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Economic Tipping: An Approach to a Balanced Neighborhood

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ECONOMIC TIPPING: AN APPROACH TO A BALANCED NEIGHBORHOOD

I. Introduction

In the recent decision of *Trinity Episcopal School Corp. v. Romney*,[1] a court, for the first time, was confronted with a proposal to apply a "tipping" standard solely on the basis of income, rather than racial grounds. The case involved a group of middle-income residents seeking to enjoin the State and City of New York, as well as the Department of Housing and Urban Development (HUD) from increasing an area's low-income population through the building of various housing projects.[2] "Tipping" has been defined as "that point at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of instability which result in the deterioration of the neighborhood environment."[3]

The court in *Trinity* refused plaintiffs' request to expand the tipping doctrine to include economic classifications because of the absence of legal precedent for such an argument and the inherent difficulty in expressing the tipping concept in economic terms.[4] Although one court has recognized and accepted the concept of racial tipping,[5] no court has extended this concept into the area of economics.[6] Because all forms of tipping are relatively new concepts, parties using this argument must generally be wary of other problems; *i.e.*,

1. 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd in part*, No. 75-7061 (2d Cir. July 24, 1975).

2. Roland N. Karlen, Alvin C. Hudgins, residents of the area, and the Committee of Neighbors to Insure a Normal Urban Environment (CONTINUE), another community group representing area residents, intervened as plaintiffs. Stryker's Bay Neighborhood Council, Inc. intervened as defendants. *Id.* at 1047 n.2.

3. *Id.* at 1065-66.

4. *Id.* at 1064.

5. Otero v. New York City Housing Auth., 484 F.2d 1122 (2d Cir. 1973). In the interest of preserving the desirable qualities of a certain district, the court prevented the influx of potential tenants of low-income projects where it had been established that their presence would detrimentally affect the racial composition of the area. *But see* Gautreaux v. Chicago Housing Auth., 296 F. Supp. 907 (N.D. Ill. 1969), *judgment ordered*, 304 F. Supp. 736 (N.D. Ill.), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971). For extensive examination of the racial tipping concept, see Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW.U.L. REV. 363 (1966); Note, *The Benign Housing Quota: A Legitimate Weapon to Fight White Flight and Resulting Segregated Communities?*, 42 FORDHAM L. REV. 891 (1974); 85 HARV. L. REV. 870 (1972).

6. *See* Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974).

questions of standing[7] and the evidentiary validity of sociological data and research statistics.[8] These parties, recognizing the legal weaknesses of a tipping theory, have also added equal protection[9] arguments where possible to encourage the courts to accept their position. Therefore, to be persuasive, an economic tipping argument should be fashioned after an argument for racial tipping.

II. Racial Tipping

The concept of racial tipping in integrated neighborhoods is a new development in the law. Historically, racial segregation issues have generally been decided in favor of increased integration, without judicial consideration of the effects of such policies on the existing population.[10] In *Otero v. New York City Housing Authority*,[11] how-

7. *See* Sierra Club v. Morton, 405 U.S. 727 (1972) (no standing where petitioner asserts no individualized harm to itself or its members); Eisenstadt v. Baird, 405 U.S. 438 (1972) (a petitioner with adequate incentive has standing to assert the rights of third parties, particularly where the third parties have no forum in which to assert their own rights); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970) (standing for those who show injury in fact and that the interest sought to be protected is within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question); Barrows v. Jackson, 346 U.S. 249 (1953) (standing for those injured by operation of the statute).

