one-for-one replacement requirement that is at

⁷⁵ GOERING, *supra* note 25, at 31.

⁷⁶ See Schill & Wachter, *supra* note 1, at 1300 & n.70.

⁷⁷ See PETERSON & WILLIAMS, *supra* note 27, at 78.

⁷⁸ See 42 U.S.C. § 1437p (1988 & Supp. V 1993).

⁷⁹ Schill & Wachter, *supra* note 1, at 1314-15.

fault; it is noncompliance with the one-for-one requirement. Schill and Wachter's real argument is not against the one-for-one requirement, but against implementation of the requirement in a way that discourages replacement or rehabilitation of severely distressed public housing.

Five issues have plagued the one-for-one replacement debate. The first is whether subsidized units should be replaced at all. Those who deplore federal provision of housing subsidies obviously would welcome a diminution of the subsidized housing stock. Certainly, this is not Schill and Wachter's position. If one takes the view that the government should subsidize housing for people who cannot otherwise secure decent housing, the one-for-one requirement is beneficent, not pernicious: it assures that the precious stock of housing subsidies will not be diminished. Given that the government currently provides housing subsidies to only one in three poverty-level families,⁸⁰ housing subsidies need to be increased, not reduced.

The second issue is whether replacement should be by "hard" public housing units or by certificates or vouchers. "Hard" units have the virtue of long-term availability; certificates and vouchers are short-lived. "Hard" units also are more likely to include three-, four-, and five-bedroom units needed by large, low-income families. "Hard" units add to the stock of community-owned housing, while certificates and vouchers merely help pay rent.⁸¹ Certificates and vouchers, on the other hand, have the virtues of allowing choice and dispersal; they can enable racial and economic integration in jurisdictions in which PHAs might not be able to build units. This last virtue makes certificates and vouchers especially attractive to some and especially odious to others.⁸²

The third one-for-one replacement issue has been site selection. Just as certificates and vouchers have aroused enthusiasm and

⁸⁰ See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 1994, at 16 (1994).

⁸¹ The relative costs of the two programs are a matter of intense debate. HUD's most recent report is that the monthly subsidy per occupied unit of public housing is \$481, and the cost of a certificate for the same family would be \$440. The comparison does not take into account the capital asset that the public housing unit would represent. See Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urban Dev., *Will It Cost More to Replace Public Housing with Certificates?* (Mar. 1995) (issue brief, on file with author); Response of the National Housing Law Project (Apr. 14, 1995) (unpublished manuscript, on file with author).

⁸² See, e.g., Karen de Witt, *Housing Voucher Test in Maryland Is Scuttled by a Political Firestorm*, N.Y. TIMES, Mar. 28, 1995, at B10.

opposition for their capacity to undo or exacerbate segregation, replacement by "hard" public housing units poses the issue even more strongly. HUD's current Site and Neighborhood Standard regulation on its face favors siting in nonsegregated, nonimpacted areas,⁸³ although in reality the exceptions to the regulation have swallowed the general rule, and replacement units have been approved for segregated, poverty-concentrated locations.⁸⁴

In many situations, funding is available, but the actual provision of the replacement units is delayed because of political opposition to the siting of public housing units. In New Haven, Connecticut, for example, funding was available for replacement of the Elm Haven high-rise with scattered-site public housing, to be constructed or acquired in nonsegregated neighborhoods; although suitable sites were identified promptly, many years elapsed without significant progress toward replacing the units.⁸⁵ As this example suggests, a principal obstacle to replacing units is opposition to having black public housing residents living in nonsegregated, nonghetto neighborhoods. The opposition is to the people, regardless of the kind of housing in which they live. The opposition is not to the people's poverty: poor white people live in those neighborhoods without hindrance. The opposition is to the race and color of the would-be residents.

The fourth issue has been funding. Congress never has appropriated enough money to repair or replace all severely distressed public housing, and Congress has not allowed PHAs a free hand in allocating money between modernization and demolition/replacement.

The final issue has been competence. While some PHAs have done a very good job of modernization and demolition with replacement, others have allowed funding to stand unused.

