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Affirmative Duty to Integrate Applied to Exclude Non-Whites (Otero v. New York City Housing Authority)

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On the other hand, however, one must not lose sight of the plight of the New York City resident. The Supreme Court has declared that durational residency requirements prerequisite to public assistance constitute an abridgement of the constitutionally protected right of freedom of interstate travel.[28] If, at the same time, the courts are willing to uphold public assistance financing programs which require geographic districts to pay a fixed percentage of their welfare expenses without regard to the number of recipients within the districts, the City's taxpayers, and all others in areas paying relatively high welfare benefits, will be caught in a financial squeeze.

Responsibility for solving this complex problem now lies with the three-judge district court and its decision promises to have far-reaching consequences. Despite the Second Circuit's decision in *Aguayo v. Richardson*,[29] wherein an attack on the state's experimental welfare programs was repulsed, *Richardson* is distinguishable on its facts.[30] In any event, the final resolution of this issue will lie with the Supreme Court.[31]

AFFIRMATIVE DUTY TO INTEGRATE APPLIED TO EXCLUDE NON-WHITES

Otero v. New York City Housing Authority

Municipal authorities have an affirmative duty to integrate their public housing. This responsibility derives from both the equal protection clause of the Constitution and the Fair Housing Act of 1968.[1]

interfering with local attempts at solving the problem. *Id.* at 53-55. *But see* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 97 Cal. Rptr. 601 (1971); Note, *Equal Educational Opportunity: A Case for the Children*, 46 ST. JOHN'S L. REV. 280 (1971).

28 *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

29 473 F.2d 1090 (2d Cir. 1973); see pages 278-87 *supra* for detailed treatment of *Aguayo*.

30 In *Aguayo* the plaintiffs were attacking the implementation of two experimental programs, *id.*, while in *Richardson* the attack was aimed at the established and continuing scheme. 473 F.2d at 930. While some latitude might be given to the states where experimental programs are involved, such latitude seems inappropriate where an established state scheme is questioned. Moreover, the *Aguayo* court was able to find that the programs "suitably furthered" a legitimate state interest. 473 F.2d at 1109. In *Richardson*, Judge Kaufman noted that the state "has not offered any rational justification" for the scheme, nor was it perceivable "what justifying considerations may have motivated the State legislature to devise a system that appears on the surface discriminatory." 473 F.2d at 932.

31 Appeals from decisions of three-judge district courts are direct to the Supreme Court as of right. 28 U.S.C. § 1253 (1970).

1 42 U.S.C. § 3601 *et seq.* (1970). The Act contains a broad declaration stating: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1970). The Act also requires the Secretary of Housing and Urban Development (HUD) to: "(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. § 3608 (1970). Thus, the affirmative duty

While the scope of this duty has never been delineated, it has served as the basis for invalidating both site and tenant selection criteria when such classifications have had the effect of confining minorities to ghetto areas.[2] While such a mandate appears on its face to be wholly consonant with the prohibition against discrimination, *Otero v. New York City Housing Authority*[3] demonstrates the conflict between the duty to integrate and the anti-discrimination laws.

In a potentially far-reaching decision, the Second Circuit upheld

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to integrate arises from the requirement that the Secretary act affirmatively to implement the policies of the Act. *See* note 35 *infra*.

In Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970), the court ordered an injunction against further development of a federally assisted project until the impact of its location on racial concentration could be determined. It held that the affirmative duty to integrate required consideration of racial factors in project site selection. The duty was found to permeate the collective housing laws:

> Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight . . . . Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.

Id. at 816. Similarly, in Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *modified*, Civil No. 72-1576 (6th Cir., filed Jan. 8, 1973), the failure to include racial criteria in determining site selections was held to be violative of the affirmative duty to integrate. The district court based the duty on the equal protection clause and the Fair Housing Act. It concluded that the Act

> carried with it the clear implication that local housing authorities in conjunction with Federal agencies responsible for housing programs are to affirmatively institute action the direct result of which was to be the implementation of the dual and mutual goals of fair housing and the elimination of discrimination in that housing.

Id. at 1182. In neither *Shannon* nor *Banks* did the duty to integrate conflict with the Act's prohibition against discrimination, 42 U.S.C. § 3604 (1970). For an extensive examination of the Fair Housing Act of 1968 see Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159 (1972).

