THE ROLE OF THE STATE, THE NECESSITY OF RACE-CONSCIOUS REMEDIES, AND OTHER LESSONS FROM THE *MOUNT LAUREL* STUDY

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The New Jersey Supreme Court's first and second *Mount Laurel* decisions[2] were great and proud moments in public law, public policy, and public justice, epitomizing Justice Cardozo's injunction that courts "maintain a relation between law and morals . . . ."[3]

The central aspect of the decisions was the court's declaration that because "the State controls the use of land, *all* of the land," the State and its municipalities cannot use that control to "favor rich over poor,"[4] thus contradicting and correcting a fundamental motive of zoning law: to enable powerful people to use government authority to create and maintain exclusionary communities.[5]

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[2] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) [hereinafter *Mount Laurel I*]; Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter *Mount Laurel II*].

[3] BENJAMIN NATHAN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 133 (1921).

[4] *Mount Laurel II*, 92 N.J. at 209, 456 A.2d at 415.

[5] *See* SAM BASS WARNER, JR., THE URBAN WILDERNESS: A HISTORY OF THE AMERICAN CITY 28-32 (1972) (describing the origins of the New York and Standard State Zoning Enabling laws). The first use of zoning was to restrict "racial" minorities, initially, the Chinese. *See In re* Lee Sing, 43 F. 359 (N.D. Cal. 1890). Virginia's statute imposing segregation on blacks was enacted in 1912. *See* A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 809-10 (1990).

In the wake of *Mount Laurel II*, the State Legislature enacted the Fair Housing Act (FHA),[6] creating the new Council on Affordable Housing (COAH), purportedly to implement that constitutional obligation.[7] The supreme court then held, in *Hills Development Company v. Township of Bernards*,[8] that it would, at least at that point, take the legislature at its word and allow the FHA's mechanisms to endeavor to implement the *Mount Laurel* obligations. If, however, the Court said, the legislation, as implemented by COAH, did not serve the constitutional requirements, the Court would re-enter the field.[9] The Court has been consistently clear that its approval of the FHA is provisional.[10]

Twenty years after *Mount Laurel I*, the Ford Foundation and the Fund for New Jersey commissioned a study of the impact of "the *Mount Laurel* initiatives"—the fruits of the court decisions, the Fair Housing Act, and the COAH implementation. The report of the results of this study—the Wish-Eisdorfer Report[11]—identifies three judicial objectives:

> 1. To increase housing opportunities for low and moderate income households.
>
> 2. To provide housing opportunities in the suburbs for poor urban residents who had been excluded by past suburban zoning practices.
>
> 3. To ameliorate racial and ethnic residential segregation by enabling blacks and Latinos to move from the heavily minority urban areas to white suburbs.[12]

The Report concludes that the *Mount Laurel* initiatives to date have served some of the first, but not the second or third objectives.[13] The

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[6] N.J. STAT. ANN. §§ 52:27D-301 et seq. (West 1986); *see also* James E. McGuire, *The Judiciary's Role in Implementing the* Mount Laurel *Doctrine: Deference or Activism*, 23 SETON HALL L. REV. 1276, 1292-94 (1993) (describing the enactment of the FHA).

[7] *See* N.J. STAT. ANN. § 52:27D-303 (West 1986) (describing the FHA as legislative satisfaction of "the constitutional obligation enunciated by the supreme court.").

[8] 103 N.J. 1, 510 A.2d 621 (1986) [often referred to as *Mount Laurel III*].

[9] *See id.* at 46, 510 A.2d at 645. The supreme court decided *Hills Dev. Co.* only eight months after enactment of the FHA. The court explained its deference to COAH on the ground that the FHA was "new and innovative legislati[on]." *See id.* at 45, 510 A.2d at 645.

[10] *See In re* Warren, 132 N.J. 1, 23, 28, 622 A.2d 1268, 1270 (1993) (citing *Huntington Branch N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2nd Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988) (per curiam) in which "the Second Circuit expressed the practical concern that facially-neutral rules 'bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied'"). *See also* Van Dalen v. Washington Township, 120 N.J. 234, 246, 576 A.2d 819, 825 (1990).

[11] NAOMI BAILIN WISH, PH.D. & STEPHEN EISDORFER, ESQ., CENTER FOR PUBLIC SERVICE, SETON HALL UNIVERSITY, THE IMPACT OF THE MOUNT LAUREL INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF APPLICANTS AND OCCUPANTS (1996) [hereinafter Wish-Eisdorfer Report].

[12] *See id.* at 10.

Mount Laurel program has produced housing for moderate income households; suburbs that used to hold only expensive housing now offer some homes for people with moderate incomes.[14] But the goals of serving low-income people, facilitating moves from city to suburb, and achieving racial and ethnic integration have not been served. Most of the housing is for moderate-, not low-, income people. Very few households moved from urban to suburban areas;[15] a higher percentage of African-American households moved from suburbs to cities than vice-versa.[16] Of the *Mount Laurel* units amenable to study, "81 percent of all suburban . . . units are occupied by white households, [while] 85 percent of all urban . . . units are occupied by black or Latino households."[17] When the ratios of successful applicants to all applicants are computed for people in various racial or ethnic categories, the results show that "the success ratio of . . . black applicants is . . . less than half of the success ratio of whites[,]" and the success ratio for Latinos is even lower: only "one-third that of whites."[18]

This Symposium was convened to address the issues posed by the Wish-Eisdorfer Report. We were challenged to explain why the Court's goals were so far from fulfillment and what might be done to increase vindication of the *Mount Laurel* principles. This paper identifies four changes which should be made:

First, the obligations of the State must be accepted;

Second, racial and ethnic integration must be acknowledged as a goal and addressed directly;

Third, the subsidies required for low-income households must be provided; and

Fourth, the collection and reporting of accurate data must be assured.

The goal of this paper is to suggest steps that could be taken by state and local government agencies and by fair housing, civil rights, civil liberties, tenants' rights and other advocacy groups, including law school clinics, concerned to advance the principles of *Mount Laurel*.

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[13] *See id.* at 68-74.

[14] *See id.* at 68; *see also* John M. Payne, *Norman Williams, Exclusionary Zoning, and the* Mount Laurel *Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 667 (1996) [hereinafter Payne, VT. L. REV.].

[15] Wish-Eisdorfer Report, *supra* note 11, at 69 (noting that of the 2675 cases for which previous and current residence and race and ethnicity are known only 15% of the previously urban households moved to suburbs).

[16] *See id.* at 70 (5% to suburbs, 21% from suburbs to city).

[17] *Id.* at 70-71.

[18] *Id.* at 53.

I. THE OBLIGATIONS OF THE STATE MUST BE ACCEPTED

In considering how to vindicate the *Mount Laurel* doctrine, a crucial element is recognition of the obligations of the State government. The original focus of *Mount Laurel* was on municipal action, for the original challenge was to suburban municipal zoning that excluded multifamily housing, mobile homes, and other means of housing non-wealthy people.[19] Even then, of course, state power was at issue, since municipalities exercise zoning authority only by delegation to them of the State's police power.[20] But in the original *Mount Laurel* cases, the impediments to moderate income housing had been imposed by municipalities, and the relief sought was against the municipalities.

The Fair Housing Act, however, reemphasized the State government's authority and responsibility for housing decisions; indeed, the Act represents an explicit assumption of the *Mount Laurel* obligation by the State as well as the municipalities. As the supreme court said in upholding the Act, "[i]ts statewide scope is an extensive departure from the unplanned and uncoordinated municipal growth of the past."[21] "[A]n overall plan for the entire state is envisioned, with definitions and standards that will have the kind of consistency that can result only when full responsibility and power are given to a single entity."[22] The statute calls for "a comprehensive planning and implementation response to this constitutional obligation."[23] Because COAH has "full responsibility," it is "the Council's work" that is intended to create "a statewide plan . . . that provides . . . a realistic 'likelihood' . . . for the construction or rehabilitation of lower income housing."[24]

A central purpose of the Fair Housing Act was "to bring an administrative agency into the field of lower income housing to satisfy the *Mount Laurel* obligation."[25] The imposition of responsibility upon the administrative agency, COAH, was the imposition of responsibility upon the State. As the supreme court said in *Hills Development Company v. Township of Bernards*, the Fair Housing Act constitutes a "substantial occupation of the field by the Governor and the Legislature."[26]

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[19] *See Mount Laurel I*, 67 N.J. at 179, 336 A.2d at 713; *Mount Laurel II*, 92 N.J. at 208-9, 456 A.2d at 390.

[20] *See* N.J. STAT. ANN. § 40:55D-62 (West 1993).

[21] *Hills Dev. Co.*, 103 N.J. at 22, 510 A.2d at 632.

[22] *Id.*

[23] N.J. STAT. ANN. § 52:27D-302(c) (West 1986).

[24] *Hills Dev. Co.*, 103 N.J. at 22, 510 A.2d at 632.

[25] *Id.* at 49, 510 A.2d at 647.

[26] *Id.* at 25, 510 A.2d at 634.

The importance of the FHA's explicitly refocusing responsibility on the State government has only begun to be appreciated. Certainly, actions taken by COAH must be consistent with *Mount Laurel* principles; the supreme court applied that standard in *In re Warren*, where a COAH regulation was invalidated because it did "not comport with the doctrine of *Mount Laurel*."[27] But there are other important consequences of the assumption of state responsibility. One is that state inaction can be as unlawful as state action. Both the New Jersey Constitution and the FHA require "affirmative" action;[28] omissions are unlawful where duty requires action.

Another consequence of state responsibility is that state agencies in addition to COAH are responsible for complying with the *Mount Laurel* doctrine. The FHA explicitly involves the New Jersey Housing and Mortgage Finance Agency (HMFA); other state agencies with appropriate jurisdiction could also be required to comply with the constitutional and statutory obligations.[29]

This larger responsibility of COAH and other state agencies has not yet been widely acknowledged. COAH explains the constitutional obligation as requiring municipalities to act "generally through municipal land use and zoning powers."[30] HMFA has not acknowledged any affirmative obligation to carry out *Mount Laurel*'s goals. But those state responsibilities exist, in part because of the FHA and in part because of the State's affirmative obligation to eliminate racial and ethnic discrimination and segregation in the State's housing programs.[31] The Second Circuit's recent decision imposing liability on the State of New York for its failure to undo segregation in the City of Yonkers is instructive. "Government officials," the Second Circuit held, "whether city or state, are not permitted to engage in deliberate . . . omissions that have the

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[27] In re *Warren*, 132 N.J. at 35, 622 A.2d at 1274.

[28] *See Mount Laurel II*, 92 N.J. at 271, 456 A.2d at 448: "If it is plain, and it is, that unless we require the use of affirmative measures the constitutional guarantee that protects poor people from municipal exclusion will exist 'only on paper,' then the only 'appropriate remedy' is the use of affirmative measures"; N.J. STAT. ANN. § 52:27D-302(h) (West 1986).

[29] The FHA specifies that proposed housing projects under programs administered by the Housing and Mortgage Finance Agency (HMFA) are to be given priority ratings based, inter alia, on the extent to which they serve people of different income levels. N.J. STAT. ANN. § 52:27D-307.3a(2)(c) (West 1986). COAH states that "funding is usually provided" by the Department of Consumer Affairs (DCA) or HMFA. 1995 COUNCIL ON AFFORDABLE HOUSING ANN. REP. at 1. The New Jersey Urban Development Corporation also could serve *Mount Laurel* goals. *See* N.J. STAT. ANN. § 55:19-3(e)(5) (West 1996) (authorizing "multi-purpose" projects, including housing).

[30] 1995 COUNCIL ON AFFORDABLE HOUSING ANN. REP. at 1.

[31] *See infra* notes 52-57 and accompanying text.

foreseeable effect of perpetuating known segregation, where their acts or omissions are undertaken in response to and in accordance with the segregative wishes of others that are known to be racially motivated."[32] This reasoning applies to the State of New Jersey as well as to the State of New York.[33]

The pages that follow describe three areas in which *Mount Laurel* performance may be made more consonant with *Mount Laurel* principles. The discussion considers what state agencies should do as well as what actions municipalities and developers should take.

II. Racial and Ethnic Integration Must Be Acknowledged as a Goal and Addressed Directly

The Wish-Eisdorfer Report shows plainly that at every income level, in every aspect of the *Mount Laurel* program, Black and Latin people are treated differently from, and less well than, Whites. Moreover, two-thirds of the *Mount Laurel* units were excluded from the Wish-Eisdorfer study because their developers did not use the State's Affordable Housing Management Service (AHMS) for processing applicants;[34] it is reasonable to suspect that these developers, who do their own marketing, are less likely to serve minorities than Whites. Thus, the dismal race statistics of the Wish-Eisdorfer Report almost certainly would be even more dismal if we had a view of the full universe of *Mount Laurel* housing.