Each of these issues demands its own solution, and the problem and solutions will differ for each public housing development in each community. More flexibility to use funding for replacement rather than modernization and for certificates and vouchers rather than hard units would be welcome.⁸⁶ The one response that ought

⁸³ 24 C.F.R. § 941.202(c) (1994).

⁸⁴ See NATIONAL HOUS. LAW PROJECT, PUBLIC HOUSING IN PERIL, 1990, at 79; see also Class Action Complaint, Christian Community Action, Inc. v. Kemp (D. Conn. 1991) (No. 391CV00296 TFGD).

⁸⁵ See Class Action Complaint, *supra* note 84, at 15-19.

⁸⁶ See U.S. GEN. ACCOUNTING OFFICE, PUBLIC HOUSING: FUNDING AND OTHER CONSTRAINTS LIMIT HOUSING AUTHORITIES' ABILITY TO COMPLY WITH ONE-FOR-ONE

to be unacceptable is elimination of the one-for-one replacement requirement. What that would achieve is simply elimination of subsidized units. Schill and Wachter's central point is that the worst result is keeping "deteriorated or vacant projects." I disagree. I think the worst result would be to eliminate the "deteriorated or vacant projects" without requiring that the subsidies be replaced, one for one, with whatever combination of "hard" units or certificates or vouchers would best produce decent housing with genuine free choice of location. The real solution to the problem of high-rises that should be demolished is an effective program of replacing these units with scattered-site units and certificates or vouchers in nonsegregated, nonpoor neighborhoods.

In the current political context, discussing the one-for-one replacement requirement is quite removed from reality: this Congress is likely to eliminate the requirement altogether. If the requirement should be eliminated, proposed demolitions will be challenged as violations of the constitutional and statutory civil rights obligations: the decision to demolish without replacement projects that housed minorities raises obvious civil rights issues. A lawful, humane, and responsible subsidized housing policy would honor the fundamental principle that the one-for-one requirement embodies: the need to increase, and certainly not to decrease, the quantity of decent, desegregative, subsidized housing opportunities for low-income people.⁸⁷

IV. SOLUTIONS

Schill and Wachter offer four solutions to the problem of concentrated poverty in public housing. Their proposals are: increasing fair housing enforcement, removing land use barriers that inhibit the production of affordable housing, changing several aspects of the current public housing program, and expanding housing mobility programs. I agree with them only about the last.

RULE 11 (1995) ("To assist housing authorities to make the best use of the resources at their disposal, the Congress should consider giving the Secretary of HUD the flexibility to approve alternative approaches to replacing nonviable housing that has been demolished or sold.")

⁸⁷ The Twentieth Century Fund Task Force on Affordable Housing urged that "no privatization effort should be undertaken without a clear commitment that every unit lost to the public housing stock will be replaced on a unit-for-unit basis." STEGMAN, *supra* note 34, at 16.

A. *Fair Housing Enforcement*

Fair housing enforcement alone is not a tool for deconcentrating poverty. Most fair housing enforcement is driven by individual complaints, and a disproportionate amount of the enforcement activity is on behalf of persons with disabilities and families with children rather than on behalf of racial and ethnic minorities.⁸⁸ Even when the complaints are of racial or ethnic discrimination, they are unlikely to come from very poor people. Relatively few poor people of color have the time, confidence, and psychic energy to pursue fair housing complaints.

Fair lending is of questionable utility for deconcentrating poverty. Schill and Wachter perform a very useful function in separating three distinct but related issues: to whom is the money being loaned, for what purpose is it being loaned, and in which neighborhoods will it be used? It is not enough to say that more money should be loaned to people of color or for minority neighborhoods: lending money to build more housing in those neighborhoods will not likely contribute to desegregation; lending more money to enable people to leave those neighborhoods will not promote deconcentration of poverty. Fair lending for single-family homeownership is a program directed at moderate- or middle-income blacks, not at very poor people: very poor people cannot afford homeownership in cities. If "fair lending" increases black homeownership in minority neighborhoods, it exacerbates racial concentration. If it enables blacks to move to white neighborhoods, it exacerbates poverty concentration by leaving poor blacks behind. In the relatively unusual event that fair lending programs enable higher-income whites to move to poor black neighborhoods, desegregation and deconcentration would occur at the expense of poor black people. Loans directed towards minority neighborhoods may be desirable, and they may promote physical improvement of the neighborhoods, but they are not tools for deconcentration and desegregation.

