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Race, Housing, and the Government

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I. INTRODUCTION

The problem of race and housing is complicated and limited by several factors not present in other racially controversial areas. First, the limited supply of decent housing forces the exercise of some selection in allocating existing housing resources. Second, housing is relatively fixed in nature and has a long usable life. Third, housing constitutes part of a neighborhood or a community—a total fabric of living. Finally, because of the individual nature of most transactions of buying or renting—except when a suburban tract or a new apartment house is concerned—enforcing the laws prohibiting racial discrimination in housing is very difficult. Analyzing each of these factors in terms of its effect on racial integration leads to the unfortunate conclusion that housing has been profoundly resistant to any significant and meaningful change in racial composition.

First, because of the growing number of poor, and particularly black, people who live in substandard or slum housing,[1] together with the number of old housing units destroyed each year by urban renewal, highway construction, and other public and private improvements, and the very limited number of new units of housing built for low-income families every year,[2] the demand for the limited supply of decent housing is increasing daily. The need, therefore, to select who will receive the decent apartment is always present. If the need of a black family is more pressing, should a white family be accommodated to promote integration, or should the black family receive the apartment even if this choice means a totally segregated building?[3]

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1. The word black will be used throughout this Article to refer to all people considered nonwhite by the white majority, including Chinese, Mexican Americans, and Puerto Ricans. Although most cases mentioned in this Article involve Negroes, a few involve other nonwhite minorities.

2. George and Eunice Grier state that only 300,000 units of public housing were built between 1950 and 1960. G. GRIER & E. GRIER, EQUALITY AND BEYOND 20 (1966).

3. Statistics of the New York City Housing Authority for its Lower East Side projects in 1972 indicated that, while only half the families that moved out were black, 85% of the families moving in were black. In the 2 decades since original occupancy, therefore, the ratio of black to white changed from 32/68 to 68/32. Exhibits filed in Otero v. New York City Housing Authority,

Further, when slum areas are cleared to build new housing, the people dislocated most often are poor and black. Most new housing, however, is built for middle- and upper-income—therefore white—families. The small percentage built for low-income families is therefore in strong demand by former site residents. Satisfying this demand, however, may result in substantially black buildings.[4]

The decision to achieve "integration" rather than satisfying this demand means many displaced families will be forced into other slum housing, since other factors affecting housing for blacks will prevent most dislocated families from finding good housing in the private sector. Because the black demand for decent housing so far exceeds the supply, the various formulas governing admission to public or publicly assisted housing can be used to serve a racial function—either to let blacks in or to keep them out.

Second, the relatively fixed nature of housing, together with its long life, means that once housing has been built for a specific income level, it generally will remain at that level or "trickle down" to a lower one. Housing is seldom upgraded beyond the economic level for which it was built.[5] Therefore, housing for low-income families built when "separate but equal" was a permissible racial standard remains, long after the standard has changed. If the housing was built in large tracts, this heavy concentration of low-income families tends to create black ghettos because the poor in urban areas usually are black and because the legal restrictions placed on the maximum income of residents drive out white families, who tend to be more upwardly mobile in the job market. These factors thus prevent both racial and economic integration.[6]

Third, the neighborhood or community element of housing, reinforced by the long useful life of physical structures and the relative economic stability and homogeneity of neighborhood residents, oper-

344 F. Supp. 737 (S.D.N.Y. 1972) (preliminary injunction), Civil No. 72-1733 (S.D.N.Y., Feb. 8, 1973) (summary judgment).

4. The Seward Park Extension Urban Renewal area displaced some 1,800 families, 1,400 of them poor. The new housing planned includes 360 low-income apartments, 200 apartments for the elderly, and 1,200 middle-income apartments. Only 20% of the apartments in the middle-income buildings are to be set aside for low-income families. Otero v. New York City Housing Authority, Civil No. 72-1733 (S.D.N.Y., Feb. 8, 1973).

5. Sometimes housing built for middle-income families has deteriorated and become a slum. A later revival of interest in the area, however, may cause an influx of money that will restore the buildings to their original quality. The brownstone revival on the West Side of Manhattan is a good example of this phenomenon.

6. The federal government and most states have maximum income ceilings for families living in public housing and other government subsidized housing. On the other hand, given the limited amount of low-income housing available, allowing a family that could afford middle-income housing to remain in low-income housing denies a poorer family a decent place to live.

ates in two ways to interfere with racial integration. White, middle-class neighborhoods often tend to resist bitterly attempts to build low-income public housing in the neighborhood.[7] On the other hand, because of a developing awareness of "black nationalism," a growing pride in ethnicity, and a desire for and an understanding of political power, the minority community may strongly resist being dispersed, perceiving dispersal as an attempt to destroy the group's potential political base.

In 1960, for example, blacks were more than 50 percent of the population of central Washington, D.C., but constituted only a quarter of the total metropolitan area's population.[8] If they were dispersed throughout the metropolitan area instead of concentrated in the central city, the possibility of gaining majority political control in any community would evaporate, absent a system of proportionate representation. Blacks may therefore fight to have new housing built in their neighborhoods, even though this will result in continuation of the black ghettos.

Fourth, the individual nature of housing transactions inhibits the attempt to enforce integration—if integration is the desired goal. Assuming the goal is integration, the history of public and FHA subsidized housing suggests that it may be very slow in realization. Mistakes and decisions made in the past influence the present and future racial composition of existing housing. Moreover, redeveloping slum communities may merely perpetuate existing ghettos, albeit with better housing. The forces opposed to integration can throw obstacle after obstacle into the path of integration and force long and costly lawsuits for each small advance. The very legitimate needs and desires of people both to have a decent place to live and to have some control over the fabric and quality of the community where they live may work against integration. One very serious question raised—and not yet answered or really discussed—is whether the duty to integrate should override all other needs and desires relating to housing.[9]

7. Recently Forest Hills, a predominantly white, middle-class neighborhood in New York City, fought in the courts, the legislature, and in the streets to prevent construction of a public housing project in the neighborhood. As a result of political pressure, the Housing Authority reduced the number of units to be built and allocated a large number to elderly white families.

