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United States v. Starrett City Associates and United States v. Yonkers Board of Education: Can More Be Done to Remedy Housing Discrimination?

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CURRENT ISSUES

UNITED STATES v. STARRETT CITY ASSOCIATES AND UNITED STATES v. YONKERS BOARD OF EDUCATION: CAN MORE BE DONE TO REMEDY HOUSING DISCRIMINATION?

Recently, against the back-drop of resurging racial tensions in the United States, the Brooklyn apartment complex Starrett City,¹ and the City of Yonkers,² both in New York State, were defendants in litigation involving discriminatory housing practices. Although factually distinct, these two cases are illustrative of the damaging effects that race-conscious people have on their neighbors. This Article will examine the various legal theories used to challenge these practices in both communities, and will outline some of the flaws which become apparent when attempting to rationalize discriminatory behavior.

¹ *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir.), *cert denied*, 109 S. Ct. 376 (1988); *see infra* notes 46-62 and accompanying text (analysis of case).

² *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988); *see infra* notes 88 *et seq.* and accompanying text (analysis of case).

I. APPLICABLE LAW

A. Equal Protection

The equal protection clause of the fourteenth amendment³ proscribes any governmental action that is racially discriminatory.⁴ To bring a successful equal protection claim, the party asserting the claim must show an underlying governmental intent to discriminate.⁵ It is not necessary, however, for discriminatory intent to be the sole, or even the major motivating factor for implementing the discriminatory act.⁶ While the discriminatory impact

³ U.S. Const. amend. XIV § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

⁴ *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). The fourteenth amendment is aimed at ending government based discrimination. *Id.*; *Burney v. Housing Auth.*, 551 F. Supp. 746, 757 (W.D. Pa. 1982). The court noted that, traditionally, there has not been a government interest compelling enough to overcome the burden discrimination places on minorities. *Id.*; *Mayers v. Ridley*, 465 F.2d 630, 637 (1972). No official actions, whether by legislative, executive, or judicial authority can violate the equal protection clause. *Id.*; Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L.L. REV. 128, 134 (1976). The equal protection clause has been interpreted as proscribing all governmental discrimination based on race. *Id.*; see *Palmer v. Thompson*, 403 U.S. 217, 220 (1971) (equal protection clause designed to protect blacks against discriminatory action by States).

⁵ *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (hereinafter "Arlington I"). Proof of racially discriminatory intent is needed to show a violation of the equal protection clause. *Id.*; see *Washington v. Davis*, 426 U.S. 229, 239 (1976). The Court stated that case law indicates that discriminatory impact without intent is not enough to violate the equal protection clause. *Id.* In order to have an equal protection claim the defendant must have intended to discriminate. *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). A claim of governmental infringement on constitutional rights must include proof of discriminatory purpose. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 140 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1977); *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988, 992 (D.Mass. 1981) (intent needed to show official acts of discrimination violated the equal protection clause); Rice, *Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendment Act of 1983 Would Eliminate*, 27 HOW. L. J. 227, 233 (1984). Under an equal protection claim the plaintiff must show some intentional racial discrimination. *Id.*

⁶ *Arlington I*, 429 U.S. at 265. As the Court said, "rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Id.*; see also *Washington*, 426 U.S. at 241 (purpose does not have to be express or on face of statute); *Smith*, 682 F.2d at 1066 (action does not have to rest solely on discriminatory intent).

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of an official act can be an important element in proving a violation of the equal protection clause,⁷ as the United States Supreme Court has noted, it is not “the touchstone” of an invidious racial discrimination forbidden by the Constitution.⁸ The intent requirement imposes a heavy burden on the plaintiff, since the impetus for such governmental action is not readily ascertainable and can be easily disguised.⁹

In *Arlington Heights v. Metropolitan Housing Corp.* (“Arlington I”),¹⁰ the Supreme Court helped clarify this area by enumerating certain pieces of evidence, both circumstantial and direct, to be considered in determining intent. These factors are: (1) the historical background and context of the action; (2) the particular sequence of events leading up to the challenged action; and (3) a departure from the normal procedural sequence.¹¹ These factors are used to establish a prima facie case and may be supplemented with evidence of disproportionate impact on one particular group, as well as by legislative and administrative history.¹²

Once the intent requirement has been met, a prima facie case has been established and the burden of proof shifts to the governmental defendant. The government action in question will then

⁷ *Washington*, 426 U.S. at 242. Impact is relevant in determining an equal protection violation. *Id.* As stated in *Smith*, 682 F.2d at 1066, a finding of discriminatory intent does not have to rest solely on evidence of intent. *Id.* at 1066. Evidence of a violation may also come from discriminatory impact on a group. *Resident Advisory Bd.*, 564 F.2d at 141; *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988, 993 (D. Mass. 1981) (discriminatory impact of action used as method of finding intent).

⁸ *Washington*, 426 U.S. at 242.

⁹ See *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). The court stated that:

Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations, realize the unattractiveness of their prejudices when faced with their perpetuation on the public record.

Id.; *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979). The court noted that effect is the touchstone in Title VIII claims because it is easy for a party to conceal its motivation. *Id.* at 1037 (citing *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir.), *cert. denied*, 422 U.S. 1042 (1974)); *Rice*, *supra* note 5, at 233. The author states that racial motivation per se is difficult to prove and identify. *Id.*

¹⁰ 429 U.S. 252 (1977).

¹¹ *Id.* at 267; see also *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 143 (3d Cir. 1977) (adopted factors listed in *Arlington I*); *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988, 993 (D. Mass. 1981) (adopts factors listed in *Arlington I*).

¹² *Arlington I*, 429 U.S. at 267-68.

be subject to strict scrutiny.¹³ Initially, this burden can be met if the action fosters some government interest, and serves a substantial public interest outweighing any private detriment caused.¹⁴ If the defendant is able to meet these standards, it then faces the additional burden of showing that such ends could not be reached through less discriminatory means.¹⁵

In racial discrimination cases, it is unlikely that the defendant's action will survive strict scrutiny, as "[t]raditionally, courts have deemed the government interest in not burdening racial minorities so important that virtually no competing government interests have been found sufficient to justify race conscious action."¹⁶ This view comports with the intent of the equal protection clause to eliminate governmental conduct that is racially discriminatory.

B. *The Fair Housing Act*

Title VIII of the Civil Rights Act of 1968¹⁷ provides statutory protection for minorities in their attempts to procure housing.¹⁸

¹³ *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Discriminatory action by a government will be subject to strict scrutiny and must be based on a compelling governmental interest. *Id.*; *Regents of University of California v. Bakke*, 438 U.S. 269, 291 (1978) (opinion of Powell, J.). State race based discrimination will be subject to strict scrutiny. *Id.*; see also *Mayers v. Ridley*, 465 F.2d 630, 638 (D.C. Cir. 1972). Close scrutiny will be applied to official acts that are discriminatory. *Id.*; *Burney v. Housing Auth.* 551 F. Supp. 746, 755 (W.D. Pa. 1982) (state action restricting fundamental rights based solely on race subject to strict scrutiny).

¹⁴ *Bakke*, 438 U.S. at 357 (Brennan, J., concurring in part and dissenting in part). A racially motivated action is only justified by a compelling interest with no less restrictive alternative. *Id.* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 16-17 (education system must serve legitimate objectives); *Mayers v. Ridley*, 465 F.2d 630, 638 (D.C. Cir. 1982). To overcome strict scrutiny there must be some rational, legitimate purpose for the action. *Id.* This purpose will then be balanced against the discriminatory effects that result. *Id.*; *Burney*, 551 F. Supp. at 756 (government practice containing suspect classifications needs compelling government purpose); see also *United States v. City of Black Jack*, 508 F.2d 1179, 1186-87 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (these principles applied to a Title VIII action).

¹⁵ *Bakke*, 438 U.S. at 357 (Brennan, J., concurring in part and dissenting in part); *San Antonio Indep. School Dist.*, 411 U.S. at 16-17 (state must show it chose least drastic means in structuring educational system); *Burney*, 551 F. Supp. at 756 (must be no less restrictive alternative to government action containing suspect classifications); see *City of Black Jack*, 508 F.2d at 1186-87 (same principles applied to Title VIII claim).

¹⁶ *Burney*, 551 F. Supp. at 756. The only exception to this doctrine has been the Japanese internment cases. *Id.*; see *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

¹⁷ The Fair Housing Act, 42 U.S.C. §§ 3601 - 3631 (1982 & Supp. III 1985).

¹⁸ *Id.* § 3601. The Fair Housing Act was enacted "to provide, within constitutional limi-

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The Fair Housing Act (hereinafter "Title VIII") was enacted under Congress' thirteenth amendment power to abolish slavery,¹⁹ and often provides a less resistant path to redress than an equal protection claim.²⁰ Most courts have construed its language broadly, analogizing it with Title VII.²¹ While Title VII proscribes discrimination in the workplace,²² the common language of the two Acts justifies this analogy.²³ Accordingly, most courts have

tations, for fair housing throughout the United States." *Id.* Section 3604 enumerates the conduct which is proscribed under the Act, providing in pertinent part that:

it shall be unlawful-

(a) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex or national origin.

(b) to discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(d) to represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

Id.

¹⁹ U.S. CONST. amend. XIII. The thirteenth amendment provides that: "(1) Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction. (2) Congress shall have the power to enforce this article by appropriate legislation." *Id.* *Jones v. Mayer Co.*, 392 U.S. 409 (1968). *Jones* recognized that "[w]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, it . . . is a relic of slavery." *Id.* at 442-43. Since Congress is empowered to enact legislation to eradicate slavery, it follows, *a fortiori*, that the Fair Housing Act is a valid exercise of that power. *Id.* at 438-49. *See Williams v. Matthews*, 499 F.2d 819, 825 (8th Cir.) (Fair Housing Act is an example of an appropriate exercise of congressional power to abolish slavery), *cert. denied*, 419 U.S. 1021 & 1027 (1974); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.) *cert. denied*, 414 U.S. 826 (1973) (same).

²⁰ *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977) (since Title VIII requires a lesser burden on the plaintiff, it is becoming a more attractive path for litigants than a constitutional action). *See generally* Comment, *supra* note 4 (analysis of the efficacy of Title VIII in housing discrimination cases).

²¹ *Metropolitan Hous. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). The court recognized that in light of the congressional intent set forth in section 3601, it should "construe the Act expansively in order to implement that goal." *Id.* at 1289; *see, e.g., Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (the Act is made vital through a generous construction); *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (Civil Rights Acts should be interpreted broadly); *see generally* Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAWYER 200, 203 (1974) (Congress used the broadest language possible in order to effectuate the purpose of the Act).

²² Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e-2002-17 (1964). Title VII makes it unlawful for an employer to rely on any ability test for employment purposes if "its administration or action upon the results is . . . designed, intended, or used to discriminate because of race, color, religion, sex, or national origin." *Id.* § 2000e-2(h).