2 Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972). A finding that the site selection policies of the local housing authority fostered existing patterns of racial segregation was made in Gautreaux v. Chicago Housing Auth., 296 F. Supp. 907 (N.D. Ill. 1969); *id.* 304 F. Supp. 736 (supplemental judgment order), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971). The court held that the tenant selection policies which imposed "elastic quotas" on blacks in "white projects" were unconstitutional. The Housing Authority sought to defend the quotas as necessary to avoid racial tensions. 296 F. Supp. at 909. The judgment order required limitations on the number of units available to neighborhood residents and permitted the tenant assignment plans of the previously white projects to "contain provisions designated to assure that such projects do not become racially segregated." 304 F. Supp. at 740. The concern appears to have been that the projects would remain predominantly white. In Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972), the court similarly held that concentration of local housing projects within the city limits denied the plaintiffs equal protection and violated the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970). *See also* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970); Blackshear Residents Organization v. Housing Auth., 484 F.2d 1122 (2d Cir. 1973).

3 484 F.2d 1122 (2d Cir. 1973).

the right of a public housing authority to limit admissions of non-whites in order to ensure the racial balance of a community.[4] Judge Mansfield, writing for a unanimous panel,[5] held that when a New York City Housing Authority regulation giving former area residents first priority admission status to new projects[6] conflicts with the Authority's duty to integrate, the latter must prevail. Accordingly, the Authority

> may limit the number of apartments to be made available to persons of white or non-white races, including minority groups, where it can show that such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community.[7]

The City had taken title to a 14-block urban renewal area on Manhattan's lower east side for the purpose of constructing a low and middle income housing project known as the Seward Park Extension. Residents of the urban renewal area were informed at the time of their relocation that, pursuant to a revised regulation, they would have first priority to return to any housing built within the renewal area.[8]

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[4] The court adopted the plaintiffs' terminology of "non-whites" which included Puerto Ricans, the majority of the plaintiffs' class, as well as blacks and orientals. *Id.* at 1126 n.4.

[5] Joining Judge Mansfield were Judges Hays and Mulligan.

[6] The Authority's regulation regarding admissions set forth the following order of priorities:

1. site residents of the site upon which the project was built, and if the project is within an urban renewal area, model city area, or other redevelopment area, site residents of sites acquired to effectuate the plan for such area;
2. families in emergency need of housing, including families who are homeless, under order of eviction, living in buildings condemned as unfit for human habitation, living under housing conditions which because of illness or disease endanger life, or facing displacement from sites, buildings of dwelling units, being cleared or vacated by governmental action;
3. families residing under extremely substandard conditions, and severely handicapped persons who reside under conditions which create extreme hardship;
4. families residing under grossly overcrowded conditions;
5. families residing under conditions which create a health hardship for one or more persons;
6. families residing under other substandard or hardship conditions.

GM 1810, as cited by the district court in the appendix to the preliminary injunction, Otero v. New York City Housing Auth., 344 F. Supp. 737, 748 (S.D.N.Y. 1972).

[7] 484 F.2d at 1140.

[8] A prior regulation would have given first priority status only to those persons who actually resided on the physical location of the housing project, referred to by the court as "project site residents." The amended regulation, note 6 *supra*, expanded the priority status to residents of locations acquired to implement the overall plan called "urban renewal site residents." The court referred to the two groups together as "former site occupants."

Since the revised regulation was promulgated after the City took title to the urban renewal area, the Authority argued that it should not be applied in the instant case. The court rejected this argument:

> Having bound itself to that course in statements to plaintiffs, having publicly held itself out as prepared to follow that course with respect to this project and having in fact acted accordingly, it could not switch back in mid-stream to its earlier policy, even though it might have done so *ab initio*.

484 F.2d at 1132.

When the low income project was near completion, the offer was again renewed. The response was overwhelming and unexpected.[9]

The Authority later reneged on its promise and agreed to lease a substantial number of apartments to non-renewal area residents, most of whom were white. While 161 of the 360 apartments went to prior occupants of the area, the remainder were rented to individuals having lower priorities despite a lengthy waiting list of former area residents who sought to return. Included in the 171 non-area families selected were 48 who had been granted transfers in order to be closer to a synagogue where they traditionally had worshipped.