8. G. GRIER & E. GRIER, *supra* note 2, at 7.

9. In Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972), *rev'g* 332 F. Supp. 366 (N.D. Ill. 1971), the court indicated that the lower court's order preventing the distribution of all Model Cities program funds until the Chicago Housing Authority complied with the order by building public housing in white neighborhoods was too drastic a remedy, given the tremendous needs of the community. The dissent, however, argued that the order should be affirmed pursuant to an explicit policy judgment of not enriching the ghetto.

II. Development of Government-Assisted Housing and Its Effects on Racial Discrimination

Integration in housing did not become a controversial issue until the mid-1930's, when the federal government first entered the area in a large-scale way through the National Housing Act of 1934[10] and the Housing Act of 1937.[11] Prior to this governmental involvement in the housing market, the integration issue was submerged by the long-standing judicial holdings that a private owner could discriminate for any reason, including race. Not until 1948, in *Shelley v. Kraemer*,[12] did the Supreme Court speak out against racial discrimination in housing by holding that state courts are prohibited by the fourteenth amendment from enforcing racially restrictive covenants in deeds. The Court had earlier outlawed racial zoning.[13] However, since all housing before 1934 was built, financed, rented, and sold by private parties, blacks could move into white neighborhoods only when the private owner agreed to rent or sell.[14] In addition, even when a private owner was willing to sell to a black, banks and other lending institutions frequently refused to provide the necessary financing. Brokers also contributed to the problem by refusing to show blacks homes in white neighborhoods.[15]

Once the federal government entered the housing market, both as insurer and as builder, the problem of race became important. When the first national housing act was passed,[16] the *Plessy v. Ferguson*[17] doctrine of "separate but equal" was the law of the land. Accordingly, early public housing developments could be—and were—therefore built on a segregated basis.

A. Public Housing

In the beginning, public housing was seen not as a part of slum

10. Act of June 27, 1934, ch. 847, 48 Stat. 1246 (codified in scattered sections of 12, 41, 49 U.S.C.).

11. 12 U.S.C. § 1703 (1970) (originally enacted as Act of April 22, 1937, ch. 121, § 2, 50 Stat. 70).

12. 334 U.S. 1 (1948). *See* Hurd v. Hodge, 334 U.S. 24 (1948) (applying the same prohibition to federal courts). In Barrows v. Jackson, 346 U.S. 249 (1953), the Court held that the *Shelley* rule also prohibits suits for damages based on breach of restrictive covenants.

13. *See* Buchanan v. Warley, 245 U.S. 60 (1917).

14. *See* Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515 (1959).

15. Discriminatory practices of banks and brokers continue to be a barrier, particularly to middle-income blacks, even though the Fair Housing Act of 1968 expressly prohibits them. 42 U.S.C. §§ 3601-19, 3631 (1970).

16. *See* notes 10-11 *supra*.

17. 163 U.S. 537 (1896) (state law requiring the races to use separate but equal passenger facilities aboard railroads does not violate thirteenth or fourteenth amendments of the United States Constitution).

clearance, but as a means of providing decent housing for working families whose incomes had been seriously reduced by the Depression. In most communities this meant white families. Large-scale government housing projects during and after the Second World War were initiated to provide housing near new defense industry sites and military bases. Again, this meant that the housing primarily served white working families.[18]

Only after the Second World War and the internal migration of blacks from the rural South to metropolitan areas in both the North and South was public housing first seen as black housing.[19] This change also coincided with the beginning of a massive infusion of federal monies into housing through urban renewal. Urban renewal was primarily slum clearance—which, after the migration of blacks into the central cities, meant black removal. Public housing was viewed as a way of relocating families displaced by urban renewal. Public housing therefore frequently became black housing. One side consequence of this development was a growing hostility or indifference on the part of Congress and local communities to public housing programs.

In 1954, the Supreme Court reversed the "separate but equal" doctrine in *Brown v. Board of Education*.[20] Earlier, several cases had held that intentional segregation by a public housing authority was unconstitutional; these cases, however, involved explicit denials of admission to public housing because of race[21] and did not lead to significant change in housing policies, since the tenantry of public housing usually follows the existing racial pattern of the community or neighborhood in which the housing is located. By deciding where to build a project, the resulting racial composition could therefore be determined fairly well without specific rules barring whites or blacks. In addition, preferences often were—and still are—established for people living within a given radius of the project. This policy was particularly important in excluding blacks from projects built in basically white neighbor-

18. For a discussion of the development of public housing see L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING (1968).

19. During the 1950-1960 period, the nation's 15 largest metropolitan areas registered larger increases in black than white population, and the black percentage of Washington, Baltimore, New Orleans, Philadelphia, Detroit, Cleveland, and St. Louis rose to between 25 and 50% of the total population. G. GRIER & E. GRIER, *supra* note 2, at 6-7.

20. 347 U.S. 483 (1954) (state laws requiring segregation of children in public schools solely on the basis of race violate the equal protection clause of the fourteenth amendment).

21. Vann v. Metropolitan Housing Authority, 113 F. Supp. 210 (N.D. Ohio 1953); Banks v. Housing Authority, 120 Cal. App. 2d 1, 260 P.2d 668 (Ct. App. 1953), *cert. denied*, 347 U.S. 974 (1954). Since *Brown*, all state appellate and federal courts have denied the existence of state power to segregate. *See* Note, *supra* note 14, at 518.

hoods. Whites normally refuse to move voluntarily into black neighborhoods.

