

# Minimum Income Requirements Can Be Another Form of Housing Discrimination

by Adam Culbreath

The rental application process is relatively straightforward: the prospective tenant submits an application containing information about household composition and income, along with references; the landlord reviews the information, obtains credit reports on prospective tenants, and selects a small pool of satisfactory applicants; references are checked; and a decision is made. Some landlords, however, abbreviate this process by refusing even to consider otherwise qualified applicants, solely because their income is less than a particular multiple of the rent. Many landlords believe that minimum income requirements and mandated income-to-rent ratios<sup>1</sup> provide an easy way to determine an applicant's default risk. Yet, such income policies often serve, in the end, primarily as an effective way to exclude low-income families.

<sup>1</sup> Unless otherwise specified, this article uses "minimum income requirements" and "income-to-rent ratios" interchangeably. It would seem that most landlords would do likewise, to the extent that both concepts express a minimum income threshold relative to the rent. Some landlords, however, require a minimum income without regard to the ratio of income-to-rent, a decision that can have significant results. See, e.g., *Commission on Human Rights v. Sullivan Associates*, 251 Conn. 924, 742 A.2d 364 (Conn. 1999), discussed later in this article.

The circumstances under which most housing markets operate call into question the effectiveness of minimum income requirements as a screening tool. Nationally, 82% of low-income renter households spend at least 30% of their income on housing; 59% spend over half of their income.<sup>2</sup> If income-to-rent ratios, be they 2:1 or 3:1 or 4:1, are reliable measures of ability to pay rent, why are we not facing a massive rent default crisis? The reason, simply put, is that income-to-rent ratios and minimum income requirements are not valid predictors of risk.

In one of the only detailed examinations of the issue, the Ontario (Canada) Human Rights Commission undertook a study to assess the effect of income criteria on various groups protected from housing discrimination under Ontario's Human Rights Code.<sup>3</sup> The study

<sup>2</sup> Jennifer Daskal, *In Search of Shelter: The Growing Shortage of Affordable Rental Housing*, at 12, Washington, DC: Center on Budget and Policy Priorities (June 1998).

<sup>3</sup> Michael Ornstein, *Access to Rental Accommodation Restricted by Income Criteria: The Effect of Permitting the Use of "Income Information" in Tenant Selection*, Submissions to the Standing Committee on General Government With Respect to Bill 96, Section 36 and 200, Ontario, Canada (June 1997) (on file with the National Center for Youth Law).



used as a benchmark the standard requirement that rental payments should constitute no more than 25% - 30% of an applicant's income. Not surprisingly, under this measure, 100% of Ontario families whose only source of income was public assistance would be excluded as tenants, as would 51% of households headed by women; 51% of female-headed households that contained children; and 59% of households that had children and were headed by non-citizen women.

The study also compared the average income-to-rent ratios of tenants who defaulted and tenants who paid their rent on time each month, and found no statistically significant correlation between a lower income to rent ratio and default.<sup>4</sup> Although many tenants were paying more than 30% of their income on rent, landlords' resulting losses due to default were relatively small. As a percentage of gross revenue, bad debt was less than 1%; court fees and other eviction related costs comprised 0.1%; and rent arrears 0.3%. These numbers, said the study, are normal for most wholesale and retail businesses.

Why, then, do landlords continue to impose minimum income requirements? One reason, in addition to ease and convenience, is probably that this sort of screening mechanism holds a certain intuitive appeal. After all, if rent defaults are due to lack of money, and low-income tenants by definition lack money, landlords should presumably avoid such tenants. However, aside from being contradicted by the research, this reasoning fails at the most basic level to account for the various factors that determine whether a family can make its monthly rent payment. For example, as one observer has argued,

[y]oung families with children ... will invariably have to pay a higher proportion of their income toward rent because they need more bedrooms and they are sometimes reduced to one income. But these households may also have the greatest interest in maintaining the stability of their housing, may tend to choose stable employment over more risky alternatives, and probably make a priority of paying rent every month.<sup>5</sup>

Accordingly, another, more pernicious explanation for minimum income requirements may be at play: discrimination. Whether aimed specifically at low-income families or designed as a pretext for discrimination against families otherwise protected by fair housing laws, minimum income requirements constitute a powerful exclusionary tool. Even if imposed without a discriminatory intent, they disproportionately affect families with children, racial and ethnic minorities, women, and tenants with disabilities.