The racial and ethnic separation in *Mount Laurel* housing is independent of economics. Low-income white households are in the suburbs; black and Latin low-income households are in urban areas.[35] This is true not only of families but of what must be the least offensive, least threatening category of people: elderly women. The white, low-income, elderly women in *Mount Laurel* units are in the suburbs; the black and Latin low-income elderly women are in urban areas.[36]

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[32] United States v. City of Yonkers, 96 F.3d 600, 617-618 (2d Cir. 1996).

[33] Compare the closely related case of *Abbott v. Burke*, 136 N.J. 444, 643 A.2d 575 (1994), where the court underlined the clear and absolute responsibility of the State for both the problem and its solution, noting that "all of the money that supports education—all of it public money whether the taxes are local or state—is authorized and controlled in terms of its source, amount, distribution, and use by the state, and that all of the students are citizens of the state, no less citizens in the special needs districts than in the richer districts, all entitled to be treated equally, to begin at the same starting line." For housing, as for education, "also at stake is the future of the state and the rest of its citizens . . . ." *Id.* at 456, 643 A.2d at 581

[34] Wish-Eisdorfor Report, *supra* note 11, at 26-32.

[35] *See id.* at 61.

[36] *See id.*

Moderate income Blacks who occupy sales units do so predominantly in the cities, not the suburbs. Forty-two percent of the moderate-income black households in the AHMS database have purchased homes. These people have overcome any discrimination that may be practiced by realtors, lenders and insurers; they have surmounted the problems of net worth differentials often used to explain racial disparities in housing[37]—and only 23% of these households are in the suburbs.[38] In the suburbs, Whites occupy 88% of the rental units and 89% of the sales units; in urban areas, Blacks occupy 98% of the sales units and 92% of the rental units.[39] Of Black households who previously lived in the suburbs, 21% have moved to the urban areas.[40]

Dean Ronald J. Riccio opened the October Symposium by asking why this has happened. Is it because "activist" courts are incapable of changing racial mores? Is it because the problems of race are "intractable" and simply cannot be solved? Do courts lack the power and legitimate authority to change the ways in which people live?[41] Does the Wish-Eisdorfer Report teach us that no matter what a court says or does about racial separation, the court will not be able to implement its will?

The Wish-Eisdorfer Report certainly does not teach those lessons. It teaches no lessons about what happens when courts issue orders forbidding racial separation. It teaches no such lessons because the New Jersey Supreme Court's *Mount Laurel* orders do not enjoin racial separation.

Although *Mount Laurel* began as a challenge to racial segregation and discrimination,[42] the New Jersey Supreme Court transformed it into a

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[37] *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 58-60 (1995).

[38] *See* Wish-Eisdorfer Report, *supra* note 11, at 61. Consider also the important point made by Chester Hartman at the Symposium: there are distinctions among suburbs, and it well may be that many of these moderate-income black families are in close-in, predominantly Black suburbs, where public education, employment and other life opportunities are not substantially better than those in the inner cities. *See, e.g., DeSimone v. Greater Englewood*, 56 N.J. 428, 435, 267 A.2d 31, 34 (1970) (In 1970, Englewood was 20% to 25% Black). Englewood today is 38% Black and 16% Hispanic (White or Black). Robert Hanley, *New Jersey Will Not Force High School's Desegregation*, N.Y. TIMES, Feb. 7, 1997, at B4 (Chart based on 1990 U.S. Census).

[39] *See* Wish-Eisdorfer Report, *supra* note 11, at 54.

[40] *See id.* at 70.

[41] *See generally* LAWRENCE D. BARNETT, LEGAL CONSTRUCT, SOCIAL CONCEPT: A MACROSOCIOLOGICAL PERSPECTIVE ON LAW (1993); GERALD N. ROSENBERG, THE HOLLOW HOPE (1993).

[42] *See* John M. Payne, *Title VIII and* Mount Laurel: *Is Affordable Housing Fair Housing*?, 6 YALE L. & POL'Y REV. 361, 362 (1988) (discussing the origin of *Mount Laurel* in civil rights advocacy). The term "race" is used throughout this article despite the

case about economic exclusion.[43] The plaintiffs in the case were "poor [B]lacks and Hispanics," but the court said that it was enlarging the protections of its ruling because Blacks and Hispanics "are not the only category of persons barred by reason of restrictive land use regulations."[44] The court said that its expanded ruling was to protect

> young and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments.[45]

The court said that it would "consider the case from the wider viewpoint" of all those excluded "because of the limited extent of their income and resources."[46]

The supreme court's decisions, the Fair Housing Act, the COAH regulations, and the municipal zoning ordinances all are expressed in economic, not racial, terms. COAH's statement of its goals contains not a word about "race" or "ethnicity."[47] The supreme court did not say that it sought to achieve, or that the New Jersey Constitution required, anything with respect to race or ethnicity; the court's interpretation of the New Jersey Constitution and the statute that implements the holding impose no requirements with respect to race and ethnicity.

It may be that the court believed (or hoped) that economic integration would produce racial and ethnic integration,[48] but that belief (or

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author's understanding of the difficulties of defining it. *See, e.g.*, F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (1993); IVAN HANNAFORD, RACE: THE HISTORY OF AN IDEA IN THE WEST (1996); RACE AND OTHER MISADVENTURES: ESSAYS IN HONOR OF ASHLEY MONTAGU IN HIS NINETIETH YEAR (Larry T. Reynolds & Leonard Lieberman eds., 1996). "Race" as used in this article encompasses "ethnicity."

[43] Norman Williams & Anya Yates, *The Background of* Mount Laurel I, 20 VT. L. REV. 687, 695-96 (1996) (the legal services lawyers representing the plaintiffs in *Mount Laurel* "had phrased their case largely in racial terms . . . [;][i]t was a matter of definite choice by the New Jersey Supreme Court to transmute the *Mount Laurel* case into a challenge to the exclusion of housing for a wide variety of groups").

[44] *Mount Laurel I*, 67 N.J. at 159, 336 A.2d at 717.

[45] *Id.*

[46] *Id.*

[47] *See* 1995 COUNCIL ON AFFORDABLE HOUSING ANN. REP. at 6.

[48] *See* Rachel Fox, *The Selling Out of Mount Laurel: Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 FORDHAM URBAN L.J. 535, 552 (1988) (acknowledging that "the only mention by the *Mount Laurel II* court of race . . . was a reference, buried in a long footnote, to a finding by the [Kerner] Commission . . . that suburban exclusionary zoning was a principal reason why the United States was developing into two societies, 'one black, one white—separate and unequal.'") (citing *Mount Laurel II*, 92 N.J. at 210 n.5, 456 A.2d at 415 n.5; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (U.S. Gov't Printing Office 1968)). Fox argues that "while the *Mount Laurel* mandate might have been clearer if the court had specifically

hope) was probably groundless from the start and certainly has been proven so.[49] Economic disparities account for only a small portion of racial and ethnic residential segregation;[50] economic inclusion, therefore, can play only a small part in desegregation. In any event, twenty years of experience with *Mount Laurel* has shown that constitutional doctrine, legislation, regulations, and ordinances that do not mention race and ethnicity do not produce racial and ethnic desegregation. The lesson powerfully suggested by this, surely one of the principal lessons of *Mount Laurel* and the Wish-Eisdorfer Report, is that to deal with race, courts, legislatures and agencies must address race, and not use income or anything else as a proxy for race.[51]

There are two ways in which race (and ethnicity) are relevant to *Mount Laurel*. The first is that state and local governments in general may have a duty to reduce segregation, and to use *Mount Laurel* programs to that end. The second is that the *Mount Laurel* program itself has produced segregation and inequality. The Wish-Eisdorfer Report shows that *Mount Laurel*, a long-term, state-wide, government-designed and -implemented program, separates people by race, color and ethnicity and affords Whites the greatest opportunities to live where schools, public safety, employment and other necessities of life are best.

There are various federal legal bases for imposing on local and state governments the obligation to undo racial and ethnic segregation.[52] In

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addressed the race issue, in light of the demographics of New Jersey there is no need to do so. It is implicit that a measure of racial integration was intended in the court's holding." Fox, *supra*, at 564; *see also id.* at 565 ("the *Mount Laurel* courts, in fashioning a remedy for economic segregation . . . understood that implicit in their remedy was a measure of racial desegregation as well.")

[49] *See* Robert C. Holmes, *A Black Perspective on* Mount Laurel II*: Toward a Black 'Fair Share*," 14 SETON HALL L. REV. 944, 950 (1984) (reviewing demographic data suggesting that "selection criteria left unmonitored could result in apparent significant success for the *Mount Laurel* mandate without accommodating a single black family.")

[50] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 84-88 (1993) (summarizing studies that show that "black segregation does not vary by affluence"); Paul A. Jargowsky, *Take the Money and Run: Economic Segregation in U.S. Metropolitan Areas*, 61 AM. SOCIOLOGICAL REV. 984, 986 (1996); Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 488-89 n.48 (1995) [hereinafter Roisman, IOWA L. REV.] (collecting authorities).

[51] *See* BALTIMORE NEIGHBORHOODS, INC., BETTER TOGETHER 45, 50 (1996) [hereinafter BETTER TOGETHER].

[52] *See* Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968) (local school board that has intentionally created segregation is obligated to eliminate its vestiges, root and branch). Agencies that receive Community Development Block Grant funding have that obligation by statute. *See* 42 U.S.C. § 5304(b)(2) (1994). Local agencies also may be subject to the federal Fair Housing Act's requirement that federal agencies "affirmatively further" fair housing. *See* 42 U.S.C. §§ 3608(d) and (e)(5) (1994); Otero v. New York

addition to these federal theories, there is a sound basis for maintaining that government imposition of separation and inequality, as in the *Mount Laurel* program, is inconsistent with the general welfare clause of the New Jersey Constitution. The court that held that state control of land may not be used to "favor rich over poor"[53] may be expected to hold that state control of land may not be used to favor white over non-white, "Anglo" over "Latin." The New Jersey Supreme Court has not reached this point, but it had indicated an inclination to do so even before *Mount Laurel I*. In 1970, in *DeSimone v. Greater Englewood Housing Corp. No. 1*,[54] the court endorsed the principle that "breaking the long-standing patterns of racial segregation . . . will promote the general welfare of the community."[55] It is likely that the court would now do what it avoided doing in *Mount Laurel I*: hold that the New Jersey Constitution prohibits racial exclusion by suburbs. Moreover, as *In re Warren* indicates, the supreme court is very sensitive to the constraints of the New Jersey Law Against Discrimination (LAD) as well as the federal fair housing laws.[56] Thus, if the municipalities and state agencies do not voluntarily act to redress the racial and ethnic segregation and discrimination in the *Mount Laurel* program, it is likely that seeking judicial redress would be successful.[57]

City Hous. Auth., 484 F.2d 1122, 1132 (2d Cir. 1973) (applying § 3608(e)(5) to local PHA); *but cf.* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 140 n.18, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (questioning that holding); *see also* Akhil Reed Amar et al., *Symposium on Affirmative Action: Bakke's Fate*, 43 U.C.L.A. L. REV. 1745, 1773-1780 (1996) [hereinafter Amar, *Bakke's Fate*] (arguing that even after *Adarand v. Pena*, 115 S. Ct. 2097 (1995), affirmative action to achieve diversity in education would be constitutional). The arguments for education are closely analogous to those for residential diversity.

[53] *See Mount Laurel II*, 92 N.J. at 209, 456 A.2d at 415.

[54] 56 N.J. 428, 267 A.2d 31 (1970).

[55] *Id.* at 441, 267 A.2d at 37 (quoting the Board of Adjustment of the City of Englewood). See also the prescient and justly famous dissent of Justice Hall in *Vickers v. Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962), noting the contradiction between exclusionary zoning and "legislative policy at the State level forbidding various kinds of discrimination in housing . . . ." *Vickers*, 37 N.J. at 265, 181 A.2d at 147.

[56] The federal Fair Housing Act is Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq. Other federal fair housing laws include the Civil Rights Act of 1866, 42 U.S.C. § 1982, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1995).

[57] COAH has the authority "to promulgate whatever rules and regulations may be necessary to achieve its statutory task"—which is the achievement of the constitutional purpose. Hills Development Company v. Township of Bernards, 103 N.J. 1, 20, 510 A.2d 621, 631-32 (1986); N.J. STAT. ANN. § 52:27D et seq. (West 1996). Rulemaking petitions may be an effective way of presenting this issue to the courts. *Cf. In the Matter of Petitions for Rulemaking, N.J.A.C. 10:82-1.2 and 10:85-4.1*, 117 N.J. 311, 566 A.2d 1154 (1989).

