

Judging Remedies: Judicial Approaches to Housing Segregation

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Using the law to promote diversity in residential communities is probably more difficult than promoting it in any other public policy domain. Many reasons for this difficulty arise from the distinctive nature of housing markets, which in turn reflects the unique ethos that surrounds housing in American culture. Other problems are endemic to public law generally. In this Article, I discuss how the law has defined and handled the goal of residential diversity, a project in which the courts have taken a remarkable degree of policy initiative, rather than simply react to or implement policies developed by politicians and bureaucrats.

This Article is divided into five Parts. In order to frame the discussion that follows, Part I sketches the nature of housing markets and the regulatory context that shapes and constrains residential diversity policies. Part II examines the actual extent of America's residential diversity, finding much racial and social class diversity *across* residential communities but far less diversity *within* them. Here, we see how Americans, as individuals and as communities, actually define the residential diversity they seek in the market. Part III discusses how various theorists have formulated an ideal of residential diversity.

Part IV, the heart of this Article, is historical-empirical. I use three protracted litigations to show how governmental entities deploy law to pursue and instantiate the diversity ideal—almost always as a way to remedy past and continuing discrimination. The first, *Mount Laurel*,¹ began as a state court challenge to income-based discrimination in suburban housing under New Jersey law, but morphed into a permanent regulatory

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¹ The discussion of the *Mount Laurel* litigation draws primarily on two decisions, *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) ("*Mount Laurel I*"), and *Southern Burlington City NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) ("*Mount Laurel II*").

program to promote affordable housing in all developing towns. The other two litigations, *Gautreaux*² and *Yonkers*,³ were federal court challenges to the placement of public housing in areas where racial minorities were already concentrated. Because these cases took quite different remedial paths, they invite comparison.

Finally, Part V distills from these case studies several lessons for efforts to increase residential diversity. Litigation against recalcitrant communities is a crude, costly, often counterproductive tool for diversifying them. Resistance to diversity is greatest when communities think that government is forcing on them members of a social class who cannot afford the neighborhood's housing. The government can minimize this resistance by providing new entrants with rent-equivalents that they can use, with the aid of mobility professionals, to negotiate quietly with landlords on a unit-by-unit basis.

I. NATURE AND REGULATION OF HOUSING MARKETS

This Part provides a schematic account of the highly complex, diversified, fragmented, and intensely competitive residential housing market.⁴ In 1999, there were 119 million units in the nation's housing stock. Of these, about 12% were vacant, 59% were owner-occupied, and 29% were rentals. That year, construction began of more than 1.6 million privately owned housing units (three-quarters single-family houses), 5.1 million existing one-family houses were sold, and 225,000 apartments were completed and rented. In 2000, home ownership reached 67.5%, with 69.8 million homeowners.⁵

The industry, broadly defined, consists of literally millions of firms, most of them small and specialized. Home assemblers include homebuilders, contractors, home manufacturers and their dealers, and mobile home producers. These assemblers procure their materials from a network of specialized wholesalers and retailers who distribute the materials of a large number of manufacturers and processors. Land acquisition, preparation, and construction involve real estate developers, brokers, advertisers and marketers, lawyers, title insurance companies, zoning officials and experts, surveyors, designers, civil engineers, and possibly land

² *Hills v. Gautreaux*, 425 U.S. 284 (1976).

³ *United States v. Yonkers Bd. of Educ.*, 518 F. Supp. 191 (D.C.N.Y. 1981).

⁴ This Part draws on ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* (2d ed. 2000). Ellickson and Been report that the nation's largest homebuilder in 1993, Centex Corporation, accounted for under 1% of total national housing starts. *Id.* at 20. Concentration is usually greater in specific metropolitan areas; one study found that the combined market share of the four largest builders in several metropolitan areas was about 50%. *Id.*

⁵ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2000*, at 713 tbl. 1195, 716 tbls. 1201 & 1202, 718 tbl. 1207 (2000); David Leonhardt, *More Falling Behind on Mortgage Payments*, N.Y. TIMES, June 12, 2001, at A1 (data for 2000).

planners and landscape architects. Much on-site construction work is performed by specialty subcontractors. Financing needed by builders, land wholesalers, developers, and buyers of completed sites and units is available through an array of lending institutions. Operation of apartments may involve superintendents, management firms, and maintenance workers.

The supply side of the market is risky, and profits are commensurate with risk. Construction schedules depend on weather, deliveries, bureaucratic delays, and unions. Builders often work with thin capitalization, much of which comes from large financial institutions with great leverage over them. The industry's financing and costs, like consumer demand, are sensitive to the business cycle in general and to interest rates in particular. An immense stock of existing housing hangs over and competes with the market for new units. Builders, developers, and contractors are literally tied to land and regulated by local building codes and zoning rules that are highly discretionary and whose administration depends on local knowledge and influence.⁶ Although builders and developers have some exit power, their businesses tend to be territorially fixed and captive to local conditions.⁷

The distinctive character of housing and the regulatory environment that constrains it makes the demand side of the market well-informed, competitive, and deliberate. The typical homeowner is not substantially diversified in an economic sense. Housing is the single most costly item that most consumers will ever purchase (or rent) and becomes by far their greatest asset. Homeowners or buyers usually expect to remain in a unit for a long time (even though Americans move every six years, on average).⁸ Housing is among Americans' most important sources of enjoyment, security, and emotional well-being. Not surprisingly, then, Americans tend to shop for housing conservatively and carefully. They search out alternatives and compete against others for the units they want. Perhaps more so than for any other economic decision they make, consumers usually obtain considerable market information before making their decisions. The Internet is steadily reducing search costs while improving the ability to make informed decisions. Once a home is acquired, real or perceived threats to its value can create genuine financial and psychological risks to the family that owns it.

If homeowners are financially undiversified, their housing choices in the market are just the opposite. Housing demand is so individualized

⁶ EDWARD L. GLAESER & JOSEPH E. GYOURKO, *THE IMPACT OF ZONING ON HOUSING AFFORDABILITY* (Nat'l Bureau of Econ. Research, Working Paper No. 8835, 2002), available at <http://papers.nber.org/papers/w8835.pdf>.

⁷ See Vicki L. Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991) (describing market forces).

⁸ U.S. CENSUS BUREAU, *supra* note 5, at tbl. 28 (sixteen percent of households move each year).

that the industry must offer an exceptionally wide range of units in terms of price, size, quality, amenities, and type. Mass-produced standardized units are often difficult to market because of the variations in consumer demand. Housing units increasingly are single-family homes, and more and more of these are custom-tailored to the desires of their first occupants. The era of Levittown-type cookie-cutter homes is over; today, even builders of tract homes usually offer potential buyers a range of models and options from which to choose.

Residential housing is probably regulated more heavily than any comparably diverse, fragmented, and competitive market. Although much of this regulation—especially zoning, building codes, development standards, tax programs, and other exactions and fees that shift infrastructure costs to developers—is local, all levels of government intervene in this market. They do so in many ways and with different policy goals, so it is not surprising that their interventions often have conflicting purposes. Some regulations, for example, are designed to reduce housing costs (e.g., financing disclosure requirements); others are designed to increase costs (e.g., the Davis-Bacon Act,⁹ which stifles wage competition). Some subsidize relatively well-off homeowners (e.g., the Federal Housing Administration mortgage interest deduction¹⁰); others subsidize groups thought to have special housing needs or claims to assistance (e.g., veterans, the elderly, the poor, and the disabled). Some hope to revitalize declining urban neighborhoods (e.g., subsidies to inner-city housing); others promote suburbanization (e.g., The Fair Housing Act of 1968¹¹ mortgages). Some are intended to reduce sprawl (e.g., growth controls); others encourage it (e.g., large-lot zoning and duty-to-serve-all-comers rules). Some look to reduce negative externalities like pollution and noise (e.g., environmental and nuisance law); others encourage them (e.g., development subsidies). Some seek to reduce health risks (e.g., building codes); others increase such risks (e.g., industrial development bonds). Some would entrench existing residential patterns (e.g., rent control); others facilitate mobility (e.g., tax rollovers of gains on sales of homes). Some defer to the desire to exclude poor people (e.g., large-lot zoning); others constrain those desires (e.g., inclusionary zoning).

The conflicting *purposes* of these policies say nothing about their conflicting *effects*. This distinction is important because housing policies, mediated as they are by robust market forces and powerful political constituencies, often have unanticipated effects that deviate sharply from their animating purposes. Rent regulation in New York City is a particu-

⁹ Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (2000) (establishing a high floor under wages of construction workers in federally subsidized projects).

¹⁰ Federal Housing Administration Act of 1937, United States Housing Act of 1937, 42 U.S.C. §§ 1401 *et seq.* (1994).

¹¹ Fair Housing Act § 804, 42 U.S.C. § 3604 (1994) (barring discrimination in the sale or rental of housing and other prohibited practices).

larly notorious and well-documented example. This scheme subsidizes more than one million units. Many of them are occupied by middle-class families fortunate or wily enough to have rent-controlled or -stabilized units at the expense of others, including low-income families whose access to affordable units is reduced because of the scheme's development disincentives.¹² The *Mount Laurel* case study provides a second example of unanticipated effects: the conflict between exclusionary zoning (and other laws often justified by environmental and aesthetic considerations) and the goal of improving access for low-income people to the suburbs by reducing their housing costs.¹³ A third example, striking because of its magnitude, is the policy of subsidizing home ownership but not tenancy, which probably exacerbates the racial segregation that civil rights programs seek to combat.¹⁴ The Office of Management and Budget estimates the mortgage interest deduction alone will cost \$67.5 billion per year by 2000,¹⁵ with the tax benefits concentrated among high-income owners in a few, large metropolitan areas.¹⁶

For present purposes, our interest is in the particular regulatory policies that are driven by an affirmative commitment to one or another diversity ideal. These policies are few and far between because the ideal of residential diversity, which I elaborate below, is weak compared to two other, less integrative norms: the nondiscrimination principle and what I call classism.

These two norms require explication. Federal and local legislation seek to implement a policy against housing discrimination. The Fair Housing Act of 1968 ("FHA") (also known as Title VIII) prohibits discrimination in housing on the basis of race, color, religion, sex, family status, age, national origin, or handicap.¹⁷ Some state and local fair housing laws extend protection to other characteristics, like sexual orientation.¹⁸ Such laws assume that one should make one's housing choices in markets unimpeded by the bias of others. From this nondiscrimination

¹² ANTHONY DOWNS, A RE-EVALUATION OF RESIDENTIAL RENT CONTROLS 61-63 (1996). There are dignity-based arguments favoring rent control, *see, e.g.*, Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987), though, in my view, the advantages claimed by such arguments are outweighed by their disadvantages.

¹³ *See, e.g.*, Andrew Jacobs, *New Jersey's Housing Law Works Too Well, Some Say*, N.Y. TIMES, Mar. 3, 2001, at A1.

¹⁴ *See* INGRID GOULD ELLEN, SHARING AMERICA'S NEIGHBORHOODS: THE PROSPECTS FOR STABLE RACIAL INTEGRATION 176 (2000) (finding that homeowners are more resistant to residential community integration).

¹⁵ *See* CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES (1997).

¹⁶ *See* JOSEPH GYOURKO & TODD SINAI, THE SPATIAL DISTRIBUTION OF HOUSING-RELATED TAX BENEFITS IN THE UNITED STATES (Nat'l Bureau of Econ. Research, Working Paper No. 8165, 2001), available at <http://papers.nber.org/papers/w8165.pdf>.

¹⁷ Fair Housing Act § 804, 42 U.S.C. § 3604 (1994) (barring discrimination in the sale or rental of housing and other prohibited practices).

¹⁸ *See, e.g.*, D.C. CODE ANN. § 2-1402.21 (2001); MINN. STAT. § 363.03 (2000); R.I. GEN. LAWS § 34-37-4 (1995 & Supp. 2001).

perspective, whatever diversity is produced by independent market choices is optimal.

In contrast, classism countenances discrimination on the basis of wealth, income, social class, or perceived ability to pay. Classism is not only predictable, but normative as well; in a capitalist society, it seems like the natural order of things.¹⁹ A classist believes that one improves one's housing by ascending a ladder, reaching higher rungs only when one's ability to pay rises. Government, in this view, has no business inserting people who have not climbed the ladder in the customary way into a neighborhood they cannot afford, where the people who already live there can afford it through their own or their family's efforts.²⁰ Such government action, Nathan Glazer writes, is "opposed by the strongest motives that move men and women, their concern for family, children, [and] property."²¹ These motives animate virtually all Americans regardless of race or ethnicity.

The case studies that form the bulk of this Article demonstrate the truth of Glazer's assertion. They illustrate the immense difficulties that arise when courts translate the nondiscrimination principle into an affirmative mandate to reconstruct residential neighborhoods that, like almost all neighborhoods in America, are deeply committed to classism. The nondiscrimination principle, which is also very widely held, does not translate well into an affirmative judicial mandate to reconstruct residential neighborhoods on more diverse lines. The judicial tools for undertaking this reconstruction are clumsy at best, often perverse, and can even de-legitimate judicial authority and the diversity ideal it brandishes. In *Mount Laurel*, the New Jersey Supreme Court invoked a principle it created out of whole cloth and that enjoys little political or moral support in an individualistic, market-oriented society—equal access to suburban communities regardless of ability to pay. In *Yonkers*, a defiant community and a strong-willed judge transmogrified the shining ideal of diversity as a remedy for past wrongs into a costly, protracted struggle over which of them would control the community's future, with the market serving as a silent, disciplining referee. The verdict in *Yonkers* seems clear: Everyone lost. Even the rule of law did not emerge unscathed. In *Gautreaux*, a similar debilitating struggle eventually produced a more hopeful solution, one that seeks to promote diversity by using the law to work imaginatively with the market, not, as in *Yonkers*, against it.

¹⁹ See Witold Rybczynski, *City Lights*, N.Y. REV. BOOKS, June 21, 2001, at 68–69 (reviewing PIETRO S. NIVOLA, *LAWS OF THE LANDSCAPE: HOW POLICIES SHAPE CITIES IN EUROPE AND AMERICA* (1999)).

²⁰ See, e.g., Howard Husock, *A Critique of Mixed Income Housing*, RESPONSIVE COMMUNITY, Spring 1995, at 34, 34. For a discussion of a black community's classist resistance to public housing, see BRUCE D. HAYNES, *RED LINES, BLACK SPACES: THE POLITICS OF RACE AND SPACE IN A BLACK MIDDLE-CLASS SUBURB* 105–08 (2001).

²¹ NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 146 (1997).

II. RESIDENTIAL DIVERSITY TODAY

This Part describes the extent of racial segregation and isolation in neighborhoods. It then considers this phenomenon in light of four likely contributing causes: racial prejudice, traditional residential clustering, the complex dynamics of white flight, and classism.

In 1993, sociologists Douglas Massey and Nancy Denton published an important book about racial segregation in residential communities entitled, provocatively, *American Apartheid*.²² To anyone who values community diversity, their findings were alarming. Relying mostly on 1980 census data and employing a variety of segregation measures, they found that “a substantial and marked decline in black segregation” occurred in certain smaller metropolitan areas between 1970 and 1980 but that segregation “continue[d] unabated” in the largest ones.²³ Based on their limited analysis of 1990 census data, they found that segregation dissipated very slowly in northern cities during the 1980s and that “modest but significant declines” had occurred in six of twelve southern cities.²⁴

Not included in Massey and Denton’s study is preliminary data from the 2000 census that show some reduction in minority segregation, particularly in high-growth areas. The data also suggest that the suburbs of major metropolitan areas are becoming much more racially and ethnically diverse. Minorities now constitute 27% of their population, up from 19% in 1990, with the greatest increase occurring, again, in high-growth areas.²⁵ More than half of Asians, almost half of Hispanics, and 39% of blacks in these metropolitan areas live in the suburbs, with Hispanics showing the greatest increases.²⁶ Nevertheless, blacks’ residential isolation (one measure of segregation) is greater than that of other minority groups and has declined more slowly than for any other minority group, including non-black immigrants.²⁷

American Apartheid has been widely praised and much cited.²⁸ Nonetheless, even some of the authors’ admirers have challenged their

²² DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

²³ *Id.* at 109–10.

²⁴ *Id.* at 221. Others find more, albeit still limited, integration. See, e.g., David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455 (1999).

²⁵ WILLIAM H. FREY, *MELTING POT SUBURBS: A CENSUS 2000 STUDY OF SUBURBAN DIVERSITY* 1, 13 (The Brookings Inst., Ctr. on Urban & Metro. Policy, Census 2000 Series, 2001), available at <http://www.brook.edu/dybdocroot/es/urban/census/frey.pdf>.

²⁶ *Id.* at 1, 6.

²⁷ *Id.* at 1, 12.

²⁸ Among the favorable reviews are Lawrence Fuchs, Book Review, 99 AM. J. SOC. 1342 (1994), Roberta Johnson, Book Review, 534 ANNALS AM. ACAD. POL. SCI. 203 (1994), and Michael Schill, *Race, the Underclass, and Public Policy*, 19 LAW & SOC. INQUIRY 433 (1994) (book review).

methodology, interpretations, and prescriptions, and the book's claim that racial prejudice is the overwhelming cause of residential segregation.²⁹ The racial isolation that the preliminary 2000 Census data suggests clearly has a number of causes, but there is little consensus on the relative significance of each of them.

A. Racial Prejudice

The history of racial prejudice, enforced by both public policy and the practices of private developers, brokers, and housing consumers, surely explains much of today's segregation.³⁰ Although the extent and intensity of racism have declined markedly in recent decades, the residential patterns it produced have great staying power. Because people make large investments in their housing and plan to occupy it for many years, the effects of individual, group, and neighborhood choices may persist much longer than the racial attitudes that originally influenced them. Neighborhood demographics constantly change, of course, but the process is usually quite gradual.

B. Clustering

Much of the observed racial isolation might be caused by other, less invidious factors and even by benign ones. Family composition, income, property and income tax rates, access to jobs and transit, and other seemingly neutral market factors powerfully affect housing choices. Ethnic groups in the United States have always clustered together in enclaves until they felt comfortable in the dominant culture—but they have also clustered afterwards to some extent. For straightforward economic and social reasons, as well as for more elusive psychological ones, much of this clustering would occur even in the absence of discrimination, as the clustering of even higher-income Latinos and Asians today suggests.³¹

For small entrepreneurs trying to gain a market foothold, ethnic affinities can create a natural customer base. This is especially true for those who provide food, clothing, housing, and personal services for

²⁹ E.g., Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23 (1994); Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479 (1995) (book review); Wilbur Rich, Book Review, 108 POL. SCI. Q. 574 (1993); Ceri Peach & Gunther Glebe, *Muslim Minorities in Western Europe*, 18 ETHNIC & RACIAL STUD. 26 (1995); Richard H. Sander, Book Review, 44 J. LEGAL EDUC. 143 (1994); Nathan Glazer, *A Tale of Two Cities*, NEW REPUBLIC, Aug. 2, 1993, at 40 (book review) ("When it comes to causes, they present only prejudice."); Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1982–85 (2000).

³⁰ See generally MASSEY & DENTON, *supra* note 22.

³¹ Janny Scott, *Rethinking Segregation Beyond Black and White*, N.Y. TIMES, July 29, 2001, § 4, at 1.

which knowledge of a group's distinctive preferences, speech patterns, and customs is highly valued. Ethnic networks in the community constitute efficient sources of information about religious, social, and economic opportunities. For many products and services, ethnic enclaves also generate scale economies such as personal and business reputation, whose reliability and value depend in large part on the number of people who know the individual or firm from repeated, face-to-face contacts, family ties, and back-fence gossip.

Perhaps ironically, America's ethnic diversity contributes to this clustering. Pietro Nivola contends that the flow of immigrants to American cities helps to explain the greater urban sprawl compared with European cities, and that this sprawl facilitates clustering even as it reduces population density.³² People from very diverse backgrounds, Nivola says, want to live near those with whom they have ethnic ties and choose to spread out rather than live close to those who are so different. "Plainly stated, a good deal of sprawl in this country may be a necessary complement to its extreme multiculturalism."³³ But the racial and ethnic clustering in neighborhoods is more complex even than this; for example, economic segregation is growing *within* racial groups.³⁴

C. *The Dynamics of White Flight*

More than three decades ago, economist Thomas Schelling analyzed a social process that leads ineluctably to more racial segregation than people actually want.³⁵ Individual choices in the housing market, Schelling demonstrated, can transform small differences in groups' attitudes about neighborhood diversity into relatively high levels of segregation. Under such conditions, according to Schelling's analysis, almost all configurations will be unstable and vulnerable to rapid change: "A moderate urge to avoid small-minority status may cause a nearly integrated pattern to unravel and highly segregated neighborhoods to form."³⁶ Unless blacks and whites do not have any preferences about neighborhood composition or their preferences happen to converge on the identical integration level, the unraveling process will ensue and segregated housing

³² PIETRO S. NIVOLA, *LAWS OF THE LANDSCAPE: HOW POLICIES SHAPE CITIES IN EUROPE AND AMERICA* (1999). See also Peter Grant, *Sprawl Thins Populations in Older Suburbs*, WALL ST. J., July 9, 2001, at A2 (densities decreasing in most suburbs, especially in Northeast and Midwest).

³³ NIVOLA, *supra* note 32, *quoted in* Rybczynski, *supra* note 19, at 70. See also Janny Scott, *Amid A Sea of Faces, Islands of Segregation*, N.Y. TIMES, June 18, 2001, at A1 (examining ethnic clustering in diverse communities).

³⁴ See, e.g., Paul A. Jargowsky, *Take the Money and Run: Economic Segregation in U.S. Metropolitan Areas*, 61 AMER. SOCIOLOGICAL REV. 984 (1996).

³⁵ See Thomas C. Schelling, *On the Ecology of Micromotives*, 25 PUB. INT. 59 (1971).

³⁶ *Id.* at 88. See generally MALCOLM GLADWELL, *THE TIPPING POINT* (2000). But see Bell & Parchomovsky, *supra* note 29, at 1988–96 (criticizing Schelling's model).

patterns will persist or even grow. In fact, however, the groups' preferences may differ significantly. As Nathan Glazer has noted, "the neighborhood that blacks would like, 50 percent black, is one that most whites would move away from, making it close to 100 percent black."³⁷

Efforts to arrest this seemingly inexorable process almost always fail. As Schelling emphasized, the dynamics of flight in such communities reflect what game theorists call a collective action problem that rationality deepens rather than solves. Each family, guided by its self-interest, will act in ways that leave it worse off (fleeing) than the family would have been had it agreed with its neighbors to do what would make them all better off (remain). The problem arises because such an agreement is hard to enforce. Each family has an incentive to defect from the agreement unless it knows that all families will comply, yet all the other families have the same incentive to defect. Thus, a white family may be perfectly happy to remain in a town into which black families are moving. But if it thinks that (1) other white families are ready to flee, (2) it has no way to prevent them from doing so, and (3) it will be worse off if they do flee, then the white family will want to flee first and no agreement by others to remain will dissuade it from doing so.

Can the law solve this problem by enforcing an agreement to maintain racial balance? Probably not, *Starrett City*³⁸ suggests. Starrett City, was a large development in New York, aimed at a middle-class market and was heavily subsidized by the state and federal governments. It maintained a "managed waiting list" for admissions designed to ensure that 70% of its occupants were white. Using separate waiting lists for whites and blacks, Starrett City let apartments sit empty and kept prospective black tenants waiting until it could find white families to fill the quota. Supported by some strong advocates of housing integration, Starrett City claimed that its system, which community leaders had demanded as the price of overcoming their opposition to the project, was essential to forestall white flight and maintain integration. Indeed, the state housing agency had subsidized the vacancies resulting from this system to help Starrett City attract and retain middle-income (mostly white) tenants who would only move to the project if they were assured that it would not "tip"³⁹ racially, causing other whites to flee. In 1988, the

³⁷ Glazer, *supra* note 29, at 40. *But see* RICHARD P. TAUB ET AL., *PATHS OF NEIGHBORHOOD CHANGE: RACE AND CRIME IN URBAN AMERICA* 150 (1984) (finding that the wording of survey questions affects the preferences expressed by blacks, that "[t]he percentage of blacks who are tolerant of all racial mixtures up to extreme minority or extreme majority status for themselves is quite high," and that this affects models predicting the dynamics of tipping).