### State Law

Currently, no state statutes expressly forbid private landlords' use of minimum income requirements, and thus, to challenge these policies, advocates have been forced to make creative use of state civil rights laws.<sup>6</sup> For instance, California's Unruh Act, a state public accommodations law, has been broadly interpreted to cover a wide variety of discriminatory practices, including those deemed "arbi-



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trary."<sup>7</sup> In *Harris v. Capital Growth Investors XIV*,<sup>8</sup> the California Supreme Court considered an Unruh Act challenge to a landlord's requirement that applicants have a monthly income of at least three times the rent. The *Harris* plaintiffs were all female heads of low-income families whose income consisted solely of public assistance benefits, and who were turned away by the minimum income policy, although they could afford the rent. The court, however, rejected their claims, refusing to extend the state statute's prohibition on arbitrary discrimination to so-called "economic discrimination." Discrimination is not arbitrary, wrote the court, if it is simply the result of a business "charg[ing] a stated price for goods or services and demand[ing] payment in advance." Ultimately, the court sanctioned the minimum income requirement since it was based on "the rational economic interest of the landlord to minimize defaults and maintain the solvency of his business establishment...."

The court's analysis, however, reflects a misunderstanding of the opposition to minimum income requirements. A landlord's *interest* in minimizing defaults is rational; it is the method the landlord chooses to pursue that interest that is the problem. If minimum income requirements are motivated by some rational interest, what are the limits? 5:1? 10:1? Also, despite the *Harris* court's ruling to the contrary, minimum income policies do not belong in the "stated price or payment term" rubric. Applicants who object to such policies have no quarrel with the amount of rent demanded; they merely take issue with policies that deny them the opportunity to compete with other applicants for vacant units.

Some state anti-discrimination laws expressly acknowledge the legitimacy of minimum income requirements. For example, Connecticut's fair housing statute, which prohibits discrimination based on "source of income,"<sup>9</sup> contains an exception specifically permitting

<sup>4</sup> Research in other financial and business sectors shows similar results. See *Credit Risk, Credit Scoring and the Performance of Home Mortgages*, Fed. Reserve Bull., at 624 (July 1996) ("after controlling for other factors, the initial ratio of debt payment to income has been found to be, at best, only weakly related to the likelihood of default").

<sup>5</sup> Gary McIlravy, *The Use of Income Criteria in Selecting Prospective Tenants: Is it Necessary to a Residential Landlords' Business?*, Submissions to the Standing Committee on General Government With Respect to Bill 96, Section 36 and 200, Ontario, Canada (June 1997) (on file with the National Center for Youth Law).

<sup>6</sup> Advocates in some states, however, have succeeded in obtaining incremental protections in this arena. For example, California law now prohibits landlords from using income requirements that fail "to account for the aggregate income of persons residing together or proposing to reside together on the same basis as the aggregate income of married persons residing together or proposing to reside together." Ch. 590, 1999 (SB 1098, Burton), amending Cal. Gov. Code § 12955. That same law also requires landlords accepting tenants with government housing subsidies to consider only the portion of rent to be paid by the tenant, when assessing the tenant's ability to qualify financially for a dwelling.

<sup>7</sup> Cal. Civ. Code § 51; see *In re Cox*, 3 Cal.3d 205, 212 (Cal. 1970) (Unruh Act prohibits "all arbitrary discrimination by business establishments").

<sup>8</sup> 278 Cal.Rptr. 614 (Cal. 1991).