The racial and ethnic disparities in the *Mount Laurel* program are not inescapable or incurable. There are a variety of actions that could and should be taken that would improve the situation with respect to the existing *Mount Laurel* units and reduce such disparities for the future. The list that follows is suggestive, not exhaustive.

A. *Counter Lending and Insurance Discrimination*

There is considerable evidence of racial and ethnic discrimination in the mortgage lending and homeownership insurance industries.[58] Both the existence and the expectation of such discrimination discourage minority homebuyers from buying at all or from buying in predominantly white neighborhoods.[59] Countering the reality and the expectation of such discrimination seems a necessary, if not a sufficient, condition of encouraging racial and ethnic desegregation.

The state can take a variety of steps to achieve this goal. It can enhance its regulation and enforcement of anti-discrimination laws, and be sure that *Mount Laurel* applicants are particularly well informed about those activities. The state should assure every applicant household, in writing and orally, that it will conduct scrupulous monitoring for lending and insurance discrimination in connection with each application, and such monitoring should in fact occur. In the marketing of *Mount Laurel* sales units, specific assurances of non-discriminatory lending and insurance should be provided, with explicit referrals to lenders committed to measured achievement of integrative goals.

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[58] *See* 1994 HUD's FAIR HOUSING ANN. REP., 39-53; James H. Carr & Isaac F. Megbolugbe, The Federal Reserve Bank of Boston Study on Mortgage Lending Revisited (FNMA) (Working Paper 1993); George C. Galster, *Use of Testers in Investigating Discrimination in Mortgage Lending and Insurance, in* CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 287, 289-99 (Michael Fix & Raymond J. Struyk eds., 1993) (reviewing studies); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 63-85 (1995).

[59] *See* Tara D. Jackson, *The Other Side of the Residential Segregation Equation: Why Detroit Area Blacks Are Reluctant to Pioneer Integration*, URBAN AFFAIRS REV. (forthcoming 1997) [hereinafter Jackson, URB. AFF. REV.] (indicating that it is "widely-held perceptions of housing discrimination that strongly hinder Detroit area blacks' willingness to integrate all-white neighborhoods."). "A 1990 survey by the National Opinion Research Center showed that 86 percent of blacks and 75 percent of whites agreed that blacks experience some or a lot of discrimination when they buy or rent housing." JOHN GOERING ET AL., PROMOTING HOUSING CHOICE IN HUD's RENTAL ASSISTANCE PROGRAMS: REPORT TO CONGRESS 34-36 (Apr. 1995) [hereinafter GOERING, PROMOTING]; Reynolds Farley, *Neighborhood Preferences and Aspirations Among Blacks and Whites, in* HOUSING MARKETS AND RESIDENTIAL MOBILITY 161, 183 (G. Thomas Kingsley & Margery Austin Turner eds., 1993).

Thus, for example, Fleet Financial Corporation recently settled a Community Reinvestment Act[60] (CRA) challenge by agreeing to provide in New Jersey $75 million in home mortgage loans and $27.5 million for a down payment assistance program, part of a $502.5 million commitment for affordable housing and small business loans in the State.[61] Other lending institutions may well be interested in making similar commitments, either to avert potential CRA liability or for other reasons. The state also can refer homebuyers to the Fund for an Open Society, which offers below-market-rate second mortgage loans for integrative home purchases.[62]

In addition, HMFA itself should offer mortgage insurance and direct mortgage financing for homebuyers making integrative moves. A program of HMFA mortgage insurance for integrative moves could encourage lenders to make loans they consider questionable.[63] Ohio, Wisconsin, and Washington have such programs to achieve school and housing desegregation.[64] A program of home equity insurance could help to create and protect integrated communities.[65]

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[60] 12 U.S.C. § 2901 et seq. (1977).

[61] *See* 24 HOUSING & DEV. REP. 459-60 (Dec. 2, 1996).

[62] *See* BETTER TOGETHER, *supra* note 51, at 50.

[63] *See* YINGER, CLOSED DOORS, *supra* note 58, at 77 (noting that lenders may use "minority status as a signal that an applicant has relatively poor unobserved credit characteristics . . . "; Carr & Megbolugbe, *supra* note 58, at 35 ("minorities receive systematically lower credit ratings.").

The New Jersey Housing and Mortgage Finance Agency (NJHMFA) has broad authority. *See* N.J. STAT. ANN. § 55:14K-1 et seq. (West 1986); NJHMFA v. Moses, 215 N.J. Super. 318, 321, 521 A.2d 1307 (1987) (upholding authority of HMFA to condemn private property to be transferred to other private ownership for construction of a shopping center). It "can pool loans, offer incentives, develop cooperatives, organize subsidiary corporations, create a Housing Development Corporation, and issue taxable and nontaxable bonds. It may provide financing for operating, maintaining, constructing, acquiring, rehabilitation or improving various types of housing, ranging from single room occupancy housing to single family homes to multi-family dwellings." *Id.* at 321-22, 521 A.2d 1307. HMFA is to be a "strong, unified advocate for housing production, finance and improvement" which will, among other things, "stimulate the construction, rehabilitation and improvement of adequate and affordable housing, . . . particularly [housing for] New Jersey residents of low and moderate income . . . ." N.J. STAT. ANN. § 55:14K-2(e)(2) (1984). HMFA is "generally charged with administering a legislative program designed, inter alia, to stimulate the availability of affordable housing . . . ." NJHMFA v. Bedminster Hills Hous. Corp., 285 N.J. Super. 255, 268, 666 A.2d 1018, 1025 (1995) (setting aside a sheriff's sale to permit a non-profit corporation to exercise a mortgagor's right of redemption; in the process, castigating HMFA, which "is not an ordinary, private sector mortgagee and should not act like one."). *Id.* "HMFA is a sister agency, in, but not of, the same Department of Community Affairs as the Council on Affordable Housing, the agency charged with administering the legislated policies of this State designed to promote the availability of affordable housing . . . ." *Id.*; *see also* N.J. STAT. ANN. § 52:27D-307 (West 1996).

[64] *See* GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL

B. Provide Mobility Counseling for Homebuyers and Tenants

COAH now requires that municipalities provide to applicants for *Mount Laurel* units counseling "on subjects such as budgeting, credit issues, mortgage qualifications, rental lease requirements, and landlord/tenant law . . . ."[66] This should be expanded to encompass mobility counseling, to provide the information and assurances necessary to enable integrative moves.

In programs that have achieved racial integration across class lines, mobility counseling is considered very important. "In highly concentrated metropolitan housing markets, where there are large concentrations of racially isolated poverty households, intensive personal counseling has . . . been critical" to promote moves from poverty to non-poverty areas.[67] This counseling may consist of providing information, assisting with transportation, or other support.[68] Counseling was useful in the Gautreaux housing mobility program, and is being employed in the Moving to Opportunity and regional mobility projects of HUD.[69] A program of mobility counseling could be very helpful to promoting integration in *Mount Laurel* units.

Having disparate municipalities provide counseling is not the best idea, for several reasons. First, applicants should be reached when they first indicate an interest in securing a new home; by the time a person has identified a particular municipality, the point of mobility counseling will have been lost. Second, disparate municipalities are unlikely to offer the most sophisticated, consistent counseling. The counseling should be per-

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OF BROWN V. BOARD OF EDUCATION 327 (1996).

[65] *See* BETTER TOGETHER, *supra* note 51, at 51 (recommending a home equity insurance program); W. DENNIS KEATING, THE SUBURBAN RACIAL DILEMMA 202-220 (1994) (describing such programs); JULIET SALTMAN, A FRAGILE MOVEMENT: THE STRUGGLE FOR NEIGHBORHOOD STABILIZATION 387 (1990) (same); South Suburban Hous. Ctr. v. Greater South Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991) (same).

[66] N.J. ADMIN.CODE tit. 5, § 93-11.2(c) (1996).

[67] George E. Peterson & Kale Williams, *Housing Mobility: What Has It Accomplished and What Is Its Promise?, in* HOUSING MOBILITY: PROMISE OR ILLUSION 7, 17 (Alexander Polikoff ed., 1995); *see also* U.S. DEPT. OF HOUS. & URBAN DEV., EXPANDING HOUSING CHOICES FOR HUD ASSISTED FAMILIES: MOVING TO OPPORTUNITY: REPORT TO CONGRESS 3-7 (April 1996) [hereinafter EXPANDING CHOICES].

[68] See Goering, PROMOTING, *supra* note 59, at 34-36 (discussing the impediments of distance and lack of information). For a description of the counseling previously used in the *Gautreaux* housing mobility program, see Mary Davis, *The Gautreaux Assisted Housing Program, in* HOUSING MARKETS AND RESIDENTIAL MOBILITY 243, 246 (G. Thomas Kingsley & Margery Austin Turner eds., 1993).

[69] *See* Roisman, IOWA L. REV., *supra* note 50, at 507 n.140 (collecting authorities about *Gautreaux*); EXPANDING CHOICES, *supra* note 67, at 3-7; Margery Austin Turner & Kale Williams, *Housing Mobility: Realizing the Promise: Report of the Second National Conference on Housing Mobility* (forthcoming 1998).

formed by one agency, either a state agency such as AHMS or an independent fair housing group (such as the Leadership Council in Chicago).[70]

C. Offer Provider and Community Counseling

There is common consent that education and counseling are essential in order to achieve desegregation and deconcentration. That education and counseling, however, should not be focused exclusively on minorities. It is not primarily minority ignorance and violence that has created racial and economic separation, and it is not primarily minority ignorance and violence that prevents desegregation and deconcentration.[71] Whites who oppose taking down the walls surrounding "their" suburbs need to be educated and counseled. They need to understand that they do not own the earth and all that is on it; that they are the beneficiaries of immense government expenditure and cannot hoard all of it for themselves; that the qualities that make for good human beings and good neighbors are as unevenly distributed among themselves as among the people of color and poverty[72] whom they fear. Information about communities that have successfully integrated people of different races and ethnicities—and incomes—also should be disseminated as broadly as possible.[73]

D. Improve and Enforce the Affirmative Marketing Requirements for Mount Laurel *Units*

COAH regulations have required "affirmative marketing" of *Mount Laurel* units. The COAH regulation that authorized occupancy preferences also required municipalities to develop and implement affirmative

[70] *See* Florence W. Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 335, 351 (1993) (after reviewing mobility programs, concluding that "administration by a private non-profit fair housing group generally is preferable to administration by a PHA").

[71] Many studies show that most minorities prefer integration and that segregation is not primarily the result of minority choice. See Roisman, IOWA L. REV., *supra* note 50, at 488 n.47 (collecting authorities).

[72] *See* Donald L. Beschle, *You've Got To Be Carefully Taught: Justifying Affirmative Action After* Croson *and* Adarand, 74 N.C. L. REV. 1141, 1145, 1163-72 (1996) [hereinafter *Justifying Affirmative Action*] (reviewing social science evidence that "bias toward those like oneself is a pervasive human trait, but one that can be countered by social institutions"); *see also* Steven A. Tuch et al., *Whites' Racial Policy Attitudes*, 77 SOC. SCI. Q. 723 (1996) (showing the importance of "educational programs aimed at increasing whites' understanding of the insidious nature of past and present discrimination and of the effects of structured inequality . . . .")

[73] *See generally* KEATING, *supra* note 65; SALTMAN, *supra* note 65; BETTER TOGETHER, *supra* note 51.

marketing programs.[74] After the supreme court invalidated the occupancy preferences in *In re Warren*, COAH revised its regulations, promulgating a subchapter dealing with "Affirmative Marketing."[75] These new affirmative marketing requirements are very weak: they should be improved in substance and by provision for effective monitoring and enforcement.[76]

"Affirmative marketing" is a term that requires definition. When the occupancy preference requirements were before the appellate division in *In re Warren*, the court noted that COAH "does not describe what constitutes 'affirmative marketing.'"[77] The appellate division attempted to give content to this "requirement" by noting that

> this term of art is widely used in governmental housing programs to refer to plans designed to ensure that members of minority groups have the same access to housing opportunities as all other persons. *See* 24 C.F.R. § 200.600 (defining term for use in housing programs of the federal Department of Housing and Urban Development) . . .[78]

The new COAH regulations, however, are not adequate to "ensure that members of minority groups have the same access to housing opportunities as all other persons."[79] Consideration of the HUD regulations to which the appellate division referred indicates some of the improvements needed in COAH's affirmative marketing regulations:

1. The regulations must set the goal of attracting persons who are underrepresented in the community. HUD describes the purpose of affirmative marketing as "ensur[ing] positive outreach and informational efforts to those who are least likely to know about and apply for the housing in question."[80] COAH requires only that the affirmative marketing be designed "to attract . . . all majority and minority groups" in the region.[81]

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[74] *See* N.J. ADMIN. CODE tit. 5, § 92-15.2 (1992).