When it became apparent that a policy statement prohibiting racial discrimination in public housing would not result in integrated housing, more affirmative steps were taken by the Executive and then by Congress. In 1962, President Kennedy issued Executive Order 11063[22] banning racial discrimination in all federal programs. Two years later, the Executive Order was superseded in large part by enactment of Title VI of the Civil Rights Act of 1964.[23]

Pursuant to the Executive Order of 1962 and the Housing Act of 1964,[24] the Public Housing Administration (PHA) required local housing authorities to follow one of two alternate plans for ensuring integration. The "Free Choice" plan, which gives each applicant his choice of any project, theoretically results in many blacks choosing projects in white neighborhoods and many whites choosing projects in black neighborhoods. Unfortunately, the latter is rarely the case. The second, or "First Come, First Served" plan, which assigns applicants to the first available apartment, should by the law of averages produce integration; many whites, however, simply will not accept an apartment in a project in a black neighborhood. While these plans resulted in a certain amount of token integration in projects in white or mixed neighborhoods,[25] projects built in black neighborhoods—the majority of all projects—remained black.[26]

Discrimination in housing was addressed specifically by Congress with the enactment of the Fair Housing Act of 1968,[27] which prohibits racial discrimination in the sale or rental of residential housing and requires the Secretary of the Department of Housing and Urban Development (HUD) to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." Regulations implementing the Executive Order, the Civil Rights Act of 1964, and the Fair Housing Act of 1968

22. 3 C.F.R. § 652 (1959-63 comp.). *See also* 42 U.S.C. § 1982 (1970).

23. 42 U.S.C. § 2000(d) (1970) (prohibiting discrimination in any public benefit program).

24. Act of Sept. 2, 1964, Pub. L. No. 88-560, 78 Stat. 769 (codified in scattered sections of 12, 15, 38, 42 U.S.C.).

25. HUD defined integration, at least for purposes of its statistics, as one or more blacks in a white building.

26. Note, *Public Housing and Integration: A Neglected Opportunity*, 6 COLUM. J.L. & SOC. PROB. 253, 256 (1970).

27. 42 U.S.C. §§ 3601-19, 3631 (1970).

28. *Id.* § 3608(d)(5).

lay the burden of enforcement explicitly upon HUD[29] by requiring extensive reports from local agencies and compliance investigations. Moreover, the regulations prohibit discrimination in both tenant and site selection.

Site selection is now the most crucial factor in determining whether public housing will be segregated and whether poor blacks will have an opportunity to live in white neighborhoods. Among the numerous suits challenging various aspects of the site selection process, some have involved attempts to prevent a local housing authority from building new housing on sites within existing black communities. The courts have held that building exclusively or almost entirely in black neighborhoods constitutes discrimination and have required planners to build in white or mixed neighborhoods at the same time, or before, more projects are built in black neighborhoods.[30]

In *Gautreaux v. Chicago Housing Authority*[31] and its companion case, *Gautreaux v. Romney*,[32] the Seventh Circuit found that the Chicago Housing Authority (CHA) had intentionally maintained a system of public housing that discriminated racially in site selection. Almost all family units operated by CHA were in neighborhoods between 50 to 100 percent black, a situation that resulted in limiting interest in public housing to blacks, who comprised 90 percent of the waiting list. The court prohibited CHA from constructing any units in the Limited Public Housing Area (census tracts with 30 percent or more nonwhite population) until 700 units were built in a General Public Housing Area (the

29. HUD replaced PHA as the administration of public housing in 1965. *See* 42 U.S.C. § 3534 (1970).

30. In Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969), the court granted a preliminary injunction prohibiting the Bogalusa Housing Authority from building public housing in black neighborhoods until alternate locations in white neighborhoods were shown to be unavailable, and in Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), the court prohibited the Cuyahoga Metropolitan Housing Authority (Cleveland, Ohio) from building any public housing in black neighborhoods of the city.

In Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970), HUD was ordered to assess the racial concentration effects of rent supplement payments upon an apartment project by adopting "some adequate institutional means" to marshall all facts relevant to determining racial impact. In response to the judgment order in *Shannon* and other cases, HUD has issued comprehensive new regulations governing site selection. 37 Fed. Reg. 203-09 (1972). HUD has tried to resolve the conflict between residential segregation and housing need. For a comprehensive, up-to-date discussion of the new regulations and the discrimination problem see Maxwell, *HUD's Project Selection Criteria—A Cure for "Impermissible Color Blindness,"* 48 NOTRE DAME LAW. 92 (1972) (the author is HUD's General Counsel).

31. 296 F. Supp. 907 (N.D. Ill.), 304 F. Supp. 736 (N.D. Ill. 1969), *supplemental order aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

32. 448 F.2d 731 (7th Cir.), 332 F. Supp. 366 (N.D. Ill. 1971) (judgment order on remand), *rev'd*, 457 F.2d 124 (7th Cir. 1972).

remainder of the city). Seventy-five percent of all units built thereafter were to be placed in the General Public Housing Area.