<sup>9</sup> Conn. Gen. Stats. '46a-63(3), 46a-64c.

the denial of housing “solely on the basis of insufficient income.” The critical question, of course, is what constitutes “insufficient income.” In *Commission on Human Rights v. Sullivan Associates*,<sup>10</sup> the Connecticut Supreme Court discussed the significance of the exception vis-a-vis a prospective tenant whose source of income included a federal Section 8 housing subsidy. While rejecting a lower court’s determination that landlords are the sole arbiters of whether a tenant’s income is sufficient, the court nonetheless set forth a standard that appears to allow landlords to continue to use income-to-rent ratios as a screening device: “a finder of fact . . . properly may consider criteria that include, but are not limited to, the potential tenant’s income, personal rental obligation, foreseeable utility expenses and foreseeable liability for other than ordinary wear and tear.”

In the context of minimum income requirements, *Sullivan Associates* is notable for how the facts of the case betrayed the irrationality of some landlords’ screening mechanisms. The landlord required a minimum income of \$38,000/year for an apartment renting for \$750. In other words, the landlord insisted that tenants not spend more than 23% of their monthly income on rent. One of aggrieved prospective tenants had a rent subsidy of \$686 and other income of \$902. Although her annual income fell well below the landlord’s minimum threshold, her portion of rent — \$64 — constituted a mere 7% of her income.

### Federal Fair Housing Act

Given the difficulty in seeking recourse through state law, advocates may want to consider using the federal Fair Housing Act (FHA), which outlaws housing discrimination based on race, color, national origin, religion, sex, disability, and “familial status” (presence of children in the household).<sup>11</sup> Also known as Title VIII, the FHA prohibits not only intentional discrimination, but also facially-neutral policies that disproportionately affect protected classes.<sup>12</sup> Since “income” is not a protected category under the FHA, advocates generally must rely on this latter, disparate impact theory when using the FHA to challenge minimum income requirements.<sup>13</sup> Such challenges have, perhaps surprisingly, been relatively successful.

In *Boyd v. Lefrak*,<sup>14</sup> however, the approach got off to an inauspicious start. The landlord in that case operated over 15,000 apartment units in the New York City metropolitan area. Confronted with the landlord’s requirement that applicants have weekly incomes of at least 90% of the monthly rent, a plaintiff class of African-American public assistance recipients brought suit under the FHA. The 90% rule excluded virtually all public assistance recipients, a large

majority of whom were African-American or Puerto Rican, and the plaintiffs claimed that the status of “welfare recipient” was thus the “functional equivalent of race.” The court rejected this argument. Moreover, it held that a disparate impact analysis was “inappropriate in the context of a purely private action asserting a claim of racial discrimination,” and that the FHA required a showing of “demonstrable prejudicial treatment.”

This disparate impact aspect of the court’s ruling has since been repudiated. Indeed, the dissenting opinion in *Boyd*, penned by Judge Mansfield, presciently argued that “where a facially-neutral practice has a serious and substantial de facto discriminatory impact, it prima facie violates a statutory prohibition against racial discrimination unless the alleged violator can show that the practice is necessary for non-racial reasons.” Under the 90% rule, white households would be four times more likely to be eligible for rental units than African-American households and 10 times more likely than Puerto Rican households. The landlord had made no showing that the 90% rule was reasonably necessary to insure payment of rent.

Judge Mansfield’s dissent in *Boyd* was vindicated in another New York case, *Bronson v. Crestwood Lake Section 1 Holding Corp.*,<sup>15</sup> in which the landlord refused to consider applicants whose income was less than three times the rent. As in *Boyd*, the plaintiffs charged that the landlord’s mandated income-to-rent ratio disproportionately and adversely affected African-American and Latino applicants, in violation of the FHA. Unlike *Boyd*, however, the *Bronson* court held that disparate impact was a permissible theory of lia-

<sup>15</sup> 724 F.Supp. 148 (S.D.N.Y. 1989); see also *Robinson v. 12 Lofts Realty*, 610 F.2d 1032 (2d Cir. 1979); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), aff’d per curiam, 109 S.Ct. 276.