The Authority defended its actions on the theory that the admission of additional former area residents would tip the racial balance of the project and, in turn, that of the community. It argued that this would ultimately lead to segregation and thus force a violation of its affirmative duty to integrate. Undisputed facts indicated that 60 percent of the former area residents who had been granted leases were non-white whereas 88 percent of the non-area residents selected were white.[10] Projections showed that the completed buildings would become 80-20 in favor of non-whites if the regulations were followed but would have a 60-40 white majority if the Authority could disregard the priority status of former area residents.[11]

A complaint was filed on behalf of a class of non-whites which included prior residents of the renewal area as well as persons in emergency need of housing or in already crowded projects. The plaintiffs sought injunctive relief alleging discrimination in violation of the Civil Rights Acts,[12] including the Fair Housing Act of 1968.[13] Furthermore, they alleged that the house of worship transfers were based on a religious criterion and, therefore, violated the establishment clause of the first amendment.

On cross motions for summary judgment, the district court granted an injunction against the Authority holding that, although it had a duty to integrate, it could not act at variance with its own regulation.[14]

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9 The Authority had found through past experience that only 4% of those given an opportunity to return exercise their option. In this case, however, 27% of those with former site priority sought to enter the completed project. In fact, the number of applications from former site occupants exceeded the total number of apartments built. In addition to the 161 who were granted leases, 322 former residents remained on the waiting list. 484 F.2d at 1126.

10 *Id.* at 1128.

11 *Id.*

12 42 U.S.C. §§ 1981-83, 2000d (1970).

13 *Id.* §§ 3604, 3608 (1970).

14 Otero v. New York City Housing Auth., 354 F. Supp. 941, 957 (S.D.N.Y. 1973). Judge Lasker granted a permanent injunction which barred the Authority:

(1) from renting any apartments in its Seward Park Extension buildings to any

Once the regulation was found valid, due process required that the Authority adhere to it even though it originally could have promulgated different selection criteria.[15] The court expressed a belief that the Fair Housing Act and subsequent decisions interpreting it do not "require affirmative action to achieve integration *at the expense of minority groups*."[16] Although it acknowledged that its primary holding rendered the question nonessential, the district court found the use of religious criteria in the case of the house of worship transferees unconstitutional.

On appeal, the Second Circuit reversed and remanded, holding that the Authority would be justified in ignoring its own selection criteria, if "adherence to [the regulation] would tend to precipitate a racial imbalance which might ultimately prevent the Authority from exercising its duty to maintain integration in the community."[17] In addition, it remanded for a determination of whether, as alleged, the house of worship transfers were made on non-religious grounds, namely to protect the transferees from physical and verbal assaults. The court held that a transfer based on such neutral grounds would no more offend the establishment clause than a transfer to avoid harassment of persons because of physical attributes, race, or national origin.[18]

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individual or family unless and until all former site occupants, who were eligible (without regard to housing need) and have applied for and for whom there is an apartment of appropriate size, are offered leases in the building;

(2) from allowing any individuals or families who are not former site occupants to whom it has rented apartments in the Seward Park Extension buildings from taking possession of the apartments unless and until all former site occupants, who are eligible (without regard to housing need) and have applied for and for whom there is an apartment of appropriate size, are offered leases in the buildings; and

(3) from leasing apartments on a priority basis to persons seeking proximity to their house of worship.

Judge Frankel's opinion granting a preliminary injunction is reported in 344 F. Supp. 737 (S.D.N.Y. 1972).

15 354 F. Supp. at 950. *See* note 8 *supra;* Service v. Dulles, 354 U.S. 365 (1953). It is immaterial that the agency could have instituted different procedures de novo. Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959).

In determining whether or not the Authority's disregard of a valid regulation violates due process, it is significant that the directive was well publicized and that the agency could expect reliance upon it. United States v. Leahey, 434 F.2d 7, 11 (1st Cir. 1970). *See generally* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); United States *ex rel.* Donham v. Resor, 436 F.2d 751 (2d Cir. 1971).

16 354 F. Supp. at 953 (emphasis in original).