Other cases have been brought to force authorities to grant necessary building or other permits to allow low-income projects to be built in predominantly white areas.[33] It should be noted that when local housing authorities have been able to show a plan to build in both white and black areas, the courts have held that building projects in black neighborhoods is not discriminatory.[34]

Neither the cases, the statutes, nor the regulations, however, have furnished any guidelines on the proper racial composition of projects or individual buildings. Therefore, while the site selection cases imply that integration will be promoted by placing a public housing project in a mixed or white neighborhood, none mentions the constitutional questions stemming from the project's being all or mostly black. Earlier studies indicated that the racial composition of a project tends to follow that of the neighborhood in which it is located. Since a large percentage of families eligible or on waiting lists is black, new projects may become black ghettos within white communities.[35]

Otero v. New York City Housing Authority,[36] an action brought by tenants—most of whom were black—dislocated by an Urban Renewal project to force the Housing Authority to honor their placement priority to an apartment built in the Renewal area, directly raised the

33. *See, e.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (private project); Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971) (zoning changes); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

34. In Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), the court dismissed counts of the complaint against the Atlanta Housing Authority when the Authority showed that over 93% of all proposed units were for areas having a population between 80 and 90% white. In Croskey Street Concerned Citizens v. Romney, 459 F.2d 109 (3d Cir. 1972), *aff'g* 335 F. Supp. 1251 (E.D. Pa. 1971), the court upheld construction of 313 low-rent units in a black area when 360 units scheduled for a white area were part of the same package. *See* Maxwell, note 30 *supra*.

35. In *Gautreaux*, the order limited both the maximum unit size and maximum floor utilization of future projects. Moreover, projects may not constitute more than 15% of the total apartments and single-family residences in any census tract. "These provisions, limiting the size and concentration of future projects, are apparently designed to assure stable integration of new housing into the larger white community." Note, *Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority*, 79 YALE L.J. 712, 720 (1970). The idea that the projects will be almost all black is implicit. It had not been disputed at trial that aldermen to whom proposed sites were submitted for preclearance under the particular system used in Chicago vetoed sites in white areas because the 90% Negro waiting list and occupancy rate would create a concentrated black population in the white areas. 436 F.2d at 307-08.

36. 344 F. Supp. 737 (S.D.N.Y. 1972) (preliminary injunction), Civil No. 72-1733 (S.D.N.Y., Feb. 8, 1973) (summary judgment for plaintiffs). *See* section III C *infra*.

issue of the degree of integration required in a public housing building. The project in question was immediately surrounded by white middle-class buildings in turn surrounded by a larger mixed, but predominantly black slum. The Authority refused to let most former site tenants move back because admitting them would make the project over 80 percent nonwhite, a situation that, according to the Authority, would violate its affirmative duty to integrate. The former site tenants contended that their right to return took precedence over the affirmative duty to integrate, and further, even if the duty to integrate should predominate, that a building 80 percent nonwhite is integrated. The former tenants also argued that even if the building is totally black, its location in a white community meets the requirement of the affirmative duty to integrate. The district court granted the former tenants' motion for summary judgment.[37]

Although *Otero* raises several problems in defining "integration," the law is clear that public housing authorities have an affirmative duty to "integrate," both in admitting tenants into public housing facilities and in selecting sites in areas other than black neighborhoods.

B. Federally Assisted Housing

The National Housing Act of 1934 established a system of mortgage insurance for private owners administered by the Federal Housing Administration (FHA). The mortgage guarantees are available to individual home owners and builder-developers of multifamily projects.[38] Based on the assumption that economic stability requires racially and economically homogeneous neighborhoods, the FHA initially adopted policies that effectively blocked black entry into white neighborhoods. Appraisers were told that "if a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes."[39] The FHA deemed restrictive covenants the best protection against eventual neighborhood invasions by "incompatible groups." Such covenants were recommended for "all land in the immediate environment of the subject location."[40]

By adopting racially restrictive covenants and their underlying ideology, the FHA helped to create a movement that was to make white suburban areas essentially unavailable to minorities. Thus black fami-

37. Civil No. 72-1733 (S.D.N.Y., Feb. 8, 1973).

38. National Housing Act, 12 U.S.C. § 1701 *et seq.* (1970). See Executive Order No. 7280, (Jan. 28, 1936).

39. FEDERAL HOUSING ADMINISTRATION, UNDERWRITING MANUAL §§ 937, 980 (1938).

40. *Id.*

lies searching for better housing were forced to seek out existing black communities—usually in the central city—rather than moving into the suburbs or the central city white communities since most needed FHA or VA mortgages to buy a house. As a result, communities tended to retain their existing segregated racial composition, and the natural integration that might have occurred because of increasing black economic entry into the middle class failed to materialize.

In the last two and a half decades, however, the FHA's original bluntly segregationist policies have given way, in the face of Supreme Court decisions and federal legislation that culminated in the Fair Housing Act of 1968 and its implementing regulations,[41] to a policy of strong support for open housing.[42] The extent of FHA[43] enforcement of statutes and regulations against discrimination, however, is questionable, for the FHA merely insures mortgages made by banks and other financial organizations and can therefore hide behind discriminatory policies of the primary lending institutions. Analyzing enforcement of FHA policies and guidelines is complicated further by the individual nature of mortgage requests: refusals may be predicated ostensibly upon the applicant's job, salary, other financial resources, credit standing, etc. When an applicant seeks mortgage money to purchase an older house, the house itself is deemed unique. Because of these and other factors, pointing to racial discrimination in given cases becomes very difficult. When developers advertise that FHA financing is available for a large tract of homes, however, at least the condition of the house is eliminated as an obstacle to showing discrimination. Patterns of racial discrimination are also more discernible.

Although the FHA had the power under Executive Order 11063 to invoke sanctions against builders practicing racial discrimination, it never exercised this power prior to 1968. Reasoning that imposing sanctions would merely turn builders to conventional market financing, the FHA saw the exercise of its powers as inconsistent with aiding the home-building industry—its ultimate constituency—and maintaining the FHA financing market share—its primary goal.[44]

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41. 24 C.F.R. § 200.300 *et seq.* (1972).

