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## The Properties of Integration: Mixed-Income Housing as Discrimination Management

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# U.C.L.A. Law Review

## The Properties of Integration: Mixed-Income Housing as Discrimination Management

Audrey G. McFarlane

### ABSTRACT

Mixed-income housing is an increasingly popular approach to providing affordable housing. The technique largely went unnoticed until developers of mixed-income housing constructed buildings containing separate entrances for rich and poor residents. The ensuing “poor door” controversy illustrated that mixed-income housing, as both a method of affordable housing production and an integration strategy, is in unacknowledged tension with itself. This Article argues that, mixed-income housing is implemented as a surreptitious form of racial and economic integration that accommodates and replicates prevailing race and class assumptions detrimental to the needs and interests of low to moderate-income individuals in need of housing. The mixed-income housing strategy, at its heart, serves as a form of discrimination management—a way to work around the race and class discriminatory impulses of residents within a development and within a particular jurisdiction. The paper recommends ways in which to think more critically about this important question of community design in ways that account more honestly for the limits and possibilities of how we may choose to use affordable housing for race and class integration.

### AUTHOR

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## INTRODUCTION

“I do not think this country can solve its urban problems, the problems which we face in the American cities, until we take the simple step of agreeing that we are going to live together, not separately.”<sup>1</sup>

“The value and meaning of good neighbors...are one part of the larger story of the moral uses of pluralism.”<sup>2</sup>

“Cities are difference engines, and one of the qualities they assign is the place of class in space.”<sup>3</sup>

“Do I really *want* to be integrated into a burning house?”<sup>4</sup>

Rampant development and gentrification have transformed parts of many inner cities into fabulous, expensive places to live, accessible to those with the money to pay.<sup>5</sup> Cities have welcomed this influx of the affluent as an indicator of the success of local economic development policy: they’ve succeeded in attracting people with resources to live, work and play.<sup>6</sup> Yet one need not look far to see that this market-based success has been accompanied by displacement and exclusion. The high cost of housing in some areas is out of reach for low-, moderate-, and even some upper-income residents. With federal housing support in decline, a number of cities around the country (and across the globe) are seeking to ease the transformation by encouraging new housing developments to “mix in” some housing units that are comparatively affordable into otherwise market rate developments.<sup>7</sup> The costs of these below-market price units are often offset by lucrative regulatory waivers or

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1. 114 CONG. REC. S2993 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).
  2. NANCY L. ROSENBLUM, *GOOD NEIGHBORS: THE DEMOCRACY OF EVERYDAY LIFE IN AMERICA* 13 (2016).
  3. Michael Sorkin, *What’s Behind the ‘Poor Door?’*, *NATION* (April 2, 2014), <http://www.thenation.com/article/whats-behind-poor-door> [<https://perma.cc/UA3R-74WR>].
  4. JAMES BALDWIN, *THE FIRE NEXT TIME* 108 (1963).
  5. See Saskia Sassen, *Who Owns Our Cities—And Why This Urban Takeover Should Concern Us All*, *GUARDIAN* (Nov. 24, 2015, 3:30 AM), <https://www.theguardian.com/cities/2015/nov/24/who-owns-our-cities-and-why-this-urban-takeover-should-concern-us-all> [<https://perma.cc/FH4N-XEXP>].
  6. See generally Neil Smith, *New Globalism, New Urbanism: Gentrification as Global Urban Strategy*, 34 *Antipode* 427 (2002).
  7. See generally INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE: AFFORDABLE HOUSING, SOCIAL INCLUSION, AND LAND VALUE RECAPTURE (Nico Calavita & Alan Mallach eds., 2010).

tax breaks.<sup>8</sup> This mixed-income policy has also been adopted on the opposite end of the housing spectrum—the federal government is redeveloping exclusively low-income public housing to be economically mixed.<sup>9</sup> For the most part, mixed-income housing is regarded favorably; many attractive, well-designed developments have been and are being built without controversy.<sup>10</sup> Yet mixed-income housing as a policy for how housing should be built has not been thoroughly examined for some hidden yet troubling problems.

An indication of the hidden problems surfaced when developers of mixed-income residential developments opted to physically separate the wealthier residents from the lower-income residents by building separate entrances to their buildings—a luxury entrance with a doorman, concierge, and valet and a less elaborate, perfectly functional, entrance with a lock.<sup>11</sup> In other buildings, amenities like exercise facilities were off limits to the lower-income residents even if they were able to pay.<sup>12</sup> Separate entrances were

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8. See Samuel Stein, *Progress for Whom, Toward What? Progressive Politics and New York City's Mandatory Inclusionary Housing*, 40 J. URB. AFF. 770 (2017); Ajay Garde, *Affordable by Design? Inclusionary Housing Insights From Southern California*, 36 J. PLAN. EDUC. & RES. 16 (2016) (suggesting other incentives such as design flexibility and expedited processing).
  9. See EDWARD G. GOETZ, NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, AND PUBLIC HOUSING POLICY (2013); Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 1020 (2010) (noting the trend towards mixed income projects since the early 1970s); OFFICE POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUSING & URBAN DEV., *Confronting Concentrated Poverty with a Mixed-Income Strategy*, EVIDENCE MATTERS (Spring 2013), <https://www.huduser.gov/portal/periodicals/em/spring13/highlight1.html#title> [<https://perma.cc/RJ4-QHDD>].
  10. But some developers complain that the inclusionary housing schemes that embody the mixed income principle come at the expense of their profits. See, e.g., 616 Croft Ave., L.L.C. v. City of West Hollywood, 207 Cal. Rptr. 3d 729 (Cal. Ct. App. 2016); Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015).
  11. For example, in London, developers produced a brochure for One Commercial Street on the edge of the area of London called “the City”, which promising a “bespoke entrance lobby . . . With the ambiance of a stylish hotel reception area [that] creates a stylish yet secure transition space between your home and the City streets.” Hilary Osborne, *Poor Doors: The Segregation of London's Inner-City Flat Dwellers*, GUARDIAN (July 25, 2014, 2:46 PM), <https://www.theguardian.com/society/2014/jul/25/poor-doors-segregation-london-flats> [<https://perma.cc/52KP-QQS8>] (noting “[e]ven bicycle storage spaces, rubbish disposal facilities and postal deliveries are being separated”).
  12. See, e.g., Melkorka Licea, *'Poor Door' Tenants of Luxury Tower Reveal the Financial Apartheid Within*, NY POST (Jan. 17, 2016, 1:48 AM) <https://nypost.com/2016/01/17/poor-door-tenants-reveal-luxury-towers-financial-apartheid> [<https://perma.cc/FPC9-S575>] (lower-income tenants apartments look out on courtyard they are forbidden to use); Ronda Kaysen, *What's Next, a Bouncer?*, N.Y. TIMES (May 16, 2014), <https://www.nytimes.com/2014/05/18/realestate/rent-regulated-tenants-excluded-from-amenities.html> [<https://perma.cc/5HUM-KMQL>] (rent regulated tenants prevented from using building amenities possibly to encourage them to move); Bryce

considered necessary to maintain exclusivity for the wealthier residents, who sometimes paid millions of dollars for their units, while the lower-income residents rented units for only several hundred dollars per month.<sup>13</sup> Public reaction to media reports about the separate entrances, or the poor door as it was referred to,<sup>14</sup> was swift and condemning.<sup>15</sup> Separately designated entrances were widely perceived as a modern iteration of separate and unequal, a demeaning, discriminatory practice from the era of de jure segregation.<sup>16</sup> A form of housing development initially perceived as inclusive and morally just was now deemed unjust as it turned lower-income residents into second-class citizens in their own communities. Others, however, shrugged off the suggestion that there was any problem with this arrangement—separation based on ability to pay was “rational” and, moreover, made sorely needed access to affordable housing in centrally located places available.<sup>17</sup>

Poor doors may be merely a symptom of a larger problem of how we are choosing to build housing based on market preferences, while also aspiring to economically integrate in a society shaped by racial segregation and discrimination. What if the problem arose from those market driven preferences and practices (often premised on exclusion) being married with

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Covert, *Luxury Apartment Building Will Have Separate Door for Poor Residents*, THINK PROGRESS (July 21, 2014, 1:01 PM), <https://thinkprogress.org/luxury-apartment-building-will-have-separate-door-for-poor-residents-f0449766d474> [<https://perma.cc/Q6XF-8NKL>]. See generally Lauren C. Wittlin, *Access Denied: The Tale of Two Tenants and Building Amenities*, 31 TOURO L. REV. 615 (2015) (arguing tenants should have access to building amenities through rent regulation prescribing a reasonable fee.).

13. See Mireya Navarro, *'Poor Door' in a New York Tower Opens a Fight Over Affordable Housing*, N.Y. TIMES (Aug. 26, 2014), <https://www.nytimes.com/2014/08/27/nyregion/separate-entryways-for-new-york-condo-buyers-and-renters-create-an-affordable-housing-dilemma.html> [<https://perma.cc/F2JT-JG7L>]; Osborne, *supra* note 11.
14. Covert, *supra* note 12.
15. See, e.g., Lucy Westcott, *New York City Approves 'Poor Door' for Luxury Apartment Building*, NEWSWEEK (July 21, 2014, 5:49 PM), [www.newsweek.com/new-york-city-approves-poor-door-luxury-apartment-building-260218](http://www.newsweek.com/new-york-city-approves-poor-door-luxury-apartment-building-260218) [<https://perma.cc/HPN9-WABZ>].
16. *Id.*
17. See e.g., Rick Jacobus, *In Defense of the 'Poor Door'*, SHELTERFORCE (Oct. 14, 2015), [https://shelterforce.org/2015/10/14/in\\_defense\\_of\\_the\\_poor\\_door/](https://shelterforce.org/2015/10/14/in_defense_of_the_poor_door/) [<https://perma.cc/32NJ-FJN3>]; Carol Lamberg, *Housing Priorities: Quality is More Important than the Number of Entrances*, DREAM REVISITED (March 2015), <http://furmancenter.org/research/iri/essay/housing-priorities-quality-is-more-important-than-the-number-of-entrances> [<https://perma.cc/5ZZX-NXWB>]. Mixed-income housing has even made it into film. See Kate Wilson, *Film: High Rise*, VARSITY (Oct. 9, 2015, 5:34 PM), <https://www.varsity.co.uk/reviews/8948> [<https://perma.cc/JK22-DVJ3>] (describing mixed-income high rise where the elite live at the top and the “commoners” live on the lower floors with competition to rise in the social hierarchy causing the community to “descend[] into anarchy”).

an effort to integrate (a policy of inclusion)? Then certainly the poor door controversy reflects a problem with the underlying strategy of mixed-income housing, an increasingly popular policy approach to provide both housing integration and access to the city.

Mixed-income housing involves newly built buildings or communities that contain units affordable to the wealthy as well as to moderate- and low-income residents. The affordable units evince an economic integration strategy that can involve a mix of incomes as well as a mix of ownership arrangements.<sup>18</sup> Mixed-income housing embodies the highest ideals for an integrated society—mutual understanding through diversity of neighbors in all stations of life. Beyond the controversy of separate doors for the wealthy and the nonwealthy, the debate over desirable or acceptable housing arrangements invites us to examine the greater project and policy goals of mixed-income housing itself. Mixed-income housing policy is at the unacknowledged center of an unresolved tension between our aspirations for inclusion in the face of a society and economy structured around separation, differentiation, and exclusion. With much of society's arrangements premised on segregation, at best, only a part of our societal instinct is towards mixing. Arrangements as fundamental and seemingly benign as our zoning system are based on separation and class sorting—exclusion as well as uniformity of uses within a particular zoning district—and real estate and other markets premised on differentiation.<sup>19</sup> Our aspiration today may be mixing, yet land use and other law, as well as societal practices, have empowered separation.<sup>20</sup>

While it is generally not understood as such, mixed-income housing is a poor door strategy itself. In a neoliberal, market-based conception of society, mixed-income housing provides entrance to places off limits to people who would otherwise be shut out. It is a way for the lower income and often, racial minority groups, to gain access to housing in central places in the face of growing housing shortages. It is also a tactical strategy to circumvent

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18. See Anouk K. Tersteeg, Fenne M. Pinkster, "Us Up Here and Them Down There": *How Design, Management, and Neighborhood Facilities Shape Social Distance in a Mixed-Tenure Housing Development*, 52 URB. AFF. REV. 751 (2016).

19. See generally Marion Fourcade & Kieran Healy, *Classification Situations: Life-Chances in the Neoliberal Era*, 42 HIST. SOCIAL RES. 23 (2017) (discussing the use of actuarial scores to classify people for consumer credit, insurance, real estate and employment creating markets that structure individual life chances); Annette B. Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 585 (1981) (reviewing exclusionary land use regulatory devices and arguing they should not be subject to the traditional deferential standards of review).

20. See, e.g., *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007); *Milliken v. Bradley*, 418 U.S. 717 (1974).

objections to affordable housing development by, in effect, unobtrusively ushering the poor into otherwise affluent developments. Mixed-income housing also quietly uses economic integration to respond to residential racial segregation. The racial integration we pursue today is the problem that was not solved by the Fair Housing Act: segregation of Black, lower-income people, the non-middle class.<sup>21</sup> The type of housing needed is not being constructed in sufficient numbers. Stigmatized Black racial identity is combined with the stigma of low income in a capitalist society.<sup>22</sup> Since 1968, non-middle class racial integration in housing has been persistently yet unsuccessfully sought—a goal now made even further elusive by rising economic inequality.<sup>23</sup> Paradoxically, rising inequality is accompanied by an attachment by many to consumption of material goods, such as housing, to provide economic status and identity. For this and other reasons, the stakes are high when it comes to housing. One’s self concept, one’s shelter, and likely one’s largest financial investment are all tied up in housing. Access to the perceived good life is premised on wealth. Wealth, and who does or does not have it in the United States, is stubbornly tied to race. Racial segregation has manifested in the persistence of hyper-impooverished neighborhoods that are burdened with terrible economic and health statistics.<sup>24</sup> Since 1968, this race-based class segregation has proven so intractable that sophisticated mobility strategies premised on mixed-income housing have proven necessary to allow individuals to navigate around the exclusionary metropolis.<sup>25</sup>

Mixed-income housing and its integrationist goal face many challenges that have been inadequately addressed. Because the policy was designed, in part, as a surreptitious workaround to objections to low-income housing,<sup>26</sup> this paper argues that the policy has also by necessity had to accommodate enduring expectations and practices for race and class separation and

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21. The Fair Housing Act of 1968 succeeded mainly in freeing black middle- and upper-class people to live in areas where they had the money to purchase. *See infra* text accompanying notes 163–170.

22. *See generally* IYIOLA SOLANKE, *DISCRIMINATION AS STIGMA: A THEORY OF ANTI-DISCRIMINATION LAW* (2017) (providing a detailed analysis of stigma being at the heart of discrimination that should be protected against under law).

23. *See generally* PETER TEMIN, *THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY* 129–31 (2017) (attributing a dual residential system to rising economic inequality).

24. *See* Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 *DEMOGRAPHY* 1025 (2015).

25. *See* Patrick Sharkey, *Residential Mobility and the Reproduction of Unequal Neighborhoods*, 14 *CITYSCAPE* 9 (2012).

26. *See* Alexander POLIKOFF, *WAITING FOR GAUTREAU* 352(2006) (describing the ways in which suburban towns exclude affordable housing).



exclusion. The poor door controversy dramatically illustrates that mixed-income communities defer to discrimination by implicitly taking race and class preferences into account when designing new developments, as well as in zoning rules that set minimum percentage thresholds for inclusionary units. Both internally within the residential product created and externally to the surrounding host community, mixed-income housing is both a response to and tacit embrace of discrimination. It incorporates discrimination's norms and assumptions, and then seeks to manage it. Such discrimination management seems realistic and expedient; but right now, efforts to manage discrimination operate within a vacuum that has not considered the implications nor consequences of accepting such discrimination.

As the mixed-income principle in housing has grown from voluntary state inclusionary laws to the preferred approach in federal housing policy, there has been little to no examination of mixed-income housing's origins as a response to racial segregation, its normative goals, or the race and class assumptions embedded in how we define a good community. Little normative guidance exists for how existing discrimination should be managed. This paper argues that when the goal is integration, rigorously identifying integration's reasonably expected benefits should guide discrimination management. As the discussion will show, this is more difficult than it sounds since integration comes with paradoxical challenges. One significant challenge is that segregation is highly valued and reflects a concerted effort to maintain social domination.<sup>27</sup> This reality suggests that discrimination management should not disadvantage the group presumably targeted to benefit from these schemes. At the very least, discrimination management should be openly discussed and interrogated to ensure that the housing policy of our time does not replicate the very assumptions and structures that subordinate the purported beneficiaries of inclusionary, mixed-income housing programs. Developing antistatutory norms for discrimination management in this context requires situating mixed-income housing within the context that lead to its genesis—a response to racial segregation and segregation's quest for maintenance of social domination and efforts to promote the creation of integrative affordable housing. Only then can we consider both the promising and troubling aspects of the segregated society reflected in mixed-income housing schemes.

The poor door controversy offers a timely opportunity to consider the tension inherent in our present version of the inclusive city—one of

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27. See *infra* text accompanying notes 88–92.

separation and segregation based on ability to pay combined with a fixation on luxury and exclusivity. In this context, mixed-income housing may be both the right and the wrong way to address segregation. Right in the sense that it responds to the constraints of present realities. Wrong because it fails to honestly consider society's acceptance and incorporation of segregation. In light of how persistent segregation is, it is important to consider the needs segregation fulfills and which of segregation's values we actually reject. The quick answer would be racism certainly. But we too often consider racism to be merely about attitudes rather than structural or systemic. We often fail to ask why racism is so structurally embedded in all aspects of society. Social domination theory provides helpful insight into how and why segregation is valued. The poor door can then properly be understood and assessed within a social and legal context that embraces both integrationist aspirations and segregated realities embedded within markets.

Part I of this Article discusses the poor door controversy and the clash it reflects between the competing values of housing as access (to material goods like shelter) and housing as a psychic good (consisting of status derived from living in a community that is exclusive to those who are similarly situated). Part II of the Article explains why it is important to understand that structural racism, in the form of racial segregation, is at the heart of mixed-income housing policy. This Part demonstrates how concerted efforts over the twentieth century to racially segregate reflect an unquestioned need for social domination and thus presents a formidable obstacle to dismantling racialized housing. Part III of the paper critiques mixed-income housing as a form of discrimination management. Because mixed-income policy surreptitiously addresses racial segregation under cover of the more politically expedient goal of economic integration, it renders invisible the policy's deliberate choices to manage discrimination, its perpetuation of racial subordination and its very real consequences.

## I. THE POOR DOOR CONTROVERSY

In 2014, the planned construction of a luxury residential condominium tower in New York City captured the public's attention for a very unusual reason. The 219 unit building, intended for a high-income clientele with the units marketed at a price point of approximately \$1 million to \$26 million, included amenities such as "a gym, a swimming pool, a bowling alley, a rock-climbing wall, an indoor playground, a squash court, [and] a golf

simulator . . . .”<sup>28</sup> Even though the building was privately built and intended to house the very high end of the real estate market, the developer took advantage of a number of available tax incentive programs under which, inter alia, property taxes were abated for a number of years.<sup>29</sup> In return for the valuable tax benefits, the developer was obliged to list a percentage of the units in the building at a price point affordable to low- and moderate-income renters.<sup>30</sup> This type of inclusionary requirement uses existing zoning regulations to encourage affordable housing construction wherever centrally located, market rate housing is built.<sup>31</sup> Approximately 27 states and the District of Columbia have adopted mandatory or voluntary Inclusionary Housing programs.<sup>32</sup> The ordinances typically offer tax incentives and regulatory waivers that allow developers to increase profit by increasing the height and bulk of their developments, allowing them to build more units than would otherwise be permissible under governing zoning ordinances.<sup>33</sup> Mixed-income housing has also been prioritized in the redevelopment of public housing in the Hope VI program.<sup>34</sup> As the biggest source of funding for affordable housing development today, the federal Low Income Housing Tax Credit program reflects a mixed-income housing policy goal as well.<sup>35</sup>

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28. Navarro, *supra* note 13.

29. See generally ALESSANDRO BUSA, *THE CREATIVE DESTRUCTION OF NEW YORK CITY: ENGINEERING THE CITY FOR THE ELITE* 65 (2017) (describing the impact of New York City’s 421-a tax abatement program on the proliferation of luxury housing). See also Robert Hickey et al., *Achieving Lasting Affordability Through Inclusionary Housing* 18 (Lincoln Inst. Land Pol’y, Working Paper No. WP14RH1, 2014), <https://www.lincolnst.edu/sites/default/files/pubfiles/achieving-lasting-affordability-through-inclusionary-housing-full.pdf> [<https://perma.cc/X9B2-D2FF>] (noting that to date, twenty-seven states and the District of Columbia have adopted inclusionary zoning ordinances).

30. See generally Seth B. Cohen, *Teaching an Old Policy New Tricks: The 421-A Tax Program and the Flaws of Trickle-Down Housing*, 16 J.L. & POL’Y 757, 772 (2008) (describing the available abatements under New York City’s inclusionary housing program).

31. See *id.* at 18 (analyzing a set of twenty inclusionary housing programs). See also OFFICE POLICY DEV. & RESEARCH, U.S. DEP’T OF HOUSING & URBAN DEV., *Inclusionary Zoning and Mixed-Income Communities*, EVIDENCE MATTERS (Spring 2013) <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html#title> [<https://perma.cc/78PU-UTJX>].

32. See generally Hickey et al., *supra* note 29.

33. See Audrey G. McFarlane & Randall K. Johnson, *Cities, Inclusion and Exactions*, 102 IOWA L. REV. 2145, 2157 (2017).

34. Lawrence J. Vale & Shomon Shamsuddin, *All Mixed Up: Making Sense of Mixed-Income Housing Developments*, 83 J. AM. PLAN. ASS’N 56 (2017).

35. Raquel Smith, *A Seat at the Table: Changing the Governing Structure of Low Income Housing Tax Credit Program Administration to Reflect Civil Rights Values and Fair Housing*, 6 COLUM. J. RACE & L. 193, 199 (2016).