8. *See* Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974). *See also* Fahr & Ojemann, *The Use of Social and Behavioral Science Knowledge in Law*, 48 IOWA L. REV. 59 (1962). In referring to lawyers' attitudes towards the social sciences, the authors state that the legal profession is "opposed to granting any very large amount of credence to evidence amassed by psychologists, sociologists, psychiatrists, and the like." *Id.* at 60. Many lawyers recognize the potentialities of using these disciplines but "remain dubious as to applying them to legal matters." *Id.* However, other writers have pointed out that the courts are increasingly utilizing such disciplines, at least in certain circumstances: "Judges may be especially prone to use social science research when opinions attempt to break with precedent; in those situations, social science research may be used to buttress the view that social reality demands a reevaluation of the law." Lochner, *Some Limits on the Application of Social Science Research in the Legal Process*, 1973 LAW & SOCIAL ORDER 815, 835. This quotation might well be relevant to future cases concerning issues analogous to those in the *Trinity* case. *But cf.* Brown v. Board of Educ., 347 U.S. 483 (1954), in which the Court used sociological data to find that the plaintiffs were deprived of equal protection by the defendant's segregatory practice. *Brown*, however, was a landmark case. Unlike many Supreme Court decisions which are evolutionary or merely modifications in a trend, *Brown* was a radical turnabout in outlook to a constitutional right. Thus, without *any* precedent to draw from, sociological data was a primary tool used to buttress the Court's decision. For a more detailed discussion of the use of sociological data, see text accompanying notes 68-76 *infra*.

9. *See* text accompanying notes 78-82 *infra*.

10. In Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972) where 90 percent of families on waiting lists for federally-assisted housing were black, the failure of Cleveland's Metropolitan Housing Authority (MHA) to place a majority of new public housing in white neighborhoods

ever, the Second Circuit added a new dimension to the integration problem.

The *Otero* decision dealt with 360 units in two low-income apartment buildings supervised by the Housing and Development Agency (HDA) with federal assistance from HUD. In order to construct the complex, HDA relocated 1,852 families, but promised to give these people priority to return when the project was finished. However, the agency received an unusually large number of responses to its offer, and, therefore, decided against accomodating a portion of those families who accepted the prior invitation. The evidence indicated that normally only four percent of relocated families seek occupancy in the newly constructed buildings, but in this case 27 percent of the former tenants were interested in obtaining apartments. In the interest of preventing racial tipping of the neighborhood, the HDA leased only 161 of the 360 units to former site occupants. Furthermore, it chose to ignore or reject the applications of 322 other former residents, most of whom were non-whites. Subsequently, the HDA rented the remaining dwellings to outsiders, most of whom were white. As a result, minority tenants wishing relocation filed a complaint against the HDA and HUD under the Civil Rights Act of 1968.[12]

The plaintiffs obtained summary judgment at the district court level[13] where defendants were permanently enjoined from leasing to outsiders until they first fulfilled their obligation of providing for all present and former site occupants.[14] However, the court of appeals reversed on the ground that genuine issues of fact existed as to the tipping effect of a high concentration of non-whites in the neighbor-

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constituted a violation of federal public housing and civil rights statutes.

In Gautreaux v. Chicago Housing Auth., 296 F. Supp. 907 (N.D. Ill. 1969) the district court judge found significant the fact that except for four projects with quotas for black residents, almost all tenants in projects controlled by the Chicago Housing Authority were black and the overwhelming majority of the family units under the Authority's jurisdiction were located in black areas.

Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971) *aff'd*, 457 F.2d 788 (5th Cir. 1972) held that denial of building permits for apartments by Fulton County upon discovery that apartments would be occupied by low-income black tenants was violative of the equal protection clause.

11. 484 F.2d 1122 (2d Cir.), *rev'g* 354 F. Supp. 941 (S.D.N.Y. 1973).
12. *Id.* at 1125-26.
13. Otero v. New York City Housing Auth., 354 F. Supp. 941 (S.D.N.Y. 1973).
14. *Id.* at 957.

hood.[15] The court held that the defendants obviously had a duty to integrate, but in certain circumstances this obligation may be carried out by limiting the number of apartments available to minority groups.[16]

Two contradictory factors governed the tenants' assignment policy of the defendants. Under the Civil Rights Act of 1968, housing authorities had a duty to integrate.[17] However, the defendant was also subject to a regulation granting first preference in renewal housing to present and former residents from the original urban renewal site.[18] The court of appeals reconciled these two objectives by deciding that defendant could suspend its priority regulation and refuse to give non-white former residents an apartment in the new project if it were deemed necessary to preserve the racial balance.[19] It reasoned that instead of simply benefiting minority groups, the purpose of racial integration should be advantageous to the community as a whole.[20] In writing for the majority, Judge Mansfield stated:[21]

15. 484 F.2d at 1140. If all the tenants who were to be relocated in the project had been given priority, there could have been a large influx of minority persons, and, as the defendants argued, a corresponding exodus of whites from the community.