42. For detailed treatment of the development of FHA programs and their effects see G. GRIER & E. GRIER, *supra* note 2; D. MCENTIRE, RESIDENCE AND RACE (1960); Hill, *Demographic Change and Racial Ghettos: The Crisis of American Cities*, 44 J. URBAN L. 231 (1967). For case studies of difficulties encountered in the development of interracial housing see G. GRIER & E. GRIER, PRIVATELY DEVELOPED INTERRACIAL HOUSING (1960).

43. FHA became a part of the Housing and Urban Development Department (HUD) in 1965. Act of Sept. 9, 1965, Pub. L. No. 89-174, § 5(a), 79 Stat. 669.

44. Schwelb, *From Illusion to Reality—Relief in Civil Rights Cases*, 48 NOTRE DAME LAW. 49, 68-75 (1972).

Passage of the Fair Housing Act of 1968[45] has not substantially changed the situation. Sponsors of federally assisted projects are now required to certify that they will not discriminate for racial reasons, but the FHA has not taken direct action to enforce the no-discrimination rule. Despite elaborate provisions and safeguards in the Fair Housing Act, therefore, very little real integration in federally assisted housing has occurred by reason of governmental pressure; willing and committed private owners account for most improvements in racial balance.

As has been indicated, however, even dedicated enforcement would not have been totally effective, for few nonwhite families have been able to meet government-imposed credit standards at new private housing price levels.[46] The Housing and Urban Development Act of 1968, however, has attempted to meet this problem by liberalizing the standards for obtaining FHA backing and by lifting eligibility restrictions on insuring housing in declining neighborhoods.[47]

Legislation has also been enacted to encourage private development of low-income, multifamily housing. The section 221(d)(3) program, begun in 1961, authorizes three percent loans to limited-profit and nonprofit developers of housing for the poor.[48] The section 236 program, enacted in 1968, lowers rentals to a level consonant with construction of the project under a one percent mortgage.[49] Although units built under these programs fall under the positive commitment to integration initially established by the 1962 Executive Order, because of higher construction costs most section 221(d)(3) and 236 projects actually serve moderate-income families, with 20 to 30 percent of the apartments set aside for low-income families, under additional separate subsidies.[50] Accordingly, integration in these buildings is often a mixture of the black poor with middle-income whites.

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45. The Fair Housing Act of 1968 made discrimination by institutions financing housing illegal. 42 U.S.C. § 3605 (1970). Discrimination in the provision of brokerage services was also prohibited. 42 U.S.C. § 3606 (1970). While the law prohibits discrimination by large-scale sellers or renters of housing, single-family home owners and renters of 3 or fewer apartments are exempted from coverage. 42 U.S.C. §§ 3603(b), 3604 (1970). In 1968, the Supreme Court ruled that the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970), outlawed all discrimination in the sale or rental of property, including purely private discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (refusal to approve assignment of membership share in a park, which was integral part of a lease, on racially discriminatory grounds held violation of 42 U.S.C. § 1982).

46. G. GRIER & E. GRIER, *supra* note 2, at 64-65.

47. 12 U.S.C. §§ 1715z-2 to -3 (1970).

48. 12 U.S.C. § 1715*l* (1970).

49. 12 U.S.C. § 1715z-1(c) (1970).

50. *See* 42 U.S.C. § 1431b (1970).

C. Zoning

Although the Supreme Court ruled in 1917 that racially motivated discriminatory zoning is unconstitutional,[51] zoning—a generally valid exercise of the state police power[52]—remains one of the most important factors inhibiting the growth of integrated housing. As federal and sometimes state funding became available to build new housing for low-income—thus predominantly black—families,[53] communities enacted zoning regulations to make it virtually impossible to build low-income housing.[54]

Zoning regulations normally attempt to keep a community white by limiting developments to middle- and luxury-class housing. The reasons put forward to justify these restrictions include the needs to preserve the tax base, to prevent the schools from becoming over-crowded, to avoid overburdening of other community facilities, and to preserve the essential character of the particular community, *i.e.* the status quo for the people who are already there.

Zoning regulations vary from single-family residence and minimum acreage requirements to complex master plans that provide detailed regulation of the pace of development and specify particular areas where residences, factories, or multifamily projects may be built. Minimum acreage and single-family residence requirements keep out all apartments, regardless of income levels. Minimum room size requirements, on the other hand, exclude lower income groups by making houses or apartments too expensive to rent and too costly for FHA financing criteria, particularly in the 221(d)(3) and 236 programs, which are aimed at low- and moderate-income housing.[55]

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51. Buchanan v. Warley, 245 U.S. 60 (1917) (city ordinance held violative of property owner's fourteenth amendment right to dispose of his property to any constitutionally qualified purchaser).

52. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The standard of proof required in *Euclid*, the first Supreme Court decision on the validity of zoning under the equal protection and due process clauses of the fourteenth amendment, has unfortunately proven a continuing hindrance to subsequent attempts to invalidate zoning regulations as unreasonable exercises of the states' police powers.

53. 12 U.S.C. §§ 1715*l*(d)(3), z, z-1 (1970).

54. For example, 90% of the vacant land in the New York Metropolitan Area is zoned for single-family residences, and 2/3 of this land requires lot sizes of 1/2 acre or more. Forty percent of the land within mass transit commuting distance of New York City is zoned for 4-or-more-acre lots. In Connecticut, 50% of the vacant residential land in the entire state is zoned for one- or 2-acre lots. Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 22-23 (1971). For a general discussion of exclusionary zoning tactics see Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972).

