Journal of

Affordable Housing

& Community Development Law

VOLUME 25, NUMBER 3
2017

From the Editor-in-Chief
Laurie J. Hauber .... *v*

From the Chair
Lawyering and Advocacy in Times of Uncertainty
Dina Schlossberg .... *ix*

From the Reading Room
The Everyday Economic Violence of Black Life
Review by Renee C. Hatcher *275*

Commentary
Ferguson: Undoing the Damage of the Past—Creating Community Wealth
Sandra M. Moore *297*
Deconstructing Philadelphia's "Blueprint" Project: A Unique and Effective Multiyear Partnership to Expand Permanent Supportive Housing
Marcella Maguire *309*
A Coordinated Response to Homelessness in Los Angeles—Reforming the System to Deliver Better Outcomes
David Streim *319*
Health Policy Brief: Medicaid and Permanent Supportive Housing
Health Affairs *329*

Digest of Recent Articles *339*

Articles
Ten Years of Fighting Blighted Property in Memphis: How Innovative Litigation Inspired Systems Change and a Local Culture of Collaboration to Resolve Vacant and Abandoned Properties
Steven E. Barlow, Daniel M. Schaffzin, and Brittany J. Williams *347*
Disparate Impact Liability Under the Fair Housing Act After *Inclusive Communities*
Daniel Sheehan *391*
Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act
J. William Callison *421*

2017 Law School Writing Competition
Fair Housing's Trap Door: Fixing the Broken Disparate Impact Doctrine under the Fair Housing Act
Kerri Thompson *435*

Erratum

In the article titled *Transportation Matters: Closing the Chasm between Housing and Transportation to Foster Communities of Opportunity for All* (Vol. 25-2), there was a reference to the Sustainable Communities Initiative. The editors would like to clarify that the U.S. Department of Housing and Urban Development, not the Transportation Equity Caucus, launched the Sustainable Communities Initiative.

FORUM ON AFFORDABLE HOUSING AND COMMUNITY DEVELOPMENT LAW

EDITORS

Editor-in-Chief
Laurie J. Hauber
Staff Attorney
Community Economic Development Program
Legal Services of Eastern Missouri, Inc.
St. Louis, Missouri
ljhauber@lsem.org

Associate Editor
Brandon Weiss
University of Missouri at Kansas City Law School
Kansas City, Missouri
bweiss@umkc.edu

Senior Editor
James J. Kelly, Jr.
Clinical Professor of Law
University of Notre Dame
South Bend, Indiana
j.kelly@nd.edu

Managing Editor
Wendy J. Smith
Chicago, Illinois
wendysmith08@gmail.com

Forum Manager
Dawn R. Holiday
American Bar Association
Chicago, Illinois
dawn.holiday@americanbar.org

The *Journal of Affordable Housing & Community Development Law* is the official quarterly publication of the Forum on Affordable Housing & Community Development of the American Bar Association. It is targeted toward attorneys and other housing and community development specialists. It provides current practical information, public policy, and scholarly articles of professional and academic interest.

Disclaimer: The opinions expressed in the articles published in the *Journal of Affordable Housing & Community Development Law* are those of the authors and do not reflect those of the American Bar Association or the Forum on Affordable Housing and Community Development Law.

Membership: For information about membership in the Forum, please contact the ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or visit americanbar.org.

Back Issues: Back issues are available for $15 per copy plus $3.95 shipping and handling charges. Contact ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or ShopABA.org.

Member Address Changes: Send your member number and new address to coa@americanbar.org or change online at www.americanbar.org.

Permission to reprint: Requests to reproduce portions of this issue should be addressed to Contracts, Copyrights & Policies, American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598, FAX 312-988-6030, or e-mail copyright@americanbar.org.

© 2017 American Bar Association.

Journal of Affordable Housing & Community Development Law (ISSN 1084-2268) is published as a membership benefit by the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598. Subscriptions are available to nonmembers at an annual rate of $60. **Postmaster:** Send address changes to Affordable Housing Member Records, American Bar Association, ABA Service Center, 321 North Clark Street, Chicago, IL 60654-7598.

From the Editor-in-Chief

Laurie J. Hauber

As with the state of our nation and the uncertainty involving the future of affordable housing and community development, this issue features articles and commentaries on two topics—permanent supportive housing and disparate impact since the *Inclusive Communities* decision—around which a great deal of uncertainty exists among practitioners and scholars alike. The summaries of each piece in this issue are organized primarily by theme rather than the usual order that follows the table of contents.

Before our theme-based pieces, this issue begins with a review by Renee Hatcher of the ABA publication, *Ferguson's Fault Lines: The Race Quake That Rocked a Nation*, edited by Kimberly Jade Norwood. Ms. Hatcher's review provides a chapter-by-chapter synopsis of the various social, political, and economic conditions that led to Michael Brown's death and the national uprising it stirred. As a CED practitioner who worked in Baltimore for several years, she writes this review and her additional analysis through the lens of affordable housing and CED. While the focus of the book and Ms. Hatcher's own analysis is on St. Louis, with some comparisons to Baltimore, she makes clear that the book provides a template for communities around the country to examine their own historical, institutional policies and practices that have led to race-based disinvestment and abandonment in both urban and suburban environments.

Three of the four commentaries are about permanent supportive housing.[1] Our first two, "Deconstructing Philadelphia's "Blueprint" Project: A Unique and Effective Multiyear Partnership to Expand Permanent Supportive Housing" and "A Coordinated Response to Homelessness in Los Angeles—Reforming the System to Deliver Better Outcomes," present

1. Permanent supportive housing generally is described by HUD, DHS, the United States Interagency Council on Homelessness and other federal agencies as an evidence based approach that provides long-term affordable housing to persons experiencing chronic homelessness, along with wrap-around voluntary services to help keep them housed.

Laurie J. Hauber was Program Director and Managing Attorney of the Community Economic Development Program of Legal Services of Eastern Missouri in St. Louis until she moved to Eugene, Oregon, this past summer. She continues to work with the program in a consulting capacity. Laurie welcomes comments from Forum members and other readers and can be reached at hauberyang@gmail.com.

models that demonstrate the effectiveness of this approach with significantly reducing chronic homelessness in respect to housing stability, improved physical and mental health outcomes, and the reduction in use of high-cost medical services such as hospital emergency visits. Dr. Marcella Maguire shares the tremendous success story of the Philadelphia Blueprint Project that she helped create, an interdisciplinary collaboration of multiple government agencies and nonprofit organizations to effectively address chronic homelessness in Philadelphia. In sharing the story of how this project was formed, the roles of the various participating agencies, and the outcomes to date, she emphasizes the importance of strong local leadership committed to the issue as well as data collection and analysis. David Streim of the Nonprofit Finance Fund (NFF) presents a case study of NFF's investment and partnership with LA Family Housing. The case study discusses LA Housing Fund's leadership role in establishing the Coordinated Entry System in Los Angeles, which was the result of its successful efforts at bringing all homeless service providers together to establish a system for sharing data among all participating agencies. Through NFF's investment, which was a significant part of a larger innovative financing structure, LA Family Housing was able to build a permanent facility that houses local social service providers and also a health clinic and coordinates various housing options to meet the needs of homeless individuals and families in one location.

Recognizing the interconnectedness between housing and health, "Medicaid and Permanent Supportive Housing," first published in *Health Policy Brief*, discusses the critical connection between the provision of services that keep people housed and improved mental and physical health outcomes. Following a brief overview of permanent supportive housing, this commentary discusses the various strategies available to states to use Medicaid to cover services provided as part of the permanent supportive housing model, along with some of the complexities of doing so. The author acknowledges that this model is most effective in states that have expanded Medicaid coverage to include low-income childless adults. The ability to cover chronically homeless adults is far more limited in states without this expanded coverage.

Eliminating expanded coverage of Medicaid as well as the proposed deep budget cuts that Dina Schlossberg discusses in her column undoubtedly could devastate the meaningful progress toward addressing chronic homelessness that has been made in Philadelphia, Los Angeles, and other cities around the country. For housing and CED advocates of low-income populations, including people who suffer chronic homeless, it is beneficial to understand the collaborative structure and funding strategies of successful models to more effectively advocate at the federal and state levels around the allocation of funding as budgets are being considered.

The authors of this issue's two articles on disparate impact both express their concerns about the confusion that *Inclusive Communities* has created and the limited window the decision leaves open for plaintiffs

to bring disparate impact claims under the Fair Housing Act. Bill Callison, in "Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act," highlights the decision's language that firmly states a plaintiff must show a causal connection between a policy and a disparate impact to prevail. Mr. Callison concludes that strategies to create racial integration in housing will be difficult to accomplish through court action based on the causality connection and other language of this decision. Daniel Sheehan, author of "Disparate Impact Liability Under the Fair Housing Act After Inclusive Communities," affirms Mr. Callison's conclusion, asserting that based on Justice Kennedy's opinion, courts likely will favor housing policies that focus on revitalization of low-income communities over integration with more affluent communities. Mr. Sheehan argues that the framework Justice Kennedy has created is a mix of "housing barrier" and "housing improvement" litigation cases, which will make application in future cases convoluted and difficult to apply. Among the many factors he discusses, Mr. Sheehan, like Mr. Callison, points to the causality requirement to show how ICP's framework essentially prevents housing improvement cases from going forward.

Sandra Moore's commentary, "Ferguson: Undoing the Damage of the Past—Creating Community Wealth," presents a compromise of sorts that addresses the tensions between revitalization and integration that undoubtedly will continue in the future and arguably have been exacerbated by the ICP decision. After acknowledging the strengths and drawbacks of each approach, Ms. Moore advocates that the objectives of each can best be accomplished by the development of mixed-income housing in lower income areas. She uses Colin Gordon's essay in *Ferguson Fault Lines* regarding housing segregation and uneven development as the launching pad for her analysis. She asserts that this approach, with intentional planning for economic mobility of low-income residents and building to the highest standard, will lead to the same results as a targeted effort to create housing in higher income higher opportunity areas—a reduction in the concentration of poverty, an increase in housing values, individual and community wealth, and further investment.

Coincidentally, the winning student submission of the Forum's Law Student Legal Writing Competition this year complements our two articles on disparate impact and Ms. Moore's commentary. I am honored to introduce Kerri Thompson, a student at George Washington University Law School. She was selected among several strong contenders for her outstanding submission, "Fair Housing's Trap Door: Fixing the Broken Disparate Impact Doctrine Under the Fair Housing Act." Following a discussion of the original intent of the Fair Housing Act and how courts' application of the statute no longer addresses the more subtler forms of housing discrimination that plaintiffs typically confront today, the focus of her submission is her proposal to amend the FHA to better reflect today's housing discrimination. She argues that the burden-shifting test

for plaintiffs to successfully prove discriminatory impact is virtually insurmountable as it has been applied by courts in recent years. She proposes a four-part balancing test that she asserts will better address today's forms of housing discrimination and lead to more just results.

This issue also includes an article about the success that Memphis has had in addressing blighted properties through a coordinated litigation strategy. "Ten Years of Blight Fighting in Memphis: How Experimental Litigation Led to Systems Change and a Local Culture of Collaboration Around Blight Elimination," by Steven Barlow, Daniel Schaffzin, and Brittany Williams, tells a compelling story of how Memphis turned small-scale limited efforts into a citywide, coordinated blighted property reduction effort with dedicated resources and multiple committed stakeholders. Through their detailed discussion of the legal strategies employed to address property tax foreclosure and code enforcement, led by city attorneys and the University of Memphis School of Law's Neighborhood Preservation Clinic, the authors demonstrate the viability of a litigation-focused approach toward eliminating blight—one that serves as a model for other cities around the country. They emphasize the importance of a robust litigation team that works closely with the local property maintenance code enforcement officers, along with strong leadership among high-level local government officials, as critical to successful outcomes.

Finally, thanks to the hard work by several attorneys at Robinson+Cole, two attorneys at Holland & Knight, and one attorney from Klein Hornig LLP, this issue includes a digest of twelve law review articles, academic reports, and reports from policy institutes.

In closing, I would like to remind everyone of the *Journal*'s invitation to publish. For the next several issues, we will be seeking papers that discuss challenges and opportunities under the new administration and its proposed policies. We invite all of you to share your proposals, policy analysis, and any other form of ideas that may guide our readership through these uncertain times and offer a voice to HUD as it develops its priorities and policies. Please send abstracts directly to me at hauberyang@gmail.com.

From the Chair

Lawyering and Advocacy in Times of Uncertainty

Dina Schlossberg

Dina Schlossberg

Wow—what a year to be the Chair of the Forum! As Mr. Trump settles in to his position as president, the sweeping and seemingly endless proposed changes to federal agency budgets, priorities, and executive leadership have left affordable housing and community development attorneys reeling with uncertainty as to what the future will bring for this field of practice. The first consequence of this change occurred soon after the November election. Shortly after the election, due to a common belief that the incoming administration would push for tax reform and a reduction in the top corporate tax rate, there was a direct and swift reduction in pricing by the equity market that invests in low income housing tax credit developments. This downward pricing caused many affordable housing projects to experience a funding gap, or for some housing developments, to have investors rescind offers entirely. The market is now beginning to stabilize but this disruption was certainly a shock to the affordable housing development community.

While most affordable housing analysts believe the Low Income Housing Tax Credit Program will survive tax reform, there is some concern that the New Market Tax Credit Program, which was created in 2000 and most recently extended through 2019 by the Protecting Americans from Tax Hikes (PATH) Act of 2015, may face an uphill battle when the time comes to advocate another extension of this program.

More recently, the Trump administration introduced its proposed budget blueprint for FY 2018. As many affordable housing advocates feared, this proposed budget calls for a sharp reduction in non-defense spending in favor of an increase in defense spending. The proposed HUD budget was not spared with an estimated $6.2 billion or 13 percent reduction from 2016 budget levels. As reported by the National Low In-

Dina Schlossberg is Deputy Director/Senior Attorney of Multi-Family Housing at Regional Housing Legal Services in Glenside, Pennsylvania. She can be reached at dina.schlossberg@rhls.org and welcomes comments from Forum members.

come Housing Coalition, when compared to funding levels that were actually needed for FY 2017 (but not funded), the proposed cuts amount to 15 percent or a $7.5 billion reduction. The president's budget blueprint proposes to eliminate funding for the Community Development Block Grant Program, the HOME Investment Partnerships Program, Choice Neighborhoods grants, NeighborWorks America, and the Self-help Homeownership Opportunity Program. Other HUD programs, including those that support housing needs for veterans, homeless individuals and families, low-income seniors, and Native American communities, are also rumored to have sharp reductions in funding.

This proposed budget would also eliminate the U.S. Interagency Council on Homelessness, which coordinates the federal response to homelessness across nineteen federal agencies; federal funding for the Legal Services Corporation, which provides critical legal services to very low-income individuals; and funding for the Low Income Home Energy Assistance Program (LIHEAP), which provides critical assistance to low-income families and seniors with funds to heat their homes in the winter.

These are troublesome cuts that have an impact on how we, as lawyers, carry on our work and how we serve our clients. As affordable housing advocates, we know that if these proposed cuts are implemented, the impact will be devastating to many low-income households and under resourced communities.

Throughout all of this turmoil, the Forum has remained committed to its mission to educate and serve its membership and has focused much of its programming and activities on these very topical issues. In January, the Forum hosted an excellent and informative webinar (free to Forum members) on the Implications of Tax Reform, moderated by Governing Committee member Glenn Graff. More than 100 people participated. In April, the Forum will be hosting a webinar on a California state tax credit that is being used to help fill funding gaps in affordable housing developments. Many other webinars were also offered this year on substantive practice-related topics, such as HUD 2530 Compliance, Implementing the Housing Opportunities Through Modernization Act of 2016 (HOTMA), Fair Housing Developments in Treasury Department Programs, and LIHCT. All were presented by experts in their respective fields, well attended, and free to members of the Forum!

The Forum is reaching out to the new HUD administration and we hope to be a valued resource as it gains an understanding of housing programs and issues. The Governing Committee prepared and submitted to Secretary Carson a letter that outlines the many important challenges and issues concerning affordable housing and HUD. This letter is an invitation to engage in an ongoing dialogue with hopes that the Forum may be a relevant and welcome resource.

The Annual Meeting in May promises to be another opportunity for discourse and education on all of these relevant topics. We have invited Secretary Carson to be a keynote speaker and hope his schedule will

allow him to attend. We have other thought provoking and enlightening keynote and plenary programs planned, as well as over twenty-five topical and practice oriented workshops scheduled.

We are a community that does a great job at sharing knowledge and communicating ideas. This year it is even more critical for all affordable housing and community development attorneys to participate in the Forum as we learn to adapt to these changing times and do our very best to remain effective lawyers and zealous advocates.

