... afraid if we moved too fast, people might be killed."


"One child told me 'I got a BB gun,'" she said. "I said, 'I ain't got a BB gun, but I got one that shoots lead. It'll tear your butt up.' And I ain't seen him again. Sure I've got a gun, but I wasn't going to shoot him. I just wanted to let him know."

Ms. Alberta Lott, elderly African-American tenant who transferred to the white Clarksville, Texas, project, referring to her reaction to harassment by white children after the move.

SEPARATE AND UNEQUAL—
The Root and Branch of Public Housing Segregation

By
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and
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I. Introduction

Many of our country's public housing authorities (PHAs) are and have been purposely racially segregated as part of the general pattern of modern town and city residential segregation. This segregation is found in small towns and in large cities, in the North and in the South. Low-income African-American families receiving public housing, Section 8, or other assistance provided by these PHAs are subjected to unit, project, and neighborhood conditions that are both separate and unequal. In many cases, the unequal conditions are also slum conditions.²

When we address the problems caused by deliberate racial discrimination in public housing programs, the application of traditional dual system liability and remedy principles developed in the school desegregation cases should be considered.³ Such an approach offers the opportunity both to equalize African-American projects with white-occupied assisted housing and to provide effective access for African-American families to a wide choice of housing opportunities. In developing the full range of remedies, such litigation can also raise the quality of African-American-occupied units under the Section 8 Existing Housing Program and other programs under the administration of the PHA, can provide access to other HUD-assisted low-income housing, and may mandate city revitalization efforts around the African-American projects.

Many low-income African-American families receiving federal housing assistance do not receive the minimum decent, safe, and sanitary housing that was the objective of the law establishing the various housing programs.⁴ Even if these families do receive the minimum required by law, they do not receive the same high level of facilities and services received by whites under identical or similar programs.⁵ Many of the units in the predominantly African-American projects are unused and unusable because of the condition of the projects. Some that are uninhabitable are in fact inhabited.

In addition to the inequality in the actual housing provided to low-income African-American families under the federal programs, the neighborhoods in which they receive assistance are usually subject to various adverse conditions not found in the neighborhoods surrounding the housing units in which whites receive the same assistance. These conditions include inferior city-provided facilities and services, little or no new or newer residential housing, large numbers of seriously substandard structures, noxious environmental conditions, substandard or completely absent neighborhood service facilities, high crime rates, inadequate access to job centers, and little or no investment of new capital in the area by public and private entities.⁶

Given the history of racism in this country, the gross inequality in facilities and services should at least raise as a working hypothesis the theory that these disparities in the quality of federally assisted housing are purposely inflicted upon low-income African-American families because of their race. Adding strength to this hypothesis is the additional fact that most low-income African-American families receive housing assistance only in predominantly African-American neighborhoods, while almost all of the assisted white families receive the assistance in white neighborhoods. The usual race-neutral rationalization for white/African-American disparities—economics—obviously does not apply. The same federal dollars allocated under the same federal programs are used to provide different levels of services within a recipient population that is economically homogeneous.

The basic premise of deliberate discrimination by whites against African-Americans is belief in white supremacy and its logical corollary, African-American inferiority. Since the mass migration of this country’s population to towns and cities began in the 20th century, the primary tool for the practical implementation of white supremacy has been racial segregation. Once the African-American and white population moved from the dispersed agrarian patterns of farms and villages to the more dense and impersonal town and city patterns that mark our present society, the old mechanisms of racial domination had to be adapted if white supremacy was to continue.⁷

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2. Hearings on Discrimination in Federally Assisted Programs, supra note 1, at 22-61.


5. See, e.g., the instances cited in the Dallas Morning News series, Hearings on Discrimination in Federally Assisted Programs, supra note 1.

6. Hearings on Discrimination in Federally Assisted Programs, supra note 1, at 23, 75.

The imposition of involuntary residential racial segregation of African-Americans and whites has been a key mechanism for maintaining white supremacy. The genius of segregation has been its flexible and seemingly moderate ideology, as opposed to the more vicious approach found in the white radical racial supremacists who argue for total exclusion of African-Americans from modern society. The state-initiated, -supported, and -maintained residential separation of whites and African-Americans allows a number of basic discriminatory decisions to be made and implemented without actually confronting the staggering conflict between the values of freedom and equality to which we have subscribed as a nation and the realities of a system in which whites benefit from the deprivation of African-Americans.