Developers are often allowed, in return, to build taller building containing a greater number of units (density bonuses) or receive tax breaks that allow the developer, in theory to recoup costs of the income foregone for the required percentage of inclusionary units. One could call the market rate units unsubsidized, but in fact the market units were subsidized as well through the tax abatement. Such units that are set aside for rental by low- or moderate-income residents and are often built with cheaper finishes and fewer amenities within the unit.<sup>36</sup> Outside of the unit, however, the inclusionary units are indistinguishable from the market rate units and are typically supposed to be unobtrusively mixed in throughout the development. It is not uncommon for some inclusionary zoning laws to allow developers to opt out of inclusionary requirements, allowing them to instead build units off site (in another location), or instead the developer may contribute to an affordable housing fund.<sup>37</sup> For example, the New York City (NYC) program allowed developers to receive tax breaks if they offered affordable housing at the site or within a half mile of the site.<sup>38</sup>

In contrast to the typical inclusionary yet unobtrusive dispersal approach, the Extell Building's developer took advantage of an amendment to the NYC rules which allowed the units to be grouped together in one area of the building, "in an attached segment of the building."<sup>39</sup> The developer planned to build a separate entrance for the affordable units all located in one lower corner of the building. This section was walled off from access to the

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36. See, e.g., URBAN INST., EXPANDING HOUSING OPPORTUNITIES THROUGH INCLUSIONARY ZONING: LESSONS FROM TWO COUNTIES (2012), [https://www.huduser.gov/portal/publications/HUD-496\\_new.pdf](https://www.huduser.gov/portal/publications/HUD-496_new.pdf) [<https://perma.cc/KVK9-7H3R>].

37. See, e.g., Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, 36 ZONING & PLAN. L. REP. 1, 4 (2013).

38. Alexandra Schwartz, *The "Poor Door" and The Glossy Reconfiguration of City Life*, NEW YORKER (Jan. 22, 2016), <http://www.newyorker.com/culture/cultural-comment/the-poor-door-and-the-glossy-reconfiguration-of-city-life> [<https://perma.cc/NQ8B-ZCYL>]. But see Emily Badger, *When Separate Doors for The Poor Are More Than They Seem*, WASH. POST (July 31, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/07/31/when-the-poor-want-their-own-door> [<https://perma.cc/RU5H-8WXL>] (describing "Portner Place, a complex of garden-style Section 8 apartments . . . [in] Washington, D.C. . . . slated for redevelopment into a roughly 350-unit mixed-income property that will include two wings: one for market-rate professionals eager to live near the U Street scene, and the other for Portner Place's existing residents, plus another 48 units of affordable housing meant for households making less than 60 percent of the area median income. The wings will have separate entrances, off separate streets. Portner Place's current tenants requested this.").

39. Shannon Ayala, *Upper West Side Board Is Crafting an Anti-Poor Door Proposal*, CURBED N.Y. (Oct. 10, 2014, 1:40 PM), <http://ny.curbed.com/2014/10/10/10037458/upper-west-side-board-is-crafting-an-anti-poor-door-proposal> [<https://perma.cc/5WFV-7A9W>].

main part of the building that contained the luxury amenities and from interaction with the market rate tenants.<sup>40</sup> The City approved the plans that included the wealthy apartments facing the water and the poor apartments having an entrance in the back, facing the street.<sup>41</sup> The two sets of residents would have two different entrances—a luxury entrance for the 219 market rate condos, where unit owners would have a doorman, concierge and valet, while the entrance for the fifty-five income-restricted, rental unit tenants<sup>42</sup> would be separate and less elaborate with just a lock on the front door.<sup>43</sup>

A public uproar ensued. The term “poor door” was coined to poke fun and point a shaming finger at exclusionary practices that were themselves shaming. Not only was the public shocked at the separate door arrangement, members of the public seemed doubly offended because the developer would receive tax credits and highly lucrative permission to build a taller building in return for providing more modest, income restricted, affordable units in the development.<sup>44</sup> There was a sense that what the developer had done was repugnant—he had essentially segregated a new community, seemingly placing us on a slippery slope towards the old practices of separate but unequal treatment—separate entrances, water fountains, public restroom, seating areas in restaurants, sitting in the back of buses. It also resonated with the sense of exclusion even the middle class are feeling in an expensive global city like New York.<sup>45</sup>

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40. See Daniel R. Jones, *We Need Stronger Rent Laws, Not Developer Giveaways*, URB. AGENDA (Feb. 26, 2015), <http://www.cssny.org/news/entry/we-need-stronger-rent-laws-not-developer-giveaways> [https://perma.cc/GZS7-SW28] (brief description of the history of the genesis and inefficiencies of the 421—a tax incentive program which was “created in the 1970s at a time when private residential construction in the city had collapsed . . . . By the 1980s, any justification for the program was . . . weak. But the city’s powerful real estate industry was not about to part ways with the subsidy. So legislators found a way to keep the program alive by adding “affordability” requirements and thereby giving it a new justification”).

41. In response to the uproar, the quality of the door finishes was upgraded to include a glass façade and “custom-wood” and to face a planned public park instead of the side street. Laura Kusisto, *A ‘Poor Door’ on a Planned New York Apartment Tower with Affordable Housing Gets a Makeover*, WALL STREET J. (Aug. 29, 2014, 9:37 PM), <https://www.wsj.com/articles/a-poor-door-on-a-planned-new-york-apartment-tower-with-affordable-housing-gets-a-makeover-1409276266> [https://perma.cc/CRR8-36JC].

42. *New UWS Development Could Have Separate Entrance for Poorer People*, WEST SIDE RAG (Aug. 12, 2013, 2:30 PM), <http://www.westsiderag.com/2013/08/12/new-uws-development-could-have-separate-entrance-for-poorer-people> [https://perma.cc/E2AD-XEZG].

43. *Id.*

44. *Id.*

45. Some argue that the middle class and affluent benefit the most from affordable housing programs:

The Extell building became the lightning rod of the rising inequality in a city experiencing rapid, hyper gentrification with prices rising above a price point that upper-income people would find unaffordable. Unbeknownst to the New York public, other buildings in the City quietly used the poor doors as well.<sup>46</sup> For example, in an already existing building in New York with separate entrances, one 34-year-old bank employee tenant who wanted to remain anonymous for fear of jeopardizing her one-bedroom rental complained: “We can’t even use the pool or the gym. I’ve asked and offered to pay. It’s kind of messed up.”<sup>47 48</sup> And poor doors have been an international inclusionary housing problem. For example, Vancouver, Canada, quietly used poor doors, until the controversy in New York sparked a debate in Vancouver.<sup>49</sup> A similar building was also contemplated in Toronto.<sup>50</sup> Similar buildings in London caused a large public outcry in the city including a protest march.<sup>51</sup>

The London protests, which were centered on already completed projects, are useful for understanding some of the lived experience in buildings with poor doors. The setting for the London controversy is a hyper

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Take Manhattan’s 606 West 57th Street, a 1025-unit building to be put up by developer TF Cornerstone. In exchange for setting aside 220 of those apartments for ‘lower income’ tenants, the developer will get a local real estate tax exemption, tax-exempt financing, Low Income Housing Tax Credits (in which banks kick in equity in exchange for a tax rebate), and permission to build a larger building than the zoning code would otherwise allow.

Jim Epstein, *New York City’s Affordable Housing Bonanza for The Rich*, REASON (July 3, 2014, 4:31 PM), <http://reason.com/archives/2014/07/03/new-york-citys-affordable-housing-bonanz> [<https://perma.cc/ME8D-GQTG>]

46. Brentin Mock, *No More ‘Poor Doors’ in NYC*, CITYLAB (July 1, 2015), <https://www.citylab.com/equity/2015/07/no-more-poor-doors-in-nyc/397499> [<https://perma.cc/7KL7-V5BU>] (describing planned mixed-income development that will use separate buildings: “In Brooklyn, developers of the Greenpoint Landing project are preserving three of its planned 10 buildings for units subsidized for low-income tenants. Those three buildings will contain 300 affordable units. When all of the buildings are complete, some wealthier residents will not have to share vestibules with poorer neighbors, though they will live within the same complex.”).
47. Navarro, *supra* note 13.
48. *Id.*
49. Jeff Lee, *New Vancouver Highrise to Have Separate Door for Social Housing*, VANCOUVER SUN (May 5, 2015) <http://www.vancouversun.com/Vancouver+highrise+have+separate+door+social+housing/11031424/story.html> [<https://perma.cc/QDS9-CLPG>].
50. Jessica Smith Cross, *Separate Entrances: Are New York-style ‘Poor Doors’ Here in Toronto Already?*, TORONTO METRO (Sep. 3, 2014), <http://www.metronews.ca/news/toronto/2014/09/03/separate-entrances-are-new-york-style-poor-doors-here-in-toronto-already.html> [<https://perma.cc/RR6C-DB39>]. See Martine August, *Revitalisation Gone Wrong: Mixed-Income Public Housing Redevelopment in Toronto’s Don Mount Court*, 53 URB. STUD. 16 (2016).
51. See generally, Chris Low, *Developers Installed ‘Poor Doors’ and ‘Rich Doors’ On a Block of London Flats*, Vice News (Aug. 22, 2014) (noting protests in London over poor doors).

gentrification possibly worse than New York's, that is largely putting the entire city out of the reach of all but the very wealthy. The Grenfell Towers burnt shell, the site of many lives lost to fire, stands as a symbol of the dim prospects for the poor to remain in the neighborhoods that have gentrified around them.<sup>52</sup> The context heightened the perception that poor doors represented a stigmatizing separate but unequal policy. One London tenant of an existing building with a luxury entrance for the market rate tenants and a plain entrance for the lower-income tenants, explained the hurt of the separation:

“We know our place,” Donna says bitterly, her eyes filling with tears. “They’ve made sure of that. It’s us and them. I’ve never felt poorer in my life because of the way we’re kept apart. “It’s not about the quality of the building. I’m grateful for the help I’ve had from the housing association. But being kept apart makes us feel like scum. We’re second-class citizens. I don’t want my kids thinking they deserve to be treated differently. It’s humiliating and wrong.” Donna also claim[ed] her children have been “ridiculed and sworn at” by posh neighbors[.] (emphasis added)<sup>53</sup>

No such overt conflict was reported in New York, yet the message there is palpable. “Buildings that segregate entrances for lower-income and middle-class tenants are an affront to our values,” said Manhattan Borough President Gale Brewer.<sup>54</sup> According to Assemblywoman Linda Rosenthal:

This ‘separate but equal’ arrangement is abominable and has no place in the 21st century, let alone on the Upper West Side . . . . A mandatory affordable housing plan is not license to segregate lower-income tenants from those who are well-off. The developer must follow the spirit as well the letter of the law when building

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52. A West London tower block building, one of the last housing structures affordable to low-income residents, in a heavily gentrified area burned to the ground killing 71 residents. The cause of the fire was the purely aesthetic exterior cladding that acted like an accelerant, which, when combined with blocked passageways, resulted in a terrible loss of life and the homelessness for 209 families. Sam Knight, *The Year the Grenfell Tower Fire Revealed the Lie That Londoners Tell Themselves*, NEW YORKER (Dec. 27, 2017), <https://www.newyorker.com/culture/2017-in-review/the-year-the-grenfell-tower-fire-revealed-the-lie-that-londoners-tell-themselves> [https://perma.cc/TH63-QMXE].
53. Gemma Aldridge, *Poor Doors’ Scandal: Separate Entrances for Wealthy and Housing Association Tenants at Apartment Blocks*, MIRROR (Aug. 2, 2014, 6:31 PM), <https://www.mirror.co.uk/news/uk-news/poor-doors-scandal-separate-entrances-3954389> [https://perma.cc/DL2X-ACP4].
54. Cyril Josh Barker, *City Approves ‘Poor Door’ for Affordable Housing Residents*, AMSTERDAM NEWS, (July 24, 2014, 9:15 AM), <http://amsterdamnews.com/news/2014/jul/24/city-approves-poor-door/> [https://perma.cc/VP4M-3QQ6].

affordable housing, and this plan is clearly not what was intended by the community.”<sup>55</sup>

But as certain as the critics have been that this poor door plan was objectionable on its face, there were equal, if not greater, numbers of others who questioned why the separate doors were considered a problem. This was reinforced by the results of the lottery that was held for the fifty-five units available in the Extell building. Approximately 88,000 people applied for one of the apartments.<sup>56</sup> An affordable apartment, even under possibly demeaning circumstances, was a worthwhile tradeoff in an impossibly tight and expensive real estate market. Thus, there have been a variety of responses to the poor door controversy and whether such separate entrances are objectionable or justifiable as discussed below.

#### A. The Technical, Rationalist Response

Notwithstanding the headlines, the predominant argument in the poor door debate was that the separate doors had nothing to do with an effort by the developer to exclude, but simply reflected a necessary configuration in order to make the deal work financially. Because the project was subject to often competing regulatory requirements for different sources of subsidy, the implicit argument was that the exclusion was out of developers' hands. Accordingly, the developers repeatedly asserted that the affordable housing section of the building was a “legally separate entity.”<sup>57</sup> First, in order to get the density bonus for including the affordable housing unit the developer needed the proportion of extremely low-income tenants to be 60 percent.<sup>58</sup>

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55. WEST SIDE RAG, *supra* note 42.

56. Mireya Navarro, *88,000 Applicants and Counting for 55 Units in 'Poor Door' Building*, N.Y. TIMES (April 20, 2015), <https://www.nytimes.com/2015/04/21/nyregion/poor-door-building-draws-88000-applicants-for-55-rental-units.html> [<https://perma.cc/85SP-8F22>].

57. The project also received a floor area bonus from the provision of affordable units, which the developer did not use to expand the floor area of the Extell Building, instead selling the bonus to other buildings within half a mile of the site. See Letter from Howard Lowenstein, Extell Attorney, to Matthew Diller (June 4, 2013) (on file with author) (“The developer says that by building the affordable units it will earn credits allowing it to sell rights to other nearby developers that will let them add more floor area.”). See also WEST SIDE RAG, *supra* note 42.

58. See generally Seth B. Cohen, *Teaching an Old Policy New Tricks: The 421-A Tax Program and the Flaws of Trickle-Down Housing*, 16 J.L. & POL'Y 757, 764 (2008); Samuel Stein, *Progress for Whom, Toward What? Progressive Politics and New York City's Mandatory Inclusionary Housing*, 40 J. URB. AFF., 770 (describing the New York City 421-A program, a tax abatement program used to subsidize the Extell building).



For example, Low Income Housing Tax Credits require a certain percentage of a building to be dedicated to very low to low-income housing.<sup>59</sup> But, apparently, this argument is not quite true. Other inclusionary housing buildings had units mixed in within the entire development.

The other concern might be that, particularly in a condominium building, the common charges are paid by unit owners. Low-income residents could not afford to pay the maintenance charges and therefore they could not own condominium units. But, this problem could easily be handled by the units being owned together as an entity while nevertheless being scattered throughout the building, or perhaps confined to the lower, less expensive, noisier floors.

Perhaps the explanation is no more complicated than the developer had applied to participate in New York City's Inclusionary Housing Program, making the project eligible for additional lucrative floor area in exchange for providing affordable housing units in the project or at another location. That law had been explicitly amended to allow low-income units to be placed elsewhere than on site. It may be that Extell simply took advantage of a deliberate loophole that allowed them the perceived benefit of locating lower-income tenants out of sight and being able to market the building for its exclusiveness rather than inclusiveness.

## B. The Economic Realist Response

Mixed-income housing posits that regardless of income, residents of a community will be indistinguishably economically integrated.<sup>60</sup> As many voices that were raised in opposition to the separate and unequal poor door, there were a considerable number of others who found the poor door arrangement indistinguishable from the class distinctions that are made in private and public accommodations every day. There are services provided by class on trains. On airplanes first class is separated by a curtain from coach.<sup>61</sup> Hotels

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59. Smith, *supra* note 35, at 200 ("For a period of fifteen years, a property owner must rent at least twenty percent of the project's units to households with incomes at or below fifty percent of the area median gross income or rent at least forty percent of the units to households with incomes at or below sixty percent of the area median gross income in order to qualify for the [LIHTC] program.")

60. See Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585 (2015).

61. Tanvi Misra, *The Consequences of Airplane Classism*, CITYLAB (May 2, 2016), <https://www.citylab.com/transportation/2016/05/the-consequences-of-airplane-classism/480813> [<https://perma.cc/9GWL-QKTH>] (stating flights with first-class cabins are more likely to cause passengers to act out).

are distinguished by the price point that reflects the high, medium, or low quality of services. Also, neighborhoods and buildings are segregated by the expense of the building product. In urban areas, though it is not often thought of as such, luxury buildings with doormen are a form of gated community. If one wants entrée to a higher-class neighborhood, one need simply to pay. Free choice is only limited by one's resources. Thus, economic segregation appears reasonable, as you consume what you can afford.

Perhaps the difference is the class distinction within one's residence. Usually, class distinctions manifest outside of the home. Also, the other class-based distinctions are limited in time—a few hours on a train, plane, or in a hotel. Home class-based distinctions are more permanent. Living with the class distinction up close is much more difficult and potentially stigmatizing. This of course begs the question: If up close distinctions based on class and income are not tolerable, then why have mixed-income living arrangements in the first place? Other values must be at play in order to arrive at such an approach that are contrary to our present orientation towards luxury and consumption that hides what is less than pleasant in our society behind a veneer of perfection.<sup>62</sup>

### C. The Pragmatic Advocacy Response

The pragmatic response to the poor door controversy focused on the expediency of the poor door buildings creating much needed housing. Because the 88,000 people applying for the fifty-five spots have been so beaten down by the structural realities of segregated and unequal housing opportunities, they were willing to accept some stigmatization—perhaps they view the cost of stigma as being less than the cost of living in housing that is substandard and/or unaffordable. In addition, the fifty-five lottery winners are located in an opportunity-rich neighborhood in terms of jobs, schools, and transportation. The cities are only trying to offset the grievous problem of lack of affordable housing by incentivizing private developers to build mixed-income, inclusionary housing. It seems a win-win because some is better than none—these developments would not have any affordable housing. If the developers complied by building separate entrances for market-rate unit and low-income unit tenants, then many seem to assume this is a negligible price for an affordable

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62. See MICHAEL SORKIN, *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* (1992) (explaining how theme park concepts drive privatized urban development and shape and control expectations for an “experience” that does not admit the reality of a less than perfect, stratified society).

place to live. As a matter of policy, the question remains whether one should have to endure stigma in order to obtain housing. It would seem that it should be an unconstitutional condition to have to surrender one's dignity for a privilege of being affordably housed.<sup>63</sup>

#### **D. Acceptable Market-Based Discrimination or Invalid Race and Class Discrimination?**

Mixed-income housing is an approach to housing that responds to several explicit and implicit dimensions of racial discrimination in land use.<sup>64</sup> In particular, this question arises wherever there is an appreciable black population, due to a long history of racial discrimination. As I argued in an earlier article, these race differences often track class differences (for example, differences in socioeconomic status, income, and wealth) though not necessarily so. Class is a racialized concept in the United States, and questions of economic justice are intertwined with racial justice.<sup>65</sup>

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63. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.")

64. See generally Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75-92 (2005) (suggesting a conceptual framework for understanding mixed-income housing and its lessons). King and Smith argue that the proper mode of analysis is to consider the interaction of race and politics and the historical truth that systems of racial hierarchy have dominated United States politics. *Id.* at 75. Thus, we should consider housing policy in the United States, in general, and mixed-income housing policy in particular as reflecting two competing "racial institutional orders" with competing ideologies in which the balance of power has changed over time. *Id.* One is a "white supremacist" order and the other is an "egalitarian transformative" order. *Id.* at 75-76. According to King and Smith, "most political actors possess partly conflicting identities and interests... [which in combination with] preexisting contexts define the problems and options actors face..." *Id.* at 76.

65. Several scholars have discussed the intersection between racial justice and economic justice:

The literature has long acknowledged an intersection between race and class, but there has been little actual exploration of the meaning of this interaction and its significance for antidiscrimination theory... [R]ace, as the central barrier to a black person's opportunities, may change as class changes. Class is something that can be deployed in certain circumstances to deflect racial stigma and disadvantage suggests that race is inaccurately conceptualized as fixed or absolute. It might instead be only nearly fixed and nearly absolute, a slight albeit noteworthy shift signaling issues that might have to be faced fully if and when improvement in economic conditions for Blacks continues. Class is conceptualized or mythologized as fluid because it can be manipulated by

Thus, even in supposedly race neutral housing schemes, race and class differences are interacting in an overlapping, unspoken ways that result in perplexing controversies like the poor door. Assessing the propriety of the poor doors and income based distinctions in access to amenities in mixed-income housing requires considering the overarching policy reasons for adopting the mixed-income principle in the first place. The emphasis on income mixing suggests a perceived value from connection and access for people of different income brackets to be in the same places. Indeed, the data, suggests that the trend in U.S. housing development is towards greater economic segregation.<sup>66</sup> The literature also reveals that economic segregation is an even greater problem when viewed through the lens of race.<sup>67</sup> Yet the story of class is intertwined with the story of race. The black and poor in the United States are the most segregated group by far.<sup>68</sup> In the context of the United States' protracted history of racial segregation, the quest for racial integration undeniably undergirds inclusionary housing's mixed income, racially neutral, class-based strategy. Racial integration as a policy goal lingers in the background, undefined, undiscussed, and unfulfilled. This unresolved tension is exacerbated by the U.S. Supreme Court having read racial integration out of constitutional jurisprudence.<sup>69</sup> The Court only recently affirmed that avoiding racial isolation and achieving diversity constitute a compelling government interest, yet it still struggles to reconcile the efforts to address persistent racial disparities in ways considered acceptably race neutral or even colorblind.<sup>70</sup> In addition, concerns about racial segregation are

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acquisition of material things. But there might likewise be changes in the perception of one's race as one travels through different strata of class.

Audrey G. McFarlane, *Operatively White?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, L. & CONTEMP. PROBS., 163, 184–85 (2009).

66. See generally RICHARD FLORIDA & CHARLOTTA MELLANDER, MARTIN PROSPERITY INST., SEGREGATED CITY: THE GEOGRAPHY OF ECONOMIC SEGREGATION IN AMERICA'S METROS, (2015) <http://martinprosperity.org/media/Segregated%20City.pdf> [https://perma.cc/ZQZ5-64BH].
67. See generally RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).
68. See generally Massey & Tannen, *supra* note 24, at 1025.
69. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (invalidating a school integration remedy that required crossing school district jurisdictional boundaries because it arose from defacto not de jure segregation); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (upholding a town's exclusion of an integrated housing development for failing to show intentional racial discrimination).
70. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (rejecting integrative school assignment plan because use of racial categories was not sufficiently narrowly tailored); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that the Texas system of school finance which resulted in well-funded schools and impoverished schools did not violate Equal Protection). *But see* Texas Dep't of Hous. & Cmty.

considered old fashioned, out of date, and politically incendiary because the status of racial integration and diversity in contemporary American culture is being seriously questioned.<sup>71</sup>

Mixed-income housing as our integration strategy and the poor door controversy reveals the unaddressed tensions simmering beneath the surface of mixed-income housing policy. The most significant tension is that the policy seeks to circumvent discrimination by managing it.