²³ *See* 42 U.S.C. §§ 2000e-2(h), 3604 (a,b,e). Title VII and Title VIII share the language "because of race, color, religion, sex, or national origin." *Id.* This language could be read

utilized the Title VII prima facie case concept in Title VIII cases.²⁴

The prima facie case which has evolved in Title VIII litigation can often be established by showing discriminatory effect alone.²⁵ Unlike an equal protection action, discriminatory intent is not absolutely necessary.²⁶ This is a direct result of the Title VII analogy.²⁷ Although there is some consensus that Congress enacted both statutes to address the "consequences of [discriminatory] practices, not simply the motivation,"²⁸ the application of the Title VII prima facie case to Title VIII cases is not accepted as inviolate.²⁹

While a Title VII prima facie case can be established by a showing of discriminatory effect alone, some courts have indicated that the Title VIII prima facie case also requires the weighing of three factors: (1) the strength of the discriminatory effect; (2) whether the defendant has a legitimate interest in taking the violative ac-

as requiring intent to discriminate, but it has not. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (Court interpreted language of Title VII as not requiring intent to establish a prima facie case). Because the language of the two acts are identical as to intent, Title VIII has been construed, as has Title VII, not to strictly require intent in order to sustain the action. See generally *Arlington II*, 558 F.2d at 1289 (background discussion of Title VIII intent requirement); Comment, *supra*, note 4 (argument for applying the Title VII prima facie case concept to Title VIII cases). But see *United States v. Starrett City Assoc.*, 840 F.2d 1096, 1107 n.4 (2d Cir.) (Newman, J., dissenting) (two acts should not be analogized), *cert. denied*, 109 S. Ct. 376 (1988).

²⁴ See *infra* notes 34-37 and accompanying text (discussing the prima facie case concept as applied in judicial decisions).

²⁵ *Arlington II*, 558 F.2d at 1289 (requiring a substantially lesser showing of intent than does an equal protection claim).

²⁶ Cf. *Arthur v. City of Toledo*, 782 F.2d 565, 573 (6th Cir. 1986) (intent should not be a factor at all in Title VIII cases).

²⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The plaintiff bringing a Title VII action is only required to prove that there was discriminatory effect—no discriminatory intent need be shown. *Id.* at 432. Reversing the lower court's holding that lack of discriminatory intent would defeat an employment discrimination action, the court found that, because a disproportionately large percentage of blacks were hindered in their efforts to advance because of a test which was unrelated to job performance, there was a violation of Title VII even absent an intent to discriminate. *Id.* at 430-31. See *supra* note 23 and accompanying text (language similarity of Titles VII and VIII allows this analogy).

²⁸ *Griggs*, 401 U.S. at 432.

²⁹ See *Arlington II*, 558 F.2d at 1290 (court not willing to completely succumb to Title VII prima facie case in Title VIII actions); *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1107 n.4 (2d Cir.) (Newman, J., dissenting) (since Title VII actions do not carry the potentially devastating effects of Title VIII actions, the two acts should not be analogized), *cert. denied*, 109 S. Ct. 376 (1988).

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tion; and (3) whether the plaintiff seeks to compel the defendant to provide housing, or enjoin defendant's interference with individual property owners wishing to provide such housing.³⁰ *Arthur v. City of Toledo*³¹ illustrated the balancing of these factors.

In *Arthur*, a law requiring a public referendum to approve the zoning of low income housing was challenged.³² Because evidence of the discriminatory effect of the bill was scant, if existent at all, the court held that the public policy advantages of public referenda outweighed the insignificant evidence of discrimination which it may have caused.³³

It is important to note that when the plaintiff does establish the requisite effect,³⁴ it becomes the defendant's burden to prove that

³⁰ See *Arlington II*, 558 F.2d at 1290. The test originally set forth in *Arlington II* also required a showing of discriminatory intent in some circumstances. *Id.* However, *Arlington's* "four critical factors" test has evolved to omit the intent requirement. *Id.* See generally *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir. 1987) (no need to show any intent to discriminate), *cert. denied*, 108 S. Ct. 2821 (1988); *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 986-87 (4th Cir. 1984) (discriminatory impact is all that need be shown to establish Title VIII case); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir.) (United States Supreme Court has indicated that Congress can legislate against effects without an intent requirement), *cert. denied*, 469 U.S. 976 (1984); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) (courts must look at "practices which actually result in racial discrimination."), *cert. denied*, 435 U.S. 908 (1978); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 649-50 (N.D. Cal. 1973) (court omitted consideration of intent from prima facie analysis), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975).

³¹ 782 F.2d 565 (6th Cir. 1986); see also *Smith v. Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) (applying the four critical factors of *Arlington II*).

³² *Arthur*, 782 F.2d at 567.

³³ *Id.* at 576. While the court treated this as a failure of plaintiff's prima facie case, the public policy advantages of referenda is the defendant's rebuttal. *Id.* The importance of *Arthur* is its treatment of the defendant's rebuttal, and not its prima facie case treatment. *Id.*

The prima facie case in *Arthur* was established by the slight discriminatory effect, thereby contributing to the evolution of the disparate impact Title VIII prima facie case. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.) (factors for determining prima facie case in *Arlington II* actually go to merits of case), *aff'd*, 109 S. Ct. 824 (1989). "Employing the test in *Arlington Heights II* as a prima facie hurdle would cripple Title VIII." *Id.* at 936. The prima facie case concept has been adopted by courts as an evidentiary tool in Title VIII cases to ease the plaintiff's burden because discriminatory effects are often not a result of "blatant discriminatory acts." *Id.* See *Wharton v. Knepfel*, 562 F.2d 550, 555 (8th Cir. 1977) (rationale of evidentiary treatment of discriminatory effects); see also Comment, *supra* note 4, at 151-52 (burden of proof belongs on defendant); E. CLEARY, MCCORMICK ON EVIDENCE 947 (3d ed. 1984).

³⁴ See generally Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398, 406 (1979) (discriminatory effect is all plaintiff need show to establish Title VIII prima facie case); Comment, *supra* note 4, at 163 (discussion of the intent required to sustain Title VIII action).

the state's interest is legitimate, that it outweighs the plaintiff's injury, and that no other less discriminatory plan is possible to meet defendant's interest.³⁶ The prima facie case then is actually established upon a showing of discriminatory effect alone, thereby placing a burden on the defendant to justify its actions which is only slightly less than that in equal protection cases.³⁶ A Title VIII case, therefore, is similar to an equal protection case, but with the more lenient plaintiff's burden of showing discriminatory effect alone.³⁷

The difference in pleading requirements between Title VIII and equal protection cases is especially important in situations where a legislative, or quasi-legislative body is the defendant.³⁸

³⁶ *Huntington*, 844 F.2d at 936. A municipal defendant can escape liability under the Fair Housing Act by showing that its actions furthered a legitimate governmental interest in the least discriminatory manner possible. *Id.* See also *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 436 U.S. 908 (1978). Defendant can overcome burden if he can show that the violative practice served "a legitimate, bona fide interest . . . , and . . . that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Id.* If the defendant successfully meets these requirements, then the burden is shifted back to the plaintiff. *Id.* at n. 37.

³⁶ See, e.g., *Rizzo*, 564 F.2d at 149 (rebuttable presumption exists that defendant is in violation of Title VIII). See also Schwartz, *Making and Meeting the Prima Facie Case Under the Fair Housing Act*, 20 AKRON L. REV. 291 (1986). "[T]o say the plaintiff has made out a prima facie case means that the order of proof shifts to the defendant . . . to rebut the plaintiff's evidence . . ." *Id.* at 195; cf. Note, *Title VII—Employment Discrimination—Defendant's Burden of Proof in Rebutting Prima Facie Case*, 28 WAYNE L. REV. 1477 (1982) (discussing defendant's burden under Title VII case).

³⁷ *Huntington New York v. Huntington Branch, NAACP*, 109 S.Ct. 824 (1989). There is no requirement to show that there was any discriminatory intent to establish a Title VIII prima facie case. *Id.* All that is needed is discriminatory effect. *Id.* See *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1384 (5th Cir. 1986) (violation of Title VIII may be established by showing significant discriminatory effect); *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir.) (sufficient discriminatory effect where property owner would only sell lots to "approved" builders, but no blacks were on "approved" builders list), *cert. denied*, 419 U.S. 1021 & 1027 (1974). See generally *Rizzo*, 564 F.2d at 147. The court noted that in *Arlington I*, the United States Supreme Court left the question of intent to be decided on remand, sending a clear signal that intent should not be required in Title VIII cases. *Id.*; *United States v. Village of Black Jack*, 508 F.2d 1179, 1181 (8th Cir. 1974) (discriminatory effect alone is basis for bringing Title VIII action), *cert. denied*, 422 U.S. 1042 (1975). But see *Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir. 1975) (rejecting prima facie case in Title VIII litigation over private housing).

³⁸ *Huntington*, 844 F.2d at 935 (legislature specifically wanted Title VIII to be used on facially neutral legislative policies), *aff'd*, 109 S.Ct. 824 (1989); *Smith v. Clarkton, N.C.*, 682 F.2d 1022, 1065 (4th Cir. 1982) (government entities bound to uphold provisions of Title VIII).

An equal protection claim, however, requires proof of discriminatory intent. See *Washington v. Davis*, 426 U.S. 229, 245 (1976) (complaint under Fair Housing Act only requires

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Under these circumstances it can be extremely difficult to show the intent necessary to sustain an equal protection action since the defendant's motivation is often concealed; Title VIII provides a vehicle for redress in this situation.³⁹

II. UNITED STATES V. STARRETT CITY ASSOCIATES

A. *Discrimination without Malicious Intent*

While there is little doubt that the Fair Housing Act was enacted to fight the effects of discrimination in housing,⁴⁰ it is not clear whether the ultimate aim was to avoid discrimination or abolish segregation.⁴¹ While it would seem that these two goals are congruous,⁴² there are times when desegregation programs

showing of discriminatory effect); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (same).

³⁹ *United States v. Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) ("Effect . . . is the touchstone, in part because clever men may easily conceal their motivations."), *cert. denied*, 422 U.S. 1042 (1975); Schwemm, *supra* note 21, at 216 (defendant less likely to escape liability because effects are easier to prove than intent). *See also* *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) ("a thoughtless housing practice can be as unfair to minority rights as a willful scheme."). *Cf.* Note, *Business: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 377 (1981) (Title VII was vehicle for similar situation in the business arena).

⁴⁰ *Huntington*, 844 F.2d at 934 (purpose of Act was to end discrimination); *see* *Fair Hous. Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071, 1075 (D.N.J. 1976) (Act "clearly reflects Congressional intent to extirpate the poisonous influences of racial . . . prejudice in the Nation's housing markets."); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973) (Congress exercised its constitutional power to combat racism), *aff'd in part, remanded in part*, 509 F.2d 623 (9th Cir. 1975); Comment, *supra* note 34, at 406 (according to legislative history, Act's purpose was to end discrimination).

⁴¹ *See Fair Hous. Council*, 422 F. Supp. at 1075 (prohibitions are broadly drafted to end discrimination in housing); Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L. J. 891, 910 (1981) (Fair Housing Act is "color blind"); *see generally* Lamb, *Congress, The Courts and Civil Rights: The Fair Housing Act of 1968 Revisited*, 27 VILL. L. REV. 1115 (1982) (discussion of legislative history and congressional purpose in enactment of Fair Housing Act). *Contra* *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973). There is an affirmative duty to integrate "even though this may in some instances not operate to the immediate advantage of some non-white persons." *Id.* at 1125; *see generally* Comment, *The Legality of Race-Conscious Access Quotas Under the Fair Housing Act of 1968*, 9 CARDOZO L. REV. 1053, 1074-75 (1988) (judicial, legislative, and scholarly background of bifurcated Fair Housing mandates); Note, *Urban Renewal—HUD has Affirmative Duty to Consider Low Income Housing's Impact upon Racial Concentration: Shannon v. HUD*, 85 HARV. L. REV. 870 (1972) (court decision that HUD has affirmative duty to integrate is sound).