17 484 F.2d at 1137. *See* text accompanying note 7 *supra.*

18 484 F.2d at 1139. The Supreme Court has indicated that: "[T]he Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, even-handed in operation and neutral in primary impact." Gillete v. United States, 401 U.S. 437, 450 (1971).

The more recent decision of Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), indicates that there is a tripartite test: "First, the statute must have a secular legislature purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 393 U.S. 236, 243 (1968); finally, the statute must

In assessing the potential impact of further admissions of non-white former area residents, Judge Mansfield stressed the so-called "tipping effect."[19] According to this theory there exists a theoretical maximum ratio of minority members to whites beyond which the whites will flee a given area at a sudden accelerated pace, causing it to become predominantly inhabited by members of the minority group.[20] Thus, the primary concern was not merely with the racial makeup of the Seward Park Extension, but rather that a racially one-sided project might destroy the racial balance of the outlying area.[21] On remand, the district court was to take the tipping effect into consideration. It would also have to perform the difficult task of defining the relevant area in which the effect was to be considered.[22] The *Otero* panel specifically rejected the district court's speculation that, because of the large number of moderate-income units and units for the elderly planned for the remainder of the project, the overall urban renewal area would become 82 percent white if the defendant prevailed, but only 73 percent white if the plaintiffs were successful.[23]

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not foster 'an excessive government entanglement with religion' . . . ." The instant case deals with an agency's actions rather than a statute or regulation. The court expressed concern that these matters were left to an "ad-hoc determination." 484 F.2d at 1139.

One question still remaining is that assuming the house of worship transfers are not violative of the establishment clause, how may the Authority ignore the remaining order of allocation set forth in its regulation? *See* note 6 *supra*. One answer might be that since they are transferees, there is no net loss in the total number of public housing units available, and they are, therefore, not subject to the regulation's priorities.

[19] 484 F.2d at 1135-37. *See* Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531, 533 (1963) [hereinafter cited as Hellerstein]; Kaplan, *Equal Justice in an Unequal World — The Problems of Special Treatment*, 61 NW. U.L. REV. 388, 390 (1966); Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30, 31 (1960) [hereinafter cited as Navasky]. *See also* 85 HARV. L. REV. 870, 875-76 (1972); Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1106 (1969).

[20] Hellerstein, *supra* note 19, at 533; Navasky, *supra* note 19, at 31.

[21] The population of the lower east side had shifted from 58.9% white and 41.1% non-white in 1965 to a ratio in 1970 of 51.7% non-white to 48.3% white. 484 F.2d at 1136. The district court took the position that the return of former area residents could not, by definition, upset the community's balance. 354 F. Supp. at 954. The Second Circuit disagreed and held that on remand the Authority would have the opportunity to show that a heavy concentration on non-whites in the project, whether or not the individuals were originally from the area, could "tip" the surrounding community. 484 F.2d at 1136-37.

[22] The *Otero* panel, as well as the parties, discussed the impact of the project both within the confines of the urban renewal area, and the broader periphery of the entire lower east side. The court left the task of defining the bounds of the "community" for the district court. In the final analysis, this may prove to be the most important consideration when applying the principles suggested in the court's opinion. The tipping factor may be likened to a pebble dropped into a pond — the impact of a segregated project would naturally be greatest in the areas closest to the project.

[23] 354 F. Supp. at 946, 484 F.2d at 1137. In remanding, the court ruled that at trial:

the parties would be permitted to offer evidence as to the relevant community,

Benign quotas have at times been suggested to lessen the impact of the tipping effect.[24] Basically, there are limitations imposed on the number of members of racial or ethnic groups which may enter a given housing development with the underlying purpose of achieving and maintaining integration.[25] The primary difference between the traditional notion of a benign quota and the limitation in *Otero* is that in the latter a subjective test is suggested rather than a fixed ratio.[26] Benign quotas insure that a policy of open housing does not result in unconscious de facto segregation. This policy has been criticized on the ground that it is a government-sanctioned use of race as a basis for allocating benefits, thus leading to a double standard.[27] Furthermore, they invariably lead to denial of an individual's access to living quarters solely because of race.[28] The legality of such quotas is rendered

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the impact of adherence to the priority regulation, including the declining white population in that community, the effect of transfers from other locations in the community to the Seward Park Project, estimates as to the total racial composition of the Urban Renewal Area upon completion, and the racial composition of the available population that is eligible for public housing.