⁸⁸ See James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUSING POL'Y DEBATE 537, 565-66 & nn.162-63 (1992) (warning that fewer administrative enforcement resources will be available to combat traditional racial and ethnic discrimination because of a substantial increase in familial and disability bias claims).

B. *Land Use Regulation*

Encouraging affordable housing development alone will not do much to deconcentrate poverty. Shallow-subsidy, affordable housing reduces the cost of housing only by a relatively small amount; it cannot, standing alone, deconcentrate poor areas. Indeed, developing shallow-subsidy, affordable housing programs that include genuine fair housing principles might well enable moderate-income people to leave poor areas, thereby further isolating and concentrating people who are poor. This is not to say that affordable housing should not be constructed; rather, it is to insist that, to achieve deconcentration, affordable housing construction must be linked to both deeper subsidies and desegregative action. The provision of a deep subsidy is crucial to enable very poor people of color to move to nonpoor areas. Schill and Wachter suggest that providing shallow-subsidy units in higher-income white areas can achieve deconcentration and desegregation because poor blacks will use demand-side subsidies—Section 8 certificates and vouchers—to move to these units.⁸⁹ Experience shows, however, that that linkage is unlikely to be made unless it is required by law. The shallow-subsidy developments that now exist in white areas have not achieved racial desegregation, despite civil rights laws, including HUD's Affirmative Fair Housing Marketing Regulations.⁹⁰

C. *Changes in the Housing Programs*

Schill and Wachter fault the public housing program for concentrating poverty; I fault the other housing programs for excluding most poor people. Schill and Wachter propose changes to public housing; I maintain that solving the problems of public housing will require changes in other housing programs. Alternative housing must be made available to the very poor for whom public housing is now the only significant option. If public housing remains the only viable option for the thirteen million poor households in the United States, it will continue to be a source of concentrated poverty. If we are not willing to end poverty but want to deconcentrate it, we must make it possible for poor people to live in places other than public housing.

⁸⁹ See Schill & Wachter, *supra* note 1, at 1335-36; see also Michael H. Schill, *Race, the Underclass, and Public Policy*, 19 L. & SOC. INQUIRY, 433, 453 (1994).

⁹⁰ See *supra* text accompanying notes 27-32 (discussing HUD's complicity in perpetuating segregation).

One place to begin is with the deeply subsidized housing in predominantly white, nonpoverty areas. Public housing for the elderly often is located in predominantly white neighborhoods (and is occupied predominantly by white residents);⁹¹ Section 8 New Construction or Substantial Rehabilitation, Section 236 deep subsidy, Section 202 or 202/8 projects exist in white neighborhoods and serve white residents. Further, shallow-subsidy developments, publicly financed but privately owned, are located in predominantly white, nonpoverty-concentrated areas in cities and suburbs.⁹² An effective program of deconcentrating poverty and desegregating federally assisted housing would bring this stock of federally subsidized housing into compliance with civil rights laws, including the Affirmative Fair Housing Marketing Regulations.⁹³ Shallow-subsidy developments should be required to accept a percentage of Section 8 certificate and voucher holders or, at the least, be prohibited from discriminating against them.⁹⁴

The FHA home mortgage assistance program also should be used to promote desegregation and deconcentration. As Schill and Wachter point out, this program was a principal cause of segregation and poverty concentration;⁹⁵ now it should be used to undo the damage it caused.⁹⁶

As other forms of federal assistance produce new housing developments, these new developments should be required to include some very poor families. Such programs could be modeled on the program pioneered in Montgomery County, Maryland, in which an inclusionary zoning ordinance, in effect since 1974, requires subdivisions of fifty or more units to make available to the

⁹¹ See GOERING, *supra* note 25, at 1 (stating that "whites, living in elderly housing, typically live in areas with large numbers of whites who are not poor").