[75] *See* N.J. ADMIN. CODE tit. 5, § 93-11.1 to 93-11.7 (1996).

[76] While the COAH regulations should be strengthened, it also would be worthwhile for advocacy groups to monitor compliance with the existing regulations. It is probable that monitoring would disclose widespread non-compliance—failure to file plans and failure to comply with plans. These were the results of monitoring of HUD's affirmative marketing requirements. *See* Laura Lazarus, Affirmative Fair Housing Marketing Regulations: HUD's Failed Attempt to Implement a Good Idea 14-23 (1993) (unpublished manuscript on file with author). Disclosing such noncompliance and segregatory housing patterns would be a good basis for seeking strengthened regulations.

[77] *In re* Warren, 247 N.J. Super. 146, 166, 588 A.2d 1227, 1237 (1991).

[78] *Id.*

[79] *Id.*

[80] HUD Affirmative Fair Housing Marketing Handbook (8025.1 REV. 2) §§ 1-2 to 1-3 (1993) [hereinafter Handbook].

[81] N.J. ADMIN. CODE tit. 5, § 93-11.1(a) (1996).

2. HUD requires that the developer "identify the groups that are least likely to apply for housing" and provide "special outreach" for these groups; marketing and management staff must be trained in fair housing.[82] Racial and ethnic data from Census reports and other sources must be considered.[83] Advertising is to be directed to media that serve particular groups.[84] "All advertising . . . depicting persons [must] depict persons of majority and minority groups, including both sexes."[85] Developers are to contact community groups "that have direct and frequent contact with those groups identified . . . as least likely to apply. The contacts should also be chosen on the basis of their positions of influence within the general community and the particular target group."[86]

The COAH regulations provide dim, diminished reflections of these standards. The goal of specific outreach to unrepresented groups is abandoned for a general requirement of listing media and community contacts, with no standards for selecting these contacts. The limitation to regional outreach allows predominantly white regions to remain predominantly white.

3. HUD's affirmative marketing requirements have been criticized, by HUD and others, for inadequate standards, monitoring, and enforcement.[87] The COAH regulations are far weaker than their HUD counterparts. The COAH regulations should be strengthened, making the improvements already suggested for HUD's affirmative marketing regulations.

As Philip Tegeler pointed out at the Symposium, while the many *Mount Laurel* units in the suburbs may not have served a desegregatory purpose to date, they are available to serve a desegregatory purpose in the future. Affirmative marketing can make that happen.

I will not be so bold as to propose that the white occupants of the suburban *Mount Laurel* units be required to change places with black occupants of urban units financed through Regional Contribution Agreements (RCA).[88] I do, however, endorse what I understand to be the

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[82] Handbook, *supra* note 80, § 2-8 A at 2-6 and § 2-13 at 2-17, 2-18.

[83] *See id.* § 2-8 C at 2-7.

[84] *See id.* § 2-9 at 2-9, 2-10.

[85] 24 C.F.R. § 200.620 (a) (1996).

[86] Handbook, *supra* note 80, § 2-9D at 2-12.

[87] *See* HUD, AN ASSESSMENT OF THE MULTIFAMILY AFFIRMATIVE ACTION FAIR HOUSING MARKETING PROGRAM (Office of Fair Housing and Equal Opportunity, Office of Program Standards and Evaluation, Program Evaluation Division) (Mar. 1990)); Lazarus, *supra* note 76, at 38-40 (discussing recommendations for improvement).

[88] But see the order of Judge William Wayne Justice in *Young v. Pierce*, 628 F. Supp. 1037, 1051-52 and 1052 n.7 (E.D. Tex. 1985). Judge Justice ordered the Clarksville Housing Authority to transfer over-housed white families to appropriately sized units in

Tegeler suggestion, that as those suburban units are vacated, aggressive affirmative marketing should be employed to assure that the occupants are replaced by people who will bring some diversity to the development and the municipality.[89]

The central change that must be made in COAH's affirmative marketing regulation would be an authoritative statement of desegregation as an objective of the program. The statement should be accompanied by the establishment of specific goals for each municipality, performance testing to ascertain whether each municipality does achieve its goal, and reward and punishment in response to achievement and dereliction.

These are the basic requirements that must be imposed on any program to achieve any desired result. These basic requirements should be imposed upon all of the government-involved housing programs in the State that have, to this date, maintained, perpetuated, and exacerbated residential racial segregation; the programs must therefore be used to undo some of the damage they have done. *Mount Laurel* is one, but only one, housing program that meets this description.[90] *Mount Laurel* has in fact enhanced residential racial segregation. It should be subjected to the discipline of established desegregative goals, standards, performance testing and consequences.[91]

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the "black" project, and to allow black families to move to appropriately sized units in the "white" project. While this order was highly controversial at the time, it seems to have had good effect and was, in any event, scarcely an excessive response to a blatantly unconstitutional allocation of resources by the Clarksville Housing Authority and HUD. *See* Florence W. Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color: Recent Development in Federal and State Courts*, 24 CLEARINGHOUSE REV. 312, 331 (1990).

[89] While the United States Supreme Court has set strict standards for race-conscious remedies, it has assured us that strict scrutiny is not "fatal in fact." *See* Adarand v. Pena, 515 U.S. 200, 237 (1995). To undo the public and private discrimination in the *Mount Laurel* and other state housing programs, "narrowly tailored race-based remed[ies]," thoroughly explained, should be within even federal constitutional constraints. *Id.* Justice O'Connor has acknowledged "the compelling governmental interest in redressing the effects of past discrimination" Missouri v. Jenkins, 515 U.S. 70, 78 (1995) (O'Connor, J., concurring). As Justice Souter noted in *Adarand*, "a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination" *Adarand*, 515 U.S. at 270 (Souter, J., dissenting). There is, in addition, a persuasive argument that achieving diversity may be as compelling a justification as remedying past discrimination. *See* Amar et al., *Bakke's Fate*, *supra* note 52, at 1773-80. *See generally* Beschle, *Justifying Affirmative Action*, *supra* note 72.

[90] Public and HUD-assisted housing in New Jersey were as segregated as elsewhere throughout the nation. *See* Roisman, IOWA L. REV. at 491-93 (collecting authorities); Levitt and Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 158 A.2d 177 (1960).

[91] The long history and current continuation of housing discrimination and segregation in the State generally and in the State housing programs in particular would not only

E. Eliminate the Regional Contribution Agreements

The NJFHA provides that a "municipality may propose the transfer of up to 50% of its fair share to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter."[92] COAH is required to approve such an RCA if it finds that "the agreement provides a realistic opportunity for low and moderate income housing within convenient access to employment opportunities, and that the agreement is consistent with sound, comprehensive regional planning."[93]

The RCA provision of the Fair Housing Act has been a principal means of maintaining and increasing minority population in the cities rather than the suburbs. As noted by Professor Payne, a participant and observer: "no one with the slightest acquaintance with this process doubts that the RCAs help keep the suburbs white and the central cities otherwise."[94]

Nonetheless, in *Hills Development Company v. Township of Bernards*, the supreme court upheld the facial constitutionality of the RCA provision, noting that RCAs would have the beneficent effect of improving housing in urban areas.[95] Thereafter, in *In re Warren*, the appellate division rejected attacks on the RCAs, holding that they violated neither *Mount Laurel* nor constitutional and statutory prohibitions against racial

justify but require such compensatory attention to minorities. HMFA gives preference to projects that employ minority owned businesses and women owned businesses; the agency justifies this because "the Governor's Study Commission concluded [in 1993] that there was sufficient evidence of race and gender discrimination in procurement and construction contracting in New Jersey to support a State set-aside or preference in procurement and construction contracting for qualified MBE WBEs." HMFA Low Income Housing Tax Credit Qualified Allocation Plan, Summary of Public Comments and Agency Responses, 28 N.J. Reg. 2843, 2844 (June 3, 1966). The Wish-Eisdorfer Report (and other material) provide sufficient evidence of race and national origin discrimination in occupancy to support such a State set-aside or preference in occupancy. The data provided by Professor Nancy Denton provides further support for such relief. She reports that in Newark, one of the hypersegregated cities she and Douglas Massey have identified, between 1980 and 1990, every one of the five indices of segregation for African-Americans increased. As she said at the Symposium: "if we are having a *Mount Laurel* plan, the goal of which is to increase opportunities and to desegregate, they should not all be going up."

[92] N.J. STAT. ANN. § 52:27D-312 (West 1986).

[93] N.J. STAT. ANN. § 52:27D-312(e) (West 1986). "These requirements are mirrored in COAH's regulations. N.J.A.C. 5:91-12.3(c)." *In re Warren*, 247 N.J Super. at 162, 588 A.2d at 1235.

[94] Payne, VT. L. REV., *supra* note 14, at 675. Compare Professor Derrick Bell's allegedly fanciful parable of "The Space Traders," who offered great treasure in exchange for the expulsion of all black citizens of the United States. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 158-94 (1992).

[95] *See* Hills Development Company v. Township of Bernards, 103 N.J. 1, 56-65, 510 A.2d 621, 651-55 (1986).

discrimination.[96] The New Jersey Supreme Court denied petitions for certification with respect to the RCAs.[97]

The findings of the Wish-Eisdorfer Report and the operation of the Low Income Housing Tax Credit[98] and other federal programs provide grounds for renewing the attack on the RCAs.

The appellate division in *In re Warren* held that the RCA provision does not violate the federal Fair Housing Act or the LAD because, even if the RCAs have a racially discriminatory impact,[99] they are justified under the test laid down by the Third Circuit in *Resident Advisory Board v. Rizzo*[100] and endorsed by the Second Circuit in *Huntington Branch N.A.A.C.P. v. Town of Huntington*:[101]

> The State certainly has a legitimate, indeed compelling, interest in rehabilitating or replacing substandard housing in urban areas. And the means other than RCAs available to accomplish this objective are inadequate, because federal and state funds for the construction and rehabilitation of lower income housing are extremely limited.[102]

The Wish-Eisdorfer Report undercuts this by showing starkly the racial and ethnic disparities in the operation of the *Mount Laurel* program. Moreover, there are other programs for improving urban housing, including the LIHTC program, which was created after the FHA. Furthermore, as the supreme court's reasoning in *In re Warren* shows, not every legitimate goal may be imposed on the *Mount Laurel* program. The supreme court in *In re Warren* applauded local concern to provide for a municipality's own residents, but held that that goal should be achieved by programs outside of *Mount Laurel*, therefore rejecting local residence preferences for *Mount Laurel* housing. In the same way, the

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[96] *See* In re *Warren*, 247 N. J. Super. at 162-70, 588 A.2d at 1236-39.

[97] *See* In re *Warren*, 132 N.J. at 9, 622 A.2d at 1261. The supreme court did review, and invalidate, COAH's occupancy preference regulation. The bases for the challenge to the RCA between Warren and New Brunswick were "first, that it violates the *Mount Laurel* doctrine because it will shift the location of proposed *Mount Laurel* housing from a municipality which has virtually no lower income housing to a municipality which already has a disproportionate share of the region's lower income households, and second, that it violates constitutional and statutory prohibitions against racial discrimination because it will result in the construction of new lower income housing in a municipality which has a disproportionately large number of minorities rather than one which has virtually no minority population" In re *Warren*, 247 N. J. Super. at 162, 588 A.2d at 1235.

[98] 26 U.S.C. § 42 et seq. (1996).

[99] "Although our disposition of these appeals does not require that we decide the issue, our precedents persuasively suggest that proof of discriminatory impact alone, without proof of discriminatory intent, would be sufficient to establish a prima facie violation of the LAD." In re *Warren*, 132 N.J. at 25, 622 A.2d at 1269.

[100] 564 F.2d 126, 149 (3d Cir. 1977).

[101] 844 F.2d 926 (2d Cir.), *aff'd in part* 488 U.S. 15 (1988) (per curiam).

[102] In re *Warren*, 247 N.J. at 169, 588 A.2d at 1239.

goal of improving inner city housing should be achieved by programs other than *Mount Laurel*.

As Professor Payne has noted, the *In re Warren* court virtually invited a Title VIII challenge to the RCA provision.[103] The invitation should be accepted.[104]

F. The State Housing and Mortgage Finance Agency Should Use the Low Income Housing Tax Credit Program to Advance Racial and Ethnic Desegregation

The Low Income Housing Tax Credit (LIHTC) program is "the only major Federal assistance program . . . that is currently active"[105] in producing new or rehabilitated subsidized housing. It can serve a particular unmet need in *Mount Laurel*: that for subsidized rental housing.[106]

The LIHTC program offers the State one of its best opportunities for promoting racial and ethnic desegregration as well as economic integration and mobility from urban to suburban areas. The state can serve these goals through both tenant and site selection.