³⁸ *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988).

³⁹ "Tipping" refers to a disequilibrium dynamic in which whites would leave, making the project "blacker," thus encouraging more whites to leave, and so on until the project—and the local schools and perhaps the neighborhood as a whole—might become entirely black.

United States Supreme Court let stand a Second Circuit decision invalidating the quota system under the Fair Housing Act, even though the system's purpose was to prevent white flight and promote racial integration.⁴⁰

The metaphors of white flight and unraveling, however, are a bit misleading, or at least are incomplete insofar as the actual dynamics of racial segregation in housing are concerned. Ingrid Gould Ellen, an analyst of neighborhood transitions, has shown that racial composition affects entry decisions more than exit decisions: "white avoidance"—the decisions of whites living in all-white neighborhoods *not to move into* integrated neighborhoods—contributes more to the racial composition of those neighborhoods than white flight. She has found that this is also true, albeit to a much smaller extent, of black avoidance of all-white neighborhoods.⁴¹

The analyses of Schelling and Ellen raise an extremely important question going to the very essence of racism: is the fact that one has a preference about the optimal level of racial or ethnic integration in one's community proof of racism or ethnic bias? To put the question more provocatively: would even a white person who wants to live in a neighborhood that is 90% black, or a black person who wants hers to be 90% white, be guilty of racism simply because she is not indifferent to the racial composition of the neighborhood or because she prefers a mix that differs from the demographic distribution of society as a whole?

There is no agreed-upon answer to this question, but some answers are more convincing than others. In thinking about this question, we must be mindful of Schelling's ultimate irony: one who wants to live in an integrated neighborhood or (to avoid a circular definition) a neighborhood in which no resident has any preference concerning its racial composition, cannot be indifferent to the race of her neighbors lest she end up with more segregation than she wants. For so long as the neighbors have preferences about this, their preferences (if different from hers) can trigger a process that will remorselessly generate an equilibrium of less integration than she (and perhaps they) want. If merely having a preference for some degree of racial diversity indicts one as a racist, then most blacks, and not just whites, are guilty—including those who desire a high level of integration.⁴²

⁴⁰ *Id.* See also *Davis v. N.Y. City Hous. Auth.*, 278 F.3d 64 (2d Cir. 2002). In an interesting variation on the quota theme, the Second Circuit recently invalidated a trial court's effort to racially configure a jury in a criminal case. *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002).

⁴¹ ELLEN, *supra* note 14, at 2–3.

⁴² I can think of only two ways to avoid such an absurd characterization. One would be to evaluate the preferred levels directly: a white person who preferred, say, fewer than 50% of her neighbors to be black would be considered, perhaps only presumptively, to be a racist. But any number (even an extremely low one) would be quite arbitrary, especially since we would be unable to determine the extent to which that number took into account

The point of Schelling's analysis, and my use of it, is *not* to deny the existence of racism in housing decisions but rather to suggest how misleading it would be to infer racism simply from one's neighborhood choice. In fact, the problem is even more complex. To see why, we need look no further than Jonathan Rieder's fine ethnography of Canarsie, a working class Brooklyn neighborhood into which blacks were beginning to move when he studied it in the early 1980s.⁴³ Canarsie's resistance in the face of what it saw as convulsive change is a finely etched and depressing portrait of racism—a racism so explicit in the residents' words that one need not infer it from their conduct. Rieder also shows, however, that even in Canarsie, some motives had less to do with racial hostility per se than with anxieties familiar to all Americans, black or white, that arise out of their predictions about how the independent choices of their existing neighbors will affect them, their children, their neighborhood, their vulnerability to crime, and their property values. One would expect middle-class blacks, no less than whites, to resist the building of nearby housing projects or the in-migration of poor people, and for the same reasons: concerns about crime, property values, school quality, and the like.⁴⁴ The fact that these predictions become self-fulfilling prophecies, or might have proved wrong had not so many made and acted on them, is tragic but, in Schelling's sense, irrelevant. The people doing the predicting are not social scientists, and the accuracy of their predictions depends on the choices of others who are keenly aware of white flight and unwilling to behave heroically in the face of risk.

The notion that race per se plays only a secondary role in causing racial and economic change in urban neighborhoods is a central finding of a study published in 1984 by Richard Taub and associates. The Taub study used statistical techniques and cross-community analyses to compare eight neighborhoods in Chicago that varied in crime rates, racial stability, and housing market trends,⁴⁵ and it sought to disentangle the complex factors that cause neighborhoods to tip. It found that individual residents make the decisions contributing to neighborhood change largely on the basis of their perceptions of the risk of crime and deterioration; that both blacks and whites know that these problems tend to be more severe in minority-concentrated neighborhoods; that racial stereotypes, while operative, influence these decisions less than the realities of crime

the preferences of others and hence the risk of a perverse tipping. The second way would be to try to distinguish between good and bad motives for having such a preference. In the real world, however, it is difficult to imagine how one might go about doing this. Again, would selecting a preferred level by taking into account the tipping-relevant preferences of others be a good motive or a bad one?

⁴³ JONATHAN RIEDER, *CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM* (1985).

⁴⁴ See, e.g., TAUB, *supra* note 37, at 132, 135, 190; Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167, 1198–1202 (1981).

⁴⁵ See TAUB, *supra* note 37, at 186–90.

and deterioration; and that “once forces are set in motion for the withdrawal of white residents, there is little individuals acting alone can do to reverse the pattern, nor are there likely to be many who would be willing to try.”⁴⁶ The Taub study concluded that “[e]ven with higher levels of tolerance and a substantial black middle class, some sort of firm undergirding is necessary to allow citizens to take hold.”⁴⁷

Ingrid Gould Ellen’s research confirms a similar race-based neighborhood stereotyping model. According to this model, blacks and whites alike associate predominantly black neighborhoods with high crime, poor schools, and declining property values, and on this basis they decline (if they have a choice) to move there.⁴⁸ Sound policymaking requires a distinction between aversion to black neighborhoods and aversion to blacks as individuals, but doing so, as Ellen emphasizes, is both morally and empirically complex.

Indeed, integrating residential neighborhoods is even more difficult. The Taub study found that corporations, universities, and other institutions with major fixed assets and stakes in neighborhoods can provide the necessary signals to trigger a “virtuous cycle” that sometimes enables even neighborhoods with large low-income populations to remain racially integrated.⁴⁹ On the other hand, Celebration, a planned community in Florida that went to extraordinary lengths to foster racial diversity, abjectly failed to achieve it. Celebration’s experience suggests that even strong institutional commitment is often insufficient to overcome the forces impelling suburban segregation. Despite pro-integration advertising, an integrated sales force, inclusion of affordable units near more expensive homes, and even a buyers’ lottery to prevent racial discrimination, only 1% of Celebration’s residents are black and 7% are Hispanic in a county that is 6% black and 29% Hispanic.⁵⁰

D. Classism

Classism explains much residential segregation. Indeed, the distinction between racism and classism is pivotal. American popular culture, morality, and law treat them very differently, particularly as concerns residential choices. Although racism is categorically illegal in all but the most private contexts, the law bars classism only when it works to deny voting rights, access to the courts, legal counsel in serious criminal cases, and a few other basic incidents of common citizenship.⁵¹ In all other re-

⁴⁶ See TAUB, *supra* note 37, at 186.

⁴⁷ See *id.*

⁴⁸ See ELLEN, *supra* note 14, at 4–5.

⁴⁹ See TAUB, *supra* note 37, at 186–88.

⁵⁰ Jayson Blair, *Failed Disney Vision: Integrated City*, N.Y. TIMES, Sept. 23, 2001, at A31.

⁵¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1972) (noting that

spects, the law protects, or even permits, classism.⁵² Housing is no exception. Residential isolation by class is the norm, especially at the building or block level, and even advocates of class integration of communities seek to do so only at the level of the neighborhood or larger community. Whereas many minorities live in predominantly white neighborhoods, unsubsidized low-income people cannot afford to live in more affluent areas. Moreover, the federal government strongly reinforces this class stratification, spending more than twice as much on the mortgage interest deduction as on all housing programs for the poor, such as Section 8 rental vouchers and public housing, discussed below.⁵³

Distinguishing racism from classism is no easy matter. Racial isolation in neighborhoods is over-determined. With race and income highly correlated,⁵⁴ minorities and the poor are often the same people and thus the targets of both racism and classism. It is difficult to determine if a decision that disadvantages a racial minority is motivated by racism, classism, or both, as racism and classism may prompt identical behavior.⁵⁵ Still, classism cannot fully explain blacks' residential isolation; some analysts think it only explains a small part.⁵⁶ Solving this causal puzzle requires, at a minimum, a much clearer definition of classism and its normatively proper limits than we now possess. Another complication is that racists can try to escape the moral censure (and sometimes illegality) that racism now arouses by couching their words in more acceptable classist terms. Finally, there is a problem of asymmetric information between whites who already live in a community and blacks seeking to enter it. Well-publicized government efforts to increase residential diversity by building affordable housing projects may lead some whites to assume that all blacks moving into their community are government-subsidized and of a lower social class, especially when the blacks cannot readily signal the contrary and the whites cannot easily ascertain the

"under the Constitution . . . the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms").

⁵² *Id.*

⁵³ See HOWARD, *supra* note 15, at 27–28 ("Subsidies for home ownership comprise almost all housing tax expenditures, to the tune of \$90 billion per year. Tax subsidies for rental housing and low-income housing come to a few billion dollars at most.").

⁵⁴ See generally DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993) (arguing that, in many ways, the poverty problem is a race problem).

⁵⁵ *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute . . . proof of a pattern or practice of [racial] discrimination."). The law sometimes tries to manage this indeterminacy by barring unbiased practices that nevertheless have a "disparate impact" on minorities. For example, the implementing regulations of Title VI of the Civil Rights Act of 1964 prohibit educational programs that receive federal assistance from acting in ways that "have the effect of defeating or substantially impairing accomplishment of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (1999).

⁵⁶ See, e.g., James E. Ryan, *Schools, Race, and Money*, 109 *YALE L.J.* 249, 279 n.132 (1999) (discussing the residential isolation of blacks).

truth of the matter.⁵⁷ For this reason, subsidizing through vouchers, discussed below, may be preferable. After all, vouchers make it hard for anyone other than a landlord to identify who is being subsidized.

Whatever the precise mix of causes for racial isolation, it constitutes one of America's most serious social problems. Racial isolation practically ensures the continuation of inequalities in education, employment, culture, personal networks, freedom from crime, and the many other opportunities, amenities, and freedoms that are related to location. The interaction of classism and racism makes racial isolation in neighborhoods and attendant social inequalities both socially destructive and difficult to remedy. As the case studies will reveal, however, some solutions are more promising than others.

III. IDEALS OF RESIDENTIAL DIVERSITY

This Part explores different visions of why communities do and *should* seek visual, functional, demographic, and other kinds of diversity. I discuss the visions advanced by four leading ideals of residential community that have influenced judges, politicians, interest groups, commentators, and the public. Along with the norms of nondiscrimination and classism, these ideals—localism (Charles Tiebout), demographic and activity diversity (Jane Jacobs), neighborhood connectivity (Andres Duany, Elizabeth Plater-Zyberk, and Jeff Speck—collectively representing the New Urbanism Movement), and dispersal of low-income and minority communities to the suburbs (Anthony Downs)—help to shape the competing conceptions of neighborhood diversity that collided in *Mount Laurel*, *Gautreaux*, and *Yonkers*.

A. Charles Tiebout

In a famous 1956 article, economist Charles Tiebout proposed a model to account both for how individuals decide among the variety of communities in which they might choose to live, and for how different communities decide, through their local governments, which public goods and services to provide to their residents.⁵⁸ He addressed the “free rider” problem that afflicts “public goods”: everyone shares an incentive not to pay for goods such as clean air or police protection, as they can

⁵⁷ A similar asymmetry contributes to the stigma borne by blacks in selective schools that are suspected of using racial preferences. See generally George Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

⁵⁸ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLIT. ECON. 416 (1956). The following discussion of Tiebout draws as well from William A. Fischel, *Municipal Corporations, Homeowners, and the Benefit View of the Property Tax*, in PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE 33, 33–68 (Wallace E. Oates ed., 2001).

enjoy them without paying their costs. Because the market will not provide such goods and government will be unable, for the same reason, to convince voter-taxpayers to pay for them, they will either be underprovided (relative to people's preferences) or not provided at all.⁵⁹ Tiebout's innovation was to suggest that local governments might not be subject to the free rider problem for a large class of public goods. Each community offers residents a distinctive package combining different types and levels of public goods and taxes, and potential residents "vote with their feet" for whichever package they prefer. This behavior, Tiebout argued, enables residents with similar taxing and spending preferences to group themselves in communities that satisfy them.⁶⁰

Subsequent research by others showed that inter-municipal differences in local taxes and spending are capitalized in housing prices, that zoning restrictions help to stabilize these arrangements and keep the poor from upsetting a community's equilibrium too much, and that the model must include political factors affecting a community's ability to make collective decisions of this kind.⁶¹ For our purposes, Tiebout's model has an important, empirically demonstrable implication: in a society like the United States, which localizes taxing and spending decisions, people use their housing market choices to express their preferences for different kinds of communities.

Tiebout's choice model helps to explain why different communities permit diverse patterns of property use. In almost all communities, some combination of decisions by private developers, neighborhood groups, and public zoning boards restrict numerous aspects of property use and activity, such as aesthetics, animal ownership, signage, subdivision, lot size, building materials, setbacks, commercial activity, household composition, and environmental controls. Courts, moreover, may augment these restrictions through nuisance law. Although constitutional, statutory, and other common law principles limit communities' power to impose such restrictions, they still enjoy broad discretion.⁶² Property use decisions, like decisions concerning taxes, spending, and public goods, are mostly left to individual communities. By allowing each community to reduce its *internal* diversity in property use and activity, the system enlarges the diversity *among* communities. Again, some trade-off between these diversity goals is inescapable.

Tiebout's choice model contrasts starkly with what Robert Ellickson and Vicki Been call a "Waring Blender model." In this model, each neighborhood would have all types of land uses and all types of households in proportion to their representation in the entire metropolitan area.

⁵⁹ Fischel, *supra* note 58, at 33–36.

⁶⁰ *Id.* at 35.

⁶¹ *Id.* at 36–68.

⁶² See generally ELLICKSON & BEEN, *supra* note 4, at 922–23.

Unlike Tiebout, the “Waring Blender model produces great diversity *within* neighborhoods, but no diversity *between* them, and thus may limit the variety of residential choices available to households.”⁶³ In the case studies that follow, I explore this crucial distinction and the trade-offs that it entails.

B. Jane Jacobs

Jacobs is without question the most influential analyst of neighborhoods. Her 1961 book *The Death and Life of Great American Cities*⁶⁴ quickly achieved the status of a classic. A paean to diversity within and among urban neighborhoods, the book analyzed the conditions that generate and sustain diversity and rendered a withering indictment of the top-down, monochromatic (as Jacobs saw it) visions of urban planners. Jacobs’s ideal of diversity concerned the communities that she believed arise naturally and spontaneously in urban neighborhoods when they are left free to meet human needs, as defined by ordinary people from the bottom-up. These needs include the desire for frequent and casual interactions, unexpected encounters, heterogeneous vistas, a jumble of mixed land uses, uncoordinated sidewalk activity, reduced auto traffic, a profusion of small neighborhood meeting places and institutions, buildings of varying age and composition, short blocks and frequent turnings, irregular lots, “eyes on the street” to look after children and assure safety, and density of population and activities.⁶⁵ Jacobs excoriated the urban renewal and massive highway construction projects that were substituting artificial, sterile, homogeneous, over-sized, and predictable districts for these more natural conditions.⁶⁶

In light of the analysis in the remainder of this Article, it is significant that the diversities Jacobs extolled in her ideal neighborhoods had everything to do with the diversity of land uses, visual factors, and intensive human interactions, and little to do with the racial and class attributes of the denizens per se. This is not because Jacobs was indifferent to race and class integration; she clearly placed a very high value on it. But she thought that such integration results from the presence of *other* diversities. Absent those diversities, segregation will continue. If they can be encouraged, however, “no . . . slum need be perpetual.”⁶⁷

James Scott’s critique of “high modernism” in city planning finds additional virtues in Jacobs’s ideal of neighborhood diversity:

⁶³ *Id.* at 923.

⁶⁴ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

⁶⁵ *See generally id.* at 143–240.

⁶⁶ On the importance of the idea of nature in Jacobs’s work, see generally JANE JACOBS, *THE NATURE OF ECONOMIES* (2000).

⁶⁷ JACOBS, *supra* note 64, at 273.

While Jacobs makes a convincing case for mixed use and complexity by examining the micro-origins of public safety, civic trust, visual interest, and convenience, there is a larger argument to be made for cross-use and diversity. Like the diverse old-growth forest, a richly differentiated neighborhood . . . is, virtually by definition, a more resilient and durable neighborhood. Economically, the diversity of its commercial assets . . . makes it less vulnerable to economic downturns. At the same time its diversity provides many opportunities for economic growth in upturns. Like monocropped forests, single-purpose districts, although they may initially catch a boom, are especially susceptible to stress. The diverse neighborhood is more sustainable.⁶⁸

Economic stability, then, may be another benefit of Jacobs's vision of diverse land uses and organic neighborhood development.

C. *New Urbanists*

The architects, city planners, and other urbanologists who constitute the New Urbanism movement endorse some of Jacobs's diversity values but diverge from her in important respects, in part because of their preoccupation with suburban rather than city neighborhoods. The movement's leading exponents, Andres Duany, Elizabeth Plater-Zyberk, and Jeff Speck, identify the great vice as suburban sprawl that is caused by federal policy, local zoning laws, and the demands of the automobile. In its stead, they propose six fundamental rules for suburbs in their 2000 book, *Suburban Nation*: (1) a clear neighborhood center or focus; (2) pedestrian-friendly policies that place life's daily needs within walking distance; (3) a street network, preferably a grid, with relatively small blocks, straight streets, and "connectivity" of all compatible land uses; (4) narrow, versatile streets with trees; (5) mixed use zoning that clusters buildings of similar size and ordinarily brings them close to the sidewalks; and (6) special siting for civic buildings, which represent the collective identity and aspirations of the community.⁶⁹

Unlike Tiebout and Jacobs, New Urbanists explicitly denounce the income segregation of communities and of neighborhoods within communities. They advocate several measures designed to integrate affordable units into relatively wealthy blocks and neighborhoods.⁷⁰ For example, they propose to scatter affordable units among market-rate units in a

⁶⁸ JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 138 (1998).

⁶⁹ ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000).

⁷⁰ *Id.* at 43–55.

1:10 ratio, and to eliminate restrictions on outbuildings and on apartments that are above or below stores.

D. Anthony Downs

Anthony Downs, an innovative economist and real estate industry expert, has focused more than Jacobs and the New Urbanists on the social and economic evils of segregating communities by income and race. In a 1973 book entitled *Opening Up the Suburbs*, Downs detailed what has come to be known as the “geography of opportunity.”⁷¹ Facilitating the ability of low- and moderate-income people to move to more prosperous, largely white suburbs, he claimed, would increase their social and economic mobility and opportunities. In turn, this suburban diversity would ameliorate other conditions associated with recalcitrant inner-city poverty and eventually produce racial integration. More recently, analysts such as William Julius Wilson, Gerald Frug, Michael Schill, and Richard Thompson Ford, have reached similar conclusions, though by somewhat different analytical paths.⁷²

A broad consensus has long existed that greater residential mobility and access to suburban jobs for low-income families and racial minorities, especially blacks, is essential not only for them but also for American society as a whole. In this sense, residential diversity is a leading policy goal. What remains to be considered is what role law can and should play in pursuing it.

Of all the diversity ideals being actively debated in the area of housing policy, the most controversial and difficult are those relating to class and race and the relationship between them. A community’s diversity ideals regarding the design, size, and cost of homes, the mix of publicly provided goods, services, and amenities, and the patterns of property use and activity are largely defined by people’s individual choices in the housing market. These choices instantiate a kind of meta-diversity ideal. Residential diversity should be a function of personal predilection, which no independent, communal ideal of diversity can override. Although ideals such as nondiscrimination against protected minorities, nuisance law, and environmental safety can trump individual choices and affect residential diversity, these ideals promote values other than diver-

⁷¹ ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973).

⁷² Compare *id.* at 138–39 (discussing the priority of economic over racial integration), with WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996), and GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 143–64 (1999), and Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 *CHI.-KENT L. REV.* 795, 894 (1991), and Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1843 (1994).

sity. Nondiscrimination, for example, may have the effect of increasing diversity, but this is not its central justification.

Much the same is true of choices about the ethnic, racial, or class characteristics of one's neighbors. In selecting neighborhoods, individuals consider the kinds of people with whom they want to interact, taking into account whatever personal factors they deem relevant. With limited exceptions, the law enforces such choices. But it has sometimes formulated different diversity ideals regarding race and class and then ordered communities to implement them. The case studies that follow provide examples.

IV. THE LAW AND RESIDENTIAL DIVERSITY: THREE CASE STUDIES

In Part I, I noted that the nondiscrimination principle embodied in fair housing laws is a constraint on all housing markets. The law, however, has sometimes gone beyond the nondiscrimination principle to impose an affirmative obligation on government to increase diversity in ways that judges, not markets, define and implement. The tasks of defining and implementing diversity are more difficult than the courts imagined, however, and their Herculean efforts have borne little fruit. Indeed, Promethean might be a more apt adjective, as their efforts have entailed laborious persistence, mythic hubris, and tragic failure.

I illustrate these points by examining three examples of judicial policymaking aimed at increasing demographic diversity in housing. I begin with the epic *Mount Laurel* litigation,⁷³ which involved a state law remedy—first judicial, now administrative—for what the court viewed as class discrimination against low- and moderate-income families in suburban housing in New Jersey. By way of comparison, I discuss *Gautreaux*,⁷⁴ which challenged racial bias in Chicago's public housing projects and fashioned a different, more effective remedy aimed at both racial and class barriers to the migration of black families to Chicago's suburbs. The *Gautreaux* strategy devised a more successful, though not unproblematic, path largely through a remedy that relied more on market mechanisms and less on legal compulsion. Finally, drawing on my own field work, I turn to the tortuous *Yonkers* litigation, which I describe in much greater detail. Like *Gautreaux*, the *Yonkers* court found racism in the placement of public housing developments. Yet, even with the lesson of *Gautreaux* before it, the *Yonkers* court still did not find its way and decreed a remedy similar to one that the *Gautreaux* court originally ordered but ultimately found unavailing.

⁷³ *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) ("*Mount Laurel I*"), and *Southern Burlington City NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) ("*Mount Laurel II*").

⁷⁴ *Hills v. Gautreaux*, 425 U.S. 284 (1976).

A. Mount Laurel⁷⁵

In the quarter-century since the initial decision, *Mount Laurel* has become the icon of legal, and especially judicial, approaches to the economic integration of communities in the face of classist practices. In 1971, a group of low- and moderate-income families sued Mount Laurel, a sprawling, developing suburban township in New Jersey, claiming that its exclusionary zoning practices excluded them from the community in violation of the state constitution. Exclusionary zoning practices take a variety of specific forms, including limitations on non-residential uses or housing types, requirements for maximum building or occupant densities, and requirements for minimum lot sizes, building setbacks, or floor areas. Each type of exclusionary zoning has the effect, and often the purpose, of increasing housing costs, which inevitably reduces the number of affordable units for low-income persons.

