NOTES

GENTRIFICATION, TIPPING AND THE NATIONAL HOUSING POLICY

I

INTRODUCTION

America's poor have become increasingly concentrated in the deteriorating neighborhoods of the inner city.[1] Despite the emergence of a black middle class, racial segregation in American cities continues to increase.[2] For the past several decades, both industry and white, more affluent residents have been deserting the older cities of the Northeast and Midwest for the suburbs and the Sun Belt.[3] Federal and local governments bear much of the responsibility for economic and racial segregation in the United States:[4] mortgage financing programs,[5] construction of suburban infrastructure,[6] public housing siting,[7] urban renewal and relocation programs,[8] and even Great Society programs[9] have promoted segregated housing patterns, both by design and in effect.

In recent years a glimmer of hope has appeared for the older deteriorating cities. Housing in a small number of inner-city neighborhoods has been renovated by a new private market, created by young, middle-class consumers, bold lenders, and eager developers who have promoted the attractions of urban life.[10] Federal and local officials have eagerly jumped on the bandwagon of this phenomenon, known as "gentrification," because it has a visible effect on previously deteriorated areas, and because it reverses the decline of city property tax bases.[11] Others have protested gentrification out of concern for the fate of poor and nonwhite residents who are displaced to make way for the new urban middle class.[12] Serious questions can and

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1. *See* Congressional Budget Office, *New York City's Fiscal Problem,* in THE FISCAL CRISIS OF AMERICAN CITIES 289 (R. Alcaly & D. Mermelstein eds. 1976) [hereinafter cited as Alcaly & Mermelstein].

2. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States,* 22 How. L. J. 547, n.1 (1979).

3. *See* Alcaly & Mermelstein, *supra* note 1, at 289.

4. This thesis was eloquently argued in Kushner, *supra* note 2. *See also* M. SLOANE, FEDERAL PROGRAMS AND EQUAL HOUSING OPPORTUNITY, *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS SENATE COMM. ON THE JUDICIARY, CIVIL RIGHTS, 94th Cong., 2d Sess. 131-51 (Comm. Print 1976). While most evidence is on racial segregation, government promotion of suburbanization helped create economic segregation as well.

5. Kushner, *supra* note 2, at 567-68 and n.51.

6. *Id.* at 569-71.

7. *Id.* at 577-78. *See infra* text accompanying notes 173-75.

8. *Id.* at 583-86.

9. *Id.* at 587-89.

10. *See infra* text accompanying notes 36-47.

11. *See infra* text accompanying notes 56-69.

12. *See infra* note 50.

should be raised about government programs that aid the affluent in renovating nice homes in quaint neighborhoods to the detriment of the largely minority urban poor. This Note will propose a more farsighted government policy towards gentrification: because of past complicity in creating residential segregation, the Department of Housing and Urban Development (HUD) has an affirmative obligation to resist the resegregation of urban neighborhoods. HUD and local officials should direct their efforts towards achieving a modest measure of residential integration, by race and income, through intervention designed to prevent the segregating effects of the private market. Existing law, in fact, requires such affirmative intervention.[13] The first part of this Note will trace the origins of the federal housing mandate for "spatial deconcentration" of racial minorities and the poor. The second part will present some relevant social science evidence on gentrification. The third part will set forth the legal framework within which HUD and local agencies must act, and the final part will propose legal theories which may be used by victims of gentrification to enforce the federal commitment to desegregation.

II

THE ORIGINS OF THE DECONCENTRATION POLICY

A. Failure of the Model Cities Program

Early federal government efforts to alleviate urban poverty focused attention on ghettos as physical neighborhoods, first by bulldozing them away, then by funnelling antipoverty expenditures into them. The Model Cities program,[14] adopted in 1966, replaced slum clearance as the federal response to urban decay. It was originally conceived as an experimental program which would allow cities to take varying approaches to the varying problems of the inner city.[15] Participating cities were expected to use job programs, education, health, and other measures to complement traditional housing and physical upgrading methods. The program ended up concentrating federal resources in the most blighted areas and devoting inadequate resources to each area.[16] The Model Cities program's ultimate failure has

13. *See infra* text accompanying notes 120-124. Obviously, racial and economic integration do not always coincide. HUD is independently required to prevent segregation by race and concentration of the poor. *See infra* text accompanying notes 73-87, 102-20. For simplicity, racial and economic integration will be discussed together throughout this note. The separate strands of the analysis could be applied to a program with racial rather than economic impact, or vice versa.

14. Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, 80 Stat. 1255 (1966) (codified as amended at 42 U.S.C. § 3301 (1976)).

15. C. HAAR, BETWEEN THE IDEA AND THE REALITY: A STUDY IN THE ORIGIN, FATE AND LEGACY OF THE MODEL CITIES PROGRAM 44-54 (1975).

16. As its name suggests, the Model Cities program was intended by its designers to channel federal funds into a few cities which would develop antipoverty techniques to be used in the rest of the nation. Because of political pressures, however, "the model cities program

been attributed in part to this exclusive focus on the worst-off neighborhoods.[17] Concentrated spending in the worst-off areas had several drawbacks: urban decay could be displaced to other neighborhoods, the targeted areas could still receive inferior local government services, and the fundamental problem of the absence of locally generated income (aside from the federal payroll) was not remedied. One lesson that was drawn from the Model Cities program was that huge sums must be spent to bring about a real improvement of the quality of life for disadvantaged residents of the slums. Furthermore, such spending was thought to have far less effect than desegregation of the poor out of the slums, or "deconcentration."[18] Deconcentration of the poor allows them to share the external benefits of middle-income communities, like good schools, convenient transportation and shopping, and, most importantly, employment in local industry. Deconcentration requires two steps: housing for the poor needs to be made available outside the center city,[19] and the affluent need to be reintegrated into center city neighborhoods.[20] Congress adopted the strategy of deconcentrating minorities and the poor, implicitly in the Fair Housing Act of 1968[21] and

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was rapidly expanded to meet th[e] natural desire of congressmen to deal themselves in". *Id.* at 217. Because less money was available to each city than originally planned, the money was concentrated in only the most blighted areas. *See id.* at 218-20.

17. *See id.* at 218-20. Warren, *"Spatial Deconcentration": A Problem Greater than School Desegregation,* 29 AD. L. REV. 577, 583 n.35 (1977) [hereinafter cited as Warren].

18. A. DOWNS, OPENING UP THE SUBURBS 125-127 (1973); *cf.* C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 84-110 (1972) (the author argues that increasing expenditures on education for black and disadvantaged children does little to improve their educational achievements, while desegregation creates a more noticeable improvement).

19. *See* A. DOWNS, *supra* note 18, at 123-24. A key legal development in carrying out deconcentration is the concerted attack on zoning barriers to low-income housing, commonly referred to as exclusionary zoning. Attacks on exclusionary zoning have had mixed results. The New Jersey Supreme Court's *Mount Laurel* decision set forth a broad mandate for deconcentration: suburbs were required by the decision to plan for their "regional fair share" of housing for the poor. Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 188-90, 336 A.2d 713, 732-33, *appeal dismissed,* 423 U.S. 808 (1975). The Supreme Court, however, has raised barriers of standing, Warth v. Seldin, 422 U.S. 490 (1975), and proof of intent to discriminate, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), to exclusionary zoning challenges based on the equal protection clause, U.S. CONST. amend. XIV. The Court has left open the possibility that future challenges may be successful under the Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1976); *see Arlington Heights,* 429 U.S. at 271. The existence of exclusionary zoning illustrates the strong political resistance that any plan to deconcentrate the poor, especially nonwhite poor, will face from suburban communities. *See* Schultze, Fried, Rivlin, Teeters & Reischauer, *Fiscal Problems of Cities,* in Alcaly & Mermelstein, *supra* note 1, at 206. *See generally* Sager, *Questions I Wish I Had Never Asked: The Burger Court in Exclusionary Zoning,* 11 SW. U. L. REV. 509 (1979).