484 F.2d at 1137.

[24] Hellerstein, *supra* note 19; Navasky, *supra* note 19; Wofford, *Notre Dame Conference on Civil Rights: A Contribution to the Development of Public Law*, 35 NOTRE DAME LAW. 328, 366 (1960) [hereinafter cited as Wofford]. In Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681 (N.D. Ill. 1968), a private developer attempted to establish a housing project with an 80% white to 20% non-white benign quota as established through covenants in the deeds. Upon learning that the project was intended to be interracial, the local town, pursuant to a referendum, condemned the land for a park. The developer filed suit under the Civil Rights Act, 42 U.S.C. §§ 1981-83, 1985, 1988 (1957), seeking an injunction and damages. The relief was denied on the grounds, *inter alia*, that he had failed to establish the alleged conspiracy and lacked "clean hands" in that his project was an attempt to circumvent Shelley v. Kramer, 334 U.S. 1 (1948).

[25] Hellerstein, *supra* note 19, at 533. The court did not reject the categorization of the Authority's limitation as a benign quota. 484 F.2d at 1136.

[26] The *Otero* court did not speak in terms of an absolute or fixed quota. Rather, the controversy before it required the assessment of the impact of admitting a large group of the plaintiffs' class at one time. The court attempted to establish a subjective test. The language of the court varied throughout the opinion: "[t]he district court must be satisfied that adherence to [the regulation] would probably lead to eventual ghettoization of the community." *Id.* at 1136. The trial court must determine "whether adherence to [the regulation] would tend to precipitate a racial imbalance . . . ." *Id.* at 1137. The regulation may be disregarded "where [the Authority] can show that such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community." *Id.* at 1140.

[27] It has been convincingly argued that:

> the government's intentional and explicit use of race as a criterion of choice is bound — no matter how careful the explanation that this is a "good" use of race — to weaken the educative force of its concurrent instruction that a man is to be judged as a man, that his race has nothing to do with his merit. Citizens, thus besieged by what will understandably, be taken to represent two conflicting government endorsed principles, are likely to listen to the voice they wish to hear.

Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1259 (1970).

[28] Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1, 42-45 (1964).

even more doubtful in light of recent federal anti-discrimination legislation.[29]

The court found the overriding duty to integrate mandated by the equal protection clause as well as by the broad declaration of policy contained in the Fair Housing Act.[30] Decisions enforcing this duty have often arisen where the policy of a local housing authority has limited low income projects to areas already concentrated with minority groups.[31] Housing authorities, therefore, have been required to consider the probable racial composition of a given project and the effect of its location on the outlying area,[32] Viewed as a mandate in planning, the duty to integrate has never been applied so as to deny a particular class of persons admission to a project solely because of their race.

The equal protection clause does not prohibit racial classifications per se.[33] Although subject to rigid scrutiny, such classifications will be upheld if they are shown to be the only practical means of achieving a compelling state interest.[34] The Fair Housing Act, however, expressly

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[29] After a lengthy discussion of housing quotas, Mr. Navasky concludes:

> Where a publicly-imposed benevolent quota works to deny any individual of an accommodation solely because of race, I think a court should, and probably would, hold it unconstitutional.
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> The best way for the courts to handle the problem would be to use the "reasonable alternatives" formulation.
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> In a world of limited energies, people interested in integrated housing should work for passage and effective enforcement of non-discrimination laws and also to increase the housing supply. These approaches are more basic than the quota approach.
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> The benevolent quota, while not intrinsically bad, is potentially dangerous. Let us first try and get our integrated housing through site selection, pricing, promotion, and other such techniques. If this does not work, private developers might then, with cause, rely heavily on quotas.

Navasky, *supra* note 19, at 68.

Although favoring quotas, a doubt as to their constitutionality was also expressed in Wofford, *supra* note 22, at 366. The passage of the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.* (1970), subsequent to the expression of these views, places an additional hurdle in the way of their constitutionality. *See* note 32 and accompanying text *infra*.