The use made of residential racial segregation by Robert Moses during his reign as a controlling figure in New York City planning and development is an example. Tight park budgets were met by building facilities only in white neighborhoods, by substantially decreasing the quality of facilities in African-American neighborhoods, and by limiting or prohibiting African-American use of otherwise public facilities. Transportation budgets were stretched by using covered tracks in white neighborhoods and using cheaper, open tracks in African-American areas. Racial segregation made possible the massive Negro removal, urban renewal projects carried out under Moses' regime.

Without racial segregation in our publicly funded, low-income housing programs, it would be impossible to maintain the vast racial disparities in the quality and quantity of housing and related services and facilities that currently exist. It would be practically difficult to let the roof leak only over the African-American tenants if they were housed in the same building with whites. It would be even more difficult to defend such an individualized and physically juxtaposed discrimination legally and morally. Yet, once physical separation of the races is adopted and implemented, it allows those white people who would shrink from such a personal infliction of racial oppression to maintain and benefit from white supremacy.

II. Arguments for Choosing Not To Seek Relief from Racial Segregation

If the adverse housing conditions suffered by our clients are the result of deliberate racial discrimination, then relief can be sought under constitutional as well statutory principles prohibiting racial discrimination and mandating relief for the victims of that discrimination. Local, state, and federal legislative and executive government officials have historically refused to remedy these conditions, which cause pain and oppression to our clients. If we as low-income housing advocates do not seek that relief where it is available, then our clients will continue to suffer from both the absolute deprivations of minimum, decent, safe, and sanitary housing conditions and the gross inequality of those conditions.

But should we seek that relief? Numerous arguments, reasons, and rationalizations are used to support a negative answer.

Argument 1

Racial segregation in publicly funded low-income housing is an evil, but, given the vast number of low-income African-Americans who do not even have the benefits of segregated public housing, our efforts should be expended on increasing the total amount of subsidized housing available and ensuring that African-Americans receive at least their proportional share of that housing. Once we get the housing, we will deal with the discrimination. Given the forces aligned against increasing the supply of subsidized housing, requiring contemporaneous solutions to the deliberate racial discrimination already in the system will be counterproductive.

The past track record of the proponents of this argument is not good. Prior to the enactment and implementation of the 1949 Housing Act,10 African-American families were receiving 46,000 (33 percent) of approximately 138,000 public housing units.11 As of 1985, the only national estimate available for federal low-income housing programs showed African-Americans occupying 28 percent of a total of 3,699,137 public housing, rent supplement, Section 221 BMIR (Below-Market Interest Rate), Section 515, Section 236, and Section 8 rental units. The pattern by age of program is even less encouraging. African-Americans occupy 47 percent of public housing, the oldest program, and only 15 percent of Section 8 New Construction and 23 percent of Section 8 Existing Housing, the newest programs.12

A "let us get the housing now and desegregation later" argument was made in 1949 by Senate liberals, who defeated a proposed amendment that would have prohibited racial discrimination and segregation in public housing funded under the 1949 Housing Act. Even though the antisegregation amendment was endorsed by the NAACP, the public housing senators passionately argued that attacking racial segregation in public housing would mean defeat for the public housing provisions in the 1949 Act and would thus deny African-American families much needed assistance even though that assistance would be provided on a racially segregated basis. The public housing forces promised, once the Housing Act was passed, to get on with the task of providing civil rights for African-Americans.13

9. Roisman, supra note 3, at 703-06.
11. 95 Cong. Rec. 4852 (1949).
12. Hearings on Discrimination in Federally Assisted Programs, supra note 1 (Dallas Morning News series).
Senator Douglas, a leader in the fight against banning racial segregation in public housing, responded to the African-Americans who endorsed the amendment by stating:

I should like to point out to my Negro friends what a large amount of housing they will get under this act. At present Negroes occupy approximately 46,000 dwelling units in Federal Housing projects, or about one-third of the total. This does not mean that the Negroes, who form only one-tenth of the total population, have been unduly favored. Because of their poverty and the bad quarters in which many of them live, they need a third of the units. It does show, however, that the American cities as a whole have not discriminated against the Negroes in providing quarters for them.14

After the Senate defeated the antisegregation amendment, an antirace discrimination amendment was introduced to the Housing Act in the House of Representatives. The sponsor of the House amendment, Vito Marcantonio, answered the liberal senators' arguments by stating:

Further to those who want to use the opportunistic argument, let me tell them that you have no right to use housing against civil rights. Housing and civil rights are an integral part of each other. Housing is advanced in the interest of the general welfare and in the interest of strengthening democracy. When you separate civil rights from housing you weaken that general welfare. You weaken the democracy you pretend to strengthen. Remember, here you launch a 40-year program whereby you deny equal opportunity in housing to 14,000,000 American citizens and to other racial minorities. This attempt to separate civil rights from housing is dishonest political opportunism.15

The House responded by turning down attempts to include antidiscrimination language in the bill. The current pattern of separate and unequal housing conditions is the result.