⁴² *Burney v. Hous. Auth.*, 551 F. Supp. 746 (W.D. Pa. 1982). "Congress perceived antisegregation and antidiscrimination to be complementary. Unfortunately this is not the

are themselves racially discriminatory.⁴³ For example, the sponsors of a given program may actually have good intentions, while simultaneously injuring the very class they seek to benefit.⁴⁴ Alternatively, the sponsors may intend to injure the class arguing that the harm is necessary to achieve integration.⁴⁵

In *United States v. Starrett City Associates*,⁴⁶ the appellant, Starrett City Associates, was engaged in an application procedure designed to maintain a specific ratio of minority to white tenants.⁴⁷ The purpose of the procedure was to avoid white flight⁴⁸ by limiting the number of minority tenants in the complex.⁴⁹ The application procedure required each applicant to complete a preliminary information card containing the applicant's race, income level, family composition, and type of employment.⁵⁰ The initially acceptable applications were placed in an "active" file according, *inter alia*, to race and income level.⁵¹ The accepted applicants were sub-

case" *Id.* at 769. In *Burney*, the court acknowledged this dilemma and endorsed a race neutral approach. *Id.* See generally Rubinstein & Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Remedies in Federal Homeownership Programs*, 74 Nw. U. L. Rev. 491, 538 n. 178 (1979) (legislative history in context further confuses bifurcated mandate problem); Comment, *The Benign Housing Quota: A Legitimate Weapon to Fight White Flight and Resulting Segregated Communities?*, 42 FORDHAM L. REV. 891 (1974). As the number of minorities moving into an area increases, eventually the whites leave, creating a newly segregated minority community. *Id.* at 898.

⁴³ See *infra* notes 47-52, 64-70 and accompanying text (Starrett City's policies are illustrative).

⁴⁴ *United States v. Black Jack*, 508 F.2d 1179 (8th Cir. 1974). "[W]e now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Id.* at 1185 (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.*, *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc). See *Sisters of Providence v. Evanshon*, 335 F. Supp. 396, 404 (N.D. Ill. 1971) ("seemingly neutral law can have an unequal effect [or be] unequally applied").

⁴⁵ See *infra* notes 113 & 119 and accompanying text (examples from Yonkers).

⁴⁶ 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

⁴⁷ *Id.* at 1099.

⁴⁸ See *infra* notes 160-165 and accompanying text (discussion of white flight).

⁴⁹ *Starrett City*, 840 F.2d at 1099. Starrett had three expert witnesses who determined that this percentage ranged from one percent to sixty percent minority. *Id.* Starrett claimed that the racial balance necessary to avoid white flight was sixty-four percent white, twenty-two percent black and eight percent hispanic. *Id.* at 1098. Starrett insisted that "racial animus" was not a motivating factor in determining its application procedure or admission policy. *Id.* at 1099.

⁵⁰ *Id.* at 1098-99.

⁵¹ *Id.* The applicant file was 21.9 percent white, 53.7 percent black and 18 percent hispanic. *Id.* The ratio of apartments that was actually maintained at Starrett was 64.7 percent white, 20.8 percent black and 18 percent hispanic. *Id.*

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sequently informed that there were no apartments available.⁵³ Whenever a tenant left the complex, a racially similar applicant was contacted and offered an apartment, thus maintaining the previously existing racial balance.

Although Starrett's practices were previously challenged in *Arthur v. Starrett City Associates*,⁵⁴ that case was settled,⁵⁴ and the issue concerning the proper priority of the bifurcated mandates of the Fair Housing Act was left expressly undecided.⁵⁵ The United States brought an action shortly thereafter to specifically challenge this practice.⁵⁶

On cross-motions for summary judgment, the District Court for the Eastern District of New York found that Starrett's procedure clearly violated Title VIII,⁵⁷ and that its involvement with the Department of Housing and Urban Development,⁵⁸ joined as a de-

⁵³ *Id.* Because of the disparity between the racial proportions in the application file and the actual tenant distribution, a black applicant had to wait "up to ten times longer than the average white applicant before being offered an apartment." *Id.* at 1099. This practice is clearly in conflict with section 3604(d) of the Act since it "represent[s] to . . . [minorities] . . . that [a] dwelling is not available for . . . rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d) (1984).

⁵⁴ 98 F.R.D. 500 (E.D.N.Y. 1983).

⁵⁴ *Arthur v. Starrett City Assocs.*, No. 79-CV-3096, slip op. at 1 (E.D.N.Y. April 2, 1985). Starrett agreed to raise the minority quotas to allow thirty-five more units per year to become minority occupied. *Id.* at 10.

⁵⁵ *See United States v. Starrett City Assocs.*, 605 F. Supp. 262 (E.D.N.Y. 1985). "The court has made no findings of violation of law or of the legality of the practices complained of. No party, by entering into this settlement, admits or is deemed to admit any violation of law or the legality of the practices complained of at Starrett City." *Id.* at 263 (quoting paragraph 14 of settlement agreement from *Arthur*).

⁵⁶ *Id.* at 262-63 (the complaint was filed to adjudicate the issue left unresolved in *Arthur*).

⁵⁷ *United States v. Starrett City Assocs.*, 660 F. Supp. 668 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988). After determining that section 3604 was the applicable law, the court held that the differential treatment afforded minority applicants violated the law by establishing quotas and by holding vacant apartments that could have been rented. *Id.* at 678-79.

⁵⁸ *Id.* at 679. The Department of Housing and Urban Development (hereinafter "HUD") became involved with Starrett City early in its development. *Id.* at 670. The complex was originally to be developed by the United Housing Federation, but the project was abandoned in 1971 and Starrett agreed to take it over and operate it as rental housing. *Id.* In order to take advantage of the former developer's tax abatement, Starrett agreed to maintain a racially integrated complex. *Id.* Starrett was thus able to get a significant amount of assistance from HUD. *Id.* In addition to subsidizing Starrett's mortgage payments by \$211,275,605.00 from April 1975 through March 1986, many of Starrett's tenants were involved in HUD's Rental Assistance Program which was expanded to include all of Starrett's apartments. *Id.* at 671.

fendant, did not excuse or justify this violation.⁶⁰ Furthermore, the court reaffirmed that HUD may not discriminate or excuse discrimination despite its statutory mandate to promote integrated housing.⁶⁰ Moreover, the court noted that in prosecuting a discrimination action, the government is not estopped simply because its own agent was involved in the offense.⁶¹ Starrett was ordered to adopt a nondiscriminatory application procedure to satisfy the Fair Housing Act, with the district court retaining jurisdiction for three years.⁶² Starrett appealed.

The Second Circuit Court of Appeals affirmed the lower court's judgment.⁶³ Looking to analogous federal law for guidance,⁶⁴ the court found that the discriminatory effects of this policy were clearly violative of Title VIII.⁶⁵ Moreover, regardless of whether Starrett was "clothed with governmental authority"⁶⁶ through its association with HUD, it still lacked the justification for imposing racial quotas since HUD itself could not so discriminate under Title VIII.⁶⁷ While the court recognized that not all racially con-

⁶⁰ *Id.* at 676 (even if HUD approved quotas, Starrett would not be insulated from consequences of its actions).

⁶⁰ *Id.* at 677. "HUD has no power to excuse discriminatory acts or to waive, on behalf of those injured by them, the right to such a remedy." *Id.* (quoting *United States v. Yonkers Bd. of Ed.*, 624 F. Supp. 1276, 1375 (S.D.N.Y. 1985)).

⁶¹ *Id.* at 676. The interests of the people would be severely undermined if the government were estopped from enforcing a law because it was broken by an agent of the government. *Id.*; see generally *Heckler v. Community Health Services, Inc.*, 467 U.S. 51 (1984) (although flat rule that government may never be estopped was rejected, circumstances giving rise to estoppel would have to be extraordinary).

⁶² *United States v. Starrett City Assocs.*, 660 F. Supp. 668, 679 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

⁶³ *Id.*

⁶⁴ *Id.* at 1101. The court, noting that the legislative history of Title VIII is of little help in determining the priorities of the Act, gleaned its priorities from Title VII. *Id.* See *supra* notes 21-24 and accompanying text (discussion of Title VII/Title VIII analogy).

⁶⁵ *Starrett*, 840 F.2d at 1100. The discriminatory nature of Starrett's application policy was manifest in the delay which minority applicants suffered in apartment availability and the unfair burden which this process placed on the minority applicants. *Id.*; see generally Smolla, *supra* note 41, at 900. "[A]ll integration-maintenance plans share three essential characteristics: (1) they treat prospective entrants in a community differently on a racially selective basis; (2) their objective is the avoidance of white flight; and thus (3) they attempt to some degree to discourage black entry." *Id.*

⁶⁶ *Starrett*, 840 F.2d at 1100-01. Starrett argued that through its association with HUD, it was like a public authority, and therefore had a duty to promote integration by avoiding white flight. *Id.*

⁶⁷ *Id.* at 1101; *Jaimes v. Lucas Metro. Hous. Auth.*, 833 F.2d 1203, 1207 (6th Cir. 1987). The court noted that a government integration plan will be void to the extent that it acts

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scious policies violate constitutional and statutory proscriptions,⁶⁸ the indeterminate duration and arbitrary nature of Starrett's policy removed it from any recognized class of justification.⁶⁹ The court further noted that it was impermissible to establish a program to maintain integration that places hardship on the innocent victims of racial discrimination.⁷⁰

Judge Newman, writing the dissent,⁷¹ would bypass the language of the Act and focus on congressional intent, which he argued was to provide whites and minorities with the experience of living together.⁷² Furthermore, he speculated that in as much as

as a strict racial quota. *Id. But cf.* 42 U.S.C. § 3608(e)(5) (West Supp. 1988) which provides that the Secretary of HUD shall: "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this chapter." *Id.*; Comment, *supra* note 41, at 873-74 (HUD must be affirmatively involved with promoting integration - with or without discrimination).

⁶⁸ *Starrett*, 840 F.2d at 1100. "[N]ot every denial, especially a temporary denial, of low income public housing has a discriminatory impact on racial minorities in violation of Title VIII." *Id.* (quoting *Arthur v. City of Toledo*, 782 F.2d 565, 573 (6th Cir. 1986)); see *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). Title VII's antidiscriminatory provisions, which are substantially similar to Title VIII's, do not proscribe all race-conscious affirmative action plans. *Id.*

⁶⁹ *Starrett*, 840 F.2d at 1101-02. To justify the imposition of racial quotas in housing, the plan must: (1) have an access rather than a ceiling quota; (2) have a specific duration; (3) have a specific goal; and (4) be imposed to remedy a "history of racial discrimination." *Id.* See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616 (1987). In *Johnson*, the plaintiff asserted that an employer's affirmative action plan was violative of Title VII of the Civil Rights Act. *Id.* at 1442. In holding that the plan was not violative of Title VII, the Court found, *inter alia*, that the plan, although not expressly temporary, did not have an unlimited duration and also that it had a specific goal. *Id.* at 1456.