20. *See* A. DOWNS, *supra* note 18.

21. Pub. L. No. 90-284, title VIII, 82 Stat. 81 (1968) (codified at 42 U.S.C. §§ 3601-3619) (1976).

then explicitly in the Housing and Community Development Act (HCDA) of 1974.[22]

B. The National Housing Policy

The federal government committed itself to racial housing integration in the Fair Housing Act of 1968. Enacted as Title VIII of the Civil Rights Act of 1968,[23] the Act makes discrimination in sale, lease or financing of a home on the basis of race illegal, and provides that: "The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[24] HUD therefore cannot be neutral; its programs must promote integration.

Spatial deconcentration of the poor was also declared to be the national housing policy in the 1974 HCDA:

> The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. . . . [T]he federal assistance provided in this chapter is for the support of [C]ommunity [D]evelopment activities which are directed toward the following specific objectives . . . (6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income.[25]

The HCDA consolidated numerous grant-in-aid programs for housing and development into Community Development Block Grants[26] which were to be administered to achieve the stated policy objectives. Cities applying for the block grants were required to develop housing assistance plans (HAP's) which furthered deconcentration of the poor.[27]

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22. Pub. L. No. 93-383, 88 Stat. 633 (1974) (current version codified at 42 U.S.C.A. §§ 5301-5320) (West 1977 & Supp. 1978-81).

23. Pub. L. No. 90-284, 82 Stat. 81 (1968).

24. Fair Housing Act of 1968 § 808(e)(5), 42 U.S.C. § 3608(d)(5) (1976).

25. 42 U.S.C. § 5301(c)(6) (1976).

26. 42 U.S.C. § 5303-5306 (1976). Ten categorical development programs were combined into the block grants. *See* SEN. REP. No. 693, 93rd Cong. 2nd Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4273, 4318.

27. 42 U.S.C. § 5304(a)(4) (1976) (current version at 42 U.S.C.A. § 5304(c) (West Supp. 1978-81)).

The legislative history of the HCDA provides little background on the reasons Congress adopted deconcentration as a housing policy.[28] Representative Thomas Ashley, sponsor of the HCDA in the House, was apparently influenced to some extent by criticism of the Model Cities approach, particularly that of Anthony Downs,[29] who advocated spatial deconcentration in his 1973 book, *Opening Up the Suburbs*.[30] The meager discussion of the deconcentration goal which does appear indicates that it was to be achieved on a metropolitan level, rather than being limited by municipal boundaries.[31]

Senator Edward Brooke, an outspoken advocate of low-income housing, objected to the deconcentration policy because it might cause local officials to deny housing to poor and minority applicants in order to achieve a greater racial or income mix.[32] His apprehension has been borne out to some extent when deconcentration has been attempted on the limited scale of single public housing projects.[33] Comprehensive deconcentration, however, need not reduce housing opportunities for the nonwhite poor if public and private housing is made available in previously all-middle-class and all-white areas rather than solely in existing low income areas.

A more basic objection to deconcentration has also been offered: it is argued that if the nonwhite poor are dispersed, their political power will be diluted and they will consequently lose any impact they may have had on city politics.[34] It is also arguable, however, that the political power gained by minority inner-city poor in the 1960's did not secure lasting improvements in their condition.[35] Therefore, this Note will proceed on the assumption that deconcentration—housing desegregation—is not only the law, but that it is a good thing, with its economic and social benefits outweighing speculative political losses for the nonwhite poor.

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28. Note, *National Problems and Local Control: Tension in Title I of the Housing and Community Development Act of 1974,* 13 COLUM. J. L. & SOC. PROBLEMS 409, 415, n.29 (1977).

29. Warren, *supra* note 17, at 583 n.35.

30. DOWNS, *supra* note 18.

31. *See* Note, *supra* note 28, at 415; Note, *Symbolic Gestures and False Hopes: Low-Income Housing Dispersal after* Gautreaux *and the Housing and Community Development Act of 1974* [hereinafter cited as *Symbolic Gestures*], 21 ST. LOUIS UNIV. L. J. 759, 792 n.226 (1978).

32. Gesmer, *Discrimination in Public Housing under the Housing and Community Development Act of 1974: A Critique of the New Haven Experience,* 13 URB. L. ANN. 49, 54 (1977).

33. *See id.*

34. Frances Fox Piven is a leading exponent of this view. *See* Piven & Cloward, *The Case Against Urban Desegregation* in HOUSING URBAN AMERICA 97 (J. Pynoos, ed. 1973).

35. *See* Piven, *The Urban Crisis: Who Got What and Why,* and Tabb, *Blaming the Victim,* in ALCALY & MERMELSTEIN, *supra* note 1, at 132, 315.

III

GENTRIFICATION

A. Description

Gentrification is the entrance of large numbers of middle-class whites into formerly deteriorated, center-city neighborhoods, accompanied by substantial privately financed rehabilitation of housing stock.[36] Gentrification, viewed superficially, appears to successfully accomplish a form of spatial deconcentration, because white middle-class people move into areas with poor nonwhite residents. It thus seems the complement to the opening up of housing opportunities for minority poor in the suburbs. This would be so, if such opportunities were indeed opening up.

Gentrification was virtually unknown at the time the HCDA was drafted; it represents a reversal of the historical pattern of American housing evolution, referred to by social scientists as the "trickle down" process.[37] According to the trickle down model, as Americans become more affluent, they move to newer housing, farther from the central city, leaving their somewhat older housing to the income strata below them. The poorest residents are concentrated in the oldest housing in the central city, which has "trickled down" to them from progressively less affluent former residents.[38] Gentrification is a result of a new preference on the part of affluent housing consumers for inner-city housing, and a rejection of the suburban life as a consumer ideal.[39] In addition to changes in consumer preferences, gentrification requires a decision by private sources of capital to cease "redlining"[40] and to invest in central city housing renovation.[41] It appears to occur in stages, with "young pioneers" of moderate affluence coming first, followed by progressively more affluent people as the neighborhood upgrades, or "trickles up."[42]

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36. *See* Gale, *Middle Class Resettlement in Older Urban Neighborhoods,* 45 AM. PLAN. A. J. 293 (1979). The condition of neighborhoods prior to gentrification varies, including industrial, stable, low-income, or abandoned.

37. *See* DOWNS, *supra* note 18, at 2-6.

38. *Id.*

39. *See* Gale, *supra* note 36, at 296-97.

40. Mortgage redlining refers to a bank policy of automatically denying mortgage applications to purchase a home in a specified (usually nonwhite, low-income) neighborhood. Insurance redlining means systematic refusal to provide homeowner insurance in a specified neighborhood.

41. Smith, *Toward a Theory of Gentrification: A Back to the City Movement of Capital not People,* 45 AM. PLAN. A. J. 538 (1979).

42. *Id.* at 303.

B. Extent of Gentrification

The empirical evidence shows that some degree of gentrification affects almost all major metropolitan areas, as well as many medium-sized cities.[43] Even in Midwestern cities in which the trend to gentrification has been far less noticeable than in the East, a substantial number of neighborhoods are experiencing significant immigration of professionals.[44] The number of longterm neighborhood residents ("outmovers") displaced by gentrification is a subject of dispute among social scientists, largely because it is so difficult to isolate and define which moves are actually "caused" by gentrification.[45] Estimates of the number of people displaced range from a few hundred to more than two million.[46] Meanwhile, more urban neighborhoods are being abandoned than are being gentrified. As a result, central cities continue to experience a net population loss.[47] Gentrification must be understood in the context of its widespread existence and limited impact on "saving" the inner city.