The cost-increasing effect of exclusionary zoning creates a formidable obstacle to any legal challenge to such practices. First, as noted earlier, most Americans do not regard classist exclusions, as distinguished from racist ones, as a social problem.⁷⁶ They do not think it unjust if people live only in communities that they can afford.⁷⁷ Second, the law permits communities to pursue a variety of legitimate purposes (e.g., limiting pollution or congestion) through zoning techniques that sometimes have intended or unintended exclusionary effects. This means that even in a community that bars zoning for classist purposes, an effective legal challenge must show that the community's facially neutral, ostensibly legitimate purposes are in fact a pretext for a classist one.

Nevertheless, the trial court upheld the plaintiffs' claim in 1972, and, three years later, the New Jersey Supreme Court affirmed in *Mount Laurel I*.⁷⁸ The court assumed that Mount Laurel's zoning was designed not to exclude the poor or minorities but to minimize the tax burdens occasioned by the additional public services that a more populous and congested community would require.⁷⁹ The court held that Mount Laurel had

⁷⁵ In addition to *Mount Laurel I* and *Mount Laurel II*, this section refers to several secondary sources including: CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996); DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995); J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 *Geo. L.J.* 2265 (1997) (reviewing HAAR, *supra*, and KIRP, *supra*); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning* (2001) (unpublished manuscript, on file with the author) (a recent analysis of the effects of Mount Laurel and of reform efforts in other states).

⁷⁶ See discussion *supra* Part I.3.

⁷⁷ The mayor of Mount Laurel issued a statement to this effect in the speech that triggered the Mount Laurel litigation: "If you people can't afford to live in our town, then you'll just have to leave." See KIRP, *supra* note 75, at 2.

⁷⁸ See *Mount Laurel I*, 336 A.2d at 713.

⁷⁹ For a different view, see DAVID L. KIRP, *ALMOST HOME: AMERICA'S LOVE-HATE RELATIONSHIP WITH COMMUNITY* ch. 3 (2000).

violated a state constitutional provision requiring all police powers, including zoning, to promote the general welfare. Significantly, the court based its decision entirely on exclusionary zoning's adverse effects on general welfare, not on its racially discriminatory effects.⁸⁰

As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs.⁸¹

The court went on to impose an affirmative duty on every developing municipality to bear its "fair share" of the regional burden, without defining this critical concept. It allowed Mount Laurel ninety days to amend its zoning system to correct the constitutional deficiencies. The court held that in the future, a municipality would have the "heavy burden" of justifying its system once a plaintiff demonstrated that the system prevented the creation of affordable housing for low- and moderate-income families.⁸²

The many procedural, substantive, and remedial uncertainties that *Mount Laurel I* failed to resolve unleashed a flood of litigation by would-be homeowners and builders seeking to invalidate municipal zoning restrictions. In 1981, the New Jersey Supreme Court consolidated six of these cases, ordering the litigants to participate in a highly unusual, three-day, legislative-type hearing, and to answer twenty-four questions put to them in advance.

Two years later, the court issued its decision in *Mount Laurel II*.⁸³ This ruling surely qualifies as one of the most extraordinary judicial opinions ever written. In scathing terms, the court denounced the state's developing municipalities for their "blatantly exclusionary" zoning laws

⁸⁰ The same court had exhibited similar creativity two years earlier in *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976), which invoked the New Jersey constitution's "thorough and efficient [public education]" clause, rather than the equal protection clause, to invalidate the state's school finance system, unleashing a "three-decade saga." See Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 99 (2000).

⁸¹ *Mount Laurel I*, 336 A.2d at 731–32.

⁸² *Id.* at 724.

⁸³ *Southern Burlington City NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

and their “determination to exclude the poor.”⁸⁴ The court chastised the state legislature for failing to protect poor people’s constitutional rights.⁸⁵ Additionally, the court criticized the lower courts for having allowed the municipalities to delay and defeat the plaintiffs’ claims under *Mount Laurel I* through endless and costly litigation.⁸⁶ More than ten years after the trial court’s order in that case, the court noted that Mount Laurel had made absolutely no progress.⁸⁷

In order to cut through this morass, the court performed what Rutgers Law School professor John Payne calls a “gut rehab” of *Mount Laurel I*.⁸⁸ Abandoning most of the decision, it prescribed a remarkably detailed set of rules that municipalities and the lower courts would have to follow in implementing its order. The court divided New Jersey into three areas, assigned a trial judge to each, and ordered that any future *Mount Laurel* litigation be assigned to the judge according to the area in which the case arose. The judge, assisted by special masters, was to determine the numerical fair shares of affordable housing for each municipality located in a growth area (no longer just developing municipalities) in each housing region. The court left key regulatory definitions to future elaboration based on the State Development Guide Plan (“SDGP”), a regional planning document that a state agency had drawn up several years earlier for more limited purposes.

For municipalities to meet their fair share obligations, the court noted, they might have to do more than eliminate excessive zoning, subdivision restrictions, and exactions that impeded the construction of affordable housing.

Affirmative governmental devices should be used . . . including low-income density bonuses and mandatory set-asides. Furthermore the municipality should cooperate with the developer’s attempts to obtain federal subsidies. For instance, where federal subsidies depend on the municipality providing certain municipal tax treatment allowed by state statutes for low-income housing, the municipality should make a good faith effort to provide it.⁸⁹

Municipalities had to offer “affirmative inducements to make the opportunity real,” including subsidies.⁹⁰ It would no longer suffice for a mu-

⁸⁴ *Id.* at 410.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ E-mail from John M. Payne, Professor of Law, Rutgers School of Law, to Peter H. Schuck, Professor of Law, Yale Law School (Sept. 20, 2000) (on file with author).

⁸⁹ *Mount Laurel II*, 456 A.2d at 419.

⁹⁰ *Id.* at 442.

nicipality to rezone land to permit low-income housing as well as other, more profitable and more expensive housing.⁹¹

Most important, the court evidenced a firm resolve to use the profit motive to power the reform process. Lower courts, it held, must allow a direct remedy to builders who propose projects that include a “substantial amount of low-income housing”⁹² consistent with “sound zoning and planning concepts, including its environmental impact.”⁹³ Such builders could legally challenge the validity of municipal laws and conduct. If they prevailed, they could proceed with their projects, which usually included “inclusionary zoning” provisions requiring that at least twenty percent of the units be affordable to low-income families.

While warning the lower courts to prevent abuses of this “builder’s remedy,” the New Jersey Supreme Court surely anticipated that this would prove to be the most powerful lever for change under *Mount Laurel*. The court’s predictions proved accurate—developers, rather than poor people or non-profit groups, have filed nearly all the subsequent lawsuits.⁹⁴ In effect, the court empowered the lower courts to rewrite municipal zoning ordinances within ninety days when necessary to produce the required low-income housing.⁹⁵

Mount Laurel II was a breathtaking assertion of judicial power, policymaking initiative, and remedial innovation. Even Charles Haar, a Harvard Law School professor and admirer of the decision, concedes that the court was so determined to put “steel into its Mount Laurel Doctrine” that it invited the legislature to undertake the task, while warning that the constitutional duty must not be compromised by conventional remedial limitations.⁹⁶ Eager builders, taking the court at its word, filed about 140 lawsuits by June of 1985.⁹⁷

Application of the *Mount Laurel II* formulas to particular municipalities, laws, and proposals generated a new round of conflicts. Two book-length studies of this period emphasize the unprecedented demands that these tasks placed on the three judges and their special masters.⁹⁸

⁹¹ *Id.* at 443.

⁹² *Id.* at 452.

⁹³ *Id.* at 420.

⁹⁴ See Jacobs, *supra* note 13 (developers are the main enforcers).

⁹⁵ *Mount Laurel II*, 456 A.2d at 453.

⁹⁶ HAAR, *supra* note 75, at 50.

⁹⁷ See Alan Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Doctrine*, 4 PACE ENVTL. L. REV. 37, 119 (1986); Payne, *supra* note 88. Payne recounted the summation of a much older case filed by the Urban League against Middlesex County towns and consolidated in *Mount Laurel II*. The judge sequestered almost two dozen planning experts in a conference room where they met in a non-judicial forum without the participation of the attorneys representing the parties. The judge ordered them to work out the relevant formulas on regional needs, fair shares, growth areas, and so forth. After several months, the planners agreed on formulas that the judges then used throughout the state.

⁹⁸ See HAAR, *supra* note 75, at 55–86; KIRP, *supra* note 75, at 83–111.

They had to set fair share numbers for each town, assess the adequacy of existing zoning ordinances and proposed revisions to them, and supervise their implementation. To do this, they transformed the courts into something like three streamlined regional administrative agencies. Each performed economic projections, estimated job availability, assessed housing needs, prepared environmental impact statements, used planning criteria for suitable sites (making judgments about soils and infrastructure), analyzed whether the incentives offered by municipalities to prospective developers were sufficient, and addressed countless other issues. As a result, *Mount Laurel II* severely strained the traditional conception of judicial competence. The ruling encouraged judges to assume a heroic, often imaginative, and only occasionally successful role in increasing the supply of affordable housing for the poor.⁹⁹

New Jersey politicians, like many other observers, found the judges' improvisations problematic.¹⁰⁰ Indeed, *Mount Laurel II* and its early implementation by the courts ignited a political conflagration.¹⁰¹ With suburban communities lobbying furiously for legislation that would get the judges off their backs, and citing the court's invitation in *Mount Laurel II* to come up with a better solution, the New Jersey Legislature enacted its own Fair Housing Act.¹⁰² The Act was the product of a grudging, grueling political compromise between resolute *Mount Laurel* opponents in the suburbs and a coalition of pro-development, realtor, and civil rights groups brandishing the *Mount Laurel* decisions as their weapon.

The Act created a new agency, the Council on Affordable Housing ("COAH"), and granted it the responsibility to assign, calculate, adjust, certify, and de-certify the municipalities' fair shares.¹⁰³ The Act gave COAH few remedial powers, but it created incentives for municipalities to comply voluntarily. These included the prospect of immunity from further *Mount Laurel* litigation for six years, a strong presumption of validity for COAH-certified fair share plans, a temporary cap on the number of affordable units required, and financial subsidies.¹⁰⁴

In addition, the Act placed a temporary moratorium on the builder's remedy. This had the effect of postponing the program until after the real estate boom of the mid-1980s had passed. The Act also gave communities a number of ways to reduce or eliminate their fair share obligations. For example, they could get credit for protecting historic sites, environmentally sensitive sites, established development patterns, farmland, and

⁹⁹ See HAAR, *supra* note 75, at 55–86; KIRP, *supra* note 75, at 83–111.

¹⁰⁰ See, e.g., Byrne, *supra* note 75; John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1705, 1712–13 (1998) (book review); ELLICKSON & BEEN, *supra* note 4, at 934 (citing other sources).

¹⁰¹ See KIRP, *supra* note 75, at 112–36.

¹⁰² Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to 52:27D-329 (West 2001).

¹⁰³ N.J. STAT. ANN. § 52:27D-305 (West 2001).

¹⁰⁴ N.J. STAT. ANN. § 52:27D-307 (West 2001).

open spaces. They could show that they lacked vacant and developable sites. They could enter into “regional contribution agreements” (“RCAs”) under which they paid another community (typically a poor, minority, largely urban locality, like Newark) to discharge up to half of their fair share obligation.¹⁰⁵ Because of these reduction mechanisms for established communities, the fair share quota primarily affected newly developing suburbs.¹⁰⁶

A year later, the New Jersey Supreme Court upheld the Act in *Mount Laurel III*.¹⁰⁷ Repeating the mantra that a legislative solution would be better than a judicial one, the court signaled its intention to retreat from the field and to cede responsibility to the cautious politicians. According to Payne, a long-time advocate of low-income housing, a participant in the litigation since 1983, and a sympathetic critic of the *Mount Laurel* approach, “COAH was set up to dissipate constitutional pressure, not to further expand constitutional confrontation by pursuing aggressive new policies.”¹⁰⁸

Almost twenty years after *Mount Laurel II*, few analysts of the affordable housing problem find much to show for all the time and trouble.¹⁰⁹ For one thing, the courts had changed how the key benchmark, the *need* for such housing, would be measured. The first special judge to decide a case after *Mount Laurel II* developed a “consensus methodology” based on the number of low-income households spending more than 30% of their income on housing.¹¹⁰ This produced a ten-year, statewide need estimate of 243,736 units, not counting the homeless.¹¹¹ The state has not come close to meeting the targets. In July 2001, fifteen years after COAH began, 28,392 units (accessory apartments, group homes, mixed-income development units, municipal- and non-profit-sponsored units, and “buy-down” units) had been built or were under construction to satisfy the mandates of challenges brought before COAH or the courts. Another

¹⁰⁵ I have proposed an analogous scheme for allocating refugee burden-sharing obligations. PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* ch. 13 (1998).

¹⁰⁶ See Edward A. Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665, 688 (1998) (reviewing KIRP, *supra* note 75). For commentary on RCAs, see sources cited in ELLICKSON & BEEN, *supra* note 4, at 938.

¹⁰⁷ *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986) (“*Mount Laurel III*”).

¹⁰⁸ Payne, *supra* note 100, at 1698.

¹⁰⁹ The summary that follows draws on Span, *supra* note 75, and Telephone Interview with Sidna B. Mitchell, Deputy Director of the New Jersey Council on Affordable Housing (July 17, 2001). *But see* Robert W. Burchell, a housing policy analyst and *Mount Laurel* enthusiast at Rutgers University, cited by Andrew Jacobs, *supra* note 13.

¹¹⁰ For a discussion of the numbers problem, see ELLICKSON & BEEN, *supra* note 4, at 937–38.

¹¹¹ *Id.* In 1991, it was estimated that 675,000 households exceeded the 30%-of-income standard. *Id.* COAH defines need as the number of households living in decrepit units (which constantly decreases as substandard housing is retired) plus an estimate of needed new construction, over a six-year period. *Id.*

13,056 units had been zoned for or approved but not yet built, 11,245 had been created through rehabilitation, and 7396 had been transferred under RCAs from suburbs to Trenton, New Brunswick, Jersey City, and some smaller communities.

Compared to the estimated need for affordable housing in New Jersey, these figures suggest that *Mount Laurel* and COAH have not made much of a dent. Beyond this, however, appraising the program's success or failure depends, among other things, on one's view of how the program's costs affect building activity, how many units would have been built without the program, and how many of its beneficiaries would have obtained affordable units through the filtering process triggered when new market-rate units were built. The realities of the New Jersey housing market suggest that few of the roughly 1890 units of low-income housing actually built annually during the fifteen-year period would have materialized without the COAH incentives. In comparison, very few publicly funded units were built in this period, and 25,000 to 30,000 privately owned units *not* under COAH were begun each year during the late 1990s.

Which kinds of people, demographically speaking, occupy the *Mount Laurel* housing? Commentators, and COAH in its pleas to suburban municipalities, characterize beneficiary households as being of relatively high socioeconomic status but at a low point in their lifetime earning potential. They are people whom Charles Haar described as "junior yuppies, the recently divorced, graduate students, [and] the retired."¹¹² The most recent study of the situation, published in 1997 by Naomi Bailin Wish and Stephen Eisdorfer,¹¹³ confirmed this characterization using data from a state agency, the New Jersey Affordable Housing Management Service ("AHMS"), that qualifies and places applicants for low-income housing. Specifically, the Wish-Eisdorfer study found that although households headed by persons aged sixty-two or over constitute only 17% of the applicant pool, they occupy 27% of all AHMS-administered units and 39% of the suburban ones. Elderly white females living alone account for only 4% of the pool but occupy 10% of the units and 15% of the suburban ones. Another group that seems to have benefited are middle-class people who could not otherwise afford to live in the towns where they worked.¹¹⁴

Mount Laurel and COAH have moved few poor people from cities to suburbs. For those households for which Wish and Eisdorfer could determine both current and previous residence, as well as race and ethnicity, 47% previously lived in urban areas but only 15% of these (7% of the total) moved to units in the suburbs. Two-thirds of those who did move to

¹¹² HAAR, *supra* note 75, at 115.

¹¹³ Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268 (1997).

¹¹⁴ *Id.* at 1298–99.

suburbia were white, 23% were black, 2% were Latino, and 9% were classified “other.” Notably, almost as many black households decided to move in the *other* direction, from suburbs to cities. Of those that did, 90% were black and none were white.¹¹⁵ Thus, *Mount Laurel* enabled some low-income suburbanites to remain in suburbia and a handful of city-dwellers to move to it. Indeed, by helping low-income people, mainly whites, move from the cities to the suburbs, *Mount Laurel* may even have exacerbated residential segregation by race, though this segregative effect would be small, given the low migration totals.¹¹⁶

John Payne, reflecting on an academic symposium that reviewed the Wish-Eisdorfer study, notes the limitations of the AHMS definitions and data (particularly its skewing toward those living in urban projects). As to *Mount Laurel*'s demographic effects, he reports that “the general feeling among the commentators is that the results of the study, troubling as they are, probably overstate *Mount Laurel*'s accomplishments, rather than the reverse.”¹¹⁷ For example, Payne challenges the view of Haar and other analysts who praise the builder's remedy for its boldness in using builders' profit motives to propel law reform far beyond where “public interest” lawyers could have taken it.¹¹⁸ In Payne's view, the builder's remedy is a “potentially Faustian bargain with the developers.”¹¹⁹ It has excluded organizations and lawyers representing racial minorities, renters, and poor people in *Mount Laurel* litigation by making cases more costly to bring and harder to settle. Payne argues that, contrary to what the court had intended, the builder's remedy provides a decisive advantage to developers, as opposed to these groups, by allowing them to supply large tracts of land for new inclusionary zoning projects and by excluding most older, built-up parts of the state. The remedy is also land-intensive, requiring four market-rate units to assure one *Mount Laurel* unit. For this reason, inclusionary zoning projects arouse fierce opposition by environmental and anti-growth groups and supply a useful pretext to those with other exclusionary motives. Finally, Payne contends that the builder's remedy “drove out all strategies other than inclusionary zon-

¹¹⁵ *Id.* at 1295–96.

¹¹⁶ *Id.* at 1304.

¹¹⁷ E-mail from John M. Payne, Professor of Law, Rutgers School of Law, to Peter H. Schuck, Professor of Law, Yale Law School (May 29, 2001) (on file with the author). While criticizing over-reliance on inclusionary zoning, Payne believes that it can be a useful tool when, for example, localities approve large-tract, high-density developments. *Id.*

¹¹⁸ A leading developers' law firm, for example, maintains a Web site featuring a wallet filling up with dollars, a list of 196 towns that are fair game, and an exhortation that developers “contract for land in one of them, decide what you would like to build, and sue.” Andrew Jacobs, *supra* note 13, at B5. Jacobs reports that forty-seven municipalities are now in *Mount Laurel* litigation, many of them rural or agricultural, and most will probably lose. *Id.*

¹¹⁹ Payne, *supra* note 100, at 1702.

ing.”¹²⁰ This, despite the fact that, as we shall see, better strategies do exist.

The court in *Mount Laurel* did not just select the wrong tool for reforming affordable housing markets generally. It also chose the wrong target and offered the wrong justification for what it was doing. As noted earlier, the court decided for tactical and doctrinal reasons to attack exclusionary zoning’s classism, not its racism, and framed both the indictment and the remedy accordingly. As Payne notes, this was a fateful choice.

Simply put, there are so many more poor White families than there are poor minority ones that, absent a massive infusion of resources into producing affordable housing that has not happened and realistically could not have happened, it was foreseeable that the lion’s share of the housing that could be produced would go first, whenever possible, to White households, which, if suspect because of their poverty, were nonetheless not so frightening to many middle-class suburbanites as poor Black families.¹²¹

Payne is correct as a matter of fact, but he fails to explain why, as a matter of substantive policy and justice, New Jersey housing law should have less solicitude for poorly housed whites than for poorly housed blacks. He contends that the court should have repaired a structural defect in the representation of low-income people: the state’s “failure to provide them with a political forum in which they can fairly compete with other interest groups for their ‘fair share’ of society’s beneficence.”¹²² It should have done so, Payne argues, by invalidating the delegation to municipalities of the power to adopt exclusionary zoning policies.¹²³ Yet it strains credulity to imagine that such a radical decree, in the face of overwhelming public support for local, class-sensitive zoning power, would have aroused less opposition than did *Mount Laurel* itself.

Of greater interest is Payne’s claim that the court, by relying on the “general welfare” clause of the state constitution to fight class discrimination in housing, earned less public legitimacy than it might have earned through a frontal challenge to racial discrimination. Payne asserts that this doctrinal bastardy of *Mount Laurel* weakened its moral force and effective implementation—and by extension, that of COAH. Lacking this legitimacy, he says, *Mount Laurel* was “a public relations disaster.”¹²⁴ *Mount Laurel* would have succeeded in integrating the suburbs, Payne

¹²⁰ *Id.* at 1696.

¹²¹ *Id.* at 1707.

¹²² *Id.* at 1710.

¹²³ *Id.* at 1710–11.

¹²⁴ *Id.* at 1713.

suggests, had the court only justified it on the basis of racial equity, which carries a deeper moral resonance among most Americans than class integration does.¹²⁵

There are several reasons to doubt Payne's assertions. First are the many problems with the builder's remedy that Payne himself points out. Absent this remedy, the drive for housing integration beyond what non-discrimination produces would have had to have been fueled by government litigation or public interest groups; yet such litigation might have been even less effective than the builders' cases, given the limited resources available to such groups and the municipalities' strong resistance. Another reason to doubt the efficacy of a race-based strategy is the immigration-driven demographic change that has been transforming New Jersey even more than most other high-immigration states.¹²⁶ As the 2000 Census shows, blacks are no longer the only large minority group able to assert race-based claims to special benefits like inclusionary zoning, nor are the traditional racial categories as administratively useful or morally compelling as they once were.¹²⁷

A third cause for doubt is legal. The Equal Protection Clause severely limits government's power to distribute special benefits to groups on the basis of race. As a constitutional matter, government may do so only as part of a carefully designed, victim-tailored remedy for intentional, purposive, racial discrimination in housing.¹²⁸ As a statutory matter, proof of discriminatory impact without discriminatory intent may suffice to establish a violation of the federal Fair Housing Act of 1968 and perhaps justify a race-based remedy.¹²⁹ It will be the rare case, however, especially under exclusionary zoning laws, when plaintiffs can prove discriminatory intent and when defendant municipalities cannot justify those laws on legitimate, nondiscriminatory grounds. This fact best explains the decision by the *Mount Laurel* plaintiffs and the New Jersey Supreme Court to focus on income-based rather than race-based discrimination,¹³⁰ although, as Anthony Downs and others have contended, there are also strong policy grounds for this decision.¹³¹

Mount Laurel's minimal effect on the production of affordable housing in New Jersey is not surprising. Other states have attacked exclu-

¹²⁵ *Id.*

¹²⁶ See, e.g., KEYS TO SUCCESSFUL IMMIGRATION: IMPLICATIONS OF THE NEW JERSEY EXPERIENCE (Thomas J. Espenshade ed., 1997).

¹²⁷ See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 14-16 (2002).

¹²⁸ Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("*Arlington Heights I*").

¹²⁹ See, e.g., Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) ("*Arlington Heights II*").

¹³⁰ See Payne, *supra* note 100, at 1706-07 (analyzing litigation strategy).