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[103] Noting the New Jersey Supreme Court's "strong dictum" in *In re Warren* "all but saying that they [municipality residency and work preferences] would also violate Title VIII. It requires no great leap of analysis to apply the *Warren* dictum to RCAs." Payne, VT. L. REV., *supra* note 14, at 675 n.39.

[104] There is close precedent for the New Jersey Supreme Court's upholding the facial validity of legislation and then declaring the legislation unconstitutional as applied. *See* Abbott v. Burke, 119 N.J. 227, 300, 575 A.2d 359, 365 (1990) (holding unconstitutional school financing legislation upheld in *Robinson v. Cahill*, 69 N.J. 449, 355 A.2d 129 (1976)).

[105] HUD, Final Rule, 60 Fed. Reg. 61,846, 61,917 (Dec. 1, 1995); *see also* Abt Assoc. Inc., Development and Analysis of the National Low-Income Housing Tax Credit Database: Final Report (July 1, 1996) at 1-2 [hereinafter Abt Report] ("The LIHTC has become the principal mechanism for supporting the production of new and rehabilitated rental housing for low-income households."); General Accounting Office, *Tax Credits: Opportunities to Improve Oversight of the Low-Income Housing Program* (Mar. 1997) § 2 ("currently the largest federal" low-income housing development and rehabilitation program).

[106] In 1995, 2286 LIHTC units were funded in New Jersey. *See* 1995 HMFA ANN. REP. at 6; N.J. ADMIN. CODE tit. 5, § 80-33.1 (a) (1996) (NJHMFA "is the designated agency for the State of New Jersey to be responsible for the oversight of the Federal Low Income Housing Tax Credit Program"). For a general description of the LIHTC program, see Tracy Kaye, *Sheltering Social Policy in the Tax Code: The Low Income Housing Tax Credit*, 38 VILL. L. REV. 871 (1993).

1. Tenant Selection

a. Compliance with laws against discrimination

Sponsors of LIHTC projects, like all landlords in New Jersey, are subject to the non-discrimination requirements of Title VIII and the LAD. This obligation should be spelled out in the HMFA regulations, and owners should be required to certify compliance with that requirement.

Owners of tax credit developments now are required to make a series of certifications, including a certification "that each building in the project was suitable for occupancy, taking into account local health, safety and building codes . . . ."[107] The U.S. Department of the Treasury requires owners to certify "that all units in the project were for use by the general public . . . ," a requirement that Treasury defines as a non-discrimination requirement:

> A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 C.F.R. subtitle A and chapters I through XX).[108]

Owners should be required to certify annually that they are in compliance with federal fair housing laws and the LAD.[109]

b. Affirmative marketing of tax credit units

HMFA regulations also provide that "NJHMFA *encourages* all owners/developers to affirmatively market their projects" and *requires* that

> for projects over 25 units, applicants shall submit an Affirmative Fair Housing Marketing Plan, which, in short, documents how the project will be marketed to those people who are least likely to apply. For

[107] N.J. ADMIN. CODE tit. 5, § 80-33.30(d)(6) (1996).

[108] 26 C.F.R. § 1.42-9(a) (1994). It is by no means clear precisely what Treasury means to require. The Treasury regulation mentions subtitle A and Chapters I through XX of Title 24 of C.F.R., which comprise almost the entire seven volumes of Title 24 of the Code of Federal Regulations. Subtitle A is more than 800 pages long, encompassing 24 C.F.R. Parts 0-92. Chapters I through XX of Subtitle B include 24 C.F.R. Parts 100 through 3500, almost 2 inches thick, consisting of hundreds of pages, not consecutively numbered, from Volume 1 to Volume 7 of Title 24 of C.F.R. Although the meaning of "use by the general public" is unclear, HMFA requires that all LIHTC owners certify "that all units in the project were for use by the general public . . . ." N.J. ADMIN. CODE tit. 5, § 80-33.30(d)(5) (1996).

[109] The Sponsor's Certification form prepared by HMFA now requires certification that "the developer/applicant/recipient fully intends to abide by all applicable federal laws and regulations relating to the Low-Income Housing Tax Credit." (Page 1 of 4 in the 1996 Application Packet.) This should be amended to include Title VIII specifically.

> instance, if the proposed development is located in an area predominantly populated by Caucasians, outreach should be directed to non-Caucasians. Conversely, if the population is predominantly African American, outreach should be directed to non-African American groups. At the time the units are placed in service, the developer and rental agent shall certify that the project was affirmatively marketed.[110]

Several changes should be made in the HMFA regulations. HMFA should provide content and specificity to the affirmative marketing requirement, should impose the requirement on all developers (not only those of projects larger than 25 units), should require owners to certify compliance with the affirmative marketing requirements not only at initial rent-up but annually,[111] should require owners to collect the information by which compliance could be measured, and should provide for monitoring of compliance with those requirements.

HMFA has divided its tax credit allocations between urban and suburban areas. This is not a perfect proxy for "white" and "minority" areas, for there is substantial minority presence in some suburbs. At least for the projects in the suburban areas, HMFA should require that projects achieve and maintain some specified level of diversity in their resident population, i.e., a percentage of units in predominantly white suburbs should be set aside for minority residents and perhaps for minority residents moving from urban areas.[112]

HMFA should require that owners provide information about the race, ethnicity, gender and disability status of the occupants of the LIHTC units. The Treasury Department permits housing credit agencies, like HMFA, to "adopt stricter monitoring requirements or procedures if they wish."[113] Other state credit agencies require or invite data about race, ethnicity and other protected categories.[114] The LIHTC program is almost unique among subsidized housing programs in not requiring

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[110] N.J. ADMIN. CODE tit. 5, § 80-33.11(a)(16) (1996).

[111] Compare the requirement, in N.J. ADMIN. CODE tit. 5, § 80-33.30(d)(9) (1996), that the owner annually certify that "if a low income unit . . . became vacant during the year, . . . reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income . . . ."

[112] Compare HMFA's preference for projects owned by minorities and women, *supra* note 91.

[113] JOSEPH GUGGENHEIM, TAX CREDITS FOR LOW INCOME HOUSING 74 (1996) [hereinafter GUGGENHEIM, TAX CREDITS].

[114] See Jarrett Barrios, Federal and State Fair Housing Obligations Administering the Low Income Housing Tax Credit (Sept. 1994) (unpublished paper for Georgetown University Law Center Housing Seminar, on file with the author) [hereinafter Barrios].

housing owners to collect and report such data.[115] The provision of such information is essential to determine whether and to what extent the development is succeeding in complying with affirmative marketing requirements.

The Internal Revenue Code (IRC) requires the State agency to monitor all tax credit developments.[116] Agencies may engage outside contractors and may charge compliance monitoring fees to be paid by the owners of tax credit properties.[117] HMFA and private groups should monitor the tax credit projects for compliance with the non-discrimination requirements of the IRC, Title VIII and LAD.

Both HMFA and outside groups should ascertain whether owners have filed the required affirmative fair housing marketing plans and the extent to which owners have complied with those plans with respect to advertising, community contacts, training and other subjects, including the required affirmation "that changes necessary to ensure continued compliance with the affirmative fair housing marketing requirement will be made."[118] LIHTC projects whose occupancy and marketing patterns indicate non-compliance with any reasonable interpretation of these requirements should be challenged. The threat of loss of the tax credit should be a powerful inducement to the developers to do serious affirmative marketing and achieve some significant diversity in occupancy.

2. Site Selection

In selecting from among the many applications for LIHTC funding, HMFA can help to desegregate the dual housing market in state-assisted housing and in housing generally throughout the State of New Jersey.[119] HMFA takes a step in this direction by awarding five points to "projects

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[115] LIHTC projects may be the only federally subsidized multifamily rental projects that do not require tenant certification and reporting on race and ethnicity. *See* Tables 1 and 2 in Anne B. Shlay & Charles King, *Beneficiaries of Federal Housing Programs: A Data Reconnaissance*, 6 HOUSING POL'Y DEB. 409, 493-96 (1996) [hereinafter Shlay & King, HPD].

[116] 26 U.S.C. § 42 (l)(3) (1996).

[117] GUGGENHEIM, TAX CREDITS, *supra* note 113, at 74. HMFA charges a monitoring fee of $625 per unit "one-time up-front" or $60 per unit if paid annually. *See* N.J. ADMIN. CODE tit. 5, § 80-33.32 (1996).

[118] See page two of the two-page form Affirmative Fair Housing Marketing Plan prepared by the NJHMFA for the LIHTC 1996 Application Packet.

[119] The LIHTC statute requires state credit agencies to use "project location" as one of several criteria for selecting among projects, though neither Congress nor Treasury has told the housing credit agencies what it is about "project location" that they are to favor. *See* 26 U.S.C. § 42(m)(1)(C) (1996). The statute also specifies that some areas are to get preferential treatment: a higher tax credit is allowed for developments in Difficult Development Areas and Qualified Census Tracts. *See* 26 U.S.C. § 42(d)(5)(C)(i)(DDA); § 42(m)(B)(C) (QCT) (1996).

meeting the definition of a COAH obligation or court-ordered obligation . . . ."[120] This is inadequate in two respects. First, the preference should not be limited to the relatively few projects that meet the definitions of "COAH obligation" and "court-ordered obligation."[121] The powerful role for HMFA to play would be in providing an additional incentive for integrative developments. The preference should apply to any project whose location would increase integrative housing opportunities. Second, the preference should not be limited to five points. There should be an absolute preference for projects that would help to desegregate state-assisted housing in New Jersey.

III. THE NEED FOR LOW-INCOME HOUSING MUST BE ADDRESSED DIRECTLY: SUBSIDIES MUST BE PROVIDED FOR LOW-INCOME HOUSEHOLDS

The core of *Mount Laurel* is the provision in higher-income suburbs of housing opportunities for low and moderate-income people. In *Mount Laurel I* and *II*, the court defined "low-income" as 50% of area median income, and moderate income as 50% to 80% of area median income, varying definitions used by HUD.[122] The FHA makes subtle changes in these definitions by referring to 50% and 80% of "median gross household income . . . within the housing region . . . ."[123]

The Wish-Eisdorfer Report makes clear that there is not enough low-income housing, i.e. housing for households with incomes below 50% of area median. (50% of state-wide regional median income for a four-person household is $28,150).[124] Eighty-two percent of the house-

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[120] N.J. ADMIN. CODE tit. 5, § 80-33.15(a)1 (1996).

[121] *See id.* § 80-33.2(1996). "COAH obligation" is defined as a "low/moderate income rental project that is in a COAH-certified plan or in a plan that is currently under COAH's jurisdiction as the result of a petition for substantive certification." "Court-ordered obligation" is defined as "a low-moderate income rental project that is part of a judgment of repose, a pending judgment of repose, and/or a court settlement that is the result of an exclusionary zoning lawsuit."

[122] *See* Mount Laurel I, 67 N.J. 151, 158, 336 A.2d 713, 716 (1975); Mount Laurel II, 92 N.J. 158, 221 n.8, 456 A.2d 390, 421 n.8 (1983). These are the definitions used by HUD to define "very low income" and "low income," respectively, for the Section 8 and public housing programs. See 42 U.S.C. § 1437a(b)(2) (1996).

[123] N.J. STAT. ANN. § 52:27D-304(c) and (d) (West 1986). Each of these sections begins by defining low- and moderate income housing as "housing affordable according to federal Department of Housing and Urban Development or other recognized standards . . . "; that reference seems to be to the idea of "affordability" rather than to the specification of what is "low" and what is "moderate" income. The use of "gross" rather than "adjusted" income would increase the median. See 24 C.F.R. §§ 813.102, 813.106 (1996), defining "adjusted" and "annual" income for the Section 8 and related programs.

[124] *See* Chart, N.J. LIHTC Application 1 (1996).

holds with serious housing need, and 97% of those with worst-case housing need, are low-income; but the supply of low-income units is egregiously inadequate to meet this need.[125] And this measure of need understates the real need, because very low income households are counseled against even applying for subsidized housing.[126]

In *Mount Laurel II*, the court concluded by promising that "if the poor remain locked into urban slums, it will not be because we failed to enforce the Constitution."[127] The Wish-Eisdorfer Report shows that the poor do "remain locked into urban slums." The New Jersey Supreme Court's promise to enforce the Constitution has yet to be fulfilled.