C. Integrating or Segregating Force?

The homogeneity of gentrified neighborhoods is a crucial issue in assessing gentrification's potential for deconcentrating the poor and nonwhite. If gentrification produces stable, integrated neighborhoods government agencies would have good reasons to encourage it. Thus far, however, gentrification does not appear to have effected lasting integration.

Studies of the middle-class entrants in inner city neighborhoods show that they are overwhelmingly white and college educated, and predominantly young, middle-income professionals with no children.[48] Since the new arrivals are homogeneous, an integrated neighborhood can be maintained only if some original residents stay.

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43. Gale, *supra* note 36, at 297. Most studies consist of surveys distributed to realtors and local officials, and they provide data only on the number of cities affected by any degree of gentrification. *Id.* One exhaustive study of 967 census tracts in nine cities not well known for being affected by gentrification (Cincinnati, Dayton, Louisville, Memphis, Milwaukee, Minneapolis, Oklahoma City, Rochester and St. Paul) found that twenty-two percent of all households lived in tracts with a five percent or greater immigration of professionals each year. Henig, *Gentrification and Displacement within Cities: A Comparative Analysis,* 61 Soc. Sci. Q. 638, 645 (1980). However, even more areas were in abandonment; and "gentrifying" neighborhoods were often quasi-suburban, and thus not within the model of the ghetto in renovation. *Id.* at 650.

44. *See supra* note 43.

45. *See* Sumka, *Neighborhood Revitalization and Displacement: A Review of the Evidence,* 45 Am. Plan. A. J. 480, 486 (1979); Henig, *supra* note 43.

46. LeGates & Hartman, *Gentrification-Caused Displacement,* 14 Urb. Law. 31, 53 (1982).

47. *See* Henig, *supra* note 43.

48. Gale, *supra* note 36, at 294-95 (from data obtained in surveys in seven cities).

In fact, both market forces and political behavior tend to drive out former residents and make gentrified neighborhoods homogeneous by race and class. Since consumers expect neighborhood homogeneity,[49] when some middle-class pioneers move in, others follow in anticipation of the neighborhood's eventual transition up to middle class. As affluent housing consumers (who tend to be white) decide to move in,[50] the local real estate market heats up and a rush of speculative buying raises property values and rents. The poor (who tend to be black) are soon faced with unaffordable rents, taxes and purchase prices which force them to move out of the neighborhood.

Market forces are reinforced by political behavior: the newly-arrived gentry resist the construction or rehabilitation of low-income housing (especially for nonwhites) in their new neighborhood.[51] The affluent have the requisite skills, or money to hire those who have the skills, to take over neighborhood organizations, using the courts and their access to city hall to help transform their new community into a homogeneous one.[52]

Absent government intervention, gentrification will not produce more than momentarily integrated neighborhoods either by race or by class.[53] The predominantly nonwhite poor will be forced to move, or will already have moved, to other decaying inexpensive neighborhoods, possibly in the first ring of older suburbs, as another round of trickle down gets underway.[54] Even if the nonwhite poor do not leave the neighborhood, segregation often occurs within the neighborhood itself.[55]

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49. Laska & Spain, *Urban Policy in the Wake of Gentrification,* 45 AM. PLAN. A. J. 523, 527-29 (1979).

50. *Task Force on Rental Housing: Hearings before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,* 96th Cong., 2d Sess. 465 (1980) (statement of Calvin Bradford) [hereinafter cited as *Task Force on Rental Housing*].

51. *E.g.*, Auger, *The Politics of Revitalization in Gentrifying Neighborhoods: The Case of Boston's South End,* 45 AM. PLAN. A. J. 515, 518-19 (1979).

52. *Id.*; for examples of court challenges against lower-income housing by the new gentry, *see* Alshuler v. H.U.D., 652 F.2d 472 (7th Cir. 1982); Business Assoc. of Univ. City v. Landrieu, 660 F.2d 867 (3d Cir. 1981); Aertsen v. Landrieu, 637 F.2d 12 (1st Cir. 1980); cases brought by affluent residents of Chicago, Philadelphia and Boston, respectively.

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> Five recent studies provide . . . empirical evidence on the racial dynamics of gentrifying neighborhoods. All five suggest that gentrification produces racial conflict and will not necessarily promote integration. A study of white 'reinvasion' pushing black populations out of four District of Columbia neighborhoods . . . found that virtually all the original resident blacks were ultimately pushed out.

LeGates & Hartman, *supra* note 46, at 51 (citations omitted). *See also* DOWNS, *supra* note 18, at 122.

Capitol Hill in Washington, D.C. is the archetypal gentrified neighborhood; it is now 94% white and 75% of its residents have incomes over $25,000 per year. Goldfield, *Private Neighborhood Redevelopment and Displacement: The Case of Washington, D.C.*, 15 URB. AFF. Q. 453, 455 (1980).

54. DOWNS, *supra* note 18, at 122; Smith, *supra* note 41, at 547.

55. LeGates & Hartman, *supra* note 46, at 51-52.

D. The Merits of Gentrification

The debate on the merits of gentrification has been largely bipolar. On one side are those who favor it because it revives places, that is, it causes private redevelopment of a city's physical structures.[56] On the other side are those who focus attention on the displaced poor, who are, they claim, driven out in hordes when property values skyrocket. These opponents call for a halt to gentrification, for example, through moratoria on condominium conversions.[57] A more reasonable position is that gentrification can be a positive force in deconcentrating the poor, but only if government intervention assures that a significant percentage of nonwhite and poor tenants or owners remain in gentrified neighborhoods. Such government intervention is not only sound policy:[58] it is the national housing policy as declared in the fair housing laws[59] and required by the HCDA.[60]

E. Government Promotion of Gentrification

Gentrification has not been a purely private market phenomenon; it has been actively stimulated by the federal government (through HUD) and local agencies. Local governments have provided low-interest or tax-free loans to private developers rehabilitating in gentrifying neighborhoods[61] and used Community Development Block Grants created by Title I of the HCDA[62] to fund gentrification-related redevelopment.[63]

Governmental encouragement of gentrification has stemmed from the visible effects that gentrification has upon places, and has either ignored its segregating effects or failed to anticipate them. A desire for immediate visible results, reinforced by HUD regulations,[64] causes local governments to focus redevelopment efforts on areas where private redevelopment, for

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56. *See, e.g.*, Sumka, *supra* note 45.

57. *Compare* Hartman, *Comment on "Neighborhood Revitalization and Displacement: A Review of the Evidence,"* 45 AM. PLAN. A. J. 488 (1979) *with* Sumka, *The Ideology of Urban Analysis*, 45 AM. PLAN. A. J. 491 (1979). *See also Task Force on Rental Housing, supra* note 51, where witnesses tended to take one of these two positions, *e.g., id.* at 878.

58. *See supra* text accompanying notes 17-20, 32-35.

59. Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1976).

60. *See infra* text accompanying notes 120-23.

61. *See, e.g., Task Force on Rental Housing, supra* note 50, at 469-78.

62. Community Development Block Grants, 42 U.S.C. § 5303 (1976) (current version at 42 U.S.C.A. § 5303 (West Supp. 1978-81)); Urban Development Action Grants, 42 U.S.C.A. § 5318 (West Supp. 1978-81).

63. *See Task Force on Rental Housing, supra* note 50, at 465, 878; Auger, *supra* note 51, at 516-17 (private redevelopment preceded by urban renewal); Laska & Spain, *supra* note 49, at 529 (local governments cater to the new middle class in spending Community Development funds).