⁷⁰ *Starrett*, 840 F.2d at 1102; see *University of Calif. Regents v. Bakke*, 438 U.S. 265, 361 (1978). Ceiling quotas are impermissible because they "single out those least well represented in the political process to bear the brunt of a benign program." *Id.*

⁷¹ *Starrett*, 840 F.2d at 1103 (Newman, J., dissenting).

⁷² *Id.* at 1106 (Newman, J., dissenting). Judge Newman asserted that: "[t]he purpose of Title VIII . . . was to replace the ghettos 'by truly integrated and balanced living patterns.'" *Id.* (quoting 114 CONG. REC. at 3422). He also quotes language which indicates that "'[o]ne of the biggest problems we face is the lack of experience in actually living next to Negroes.'" *Id.* (quoting 114 CONG. REC. at 2275); see also *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977). The Court "has recognized that substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing." *Id.*; *Trafficante v. Metropolitan Ins. Co.*, 409 U.S. 205, 211 (1972) (purpose of Title VIII was to establish policy aimed at promoting racial integration). *But see* *Rubinowitz & Trosman*, *supra* note 42. When the entire congressional history is read, and quotes are not taken out of context, it is obvious that Congress intended the Act to result in integration, but that integration is a by-product of the Act, while abrogating prejudice is its primary purpose. *Id.* at 591 n. 178. The purpose of Title VIII is to prevent racial discrimination in the private housing market. *Id.* at 543. The statute obligates HUD to ensure that minority families have a choice as to where they want to live. *Id.* This does not necessarily indicate integration. *Id.*

Starrett City is the most successful integrated housing project in the country,⁷³ Congress would not have legislated against Starrett's policies had it foreseen the problem.⁷⁴

B. Equal Protection Ramifications

Had the court accepted Starrett's assertion of governmental authority,⁷⁵ it could have found violations in both the equal protection and Title VII areas. It is submitted that officially implemented plans that limit minority entrance should be held unconstitutional *per se*. The intent is clear in this area, where racial ceiling quotas are used to restrict minority entry, thereby discriminating solely on the basis of race. The defense that quota systems are intended to insure integration "[i]ncorrectly perceives the nature of the equal protection intent requirement."⁷⁶ It is the intentional exclusion of certain races, and not the driving force behind that exclusion, that is at odds with the Constitution.⁷⁷

In facing strict scrutiny⁷⁸ it is suggested that these plans be subject to a modified approach, as they were based on a desire to integrate, however misguided. Under this theory, the heavy presumption against legitimacy in discriminatory actions is lessened to create the possibility that there may be some compelling interest.⁷⁹ This "review . . . will be strict and searching, not fatal in

⁷³ *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2d Cir. 1988). Starrett City is the largest apartment complex in the country, consisting of forty-six buildings which contain 5881 units housing some 17,000 people. *Id.*

⁷⁴ *Id.* at 1106 (Newman, J. dissenting). Congress never considered that a private real estate owner would effectuate an integration policy, but "[h]ad they thought of such an eventuality, there is not the slightest reason to believe that they would have raised their legislative hands against it." *Id.*

⁷⁵ *Id.* at 1100-1101. The court stated that "it need not decide whether Starrett is a state actor" because even if it were, Starrett's practices still "violate[d] the antidiscrimination provisions of the Fair Housing Act." *Id.* at 1101; *see supra* notes 67-68 and accompanying text (discussion of Court's treatment of Starrett's affiliation with HUD).

⁷⁶ *Burney v. Housing Auth.*, 551 F. Supp. 746, 757 (W.D. Pa. 1982).

⁷⁷ *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only on an extraordinary justification." *Id.*; *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (racial classifications are "constitutionally suspect"); *Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954) (school segregation solely based on race deprives children of equal educational opportunities); *see supra* note 70 and accompanying text.

⁷⁸ *See supra* notes 13-16 and accompanying text.

⁷⁹ *Burney*, 551 F. Supp. at 756. Because these plans combine the desirable goal of integration with discriminatory racial classifications, a less rigid strict scrutiny analysis should

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fact, merely because of its application.”⁸⁰

Under this modified analysis, some compelling interest must be shown to justify placing the burden of integration on those it intends to benefit⁸¹ and the method chosen must be the least restrictive available⁸². The stumbling block here is that by implying that a community can only withstand a limited number of minorities, these plans stigmatize minorities by inferring some innate inferiority.⁸³ This consequence severely undercuts any benefit that may flow from integration. Further, the United States Supreme Court has indicated that it would not approve a desegregation plan that establishes exact ratios of integration⁸⁴ due to a fear of resulting white flight.⁸⁵ By refusing to validate integration maintenance plans, these cases suggest that there is no constitutional duty to

apply. *Id.*

⁸⁰ *Id.* at 756-57.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Brown v. Board of Ed.* 347 U.S. at 483, 493 (1954). “To separate them from others of similar age and qualifications solely because of race generates a feeling of inferiority as to status in the community that may affect hearts and minds in a way unlikely to ever be undone.” *Id.* It has been recognized that government policies restricting minority access might stigmatize blacks by the implication of inferiority. *Burney*, 551 F. Supp. 746,758. See Smolla, *supra* note 41, at 929 (quotas exclude on racial grounds on assumption that economic, social, and educational decline accompany entrance of blacks); Farrell, *Integrating by Discriminating: Affirmative Action that Disadvantages Minorities*, 62 U. DET. L. REV. 553, 561 (1985) (limits on black occupancy is response to white unwillingness to live with minorities); see generally Note, *Race Quotas*, 8 HARV. C.R.-C.L. L. REV. 128 (1973) (discussion of different types of race quotas and their characteristics).

⁸⁴ *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976). The court’s duty is over once it has ended officially sponsored discrimination. *Id.* The responsibility ends once a racially neutral plan is instituted. *Id.* at 436-37; *Swann v. Board of Educ.*, 402 U.S. 1, 24 (1970). While the court consented to the District Court’s authority to implement a desegregation plan where local authorities failed to do so, it would not have accepted a plan that established a particular degree of integration. *Id.* This is not part of the constitutional duty to desegregate schools. *Id.*

⁸⁵ *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972). Here the court stated that the community’s fear that school integration would lead to white flight was not a valid reason for establishing quotas. *Id.* Justice Brennan, writing for the court, stated that the rights of blacks to enter the school should not be affected by the probability that whites would leave the school. *Id.* at 486; see *Burney*, 551 F. Supp. at 758; Note, *Racial and Ethnic Quotas: The Tipping Phenomenon in Otero v. New York City Housing Authority*, 4 N.Y.U. REV. L. & SOC. CHANGE 1, 15 (1974); *contra* *Parents Assn. of Andrew Jackson H.S. v. Ambach*, 598 F.2d 705, 720 (2d Cir. 1969). White flight is a compelling concern when used to promote wider integration. *Id.*; *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1140 (2d Cir. 1973). The court states that the number of apartments available to minorities may be limited to promote integration and prevent segregation. *Id.*

maintain fixed levels of integration.⁸⁶

It is clear that the plaintiffs in *Starrett* could have established an equal protection violation had the court accepted the defendant's claim of governmental authority. It is submitted that this should be true of all officially implemented integration plans with strict minority quotas. The discriminatory intent, as well as the aspersions cast upon minority groups, is clear, despite arguments to the contrary.

While the equal protection aspects of *Starrett* are not terribly complex, it is not typical of the scenario from which equal protection claims normally arise. *United States v. Yonkers Board of Education*⁸⁷ provides a more illuminating study.

III. UNITED STATES V. YONKERS BOARD OF EDUCATION

A. *The State of Housing in Yonkers*

Geographically, the city of Yonkers is four to six miles long and about three and one half miles wide.⁸⁸ It is broken into three major sections: East Yonkers, Northwest Yonkers, and Southwest Yonkers.⁸⁹ Southwest Yonkers is slightly less than one-quarter of the total area of Yonkers and is the only industrialized area of the City.⁹⁰ These areas are further divided into census tracts, with Southwest Yonkers containing ten census tracts and the rest of

⁸⁶ See *supra* note 16 and accompanying text. Assuming there was such a duty, a plan like that imposed by *Starrett* fails to meet the requirement that it be the least restrictive alternative available. *Id.* The inaccuracy of *Starrett's* plan is made abundantly clear by the fact that each of *Starrett's* experts placed the tipping point at different levels. *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099 (2d Cir. 1988). One expert stated that the point could be anywhere between 1 and 60% black, but is usually between 10 and 20% black. *Id.* A second expert placed the tipping point at 40% black by population. *Id.* The final expert concluded that successful integration occurred when there was a two to one white to minority ratio. *Id.*

Additionally, benign housing quotas that exceed the tipping point are invalid. *Burney v. Housing Auth.*, 551 F. Supp. 746, 767 (W.D. Pa. 1982). As the court stated "[w]hen the percentage of blacks is kept below the tipping point, the quota imposes unnecessary costs on black entrants, serving the invidious purpose of exclusion more than the benign purpose of integration." *Id.*

⁸⁷ *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (E.D.N.Y. 1980), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

⁸⁸ *Yonkers*, 837 F.2d at 1185.

⁸⁹ *Id.*

⁹⁰ *Id.*

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Yonkers' fourteen tracts subdivided into thirty-two subtracts.⁹¹

As of 1980, 40.4 percent of the population of Southwest Yonkers was minority, contrasted with a 5.8 percent minority population in Northwest and East Yonkers.⁹² Within the areas themselves, there was further segregation. Five of the tracts in Southwest Yonkers had minority populations exceeding 50 percent, and four had minority populations ranging between 20 and 50 percent.⁹³ Of the thirty-two subtracts which comprised the remainder of Yonkers, only two subtracts had a minority concentration greater than 7 percent.⁹⁴ One of the subtracts abutted a Southwest tract which contained over 50 percent minorities and the other subtract included a neighborhood of black homeowners called Runyon Heights.⁹⁵

The public housing in Yonkers is located primarily in or adjacent to Southwest Yonkers.⁹⁶ The two projects located outside of this area include a family project located in Runyon Heights, and a senior citizen unit located in East Yonkers.⁹⁷ The senior citizen project was expected to be, and in fact was, predominantly white.⁹⁸

B. Methods of Segregation

Yonkers is governed by a city council (hereinafter "council") which is comprised of a generally elected mayor, and twelve coun-

⁹¹ *Yonkers*, 837 F.2d at 1186.

⁹² *Id.* at 1185 (minority is defined as blacks or hispanics).

⁹³ *Id.* at 1185-86.

⁹⁴ *Id.* at 1186.

⁹⁵ *Id.* Runyon Heights is a middle income black community. *Id.* It was founded at the start of this century when a senator who owned the parcel began inviting blacks from Harlem to the area for picnics. *Id.* The senator auctioned off parts of the site, which was originally to be a cemetery, to blacks as an act of rebellion against community opposition to the cemetery. *48 Hours: Not on My Street* (NBC television broadcast, September 26, 1988) (hereinafter "My Street") (transcript on file in office of St. John's Journal of Legal Commentary) page 6.

Homefield, the community adjacent to Runyon Heights, is white. *Yonkers*, 837 F.2d at 1186. The deeds to most Homefield properties contained racially restrictive covenants. *Id.* Additionally, the neighborhood association purchased and maintained a four foot strip of land in order to separate the black and white neighborhoods. *Id.* "To this day, Runyon Heights streets terminate in a dead-end just below this strip." 624 F. Supp. at 1410.