I hope you enjoy this issue of the *Journal*, which is full of inspiring articles on services to the homeless community plus other relevant articles. I hope to see you in May at the Forum's Annual Meeting.

FROM THE READING ROOM

The Everyday Economic Violence of Black Life

Reviewed by Renee C. Hatcher

Ferguson's Fault Lines: The Race Quake That Rocked a Nation
Kimberly Jade Norwood, Editor
American Bar Association
276 pages, $24.95

There are two Fergusons. There are two Americas. We cannot change this reality unless we first acknowledge it.[1]—KIMBERLY JADE NORWOOD

The truth about the racism and brutality of the police has broken through the veil of segregation that has shrouded it from public view.[2]—KEEANGA YAMATTA-TAYLOR

You can't understand your appropriate role in this moment without understanding the moment we're in.[3]—PURVI SHAH

I. Introduction

All too often, what is missing from the mainstream discourse around race is the historical and political context that has shaped the present-day reality.

1. Kimberly Jade Norwood, *Introduction*, *in* FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION xxi (Kimberly Jade Norwood ed., 2016).
2. KEEANGA YAMATTA-TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 154 (2016).
3. Purvi Shah, Closing Keynote Address at the Rebellious Lawyering Conference 2017 (Feb. 18, 2017).

Renee Hatcher (rhatche@jmls.edu) is a human rights and community development attorney. She is the Director of the Business Enterprise Law Clinic at John Marshall Law School-Chicago and previously taught in the Community Development Clinic at the University of Baltimore School of Law as a Clinical Faculty Fellow.

Often there are conversations about the condition of Black neighborhoods, without the mention of redlining; conversations about the poverty rate in the Black community, without discussing the employment and housing discrimination experienced by Black citizens. Most often, there are conversations about Black criminality, without the mention of predatory policing in low-income Black neighborhoods or the targeted enforcement of petty crimes on Black citizens. *Ferguson's Fault Lines* provides a much needed social, political, and historical context to the national conversation about racialized state violence reignited by the 2014 killing of Michael Brown at the hands of Officer Darren Wilson. We may never definitively know what happened on August 9, 2014,[4] but we do know the long history of discriminatory policies that shaped the conditions and policing practices in Ferguson. *Ferguson's Fault Lines* begins to unpack the ways in which urban and more recently suburban landscapes have continuously been racialized through decades of state de jure and de facto discrimination and corresponding institutional policies. While there may never be justice for Michael Brown, there can still be justice for the communities, like Ferguson, that have suffered state-sanctioned structural and spatial racism.

Kimberly Norwood has wonderfully curated thirteen chapters, each written by a different scholar or advocate, that begin to shine a light on why the slaying of Michael Brown at the hands of Officer Darren Wilson sparked mass protests around the country and captured the nation's attention. While the killing of Michael Brown was the spark that ignited the flame, the book examines the social conditions and economic and political policies that served as tinder. Nearly half of the chapters paint a picture of the historical and ever present state-sanctioned economic violence on the Black community in Ferguson and greater St. Louis.

While the value of *Ferguson's Fault Lines* is partly the nuanced historical (policies) account of Ferguson and the St. Louis metropolitan area, there are a number of parallels of state institutions and social forces that are relevant for almost every city and suburb across the country. As a result, Kimberly Norwood has provided a blueprint for the type of research that is necessary to have fruitful public discourse and policy-making discussions not only on local policing practices but also on housing, education, and community development. The book marks a two-fold achievement of connecting oppressive state-sanctioned policies to the current conditions of Black communities, and it expands the call to transform not only discriminatory policing practices but also those policies that contribute to the everyday economic violence of Black life.

4. Michael Harriot, *Everything You Think You Know About the Death of Mike Brown Is Wrong, and the Man Who Killed Him Admits It*, The Root, Mar. 15, 2017, http://www.theroot.com/everything-you-think-you-know-about-the-death-of-mike-b-1793261221?utm_source=theroot_facebook&utm_medium=socialflow.

In Part II, I briefly summarize and analyze each of the thirteen chapters of the book. Chapters One and Two explore how the history of slavery and violence against Black bodies continues to shape modern day America. Chapter three recounts the unorthodox grand jury proceeding of Darren Wilson for Michael Brown's murder. Chapters Four through Eight are the heart of the book and begin to paint a picture of spatial racism, the current geography of inequality, and discrimination in Ferguson and the St. Louis metropolitan region. Chapters Nine through Thirteen explore different societal responses to the killing of Mike Brown and the events that happened afterward. When read together, the chapters provide the necessary context to discuss the current moment on injustice and inequality of Ferguson and the necessary steps to address it.

In Part III, I draw some concluding thoughts and raise unanswered questions regarding the uneven development, spatial racism, and discriminatory practices in Ferguson. These policies assign different spaces, neighborhoods, and opportunities to citizens of different races in the St. Louis metropolitan region. In doing so, they create unequal access to education, employment, transportation, health outcomes, and life expectancies, based on race and zip code. They also give rise to and enable discriminatory policing. Much of my analysis is based upon my experiences as a community economic development (CED) lawyer in cities with substantial Black populations, namely Chicago, Gary, and, most recently, Baltimore. I ultimately argue that state-sanctioned discriminatory policies of both physical and economic violence are intertwined, cyclical, and compounding. In looking to solutions, I advocate that community-driven strategies that address historical discrimination and inequality will move the needle towards progress. By the same token, local housing and development policy makers should employ a racial equity impact assessment for all future investments and policies and take affirmative action to address the geography of inequality that they have helped to create and sustain.

II. From Slavery to Policing in the 21st Century

Chapter 1: Michael Brown, Dignity, and Déjà Vu: From Slavery to Ferguson and Beyond

Christopher Alan Bracey

The shooting of Michael Brown is reflective of a much older and deeper pathology that lies at the core of our shared national identity.[5]—Christopher Alan Bracey

Racial oppression in the United States predates the very founding of this country. America, a country founded on the ideals of freedom and

5. Christopher Alan Bracey, *Michael Brown, Dignity, and Déjà Vu: From Slavery to Ferguson and Beyond*, *in* Ferguson Fault Lines, *supra* note 1, at 2.

equality, was entangled in chattel slavery of African peoples for more than a century before the ratification of the U.S. Constitution. The survival and function of the "peculiar institution" was based on "the belief of whites that Blacks did not possess equal humanity and therefore did not deserve equal treatment."[6] This, as Bracey puts it, was a "core founding principle of this nation" and "underlies a great deal of historical racial interactions in American life."[7] As we begin to make sense of the both tragic and heroic events that took place in Ferguson in late 2014, we must first understand that a tradition of oppression has been embedded in America's cultural consciousness since the nation's founding.

Michael Brown's death was "yet another vicious downbeat in the rhythmic assault on black humanity," writes Bracey. A part of the recurrent ritual of expropriating the basic dignity and equal humanity of Black people in furtherance of some larger agenda, or what Bracey refers to as the "dignity expropriation" of racial oppression, is a concept he developed in his co-authored book, *The Dred Scott Case: Historical and Contemporary Perspectives on Race and the Law.*[8]

Bracey's chapter is compellingly constructed and an important foundation for understanding the history of Black people and the state. Quoting Justice Taney from the landmark *Dred Scott* decision, Bracey shows the way in which the law has reinforced and contributed to the denial and emphatic rejection of Black humanity:

> Negroes had for more than a century before been regarded as being an inferior order; and altogether unfit to associate with the white race . . . ; and so far inferior that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for [the white man's] his benefit.[9]

While the Reconstruction Amendments, most notably the Fourteenth Amendment, renounced Justice Taney's opinion as law, Blacks continued to experience racial oppression and dignity expropriation throughout the 20th century.

Bracey ultimately argues that Blacks in Ferguson were denied basic dignity and equal humanity by the very nature of racial profiling and predatory policing they endured, as evidenced by the U.S. Department of Justice's investigation of the Ferguson Police Department.[10] The pattern and practice of discriminatory policing in Ferguson is akin to the disparate law enforcement of the 19th century, designed to relegate Negro

---

6. *Id.*

7. *Id.*

8. *The Dred Scott Case: Historical and Contemporary Perspectives on Race and the Law* (David Thomas Konig, Paul Finkelman & Christopher Alan Bracey eds., 2010).

9. Scott v. Sandford, 60 U.S. 393, 407 (1856) (Taney, J.).

10. U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* (Mar. 4, 2015), https://www.courts.mo.gov/file.jsp?id=95274).

slaves to servitude and oppress emancipated Blacks. Bracey traces this history of discriminatory policing from the slave codes (Slave Act of 1850, The Fugitive Slave Act, etc.) to modern day criminal justice and policing. An important point connected to this history is the exploitation of Black labor. The law has historically and continuously been used to exploit Black labor. From the slave codes to the Black codes to the excessive fines and fees and predatory policing, the law in the United States has been used to extract value from Black citizens to the benefit of whites who are embedded in the power structure.

The #BlackLivesMatter movement is yet another reminder that "the call for equal dignity and equal humanity has remained fundamentally unanswered."[11] Promoting a culture of racial equality and inclusiveness is the clearest way of fulfilling this demand. For Bracey, this can only be possible if we "historicize, contextualize, and deepen our conversation about race in America"[12] and interrogate our respective racial identities and histories to seek affirmation of our collective humanity.

Chapter 2: The Psychology of Racial Violence
Phillip Atiba Goff and L. Song Richardson

Chapter 2 provides a useful scientific foundation to understand the contemporary ways in which racial bias shapes discriminatory policing practices and outcomes. Black suspects are five times more likely to die at the hands of police than white suspects. In the wake of these extrajudicial killings, often the attention of the media pits the character of the officer against that of the victim. "Was the officer racist and was that racism responsible for the death? Or did the victim act in ways that could be considered threatening and dangerous?" However, this dichotomy ignores the current scientific understanding of bias, specifically racial "suspicion cascades" and the implicit dehumanization of Black people.

Racial "suspicion cascades," a term coined by Philip Goff, refers to multiple waves of decision-making errors that can warp a person's perception, regardless of his or her individual racial attitudes.[13] Citing several studies, Goff and Richardson assert that even individuals who hold egalitarian beliefs are subject to these psychological processes that cause errors in and perceptions in judgment.[14] Racial suspicion cascades theory is informed by a contemporary understanding of racism, which recognizes that racism can exist without racists. Thus, it provides an important framework to discuss discriminatory policing practices and outcomes.

11. Bracey, *supra* note 4, at 12.

12. *Id.*

13. Phillip Atiba Goff & L. Song Richardson, *The Psychology of Racial Violence*, *in* FERGUSON FAULT LINES, *supra* note 1, at 17.

14. *Id.* at 18 n.15.

Implicit dehumanization is the tendency to associate Blacks with beasts, particularly apes.[15] Numerous studies have shown that implicit dehumanization facilitates racial violence against Blacks, including the use of excessive force by police officers on Black citizens, and also makes people feel more comfortable with such racial violence.

In looking to address these troubling, documented phenomena, Goff and Richardson suggest that community policing is a possible solution. The coauthors define community policing as a model in which officers and communities work closely together to address the underlying causes of crime and disorder and focus on crime prevention and the social work aspects of policing.[16] Goff and Richardson also emphasize the importance in power and privilege analysis in constructing community policing models and policies. They propose specific, immediate solutions, including reforming police training practices to center de-escalation; revising officer incentive structures to reward creative problem solving, interpersonal skills, and ingenuity; using a multidisciplinary approach to identify interventions to reduce racial violence; and abandoning practices that have shown to be ineffective but exacerbate community tensions, such as stop and frisks strategies.

In their conclusion, Goff and Richardson insightfully contend that even if such recommendations were implemented, the current legal doctrine in the U.S. justice system is inadequate to address racial violence. Therefore, in addition to any policy changes regarding policing practices, there must also be a new doctrinal framework that (1) abandons the law's current reliance on demonstrating discriminatory intent or racial animus and considers the historical context of U.S. race relations and (2) shifts the burden to the state to remedy the institutional factors that exacerbate racial violence.

Chapter 3: The Prosecution, the Grand Jury, and the Decision Not to Charge
Katherine Goldwasser

> *I want to tell you how this is going to proceed. Obviously, it's going to be different from a lot of the other cases that you've heard during your term.*
> —Bob McCullough, St. Louis County Prosecutor

The chapter details the prosecutorial options that were available and chronicles the way in which Darren Wilson's case substantially diverged from the normal order of business in a typical criminal grand jury proceeding. Infamously, the prosecutor in the case, Robert P. McCullough made the above statement at the outset of Darren Wilson's grand jury proceeding.

15. *Id.* at 20.
16. *Id.* at 26.

Chapter 3 explores the irregularities of the grand jury proceeding in the Darren Wilson case. This issue is especially relevant in the context of the many recent, highly publicized shootings of Black men. The unfortunate parallel between many of these cases is that the killer, often a police officer, escapes criminal liability. There is also a historical reality of ethnic minorities, especially African Americans, being subject to systematic miscarriages of justice and extrajudicial killings under the color of law.

First, Goldwasser cites the stark difference in the scope and volume of evidence presented to the grand jurors concerning Officer Wilson and the time it took to present it. Normally, a similar case might have one or two witnesses and few, if any, exhibits. Often, cases are presented in less than an hour. In Wilson's case, McCullough decided to present for over seventy hours, including sixty witnesses and hours upon hours of audio and video recordings, in addition to hundreds of photographs.

Goldwasser summarily asserts that Robert McCullough had an obvious anti-indictment bias, evidenced by the prosecution's decision to call Darren Wilson as a witness and the introduction of the use of deadly force statute during the grand jury proceedings. Moreover, throughout the totality of the grand jury proceedings, it was particularly telling that there was no mention of race. Yet, race was cited as a factor of the Department of Justice investigation into Michael Brown's death.

Goldwasser ultimately calls for secrecy in grand jury procedures to be eliminated, race to be considered as a relevant factor in use of force cases, and independent prosecutors to be installed for police prosecutions. While these recommended solutions are important piece of meaningful judicial reform, they only begin to scratch the surface of the ways in which prosecutorial discretion delivers unjust discriminatory outcomes in the justice system.

Chapter 4: St. Louis County Municipal Courts, For-Profit Policing, and the Road to Reforms
Thomas Harvey and Brendan Roediger

At the time of Mike Brown's death, there were more warrants for arrest than people living in the city of Ferguson.[17]—Thomas Harvey and Brendan Roediger

For-profit policing has been a touchstone for advocates of police reform in the wake of recent law enforcement involved killings. Data suggests that for profit policing tactics often result in the violation of citizens' constitutional rights. When police are mandated to achieve quotas based on a

17. Thomas Harvey & Brendan Roediger, *St. Louis County Municipal Courts, For-Profit Policing, and the Road to Reforms*, *in* Ferguson Fault Lines, *supra* note 1, at 64.

municipality's budgetary needs and the requisite number of crimes has not occurred, they engage in unlawful means to issue summons.

Chapter 4 discusses troubling reports of rampant constitutional violations by way of closed criminal hearings, municipal jails operating as de facto debtors' prisons, and often deplorable conditions for prisoners. There is a moving list of the grotesque things reported by prisoners in the local system and informative arrest statistics from cities in the region. Among the reported penal conditions are defendants suffering from dehydration in the absence of a trustworthy water supply, weeks without an opportunity to shower, and inhumane medical conditions and access to medication. The statistics from the region that are presented tend to show that Blacks are stopped and ticketed at a rate that is disproportionate to their share of the population, even in instances where the data suggest that whites are almost twice as likely to carry contraband.

It also chronicles the uniquely fragmented nature of municipalities in St. Louis County and how this structure contributes to the perpetuation of inequities in the administration of law. For instance, many extremely small towns operate a single former residential property as a jail, police station, and court. These places often hold court only once or twice a month, leading to defendants having to wait weeks sometimes for a purely administrative hearing to discharge them. Another consequence of the fractured municipalities is what the authors refer to as the "muni-shuffle," or the process of being transported from small jail to small jail, to adjudicate what are often minor or arbitrary offenses, such as manner of walking.

ArchCity Defenders' recent white paper detailed the many ways in which the policing and justice systems play a role in creating and maintaining poverty of St. Louis residents.[18] ArchCity Defenders has played an important role in advocating judicial and policy reform, including requests for amnesty from the Ferguson City Court, a proposal to the Missouri Supreme Court to make fines proportional to a person's income, litigation attacking certain court fees as unlawful, seeking a writ of prohibition from the state sanctioning towns in violation of a state law prohibiting cities from using police revenue for more than 30 percent of their budget, debtor's prison lawsuits, the Ferguson Commission tasked by the governor to make recommendations to improve the courts, and others.

18. Thomas Harvey et al., ArchCity Defenders: Municipal Courts White Paper (Nov. 23, 2014), http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf.