¹³¹ See, e.g., DOWNS, *supra* note 71, at ch. 12.

sionary zoning in a variety of ways, yet they too have had little effect.¹³² Indeed, inclusionary zoning laws are likely to harm those members of the eligible income class, the vast majority of whom do not receive subsidized units.¹³³ Because high land and construction costs and other factors besides exclusionary zoning contribute to the affordable housing deficit in the more prosperous suburbs, we should not expect that reducing exclusionary zoning will solve the problem.¹³⁴ This presumably is why Anthony Downs devotes little attention to courts and zoning changes in his comprehensive analysis of the policies needed to truly open up the suburbs.¹³⁵

Nonetheless, Payne and other housing advocates who prosecuted the *Mount Laurel* litigation have not given up on either the courts or zoning reform. Insisting that “Mount Laurel never really reached our clients at all,” the advocates argued a new case before the New Jersey Supreme Court in November 2001, the first significant *Mount Laurel* dispute to reach that court since 1985.¹³⁶ Having decided to strike the Faustian bargain of which Payne spoke, they now support the builder’s remedy while numerous suburban communities fiercely oppose it.¹³⁷

B. Gautreaux

Of our three case studies, the only one that seems to have succeeded in moving a significant number of blacks to previously white suburbs is *Gautreaux*,¹³⁸ in which a race-based remedy was granted only after proof that a government agency had intentionally isolated low-income blacks in black neighborhoods. *Gautreaux* employed a very different approach to integrating minorities into white suburbs than did *Mount Laurel* or *Yonkers*. In so doing, it seems to have succeeded where both have failed.¹³⁹

In 1966, black residents of public housing in Chicago brought a class action suit against the Chicago Housing Authority (“CHA”) and the United States Department of Housing and Urban Development (“HUD”) alleging a conspiracy to locate public housing and assign tenants to proj-

¹³² See Span, *supra* note 75 (discussing Pennsylvania, New York, New Hampshire, New Jersey, Oregon, and California).

¹³³ Ellickson, *The Irony of Inclusionary Zoning*, *supra* note 44 at 1203.

¹³⁴ Payne agrees with this assessment. See Payne, *supra* note 88.

¹³⁵ See Downs, *supra* note 71.

¹³⁶ Andrew Jacobs, *Justices Pondering Old Barriers in Housing*, N.Y. TIMES, Nov. 28, 2001, at D5 (citing Peter O’Connor, a housing advocate); *Toll Bros., Inc. v. Township of W. Windsor*, 772 A.2d 914 (N.J. 2001).

¹³⁷ Jacobs, *supra* note 136; *Toll Bros., Inc. v. Township of W. Windsor*, 772 A.2d 914 (N.J. 2001).

¹³⁸ See *Hills v. Gautreaux*, 425 U.S. 284 (1976).

¹³⁹ The summary that follows draws heavily on LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000).

ects on a racially segregated basis.¹⁴⁰ Three years later, a federal trial judge dismissed HUD but agreed with the plaintiffs and ordered the CHA to build and buy low-rise, small buildings on sites that were far more “scattered” than in previous programs. In addition, because half of the units in any CHA scattered site development were reserved for low-income families (presumably whites) who were already living in the new neighborhoods, the court ordered CHA to assign occupants on a desegregated basis so that black families could move into predominantly white neighborhoods in Chicago rather than remain concentrated in a few black neighborhoods. These provisions were designed to foster peaceful, stable integration, minimize white “fight and flight,” reduce public housing’s stigma, and reassure the community about the neighborhoods’ futures.¹⁴¹ Even so, much political resistance impeded the program’s implementation, and in 1987, the judge appointed a receiver to administer it.¹⁴² Opposition continued, however, not only in white neighborhoods but also in Latino and black ones.

The case against HUD moved on a separate track. In 1971, the court of appeals ruled that HUD should not have been dismissed and was indeed liable.¹⁴³ It ordered the agency to establish and fund a program enabling low-income, black families to relocate beyond the city limits and throughout the Chicago metropolitan area, largely into rental housing.¹⁴⁴ In 1976, the United States Supreme Court upheld this remedy,¹⁴⁵ the first time it had ever authorized a school or housing desegregation plan to extend beyond the community where the legal violation took place. A consent decree was entered in 1981, and this metropolitan-wide remedy, which soon eclipsed the troubled CHA scattered site program, became known as the Gautreaux Assisted-Housing Program (“GAHP”).

Although the GAHP continued the scattered site approach that emphasized existing housing and gave receiving suburbs little reason to fear additional migration by non-*Gautreaux* blacks, it used a new funding and delivery mechanism known as Section 8, which Congress created in 1974.¹⁴⁶ Under Section 8, the public housing authority (here, CHA) provides vouchers to income-eligible families. Generally, the vouchers’ value equals the difference between 30% of family income and an agency-prescribed payment standard defined as some percentage of the “fair market rent” figure determined by the agency. Armed with vouchers

¹⁴⁰ *Id.* at 1.

¹⁴¹ *Id.* at 1–2; *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736 (N.D. Ill. 1969), *enforcing* *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

¹⁴² RUBINOWITZ & ROSENBAUM, *supra* note 139, at 27.

¹⁴³ *Id.* at 36; *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

¹⁴⁴ *Id.*

¹⁴⁵ RUBINOWITZ & ROSENBAUM, *supra* note 139, at 2; *Hills v. Gautreaux*, 425 U.S. 284 (1976).

¹⁴⁶ Housing and Community Development Act of 1974 § 201(a), 42 U.S.C. § 1437d (Supp. IV 1998) (as amended).

and assisted by a non-profit fair housing agency, families in the GAHP would enter the market and negotiate five-year renewable leases with landlords for housing units they wanted and could afford. Because the GAHP lacked *Mount Laurel's* power to invalidate exclusionary zoning practices, the voucher and traditional fair housing laws were the families' only ticket for entry to the white suburbs.

In the fall of 1998, when HUD's obligation to fund the GAHP ended and the last relocation was completed, the program had moved 7100 low-income black families out of inner-city neighborhoods (over 90% black). Most participants moved to more than 100 suburban communities (96% white, on average), and the rest (a comparison group) moved to other neighborhoods within Chicago (99% black, on average) that were demographically similar to the neighborhoods they had left. In contrast, most families who left CHA housing with Section 8 vouchers but did not participate in the GAHP and, therefore, did not receive mobility counseling, ended up moving to other black, high-poverty neighborhoods.¹⁴⁷

Long-term research on the GAHP has documented many of the effects on both the suburban movers and the city movers.¹⁴⁸ The results are more encouraging than those in *Mount Laurel* and compare especially well to the public housing status quo, which is more expensive and less socially integrative. First, in exchange for a much-reduced risk of the crime and violence that pervaded daily life in their original communities, the suburban movers experienced a higher risk of racist encounters. These encounters, however, while upsetting, were infrequent and non-violent. Second, suburban movers initially experienced more harassment than city movers, but after the first year, the two groups experienced similar levels. Third, both groups experienced similar levels of social integration in terms of number of friends made, levels of interaction with neighbors, and feelings of acceptance. Suburban movers tended to have more white friends than city movers, but some of the suburban movers had more black than white friends.

Fourth, the suburbs offered safer schools, smaller class sizes, and higher educational standards, but the movers found this a mixed blessing. Although these benefits helped children achieve far beyond what the city schools even aspired to attain, many quickly realized that their performance was substantially below the new schools' expectations, and they doubted their capacity to meet them. The children of suburban movers were more likely than their city counterparts to be in high school, on a college track, in a four-year college, in a job, and in a job with benefits. Nonetheless, they had very similar rates of behavior problems, similar

¹⁴⁷ William P. Wilen & Wendy L. Stasell, *Gautreaux and Chicago's Public Housing Crisis: The Conflict Between Achieving Integration and Providing Decent Housing for Very Low-Income African Americans*, 34 CLEARINGHOUSE REV. 117, 126 nn.79–82 (2000).

¹⁴⁸ The research on which this paragraph draws is discussed in RUBINOWITZ & ROSENBLUM, *supra* note 142.

grades, and similar class ranks. Given the much higher standards the suburban movers faced, however, this ostensible equivalence probably reflects a higher level of performance.¹⁴⁹

Galvanized by the promise of the GAHP approach, some courts, HUD, and other public and private agencies throughout the country are seeking to create similar “mobility-based housing” programs. Their approach is to use direct tenant subsidies to help low-income black families move to predominantly white, middle-class, suburban communities. Federal policy has moved strongly in this direction, marshalling Section 8 as the programmatic vehicle for almost all new assistance since the mid-1980s. According to a General Accounting Office study, 1.4 million low-income households were using housing vouchers in 2000, down from 1.7 million in the early 1990s, but still surpassing the number living in public housing.¹⁵⁰ The study also found that the total per-unit costs for housing voucher programs are from 32% to 59% lower than the unit costs for bricks-and-mortar production programs in the first year and from 12% to 27% lower over thirty years.¹⁵¹ Voucher-based mobility programs, coupled with new funds for counseling and housing search assistance, become even more important as the units available to low-income renters dwindle. These units are becoming scarcer because public housing projects are slated for demolition or revitalization with fewer units, troubled subsidized private buildings are being closed, and viable ones are being converted by their owners to market-rate status.¹⁵²

Initially, reformers’ enthusiasm about the GAHP approach was somewhat muted by fears that its success might have been due in part to self-selection into the program by more highly motivated, easily integrated black families. In order to find out, Congress enacted the “Moving to Opportunity” program (“MTO”) in 1992, establishing a controlled experiment to help low-income families living in concentrations of poverty move to areas of lower poverty.¹⁵³ Under the experiment, three distinct groups of low-income families in five different cities were randomly chosen, with one group moving to designated areas, a second group moving any place they chose, and a control group not moving at all. The MTO programs differ from the GAHP in that they are not instituted through a court decree, they are smaller (approximately 5000 families), they seek to remedy proven racial discrimination, and they are not limited to racial minorities. The results of MTO programs have been mixed. The pro-

¹⁴⁹ *Id.*

¹⁵⁰ U.S. GENERAL ACCOUNTING OFFICE, GAO-01-901R, COSTS AND CHARACTERISTICS OF FEDERAL HOUSING ASSISTANCE 4, 47–52 (2001), available at <http://www.gao.gov/new.items/d01901r.pdf>.

¹⁵¹ *Id.*

¹⁵² Dennis Hevesi, *Cracks in a Pillar of Affordable Housing*, N.Y. TIMES, Nov. 18, 2001, § 11, at 1.

¹⁵³ Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 152, 106 Stat. 3672, 3716–17 (1992).

grams have encountered even more of the obstacles that faced *Gautreaux*, including limited Section 8 funds, a declining stock of affordable units, and concentration of even Section 8 recipients in racially and income segregated neighborhoods. Nevertheless, and despite fierce opposition to MTO in the Baltimore research site, the early results are encouraging.¹⁵⁴

More generally, conventional Section 8 programs have succeeded in improving housing quality and affordability for low-income minorities, the elderly, families with children, and the disabled. Section 8 tenants are far less concentrated in high-poverty neighborhoods than are public housing and unassisted tenants, and the relative invisibility of vouchers diffuses opposition by making it harder for neighbors to detect whether newcomers are subsidized. Despite this success, the programs' growing emphasis on dispersing assisted tenants into higher-income communities has increased their clustering there, which engenders some opposition. At the same time, recipients of Section 8 vouchers have increasingly used their vouchers in low-income areas, resulting in clustering in high-poverty neighborhoods. Both kinds of clustering reflect various factors that policymakers are beginning to address such as high rents in more desirable areas, recipients' wishes to retain family and social networks, discrimination based on race, class, and Section 8 status, community opposition, ignorance about housing options, high search costs, and poor program administration.¹⁵⁵ The *Yonkers* case, discussed immediately below, illustrates some of these challenges to Section 8's effectiveness—particularly community opposition and administrative challenges—but more fundamentally demonstrates the dearth of better alternatives.

¹⁵⁴ See JOHN GOERING ET AL., OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUSING AND URBAN DEV., MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: CURRENT STATUS AND INITIAL FINDINGS (1999), available at <http://www.huduser.org/publications/pdf/mto.pdf>.

¹⁵⁵ See MARGERY AUSTIN TURNER ET AL., SECTION 8 MOBILITY AND NEIGHBORHOOD HEALTH: EMERGING ISSUES AND POLICY CHALLENGES (2000), available at http://www.urban.org/community/sec8_mobility.pdf.

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As noted earlier, housing patterns are intricate mosaics in which the pieces are shaped and fitted together by many private choices of individual consumers, commercial and industrial firms, property owners, developers, insurers, lenders, the construction industry, utilities, and other institutions. These private choices are in turn influenced by public policies directed not only, or even primarily, at housing, but also at economic development, transportation, infrastructure, energy, recreation, environment, schools, hospitals, and other public services. And although a city's residential patterns change over time, those changes tend to occur almost imperceptibly. The private and public choices of long ago create a path dependency that blunts the effectiveness of more recent ones.

As a practical matter, and perhaps as a matter of professional training as well, lawyers and judges generally can only focus on a few of the mosaic's more visible shards. The rest remain unexamined, and their complex linkages go unexplored. In *Yonkers*, the lawyers focused almost exclusively on one set of choices: the forty-year sequence of municipal decisions about whether and where to build subsidized (i.e., public and assisted) housing. The evidence about those choices clearly established many "who did what to whom, when, and why" kind of facts. As to this, the factual record was immense; the judge later required more than 250 pages of double-columned, small-type, printed opinion simply to describe and evaluate it.¹⁵⁷ My necessarily schematic review, then, is like a topographical map that must suppress many arresting details in order to render the main contours both intelligible and useful.

¹⁵⁶ For the events up to 1989, this section draws on my own extensive interviews and research on the *Yonkers* case, which are unpublished. For events after 1989, it draws on a variety of sources, including the following: LISA BELKIN, *SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION* (1999); Telephone Interviews with Andrew Beveridge, sociologist and former president of the Yonkers Board of Education (July 11, 16, 2001); E-mail from Andrew Beveridge, sociologist and former president of the Yonkers Board of Education, to Professor Peter H. Shuck, Professor of Law, Yale Law School (Sept. 11, 2001); Telephone Interviews with Diane Houk, Housing & Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice to Peter H. Schuck, Professor of Law, Yale Law School (July 12, 16, 17, 2001); E-mail from Diane Houk, Housing & Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice to Peter H. Schuck, Professor of Law, Yale Law School (July 12, 2001); Telephone Interview with Jerrold Levy, General Counsel of Enhanced Section 8 Outreach Program, Department of Housing and Urban Development (Oct. 12, 2001); Telephone Interview with Xavier de Souza Briggs, Assistant Professor of Public Policy, Kennedy School of Government, Harvard University (July 1, 2001); Telephone Interview with Peter Smith, Executive Director of Yonkers Municipal Housing Authority (Oct. 19, 2001); E-mail from Ming-Yuen Meyer-Fong, Housing Section, Civil Rights Division, U.S. Department of Justice, to Peter H. Schuck, Professor of Law, Yale Law School (Dec. 26, 2001); and public documents.

¹⁵⁷ See *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). The length of the docket sheet alone, which simply lists the court filings only to the middle of 1986 (that is, only through the liability phase in the district court and before the remedial phase really got under way) runs to forty-three pages.

The *Yonkers* story confirms the adage that geography is destiny. The city's political, social, and ethnic divisions reflect its physical features and topographical contours to a remarkable extent. It is ribbed by a series of natural barriers, almost all of which run from north to south. High, unbroken ridges run parallel to each other north-south barrier, requiring east-west travelers to traverse steep hills. From the Hudson River, which marks the city's western border, to the Bronx River Parkway on the east, these ridges occur at regular intervals. The natural barriers are reinforced by artificial ones. Most of the city's major arteries—the Saw Mill River Parkway, the Thruway, and the Hudson Line of the Metro-North Commuter Railroad—run north-south, creating another array of formidable barriers to east-west traffic. Additionally, the Saw Mill River Parkway splits the city approximately in half, marking a boundary between the more populous, urban west Yonkers and the more suburban east Yonkers. This fragmentation is aggravated by the dearth of major thoroughfares crossing the arteries to connect the east and west.

These physical features have strongly influenced the ethnographic development of Yonkers. For Yonkers, as for almost all cities, physical development has always been intimately linked to economic and technological development. As Yonkers became industrialized and urbanized during the late nineteenth and early twentieth centuries, the location of its industries was determined largely by the need for access to low-cost power and transportation. As Charlie Curran, an eighty-seven-year-old lawyer and former city manager and life-long resident of Yonkers, put it, “the Hudson River has strongly influenced the development of Yonkers since the very beginning.”¹⁵⁸ The city's factories, its workers' homes, and the region's central commercial district (known as Getty Square) were all concentrated in southwest Yonkers adjacent to its rivers and rail line. East Yonkers remained sparsely populated until the 1940s.¹⁵⁹

Before World War II, Yonkers's population primarily consisted of Irish, Italian, and Eastern European blue-collar, working-class families who had come to the city to labor in its factories and on its public works projects. Relatively prosperous blacks clustered in the Runyon Heights area of east Yonkers between the Nepperhan River and the railroad line. This enclave, which flourished most in the period from 1910 to 1925, boasted lawyers, doctors, and Pullman porters.¹⁶⁰ Most minorities in Westchester County, however, lived in southwest Yonkers and in the nearby cities of New Rochelle, Mount Vernon, and White Plains.¹⁶¹

The decades immediately following World War II affected the course of Yonkers's development in several important ways. During the 1940s

¹⁵⁸ Interview with Charles Curran, former Yonkers City Manager, in Yonkers, N.Y. (Feb. 3, 1989).

¹⁵⁹ *Yonkers*, 624 F. Supp. at 1290; interview with Charles Curran, *supra* note 158.

¹⁶⁰ This unusual community is the subject of Haynes's work, *supra* note 20, at 18–32.

¹⁶¹ *Id.*

and 1950s, White Plains launched an ambitious program of slum clearance, razing much residential housing in hopes of becoming a commercial and corporate center. Many blacks displaced from White Plains, or leaving New Rochelle or Mount Vernon, moved to Yonkers and settled mostly in the southwest section, finding cheap housing near the factories where they hoped to work. Much of the housing in this downtown district consisted of three-story wood-frame walkups, where Irish and Italian laborers had lived. In the 1950s these units were still almost all owned and occupied by whites, but as upwardly mobile Irish and Italians moved east and south to more exclusive residential areas, blacks from downtown areas often succeeded them.

During the same time period, new commuter rail lines and highways connecting Yonkers to New York City and to the eastern portions of Westchester County came into service. They increased pressures to expand eastward where there were large tracts of empty land. Lacking usable east-west arteries, the city addressed the problem by straightening and widening Yonkers Avenue. Builders began to erect single-family and, later, multiple-family dwellings in east Yonkers. This development coincided with the gradual deterioration of the southwest sector's housing stock and with the decline of industrial employment and commercial vitality. As the more upwardly mobile families sought to escape the deterioration by moving to the new developments east of Central Park Avenue (the new dividing line between the two halves of Yonkers), many black families took their place in the increasingly blighted southwest neighborhoods.

At this point, many neighborhoods in Yonkers's southern and eastern sectors began to develop and assume their present ethnic configuration. In the southeast, Lincoln Park became a white middle class neighborhood populated mainly by people from New York City who moved to Yonkers to avoid the increasing number of public housing projects for low-income families that were being built in their old neighborhoods. These new residents became some of the most vocal opponents of the Lincoln Park public housing sites proposed in the course of the *Yonkers* litigation.

The northeast sector developed into the more exclusive white neighborhoods. These include Lawrence Park, which is next to Bronxville, where Sarah Lawrence College is situated, and Crestwood, which abuts Eastchester in the north. In a series of 1955 *New York Times* articles about Yonkers, Harrison Salisbury referred to these more affluent residents, who were generally Republican and Protestant or Jewish, as "the carpetbaggers."¹⁶² They were oriented toward Manhattan and often said

¹⁶² See, e.g., Harrison Salisbury, *Changing Economy Jars Yonkers, Unprepared for Swift Transition*, N.Y. TIMES, Apr. 18, 1955, at 1; Harrison Salisbury, *Yonkers Business Takes a New Turn*, N.Y. TIMES, Apr. 19, 1955, at 21; Harrison Salisbury, *Schools are Clue to Yonkers' Pains*, N.Y. TIMES, Apr. 20, 1955, at 30; *Choice of Future is Up to Yonkers*, N.Y. TIMES, Apr. 21, 1955, at 25.

that they lived in the small, upscale communities adjacent to Yonkers, including Eastchester, Tuckahoe, Bronxville, and Scarsdale. The residents of these upscale neighborhoods opposed public housing in their areas, though less militantly than the residents of Lincoln Park.¹⁶³

The almost entirely black and Hispanic minority population is now concentrated in west Yonkers, an area near the dilapidated remains of the old commercial and industrial core where Italians, Catholics, and Democratic voters predominated until the 1950s. This area contains the public housing projects, built from the 1950s to the 1970s, that were the focus of the *Yonkers* litigation.

These physical, economic, social, and ethnic divisions generated a remarkable amount of civic organization and activity in Yonkers in response to the litigation. Writing in August 1988, at the height of the City Council's contemptuous resistance to Judge Leonard B. Sand's housing remedy discussed in detail below, a *New York Times* reporter found no fewer than fifty civic groups operating in the city, four or five times the number that had been active prior to the litigation.¹⁶⁴ Eight of these groups joined to form Citizens and Neighbors Organized to Protect Yonkers ("CANOPY"), an organization opposed to public housing in members' neighborhoods but committed to improving the city's image by supporting the court's orders. Most of CANOPY's members were professionals who lived in the affluent neighborhoods in the north and far south of the city. The remaining forty-plus groups formed the Save Yonkers Federation ("SYF"), which strongly opposed the court. SYF had a diverse membership: many were teachers, police officers, electricians, secretaries, and owners of small businesses, and many owned modest, well-kept homes. SYF drew its greatest support from southeast Yonkers neighborhoods where some of the proposed sites were to be located—a fact that SYF did not consider coincidental.

1. *Planning the Litigation*

Lawyer in the United States Department of Justice ("DOJ") under Jimmy Carter knew nothing about these divisions when they conceived the *Yonkers* case in 1980. They and some old-line civil rights organizations had become frustrated by the limited capacity of school desegregation and fair housing cases to improve the actual conditions of racial minorities. For more than twenty-five years, they had brought and won school desegregation cases, but racial isolation in urban school systems remained endemic. More recently, DOJ had launched a number of law-

¹⁶³ See generally Salisbury articles, *supra* note 162.

¹⁶⁴ Lisa W. Foderaro, *Neighborhood Groups Wield Influential Role in Yonkers*, N.Y. TIMES, Aug. 21, 1988, § 22 (Westchester Wkly.), at 1. The account of these groups that follows is taken directly from this article.

suits under the Fair Housing Act of 1968 (“Title VIII”),¹⁶⁵ but with limited results.¹⁶⁶

Several related obstacles hobbled DOJ’s efforts. Segregated school systems almost always reflected segregated residential patterns, so little could be gained by dismantling the former without altering the latter. Yet even successful Title VIII cases did not have much impact on the racial composition of communities. As one expert put it, Title VIII cases were little more than “a chase from block to block.”¹⁶⁷ Intentional discrimination, usually required in order to establish a constitutional violation,¹⁶⁸ was also important, if not always strictly necessary, to support a Title VIII claim, yet it was ordinarily very difficult to prove. In addition, the people subject to the court decrees often were not the ones primarily responsible for, or able to rectify, the condition, while the responsible parties—often politicians—were not always haled into court as defendants.

As the government lawyers searched for a way to resolve or circumvent these dilemmas, fortune intervened. While attending a conference that had convened judges, school administrators, teachers, and school board members to discuss education reform, Drew Days III, the Assistant Attorney General for Civil Rights in DOJ and a former NAACP Legal Defense and Education Fund litigator, happened to meet a former Yonkers school superintendent who related, at great length, the difficulties that he had encountered when he proposed a voluntary school desegregation plan.¹⁶⁹ Days had long been eager to link school and housing issues and had even asked Civil Rights Division investigators to identify communities where such a linkage might be proven. Upon hearing about the problems in Yonkers, Days instructed his staff to conduct an inquiry by examining prior civil rights complaints and city records and by interviewing minority community leaders.

The staff returned with a recommendation for a suit against Yonkers, and Days, who did not have to obtain the Attorney General’s approval, accepted it. He regarded the case against Yonkers to be “a strong one as

¹⁶⁵ Fair Housing Act § 804, 42 U.S.C. § 3604 (1994).