Today, some housing advocates still fear that efforts to address the civil rights issues inherent in assisted housing will hurt efforts to increase the supply of much-needed low-income housing. To the contrary, efforts to remedy the separate and unequal legacy can create a legal as well as a moral imperative to increase substantially the supply of housing.16 Such an increase in housing resources is an essential part of any effective desegregation remedy.

Argument 2

It is an insult to the racial pride, dignity, and self-respect of our clients to litigate for a remedy that suggests that they cannot be happy unless they are living with white people.

In many ways, it is amazing that any African-Americans are willing to live with whites if you consider the history of cruelty, violence, oppression, and denial of equal status as persons and citizens that has marked the behavior of whites in their relations with African-Americans. The purpose-violation remedies urged below are not premised on an assumption that there is anything inherently preferable to living near white people. A quite rational argument can be made to the contrary. The remedies are premised on the assumptions that each African-American family receiving federal low-income housing assistance has the right to nonsegregated housing and that the family's participation in a federal program should not be subject to unequal and adverse conditions.17 Given that a substantial number of African-Americans continue to express a preference for racially mixed occupancy patterns,18 it is inappropriate to devise remedies that exclude that choice.

Ghetto residence may thus offer social and psychological advantages to at least some blacks and at the same time be responsible for some economic and social drawbacks. Are the disadvantages of the ghetto so great that it should be eliminated and blacks distributed around the city in a manner that would produce a value of zero on the Taubers' segregation index? To phrase the question this way is to continue the traditional race-relations pattern in which whites do the deciding and then do things "for" or "to" the blacks. It seems evident that the "mix" of favorable and unfavorable aspects of ghetto vs. nonghetto residence would be different for different individuals and families. The question cannot be decided in the abstract but must be answered by each person or family. The conclusion these considerations suggest, then, is that some degree of segregation may be desired by at least some blacks for whom the advantages of the ghetto outweigh the disadvantages. The obvious solution to this issue is that ghetto residence be voluntary.19

14. Id. at 4852.
15. Id. at 8656.
16. Roisman, supra note 3, at 713.
18. Calmore, supra note 4, at 95-102.
Argument 3

Public housing is and always has been an embattled, unpopular program that is thinly funded and without the power or ability to command the resources necessary for extensive remedies. PHAs at least serve low-income African-American families. Litigation challenging the disparate conditions suffered by African-Americans in public housing merely adds unfair "integration" baggage to a program that has to struggle merely to provide decent, safe, sanitary, and affordable housing.

Litigation that merely focuses on the PHA will not necessarily accomplish much for our clients. PHA segregation is usually done at the behest of or with the support of the local municipality for the purpose and with the effect of perpetuating racial disparities and segregation throughout the area. HUD approves of PHA segregation because it allows HUD to focus its other assistance on the predominantly white population and it avoids the political repercussions from whites' reaction to the remedies for segregation. The racial purpose litigation argued for below focuses on the liability of all government actors contributing to the segregation and seeks to marshal their resources for a remedy that also includes neighborhood equalization measures.

Successful racial purpose litigation changes the political environment in which allocation decisions are made. At this time, housing subsidy measures must rely on moral and social arguments to executive and legislative bodies. The effort to remedy purposeful racial discrimination must raise the priority given to subsidized low-income housing measures.

Argument 4

Public housing desegregation litigation results only in token integration efforts at best, is an insult to the dignity of African-American cultural and social accomplishments, and is a threat to the exercise of the political power now being gained and exercised by African-Americans in many urban settings.

Public housing desegregation litigation remedies to date have focused on ending the overt racial assignment of tenants designed to maintain racial segregation. As argued below, more complete remedies should be sought using the desegregation principles developed in the school cases. One of the reasons for focusing on the racial purpose behind the segregated and disparate conditions in public housing is to provide the legal basis for a complete remedy that addresses both the barriers to open housing choices erected by segregation and the unequal facilities and services that usually accompany white-enforced segregation.

Another reason for focusing on racial purpose is to cure the condition that offends the Constitution and laws—white-enforced separation and inequality. The problem is not voluntary African-American communities where residents seek to use their individual and common resources to secure their individual and common goals. Ignoring the cause of segregation leads to absurdities such as denying African-Americans housing because of their race in order to accommodate white willingness to live with African-Americans only if the African-American population does not exceed a specified maximum percentage of the population. If maintenance of integration requires catering to the same white prejudice causing segregation, then maintenance of integration should not be part of a desegregation remedy.