In *In re Warren*, the Public Advocate challenged COAH's regulations because "they make no provision for housing that is realistically affordable to households with income below 40% of the median household income in the region,"[128] which equates to incomes ranging from about $16,600 to $40,440 for families of four persons.[129] The appellate division rejected this claim, noting that "the Public Advocate does not indicate how housing can be made affordable to this category of lower income households through inclusionary developments or any of the other remedial devices suggested in *Mount Laurel II* . . . or authorized by the FHA."[130] The appellate division relied upon the understanding that to secure production of low-income units, it is absolutely essential that deep subsidies be provided.[131] Cross-subsidies from other units, the advantages of density bonuses, and other incentives within the providence of municipalities cannot suffice to reduce housing costs enough to make

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[125] *See* Wish-Eisdorfer Report, *supra* note 11, at 47; *see also* NATIONAL LOW INCOME HOUSING COALITION, *Out of Reach: Rental Housing at What Cost?* 18 (Sept. 1997) (showing that the percentages of New Jersey renter households unable to afford Fair Market Rents are 40% for one-bedroom units and 47% for two-bedroom units) [hereinafter *Out of Reach*].

[126] *See* Wish-Eisdorfer Report, *supra* note 11, at 27-33.

[127] *Mount Laurel II*, 92 N.J. at 352, 456 A.2d at 490.

[128] *In re* Warren, 247 N.J. Super. 146, 181, 588 A.2d 1227, 1245 (1991).

[129] The New Jersey county with the lowest median income in 1996 was Cumberland County, where the median income for a four-person family was $41,500. Forty percent of that lowest median income is $16,600. The New Jersey location with the highest median income in 1996 was Middlesex, Somerset, and Hunterdon counties, where the median was $67,400; 60% of that median is $40,440. All of these statistics are taken from the chart, "1996 New Jersey Incomes by County Adjusted by Family Size," prepared by HMFA and included in the HMFA's 1996 Application packet for the LIHTC. The data in the chart is derived from U.S. Department of Housing and Urban Development statistics.

[130] In re *Warren*, 247 N.J. Super. at 181-82, 588 A.2d at 1245.

[131] *See Mount Laurel II*, 92 N.J. at 263, 456 A.2d at 444; *see also* Martha Lamar et al, Mount Laurel *at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1261 (1989) [hereinafter *Mount Laurel at Work*] ("construction of lower income housing is practically impossible without some kind of governmental subsidy").

housing affordable to low-income people.[132] For households with incomes below 30% of median income, it is not possible for the private market to provide decent housing without a deep subsidy.

Although it agreed that subsidies would be essential if poor households were to be served, the appellate division held that *Mount Laurel I* and *II* imposed on municipalities and developers no obligation to provide subsidies, and that the Public Advocate's challenge therefore must fail. The court held that while COAH's "standards are subject to challenge on the ground of unreasonableness, the Public Advocate has not pointed to any data which indicates [sic] that COAH's current affordability standards fail to properly implement the goals of *Mount Laurel* within the economic limitations imposed by the operation of the private real estate market."[133] The New Jersey Supreme Court denied the petition for certification seeking review of the validity of COAH's omission of any requirement for housing affordable to households earning less than 40% of regional median income.[134]

In the wake of the Wish-Eisdorfer Report, the challenge to the COAH regulations should be renewed, making three points: first, that the Wish-Eisdorfer Report provides data which indicates that COAH's current affordability standards fail to properly implement the goals of *Mount Laurel*; second, that there are subsidies available to municipal governments that would make the provision of such housing feasible; and third, that under the FHA, the State has both responsibility and the ability to provide subsidies for housing for people with incomes below 40% of median.

The appellate division erred in assuming that only the municipalities, and not the State, must act to satisfy *Mount Laurel*. The appellate division's discussion of this point focused on the supreme court's decisions in *Mount Laurel I* and *II* and referred only in passing to the FHA.[135] But the supreme court's discussion of subsidies in *Mount Laurel I* and *II* predated the enactment of the FHA, and did not foreclose post-FHA

[132] This is one of many lessons taught by the federal public housing and other federally-subsidized programs. In the public housing program, all of the capital costs are paid by the federal government, and there are no taxes or profits to pay. Occupants are required to pay 30% of their income, amounts far too large to be considered genuinely affordable for many low-income households. *See generally* MICHAEL STONE, SHELTER POVERTY: NEW IDEAS ON HOUSING AFFORDABILITY (1993) (demonstrating that, at incomes below 30% of median, families with children in particular are unable to afford anything close to 30% of income). Nonetheless, occupants are unable with 30% of their income to pay the cost of operating those units: the federal operating subsidy is very substantial. *See* MICHAEL A. STEGMAN, MORE HOUSING, MORE FAIRLY 54 (1991).

[133] In re *Warren*, 247 N.J. Super. at 182-83, 588 A.2d at 1246.

[134] *See In re* Warren, 132 N.J. 1, 9, 622 A.2d 1268, 1261 (1993).

[135] *See* In re *Warren*, 247 N.J. Super. at 181-83, 588 A.2d at 1245-46.

changes in the availability of subsidies. Indeed, the *Mount Laurel II* court said that "the kinds of low income housing subsidies available are subject to change—and have in fact changed often."[136] One crucial change made after *Mount Laurel II*, as the supreme court indicated in *Hills Development Company v. Township of Bernards*, is that the FHA made the State a central participant in the *Mount Laurel* process.[137] Another important change after *Mount Laurel II* is that the federal government created a new housing subsidy program, the LIHTC, which is administered through the states, not municipalities. Thus, the appellate division in *In re Warren* did not ask a vital question about subsidies for housing for poor people: what is the State able to contribute to housing for people with incomes below 30% of median?

The discussion below considers some ways in which municipalities and the State could provide housing opportunities to truly poor people, that is, people with incomes below 30% of median.[138]

A. *The Use of Section 8 Subsidies*

Many local Public Housing Agencies (PHAs) in New Jersey and the State Department of Community Affairs (DCA) administer Section 8 certificates and vouchers under the Section 8 Existing Housing program.[139] There are a variety of ways in which the Section 8 Existing Housing Program could be used to serve *Mount Laurel*. While there are few new

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[136] *Mount Laurel II*, 92 N.J. at 262-63, 456 A.2d at 443.

[137] Payne considers that even under *Mount Laurel II* the State was obligated to provide subsidies for *Mount Laurel* housing. He writes of *Mount Laurel I*'s holding that municipal subsidies were not constitutionally required: "hindsight suggests that this was a bit naive. The commitment to public sector subsidies was weakening, even by 1975, and by 1983 it was unmistakably clear that requiring municipalities to do no more than simply 'get out of the way' would achieve a hollow victory." Payne, VT. L. REV., *supra* note 14, at 682. Payne writes that the *Mount Laurel II* court made a "dramatic shift, from the passive remedies of *Mount Laurel I* to the active requirement of *Mount Laurel II*," where the court "asked what would work . . . ." *Id.* "One cannot fairly read *Mount Laurel II* as requiring the government to be the provider of last resort for any citizen in need of shelter but one can read the decision as requiring that governments (the state government as well as its constituent municipalities) do all that is within the ambit of their powers to ameliorate suffering." *Id.* at 683. "From the 'realistic opportunity' standard of *Mount Laurel I*, *Mount Laurel II* subtly shifts to a 'realistic effort' standard." *Id.*

[138] The statewide median of the county medians for 4-person households was $56,300. Thirty percent of that is $16,890. *See* Chart, New Jersey LIHTC Application 1 (1991). That is far above the incomes of public assistance recipients or social security retirees; it exceeds the gross annual wages of *two* full-time, year-round workers at the minimum wage of $5.15/hour. (The maximum Temporary Assistance for Needy Families (TANF) grant in New Jersey for a three-person household was $424/month in 1997). *See Out of Reach*, *supra* note 125, at 67. The maximum Supplemental Security Income grant for a two-person household in New Jersey in 1996 was $730/month. *See id.* at 83.

[139] 42 U.S.C. § 1437f(o) (1994).

certificates and vouchers, certificates and vouchers do "turn over" as households stop using them. As those Section 8 certificates and vouchers become available, they could and should be used to enable poor people to live in non-poor, suburban locations.

This would require several changes in the standards for allocating Section 8 certificates and vouchers. First, DCA and the local PHAs should afford the highest preference to applicants with incomes below 30% of median income. (This would be akin to the past federal preference for applicants with greatest need.)[140] Massachusetts had a similar policy in the mid-1980s, when its Executive Office of Communities and Development, which administered a Section 8 program, gave its program's highest preference to homeless people.[141] Section 8 certificates and vouchers do not now go to the lowest income people;[142] *Mount Laurel* would be served if they did.

Second, poor people should be encouraged to use Section 8 in non-poor communities. This would be advanced by a housing mobility program[143] with at least two elements: recruitment of landlords and counseling of tenants. The landlord recruitment would produce a list of property owners in non-poor communities who are willing to rent to Section 8 recipients at Fair Market Rents. Owners of *Mount Laurel* rental developments should be required to seek out and accept Section 8 certificate- and voucher-holders. The tenant counseling would address the perceived impediments to making such a move.

Third, local residency preferences for Section 8 should be evaluated for consistency with *Mount Laurel* as well as with civil rights laws.[144]

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[140] Suspended through Sept. 30, 1997 by Balanced Budget Downpayment Act I, Pub. L. No. 104-99, 110 Stat. 26 (Jan. 26, 1996), 142 CONG. REC. H883 (Jan. 25, 1996) and Pub. L. No. 104-204, 110 Stat. 2874 (Sept. 26, 1996).

[141] *See* Barbara Sard, *The Massachusetts Experience with Targeted Tenant-Based Rental Assistance for the Homeless: Lessons in Housing Policy for Socially Disfavored Groups*, 1 GEO. J. FIGHTING POVERTY 16, 18 (1993).

[142] In 1989, median household income for certificate- and voucher-holders was $7060, compared to $6571 for public housing residents. *See* CONNIE H. CASEY, U.S. DEP'T OF HOUS. & URBAN DEV., CHARACTERISTICS OF HUD ASSISTED RENTERS AND THEIR UNITS IN 1989 10 (Mar. 1992). Newman and Schnare report a similar disparity: $9609 for certificate- and voucher-holders, $9142 for public housing tenants. *See* Sandra J. Newman & Ann B. Schnare, *Last in Line: Housing Assistance for Households with Children*, 4 HOUSING POL'Y DEB. 417, 422 (1993).

[143] The seminal housing mobility program is the *Gautreaux* housing mobility program, which was praised by several participants in the Symposium, including Alexander Polikoff and James Rosenbaum. For a description of the *Gautreaux* program and a bibliography of material about it, see Roisman, IOWA L. REV., *supra* note 50, at 507. *See also supra* notes 66-70 and accompanying text.

[144] *See* Philip D. Tegeler et al., *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 HARV. C.R.-C.L. L.

Finally, local and state Section 8 programs should be studied to eliminate all administrative and other barriers to the use of Section 8 in non-poor communities.[145]

B. The Use of the State Housing and Mortgage Finance Agency

There are many ways in which HMFA could administer its housing programs so as to promote economic integration. It could use a Housing Development Corporation to produce subsidized housing. It could offer below-market interest rates for first or second mortgages to homebuyers making integrative moves.[146] HMFA offers 5% mortgages in four urban neighborhoods;[147] it should extend the program to integrative moves made outside urban areas. In HMFA's multi-family development program, siting decisions should take into account the need to achieve economic deconcentration. Developers should be required to conduct economically affirmative marketing; they should be required to seek out and accept some subsidy holders as residents.

In particular, HMFA's administration of the LIHTC program should be coordinated with the *Mount Laurel* program. On its own, the LIHTC program serves households at 40% to 60% of area median income,[148] but the program has the capacity to serve poor households in several situations, each of which can and should be encouraged by HMFA:

1. First, poor households that have access to additional subsidies should be encouraged to occupy LIHTC units, and LIHTC developers should be required to facilitate such occupancy. The most obvious situation involves Section 8 certificate and voucher holders. The combination of the LIHTC and the Section 8 certificate or voucher would enable very poor households to live in well-served communities where market rents would be too high even for Section 8, but the LIHTC subsidy makes possible the use of Section 8.

a. The IRC provides that no tax credit shall be allowed absent an agreement between the taxpayer and the housing credit agency which prohibits a refusal to lease to a Section 8 certificate- or voucher-holder

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REV. 451, 471-74 (1995).

[145] *See id.* at 477-81 (considering inadequate Fair Market Rents, administrative barriers to portability, and other PHA administrative practices).

[146] *See supra* notes 63-65 and accompanying text.

[147] *See* 1995 HMFA ANN. REP. 8.

[148] "Unless they have additional subsidies, LIHTC occupants must have incomes between 40 and 60 percent of the median to avoid severe rent burdens, and research shows that families who occupy such units do have incomes in that range . . . ." Kathryn P. Nelson, *Whose Shortage of Affordable Housing?*, 5 HOUSING POL'Y DEBATE 401, 411 (1994).