## II. MIXING AND THE CHALLENGES OF SOCIAL DIFFERENTIATION

### A. Mixing as Utopian Social Ideal

Mixed-income housing embodies idealized notions of social mixing, whose origins within a line of utopian thinking date back to the late 1800s. Mixing was integral to ideas about desirable community design—seen as egalitarian, providing ‘balance,’ and making common sense.<sup>72</sup> This notion of balance was at once conservative and romantic—harkening back to notions of the rural village as a model of interaction but maintaining a sense of everyone having their designated social place.<sup>73</sup> The famously successful Garden City movement, while adopting a limited form of social mixing, spread the idea of mixing as a normative goal.<sup>74</sup> The communities were intended to contain “a cross-section of society” at the macro level, but communities were also segregated by class “on the micro-level.”<sup>75</sup> The assumption was that the lower class would reap advantage from contact with

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Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (recognizing disparate impact as a basis of FHA liability but requiring proof of causation).

71. Kenneth W. Mack, *Law and Local Knowledge in the History of the Civil Rights Movement*, 125 HARV. L. REV. 1018 (2019) (reviewing TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2012)) (describing how “[l]aw, including Supreme Court decisions, often helped and hindered the participants in civil rights-era controversies in unexpected ways . . .”).
72. See Sarah Glynn, *Regeneration as a Trojan Horse*, in *WHERE THE OTHER HALF LIVES: LOWER INCOME HOUSING IN A NEOLIBERAL WORLD* 77 (Sarah Glynn ed., 2009) (discussing the idea of tenure mix and mixed-income housing to as early as 1838 when a UK parliamentary Select Committee argued “seclusion from ‘the observation and influence of better educated neighbours’ in the dense London slums resulted in a ‘state of moral degradation.’”).
73. BOURNVILLE VILL. TR., *THE BOURNVILLE VILAGE TRUST, 1900–1955*, 19 (1956) (discussing an early utopian development, Bourneville near Birmingham U.K. in the 1890s aimed at “gathering together as mixed a community as possible applied to the character and interests as well as to the income and social class”). See also Wendy Sarkissian, *The Idea of Social Mix in Town Planning: An Historical Review*, 13 URB. STUD. 231, 235 (1976).
74. See EBENEZER HOWARD, *GARDEN CITIES OF TOMORROW* (1902).
75. See Sarkissian, *supra* note 73, at 235.

higher classes, likely as a consequence of the functional need for a range of employment.<sup>76</sup>

The most consistent, modern proponent of mixing was historian and sociologist Lewis Mumford. His social philosophy opposed segregation in any form as being artificial, destructive of cultural unity, and detrimental to society.<sup>77</sup> According to Mumford, the issue was a functional one:

[T]he city, if it is to function effectively, cannot be a segregated environment: the city with the single class, with a single social stratum, with a single type of industrial activity, offers fewer possibilities for the higher forms of human achievement than a many-sided urban environment.<sup>78</sup>

Notwithstanding Mumford's views, with few exceptions, the approach to community design that was actually practiced during the twentieth century involved social separation along race and class lines, rather than mixing. At the time, the reality of residential living patterns followed a norm of stringent racial segregation.<sup>79</sup> Also, according to planner Wendy Sarkissian, "American housing and planning legislation since 1954 has . . . inefficiently[] emphasized social mix at the neighborhood level."<sup>80</sup> Such "[m]ix distinctly favoured the middle class."<sup>81</sup> She further noted, however, "neither the degree of mix nor the means of achieving mix was spelled out very clearly."<sup>82</sup> Nevertheless, during the Cold War era, these general notions of social mixing and the socially balanced neighborhood as a planning goal allowed the United States

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76. See *id.* at 236. Another Garden City proponent, Sennett opposed micro mixing—"residential segregation by class was essential," he thought and "any greater degree of mix" would mean "a dead level of equality" and hence mediocrity. *Id.* at 236. Yet another Garden City contemporary, however, advocated residential mix for three reasons: (1) Aesthetics—exposure to beautiful buildings; (2) Social—"all classes may live in kindly neighborliness" and (3) Functional—"the factory worker and the brain worker in the same district . . . is . . . expressly desirable." *Id.*

77. *Id.* at 237.

78. LEWIS MUMFORD, *THE CULTURE OF CITIES* 486 (1938).

79. See Sarkissian, *supra* note 73, at 239.

80. *Id.* at 240. Sarkissian argues that the Housing Act of 1954 (urban renewal), the New Communities Act of 1968, and efforts to adopt inclusionary zoning in Fairfax County in the early 1970s were all "attempts to increase opportunities for low-income and black families to live in neighborhoods which would otherwise have been racially or socially homogeneous." *Id.* With regards to urban renewal, Sarkissian asserts that urban renewal was pro-mix—"on the assumption that mix contributed to community stability and would stem movement of the upper classes to the suburbs." *Id.* at 241. "Public reaction to the effects of early urban renewal programmes (which featured 'slum clearance' and 'comprehensive redevelopment') finally significantly changed the direction of thinking about social mix, and is responsible in part for the present re-evaluation of the concept." *Id.* at 241.

81. *Id.*

82. *Id.*

to present itself as having removed impediments to economic opportunity and “demonstrate that under its new welfare economy, the... [US] government [would] now be employed to secure a decent family life in neighborhoods which afford equal access to all, regardless of race, creed or color.”<sup>83</sup>

On its face, aspiring to social mixing is fair and egalitarian in a plural society. It seems sensible, if not important, that people be accustomed to people from all walks of life. Yet, beneath the surface, social mixing presents some discomfiting realities, including that in the past, mixing happened based on the needs of the affluent, and the arrangements retained strict demarcations of status distinctions and social control. There was a time when social mixing in living arrangements was more prevalent. Yet, such mixing in living arrangements was based on necessity and the reciprocal needs of the wealthy and those who served them. In the mixed arrangements of the seventeenth century, for example, before the advent of elevators, the poor, in some European cities lived at the top of multistory apartments with the wealthier living in ground floor apartments.<sup>84</sup> Because the lower classes often provided services to the wealthy, having them close by was essential. Similarly, until the early twentieth century in the United States, the servant and artisan classes lived in close proximity to the wealthy, making a form of mixing the default rather than the exception. Housing in New Orleans and Washington DC for the wealthy and white, for example, was accompanied by a form of mixed housing scheme—lesser alley dwellings where the poorer, often black, servants lived, again, to service the needs of the wealthy.<sup>85</sup> With improvements in technology and transportation, the need for proximity steadily decreased while a desire for social status differentiation increased.

### **B. Mixing and Race: Segregation as a Quest for Social Dominance**

The desire for social status differentiation in the United States has manifested itself through a pursuit by white people of social separation via racial residential segregation. Mixed-income housing policy only makes sense by taking this context into account. Racial residential segregation has been deliberately and persistently constructed and fiercely maintained by

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83. *Id.* at 239.

84. *Id.*

85. SABIYHA PRINCE, *AFRICAN AMERICANS AND GENTRIFICATION IN WASHINGTON, D.C.: RACE, CLASS AND SOCIAL JUSTICE IN THE NATION’S CAPITAL* 43 (2014).

public and private actors.<sup>86</sup> The persistence of the pursuit of residential segregation is important to consider because we only vaguely understand segregation as a pursuit of geographical differentiation and hierarchy; *i.e.* a quest for social dominance.

Social dominance theory “attributes systemic racial inequality to purposeful efforts by dominant classes to preserve their privileged status.”<sup>87</sup> Under this theory, society organizes itself into groups, some of which are dominant while others are subordinate.<sup>88</sup> The dominant groups are advantaged in status and access to resources, justifying such advantages through “legitimizing myths.”<sup>89</sup> The myths “can appear as racist or as race-neutral and still accomplish the same goal of social domination.”<sup>90</sup> Whites, as part of the dominant group in the United States endorse and legitimize race-neutral policies that disparately impact people of color to “preserve their dominant racial status.”<sup>91</sup> For example, inequalities in the ways criminal laws are conceived, and enforced either selectively or harshly are a persistent reflection and effective method of social dominance.<sup>92</sup> Race has historically been connected to which activities were defined as crimes and resulted in today’s hierarchy of black subjugation and white supremacy where those with a criminal record are locked into economic and social exile.<sup>93</sup> Racial segregation in housing reflects decisions made to legitimize exclusionary housing choices and patterns that result in racialized social dominance. The legitimizing myth in terms of race, geography and housing is that the poverty of the inner cities and the racialized white wealth of the suburbs are due to individual merit which some groups possess and others do not. Similarly, gentrification is considered inevitable and unstoppable because the dominant

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86. See, e.g., CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* (1955); DAVID M. P. FREUND, *COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA* (2007); ROTHSTEIN, *supra* note 67.

87. Darren L. Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 53 (2015). See also Erika K. Wilson, *Why Diversity Fails: Social Dominance Theory and the Entrenchment of Racial Inequality*, 26 NAT. BLACK. L.J. 129, 147–50 (2017).

88. JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* 31 (1999); see also Hutchinson, *supra* note 87, at 32.

89. SIDANIUS & PRATTO, *supra* note 88, at 31–32, 45–48.

90. Hutchinson, *supra* note 87, at 47. See also SIDANIUS & PRATTO, *supra* note 88, at 171–75.

91. Hutchinson, *supra* note 87, at 48. See also SIDANIUS & PRATTO, *supra* note 88, at 45; Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 95 (2000).

92. See Hutchinson, *supra* note 87, at 32–33, 84. See also SIDANIUS & PRATTO, *supra* note 88, at 202, 205–06.

93. See Hutchinson, *supra* note 87, at 74–85.



group have selected formerly reviled places as desirable. In terms of particular locations and places, these choices, protected by law, naturalize and mask the pursuit of and a need for social dominance that once one looks closely is apparent as the heart of racial residential segregation.

The history of racial residential segregation constructed during the 20<sup>th</sup> century can clearly be seen as being in pursuit of social domination. Arising in response to newfound Black mobility at the end of legal slavery and the demise of Reconstruction,<sup>94</sup> Whites engaged in a succession of efforts to contain, control, and isolate Blacks.<sup>95</sup> In search of improving their economic circumstances and safety from the regimes of terror in former slave states, Blacks migrated both locally and nationally in search of work and freedom from the violence and feudal fetters of the Jim Crow south.<sup>96</sup> Whites perceived this mobility as a problem, or even an upheaval. Each succeeding decade in the 20th century witnessed the adoption of new and improved tools, both legal and extralegal, public and private. These were accompanied by legitimizing myths that justified controlling where Blacks, and to ensure Whites lived apart from them. These tools of residential separation involved a series of trial and error efforts that cumulatively implemented a desire by Whites to control Black movement and live apart from Blacks, Asians, Jews, Mexicans, immigrants or anyone stigmatized as being undesirable.<sup>97</sup> This separation is noteworthy because postslavery, Blacks and Whites often lived in much less separated residential patterns than today with some Blacks and some Whites living intermixed or in scattered micropockets of racial groupings, still segregated but less so than today.<sup>98</sup> And simultaneously even during those

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94. This effort was of course in tandem with efforts to promote racial segregation in all other aspects of American life, employment, education, public accommodations. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (affirming strict racial separation and exclusion in public accommodations), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 373–74 (N.J. 1982) (attributing the concept of the proprietor's "absolute right of exclusion" at places otherwise held open to the public to the end of slavery).

95. Charles Abrams lamented: "The suburbs and the quest for status are shaping the American personality of the future as the frontier once shaped the American personality of the past . . . American neighborhoods have turned into a breeding ground of bias, fear and discrimination." ABRAMS, *supra* note 86, at 140, 149. The fear was one of inundation. For example, in interracial public and cooperative housing, quotas for the number of Negroes appears to have been considered desirable. *Id.* at 311–12, 316.

96. See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

97. See text accompanying notes 96–112.

98. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 20 (1993). See ROTHSTEIN, *supra* note 67, at 22, 27 (describing existing racially mixed neighborhoods). New, finer-grained studies reveal

relatively more integrated days, because of the separation that did exist, Blacks were more easily economically exploited, as their options for living spaces were kept artificially limited by segregation. They paid relatively high rents for poor living accommodations.<sup>99</sup>

Though the racial residential segregation that we live with today seems natural to some and inevitable to many, the literature makes it quite clear that it did not happen by accident. Instead, the landscape we navigate daily was deliberately constructed by multiple individual, institutional, and governmental decisions and policies over the past 100 years. The residential segregation that was constructed during the twentieth century continues to this day and has resulted in a pattern of racial residential segregation across the United States.

Social domination theory posits that efforts to maintain social dominance, in this case segregation, take place simultaneously through individual, institutional, and societal means. Segregation was created and maintained through a variety of means that reflect an ever-shifting interplay of private sentiments and public practices.<sup>100</sup> It was a vast self-reinforcing experiment of sorts—with the invalidation of one technique, another technique replaced it. Sometimes there was government regulation, state action, unofficial practices, or failure to regulate or provide redress. For example, the Supreme Court’s invalidation of racial zoning in 1917 led to a desperate search for other mechanisms to contain black mobility and fulfill the continued pervasive desire for separation.<sup>101</sup> Private land use agreements

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racial mixing in neighborhoods as segregation doubled nationally from 1880 to 1940. Trevon D. Logan & John M. Parman, *The National Rise in Residential Segregation*, 77 J. ECON. HIST. 127, 129 (2017).

99. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008). But see generally N.D.B. CONNOLLY, *A WORLD MORE CONCRETE: REAL ESTATE AND THE REMAKING OF JIM CROW SOUTH FLORIDA* (2014).

100. See, e.g., Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 967 (2012) (concluding that the Fair Housing Act’s nondiscrimination provisions cannot combat white housing preferences for segregation).

101. See Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913*, 42 MD. L. REV. 289, 314–15 (1983) (discussing Baltimore’s decision to closely follow the Chicago Plan for racial segregation: “The plan was ‘to forc[e] out the blacks already residing in [white] neighborhoods and [to ensure] that no others entered.’”); Garrett Power, *Meade v. Dennistone: The NAACP’s Test Case to “. . . Sue Jim Crow Out of Maryland with the Fourteenth Amendment”*, 63 MD. L. REV. 773, 792 (2004) (“The Committee on Segregation undertook to encourage neighbors, government officials, and real estate agents to use restrictive covenants, peer pressure, harassment, and suasion to promote *de facto* segregation.”).

and racially restrictive covenants became the next technique of choice.<sup>102</sup> While enforcement of such covenants was proscribed in 1948,<sup>103</sup> private decisions to racially discriminate went unchecked until the 1968 Fair Housing Act.<sup>104</sup> At the same time, federal practices enshrined racial segregation in suburban living patterns through federal financing guarantees. Redlining based lending risk assessments on negative racial perceptions assuming black occupancy in a neighborhood meant it was in decline or of low value.<sup>105</sup> Racially homogeneous white neighborhoods were deemed a sure bet for stable lending. Regardless of income, mortgage loans were overwhelmingly unavailable to Blacks.<sup>106</sup> Segregation was also enforced by violence, which was especially prevalent when black families tried to move into white neighborhoods.<sup>107</sup> Tacit agreements among owners and realtors also allowed the ghetto to easily capture Blacks as they sought to move.<sup>108</sup>

Also, the federal government consistently conditioned building projects on maintaining strict racial separation or exclusion of Blacks under the rationale that it was adopting the prevailing practices but often it was introducing racially segregatory practices.<sup>109</sup> Similarly, eminent domain and

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102. See Power, *Meade v. Dennistone*, *supra* note 101, at 792. (detailing the collaboration between the city agencies, real estate professionals and white homeowners associations to racially segregate black homeowners).

103. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

104. For example, the infamous Levittown development was racially restricted based on what was considered to be a market imperative of prevailing hostility to Black neighbors. See ROTHSTEIN, *supra* note 67, at 266. (“As a Jew, I have no room in my mind or heart for racial prejudice,” [Levittown builder William Levitt] said. “But I have come to know that if we sell one house to a Negro family, then 90 or 95 percent of our white customers will not buy into the community. This is their attitude, not ours. As a company, our position is simply this: We can solve a housing problem, or we can try to solve a racial problem, but we cannot combine the two.”).

105. See FREUND, *supra* note 86, at 113–14; ROTHSTEIN, *supra* note 67, at 64–82, 86; JACKSON *infra* note 195, 199–200 (2017).

106. See generally BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA* (2009).

107. In the Midwest and the South, for example, sundown towns rigidly enforced a tacit threat that black people had to be out of town by sundown. JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM*, 90–115 (2005) (describing the variety of methods for excluding black people from towns across America through violence, ordinance or informal law enforcement actions. The term “sundown” refers to the understanding that black people had to conclude their business in a town and get out by the end of the day).

108. See ANTERO PIETILA, *NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY* 56–60 (2010).

109. See ROTHSTEIN, *supra* note 67, at 21. During the Depression era, federal housing projects followed “a ‘neighborhood composition rule’: federal housing projects should reflect the previous racial composition of their neighborhoods. Projects in white areas could house

redevelopment disproportionately targeted black neighborhoods.<sup>110</sup> And through it all, municipal regulatory power was exercised via zoning—styled as neutral, implemented according to an exclusionary world view, but ultimately a pillar of residential racial segregation. Zoning ordinances emerged as a revolutionary modern tool of regulation that applied race and class reasoning and aspirations to a still nascent suburban ideal to restrict land use by building type. Such ordinances assumed an inherent incompatibility between the single-family home and the multifamily building. When the Supreme Court ratified zoning in *Village of Euclid v. Ambler Realty Co.*,<sup>111</sup> it enshrined economic segregation and exclusion as a constitutional, if not sensible, exercise of the police power. One’s housing type and size were understood as a function of buying power and, tacitly, of economic station. Exclusionary zoning thus became a central tool in the localist toolkit for hoarding resources for the members of relatively affluent local government units.<sup>112</sup>

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only white tenants, those in African American areas could house only African American tenants, and only projects in already-integrated neighborhoods could house both whites and blacks.” *Id.*

110. See *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 428 (D. Md. 2005) (describing an example of segregatory practices in relation to Baltimore’s public housing); ROTHSTEIN, *supra* note 67, at 32, 191–92 (use of redevelopment to demolish black neighborhoods usually forcing black residents into other segregated neighborhoods.). See also James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 588–90 (1979) (noting that the Great Society programs with geographic emphasis and geographic eligibility requirements, like Model Cities and Community Action Programs, generally perceived as benign or beneficial, worsened segregation and movement to the suburbs); Colin Marshall, *Pruitt-Igoe: The Troubled High-Rise That Came to Define Urban America*, GUARDIAN (Apr. 22, 2015, 7:52 AM), <https://www.theguardian.com/cities/2015/apr/22/pruitt-igoe-high-rise-urban-america-history-cities> [<https://perma.cc/D6XL-AEYQ>] (infamous public housing project demolished in the 1970s that has come to symbolize the failures of public housing divorced from place, economic feasibility and the needs of its residents).
111. 272 U.S. 365 (1926).
112. See RICHARD REEVES, *DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT* (2017); Steve Inskip, *Top 20% of Americans ‘Hoard the American Dream’*, NPR: MORNING EDITION (May 31, 2017, 5:03 AM), <http://www.npr.org/2017/05/31/530843665/top-20-percent-of-americans-hoard-the-american-dream> [<https://perma.cc/QC3U-9KRB>] (“Reeves argues that the top 20 percent of Americans . . . dominate the best schools, live in the best-located homes and pass on the best futures to their kids. . . . [W]e protect our neighborhoods, we hoard housing wealth, we also monopolize selective higher education and then we hand out internships and work opportunities on the basis of the social network—people we know in the neighborhood or meet on the tennis courts. As so to that extent we are kind of hoarding those things that should be more widely available.”).

For much of the twentieth century, the racially-disparate negative effects of zoning were rarely acknowledged, and were legitimated as natural and inevitable.<sup>113</sup> One consequence has been that zoning has enshrined a stigmatization of lower cost multifamily housing, in particular rental apartments—it allows owners of relatively higher priced single family housing to exclude multifamily housing structures from zones designated single family.<sup>114</sup> For over 90 years, zoning as a tool of community design has allowed choices that assumed the most desirable way to live was cloistered from commerce, lower cost housing, strangers, and foot traffic.<sup>115</sup> An overlooked consequence of the ubiquity of this assumption is that but for zoning, an individual homeowner's or neighborhood's ability to exclude low cost housing would not exist.<sup>116</sup> This history of deliberate, consistent, and

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113. See *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 313 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926) (“[N]o gift of second sight is required to foresee that if [racial zoning] had been sustained [in Buchanan], its provisions would have spread from city to city throughout the length and breadth of the land. And it is equally apparent that the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored races or certain foreign races invade a residential section, are so well known as to be within judicial cognizance.”).
  114. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (“[I]n . . . [single family or detached houses] sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district . . . their height and bulk [interfering] with the free circulation of air and monopolizing the rays of the sun . . . and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business . . . detracting from their safety and depriving children of the privilege of quiet and open spaces for play, . . . until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses . . . come very near to being nuisances.”).
  115. Though studies seldom demonstrate a negative impact on housing prices from the construction of well-managed and appropriately scaled apartments, the conventional wisdom that multifamily housing hurts property values is accepted unquestioningly as fact. See Mai Thi Nguyen et al., *Opposition to Affordable Housing in the USA: Debate Framing and the Responses of Local Actors*, 30 HOUSING THEORY & SOC’Y 107, 111 (2013) (discussing the stigmatization of affordable housing as tied to race and attributed to, among other things, fears of declines in property values); J. Rosie Tighe, *Public Opinion and Affordable Housing: A Review of the Literature*, 25 J. PLAN. LITERATURE 3, 9–10 (2010) (noting the numerous efforts to study assumed negative effects of affordable housing on property values and finding little evidence of such effect from well-managed developments).
  116. GUY STUART, *DISCRIMINATING RISK, THE U.S. MORTGAGE LENDING INDUSTRY IN THE TWENTIETH CENTURY* 37 (2003) (observing that, absent zoning, high land values are inadequate for excluding lower-income residents from a neighborhood because housing can be made affordable by owners building and renting out apartments). The effect of lower cost housing located near higher cost housing could be nearly eliminated because no neighborhood

institutional racial segregation has led to effects that are devastating in two overlooked respects—segregation has 1) shaped the lack of affordable housing in the United States and 2) been exacerbated by unstable, market-based approaches to the provision of lower-income housing.<sup>117</sup>

### C. **Mixing and Class: The Opposition to Low-Income Housing**

The notion that poor people bring something undesirable to a neighborhood has been widespread and persistent in the twentieth and twenty-first centuries. This belief manifests in persistent opposition to the building of low-income housing in single family residential home neighborhoods.<sup>118</sup> This opposition is largely seen as a rational response to the investment in one's home resulting in an attendant investment in racialized property values enhanced by race and class exclusion.<sup>119</sup> Social domination theory is helpful for understanding this class opposition as a pursuit of status and dominance, as well as the reciprocal relationship between dominant and subordinate status. Thus, the flip side of the resulting black spatial isolation is status protection. White residential homogeneity has benefitted Whites financially and psychically by providing a highly valued form of culturally transmitted capital. Not only does segregation relate to such status, but it allows Whites to feel safe from fear of Blacks. The fear is rationally irrational—the safety provided by segregation is so highly valued that it is reflected in the prices that buyers are willing to pay for neighborhoods that

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would be immune and builders who might find it financially attractive to build such housing could do so. Low cost housing would theoretically be dispersed in diverse places. The ability to run would not exist and thus the need to accept it would be increased.