There is an undeniable link between racial residential segregation and increased minority political power. The traditional single-member district remedy for past and present dilution of the African-American vote is based on the continued existence of racially segregated housing patterns. The whole purpose of the Voting Rights Act is to remedy the lack of political power caused by the same white political dominance that has caused racial housing segregation. Once African-American public housing families have the actual opportunity to exercise a nonsegregated housing choice, certain individuals may decide to remain in a location because of a desire to participate in strengthening the African-American political power base. But the choice should not continue to be made for the individuals by maintaining the present barriers.

Where African-Americans have been able to obtain access to political power, they should not have to expend that resource curing problems that their jurisdictions have had the clear legal duty to eradicate for years.

Argument 5

Racial purpose cases are too difficult to document and prove. If we cannot do the cases on an effects or disparate impact theory, then we will not win. Given the self-interest motivation of housing and other officials to dissemble and cover up their real motivations, purposeful segregation evidence is too hard to find.

The evidence of past and present purposeful racial segregation is painful to look at, but it is not hard to find. The massive and thorough social engineering that governments and public housing agencies have engaged in to maintain the present system of racially segregated housing could not have been done, and has not been done, clandestinely.

There are several good histories of local and federal enforcement of racial residential segregation. These books provide adequate coverage to the role that white violence and threats of violence have played in forming the location and

occupancy characteristics of present-day public housing. Violence against African-Americans has been and continues to be used in denying equal housing opportunity.25

There are several other sources for explicit evidence of a federal purpose to maintain segregation in public housing. The debates on the 1949 Housing Act make it very clear that everyone knew that the public housing already constructed and the housing to be constructed under the Act would be segregated. Acceptance of the segregation was seen to be a precondition to congressional approval of the program. Efforts to prohibit discrimination were explicitly considered and rejected by proponents of the Act.26

Housing desegregation cases contain many specific examples of HUD's segregative purpose.27 A Dallas Morning News series and the HUD report in response to the series also chronicle the overt role of race in HUD's public housing administration.28

HUD, local PHA, and local municipality reports, correspondence, and other documents will track the national story as it affects local housing.

The records and other evidence of specific PHAs will show stark patterns of segregation in all programs, stark patterns of inequality in all programs, past overt or de jure segregation policies, failure to follow race-neutral tenant selection and assignment policies, and active and passive resistance to federal desegregation initiatives. In addition, the record will often show the influence of municipalities or other white-dominated political organizations on PHAs' actions.

The record for municipalities, large and small, will show many of the following:

(1) A variety of legal and practical relationships between the municipality and the PHA, e.g., Yonkers. The PHA is usually an arm of convenience of city government even if it may have the legal form of a separate political entity, as illustrated by the city's use of the PHA as a means of achieving Community Development Block Grant (CDBG) Housing Assistance Payment housing goals.

(2) Racial residence ordinances.
(3) A history of housing decisions based on overt segregationist factors, including opposition to increasing the supply of public housing and opposition to the placement of public housing in or near white areas.
(4) Official and unofficial enforcement of racially restrictive covenants.
(5) Formal or informal history of race relations in the jurisdiction that includes the failure effectively to disestablish effects of past racial segregation in schools and other public institutions.
(6) Failure to comply with the CDBG affirmative fair housing obligation.29
(7) Extensive separate and unequal conditions affecting PHA program participants.
(8) Passive or active resistance to HUD or other federal desegregation initiatives connected with the city's receipt of federal funds.
(9) Actual or constructive knowledge of separate and unequal conditions at the PHA and failure to require disestablishment, either through enforcement of a local antihousing discrimination ordinance or through the failure to condition city financial or other support for the PHA on an end to the segregation.

A focus on purpose evidence and violations may be necessary in order to obtain the necessary scope of relief. The scope of remedy for effect/impact violations is not yet clear.30 Evidence of purpose may be necessary even in proving an effect violation for which a substantial remedy is sought.31

Purpose evidence sometimes shocks the conscience of judges, government decision makers, the media, and the public. For example, the Senate gave as one reason for its adoption of an effects test for section 2 of the Voting Rights Act the importance of avoiding purpose findings with the attendant tension, divisiveness, and discomfort that accompany the allegations and proof of overt discriminatory behavior.32

Purpose cases avoid the common problem of cases that begin as claims concerning the effects of racial discrimination, but are transformed into complaints of economic injustice, and then denied.33 For example, the challenge to race discrimination in the determination of state welfare benefits was lost when effect was emphasized, yet that challenge was won when the lawyers were able to make a court focus on purpose.34