⁹⁶ *Yonkers*, 837 F.2d at 1186 (96.6 percent of units are so located).

⁹⁷ *Id.*

⁹⁸ *Id.*

cil members who are elected by district (wards).⁹⁹ The other pertinent governmental actors include the seven member planning board, appointed by the mayor, and the Municipal Housing Authority ("MHA").¹⁰⁰ The MHA was a corporation organized to "propose, construct, and operate public housing in Yonkers."¹⁰¹

To approve a request for federal funding of public housing, the MHA needed either a majority vote from both the planning board and the council, or a three fourths vote in the council to overcome a rejection by the planning board.¹⁰² Yonkers followed New York law in this area, but with a twist. In practice, the opposition of any one council member was honored by the others,¹⁰³ thus creating a veto power which could be exercised by any one council member.¹⁰⁴

The only sites which were approved by the Council and Planning Board were in areas with previous high minority concentrations. The sites which were rejected often were considered to be ideal for this type of housing.¹⁰⁵ Vacant lots, and closed schools costing the city more to keep vacant than to build on were rejected.¹⁰⁶ At one point, there were between 1200 and 3000 applications for 415 housing units, but the city chose to lose its allocated funds rather than build the necessary housing to accommodate these people.¹⁰⁷

When the City was able to get funds re-allocated, the council, succumbing to community opposition, rejected the two sites considered to be excellent for subsidized housing.¹⁰⁸

⁹⁹ *Id.*

¹⁰⁰ 837 F.2d at 1186.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* This also gave a veto power to the receiving community, since one vote against the project from that community's elected representative would effectively kill the plan. *Id.*

¹⁰⁵ See *infra* note 119 and accompanying text.

¹⁰⁶ *Id.*

¹⁰⁷ 837 F.2d at 1188. This was accomplished through a combination of disapproving proposed sites and procrastination. *Id.* Furthermore, during this period, the planning board was acutely aware of the "desperate need for public housing in Yonkers." *Id.*

¹⁰⁸ *Id.* To protest the construction, the Yonkers community held meetings with attendance of up to 1,000. *Id.*

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C. Equal Protection and Yonkers

The Yonkers case provides a clear example of intentional discrimination in violation of the equal protection clause. As has been discussed, intent can be established by application of the three factors set forth in *Arlington I*: (1) the historical background and context of the decision; (2) the particular sequence of events leading up to the challenged action; and (3) a departure from the normal procedural sequence.¹⁰⁹ The *Yonkers* court effectively applied these factors.¹¹⁰

With respect to the first factor, the historical background of the Yonkers case is replete with racially motivated decisions by the council to block the construction of low income housing. From 1948 through 1982 the council continuously approved sites for low-income housing only to abandon these plans when faced with community opposition.¹¹¹ The racial motivations of these actions are evidenced by the fact that a majority of the housing plans that were approved were either located in a minority area or adjacent to one.¹¹² In addition, most, if not all of the community opposition was expressly based on a desire to exclude blacks and other minorities from certain areas.¹¹³ Furthermore the council refused to implement the use of "Section 8 Certificates"¹¹⁴ that would en-

¹⁰⁹ See *supra* notes 10-12 and accompanying text (factors for establishing equal protection prima facie case).

¹¹⁰ *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181,1221-22 (2d Cir. 1987).

¹¹¹ See *infra* notes 117-119 and accompanying text.

¹¹² See *supra* notes 88-98 and accompanying text (discussion of the state of housing in Yonkers).

¹¹³ *Yonkers*, 837 F.2d at 1181. The court states that a group of white Catholics, equating low income housing with minorities, urged that the planned housing be changed to senior citizen housing. *Id.* at 1221. One councilman testified that his public, non-racial opposition to the housing was only a smoke screen to the community's concern that "they did not want the housing because they didn't want any blacks there," and they did not want to "absorb the overflow from Puerto Rico or Harlem." *Id.* On one occasion, when housing was planned for two white areas and a black area, all three communities opposed the plan. *Id.* at 1188. The two white communities proposed a public referendum to provide:

time to acquaint each and every citizen with the full facts on public housing. Where will these tenants come from? How will we provide schools? How much will it cost us over the years? What safeguards do we have against our having to absorb the overflow from Puerto Rico or Harlem?

Id. The council rejected the sites which were located in these two neighborhoods. *Id.* But it approved the third site; it was located in Runyon Heights. *Id.*

¹¹⁴ Pub. L. No. 93-383, 88 Stat. 633. The Yonkers Department of Development had applied to the HUD and received 100 such certificates to be divided between senior citi-

able low income people to obtain housing in certain buildings and receive rent subsidies from the federal government. This program was disallowed out of a fear that "members of the minority community would . . . seek and probably find units on the east side of the city."¹¹⁵

The second factor, which surveys the particular sequence of events leading up to the challenged action, was also born out by the council's actions. One glaring example was the city's decision to change its zoning ordinances to prohibit the building of low income housing in a neighborhood that was 98% white.¹¹⁶ This impropriety was exacerbated when the city approved a builder's plan to construct high priced condominiums on that site.¹¹⁷ This plan was approved despite the prohibitory zoning because the council would "change that zone when the concept fit[] the people, not before."¹¹⁸ The City also refused to grant a minor zoning ordinance to an approved plan for senior citizen housing when it learned that a portion of the units would be made available to minorities.¹¹⁹ Zoning changes have been held to be strong evidence of intentional discrimination.¹²⁰ Evidence that a city council zoned out low income housing and subsequently made the same land available to a more "suitable" developer should be conclusive

zens and families. *Yonkers*, 837 F.2d at 1191. For the most part, however, the Council only approved certificates for senior citizens. *Id.* If families were granted certificates they were exclusively referred to buildings in Southwest Yonkers. *Id.* Conversely, white families were permitted to use the Section 8 Certificates in white areas of Yonkers. *Id.* In 1981 the Council forbade any further requests for certificates for families. *Id.*

¹¹⁵ *Yonkers*, 837 F.2d at 1191.

¹¹⁶ *Id.* at 1192.

¹¹⁷ *Id.* This project was approved because the \$100,000 units would draw in people "we would like in the neighborhood." *Id.* The previous zoning would have permitted housing. *Id.* This property was empty at the time, and cost the city \$40,000-\$50,000 per year to maintain. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Yonkers*, 837 F.2d at 1191-92. The City's Zoning Board denied minor variances for parking and the Council declared the site was unfit for seniors because of a nearby "unsightly car lot," despite contrary findings by housing experts. *Id.* at 1192.

¹²⁰ *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 267 (1977). The court inferred that there would probably be an equal protection clause violation if the property involved had undergone a zoning change when it was learned that integrated housing would be built. *Id.*; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 145 (3d Cir. 1977). The statement made by the Court in *Arlington* is adopted here. *Id.*; *Kennedy Park Home Assoc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir.) *cert. denied*, 401 U.S. 1010 (1970). Discrimination claim is strengthened where an area's zoning status was altered and all new construction was stopped after a low income housing plan was implemented. *Id.*

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as to intent.

The third factor, procedural deviations, was also present. In order to secure approval to sell the land rezoned to exclude the senior citizen housing, the city council established an advisory board consisting of five people, four with no knowledge of zoning or planning issues, to circumvent the planning board.¹²¹ In addition, the city ignored recommendations from the planning board as to how many units of low-income housing should be built and ignored all recommendations concerning sites in white neighborhoods.¹²²

It is clear that the impact of the city's housing policies fell squarely and solely on minorities who had been continuously denied housing in areas other than Southwest Yonkers. While impact alone is not determinative,¹²³ it bolsters the finding of intent.

The city attempted to avoid a finding of intent, stating that the council was merely effectuating the wishes of its constituents.¹²⁴ As the circuit court effectively pointed out, this argument is not persuasive.¹²⁵ No official body can avoid the restrictions of the equal protection clause, or enforce the biases of the electorate by claiming that they are simply effectuating their constituents' desires.¹²⁶ The actions involved here become no less discrimina-

¹²¹ *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1192 (2d Cir. 1987). This citizens committee was never instructed to work with the Planning Board. *Id.* At a council meeting to vote on the committee's recommendation to sell the property to the developer there was substantial community support for the sale, much of it for discriminatory purposes. *Id.*

¹²² *Yonkers*, 837 F.2d at 1222. In the 1950's the City ignored a Planning Board recommendation to build only 250 units of low-income housing in minority areas and built 415; it continued construction in minority areas despite opposition to this by the Planning Board, and it changed zoning ordinances to prevent low-income housing in white areas. *Id.*

¹²³ *Washington v. Davis*, 426 U.S. 229, 242 (1976) (disproportionate impact not sole factor of invidious racial discrimination); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (racially disproportionate impact relevant factor for court's consideration); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 141 (3d Cir. 1977); *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988, 992-93 (D. Mass. 1981) ("Racially disproportionate impact alone will not suffice to render official action unconstitutional."); *Mayers v. Ridley*, 465 F.2d 630, 638 (D.D.C. 1972).

¹²⁴ *Yonkers*, 837 F.2d at 1222.

¹²⁵ *Id.* at 1222-23. The officials were not mere passive receptacles of community wishes. *Id.* at 1223. One councilman urged his constituents to oppose the sale of land to build low income housing so "the wishes of the NAACP for low income housing would be defeated." *Id.* The mayor took similar action. *Id.*

¹²⁶ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985). A city cannot evade the equal protection clause on the grounds that it is implementing the pub-

tory or intentional, simply because that is what the people wanted. This is especially true where the officials knew that the motivation behind the people's desires was racially based, as was the case in Yonkers.¹²⁷ "[T]he electorate as a whole . . . could not order city action violative of the Equal Protection Clause . . . and the city may not avoid the strictures of that clause by deferring to some . . . fraction of the body politic."¹²⁸

Once intent was established, Yonkers faced the onerous burden of proving some legitimate governmental interest that outweighed the private detriment it had caused.¹²⁹ None existed. Yonkers asserted that its actions were motivated by a desire to preserve property values and effectuate the wishes of the community. Neither balanced out the effect of restricting black entry into certain communities, nor rose to the level of some rational or legitimate governmental purpose. Although it has been suggested that no governmental discrimination along racial lines will be permitted under the Constitution, even without this assertion, there is little doubt that the Yonkers City Council had created an easy target for an equal protection claim.

lic's wish. *Id.*; *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[p]rivate biases may be outside the reach of the law, . . . but the law cannot give them effect"); *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting). "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." *Id.*; *Cooper v. Aaron*, 358 U.S. 1, 25 (1958) (Frankfurter, J., concurring). While school desegregation stirs violent emotions, these emotions will not be calmed when officials, sworn to uphold the Constitution, submit to them. *Id.*; *Smith*, 682 F.2d at 1068-69 (4th Cir. 1982). Town is liable for actions in response to its constituent's racially motivated opposition. *Id.*; *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970). Local officials will be liable for effectuating the discriminatory designs of private individuals. *Id.*

¹²⁷ See *supra* note 113-114 and accompanying text (examples of racially based motivations).

¹²⁸ *City of Cleburne*, 473 U.S. at 448.