64. HUD encourages concentration of resources in Neighborhood Strategy Areas, coupled with a plan that "provides sufficient resources to produce substantial long-term improvements in the area within a reasonable period of time." 24 C.F.R. § 570.301(c) (1981). *See also* WORKING GROUP FOR COMMUNITY DEVELOPMENT REFORM MONITORING COMMUNITY DEVELOPMENT: THE CITIZEN'S EVALUATION OF THE COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM (1980) at 34-35 [hereinafter referred to as MONITORING CD].

which they can then take credit, is or will soon be underway, rather than on funding projects in the most blighted areas.[65] At the federal level, HUD's record in enforcing the deconcentration policy through scrutiny of housing assistance plans[66] has been mixed. In particular, HUD has approved development plans which fall short of meeting low-income housing needs identified in the plans themselves.[67] It has also acquiesced in the use of block grants for housing rehabilitation by middle and upper income owners in gentrifying neighborhoods.[68] HUD has therefore not consistently applied federal funds to stimulate spatial deconcentration of minority and poor city residents as required by law.[69]

IV

THE TIPPING CASES AND HUD'S DUTY TO INTEGRATE

A. Tipping Analysis under the Fair Housing Act

Gentrification is a recent development in the evolution of American neighborhoods. In order to see how the legal mandate to desegregate[70] should be applied in this new context, useful analysis may be drawn from cases dealing with the old, familiar form of neighborhood transition, trickle down.[71] When the low-income and minority population of a neighborhood is increasing as part of the trickle down process it is said to reach a "tipping point," at which the remaining white, more affluent residents flee in large numbers, causing the area to become a low-income minority ghetto.[72]

Involvement of government housing programs in causing or preventing tipping has been a central issue in cases challenging federal actions. The Fair Housing Act of 1968,[73] which affirmatively requires HUD to promote racial housing integration,[74] is the most important statute used to challenge HUD and local agency actions. Two other statutes were also invoked in the early

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65. Writing off the worst-off neighborhoods is called "triage." *See* MONITORING CD, *supra* note 64, at 12.

66. All communities receiving Community Development Block Grants must submit a Housing Assistance Plan. 42 U.S.C.A. § 5304(c)(1) (West Supp. 1978-81). *See infra* text accompanying notes 102-07.

67. *Symbolic Gestures, supra* note 31, at 774-75 nn.115-17.

68. MONITORING CD, *supra* note 64, at 33-36.

69. *Id.* It is possible to force deconcentration of the nonwhite poor on reluctant communities through the Community Development Block Grants, as HUD has done in Fairfax, Virginia. *See* Goldfield, *supra* note 53, at 464-65.

70. *See supra* text accompanying notes 21-25.

71. *See supra* text accompanying notes 37-38.

72. For a frequently cited discussion of tipping, *see* Navasky, *The Benevolent Housing Quota*, 6 How. L. J. 30 (1960). Consumer racism is the accelerating, if not the determining, agent in the trickle down process.

73. 42 U.S.C. §§ 3601-3631 (1976).

74. *Id.* § 3608(d)(5).

tipping cases: the National Environmental Policy Act (NEPA)[75] and Title VI of the Civil Rights Act.[76] NEPA requires that an environmental impact statement be prepared prior to major agency actions with significant impact on the environment.[77] Title VI bars racial discrimination in "any program or activity receiving Federal financial assistance."[78] The principle consistently expressed in the tipping cases is that HUD and the local agencies which it funds must avoid causing an area to "tip" and become concentrated with poor, nonwhite residents.

In *Shannon v. U.S. Dept. of Housing and Urban Development*[79] black and white Philadelphia residents challenged the construction of a HUD-financed apartment project. The project was to be built in an urban renewal area by a private developer with HUD mortgage insurance and rent subsidies. The urban renewal plan for the area had previously contemplated construction of owner-occupied housing on the site. The shift to low-income rental housing, the plaintiffs claimed, would increase the already high concentration of minority residents in the area. Plaintiffs claimed that Title VI and HUD's affirmative duty under section 808(e)(5) of the Fair Housing Act[80] required HUD to study the project's impact on racial concentration. The claim, and the relief granted, were essentially procedural: the Third Circuit found that HUD's affirmative duty to promote racial integration required that it study the racial impact of its project before proceeding.[81] In spite of the fact that the project had already been built, the court ordered the district court to enjoin the provision of mortgage insurance until the racial impact study was completed.[82] The court implied, furthermore, that a pro forma study of racial impact would be insufficient by setting forth the legal standard the project would have to meet: "[the agency must find] that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration."[83]

HUD's duty to prevent racial concentration and tipping under the Fair Housing Act and the equal protection clause[84] was used as a defense in *Otero v. N.Y.C. Housing Authority*,[85] the leading case on tipping. The New York City Housing Authority bulldozed a site in Manhattan's Lower East

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75. Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321-4361 (1976)).
76. Pub. L. No. 88-352, title VI, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d (1976)).
77. 42 U.S.C. § 4332(2)(c)(1) (1976).
78. 42 U.S.C. § 2000d (1976).
79. 436 F.2d 809 (3d Cir. 1970).
80. 42 U.S.C. § 3608(d)(5) (1976).
81. *Shannon*, 436 F.2d at 820-21.
82. *Id.* 822-23.
83. *Id.* at 822.
84. U.S. CONST. amend. XIV, § 1.
85. 484 F.2d 1122 (2d Cir. 1973).

Side and built new public housing. In order to preserve racial balance in the area, the Authority denied units in the new housing to nonwhite former residents of the site. The Second Circuit had to balance the rights of the minority plaintiffs to return to their neighborhood against the danger of tipping caused by introducing a large number of minority residents into the neighborhood.

Ordinarily, the court said, the Housing Authority could not deny housing to minority applicants to achieve an optimum racial mix. But, the denial of housing to minority applicants would be allowed if accepting more minority tenants would "lead to a substantial increase in the overall nonwhite population in the community, precipitating a trend towards ultimate ghettoization of the entire community."[86] The *Otero* holding has important implications: the affirmative duty to integrate applies to local agencies as well as to HUD,[87] and prohibits any project which will cause the total segregation of a neighborhood.

In *Trinity Episcopal School Corporation v. Romney*[88] the Second Circuit applied the tipping test elaborated by the lower court[89] on the basis of *Otero,* but found inadequate the evidence that the neighborhood where HUD was building low-income housing would actually racially tip and become segregated. The court upheld the district court's conclusion that an increase in low-income population per se without proof of change in racial composition did not prove racial tipping.[90]

Later Second Circuit cases, however, have tended to confuse racial and economic tipping, as well as the legal bases for preventing them.[91] *Otero* was clearly grounded in the Fair Housing Act, and dealt only with racial concentration, not concentration of residents by income (i.e., economic tipping). *Karlen v. Harris,*[92] the Second Circuit's decision on appeal after remand from the *Trinity* case, reconsidered the increase in low-income population in light of both the Fair Housing Act and NEPA.[93] The Second Circuit held in *Karlen* that concentration of low-income residents, and the resulting economic tipping, was an "environmental impact" within the meaning of

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86. *Id.* at 1135.
87. *Id.* at 1133-34.
88. 523 F.2d 88 (2d Cir. 1975).
89. 387 F. Supp. 1044, 1065-66 (S.D.N.Y. 1974).
90. 523 F.2d at 92 (citing the district court opinion, 387 F. Supp. 1044, 1072-1073 (S.D.N.Y. 1974)).
91. *See* Karlen v. Harris, 590 F.2d 39, 44-45 (2d Cir. 1978), *rev'd sub nom.* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) (the circuit court blends discussion of NEPA and income concentration with references to *Otero* and the Fair Housing Act, which refer to race concentration.)
92. 590 F.2d 39 (2d Cir. 1978).
93. *See id.* at 44-45.