117. See generally JASON HACKWORTH, *THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM* 48–60 (2006) (describing the influence of neoliberalism in the move towards privatization in the provision of public housing as exemplified by the HOPE VI program).
118. See, e.g., DOUGLAS S. MASSEY ET AL., *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* 44–49 (2013) (providing an example of the typical political opposition to an affordable housing development in Mount Laurel, New Jersey); JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* 158–59 (2012) (describing the opposition to affordable housing in Chicago in the context of *Gautreaux* litigation settlement); CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 235–36 (2005) (noting the reality of opposition to low-income family housing in Nassau County, Long Island as perceived as being occupied by African Americans).
119. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

are homogeneous.<sup>120</sup> It has also enabled the white hoarding of segregation's benefits, with resources withdrawn in various ways from black areas.<sup>121</sup> As discussed above, generic rules of zoning allow those resources in terms of lower taxes from higher property values and with greater resources for services like schools, to be retained for current and future generations.<sup>122</sup> As a result of the successful opposition to low-income housing, the segregated metropolitan landscape is comprised of a spatial and societal dynamic of stigma, shame, valorization, and self-satisfaction. The stark contrast in neighborhood circumstances also provides an unacknowledged benefit—the pleasure of the contrast, a reciprocal relationship between disinvestment and valorization. The worse one area is, the more valuable other areas will be. This benefit is racialized—it is available to Whites even if they are lower income.<sup>123</sup>

The cost is a belief that this engineered situation is natural, and that to reverse it requires social engineering. This fuels a racialized withdrawal from the provision of public goods, or seeing the need for them, because they are

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120. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 150 (2d ed., 2006) (“In general, homes of similar design, size, and appearance cost more in white communities than in black or integrated communities. Their value also rises more quickly and steeply in white communities. In theory, then, whites pay a premium to live in homogeneous neighborhoods, but their property appreciates at an enhanced rate.”). See also LEEANN LANDS, *THE CULTURE OF PROPERTY: RACE, CLASS, AND HOUSING LANDSCAPES IN ATLANTA, 1880–1950* 93 (2009) (noting an early opponent to racial integration argued “[t]here is no problem so grave, nor one so fraught with so much danger to property values as the gradual influx of the negro into blocks or squares where none but whites reside”); WILKERSON, *supra* note 96, at 376 (“It was an article of faith among many people in Chicago and other big cities that the arrival of colored people in an all-white neighborhood automatically lowered property values.”).
  121. See DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 19 (2007) (“If out-group members are spatially segregated from in-group members, then the latter are put in a good position to use their social power to create institutions and practices that channel resources away from the places where out-group members live . . . . Spatial segregation renders stratification easy, convenient, and efficient because simply by investing or disinvesting in a place, one can invest or disinvest in a whole set of people.”).
  122. See REEVES, *supra* note 112, at 104–05 (describing the manifestation of exclusionary zoning today).
  123. While the white lower-income person generally does not reside in neighborhoods of concentrated poverty and instead resides in economically integrated neighborhoods, overall income inequality is increasing economic segregation as the advantaged segregate themselves. See generally FLORIDA & MELLANDER, *supra* note 66 (“The wealthy are more segregated than the poor—indeed they are the most segregated of all, and by a considerable margin . . . . About half of all black families have lived in the poorest American neighborhoods over the last two generations, compared to just 7 percent of white families.”).

perceived to be benefiting an undeserving, illegitimate other—Blacks.<sup>124</sup> The opposition to low-income housing has been, and is still, a significant impediment to racial integration and the building of affordable housing outside of the inner cities. It is the reason why racial segregation continues to be a battleground fifty years after the passage of the Fair Housing Act.<sup>125</sup>

### 1. Federal Withdrawal From Support for Affordable Housing Has Led to Market-Based Approaches

The negative attitude towards public or social housing in the United States has been shaped by a sense of failure of surrounding public housing developments accompanied by a longstanding ideologically driven belief that somehow the private market can do a better job than the government.<sup>126</sup> Public housing began almost as an aberration following the Great Depression to address the housing needs of a temporarily submerged middle class and then became a program of last resort, housing for the poorest of the poor.<sup>127</sup> With the growing lack of support for social housing, the federal government has steadily withdrawn direct financial support for construction and subsidies and tended towards relying on private markets and actors—the most dramatic illustrations of this approach are the Section 8 housing voucher program and the Low Income Housing Tax Credit (LIHTC) programs.<sup>128</sup> Accompanying this development has been the rise of the mixed-income principle, whose

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124. While the homogeneity has benefited white residents financially, it has arguably deprived white people living in homogeneously white areas of access to and ability to cope with difference. Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 640 (2008) (“A 2006 review of 500 prior studies, involving more than 250,000 participants, found that greater levels of intergroup contact among children, adolescents, and adults are associated with lower levels of intergroup prejudice.”). But J. Eric Oliver notes that the higher the minority population at the metropolitan level, the higher levels of racial prejudice. J. ERIC OLIVER, *THE PARADOXES OF INTEGRATION: RACE, NEIGHBORHOOD, AND CIVIC LIFE IN MULTIETHNIC AMERICA* 8 (2010).

125. See, e.g., *Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (holding that disparate-impact liability was available under the Fair Housing Act); *Cty. of Westchester v. U.S. Dep’t of Hous. & Urban Dev.*, 116 F. Supp. 3d 251, 261 (S.D.N.Y. 2015), *aff’d*, 802 F.3d 413 (2d Cir. 2015) (dismissing County’s challenge to earlier ruling that False Claims Act had been violated when County falsely certified it had analyzed race-based impediments to fair housing).

126. See LAWRENCE J. VALE, *PURGING THE POOREST: PUBLIC HOUSING AND THE DESIGN POLITICS OF TWICE-CLEARED COMMUNITIES* (2013).

127. See Jason Hackworth, *Destroyed by Hope: Public Housing, Neoliberalism and Progressive Housing Activism in the US*, in *WHERE THE OTHER HALF LIVES: LOWER INCOME HOUSING IN A NEOLIBERAL WORLD* 236 (Sarah Glynn ed., 2009).

128. See *id.* at 241.



popularity has grown steadily as a way to avoid the past failures of public housing and hopefully ensure healthy sustainable integrated developments.<sup>129</sup> The extensive public housing redevelopment program, HOPE VI, was the first widespread effort to adopt the mixed-income and mixed-tenure principle.<sup>130</sup> The program was highly controversial because it tore down existing public housing to construct mixed-income, mixed-tenure replacement housing developments that never contained sufficient units to house all of the original residents.<sup>131</sup> Displaced residents were often given Section 8 vouchers and were forced to resettle in surrounding high-poverty, segregated neighborhoods.<sup>132</sup> This history is crucial for understanding how mixed-income housing has become so popular. The Department of Housing and Urban Development (HUD) began to endorse mixed-income housing as the desirable way to build social housing and foster integration.<sup>133</sup> While not widely understood as a racial integration strategy, the tacit assumption has been that indirectly, economic integration would achieve all of the same things that a racial integration strategy would. Since Blacks are overrepresented in low-income groups, the unspoken assumption is that Blacks will likely be included in the target beneficiary group in many metropolitan areas. This is beneficial since, as this paper argues, economic integration is more socially and politically

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129. See Glynn, *supra* note 72, at 78 (“[T]he push for income mix today has coincided with a retreat towards past levels of inequality as governments abandon the idea that equality is possible, or even desirable. Income mix has become a substitute for income equality. . . . The current incarnation of the idea of income mix is based around the argument for area effects—that is, that it is worse to be poor in a poor area than poor in an area of mixed prosperity. This is an idea that developed in the United States and has become generally accepted, acquiring the status of a common-sense truth. However, it was based more on intuition than evidence.”).
  130. See Richard D. Baron, *The Evolution of Hope VI as a Development Program*, in FROM DESPAIR TO HOPE: HOPE VI AND THE NEW PROMISE OF PUBLIC HOUSING IN AMERICA’S CITIES 31, 31–33 (Henry G. Cisneros & Lora Engdahl eds., 2009); Henry G. Cisneros, *A New Moment for People and Cities*, in FROM DESPAIR TO HOPE: HOPE VI AND THE NEW PROMISE OF PUBLIC HOUSING IN AMERICA’S CITIES, *supra*, at 9–12; Bruce Katz, *The Origins of Hope VI*, in FROM DESPAIR TO HOPE: HOPE VI AND THE NEW PROMISE OF PUBLIC HOUSING IN AMERICA’S CITIES, *supra*, at 21.
  131. See generally WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES (Larry Bennett, Janet L. Smith, & Patricia A. Wright eds., 2006) (describing Chicago and other cities efforts to build mixed-income housing through the HOPE VI program).
  132. See *Thompson v. Dep’t Hous. & Urban Dev.*, 404 F.3d 821 (4th Cir. 2005) (finding HUD failed to affirmatively further fair housing when it allowed public housing authorities to follow historic intentionally racial discriminatory patterns of public housing siting).
  133. See Bruce Katz, *supra* note 130, at 27.

palatable since racial hostility is still a feature of the American landscape.<sup>134</sup> Yet whether mixed-income housing represents an advancement or retrenchment is still an unanswered question. As Edward Goetz observes:

“We find ourselves now at the end of the era of public housing, as those same facilities, now aged, neglected, and sometimes severely distressed, are taken down and replaced by another new planners’ utopia, the mixed-income, New Urbanist community. This circularity is notable in itself . . . .”<sup>135</sup>

The downside of the economic integration approach is the extent to which market considerations fail to meet the needs of those in most need of housing support. As the following discussion will demonstrate, the market does not favor low-income people. Racial stigma and hostility over status threat are ever present. Providing a public good like mixed-income housing through private means requires program administration that maximizes private market value with the minimum of public subsidy. In the housing context, this reality has been exacerbated by the steadily declining financial support for subsidized rental housing.

#### D. Mixing and the Consequences of Segregation

The legacy of twentieth century segregation and present-day segregative behaviors is widespread white-black spatial isolation and social separation. While mixing is the current social goal, our metropolitan regions are divided into dual housing markets that result in concentrations of black disadvantage and white advantage. Black people were excluded from the initial wave of suburbanization and were overwhelmingly cut off from access to asset building through house value appreciation. They were instead relegated to crowded, expensive areas with depressed markets.<sup>136</sup> The consequence and challenge for mixing is that wherever Blacks are they are concentrated in

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134. See Seicshnaydre, *supra* note 100, at 1015 (“Inclusionary zoning policies are not silver bullets for inclusion in that urban poor households do not always benefit from these policies.”); see generally Drew Volmert et. al., *Mixing It Up: Reframing Neighborhood Socioeconomic Diversity* 44–48 (2016) (for a helpful exposition of the need for economic integration while secondarily acknowledging racial integration and Fair Housing as a necessary component), [http://www.frameworksinstitute.org/pubs/mmm/mixingitup/Knight\\_MessageMemo\\_Final\\_2016.pdf](http://www.frameworksinstitute.org/pubs/mmm/mixingitup/Knight_MessageMemo_Final_2016.pdf) [<https://perma.cc/U5P7-EB4R>].

135. Edward G. Goetz, *Book Review: Purging the Poorest: Public Housing and the Design Politics of Twice-Cleared Communities*, 44 CONTEMP. SOC., 128 (2015) (reviewing VALE, *supra* note 126) <https://journals.sagepub.com/doi/full/10.1177/0094306114562201ddd> [<https://perma.cc/5YJW-CCHD>].

136. See generally FREUND, *supra* note 86.

certain identifiable areas of town.<sup>137</sup> This phenomenon of segregation can be measured by a “dissimilarity index,” which indexes metropolitan areas based on the percentage of Whites that would have to move to achieve statistical integration.<sup>138</sup> Thus an index of 65 means 65 percent of Blacks would have to move to achieve eliminate segregation. All of the dissimilarity indices show increasing rates of black-white segregation through the twentieth century.<sup>139</sup> As Massey and Denton found, “[b]efore 1940, no racial or ethnic group . . . had ever experienced an isolation index above 60 percent,” but between 1940 and 1970 Blacks and Whites occupied wholly distinct neighborhoods.<sup>140</sup> As discussed above, this was a dramatic departure from nineteenth century residential housing patterns “where neighborhoods were racially integrated and the social worlds of blacks and whites overlapped.”<sup>141</sup> The depressive impact on wealth accumulation and intergenerational wealth transmission serves as a profound intergenerational transmission of inequality.<sup>142</sup>

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137. The scientific measures fail to capture the lived experiences of racial separation and homogeneity. That lived experience has to take into account both the pain and pleasure of the resulting racial segregation. On the one hand, racial segregation has provided a certain predictability to our metropolitan areas. It denotes for many places to be avoided and places to desire. For example, academics and journalists have documented that the vast majority of MLK Blvds in the United States ran through areas with Black residents. See Tanvi Misra, *The Remaking of Martin Luther King Streets*, CITYLAB (Nov. 23, 2015), <https://www.citylab.com/solutions/2015/11/the-remaking-of-martin-luther-king-streets/415449> [<https://perma.cc/X5WN-6B4T>].
138. See generally RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, *MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING* passim (2018) (describing changes in the dissimilarity index over time as part of a comprehensive review of the policies giving rise to segregation and arguments for steps to take to promote integration).
139. See generally MARK FOSSETT, *NEW METHODS FOR MEASURING AND ANALYZING SEGREGATION* (2017). The persistent extreme segregation for black people in high poverty black neighborhoods that existed in the 1960s or 1970s are the same high poverty neighborhoods that exist today. But see Alan Berube, *Beyond Baltimore: Thoughts on Place, Race, and Opportunity*, BROOKINGS (Sept. 29, 2015), <https://www.brookings.edu/on-the-record/beyond-baltimore-thoughts-on-place-race-and-opportunity> [<https://perma.cc/X5WN-6B4T>] (noting that Baltimore has below average concentration of poverty); Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law, and Residential Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 CAL. W. L. REV. 185, 195 (1997); (“[G]iven the same economic ability, Asians preferred to live in Asian and Anglo neighborhoods, while avoiding African-American communities.”).
140. Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in *SEGREGATION: THE RISING COSTS FOR AMERICA* 39, 66, 75 (James H. Carr & Nandinee K. Kutty eds., 2008).
141. *Id.* at 75.
142. See, e.g., MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 130–38, 148–68 (2d ed. 2006).

Racial segregation is still, however, perceived to be merely the natural separation of the races with the causes of that separation poorly understood.<sup>143</sup> The first way that segregation should be understood is as not merely separation, but as a disinvestment by the majority society. That disinvestment happens on two levels. First, disinvestment means that those with resources leave or avoid neighborhoods that are primarily Black or such neighborhoods become so after White flight. Second, the neighborhoods are commercially abandoned—national retail and commercial enterprises bypass these communities, leading to food deserts, and a lack of banking and retail options. The consequence of both is that the housing markets suffer—to the extent there is homeownership, there will be lower property values for comparable housing.<sup>144</sup>

Second, segregation should be understood as causing a concentration of impoverished Black people in racially segregated neighborhoods. This phenomenon is seen as one of personal choice, cultural behaviors, and lack of striving—a bad place is widely believed to reflect bad people. Yet, sociologists have proven that racial segregation causes concentrations of poverty.<sup>145</sup> First, the trend towards racial segregation coincided with deindustrialization and the loss of manufacturing industries. The resulting unemployment concentrates the people most affected into inner city communities. As noted by William Julius Wilson, the poverty numbers and stigma are a geographical manifestation of these economic trends.<sup>146</sup> For lower-income Blacks, these neighborhoods are characterized by low property values, high dilapidation, commercial underinvestment, criminogenic living experiences, and paradoxically high public investments focused on policing, incarceration, and

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143. See Volmert et. al., *supra* note 134, at 4.

144. See Rafael Mota, *The Power of an Illusion: How the Racial Wealth Gap was Created*, YouTube (Sep. 13, 2018), <https://www.youtube.com/watch?v=QHo8AKNfB68> (discussing the property values of his childhood home as compared to identical structures in white suburban neighborhoods).

145. See generally MASSEY & DENTON, *supra* note 98, at 115–47 (segregation leads to geographical stratification of affluence and poverty that tracks race); GARY ORFIELD, CHUNGMEI LEE, *WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY* (2005) (segregation creates high poverty schools); MARY PATTILLO, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS*, (2d ed. 2013); JOHN R. LOGAN, *SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS, AND ASIANS IN METROPOLITAN AMERICA* (2011); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* (2013). *But see* Lincoln Quillian, *Segregation as a Source of Contextual Advantage: A Formal Theory with Application to American Cities*, 3 *RSF: RUSSELL SAGE FOUND. J. SOC. SCI.* 152 (2017) (arguing that income is very important to understanding how segregation or desegregation affects racialized concentrations of poverty and affluence).

146. WILLIAM J. WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1997).

the services necessary to address the social consequences of such incarceration (referred to as “million dollar blocks”).<sup>147</sup> According to Mary Patillo, for upper-income Blacks, their neighborhoods often adjoin these lower-income black neighborhoods. They experience lower property values, and the spillover effects of the concentrated poverty on their neighborhoods.<sup>148</sup> Thus, the Black middle-class experience comes with a somewhat paradoxical deprivation—the paradoxical decreased ability to as effectively exclude lower-income housing experienced by white middle-class neighborhood residents.<sup>149</sup> Mixing could theoretically ameliorate these consequences.

## E. Mixing and Attaining Integration

### 1. Defining Integration

Mixing is a principle and method designed to accomplish the goal of integration. Because of the difficulty in coming up with an operational definition of integration, it is challenging to develop consistent, principled standards for mixing. The question is rarely asked is how much mixing is required to count as mixing. Instead, the principle or method threatens to become the goal itself, rather than serving as a means to a desired end. The assumption is that the mixing principle is the same as the goal of integration. This is similar to the diversity principle in affirmative action litigation, where the method or technique of diversity to accomplish integration has become an end in itself, diversity is now the goal rather than a means to a desired

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147. See James Austin et al., *Sentencing Project, Ending Mass Incarceration: Charting A New Justice Reinvestment* 5 (2013). (“The most locally concentrated pockets of incarceration were dubbed “Million Dollar Blocks,” because of the millions being spent each year on prison cells for high proportions of working-age male residents for an average of three years. Million dollar blocks dramatized the tradeoffs for specific neighborhoods between locally concentrated incarceration spending policies, and alternative, locally focused investment policies that could yield greater returns in public safety, strengthened community institutions, and expanded neighborhood networks.”); Jennifer Gonnerman, *Million-Dollar Blocks: The Neighborhood Costs of America’s Prison Boom*, VILLAGE VOICE (2004), <http://www.november.org/stayinfo/breaking2/Millions.html> [https://perma.cc/3FK5-6HKP] (reprinted in TARA HERIVEL & PAUL WRIGHT, *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION* (2009)); George C. Galster, Jackie M. Cutsinger & Ron Malega, *The Costs of Concentrated Poverty: Neighborhood Property Markets and the Dynamics of Decline*, in REVISITING RENTAL HOUSING: POLICIES, PROGRAMS, AND PRIORITIES 93, 94–96 (Nicolas P. Retsinas & Eric S. Belsky eds., 2008).

148. PATILLO, *supra* note 145, at 30, 87. See also Bart Landry & Kris Marsh, *The Evolution of the New Black Middle Class*, 37 ANN. REV. SOC. 373 (2011) (discussing black middle class and racial residential segregation).

149. See Patrick Sharkey, *Spatial Segmentation and the Black Middle Class*, 119 AM. J. SOC. 903 (2014); McFarlane, *supra* note 65.

policy end.<sup>150</sup> Mixing likewise becomes an end that leads to failure to identify standards for how or why it should be accomplished.

There is a tendency to be vague about mixing because defining integration is hard. The literal definition of integration is “[t]he process of making whole or combining into one.”<sup>151</sup> It is estimated that attaining perfect residential integration, according to the dissimilarity index, would require all Blacks to move based on the segregation index in the metropolitan region.<sup>152</sup> This clinical definition of integration raises the question of whether, and why, we want to achieve this.<sup>153</sup> The unstated assumptions are that there are no appreciable differences between Blacks and Whites and that community among black people is undesirable and unnecessary.<sup>154</sup> The National Research Council definition suggests an alternate, more fully developed definition of integration:

Complete integration exists in a multiracial institution if: (1) there is *significant* numerical representation for each group; (2) each group is distributed throughout the institutional structure; and (3) each group enjoys equality, authority, and power within the institution. These conditions will not develop . . . unless equal status of the races is achieved, common superordinate goals exist for all, and the process has authoritative sanction and support.<sup>155</sup>

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150. See Lesley A. Jacobs, *Integration, Diversity, and Affirmative Action*, 32 LAW & SOC'Y REV. 725, 728 (1998) (arguing for pursuing both an integration rationale and the diversity rationale for affirmative action).

151. See *Integration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

152. MASSEY & DENTON, *supra* note 98, at 20 (“The standard measure of segregation is the index of dissimilarity, which captures the degree to which blacks and whites are evenly spread among neighborhoods in a city . . . The index of dissimilarity gives the percentage of blacks who would have to move to achieve an ‘even’ residential pattern—one where every neighborhood replicates the racial composition of the city.”).

153. See generally ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2013).

154. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1497 n.46 (1993) (“Although blacks and whites share consensus on an abstract goal of achieving an integrated and equalitarian society, ‘their images of what constitute integrated, equalitarian, and racially harmonious conditions are often different or contradictory . . . and [their] perceptions of the genesis and reproduction of group inequality are sharply divergent.’”).