<sup>10</sup> 251 Conn. 924, 742 A.2d 364 (Conn. 1999).

<sup>11</sup> The FHA makes it illegal to misrepresent the availability of housing; to “blockbust”; to discriminate in the terms or conditions of sales or rentals; to publish notices indicating discrimination; to threaten or interfere with anyone who is attempting to exercise their rights under the Act; or to otherwise make unavailable or to deny housing to members of protected classes. See 42 U.S.C. “ 3601 et seq.; 24 C.F.R. Part 100.

<sup>12</sup> This doctrine, known as “adverse” or “disparate” impact, provides that even if a housing practice does not intentionally discriminate against a protected class, it violates fair housing law if (1) the plaintiff shows that the practice has a significant disparate impact on members of a protected class, and (2) the landlord fails to justify adequately the need for the practice.

<sup>13</sup> Under some circumstances, landlords may, when pressed, reveal that their minimum income requirements are specifically directed at low-income persons as a definable class; and that “low-income” is really a proxy for a protected class. This may be indicative of intentional discrimination, which would provide another basis — either instead of, or in addition to, disparate impact — for challenging a provider’s minimum income requirement.

Advocates may also want to consider using an equivalent state fair housing statute that, either expressly or through judicial interpretation, permits use of a disparate impact theory of liability. For example, California’s Fair Employment and Housing Act expressly permits disparate impact claims. Cal. Gov. Code § 12955.8(b). Significantly, the statute establishes a stringent test used to evaluate defendants’ rebuttal evidence: the challenged practice will stand only if it is “necessary to the operation of the business and effectively carries out the significant business need.” Moreover, liability is established if there exists any less discriminatory “feasible alternatives” that would accomplish the purpose of the discriminatory practice.

<sup>14</sup> 509 F.2d 1110 (2d Cir. 1975), cert. denied, 423 U.S. 896.



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bility, noting that “the challenged application policies utilized by the defendants do indeed have a substantial disparate impact on minority persons.” With respect to the triple income test, 28% of the non-minority households within the applicant pool qualified for tenancies, versus only 14% of the minority households. As for defendant’s asserted business justifications, the court found little more than “general conclusory assertions and broad references to an apartment management manual . . .,” with no “evidence to show that the challenged policies are reasonably necessary to insure payment of rent or that Crestwood has, in past experience, encountered losses or defaults as a result of accepting . . . tenants who fail to meet the triple income test.”

One court, however, has tried to resurrect *Boyd*. In a Michigan case, *Shanz v. Village Apartments*,<sup>16</sup> the court upheld a landlord’s minimum income screening mechanism as applied to a disabled prospective tenant who would have been paying more than the landlord’s ceiling of 71% of income on rent. In doing so, the court was “guided by the cases of *Boyd v. Lefrak Organization* [citation] and *Williams v. 5300 Columbia Pike Corp.*, 103 F.3d 122 (4th Cir. 1996),” characterizing both decisions as precluding use of the FHA to challenge neutral income criteria, despite their disparate impact on protected classes.

Yet, *Shanz* should be seen as an anomaly. Most significantly, allowing rent to be up to 71% of income is a far cry from the more typical 25% - 40% that most landlords require. Also, the plaintiff had a credit history “riddled with red flags . . .” The plaintiff in *Shanz*, moreover, did not raise a claim of disparate impact, choosing only to bring FHA claims based on intentional discrimination and failure to provide reasonable accommodation of disability. In this respect, the court’s invocation of *Boyd* and *Williams* — both of which involved claims of disparate impact — was misplaced.