Chapter 5: Making Ferguson: Segregation and Uneven Development in St. Louis and St. Louis County
Colin Gordon

The surprise in Ferguson is not what happened but why it does not happen more often.[19]—COLIN GORDON

Modern day St. Louis is the fifth most segregated city in the United States.[20] This is no accident, but the result of a confluence of private and public policies of racial discrimination and exclusion. Beginning in the early twentieth century, when cities first started to develop zoning regulations, St. Louis was one of a handful of cities that first passed laws racially segregating city neighborhoods. The first city to pass such an ordinance was Baltimore in 1910—perhaps no coincidence since Baltimore and St. Louis had the two largest Black populations of any other cities at the time and both were located in slave border states. Redlining and federal housing policies in the decades to come cemented the spatial segregation of the city. In the 1950s, the federal government's urban renewal, often called "Negro removal" in Black communities, displaced hundreds of Black families to the inner ring suburbs of the City of St. Louis.

While many of the discriminatory policies that shaped modern St. Louis touched every part of the United States, the history of segregation, Black dislocation, and dispossession in St. Louis is a particularly brutal one. After all, the policies and practices of segregation in St. Louis gave way to *Shelley v. Kraemer* (the landmark 1948 Supreme Court case that outlawed state enforcement of restrictive covenants),[21] *Jones v. Alfred H. Mayer Co.* (the 1968 case that prohibited private discrimination in real estate transactions),[22] and *United States v. City of Black Jack* (one of the first exclusionary zoning cases).[23]

Colin Gordon traces the policies of spatial racism and housing discrimination in St. Louis, ranging from public practices, such as redlining and exclusionary zoning, to private practices, such as restrictive covenants and agreements among realtors not to sell to Blacks. Gordon identifies a common thread that runs through the ways in which the old de jure discriminatory policies have been transformed into modern day de facto discriminatory public policy. For example, a focus on blighted development

19. Colin Gordon, *Making Ferguson: Segregation and Uneven Development in St. Louis and St. Louis County*, *in* FERGUSON FAULT LINES, *supra* note 1, at 88.

20. An interactive demographic map of the greater St. Louis area developed by Gordon also reveals the extent of the racial segregation across St. Louis County, where Ferguson is located. *See Mapping Decline: St. Louis & the American City*, http://worldmap.harvard.edu/mappingdecline/.

21. 334 U.S. 1 (1948).

22. 392 U.S. 409 (1968).

23. 508 F.2d 1179 (8th Cir. 1974).

has yielded much more commercial development than residential and has displaced many Black families in St. Louis.

Gordon contends a confluence of four factors have created and maintained the north-south St. Louis racial and economic divide: (1) structural discrimination and disinvestment have produced gross inequality between white and Black wealth in St. Louis; (2) the northern inner suburbs of North County were treated much like the city itself in terms of zoning and residential development; (3) disinvestment and redevelopment initiatives have caused a shortage of affordable quality housing; and (4) spatial racism and considerations of race in the development process have produced and maintained a certain spatial arrangement, marked by white flight into southern St. Louis County, and later Black flight into North County.

Gordon concludes the chapter by urging the municipal agencies and actors of St. Louis to assume a "stronger sense of responsibility for the local legacy of segregation and local inequality it has sustained."[24]

Chapter 6: From *Brown* to Brown: Sixty-Plus Years of Separately and Unequal Public Education
Kimberly Jade Norwood

Indeed, public schools remain "so separate and vastly unequal that Plessy v. Ferguson, *not* Brown v. Board of Education, *might as well be the law of the land."*—Kimberly Norwood

What is left of *Brown*? Chapter 6 explores the current state of unequal public education through the lens of Michael Brown's school district, Normandy School District, which was "predominately black, poor, and in academic distress." Norwood explores the conditions that plague urban schools nationwide, such as having few textbooks, teachers that fail to meet the lowest standards of professionalism and competence, and unattended classrooms. She also examines the effectiveness of *Brown v. Board of Education*.

The history of the Normandy School District is a heart wrenching story that is emblematic of the disinvestment and policies that have undermined the success of public schools in majority Black neighborhoods. Originally the district served almost entirely white families, but as Blacks began to move into Normandy and adjacent municipalities, including Ferguson, white families fled to the western and southern suburbs of St. Louis. Some time in the late 20th century, Normandy became the school district with the highest percentage of Black students in the St. Louis metropolitan area. Since 1991, Normandy School District was provisionally accredited because the school district failed to pass state accreditation standards. Michael Brown started kindergarten in Normandy Schools

24. Gordon, *supra* note 19, at 88; *see also* Patience Crowder, *Inequality, Economic Development, and the New Regional Community*, 43 Sw. L. Rev. 569 (2014).

around 2000. The district experienced many challenges regarding funding, the lack of quality teachers, and crowded classrooms. To make things worse, the State of Missouri in 2009 dissolved the neighboring Wellston School District, another all-Black, poor, unaccredited district and placed all of its students in the "technically-unaccredited-but-nonetheless-labeled-provisionally-accredited" Normandy Schools.[25] Many questioned the decision because there were two high performing school districts closer to the Wellston School District. These districts also happened to be in affluent, almost all-White neighborhoods. The vice president of the Missouri Board of Education commented, "The Wellston students were not going to be absorbed into any of the high performing, mostly White districts nearby. You'd have a civil war."[26]

By 2012, Normandy schools collapsed. The schools would be unaccredited by January 2013, triggering the Missouri state transfer law, which required Normandy to pay the tuition of students who choose to transfer to neighboring districts and to provide transportation. Normandy chose to provide transportation to the all-white Francis Howell School District, twenty-three miles away. Again, there were two other school districts that were higher performing and closer. In the weeks that followed, the public outcry from Francis Howell parents was somewhat unbelievable. There were stories in the newspapers and town hall meetings in which parents objected to the transfer enrollments. Normandy school children were referred to as "trash, slum kids, thugs, and rapists."[27] Parents voiced concerns about the bad influence, lower test scores, and drug use that the Normandy students might bring into the school. Yet, the transfer proceeded. Eighteen months later, the state dissolved the Normandy School District and created a new district, "Normandy Schools Collaborative (NSC)."[28] Nothing had changed, except the new district was labeled as a "State Oversight District." As a result, the transfer students at Francis Howell were asked to reenroll in this new district. A few families sued to keep their children at Francis Howell in order not to interrupt their education again. Months later, a court held that the new NSC district was "abysmally unaccredited."[29] To this day, NSC continues to struggle with academic issues, over 90 percent of its students are on free or reduced lunch, and 97 percent of the student body is Black. By the time that Michael Brown graduated from NSC, it had the worst academic record in the state.

25. Kimberly Jade Norwood, *From Brown to Brown: Sixty-Plus Years of Separately and Unequal Public Education*, *in* FERGUSON'S FAULT LINES, *supra* note 1, at 99.

26. *Id.* at 100.

27. *Id.* at 102.

28. *Id.* at 103.

29. Massey v. Normandy Schs. Collaborative, 492 S.W.3d 189 (Mo. Ct. App. 2016).

Chapter 7: If Mike Brown Were Alive, Would He Be Employable?
Terry Smith

"We will never know whether Michael Brown would be employed or employable had he lived, but chances are he would have faced long odds, as do so many young black men."—Terry Smith

Ferguson has become the poster child for structural inequality and petty law enforcement against Black citizens. Their resulting criminal histories all too often lock many individuals out of the formal economy. "It costs more than $80 billion annually to maintain the U.S. prison system, and unemployment for those with criminal records reduces GDP by as much as $65 billion per year."[30] The chapter discusses the obstacles to Blacks in the labor market and their often segregation era rooted causes. Discrimination is an obstacle for many African Americans because it restricts access to labor markets and the type of work available to them. Forty-seven percent of young adult males are unemployed in St. Louis County, compared to only 16 percent of their white counterparts. Furthermore, Blacks are three times as likely to live in poverty in St. Louis County. Smith sees the enforcement of petty crimes as the vestiges of Black codes and peonage laws in the former slave states. In Ferguson, Blacks are charged disproportionately for discretionary offenses, such as "manner of walking," the offense that Michael Brown was originally stopped for. Yet, "Ferguson is but one case study in the collateral consequences of petty-crimes law enforcement, not the least of which is the death of Michael Brown."[31] Smith recognizes that Michael Brown would have faced long odds and many obstacles to gainful employment had he not been killed.

Chapter 8: The Geography of Inequality: A Public Health Context for Ferguson and the St. Louis Region
Jason Q. Purnell

When considering the social, economic, and health characteristics of the St. Louis region, Ferguson emerges "a stark picture of the geography of inequality."
—Jason Purnell

Chapter 8 provides some useful data on Ferguson and the larger St. Louis metropolitan region. Ferguson, by the numbers, makes clear that

30. Karen Dolan & Jodi Carr, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*, Inst. Pol'y Studies 13–14 (2015) (citing Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, Ctr. for Am. Progress (Dec. 2, 2014)).

31. Terry Smith, *If Michael Brown Were Alive, Would He Be Employable?*, in Ferguson Fault Lines, *supra* note 1, at 127.

racial inequality is not limited to the criminal justice system, but extends to all social determinants of health (education, economics, etc.). Jason Purnell draws largely from *For the Sake of All: A Report on the Health and Well-Being of African Americans in St. Louis—and Why It Matters to Everyone*,[32] which was released three months prior to the fatal shooting of Michael Brown, to detail the social, economic, and health characteristics of the population of Ferguson. The report also took a historical look at the demographics and social determinants over time, honing in on the decades of inequality along racial and geographic lines.

The geography of inequality literally takes years off of the lives of residents of certain communities. In St. Louis, there is an eighteen-year gap in life expectancy at birth between babies born in a predominantly Black, high poverty, high unemployment zip code and those born in the mostly white, affluent zip code less than ten miles away.[33] Educational attainment is one of the best predictors of life expectancy. Studies have shown that someone with some college education gains 1.6 years in life expectancy. In St. Louis city and county combined, 74 percent of whites have at least some college education compared with 57 percent of African Americans. African Americans in Ferguson were more than three times more likely to be unemployed than their white counterparts, 16.6 percent and 5.5 percent, respectively. Poverty has a significant effect on health and life expectancy. Approximately one in three African American residents of Ferguson live in poverty in comparison to one in ten of the town's white residents. Forty-percent of African American households in St. Louis city and county live on less than $25,000 of income per year. Furthermore, even when socioeconomic status is controlled across households, lower socioeconomic status in neighborhoods has a negative effect on health.

Informed by research and community input, Purnell concludes the chapter with following six recommendations, which were also outlined in *For the Sake of All*, to address these problems:

(1) Invest in quality early childhood development for all children.

(2) Help low- to-moderate income families create economic opportunities.

(3) Invest in coordinated school health programs for all students.

(4) Invest in mental health awareness, screening, treatment, and surveillance.

(5) Invest in quality neighborhoods for all in St. Louis.

---

32. Washington Univ., *For the Sake of All: A Report on the Health and Well-Being of African Americans in St. Louis—and Why It Matters to Everyone* (May 30, 2014), https://forthesakeofall.files.wordpress.com/2014/05/for-the-sake-of-all-report.pdf.

33. Jason Q. Purnell, *The Geography of Inequality: A Public Health Context for Ferguson and the St. Louis Region*, *in* FERGUSON FAULT LINES, *supra* note 1, at 159.

(6) Coordinate and expand chronic and infectious disease prevention and management.

Chapter 9: Media Framing in the Black and White: The Construction of Black Male Identity
Candice Norwood

Mainstream "framing techniques continuously reduce black men to a list of stereotypes that affect their social, economic, and legal treatment in American society."—CANDICE NORWOOD

With great precision, Chapter 9 focuses on techniques, such as framing theory, used by the media to obscure facts in cases of police brutality with Black victims. Norwood argues that the news media by and large has served as a microphone for cultural racism. The criminalization, "thugification," and other stereotypes projected on Black men were ever present and, more often than not, used to discredit Black victims of state violence in the media. Norwood uses several examples of actual media coverage to demonstrate the use of the framing technique in the media. For example, after the Ferguson police left Michael Brown's body in the road for four hours and held back his parents with dogs and guns, the New York Times declared Brown was "no angel" because he occasionally smoked marijuana and sometimes listened to rap. After a thorough review of the media framing of the Michael Brown's death, Norwood reminds us that throughout the history of the United States, "whites sought to create fear of black men" by constructing false narratives and negative depictions to associate Black bodies with criminality.[34] This history continues to "shape the cognitive framework of American society."[35]

Norwood concludes the chapter by challenging and calling on journalists and news media to do a better job of policing themselves for bias rather than a grassroots effort to spark change.

Chapter 10: Psychic Pain: Residents, Protesters, Police, and Community
Kira Hudson Banks and Vetta L. Sanders Thompson

Racism and racial discrimination have health, psychological, and mental health impacts.—KIRA HUDSON BANKS AND VETTA L. SANDERS THOMPSON

Chapter 10 provides context for the psychological responses of and effects on the Ferguson community resulting from the killing of Michael Brown, the ensuing investigation, and the fight for systemic change. Drawing upon experiences in Baltimore, Chicago, and Ferguson, Banks

34. Candice Norwood, *Media Framing in the Black and White: The Construction of Black Male Identity*, *in* FERGUSON FAULT LINES, *supra* note 1, at 180.
35. *Id.*

and Thompson importantly situate the community effects of state-sanctioned violence against Black bodies within the framework of cultural, structural systemic racism, and individual discrimination. They also explore the psychosocial harm of racism on whites that often go unrecognized in the wake of police killings.

Prior trauma and mental health, social support, neighborhood quality, and conflict all affect an individual or a community's response and ability to cope with traumatic events. Banks and Thompson advocate ongoing counseling for Ferguson residents and similar communities that have experienced a history of police violence to address the trauma associated with such events and experiences.

Chapter 11: Ferguson and the First Amendment
Chad Flanders

> *In what became an endlessly playing loop, the aggressive police response to protestors decrying injustice became an instance of the very injustice that the protestors were decrying . . . and what suffered, what kept being put back on its heels, were the First Amendment rights of the people.*—CHAD FLANDERS

Chapter 11 explores the racialized aggressive, militarized police response to protestors in Ferguson as a metaphor for the killing of Michael Brown at the hands of Darren Wilson. Flanders posits that "everything people *thought* went wrong between Brown and Wilson *did* go wrong in the police response to the protestors."[36]

Flanders thoughtfully unpacks the analogous similarities between the encounter of Brown and Wilson and those seeking justice for his death and the police's militarized response. What unfolds is a narrative of the state-sanctioned violence and excessive force against Black bodies, deeply rooted in the historical oppression of Black people. Flanders raises important questions as to the First Amendment rights of Ferguson's Black citizens, although he never explicitly mentions race. The story goes something like this: a man was told to get out the street by a police officer and walk somewhere else. When the man turned toward the officer, a confrontation ensued, and the officer used aggressive potentially deadly force against the man. There was no reliable video of the encounter, and the police released only selective information to the media that was favorable to the level of force used. As a result, public perceptions were drastically different as the culpability of the police or the man and the level of force that was used. Ultimately, the incident raised important concerns as to the exercise and protection of First Amendment rights of Black citizens when encountered by police. As outlined in the Department of Justice report, aggressive police tactics were a long part of Ferguson's history. "Officers

36. Chad Flanders, *Ferguson and the First Amendment*, *in* FERGUSON FAULT LINES, *supra* note 1, at 198.

expect and demand compliance even when they lack legal authority. They are inclined to interpret the exercise of free-speech rights as unlawful disobedience, innocent movements as physical threats . . ."[37]

Flanders likens the protest in Ferguson to "speaking truth to power."[38] While that may be so, it also misses many of intended and subsequent benefits of protests and organized actions. Civil disobedience and political protest have been proven to be an effective tool of power building and grass-roots lobbying. Would there ever have been a grand jury for Darren Wilson, or a Department of Justice report on the discriminatory pattern and practice of the Ferguson Police Department, if it had not been for the mass protests in Ferguson? Would the country have ever heard of Ferguson, if not for the committed people who were brave and courageous and fueled by injustice in the wake of Michael Brown's death?

Chapter 12: The Uncertain Hope of Body Cameras
Howard M. Wasserman

> *The current discussion—in which cameras are erroneously touted as magic solutions that resolve all problems—highlights the failure to recognize [that] complexity*.—HOWARD WASSERMAN

Post-Ferguson, much of the mainstream policy debate around police reform focused on the benefits of police body cameras. In some spaces and media outlets, body cameras were touted as the silver bullet to create a more just policing culture. Wasserman asserts that the support for body cameras was widespread and favored by both communities and activists and police advocates. I disagree. A number of organizations and activists are opposed to body cameras and the police and expressed concerns that such equipment could be just another means to conduct surveillance of Black and low-income communities. However, the proponents of body cameras tout them as a tool to achieve both transparency and accountability for both police and the citizens they encounter. The argument in support of body cameras often goes something like this. First, body cameras will encourage police and the public to behave better during encounters because the body cam video could be used as potential evidence of police misconduct or law breaking. Secondly, if there is unlawful conduct, the body camera will provide neutral and objective evidence of the police-citizen encounter. Thirdly, body cameras will lead to less police abuse and citizen complaints and provide important evidence during the review process or litigation.