¹⁶⁶ See, e.g., *United States v. City of Birmingham*, 727 F.2d 560 (6th Cir. 1984) (finding the city acted with discriminatory intent to block a low-income housing proposal and enjoining the city from engaging in any conduct because of race); *United States v. Hous. Auth. City of Chickasaw*, 504 F. Supp. 716 (D.C. Ala. 1980) (holding that city housing authority’s “citizenship requirement” for public housing violated the Fair Housing Act).

¹⁶⁷ Interview with Drew Days III, Professor of Law, Yale Law School, in New Haven, Conn. (Sept. 26, 1988) (Professor Days was formerly an Assistant Attorney General for the Civil Rights Division, U.S. Department of Justice).

¹⁶⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977). *Arlington Heights* simply applied to housing cases the principle announced a year earlier in *Washington v. Davis*, 426 U.S. 229 (1976). A decade before that, the same principle had been applied in another Fourteenth Amendment challenge to public housing siting policy. See *Gautreaux v. Chi. Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967).

¹⁶⁹ Interview with Drew Days III, *supra* note 167.

northern cases go,” but he anticipated problems in proving discriminatory intent.¹⁷⁰ “There are usually more footprints than there were in Yonkers,” he later recalled, “and there was no history of *de jure* discrimination and no smoking guns.”¹⁷¹ In their memo to Days supporting their recommendation, moreover, the staff lawyers had been quite vague about the housing remedy that DOJ should seek from the court. (They were no clearer in the documents they filed with the court during the next several years.) In some ways, the lawyers’ calculated ambiguity on this question is easy to understand. DOJ’s practice was to file “barebones complaints,” and the schools-related claims, which were conventional and requested the standard school desegregation remedies, were initially viewed as the core of the case. The lawyers foresaw a long, difficult journey before they could hope to reach the remedial stage. They could worry about an appropriate remedy, they reasoned, if and when they proved liability.

Still, it is striking—especially in light of the legal novelty of their housing claims and the ferocious struggle that ensued—that the lawyers finessed the remedial issue when the government planned and then prosecuted the case. They did not officially consult with HUD. As Days later said, “we preferred to go it alone rather than get bogged down with a weak HUD enforcement system.”¹⁷² Nor did they seek advice from a housing consultant about the nature of housing markets. Such a step, Days noted, would have been very unusual; the typical procedure was for the staff to talk to fair housing groups and assign a paralegal to canvass the literature on fair housing.¹⁷³ The lawyers’ dim understanding of the nuanced relationship between housing politics and housing markets in Yonkers was further limited by the absence of any subpoena or “civil investigative demand” authority through which they might obtain records and other data from city officials who were unlikely to volunteer it. The lawyers therefore relied for their information largely upon public documents, newspaper articles, community leaders, state and local civil rights agencies, and the local chapter of the NAACP.

2. *Low-Income Housing in Yonkers*

Yonkers has a long history of public housing and urban development. Even before the Housing Act of 1949 (the “Housing Act”),¹⁷⁴ the federal government’s first major urban renewal program, the city had built two public housing projects (Mulford Gardens and Cottage Place Gardens) in the southwest sector to house people (almost all whites) dis-

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Housing Act of 1949, ch. 338, 63 Stat. 413 (codified as amended in various sections of Titles 12 and 42 of the U.S. Code).

placed by slum clearance. The Housing Act substantially increased federal funds for public housing built and operated by local housing agencies, and the city moved quickly to tap into this money. Judge Sand's lengthy decision painstakingly chronicles how each of these projects was planned, processed, politicized, sited, approved, and populated—a mode of housing policymaking that continued essentially unchanged for more than thirty years.¹⁷⁵

At first, the city sought public housing largely as an adjunct to its program of slum clearance and redevelopment in southwest Yonkers, which would help relocate those displaced when their homes were razed. But, whenever the city government or the independent (at least formally) Yonkers Municipal Housing Authority (“MHA”) proposed a site for a new project outside of southwest Yonkers, opposition by residents and community groups in the targeted area quickly arose. The City Council was almost always sympathetic and responsive to this opposition and indeed sometimes instigated it. Opponents feared that building public housing in their neighborhoods would adversely affect the resale and loan value of their homes by bringing in a different “class of people.”¹⁷⁶ They also feared increased crowding in their local public schools, hospitals, streets, and other public services. Moreover, they believed the sites would be more valuable if used for tax revenue-generating activity instead of for housing that had to be subsidized through tax abatements.¹⁷⁷

Resentment also simmered, and occasionally flared, out of a widespread belief that other, more prosperous communities near Yonkers, especially White Plains, were using their federal urban renewal funds to push welfare families out of those communities and into Yonkers.¹⁷⁸ None of these communities, not to mention nearby Scarsdale and Hartsdale, provided much affordable housing for the poor, leaving Yonkers to bear a vastly disproportionate share of the regional burden. Most alarming to many Yonkers residents was the prospect that more public housing would lead to a rapid, irreversible “Bronxification” of the city, attracting (at the taxpayers' expense) the same criminal, drug-dependent, and rootless people from whom many Yonkers residents had only recently, and with extraordinary effort and sacrifice, managed to escape.¹⁷⁹

Yonkers residents of all income levels and all races shared these sentiments to some degree, but the ardor with which they felt and expressed them varied. Groups representing blacks were in a particularly

¹⁷⁵ See *Yonkers*, 624 F. Supp. at 1294–1363.

¹⁷⁶ See *id.* at 1295 (Judge Sand's discussion of the reasons for community opposition).

¹⁷⁷ See *id.* at 1294–1363.

¹⁷⁸ E.g., Interview with Angelo Martinelli, former Mayor of Yonkers, in Yonkers, N.Y. (Feb. 8, 1989).

¹⁷⁹ See *Yonkers*, 624 F. Supp. at 1294–1363. Here, as elsewhere, the parallels between the anxieties in Yonkers and those described by Jonathan Rieder in his study of Canarsie, *supra* note 43, are interesting.

delicate position. They wanted to expand housing opportunities for low-income people, many of whom were black, but the politics of doing so created genuine dilemmas. At first, it seemed fair and sensible to disperse public housing into east Yonkers, where the superior schools, safer streets, and more desirable neighborhoods were located, rather than to build more public housing in southwest Yonkers, which might well accelerate racial tipping by causing the remaining whites there to leave.

But there were also strong countervailing considerations. Dispersal would have diluted black voting power in the southwest sector and drained support away from businesses and churches there. More money for public housing could have meant less money for assisted housing for working- and middle-class blacks. Many blacks in the east that had managed to distance themselves from the culture of poverty feared that public housing, by concentrating and perhaps perpetuating that culture, might threaten their own hard-won gains. Indeed, the black community in the east Yonkers enclave of Runyon Heights, which had to absorb a large public housing project in the 1960s, advanced many of the same arguments used by the SYF.¹⁸⁰ The leading black civil rights groups opposed to the sites in the southwest, also advanced these arguments.

But blacks faced a more poignant dilemma. Those who saw the need for more public housing and wanted it sited in east Yonkers had to accept an increasingly obvious political reality: unless it were built in southwest Yonkers, it probably would not be built at all.¹⁸¹

For the city, the lure of federal and state funds was irresistible. Although almost all vocal groups in Yonkers opposed new public and assisted housing, certain locations and target populations proved to be politically acceptable. These included state-subsidized (Mitchell-Lama) projects for middle-income residents in southwest Yonkers, and public housing for senior citizens rather than families—although even some seniors' projects were defeated out of fear that they might eventually be occupied by poor families. Most striking—and most significant to Judge Sand—was the location in the black middle-class neighborhood of Runyon Heights of the only public housing project built in east Yonkers.¹⁸²

The legislative and bureaucratic politics of these siting controversies followed a fairly consistent script, which one of the plaintiff's lawyers later called "the dance."¹⁸³ The HUD administrators responsible for ultimate project approval and funding would prod the Yonkers city planners and other officials to press for building at scattered sites outside the southwest area, but the City Council almost always rejected such sites. As the concentration of sites in the southwest sector became too obvious

¹⁸⁰ *Yonkers*, 624 F. Supp. at 1298–1300, 1304.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1312.

¹⁸³ Interview with Michael H. Sussman, Counsel for the NAACP, in Goshen, N.Y. (Aug. 21, 1988).

for even HUD to ignore, it rejected the only proposals that the City Council was prepared to approve. In a political climate that would later shape Judge Sand's legal decision, and to an extent his remedial strategy, community opponents always mobilized to defeat any siting ideas floated at the staff level by lobbying the Planning Board and the MHA, which were both wholly or largely mayor-appointed. Especially in a weak-mayor government, such as the Yonkers system during most of the period in question, professional siting criteria were simply no match for aroused, politicized community indignation.

The crucial player in all this was the City Council, whose structure had changed several times in response to litigation under the Voting Rights Act of 1965.¹⁸⁴ By the late 1980s, it had seven members—six councilors who were elected by wards for two-year terms, and the mayor, who presided over the Council, and was elected on a city-wide basis, also for a two-year term. The City Council members exhibited four unequivocal behaviors in all public housing controversies: (1) they were very responsive to their constituents on siting issues; (2) they selectively relied on the city planners' recommendations; (3) the councilor in whose ward the proposed project would be located in effect enjoyed a veto; and (4) their votes concentrated almost all of the city's public housing projects in the southwest sector. The Council followed this pattern in connection with the fifteen housing projects for families and the two for senior citizens that it approved between 1968 and 1972—only one of which (a project for seniors) was public housing, and only two of which (another seniors' project and the controversial Parkledge project, perched over the Saw Mill River Parkway close to east Yonkers) were situated outside areas of minority concentration in the southwest.¹⁸⁵

When Congress enacted the Housing and Community Development Act of 1974,¹⁸⁶ it adopted a fundamentally different approach to federal housing assistance and priorities. Instead of promoting the construction of public housing and directly subsidizing builders, the statute directed HUD to place its primary emphasis on two new programs: Community Development Block Grants ("CDBG") and Section 8 rent subsidies and vouchers (described earlier in connection with the *Gautreaux* remedy). The CDBG program supplanted a large number of urban renewal-related categorical programs with a single grant that localities could use in a more flexible, discretionary manner for non-housing community development programs. To receive a CDBG, a locality had to submit an annual Housing Assistance Plan ("HAP") to HUD. The HAP identified a community's low-income housing needs, indicated where the HUD-assisted

¹⁸⁴ See Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1994) (as amended).

¹⁸⁵ See *Yonkers*, 624 F. Supp. at 1315–42.

¹⁸⁶ Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in various sections of Titles 12 and 42 of the U.S. Code).

housing would be located, and helped HUD to decide whether to make or renew a grant.¹⁸⁷

These new programs transformed the regulatory environment for low-income housing, but the Yonkers City Council responded to the new programs as if little had changed. Yonkers housing officials filed HAPs that emphasized the need for new housing in east Yonkers, outside the southwest sector, and city planners proposed sites that would meet those specifications. The City Council, however, rejected the proposals. HUD acquiesced; it funded projects that the Council supported in the southwest sector and did not fund the others. In 1979, the Council approved a public housing project sited in east Yonkers over strong community opposition. But this decision was consistent with the traditional pattern—the housing was for senior citizens rather than for families. The pattern was evident in Yonkers’s response not only to the new supply-side CDBG program but even more so in its response to the highly flexible demand-side Section 8 program. As Judge Sand would later point out:

[T]he certificates . . . imposed no financial burden on the City. No tax abatement was required, as in the case of most subsidized housing projects, and included with the grant of the certificates were funds payable to the City for the cost of administering the program Section 8 Existing Certificates offered a way to disperse low-income housing without adding to the density of a neighborhood (as a subsidized housing project might) and without raising any other real or imagined physical planning problems.¹⁸⁸

On the other hand, if the City Council wished to keep poor or minority people from residing in certain areas, it would regard Section 8’s purchasing power and locational flexibility as a threat rather than an opportunity. In fact, this was precisely how the Council seems to have viewed the program. Again, Judge Sand’s opinion makes the point:

[F]or three years, the City refused entirely to apply for Section 8 Existing Certificates for families; failed to use many of the certificates eventually applied for; failed to make any significant efforts to promote their use outside Southwest Yonkers; sought to conceal from HUD the extremely limited geographic scope of its outreach efforts; resisted efforts by HUD to transfer the program to an agency perceived by the City to be less “responsive

¹⁸⁷ Interview with John Herold, Office of the General Counsel, United States Department of Housing and Urban Development, in Washington, D.C. (Mar. 9, 1989).

¹⁸⁸ *Yonkers*, 624 F. Supp. at 1347. Judge Sand had made the same point in an earlier opinion. See *United States v. Yonkers Bd. of Educ.*, 611 F. Supp. 730, 738 (S.D.N.Y. 1985).

to elected City officials”); and opposed the efforts of that agency to obtain certificates on its own.¹⁸⁹

By mid-1980, when DOJ decided to investigate Yonkers, the city’s approach was transparent. It had built a great deal of public and assisted housing for low-income families, but all of it, except for the project in Runyon Heights, was located west of the Saw Mill River Parkway. The Section 8 rent subsidies for which it had grudgingly applied were being used almost exclusively in that same area. And HUD, while gently prodding the city to disperse its low-income housing, seemed resolved not to rock the boat.

But the city’s luck was running out. DOJ’s interest in Yonkers housing patterns began to embarrass HUD, which saw the growing possibility that DOJ would challenge as racist a housing policy that a HUD agency had richly subsidized for decades. For political and perhaps constitutional reasons, DOJ did not sue HUD, although it recognized that it would have to implicate the agency in order to defeat the city.¹⁹⁰

In response to this pressure, HUD insisted in June 1980 that it would not grant Yonkers its next round of CDBG funds unless the city agreed to do what it had already promised in its HAP: “take all actions within its control” to build 100 units of subsidized housing for low-income families “located outside of areas of minority concentration.”¹⁹¹ It was never clear whether this HAP statement constituted an enforceable commitment by Yonkers to build the housing, and if it was enforceable, whether the city could have pointed to the ferocious political opposition to east Yonkers siting as a legitimate reason for non-compliance.¹⁹² What is certain is that, as Judge Sand later put it, “[i]n the two years following the imposition of the 1980 contract conditions, the City Council failed to support a single site for subsidized housing for families,”¹⁹³ again reflecting the now familiar patterns of bowing to constituent pressures and ward courtesy.

3. *The Yonkers Litigation*

As the Carter Administration began to wind down following Ronald Reagan’s victory in the 1980 presidential election, and as Yonkers’s determination to stay its course became unmistakable, Drew Days authorized his DOJ lawyers to contact Joan Raymond, the Yonkers school superintendent, to inform her that DOJ intended to initiate a housing and

¹⁸⁹ *Yonkers*, 624 F. Supp. at 1347.

¹⁹⁰ Interview with Drew Days III, *supra* note 167. HUD Secretary Moon Landrieu, the former Mayor of New Orleans, later refused to allow HUD to join the suit as a plaintiff. *Id.* Interview with Michael H. Sussman, *supra* note 183.

¹⁹¹ Interview with John Herold, *supra* note 187.

¹⁹² *Id.*

¹⁹³ *Yonkers*, 624 F. Supp. at 1356.

education lawsuit and to offer to negotiate a consent decree with the city to be signed at the time the lawsuit was filed. The city, evidently preferring to take its chances with the incoming administration, rejected Days's offer.¹⁹⁴ On November 24, the Yonkers Board of Education, hoping to stall matters until a new Attorney General could take over, sought to enjoin the imminent lawsuit, arguing that the city needed more time to develop community support for a voluntary integration plan. This desperate gambit failed, however, and DOJ filed a school and housing desegregation suit against Yonkers on December 1, 1980, in the United States District Court for the Southern District of New York in Manhattan.¹⁹⁵ Judge Sand was assigned to the case, and a legal marathon was off and running.¹⁹⁶

From a detached perspective, the fit between judge and case was excellent. Judge Sand was known as a sound, thorough, lawyerly, and highly intelligent man who had built a successful career as a litigator with a New York City firm. From the plaintiffs' partisan vantage point, Judge Sand's assignment to the case must have seemed providential. Appointed to the bench by President Carter, he was reputed to be a reliable liberal who was sympathetic to an activist government role in society generally and to civil rights in particular.

The litigation promised to be protracted. The city's unsuccessful efforts to have the case dismissed dominated the first year, along with the normal run of procedural gambits, tactical maneuvers, and initial discovery. Two important developments occurred during that year. First, the NAACP, aware that the Reagan Administration might drop the case, intervened as a plaintiff. This addition of a well-respected civil rights group and its very talented, energetic, and zealous young lawyer from Yonkers, Michael Sussman, greatly enhanced the plaintiffs' resources, effectiveness, and public legitimacy. The NAACP intervention also put DOJ on notice that an independent advocate equipped with good information and media access would be looking over its shoulder and would not hesitate to criticize its positions and propose alternatives. Sussman skillfully exploited these pressure points in order to shape the course of events, becoming the dominant force in the legal assault on Yonkers.

Second, Yonkers brought HUD into the case as a co-defendant. Pointing to the numerous HUD approvals of its public and subsidized housing projects over the years, Yonkers argued that HUD's policies, by emphasizing the need to locate those projects in areas with relatively low

¹⁹⁴ Tom Ferrell et al., *Yonkers Challenges Desegregation Suit*, N.Y. TIMES, Nov. 30, 1980, § 4, at 6. The clock was running for both sides. After the November elections, the lame-duck Congress passed and sent to the President a bill to prevent DOJ from suing for court-mandated school busing, a bill that some liberals feared President Carter might not veto. *Id.*

¹⁹⁵ See *United States v. Yonkers Bd. of Educ.*, 518 F. Supp. 191 (S.D.N.Y. 1981).

¹⁹⁶ Although the housing and schools cases were very much linked in the minds of DOJ lawyers, this Article deals only with the housing side of the case. The schools case has been even more protracted; it was only settled in the spring of 2002.

land acquisition costs, had actually *encouraged* the city to concentrate the projects in minority areas. If Yonkers were found liable to the plaintiffs, the city argued, HUD should also be liable as the truly responsible party.

Sussman looked upon this development with mixed feelings. If he could establish liability, an effective remedy would require HUD funds and program authority. And he might use the recrimination between Yonkers and HUD to play them off against one another, bolstering his case. On the other hand, their mutual finger-pointing was risky. Yonkers hoped to deflect blame by showing that it had simply complied with HUD's directives. If the court accepted this argument, the plaintiffs would lose the case because they had to prove the city's racial animus, not just its passive acquiescence and complaisance.

To surmount this obstacle, Sussman had to do two things. First, he had to show that HUD was *independently* liable whether or not the city was also liable. He hoped to do this by focusing on HUD's failure to enforce its own regulations that required cities to use their HUD funds to deconcentrate minority enclaves through scattered siting. He also hoped to do this by proving the following: HUD issued anti-concentration regulations; Yonkers was aware of them but did not comply because of racism; HUD knew this but did nothing about it.¹⁹⁷

But this would take some time, and Sussman's second goal—to capture HUD funds for remedial purposes before they disappeared—could not wait. He feared (with justification, as it turned out) that the Reagan Administration would place a moratorium on new projects, and he searched for a way to keep the spigot open long enough to secure an effective housing remedy. In thinking about how to do this, Sussman faced two fundamental legal and remedial issues: Could a court force Yonkers to use HUD funds against its will and in ways that it opposed? And if there were no HUD funds (or even if there were), could the city be forced to use its own resources to fund a remedy?

Uncertain of the answers, Sussman took a gamble. He filed the NAACP's own claims against HUD and immediately moved for a preliminary injunction, asking the court to require HUD to escrow the funds necessary to construct or otherwise provide 200 units of housing.¹⁹⁸ As Sussman predicted, this tactic put DOJ in a ticklish position. Many lawyers in the Civil Rights Division secretly sympathized with his strategy, but DOJ could not support it. Perhaps for this reason, HUD decided that it was time to get its own lawyers rather than continue to rely on the Civil Rights Division, where many of Sussman's allies and former colleagues still worked.

¹⁹⁷ Interview with Michael H. Sussman, *supra* note 183.

¹⁹⁸ *Id.*

Sussman was also uncomfortable relying on the Civil Rights Division. He did not trust the Reagan appointees who now led it, or that another division of DOJ now represented HUD. In addition, the government's theory of Yonkers's liability differed from that advanced by the NAACP. Whereas the government focused on the city's failure to build in east Yonkers, the NAACP focused on the increased minority concentration in southwest Yonkers, which resulted from the housing that the city did build. In addition, Sussman was intent on implicating HUD as well as Yonkers, and to do this he had to stress both what was and was not built.

Sussman's motion to escrow HUD money to fund a possible remedy was a long shot, and no one was really surprised when Judge Sand denied it as premature because HUD's liability had not yet been established.¹⁹⁹ But the motion also served three of Sussman's tactical goals: to gain quick access to HUD's files; to use the HUD documents to guide his later discovery against Yonkers; and to educate the court about Sussman's theory of the case and version of the facts.

The discovery, Sussman recalled with pleasure, revealed "the city's footprints all over HUD's files."²⁰⁰ The HUD-Yonkers interface was close and tended to implicate both. For example, Bill Green, HUD's regional director (and later a Congressman), had urged the city to locate 1200 units of assisted housing outside southwest Yonkers, but when the city insisted on locating them inside that area he funded them anyway. The files also showed that the city had vetoed many projects that HUD was willing to fund, thus belying the city's argument that land cost was the obstacle.²⁰¹ Most important, HUD's files, along with other evidence gathered by Sussman, showed in choreographic detail that "the dance"—in which east Yonkers sites proposed by the city bureaucracy and approved by HUD were rejected by the City Council, followed by HUD's funding of other locations—was still very much in progress.

In addition to the material Sussman found during the HUD discovery process, he viewed the Board of Education's motion to sever its case from the city's as implying its fear that the city's case was weak and might taint its own. Sussman used this motion to tighten the linkage between segregation in schools and housing, which the court used to deny the severance.²⁰²

In Sussman's view, the decisive development in the entire case occurred in December 1982 when the city tried to sell the Public School 4 ("P.S. 4") site.²⁰³ More than two years earlier, just before the suit was filed, the city had responded to HUD's request for an inventory of sites available for public and assisted housing. Of the fourteen locations listed

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

by the city, HUD had found only two to be acceptable—a McLean Avenue property, and the vacant P.S. 4 site. When the city permitted the McLean Avenue site to be developed as a shopping center, it left P.S. 4 as the only HUD-approved location for low-income housing. Then, when the city moved to sell it to a condominium developer, HUD did not object. Sussman, however, did. He swiftly moved to enjoin the sale, insisting that the city had a responsibility to preserve what might be the only site with which it could meet its 1980 commitment to HUD. In discovery, several members of the committee that the Council had appointed to screen potential developers of the site admitted to Sussman that its real purpose was to bypass the normal processes and move the property into private hands where it could not be used for public or assisted housing. Confronted with this evidence, the city's lawyer persuaded the City Council to consent to the preliminary injunction. When the Council refused to drop its plan to sell, the lawyer quit. This episode, Sussman says, "vividly illustrated everything we were trying to tell the court about why the city was liable and why HUD, which did not even object, was also liable. And it happened right before the judge's eyes, two years after the case started."²⁰⁴

The trial began in August 1983 after Judge Sand's strenuous efforts to promote a negotiated settlement failed. Positions had hardened. Yonkers pointed the finger at HUD, which had approved all of the sites. HUD insisted that it had no way of knowing that the city's site selections were a pretext for discrimination. The School Board denied any responsibility for the city's misdeeds. Sussman contended that the city and HUD were equally to blame. He opposed settlement on principle and felt that the Yonkers community would never accept liability and a far-reaching remedy unless the whole story could be laid out at a trial and confirmed in the court's opinion.

On Christmas Day, a *New York Times* article reported that, after several more aborted attempts at settlement, the negotiators had reached a tentative agreement.²⁰⁵ But Mayor Angelo Martinelli and a majority of the Council, who were receiving gloomy briefings from the city's lawyers that summarized the damaging testimony being given by city officials (including Martinelli himself), opposed any plan involving mandatory busing, enlarged neighborhood school districts, large expenditures, or subsidized housing in east Yonkers. Even so, Martinelli was slowly and privately coming around to the city lawyers' pro-settlement view.²⁰⁶

²⁰⁴ *Id.*

²⁰⁵ Lena Williams, *Agreement is Near in Yonkers Suit*, N.Y. TIMES, Dec. 25, 1983, § 22 (Westchester Wkly.), at 8.