16. *Id.*

17. Civil Rights Act of 1968, 42 U.S.C. § 3610 (1970).

18. GM 1810: Regulations of the New York City Housing Authority Governing Admission to Public Housing. *See* 344 F. Supp. 748-49 (appendix).

19. 484 F.2d at 1140.

20. *Id.* The development of integration policy has undergone a significant number of transitions over the years. For example, in the early decision of Plessy v. Ferguson, 163 U.S. 537 (1896) the Court introduced the "separate but equal" doctrine. This policy guaranteed for all practical purposes that the initial public housing projects would be racially segregated. However, in later years the Court discarded the *Plessy* holding and instituted a plan of judicially enforced integration. Brown v. Board of Educ., 374 U.S. 483 (1954). In addition, state legislatures drafted statutes banning discrimination against racial, ethnic, or religious groups. *See, e. g.*, N.Y. PUB. HOUSING LAW § 223 (McKinney 1955): "[N]o person shall, because of race, creed, color or national origin, be subjected to any discrimination."

To facilitate the promotion of integrated public housing in particular, the authorities utilized strategic site selection and affirmative tenant assignment, to govern priority of admission to public housing. *See* Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63, 69 (1970). Besides integrating neighborhoods which previously had been exclusively white, the goal of the housing projects was to eliminate deteriorating, substandard housing. *Id.* Frequently members of the white community expressed anxiety concerning the authority's plans, and the government was aware of this opposition. *Hearings Before the Senate Select Comm. on Equal Educational Opportunity, De Facto Segregation and Housing Discrimination*, 91st Cong., 2d Sess. 2971 (1970) (statement of Anthony Downs). Despite the reluctance of individuals to accept such methods of forced integration, the housing authorities have relied on constitutional and statutory guidelines in the carrying out of their plans. Despite the judicial and legislative ideal of complete integration, it has been recognized that

> We disagree as to the district court's interpretation of the Authority's duty to integrate. We do not view that duty as a "one-way street" limited to introduction of non-white persons into a predominantly white community. The Authority is obligated to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons.

Another crucial factor in the *Otero* decision was the court's acceptance of the use of a quota system[22] as an indication of the limit for community integration. Many federal and state decisions have utilized racial quotas and sociological data.[23] Cases involving discrimination in education and employment in particular have used such statistics in reaching their result.[24] On the other hand, there have been some state court decisons which have exhibited a reluctance to accept any use of racial quotas or empirical data in formulating an opinion.[25] These cases have attempted to rely solely on legal tests rather than statistical ones.

Otero is one case which made use of racial quotas in deciding issues involving housing. Its true significance, however, lies in the

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in the interim between the groundbreaking and the completion of the projects, the area undergoes a radical change due to fleeing whites, who fear the increase in crime and decrease in property values which they associate with the influx of non-whites. In reference to the flight of middle-class whites from New York City, see N.Y. Times, May 29, 1973, at 1, col. 5.

21. 484 F.2d at 1125.

22. *Id.*

23. In Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (Ch. 1954), the Housing Authority of Elizabeth, N.J. admitted blacks to projects under their control on the basis of a quota system, with the percentage of units allocated to blacks corresponding to the approximate percentage of the black population in that city. In Banks v. Housing Auth., 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954), the Housing Authority of the City and County of San Francisco allocated low rent housing accomodations on a 70/30 percent basis, to correspond with the needs of whites and non-whites, respectively, in substandard housing. In both cases, the courts held these quotas to be violative of equal protection and the Housing Act. The holdings in the state and federal cases seem inconsistent. *See* note 10 *supra*. However, the quota referred to in the state court decisions were invalidated because they reinforced existing patterns of racial segregation in public housing. Contrastingly, the limitation in *Otero* was intended to avoid causing the neighborhood to become segregated. 484 F.2d at 1125. For instance, without such a quota the influx of minority groups coupled with the flight of white families would culminate in a ghetto environment. Even though the housing authority has a responsibility to integrate all white communities, it has an attendant obligation to prevent the creation of a segregated black neighborhood.

24. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1971)(education); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (employment).