55. The court in Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971), for example, held floor space and lot size limitations unconstitutional. The

Complex master plans may delay low-income housing for long periods, if the locality's plans call for long-range capital improvements before additional housing may be constructed. For example, the master plan of the town of Ramapo in New York State provides for orderly development by phasing residential development to the town's ability to provide sewers, parks and schools, roads, firehouses and drainage facilities. The plan was adopted to prevent urban sprawl and to eliminate premature subdivisions. An eighteen-year period was allowed for the building of necessary improvements. When the plan was challenged as unreasonably exclusionary in *Golden v. Planning Board*,[56] the New York Court of Appeals upheld the law. Although the majority recognized the pressing need for housing, its decision accorded greater weight to the need for orderly growth. Judge Breitel dissented strongly, arguing that housing needs are so great that requiring construction to await completion of the town's plan for capital improvements was unreasonable.

Recently, however, other courts have responded to the nation's housing shortage by striking down exclusionary zoning laws. In *National Land & Investment Co. v. Easttown Board of Adjustment*,[57] for example, the Supreme Court of Pennsylvania struck down a four-acre lot limitation, holding that a zoning regulation may not be used to prevent people from satisfying their need for a decent place to live, despite the future burdens upon public services and facilities that would necessarily be imposed.[58] The same court has subsequently relied on *National Land* in invalidating two- and three-acre requirements[59] and, more importantly, in abolishing a zoning scheme that prevented the building of apartments.[60]

These decisions do not necessarily presage universal judicial support for the right of poor people to overcome exclusionary zoning, however, because the Pennsylvania court expressly stated that a community can adopt a plan for its orderly growth provided that a valid basis exists for the guidelines and restrictions made in the plan.[61] Moreover, although the *Golden* court previously had struck down a simple

zoning requirements had made about 8,000 acres unavailable for low- or moderate-income housing developments.

56. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

57. 419 Pa. 504, 215 A.2d 597 (1965).

58. *Id.* at 528, 215 A.2d at 612.

59. *In re* Concord Township, 439 Pa. 466, 268 A.2d 765 (1970).

60. *In re* Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

61. *In re* Concord Township, 439 Pa. 466, 475, 268 A.2d 765, 769 (1970) (citing *In re* Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968) (upholding a plan)).

zoning regulation prohibiting multiple dewellings.[62] When presented with a master plan allowing growth, but in an "orderly" fashion, however—thus effectively excluding low- and moderate-income housing for many years—the court upheld the regulations.[63]

In this context, judicial opinions in Michigan and New Jersey are especially significant. The Michigan Court of Appeals, in *Bristow v. City of Woodhaven*,[64] invalidated zoning that limited use of land to single-family residences and prohibited trailer parks. Recognizing the traditional test presuming the validity of zoning ordinances, the court nevertheless held that certain land uses in Michigan had been placed in a kind of "preferred or favored status,"[65] and that, when such a status is involved, the burden of proving the reasonableness of the zoning ordinance shifts to the municipality.[66] Moreover, the court said that mobile homes, as a housing resource for low-income people, enjoy this favored status. Since the City's justifications for its ordinance were insufficient, the zoning was invalidated. Like the Pennsylvania court in *National Land*, the Michigan court stated that people have a right to be able to obtain decent housing at a price they can afford and that zoning whose primary purpose is to exclude a certain group of people is invalid.[67] Michigan's "favored status" has since been extended to multiple-unit dwellings.[68]

These decisions did not involve comprehensive master plans, however, and the court in *Bristow* intimated that a well-reasoned, flexible plan might enable municipalities to meet the burden of proving that zoning excluding favored status housing was reasonable.[69] In *Kropf v. City of Sterling Heights*,[70] however, even a master plan did not meet the municipality's burden because the court found no *specific* reason to prohibit multiple dwellings in the *particular* loeation at issue.

In *Cohen v. Charter Township of Canton*,[71] on the other hand, the court upheld the prohibition of a particular mobile home park because the municipality had not only adopted a comprehensive master plan, but

62. *See* Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969).

63. Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

64. 35 Mich. App. 205, 192 N.W.2d 322 (1971).

65. *Id.* at 210, 192 N.W.2d at 324.

66. For a general discussion see Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971).

67. Bristow v. City of Woodhaven, 35 Mich. App. 205, 217, 192 N.W.2d 322, 327-28 (1971).

68. Simmons v. City of Royal Oak, 38 Mich. App. 496, 196 N.W.2d 811 (1972).

69. 35 Mich. App. at 219-20, 192 N.W.2d at 329.

70. 41 Mich. App. 21, 199 N.W.2d 567 (1972).

71. 38 Mich. App. 680, 197 N.W.2d 101 (1972).

had provided three mobile home areas in the town and in fact had the largest number of mobile home sites of any community in southeastern Michigan.

Lower courts in New Jersey[72] and Illinois[73] have also recognized housing needs and invalidated local exclusionary zoning ordinances. *Southern Burl County NAACP v. Township of Mount Laurel*,[74] a New Jersey case that invalidated a zoning regulation—specifically because, by prohibiting low-income, multifamily housing, it effectively prevented slum residents living in the township from relocating into decent housing—is particularly important. The regulation in question used a combination of limitations on the number of bedrooms and a minimum apartment room size. Most significantly, the court ordered the township to ascertain the number of low- and moderate-income units needed to meet anticipated township needs and then to adopt a plan for satisfying these needs.

Because of the traditional judicial reluctance to invalidate zoning ordinances on due process grounds, a number of commentators have suggested applying equal protection principles.[75] Equal protection principles lay at the heart of the *Mt. Laurel* decision, but the effectiveness of this approach in other jurisdictions remains open to question.[76]

Even when courts are receptive to doctrines that annul exclusionary zoning practices, however, the task of bringing suit and proving an invidious and improper basis for each municipality's zoning regulation is enormous; moreover, individual cases may consume years of preparation.