¹²⁹ *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974); *Mayers v. Ridley*, 465 F.2d 630, 638 (D.D.C. 1972). See *Palmore*, 466 U.S. at 432 (need compelling governmental interest to justify governmental race based discrimination); *Burney v. Housing Auth.*, 551 F. Supp. 746, 756 (W.D. Pa. 1982) (racially motivated action only justified by compelling governmental interest with no less restrictive alternative); Comment, *supra* note 4, at 135 (compelling state interest necessary to justify state action based on suspect classifications or impinging fundamental interest).

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D. Remedies, Sanctions and Legislative Immunity

For a court order to have any real authority, it is necessary to vest the court with the power to fashion remedies.¹³⁰ Where equal protection issues are involved, courts have broad remedial powers.¹³¹ This power, however, is not unlimited; its exercise should be restrained and tailored to correct only the violation at hand.¹³²

In *Milliken v. Bradley*¹³³ the United States Supreme Court ably condensed the law in this area into three factors to be considered when applying equitable principles: (1) the remedy must relate to the violation; (2) the cure must be remedial so that it restores the victim to the condition he would have occupied absent any discrimination; and (3) the remedy should consider the interest of state and local authorities in managing their own affairs.¹³⁴

The remedies ordered in *Yonkers* met the first two of these re-

¹³⁰ *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980). Federal courts have the power, and duty, to make their intervention effective. *Id.*; John Randolph Tucker Lecture (by Paul J. Mishkin) *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 952 (1978). In reference to school desegregation it was asserted that judicial supervision or intervention is necessary on more than a sporadic basis to ensure the underlying constitutional rights of minorities. *Id.*; see *Ruiz v. Estelle*, 679 F.2d 1115, 1155 (5th Cir. 1982) (once constitutional violation shown, court may exert its equitable power to prevent recurrence of the violation); see also *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977) (federal court may compel state officials to perform their official duties in compliance with constitution).

¹³¹ *Swann v. Board of Educ.*, 402 U.S. 1, 15 (1970) (scope of court's power to remedy past wrong is broad); *Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982). Once a constitutional violation is discovered, a district court has broad discretion to fashion a remedy. *Id.* A court's equity power is broad and flexible but there must be a balance between individual and collective interests. *Morgan v. McDonough*, 548 F.2d 28, 31 (1st Cir. 1977); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974). Wide discretion is given where a court is fashioning relief for a constitutional violation. *Id.*; Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). The authors aver that federal courts sitting in equity exercise broad remedial powers. *Id.* at 853; cf. *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (use injunction sparingly and only in clear and plain case).

¹³² *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 436-37 (1976). In *Spangler*, the United States Supreme Court held that courts should not keep their supervisory role once the violation is corrected. *Id.*; *Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9th Cir. 1986). All injunctions exceeding the Constitution must be tailored to correct the injury at hand and cannot unnecessarily infringe into areas of state authority. *Id.* The court's power is limited to finding a constitutional violation and correcting that violation only. *Hoptowit*, 682 F.2d at 1246. In *Gates*, while affirming a district court remedy deemed tailored to end unconstitutional practices, the court stated that this seems to be a requirement. *Gates*, 501 F.2d at 1320; Special Project, *supra* note 131, at 855 (remedy must be tailored and related to the violation itself).

¹³³ 433 U.S. 267 (1977).

¹³⁴ *Id.* at 280-81.

quirements with relative ease.¹³⁵ By requiring the city to build two hundred units of public housing and additional units of subsidized housing, Judge Sand clearly attempted to eradicate the effects of Yonkers' refusal to do so.¹³⁶ The second requirement, was clearly aimed at providing housing to minorities to whom it had been consistently denied.¹³⁷ The final factor, however, requires further analysis.

It is submitted that the constraints of federalism and the separation of powers doctrine must be considered when a court attempts a foray into a quasi-legislative area, such as the allocation of housing construction. It is equally true, however, that courts do not owe local and state authorities a duty of blind deference. As the United States Supreme Court has stated, judicial authority can be exercised where local authorities fail to act.¹³⁸

In the area of school segregation the district courts have been held to possess the authority to take such diverse actions as devising a desegregation plan where the local school board failed to,¹³⁹ and requiring large scale additions to a school district's budget for the implementation of a desegregation plan.¹⁴⁰ In the housing

¹³⁵ *Yonkers*, 837 F.2d 1181, 1194 (2d Cir. 1988). Yonkers was ordered to submit a housing assistance plan to HUD to receive grants for 200 units of subsidized housing. *Id.* It also had to submit at least two sites for 140 of the units to HUD for approval. *Id.* If the City failed to submit these sites within thirty days, the order specified three closed school sites that would be used. *Id.* The City was also required to establish a trust fund to encourage private development of low and moderate income housing with a percentage of its grants from HUD. *Id.* The establishment of a Fair Housing Office, the transfer of the administration of Section 8 certificates to the MHA with HUD's approval, and the development of additional subsidized family housing outside Southwest Yonkers was also ordered. *Id.* at 1194-95.

¹³⁶ *Yonkers*, 837 F.2d at 1236-37.

¹³⁷ *Id.*

¹³⁸ *Hutto v. Finney*, 437 U.S. 678, 687 (1978). Judicial authority may be invoked when local authorities fail in their duty to cure constitutional violations. *Id.* at 687 n. 9; *Milliken v. Bradley*, 433 U.S. 267 (1977). Where a school board failed in its obligation to act against discrimination, judicial authority could be invoked. *Id.* at 281; In *Swann v. Board of Educ.* 402 U.S. 1 (1970), the judicial authority to act where local authorities fail to was gleaned from earlier cases that imposed a duty to eliminate school segregation. *Id.* at 15. The *Swann* court referred to *Green v. School Bd.*, 391 U.S. 430, 437-38 (1968) and *Brown v. Board of Educ.*, 347 U.S. 483 (1954) in reaching this conclusion. *Id.*

¹³⁹ *Swann*, 402 U.S. at 15.

¹⁴⁰ *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983). It was held to be within the district court's discretion to require the addition of 7.4 million dollars to the school's budget. *Id.* at 814; see *Griffin v. School Bd.*, 377 U.S. 218, 233 (1964) (local authorities can be required to levy taxes to operate and maintain services without discriminating).

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area this authority has included: (1) the right to permit construction of public housing after the adoption of a plan to use existing programs; (2) taking the necessary steps to submit an adequate application for funds; and (3) requiring the establishment of a fair housing committee.¹⁴¹

These powers are not arbitrary, but necessary to insure and effectuate constitutional rights. In situations like *Yonkers*, where local authorities were stagnant, courts have become the only avenue by which those discriminated against can obtain a remedy.¹⁴² Additionally, courts owe no duty of deference to discriminatory legislative action.¹⁴³ In such instances courts have been empowered to enact remedies beyond those required by the Constitution.¹⁴⁴ This is necessary to insure the remedy's success and prevent continued violation. Without this power a court's order would be effectively meaningless.

Once the court in *Yonkers* had imposed remedies its authority did not cease. While courts are granted broad discretion to imple-

¹⁴¹ *United States v. City of Parma*, 661 F.2d 562, 577-78 (6th Cir. 1981). See *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 652 (N.D. Cal. 1973) (district court can order education of employees to inform them of duties under Fair Housing Act).

¹⁴² Note, *Judicial Remedies In "Pattern and Practice" Suits under the Fair Housing Act of 1968*: *United States v. City of Parma*, 33 CLEV. ST. L. REV. 109 (1984). The author states:

[I]t seems that state and local legislatures are 'paralyzed' with respect to fair housing issues and that, realistically, the courts are the only likely sources of remedy; thus, the courts have a large share of the responsibility in the carrying out of the national policy of fair housing. This responsibility should not be shirked but rather accepted, even at the expense of stretching the traditional remedy-shaping power of the courts.

Id. at 135.

¹⁴³ *Arlington Heights v. Metropolitan Hous. Auth.*, 429 U.S. 252, 265-66 (1977) (Arlington I) (where there is proof of discriminatory purpose no judicial deference justified); Note, *supra* note 142, at 135; see *Bush v. Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La. 1961) (where goal of measures is to deny constitutional rights plaintiff can properly seek injunction), *aff'd sub nom Denny v. Bush*, 367 U.S. 908 (1971); Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 527 (1982) ("[w]hen a court of equity is confronted . . . with a continuing violation of statutory law, it has no discretion or authority to balance the equities so as to permit that violation to continue.").

¹⁴⁴ *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986) (court may go beyond that which the Constitution would allow to remedy violations); *Ruiz v. Estelle*, 679 F.2d 1115, 1155 (5th Cir. 1982) (court may require remedial measures that Constitution does not initially require); *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980) (courts may order relief not required by constitution to successfully prevent further violations); see Note, *supra* note 142, at 135 (courts should accept responsibility of implementing national fair housing policy, even at expense of stretching normal remedial powers of courts).

ment coercive sanctions,¹⁴⁵ this power is not absolute. The character and magnitude of continued non-compliance, the effectiveness of fines, and the burden placed on the defendant by the fines all must be considered.¹⁴⁶ Again, the action taken by Judge Sand comports with these rules.

Initially, the fines were set at one hundred dollars per day, doubling every day thereafter until the city complied. If the city had not continued to ignore the order, it could have paid the fine without unduly straining its budget. Secondly, courts are justified in imposing fines that make it more attractive for a defendant to consent than to continue in contempt.¹⁴⁷ Without the power to impose heavy sanctions a judge's enforcement power would be non-existent. Ignoring an injunctive decree usually leads to punishment for contempt; in order to avoid punishment, those subject to an injunction must abide by it until it is altered or struck down.¹⁴⁸

The concept of legislative immunity was adopted in order to insure that legislators could act without fear of public interference.¹⁴⁹ Although this originally applied only to federal officials, the privilege has been extended to include state and local legisla-

¹⁴⁵ *Perfect Fit Indus., Inc. v. Acme Quitting Co.*, 673 F.2d 53, 57 (2d Cir. 1982) (courts have broad discretion when implementing coercive sanctions); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979) (district judge in equity has wide discretion in fashioning remedies); *see also* *United States v. United Mine Workers*, 330 U.S. 258, 304-05 (1947) (imposition of a large fine is not necessarily an abuse of discretion; court imposed \$2.8 million dollar fine).

¹⁴⁶ *Perfect Fit Indus.*, 673 F.2d at 57; *International Business Mach. v. United States*, 493 F.2d 112, 116 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Mine Workers*, 330 U.S. at 304.

¹⁴⁷ *Perfect Fit Indus.*, 673 F.2d at 57. Fines must be substantial enough to make compliance more economical than contempt; *see* *Hutto v. Finney*, 437 U.S. 678, 690 (1978) (financial penalty may be most effective way to insure compliance with court order).

¹⁴⁸ *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976); *see* *Howat v. Kansas*, 258 U.S. 181, 190 (1922) (court orders must be respected; disobedience to court order is contempt which requires punishment).