25. *See, e.g.*, Banks v. Housing Auth., 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954); Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (Ch. 1954).

fact that unlike prior cases it used such statistics to put a ceiling on integration rather than to promote it.

The difference between *Otero* and other cases involving integration can be demonstrated by comparing *Otero* with *Gautreaux v. Chicago Housing Authority*.[26] In *Gautreaux*, the court found that the defendant housing authority's practice of selecting family public housing sites which would maintain residential separation of racial groups denied Negro plaintiffs their fourteenth amendment rights. Plaintiffs established through statistics that the defendant imposed illegal quotas in four housing projects in order to keep the number of Negro tenants in such projects at a minimum.[27] The court found such conduct unacceptable,[28] even in view of an atmosphere of racial tension and acts of violence.

In *Otero*, the housing authority was not arbitrarily barring minority groups from applying for apartments in an exclusively white neighborhood.[29] Instead, the area was already integrated, and the population was nearly equally divided between whites and non-whites. The defendant housing authority's purpose in denying permission to plaintiff non-whites was not to foster racism, but "to stem a steady decline in the percentage of the white population in the community."[30] Thus, *Otero's* use of quotas was to preserve a balanced integration rather than to foster more immediate increases in the non-white population and an eventual flight of whites. The housing authority had a duty to integrate according to a particular quota, but at the same time had a corresponding responsibility to prevent the creation of a segregated black neighborhood by integrating too much. The racial integration issue thus progressed from the traditional view[31] to a more sophisticated tipping analysis in *Otero*.

The legal theories which favor the acceptance of a racial tipping

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26. 296 F. Supp. 907 (N.D. Ill. 1969).

27. *Id.* at 909.

28. *Id.* at 915. Essentially this action arose because the non-whites wanted to move into a white community.

29. In this case, the neighborhood already contained a racial mixture, and the defendants wanted to stem the tide of non-white residents on the grounds "that large concentrations of non-whites in one or more pockets within the community would act as a 'tipping factor' which would precipitate an increase in the non-white population in the surrounding neighborhoods, leading to a steady loss of total white population over a given period of time." 484 F.2d at 1133.

30. *Id.* at 1124.

31. Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970) (HUD has an affirmative duty to consider impact of low-income housing on racial concentrations); Blackshear Residents Organi-

standard are not easily applicable to economic tipping. In order for state action to be presumed invalid, there must be an infringement upon a fundamental right or discrimination against a protected class.[32] However, the right to housing is not considered fundamental,[33] nor is wealth considered a suspect classification.[34] Thus to avoid these problems, it is tempting for a party to argue racial rather than economic tipping.

III. Economic Tipping

A. The *Trinity* Case

As indicated above, the first case dealing with economic, as opposed to racial, tipping was *Trinity Episcopal School Corp. v. Romney*.[35] In that case the plaintiffs, a parochial school and a group of middle-income brownstone residents,[36] sought to enjoin HUD, the State and City of New York, and a community group from increasing the number of federally subsidized, low-income housing units planned for the West Side Urban Renewal Area in Manhattan.[37] The West Side Urban Renewal Area was created in 1956[38] by the City of New York to "preserve and improve the existing community so as

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zation v. Housing Auth., 347 F. Supp. 1138 (W.D. Tex. 1971) (action must be taken to avoid the increase of segregation, in ghettos, of racial groups whose lack of opportunity the Fair Housing Act was designed to combat); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (an authority is barred from restricting non-whites to areas already concentrated with non-whites); Gautreaux v. Chicago Housing Auth., 296 F. Supp. 907 (N.D. Ill. 1969), *judgment ordered*, 304 F. Supp. 736 (N.D. Ill.), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971) (a tenant assignment policy which assigns persons to a particular project because of the concentration of minorities already present at the project is prohibited).

32. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

33. Lindsey v. Normet, 405 U.S. 56 (1972). "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions." *Id.* at 74.

34. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 61 (1973)(Stewart, J., concurring).

35. 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd in part*, No. 75-7061 (2d Cir. July 24, 1975). The court of appeals did not discuss the issue of economic tipping.

36. Roland H. Karlen and Alvin C. Hudgins claimed breach of contract by the city for failure to request their written consent before making changes in the plan. *Id.* at 1048.