NEPA.[94] HUD had prepared an environmental impact statement for the low-income housing project. The statement conceded that alternative sites would create less tipping effect, but stressed the fact that changing the site would cause costly delays. The Second Circuit overruled HUD's determination that the "environmental" tipping effect was outweighed by the delay attendant to relocating the project. Invoking *Otero*, the Second Circuit held that an increase in concentration of low-income housing "should be given determinative weight."[95] The Supreme Court reversed the *Karlen* decision,[96] saying that the Second Circuit exceeded the scope of its review in enforcing the essentially procedural requirements of NEPA by considering the substance of HUD's decision. The Supreme Court did not decide whether concentration of low-income residents and tipping were environmental impacts for the purposes of NEPA.[97]

Using NEPA to foster economic housing integration may be objectionable because it may be necessary to do so in a way that amounts to regarding the poor as pollution.[98] One commentator has noted that middle- and upper-income residents could use such an analysis to resist deconcentration of the poor into their neighborhoods.[99] More fundamentally, environmental policy is not a substitute for the proper application of fair housing policy.[100] The racial tipping cases, combined with the 1974 Housing and Community Development Act (HCDA) provide a better and more legitimate basis for preventing economic tipping, that is, segregation by income.

B. Economic Tipping and the HCDA

The HCDA expresses the housing goal of spatial deconcentration in both its policy statement[101] and in the section on grant procedures. The latter section, describing requirements to be met by communities receiving funds, provides:

> Any grant . . . shall be made only if the unit of general local government certifies that it is following a current housing assistance plan which has been approved by the Secretary and which— . . . indicates the general locations of proposed housing for lower income persons, with the objective of . . . (ii) promoting greater

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94. *Id.* at 43; *see* Note, *NEPA, Tipping and the Siting of Low-Income Public Housing: The Dangers of* Strycker's Bay Neighborhood Council v. Karlen, 6 COLUM. J. ENVTL. L. 31 (1979) [hereinafter cited as *Dangers of* Strycker's Bay].

95. 590 F.2d at 44.

96. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).

97. *Id.* at 500; *see Dangers of* Strycker's Bay, *supra* note 94.

98. *Dangers of* Strycker's Bay, *supra* note 94.

99. *Id.* at 46.

100. *Id.*

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

> choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low income persons . . . .[102]

While these provisions are relevant only to projects receiving funds under Community Development Block Grants established in Title I of the HCDA,[103] local governments will often include their planned use of other federal housing and development funds in their housing assistance plans. Any use of federal funds included in the housing assistance plan must further the deconcentration objective, given the definition of an adequate housing plan. Section 8 projects[104] are independently required to promote housing integration.[105] While HUD supervision of local activities is generally limited,[106] HUD subjects each local use of funds to annual performance review. A locality's failure to promote the deconcentration goal in the manner described in the housing plan would supply an adequate basis for denying funds or applying other sanctions.[107]

Deconcentration requirements are not wishful thinking on the part of Congress, but legal standards.[108] HUD's adherence to the mandates of the HCDA can be and has been subjected to judicial review.[109] Courts have

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102. 42 U.S.C.A. § 5304(c) (West Supp. 1978-81) (as amended by Housing and Community Development Amendments of 1981, Pub. L. No. 97-35, title IV, 95 Stat. 384 (1981)).

103. 42 U.S.C. § 5303 (1976).

104. 42 U.S.C. § 1437f (1976). "Section 8" provides payments to private developers of low-income housing to make up the difference between thirty percent of a poor tenant's income and fair market rent; funds are also made available in advance for construction and rehabilitation of housing which will contain a requisite number of low-income tenants.

105. Alschuler v. HUD, 652 F.2d 472 (7th Cir. 1982); 42 U.S.C. § 1437f(a) (1976).

106. Prior to 1981, HUD could disapprove a grant application if the description of community needs was "plainly inconsistent" with generally known facts, if the proposed activities were "plainly inappropriate" to meet the plan's goals, or if the application did not comply with federal law. HCDA, 42 U.S.C. § 5304(c) (1976) (amended 1981). The 1981 amendments, included in the 1981 Omnibus Budget Reconciliation Act, eliminated application review. Cities now submit a statement of activities which HUD apparently must accept. *See* 42 U.S.C.A. § 5304(a) (West Supp. 1978-81). HUD may, however, withhold funds if the proposed activities will not be administered in compliance with the Fair Housing Act, *id.* § 5304(b)(2), or do not give "maximum feasible priority" to aiding the poor or eliminating slums, *id.* § 5304(b)(3), or if the local government is not following a housing assistance plan approved by HUD and which avoids low-income concentration, *id.* § 5304(c)(1)(C). The legislative history indicates that these changes were intended to reduce HUD supervision of local community development activities. *See* H.R. CONF. REP. No. 208, 97th Cong. 1st Sess., *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1010, 1032. In spite of these changes, HUD retains enough control to carry out its mandate: HUD can insure that local activities are designed to effect economic and racial integration through the housing plan and fair housing compliance requirements.

107. 42 U.S.C.A. § 5304(d) (West Supp. 1978-81). HUD may reduce or deny grants if annual review shows that a local program does not meet all legal requirements (which include fair housing and housing plan deconcentration requirements). *Id.*

108. *E.g.*, Alschuler v. HUD, 515 F. Supp. 1212 (N.D. Ill. 1981), *aff'd*, 652 F.2d 472 (7th Cir. 1982).

109. *Id.*

scrutinized HUD-financed activities to determine whether they would result in "undue concentration" of low-income residents.[110] In several cases, HUD-sponsored projects planned for gentrifying areas have been challenged by upper-income plaintiffs, who alleged that low-income housing would cause their recently integrated neighborhood to tip back toward low-income concentration. In fact, the trend in these neighborhoods was shown to be strongly toward upper-income dominance.[111] HUD had thus been furthering the deconcentration policy by preserving low-income housing in these areas where private housing would otherwise soon be unaffordable for the poor.[112] The courts therefore rejected these challenges[113] only because HUD could prove it was furthering economic and racial integration by funding low-income housing. The cases demonstrate that the HCDA can be used as a tool that allows courts to enforce HUD's affirmative duty to deconcentrate the poor.

The district court in *King v. Harris* extended HUD's duty to integrate to both race and income, partly on the basis of the HCDA.[114] District Judge Costantino enjoined HUD from providing section 8 subsidies to a low-income housing project. The challenged project was to be built in an integrated area in Staten Island, New York, whose low-income minority population had been increasing. The Fair Housing Act, NEPA, and the HCDA taken together, wrote Judge Costantino, require HUD to "avoid the continued and unnecessary area concentration of low-income and minority families."[115] Using the statutes as a starting point, Judge Costantino cited *Otero, Trinity,* and *Karlen* in support of his racial and economic tipping analysis.[116] He found two alternative grounds for the injunction against the project. First, because it was limited to one census tract, HUD's consideration of the concentrating effect by race and income was held inadequate, and the resulting decision was held arbitrary.[117] Second, from his own review of the facts, Judge Costantino found that the project would cause the neighborhood to tip,[118] creating an imminent threat of actual racial and economic segregation.[119] Both alternate holdings are concrete judicial applications of

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110. *Id.*

111. Business Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 872-73 (3d Cir. 1981); *Alschuler*, 515 F. Supp. 1212; *see also* Morris v. Chicago Housing Auth., 500 F. Supp. 763, 765-66 (N.D. Ill. 1980).

112. *See supra* text accompanying notes 49-54.

113. *See* cases cited *supra* note 111.

114. 464 F. Supp. 827 (E.D.N.Y. 1979), *aff'd mem. sub nom.* King v. Faymore Dev., Inc., 614 F.2d 1288 (2d Cir. 1979), *vacated and remanded*, 446 U.S. 905 (1980), *aff'd mem. on remand*, 636 F.2d 1202 (2d Cir. 1980).

115. 464 F. Supp. at 837.

116. *Id.* at 837, 842-43. *See supra* text accompanying notes 84-97.

117. *Id.* at 839-41.

118. *Id.* at 841-44.

119. *Id.* at 842-43.