25. Hirsch, supra note 24, at 36, 239-41, 254-55; Weaver, supra note 24, at 93-96, 195; Abrams, supra note 24, at 85-136; Schwartz, The Accommodation: The Politics of Race in an American City (1986); Hearings on Discrimination in Federally Assisted Programs, supra note 1, at 27, 40, 51-52, 56-69; Resident Advisory Bd. v. Rizzo, 425 F. Supp. 1001, 1003, 1006-08, 1019, 1023 (E.D. Pa. 1976); on motions for contempt, 503 F. Supp. 383, 386-88, 399, 404 (1980); Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907, 909 (N.D. Ill. 1969). At least occasionally, whites have gotten bored with their usual tools of violence and have exercised some imagination. Homeowners protesting a black public housing project convinced the federal government to withdraw its approval for the project when they threatened to withhold their FHA mortgage payments. Another set of protesters squatted in a project until the PHA agreed to drop black occupancy from 18 to 2. Weaver, supra note 24, at 93, 195.
27. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Clients' Council v. Pierce, 711 F.2d 1406 (8th Cir. 1983) (Clearinghouse No. 34,828); Young v. Pierce, 628 F. Supp. 1037 (E.D. Tex. 1988) (Clearinghouse No. 41,451).
28. Hearings on Discrimination in Federally Assisted Programs, supra note 1.
29. 24 C.F.R. § 570.601.
30. See, e.g., the debate about whether or not a site-specific remedy can be ordered in an exclusionary zoning impact case. Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 941-42 (2d Cir. 1988), affirmed per curiam, 57 U.S.L.W. 3331 (U.S. 1988).
31. Huntington, 844 F.2d 926.
33. Calmore, Exploring the Significance of Race and Class in Representing the Black Poor, 61 Or. L. Rev. 210, 235 (1982).

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III. Racial Purpose Principles of Liability and Remedy

Public housing actions taken with a racially discriminatory purpose violate the fifth and fourteenth amendments to the U.S. Constitution, 42 U.S.C. §§ 1981, 1982, 1983, 2000d, and 3604. The offending purpose may be present in several ways. The actor may employ explicit racial criteria in laws, ordinances, regulations, or contracts. When done by a public body, this is de jure discrimination. The actor may provide significant, knowing support for purposeful discrimination practiced by another actor. The actor may employ facially race-neutral laws, criteria, practices, or standards that are in some sense designed to accord disparate treatment on the basis of racial classifications. An actor who has engaged in prior purposeful racial discrimination continues the violation when he or she does not take the steps necessary to disestablish the effects of the prior discrimination.

If purposeful racial segregation is shown to exist in a substantial part of a system, then racial disparities in other parts of the system are presumed to be a product of the same purpose. All parties who have significantly contributed to the initiation or perpetuation of the purposeful discrimination are liable for the violation. If the purposeful violation is racial segregation that involved the provision of unequal facilities or services, then the first remedial responsibility is equalization of those facilities or services. Another indispensable remedy is the provision of assistance necessary to remove barriers for the effective exercise of choice by African-Americans who wish to leave a predominantly African-American facility. Single-race facilities can be justified only upon a showing that they are not the result of continuing discrimination, past or present. The remedy will extend to all steps necessary to restore the victims of the discriminatory conduct to the position they would have enjoyed had the benefits been provided in a nondiscriminatory manner in a system free from pervasive purposeful segregation.

The obligation to disestablish a dual system by transition to a racially nondiscriminatory system exists whether the purposeful discrimination is de jure or otherwise intentional.

The remedy for a segregated system will almost inevitably have to involve race-conscious remedies. Otherwise, the status quo that is the target of the desegregation process will be frozen into place. The use of apparently race-neutral or color-blind requirements, procedures, or practices to obstruct effective desegregation violates the obligation to disestablish the effects of purposeful discrimination. The remedial obligation is fulfilled only by measures that insofar as possible eliminate the discriminatory effects of the past discrimination and bar like discrimination in the future. These remedial principles are well-established as constitutional principles. The Supreme Court and HUD have accepted these principles as controlling in the case of public housing desegregation.

Once a remedy is in place, the court has broad power to enjoin interference with the remedy and to order even innocent third parties to take actions necessary for the success of the decree.

Municipalities that have accepted CDBG funds have an obligation to administer all programs relating to housing and community development in a manner to further affirmatively fair housing. If this obligation is given the same interpretation as the similar language in 42 U.S.C. § 3608, a municipality must go beyond its constitutional obligations in remediating segregated housing.

To date, neither court nor administrative relief for public housing segregation has been as complete as the law would allow and require. The authors are aware of no final remedy that has required equalization of facilities and neighborhood improvements. Remedies have focused almost solely on tenant selection and assignment procedures and transfers, usually voluntary.