37. The West Side Urban Renewal Area consists of a twenty square block community from West 87th to West 97th Street, bounded by Central Park West and Amsterdam Avenue. *Id.* at 1047.

38. In 1956, New York City applied for, and received, federal grant funds for a demonstration study of a 20 block area. These funds were granted under the Housing Act of 1954, 42 U.S.C.§§1452(a), 1453(a) (1970).

to continue to accomodate the varied needs of its population."[39] The West Side Urban Renewal Plan governing housing construction in the area was intended to rehabilitate and renew the neighborhood.[40] Under its original plan, the renewal area was to allocate one-third of the proposed housing construction to low-income residents.[41] Later, this plan was revised to accomodate some 2,500 more units within the urban renewal area.[42] This revision ultimately led to the litigation in *Trinity*.

Plaintiffs in *Trinity* alleged that the city had breached its contract with the Trinity Episcopal School, the sponsor of the housing project, by revising the plan so as to allow a greater admission of low-income families.[43] The plaintiff-intervenors argued that they relied on the original West Side Renewal Plan when moving into the area, and therefore the representations contained therein were enforceable against the city by the purchasers of property within the community.[44]

The main argument put forth by plaintiffs was the tipping contention,[45] which the trial court deemed to be the crux of the litigation.[46] Plaintiffs primarily asserted that the "indiscriminate admission of relocatee low-income families" had caused the renewal area to reach the "tipping-point,"[47] whereby an increase in low-income residents would tip the community's economic balance, causing the flight of middle-income residents and the subsequent deterioration of the neighborhood.[48]

Plaintiffs recognized that the concept of tipping had been confined to racial questions, but maintained that it could likewise be applied to situations where the arrival of low-income groups would cause middle-income residents to flee.[49] They therefore requested

39. 387 F. Supp. at 1049.

40. *Court Rules NEPA Impact Statement Not Required in Suit Concerning Public Housing Site Selection*, 8 CLEARINGHOUSE REV. 629 (1975).

41. 387 F. Supp. at 1047 n.3.

42. *Id.* at 1051.

43. *Id.* at 1048.

44. *Id.* at 1059-60.

45. *Id.* at 1048.

46. *Id.* at 1063.

47. *Id.*

48. *Court Rules NEPA Impact Statement Not Required in Suit Concerning Public Housing Site Selecting*, 8 CLEARINGHOUSE REV. 629 (1975).

49. 387 F. Supp. at 1064.

the court to enjoin construction of all public housing in the neighborhood and direct that low-income "squatters"[50] be removed from the area and that all new middle-income buildings observe a housing ratio of 70/30 percent middle-low-income families as originally proposed in the plan.[51]

The defendant's response to plaintiffs' allegations was that the " 'tipping phenomenon is a racial issue which relates to economics only insofar as minority persons . . . are often associated with persons of low income.' "[52] Thus, the arguments used in the *Otero* decision were inapplicable.

Defendants were of course correct in pointing out that the tipping argument is easy to apply to racial desegregation. Economic tipping is more difficult to prove however. Unlike racial criteria which are easily measurable, any definition of low income is imprecise. It depends upon such arbitrary factors as income ceiling, family size, and the cost of living. These are all ambiguous and difficult to measure.[53]

Although the *Trinity* court decided that plainttiffs had failed to show that the neighborhood was in danger of tipping, and entered judgment in favor of the defendants,[54] Judge Cooper did not rule out the use of economic tipping as a legal theory. He simply found a failure of proof. He likewise pointed out some of the evidentiary problems which future plaintiffs would encounter:[55]

> Even assuming *arguendo*, however, that tipping could be correlated with an increase in the low income population of a neighborhood, the questions are still raised as to what criteria should be considered in determining if the tipping point has been, or is likely to be, reached, and what standard of proof plaintiffs must meet in order to succeed. While community attitudes towards an increasing presence of low income families must of necessity influence the

50. In the Spring of 1970, the same time that the sites were reclassified to low-income housing, squatters occupied several buildings in the area awaiting demolition, including those buildings on the reclassified sites. *Id.* at 1056.

51. *Id.* at 1047 n.3.