155. GERALD DAVID JAYNES, ROBIN M. WILLIAMS, JR., EDs., *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* (1989), *supra* note 154, at 57 (italics added). See Minow, *supra* note 124, at 600; 602 (“As Dr. King described it, integration involves the creation of a community of relationships among people who view one another as valuable, who take pride in one another’s contributions, and who appreciate differences and know that commonalities and synergies outweigh any extra efforts that bridging differences may require. . . . In integrated communities, people’s differences become a resource, opening avenues for learning, exchange, self-invention, and self-extension through connections,

Yet, none of the theoretical definitions acknowledge the tension caused by an ongoing white preference for segregation that exists in tandem with integration efforts.<sup>156</sup> The definition of integration that underlies many such policy efforts relies heavily on the elusive elements of social acceptance, and probably explain why we have not yet achieved it meaningfully.<sup>157</sup> If, as discussed above, white space is highly valued as a hoarded resource,<sup>158</sup> integration means something far more radical than merely desegregating—it means accepting Blacks, possibly in substantial numbers, into areas that are cherished for being exclusively white areas. Integration has been problematic due to these inherent group inequality and power differentials that are attendant to America’s history of racial segregation. Yet, focusing integration efforts more directly on disrupting the group inequality and power differentials is potentially politically fraught. In this challenging context, integration’s first goal is to establish a norm of mixing as nonsegregation and then see that the principle is followed in community planning and design. Second, it has to define what that mixing should look like in ways that fulfill antidiscrimination principles. Third, from an efficacy standpoint, it has to face entrenched attachment to both segregation and discrimination, as well as the financial and political ability to circumvent. In particular, this challenge is compounded by the effects of segregation, namely that non-middle-class Black integration remains the primary battleground.

## 2. The Fair Housing Act as the Prevailing Legal Norm for Integration

Desegregation and integration legislation faced a daunting challenge of ending a destructive practice that the majority perceived to be tangibly beneficial. Law makers sought to do so in a manner that would not offend or upset that majority who felt a perceived property right to discriminate based on race was being circumscribed. The formal adoption of antidiscrimination

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disagreements, and identifications with people sharing multiple lines of similarity and difference.”).

156. See Cara Wong, *Would We Know ‘Integration If We Were to See It?’ Measurement and the Imperative of Integration*, 12 POL. STUD. REV. 353 (2014) (summarizing the quantitative challenges of defining and measuring integration).
157. Rodney A. Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980’s*, 58 S. CAL. L. REV. 947 (1985) (arguing that racial integration been essentially written out of U.S. Supreme Court doctrine).
158. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1746 (1993) (“After the dismantling of legalized race segregation, whiteness took on the character of property in the modern sense in that relative white privilege was legitimated as the status quo.”).

principles with respect to housing began with the 1968 federal Fair Housing Act (FHA).<sup>159</sup> The legislation's sponsors saw the contradiction of American ideals of liberty and mobility by allowing the exclusion of Blacks with financial resources as one of the most blatant manifestations of the harms of rampant discrimination. Since then, the legislation has been understood as using the prohibition on discrimination to attain integration as a complementary goal.<sup>160</sup> The necessary first step to implementing integration was to remove artificial barriers to geographic mobility that restricted racial minorities of economic means from moving out of ghetto areas.

Reflecting the realpolitik of the era, desegregation was couched in the language of discrimination based on racial identity, as well as other prohibited identity categories, but was in fact class-based in terms of who would be able to take advantage of its' provisions—mainly affluent and upper middle-class black homeowners aspiring to purchase or rent in white neighborhoods that were formerly off limits. When the Act prohibited exclusion of individuals seeking to rent or purchase housing, the drafters knew and, in search of votes, explicitly assured legislators that very few Blacks would be able to take advantage of the Act's protections because relatively few would have the resources to purchase housing.<sup>161</sup> Black exit was always assumed to be to the suburbs, where the jobs were located but, simultaneously understood to be economically unobtainable locations. The legislation's promise was mobility

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159. Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2015). At the height of agitation for “open housing,” the Supreme Court revived the Civil Rights Act of 1866 in *Jones v. Mayer* making available the statute's broad antidiscrimination principles with respect to property ownership. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

160. See *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521–22, 2525–26 (2015) (recognizing the FHA's goal was to achieve integrated communities by, among other things, eliminating barriers from zoning); see Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 715 (2017) (“[E]arly Supreme Court and lower-court decisions [recognized] the statute should be interpreted broadly to achieve its goal of integration.”).

161. 114 CONG. REC. 2279 (1968) (statement of Sen. Brooke) (“Fair housing does not promise to end the ghetto; it promises only to demonstrate that the ghetto is not an immutable institution in America. It will scarcely lead to a mass dispersal of the ghetto population to the suburbs; but it will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America.”); 114 CONG. REC. 2525 (1968) (statement of Sen. Brooke) (“This measure, as we have said so often before, will not tear down the ghetto. It will merely unlock the door for those who are able and choose to leave. I cannot imagine a step so modest, yet so significant, as the proposal now before the Senate.”); 114 CONG. REC. 3421 (1968) (statement of Sen. Mondale) (“[T]he basic purpose of the legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.”).



for those in the ghetto who had the financial means and the emotional stamina to experience hostility to their arrival. The FHA promoted a version of integration informed by stark principles of individualism,<sup>162</sup> limiting the scope and reach of its integrative potential, and thus making it palatable for adoption.

The proponents intended to address the income gap in ability to purchase housing through companion federal legislation that made funds available for homeownership. This legislation also intended for low- and moderate-income housing to be built outside of “the ghetto” in the suburbs.<sup>163</sup> This income gap illustrates that attaining integration, being able to live outside of black ghetto areas in cities and in white areas in the suburbs, closer to jobs, had two dimensions: 1) integration for Blacks with financial means to be mobile and move where desired; and 2) integration for Blacks without financial means, who needed financial support to acquire or rent homes, as well as, new homes built outside of inner city areas. It is this second aspect of the integration challenge that continues today—the need for lower income, non-middle-class integration. The federal government has struggled ever since to find a way to make white communities to accept racial integration, in general, and specifically integration of non-wealthy Blacks.<sup>164</sup>

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162. EDWARD WILLIAM BROOKE, *THE CHALLENGE OF CHANGE: CRISIS IN OUR TWO-PARTY SYSTEM* (1966) (explaining his centrist, progressive conservative beliefs in both limited government, robust civil rights and social uplift through access to the free market). See also Leah Wright Rigueur, *Neoliberal Social Justice: From Ed Brooke to Barack Obama*, ITEMS: INSIGHTS FROM SOC. SCI. (May 30, 2017) (ascribing to Sen. Brooks a black neoliberal ideology that finds solutions to racial inequality in wealth via individual success in the free market), <http://items.ssrc.org/neoliberal-social-justice-from-ed-brooke-to-barack-obama> [https://perma.cc/S3SJ-P3FD].

163. See RICHARD K. GREEN & STEPHEN MALPEZZI, *A PRIMER ON U.S. HOUSING MARKETS AND HOUSING POLICY* 92, 96–98 (2003). The Housing and Urban Development Act of 1968 contained programs to provide homeownership for the poor through interest rate subsidies for low- and moderate-income families to purchase houses (Section 235 Homeowner Assistance Program) and interest rate subsidies for developers who agreed to build and lease dwellings to low-income persons in suburban locations (Section 236 Rental Assistance Act). *Id.*

164. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). A proposed development that would be racially integrated was denied by a town that was 99 percent white. The effort to integrate was entitled to no higher land use protection because the U.S. Constitution was deemed insensitive to racial exclusion and segregation. *Id.* Thus, the Constitution would only respond where the official was not savvy enough to avoid letting bad thoughts be known. Under this rationale, the ordinary rules of zoning granted a collective right to exclude. *Id.*

What does it mean that the primary legislative vehicle for advancing integration adopted a less than radical definition of integration?<sup>165</sup> The pragmatism reflected in the bill certainly reflects only glimmers of an ideal, tempered by the reality of of staunch attachment to racial segregation. Unwilling, or perhaps unable, to confront such opposition, the FHA utilized a limited prohibitory approach and promoted a very limited form of integration when it advanced housing laws that, in theory, opened up housing markets to everyone regardless of race. However, it did not address the structural discrimination that would make it impossible for all but a limited number of elite Blacks to escape the ghetto.<sup>166</sup> The drafters' vision was to dismantle ghetto by allowing middle-class Blacks to access the level of housing their incomes would actually allow. The drafters were acutely aware of the need to deal with Blacks left in the ghetto. But rather than incorporate them explicitly into a vision of integration, the FHA opted for the more politically feasible route of managing discrimination by maneuvering around it. The FHA's remedy then and now is to attain integration through mobility to escape from the segregated, low-income neighborhoods for the black poor. Low- and moderate-income housing programs, such as the Section 235 program, were intended to be complementary legislation that would provide access for lower-income Blacks through purchasing power.<sup>167</sup> Funds were also intended to increase the supply of low-cost housing in suburban areas. The first program ended in a scandal of predatory abuse.<sup>168</sup>

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165. JORGE ANDRES SOTO & DEIDRE SWESNIK, AM. CONST. SOC'Y ISSUE BRIEF, THE PROMISE OF THE FAIR HOUSING ACT AND THE ROLE OF FAIR HOUSING ORGANIZATIONS 17 (2012) (“[I]ntegration is thought of as a dream and not a possible reality . . .”).

166. 114 CONG. REC. 2278 (1968) (statement of Sen. Mondale) (“[A] substantial market of financially able Negroes [are] prevented from buying housing of their choice because of deeply entrenched patterns of discrimination in the sale and rental of housing in our country.”).

167. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 235, 82 Stat. 476, 476–77 (1968) (repealed by Pub. L. No. 100-242, § 401(d), 101 Stat. 1898, 1899 (1988)). See Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1312 (1995) (“Section 235 was designed to make capital more available to lower-income urban homebuyers. From 1969 to 1979, approximately 500,000 homes were purchased under the program. Nevertheless, in several cities, rather than stabilizing inner-city communities, Section 235 promoted rapid neighborhood racial transition and, in some instances, decline.”).

168. Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 895–96 (2011) (describing the predation connected with the Section 235 program, the companion legislation to the FHA). See Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187, 218, 223 (2015) (for an insightful argument about the reification of the single-family house and the white nuclear family in law and policy and the prerogative to exclude multifamily housing).

Yet, the Act's vision of integration was at best gradual, certainly minimal. It seems fair to say the vision was of not pure integration but of a minimal amount deemed bearable—antidiscrimination provisions that only reached affluent or middle-class racial integration. This was understood at that time as an inherent limitation to the legislation's potential, which paradoxically doubled as a selling point.<sup>169</sup> Today, it is the problem of non-middle class, lower-income racial segregation that continues to pose the biggest challenge.<sup>170</sup>

Today, the Fair Housing Act does more to treat the structural aspect of segregation as an obstacle to integration. The Supreme Court in *Inclusive Communities v. Texas* validated a longstanding view that a FHA claim was not limited to intentional discrimination, but could also challenge decisions resulting in disparate racial impact. This interpretation included decisions that perpetuated segregation by promoting community segregative effect, in effect, recognizing that the FHA could be violated by structure: Habitual practices of financing and implementing the construction and location of affordable housing could have a disparate impact on minorities.<sup>171</sup> By not requiring proof of discriminatory intent, the Court recognized that past practices shaped a racial geographical hierarchy such that today's government approval of new development projects, whether intentional or not, could perpetuate segregation.<sup>172</sup> This other aspect of the FHA that sought to address structural barriers to integration was by requiring the Department of Housing and Urban Development (HUD) to monitor the structural effects of federal funding, and to "affirmatively further" Fair Housing.<sup>173</sup> This has been understood to mean, at the very least, federal funds should not be used by

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169. See *supra* note 161.

170. See Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. L. 399 (2003).

171. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2522–23 (2015) (recognizing that the FHA encompasses disparate impact liability, but allowing leeway to housing authorities and private developers to explain and prove that the policy in question serves a valid interest and requiring the plaintiff to make a prima facie case for discriminatory impact).

172. *Id.*

173. 42 U.S.C. § 3608(d), (e)(5) (2006) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of [the FHA] and shall cooperate with the Secretary [of HUD] to further such purposes."). For a discussion of the history of this provision, see Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing*, 100 KY. L.J. 125, 126–28 (2011).

local governments to perpetuate segregation.<sup>174</sup> Federally subsidized affordable housing programs, as well as infrastructure subsidies which were crucial to building racially integrated, workforce housing were rendered ineffective by Executive Policy and inaction at HUD to use subsidized housing funds to carry out this process.<sup>175</sup> During the Obama Administration, HUD comprehensively addressed this problem by adopting an extensive regulations on advancing fair housing.<sup>176</sup> Today, those regulations are in limbo.<sup>177</sup>

After the passage of the FHA, exclusionary practices continued largely unchecked.<sup>178</sup> As discussed above, poorly designed programs like the Section 235 program were exploited and failed to implement obvious solutions.<sup>179</sup> Federal efforts by the Department of Housing and Urban Development were

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174. See David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5, 45–46 (2017) (“The breadth of the definition of AFFH is almost limitless...the definition... dislodges the anti-segregation aspect of the [FHA] from the anti-discrimination prong.”); 114 Cong. Rec. H3422 (daily ed. Feb. 20, 1968); *Schmidt v. Bos. Hous. Auth.*, 505 F. Supp. 988, 996 n.1 (D. Mass. 1981) (quoting 114 CONG. RECORD 2527–28 (1968) (statement of Sen. Brooke)) (“Today’s Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph—even as he ok’s public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have memos to prove it.”).
175. See LAMB, *supra* note 118, at 146, 159–60 (describing Nixon’s 1971 policy statement on fair housing which promised suburbs not to force economic integration on them and to defer to local control to promote racial integration on a voluntary basis).
176. 42 U.S.C. § 3608(e)(5) (2012); 24 C.F.R. § 5.152 (2016) (stating that affirmatively furthering fair housing means “taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws”).
177. See *Policy Minute: HUD Delays Critical Fair Housing Requirement*, N.Y.U. FURMAN CTR: RES. & POL’Y. (Mar. 9, 2018), <http://furmancenter.org/thestoop/entry/policy-minute-hud-delays-critical-fair-housing-requirement> [<https://perma.cc/9W3B-LLKR>].
178. SHARKEY, *supra* note 145, at 53. See Schwemm, *supra* note 173, at 176 (“[T]he 2000 Census demonstrated that, while residential racial segregation of Blacks has been declining slightly, it still is at such high levels that if it continued to decline at the same rate, it would be decades before a moderate level of segregation were reached.”); see also Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1975 (2000) (“The magnitude of the [racial segregation in housing] problem has remained relatively static over the last half century.”).
179. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1312–13 (1995).

thwarted.<sup>180</sup> Many of the high poverty black neighborhoods of the 1960s continue to be the high poverty neighborhoods of today.<sup>181</sup>

The structure of the FHA and its trajectory of ineffective enforcement for low-income Blacks reflects that in a capitalist society, access to racial integration through law will always be mediated by class. The reality that there are, in effect, two types of integration—middle class and non-middle class—also means that mobility for one group comes with immobility for another, resulting in unaddressed costs and tension. The ability to integrate for the black middle class is simultaneously the right to withdraw from the poor.<sup>182</sup> While the FHA appears to address a fundamental deprivation of a right based on one's skin color and African heritage, it imperfectly addressed that the right can also be denied by income which is structured by race. This, however, is consistent with the American world view that a denial based on income would not be a legally cognizable harm and nor should it be.<sup>183</sup>

### III. MIXED-INCOME HOUSING AS DISCRIMINATION MANAGEMENT

The foregoing discussion demonstrates that the challenge for mixing is the need and habit of discrimination via the race and class expectation of domination. Racial segregation reflects racially discriminatory preferences that are habitual and based on aversion, fear, and stereotype. It reflects social networks, and their communicated perceptions of desirability, connection, and safety. Lastly, racial segregation reflects financial investments in status and fierce defense of that status against inclusion. The result is metropolitan areas characterized by racialized concentrations of poverty and affluence that reflect overinvestments and disinvestments and result in drastically different living experiences based on race and class. At the extremes, there are neighborhoods filled with amenities and others starved of amenities and overpoliced. Thus, this geographic manifestations of race and class discrimination are demonstrably deeply embedded, highly valued, and nearly impossible to dislodge.

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180. See LAMB, *supra* note 118, at 159–60 (detailing George Romney's determined efforts to enforce the affirmatively further mandate).

181. Douglas S. Massey, *Inheritance of Poverty or Inheritance of Place? The Emerging Consensus on Neighborhoods and Stratification*, 42 CONTEMP. SOC. 690, 693 (2013) ("The same neighborhoods that were disadvantaged in 2000 were disadvantaged in 1990, not to mention 1980, 1970, and 1960.").

182. For a fuller explanation of this argument, see McFarlane, *supra* note 65, at 168–69.

183. See ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES: AN INTRODUCTION 16–23 (2006) ("[C]oncluding that the case for fostering greater income integration is not yet proven.").

By prohibiting racial discrimination in housing,<sup>184</sup> we have declared it unlawful to deny opportunities for housing on the basis of race or that bear more heavily on a protected group. This prohibition reflects two distinct but interrelated understandings of antidiscrimination protections. One understanding is based on a colorblind anticlassification principle which formally treats race as an arbitrary, invalid criterion. Implicit in the formal prohibition is the concern that individuals subject to arbitrary treatment are deprived of basic rights and their ability to survive or thrive. The cumulative effect for a group of people consistently subjected to such treatment is subordination or second-class citizenship. The anticlassification principle is in tension, however, with antisubordination concerns. Many assume that formal prohibitions on racial classification prevent any consideration of race in efforts to ameliorate negative conditions or improve the circumstances of a subordinated group.<sup>185</sup> While this assumption has certainly been considered extensively in the affirmative action context,<sup>186</sup> little if any attention has been paid to a corollary principle or concern—is it ever proper to take into account, during policy making, a preference for discrimination? Despite legal proscriptions against discrimination, discrimination certainly persists. When Derrick Bell famously observed that racism was permanent, it seemed a hopeless, even demoralizing, observation.<sup>187</sup> Yet it turns out that this insight is borne out by data showing the enduring nature of racial disparities,<sup>188</sup> and is also consistent with the social domination theory's insights that an integral part of social relations and psychology in the United States are the individual and institutional actions that create and maintain a social hierarchy.

How should the omnipresence of discrimination be reflected in law, advocacy, and policy? As mixed-income housing policy shows, we tacitly understand, and policies reflect, that we often concede or cater to a certain

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184. See John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 18 J. AFFORDABLE HOUS. 605, 615 (2008) (“The focus on anti-discrimination normative measures has served to increase the freedom of choice for homebuyers, but it has not necessarily helped produce integrated neighborhoods or addressed segregated living patterns.”).

185. Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1138–41 (1996).

186. Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1046–48 (1997).

187. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 153 (1989).

188. See, e.g., Sharkey *supra* note 145, at 54.

amount of discrimination. These policies show that we, both consciously and unconsciously, manage discrimination by catering to it, even as we say we want to fight it. The poor door and its parent, mixed-income housing, force us to consider the extent to which existing preference for discrimination may validly be factored into our integration efforts. Is it ever morally just to concede to discrimination?<sup>189</sup> When? How much discrimination is tolerable? How much is too much? What should policymakers do?<sup>190</sup>

In the face of what seems to be an enduring geography of race and class separation in housing, a mixed-income housing scheme is certainly a creative discrimination management response. Such schemes tacitly take discriminatory preferences, like preferences for homogeneity or dislikes that manifest in aversion, into account and accommodate them. This is discrimination management—pragmatically considering discrimination as inevitable and managing it by working to cater to some dimensions of it while carefully working around other parts of it. Yet engaging in such discrimination management is an unacknowledged fraught endeavor. The New York City and London poor doors were crude, stigmatizing efforts to overtly cater to discriminatory impulses. The doors were not mere matters of convenience but a way of signaling preferred or high status to some users and lack of status to others. Accordingly, the poor doors demonstrate that the overall project of mixed-income housing has managed discrimination in a manner that is not self-aware nor self-critical. Mixed-income housing uncritically accepts discriminatory preferences as justified because they mirror policymakers' own biases and what they consider to be desirable living arrangements. Moreover, low-income persons are stereotyped and cut off from receiving the valuable resource of housing because they are defined as only eligible for a limited share. Managing discrimination in this way leads to a housing scarcity that perpetuates, if not exacerbates, the problem it intended to solve. The ways in which mixed-income housing has been conceived and

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189. See ROBERT C. POST, *PREJUDICIAL APPEARANCES—THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 22 (2001); DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008).

190. Scholars have partially considered these questions in Supreme Court Equal Protection jurisprudence with the observation that, over time, antidiscrimination protections have been minimized to avoid political backlash and prevent perceived balkanization. Reva Siegel argues that recent Supreme Court decisions have reflected an antibalkanization principle: The Court has “voted to uphold and to restrict race conscious remedies because of concern about social divisiveness which, they believe, both extreme racial stratification and unconstrained racial remedies can engender.” Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1278 (2011).

deployed through inclusionary zoning suggests we have failed to question whether we unacceptably perpetuate discrimination by conceding too much to prevailing structures and norms of race and class discrimination in land use. As the following discussion will show, mixed-income housing is premised on sneaking the poor in, disguising their presence, dispersing them, and avoiding a tipping point where the communities would become unattractive to the affluent. It also relies on legitimizing myths like the benefits of role models for the poor.

#### A. Managing Neighborhood Opposition Through Microintegration

Since the passage of the FHA, it was understood that desegregation would involve mobility of Blacks from cities to suburbs, allowing them to follow the trajectory of development, economic activity, and jobs to the suburbs.<sup>191</sup> As the legislative history demonstrates, the Fair Housing Act of 1968 was premised on the policy solution of facilitating geographic mobility to address the then-recognized problem of spatial mismatch between black people in cities needing jobs that were moving to the suburbs.<sup>192</sup> The non-middle-class black person confined by geography and transportation to the central cities would not be able to benefit from such legal proscriptions without supply-side interventions—funding to subsidize low- to moderate-income homeownership and funding for construction of affordable housing in suburban areas. The road out of segregation and poverty required a triage approach<sup>193</sup> to provide both escape and access to amenity-rich places and their associated opportunities—good jobs, well-funded schools, and transportation.<sup>194</sup>

The effort to promote geographic mobility and integration post FHA was largely stymied by exclusionary zoning and neighborhood opposition.<sup>195</sup> Geographic mobility is still believed to be the key to deconcentrating black segregation and the cornerstone of housing policy with mixed-income housing as the preferred housing design. According to Patrick Sharkey:

“ . . . research on neighborhood and the life course demonstrates that changes in geographic location—particularly among youth in

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191. See Schwemm, *supra* note 173.

192. See 114 CONG. REC. 2274 (1968) (statement of Sen. Mondale).

193. See 114 CONG. REC. 2991 (1968) (statement of Sen. Brooke) (discussing the complex array of solutions needed to promote desegregation).