More consistent with developing FHA jurisprudence are cases like *Gilligan v. Jamco*<sup>17</sup> and *HUD v. Ross*.<sup>18</sup> In *Gilligan*, which involved a challenge to a “no AFDC” policy, the Ninth Circuit held that, for purposes of a defendant landlord’s motion to dismiss, the plaintiff’s failure to alleged in her complaint that she “had enough money to pay the rent” did not matter. The plaintiff’s financial status was relevant only to the defendant’s affirmative defense of business necessity, not to the plaintiff’s prima facie case of disparate impact. In *Ross*, a HUD administrative law judge ruled that the landlord’s “no AFDC” policy had a substantial disparate impact on Latino households and on households headed by women; the landlord, moreover, could not show a justifiable business necessity and was, accordingly, found liable under the FHA.

<sup>17</sup> 108 F.3d 246 (9th Cir. 1997).

<sup>18</sup> Prentice Hall Fair Housing - Fair Lending Rptr. & 25,075, 25,083 (HUD ALJ 1994).

<sup>16</sup> 998 F.Supp. 784 (E.D. Mich. 1998).

Perhaps the most comprehensive ruling on a challenge to a minimum income requirement occurred in Ontario, Canada. In 1998, that province's Human Rights Commission ruled that landlords may not refuse to rent to a poor family based solely on its low income.<sup>19</sup> The Commission held that the use of income criteria to exclude low-income applicants constitutes "adverse effect or constructive discrimination" under the provisions of the Human Rights Code. "[T]he use of income criteria," wrote the Commission, "is not a valid predictor of default" and, furthermore, resulted in the disproportionate exclusion of groups with characteristics protected by the Code, i.e. sex, age, race, and families with children. While the respondent landlord had the opportunity to demonstrate that the income criteria were reasonable and necessary to avoid undue financial hardship, it was unable to do so. At the time of the decision, at least 100 similar cases were pending before the Commission, according to local advocates. The decision, therefore, should result in a favorable outcome not only for those who had filed complaints with the Commission, but also for countless other low-income families who will benefit prospectively from the decision's precedential value and deterrent effect.

Conventional wisdom, even among some tenant advocates, says that a family's income, at some level, is predictive of its ability to pay rent. At the extremes, this may be true, e.g. where a family would be paying 70% - 90% of its income. However, research shows that the more typical minimum income-to-rent ratios — 3:1 or 4:1 — are not valid predictors of risk of default. Restrictive income policies, moreover, tend to have a disproportionately adverse effect on groups protected by fair housing laws and may even be a subterfuge for intentional discrimination against those same groups. Advocates

<sup>19</sup> *Kearney v. Bramela, Board of Inquiry, Ontario Human Rights Commission (Dec. 22, 1998)* (summary of decision on file with the National Center for Youth Law; full text available at <http://www.web.net/cera/dec22ohrc.htm> (accessed Sept. 24, 1999)).

should not assume the legitimacy of a landlord's restrictive income policies, but rather should seek to document the effect of such policies in particular communities, as well as the weak correlation between income and risk of default. Such documentation can provide the necessary foundation for public education, legislative campaigns, and litigation.

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## Schools Are Promising Avenue for CHIP Outreach

A new report released by Consumers Union, "A Golden Opportunity: Improving Children's Health Through California's Schools," analyzes CHIP/Medicaid outreach efforts across the state of California. Through a variety of successful pilot initiatives in California, schools have become the "number one source of requests for Healthy Families and Medi-Cal [California's CHIP and Medicaid programs] applications." More than 140 districts target children in the School Lunch program, while others provide specific help in filling out applications.

The report recommends that state and local governments 1) increase funding of school efforts to boost enrollment in health insurance programs; 2) hire a health coordinator for each school district to promote health insurance programs and enroll eligible children; 3) create additional pilot programs to test different school-based strategies; and 4) offer schools financial incentives to support outreach efforts.

For copies of the report, please call Consumers Union at (414) 431-6747, or visit their web site at [www.consumersunion.org](http://www.consumersunion.org) and go to the "Health" section.