HUD's duty to promote racial and economic integration. The key element of the *King* decision, and its importance for gentrification cases, is its holding that extends HUD's affirmative duty to integrate to income deconcentration.[120]

V

APPLYING TIPPING AND DUTY TO INTEGRATE PRINCIPLES TO A GENTRIFICATION CASE

Since gentrification is essentially "trickle up,"[121] or tipping in reverse, the outcomes of gentrification and tipping are similar: neighborhoods become segregated by race and income.[122] Thus, HUD's duty to integrate applies to gentrification as well as to the tipping phenomenon addressed in *Otero* and subsequent cases. Although gentrification may appear only to concentrate affluent whites, whom HUD is not barred from concentrating, its clear effect is to exclude poor nonwhites from the gentrified area.[123] The inevitable result of driving out all minority and poor residents is to relegate them to other areas of concentrated minority, low-income population.[124] In addition, since HUD's duty to integrate is affirmative, it should only be able to fund activities in gentrifying neighborhoods if they preserve an adequate amount of housing for poor and nonwhite residents. Thus, the statutes and the tipping cases which delineate HUD's duties with respect to low-income housing developments can provide the basis for courts to enjoin HUD-sponsored activities which promote gentrification and do not provide for the preservation of substantial low-income and minority populations.

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120. After being affirmed by the Second Circuit, 614 F.2d 1288 (2d Cir. 1979), the *King* decision was reversed and remanded by the Supreme Court, Faymor Dev. Inc. v. King, 446 U.S. 905 (1980), for consideration in light of the Court's reversal in *Strycker's Bay Neighborhood Council v. Karlen*. *See supra* text accompanying notes 96-100. The Court apparently asumed that Judge Costantino's citation of the *Karlen* Second Circuit decision was essential to the outcome in *King*: in fact it was not. Judge Costantino explicitly refused to base his decision in *King* on NEPA, the statute at issue in *Karlen*. *See* 464 F. Supp. at 844, n.32. On remand, the Second Circuit reaffirmed the *King* decision without opinion. 636 F.2d 1202 (2d Cir. 1980).

King has been cited approvingly by other courts for the proposition that the Fair Housing Act, the HCDA and other statutes, taken together, require HUD to affirmatively promote both racial and economic housing integration. Alschuler v. HUD, 686 F.2d 472, 482 (7th Cir. 1982) ("Congress imposed on HUD a substantive obligation to promote racial and economic integration in administering the section 8 program"); *Business Ass'n of Univ. City*, 660 F.2d at 874; Young v. Pierce, 544 F. Supp. 1010, 1017-18 (E.D. Tex. 1982).

121. *See supra* text accompanying notes 37-42.

122. *See supra* text accompanying notes 48-55.

123. *See supra* text accompanying notes 49-54.

124. *See supra* note 54 and accompanying text.

A. The Suit against Total Gentrification

Gentrification has spawned a number of lawsuits, most of which have been brought by middle-class residents to prevent construction or preservation of subsidized housing.[125] Nevertheless, the victims of gentrification are engaged in ongoing litigation in two cities, Boston[126] and Chicago,[127] drawing primarily on the Fair Housing Act and civil rights statutes in challenges to government redevelopment programs whose impacts are facially discriminatory. These cases are still in their early stages, but holdings on motions to dismiss have not dimmed the prospects for their success.

Avery v. Chicago[128] presents a typical scenario of HUD-supported gentrification activity being resisted by poor minority residents who wish to remain in their neighborhood rather than being forced to move to a segregated area. Community Development Block Grants[129] were apparently used by the city of Chicago to support the activities of a developer who had been systematically evicting low-income, minority tenants in order to renovate a building in Uptown, a rapidly gentrifying area in Chicago.[130] The plaintiffs claimed that HUD, the city agency and the developer were involved in a conspiracy to force minority tenants to move to segregated neighborhoods, in violation of the Civil Rights Act[131] and the Fair Housing Act. Thus far, the plaintiffs have survived two motions to dismiss: in the first, the court held that the evicted tenants had standing to raise their claims,[132] and in the second that HUD was a proper party to the suit, given the allegations of a link between Chicago's use of Community Development Block Grants and the developer's activity.[133] What follows is a discussion of the legal issues confronted in resisting gentrification in the courts. Plaintiffs will have to overcome legal hurdles of standing, right of action and basis for judicial review; show government involvement in gentrification; provide the necessary socioeconomic factual showings; and propose effective remedies that are within the court's power.

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125. *See supra* note 52 and accompanying text.

126. Munoz-Mendoza v. Pierce, 520 F. Supp. 180 (D. Mass. 1981). *See infra* notes 150-53 and accompanying text.

127. Avery v. Chicago, 501 F. Supp. 1 (N.D. Ill. 1978).

128. *Id.* (plaintiffs had standing and stated a claim under the Fair Housing Act) and Avery v. Harris, No. 75-3379 slip op. (N.D. Ill. Jan. 29, 1981) (same case) (dismissal as to defendant HUD denied).

129. *See supra* note 103 and accompanying text.

130. Avery v. Harris, No. 75-3379 slip op. (N.D. Ill. Jan. 29, 1981).

131. 42 U.S.C. § 1983 (1976).

132. Avery v. City of Chicago, 501 F. Supp. 1 (N.D. Ill. 1978).

133. Avery v. Harris, No. 75-3379 slip op. (N.D. Ill. Jan. 29, 1981).

1. Standing

Suits against HUD-funded gentrification must show that this new form of neighborhood transition is properly the subject of the federal court's consideration. As always, proper plaintiffs must be found in order to avoid standing problems. To have standing, plaintiffs must show they have been injured in fact and that their injury can be redressed by curing the violation of law asserted; or, put another way, that there is a causal nexus between the injury and legal violation.[134] The plaintiff's injury must be individual[135] but may be intangible, such as a loss of opportunity to live in a racially integrated neighborhood.[136]

A series of recent circuit court cases have explored the standing issue in Fair Housing Act and HCDA challenges to HUD projects. The analysis in those federal housing cases may be applied to cases challenging HUD-aided gentrification. In *City of Hartford v. Glastonbury*[137] standing was denied in a weak case for the plaintiffs. The plaintiffs, officials and residents of Hartford, Connecticut, objected to HUD's approval of a housing assistance plan submitted by Glastonbury, a Hartford suburb, in order to obtain federal funds. Plaintiffs alleged that because Glastonbury failed to plan for enough future low-income residents, Hartford's inner-city poor suffered a loss of potential housing opportunities.[138] The housing assistance plan was legally inadequate under the HCDA, plaintiffs claimed.[139] The Second Circuit, sitting en banc, held that if HUD were required to disappove Glastonbury's housing plan, and funds were cut off, the inner-city plaintiffs would still not benefit because no housing would be created for them in the suburb. They lacked standing to challenge the legal adequacy of the housing assistance plan because their injury would not be redressed by a favorable decision.[140]

Later First Circuit cases have construed *Hartford* generously for plaintiffs, because in those cases plaintiffs were able to allege some sort of causal connection between remedying HUD's legal violation and redress of the injury they suffered. *NAACP, Boston Chapter v. Harris*[141] and *Munoz-Mendoza v. Pierce*[142] both involved Fair Housing Act challenges to Boston's proposed use of Urban Development Action Grant[143] (UDAG) funds.

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134. Warth v. Seldin, 422 U.S. 490 (1975).
135. Sierra Club v. Morton, 405 U.S. 727 (1972).
136. Shannon v. HUD, 436 F.2d 809, 818 (3d Cir. 1970).
137. 561 F.2d 1032 (2d Cir. 1976), *rev'd*, 561 F.2d 1048 (2d Cir. 1977); *but see* Coalition for Block Grant Compliance v. HUD, 450 F. Supp. 43 (D. Mich. 1978) (adopts the dissent in the *Hartford* case).
138. 561 F.2d at 1042.
139. *Id.*
140. City of Hartford v. Glastonbury, 561 F.2d 1048 (2d Cir. 1977) (en banc).
141. 607 F.2d 514 (1st Cir. 1979).
142. 520 F. Supp. 180 (D. Mass. 1981).
143. *See* 42 U.S.C.A. § 5318 (West Supp. 1978-81).