If the central city black ghettos are to be dispersed and blacks are

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72. Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (N.J. Super. Ct. 1971) (lot size and floor space limitations held unconstitutional).

73. Lakeland Bluff, Inc. v. County of Will, 114 Ill. App. 2d 267, 252 N.E.2d 765 (1969) (exclusion of mobile homes unconstitutional; shortage of low-income housing an "element" of decision).

74. 119 N.J. Super. 164, 290 A.2d 465 (Super. Ct. 1972).

75. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 782-85 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1649-50 (1971); Note, *Constitutional Law—Equal Protection—Zoning—Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339, 342 (1970); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896, 897 (1970).

76. In James v. Valtierra, 402 U.S. 137 (1971), the Supreme Court sustained a provision of the California constitution requiring community approval before low-rent projects could be constructed. Justices Marshall, Brennan, and Blackmun argued in their dissent that poor people were being deprived of equal protection. For the zoning implications of *Valtierra* see Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971). *See also* Comment, *California's Low-Income Housing Referendum: Equal Protection and the Problem of Economic Discrimination*, 8 COLUM. L.J. & SOC. PROB. 135 (1972).

to be given an equal opportunity to live in suburban areas, zoning regulations that exclude low-rent, multifamily housing, the only economically feasible source of new housing for the poor, will have to be invalidated. This is particularly important in light of the trend of industry dispersal and removal to suburban communities that presently deny residential access to low-income, *i.e.* black, industrial workers. The traditional position that multifamily, low-income housing erodes the tax base and places burdens on the community's services and facilities is morally indefensible when a community has acquired a tax-generating industry but demands that other communities assume the burdens of providing adequate housing and municipal services for the necessary workers.

III. Problems of Integration, Decent Housing, and Freedom of Choice

A. What is Integration?

Most cases and statutes speak of integration as if the word carried an understood, definite meaning. This is true only to the extent that integration clearly implies some mixture of black and white; the actual proportions of the mixture, however, are rarely even discussed. At one time, Public Housing Authority statistics classified any project with one or more blacks as integrated.[77] Very few people would be content with this definition today. Nevertheless, it is not clear what proportion constitutes an acceptable level of integration or whether a black majority ever means integration in the minds of most people. For example, many consider a neighborhood integrated if twenty percent of the population is black, but few would concur in that characterization if only twenty percent were white.

Social scientists have developed a "tipping point" theory based upon the belief that, when the proportion of blacks in a building or neighborhood reaches a critical level—usually given as approximately 40 percent—the building or neighborhood will "tip" and, unless drastic measures are taken, will fairly quickly become a black, segregated building or neighborhood. If this belief is accurate, it is virtually impossible to have a permanently integrated building or neighborhood with a black majority.

The tipping theory suggests that one definition of integration applicable to housing, might be that a mixed building or neighborhood is

77. Luttrell, *The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871 (1966).

"integrated" when, as blacks or whites move out, other blacks or whites will move in, thus keeping a fairly stable over-all percentage ratio between the two groups—a condition that probably requires a white majority.[78] This raises further problems, however. Most people would agree that a town in which whites live in one district and blacks live in another is not integrated; but what about a neighborhood having alternating "black" and "white" streets? And what about a white neighborhood with an all-black, multifamily housing project in its midst? Most public housing site selection cases aim toward exactly this type of integration.[79]

Other fundamental problems are raised by the white majority requirement inherent in the concept of integration, because a dispersed black minority destroys rights, needs, and desires to develop a political base, live in a familiar neighborhood,[80] and exercise freedom of choice in regard to housing. Moreover, what impact upon the psychic well-being of black people results from saying that all people are equal, but some are more equal because whites must predominate for a building or neighborhood to be really integrated? In effect, positing the achivement of integration as defined above to be the primary housing goal places the rights of blacks at the mercy of whites who refuse to live in a mixed environment as a minority and makes "integration" a one-way street with blacks moving into white communities, but not vice versa. The extent to which the law should cater to these prejudices and rule that public authorities must prevent tipping under an "affirmative duty to integrate" is questionable. What is the legal position of a housing applicant who is refused an apartment because the project or neighborhood is already racially balanced? Does the fourteenth amendment condone a denial based solely upon the applicant's race?

B. The "Benign Quota"

Racial quotas normally are illegal and unconstitutional because their very concept implies racially based exclusion once the quota is filled. Since racial integration does not happen spontaneously, however, there has been increasing discussion of the propriety of "benign" quotas that foster integration. At some point in applying the quota, however,

78. The introduction to the latest HUD regulations governing site selection and project approval, for example, states that proposed housing to be built in racially mixed areas will receive an "adequate" rather than a "superior" rating because they might cause the proportion of minority to nonminority residents to increase significantly and contribute to growing minority concentration. HUD Rules and Reg., 37 Fed. Reg. 204 (1972).

79. *See* cases and materials cited notes 74-76 *supra*.

80. "To create an integrated distribution of the population over 86 per cent of all blacks would have to move from their present residences." Note, *supra* note 26, at 269.

someone—either black or white—will be excluded because of his race. Some argue, on the other hand, that minimum quotas are necessary for integration to occur, because there will frequently be sufficient qualified whites, as well as blacks, available to fill all vacancies in existing white areas. Further, when a new building or housing development opens, unless a quota is alloted for blacks—depending upon the original neighborhood composition—it may become all white or all black. Moreover, given the tipping theory, unless a maximum quota is set for blacks, any integration may rapidly become segregation because the whites will leave, driven out by their own fears of what they believe will be the terrible consequences of living among a black majority.