⁹² Seventy-six percent of all black households and 67% of all Hispanic households receiving federally subsidized housing assistance are in central cities, while 59% of all non-Hispanic white households receiving such assistance live outside central cities. See CASEY, *supra* note 18, at 2-3 (tabulating the characteristics of renter-occupied units).

⁹³ See Lazarus, *supra* note 30.

⁹⁴ At present, federal housing policy prohibits discrimination against Section 8 applicants only by landlords who already rent to other Section 8 tenants and by sponsors of LIHTC developments. For a discussion of this policy, see *supra* note 17.

⁹⁵ See Schill & Wachter, *supra* note 1, at 1309-11; see also JACKSON, *supra* note 8, at 206-18; Rubinowitz & Trosman, *supra* note 9, at 511-21.

⁹⁶ A revised FHA home mortgage assistance program would include incentives for home purchases that promote desegregation, including a lease-purchase option and a zero down payment program, such as those recommended by the Twentieth Century Fund Task Force on Affordable Housing. See STEGMAN, *supra* note 34, at 20.

local public housing agency a specified portion of units to lease to public housing residents. Because of the county's demographics, most of the people who move into these units are poor and black.⁹⁷

HUD has an important role to play in promoting such inclusionary zoning. When HUD has the discretion to disperse funds, it can and should give preference to communities that promote diversity. HUD should publicize programs like Montgomery County's and encourage other communities to emulate them.⁹⁸

The public housing program itself must be desegregated. Desegregation requires the provision of alternative subsidized housing opportunities, through tenant-based, demand-side subsidies, and by acquisition or construction of new public housing units. This desegregation is essential as a matter of constitutional and human rights. Furthermore, the conditions in public housing units, projects, and neighborhoods must be improved substantially; improvement requires the infusion of funds for operating subsidies and modernization, the creation of a replacement reserve in the program, and the absolute insistence upon competent and effective management, enforced by a HUD that will use its power to take over any housing authority that fails to provide decent housing for its residents.

D. *Expansion of Mobility Programs*

Schill and Wachter encourage the development of housing mobility programs like that developed in Gautreaux.⁹⁹ I fully agree

⁹⁷ See Florence W. Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 335, 347 n.94 (1993) (citing the Montgomery County inclusionary zoning ordinance, MONTGOMERY COUNTY, MD., CODE § 25A-1-12 (1989)).

⁹⁸ Fairfax County, Virginia has adopted a similar provision. "Any developer building over 50 housing units must set aside up to 15 percent as affordable housing. In return, the developer can build about 20 percent more housing per acre." Eric Lipton, *A Matter of Home Economics: Fairfax's Affordable Housing Turns Dreams into Reality*, WASH. POST, Mar. 19, 1995, at A1, A21.

⁹⁹ There is a vast literature about the Gautreaux mobility program. For works by James Rosenbaum, the principal researcher at Northwestern University, describing the results of the studies, see generally JAMES E. ROSENBAUM ET AL., *LOW-INCOME BLACK CHILDREN IN WHITE SUBURBAN SCHOOLS* (1986); JAMES E. ROSENBAUM ET AL., *SOCIAL INTEGRATION OF LOW-INCOME BLACK ADULTS IN WHITE MIDDLE-CLASS SUBURBS* (Center for Urban Affairs & Pol'y Research Working Paper No. 91-6, 1991); JAMES E. ROSENBAUM & PATRICIA MEADEN, *HARASSMENT AND ACCEPTANCE OF LOW-INCOME BLACK YOUTH IN WHITE SUBURBAN SCHOOLS* (Center for Urban Affairs & Pol'y Research Working Paper No. 92-6, 1992); JAMES E. ROSENBAUM & SUSAN J. POPKIN, *ECONOMIC AND SOCIAL IMPACTS OF HOUSING INTEGRATION* (1990); JAMES E.

with them except for their suggestion that procedural rights should be reduced.¹⁰⁰ As Peterson and Williams reported:

Mobility should be thought of as a long-term investment with a potential for long-term payoff. It generates immediate benefits in household satisfaction and safety. It is relatively inexpensive and generates some short-run economic benefits to offset the short-run costs of administration. The potential rewards are to be found in the lives of children and in the longer-run adjustments that families make.¹⁰¹