Ultimately, Wasserman asserts that police body cameras are likely to be a net positive. Yet, he warns that there must be an honest recognition of

37. *Id.* at 210 (quoting *Investigation of the Ferguson Police Department*, *supra* note 10, at 2).

38. *Id.* at 211.

their limitations to improve policing or provide transparency. Specifically, Wasserman warns that (1) body cameras may not influence police behavior; (2) video evidence of police encounters can be interpreted differently by viewers; (3) law enforcement still has the power to enact policies regarding the use of body cameras; (4) police may still withhold body camera footage, as was the case of Laquan McDonald in Chicago; (5) video evidence of police misconduct does not necessarily lead to a conviction of a police officer, as in the case of Eric Garner in New York; and (6) from the physical perspective of the police officer, the footage may not adequately capture the encounter and actions of the officer.

Additionally, the other main problem with focusing on police body cameras as a means to reform policing is that this solution is completely reactionary. The video is not valuable or reviewed until something goes wrong. If the police do engage in excessive force or wrongfully engage in lethal force, the body camera will in no way be useful until it is too late. Moreover, many are concerned that body cameras will also become another tool of surveillance in Black and low-income communities. As detailed in Simone Brown's recent book, *Dark Matters: On the Surveillance of Blackness*, the targeted surveillance of Black people and Black bodies dates back to slavery and has continued to be a fact of life for Black people in the United States.[39] For example, the Baltimore Police Department's operation of a secret massive aerial surveillance program was revealed in 2016. The new technology, financed by a private benefactor through a local community foundation, captured the movements of persons in and out of Baltimore's primarily Black neighborhoods.[40]

Chapter 13: Policing in the 21st Century
Tracey L. Meares

> *People are motivated more to comply with the law by the belief that they are being treated with dignity and fairness than by fear of punishment. Being treated fairly is a more important determinant of compliance than formal deterrence.*—TRACEY MEARES

Public trust and the perception of fair treatment is key to the rule of law and basic functions of government, including policing. Procedural justice is the perception of fair treatment. Studies have shown that citizens are more likely to comply with the law when they perceive they are being treated fairly and trust those who enforce the law. As a result of this evidence, the Twenty-First Century Policing Task Force, of which Tracy

39. SIMONE BROWN, DARK MATTERS ON THE SURVEILLANCE OF BLACKNESS (2015).

40. Kevin Rector & Luke Broadwater, *Report of secret aerial surveillance by Baltimore police prompts questions, outrage*, BALT. SUN, Aug. 24, 2016, http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-secret-surveillance-20160824-story.html

Meares was a member, crafted its recommendations on building trust and legitimacy.[41] Meares emphasizes the importance of three of the task force's recommendations. She advocates that law enforcement (1) "embrace a guardian mindset"; (2) acknowledge the historical and present role of police misconduct, discrimination, and oppression in Black communities; and 3) acknowledge the reality that aggressive policing often has a counterproductive effect on community public safety because public trust is associated with compliance.[42] Meares suggests that police agencies emphasize the imperative of procedural justice and legitimacy-based approaches in ongoing officer training, strategies and tactics of departments, and community participation efforts of police.

III. Conclusion

How do we thoughtfully unpack not only the killing of Michael Brown, but also the structural racism and inequitable systems that shaped his community and life experiences in Ferguson? These systems, and the historical policies that have created and sustained them, represent the racial fault lines in Ferguson and, more broadly, in the United States. Since the founding of this country, crafted systems of racial oppression have subjugated Black people and ultimately continue to divide our citizenry.

By using the St. Louis-Ferguson metropolitan area as a lens, *Ferguson Fault Lines* details some of the formative ways in which the institutionalized racial oppression of Black people has created the present day reality of discriminatory policing practices. What the book shows us is that it is impossible to understand the truth about modern day racism and police misconduct without first understanding (1) the contemporary policies that have created the inequitable conditions and uneven development in which discriminatory police practices are possible, and (2) the troubling way in which police have been regarded as a solution to inequality and social strife caused by spatial racism and discrimination. In other words, state-sanctioned discriminatory policies of both physical and economic violence are intertwined, cyclical, and compounding. But for uneven development and segregation, police would not be able to target Black and low-income communities so precisely.

Furthermore, uneven, pro-growth development policies continuously create crises in non-affluent Black neighborhoods or those communities deemed unworthy of investment or development. This often leads to the hollowing out of adequate municipal services and infrastructure. Furthermore, the rise of neoliberal policies in city governance has exacerbated

41. President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (May 2015), https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

42. Tracey L. Meares, *Policing in the 21st Century*, *in* Ferguson Fault Lines, *supra* note 1, at 246–47.

inequality and abated community control. In turn, the criminal justice system, and police in particular, have been peddled as the primary solution to spatial inequality, poverty and unemployment, and financial subsistence for other city services. This has led to wide disparities in the life expectancies between Black and white babies born in the same city on different sides of invisible boundary lines. Consequently, both discriminatory, predatory policing and the economic violence of everyday Black life are killing Black people in this country. Both must be addressed to make meaningful progress.

To make #BlackLivesMatter, we must make Black neighborhoods matter. Nothing perhaps drives this point home more than the death of Freddie Gray, an unarmed Black man who suffered a fatal severe spinal injury while in Baltimore police custody in April 2015. Gray was initially targeted by police because he made eye contact with an officer and began to run away. Otherwise, Freddie Gray was simply outside in his neighborhood not far from where he lived. None of this would have been suspicious or interesting to police officers, except he lived in Sandtown-Winchester, a poor Black neighborhood in Baltimore. He was ultimately targeted because of the economic conditions and racial makeup of the place where he was born. What's more, Freddie Gray's autopsy showed he was suffering from severe lead poisoning as a result of the crumbling paint of the $300/month row home where he lived with his family. More than 65,000 children in Baltimore have tested positive for unsafe elevated levels of lead in their blood, which can lead to brain damage, memory loss, hearing impairment, stunted growth, hyperactivity, kidney damage, seizures, coma, and death.[43] Most of these children come from neighborhoods like Sandtown-Winchester. So the sad truth is Freddie Gray was likely to die due to the policies that created the conditions such as those in Sandtown-Winchester, if not at the hands of the Baltimore police.

But why Ferguson? What makes the racial chasm in Ferguson and St. Louis so vast that the fissures and fault lines erupted in 2014? To answer that question, we have to understand that history and context matter; place matters. The history of St. Louis is one that is particularly rife with racial subjugation and discrimination. As Colin Gordon has said, "Missouri has a tradition of anti-black racism and white supremacism more typical of a former slave state. On the other hand, it has levels of housing segregation, and its attendant social ills, more characteristic of

43. *Baltimore City, Sandtown-Winchester/Harlem Park 2011 Neighborhood Health Profile*, BALTIMORE CITY HEALTH DEP'T, Dec. 2011, http://health.baltimorecity.gov/sites/default/files/47%20Sandtown.pdf; *see also* Deborah Bailey, Am. Soc'y for Pub. Admin., *Freddie Gray and Lead Poisoning*, PA TIMES, Mar. 11, 2016, http://patimes.org/freddie-gray-lead-poisoning/.

Northern states."[44] As the main city center of the State of Missouri, St. Louis is a place that perhaps was exceptionally ripe with racial resentment. Similarly, Baltimore is also the main city center of a slave border state, Maryland. The police killing of Freddie Gary in 2015 sparked similar protests to erupt in what is now referred to as the Baltimore Uprising.

As cities began to use zoning for the first time in the early 20th century, St. Louis was one of the first cities to pass an ordinance racially segregating neighborhoods; Baltimore was the first to pass such a law in 1910. Blacks were by and large shut out of home ownership opportunities by realtors, developers, and white homeowners through restrictive covenants. Black communities were located in the commercial or industrial part of the city and suffered a number of negative health effects as a result. Federal housing policies compounded the problem with the creation of the Federal Housing Authority in 1934. The new federal agency-backed home loans encouraged a wave of home ownership of whites. However, the FHA explicitly refused to guarantee loans to Blacks or for properties that were in majority Black neighborhoods. This policy and practice of redlining continued well in to the late 1960s. The construction of federal highways in the 1950s also gave way to white flight to the southern suburbs of St. Louis city because the majority of Blacks lived in the city at the time. This, in part, led to the establishment of over ninety distinct municipalities in St. Louis County with fifty-eight distinct police departments and a slowly collapsing tax base and an increase in vacant and abandoned buildings in St. Louis city proper. As the effects of deindustrialization began to take hold and blue collar jobs dried up, Blacks who remained in the city faced enormous challenges to sustain their families.

Furthermore, during the period of urban renewal in St. Louis, many Black families were displaced and dispossessed as the city razed public housing buildings to make way for new office buildings or concrete parking lots. Many Black families, in their search for affordable housing, began to move to the inner ring northern and western suburbs. As a result, St. Louis is the fifth most segregated city today. Racial and economic segregation largely shape the experiences, opportunities, and burdens of its residents. The racial divide between the north and south St. Louis metropolitan region is palpable and pronounced. This spatial segregation forecloses many other important resources and opportunities, such as adequate infrastructure and sidewalks, quality public schools and education, adequate public transportation, and other important public services.

Disinvestment and coordinated abandonment of entire neighborhoods is now common place in both urban and increasingly suburban environments.

---

44. Daniel Marans & Mariah Stewart, *Why Missouri Has Become the Heart of Racial Tension in America*, Huffington Post, Nov. 16, 2016, http://www.huffingtonpost.com/entry/ferguson-mizzou-missouri-racial-tension_us_564736e2e4b08cda3488f34d (last visited Mar 10, 2017).

As a result, in poor majority Black neighborhoods, such as Ferguson, schools are more likely to be underfunded, failing, or closed; residents are more often denied financing to purchase or rehab a home; police are more likely to enforce petty low-level crimes; unemployment rates are often two, if not three or four, times higher than in neighboring middle-class majority white neighborhoods; and access to basic needs (including health care, public transportation, fresh food, and grocery stores, etc.) often go ignored. This kind of economic and social violence breeds resentment of the current socio-economic political arrangement and gives way to unrest and resistance. The government's response to such resentment and unrest has been more aggressive policing. Instead of dealing with problems created by racial and class inequality, we criminalize those who experience the brunt end of these issues. Uneven, pro-growth development and aggressive policing exacerbates inequality and significantly harms Black communities. The police have become the solution for cities and citizens who are suffering from joblessness; substandard housing; underfunded education; and negative public health issues, such as crime or environmental issues.

All is not lost: the events in Ferguson have lead to meaningful community-based change. In the spirit of the long history of community organizing in St. Louis, new community-based groups were formed, and existing organizations created wide-tent coalitions to collectively advance their organizing efforts. Organizations such as Solidarity Economy St. Louis, Million Hoodies' Movement for Justice, Ferguson Action, Law4BlackLives, Organization for Black Struggle, Hands Up United, Movement for Black Lives, and Ferguson Response Network, to name a few, have not only organized to challenge discriminatory policing but also have raised issues about the economic violence that poses an everyday threat to individual and community safety and security, such as the lack of access to basic human needs—food, work, and housing. Many of these organizations explicitly challenge the current political economy in their mission or their work. I am hopeful that community-based organizing and action, in which low-income Black community members have both agency and power, can transform the inequitable conditions of Ferguson, and beyond. Furthermore, government agencies in cities around the country should implement a racial equity analysis for all future policies and take affirmative steps to address the geography of inequality and legacy of segregation that they have helped to create and sustain.

COMMENTARY

Ferguson: Undoing the Damage of the Past—Creating Community Wealth

Sandra M. Moore

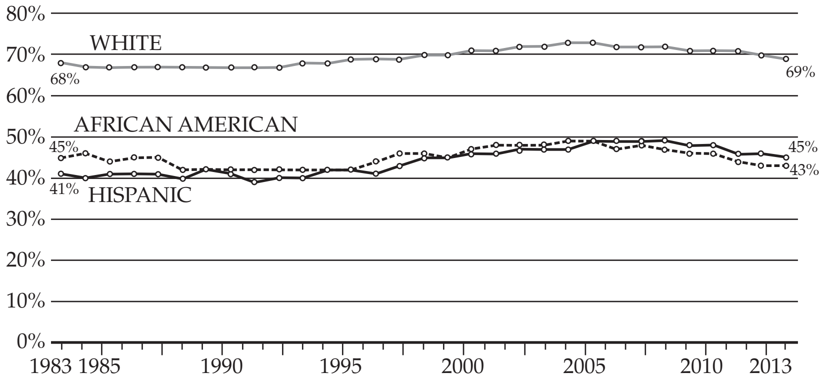
The massive relocation on the North side chronicled in Colin Gordon's essay, "Making Ferguson Segregation and Uneven Development in St. Louis and St. Louis County,"[1] disinvestment driven by impermissibly based restrictive covenants, racial steering by real estate developers, and discriminatory exclusionary zoning practices is evidence of an intentionally irresponsible, reckless approach to neighborhood development. Much of the approach has been examined by the courts and protections against the constitutionally illegal components have largely been put in place. However, the damage from the earlier practices has been done and the course of devaluation of real estate at the individual, neighborhood, and community level has taken its toll, leaving us with deeply poor, equity-barren neighborhoods, such as those in Ferguson and around the country.

According to Gordon, four main elements contributed to setting the table for the Ferguson unrest: (1) Systemic discrimination and disinvestment in Black neighborhoods produced a stark disparity between Black and white wealth; (2) The inner suburbs of North County had an uncertain and liminal status, and enclaves of white flight followed similar development and zoning patterns as in the City; (3) Decline and disinvestment on the "northside"[2] of the city created pressures on affordable housing stock in the inner suburbs in North County; and (4) The racial premises

1. Colin Gordon, *Making Ferguson: Segregation and Uneven Development in St. Louis and St. Louis County*, *in* FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION 75–91 (2016).

2. *Id.*

Sandra M. Moore (smoore@advantagecap.com) is the former president of Urban Strategies Inc. Ms. Moore left the organization in early 2017 after serving sixteen years as president and joined Advantage Capital Partners, a national investment firm, as Managing Director/Chief Impact Officer. *Ms. Moore wishes to recognize the outstanding work of Marissa Cohen, MSW, who as President's graduate intern served as the primary researcher for this comment.*



Source: Urban Institute calculations from Current Population Survey 1983–2013.

of both development and redevelopment created and sustained a pattern of population movement in greater St. Louis.[3] Like Gordon, others assessing the revitalization of communities point out persuasively that the way in which communities are developed can and did foster deep erosion of wealth in Black communities. As indicated in the chart above, Gordon reminds us "By almost any economic metric (unemployment, job quality, wages, incomes), the gap between white and black Americans is sustained and substantial, but the starkest gap, in this respect, is in wealth. The racial gap in wealth reflects gaps in the rate of homeownership, the tenure of homeownership, and the terms of homeownership."[4]

These sharp gaps are the indicators of the difference between healthy communities and distressed communities. These large gaps in wealth have been generated in part by federal, state, local, and real estate policies and practices. Close examination of the destruction of land-based wealth opportunities, such as what occurred in Ferguson, reveals that little has been put in place to actively redress the loss of value or to ensure that practices (new or old) that could lead to the same devaluing results do not reappear.

Any efforts to undo the damage of the past must necessarily focus on how to rebuild wealth in the real estate development equation for low- to moderate-income communities. Any efforts to undo the damage of the past must necessarily focus on building wealth for the minorities living in those communities who have been disproportionately economically disadvantaged by irresponsible and reckless policies, procedures, and practices.

This commentary briefly examines ideas related to structural approaches with promise for redressing the devaluation and destruction

3. *Id*. at 82.
4. *Id*.

of real estate-based, personal and community equity, i.e., wealth, for low- and moderate-income residents.