194. *Id.*

195. See ROTHSTEIN, *supra* note 67, at 52–53, 122–23; KENNETH T. JACKSON, CRABGRASS FRONTIER 241–43 (1985).



highly segregated cities or metropolitan areas-- frequently lead to or coincide with disruptions in patterns of inequality, suggesting that when young adults relocate, they will experience the most substantial changes to multiple dimensions of their lives.<sup>196</sup>

But the benefits of mobility seem to decline as the ages of the children increase.<sup>197</sup>

There is also a debate about whether geographic mobility is the answer to the consequences of disinvestment in black, segregated, and impoverished neighborhoods. Critics question mobility's costs in terms of loss of community ties and racial and class isolation in the new jurisdictions.<sup>198</sup> Some question the impact on communities left behind as the most capable are enabled to leave, and instead argue in favor of community development strategies that focus on fixing up areas of concentrated poverty instead.<sup>199</sup> Still, others argue that mobility and community development are not mutually exclusive. New developments in both city and suburb should be mixed income. Still, others point out that this facilitates gentrification in certain markets.<sup>200</sup>

From a housing advocacy point of view, a mobility strategy is still the best option to allow lower-income people to access housing that is close to good

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196. Patrick Sharkey, *Temporary Integration, Resilient Inequality: Race and Neighborhood Change in the Transition to Adulthood*, 49 DEMOGRAPHY 889, 892 (2012) (citations omitted).
197. Sharkey, *supra* note 196, at 905 ("Whereas whites experience slight declines in neighborhood poverty as they age beyond 25, the trend toward declining neighborhood poverty among African Americans who exit their county of origin flattens and reverses as they age further into adulthood. In early adulthood, there is a clear trend toward racial equality among young adults who exit highly segregated metropolitan areas, but the long-term trend suggests a reproduction of inequality in neighborhood poverty as black and white young adults move further into adulthood.").
198. See Mary Pattillo, *Investing in Poor Black Neighborhoods 'As Is'*, in PUBLIC HOUSING AND THE LEGACY OF SEGREGATION (Margery Austin Turner, Susan J. Popkin, and Lynette Rawlings eds., 2009); Sharkey, *supra* note 145 (arguing for sustained investments in nonwhite, low-income communities.).
199. See Norrinda Brown Hayat, *Urban Decolonization*, 24 MICH. J. RACE & L. 75 (2018). (arguing against mobility programs and in favor of community development). See also Calmore, *supra* note 154, at 1492, 1507 (arguing that policy should emphasize spatial equality which would be a form of "territorial reparations" and link black interests across class lines).
200. See, e.g., Samuel Dastrup & Ingrid Gould Ellen, *Linking Residents to Opportunity: Gentrification and Public Housing*, 18 CITYSCAPE (2016) (exemplifying the kinds of markets where mixed-income redevelopment would provide increased housing opportunities for gentrifiers and comparatively fewer opportunities for low-income housing), <https://www.philadelphiafed.org/-/media/community-development/events/2016/research-symposium-on-gentrification/pdfs/dastrup-ellen.pdf?la=en>; <https://www.huduser.gov/portal/periodicals/cityscpe/vol18num3/article4.html> [<https://perma.cc/5QYD-LYS4>].

employment, schools, and transportation.<sup>201</sup> Mixed-income housing presents an effective way to avoid one of the enduring obstacles to construction of affordable housing—neighbor opposition.<sup>202</sup> That opposition is generally based on negative assumptions about the racial identity and socioeconomic status of the potential residents of a proposed development, and the perceived impact on one’s neighborhood’s status and property values. Such neighborhood opposition is situational as well as structural, taking the form of vigorous neighborhood objections. Such opposition becomes embedded in zoning ordinances that make multifamily housing discretionary with willing enforcement by public officials.<sup>203</sup> Mixed-income housing, as such, is an integration strategy premised on microintegration—suburbs would also have to allow multifamily housing to be developed, which may be supported by federal funding through Section 8 vouchers. Objections are avoided by building upscale, market-rate multifamily housing with a set aside of a smattering of subsidized units. The advantage of microintegration is that developments can be built so lower-income units are not visible. A building or development could retain an upper-income status because the overall image is middle or upper middle class, while ostensibly serving a social purpose. Because mixed-income housing’s microintegration is small, happening on an almost imperceptible level, the poor can, in effect, be sneaked into the suburbs in ways not possible before. Integration would happen in a stealth manner by educating existing residents that such developments are not that bad, while also maintaining a middle-class reputational dignity for the area. This reputational dignity

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201. See JOHN POWELL, REMEDIAL PHASE EXPERT REPORT OF JOHN POWELL IN THOMPSON V. HUD (2005), [http://www.kirwaninstitute.osu.edu/reports/2005/9\\_2005\\_ThompsonvHUDRemedialReport.pdf](http://www.kirwaninstitute.osu.edu/reports/2005/9_2005_ThompsonvHUDRemedialReport.pdf). See generally Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 348 (2007) (“Studies of these mobility programs have shown a variety of important benefits for the families who were enabled to move and for the community at large. The benefits involve not only education and employment, but also health, environmental, and economic advantages.”).
202. See John Zipperer, *The Debate Over Mixed-Income Housing*, AFFORDABLE HOUS. FIN. (Jan. 1, 2006), [http://www.housingfinance.com/management-operations/the-debate-over-mixed-income-housing\\_o](http://www.housingfinance.com/management-operations/the-debate-over-mixed-income-housing_o) [https://perma.cc/J747-D75Y] (“[T]he lesson some people drew from the failure of public housing: We just had too many poor people; therefore we’ll kind of hide the poor people in these mixed-income developments and good things will happen to them.”).
203. See Nguyen, *supra* note 115. See, e.g., *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (refusing to take cognizance of opposition to affordable housing based on perceived black identity of residents); *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976). These are only select examples. The examples of neighborhood opposition to affordable housing are numerous, if not ubiquitous.

would likewise extend to the lower-income residents by allowing them to avoid the stigma of affordable housing.<sup>204</sup>

There are consequences, however, of requiring the poor residents to sneak into a community to ameliorate opposition to their presence. First, by necessity, inclusionary housing is focused on only new developments, leaving existing exclusionary zoning intact, like a magnet school or a magnet place approach. This “magnet place”<sup>205</sup> approach pretends that integration is now a product to be marketed. However, this is a limited, controlled, and often illusory integration. Several obvious limits include the relatively small number of units produced by the minimal set aside approach. The units are usually affordable for the moderate-income person rather than the low- or very low-income person who requires an individual, stigmatizing subsidy.<sup>206</sup> Also, because mixed-income housing development is a way to work around existing patterns of segregation, by hiding integration’s presence and avoiding neighbor opposition, it grants access to areas, services, and amenities that would otherwise be unavailable. It also simply provides a place to live. But thorny issues about how to fairly design these communities are rarely considered openly. Instead, design is often only discussed in terms of financial viability (how many subsidized units can the developer afford) when in fact, social assumptions and presumed discomforts shape the entire conception of the mixed-income project. This means that the number and types of these units will likely remain low, resulting in far fewer affordable housing units than are needed to address the unmet demand.

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204. See MOLLY M. SCOTT ET AL., POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM 34 (2013) (advocacy guide explaining when seeking to create a housing mobility program to consider avoiding using terms like “affordable housing” to avoid property owner and community leader resistance.) <https://www.prrac.org/pdf/ExpandingChoice.pdf> [<https://perma.cc/4U2N-A6FS>].

205. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2064–65 (2002) (“Like traditional alternative schools, magnet schools typically offer specialized programs or curricular themes . . . [and are] designed to encourage racial integration . . .”).

206. See Ellickson, *supra* note 9, at 1011 (“[T]he recipients of many inclusionary housing units are themselves middle-class suburbanites.”). Ellickson also argues that states with inclusionary zoning policies continue to “impose unusually severe legal constraints on housing supply. Collectively, their perverse policies include exclusionary zoning practices, strict growth controls, and complex environmental reporting requirements that enable opponents to delay (and sometimes derail) proposed housing developments.” *Id.* at 1020–21.

## B. Managing by (Over) Elevating Concentration of Poverty Theory

Mixed-income housing's microintegration approach means that each building has a limited number of units for low- to moderate-income residents.<sup>207</sup> The low ratio of lower-income units is considered to have distinct internal benefits within the new community.<sup>208</sup> Mixed-income housing is often justified as avoiding a new concentration of poverty and its ill-effects, called neighborhood effects, or at least as allowing them to be managed and counteracted.<sup>209</sup> Under this logic, one could assume that the fewer poor residents the better. After all, the conditions in areas of concentrated poverty speak for themselves. First, residents of racially segregated areas of high poverty are subject to high rates of violent crime—"high-poverty environments are criminogenic, encouraging youth to pursue criminal rather than legitimate careers."<sup>210</sup> Second, the poor experience spatial mismatch between places where jobs are available and where they reside.<sup>211</sup> Third, schools in areas of concentrated poverty tend to be educationally ineffective and have high dropout rates.<sup>212</sup> These facts seem to reflect common sense that concentrated poverty and the correlated negative neighborhood effects are results of the actions and decisions of poor neighborhood residents.<sup>213</sup>

Yet assumptions about the concentration of poverty underlying the support for mixed-income housing have been decontextualized and overstated. The concentration of poverty thesis is premised on the

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207. See Constantine E. Kontokosta, *Mixed-Income Housing and Neighborhood Integration: Evidence from Inclusionary Zoning Programs*, 36 J. URB. AFF. 716, 737–38 (2016) (comparing efficacy of two communities' inclusionary zoning programs in promoting racial and economic integration and diversity).

208. *Id.* See also Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585 (2015).

209. See generally Jacob W. Faber & Patrick Sharkey, *Neighborhood Effects*, INTL. ENCY. SOC. & BEHAV. SCI. 443 (2015) (reviewing data and literature of neighborhood effects).

210. Lincoln Quillian, *Segregation and Poverty Concentration, The Role of Three Segregations*, 77 AM. SOC. REV. 354, 355 (2012).

211. *Id.*

212. *Id.*

213. See NAT'L COMM'N ON SEVERELY DISTRESSED PUB. HOUS., A FINAL REPORT TO CONGRESS AND THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT (1992); John O. Calmore, *Racialized Space and the Culture of Segregation: Hewing A Stone of Hope from a Mountain of Despair*, 143 U. PA. L. REV. 1233, 1243–46 (1995) (rejecting "culture of segregation" justifications for integration as failing to acknowledge structural reasons for conditions in high poverty black neighborhoods); Laura M. Tach, *More Than Bricks and Mortar: Neighborhood Frames, Social Processes, and the Mixed-Income Redevelopment of a Public Housing Project*, 8 CITY & COMMUNITY 269, 273–74 (2009) (describing a process of framing neighborhoods that creates narratives of neighborhoods based on selective perceptions that are filtered through cultural categories.).

hyperconcentration of poverty learned through the history of public housing's perpetuation of the racialized concentration of poverty. The sociological literature indicates, however, that concentrated poverty is a particular geographic phenomenon more correctly understood as a symptom rather than a cause.<sup>214</sup> It reflects the consequences of decisions made by the rest of the society to disinvest from those areas.<sup>215</sup> A community that is characterized by concentration of poverty will have few to no amenities. That is a function of the behavior of the wider society towards that neighborhood rather than any inherent characteristic of the neighborhood itself. Relatedly, Ruth Person and Lauren Krivo have documented that the level of crime, disorder, and violence in high poverty neighborhoods varies by race and class, with white families experiencing a vastly better neighborhood circumstance than black and Latino families.<sup>216</sup> Their research also shows that when they controlled for similarities in educational and socioeconomic characteristics, the differences between black and white neighborhoods was reduced significantly.<sup>217</sup>

With improvements in statistical methods, recent social science research examining the neighborhoods effects hypothesis confirms that the impact of high poverty on neighborhoods is persistent, has increased over time, and is devastating to residents.<sup>218</sup> This literature also demonstrates that the

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214. See NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY*, 62–63 (1st ed. 1996) (“The physical deterioration and economic devalorization of inner-city neighborhoods is a strictly logical, “rational” outcome of the operation of the land and housing markets. This is not to suggest it is at all natural, however, for the market itself is a social product. Far from being inevitable, neighborhood decline is the result of public and private investment decisions. . . . [T]here is enough control by, and integration of, the investment and development actors in the real estate industry that their decisions go beyond a response and actually shape the market.”); Mark Beaulieu & Tracey Continelli, *Benefits of Segregation for White Communities: A Review of the Literature and Directions for Future Research*, 15 J. AF. AM. STUDIES 487, 501 (2011) (describing the ways in which disinvestment from inner city neighborhoods benefits suburban neighborhoods).
  215. See ROTHSTEIN, *supra* note 67.
  216. Lauren J. Krivo, Ruth D. Peterson & Danielle C. Kuhl, *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 AM. J. SOC. 1765, 1793 (2009).
  217. Ruth D. Peterson & Lauren J. Krivo, *Segregated Spatial Locations, Race-Ethnic Composition, and Neighborhood Violent Crime*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 106 (2009) (“[W]e demonstrate that indeed the social and economic character that exists within neighborhoods is critical for producing large differentials in violence across areas with distinct racial and ethnic compositions.”).
  218. LAURA TACH, ROLF PENDALL & ALEXANDRA DERIAN, WHAT WORKS COLLABORATIVE, *INCOME MIXING ACROSS SCALES: RATIONALE, TRENDS, POLICIES, PRACTICE, AND RESEARCH FOR MORE INCLUSIVE NEIGHBORHOODS AND METROPOLITAN AREAS* 12 (2014). Concentrated poverty has increased over the past four decades. *Id.* In metropolitan

concentration of poverty is a function of exclusion and disinvestment, not a cause. According to Lincoln Quillian, in the United States, a notable difference in the typical lives of white, black, and Hispanic people is the economic class of the people in their social environments. White middle-class families overwhelmingly live in middle-class neighborhoods and send their children to middle-class schools. Many black and Hispanic middle-class parents, however, live in working class or poor neighborhoods and send their children to high-poverty schools. About one in three poor white families live in poor neighborhoods and send their children to high-poverty schools, compared to two in three poor black and Hispanic families.<sup>219</sup>

Quillian has thus developed a more nuanced explanation of the causes of the negative effects of racial segregation for concentrated poverty. Concentration of poverty involves an interaction between three types of segregation: 1) racial segregation of black and Hispanic families from affluent white families, 2) intraracial income segregation; and 3) racial segregation of working and middle-class Blacks from high- and middle-income members of other racial groups.<sup>220</sup> These phenomena lead to an accumulation of advantage and disadvantage.<sup>221</sup>

Approximately 50 percent of Blacks lived in the poorest 25 percent of urban neighborhoods for at least two generations while just 7 percent of Whites lived in similar neighborhoods.<sup>222</sup> These effects have been shown to be determined by structurally produced conditions in high poverty neighborhoods rather than by family background.<sup>223</sup> In particular, the effect of poverty concentration and neighborhood circumstances has implications,

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areas, the percent of residents in “high poverty” neighborhoods increased from 6.4 percent in 1970 to 9.1 in 1990, declined to 7.2 percent during the 1990s, and since 2000 has increased by almost 12 percent. *Id.* Therefore, nearly 30 million people live in high poverty neighborhoods, 9.2 million live in census tracts with extreme poverty. *Id.* See also Quillian, *supra* note 210, at 357. Very helpful thank you.

219. Quillian, *supra* note 210, at 355.

220. Quillian, *supra* note 210, at 375–76. Quillian clarifies that on the third axis, black and Hispanic people differ. Poor Hispanic people experience less segregation but still tend to live with poor, non-Hispanic neighbors. Thus, reducing segregation for Hispanic Americans has a weaker effect in reducing poverty. Middle class black individuals have high contact with poor black people, which contributes to their comparatively fragile economic position. *Id.* at 376.

221. See DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM (2007) (discussing the concentration of poverty and the concentration of affluence as both being inherently problematic).

222. Massey, *supra* note 181, at 694 (“According to Sharkey, roughly half of the African Americans he studied had lived in the poorest quarter of urban neighborhoods for at least two consecutive generations compared with just 7 percent of whites . . .”).

223. *Id.*

not so much for upward mobility, but for downward mobility—“the prospects for downward mobility are much greater for blacks than whites.”<sup>224</sup> Patrick Sharkey’s work supports these findings, establishing that Blacks have a persistent and unique exposure over multiple generations to concentrated poverty that explains the persistence of inequality in income and wealth.<sup>225</sup> According to Patrick Sharkey, “[t]he social environments surrounding African Americans . . . make it difficult for families to preserve their advantaged position in the income distribution and to transmit these advantages to their children.”<sup>226</sup>

In its traditionally understood sense, concentration of poverty is considered socially and economically destructive, with individual and community consequences. Living in high poverty neighborhoods has been shown to be highly detrimental, if not traumatic, especially for children who grow up in and attend schools there.<sup>227</sup> The negative effects are compounded when the poverty in these same neighborhoods is intergenerational.<sup>228</sup> The individual consequences of poverty concentration include “involvement in criminal activity, gang membership, unemployment, employment in the informal economy, school underachievement and teenage child bearing.”<sup>229</sup> The community consequences or neighborhood effects include “higher crime rates, more observable public disorder and weaker institutional and political connections to the rest of the city than non-poor neighborhoods.”<sup>230</sup> The exposure to concentrated disadvantage is now thought to lead to deleterious health, and even cognitive, effects by virtue of the impact from impoverished,

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224. *Id.*; SHARKEY, *supra* note 145, at 101, 114–15.

225. SHARKEY, *supra* note 145, at 115.

226. *Id.* at 115.

227. See Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 L. & Ineq. 269, 281 (2006) (“As ‘fifty years of sociological data have made clear: being born into a poor family places students at risk, but to be assigned then to a school with a high concentration of poverty poses a second, independent disadvantage that poor children attending middle-class schools do not face.”); David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 Marq. L. Rev. 601, 612 (2018) (“Children living in isolated, concentrated poverty are at highest risk for exposure to complex trauma.”).

228. See George J. Borjas, *Ethnic Capital and Intergenerational Mobility*, 107 Q. J. ECON. 123, 147 (1992) (demonstrating “[t]he skills and labor market outcomes of today’s generation depend not only on the skills and labor market experiences of their parents, but also on the average skills and labor market experiences of the ethnic group in the parent’s generation”).

229. Tach, *supra* note 213, at 270.

230. *Id.*

violence-prone, stigmatized neighborhoods.<sup>231</sup> However, one cannot presume that this is always the case. Concentration of poverty is isolating as people do not have access to job networks nor role models to embody examples of success, or provide educational or employment networks. The possibilities for achievement and attainment are constrained or unavailable to residents, and in particular to children. Thus, the popular lesson that seems to have been taken from study of the concentrated poverty phenomenon is an odd one. Rather than help poor people to not be poor through perhaps income redistribution, the conclusion seems paradoxically to be that the best way to help poor people is by not having too many other poor people around. The mantra holds not that there should be fewer poor people in general, but that there should be a limit on entry of poor people into a residential area.

Preventing the concentration of poverty would seem to be of benefit not just for the elites, who avoid the dysfunction as well as the race and class geographic stigmatization by the wider society. But, the problems of the concentration of poverty are not fully understood as either cause or effect. Laura Tach points out, that there is no actual research examining these commonly held assumptions about neighborhood effects, which are in large part based on anecdotal observations.<sup>232</sup> She questions, for example, whether people engaging in dysfunctional behavior are influenced to do so by these neighborhoods, or are simply drawn to them because they are inexpensive.<sup>233</sup> Thus, it is not clear what the chain of causation is or whether it is solely based on correlation.

Mixed-income housing being understood as a way to avoid the concentration of poverty means that it embodies a form of discrimination management that works to the disadvantage of the poor by suggesting one cannot build affordable housing simply for people of low or modest income. It means that they have to wait for space to open up in mixed developments only. This plainly suggests that the mixed-income approach is not actually a policy to benefit poor people. It means that the purpose of mixed income is a place-based policy, to ameliorate and prevent an area from being economically and racially identified as poor and Black. In order to fit into the mainstream economy, to reap

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231. See Douglas Massey & Brandon Wagner, *Segregation, Stigma, and Stratification: A Biosocial Model*, in THE OXFORD HANDBOOK OF STIGMA, DISCRIMINATION, AND HEALTH 147, 164 (Brenda Major et al. eds., 2018).

232. Laura M. Tach, *The Stability of Mixed-Income Neighborhoods*, ANNUAL MEETING AM. SOC. ASS'N 1, 2–4 (2009).

233. Laura Marie Tach, BEYOND CONCENTRATED POVERTY: THE SOCIAL AND TEMPORAL DYNAMICS OF MIXED-INCOME NEIGHBORHOODS 1 (Apr. 22, 2010) (unpublished Ph.D dissertation, Harvard University) (on file with author).



the benefits of more affluent Whites being willing to live there, it is important to keep the low-income populations low. Even if poor people have resources to spend, their resources are devalued socially; they are not the type of customer national businesses want to serve.<sup>234</sup> This aspect of mixed-income housing as discrimination management means it responds to the reality that the society will not deal with the poor, therefore too many of them cannot be around. By elevating a dispersal and concentration of poverty rationale, it obscures that concentration of poverty is, instead, a distinct geographical phenomenon. It conflates effects with causes—the cause of concentration of poverty is everyone else—so those who have taken flight and disinvested are normalized and held not responsible.

### C. Managing the Tipping Point

The quest to integrate requires not just accomplishing integration but maintaining it. Though racism may be permanent, integration seems to promise less polarization and less inequality as it reduces separation. As long as the Fair Housing Act has been pursuing integration, the potential fragility of that integration, because of the realities of race and class dynamics in neighborhoods, has been apparent. Black people, freed by the Fair Housing Act, experienced White people begin to flee not long after they had moved into white neighborhoods. History shows that some of this flight was manufactured by predatory blockbusting tactics that were used to inflame white fears, but the phenomenon had enough legs on its own absent those techniques to warrant judicial notice.<sup>235</sup> Thus early Fair Housing jurisprudence was developed during this backdrop of white flight from cities, which was viewed as an inevitable, understandable phenomenon.<sup>236</sup>

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234. See e.g., Mary Jo Wiggins, *Race, Class and Suburbia: The Modern Black Suburb as a 'Race-Making Situation'*, 35 U. MICH. J.L. REFORM 749, 770–72 (2002) (discussing lack of retailers in affluent black communities around the United States).

235. See *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1102 (2d Cir. 1988) (noting the existence of the “white flight” phenomenon and acknowledging that it may be considered as a factor in the integration equation); *United States v. Charlottesville Redevelopment & Hous. Auth.*, 718 F. Supp. 461, 466 n.8 (W.D. Va. 1989); *Jorman v. Veterans Admin.*, 579 F. Supp. 1407 (N.D. Ill. 1984) (challenging the Veterans Administration of causing or contributing to white flight as a result of its home mortgage loan guaranty service).