"because of the status of the prospective tenant as such a holder."[149] HMFA should implement that provision, by including such a requirement in its regulations and imposing it on housing sponsors. Beyond satisfying this incontrovertible requirement of federal law prohibiting discrimination against Section 8 subsidy holders, HMFA and the agencies administering Section 8 should take steps to encourage the use of Section 8 in LIHTC units. HMFA now awards a project one point for using public housing waiting lists;[150] the requirement should be extended to Section 8 waiting lists, and should be increased to more than one point. All agencies that counsel and advise Section 8 certificate and voucher holders—local PHAs that administer the programs and counseling and fair housing groups that work with the certificate and voucher holders—should be kept fully and specifically informed about the availability of LIHTC units and encouraged to refer people to them; owners of LIHTC units should be required to notify PHAs to invite Section 8 applicants to apply for LIHTC units both at initial rent-up and as vacancies occur; HMFA should award extra points to LIHTC projects that commit to using Section 8 waiting lists to fill a portion of the units; and the State Attorney General's office, PHAs and fair housing groups should do testing to assure that LIHTC owners are complying with the non-discrimination and other requirements.

b. HMFA should coordinate the LIHTC program with DCA's Temporary Rental Assistance (TRA) program.[151] For the homeless and otherwise very poor people who use TRA, access to better served communities could be especially important in enabling them to secure employment and eliminate the need for TRA. These and other state subsidy funds would be best invested in decent housing in well-served communities.

c. HMFA should consider whether residents of Special Needs projects are likely to have housing subsidies. If they are, HMFA should amend its regulations with respect to the Special Needs cycle to give a preference to Special Needs projects located in upper-income areas.[152]

2. Even where subsidies are not available, HMFA should encourage occupancy of LIHTC units by non-traditional households. Two poor single mothers, each with one child, might be able to afford a two-

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[149] 26 U.S.C. § 42 (h)(6)(B)(IV) (West 1996).

[150] *See* N.J. ADMIN. CODE tit. 5, § 80-33.14(a)(3) (1996) (applicable to the Urban Cycle, made applicable to the Suburban Cycle by N.J. ADMIN. CODE tit. 5, § 80-33.15(a) (1996)).

[151] *See* N.J. ADMIN. CODE tit. 5, § 10:82-5.10(f)(5) (AFDC) (1996); N.J. ADMIN. CODE tit. 5, § 10:85-4.6(e)(2) (GA) (1996).

[152] *See* N.J. ADMIN. CODE tit. 5, § 10:82-5.10 (1996).

bedroom LIHTC unit in a well-served community. Public and private agencies that advise poor homeseekers should be encouraged to suggest the possibility of such combinations to improve households' housing situations, and LIHTC developers should be educated to the necessity of their accepting such occupants.

C. Linking Zoning to Subsidies

The zoning and land use regulations that are the focus of *Mount Laurel* should be adjusted so as to require accommodation for low-income people. All that is done now with density bonuses and mandatory inclusion requirements reduces housing costs only to a moderate income level. But municipal regulations also could provide that some percentage of these units be linked to deep subsidy programs—that some percentage of the units be sold or leased to a local Public Housing Agency, or used for people with Section 8 or TRA subsidies. This kind of linkage is required by the Montgomery County, Maryland, inclusionary zoning program, which mandates that 20% of the units in developments of more than 50 be moderately priced dwelling units and that one-third of those must be provided to the PHA for low-income and, indeed, very-low-income families.[153]

Development fees also could be used more creatively and expansively. In *Holmdel Builders Association v. Holmdel Township*,[154] the supreme court endorsed the use of development fees and invited COAH to promulgate standards for development fees.[155] COAH has promulgated rules regarding development fees,[156] but has limited the application of its rules to municipalities participating in the Council's substantive certification program and to urban aid municipalities.[157] Most municipalities do not participate in COAH's substantive certification program; COAH should increase the amount of the development fees allowable and should encourage all municipalities to impose development fees on commercial, industrial and residential development to promote lower-income housing.[158] Much more could be done with affordable housing trust funds

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[153] *See* Montgomery County, MD., Code Vol I, § II, 25 A.25B (1984); THOMAS HYLTON, SAVE OUR LAND, SAVE OUR TOWNS: A PLAN FOR PENNSYLVANIA 68 (1995); Roisman, IOWA L. REV., *supra* note 50, at 521 (and cited material).

[154] 121 N.J. 550, 583 A.2d 277, 290 (1990).

[155] *See id.* at 579, 583 A.2d at 291. For a discussion of *Holmdel Township*, see McGuire, *supra* note 6, at 1316.

[156] *See* N.J. ADMIN. CODE tit. 5, § 91-15.1 (procedures for retaining development fees); N.J. ADMIN. CODE tit. 5, § 92-18.1-18.20 (development fees).

[157] N.J. ADMIN. CODE tit. 5, §§ 92-18-1(b) and 92-18.3 (1996).

[158] For suggestions about development fees, see generally Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011

than New Jersey municipalities have undertaken.[159] COAH's limited response hardly satisfies the supreme court's mandate to COAH "to develop a comprehensive system of development fees."[160]

D. The Regional Preferences.

The Wish-Eisdorfer Report makes clear that there is a substantial "mis-match" between eligible population and available units: half the low-income eligible population resides in Regions 1 and 2, while most of the units are in Regions 3, 5, and 6.[161] This mis-match could help to deconcentrate Regions 1 and 2, but for the fact that residents are given a preference for units *in their regions*. It certainly is fair to assume that this has at least some effect in discouraging people from moving from Regions 1 and 2 to Regions 3, 5, and 6. Ending these regional preferences would enable more deconcentration.

E. Reform The State Tax System.

The State could provide housing opportunities for low-income people by making adjustments to the State tax system. In *Mount Laurel II*, the supreme court contemplated that municipalities would be required to grant tax abatements to developers;[162] similarly, the State could fulfill some of its *Mount Laurel* responsibilities through the tax structure.

The State might develop a Low Income Housing Tax Credit similar to the federal program; this could enable LIHTC developers to offer some units at rents affordable to very low income people. The State also might develop a tax increment financing program for low income housing. California has used tax increment financing to nurture the development of thousands of units of lower income housing.[163]

(1991); Payne, VT. L. REV., *supra* note 14, at 685 n.69 (recommending "development fees on commercial development along a busy highway corridor to finance a housing trust fund that subsidizes the difference between market rents and *Mount Laurel* levels in rental apartments in the community").

[159] *See* ALAN M. MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 166-90 (1984); Mary Brooks, *Housing Trust Funds in* THE AFFORDABLE CITY: TOWARD A THIRD SECTOR HOUSING POLICY 245 (John Emmeus Davis ed., 1994).

[160] Holmdel Builders Ass'n v. Holmdel, 121 N.J. 550, 576, 583 A.2d 277, 290 (1990).

[161] *See* Wish-Eisdorfer Report, *supra* note 11, at 35. This mismatch probably is understated by the omission of many very low-income households from the eligible population total. *See supra* note 126 and accompanying text.

[162] *See Mount Laurel II*, 92 N.J. at 264, 456 A.2d at 444.

[163] *See* CAL. HEALTH & SAFETY CODE § 33333.2 (West 1992). *See generally* John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573 (1993).

F. Conclusion

The State has available a variety of tools to meet its *Mount Laurel* obligations. The State's failure to use those tools is a violation of the *Mount Laurel* obligation just as was the municipalities' failure to do what was within their power. As the court said in *Mount Laurel II*: "The implication of the observation that lower income housing cannot be built without subsidies is that if the *Mount Laurel* principle requires municipalities to provide a realistic opportunity for such housing through their land use regulations but leaves them free to prevent subsidies through non-action, that obligation is a charade."[164]

IV. ACCURATE DATA MUST BE COLLECTED, RECORDED, AND REPORTED AS PART OF THE ADMINISTRATION OF THE MOUNT LAUREL PROGRAM

While the Wish-Eisdorfer Report is "by far the largest and most comprehensive" *Mount Laurel* study ever undertaken, its authors are at pains to emphasize the limitations of the data and the need for more comprehensive information and analysis.[165]

Three striking aspects of the Wish-Eisdorfer Report are (i) that this study was performed by a private, not a public, agency; (ii) that this is only the second study of the impact of *Mount Laurel* in twenty years; and (iii) that the data upon which it is based are both under- and over-inclusive. In such a vitally important, fundamental state program, one would expect that a public agency would assure the collection of complete, accurate records and would report regularly to the executive, the legislature and the public about the impact of the program, indicating any changes that would better achieve the public purposes to be served.

A. The Inadequacy of Public Agency Reporting

New Jersey's Fair Housing Act requires that both HMFA and COAH report annually "to the Governor and the Legislature on the effect" of the FHA; these reports "may include recommendations for any revisions or changes in this act which the agency and the council believe necessary to more nearly effectuate" the provision of low and moderate income housing throughout the State.[166]

Neither the FHA nor COAH explicitly requires the collection or reporting of information about the number of *Mount Laurel* units produced

[164] *Mount Laurel II*, 92 N.J. at 164, 456 A.2d at 444; *see* United States v. City of Yonkers, 96 F.3d 600, 617-618 (2d Cir. 1996).

[165] *See* Wish-Eisdorfer Report, *supra* note 11, at 75.

[166] N.J. STAT. ANN. § 52:27D-32(6) (West 1986).

or the characteristics of the applicants and occupants. COAH does not collect such information itself. Therefore, COAH is not able to, and does not, report about these matters. COAH produces data, but "nothing that could properly be called a 'study.' COAH has a tiny staff and a tiny budget. It is not equipped to monitor compliance and does not do so in any meaningful way."[167]

B. The Serendipitous Nature of Private Reporting

Those who are interested in ascertaining the extent to which the *Mount Laurel* obligations are being fulfilled must rely upon private resources and private agencies. Since such studies are time-consuming and expensive, it is only intermittently that individuals or institutions are able to secure financing for such studies.[168]

The absence of any requirement for the collection of basic data, of course, makes such studies even more time-consuming and expensive then they otherwise would be. The first substantial study of the impact of *Mount Laurel* was sponsored by the Alliance for Affordable Housing; funded by local foundations; performed by Martha Lamar, Alan Mallach, and John Payne; and published in the Rutgers Law Review in 1989.[169] For that study, Payne wrote, "it was difficult . . . to obtain full data on the socio-economic characteristics of occupants, because there is no centralized reporting requirement and no protocol on what information should be kept. Most importantly, most developers failed to keep (or at least were unwilling to acknowledge that they kept) data on race and ethnicity . . . ."[170]

Most of the units studied in the Lamar/Mallach/Payne Report resulted from litigation.[171] To assess the impact of the FHA and the activities of COAH, therefore, another study was necessary. This study, which produced the Wish-Eisdorfer Report, originated in the Affordable Housing Colloquium of the Seton Hall Law School Center for Social Justice. Members of the Colloquium conceived of the need for this empirical study; a symposium "designed to help . . . formulate questions"

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[167] Payne, VT. L. REV., *supra* note 14, at 672.

[168] The Wish-Eisdorfer Report says that "[t]here has been surprisingly little empirical research on the actual effects" of the *Mount Laurel* initiatives. Wish-Eisdorfer Report, *supra* note 11, at 19. In light of the necessity of securing private financing for these efforts and the inadequacies of the data, what seems surprising is that there has been any empirical research at all.

[169] *See* Mount Laurel *at Work*, *supra* note 131, at 1261; *see also* Payne, 20 VT. L. REV., *supra* note 14, at 667-68 (discussing *Mount Laurel at Work*, *supra* note 131).

[170] Payne, VT. L. REV., *supra* note 14, at 669.

[171] *See* Mount Laurel *at Work*, *supra* note 131, at 1197.

was held in 1991;[172] the study then was funded by the Ford Foundation and the Fund for New Jersey.[173] Now that this study has been concluded, there is no ongoing, continuing undertaking to collect data, to assess changes in the data, or to report on the implications of the data.

C. Imperfections of the Data

The imperfections of the data are of three kinds: they do not encompass the entire universe of *Mount Laurel* housing; they include information about residents of some housing that is not *Mount Laurel* housing; and they use an applicant universe that understates the number of very low-income (and larger) households.