Commentators have written at length on the equality and desirability of benign quotas,[81] but the constitutional issue remains undecided,[82] and existing judicial pronouncements provide only doubtful authority.[83] Although quotas determining racial mixtures have been sustained as appropriate tools to remedy past employment discrimination,[84] until recently the issue has not arisen within the housing context. Most housing decisions have centered around discriminatory site or tenant selection, the classic example of the latter situation being the exclusion of a black and the subsequent placement of a white in a basically all-white building or neighborhood. Therefore, there has been little occasion in the housing area to confront the question of a quota.

Otero v. New York City Housing Authority,[85] in which black former site tenants sought entry into public housing that replaced an earlier slum where they had lived, directly raised as an issue the validity of a "benign" quota (although not so named), because the Authority argued that its affirmative duty to integrate overrode the site tenants' priority right to return. The Authority argued that the building in question must be racially balanced, not merely that the building and surrounding re-

81. Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531 (1963); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30 (1960); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1104-20 (1969).

82. *Developments in the Law—Equal Protection, supra* note 81, at 1118 & n.233.

83. *See, e.g.*, Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681, 707 (N.D. Ill.), *modified*, 286 F.2d 222 (7th Cir. 1961); Lakewood Homes, Inc. v. Board of Adjustment, 258 N.E.2d 470 (Ct. C.P., Allen Co., Ohio), *modified*, 25 Ohio App. 2d 125, 267 N.E.2d 595 (1971).

84. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972). *See generally* Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971).

85. Civil No. 72-1733 (S.D.N.Y., Feb. 8, 1973).

newal housing had to be integrated when considered as a whole. On this basis, the Authority tried to alter the building's projected racial balance from 80 percent black and 20 percent white to 40 percent black and 60 percent white.

The district court held that the Authority could not deprive the displaced blacks of their right to return in order to integrate the buildings. The court pointed to the irony of using the affirmative duty to integrate contained in the Fair Housing Act of 1968, which had been enacted to aid blacks in obtaining decent housing, as a reason for excluding them.[86] The court held that this result was clearly not within the intention of Congress. Furthermore, the court concluded that overriding the black's priority right to return, a benefit established under a NYCHA regulation, would violate the equal protection clause as the denial of a governmental benefit on the basis of race.[87]

If *Otero* is upheld, it can be used to strike down benign quotas, at least when they operate to *deny* blacks access to decent housing. The opinion, however, does contain language indicating that quotas may be sustained when they exclude whites to leave room for blacks.[88]

C. *How Absolute the "Duty To Integrate"?*

In January 1972, HUD adopted new guidelines for evaluating requests for public housing-related funds that put renewed emphasis on the need to find housing sites for low-income, black families outside ghetto and already well-integrated areas.[89] Since the government sets unrealistically low standards for total unit costs, however, land acquisition costs must be kept so low that projects in areas which would receive a "superior" rating—nonintegrated white neighborhoods—become too expensive for public or subsidized housing.

Moreover, HUD discourages projects in integrated areas because

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86. *Id.* at 27-28.

87. *Id.* at 31.

88. The decision could be of substantial importance to blacks. A major source of opposition to urban renewal has always been that poor blacks lose their homes and that the new housing is for the middle class, that is whites. If the court had held that the Housing Authority could prevent displaced blacks from entering the few low-income apartments built in order to bring in whites to "integrate" the building, it would have created but another reason to oppose urban renewal. Urban renewal, however, is the only federal program that encourages an orderly and rational development of slum areas. It can, therefore, be of great value if properly used.

89. For example, a proposal is rated "superior" if it "will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racially mixed." A proposal will receive a "poor" rating if it will increase substantially the "proportion of minority residents in an area which is not one of minority concentration, but which is racially mixed." 37 Fed. Reg. 205-09 (1972).

of its fears of tipping and creating another ghetto. In fact, HUD's most recent regulation encourages building low-income housing in either all-white or ghetto neighborhoods.[90]

Given the difficulties inherent in this approach, HUD's action could effectively halt the construction of low-income housing.[91] If having decent housing for all—regardless of where it may be located—is an important social goal, then either the regulation or the cost formula must be altered. Both solutions will further require facing the issue of the blacks' right to remain in a black community and to have decent housing built for them there.

An absolute position on integration would require dispersal of blacks from communities in which they have lived for many years.[92] Moreover, it implies a permanent black minority relationship since blacks constitute only slightly more than ten percent of the total population.

Quotas and regulations that force the dispersal of blacks in the name of integration treat human beings as mere numbers or pawns. They erode the reality of a "community" or a "neighborhood" and disregard the reality that people exist, not in a vacuum, but in a tangle of personal, social, and economic relationships reflected by special communities that develop from group interactions. These communities may be alive and special; many inhabitants have an attachment they are unwilling to surrender in pursuit of integration.

A free nation must provide some room for differences, some room for minorities to be able to build a small, decent community and call it their own. At the same time there must be an opportunity for everyone to live wherever he desires, regardless of the racial or economic prejudices of the majority.

IV. CONCLUSION

The United States has come a long way, and yet a very short way, from separate, but "equal" housing arrangements. Unfortunately, in great measure because of policies and programs followed by the federal government and local communities, the United States is perhaps in fact, although not in law, more segregated in its housing patterns now than

90. Projects in ghettos are supposed to be built pursuant to a plan providing for a similar housing in white areas, so that minorities have the choice of a wide range of locations. 37 Fed. Reg. 205-09 (1972). *See, e.g.*, Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1972).

91. HUD imposed a moratorium on all federally subsidized housing programs in January of 1973. N.Y. Times, Jan. 9, 1973, § 1, at 1, col. 1, at 19, col. 4.

92. Note, *supra* note 26, at 269-71.

at the turn of the century. Much more must be done to make decent housing available everywhere to all races at all income levels, so that everyone can make a truly free choice to live in either an integrated or a ghetto—but not slum—community.