NAACP, Boston Chapter involved Boston's UDAG program in general, rather than its impact on a particular neighborhood. The plaintiffs claimed HUD's approval of the UDAG program in Boston failed to promote integration in the Boston area.[144] Based upon that allegation, the court granted standing to those plaintiffs who were seeking low-cost housing in integrated neighborhoods.[145] The problem in *Hartford*—that cutting off the HUD grants would not help the plaintiffs—was avoided in *NAACP, Boston Chapter* because the plaintiffs proposed as a remedy that the court should affirmatively require HUD to live up to its Fair Housing Act obligations in administering Boston's UDAG program.[146] Had the plaintiffs in *Hartford* raised the same suggestion, standing might have been found for the purpose of obtaining similar, affirmative action. To the extent that plaintiffs also sought to bar Boston's eligibility for grants altogether as the plaintiffs had in Hartford, the court held they did not have standing.[147]

The *Hartford* redressability problem is less troublesome in gentrification cases. While plaintiffs should seek the kind of affirmative relief posited in *NAACP, Boston Chapter*—an order that HUD funding be directed to promoting integration—a challenge to the granting of funds itself and an injunction against funding of gentrification-promoting projects would help potential victims of gentrification. In a case like *Hartford* or *NAACP, Boston Chapter* the defective HUD program merely fails to improve the lot of minority and low-income residents. When a HUD-funded project acts as a catalyst for gentrification, it affirmatively harms poor, minority residents. Judicial suspension of such a project will therefore remedy the plight of those residents.[148] In addition, HUD's failure to promote integration can trigger affirmative equitable remedies.[149] Plaintiffs therefore should not only have standing to claim that affirmative obligations may be imposed on HUD and the involved local agency, but also that the project should be stopped.

In *Munoz-Mendoza v. Pierce*[150] plaintiffs were granted standing although the causal connection between the HUD project and gentrification-induced displacement was tenuous. Residents of Boston's South End challenged UDAG funding of the Copley Plaza project on the grounds that construction of a luxury hotel and shopping center adjacent to their neighborhood would accelerate the South End's ongoing gentrification and reduce housing opportunities for poor nonwhites.[151] UDAG funding was

144. 607 F.2d at 522-23.
145. *Id.* at 524-26.
146. *Id.* at 522-23.
147. *Id.* at 520-22.
148. *See* Avery v. Harris, No. 75-3379 slip op. (N.D. Ill. Jan. 29, 1981).
149. *See infra* text accompanying notes 173-76.
150. 520 F. Supp. 180 (D. Mass. 1981).
151. *Id.* at 181, 184.

probably not crucial to completion of the privately financed Copley Plaza project, and the Plaza may not have had the alleged impact on gentrification of the South End, which had been under way for a long time.[152] The court found that the allegation of a causal link between the UDAG funding and housing segregation in the South End was nonetheless adequate to establish sufficient standing.[153]

The more typical gentrification case, like *Avery,* will involve HUD funding of construction or rehabilitation within the affected neighborhood, at a stage early enough to make a difference. The Illinois District Court in *Avery* had no difficulty in finding that the plaintiffs, nonwhite residents of Chicago's Uptown displaced by renovation, had standing to challenge HUD assistance to renovation and displacement in their neighborhood.

The standing issue, along with the related one of ripeness,[154] will be important in determining at what point neighborhood residents may successfully sue HUD to prevent promotion of gentrification. Ideally, the suit should be initiated early enough so that HUD and the local authorities have time to redirect their efforts to preserving a low-income minority population (for example, by setting income eligibility limits for rehabilitation loans and providing subsidies to make renovated housing affordable for the poor). On the other hand, it should be brought late enough to assure ripeness. Thus, a meaningful remedy would be available, and standing barriers would fall.[155]

2. *Private Cause of Action*

After showing that they have adequate legal standing, the plaintiffs in a gentrification suit must show that HUD and local agencies can be brought to court by private parties for violations of the duty to integrate, that is, that the Fair Housing Act and the HCDA make possible individual enforcement suits. The Fair Housing Act provides explicitly for private enforcement suits.[156] Courts have also found implied private causes of action in Title VI,[157] the HCDA,[158] and even the Administrative Procedure Act.[159] Section

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152. *Id.* at 184.

153. *Id.* at 183-84.

154. For a challenge to an administrative action to be ripe for adjudication, there must be an imminent threat of injury, or actual injury, to the plaintiffs. *See* O'Shea v. Littleton, 414 U.S. 488 (1974). Thus, if it is not yet clear in a neighborhood that middle-class rehabilitation is underway or that the HUD-funded program will not protect the low-income minority population, a legal challenge could be premature.

155. The standing requirement that plaintiff's injury be redressable by a favorable decision has been criticized extensively. *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 523-29 (Brennan, J., dissenting); L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 92-97.

156. 42 U.S.C. § 3612 (1976).

157. 42 U.S.C. § 2000d (1976). *See* Munoz-Mendoza v. Pierce, 520 F. Supp. 180, 182-183 (D. Mass. 1981); Cannon v. University of Chicago, 411 U.S. 677, 715-716 (1976).

158. Montgomery Improvement Ass'n. v. HUD, 645 F.2d 291, 295-97 (5th Cir. 1981).

159. Alschuler v. HUD, 515 F. Supp. 1212, 1228 (N.D. Ill. 1981), *aff'd,* 686 F.2d 472, 477-78 (7th Cir. 1982).

1983[160] civil rights claims may provide another avenue for private suits against promotion of gentrification.[161]

3. Legal Basis for Review

Having established standing and a private cause of action, plaintiffs in a gentrification case must set forth the basis for judicial review. Courts will not seek to correct every agency error. As in any case reviewing an agency decision, relief will be available only if HUD's approval of the challenged program was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[162] As discussed above,[163] to be in accordance with the law, any HUD program which promotes gentrification must implement HUD's affirmative duty to integrate.[164] Inadequate study of a project's segregating impact may make its approval "arbitrary."[165] Just as courts have taken cognizance of the tipping phenomenon, they must take notice of the gentrification phenomenon. Any HUD program that does not, on balance, increase the degree of racial and economic integration in a gentrifying neighborhood beyond the brief period of transition, is a program which actually fails to promote integration, and indeed encourages eventual resegregation to the disadvantage of those displaced by the process. Therefore, such a program violates the Fair Housing Act and the HCDA, and if HUD glosses over the segregating impact of a project by citing the increased integration during the transition, its approval is both arbitrary and not in accordance with law.

4. HUD Program Involvement

Unlike HUD, private developers do not have the affirmative duty to integrate housing. The affirmative duty derives from the HCDA and the Fair Housing Act, section 808(e)(5)[166] which by their terms apply to HUD only. While activities of private parties which promote gentrification could be challenged under the Fair Housing Act,[167] HUD has a special mandate to use its programs to counteract the private market's tendency towards segre-

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160. 42 U.S.C. § 1983 (1976).

161. *See* Avery v. Harris, No. 75-3379 slip op. (N.D. Ill. Jan. 29, 1981).

162. Administrative Procedure Act, 5 U.S.C. § 706(2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); *Alschuler,* 515 F. Supp. 1212, 1229, 686 F.2d 472, 481.

163. *See infra* text accompanying notes 121-24.

164. King v. Harris, 464 F. Supp. 827 (E.D.N.Y. 1979), *aff'd,* 614 F.2d 1288 (2d Cir. 1979), *vacated on other grounds and remanded sub nom.* Faymor Dev., Inc. v. King, 446 U.S. 905 (1980), *aff'd on remand,* 636 F.2d 1202 (2d Cir. 1980).