²⁰⁶ The Council members were under no pressure to settle because most people in east Yonkers were not involved in the case, didn't know or care what happened, or assumed that the city could not lose. The only thing in the lawsuit that produced a public outcry was when the NAACP got an injunction against the sale of P.S. 4 pending the outcome of the

4. *The HUD Consent Decree*

There was another defendant in the case, however, and as settlement pressures mounted, HUD's role in the litigation took center stage. As discussed above, the city had maintained that the concentration of housing in minority areas was a condition for which HUD was ultimately responsible. As the city's litigation prospects grew ever bleaker, its hope of exculpating itself by inculcating HUD became even more fervent. As a purely factual matter, Yonkers's claim implicating HUD in the siting decisions had much merit. HUD (or its predecessor agencies) had approved the sites of all of the projects that it had subsidized, going back to the public housing projects of the 1940s. But the city also contended that until fairly recently, HUD's policies had actually encouraged, if not required, it to site housing projects in southwest Yonkers rather than in the more pricey, suburban neighborhoods in east Yonkers. HUD, the city argued, preferred projects to be sited in or close to the urban renewal areas from which many of the new tenants had been displaced. There, land acquisition costs were low and housing sites would be near public services, such as low-cost transportation and shopping.²⁰⁷

Little evidence supported the strongest version of Yonkers's claim—that HUD had directed it to site public housing in or near urban renewal areas. Rather, HUD in more recent years had actually asked Yonkers to avoid concentrating minorities. But even Judge Sand found some validity in a weaker form of the city's claim. It was "reasonable to assume," he later wrote, "that HUD may have encouraged the City to put some of its relocation housing near the major urban renewal areas."²⁰⁸ In rejecting Yonkers's argument, however, Judge Sand emphasized that HUD's policy did not require the city to build in any particular area and that the city had actually considered siting some projects in non-renewal areas.²⁰⁹ None of this necessarily relieved HUD of a shared responsibility—perhaps legal but certainly moral—for the housing patterns it had financed and approved, so Yonkers wanted to keep HUD in the case as a co-defendant.

Once Sussman put his case into evidence, however, he had compelling reasons to settle with the agency. In the final analysis, only HUD had

case. That upset the people who lived near the school. *See also* Lena Williams, *School's Use Stirs Disputes in Yonkers*, N.Y. TIMES, Jan. 16, 1983, § 22 (Westchester Wkly.), at 1.

²⁰⁷ Angelo Martinelli, who was mayor during most of the litigation, underscores HUD's traditional passivity on the issue of scattered site housing by contrasting it to HUD's refusal to release federal funds for Otis Elevator's expansion, which would dislocate poor residents of southwest Yonkers, until the City Council approved the Parkledge project near east Yonkers in 1972. Just as with Parkledge, he argues, "HUD could have said 'we'll give you money for west side housing only if you also build units on the east side.' But it didn't." Interview with Angelo Martinelli, *supra* note 178.

²⁰⁸ *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1329 (S.D.N.Y. 1985).

²⁰⁹ *Id.*

the funds to provide the particular relief—more housing for low-income and minority families in scattered sites—that the NAACP had entered the lawsuit to obtain. As the price for allowing HUD to exit, Sussman hoped to extract much of these housing funds. Indeed, settling with HUD might actually produce more low-income housing than would a successful trial. After all, even if Judge Sand ruled for the plaintiffs on the liability issues, it by no means followed that he would issue a remedial order going as far as HUD might be willing to go in a settlement.²¹⁰ A settlement between the NAACP and HUD, moreover, might achieve all of this while keeping HUD in the case because Yonkers would never drop its claims against the agency.²¹¹

Sussman plunged into intensive negotiations with HUD, and early in 1984 they reached an agreement and submitted it to Judge Sand for the requisite court approval and entry of a consent decree. At its core, the agreement provided that within forty-five days, HUD would “make available solely” to Yonkers, and would invite the city to apply for, HUD funds for 200 units of two-bedroom and larger family public housing, which might or might not require new construction, “to be located east of the Saw Mill River Parkway within the City of Yonkers.”²¹² HUD also agreed to work with the city to bring any unsatisfactory proposals up to HUD standards; encourage the city to use its CDBG funds to develop this housing; refrain from seeking to recapture any unused funds for these units unless it concluded (after giving the NAACP an opportunity to object) that there were “no developable sites” in east Yonkers; invite the city to apply for 175 Section 8 certificates for families and to limit their use during the first 120 days to units located in east Yonkers; allow exceptions to the certificates’ maximum gross rent limitations; require the city to affirmatively assist certificated families to find units in east Yonkers; and report on how those certificates were being used.²¹³ Although the agreement did not specify that the new units be occupied by racial minorities, those on the waiting list for public housing would have priority, and they were mainly blacks and Hispanics.

Yonkers was not a party to the consent agreement and in fact vigorously opposed it. Nonetheless, the agreement provided that HUD would not grant the city those funds, and would in fact impose on it other fiscal penalties, unless the city complied with certain timetables and other requirements. For example, the city had to obtain site pre-approvals for at

²¹⁰ The caselaw on the authority of trial courts to grant far-reaching structural relief was (and remains) uncertain. *See Missouri v. Jenkins*, 515 U.S. 70, 100 (1995).

²¹¹ The NAACP’s settlement with HUD did enable HUD to exit from the case, since the court soon thereafter ruled that Yonkers’s claims against HUD were barred by sovereign immunity. There being no outstanding claims against HUD, it was dismissed as a party. *See United States v. Yonkers Bd. of Educ.*, 594 F. Supp. 466, 476 (S.D.N.Y. 1984).

²¹² *United States v. Yonkers Bd. of Educ.*, 611 F. Supp. 730, 742 (S.D.N.Y. 1985).

²¹³ *Id.* at 743–44.

least 140 of the units, was required to “take all actions within its control” to build 140 of the units by June 30, 1985, and was required to include in its HAP “a sufficient goal for family units in light of available resources . . . to meet its low and moderate-income housing needs.”²¹⁴

The consent agreement represented a great victory for the NAACP. It not only committed HUD to fund additional public housing and rent supplements for east Yonkers, it also protected the plaintiffs against rising housing costs by defining HUD’s obligation in terms of a specific number of units rather than a specific level of funding. In addition, it envisioned that the funds would flow quickly, on a preferential basis, and at a time when new federal housing assistance throughout the nation was being curtailed. But there was a hitch. HUD would not have to act on most of these commitments unless Yonkers took the initiative to apply for funding and met the requisite timetables and regulatory standards. In short, HUD’s promises would be meaningless unless the city government took HUD up on them, which it was not inclined to do.

When Judge Sand approved the proposed consent decree and dismissed HUD from the case, he did so over the vehement protests of the city and the newly formed Save Yonkers Federation, described earlier. In light of subsequent events, the importance of the HUD-NAACP consent decree can scarcely be exaggerated. It legitimated giving the plaintiffs more relief than the law might have allowed the judge to order on his own. It also moved Judge Sand down a remedial road that at the time appeared much better-marked, straighter, and shorter than it turned out to be. And it kept him there long after its destination ceased being a worthwhile goal. The court would learn a painful lesson: it was far easier to influence the lawyers and the other professionals in the case than to motivate the politicians in Yonkers to comply.

Although HUD was now out of the case (at least as far as the NAACP’s claims were concerned), it was not yet in the clear. Dismissing HUD, Judge Sand had taken pains to emphasize that if its future participation in the litigation became necessary, the court “would not be without means to obtain” it.²¹⁵ The ink was hardly dry on these words when the NAACP took the judge up on them. HUD responded to the decree by inviting Yonkers to apply for Section 8 certificates, but when the city applied, HUD did not issue them. Insisting that HUD had “subverted” the decree, the NAACP asked the court to compel HUD’s compliance. In court, HUD contended that the law did not authorize it to approve and issue certificates in excess of those called for in a city’s HAP. Yonkers’s failure to amend its HAP goals to include the new certificates, HUD said, prevented their issuance.

²¹⁴ *Id.* at 743.

²¹⁵ *Yonkers*, 594 F. Supp. at 476.

Judge Sand would have none of this. Castigating HUD for its position, he found that the decree had envisioned the Section 8 certificates “as relief that could be provided expeditiously, and without the need for any action on the part of the City.”²¹⁶ While acknowledging that the law precluded HUD from approving an application inconsistent with the city’s HAP goals, he found that HUD had not made the promised “reasonable effort” to induce the city to amend its HAP and thus end the problem. “In fact,” he noted with annoyance, “HUD could scarcely have done less.”²¹⁷ HUD, Judge Sand ruled, must take certain specified steps to persuade Yonkers to amend its HAP. If the city did not respond, HUD must threaten to disapprove any HAP that did not provide for the Section 8 certificates available to the city under the decree.²¹⁸

This contretemps, and others still to come, signaled the nature of the game that the defendants were playing in 1985—and continued to play for many years after. The city housing agency (“MHA”) was prepared to build public housing wherever the politicians would allow the agency to build, provided HUD came up with the necessary funding. MHA was ready to receive and distribute the 175 certificates provided under the decree, although it warned that east Yonkers landlords might not accept them.²¹⁹ Most members of the City Council, including Mayor Martinelli, did not want to build public housing *anywhere*, even in southwest Yonkers. Like many Americans, they viewed public housing projects as a breeding ground for crime, drug use, and dependency. They also believed that the city already had too much public housing, draining its limited resources.²²⁰ Concurrently, HUD entered the second term of a Reagan administration that had built only 5000 units of public housing, almost all on Indian reservations. HUD had no interest in building more, preferring to use Section 8 certificates.²²¹ It had no wish to penalize Yonkers for following its lead and was especially reluctant to impose sanctions against cities at a time when it was already reducing funding for other construction programs in which cities like Yonkers had far more interest.²²² HUD saw Yonkers as a normal grantee to be dealt with under normal rules and arrangements. But Judge Sand clearly regarded Yonkers as

²¹⁶ *Yonkers*, 611 F. Supp. at 737.

²¹⁷ *Id.* at 740.

²¹⁸ *Id.* In August of that year, the court denied HUD’s subsequent motion to modify the order compelling HUD compliance.

²¹⁹ Interview with Peter Smith, Executive Director of the Yonkers Municipal Housing Authority, in Yonkers, N.Y. (Feb. 15, 1989).

²²⁰ *E.g.*, Interview with Angelo Martinelli, *supra* note 178; Interview with Henry Spallone, Vice-Mayor and member of the Yonkers City Council, in Yonkers, N.Y. (Feb. 8, 1989).

²²¹ Interview with Victoria Holmes, United States Department of Housing and Urban Development, in Washington, D.C. (Mar. 9, 1989).

²²² Interview with John Herold, *supra* note 187.

a special situation demanding unique treatment and had placed HUD under a court order that the agency feared to defy.

5. *The Decision Imposing Liability on the City*

On November 20, 1985, fourteen months after the trial ended but only two weeks after the municipal elections, Judge Sand issued his decision. Given the testimony by Mayor Martinelli and other top officials conceding that racial factors influenced City Council siting decisions, only the ostriches and the incurably optimistic in City Hall could have been surprised at the final peroration of the housing portion of Judge Sand's gargantuan opinion:

In sum, the record clearly demonstrates that race has had a chronic and pervasive influence on decisions relating to the location of subsidized housing in Yonkers. While the precise configuration of subsidized housing which would have arisen in the absence of that influence necessarily remains a matter of speculation, it is clear that "but for" that influence, a significantly different result would have obtained.²²³

The influence of race on housing decisions, Judge Sand emphasized, was intentionally discriminatory, not merely incidental or adventitious; the pattern of segregative intent was so clear that his judgment condemning the city was "a relatively easy one."²²⁴ Considering that Judge Sand's judgment would later be affirmed by both the Court of Appeals²²⁵ and the United States Supreme Court,²²⁶ his confidence in his judgment seems justified. The evidence, indeed, supported his findings about "who did what to whom and when" and that race was a motivating factor in the city's placement decisions.

More doubtful was Judge Sand's belief that residential neighborhood segregation in Yonkers would not have occurred in the absence of the city's racism—or, to put it another way, that racism was the necessary and sufficient precondition for this segregation. Although the legal validity of his ruling depended on such a finding, Judge Sand did not spell out this belief, much less defend it. Nor is it likely that he could have done so persuasively. As noted earlier, residential segregation can be caused by a number of factors other than racism: private preferences for ethnic homogeneity, income-based differentiation of neighborhoods, land use decisions driven by tax and other economic factors, and a widely shared

²²³ *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1376 (S.D.N.Y. 1985).

²²⁴ *Id.* at 1369.

²²⁵ *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987).

²²⁶ *See Yonkers Bd. of Educ. v. United States*, 486 U.S. 1055 (1988).

classist value system with respect to housing that claims to legitimate existing housing patterns.

Judge Sand's ruling illustrates an unfortunate social and legal compulsion to use simple dualistic categories to explain complex phenomena. Here, characterizing the city's conduct as racist (and hence legally culpable), became essential to the case, even though that conduct almost certainly reflected some mixture of both racism and classism.²²⁷ Legal remedies premised on such simplifications are poorly tailored to the realities they seek to regulate and transform. I have explained this problem elsewhere:

Ordinarily we assess people and things according to the numerous dimensions along which they vary—for example, size, strength, beauty, speed, intelligence, morality, humor, culpability, and value. In contrast, law—especially regulatory law—usually attempts to constrain complex reality through simple binary, yes-or-no categories; it seldom uses the kinds of continuous categories of more-or-less that refine our perceptions and discourse and render everyday life intelligible and nuanced. The citizen beholding law's artificial, reductionist classifications often protests in the name of common sense: "The real world isn't black and white; it is all a matter of degree." Law knows this, of course, but it pretends otherwise. There are plausible arguments for using simplistic classifications, and they have usually carried the day.²²⁸

This analysis, if correct, may shed light on the remarkable fact, detailed below, that even after fifteen more years of litigation and political turmoil over implementing the court's decision, low-income blacks have little more access to housing in Yonkers's white neighborhoods today than they did before the litigation.

To the question of why the law has yielded so little, the short answer is that the city militantly and recklessly defied it. But this answer only pushes the "why" question back a step—for as Jonathan Rieder notes, the "rising up of a placid community, the breaking of lawful and routine patterns of making wishes known, is an event of remarkable singularity that demands explanation."²²⁹

One could tell many explanatory stories, the most straightforward of which being that the Yonkers resisters were simply recalcitrant racists.

²²⁷ See, e.g., LAWRENCE D. BOBO & MICHAEL P. MASSAGLI, *Stereotyping and Urban Inequality*, in *URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES* 89–163 (Alice O'Connor et al. eds., 2001) (analyzing racial and economic stereotypes).

²²⁸ PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS IN DEMOCRATIC GOVERNANCE* 428 (2000).

²²⁹ RIEDER, *supra* note 43, at 216.

But although Yonkers (and especially SFY) clearly had its racists, the city was neither a moral backwater nor a lawless, hate-filled enclave. Before the housing crisis erupted, its public and private life seemed indistinguishable from that of other American communities where racism has declined dramatically. Another story focuses on the intolerance and lawlessness of the city's political leaders. Yonkers voters, however, ratified the politicians' open defiance, costly as they knew it would be to them and to their city. For all that appears, the City Council gave the citizens what most of them seemed to want.

I wish to hypothesize a different response to Rieder's demand for explanation—one that I cannot prove but that is nonetheless consistent with the personal interviews I conducted in Yonkers. Let us suppose that most people in Yonkers genuinely believed (1) that the city's residential patterns resulted mainly from conventional private and public choices based on economic and classist, "not-in-my-back-yard" ("NIMBY") values, with racism only a marginal factor—or put another way, that those conventional reasons were a necessary and sufficient cause of the residential patterns; (2) that Judge Sand was wrong, demeaning, and morally obtuse to insist that these choices and values were racist; and (3) that his remedy was ill-founded, immoral, and jeopardized their hard-earned property and sense of well-being. My hypothesis is that citizens who believed these things might also have believed that if Judge Sand's law violated the norms of their community about how neighborhoods should form and develop, how diverse they should be, and how diversity must come about in order to be valued, then so much the worse for his law and so much stronger the reasons for resisting it.

I do not know whether the people of Yonkers actually believed these things nor do I know whether they were in fact true. Judge Sand made strong findings of fact that intentional racial discrimination played a role in Yonkers's housing patterns, findings that the appeals court fully affirmed and that seem clearly correct. But what is also arguable, and again, probably impossible to prove or disprove, is that conventional market dynamics would have caused these patterns *anyway*, with or without such discrimination. If this was so—or even if reasonable people thought it was so—then this might well explain defiance of law by many of Yonkers's whites, a defiance that, in Jonathan Rieder's sense, is otherwise inexplicable.

6. *The Decision on Remedy*

In the immediate aftermath of the court's liability decision, the schools part of the case occupied center stage. In part this reflected the fact that the housing ruling was unusual while the ruling on schools was not. The politics, and even the mechanics, of implementing whatever housing remedy the court would eventually adopt would be complicated

and protracted. It would be necessary at a minimum to agree upon a plan, negotiate with HUD for funding, select and acquire sites, solicit bids from contractors, obtain building permits and zoning approvals, and clear other administrative hurdles in order to reach even the construction stage. No city had ever done this before under the compulsion of a court order. The court's aegis might speed things up, or it might slow them down. Nobody really knew.

In contrast, there were some hopeful political portents. Mayor Martinelli, newly re-elected to his sixth term, spoke of compromise, at least on the schools front. He expressed some support for the plan that had been negotiated in March 1984 by the NAACP and the school board but was rejected by the City Council. And a new City Council, expanded to its pre-1983 complement of twelve as the result of the settlement of a federal voting rights case, would assume office in a matter of weeks. It would include two new female members and its first black member. Moreover, even the recalcitrant members presumably understood that if they left the development of the housing and school plans to the court, they would lose control over the process, the policies, and perhaps the politics.

Judge Sand ordered the parties to convene on December 18, 1985, to discuss how to proceed with the remedial phase of the case. His remedial powers, everyone knew, were awesomely broad. Indeed, in certain respects they were far broader than those of city officials, including the City Council. In principle, at least, he could exercise them unilaterally; legislative, administrative, and judicial authority were fused in him. He did not have to fashion a legislative majority, nor would he face reprisals at the polls. Perhaps most important, he alone defined the limits of his own authority, subject only to possible reversal by the appeals court.

The prospect of appellate review, however, did not pose much of a threat. The city's appeal on liability could not be filed until Judge Sand issued his remedial order, and two or more years would elapse before the appeals court finally ruled. A district court has very broad discretion to decide precisely which policy instruments and implementation processes are necessary and appropriate to remedy intentional racial discrimination. In *Gautreaux*, for example, the United States Supreme Court allowed the trial judge to extend his already broad remedy beyond the boundaries of Chicago to include the entire metropolitan housing market.²³⁰

On the housing side of the *Yonkers* case, disputes began to surface even before the parties could submit housing plans or discuss settlement. HUD, still operating under the terms of the consent decree it had negotiated with Sussman, rejected two sites in east Yonkers (one near the

²³⁰ See *Hills v. Gautreaux*, 425 U.S. 284, 297–300 (1976). In so doing, the Court distinguished its remedial plan from the inter-district relief that it had rejected two years earlier in *Milliken v. Bradley*, 418 U.S. 717 (1974).

Raceway and the other near the Cross County Shopping Center) that the city had selected for public housing to comply with the decree in order to avert the loss of \$3.6 million in HUD funds. Sussman agreed with HUD: “The two sites,” he said, “are not in neighborhoods, but on the fringes. If the sites are not in neighborhoods, how can they be integrated?”²³¹

The spirit of compromise that Martinelli and others had discerned shortly after the liability ruling vanished as quickly as it had appeared. The immediate cause was the increasingly bitter dispute over the schools remedy, but several disputed issues related directly to the still-simmering housing dispute. For example, disagreements arose over whether certain sites, such as the Whitman Middle School in northeast Yonkers (on which school buildings were located), should instead be used for public housing should those schools be closed under the remedy. Another entangling issue related to whether the city would appeal Judge Sand’s liability and remedy decisions and if so, which parts.

But the most important conflict between the two sides of the case was fiscal. Every dollar of the estimated \$37 million (not including capital expenditures) that would be required to implement the schools plan proposed by the school board was a dollar unavailable to the city to implement the housing remedy. And because there was a serious question, not resolved until 1989, about whether HUD would pay all of the housing costs to be mandated, this conflict raised serious fiscal concerns. Moreover, since the financing of any schools or housing remedy required the City Council’s approval, electoral politics would pervade any remedial plan.

On May 28, 1986, after a six-day remedial trial, Judge Sand issued his housing order.²³² He began by finding that the city’s violations of minority rights had continued beyond 1980, when the suit was filed, up to the present. In support of this finding, he noted that the city had failed to designate two acceptable public housing sites in east Yonkers, an action that it had agreed to take in 1980 to receive CDBG funds from HUD. He found, in addition, that Yonkers had failed to submit its HAP to HUD and had also failed to procure the Section 8 certificates for use in east Yonkers. Observing that “political paralysis” had “stalemated” the city’s decision processes, and citing Yonkers’s housing needs and financial straits, Judge Sand found it “unthinkable” that the city, by its inaction in selecting sites or filing required documentation, would forego “scarce federal funds that would be of significant assistance” in providing the additional housing required by his order.²³³

²³¹ Interview with Michael H. Sussman, *supra* note 183.

²³² See *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986).

²³³ *United States v. Yonkers*, No. 80 CIV 6761, 1986 WL 6159, at *1–*3 (S.D.N.Y. May 28, 1986).

Building on these findings, Judge Sand enjoined the city from confining public or subsidized housing to southwest Yonkers for racial reasons and from otherwise promoting residential segregation. He ordered Yonkers to create an ambitious fair housing program with educational, informational, marketing, and complaint-generating components to be administered by a Fair Housing Office (“FHO”) committed to non-discrimination. The FHO’s director and program would be selected under court supervision (the judge even exempted the FHO from civil service restrictions). The FHO would work with Yonkers’s MHA, to which Judge Sand ordered the city’s Section 8 program to be transferred. Together, the agencies would work to aid families who wished to use Section 8 certificates for units located in east Yonkers.²³⁴

Most of Judge Sand’s order, however, involved a *class* integration remedy that emphasized bricks-and-mortar construction of public housing in east Yonkers and not the dispersal of low-income families into existing private units through the use of Section 8 certificates. The city, Judge Sand decreed, must build 200 public housing units east of the Saw Mill River Parkway. This was the number to which the city had earlier agreed in order to obtain HUD funding and to which HUD had agreed in its consent decree with the NAACP.²³⁵

Remarkably, Judge Sand also authorized the plaintiffs to prepare the necessary proposals and documents for the implementation of these decrees and announced that if he approved these proposals and documents, he would order the actions directly into effect through the fictive device of “deeming” the city and HUD into compliance. Judge Sand also used this device to “deem” the city to have taken certain actions—the submission to HUD of certain funding applications and other documents, the designation of at least two sites for 140 family units for pre-approval by HUD, and the submission (through MHA) of site development proposals—in the face of the city’s failure to take them. He also “deemed” those actions to be in compliance with HUD’s legal requirements. Judge Sand ordered that if the city failed to designate approved sites promptly, the court would “deem” the city to have designated the combination of the P.S. 4, P.S. 15, and Walt Whitman School sites, and any other available sites designated by the plaintiffs and approved by the court.²³⁶

This approach was highly controversial, if not unprecedented. The traditional remedy for a defendant’s obduracy or inaction was to hold it in contempt and then enforce that contempt by imposing fines, imprisonment, or both. But Judge Sand anticipated, correctly, a guerilla strategy of contemptuous behavior on the city’s part. He was unwilling to tolerate

²³⁴ See generally *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986).