¹⁴⁹ *Supreme Ct. of Va. v. Consumer's Union*, 446 U.S. 719, 731 (1980). Congressional immunity is intended to insure that legislative functions can be carried out without fear of outside interference. *Id.*; *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-05 (1979). Legislative immunity is necessary to "protect the public good." *Id.*; *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (legislative immunity is intended for public good and not personal advantage); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 612 (8th Cir. 1980). Legislative immunity extends to the municipal level where there is an increased fear of personal retribution. *Id.*

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tors as well.¹⁶⁰ In an attempt to use this immunity as a shield, the Yonkers council members claimed that they were improperly subjected to the remedial order and ensuing contempt sanctions.¹⁶¹ It is submitted that the United States Supreme Court was mistaken in lifting the sanctions imposed on the individual council members.¹⁶²

Injunctions against legislators and legislative bodies have been approved where the action being enjoined deprives citizens of their constitutional rights.¹⁶³ As Justice Douglas has stated, “[i]f a committee departs so far from its domain to deprive a citizen of a right protected by the Constitution, I can think of no reason why it should be immune.”¹⁶⁴ As previously noted, the City of Yonkers clearly overstepped its bounds by its consistent racially based re-

¹⁶⁰ *Lake Country Estates*, 440 U.S. at 403-05. (legislative immunity extends to state and regional legislators as well as federal legislators); *Aitchison v. Raffiani*, 708 F.2d 96, 99 (3rd Cir. 1983) (members of municipal council acting in a legislative capacity were held to be entitled to legislative immunity); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982) (immunity applies to local legislators); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. 1981) (local legislators are entitled to immunity); *Gorman Towers*, 626 F.2d at 612 (state, regional and municipal legislators are entitled to immunity); *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980) (legislators of any political subdivision are immune when acting within their legislative capacity). *But see* *Star Dist. Ltd. v. Marino*, 613 F.2d 4, 7 (2d Cir. 1980) (immunity from damages not inevitably accompanied by immunity from injunctive relief).

¹⁶¹ *City of Yonkers v. United States*, 57 U.S.L.W. 3183, 3184 (1988).

¹⁶² *Procinier v. Navarette*, 434 U.S. 555, 562 (1978). An immunity defense to a § 1983 action is not available if the defendant knew or should have known a constitutional right was being violated and knew or should have known his conduct violated the Constitution. *Id.* There is also liability where the defendant intended to infringe on another's constitutional rights or cause other injury. *Id.* at 566; *see* *Wood v. Strickland*, 420 U.S. 308, 322 (1974). There is no immunity for a school official who knew, or should have known his acts would violate the constitution or who acted with the malicious intent to do so. *Id.* Immunity is forfeited where there is an attempt to harm another for a constitutionally prohibited reason. *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.), *cert. denied sub nom.* *Antry v. Flores*, 449 U.S. 875 (1980); *see also* *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1080 (7th Cir. 1978) (state or county tax official loses immunity if he violates plaintiff's clearly established constitutional rights or violates them with malicious disregard), *cert. denied*, 439 U.S. 1121 (1979).

¹⁶³ *Pembaur v. Cincinnati*, 475 U.S. 469, 477 (1986). A municipality may be liable for municipal policy that results in constitutional tort. *Id.*; *Progress Dev. Corp. v. Mitchell*, 286 F.2d 222, 231 (7th Cir. 1961). There is no immunity for local officials administering laws in a manner that discriminates against blacks by precluding them from moving into all white neighborhoods. *Id.*; *Bush v. Orleans Parish School Bd.*, 191 F. Supp. 871, 875 (E.D. La. 1961), *aff'd sub nom.* *Denny v. Bush*, 367 U.S. 908 (1961). Injunctions are proper where the effects of an official act deprive people of their constitutional rights, especially where the goal is to vindicate the authority of a federal court. *Id.* at 875.

¹⁶⁴ *Tenney v. Brandhove*, 341 U.S. 367, 382 (1951) (Douglas, J., dissenting).

fusal to supply low income housing; this condition abrogates its immunity.

In situations where legislators take action that consistently violates the Constitution and the authority of the federal courts, as did *Yonkers*, there is no immunity. This is necessary to preserve the authority of the federal courts. There is no governmental official, at any level, who is above the Constitution.¹⁵⁵ Notably, none of the cases extending legislative immunity to local legislatures involved constitutional issues or consent decrees. It is submitted that there is no reason to make an exception to this trend in *Yonkers*.

IV. TIPPING POINT THEORY: A CRITICAL ANALYSIS

White flight is the mass exodus of white people from their community which occurs when the neighborhood becomes racially dynamic.¹⁵⁶ The "tipping point" of the neighborhood is that ratio of minority to white population which triggers that exodus.¹⁵⁷ While a perfect tipping point theory would accurately predict this ratio, the variegated nature of the population and lack of sociological support makes realization of this precise ratio impossible.¹⁵⁸

¹⁵⁵ *Tenney*, 341 U.S. at 383 (Douglas, J., dissenting); see *supra* note 152 and accompanying text (circumstances for loss of legislative immunity).

¹⁵⁶ See generally Comment, *supra* note 42, at 898. White flight occurs as the influx of minorities to an area increases. *Id.* As the minorities enter, the whites leave, creating vacancies that are filled by more minorities. *Id.*; Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 251-60 (1974) (explanation of white flight and racial tipping point theory).

¹⁵⁷ *Id.* (the tipping point represents the ratio of minorities to whites where the remaining whites leave in droves creating a new, irreversibly segregated community); see generally Note, *supra* note 85, at 14-15 (discussion of tipping phenomenon and its applicability to integrated housing integration maintenance cases); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro-The Problem of Special Treatment*, 61 NW U. L. REV. 363, 391 (1966) (describing tipping point theory). But see Goering, *Neighborhood Tipping and Racial Transition: A Review of Social Science Evidence*, 44 J. AM. INST. PLANNERS 68, 69 (1978). "There is . . . no social science evidence that supports the existence of a single, universally applicable tipping point which can explain and predict the point at which neighborhoods will irreversibly change from white to nonwhite." *Id.*

¹⁵⁸ See Goering, *supra* note 157, at 69 (lack of social science evidence); Smolla, *supra* note 41, at 897 (if tipping points are determined by racial attitudes, then like racial attitudes will result in like tipping points). But see generally Ackerman, *supra* note 156, at 255. Attitudes affect the tipping point in such a way that:

[i]f differing individual white tolerances for black neighbors and jittery white expectations are tipping's primary causes, then tipping points will vary according to the attitudinal composition of a given white population and the differing arrangements of environmental factors which could trigger uncontrolled white fears that an irrev-

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*Otero v. New York City Housing Authority*¹⁵⁹ provides an example of judicial use of the tipping point theory. In *Otero*, a program which allowed a ceiling quota on minority applicants so that a New York apartment complex would not start its life as a pocket ghetto was upheld by the court.¹⁶⁰ This opinion recognized that to avoid white flight the tipping point of the complex must not be exceeded.¹⁶¹

The dissent in *Starrett* used this rationale to formulate a cogent argument favoring the tenanting policies used there.¹⁶² It is submitted that the tipping point theory should not be used in housing discrimination cases because it is unreliable and capricious. Furthermore, even if it were a reliable indicator of when white flight occurs, a court of law should not embrace such a phenomenon. The majority opinion, by not discrediting this theory, gives credence to the dissent, and allows or fosters other attitudes which the tipping point theory can be thought to embody.

Even without its racist connotations, the tipping point theory is not a useful indicator for developing housing policy.¹⁶³ While common experiences which tend to support the tipping point concept are commonplace, it is not obvious that this is a manifestation

ocable chain of turnover has begun.
Id. at 255. *Contra* *United States v. Starrett City Assocs.*, 660 F. Supp. 668, 674 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988) (expert testimony claiming that the tipping point for Starrett City is approximately 40% minority).

¹⁵⁹ *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973).

¹⁶⁰ *Id.* *Otero* involved a New York City Housing Authority regulation which gave first priority in rentals to displaced tenants when a new construction project was built. *Id.* at 1125-26. The city, however, refused to follow its own rules when it realized that the new tenants would be primarily minority and would put the project past its tipping point, thereby creating an instant "pocket ghetto." *Id.* at 1124, 1126.

¹⁶¹ *Id.* at 1135-37. The court allowed the city to initially rent approximately one-half of the apartments to non-former site occupants, 88% of whom were white. *Id.* at 1128-33.

¹⁶² *Starrett*, 840 F.2d at 1107 (Newman, J., dissenting). Judge Newman asserted that:

If, as the court holds, Title VIII bars Starrett City's race-conscious rental policy, even though adopted to promote and maintain integration, then it would bar such policies whether adopted on a short-term or a long-term basis. Since the Act makes no distinction among the durations of rental policies alleged to violate its terms, *Otero's* upholding of a race-conscious rental policy . . . cannot be ignored simply because the policy was of limited duration.

Id.

¹⁶³ See Note, *supra* note 85, at 19 (tipping phenomenon, whether valid or not, is not an appropriate consideration of what constitutes integrated public housing); Goering, *supra* note 157, at 69-70 ("There is no single demographic proportion of nonwhites to whites which can be used as a *a priori* basis for predicting the timing or rate of white flight.").

of the racial attitudes of the inhabitants involved.¹⁶⁴ There is significant evidence that the impetus for white flight lies in several variables including population growth, employment opportunities, housing stock, real estate activity, and the presence of community groups.¹⁶⁵

The unreliability of the tipping point theory should, in itself, suffice to preclude its application to Title VIII cases.¹⁶⁶ There are, however, more fundamental problems with its use. While its inaccuracy raises constitutional objections,¹⁶⁷ the more troubling aspects of this theory arise because of what it represents, if accurate, and the type of thinking it fosters.

Since the tipping point in its purest form is the maximum percentage of minorities which the majority race will tolerate, it is essentially a racism index.¹⁶⁸ The racist aspects of the theory become apparent when viewed through the eyes of the marginal mi-

¹⁶⁴ See Goering, *supra* note 157, at 70. "The outmigration of white residents does not appear to occur through a process of racial tipping." *Id.*; Smolla, *supra* note 41, at 896 (examples of tipping in urban residential areas); Note, *supra* note 85, at 12-13 (many other factors besides race which contribute to tipping).

¹⁶⁵ See Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1119 (1971). The "difficulties in housing, education [and] health care . . . are in significant part merely symptoms of a more basic maldistribution of economic power . . ." *Id.* See generally Smolla, *supra* note 41, at 895-96 (range of considerations lead to racial turnover).

¹⁶⁶ See *Burney v. Hous. Auth.*, 551 F. Supp. 746, 764-65 (W.D. Pa. 1982) (difficulty in determining where the tipping point is makes a Title VIII defendant's justification burden very difficult to meet); Goering, *supra* note 157, at 77 (no "social science capacity to affirm the existence of a universally applicable proportion of white to nonwhite residents which constitutes a tipping point in racially changing neighborhoods."); Smolla, *supra* note 41, at 897 ("[s]ocial science simply cannot accurately predict the tipping point for any given community."). See generally *infra* note 167 and accompanying text (unreliability of the tipping point model).

¹⁶⁷ See generally *Burney*, 551 F. Supp. at 770. Although the constitutional cases in this area yield differing tests, a common thread is that the violative policy cannot be justified absent a showing that there was not a less discriminatory method of achieving the policy's goals. *Id.*; *Fullilove v. Klutznick*, 448 U.S. 448, 480-82 (1980) (set-aside provisions to assist minority contractors constitutional because narrowly tailored to achieve its remedial goal); *Regents of the University of California v. Bakke*, 438 U.S. 265, 315-20 (1978) (specific minority quotas constitutionally invalid).

Since the tipping point is unpredictable, a quota based on it will either be too high, defeating its purpose, or too low, making a less discriminatory plan possible. See *Burney*, 551 F. Supp. at 767.