236. See *Starrett City Assocs.*, 840 F.2d at 1102; see generally Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 289, 297–99 (2002) (exploring efforts to maintain racial balance and the dynamics of white flight).

In acknowledging that the Fair Housing Act had the twin, and often conflicting, goals of antidiscrimination and integration, the courts generally upheld integration quotas as a necessary reality to maintain racially balanced communities.<sup>237</sup> The next kind of integration problems arose in the context of federally sponsored housing projects, and the manner in which the obligation to advance fair housing and prevent segregation affected decisions about racial makeup of tenant populations.<sup>238</sup> The quest to promote and achieve integration quickly ran into the problem of how to maintain that integration. Often the articulated problem of maintaining integration was in reality a subterfuge or pretext for discrimination.<sup>239</sup> In other scenarios, the Housing Authorities were genuinely seeking to maintain integration, attempted to do so through policies that came at the expense of the poor black tenants.<sup>240</sup>

It also became apparent that the goal of integration, which was always under threat from white flight, was conceived from the perspective of white people. In *Otero*, the New York Court of Appeals considered the local Housing Authority's resolution of what it believed to be a near irresolvable tension between guaranteed rights of return to redeveloped public housing and the reality that the tenants would be majority Black and thus constitute a racially segregated community.<sup>241</sup> The District Court reasoned that the proper resolution was to prioritize the access to housing and to not deprive someone of access to low cost public housing because of their race.<sup>242</sup> The court's discussion about what constitutes integration is striking. The plaintiffs asserted that "integration is achieved . . . when non-whites occupy 80% of a given project as well as when 80% of the project is white, particularly when . . . the Urban Renewal Area would probably be predominantly white overall and the Authority itself admits that the Lower East Side as a whole is

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237. See, e.g., *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1132 (2d Cir. 1973).

238. See *Starrett City Assocs.*, 840 F.2d at 1100-01 (rejecting landlord's "claim to be 'clothed with governmental authority' and thus obligated . . . to effectuate the purpose of the Fair Housing Act by affirmatively promoting integration and preventing 'the reghettoization of a model integrated community'").

239. See Ankur J. Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 URB. LAW. 369, 372-79 (1990).

240. *Id.*

241. *Otero*, 484 F.2d at 1124 ("[T]he effect of adherence to its regulation would be to create a non-white 'pocket ghetto' that would operate as a racial 'tipping factor' causing white residents to take flight and leading eventually to non-white ghettoization of the community.").

242. *Id.* at 1125 ("[A]lthough the Authority was under a constitutional and statutory duty to foster and maintain racial integration, this duty could not . . . be given effect where to do so would be to deprive a non-white minority of low cost public housing that would otherwise be assigned to it . . .").

48% white.”<sup>243</sup> The Court effectively rejected this definition and instead accepted the Housing Authority’s assertion that its duty to maintain integration as equal to preventing concentrations of nonwhite residents that would be off-putting to white residents.<sup>244</sup> Thus, maintaining integration was defined as policing the location of minorities so as to not offend white sensibilities about desirable concentrations.<sup>245</sup> The Housing Authority argued that:

[L]arge concentrations of non-whites in one or more pockets within the community would act as a “tipping” factor which would precipitate an increase in the non-white population in the surrounding neighborhoods, leading to a steady loss of total white population over a given period of time. [The Housing Authority] argues that it is under an obligation to prevent the formation of such concentrations or pockets of non-whites[.]<sup>246</sup>

*Otero*’s rationale seems, today, strikingly paternalistic and misdirected in emphasis. It views integration solely from the standpoint of the dissimilarity index rather than understanding it to also be about the right to exercise a choice. That choice was denied on the basis of race. The Court in *Otero* used past decisions about segregatory decisions that either barred nonwhite individuals from residing in white areas or relegated nonwhites to already nonwhite areas.<sup>247</sup> What the Court missed was that those decisions prevented the freedom to choose to move. The decision about the choice to return or stay was an entirely different issue—must the Housing Authority prevent a poor nonwhite person from exercising that autonomy where it would arguably result in concentrations of nonwhite people? The *Otero* court answered yes.<sup>248</sup>

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243. *Id.* at 1132.

244. *Id.* at 1134.

245. *See* *S. Burlington Cty. NAACP v. Mount Laurel Tp.*, 92 N.J. 158 (1983).

246. *Otero*, 484 F.2d. at 1133.

247. *Id.* at 1133 (citing *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969), *aff’d* 436 F.2d 306 (7th Cir. 1970)).

248. *See also* *Burney v. Hous. Auth. of Beaver Cty.*, 551 F. Supp. 746, 749 (W.D. Pa. 1982) (“[A] formal complaint against the Housing Authority charging that the Housing Authority had violated, and was continuing to violate . . . Pennsylvania Human Relations Act . . . by maintaining housing projects that were segregated by the race of the tenant. . . . [A] Consent Order was designed to desegregate the Housing Authority’s low income housing projects . . . through the use of a new tenant selection and assignment procedure. [It creates] a target racial balance for each of the Housing Authority’s family projects [and uses] an applicant’s race as a preferential determinant in order to reach and maintain that target balance.”). The question raised by the Housing Authority’s use of its integration maintenance plan, therefore, is whether an individual black may be made

As early as the early 1970s, commentators noted that “[d]evelopers anxious to avoid ‘tipping’ a project from white to black appear to set low minority marketing goals.”<sup>249</sup> In 1988, the U.S. Court of Appeals for the Second Circuit in *U.S. v. Starrett City Associates* crystallized who bore the brunt of the cap:

The consequence of Starrett’s policy of maintaining racial balance has been that Black applicants constitute a disproportionately larger share [54%] of the waiting list for apartments than do Whites [22%], and remain on the list for considerably longer periods of time than do Whites . . . For a two-bedroom apartment, the average waiting time on the list for qualified applicants was twenty months for Blacks and two months for Whites; for a one-bedroom apartment, the comparable figures were eleven months and four months.<sup>250</sup>

The most objectionable aspect of Starrett City’s integration maintenance quotas was not the “use of race” as a criteria per se, but the disparate impact of the use of race.<sup>251</sup>

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to suffer exclusion in an effort to prevent resegregation of the system. *Id.* at 758. “There is a limited usefulness in generalizing from tipping point experiences in a neighborhood, where whites are free to buy and sell homes as they please, to low-income housing, where demand exceeds supply and whites who are in need of housing may simply have to suppress their intolerance for blacks in order to receive much needed housing. This suggests that the tipping point is probably considerably higher in low-income housing projects than in residential neighborhoods.” *Id.* at 767.

249. Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Eleanor P. Wolf, *The Tipping-Point in Racially Changing Neighborhoods*, 29 J. AM. INST. PLAN. 3 (1963); John M. Goering, *Neighborhood Tipping and Racial Transition: A Review of Social Science Evidence*, 44 J. AM. INST. PLAN. 1 (1978); David Card et al., *Tipping and the Dynamics of Segregation*, 123 Q. J. ECON. 177 (2008); Thomas C. Schelling, *The Process of Residential Segregation: Neighborhood Tipping*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 157 (Anthony H. Pascal ed., 1972); see Timothy R. Graham, *The Benign Housing Quota: A Legitimate Weapon to Fight White Flight and Resulting Segregated Communities?*, 42 FORDHAM L. REV. 891 (1974); *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938 (1980); *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377 (1980).

250. See *Starrett City Assocs.*, 840 F.2d at 1104.

251. *Id.* at 1099.

[A]partment opportunities for blacks and hispanics were far fewer “than would be expected if race and national origin were not taken into account, while opportunities for whites were substantially greater than what their application rates projected. Minority applicants waited up to ten times longer than the average white applicant before they were offered an apartment. Starrett City’s active file was 21.9% white in October 1985, but whites occupied 64.7% of the apartments in January 1984. Although the file was 53.7% black and 18% hispanic in October 1985, blacks and

Starrett's allocation of public housing facilities on the basis of racial quotas, by denying an applicant access to a unit otherwise available solely because of race, produces a "discriminatory effect . . . [that] could hardly be clearer."<sup>252</sup> Such quotas do not provide minorities with access to Starrett City, but rather, act as a ceiling to their access. Thus, the impact of appellants' practices falls squarely on minorities, for whom Title VIII was intended to create housing opportunities.<sup>253</sup>

Quantitatively, the program used white fears and behaviors as the fulcrum of the policy and to the detriment of the black and Latino people who bore the brunt of those fears.<sup>254</sup> But the majority opinion concluded that only colorblind criteria would pass muster without acknowledging that income could be used as a proxy to accomplish the same thing.<sup>255</sup> The goal of maintaining integration at the expense of the supposed benefitted population is highly problematic because it takes two things away—access to housing and the right to choose where to live. The norms of mixing and integration have to include that element of choice for the lower-income person.<sup>256</sup>

Inclusionary zoning incorporates the tipping rationale in the statutorily defined inclusionary percentages.<sup>257</sup> When perceived as a floor, the percentages seem quite progressive as they ensure access where there otherwise would not have been any. But they can also be a de facto ceiling, because no for-profit developer is likely to exceed those percentages. Thus, inclusionary zoning ordinances have established a statutorily controlling tipping percentage. This

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hispanics, respectively, occupied only 20.8% and 7.9% of the apartments as of January 1984."

*Id.* (citing *United States v. Starrett City Assocs.*, 660 F. Supp. 668, 672, 676 (E.D. N.Y. 1987)) (citations omitted).

252. *Id.* at 1100.

253. *Id.* at 1102.

254. *Id.* at 1104.

255. *Id.* at 1102.

256. See John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1073 (1998); Calmore, *supra* note 154, at 1507.

257. See URBAN INST., *supra* note 36, at 88 (surveying thirteen locations nationwide and concluding that "[t]he percentage of affordable units to be side aside [under inclusionary zoning ordinances] ranges from 4 to 30. The average in the 13 jurisdictions is 13 percent."). But see Lawrence J. Vale & Shomon Shamsuddin, *All Mixed Up: Making Sense of Mixed-Income Housing Developments*, 83 J. AM. PLAN. ASS'N (2017) (establishing a framework for assessing Hope VI mixed-income developments: (1) allocation—the proportion and range of incomes included in projects; (2) proximity—the spatial scale at which income mixing is intended; (3) tenure—the balance between rental housing and homeownership units; and (4) duration—the amount of time projects remain mixed-income based on funding restrictions). Robert Ellickson argues that mixed income housing should be located by the block or neighborhood rather than building by building may, in theory, be acceptable and just as beneficial. Ellickson, *supra* note 9, at 1016.

percentage is particularly attenuated when applied to an individual development. This tipping rationale shows mixed-income housing to be a particular kind of integration maintenance technique that maintains white, affluent dominance.

This resurrects something reminiscent of the Starrett City integration maintenance policy, which was invalidated because it was explicitly predicated on race. Inclusionary zoning similarly presents the question of who bears the brunt of inclusionary housing minimum unit quotas. They are a cap. They also disparately impact the poor and minority by defining their presence in the community for reasons of social control, sensibilities, and market rate residents' preferences, rather than purely because of the financial reasons typically offered. The financial reasons could in fact be tied into the discriminatory inclinations, the class aversions, and the class cultural preferences of the middle class.

Thus, the tipping point rationale is quietly embodied in mixed income set aside percentages. Such percentages are understood as being related only to the economic feasibility of the deal, but the reality is that social assumptions and meanings are part of the definition. People are not aware nor focused on the design as reflecting prejudice. "Concentrated poverty" is now used as a causal factor rather than a descriptor of disinvestment. It is also code for class-based discrimination.

Drawing again from social domination theory, the appeal of statutory tipping rationale means mixed-income housing is structured in a way to allow the upper and middle classes to dominate the lower class. There are definitely class distinctions present in daily life, and these distinctions are particularly important to social hierarchy.<sup>258</sup> This illustrates that the need for social domination, which shaped the persistence of racial residential segregation through various iterations, also presents itself within the racial hierarchy underlying the tipping rationale.

#### **D. Managing Through Modeling and Social Control—The Myth of the Benevolent Middle Class<sup>259</sup>**

The ways in which mixed-income housing fulfills the need for social domination leads to its next limitation—mixed-income housing is supposed to

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258. NILSON ARIEL ESPINO, *BUILDING THE INCLUSIVE CITY: THEORY AND PRACTICE FOR CONFRONTING URBAN SEGREGATION* (2015).

259. August, *supra* note 50, at 3405–06 (noting the "myth of the benevolent middle class" and that "[s]upporters of redevelopment tend to draw on a common set of ideas and theories

provide opportunities to mix and learn from role models.<sup>260</sup> Mixed-income housing is justified as being beneficial for lower-income individuals personally. By socially mixing, the poor learn to aspire to something more than unemployment and impoverishment. They see people with higher education such as the doctor and the lawyer, and learn about the possibilities for personal accomplishment and economic mobility. Moreover, these associational, role modeling opportunities are touted as societally beneficial by providing social control benefits.

Mixed income's cross-class integration fails to grapple with 1) how class homogeneity is valued, 2) how status and dominance are determined by class and race, and 3) how mixed-income housing flies in the face of this. The social science literature answers the questions that the legal literature does not: 1) does cross-class interaction among residents of mixed-income developments take place meaningfully across income lines and 2) is this interaction beneficial to low-income residents in terms of "access to employment, information about schools, services, or other resources?"<sup>261</sup> The answer to these types of questions has been a resounding "no."<sup>262</sup> Residents tend to interact with one another within a development "based on perceived characteristics in common."<sup>263</sup> Consequently, this purported benefit does not exist, though it reflects romanticized assumptions in our public discourse about the benefits of integrated communities from the past.

Some researchers have advocated for the role model theory for children in these communities—children benefit from exposure to adults engaging in different career paths and lifestyles.<sup>264</sup> Yet, the literature has shown that the

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to support and justify redevelopment, including neo-traditional design ideals, academic 'deconcentration' theory and planning wisdom favouring 'social mix'").

260. Mark L. Joseph, Robert J. Chaskin & Henry S. Webber, *The Theoretical Basis for Addressing Poverty Through Mixed-Income Development*, 42 URB. AFF. REV. 369 (2007).

261. Diane K. Levy, Zach McDade & Kassie Bertumen, *Mixed-Income Living: Anticipated and Realized Benefits for Low-Income Households*, 15 CITYSCAPE 15, 18 (2013) ("Compared with the hypothesized benefits, the actual benefits from living in mixed-income developments or income-diverse areas have been limited for low-income households. In particular, investments have brought about environmental improvements to housing and neighborhoods, but benefits tied to economic desegregation and poverty alleviation have not been realized.").

262. James C. Fraser, Robert J. Chaskin & Joshua Theodore Bazuin, *Making Mixed-Income Neighborhoods Work for Low-Income Households*, 15 CITYSCAPE: J. POLY DEV. & RESEARCH 83, 89 (2013).

263. *Id.* at 90. See also Glynn, *supra* note 72, at 78–80 (citing numerous studies from the U.K. that conclude social mixing does not occur).

264. Joseph, Chaskin & Webber, *supra* note 260, at 391. See generally Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on*

role model and social networks experience does not work as theorized.<sup>265</sup> According to the social science literature, the research has shown that mixed-income living has not galvanized people to enter the workforce and end poverty, or broken down social barriers as expected.<sup>266</sup> The residents of mixed-income communities are often merely adults who likely are past the role model stage or able to seek out role models on their own.

The other prominent expectation of mixed-income housing is its explicit vision of social mixing. The social science literature shows, however, that this social mixing is affected deeply by race and class expectations, and does not seem to occur in any meaningful or beneficial way.<sup>267</sup> Mark Joseph and Robert Chaskin extensively document the uneasy relationship between former public housing residents and market rate tenants who isolate and ostracize the lower-income residents.<sup>268</sup> In particular, the lower-income residents are not able to represent their interests adequately in tenant meetings and experience excessive policing for their “non-middle class behaviors.”<sup>269</sup> Examples of the bases of conflicts between working class black residents and affluent white residents include barbecuing, congregating, Sunday parking for church, and drumming in Harlem.<sup>270</sup> Fraser writes:

Indeed, subsidized renters in mixed-income developments are often the objects of intensified surveillance and discipline, in part because site management is charged with drawing middle-income

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*Children: New Evidence From the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

265. ROBERT J. CHASKIN & MARK L. JOSEPH, *INTEGRATING THE INNER CITY: THE PROMISE AND PERILS OF MIXED-INCOME PUBLIC HOUSING TRANSFORMATION* (2015).

266. Indeed, Fraser et al. point out that many public housing residents who survived Hope VI and are now working still qualify for public housing, which suggests the problem is structural rather than due to a lack of role models. See Fraser, Chaskin & Bazuin, *supra* note 262, at 95.

267. Robert J. Chaskin & Mark L. Joseph, *Social Interaction in Mixed-Income Developments: Relational Expectations and Emerging Reality*, 33 J. URB. AFF. 209 (2011).

268. *Id.*

269. *Id.*

270. See Chaskin & Joseph, *supra* note 267 (describing conflicts over public gatherings and barbecuing at picnic tables instead of in backyards); Robert McCartney, ‘Black Nranding’—How a D.C. Neighborhood Was Marketed to White Millennials, WASH. POST, (May 3, 2017), [https://www.washingtonpost.com/local/black-branding--how-a-dc-neighborhood-was-marketed-to-white-millennials/2017/05/02/68b0ae06-2f47-11e7-9534-00e4656c22aa\\_story.html?noredirect=on&utm\\_term=.e9e78617d47a](https://www.washingtonpost.com/local/black-branding--how-a-dc-neighborhood-was-marketed-to-white-millennials/2017/05/02/68b0ae06-2f47-11e7-9534-00e4656c22aa_story.html?noredirect=on&utm_term=.e9e78617d47a) [https://perma.cc/X7XY-A6RV] (“[L]obbying by new arrivals cost black churchgoers a long-standing convenience of parking in a school playground on Sunday mornings. Small, black-owned businesses that served as public gathering places have shut their doors.”); Timothy Williams, *An Old Sound in Harlem Draws New Neighbors’ Ire*, N.Y. TIMES, July 6, 2008 (police called over Harlem tradition of Saturday evening drumming).



residents into these developments to capture enough ground rent to offset the costs associated with a devolved public housing program.<sup>271</sup>

Thus, physical integration does not only fail as a socially integrative measure, but actually increases surveillance and control of low-income people.

As a result, marginalization, both inter- and intraracial, is prevalent in mixed-income developments. The intraracial marginalization is significant because this whole endeavor has been based on William Julius Wilson's observation that the inner city poor were being deprived of interaction with higher classes of black people, and they would benefit from such exposure.<sup>272</sup> Chaskin and Joseph observe that "[s]everal theoretical propositions that lie behind this policy are based on assumptions about the ways in which living among higher-income residents can lead to relationships and interactions that may benefit poor people."<sup>273</sup> The combination of how difficult it is to foster these interactions (as numerous authors have shown) and of the reality that the number of poor have to be kept to a minimum lead the poor bear the cost of that policy goal as a result. Accordingly, Khare, Joseph and Chaskin tellingly observe:

The emerging prevalence of secondary marginalization in these new mixed-income contexts is particularly important given that the policy was in part based on the work of scholars such as Wilson (2012) who contended that the Black middle class could play a positive role as role models by returning to inner city communities.<sup>274</sup>

This observation gets to the heart of the contradiction, and again raises the questions that forcing an economic mix might 1) not be necessary and 2) be done at the expense of the poor people in the community who are deprived of the opportunity for valid status and legitimacy within their own peer group.<sup>275</sup> There is a back and forth between opacity and transparency in

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271. See Fraser, Chaskin & Bazuin, *supra* note 262, at 90 (discussing the fact that in many cases, young black men are identified as a threat when they "convene and converse in public space").

272. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 56 (1st ed. 1987).

273. Chaskin & Joseph, *supra* note 267, at 269.

274. Amy T. Khare, Mark L. Joseph & Robert J. Chaskin, *The Enduring Significance of Race in Mixed-Income Developments*, 51 *URB. AFF. REV.* 474, 480 (2015).

275. See Kelly D. Owens, *The Social Construction of a Public/Private Neighborhood: Examining Neighbor Interaction and Neighborhood Meaning in a New Orleans Mixed-Income Development*, 1473 *U. NEW ORLEANS THESES & DISSERTATIONS* 1, 10 (2012) (noting that most residents were trying to get out of the mixed-income community). "Market-rate

mixed-income housing schemes. They call for transparency in having the poor see how the well-off live but they also call for opacity by obscuring, as much as possible, that the poor are present in the formerly exclusive enclaves of the affluent.

### E. Managing Class Without Addressing Race—Microsegregation and the Integration Paradox

Further problematic in the assumptions of mixing and cross-class contact in mixed-income developments, is that research seems to indicate that significant microsegregation, rather than integration, takes place in mixed-income communities.<sup>276</sup> While mixed-income housing is appealingly and expediently framed in race-neutral, market-based terms that emphasize price point and housing tenure, the focus on income fails to acknowledge the racial dynamics within mixed-income communities. Studies indicate that microsegregation takes place when there are visible markers of status differences, such as race, use of public housing, and tenure.<sup>277</sup> More cross-class contact takes place when there is homogeneity of status.<sup>278</sup> In other words, when class tracks race, assumptions, stigmatization, and segregation result. Thus, instead of integration and inclusion, mixed-income housing schemes promise to render the poor socially isolated because they ignore the potential for microsegregation. This deprives the low-income resident of status and a voice in their own community.<sup>279</sup>

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residents were uncomfortable with the environment but constrained by rental leases; public housing residents were being marginalized but did not have other housing options; and homeowners, who were anxious about their investment in a neighborhood that was still in the early stages of change, were confined by negative equity.” *Id.* Some resident who had moved in with different expectations decided to accept the neighborhood, had positive perceptions and were engaged. *Id.* These tended to be the public housing and Section 8 residents mostly. *Id.*

276. See CHASKIN & JOSEPH, *supra* note 265. Chaskin and Joseph’s research shows that microsegregation is an enduring feature of a significant number of mixed-income housing developments; racial privilege and stigma plays a significant role in broadcasting the presence of differences in status within mixed-income communities and defines reactions of acceptance or exclusion. *Id.*

277. Laura Tach, *Diversity, Inequality, and Microsegregation: Dynamics of Inclusion and Exclusion in a Racially and Economically Diverse Community*, 16 CITYSCAPE 13, 24, 26 (2014). Tach studied residents’ perceptions of their economically and racially diverse neighborhood showed race- and class-based patterns of inclusion and exclusion in daily routines, particularly in sublocal organizations, suggesting that neighborhood integration may solve some problems of social exclusion while creating new problems of microsegregation. *Id.*

278. Tach, *supra* note 223, at 22.

279. Stereotypes about poor people are often silently connected to black spatial isolation leading not only opposition to low-income housing, but opposition to the people themselves. See Laura

Therefore, mixed-income schemes may work better in racially homogeneous settings. This reflects how property markets react to the presence of the socially stigmatized. Kushner observes that a study by Robert Putnam shows greater racial and ethnic diversity makes white people withdraw.<sup>280</sup> According to J. Eric Oliver, this is because integration presents a paradox of diversity and of community.<sup>281</sup> Integration has been found to bring greater cross-racial understanding, accompanied by more alienation. First, racial hostility increases if there are greater numbers of racial minorities at the metropolitan level—the paradox of diversity. Correspondingly, more segregated neighborhoods correlate with more racial hostility. Yet, living among people of different races in integrated neighborhoods is correlated with less racial resentment, because there is more meaningful interracial contact.<sup>282,283</sup> People in integrated neighborhoods “have more interracial social ties, participate in more interracial civic associations and work in more integrated jobs” and are less likely to have racial hostility.”<sup>284</sup> Notwithstanding this positive effect from neighborhood integration, there is also a paradoxical effect of community involvement decreasing.<sup>285</sup> For members of racial minorities, being “in a more integrated neighborhood means being less socially connected in general and more alienated from one’s neighbors in particular . . . For Americans, same-race neighborhoods provide a feeling of

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Sullivan, *Section 8 Vouchers Help the Poor—But Only If Housing is Available*, NPR (May 10, 2017, 4:35 PM), <https://www.npr.org/2017/05/10/527660512/section-8-vouchers-help-the-poor-but-only-if-housing-is-available> [https://perma.cc/7DPE-GM56]. In comparison, white Section 8 holders live in the lowest poverty neighborhoods. See Nat’l Low Income Hous. Coalition, *Who Lives in Federally Assisted Housing?*, 2 HOUSING SPOTLIGHT 4 (Nov. 2012), <http://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf> [https://perma.cc/WP7W-BRH4].