Mobility programs should be not only replicated but improved. As James Rosenbaum and his colleagues have reported, the Gautreaux

ROSENBAUM & SUSAN J. POPKIN, *THE GAUTREUX PROGRAM: AN EXPERIMENT IN RACIAL AND ECONOMIC INTEGRATION* (1990); Julie E. Kaufman & James E. Rosenbaum, *The Education and Employment of Low-Income Black Youth in White Suburbs*, 14 *EDUC. EVALUATION & POL'Y ANALYSIS* 229 (1992); James E. Rosenbaum, *Black Pioneers—Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?*, 2 *HOUSING POL'Y DEBATE* 1179 (1991) [hereinafter Rosenbaum, *Black Pioneers*]; James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 *N.C. L. REV.* 1519 (1993); James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 *HOUSING POL'Y DEBATE* 231 (1995); James E. Rosenbaum et al., *Low-Income Black Children in White Suburban Schools: A Study of School and Student Responses*, 56 *J. NEGRO EDUC.* 35 (1987); James E. Rosenbaum & Susan J. Popkin, *Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs*, in *THE URBAN UNDERCLASS* 342 (Christopher Jencks & Paul E. Peterson eds., 1991); James E. Rosenbaum et al., *White Suburban Schools' Responses to Low-Income Black Children: Sources of Successes and Problems*, 20 *URB. REV.* 28 (1988).

Alexander Polikoff, lead counsel in the *Gautreaux* litigation, has also written about this subject. See generally POLIKOFF, *supra* note 20; Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 *CHI.-KENT L. REV.* 451 (1988) (reflecting on the significance of raising questions about judicial involvement in restructuring institutions through litigation orders). Mary Davis, Associate Director of Chicago's Leadership Council for Metropolitan Open Communities and administrator of the program, has written on the issue as well. See Mary Davis, *The Gautreaux Assisted Housing Program*, in *HOUSING MARKETS AND RESIDENTIAL MOBILITY* (G. Thomas Kingsley & Margery A. Turner eds., 1993). Another close student of the program is Professor Leonard Rubinowitz of the Northwestern University Center for Urban Affairs and Policy Research. See Leonard S. Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 *N. ILL. U. L. REV.* 589 (1992). Professor Rubinowitz is preparing a book about *Gautreaux*.

For other writing on the *Gautreaux* mobility program, see KATHLEEN PEROFF, *U.S. DEP'T OF HOUS. & URBAN DEV., THE GAUTREUX HOUSING DEMONSTRATION: AN EVALUATION OF THE IMPACT ON PARTICIPATING HOUSEHOLDS* (1979); PETERSON & WILLIAMS, *supra* note 27, at 23-29; Roisman & Botein, *supra* note 97, at 335.

¹⁰⁰ Schill and Wachter are careful to urge, however, that "[b]efore eliminating or modifying these legal protections . . . their costs and benefits should be carefully analyzed." Schill & Wachter, *supra* note 1, at 1339 n.215.

¹⁰¹ PETERSON & WILLIAMS, *supra* note 27, at 9.

program succeeds despite the fact that the families do not receive educational counseling or supplemental assistance with employment, child care, transportation, or other problems.¹⁰² "A program that provided such support might produce even more encouraging results."¹⁰³

CONCLUSION

We should not have thirteen million very poor families in the United States, but we do. If we cannot alleviate their poverty, we must at least provide them with the opportunity to live in decent housing. Public housing has been virtually the only program available to these very poor families. We must open the rest of the housing stock, especially in previously "white" areas, to welcome and include these families. As we provide additional housing opportunities, we must also improve the conditions in public housing and the neighborhoods in which such housing is located. Nothing less than our humanity and our civilization are at risk if we shirk this duty.

¹⁰² See Rosenbaum, *Black Pioneers*, *supra* note 99, at 1206-08.

¹⁰³ James E. Rosenbaum, *Labor Market Experiences of Low-Income Black Women in Middle-Class Suburbs: Evidence from a Survey of Gautreaux Program Participants*, 12 J. POL'Y ANALYSIS & MGMT. 556, 571 (1993); see also MASSEY & DENTON, *supra* note 2, at 220 (endorsing these recommendations).