52. *Id.* at 1063.

53. *Id.* at 1065. In public housing, the maximum income limits of a low-income family range from $6,100 for a one-member family to $10,200 for a seven-member family. However, under criteria used for moderate-income housing, the corresponding figures are $8,235 and $13,770. *Id.* The Housing Act vaguely defines families of low income as "families . . . who are in the lowest income group and who cannot afford to pay enough to cause private enterprise . . . to build an adequate supply of decent, safe, and sanitary dwellings for their use." 42 U.S.C. §1402(2) (1970).

54. 387 F. Supp. at 1085.

55. *Id.* at 1065.

> stability of that community and are therefore relevant to a tipping analysis, the gross numbers themselves should be considered only to the extent that they are of a measurable group. Moreover, what is crucial is not the numbers *per se* (except insofar as they affect community attitudes) but rather the ability of the community from the standpoint of its services and facilities to absorb and serve the needs of the particular group in question.

The court proceeded to establish factors for determining whether or not an area has reached or is about to reach a tipping point. These include:[56]

> (1) the gross numbers of minority group families or families in a measurable economic or social group which are likely to affect adversely Area conditions; (2) the quality of community services and facilities; and (3) the attitudes of majority group residents who might be persuaded by their subjective reactions to the first and second criteria to leave the Area.

Finally Judge Cooper stated that a persuasive tipping argument would require "convincing evidence"[57] that satisfied the standards enunciated in *Otero* and *Pride v. Community School Board*.[58]

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56. *Id.* at 1066.

57. *Id.* The convincing evidence standard was also adopted in the *Otero* case. 484 F.2d at 1133-35.

58. 488 F.2d 321 (2d Cir. 1973). *Pride* involved assignment of school children away from their neighborhood because of race. The circuit court implied that a less stringent "rational basis test" be applied where racial classifications are used for benevolent purposes. *Id.* at 326-27. The court in *Pride* stated that *Otero* had adopted a stricter standard because it involved an outright denial of new public housing based entirely upon racial classifications: "Cases applying that [stricter] standard invariably involve state action having a segregatory or discriminatory effect. No court has applied the test where state action has had the effect and objective of reducing discrimination and segregation." *Id.* at 326-27. *See, e.g.*, Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55,61 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Springfield School Comm. v. Barksdale, 348 F.2d 261,266 (1st Cir. 1965); Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969), *aff'd*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *cf.* Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 16 (1972).

In *Otero*, Judge Mansfield, while discussing the evidentiary requirements in the stricter standard, stated that: "the parties would be permitted to offer evidence as to the relevant community, the impact of adherence to the priority regulation, including the declining white population in that community, the effect of transfers from other locations in the community to the . . . Project, estimates as to the total racial composition of the Urban Renewal Area upon completion, and the racial composition of the available population that is eligible for public housing. Such evidence should permit the trial judge to make findings as to whether adherence to . . . [the regulation] would tend to precipitate a racial imbalance which might ultimately prevent the Authority from exercising its duty to maintain racial integration in the community." 484 F.2d at 1137.

One reason for a strong "convincing evidence" standard in economic tipping cases is because of the constant shortage of low-income public housing. In view of the fact that housing

B. Future Status

Judge Cooper suggested that the economic tipping idea may have merit in future litigation. Hence, he formulated certain standards.[59] However, if "economic tipping" is ever to gain judicial recognition, plaintiffs must overcome certain potential legal barriers. These include standing problems and reluctance of the judiciary to accept economic and sociological data.

Courts have limited the classes of persons who may invoke the decisional and remedial powers of the judiciary under the rubric of standing. If the asserted harm is a " 'generalized grievance' shared in almost equally by a large class of citizen," then the injury rarely warrants the exercise of the court's jurisdiction.[60] At a minimum, the plaintiff must allege that he has suffered sufficient "injury in fact" to meet the "case or controversy" requirement of the United States Constitution.[61]

There are, however, additional limitations.[62] Nevertheless, it is far

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is not a fundamental right, Lindsey v. Normet, 405 U.S. 56, the requirement of a stricter evidentiary standard provides additional protection to those in need of housing.

59. *See* text accompanying note 56 *supra*.