165. *King,* 464 F. Supp. at 839, 841.

166. 42 U.S.C. § 3608(d)(5) (1976).

167. The Fair Housing Act was the basis for the *Avery* plaintiff's claim against the private developer involved in that case. *See* Avery v. Chicago, 501 F. Supp. 1 (N.D. Ill. 1978).

gation. Thus, for victims of gentrification to invoke the affirmative duty to integrate outlined in this Note, involvement of a HUD-funded program must be shown.[168]

5. Local Government Responsibility

Participation in a HUD-financed program also subjects local governments to the affirmative duty to promote integration. Communities receiving grants under Title I of the HCDA must certify that they are in compliance with Fair Housing Laws and Title VI, and must submit a housing assistance plan which provides for spatial deconcentration of low-income persons, under the HCDA.[169] While local governments are theoretically free to give up community development grants rather than meet the fair housing and deconcentration requirements, most of them can be expected to continue accepting grants, even if it means redirecting a project towards counteracting housing segregation.

B. The Factual Showings Required to Bring a Successful Suit Against Gentrification

The legal requirements for a suit against government-backed gentrification will determine the factual showings to be made. Minority, low-income plaintiffs should seek first to prove that their neighborhood is undergoing gentrification. This could be demonstrated by testimony of realtors and local residents, as well as empiricallly, through the use of census or other data on evolving neighborhood composition. Next, general social science data on gentrification[170] could be offered to show that it creates homogeneous, segregated neighborhoods and reduces housing opportunities for poor and minority residents. Specific data should be introduced to show the limited availability of housing for the poor and minorities in nonsegregated areas within the metropolitan region; this point is important in showing that

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168. Although HUD involvement in promoting gentrification is often clear-cut, *see supra* text accompanying notes 61-69, indirect subsidies to redevelopment may present problems to challenges against HUD projects. In *Young v. Harris,* 599 F.2d 870 (8th Cir. 1979), plaintiffs challenged the use of Community Development Block Grant funds in St. Louis to clear land, relocate tenants, and repair streets, while a private developer built new housing. The court held that the city's projects "could be viewed as separate from" private redevelopment, and that therefore HCDA requirements would not be applied to the housing project. *Id.* at 878. This legal conclusion is stated peremptorily, in a discussion that seems to confuse the HCDA with the Uniform Relocation Act, 42 U.S.C. § 4621-4638 (1976), and which ignores the fact that but for the city efforts, the private development and resulting displacement would not have occurred. Given HUD's affirmative duty, any use of federal funds which substantially assists redevelopment should make HUD responsible for fulfilling its mandate in the affected neighborhood.

169. HCDA, 42 U.S.C.A. § 5304(c) (West Supp. 1978-81), *as amended by* Housing and Community Development Amendments of 1981, § 302(b), Pub. L. No. 97-35, 95 Stat. 384, 385 (1981).

170. *See supra* text accompanying notes 48-55.

gentrification will segregate the nonwhite poor as well as the white affluent. Finally, the plaintiff should show that HUD funds, or locally funded activities included in a housing assistance plan approved by HUD, are furthering gentrification without promoting economic and racial deconcentration (integration). In the easiest case, there would be no provision by HUD and the local authority for subsidized housing in the neighborhood. Even if minimal allowance for low-income housing was made, the program could be challenged if, on balance, segregation would be increased rather than decreased.

C. Remedies within the Court's Power in Gentrification Suits

Fear of administering an affirmative remedy may cause courts to find against plaintiffs on standing, ripeness, or other liability issues. A clear understanding of the remedy sought, and precedent for it, can help lessen judicial hesitance. The stage of neighborhood evolution will to some extent determine the nature of the remedy sought. At a very early stage in gentrification, a simple cutoff of HUD-funded redevelopment could prevent the neighborhood from becoming all white and all middle-class. In the more usual case, however, HUD-funded redevelopment is accompanied by private redevelopment, so that the segregating effects of the HUD project may continue even if HUD funds are cut off, albeit at a slower rate. A suit based on HUD's affirmative duty to avoid segregating neighborhoods should therefore request relief that includes affirmative intervention by HUD to assure that the neighborhood remains integrated.

In the *Avery* case the plaintiffs agreed to a settlement which would have set up a cooperative land bank for present residents and provided substantial HUD subsidized housing for the neighborhood. The settlement, unfortunately, was rejected by Chicago Mayor Jane Byrne.[171] Such a remedy should be fairly simple for a court to decree: the local agency would be required to present to HUD and the court a plan which provides publicly or privately financed housing in the gentrifying neighborhood which would maintain a satisfactory degree of racial and income integration.

There is nothing novel about imposition of affirmative obligations on HUD and local governments as a result of a court's finding that they failed to promote fair housing. In *Hills v. Gautreaux*[172] the Supreme Court approved a district court order that required HUD and the Chicago Housing Authority to provide 700 low-income public housing units in predominantly white areas of Chicago.[173] A subsequent consent decree in the *Gautreaux*

171. National Law Journal, July 13, 1981, at 19.
172. 425 U.S. 284 (1976).
173. *See id.* at 288.

case extended the remedy to the entire Chicago metropolitan region.[174] The decree sets numerical goals for provision of subsidized housing in integrated areas.[175]

A detailed affirmative order was issued against a local government which had violated the Fair Housing Act in *United States v. City of Parma.*[176] Parma's refusal to participate in the section 8 and CDBG programs was held to be racially discriminatory, so the court ordered the city to apply for available federal funds for low-income housing.[177] A number of additional affirmative requirements, including an education program for city officials, were imposed.[178] Affirmative relief, in housing as in school cases, is the rule rather than the exception.[179] There is no reason to deny meaningful relief to the victims of gentrification, if it is demonstrated that HUD undertook programs which did not actively promote housing integration.

VI

CONCLUSION

The passage of the HCDA in 1974 signalled continuing congressional recognition that the problem of providing housing and decent communities for the poor transcends municipal boundaries, and requires federal intervention. Because the attractions of drawing a new middle class into the city are so great for local governments, they cannot be expected to promote and preserve low-income housing in gentrifying areas. Similarly, suburban governments will not voluntarily plan for their regional fair share of low-income housing. The only hope for fair housing is a federal housing integration policy, carried out by HUD and actively enforced by the federal courts. Existing statutes and case law provide powerful weapons to preserve integration in gentrifying neighborhoods with the aid of federal courts.

Thus far, the Reagan Administration's legislative initiatives have not altered HUD's affirmative duty under the HCDA and the Fair Housing Act

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174. Gautreaux v. Landrieu, 523 F. Supp. 665, 674 (N.D. Ill. 1981).

175. *Id.* at 679.

176. 504 F. Supp. 913, 919 (N.D. Ohio 1980), *aff'd,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* ____ U.S. ____, 102 S. Ct. 1982, *reh'g denied,* ____ U.S. ____, 102 S. Ct. 2308 (1982).

177. *Id.,* 661 F.2d at 576.

178. *Id.,* 504 F. Supp. at 918-23.

179. *Id.,* 504 F. Supp. at 923; *see also* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 145 (3d Cir. 1977), *cert. denied sub nom.* City of Philadelphia v. Resident Advisory Bd. of Philadelphia, 435 U.S. 908 (1978), U.S. v. City of Birmingham, 538 F. Supp. 819, 831-32 (E.D. Mich. 1982).

to promote integration.[180] The more radical proposals on the "new federalism" agenda, however, would sabotage the struggle against housing segregation by returning housing decisions to local governments and to the private market. The abandonment of the federal role in housing and community development would be disastrous for the victims of urban decay.

ALAN M. WHITE

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180. The HCDA Amendments of 1981, adopted as part of the 1981 budget package, retain the housing assistance plan deconcentration requirements, and leave the HCDA policy section and the obligation to comply with the Fair Housing Act unchanged. *See supra* notes 102, 106.