Before moving to a broad discussion of approaches to address this massive disinvestment, we need to look briefly at the wealth-creating proposition as it is framed here. Volumes have been written over the last twenty years or so about wealth inequality and the reasons for it.[5] There is no dispute, however, on the most basic tenets for creating individual and household wealth: increase income, increase assets, and diminish liabilities. The result is increased net worth or, for the purposes of this article, improved wealth position.[6]

At this most basic level of analysis of wealth creation, improving household income and the value proposition of housing owned by low- and moderate-income families is key.[7] While homeownership has typically been seen as the fastest road to increasing the wealth position for low- to moderate-income Americans, the homeownership crisis of 2008 and beyond has caused many advocates of attacking the wealth disparity between whites and Blacks to shy away from homeownership as the first tool to be used from the wealth creation tool box. Without wading too deeply into the theoretical discussion on the pros and cons of homeownership, suffice it to say that thirty-eight years of experience of Urban Strategies[8] working with thousands of very low-, low-, and moderate-income households teaches us that homeownership tools, intentionally applied with a focus on diminishing

---

5. Signe-Mary McKernan et al., *Less Than Equal: Racial Disparities in Wealth Accumulation,* URB. INST., http://www.urban.org/research/publication/less-equal-racial-disparities-wealth-accumulation/view/full_report; Urban Inst., *Nine Charts about Wealth Inequality in America*, http://apps.urban.org/features/wealth-inequality-charts/.

6. Meghan Kuebler, *Closing the Wealth Gap: A Review of Racial and Ethnic Inequalities in Homeownership*, 7:8 SOC. COMPASS 670–85 (2013).

7. *Id.*

8. Founded in 1978, Urban Strategies is a national leader in the field of community development, supporting more than 25,000 low to moderate-income families, approximately 100,000 individuals, in eighteen communities in eleven major metropolitan areas. The indirect impact of the work in these communities reaches hundreds of thousands of the most vulnerable families in the nation.

The Urban Strategies approach uses housing as a platform for building families and viable neighborhoods. Employing a place-based framework, Urban Strategies uses local resources to capitalize on the inherent strengths of the community, while concurrently working with developers, to create necessary new facilities and amenities that complement human service systems. It is from that national vantage point that the effect of increasing household income is observed. Sandra M. Moore, as the second president of Urban Strategies, grew the service scope from a few thousand households and partners in St. Louis to tens of thousands of homes and families in multiple cities across the nation. Together with an array of developer partners, Urban Strategies' annual operating revenue has grown from a few hundred thousand dollars to the level of a strong mid-sized national not-for-profit organization.

the wealth disparity and protecting against it, can be the right wealth building tools despite the recent economic crisis.[9]

Aside from homeownership, the next best tool is increasing household income while diminishing household indebtedness.[10] The first objective is amenable to structural change; the latter is best attacked by behavioral change. Urban Strategies has seen how both objectives can be achieved in its work with thousands of low- to moderate-income families over the past several decades to improve the economic and social well-being of individuals and families in revitalizing communities where affordable housing leads the transformation. Urban Strategies has found that with significant household income increases and support for the development of economic independence, low- to moderate-income households start to make decisions, i.e., saving, educational attainment for parents and children, and real estate purchases as ready and informed buyers, that lead to increased wealth opportunities.

There are two primary strains of thought in the affordable housing world regarding how to use place as a platform for improving the wealth position of low- to moderate-income families. We will look at the two prevailing approaches to explore how to best combat the disinvestment of the past and strengthen average individual, family, and community wealth going forward.

The Landscape

There is an existing train of thought in the affordable housing world that urges accelerating affordable housing development in communities with existing and rising opportunity. This approach is referred to here as the "opportunity" methodology. There is complementary thinking and an approach that focuses on making the existing disinvested place better or creating locus of opportunity out of the prior disinvested place. This approach is referred to here as the "mixed-income methodology."[11] It is the author's position that these two strains of thought and approaches are complementary—an opinion based on years of work with low- and moderate-income residents attempting to move up the economic ladder.[12]

The general tenet behind the "opportunity" approach is that the net outcome of improving overall life conditions for the occupants of affordable housing will accrue more quickly with their move to communities of opportunity. Housing that low- and moderate-income families can afford should be developed or otherwise be made available in places with established economic, social, and civic infrastructure that low- to moderate-income families can connect with to get on with improving their lives. Where affordable for-

9. Jordan Rappaport, *The Effectiveness of Homeownership in Building Household Wealth*, 95:4 ECON. REV. 35–65 (2010).

10. Keubler, *supra* note 6, at 670.

11. RADHIKA F. FOX & SARAH TREUHAFT, SHARED PROSPERITY, STRONGER REGIONS: AN AGENDA FOR REBUILDING AMERICA'S OLDER CORE CITIES 27–38 (2006).

12. *Supra* note 8.

sale housing is included in the housing options, homeowners buy into an equity positive housing environment, thereby immediately improving their actual wealth basis. Because of the level of "opportunity" in these communities, arguably more access to jobs, better transportation to make working more feasible for low- and moderate-income families, better schools and educational opportunities for all members of the family, low- to moderate-income renters and homeowners alike improve their wealth creation opportunities.[13]

The challenge with this approach, however, is three-fold:[14]

(1) The disinvested neighborhoods from which the target families moved and the families left behind are stuck. There is no plan for addressing the drain of wealth that the communities were either built upon or acquired over time;

(2) Without some scale and intentional connection to the building blocks of equity and wealth, the wealth proposition of low- to moderate-income families moving into communities of opportunity will not improve;

(3) Low- to moderate-income families observing the approach tend to distrust the articulated rationale of moving to increase the opportunity for participating individuals and families, most often concluding that the movement is just a way of clearing land for more profitable development opportunities.[15]

The mixed-income methodology urges the development of an array of housing types and tenure, with a clear protection of a percentage of the housing at affordable levels; affordability is generally defined by community and funding stream standards. The general tenet underlying the thinking in support of the mixed-income methodology is that the approach changes the place while protecting affordability.[16] The approach advocates changing the place to one where real estate investment draws other investment, and increased investment in the place over time restores equity and equitable wealth creation. Moreover, with time, individual and community wealth accelerates under the mixed-income methodology.

13. FOX & TREUHAFT, *supra* note 11, at 27–29.

14. Robert J. Chaskin & Mark L. Joseph, *'Positive' Gentrification, Social Control and the 'Right to the City' In Mixed-Income Communities: Uses and Expectations of Space and Place*, 37:2 INT'L J. OF URB. & REGIONAL RES. 369, 481–84 (2012).

15. Challenge three is drawn from the author's sixteen years of experience working directly with low- to moderate-income families in transitioning neighborhoods and is based on anecdotal observations during focus group sessions conducted in such neighborhoods as part of the initial information gathering stage of Urban Strategies' work.

16. Mark L. Joseph, Robert J. Chaskin & Henry S. Webber, *The Theoretical Basis for Addressing Poverty Through Mixed-Income Development*, 42(3) URB. AFF. REV. 369, 371 (2007).

There are examples of improvements in household income, home values, and increasing rental rates, all of which are markers of improving individual and community wealth, in mixed-income methodology neighborhoods across the country. Looking nationally in places where Urban Strategies has worked, such as central city New Orleans, there is evidence of improved wealth positioning at both the individual and community level. In New Orleans' Harmony Oaks community, household income climbed steadily among the low- to moderate-income dwellers of subsidized housing who received intentional support to improve their economic position. When low- to moderate-income heads of household are queried now, some ten years later, they report improved living conditions and earned income after the rebuild approach took hold. There are early reports of increased household income and community value in San Antonio after only four years of implementation of the mixed-income methodology; and good markers of improved income in Pittsburgh after only the first few years of implementation of the mixed-income methodology.[17] Looking at the St. Louis community, there are similar positive effects in the Grand Arts district where the Renaissance Place at Grand mixed-income community sits and emerging good results at the North Sarah mixed-income development on the northern side of the very vibrant central west-end neighborhoods.[18] In a 2016 data analysis by the Department of Housing and Urban Development of seven cities where the Urban Strategies team was working with developer partners in the implementation of the mixed-income methodology in specific low income housing communities, annual increases in household income for the low-income households impacted by the development were demonstrated in six of the seven locations.[19] When tracking objective evidence of improvement or simply sitting with family and community leaders in discussion, communities engaged in the mixed-income approach report improvements in place and people, as well as improvements in wealth creation and the wealth building factors of income and real estate value at the rental and homeownership levels.

Similar good results are being shown by an array of developer teams using the mixed- income methodology to drive comprehensive revitalization in places such as Boston, San Francisco, Seattle, and Chicago.[20] These teams do not include Urban Strategies.

Admittedly, the mixed-income methodology lifts these very important opportunities for wealth creation over time, but not without cost. The

17. 2011–2015 American Community Survey 5-Year Estimates, U.S. CENSUS BUREAU (median home value values in zip codes 78202 and 15206, respectively); U.S. Dep't of Housing & Urb. Dev., *Choice Neighborhoods 2015 Grantee Report*, www.hud.gov/hudportal/documents/huddoc?id=CNGranteeReport2015.pdf.

18. 2011–2015 American Community Survey 5-Year Estimates, U.S. CENSUS BUREAU (median home value values in zip codes 63106 and 63113, respectively).

19. *Choice Neighborhoods 2015 Grantee Report*, *supra* note 17.

20. *Id*. at 12.

challenge with the mixed-income methodology, as Urban Strategies has viewed it through the lens of the impact on low- to moderate-income individuals and families, is:

(1) The so-called "gentrification" of the revitalized community with all of its real and perceived negative consequences. There are indeed real consequences of accelerating the improvement of the wealth base of a disinvested community by implementing a mixed-income housing approach, the most catastrophic of which is the ultimate pricing out of low- to moderate-income families from the community.

(2) Less cataclysmic, but equally challenging, is the rebranding of the community such that, even though, affordability is maintained, low- or moderate-income families do not feel welcome. The community feels as though it has become exclusively for the "wealthy."

(3) An exceedingly challenging issue is the increase in real estate values, the resultant increase in real estate taxes, and the inability of original homeowners to keep pace, even while their property values increase. Increased property values do in fact improve wealth basis but provide nothing for a cash-strapped owner who needs to pay a higher real estate tax bill.[21]

So both approaches, moving to communities of opportunity, as the former approach has been called, and improving place and the people who live there, as the mixed-income model has been dubbed, are fraught with prospects and pitfalls.[22]

Without directed action to reverse disinvestment and promote equity, either approach can weaken the wealth position of the low- to moderate-income household. However, if real estate and housing are to be properly used as the scaffolding for rebuilding wealth in victimized communities, the author sees the greatest promise for improving the wealth position of low- and moderate-income households with the mixed-income approach. The mixed-income methodology begins to rebuild the place where the disinvestment occurred as the first step toward equitable redress. The mixed-income approach presents the strongest opportunity for building at sufficient scale to stabilize a struggling place while catalyzing investment. The mixed-income methodology provides an opportunity to target resources to increasing household income as part of the rebuilding model and finally, the mixed-income approach, which purposefully adds households with a range of incomes and a corresponding broader range of neighborhood options, creates the market pressure that can protect and promote the investments.[23]

21.

22. Joseph et al., *supra* note 16.

23. *Id*. The author acknowledges that are no places where implementation of the mixed-income approach has been perfect, producing all of the positive results discussed on pages 302–303 in one place. However, the mixed-income approach

Valuation, Equity, and Wealth Creation

First and foremost, whether building mixed-income rental or for-sale housing to catalyze investment in a disinvested area or building in areas of opportunity and growth, the real estate must be developed in such a way as to increase its value. This means the housing must be top quality with market amenities. What Urban Strategies has seen repeatedly is that building at or above the market in opportunity areas provides the low- to moderate-families moving into the housing the opportunity to stabilize, without stigma around their housing, so that they can then begin to work on improving household income.[24]

Building at the desired market level in disinvested communities is essential to attracting other investments and to stabilizing low- to moderate-income individuals and families in quality housing. Doing so provides individuals and families living in their revitalizing neighborhood the opportunity to take advantage of the new investments of better streets, roads, bridges, transportation, and job opportunities that can be planned as part of the mixed-income methodology.

The impact on homeowners in either approach, when the housing meets or exceeds the "best" community housing standard is immediate and direct: homeowners acquire housing with equity and wealth creation opportunity. This in many respects is the exact opposite of what happened in the development of communities like Ferguson.[25]

> *In Ferguson, incorporation happened first—so from the start Ferguson housing stock and lot sizes were smaller and of less value; when the crash happened in 2008–2012, the die was already cast for the double whammy of the exodus of the rising class and the acceleration of the struggling class to the area. (Gordon 2016, p.84)*

In addition to building to the market, protecting valuation, and promoting valuation increase over time, redressing the equity drain requires that the notion of increasing household income be ingrained as a community development objective. Part of the master planning for the rebuilding approach must include planning for increasing household income. Planning for economic mobility for the affordable households that will inhabit the

provides clear examples of the improvements in key wealth indicators that are possible as well as lessons learned regarding reaching those successes.

24. *See* Sandra M. Moore, *Southeast Ferguson: The Transformation Opportunity or Is Decent and Affordable Good Enough?*, 24:2 J. Affordable Housing & Cmty. Dev. L. 257 (2015).

25. *Id.*

area is as important a tool for rebuilding equity as protecting the valuation of the real estate. For people-support practitioners such as the author, planning and implementing best practice strategies for improving and raising household income are the most important parts of the redress disinvestment equation. The plan for increasing household income will necessarily require thinking about the restoration and equitable distribution of transportation and access to cutting-edge job centers. Retraining our community development operating systems to effectively use financing and funding tools to increase household income will redress disinvestment and ensure against slipping back to old community development practices like those that produced the devaluation issues in Ferguson.

So the question becomes: can we focus on creating and protecting valuation by building to the highest standard infusing equity into the development program where possible and intentionally providing opportunity to increase household income in the production of affordable housing as the revitalization platform for formerly disinvested communities?

More specifically, can we speed up the production of affordable housing communities with wealth creation opportunities while protecting affordability? Can we redirect the positive impacts of so-called "gentrification" to increase individual and community wealth opportunity and decrease real or perceived wealth inequity? There is evidence to suggest that "yes, we can."[26]

> *Katrina's Window: Confronting Concentrated Poverty Across America* (Berube & Katz, 2005) details a series of tools used during the economic boom of the 1990s to increase affordable housing production of sufficient scale, coupled with other policy and practice tools, such as the earned income tax credit, to spur significant improvements in housing quality equity and modest improvements in wealth creation measured in the traditional way with regard to homeownership and measured using increased income as a proxy for low- to moderate-income renters.

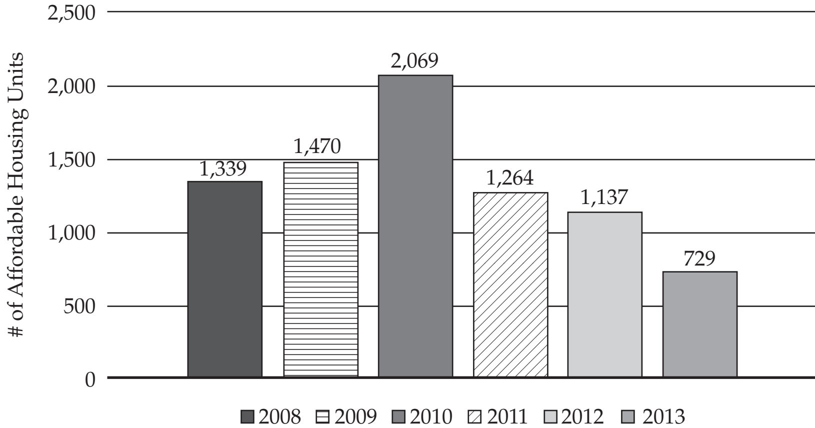
Despite the success and opportunities detailed by Berube and Katz,[27] it is not clear that we are on a path to accelerating what we know works.[28]

---

26. Chaskin & Joseph, *supra* note 14, at 481.

27. Alan Berube & Bruce Katz, *Katrina's Window: Confronting Concentrated Poverty Across America* at 7–9, Brookings Inst. Metro. Pol'y Program (2005), https://www.brookings.edu/wp-content/uploads/2016/06/20051012_Concentratedpoverty.pdf

28. Signe-Mary McKernan, Caleb Quakenbush, Caroline Ratcliffe & Eugene Steuerle, *Wealth in America: Policies to Support Mobility*, at 1 (2014), http://www.urban.org/sites/default/files/publication/32671/413186-wealth-in-america-policies-to-support-mobility.pdf.



* Data retrieved from: https://lihtc.huduser.gov. The decline in affordable housing production was of course influenced significantly by the general economic downturn in the state and nationally in 2008/2009. The uptick in 2010 is currently unexplained. Production since 2013 has begun to climb modestly but not at a pace and scope sufficient to address the pressures of Ferguson. If the modest increases in production in Missouri are mirrored in in other states the outlook for the future for low and moderate income households in search of housing as a platform for improving their economic and social position is bleak.