60. Warth v. Seldin, 95 S. Ct. 2197, 2205 (1975). *See* Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). *See also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); *Ex Parte* Levitt, 302 U.S. 633 (1937).

61. As to whether or not a party has standing to sue, the Supreme Court has stated that in terms of constitutional limitations the plaintiff need only show that the dispute can be presented in an adversary contest and is capable of judicial resolution. Flast v. Cohen, 392 U.S. 83, 101 (1968). Generally the courts have required that a party must show "injury in fact," Sierra Club v. Morton, 405 U.S. 727, 733 (1972), as a prerequisite to satisfying the standing requirement. The guidelines for this test which usually relates to pecuniary interests were set down in *Flast*. The Court required that the plaintiff, in this case a taxpayer, "[F]irst, . . . establish a logical link between [his] status and the type of legislative enactment attacked . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102.

62. Warth v. Seldin, 95 S. Ct. 2197, 2208-10 (1975). *See also* United States v. Raines, 362 U.S. 17 (1960); Barrows v. Jackson, 346 U.S. 249 (1953). Without the allegations of "demonstrable, particularized injury," there can be no confidence of "a real need to exercise the power of judicial review," or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." Warth v. Seldin, *supra* at 2210; Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-22 (1974). "The fact that the harm . . . may have resulted indirectly does not in itself preclude standing. When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, . . . the indirectness of the injury does not necessarily deprive the person harmed of standing . . . ." Warth v. Seldin, *supra* at 2208; *accord* Roe v. Wade, 410 U.S. 113, 124 (1973). "[T]his rule [denying relief to third persons] has not been imposed uniformly as a firm constitutional restriction on federal court jurisdiction." Flast v. Cohen, 392 U.S. 83, 99

easier to meet the standing requirement today than it was ten years ago. *Trafficante v. Metropolitan Life Insurance Co.*[63] provides an illustration. In *Trafficante* the Supreme Court held that under the Fair Housing Act of 1968, a white tenant had standing to protest discrimination against non-whites.[64] The Court found that "the loss of important benefits from interracial associations" was a sufficient allegation of injury.[65] Since *Trafficante*, standing has been broadened in *Shannon v. HUD*,[66] *Otero*, and *Trinity* to give neighborhood civic associations the right to protest racial discrimination.[67] Thus, by analogy to *Shannon* and *Otero*, a displacee, a tenant, a storeowner, or a church and school located within a neighborhood would all be likely to have standing to sue a housing authority.

Another problem with the economic tipping argument is the reluctance of the judiciary to accept economic and sociological data.[68] Before any economic tipping standard can be developed, the income approach must be removed from the realm of speculation; it must

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n.20 (1968). For example, in Pierce v. Society of Sisters, 268 U.S. 510 (1925) a Catholic school was allowed to attack a statute which would have forced all children to receive a public education. Furthermore, organizations have been allowed to assert the constitutional rights of their members. N.A.A.C.P. v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458-60 (1958); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). Increasingly, the courts have conferred standing, so long as the party can show himself to be within this "zone of interests." Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). In *Data Processing* the Court announced a two part test for standing. Standing exists if the plaintiff alleges that the challenged action has caused him injury and if "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute of constitutional guarantee in question." *Id.*

63. 409 U.S. 205 (1972).

64. *Id.* at 212.

65. *Id.* at 209-10.

66. 436 F.2d 809 (3d Cir. 1970). In *Shannon* a group of black and white residents, and representatives of civic organizations sought to enjoin HUD from building a project on the grounds that the authority violated the Civil Rights Act of 1968 and the thirteenth and fourteenth amendments. The court granted standing to the plaintiffs on the premise that they would be vitally affected by HUD's program, despite the fact that they were not displacees or potential occupants. *Id.* at 818. This approach allowed a larger portion of the population to challenge HUD's urban renewal decision, and greatly expanded the standing requirement beyond previous limitations. *See* Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968) (standing granted to a displacee to challenge a relocation plan); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969) (potential occupant had standing to challenge segregatory location of housing). *But see* Fletcher v. Romney, 323 F. Supp. 189, 194 (S.D.N.Y. 1971) (standing denied on ground that alleged injury was less direct than suffered in *Shannon*).