1. There is not a complete, accurate list of *Mount Laurel* units.[174] The Wish-Eisdorfer Report draws on an estimate created from responses to a questionnaire mailed by the Division of Codes and Standards of New Jersey's Department of Community Affairs to local government officials and planning consultants responsible for affordable housing in New Jersey's municipalities."[175] We are not told how "*Mount Laurel* units" were defined in that questionnaire;[176] we are not told what was the percentage of responses. We are told that the estimate—15,733 units of new housing completed or under construction, 1982 vacant units and 4679 owner-occupied units having been or being rehabilitated—is "consistent with other recent studies."[177]

2. There is no established method for collecting information about the people who occupy *Mount Laurel* housing. Neither developers nor municipalities are required to collect or report information about the income, composition or employment of the households that occupy that housing or about the places from which they come. Wish and Eisdorfer used a proxy for households in *Mount Laurel* housing: the proxy was households living in units administered by AHMS.[178] AHMS manages low and moderate income housing: its database includes approximately 7500 households who obtained such housing between 1988 and 1996.[179] AHMS-managed units in the suburbs all are new or rehabilitated low or moderate income housing that satisfies municipal fair share housing obli-

[172] *See generally Symposium,* Mount Laurel *and the Fair Housing Act: Success or Failure,* 19 FORDHAM URB. L.J. 59 (1991).

[173] *See* Wish-Eisdorfer Report, *supra* note 11, at Acknowledgments and 1.

[174] Any such list would require, of course, a definition of "*Mount Laurel* units." *See id.* at 10-11.

[175] *Id.* at 7.

[176] For possible definitions of *Mount Laurel* housing, see *id.* at 10-11.

[177] *Id.* at 7.

[178] *See* Wish-Eisdorfer Report, *supra* note 11, at 1.

[179] *See id.* at 1.

gations, and therefore "can legitimately be described as suburban *Mount Laurel* housing."[180] The urban AHMS-managed units, however, include some units that would not be considered *Mount Laurel* units by any definition.[181]

3. There is no central registry of people who apply for *Mount Laurel* housing, and neither developers nor municipalities are required to collect information about applicants. There is census data about the numbers of income-eligible people in the State and the relevant areas, but applications are taken for particular developments, not for *Mount Laurel* housing throughout the State or in any particular region or municipality. To determine an applicant universe for the study, therefore, Wish and Eisdorfer used households that have applied for AHMS housing, with the understanding that very low-income and larger households are underrepresented in the universe because they are discouraged from applying by AHMS staff, who make clear that very low income and larger households cannot be served by AHMS units.[182]

These inadequacies of data collection should and can be corrected. In this important area of public policy and expenditure, the public should not have to wait twenty years for a study, privately funded and performed, which has to rely upon information that was not exactly what was needed because housing providers and municipalities felt free to refuse to collect or furnish information, and there was no established procedure for recording and reporting information about the extent to which the program was serving the public goals for which it had been created.

1. A registry of "*Mount Laurel* units" would be more or less difficult to maintain depending upon how "*Mount Laurel* unit" was defined. If the definition included only those units produced pursuant to *Mount Laurel* litigation and units included within housing elements to which COAH had accorded substantive certification, a list could be created and maintained with relative ease. COAH would have all of the information for the latter category, and the former would be a matter of public record, most of which already has been secured. The lists compiled by the Lamar/Mallach/Payne and DCA studies would provide a good start; it would not be difficult to keep up-to-date annually on *Mount Laurel* litigation.[183] If broader definitions were used—such as the fourth and fifth

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[180] *Id.* at 11.

[181] *See id.* at 1, 11-12.

[182] *See id.* at 29.

[183] Such a registry of *Mount Laurel* units maintained by COAH would be analogous to the Register of Housing Projects expressly required by statute to be maintained by the Commissioner of Community Affairs. *See* N.J. STAT. ANN. § 52:27D-307.2 (West 1986) (HMFA-assisted units).

suggested in the Wish-Eisdorfer Report[184]—more effort presumably would be required, but a fuller and more accurate picture would be provided.

2. The information about the occupants of *Mount Laurel* housing would not be difficult to gather if each developer and each municipality were required to collect it. The developers of new and rehabilitated housing would secure it from their residents; owner-occupants would provide the information about their own units to the municipality.

3. For information about the universe of applicants for low and moderate-income housing throughout the State, AHMS provides an excellent foundation. Every application for government-assisted housing, including *Mount Laurel* housing, should be registered with AHMS as well as with the provider of the unit. This data requirement would not involve any change in the way *Mount Laurel* or other units are marketed; it would mean only that one aspect of applying for a *Mount Laurel* unit or a public housing unit or a privately owned, state- or federally-assisted unit, would be registering the application with AHMS. Modern computer technology should make this a relatively simple matter.

To carry out its mandate under the FHA, COAH should require that such data be collected, and COAH should report regularly about the data.

The "affirmative obligation" of the New Jersey Constitution and the New Jersey FHA must mean, at the least, that there must be an accurate count of the number of units, their location, the economic status of their occupants, and the prior residence of the occupants. The constitutional and statutory obligations include the duty to secure the information necessary to determine whether the obligations are satisfied. Agencies are not permitted to close their eyes to situations they are required to correct: when they have a duty to cure, they have a duty to know that cure is required.

The quality of decision making is affected directly by the quality of the information available to the decision-makers. The inadequacies of the data about *Mount Laurel* make it difficult to assess accurately the impact of the *Mount Laurel* program and to determine what kinds of changes might be needed.[185]

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[184] *See* Wish-Eisdorfer Report, *supra* note 11, at 10-11.

[185] "Data are key" for enforcement of public policies; "good-quality, accessible information systems about public expenditures are not frills; they are fundamental components of a monitoring system needed to ensure equity [,] protect civil rights [,]" and achieve compliance with legislative and constitutional mandates. Shlay & King, HPD, *supra* note 115, at 486, 518. Margery Austin Turner's remarks at the Symposium explained that such data collection and reporting would be standard actions any responsible social scientist would take in conducting any program of significance.

This is particularly true where, as here, the government is on notice that the program does not seem to be serving the ends for which it was created. The Wish-Eisdorfer Report has shown that low-income households are not being served adequately in the program, and that suburbs are not adding residents from urban areas.[186] The Wish-Eisdorfer Report concludes that "only a very small percentage" of occupants of subsidized housing moved from urban to suburban areas.[187]

Consideration of analogous language in a federal statute is instructive. The 1968 federal Fair Housing Act requires HUD "affirmatively to further the policies of this subchapter."[188] In *Shannon v. HUD*, the Third Circuit held that that requirement to act "affirmatively" meant that HUD had to consider economic information, specifically, what difference subsidized rental housing rather than home ownership might make in a neighborhood.[189] The court held that "the Agency must utilize some institutionalized method whereby . . . it has before it the relevant . . . socio-economic information necessary for compliance with its duties under the . . ." statutes.[190] The holding in *Shannon* was endorsed by the First Circuit in *Boston Chapter NAACP v. HUD*, in an opinion written by then Judge Breyer.[191]

Shannon and *Boston Chapter NAACP* are persuasive authority for interpreting the "affirmative obligations" imposed by the New Jersey Constitution and FHA. The Third Circuit said: "we hold only that the agency's judgment must be an informed one . . . ."[192] Similarly, COAH should be required to inform itself about the implementation of the State FHA.[193]

Since the occupants are the recipients of special benefits, and household size and income are what make them eligible for the benefit, there

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[186] *See* Wish-Eisdorfer Report, *supra* note 11, at 2.

[187] *See id.* at 2. The Court noted in In re *Warren* that "[a]lthough COAH has not maintained statistical records concerning occupants of existing *Mount Laurel* housing, the available information, although limited, suggests that such housing may not be serving regional needs." In re *Warren*, 132 N.J. at 32, 622 A.2d at 1273 (citing Mount Laurel *at Work*, *supra* note 131, at 1264).

[188] 42 U.S.C. § 3608(e)(5) (1994).

[189] *See* Shannon v. HUD, 436 F.2d 809, 821 (3d Cir. 1970).

[190] *Id.*

[191] *See* Boston Chapter NAACP v. HUD, 817 F.2d 149 (1st Cir. 1987).

[192] *Shannon*, 436 F.2d at 822.

[193] Even the appellate division, in In re *Warren*, said that COAH ought to be monitoring information to be sure that occupancy preferences were not abused by having income-ineligible people living in the units. *In re* Warren, 132 N.J. 1, 32, 622 A.2d 1268, 1273 (1993).

can be no legitimate objection to their being required to provide economic and employment information.[194]

A separate question is whether occupants of *Mount Laurel* units ought to be required to report their race, ethnicity, gender and disability status. In many government-assisted programs, occupants are required to report such information;[195] indeed, by statute, Congress has required that HUD and the Department of Agriculture report annually on the race, ethnicity, gender and disability of all beneficiaries of the housing programs administered by those departments.[196] Arguments against such reporting have been based on privacy and civil rights concerns,[197] but these arguments should be overborne by the need to have such data in order to determine whether the New Jersey FHA and the State and federal civil rights laws are being satisfied.[198] This is particularly true since the available data indicate that *Mount Laurel* does provide separate and unequal housing opportunities to minorities.[199]

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[194] Occupants of government-assisted housing under virtually every kind of government program are required to certify their income and household composition annually. *See, e.g.*, 26 C.F.R. § 1.42-5(c)(1)(iii); N.J. ADMIN. CODE tit. 5, § 80-33.30(b)6, (d)3 (1996); N.J. ADMIN. CODE tit. 5, § 80-33.31(a) (1996) (requiring income and household composition certification for low-income housing tax credit units).

[195] *See* Shlay & King, HPD, *supra* note 115, at 489, 497-98, 515.

[196] *See* Section 562 of the Housing and Community Development Act of 1987, 42 U.S.C. § 3608a and 42 U.S.C. § 3606(e)(6).

[197] Payne attributed the failure to keep race and ethnicity data to Title VIII concerns. *See* Payne, VT. L. REV., *supra* note 14, at 669.

[198]
> To determine whether these standards [to affirmatively further fair housing] are satisfied, we must ascertain who benefits from public programs. For this we need information on the characteristics of program beneficiaries, including data on the economic, demographic, disability, racial, and ethnic characteristics of families and individuals receiving assistance. Assessing the availability of information on the characteristics of federal housing program beneficiaries is a prerequisite to assessing the . . . extent to which the duty to affirmatively further fair housing is being satisfied.

Shlay and King, HPD, *supra* note 115, at 482-83.

[199] The Rutgers study showed that "minorities are substantially underrepresented, especially African-Americans, although there is some reason to believe that larger numbers of minorities will be found in rental developments and in developments located closest to urban centers . . . ." Payne, VT. L. REV., *supra* note 14, at 670 (citing *Mount Laurel at Work*, *supra* note 131, at 1256). Referring to "the dismal race and ethnicity data reported by the *Rutgers Study*," Payne wrote that "while the numbers do not have statistical validity, no one working in the field expects that the results will be dramatically different if and when a more comprehensive study is published." Payne, VT. L. REV., *supra* note 14, at 674. The Wish-Eisdorfer Report shows that the program has exacerbated the racial and ethnic disparities, advantaging whites over blacks and Latins in securing subsidized housing units and separating whites into suburban units and blacks and Latins into urban areas. *See* Wish-Eisdorfer Report, *supra* note 11, at 2.

CONCLUSION

The struggle to realize the inclusionary principles of *Mount Laurel* has been and will be long. Deeply-rooted mores are not easily or swiftly changed, particularly when they are embedded in the concreteness of real estate and community infrastructure.[200] *Mount Laurel* challenges "our" definition of who "we" are and what constitutes a "community." The battle for formal vindication of the constitutional mandate of equality required almost 100 years—from the ratification of the Fourteenth Amendment in 1868 to the Supreme Court's decision in *Brown v. Board of Education*[201] in 1954. Validating the premise of *Brown* in the real world may well require another hundred years.[202] The housing cases so intimately related to *Brown* require equally dedicated, long-term advocacy, which—fortunately—often has been provided.[203]

The Reverend Dr. Martin Luther King, Jr. knew better than most people how long, hard, and dangerous is the struggle for racial and economic justice. In his last speech, given on the night before he was assassinated, he said: "we've got to give ourselves to this struggle until the end." He urged his listeners to "move on in . . . these days of challenge to make America what it ought to be."[204] Those who labor to fulfill the promise of *Mount Laurel* meet this challenge.

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[200] "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed." Block v. Hirsh, 256 U.S. 135, 155 (1921) (Holmes, J.).

[201] 347 U.S. 483 (1954).

[202] *See* ORFIELD ET AL., DISMANTLING DESEGREGATION, *supra* note 64, at 23-26, 360-61.

[203] In addition to *Mount Laurel*, see the *Gautreaux* litigation, *supra* note 69, the *Young* litigation, *supra* note 88, and the *Yonkers* litigation, *supra* note 32, each continuing for more than 25 years, more than 30 in the case of *Gautreaux*.

[204] A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 283-84, 285 (James M. Washington ed., 1986).