In Missouri and many other states, there has been a decline in affordable housing production with the most serious decline occurring with the production of affordable family housing.[29] The decline in production is happening as the pressure on suburban communities, such as Ferguson, to provide more and more equitable opportunities via housing, jobs, and transportation has been increasing.[30] The Ferguson stressors are beginning to show up in ex-urban and rural areas as the migration of low- and moderate-income families away from central cities has continued. If the swift slide backwards in affordable housing production continues and the decrease in comprehensive neighborhood development in distressed urban and suburban communities that we are seeing in Missouri is repeated in other states, we will clearly need to do more than is even recommended by the masters Berube and Katz.[31]

29. U.S. Dep't of Housing & Urb. Dev., LIHTC Database Access, https://lihtc.huduser.gov.

30. Donna Kimura, *Missouri to Consider Big LIHTC Changes*, Affordable Housing Fin. (Mar. 24, 2015), http://www.housingfinance.com/policy-legislation/missouri-to-consider-big-lihtc-changes_o.

31. Berube & Katz, *supra* note 25, at 7–9.

As we move into a new era of housing policy via new federal and state administrations, is there an opportunity to fully implement existing policy or develop new ones that will improve wealth for low- to moderate-income households and communities?

What if . . .

(1) We view housing tax credits as a tool for wealth creation—as such, credits would increase support for both production of affordable housing[32] and in addition target the expansion of credits for existing and new homeowners in the developing or target area, thereby creating multiple opportunities to increase the equitable stake by those homeowners, many of whom have suffered through the generations of irresponsible and/or reckless housing development policies.[33]

(2) We favor the development of mixed-income communities at sufficient levels of scale in stretches of disinvested urban, suburban, and even rural communities with affordable housing needs. Mixed-income housing development is a logical and natural, if admittedly complex, tool to increase individual and community wealth because of the evidence that the approach (a) attracts income to the geography and (b) fuels increased value over time, housing value, neighborhood economic vitality, and household stability and wealth.[34]

(3) We create new opportunities for homeownership, such as protected lease purchase opportunities for moderate-income workers with homeownership tax benefits allowed for a portion of the lease payment. This type of tool would need to be tightly regulated given its potential for predatory activity. Or broaden the availability of the mortgage interest and property tax benefits of homeownership so that low- to moderate-income households that don't typically itemize deduction and therefore do not access these wealth creating tax benefits could do so. Typically, these households do not itemize deductions because they do not have enough tax outlay to do so.[35]

(4) We retool old and existing tax credits, such as the Work Opportunity Act Tax Credit (WOTC), so that individuals, whether renters or homeowners, who work in the development or target area receive direct benefits for getting a job as the community is revitalizing. Typically, WOTCs have been awarded to employers so the employer is incentivized to hire but not necessarily to keep employees or move them toward high paying jobs.[36] The retooled credit should create incentives

32. *Id.*
33. LIHTC Database Access, *supra* note 27.
34. Fox & Treuhaft, *supra* note 11.
35. McKernan et al., *Wealth in America*, *supra* note 26, at 3.
36. Fox & Treuhaft, *supra* note 11, at 51.

for both the employer and the employee. There is also evidence of improved personal performance across an array of areas in recent pay-for-outcomes models.[37] The success of this evidence-based strategy should be replicated in a set of approaches designed to get people to work, climb, and save as the first steps of wealth creation. Urban Strategies has for years employed incentivizing approaches, such as those used in Social Innovation Fund (SIF)[38] projects, with enormous success. All of the following approaches have succeeded in eventually increasing real household income or the likelihood of increased household income in the future: incentivizing low- to moderate-income heads of households to engage in educational programming to increase their employability or promotion potential; incentivizing parents to improve school attendance rates of children, youth, and young adults as part of encouraging school success; and incentivizing low- to moderate-income adults to engage in healthy living habits as a method of increasing the ability to work. Pay-for-success approaches have been roundly challenged and often criticized, but practitioners can show that when carefully used they can and do work at the individual and household level.[39]

These are all options available to us—options within reach of policies and approaches that have been tried before with varying degrees of success. But we recommend the modifications outlined here. These modifications are rooted in the experience of practitioners whose mission is to place vulnerable individuals, families, and the communities where they live, at the center of solutions thinking. That experience suggests that the greatest challenge to community wealth creation may be the failure to be intentional about increasing personal wealth as part of the community development, affordable housing production process. The history of U.S. housing policy suggests that the poor are generally not expected to create wealth as part of their ascension in the American dream. We must dispel this notion and purposefully insert wealth creation in the housing development equation across all income levels and all housing tenures. Despite the challenges, this is the pathway out—the methodology for reversing the damage of seventy-five years of housing-based, place-focused destruction of wealth opportunities for individuals and communities. Will we do it?

37. William Jack, *Social Investment Funds: An Organizational Approach to Improved Development Assistance*, 16(1) World Bank Observer 109, 118 (2001).

38. Corp. for Nat'l Cmty. Serv., *Social Innovation Fund*, https://www.nationalservice.gov/programs/social-innovation-fund

39. *Getting Results, Transforming Lives: The Social Innovation Fund 2010–2012 Investment Report*, Corp. for Nat'l Cmty. Serv. (2013), https://www.nationalservice.gov/sites/default/files/documents/sif_investment_report2013_0.pdf.

Deconstructing Philadelphia's "Blueprint" Project: A Unique and Effective Multiyear Partnership to Expand Permanent Supportive Housing

Marcella Maguire

Introduction

The Philadelphia Blueprint Project is a historic partnership among the city's Department of Behavioral Health and Intellectual Disabilities (DBHIDS), the Office of Homeless Services, and the Housing Authority that aligns resources between affordable housing and Medicaid Supportive Services to create a unique and effective Supportive Housing Program that has housed 1,200 people since 2008.[1] The Blueprint program has had an 87 percent success rate in preventing a return to homelessness for men and women who have serious mental illness, substance use disorders, and/or concurrent disorders and who have had long-term or chronic homelessness.

The multi-year agreement between the City of Philadelphia and the Philadelphia Housing Authority (PHA), known as the Blueprint, provides for a portion of affordable housing resources to be targeted to the community's most vulnerable population—those sleeping on our streets—and combine them with services, creating a homegrown Permanent Supportive Housing[2] program. The "city" encompasses both the Office of Homeless

---

1. *The Philadelphia Blueprint Voucher Program: A Critical Resource in Ending Homelessness*, http://www.phila.gov/hhs/PDF/Permanent%20Supportive%20Housing%20Program%20Evaluation.pdf.

2. Permanent Supportive Housing (PSH) is a term of art that the U.S. Department of Housing and Urban Development (HUD) defines as long-term, community-based housing that has supportive services for homeless persons with disabilities. This type of housing enables special needs populations to live as independently as possible in a permanent setting. More recently, the word permanent has been removed as long-term subsidy and services has reduced need for intensive behavioral health

---

Dr. Marcella Maguire (marcella.maguire@csh.org) is the Director of Health Systems Integration for the Corporation for Supportive Housing. A leading national expert on Supported Housing as a solution to homelessness, Dr. Maguire served the City of Philadelphia's Department of Behavioral Health and Intellectual Disabilities (DBHIDS) from 2003–2016 both as Director of Transitions, Integration, and Partnerships and Director of Homeless Services. In these capacities, she led the city's planning and implementation of a comprehensive network of permanent supportive housing and service options.

Services and DBHIDS, both of which deliver most services through an extensive network of community providers, primarily not-for-profit treatment and housing organizations for the homeless. "The Blueprint" is the shorthand for this extensive network organized into a Permanent Supportive Housing system. Only with the expertise and multi-layered resources of the health care delivery system was the partnership able to succeed and effectively house over 1,200 persons, the vast majority of whom were formerly homeless on the streets.[3]

Like much of the United States, homelessness in Philadelphia is a challenge for far too many vulnerable residents. The most recent Point in Time Count[4] found over 800 people sleeping on Philadelphia streets in the month of January 2017. Caused primarily by deep, long-term poverty, homelessness has grown as affordable housing resources are stretched thin as the as the result of funding cuts to the U.S. Department of Housing and Urban Development (HUD). Housing costs continue to increase and the growing crisis of substance use disorders, specifically heroin addiction and other opioids, has exacerbated the crisis. Yet even with these challenges, Philadelphia continues to have one of the lowest rates of street homelessness among cities with a population of over one million people. The Blueprint is one reason for this success.

This article deconstructs the history, structure, and financing that have made this unique partnership possible.

Setting the Stage: Local Leadership and Collaboration

The Blueprint was built out of dedicated city leadership; a tenacious, high-quality and active provider community; and a uniquely structured behavioral health system.

Successful partnerships are built on trust, data, accountability, and the dedication of time to make collaboration possible. Long-standing partnerships between the city's Office of Homeless Services (OHS) and DBHIDS had already created the trusting relationships and collaborative structures that the project built upon. Solid data systems and analytics allowed all

---

supports over time. For ease of reference to the literature, we continue to use the term Permanent Supportive Housing or PSH throughout this article.

3. Julia Paradise & Donna Cohen Ross, Henry J. Kaiser Family Foundation, *Linking Medicaid and Supportive Housing: Opportunities and On-the-Ground Examples* (Jan. 27, 2017), http://kff.org/medicaid/issue-brief/linking-medicaid-and-supportive-housing-opportunities-and-on-the-ground-examples/.

4. HUD defines the Point-in-Time (PIT) count as a count of sheltered and unsheltered homeless persons on a single night in January. HUD requires that Continuums of Care conduct an annual count of homeless persons who are sheltered in emergency shelter, transitional housing, and Safe Havens on a single night. Continuums of Care also must conduct a count of unsheltered homeless persons every other year (odd numbered years). Each count is planned, coordinated, and carried out locally.

stakeholders an assurance that the resources were being dedicated to the most in need in the community. Data continues to be the backbone of the program. A strong human services provider network ensures high quality services for program participants. A vocal and effective advocacy community highlights strengths and weaknesses of the partnerships and holds public systems accountable. Finally, each partner took the time to learn other partner's systems and work together, always with the person being served at the center of all activities.

The city's Office of Homeless Services leads the city's efforts to end homelessness. While the city receives significant funding from the federal, state, and local governments, the need far outweighs the resources. In partnership with other city departments, the Office of Homeless Services has worked to use resources from HUD more efficiently by cost shifting service funding to mainstream resources, most commonly Medicaid.[5] Through this mechanism, the Office of Homeless Services can then use the funding for that most scarce resource in a community, rent subsidies that make housing affordable. With the support from mainstream service systems, the newly available funding can be paired to provide the services coupled with rent subsidies to create additional Permanent Supportive Housing and help more vulnerable Philadelphians exit homelessness. For example, Philadelphia reached functional zero on veterans' homelessness in November 2015.

Recovery Transformation

One of the most significant contributing factors to the success of the Blueprint model is that Philadelphia has a single-payer structure for the publicly funded Behavioral Health System (Medicaid) through the establishment of Community Behavioral Health (CBH).[6] CBH is a not-for-profit 501(c)(3) located under DBHIDS. This means that the system of providing and financing behavioral health services is organized to meet the needs of the community without the profit motive of a private provider. In fact, any efficiency creates revenue known as "reinvestment dollars" by providing required services at lower cost than the state's capitation rates. With the approval of the state that the intended use provides medically necessary services, reinvestment dollars are then able to be directed to public benefit. This provides flexible funding to advance the strategic goals of the city, specifically, to provide Permanent Supportive Housing to people with significant disabilities who are experiencing homelessness.

5. Medicaid pays for the physical and behavioral health services of indigent people. It is through this core function that the behavioral health services provided through the Blueprint are connected to a publicly supported rent subsidy.

6. Philadelphia Department of Behavioral Health and Intellectual Disability Services (DBHIDS), http://www.dbhids.org/.

Because CBH exists for the public benefit and is run efficiently and effectively, the overhead costs are well below state and national averages.

This structure is possible because the State of Pennsylvania's Medicaid plan carves out behavioral health services, allowing each county the opportunity to manage the full-risk contract. Philadelphia took advantage of this opportunity beginning in 1997 to build a strategic financing structure that allows one city department to manage all federal, state, and local funds for the provision of mental health, addiction, and intellectual disability services regardless of funding source. In Philadelphia, this is DBHIDS. This strategic funding structure has allowed the behavioral health system to take on the responsibility for funding and managing services in much of the city's Permanent Supportive Housing Program.

In addition to this financial structure, Philadelphia's behavioral health system made the philosophical transformation to a recovery-oriented system of care (ROSC).[7] ROSC is a federally recognized best practice that transforms behavioral health care from a medical model to a partnership among persons in recovery, their service providers, and their communities. ROSC assumes that the person has the ability to recover from all challenges if the right supports are in place.

Historically, the system of services made requirements of the person requesting assistance before offering care. For example, consumers might be required to be clean and sober before being able to access housing. ROSC, and the Philadelphia transformation in particular, highlights that system resources should not solely be directed toward formal clinical treatment, as had been the case, but also be dedicated to four new domains of innovative community practice: Assertive Outreach and Engagement, Continuing Support, Early Re-Intervention, and Community Connection and Mobilization. These domains of the *DBHIDS Practice Guidelines for Resilience and Recovery Oriented Treatment*[8] reflect the evolution of Philadelphia's behavioral health system. Together people in recovery, their family members, treatment providers, advocates, and system administrators have developed a shared vision that has been blended with the lessons learned from Philadelphia's transformation efforts over the past thirty years. The guidelines apply to all treatment providers and individuals who are reimbursed for working in a provider organization at all levels of care. They have transformed the system to be more engaged with the community and consider more broadly the intersection with the Social Determinants of Health (SDOH).[9]

---

7. Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/recovery.

8. Phila. Dep't of Behavioral Health & Intellectual Disability Servs., *The Practice Guidelines for Resilience and Recovery Oriented Treatment*, http://dbhids.org/practice-guidelines#tab-id-1.

9. *Id.*

SDOH is the conceptual model within the health care delivery system that acknowledges that many of the factors influencing health outcomes are not directly impacted by clinical care.[10] As tools develop that can validly measure the health of a community (e.g., rate of infant mortality or diabetes), health care system leaders in general and payers in particular are demanding an improvement in the health, not just of individuals, but also of communities. As the health care system is slowly learning, those other factors, the SDOH factors, also have a strong influence on the health of a community. Permanent Supportive Housing for people who have experienced chronic or long-term homelessness is integral to improved community health outcomes, reduced acute health care costs, and population health.

The cornerstone for housing affordability for the Blueprint Project is dedicated resources from the Housing Choice Voucher Program. The Housing Choice Voucher Program is the federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market. Since housing assistance is provided on behalf of the family or individual, participants are able to find their own housing, including single-family homes, townhouses, and apartments. The participant is free to choose any housing that meets the requirements of the program and is not limited to units located in subsidized housing projects. Housing choice vouchers are administered locally by public housing agencies (PHAs). The PHAs receive federal funds from HUD to administer the voucher program.

By pairing the all too scarce Housing Choice Vouchers (formerly known as Section 8)[11] with a behavioral health network composed of over 300 community based service providers, the Blueprint Project was able to expand the community's supportive housing capacity by more than 200 units a year.

Persons are referred first to supportive services to match the challenges they face. Persons with serious mental illness have access to Targeted Case Management (TCM),[12] Psychiatric Rehabilitation Services (PRS),[13] and Certified Peer Specialist (CPS) Services.[14]

---

10. World Health Organization, *What Are the Social Determinants of Health?*, http://www.who.int/social_determinants/sdh_definition/en/.

11. U.S. Dep't of Housing & Urb. Dev., *Housing Choice Vouchers Fact Sheet*, https://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8.

12. Phila. Dep't of Behavioral Health & Intellectual Disability Servs., *Targeted Case Management (TCM)*, http://www.dbhids.org/about/organization/office-of-mental-health/coordinated-consumer-services-ccs/targeted-case-management-tcm/.

13. *Rehabilitative/Rehabilitation Services*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/rehabilitative-rehabilitation-services/.

14. Phila. Dep't of Behavioral Health & Intellectual Disability Servs., *Peer Specialist Certification Training*, http://www.williamwhitepapers.com/pr/Philadelphia%20Peer%20Specialist%20Job%20Description.pdf.

Targeted Case Management is a primary, direct service provided to adults or children with serious mental illness or emotional disorders who live in the community. TCM is designed to ensure that individuals and their families gain access to needed medical, social, and educational services as well as to other agencies whose functions are to provide the support, training, and assistance required for a stable, safe, and healthy community life.

Psychiatric Rehabilitation Services (PRS) are health care services that help individuals keep, get back, or improve skills and functioning for daily living that have been lost or impaired because a person was sick, hurt, or disabled. These services may include physical and occupational therapy, speech-language pathology, and psychiatric rehabilitation services in a variety of inpatient and/or outpatient settings.

Certified Peer Specialists (CPS) are paid staff people who are willing to self-identify as living with a serious behavioral health disorder (mental illness, substance use disorder, or co-occurring disorder and who is in recovery. To be certified as a CPS, the person must have received specific training in the role, functions, and skills for the position. The purpose of this position is to aid, teach, and support others in their recovery process. This relationship between peers is characterized by mutual trust and respect, sharing of experience and learning about the recovery process, supporting the peer in setting and achieving goals, and moving toward a more meaningful life in the community.