42. Keys v. 413 U.S. at 203.
45. Green, 391 U.S. at 723.
49. NAACP v. Secretary of HUD, 817 F.2d 149, 154-57, 160-61 (1st Cir. 1987).

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There are exceptions to the usual emphasis on tenant selection and assignment. In Gautreaux v. Pierce, the remedy involves both construction of scattered-site housing throughout the metropolitan area and a special mobility program using Section 8 Existing Housing to provide suburban housing opportunities to African-Americans. The suburban mobility part of the program has worked to provide a nonsegregated housing choice to several thousand African-American families. The scattered-site part of the program was subject to extreme delays in construction. Ultimately, many of the units that were built were never occupied. In Gautreaux, as in many housing desegregation suits, the unequal conditions aspect of the injury went unaddressed.

In East Texas, Judge Justice's interim injunction in Young v. Pierce intimates that a broad range of remedies will be required upon determination of appropriate final relief. For example, Judge Justice notes that "[t]he directions in paragraph 11, regarding Comprehensive Improvement Assistance funding priorities are necessary to promote the abolition of any lingering physical effect of a dual system in the PHA projects." HUD's East Texas desegregation efforts have included race-conscious transfers of over- and under-housed and race-

51. Gautreaux v. Pierce, 690 F.2d 616 (7th Cir. 1982).
53. Young, 685 F. Supp. 975 (interim remedy opinion).
54. Id. at 982.

"To Make Wrong Right: The Necessary and Proper Aspirations of Fair Housing"

In a recent article featured in the National Urban League's annual collection, The State of Black America, John O. Calmore discusses housing discrimination against black Americans and enforcement of the fair housing promise of the federal civil rights laws. Calmore notes that redress for racial discrimination and desegregation in housing is black Americans' "Sisyphean rock," and that housing desegregation is the "last major frontier" in civil rights.

Calmore begins with a discussion of the national housing crisis, arguing that problems of unaffordability and lack of availability have led to a "crisis that will likely cause a qualitatively different housing future for Americans, both black and white." The author describes the concept of "filtering," the process of middle-class families, spurred by tax incentives, moving up and away from older homes, leaving them to poorer neighbors. As filtered housing ages, it is occupied by successively poorer homeowners, who tend to defer increasingly necessary maintenance, leading to deterioration of the housing stock. The author notes that African-Americans are disproportionately affected by the effects of filtering because of racial segregation within metropolitan areas and the pattern of black concentration within central city areas. Yet recent housing policy has relied on filtering to direct low-income rent subsidy programs; Calmore asserts that "there has been a shift in emphasis to privatization and subsidies for existing housing while providing virtually no subsidies for increasing the supply of low-income housing through new construction and substantial rehabilitation."

Calmore maintains that housing discrimination is difficult to analyze, because housing is a broad, mixed bundle of goods and services provided in a variety of situations and transactions. He asserts that housing discrimination manifests itself in several ways, including racially selective sympathy and indifference and generalizations and stereotypes. He argues that, at present, the most significant aspects of housing discrimination are the effects of and the perpetuation of past and remote discrimination.

Calmore asserts that segregation of and discrimination against blacks is "unequally intense in that blacks are more isolated from whites than are the other major racial and ethnic minorities and for decades it has persisted at high levels while the segregation of ethnic minorities from native whites has declined over time." He maintains that segregation within urban areas is characterized by both the extent of separation within and between neighborhoods and by the pattern of black concentration in central city areas. In addition, although more and more blacks are moving to the suburbs, urbanization has not led to significant residential integration. Finally, while one might expect blacks and whites with similar incomes to live in more integrated settings, blacks are in fact significantly segregated from whites of similar economic status.

Calmore argues that efforts to improve conditions for blacks must be redirected to create spatial equality, such that "even under conditions of segregation, the setting where blacks live should be improved so that blacks are not unjustly disadvantaged because of where [they] live." Calmore asserts that "integration at best has resulted in tokenism" and that "[f]air housing must transcend its antidiscrimination principle and instead adopt an antislumulation principle which strives to dismantle legally created or legally reinforced schemes of subordination that reduce some people to second-class citizens."

conscious admissions. After Judge Justice ordered mandatory, race-conscious transfers in the Clarksville, Texas, housing authority transfer order, HUD furnished that PHA with $1,002,498 in modernization funds for the two predominantly African-American sites and made a CDBG grant to the city for paving of the streets around those sites. HUD also provided $20 million in rehabilitation funds for other East Texas PHAs during FYs 1984 and 1985 as part of the remedial effort.