[30] 484 F.2d at 1133. *See* note 1 and accompanying text *supra*.

[31] *See* note 2 and accompanying text *supra*.

[32] Shannon v. HUD, 436 F.2d 809, 821-22 (3d Cir. 1970); Gautreaux v. Chicago Housing Auth., 304 F. Supp. 736, 740 (N.D. Ill. 1969).

[33] Loving v. Virginia, 388 U.S. 1 (1967).

[34] The Supreme Court, per Chief Justice Warren, noted that

> [a]t the very least, the Equal Protection Clause demands that racial classifications, . . . be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

Id. at 11. In Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968), the court reversed a dismissal of a complaint which in substance alleged that the plaintiff class, composed of Blacks and Puerto Ricans, had been denied equal treatment in the municipality's relocation program for those displaced by its urban renewal projects. Judge Smith, writing for the Second Circuit, realized that

bans all forms of racial discrimination in housing governed by the Act.[35] Included in this prohibition are statements or notices indicating a preference or limitation based on race.[36] Implicit in the *Otero* holding is that the duty to limit housing on a racial basis, where the failure to do so would lead to segregation, is a constitutionally founded doctrine.[37] This inescapably leads to the paradox of state denial of equal protection in the name of equal protection.

> [w]hat we have said may require classification by race. That is something which the Constitution usually forbids, not because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

Id. at 931-32 (footnotes omitted). In *Otero* there was no allegation that whites were receiving unequal treatment in the allocation of public housing. Since an *Otero* limitation is based on the tipping effect, non-whites would always constitute a minority of any project in which it was applied. The racial classifications suggested in *Otero* are preventative measures against the possibility of segregation in the future. The Second Circuit did not consider the application of strict scrutiny standards in the instant case. In light of the extensive treatment of these standards elsewhere in this *Second Circuit Note,* it is not necessary to consider this point further. *See* Boraas v. Village of Belle Terre, *supra* p. 262.

[35] The Fair Housing Act of 1968, with limited exceptions for single family homes and small rooming houses, makes it 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, or national origin.
> (b) To discriminate against any person in terms, conditions, or privileges of sale rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.
> (c) To make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion or national origin, or an intention to make any such preference, limitation, or discrimination.
> (d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

42 U.S.C. § 3604 (1970).

> Under the regulations governing federally-assisted programs funded by HUD:
> A recipient . . . may not, directly or through contractual or other arrangements, on the ground of race, color, or natural [*sic*] origin: . . . .
> (v) Treat a person differently in determining whether he satisfies any occupancy, admission, enrollment, eligibility, membership, or other requirement or condition which persons must meet in order to be provided any housing, accommodations, facilities, services, financial aid, or other benefits provided under the program or activity;

24 C.F.R. § 1.4 (1973). In the instant case, HUD had been a defendant in the original action but was dismissed as a party by the district court since adequate relief was available against the Authority, and no active discrimination was alleged on the part of HUD. 354 F. Supp. at 957. In addition to the Fair Housing Act and HUD regulations, discrimination in public housing is prohibited by N.Y. CIVIL RIGHTS LAW § 18-c (McKinney Supp. 1973).

[36] 42 U.S.C. § 3604(c) (1970). *See* note 35 *supra.*

[37] The court referred to "the Authority's constitutional and statutory duty to promote

An expansion of the *Otero* rule to other areas might lead to a subversion of civil rights legislation. Conceivably, a school district, despite a ban on discrimination, could limit the number of black or Hispanic students where it can show that admission of additional members of that group "would tend to precipitate a racial imbalance."[38] It would no doubt be argued that since the goal of the limitations is to prevent segregation, it is in perfect harmony with *Brown v. Board of Education*.[39] Of course, *Otero* could not effectively be used by minorities to the detriment of whites since the tipping effect, by its nature, relates only to an influx of non-whites. Furthermore, an *Otero* limitation on minorities might be made well below the 50 percent mark.

Used properly, the affirmative duty to integrate is a powerful tool essential to achieving an important national goal. In the area of housing, it can ensure that local authorities do not limit lower income housing projects to ghetto neighborhoods. It may provide the impetus to build attractive middle income housing in racially mixed areas with the intent of drawing in a larger white population.