Persons whose only diagnosable behavioral health challenge is an addiction are able to access case management services because Philadelphia has chosen to offer that service to a defined, capitated population.

Once services are in place, the newly assigned case manager works with the person who is homeless to complete an application for a Housing Choice Voucher. With provision of these extensive supportive services described above, the administrative burden on the housing authority is lessened. Over time, the behavioral health providers have became more familiar with the processes of the housing authority.

While Permanent Supportive Housing has a robust evidence base, especially as a solution for persons experiencing chronic homelessness, the blending of funding and resources, especially across systems, is often challenging.

Through the leadership of the Mayor's office, the commitment of the public officials leading the relevant city agencies, an engaged and effective provider network, an active mental health consumer network, and an organized advocacy community, the Blueprint partnership has been able to withstand a variety of political, funding, and sustainability challenges.

The city and the housing authority signed a memorandum of understanding memorializing the Blueprint in 2008. The partnership has been sustained through regular structured communication, regular reporting, funded staffing, ongoing collaborative goal setting, and bench marking. Quarterly leadership meetings, combined with weekly meetings of managing staff, built the relationships needed to ensure consistent communication

and long-term effectiveness. Annual reconciliation of data ensures that three separate service delivery systems (and three separate data systems) managed by DBHIDS, Office of Homeless Services, and the Philadelphia Housing Authority are able to stay on track together. Regular reporting among the partners allows outcomes to be closely tracked and leadership to clearly understand what each is receiving from the partnership. All of the above strategies are recommended for any project in which funding for the project as a whole can be "braided" rather than integrated into one project budget, i.e., the relevant components are woven together while maintaining the integrity of each individual system, which has a broader purpose beyond that of the project.

Outcomes

The Blueprint Project began in the summer of 2008. As of January 2017, it has housed 1,401 individuals. Review of service data indicates that 89 percent remained housed for at least one year in their unit and many persons have now reached over five years in Permanent Supportive Housing. At lease signing, 89.4 percent are Medicaid eligible, enabling the city to be reimbursed by Medicaid for the services they receive; over half receive Supplemental Security Income or SSI benefits for a permanent disability. Almost all (97 percent) had some billable Medicaid services in both the year before lease-up and the year following lease-up.

The Blueprint has reduced Medicaid costs. One year before lease-up, 38 percent utilized high acuity, inpatient services, 81 percent utilized community-based services, and 86 percent paid claims for the tenancy supportive services portion of PSH. One year after lease-up, the percentage of individuals using high acuity services decreased to 32 percent and community-based use decreased to 72 percent while tenancy based supportive services increased to 92%.

The city established the Journey of Hope Project (JoH) as an innovative approach to the chronic homelessness of those with substance use disorders. JoH was created in 2007 as a result of collaborative efforts among DBHIDS, the Office of Addiction Services (OAS), and the Office of Homeless Services (OHS) to transform six inner city substance use disorder residential treatment programs into programs that are equipped to more effectively serve chronically homeless individuals. Unlike traditional treatment, JoH offers low-demand, long-term treatment stays of six months to one year and serves individuals with histories of homelessness who are living with substance use or concurrent disorders (mental health and addiction). Each site incorporates motivational interviewing techniques, cognitive behavioral strategies, behavioral modification, psycho-educational seminars, and other evidence-based practices into their innovative modified therapeutic community settings.

Local transitional, supported, and permanent housing programs, as well as case management services, are utilized for program participants upon discharge as additional layers of support as they re-integrate into

the community and continue with their recovery process. Connections to alumni groups, recovery community centers, clinical services, peer mentoring, and ongoing follow-up are also utilized to help support long-term, sustained recovery in the community.

Between 2012 and 2015, 386 individuals participated in the transformed JoH addiction treatment programs. Of the JoH participants, 93 percent were eligible and enrolled in Medicaid as of discharge date from residential treatment. Many were able to receive Medicaid due to Governor Tom Wolf's decision to expand Medicaid in 2015.

For those discharged from JoH to stable outcomes, such as Permanent Supportive Housing, living with friends, family, or spouse, fewer individuals utilized high acuity inpatient services one, two, and three years after discharge compared to one year before admission to JoH. However, those who did not complete the program were more likely to utilize high acuity inpatient services. Early access and engagement in behavioral health services and investment at point of entry to the JoH program suggests cost shifting over time. There was a significant reduction in Medicaid costs as individuals progressed through the program. The proportion of spending shifted from high acuity services to community-based and core services specifically for those with supportive housing upon discharge from residential treatment.

In 2008, before the start of the Blueprint Project, Philadelphia Point in Time count showed 457 unsheltered persons with a total of 3,479 people experiencing homelessness. The count also considered disabilities and in 2008, the number of persons experiencing serious mental illness (SMI) was estimated at 1,519 while those experiencing substance use disorders (SUD) was estimated at 1,678. By 2014, after five solid years of work with the Blueprint, the unsheltered total decreased to 361 persons, the estimates of persons with SMI decreased to 1,192, and those with SUD decreased to 1,344. Unfortunately, after sequestration was implemented and the housing authority and the city's housing system services suffered significant funding cuts, the level of available funding slowed the pace of voucher issuance and progress has been harder to sustain. The lack of affordable housing resources will continue to make homelessness a challenge that low-income persons and communities struggle to address.

Policy Implications

The results from Philadelphia are clear. When public sector systems work together, each building on the strengths of the other, successful community-wide outcomes are achievable. The policy questions we raise focus on the lack of alignment of funding or incentives for differing branches of government and units of the same government. Without these alignments, the examples of differing sectors working together is likely to remain few and far between and achievable community-wide outcomes will seem out of reach.

Housing funding tends to flow from the federal government directly to the local communities. Housing authorities have local boards, and urban areas tend to have their own community development funding streams. State housing finance agencies also have resources, primarily in the Low Income Housing Tax Credit program. In contrast, in the health care system, Medicaid is a state and federal partnership, often administered at the local level by private sector payers, such as managed care organizations. None of these players reports to the same hierarchy and all have their own plans, goals, and objectives. While all serve a similar low-income population, there are no requirements for coordination or collaboration, much less integration.

The Philadelphia example highlights the importance of strong local leadership and suggests that similar leadership at the federal level can incentives to coordinate community resources for a place-based success, such as what Philadelphia has achieved.

Data driven strategies have been critical to Philadelphia's success. Use of data to determine which persons receive an all too scarce resource has resulted in community-wide collaborations. Today, the provider community, together with the city, has developed a list by name and is implementing the use of the Vulnerability Index-Service Prioritization Decision Assistance Tool, augmented by local criteria, to prioritize access. Biweekly meetings of decision makers working on housing operations are critical to communication and smooth operations.

The city established a Supportive Housing Clearinghouse through which all housing referrals are prioritized and assigned. This clearinghouse facilitates an automated matching of prioritized individuals based on vulnerability and readiness for placement with appropriate housing resource opportunities, as they are available. The clearinghouse is one of many functions funded through the Medicaid reinvestment dollars, again deriving the public benefit of efficient and effective program design and administration. Regular reconciliation of the data ensures that all partners remain working together with identical numbers and clear communication. Regular joint reporting on the Blueprint credits all key partners and contributes to the sustainable partnership. Success for one is success for all. Each partner has learned the trends, strategies, priorities, and goals of each of the other partners and all are stronger in their roles as a result. The saying among key leaders is that data "will keep us honest."

Future Directions

The continuation and expansion of Permanent Supportive Housing for people experiencing street homelessness with significant behavioral health challenges continues to be a goal for the City of Philadelphia. It is an evidence-based practice that locally has been proven to prevent a return to homelessness and reduce medical costs. With declining federal investment in housing affordability, the city is exploring new ways to expand the model of combining behavioral health services with rental

assistance. Among these is the dedication of a set-aside of a percentage of subsidized units financed with Project-Based Section 8; the Low Income Housing Tax Credit; and other local, state, and federal financing sources to chronically homeless individuals. This is a feasible approach both because the service match is already guaranteed and the partnerships already exist through the Blueprint. The model has worked for nine years and appears to provide a resilient framework that can be adapted as external forces change and as evidence amasses that can transform the system to be more effective. Permanent Supportive Housing is a viable and proven solution to chronic and long-term homelessness. Through the investment and partnership of three large public systems committed to one goal, Philadelphia has made progress that can serve as a model for other communities.

A Coordinated Response to Homelessness in Los Angeles—Reforming the System to Deliver Better Outcomes

David Streim

Nonprofit Finance Fund (NFF) is a Community Development Financial Institution that provides tailored investments, strategic advice, and accessible insights to mission-driven organizations. We envision a world where capital and expertise come together to create a more just and vibrant society. Please see the end of this commentary for more information about NFF.

Addressing the Social Determinants of Health

Along with the increasing focus on health care quality and cost comes a growing recognition of the important role of social determinants of health—such as housing, food security, education, employment—on the overall well-being of our population. NFF has been expanding its work around the intersection of health care and human services where these issues frequently meet and overlap. Integration occurs across modes of care as well as in the settings where they are provided. Health providers are bringing together primary care, behavioral health, and other services that blend clinical and community-centered delivery models. There is a growing acknowledgment of the importance of social determinants on physical and mental health, as well as the recognition that many of these factors are not typically addressed in a doctor's office.

This commentary examines a recent partnership between NFF and LA Family Housing, highlighting the social and economic benefits of addressing the needs of clients who are homeless with a holistic, coordinated approach. It also includes more about NFF and how its work and investments address homelessness and other social determinants of health at a national level.

David Streim (dstreim@nff.org) is a Senior Investment Underwriter at Nonprofit Finance Fund, providing capital to nonprofits to support their operations, program growth, and facility expansion projects. In this role, he is responsible for making investments from NFF's revolving loan fund as well as its New Markets Tax Credit and Pay for Success programs. Prior to joining NFF in 2014, David was the Portfolio Manager at Opportunity Finance Network, a national association of community-based lenders, where he was responsible for a portfolio of investments to help capitalize OFN members' loan programs.

LA Family Housing

NFF recently provided financing to LA Family Housing, an organization that embodies this comprehensive definition and understanding of community and personal health. The following case study illustrates how this nonprofit agency is bringing together an array of services to address its clients' needs that goes far beyond the provision of housing. The underlying assumption is that more comprehensive approaches to homelessness lead to better outcomes for those in need as well as more efficient use of public resources.

LA Family Housing (LAFH) is a private, nonprofit, community-based organization with a mission to help people transition out of homelessness and poverty through a continuum of housing, enriched with supportive services. LAFH was founded in 1983 by an interfaith group of leaders from the San Fernando Valley, who gathered local support and raised funds to purchase a forty-unit motel in North Hollywood where families could stay for up to thirty days while they regained their footing. Thirty-four years later, LAFH has grown to become one of the largest providers of housing and homeless services in Los Angeles, serving over 6,400 individuals annually. The agency employs evidence-based best practices to achieve its goals and owns and operates twenty-three properties—temporary, permanently affordable, and permanent supportive housing across Los Angeles. This continuum of housing—coupled with a network of supportive services—provides the resources necessary to increase the stability and self-sufficiency of LAFH program participants.

LAFH has four main service areas:

- *Street Outreach, Engagement, and Intervention:* assisting individuals and families who are homeless or in danger of homelessness to be connected with housing and supportive services unique to their needs.
- *Housing Services:* helping program participants locate, secure, and move into an appropriate housing unit.
- *Supportive Services:* ensuring the individual or family has all the resources they need to achieve long-term stability and stay housed, including case management, employment and workforce development, housing retention services, life skills training, children's programs, medical and mental health care, etc.
- *Real Estate Development:* owning and operating 365 affordable housing units for individuals and families with an annual median income ranging from extremely low to moderate and continuing to develop affordable and permanent supportive housing across L.A. County.

A Centralized Model of Homeless Services

Only a few years ago in Los Angeles, if a homeless individual or family wished to access multiple safety net resources, they would have had to

visit various sites, receiving health care in one place, job training in another, and housing services elsewhere. Although the services may have been of high quality, they were geographically scattered and most agencies worked in silos, making them difficult to access. Furthermore, services were often duplicated across the region, making it nearly impossible to accurately track an individual's progress toward self-sufficiency. Funding was limited and secured in fragmented pieces, despite shared goals across the public and private sector players.

Over the past several years, Los Angeles has developed a new cohesive system of public and private collaboration to deliver coordinated services to homeless individuals and families. Between 2011 and 2013, the Registry Project assessed and prioritized homeless individuals for housing based on their level of need. Services were tailored to clients according to an assessment of their needs and provided collaboratively among local partners who shared information about their progress at frequent meetings. With support from the Conrad N. Hilton Foundation, LAFH led the coordinated Registry Project in the San Fernando and Santa Clarita valleys and placed more than 200 chronically homeless people into permanent housing. Through this pilot project, LAFH learned that homeless individuals and families had significantly higher success rates in housing and self-sufficiency when connected with a "service home" as opposed to accessing resources from multiple agencies with different physical locations and points of contact. The pilot's success helped refocus homeless efforts on collaboration among partners rather than competition for resources to serve the same population.

With the success of the Registry pilot and continued support from the Hilton Foundation and United Way of Greater Los Angeles, LAFH helped form the county-wide Coordinated Entry System (CES) for Individuals. CES is a coordinated effort to streamline service delivery among partner agencies and ensure that homeless individuals are assessed and matched with the most appropriate housing solution. LAFH was selected to be lead agency for the CES in service planning area (SPA) 2, the largest, most populous regions of L.A. County. This means that nearly every homeless individual in SPA 2 now comes through LAFH's doors at some point. The organization also has street outreach teams that identify and engage people who are homeless or at risk of becoming homeless. Once individuals are engaged, a dedicated case manager is assigned to help them navigate the process and make sure they are referred to available housing and other supports based on a needs assessment.

In addition to a coordinated system for homeless individuals, public partners, including the Los Angeles Homeless Services Authority, created a new system for homeless families called Coordinated Entry System for Families. LA Family Housing is also the lead agency for CES for Families in the San Fernando and Santa Clarita Valleys. The process for families is similar to the one for individuals, where a case manager meets with the

family to assess their needs and connect them to housing and services based on their specific circumstance.

Bringing Housing and Services Under One Roof

As LAFH continued to expand its programs—particularly through the lens of this coordinated entry approach—it undertook development of The Campus at LAFH, an 80,000-square foot development that will focus on a new strategy for delivering effective, tailored services to homeless and low-income individuals and families in Los Angeles. At its completion, The Campus will be a hub for in-need individuals and families, featuring a comprehensive services center offering fully integrated services from local social service agencies, a full-service health clinic, and an array of housing options specifically designed for individuals and families of all sizes, configurations, and levels of need.

By renovating existing family program space and razing the agency's oldest property to construct a new multi-use building, LAFH aims to create a new "service home" for thousands of homeless and low-income individuals and families. The Campus project is being completed in two phases so as not to interrupt service to LAFH program participants.

Phase I rehabilitates and expands an existing Family Services Center. On one side of the property is a large welcome center for SPA 2's CES for Families, accommodating the increased number of in-need families

in the region. Existing space has been reconfigured to create an open, collaborative environment for LAFH staff and partner agencies, such as the L.A. Unified School District, Department of Public Social Services, and more. Adjacent to this center are thirteen rehabilitated crisis housing units for families, each equipped with its own kitchen and bathroom to keep families of all sizes and configurations together. Outside, a new courtyard features green space complete with drought-resistant landscaping and play areas for children.

Prior to the renovation, hundreds of families came to LAFH each week and were cramped into a small, 100-square foot waiting room while the intake and assessment process was completed. As a result, children and parents were forced to wait outside in the parking lot. The newly renovated welcome center and outdoor green space is transforming that old parking lot into a multi-use, interactive space for parents to work with LAFH staff while their children play in a safe, monitored environment.

In another building, LAFH is providing temporary, or "bridge," housing for up to 230 individuals daily. The newly renovated, ADA compliant space creates a safe, temporary place for individuals to stay while LAFH staff helps them locate a permanent home in the community. There is a technology and employment center, a serenity lounge, private garden, an outdoor gym, and recreation areas.

The second phase of construction involves demolition of the agency's oldest existing shelter, the forty-unit motel turned shelter that housed families for up to thirty days. On its footprint, LAFH will construct a new group of buildings to meet the multiple, complex needs of the area's homeless population. A comprehensive services hub will be home to the region's CES for individuals, providing space for LAFH program staff to work alongside community partners that will offer employment services, housing assistance, legal aid, and more. On the second floor of the service hub will be LAFH corporate office space for executive, administrative, finance, and fund development teams. Adjacent to the hub, a 6,000-square foot health clinic will offer medical and mental health care as well as dental services, both to LAFH program participants and the public. Across manicured, drought-resistant green space, forty-nine new housing units of permanent supportive housing will meet the needs of chronically homeless adults, many of whom have multiple disorders and diseases.