The Memphis Housing Authority desegregation consent decree in 
Hale v. HUD required city cooperation in housing production and the use of Section 8 Existing Housing Program certificates in a mobility program.

The relief in 
United States v. Yonkers Bd. of Education included construction of public housing and city creation of an affordable housing trust for the production of low- and moderate-income housing.

In Dallas, the consent decree entered by the court in 
Walker v. HUD permitted demolition and replacement on a one-for-one, nonsegregated basis; required modernization of 840 units in a West Dallas project (except for part of one project, modernization of other units was already completed, underway, or planned as of the date of the decree); required Section 8 housing quality standards improvement and enforcement; expanded the geographic scope of Section 8 to the suburbs; required a mobility program; called for use of 120-percent exception rent Fair Market Rent levels for Section 8 housing assistance in the suburbs and in many, predominantly white, census tracts; required the PHA to have identified a number of units equal to 50 percent of the total Section 8 allocation in previously non-Section 8-impacted areas actually available to Section 8 participants; required modification of the tenant selection and assignment process; and prohibited any further removal of units from the PHA’s inventory without court approval.

Since the date of the decree in Walker, the total African-American participation in PHA public housing and Section 8 programs has increased from 7,326 to 8,060. African-American Section 8 participation has increased from 2,590 to 4,534. Prior to the decree, 7 percent of African-American Section 8 Existing Housing Program families were living in census tracts that were predominantly (70 percent or greater) white. As of January 31, 1989, 33 percent of African-American Section 8 families were in such tracts, including 463 in predominantly white suburban tracts. Two hundred sixty-eight African-American Section 8 families have found housing in previously all-white HUD-assisted projects.

IV. Remedy Considerations

The conscious application of traditional desegregation remedy principles should result in more thorough remedies for public housing segregation than have been obtained in most litigation to date. The following elements may be necessary in any given situation to provide a full remedy for the actual victims of discrimination and to disestablish the institutional effects of the past segregation.

A. Removal of Barriers Preventing African-American Families from Exercising Choice

Race-conscious transfers to existing projects or newly created projects are perhaps the most controversial aspect of remedy. In school desegregation cases, racial assignments have been necessary to remove the racially identifiable characteristic vestige of past segregation. As a practical matter, court-ordered racial assignments were often the only way African-American students could actually enter white schools, given the massive intimidation and retaliation that could be mounted against African-Americans exercising such choice.

The same and similar factors are at work in public housing. Voluntary transfers, depending as they do on "racial pioneers," have not changed and will not change the racial character of the white projects. Relying on voluntary transfers merely freezes in the separate and unequal status quo. The status quo in public housing is to allow white tenants to continue to enjoy both public housing and the satisfaction of their desire to live in that housing without having African-American neighbors.

Transfers based on a "rightful place" absent racial manipulation of assignments will usually result in substantial integration of the previously white projects. Whites who will not accept the transfers will leave the public housing system. However, if the population in need is substantially African-American, then it is likely that the vacancies filled by the departing whites will be filled by African-Americans, particularly if the whites in need are also deterred from accepting integrated or predominantly African-American projects due to their insistence on being provided housing in all or predominantly white projects.

If there is such white flight from the projects, then proponents of transfers will be criticized for having accomplished nothing, because African-Americans will still be living in predominantly African-American projects. This criticism overlooks the harm that racial purpose litigation seeks to cure—state enforcement of white supremacy. A project that has become predominantly African-American solely because of whites' refusal to live with African-Americans does not offend the Constitution. Whites who insist on accommodation of their bigotry should not be in federally assisted housing. However, white flight from public housing will usually have been encouraged, aided, and supported by the government's provision of
another, segregated housing resource to which whites can fly. In these cases, a complete remedy involves desegregating the white flight haven, not discriminating against African-Americans by supporting the overt refusal of whites to live with no more than a "tipping number" of African-Americans. 61

Use of race-conscious tenant selection and assignment with other housing resources being made available to any family who would otherwise be denied housing because of use of race in the selection and assignment process is another possible remedy. Whites are adept at using demands for desegregated facilities in a perverse way to punish those who would seek to change their system. White administrators of previously segregated facilities delight in telling African-American participants in their programs that they are being denied a housing opportunity because of a federal court’s desegregation order. That can be prevented to a large degree by thinking through every aspect of the relief sought, focusing on relief targeted to benefit the victims of the discrimination.

A common barrier to offering a desegregated housing opportunity to African-American families arises from the pattern of constructing only elderly units in nonminority neighborhoods. Reconfiguring the one-bedroom elderly units produced in excess of proportional demand or need to multibedroom units for family occupancy can remove this barrier.