It is unrealistic and unlawful for a housing authority to take a totally "color blind" attitude in planning for the housing needs of a community.[40] However, an ill-defined duty to integrate may lead to social engineering at variance with an individual's right to be free from subjection to racial discrimination.[41] In housing, as a minimum restraint, the duty should not be applied so as to conflict with the Fair Housing Act's prohibition against discrimination.

The *Otero* court was required to make its potentially far-reaching decision not in a neatly defined test case but in a controversy wherein a decision either way would adversely affect numerous innocent per-

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integrated housing . . . [as] paramount" but acknowledged that the duty does not automatically require invalidation of the regulation. 484 F.2d at 1135.

38 *See* note 17 and accompanying text *supra*.

39 347 U.S. 483 (1954). An affirmative duty to integrate has been found to exist in the area of school desegregation. The Fifth Circuit, in United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967), established a "freedom of choice" plan to insure integration in local schools. The court based its holding on the premise that: "Boards and officials administering public schools . . . have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system . . . ." In *Jefferson County*, there was an allegation that the schools were in fact segregated, and that only affirmative action could eliminate that pre-existing condition. In *Otero*, the Authority argued that the community would in the future become segregated if steps were not presently taken.

40 Shannon v. HUD, 436 F.2d 809, 820 (3d Cir. 1970).

41 The Second Circuit has ruled that due process requires the Authority to adopt "orderly procedure[s] for allocating its scarce supply of housing . . . ." Holmes v. New York City Housing Auth., 398 F.2d 262, 265 (2d Cir. 1968).

sons.[42] Unfortunately, its holding may prove a source of abuse. Since many of our cities are faced with critical housing shortages and the on-going problem of whites fleeing to the suburbs, leaving central cities to become segregated ghettos, local municipalities are confronted with the challenge of reversing this trend and thwarting further neighborhood deterioration. An increasing burden will be placed on the courts to insure that individual rights are not sacrificed to achieve this goal.

First Amendment Rights Of Newsmen Protected

Baker v. F. & F. Investment

The extent of a news reporter's right to refuse to reveal a confidential news source has been the subject of much recent discussion and judicial consideration. In the much publicized case of *Branzburg v. Hayes*[1] the Supreme Court ruled that the constitutional protections of the first amendment cannot be invoked by a newsman seeking to protect his confidential source from the inquiry of a grand jury.[2] The rationale in *Branzburg* was that the public's interest in having the grand jury receive everyman's evidence outweighs the newsman's right to withhold his confidential source.[3] Thus, absent an effective statutory

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42 A decision for the plaintiffs would have invalidated 171 leases, whereas a reversal may mean the judicially-sanctioned breach of a lawful promise made to some 322 tenants.

1 408 U.S. 665 (1972).

2 The three cases consolidated for argument in *Branzburg* are summarized as follows:

(1) Branzburg v. Hayes, 461 S.W.2d 345 (Ky. Ct. App. 1970): Paul Branzburg, an investigative reporter for the *Louisville* (Ky.) *Courier-Journal* was subpoenaed before a grand jury, but refused to reveal the identity of his confidential sources who had supplied information about local drug abuse practices. The Kentucky High Court declined to quash the subpoenas; the Supreme Court affirmed.

(2) Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970): Earl Caldwell, a *New York Times* reporter, brought an action to quash subpoenas ordering him to appear and testify before a grand jury investigating local activities of the Black Panther Party. The Court of Appeals for the Ninth Circuit quashed the subpoenas; the Supreme Court reversed.

(3) *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971): Paul Pappas, a reporter for WTEV-TV (New Bedford, Mass.), appeared before a grand jury, but refused to answer questions concerning his attendance at a local Black Panther Party meeting. The Supreme Judicial Court of Massachusetts declined to quash the subpoena and ruled: "We adhere to the view that there exists no constitutional newsmen's privilege either qualified or absolute, to refuse to appear and testify before a court or grand jury." 266 N.E.2d at 302-33. The Supreme Court refused to disturb the holding.

3 This broad statement, however, belied the reasoning used in *Branzburg*. Mr. Justice Powell, whose concurring opinion represented the crucial swing vote, wrote, in the strongest terms, that the balancing test approach has not lost its vitality:

> [I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The