²³⁵ *Id.*

²³⁶ *Id.*

the protracted, debilitating struggle that a sequential, incremental use of the contempt sanction would almost certainly entail. In addition to the use of the “deeming” device, Judge Sand warned that if the city did not comply, “the Court may appoint a person expert in such matters to assist the Court and the parties in the preparation of the materials required pursuant to this Order, whose reasonable compensation shall be paid by Yonkers.”²³⁷

Judge Sand also encouraged the city to provide most of the public housing units through an inclusionary zoning approach. The designated sites could contain market-rate units as well as assisted ones so long as at least 140 of the 200-unit total were assisted units. He hoped that integrating public housing with private housing would reduce the former’s stigma in the public mind and thus ease political opposition. He also hoped that this would encourage the city, in accordance with the prevailing city planning wisdom, to scatter the units among a number of sites rather than build one obtrusive high-rise. Finally, he hoped that it would enhance the social and economic integration of low-income tenants into the surrounding community. As for the remaining sixty units, Judge Sand ordered the city to submit proposed sites from a list of six available privately owned sites that the city’s planning director had indicated were suitable for development of public housing. He also required that no privately owned site be submitted unless MHA either had acquired legal control of the site itself or had an agreement with the owner (or with a developer holding an option from the owner) to develop the public housing units on a turnkey basis. The public housing units, he said, could be part of a mixed public/private development on the site. Eligible persons on the existing waiting list for public housing would be the first offered the units to be built in east Yonkers. Linking his housing remedy to his schools remedy, Judge Sand assigned second priority to families from southwest Yonkers with school-age children whose enrollment in the east Yonkers schools would further school integration.

In addition to mandating public housing, Judge Sand required the city, not HUD, to subsidize “affordable” housing for low and moderate-income people by creating an affordable housing trust fund, to be run by the FHO in cooperation with HUD and MHA. The trust fund would initially consist of at least 25% of Yonkers CDBG funds for a three-year period.²³⁸ Through this trust fund, Judge Sand sought to encourage private development of affordable housing and to advance racial and economic integration. Therefore, he required the city to use the trust fund to induce developers to include at least 20% of their units as affordable units by giving them certain concessions.²³⁹ Moreover, Judge Sand re-

²³⁷ *Id.* at 1581.

²³⁸ *Id.* at 1581–82.

²³⁹ *Id.* at 1582. These might include write-downs of the price of city-owned land; sub-

quired the city to quickly develop a detailed plan for creating subsidized family housing units beyond the 200 units of public housing already mandated. He insisted that these units be located “in existing residential areas in east or northwest Yonkers” and allowed them to be financed out of the trust fund or out of other public or private resources.²⁴⁰ For example, they could be included in developments containing market rate units, and the city could use inclusionary zoning arrangements to provide these units. As with the new public housing, Judge Sand mandated occupancy priorities for the new units in order to use his housing remedy to help implement his schools decree.

Judge Sand also ordered the city to file all applications and documents necessary to secure not only CDBG entitlement funds but also all available public and private funding. He required the city to fund “all of the measures set forth herein” as well as in his earlier schools order.²⁴¹ And in a decision that threatened to freeze all private development in the city, Judge Sand barred Yonkers from granting “any zoning change or variance or issu[ing] a building permit to any private developer with respect to any of the sites” referred to in the order without giving twenty days advance written notice to the plaintiffs and the court.²⁴² Finally, the court retained jurisdiction over the remedial phase for at least five years.²⁴³

This was a stunningly broad order, one of the most sweeping ever entered by a federal court.²⁴⁴ For our purposes, what is most striking about Judge Sand’s housing remedy, other than the “deeming” technique mentioned earlier, was his decision to broaden the focus of the case and the ambit of his power in three ways. First, he extended the remedy well beyond public housing, which had been the cynosure of the legal claims and the factual evidence, to also include subsidized private housing. This extension would benefit a larger group of people, including some who were neither poor nor black. Second, and directly related, he expanded the targets of his remedy far beyond the now-familiar City Council and Yonkers housing bureaucrats, who could be subjected to court orders. His decree encompassed the private housing market, an amorphous set of actors that operated according to very different incentives and whom he

sidized development costs, infrastructure improvements, or interim construction loans; rental or mortgage subsidizes to tenants or buyers; and rehabilitation funds to low- and moderate-income families. *Id.* The order included special allocation formulae to assure compliance with the CDBG rules. *See id.* at 1583.

²⁴⁰ *Id.* at 1582.

²⁴¹ *Id.* at 1583.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ The decision joins the ranks of the district court decision in *Missouri v. Jenkins*, 1991 WL 538841 (W.D. Mo. 1991), which imposed a broad tax as part of the remedy for a desegregation challenge in Kansas City. The Supreme Court later rejected the district court’s sweeping decision in *Missouri v. Jenkins*, 515 U.S. 70 (1995).

could not place under his direct control. This expansion would have enormous ramifications.

Even more importantly, Judge Sand reached beyond the goal that had justified his imposition of liability. He transmuted the lawsuit's goal of ending housing discrimination against poor blacks into a far more ambitious commitment to integrate lower-class blacks and whites into middle- and upper-class neighborhoods by locating new housing for them there. This goal, which was similar to the class-based integrations sought in *Mount Laurel* but that employed an altogether different means, was far more difficult to achieve and required much more complex governmental interventions into neighborhoods and housing markets. The particular form of intervention that Judge Sand chose was a structural injunction mandating specific numbers, types, configurations, and income compositions of housing units, and even controlling all private development in the city that might be conscripted into advancing his remedy.

In moving beyond nondiscrimination to class integration, Judge Sand must have known that he was taking on a daunting task—though just how daunting he could never have predicted. Surely he knew that almost twenty years after the original remedial order in *Gautreaux*, virtually none of the mandated public housing had been built despite prodigious efforts by the judges in that case. At the very least, the *Gautreaux* problems would reach his attention a year later when a new judge took the highly unusual step of putting the Chicago Housing Authority into receivership in an effort to gain compliance.²⁴⁵

7. *Implementing the Housing Remedy*

By September 1986, the city's requests for a stay of Judge Sand's orders pending appeal had been denied.²⁴⁶ A *New York Times* editorial pronounced that thanks largely to Judge Sand, the Yonkers schools had been desegregated "in relative tranquility."²⁴⁷ But the city, citing its pending appeal and its efforts to convince the court to modify the housing remedy, did not file the site designations nor do the rezoning required of it by the remedial order, and Sussman geared up to go back to court. In December 1986, several weeks after the city missed the deadline for filing a subsidized housing plan, DOJ asked Judge Sand to hold Yonkers in contempt and to appoint a "housing master" as a court expert to develop the required inventory of available sites at the city's expense.²⁴⁸

²⁴⁵ See discussion in Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 461 (1988).

²⁴⁶ *High Court Blocks Stay for Yonkers*, N.Y. TIMES, Aug. 21, 1986, at B4.

²⁴⁷ *Back in Balance; School Spirit*, N.Y. TIMES, Sept. 17, 1986, at A26.

²⁴⁸ James Feron, *Contempt Ruling Urged Over Yonkers Housing*, N.Y. TIMES, Dec. 6, 1986, at 30.

The NAACP supported the request for a housing master, but it did not seek a contempt citation. This decision prefigured a major tactical dispute with DOJ, one that would recur throughout the long remedial phase. Sussman felt that litigating contempt would be a political and legal sideshow. In his view, it would only delay implementation, distract attention from the city's housing violations, and ensure the reelection of lawless city councilors by making martyrs of them. The parties and the court knew what needed to be done, he argued, and Judge Sand should do it directly through his own appointee rather than give the city more opportunities to temporize. Judge Sand, while noting that contempt always remained a possibility, agreed with Sussman. He named Oscar Newman, the author of several books on city planning and an expert witness in *Starrett City* and other housing integration cases, as his housing master. He directed Newman to submit a ranked list of potential sites within ninety days.

In March 1987, after the city had again failed to designate sites for public housing, Judge Sand ordered the city to rezone two sites that it already controlled, Walt Whitman School and P.S. 4, for public housing. (These two schools were vacant, although at the time of Judge Sand's order, the Board of Education was considering using Whitman for administrative offices as part of its desegregation effort). In addition, Judge Sand ordered the city to bypass the conventional but cumbersome procedures necessary for it to sell those sites to the MHA, which would build and operate the units. Judge Sand hoped to locate 158 of the 200 units on those sites. In addition, he hoped that using only two sites for almost 80% of the units would reduce political resistance.

Newman, although dubious about the swampy Whitman site, located "dozens" of government-, institution-, and privately owned sites in east Yonkers.²⁴⁹ He hoped to avoid the traditional high-rises and he envisioned two- or three-story semi-detached or townhouse configurations to be occupied mostly by one-parent households with children. The units would be built on eight scattered sites, where they would be integrated into middle-income developments targeted at families earning \$25–35,000 a year, and would be subsidized through the city's use of its CDBG funds and inclusionary zoning deals with builders.

HUD, which would have to fund Newman's plan, had little enthusiasm for it. HUD's strict federal guidelines had been developed with more traditional, higher-density projects in mind. The agency doubted that the higher land and development costs of low-density units, especially in Yonkers's inflated housing market, could meet these restrictions.

Newman anticipated HUD's reaction, but Sussman's criticism of the planner's approach came as something of a shock. Sussman thought

²⁴⁹ James Feron, *Housing Aide Pursues Plan in Yonkers*, N.Y. TIMES, Mar. 22, 1987, § 22 (Westchester Wkly.), at 1.

Newman's preoccupation with low density was "foolish."²⁵⁰ The important goal, the lawyer said, was to maximize the number of units built with the limited funds available; "feasibility," not "the ideology of housing forms," should drive the court's decision.²⁵¹ This conflict between Newman and Sussman was as much political as it was legal or technocratic. Newman had good planning reasons for advocating low densities, but he knew that his proposals would come to naught unless he succeeded in mollifying the City Council. The political dilemma was this: although east Yonkers residents would find low-density developments far more acceptable than high-rises, the former would inevitably increase the number of sites and thus the number of neighborhoods affected, with predictable opposition.

Still, Newman's strategy seemed to be working. A turbulent mid-April meeting of the City Council, at which 1000 spectators watched councilors Spallone and McGovern engage in a heated shoving match, had approved his plan by a vote of 9-4.²⁵² But Sussman, too, had constituents to satisfy. He wanted to get as many of them as possible into public and subsidized housing. For Sussman, aesthetics and planning principles had to take a back seat to a more mundane imperative: maximizing the number of his clients who would get housing units.

Judge Sand, as usual, was the man in the middle. He appreciated the political problem underlying the ostensibly technical conflict over site scattering and densities. He also knew that the City Council was even more skittish than usual. Each member's political insecurity was increased by the fact that the Council was readying itself for elections that would consolidate twelve wards into six. Thus, if the Council would accept Newman's plan for scattered sites and low-density development and would actually implement it, Judge Sand was prepared to go along. He was even prepared to allow the city to defer construction until after the Second Circuit decided the city's appeal, so long as the city took the necessary pre-construction steps.

But as "final" deadlines came and went without the city either acquiring potential sites or adopting the necessary zoning changes, Judge Sand's patience wore thin. On July 1, he threw down the gauntlet: the city's choice, he said, was "compliance or receivership."²⁵³ The city, hoping to avoid public criticism for targeting particular neighborhoods for the housing, urged Judge Sand to impose his own housing plan but he refused to take the bait. The city must designate the sites, rezone for

²⁵⁰ James Feron, *Housing Design Argued in Yonkers Bias Case*, N.Y. TIMES, May 3, 1987, § 22 (Westchester Wkly.), at 1.

²⁵¹ *Id.*

²⁵² James Feron, *Yonkers Council Faces Housing Plan Deadline*, N.Y. TIMES, July 6, 1987, § 1, at 34.

²⁵³ James Feron, *Judge Warns Yonkers of Big Fines if Housing Integration is Delayed*, N.Y. TIMES, July 2, 1987, at A1.

denser public housing, and take the political heat. And if the city failed to submit its long-overdue affordable housing plan by mid-July, he would hold it in contempt and impose a fine of \$100 per day that would double each day thereafter. These fines would exhaust the city's entire \$306 million budget by the twenty-second day. Tightening the screws even further, Judge Sand ruled that the city could not issue any more building permits with respect to any city-owned or city-controlled property, nor could it sell, transfer, or encumber (e.g., mortgage) such property without his prior approval. Finally, he instructed Newman to submit his final site proposals for the 200 units and to identify surplus county-owned land in Yonkers that the city might use for the additional affordable units that his remedy required.

With this order, the city once again tottered on the rim of fiscal disaster. Sensing that Judge Sand would not hesitate to push it over the brink, the Council pulled back. It approved, and Judge Sand accepted, a plan to build semi-detached duplexes or town houses on eight sites, rather than concentrating them (as the court had preferred) on the Whitman and P.S. 4 sites.²⁵⁴ In a community that seemed addicted to playing the Perils of Pauline, disaster had been averted. Within a week, however, the agreement had begun to unravel as political, legal, and jurisdictional problems arose around each of the eight sites. Sensing trouble ahead, Judge Sand began to pull back from the city's alternate plan. Saying the plan might be revised, he solicited public comments on it.

Meanwhile, the municipal campaign was reaching its climax. The housing dispute was the central issue. Some groups urged compliance. Others advocated delay, hoping that the appeals court, which was expected to rule imminently, would uphold the city's position. On election day, the people spoke clearly for change: they favored *more* defiance. Mayor Martinelli, who sought a seventh term and led the small conciliatory faction on the Council, was defeated by a twenty-eight-year-old, one-term councilman, Nicholas Wasiesko, who had cultivated an image as the "anyone but Martinelli" candidate.²⁵⁵ Two incumbents who had supported the city's alternative plan in July were defeated, while three incumbents who had voted against it were easily re-elected. Democratic Party control of the Council declined from a margin of 10-3 to a bare majority of 4-3. Where the old Council had one black (and two women), the new Council included no blacks or women. In the 65%-majority black district created to settle a Voting Rights Act suit, a split between two black candidates over which area—east Yonkers (the NAACP-backed candidate) or southwest Yonkers (his opponent)—should be the site of

²⁵⁴ James Feron, *Site Questions Could Upset Housing Plan in Yonkers*, N.Y. TIMES, July 19, 1987, §22 (Westchester Wkly.), at 1.

²⁵⁵ E-mail from David Sheingold, former reporter for the Herald Statesman, to Peter H. Schuck, Professor of Law, Yale Law School (Jan. 14, 2002).

future housing development helped to elect a white incumbent whose district had been eliminated. Henry Spallone, a former police officer in the Bronx and a bombastic, populist leader who would seek to rescind the city's compromise housing plan and eventually become mayor, caught the Yonkers *zeitgeist* in classist rhetoric: "The message is very simple. The people are saying you can't arbitrarily come into a neighborhood and destroy it by putting in low-income housing projects. Anybody who wants to, can buy property at the going rate. No one is denying blacks or Hispanic people that right."²⁵⁶

Convinced now that Yonkers would respond only to persistent pressure, Judge Sand decided to force Yonkers to the brink where it might think more clearly about its future. Just before Thanksgiving, he barred the city from using zoning changes, variances, tax abatements, industrial bonds, or other incentives to assist four pending private developments or any other projects. This moratorium was categorical. Judge Sand would make an exception only if a particular project site was unsuitable for public housing. And he was prepared to go even further. If the city remained defiant, he might extend the freeze to "any and all action with respect to any real estate in Yonkers."²⁵⁷ Judge Sand knew that his step would probably bring major development in Yonkers to a grinding halt at a time when its economy was starting to boom and its budget was running a \$20 million surplus. He had raised the stakes once again, threatening to punish the city not by regulating its housing decisions but by strangling its economic development in non-housing areas.

Although *New York Times* editorials praised Judge Sand's moratorium as a creative answer to Yonkers's defiance,²⁵⁸ this tactic raised very serious questions of law, policy, and morality. Was his remedial authority broad enough to allow Judge Sand to control *everything* the city did, including mass transit, health care, and sanitation? Were there no narrower remedies that would achieve the desired result? Who would suffer most from the moratorium—city officials, private developers, or poor people living in southwest Yonkers where one of the frozen developments was to be located? And was it just or sensible to impose the burden of public and affordable housing on Yonkers while its far wealthier suburban neighbors sat back and did nothing?

While these questions were being pondered, the struggle over sites for public housing was escalating on other fronts. As more obstacles arose, Judge Sand instructed Newman to develop a list of suitable privately owned sites to go with the four school sites that Judge Sand had already secured for the city and on which he wanted the city to build 132

²⁵⁶ Interview with Henry Spallone, *supra* note 220.

²⁵⁷ James Feron, *Citing Bias Order, U.S. Curbs Yonkers on Aid to Builders*, N.Y. TIMES, Nov. 20, 1987, at A1.

²⁵⁸ *When a City Defies a Judge*, N.Y. TIMES, Nov. 25, 1987, at A26 (editorial).

of the public housing units. Newman submitted a list of nine sites that he said would be “relatively easy to develop” in the low-density configurations he had been advocating.²⁵⁹ His list, however, was extremely controversial, even provocative. Although it included sites that were already committed to housing and commercial developments, it also included acreage owned by two religious institutions, St. Joseph’s Seminary and Lincoln Park Jewish Center. The religiously owned sites’ potential condemnation by the city raised constitutional, not to mention political, questions.

Shortly after Christmas, the Second Circuit gave Judge Sand a much-wanted gift: it unanimously affirmed his liability and remedy decisions in all respects, calling them “exhaustive and well documented.”²⁶⁰ This approval strengthened Judge Sand’s hand, making it easier to deal effectively with the more recalcitrant City Council that would assume office on New Year’s Day. The Second Circuit could hardly have been more deferential to Judge Sand’s rulings on law, on facts, on liability, and most remarkably, on remedy. It’s one-page treatment of the remedy, which emphasized that the remedy was “closely tailored to the City’s constitutional violations” and that the city had agreed with HUD earlier to build the 200 units, seems extraordinarily cursory in light of the difficult legal issues raised by Judge Sand’s order. The Second Circuit did not even mention, for example, three of the most unusual aspects of the order—that it imposed a duty to promote affordable, not just public, housing; that it threatened to freeze economic development in Yonkers; and that it fashioned a remedy for a racial violation in terms of integration by income class. (When Judge Sand added a racial component a decade later, the city filed another appeal, which was denied in 2001).²⁶¹ The appellate court had given Judge Sand the whip insofar as remedy was concerned, and he lost no time in cracking it.

8. *The Yonkers Consent Decree*

The Second Circuit’s ruling, coupled with Judge Sand’s increasing pressure on the Yonkers economy and the City Council, had an immediate, unmistakable effect. To the new mayor, Nicholas Wasicsko, it “changed the landscape.”²⁶² The city’s litigation strategy, which had produced nothing but \$15 million of lawyers’ bills, had essentially come to an end. Idled developers and community groups that favored compliance swung into action. The CANOPY group, for example, distributed 60,000

²⁵⁹ James Feron, *9 Sites Listed for Public Housing in Yonkers*, N.Y. TIMES, Dec. 11, 1987, at B4.

²⁶⁰ *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1186 (2d Cir. 1987).

²⁶¹ *United States v. Sec’y of Hous. & Urban Dev.*, 239 F.3d 211 (2d Cir. 2001).

²⁶² James Feron, *Yonkers Said to Propose an Accord on Bias Suit*, N.Y. TIMES, Jan. 9, 1988, at B1.

fliers, one to almost every family in the city, urging immediate compliance and a scattered site solution.

On January 20, 1988, the Council threw in the towel—or so it seemed. Amid a clamorous chamber filled with citizens opposed to the measure, and citing the threat of large fines, the Council voted 5-1, with Councilman and Vice-Mayor Spallone opposed, to approve the HAP that Judge Sand had mandated years earlier. Five days later, after around-the-clock negotiating sessions and only one hour before the court's deadline, the city agreed to seven specific sites for townhouse-style public housing. The seven sites, each with an agreed-upon number of units, included the Whitman, P.S. 4, and Lincoln public school sites, and four privately owned properties, including part of the St. Joseph's Seminary parcel. In addition, the Council agreed to adopt an ordinance requiring that all multi-family developments designate at least 20% of the units as affordable units until a total of 800 such units was achieved within four years. In addition, the Council agreed not to seek Supreme Court review of Judge Sand's decisions.²⁶³

Announcing the settlement in open court, a lawyer for Yonkers reported that several pro-compliance Council members had received threatening phone calls and envelopes containing bullets.²⁶⁴ Expressing concern about this intimidation, Judge Sand announced that he would end his freeze on private development, although not the freeze on transfers of city-owned property. Immediately after the court adjourned the hearing, Spallone, the lone holdout on the Council and for that reason excluded from the negotiations, shouted at the lawyer, "You sold out the city!"²⁶⁵ He had a special reason to be furious: four of the seven sites, which would contain 108 of the 200 units, were located not far from Spallone's district and residence. Nicholas Longo, who had also campaigned against the court but had voted to comply, fared better. His district was assigned fewer units than expected, and one proposed site located directly behind his house was struck from the final list. As recriminations and accusations between old political allies intensified, the Council fractured along new fault lines.

After a long, raucous January 28 meeting held amid bitter taunts and shouts of "Resign! Resign!" by 800 enraged spectators under the watchful eyes of police officers, the Council voted to accept the negotiators' agreement.²⁶⁶ When the meeting ended at almost 1:30 A.M., only Spallone, who was loudly cheered, and another who switched his vote at the last moment, opposed the resolution. All but one of the councilors who

²⁶³ Sara Rimer, *Yonkers Ending 2-Year Battle, Agrees to Low-Income Housing*, N.Y. TIMES, Jan. 26, 1988, at B1.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Sara Rimer, *Council Backs Housing Order in Yonkers*, N.Y. TIMES, Jan. 29, 1988, at B1.

supported the resolution had campaigned against it less than three months earlier, and the sobriquets “wimp” and “liar” were constantly hurled at them. With this vote, the city could sign the consent decree.

Within two months, however, several developments brought the city back to court. With the deadline for appealing to the Supreme Court rapidly approaching, the city now sought to renege on its commitment to forego that appeal, a commitment that had infuriated many in Yonkers who bitterly resented Judge Sand’s orders. The mounting opposition to the consent decree, it argued, was causing “near chaos for the Council in its attempts to govern the city.”²⁶⁷ Few expected the city to win an appeal, but it would be politically popular and might delay the inevitable. When its high-profile Manhattan law firm resigned in anger over the Council’s criticism of it for not pursuing the Supreme Court appeal, more delays occurred. Meanwhile, new problems had arisen over some of the sites to which the city had consented, including soil subsidence at one location and the refusal of John Cardinal O’Connor, Archbishop of New York, to sell the seminary property. In addition, the Archbishop questioned whether the court-ordered priority for occupancy by families with children in the local public schools would discriminate against parochial school families.²⁶⁸ To add to the crisis, HUD now refused to provide funds beyond those necessary to build three-story walkups. New rounds of siting and funding proposals, and counter-proposals, culminated in a dramatic motion by the city to vacate the recent consent decree and to return the \$30 million HUD grant it had won for the housing.

Judge Sand declined to alter the consent decree. Instead, he entered an order requiring the Council to enact into law a housing plan that he had drafted in consultation with the parties. The Council refused to do so and proposed that the court should order the necessary legislation into effect. On July 26, Judge Sand issued an order giving the Council until August 1 to enact the legislation, known as the Affordable Housing Ordinance. If it failed to do so, the city and each councilor failing to vote for it would be punished with contempt citations and heavy fines. On August 1, the Council voted 4-3 not to comply, and Judge Sand held the city and four councilors in contempt and imposed the fines. The Second Circuit upheld Judge Sand’s sanctions in virtually all respects.²⁶⁹ The city and councilors appealed to the United States Supreme Court.