If the remedy involves new construction throughout the community, in white and minority neighborhoods, even under the strictures of traditional "site selection," once "comparable opportunities" exist in white neighborhoods, there is no longer any justification for vetoing new resources in minority neighborhoods. Such additional resources are essential to the expanded approach to equalization remedies argued for here.

Finally, remedies to remove barriers preventing African-Americans from exercising choice should include use of unified waiting lists for all programs administered by the PHA with comparable or overlapping eligibility requirements.

B. Section 8 Existing Housing Program Remedies

Advocates seeking to remedy segregation in the operation of the Section 8 Existing Housing Program should

(1) require effective use of the program in the suburban municipalities;

(2) require effective recruitment of private landlords, subsidized and nonsubsidized, to provide an actual choice of neighborhoods for minority Section 8 families;

(3) reform procedural barriers to affording effective choice such as inadequate Fair Market Rent levels and failure to use exception rents for voucher payment standards, making sure that the PHA is giving African-American families residing in a project the opportunity to apply for Section 8 without endangering their right to remain in the public housing project;

(4) provide counseling and transportation necessary for effective choice of housing and location;

(5) require an effective mobility program to offer existing and future tenants of the remaining, predominantly minority projects an actual desegregated housing choice in nonminority neighborhoods;

(6) require effective enforcement of fair housing on behalf of African-American low-income tenants;

(7) require effective enforcement of Section 8 housing quality standards; and

(8) engage in special efforts to make predominantly white, HUD-assisted, non-PHA projects available to African-American tenants.

C. Equalization of Facilities and Neighborhoods

In seeking to equalize facilities and neighborhoods populated by whites and African-Americans, advocates should

(1) require the use of HUD, state, and local funds to rehabilitate and modernize minority projects to the same standards as white elderly or white HUD-assisted projects;

(2) require the use of HUD and local funds for neighborhood revitalization in order to provide conditions equal to those around the white projects;

(3) reform any procedures necessary to equalize treatment of white and African-American projects, e.g., utility allowances.

D. Demolition

Defendants may choose to propose demolition and replacement of some projects rather than equalization. The high costs of full project and neighborhood equalization may make this a reasonable choice in some instances involving 1,000-plus-unit projects located in egregiously underserved and nongentrifying neighborhoods, e.g., West Dallas. Advocates can expect to be most successful in keeping up and equalizing all voluntarily occupied units and in preventing involuntary moves. To the extent that renovation of long-standing vacant units is at issue, as opposed to replacement of those units elsewhere, the relevant affected population is not those currently in public housing, who may have a tie to or preference for that particular community. The persons affected are the future African-American applicants who may or may not have such ties and preferences. This can present another set of remedy considerations. The present statutory public housing demolition and replacement standards should be used to prevent such demolition where it is not a reasonable choice. 62

61. Starrett City, 840 F.2d 1096, Young, 685 F. Supp. 975.

V. Conclusion

As advocates, we have wide discretion over which of our clients' problems we will attack and which tools we will use in addressing the problems we have chosen. As a loose community of low-income housing advocates, we have in the past chosen to expend relatively large amounts of our resources to provide our clients with remedies that they may or may not choose to use and that may or may not work to better their conditions materially. When criticized for some of these decisions, we know we are justified because of the importance of the particular matters to the dignity, self-respect, and autonomy of our clients.

Our best case-acceptance decisions are usually those that are motivated by the same emotions and values that put us in this business in the first place—our outrage at the injustices perpetrated on poor people, our hopes that our nation's fundamental legal principles provide a remedy for the injustice, our belief that we are competent enough to secure that remedy, and our commitment to try.

I would like, simply, to acknowledge your persistent reiteration of the facts, your highly specific, personal, individuated reminders of the world beyond the hallucinatory domain of privilege. The truth hurts, but it also can inspire. It seems to me that if a spirit of active compassion ever unites our divided people, it will be, in no small part, because individuals like yourselves never stopped speaking the interdicted facts of life about our "city on a hill"—because you resisted, with precious, exacting facts, our habitual, loveless disregard of those who live outside our frantically contrived reality. By voicing such things, you keep them in history, and wake us from our suicidal dream of perfect homogeneity.63

Currently accepted legal principles provide the basis for remedying the segregated conditions of our "city on a hill." There should be no conflict between low-income housing advocacy and civil rights advocacy on this issue. Both are essential to our national well-being and will best be advanced together.

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63. From a speech delivered by Judge William Wayne Justice at the Advanced Litigation Skills Conference sponsored by the Texas Legal Services Center (Dec. 12, 1986).