280. For a similar point, see James A. Kushner, *Urban Neighborhood Regeneration and the Phases of Community Evolution After World War II in the United States*, 41 IND. L. REV. 575, 599–601 (2008) (citing Michael Jonas, *The Downside of Diversity: A Harvard Political Scientist Finds That Diversity Hurts Civic Life. What Happens When a Liberal Scholar Unearths an Inconvenient Truth?*, BOSTON GLOBE (Aug. 5, 2007), [http://archive.boston.com/news/globe/ideas/articles/2007/08/05/the\\_downside\\_of\\_diversity](http://archive.boston.com/news/globe/ideas/articles/2007/08/05/the_downside_of_diversity) [https://perma.cc/ZY37-HK84] (noting a “diversity paradox” -- due to continued racial hostility withdrawal from civic life is correlated with neighborhood diversity. The more ethnically and racially diverse, the lower social capital and the higher distrust among neighbors . . . [Thus] a dispersed population does not necessarily generate an assimilated, socially cohesive society.”).

281. J. ERIC OLIVER, *THE PARADOXES OF INTEGRATION: RACE, NEIGHBORHOOD, AND CIVIC LIFE IN MULTIETHNIC AMERICA* 5–6 (2010).

282. *Id.*

283. *Id.*

284. *Id.* at 7.

285. *Id.* at 8.

community not available in a larger, diverse society.”<sup>286</sup> Oliver argues that we must pay attention to the costs of integration, which he points out are most heavily borne by dark-skinned minorities.<sup>287</sup> Oliver explains that there is an unresolved tension between assimilative processes that “sustain social cohesion” across the society, and those that maintain “cultural differences.”<sup>288</sup> Oliver posits that “the real transformation in American racial attitudes requires the elimination of ethnic, cultural and social markers that many groups hold as a fundamental part of their identity and . . . this will do so at the expense of darker-skinned people.”<sup>289</sup> For example, Oliver notes that many argue that Asian and Latino people should seek to transcend racial barriers by becoming White, at the expense of Blacks.<sup>290</sup> As a result, Oliver concludes that the increasing racial diversity in the US will lead to greater racial hostility and competition.<sup>291</sup>

Echoed by Laura Tach’s earlier work and by Chaskin and Joseph, Oliver’s most critical finding for the mixed-income community is that equality or similarity in income status is very important for racial understanding in integrated communities:

According to social psychologists and social capital theorists, interracial proximity is not sufficient for reducing racial hostility; rather, if people are to overcome their racial animosities toward

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286. *Id.*

287. *Id.* at 8. For a similar point see Calmore, *supra* note 154, at 1504–06 (“It is rare for blacks and whites to experience both integrated housing and a sense of community. Blacks demonstrate a history of integrating for a better housing package, not in quest of community. Integrated housing seldom represents ‘a path to belonging.’ It is usually at the expense of community that blacks improve their housing package in integrated settings dominated by whites. The integration imperative is predicated on white dominance and virtual assimilation by blacks as preconditions to whites accepting blacks into their communities. . . . In light of the difficulty of linking home and community in the context of residential integration, there is evidence that even middle-class blacks increasingly value black community attachment and affiliation at the expense of integration.” Accordingly, “the black middle class . . . has [managed] to attain the benefits of socio-economic mobility without living in integrated neighborhoods.”) *But see* Sharkey, *supra* note 145, at 903–54 (“Although all groups of African-Americans continue to live in areas with greater levels of neighborhood disadvantage and spatial disadvantage than other racial/ethnic groups, middle- and upper-income African-Americans increasingly live in communities that are spatially separated from highly disadvantaged neighborhoods. These changes are driven primarily by growth in the proportion of middle- and upper-income African-Americans who live outside of central cities and outside of majority-black neighborhoods.”).

288. OLIVER, *supra* note 281, at 8.

289. *Id.*

290. *Id.*

291. *Id.* at 8.

other groups, they must do so through contact in very specific circumstances (that is, all parties must be of equal status and work together toward a shared goal.) In short, people in integrated neighborhoods need to have *structured* interactions with other races, whether . . . in a work setting or within a local civic organization, to overcome their racial animosities.<sup>292</sup>

Oliver's insights are echoed by other researchers' work on the dynamics of mixed-income neighborhoods. Skoba and Goetz question "housing policies [emphasizing mobility] that, although seeking to improve the conditions for very low-income families, disrupt vital social support systems that help families meet basic needs."<sup>293</sup> According to Tach, the evidence suggests that mixed-income approaches at the neighborhood level have "modest ability to integrate the poor with near-poor or moderate-income households, but these efforts prove difficult to sustain over time because of the forces of residential mobility and neighborhood change."<sup>294</sup> Tach also notes that "few project-based or voucher-based efforts have succeeded in integrating lower-income residents into affluent neighborhoods."<sup>295</sup> However, her case study of Chester Square in the South End of Boston suggests a model of how "project-based subsidies can be used when there are motivated neighborhood actors who mobilize to preserve affordability in the face of rising property values."<sup>296</sup> Nonprofit organizations mobilized early, at the first sign of gentrification, to create affordable housing options that seemed to fit well within the existing neighborhood.<sup>297</sup>

Mixed-income housing faces a very real challenge, as it seeks to integrate by income, race plays a determining role in whether such communities succeed. Cross-class interactions that also are cross-race interactions are likely difficult, in part, because it is difficult to experience how much wealth or how little someone has relative to another person. Experiencing that

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292. *Id.* at 7.

293. Kimberly Skobba & Edward G. Goetz, *Mobility Decisions of Very-Low Income Households*, 15 *CITYSCAPE* 188, 188 (2013) (questioning assumptions that very low-income households' housing outcomes are the result of considered choices and demonstrating instead that relationships, rather than neighborhoods are the driving factor in residential decisionmaking).

294. Laura Tach et al., *Income Mixing Across the Scales: Rationale, Trends, Policies, Practice, and Research for More Inclusive Neighborhoods and Metropolitan Areas*, *URBAN INST.* 43, 43 (Jan. 2014), <https://www.urban.org/sites/default/files/publication/22226/412998-Income-Mixing-across-Scales-Rationale-Trends-Policies-Practice-and-Research-for-More-Inclusive-Neighborhoods-and-Metropolitan-Areas.PDF> [<https://perma.cc/UL7L-VJXX>].

295. *Id.*

296. *Id.*

297. *Id.* at 41–42.

difference across race violates racialized class expectations.<sup>298</sup> At the very least, it seems that managing discrimination in mixed-income policy may require focusing on structuring mixed-income housing to take into account proximity of income and status.<sup>299</sup>

[F]or mixing to have a role in making our cities more just, the people being mixed need to be in proximity on their own terms and those terms need some level of equivalence or comparability. . . . Thus, the broad consensus among those who have studied social networks in Hope VI developments is that improving the life opportunities of low-income residents cannot hinge on social mixing.<sup>300</sup>

At the very least, more social science research is needed on the impact of different aspects of mixed-income housing and resident interaction—the effects of different income and tenure mixes, whether certain resident governance structures are more beneficial than others, the extent and durability of improved educational outcomes for children, and the impact of the actual development’s design configuration on resident interaction.<sup>301</sup>

Perhaps such research might be guided by social contact theory, which is frequently explored in other fields such as diversity in college admissions, and which presumes that pursuing diversity in admissions requires paying attention to and delineating distinct cohorts of students who are close to each other in class status and experience. Social contact theory’s underlying assumption is that equal status is one of the preconditions of flourishing in a

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298. See OFFICE POLICY DEV. & RESEARCH, U.S. DEP’T OF HOUSING & URBAN DEV., *Mixed-Income Community Dynamics: Five Insights From Ethnography*, EVIDENCE MATTERS (Spring 2013), <https://www.huduser.gov/portal/periodicals/em/spring13/highlight2.html> [<https://perma.cc/N8LK-RYQ5>]. See also Amie Thurber, Claire Riehle Bohmann & Craig Anne Heflinger, *Spatially Integrated and Socially Segregated: The Effects of Mixed-Income Neighbourhoods on Social Well-Being*, 55 URB. STUD. 1859, 1870–71 (2017) (“Spatial integration requires proactive investment in preserving existing positive social networks, while at the same time promoting social integration among residents of different backgrounds.”).
299. See, e.g., Ellickson, *supra* note 9, at 1010 (“[S]ociological theory suggests that members of lower-income households themselves might dislike the social environment of an inclusionary development. Individuals tend to care a lot about their relative status in a given social setting.”).
300. Fraser, Chaskin, & Bazuin, *supra* note 262, at 90.
301. DIANE K. LEVY, ZACH McDADE & KASSIE DUMLAO, URBAN INST., EFFECTS FROM LIVING IN MIXED-INCOME COMMUNITIES FOR LOW-INCOME FAMILIES: A REVIEW OF THE LITERATURE 4–5, 14 (2010) <https://www.urban.org/sites/default/files/publication/27116/412292-Effects-from-Living-in-Mixed-Income-Communities-for-Low-Income-Families.PDF> [<https://perma.cc/HY3J-6FJE>] (conducting a literature review of mixed-income housing strategies confirming some benefits but concluding such strategies are insufficient for overcoming social barriers and alleviating poverty).

diverse environment, and the foundation for acceptance and tolerance. Similarly, mixed-income housing's already imperfect endeavor may require attention to structuring mixes of residents in terms of cohorts of status.<sup>302</sup> This of course begs the question about whether the goal of mixing may truly be fulfilled. The poor door controversy in NYC was at least caused by mixing hyper luxury and moderate income and involved a wide a gap in economic and social status. Lack of mixing, aversion, and disdain were built into the building's design on a number of levels. In a society that does not explicitly acknowledge class divisions, specifically racialized class divisions, designing cohorts in mixed-income housing will be a problematic endeavor that will vary based on context. In certain circumstances, the elite can be so comfortable with their self-perceptions of their own status that the poor do not threaten their status identity. For example, elite academics may achieve their status through educational accomplishments, and tend to have comparatively less need to obtain status through consumption of material goods, like one's home for someone who is middle or lower middle class.

#### **F. Managing Without Addressing Gentrification and the Concentration of Affluence<sup>303</sup>**

Mixed-income housing is viewed as an antidote to gentrification, yet it is not fully acknowledged that in very tight housing markets, it can be used to gentrify existing low-income neighborhoods under the guise of doing fair and equitable mixed-income development.<sup>304</sup> By definition, the predominant housing unit type available in mixed-income housing are not affordable units

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302. See Peter Arcidiacono et al., *A Conversation on the Nature, Effects, and Future of Affirmative Action in Higher Education Admissions*, 17 U. PA. J. CONST. L. 683, 698, 703–07 (2015) (debating the causes and effects of social mismatch theory in the context of affirmative action; is there too great a social distance between underrepresented minorities and whites that are detrimental to performance, or does diversity enhance perspective and shared values among students who are racially/ethnically different).

303. See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 17–21 (2006) (arguing that concentrated affluence should be the focus, not just concentrated poverty because concentrated affluence magnifies the impact of racism in the psychology of the real estate market); Douglas S. Massey, *The Age of Extremes: Concentrated Affluence and Poverty in the Twenty-First Century*, 33 DEMOGRAPHY 395, 399, 407 (1996) (predicting the divergence and distance between the social worlds of the rich and poor in twenty-first century caused by “geographic concentration of affluence and poverty”).

304. See DEREK S. HYRA, RACE, CLASS, AND POLITICS IN THE CAPPUCCINO CITY (2017) (describing the complex interplay of gentrification in mixed race, mixed income communities in Washington DC); Glynn, *supra* note 72, at 64.

but rather market rate units.<sup>305</sup> They can be used in existing low-income communities to provide more units for the affluent with only a set aside for lower-income residents.

Accordingly, Robert Chaskin observes:

[T]he narrative arc of public housing policy enactment and reform is not merely a story about housing the poor, but more broadly about the appropriation and reappropriation of urban space in succeeding efforts to reenvision, reclaim, and remake parts of the city that have become “discredited” by poverty, crime, and physical decay and to build in their place new, wholesome, reimagined communities. In pursuing these broader goals of urban renewal, public housing policies in different phases both reflect a set of moral judgments about the poor and are framed by a set of moral claims that justify the need for demolition, relocation, development, and resettlement. Within this process, residents moved out to make way for redevelopment constitute a small minority of those who move back.<sup>306</sup>

Thus, the most underdeveloped aspect of mixed-income housing theory may be its emphasis on problematizing the concentration of poverty without similarly problematizing the concentration of affluence, of which it is also a manifestation. What conclusions would we reach if we fully acknowledged that the primary force behind income segregation is concentration of affluence? According to Tach, the rise in racially segregated, high poverty neighborhoods is partly a function of increasing income inequality and a concomitant growth in economic segregation.<sup>307</sup> It turns out, however, “the rich are considerably more segregated from the non-rich than the poor are from the non-poor.”<sup>308</sup> Tach argues that the segregation of affluence is a greater concern because the it expanded at the same time that segregation of poverty grew.<sup>309</sup> Beyond reducing the odds of cross-class contact, the segregation of the affluent may reduce their support for investments that benefit cities or support regional integration. It also may reduce the chances that less-affluent

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305. See URBAN INST., *supra* note 36, at 4 (describing the percentage of units in market rate developments in Montgomery County, Maryland and Fairfax County, Virginia as ranging from a mere 6.25 percent to 15 percent).

306. Robert J. Chaskin, Book Review, 119 AM. J. SOC. 1788 (2014) (reviewing VALE, *supra* note 126).

307. TACH, PENDALL & DERIAN, *supra* note 218, at 12–13.

308. *Id.* at 12.

309. *Id.* at 12–13.



residents will benefit from the positive spillovers of public goods in affluent areas, like schools.<sup>310</sup>

In addition, sociological theory suggests that members of lower-income households themselves might dislike the social environment of an inclusionary development. Individuals tend to care a lot about their relative status in a given social setting.<sup>311</sup> In particular, Ellickson's critique gets to the heart of the class tension within mixed-income housing but overlooks a subtle but important point. Implicit in his critique is the right to places that are exclusive to high-income people.<sup>312</sup> While this is certainly an accepted reality in today's society, articulating its basis is difficult, if not problematic. He considers that lower-income people might share the preference, but states that their preferences are not solicited. Thus, the preference of the affluent will likely prevail. As John Calmore observed, integration decision-making involves a process of tradeoffs in access to goods like safe neighborhoods, schools, and other positional and status goods, but this access comes with personal costs.<sup>313</sup> Thus, the decision not to integrate may stem from seeking protection from discrimination, rather than merely aversion. This protective choice reflects other choices that have been made for you. As a result, the real question may not be a particular decision to self-segregate, but instead to ensure that there are options. The choices exercised by the wealthy and the poor will not be the same.

The problem is not really that the mixed-income model is based on somewhat misconceived or unproven ideals. Instead, the problem is that

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310. *Id.* at 13 ("Since the 1970s, income inequality in the United States has grown, with the upper tail of the income distribution pulling away from the rest . . . . More unequal places also tend to be more segregated . . .").

311. See Chaskin & Joseph, *supra* note 267, at 232. ("[Because of the] relationship between diversity and social cohesion[,] [t]he intentional diversity of unit type, income, and housing tenure status in [mixed-income] contexts has led to a population characterized by . . . fairly extreme social distances, throwing the challenges of creating social cohesion and interaction among a heterogeneous population into stark relief.").

312. Ellickson, *supra* note 9, at 1009 (observing that "the choice of the optimal social milieu for the pursuit of economic integration . . . is a difficult one" and noting with approval that the first Mount Laurel decision only required inclusionary housing at selected locations within a city's boundaries while "explicitly bless[ing] the use of zoning to set aside some neighborhoods as exclusive").

313. Calmore, *supra* note 154, at 1505–06 ("It is rare for blacks and whites to experience both integrated housing and a sense of community. Blacks demonstrate a history of integrating for a better housing package, not in quest of community. Integrated housing seldom represents 'a path to belonging.' It is usually at the expense of community that blacks improve their housing package in integrated settings dominated by whites. The integration imperative is predicated on white dominance and virtual assimilation by blacks as preconditions to whites accepting blacks into their communities.").

mixed-income housing in our national milieu plays the role of discrimination management. Mixed-income housing may cost more, may not be hospitable, and may be based on social superiority, but it has been deployed as a way to avoid middle- and upper middle-class opposition to low-income housing. This very feature is the obstacle to its success. As mixed-income housing incorporates the features of what it takes to avoid discrimination, it also takes on other discriminatory assumptions in order to do so. Managing discrimination requires taking on the mindset of those who would discriminate, allowing the discriminator's perspective to permeate the choice and design of mixed-income housing. Thus, the mixed-income model subordinates as it tries to provide a door of opportunity for those seeking to escape concentrated poverty and access affordable, safe, advantageously located housing. Perhaps this is inevitable, but it is worth noting in the hope that the ugly reflection in the mirror will allow us to see mixed-income housing for what it is. We must not consider it impossible for low-income people to live in a attractive, healthy, affordable community of their own where they have valor and stature within the community.

We also need more thought and discussion about protecting the desire for status through controlling or avoiding "others." We structure mixed-income housing in a way that reflects not just the way the market rate tenant sees the world, but also how they see the lower-income resident. We assume that exclusively high-income communities are acceptable. Before the law accepts that assumption, it must acknowledge that the endeavor is filled with other assumptions that reflect social domination, rather than the amelioration of a social ill. Discrimination may be inevitable, but instead of catering to it we need to own the source—our own discriminatory status assumptions—and understand the different ways in which people obtain status. Everyone needs the illusion of status. Everyone needs a voice. Everyone would like choice. Accordingly, at the very least, an affordable housing development may properly consist of housing devoted solely to the needs of the lower income.

### CONCLUSION

Mixed-income housing and its unexamined compromises around discrimination management reflect the tensions between the goals of inclusion within a society structured around the interests, and the preferences of the affluent, which often are for exclusion and separation. As a policy, mixed-income housing policy disrupts the social meaning and expectations

of members of a society who are increasingly accustomed to thinking of themselves as customers entitled to what they can pay for. This leads to the belief that money is the measure of who is desirable in a community, and who is so undesirable that they will ruin a community. Ultimately, these expectations inform the policy about the number of poor and black people who can live in one development or one neighborhood and be socially desirable, and therefore economically sustainable over time. Because mixed-income policy surreptitiously addresses racial segregation under cover of the more politically expedient goal of economic integration, it renders racial subordination invisible. The logic of the market at once naturalizes and makes invisible negative racial outcomes. Thus, mixed-income housing may be appropriate at some times and in some places. This Article debunks the given justifications of social mixing, role modeling, and social control. So, is there a good justification? When and how should discrimination be managed?

The beginnings of an answer comes from social domination theory which neutrally observes that any society is characterized by social domination manifesting according to the culture and history of a particular society.<sup>314</sup> Sidanius and Pratto have categorized societal practices as either domination enhancing (DE) and domination ameliorating (DA) practices.<sup>315</sup> Mixed-income housing is perceived and promoted as a domination ameliorating practice, but as this Article has demonstrated mixed-income housing is a technique for accommodating or enhancing, rather than ameliorating, discrimination. The lesson for mixed-income housing from social domination theory is to scrutinize mixed-income housing policy, and indeed, all housing policy, for its domination enhancing and domination ameliorating characteristics. The insight of discrimination management is that it provides a way to change the focus on practices that we think are domination ameliorating but are actually better characterized as domination enhancing. Further empirical study is required to explore how to evaluate the balance. The poor door controversy arose within a mixed-income housing scheme whose purpose was to ameliorate hierarchy by providing centrally located housing to those in need. The poor doors attempted to sidestep discrimination, while catering to it.

Until we acknowledge the tension between our stated desires for inclusion and the public and private practices of exclusion through a market economy that sells status through exclusion, we will continue to craft policies

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314. SIDANIUS & PRATTO, *supra* note 88, at 31–32.

315. *Id.* at 38–39.

that vacillate between two extremes. Announcements of the latest luxury high rise development and the concentration of affluence it represents contrast with stories of where the displaced end up—neighborhoods characterized by the seemingly separate phenomenon of poverty, which leads to violent crime, homelessness, and police brutality.<sup>316</sup> The occurrence of both phenomena simultaneously tells us that gentrification's concentration of wealth presents a problem of cultural dominance of elites and the reordering of society's amenities to meet their needs exclusively. As of this writing, mixed-income housing may be our best hope, but if it is, segregation and the shortage of affordable housing will continue to be the problems we fail to overcome.

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316. See, e.g., Sheryl Gay Stolberg, *Fragile Baltimore Struggles to Heal After Deadly Police Encounter*, N.Y. TIMES (Oct. 20, 2015), <https://www.nytimes.com/2015/10/21/us/a-fragile-baltimore-struggles-to-heal-itself.html> [<https://perma.cc/H3XU-YU5K>].