¹⁶⁸ See *Burney*, 551 F. Supp. at 758 (white flight phenomenon is based on white racism); Comment, *supra* note 42, at 900 (tipping point is nothing more than an index of white racism); see *supra* notes 156-158 and accompanying text (general discussion of white flight and tipping point theory).

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nority member who has just been denied housing because he would put the complex past its tipping point.¹⁶⁹

The court in *Starrett* could have overruled *Otero*, sending a message that courts will not espouse racist attitudes. Instead it focused on the effect of the policy, leaving its underlying philosophy intact. It is submitted that courts should not accept that whites will only tolerate a certain percentage of minorities; otherwise the discriminating actors, being mostly self-regarding,¹⁷⁰ can interpret this as tacitly condoning their behavior.

Although the dissent in *Starrett* was undoubtedly proffered with non-racist intentions, it illustrates that even an egalitarian-minded judge can inadvertently achieve racist consequences by basing a facially non-racist argument, which sacrifices racial equality for some other end, on tipping point reasoning. While Judge Newman would have sacrificed racial equality for integration,¹⁷¹ his condescension to the tipping point theory reinforces the notion that somehow whites have a natural right to decide whether or not to tolerate their minority neighbors.¹⁷²

In practice it is perfectly rational not to desire “a neighbor who

¹⁶⁹ See Kaplan, *supra* note 157, at 391. It may be more important for an individual minority member to procure housing, than to have integration. *Id.* The individual minority member might respond to the prospect of being denied housing for integration's sake thus:

The fact is . . . that this housing at its price is vastly superior in terms of freedom from rat-infestation, plumbing facilities, light, air, space and many other things to the housing I am now in. . . . When you deny me housing because I am a Negro, it is small consolation to me to be told that you are fighting against the very evil which is a basic cause of my problem. Your solution takes a long time and I need decent housing now.

Id. See also Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas and Goals in the 1980's*, 58 S. CAL. L. REV. 947, 999 (1985) (despite altruistic goals of maintaining integration levels, minority individual is simply concerned with obtaining better housing).

¹⁷⁰ See generally Silverman, *Subsidizing Tolerance for Open Communities*, 1977 WIS. L. REV. 375 (1977). A self-regarding individual is more concerned with the effects that a policy will have on him, then on the overall effect for everyone concerned. *Id.* at 431. The self-regarding person is the more prevalent. *Id.* at 432-33.

¹⁷¹ *United States v. Starrett City Assoc.*, 840 F.2d 1096, 1108 (2d Cir. 1988) (Newman, J., dissenting). In support of his position that quotas should be allowed to maintain integration, Judge Newman asserts that “there is a substantial argument against forcing an integrated housing complex to become segregated, even if current conditions make integration feasible only by means of imposing some extra delay on minority applicants for housing.” *Id.*

¹⁷² *Burney*, 551 F. Supp. at 758. Tipping point quotas infringe on the interests of minority individuals because they are denied access to housing solely because of their race, and because of the social stigmas associated with the quota system. *Id.*

is dirty, noisy, violent," or all three;¹⁷³ it is not, however, rational to automatically include black or poor people on that list.¹⁷⁴ The elegance of the tipping point theory is that an argument which avers that the percentage of blacks in an area be kept below the maximum which whites will tolerate seems non-racist. Yet, without the tipping point prism to pass through, the argument necessarily allows whites to either add black and indigent people to the above list of undesirables, or supports the direct equation of black and poor people with the dirty, noisy, and violent undesirables.

It is suggested that the tipping point theory approves this "minority" to "undesirable" analogy thereby establishing a racial "given" without which it is difficult to sustain many of the arguments for integrating low income housing into white neighborhoods.

The opponents of integrating neighborhoods with low income people consistently attempt to use arguments that specifically exclude racist motivations.¹⁷⁵ The community representatives in Yonkers, for example, have explicitly denied charges of racial animosity.¹⁷⁶ Many frequently-used arguments against integration are based in free-market economics.¹⁷⁷ This forum helps mitigate the racial sting of these arguments since it assumes that all actors in the market place act rationally, and in their own best interest.¹⁷⁸

Opponents of integration often argue that integrating a neighborhood forces property values to decline.¹⁷⁹ Economically, how-

¹⁷³ Silverman, *supra* note 170, at 431 (discussion of rational criteria for choosing neighbors).

¹⁷⁴ See *Starrett*, 840 F.2d at 1106 (Newman, J., dissenting). The dissent easily links its position with the majority by endorsing the goal of achieving integration, coupled with the fact that *Starrett* was voluntarily assuming the responsibility of that integration. *Id.*

¹⁷⁵ See generally Silverman, *supra* note 170, at 429-62 (background information on people's rationales for discriminatory behavior).

¹⁷⁶ *United States v. Yonkers Bd of Educ.*, 837 F.2d 1181, 1193 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988); *My Street*, *supra* note 95, at 2 (Yonkers resident discussing effects of proposed housing). "I'm not talking about black, I'm not talking about white - I'm talking about scum, in every race, color, and creed, . . . create[s] this . . . deterioration of a neighborhood." *Id.*

¹⁷⁷ See, e.g., *My Street*, *supra* note 95, at 3 (Yonkers resident discussing economics of proposed housing). "They're [the government] devaluating my value [sic]." *Id.*

¹⁷⁸ W. HIRSCH, *LAW AND ECONOMICS* 7 (1979) (according to traditional economics theory, each actor seeks to "maximize his own self interest.").

¹⁷⁹ *Yonkers*, 837 F.2d at 1187 (site was opposed because of the "likely deterioration of property values."); see generally Silverman, *Housing for All Under Law: The Limits of Legalist*

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ever, assuming an extrinsically stable economy, to upset a stable market place there must be: (1) a decrease in demand for the product; and/or (2) an increase in the supply of the product.¹⁸⁰ It is submitted that this requires the previously discussed racial "given" to occur.

A decrease in demand assumes that the infiltration of minorities into an area makes it less desirable for whites. The natural market response to this would be a decline in property values to a new equilibrium point,¹⁸¹ representing the decrease in the white resident's utility derived from living in that neighborhood without minorities.¹⁸² If this condition would ensue because of minority infiltration, then it follows that the original market was inflated by whites who were willing to pay a premium to live free of minority neighbors. The deflation of property values then merely reflects the natural color-blind market equilibrium point for that area.

The supply side of the position is exploited by the common citing of various examples of pocket-ghettos which have been created through integration. This position holds that while race is unimportant, the potential of creating another morass of urban blight motivates the resistance.¹⁸³ This proposition is flawed, how-

Reform, 27 UCLA L. REV. 99, 107 (1979) (lower-income developments are regarded as producing negative economic externalities resulting in loss of property values); *My Street*, *supra* note 95, at 4 (Yonkers resident discussing assumptions of residents regarding property values). "I had everything to lose. I had my property values to lose . . ." *Id.*

¹⁸⁰ See R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.1 (2d ed. 1977) (background discussion of supply and demand theory). "The equilibrium price of a commodity in a competitive market is determined by the . . . condition *supply equals demand*." G. FREILICH & F. GREENLEAF, *CALCULUS: A SHORT COURSE WITH APPLICATIONS* 43 (2d ed. 1985) (emphasis in original).

¹⁸¹ See R. POSNER, *supra* note 180 at § 1.1. This is not a movement along the demand curve, but an actual shift in that curve, so that each price point is associated with a lower number of potential buyers. *Id.*

¹⁸² See Silverman, *supra* note 170, at 441. In order to retain property values, people must be attracted to the area who are willing to pay the pre-integration market prices. *Id.* at 441 n. 259. There must be a decrease in utility associated with the property to bring about this effect because, with supply remaining constant, there must be fewer home-buyers who will pay the previous equilibrium price for available properties. See also R. POSNER, *supra* note 180, at § 1.1 (background discussion of supply and demand theory). This indicates that the property is not as desirable as it was previously. *Id.*

¹⁸³ *Yonkers*, 837 F.2d at 1187. "[S]uch projects . . . lead to the eventual deterioration of the surrounding community by the element which they attract." *Id.* "To penetrate the community with subsidized housing would tend to deteriorate realty values and adversely affect the character of th[e] community." *Id.* at 1189; *My Street*, *supra* note 95, at 2 (Yonkers resident discussing effects of housing project). "I sincerely believe that if you're dump-

ever, because it assumes that white flight will occur;¹⁸⁴ and is inconsistent with the rationality precept of capital economics.

The tipping point/white flight phenomenon creates excess supply which *will* decrease market values. A *rational* homeowner who attaches a certain utility level to his property will not part with that property unless a buyer will pay a price that satisfies that utility level.¹⁸⁵ It is submitted that while a fear of degradation of a community could produce a lower utility level associated with the property, any negative economic manifestations of that fear must come from the property owner himself. This implies that the property owner is willing to sell his property at a price which does not compensate him for the property's associated utility in order to escape the minority infiltration. This cannot logically coexist with the premise that these majority positions are based in capitalist economics,¹⁸⁶ unless it is accepted that these minorities belong on the list of people whom it is rational to avoid as neighbors.

It is submitted that since both the supply and demand sides of the market value arguments require the *a priori* inclusion of minorities on a list of undesirable neighbors,¹⁸⁷ these arguments should be viewed with extreme skepticism. Moreover, when a community participates in concerted action with its government to systematically exclude minorities, as in *Yonkers*, the loss which the property owners suffer can be philosophically analogized with concert of action tort damages.¹⁸⁸

ing . . . the low-income housing in one neighborhood, you're going to turn it into a South Bronx" *Id.*

¹⁸⁴ See Goering, *supra* note 157, at 76. Many people only say that they will move as a negotiating tool, others do not have the resources to move, but hope that the government will take them seriously. *Id.*

¹⁸⁵ See R. POSNER, *supra* note 180, § 1.1 (rational seller will not accept less than his property is worth to him).

¹⁸⁶ See W. HIRSCH, *supra* note 178, at 7. A person acting in his own best interest would not rationally accept less than his property is worth to him, unless that best interest includes fleeing from minorities. *Id.* Since prejudice is irrational, this cannot exist in a system which assumes rational thought as its basis. See also Silverman, *supra* note 170, at 463 ("[t]he very foundations of fact and value which generate rational moral convictions are likely to be ignored or abused by prejudiced mentality.").

¹⁸⁷ See, e.g., *My Street*, *supra* note 95, at 4 (community leader discussing pending litigation). "If there came a time where I thought that it was ultimately over, and I say this with all my conviction, I say it without talking it over with my wife, my first reaction would be to move." *Id.*

¹⁸⁸ See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 323

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CONCLUSION

Examining the current minority housing situation demonstrates the prominent place which racism still occupies in this country. Fortunately, the law provides vehicles to narrow these racial disparities. By refusing to acknowledge racist rationales, courts can and should use their unique communicative position to foster the abrogation of racism.

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(5th ed. 1984). To establish a joint tort there need only be a tacit understanding between the parties. *Id.* "All those [acting in concert] . . . are equally liable." *Id.*; Comment, *Federal Housing and School Desegregation: Interdistrict Remedies Without Busing*, 25 ST. LOUIS U.L.J. 575, 597 (1981-1982). Concert of action tort theory has been used to impose liability on the government for honoring the desires of its citizenry to have segregated schools. *Id.*