67. For a discussion of zone of interest and third party standing, see note 62 *supra*.

68. *See* note 8 *supra* and accompanying text.

be as discernible and documented as the racial approach.

Nucleus of Chicago Homeowners Association v. Lynn[69] illustrated this problem and the judicial reaction. In that case, plaintiffs sought to compel HUD to file an environmental impact statement detailing the social and economic characteristics of the proposed tenants before it constructed a housing project.[70] The court rejected this demand, and stated:[71]

> Prognosticating human behavior and analyzing its consequences on the environment is an especially difficult, if not impossible, task. . . . Sociology, a discipline attempting such prediction, has not yet attained the stage of an exact science . . . . As such, these conclusions are not very persuasive in a court of law.

While *Nucleus* did not deal with a tipping argument, the opinion illustrates the general reluctance of courts to consult sociological data in order to determine the effect of low-income families upon the neighborhood environment. Although the majority of courts do not presently recognize research compiled by sociologists, some commentators have argued that such data is worthwhile and should be resorted to in certain circumstances.[72] Other writers have voiced a fear of placing too much credence in a sociological report.[73] Nevertheless, the only means of effectively determining whether a neighborhood has in fact "tipped" is to rely upon the figures produced by an investigation. Seemingly, the courts have utilized such data in the racial tipping context to implement the constitutional guarantees[74] and the relevant statutory provisions.[75]

Judge Cooper's decision in *Trinity* considered sociological standards only in conferring jurisdiction, and consequently did not need to rely solely upon the sociologist's findings in reaching a decision on the merits.[76] Plaintiffs in *Trinity* argued that the equal protection and due process clauses of the fourteenth amendment were violated.

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69. 372 F. Supp. 147 (N.D. Ill. 1973).

70. *Id.* at 148. The filing of environmental impact statements is governed by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(c) (1970).

71. 372 F. Supp. at 150.

72. *See* note 8 *supra*.

73. *See* note 8 *supra* and accompanying text. *See also* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir. 1969).

74. *See* Banks v. Perk, 341 F. Supp. 1175, 1179-80 (N.D. Ohio 1972).

75. *See, e. g.*, Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Blackshear Residents Organization v. Housing Auth., 347 F. Supp. 1138 (W.D. Tex. 1971).

76. 387 F. Supp. at 1048.

However, the court did not discuss these issues. If the court had concluded that those amendments were violated, it may have incorporated the sociological research to buttress its decision.[77] The Supreme Court has declared that the equal protection clause is violated only when laws are invidiously discriminatory, with classifications that are wholly arbitrary or capricious.[78]

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional powers despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[79]

This presumption of validity disappears when legislation discriminates against "suspect classifications."[80] Race is a prime example of a suspect classification.[81] Wealth is *not*.[82]

If future litigants are going to succeed in their attempts to establish economic tipping, they must either convince the court of the value of the sociological report or effectively couple such statistics with a constitutional argument. Moreover, they must establish a separate income class which is discernible from a racial classification and meet the burden of proving their case by "clear and convincing evidence," as required in *Otero* and *Trinity*.

IV. Conclusion

The decision in *Trinity*, although rejecting the concept of economic tipping, as applicable to the facts of that case, opens the door to the development of judicial policy in this area. Future litigation

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77. *See* Lochner, *Some Limits on the Application of Social Research in the Legal Process*, 1973 LAW & SOCIAL ORDER 815, 836.

78. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 60 (1973)(Stewart, J., concurring).

79. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

80. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

81. *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954). *See also* Gomez v. Perez, 409 U.S. 535 (1973) (illegitimacy); Graham v. Richardson, 403 U.S. 365 (1971)(alienage); Griffin v. Illinois, 351 U.S. 12 (1956)(indigency); Oyama v. California, 332 U.S. 633 (1948) (national origin).

82. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).

on this issue will have both precedent and guidelines[83] with which to work. However, in view of the strict evidentiary requirements and the ever-present judicial distaste for sociological evidence, plaintiffs will face a rigorous challenge.

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83. Nucleus of Chicago Homeowners Ass'n v. Lynn, 372 F. Supp. 147 (N.D. Ill. 1973).