With their appeal pending, their fines rapidly growing (those imposed on the councilors were stayed pending appeal), and drastic cuts in

²⁶⁷ James Feron, *Yonkers Racial Suit Settled in Court, Not in Community*, N.Y. TIMES, Mar. 27, 1988, § 4, at 6.

²⁶⁸ See Neil A. Lewis, *4 Councilmen Bask in Local Acclaim*, N.Y. TIMES, Aug. 5, 1988, at B2; Sarah Lyall, *O’Connor Faults Parts of Yonkers Bias Agreement*, N.Y. TIMES, Mar. 27, 1988, § 1, at 40.

²⁶⁹ *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *rev’d*, *Spallone v. United States*, 492 U.S. 265 (1990).

core city services looming, the Council purged itself of contempt by enacting the Ordinance. Councilors Spallone and Fagan voted no, remaining in contempt. Spallone's obstinacy was rewarded politically in November 1989 when he ousted the pro-compliance incumbent mayor Wascisko. Two months later, he also won a legal victory when the Supreme Court ruled, over four Justices' impassioned dissent, that Judge Sand had abused his discretion by sanctioning the two councilors without waiting to see whether they would comply with the new ordinance.²⁷⁰

Mayor Spallone and the city continued to defy the court. Judge Sand responded by in effect stepping into the Council's shoes. He directly ordered the city housing agencies to implement his instructions on requesting bids for site development, choosing among the bids, transferring the building site titles to the developer, issuing building permits, and a host of other matters. HUD, which would have to fund the housing, opposed many of Newman's design and development plans on bureaucratic, procedural, and cost grounds. It second-guessed him even on matters of detail, such as the quality of fencing around the yards. When construction began on the first site in April 1991, weekly protest marches and more threats of violence followed, but to no avail. In November, Spallone was defeated for re-election.

The 200 units of scattered-site public housing that the court had mandated back in 1985 were built on seven sites that contained fourteen to forty-eight units each and were not fully occupied until the mid-1990s. Sited in overwhelmingly white, middle-income neighborhoods in east Yonkers, they were two- and three-bedroom, factory-built brick townhouses featuring small private backyards and other features designed to make them look like single-family homes and blend into the neighborhood. The tenants were low-income black and Hispanic families whom the MHA chose by lottery, half from existing public housing tenants and half from the waiting list. Building the first developments cost about \$110,000 per unit, a relatively high amount that HUD opposed and that aroused much controversy in Yonkers—especially given that its then-weak housing market would have enabled the city to acquire co-ops and other existing units, which would have saved money, permitted more scattering of the units, and produced less neighborhood opposition. In addition, by refusing to allocate city-owned sites for the housing, and by forcing MHA into the private market, the city made matters even worse.²⁷¹

²⁷⁰ Spallone v. United States, 493 U.S. 265 (1990).

²⁷¹ Xavier de Souza Briggs et al., *In the Wake of Desegregation: Early Impacts of Scattered-site Public Housing on Neighborhoods in Yonkers, New York*, 65 J. AMER. PLANNING ASS'N. 27, 33 (1999); Xavier de Souza Briggs, *Brown Kids in White Suburbs: Housing Mobility and the Many Faces of Social Capital*, 9 HOUSING POL'Y DEBATE 177, 192 (1998).

9. Yonkers in the 1990s—Developments and Reflections

In any moral accounting of the city government's behavior, it has long been bankrupt. Its defiance flagrantly violated the constitutional rights of its minority residents, demonstrated contempt for the rule of law, and nearly destroyed the community, leaving wounds that may never heal. That said (and it can hardly be said enough), any inquest on the law's effectiveness in promoting diversity must ask some other questions: What has Judge Sand's public housing remedy actually wrought? Was it worth the price that the entire Yonkers community—rich and poor, minority and white, racist and integrationist—has paid? Were there other ways through which the court could have better vindicated the law's promises?

The first two questions have an empirical core that social science can help reveal. A study of how the public housing was affecting the surrounding neighborhoods in 1994-95, shortly after the last mandated tenants moved in, concluded that the housing "has not wreaked havoc in any of the ways that opponents of the court order claimed it would. Most importantly, there are no signs of neighborhood tipping or significant white flight [A]ny negative price effects not apparent in our statistical models should be short term."²⁷² Other analysts, however, have examined the data on property value effects and concluded that such declines did occur, especially around the public housing sites in the less prestigious neighborhoods.²⁷³

Be that as it may, Xavier de Souza Briggs reported in 1997 on how the social integration of these neighborhoods had progressed several years after the moves:

[F]ew of the movers interact with whites in the new neighborhoods beyond their public housing complex, and few report having white friends or acquaintances in any domain (neighborhood, school, etc.) Also, the movers do not attend neighborhood churches, which help neighbors get acquainted in many American communities. Rather, they go back to their old churches across town But partly because of their ethnic isolation, one-half of the mover youth (and an equal proportion of stayers) cannot think of a single adult they could count on to provide helpful advice about a school program or getting a job.²⁷⁴

²⁷² *Id.* at 43. The study acknowledges that its analysis is subject to methodological difficulties and the property value effects are uncertain.

²⁷³ E-mail from David Sheingold, *supra* note 255; Telephone Interview with David Sheingold, former reporter for the Herald Statesman (Jan. 14, 2002).

²⁷⁴ Xavier de Souza Briggs, *Social Capital and the Cities: Advice to Change Agents*, 86 NAT'L CIVIC REV. 111, 116 (1997).

Lisa Belkin, a *New York Times* journalist and author of a book on Yonkers, conducted extensive before-and-after interviews with the tenants and their opponents and described the situation in 1998:

In short, the tenants in the townhouses live in a bubble within a bubble. They are still visitors in their new neighborhoods, and they have almost no interaction with the white homeowners whose world they were sent east to change. Was this what Judge Sand envisioned when he wrote his 657-page opinion? Was it worth ten years and \$260 million so that two hundred families could live in nicer homes and be ignored by their neighbors?

I asked Sand a version of this question . . . and it was the only moment during hours of conversation, that made his tone go sharp. The number of townhouses—two hundred in a city of nearly 200,000 people—was chosen by the NAACP and the Justice Department, he said. He accepted their number, but he did not choose it, and he would not comment on whether it was sufficient to remedy the perceived wrong. What he did say was that the point of all this was never *integration*. It was *desegregation*, and the differences are not merely semantic. Yonkers is, technically, desegregated. A group of people, a category if you will, is now allowed in where before it was deliberately kept out. But Yonkers is *not* integrated. Black and white are not woven into the same fabric, the same community. Time might accomplish that. A judge cannot.²⁷⁵

The third question in the inquiry of the law's effectiveness concerns the availability of more effective remedies and is more easily and categorically answered. Better alternatives existed. The *Gautreaux* plaintiffs, minority and low-income families who were no more welcome in white, middle-class neighborhoods than were their counterparts in Yonkers, used Section 8 vouchers and mobility counseling to rent private units located twenty to thirty miles from their previous central-city neighborhoods in suburbs with a higher quality of life for them and their children. Earlier, we saw that a Section 8 approach has its own serious problems. The families need help finding new housing, getting it inspected, negotiating with landlords, defraying moving expenses, and settling into an alien environment. Often, the vouchers' value is too low to pay market rents and overcome landlords' suspicions about subsidized tenants and the program's administration. That said, the results are still encouraging.

Judge Sand did not have to look to Chicago for proof of this proposition. It was right there in Yonkers—literally under his nose—in the form of the Enhanced Section 8 Outreach Program (“ESOP”). ESOP was

²⁷⁵ BELKIN, *supra* note 156, at 321.

created in 1993 in the wake of a suit against HUD and state, county, and Yonkers Section 8 agencies. The suit claimed that the entities were preventing families from using their Section 8 benefits to move into racially and economically mixed neighborhoods.²⁷⁶ The suit charged that these agencies refused to approve “rent exceptions” that could raise the vouchers’ value so that tenants could rent in such neighborhoods, steered tenants to southwest Yonkers neighborhoods, did not do the HUD-mandated outreach to landlords in other areas, and discouraged landlords from accepting vouchers. Under the consent decree in that case, ESOP would do what the city had failed to do—try to help Section 8 tenants move out of southwest Yonkers—by seeking rent exceptions, raising voucher values, recruiting and negotiating with landlords, advising and advocating for tenants, and helping them utilize existing programs.

After eight years and operating with only three people on a \$200,000 annual budget, ESOP has replicated *Gautreaux*’s generally successful mobility program. It has moved more than 200 families to housing outside southwest Yonkers, including some into other Westchester County communities. Utilizing the maximum payment standard, ESOP is moving approximately fifty families a year into mixed neighborhoods, and it anticipates that a higher payment standard, for which it is seeking HUD approval, would substantially increase the number of families it can place there.²⁷⁷ In stark contrast, *in more than twenty years*, the city’s Section 8 bureaucracy has moved only a handful of families outside southwest Yonkers.²⁷⁸ This paltry outcome is hardly surprising given the agency’s political incentives to keep them in their ghetto.

The city’s dismal performance extended as well to the separate affordable housing part of the remedy. Judge Sand required the city to secure 800 units (since reduced to 600 existing and 68 new units) for low- and moderate-income families through subsidies, inclusionary zoning arrangements, or otherwise, in existing residential neighborhoods in east or northwest Yonkers. Until the late 1990s, the affordable housing remedy was even less effective than the public housing one. The city continued to drag its feet, and private developers, who would have to build and sell 3200 market-rate units to subsidize the 800 affordable ones, found the economic incentives unattractive. Hoping to jumpstart the process, Judge Sand issued a supplemental affordable housing order in 1993 that had little effect. Consequently, in November 1996, Judge Sand required Yonkers to place eligible families in at least 100 affordable units of ra-

²⁷⁶ *Giddins v. Sec’y of Hous. and Urban Dev.*, 91 Civ. 7181 (S.D.N.Y., Nov. 10, 1993) (entry of consent decree).

²⁷⁷ Interview with Jerrold M. Levy, *supra* note 156.

²⁷⁸ Any people moved out of southwest Yonkers would probably have been low-income whites. E-mail from Professor Andrew Beveridge, sociologist and former president of the Yonkers Board of Education, to Peter H. Schuck, Professor of Law, Yale Law School (Sept. 13, 2001).

cially integrated housing in each of the next six years. He also set up a system of beneficiary group priorities and compliance incentives. Implementation soon bogged down, however, in disputes about whether the city qualified for compliance credits even though half or more of the families were being placed in already segregated neighborhoods.

In 1997, a new mayor, John Spencer, took office. Spencer convinced Judge Sand to allow the city to fulfill its obligation largely through its own agencies and by using existing units in order to minimize the delay and political turmoil involved in acquiring sites and building new units. Under a new plan, New York State, which Judge Sand had previously found to be partly responsible for Yonkers's housing segregation, would designate 740 affordable units (some existing and some new, at the city's discretion) and would pay half of the \$32 million cost. Simultaneously, other sources of potential funding arose. Sussman brought the Urban Development Corporation, a potentially substantial source of new funds, into the case. Additionally, the Emergency Financial Control Board, which under state law had supervised Yonkers's finances since 1975, decided to restore fiscal control to the city. With these developments producing some tendrils of optimism, even Judge Sand now foresaw an end to the saga.²⁷⁹

Judge Sand should have known better. Disputes with the city continued. The Fair Housing Implementation Office ("FHIO"), which Judge Sand had established in the late 1980s to secure the mandated affordable housing through some combination of public subsidies and private developers, was utterly ineffective. It generated almost no affordable housing units outside southwest Yonkers.

Judge Sand seemed surprised at FHIO's failure. But his surprise itself is surprising: Many experts had predicted its failure because it took a financial approach that made little sense even to fair-housing advocates and because of the perceived incompetence of Karen Hill, the FHIO director. Hill wanted families to *own* the affordable units. Yet FHIO's eligibility criteria gave priority to public housing families with no ownership experience, in whom potential developers, co-op converters, and lenders had little interest. Many of the families, moreover, were understandably skeptical about a program that saddled them with mortgage payments and limited their ability to accumulate equity and sell at a profit. To them, FHIO's program seemed to be mostly a downside risk.

With Judge Sand's approval, Spencer fired Hill and assigned FHIO's duties to a city-housing agency.²⁸⁰ The city agency, however, did only a

²⁷⁹ BELKIN, *supra* note 156, at 322–24.

²⁸⁰ At the same time, Judge Sand terminated Oscar Newman, his long-time special master for the housing remedy, because his high fees, inability to secure the affordable housing, and political tin ear made him a growing liability. He replaced Newman with a business executive from Washington who had experience with development of low-income housing.

little better than FHIO. Beginning in 1998, it offered ownership of existing affordable units to 175 families. Few observers were surprised by the program's slow pace given its continued stress on ownership and a widespread belief that the city wanted it to fail. In December 1999, an increasingly frustrated Judge Sand issued his third supplemental affordable housing order. The order imposed a new, racially defined system of priorities and city compliance bonuses. Both the city and the NAACP appealed. The city argued that the order violated the 1988 consent decree and unconstitutionally used racial criteria; Sussman attacked the order as too generous. The Second Circuit upheld the order early in 2001.²⁸¹ The race-conscious remedy was proper, the court held, because of the city's repeated defiance of Judge Sand's earlier orders, the re-segregative effects of its placements, and the fact that Yonkers public housing was still substantially segregated.²⁸² When the Supreme Court declined to hear either side's appeal in December 2001, this decision became final.²⁸³

Meanwhile, the ostensible point of all this legal wrangling—more affordable housing in east Yonkers—was as far from fulfillment as ever. Efforts during the late 1990s by DOJ to get HUD to issue special Section 8 vouchers to implement the Yonkers housing decree failed when HUD insisted that it lacked the authority to issue them for this purpose. DOJ lawyers then met with ESOP to explore the possibility of having the city hire ESOP to move Section 8-eligible families into better neighborhoods. Given ESOP's track record, DOJ's aim to place twenty-five to thirty families a year in this fashion seemed eminently feasible. The city, however, flatly refused either to hire ESOP or to use Section 8 vouchers. Instead, it hired a private non-profit organization, Housing Action Council, to run a new city-regulated, city-funded rent assistance program that drew families from the court-mandated priority list. Sussman acquiesced in this and DOJ did not object.

The city had also managed to whittle the consent decree's original target of 800 affordable units down to 600 existing units—100 units per year for six years beginning in 1997. At the start of 2002, the final year of this arrangement, the city had provided only 200 of the promised 600 units; its programmatic alternative to Section 8 had managed to move only five families outside southwest Yonkers. After a generation of litigation and fifteen years of resolute supervision by a resourceful judge whose far-reaching remedies were affirmed by the nation's highest court, the remedies remain mostly empty words, DOJ remains frustrated, and the minorities in Yonkers remain where they were when the litigation began, perhaps even more so because of the departure of so many whites from the city.

²⁸¹ *United States v. Sec'y of Hous. and Urban Dev.*, 239 F.3d 211 (2d Cir. 2001).

²⁸² *Id.* at 219–20.

²⁸³ *City of Yonkers v. United States*, 122 S. Ct. 643 (2001).

V. CONCLUSION

In a review of the *Yonkers* case published in 2001, two political scientists provide a sweeping and pessimistic appraisal:

To the degree that any locality can stand in for the whole, Yonkers is a microcosm of the United States on [the desegregation] issue. Its history demonstrates that, even with the best intentions and a lot of power, over the long term political actors cannot or will not extensively desegregate public schools and public housing. If Americans are serious about implementing the principles of equal opportunity and racial integration, they must find other means than the forms of desegregation with which our nation has been preoccupied since the 1960s. Mandatory school desegregation and quasi-mandatory public housing desegregation are dinosaurs—appreciated by many, laughed at by some, but doomed in any case to extinction.²⁸⁴

This is a harsh verdict but astute advice to anyone who would look to the courts to promote racial and class diversity and social integration in residential communities. Yonkers is indeed a microcosm of America, but fortunately its officials' open, protracted, and contemptuous defiance of the law is probably unique since the end of massive resistance to the civil rights laws of the 1960s.

This Article has discussed three major legal conflicts involving roughly similar social, economic, and political constraints on courts' ability to protect and implement the legal rights that the judges defined, substantively or remedially, in residential diversity terms. In *Mount Laurel*, the New Jersey courts tried to enforce a substantive right of low- and moderate-income families to live in residential communities that they could not afford without public subsidies. In *Gautreaux* and *Yonkers*, the courts tried to enforce a substantive right to equal treatment through remedies that used racial- and income-diversity measures of families' equal protection rights and community integration. *Gautreaux* has improved housing options for thousands of low-income minority families who now enjoy some of the hoped-for social, economic, and educational benefits of integration. In contrast, endless litigation in *Mount Laurel* and *Yonkers* has yielded little housing improvement and even less genuine integration. What accounts for the different outcomes?

In each case, of course, one can point to contextual differences that complicate efforts to compare and generalize, such as idiosyncratic

²⁸⁴ Jennifer Hochschild & Michael N. Danielson, *Analyzing the Demise of a Dinosaur: School and Housing Desegregation in Yonkers*, in RACE, URBAN POVERTY, AND DOMESTIC POLICY (Michael Henry ed., 2001).

judges, distinctive communities, and unique political and economic conditions. Four commonalities are striking nonetheless. First, the market's pervasive influence over housing choices powerfully constrains, and often distorts, efforts by government generally and courts in particular to shape those choices. Second, a ubiquitous classism rejects the idea that people should have a right to live in a neighborhood they cannot afford. Third, politically mobilized communities strongly oppose the kinds of diversity the courts have mandated. Fourth, courts possess only the crudest, most limited tools for constructing a new vision of diversity amid these obstacles. In effect, they are trying to erect a large tent with one hand in the middle of a hurricane.²⁸⁵

In *Mount Laurel*, the legislature sized up these four conditions and promptly supplanted the courts with an administrative agency, albeit one still unable to grapple effectively with the housing market's remorseless logic. In *Yonkers*, a determined judge promoted his remedy with every weapon in his arsenal (plus some that arguably were not), yet they proved abjectly inadequate for the task. Like Canute facing the turbulent sea, like a general without an army, Judge Sand could not master the forces on which his plan's success depended. He had to contend with the powerful self-interest of thousands of ordinary people who feared inner-city contagion, people whose locational choices were constrained only by their income and willingness to move. He was also opposed by the city politicians who reflected and fed those anxieties, by the developers who saw little profit in low- and middle-income housing, by the neighboring, resource-rich communities to which his writ did not run, and by the city bureaucracies who had incentives to delay and subvert but not to comply. His main vision, scattered-site housing for minorities and the poor, did little more than expand subsidized housing into older, blue-collar neighborhoods near the inner city while leaving more affluent areas almost as economically and racially homogeneous as before.²⁸⁶

Indeed, Judge Sand's efforts probably made matters much worse. This criticism seems amply warranted when we consider the opportunity costs of his remedial decisions—particularly the better, more integrated housing that a mobility remedy would have provided to minority and other low-income families; the scarce resources squandered by the interminable legal proceedings, most of which were paid by the city's working class taxpayers; the political scars left by the conflict; and the further segregation of a city that was 79% white in 1980 but only 50% white in 2000.²⁸⁷ Additionally, over two decades of litigation have left the public schools even more segregated than the city generally. In 2002, when the

²⁸⁵ See generally Peter H. Schuck, *Benched*, WASH. MONTHLY, Dec. 2000, at 35.

²⁸⁶ Zelinsky, *supra* note 106, at 691.

²⁸⁷ David W. Chen, *Yonkers Desegregation Plan Clears Hurdle in High Court: Justices Let Stand a Ruling Against the City*, N.Y. TIMES, Dec. 4, 2001, at D5.

schools case was finally settled (largely for cash)—and after city and state desegregation expenditures estimated at \$500 million—white students comprised only 25% of the school population, down from 65% in 1980 when the case was filed.²⁸⁸

Seldom if ever has so much judicial power been exerted for so long against so many officials and produced so little progress as in *Yonkers*.²⁸⁹ The culprit, of course, has always been the city government itself, not the judge who sought tirelessly to uphold the law. This cannot be emphasized enough. But neither this fact nor the fact that *Yonkers* is an unusually pathological case should blind us to the deeper, more structural problems that arise when the law defines, promotes, and mandates diversity in certain ways. We must go on to ask whether taking the city's flagrant defiance as a given, Judge Sand could have fashioned a more promising remedy.

Gautreaux suggests an affirmative answer. The court there faced similar resistance and seemingly endless temporizing by Chicago politicians and public housing bureaucrats. Yet the court managed to regroup and refashion its remedial approach by establishing an outreach-focused mobility program based on Section 8. This program became a national model for diversity programs (like ESOP in Yonkers) that arm families with vouchers and support services, and accompany them into the market where they can rent housing from those landlords who can be induced to accept them. Section 8 vouchers still encounter resistance from some landlords even though the program has been changed to make it more market-friendly by, for example, letting landlords use their own leases with Section 8 tenants and not requiring renewal at the tenant's option.²⁹⁰ But landlord resistance tends to be isolated, of low visibility, and sometimes tractable to negotiation by groups like ESOP on behalf of voucher-holders.

As discussed above, Judge Sand's approach was very different. His was a bricks-and-mortar, fixed-site, take-it-or-leave-it, top-down, court-designed, court-managed remedy for public housing. He did not empower the low-income families to carry money-equivalents into the market and to negotiate with landlords with the sustained assistance of highly motivated outreach and mobility specialists. Rather, he empowered the very same officials who created the problem in the first place, who had repeatedly defied the law and the court, and who had neither political nor market incentives to promote the families' interests. In addition, although Judge Sand did initially look to Section 8 as part of his

²⁸⁸ Winnie Hu, *No More Raging at a Yellow Bus: In Yonkers, Cooler Heads Look Back at Years of Desegregation*, N.Y. TIMES, Jan. 13, 2002, § 1, at 29.

²⁸⁹ A possible contender is school finance litigation. See Heise, *supra* note 80, at 99–101.

²⁹⁰ Federal law permits states and localities to bar landlords from discriminating against voucher-holders as such. 24 C.F.R. § 982.52 (1995).

affordable housing remedy, he surrendered to Yonkers's resistance to using vouchers, and then allowed the city to substitute a limited, demonstrably failed rental assistance program of its own and to continue to violate its own promises and timetables.

Indeed, Judge Sand's tenacious effort to manage Yonkers housing markets from his courtroom was even less auspicious than the command-and-control regulation that has performed so poorly in so many different policy domains.²⁹¹ By forcing families into public housing clusters, he created a highly visible target against which the community could easily stigmatize and mobilize, a target with few defenders besides the court. Had Judge Sand deployed his legal authority on behalf of a well-designed, well-supported Section 8 remedy as forcefully as he deployed it in pursuit of his bricks-and-mortar approach, the result would almost certainly have been better for low-income and minority people in Yonkers.

Diversity policymakers can draw at least one clear lesson from our case studies of residential integration. Neighborhoods are complex, fragile, organic societies whose dynamics outsiders cannot readily understand, much less control. A court demanding the implementation of a diversity ideal that a neighborhood's residents do not share, and will strenuously resist, cannot conscript the housing market to do its bidding as it might be able to conscript a public bureaucracy (though problematically, and in Yonkers's case, perversely). A court that mandates this diversity over such resistance is bound to impair its legitimacy and effectiveness. Recalcitrant neighborhoods are more likely to allow for diversity when it comes with money or other things of value, although even this may not assuage residents' fears.²⁹² Government-sponsored dispersal and integration of poor and minority families into resistant white, middle-class neighborhoods can succeed, if at all, only when done in a small, carefully orchestrated, and low visibility way. Voucher-type mobility remedies are *necessary* for this even if they are not always sufficient. The alternative, alas, is probably some version of the ongoing Yonkers imbroglio.

²⁹¹ See generally SCHUCK, *supra* note 228, at ch. 13.

²⁹² See generally David M. Halbfinger, *Yes, in Our Backyard: Accepting a Shelter Can Be a Lucrative Deal*, N.Y. TIMES, Feb. 24, 2002, § 1, at 29.