The new health care clinic will offer primary, mental health, and dental care both for LAFH program participants and the community at large. The clinic will be operated by Northeast Valley Health Corporation (NEVHC), a long-time partner of LAFH that specializes in providing health care for underserved patients in the region. Having NEVHC on-site is a critical component to addressing the full range of LAFH participant needs. As a federally qualified health center (FQHC), NEVHC has a mandate to provide primary care and non-clinical enabling services (e.g., case management, transportation, health education, etc.) to patients in areas that are deemed by the federal government as "medically underserved," regardless of the

client's ability to pay. In return, FQHCs such as NEVHC receive cost-based reimbursement, federal grants, malpractice protection, and other benefits that allow them to provide care to particularly vulnerable populations. This new health center will double the number of exam rooms, allowing NEVHC to increase patients visits and provide more comprehensive services with the addition of a dental clinic and behavioral health services.

The Campus also offers a new comprehensive services center for the region's CES for Individuals. An open-concept design, LAFH is literally and figuratively breaking down walls to work alongside community partners, offering employment services, housing assistance, legal advocacy, benefits assistance, and other supportive services. Locating these services and the new health care clinic with LAFH's temporary and permanent supportive housing programs will reduce the burden on participants to navigate the web of available supports and remove barriers to achieving stability and self-sufficiency.

The construction of this new Campus at LAFH was financed with Low Income Housing Tax Credits, New Markets Tax Credits (NMTC), private foundations and individual donors, public grants, land contributions, debt, and sponsor equity. NFF, in collaboration with two participating mission-driven lenders, Dignity Health and Genesis LA Economic Growth Corporation, provided $8.35 million in loans to LAFH to support the construction of the health center, the comprehensive services center, and corporate office space as part of the Phase II development. Of that amount, $2.1 million supports a seven-year loan to leverage equity generated by the NMTC allocation; the debt service will ultimately be covered by rent coming from NEVHC as a subtenant. The balance of NFF's loan was used to bridge capital campaign proceeds and was an additional source of leverage within the NMTC structure.

One of the unique features of this financing was that NFF provided the capital campaign bridge loan against both committed contributions as well as yet-to-be-raised donations. With a large matching grant from a major LAFH donor and several grant requests with high probabilities of being awarded, NFF and its partners agreed to bridge likely future commitments. In order to make this possible, LAFH pledged an additional piece of LAFH-owned real estate as collateral for the bridge loan.

Looking to Systems Change for Greater Impact

Coordinated system approaches, such as the CES programs led by LAFH, are not unique to Los Angeles—they are part of a national movement to coordinate the myriad agencies that otherwise tend to act independently, making services difficult to navigate. The U.S. Interagency Council on Homelessness has endorsed this model of coordination, and the U.S. Department of Housing and Urban Development has provided guidance on the characteristics that any CES should have. These recommendations include, among other things, a system for prioritization; a housing-first approach; person-centered services; fair and transparent

referral protocols; links to street outreach efforts; administrative data protocols; and standardized access and assessment across intake points, including by phone, in-person, and online.[1]

Within Los Angeles, the coordinated approach is only one key component of a larger public initiative to combat homelessness. Los Angeles has put forth an ambitious $2 billion plan with the goal of housing the city's tens of thousands of homeless residents over the next ten years. In addition to scaling up the CES, the plan calls for investment in housing units—temporary and permanent—as well as a "No Wrong Door" approach that designates a homelessness liaison within every city department, including police, fire, education, library, and others.

The integrated and coordinated nature of LAFH's approach has led to successful outcomes, even well before the new Campus project's expected completion in 2018. LAFH reports its participants' permanent housing retention rate is over 90 percent, much higher than the national average. It has reduced the average length of a family's stay in temporary or bridge housing (formerly known as shelters) to less than ninety days as of 2014. LAFH also has over 200 landlord partnerships across Los Angeles and sixty-five service partners in the CES, all of which amplify its ability to meet participant needs. When the Campus is complete, LAFH expects to be even better positioned to build on this progress.

These efforts have been successful from a qualitative perspective too. CES has saved time, eliminated redundancy, and limited frustration by having a single entry point into the system. It has brought service providers together and allowed them to operate more efficiently. LAFH's participants report a number of benefits, including feeling less stressed; not having to travel as much; and not having to go through workshops and programs that did not meet their needs, just to be deemed "housing ready."

In the words of the agency's leadership, LAFH is not only helping people move off the streets, it is also essentially ending the homelessness of nearly every individual placed into permanent housing and, through ongoing supportive services, facilitating economic independence and ultimately helping break intergenerational cycles of poverty. The Campus at LAFH represents a big step toward the goal of enhancing LA's response to homelessness and, more broadly, proving that the coordinated approach to addressing social determinants of health works.

About NFF

Nonprofit Finance Fund (NFF) unlocks the potential of mission-driven organizations through tailored investments, strategic advice, and accessible insights. Founded in 1980, NFF helps organizations connect money to

1. Dep't of Housing & Urb. Dev., *Coordinated Entry Policy Brief*, https://www.hudexchange.info/resources/documents/Coordinated-Entry-Policy-Brief.pdf.

mission effectively. A leading certified Community Development Financial Institution (CDFI) with more than $250 million in assets under management, NFF has provided over $620 million in financing and access to additional capital in support of over $2.3 billion in projects for thousands of organizations nationwide. In partnership with others, NFF also has provided more than $120 million in grants to nonprofits for recovery, capital and planning grants, and reserves. NFF serves clients from offices in five cities—Boston, Los Angeles, New York City, Philadelphia, and San Francisco.

Tailored Investments

NFF's financing helps mission-driven organizations grow, manage cash flow, purchase, expand or renovate facilities, and increase preparedness for financial uncertainty. NFF offers a range of financial products with the flexibility to tailor each investment to the specific organization and circumstance. Our borrowers cover a broad range of the social sector, including primary and behavioral health, homelessness, education, child welfare, workforce development and employment, criminal justice, and food access, among other issue areas.

Our growth loans provide organizations with capital to upgrade their IT systems, increase the scale of successful programs, create new programs or services, hire new staff members, and otherwise cover operating costs until they can generate enough revenues to support the expanded activities. Our revolving lines of credit help organizations sustain operations during delays in government contract payments, medical insurance reimbursements, and other types of receivables. NFF also makes loans for the purchase and development of brick-and-mortar community facilities, such as health centers, charter schools, after-school programs, and community kitchens. NFF has invested $250 million under the New Markets Tax Credit program to provide catalytic capital for businesses and projects in low-income communities. It has also made a small number of loans to support service providers that are participating in Pay for Success (PFS) programs[2] intended to improve the quality and efficiency of human service delivery and that that tie payment to the achievement of measurable, beneficial social outcomes.

Strategic Advice

NFF's Advisory Services address a wide range of strategic financial management needs. Our consultants help organizations stay in balance so that they are able to successfully adapt to changing financial circumstances and to grow and innovate when they are ready. We provide highly integrated,

2. Pay for Success is an approach to contracting under which local or state governments make payments based on actual outcomes achieved (e.g., reductions in recidivism, use of emergency services, foster care utilization, etc.) rather than on a fee-for-service basis. Third party intermediaries raise capital from private investors to fund the upfront cost of services and manage repayments to investors as government payments are made.

customized solutions that allow organizations to strengthen their business models, capital structures, access to revenue and capital, investment readiness, and institutional leadership for improved financial sustainability and adaptability in support of mission and program impact. In 2015, NFF provided more than 30,000 hours of direct support to more than 220 organizations. Our aim is that these direct efforts help to build a stronger social sector, better able to meet community needs and create more just and vibrant society.

Accessible Insights

NFF captures and shares data, insights, and best practices gleaned through our work with thousands of nonprofits and through partnerships that further inform a strong understanding of the social sector's dynamic operating environment. Our knowledge-creation and sharing ranges from reports and other publications to websites like our Pay for Success Learning Hub[3] and our widely cited *State of the Nonprofit Sector* survey.[4] Current initiatives include a partnership with the Federal Reserve Bank of San Francisco to help inform and accelerate the social sector's shift to outcomes-oriented approaches and funding. This will include a new online learning hub; a series of meetings and workshops around the country; and a book that compiles chapters written by dozens of leaders in the field that address the opportunities, challenges, and practical considerations for orienting the social sector around positive outcomes.

3. Nonprofit Finance Fund, *Pay for Success*, http://www.payforsuccess.org/.
4. National Finance Fund, 2015 State of the Nonprofit Sector, http://www.nff.org/learn/survey.

Health Policy Brief: Medicaid and Permanent Supportive Housing

What's the Issue?

The Affordable Care Act (ACA) gave states the option of expanding Medicaid coverage to include childless adults with incomes at or below 138 percent of the federal poverty level beginning in 2014. The ACA also gave states additional tools to use in serving this newly insured population, which would include virtually all of a state's homeless adults. Housing is one of the social and economic factors that play a critical role in determining an individual's health. Improving access to housing and the services needed to maintain housing can be a key component of improving health status for Medicaid beneficiaries. States can also use the new opportunities and tools provided by the ACA and other policy options to support individuals with disabilities living in community settings, including those who had formerly been homeless and other newly eligible members of the expansion population.

What's the Background?

The Department of Housing and Urban Development estimates that on a single night in January 2015 roughly 565,000 people were homeless, of whom 37 percent were families with children and 63 percent were individuals. Homeless individuals are more likely than families to be living unsheltered and to experience chronic homelessness. Prior to the expansion of Medicaid coverage under the ACA, most chronically homeless individuals did not have health insurance, in part because most state Medicaid programs did not cover adults without children.

Housing status and a person's health are interconnected. The Institute of Medicine noted that health problems can cause homelessness and that homelessness can cause health problems or complicate treatment of existing problems. Individuals who experience chronic homelessness have high rates of substance abuse and mental health disorders and are more likely to suffer from chronic medical conditions, such as diabetes, hypertension, and HIV/AIDS. These individuals can also be extensive users of health care services and are likely to receive care in high-cost settings, such as emergency departments and inpatient hospital stays.

The traditional model of addressing homelessness focuses on providing temporary housing, which is often institutional or contingent on simultaneously addressing mental health or substance abuse needs. The

---

This article was originally published in Health Affairs *(October 14, 2016).* Health Policy Briefs *are produced under a partnership of* Health Affairs *and the Robert Wood Johnson Foundation, http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=164. Reprinted with permission.*

short-term housing obtained with this approach might be lost if the individual no longer needs inpatient-level care or is not successful in reaching treatment goals.

More recently, some efforts to address homelessness have shifted to a "housing first" approach that prioritizes providing permanent (or longer-term) housing that is not tied to success in treatment. Access to housing alone, regardless of efforts to treat problems that might contribute to homelessness, can have a positive impact and reduce the total harm to the individual. "Supportive housing" is an important component of that approach and is targeted toward individuals and families with chronic illnesses, disabilities, mental health issues, or substance use disorders who have experienced long-term or repeated homelessness. This type of housing intervention provides long-term rental assistance and access to supportive services to help keep individuals and families housed and to address other issues, including medical and behavioral health needs. Supportive housing assists individuals who were previously homeless obtain and maintain housing and also helps provide community housing to individuals who have been institutionalized.

Supportive housing can be provided under different models that have a common set of underlying principles. Housing should be affordable, and tenants should not have to meet requirements unrelated to being a good tenant to maintain residency. Supportive services should be oriented toward keeping tenants housed; cover multiple disciplines, such as physical health, behavioral health, substance abuse treatment, and social services; and be voluntary for tenants but offered assertively so that providers remain in contact with tenants who do not take advantage of help. Individuals in need of supportive housing might come directly from homeless situations or might be at risk of becoming homeless following an institutional stay and need supports to be able to live in a noninstitutional setting.

A project-based approach might house individuals in facilities designated for rental assistance and might include supportive services provided on site in those facilities. A tenant-based approach provides rental assistance to individuals who use that help to obtain housing in private buildings. The supportive services might be provided in a centralized location or through community providers.

The goal is to achieve the benefits of housing itself and make it more likely that the individual can sustain those benefits as well as have access to other services that will improve his or her health. The supportive services can help address a wide range of needs, including physical and behavioral health care, substance abuse, employment counseling, and community integration. It might also include income and benefit supports.

Social factors such as physical environment—including housing, support networks, and socioeconomic status—are increasingly being recognized as having significant impact on health outcomes. For example, Sandro Galea and colleagues estimate that 20 percent of total deaths in the

United States can be attributed to poor education, little social support, and poverty. With Medicaid as the primary health insurance program for low-income Americans and preliminary research indicating that the above factors affect the health of Medicaid beneficiaries, these factors are also expected to affect the demand for Medicaid services.

Medicaid can play a key role in supportive housing by funding some of the services needed by residents, such as behavioral health care and substance abuse services, as well as regular medical care. Such services are commonly covered by Medicaid, but with supportive housing, those services might be provided in new settings or by nontraditional providers or be better coordinated across providers and with other supports. By law, Medicaid cannot cover rent. Under certain waiver authorities, states can choose to cover housing-related services. These can include transition services, housing and tenancy sustaining services, and housing-related collaborative activities under Medicaid. Medicaid has long covered room-and-board costs in long-term care facilities, such as nursing homes, or intermediate care facilities for the disabled.

Interest from state Medicaid programs in supportive housing models was spurred by a U.S. Supreme Court decision in 1999 (*Olmstead v. L.C.*, 527 U.S. 581 (1999)) that said states must provide services for disabled individuals in the most integrated setting appropriate to the individual's needs to comply with the Americans with Disabilities Act. In addition, since 2014, many homeless individuals have become eligible for Medicaid benefits for the first time, increasing the demand for supportive services.

Medicaid programs might also gain from having beneficiaries in supportive housing. Supportive housing might allow individuals to transition from more expensive institutional settings, such as inpatient psychiatric facilities, into community housing and might allow individuals to obtain more consistent treatment of chronic conditions in primary care settings so that they could reduce their number of emergency department visits and inpatient hospitalizations. For example, researchers have found that patients with housing have shorter hospital stays than homeless patients and that homeless patients have high readmission rates following an inpatient stay, with 70 percent of hospitalizations resulting in either another inpatient admission, observation status stay, or emergency department visit within thirty days of hospital discharge. A study of supportive housing in Los Angeles found that spending across public agencies in the county was 79 percent lower for residents with supportive housing than for homeless people. The majority of those savings came from reductions in spending on health care services, including a 91 percent reduction in average spending per month per person on certain inpatient hospitalizations and an 89 percent reduction in spending on emergency department services for individuals in supportive housing compared to spending for homeless individuals.

While a number of studies have shown health care or other social savings as a result of supportive housing, two systematic reviews of studies

and articles on the costs and benefits of Housing First and supportive housing programs suggest that the evidence is promising but not conclusive. One Los Angeles study of supportive housing for veterans indicated that overall health care use was greater for formerly homeless veterans in supportive housing than for currently homeless veterans. It has been difficult to make definitive assessments regarding the impact of supportive housing because demonstration projects have usually been small; used different study designs; and have not always collected good usage, cost, and expenditure data.

The reduction in use of health care services, and particularly in Medicaid spending, can help offset the costs of operating supportive housing programs. An evaluation of an effort to increase supportive housing capacity in New York City found that overall the program produced net savings in government spending on health care services for tenants with supportive housing compared to people who were eligible but not placed in the program. However, savings were not constant across the populations served. Most of the savings came from support for specific populations that were coming from state inpatient psychiatric facilities. Thus, the actual Medicaid savings were relatively small.

States have a great deal of flexibility and numerous options of authorities and programs they can use to include supportive services, including supportive housing, as Medicaid benefits. The scope of services typically covered by Medicaid might not necessarily include long-term care or some other services that homeless individuals might require. The Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS) have highlighted different avenues available to states to leverage Medicaid funding to support housing programs. Many of these options are targeted toward individuals who have disabilities, which could include individuals who are identified as "chronically homeless" because they have a disability and extended or repeated periods of homelessness.

These materials do not reflect a change in Medicaid policy. Instead, they identify a variety of strategies on how states can use Medicaid funding to support individuals who are or have been homeless and emphasize options for covering housing-related services under Medicaid. Housing-related services can include transition and tenancy-sustaining services but not rent.

Covering Services Under a State Plan

Each state Medicaid program has an agreement between CMS and the state (a state plan) that identifies the groups of individuals eligible for benefits, the services covered, and the payment methodologies. Some services are mandatory and must be covered, while others are optional services that states can choose to include or not. States can revise their state plans as needed to add coverage of optional services that support housing and to facilitate the furnishing of supportive services by providers serving the homeless population and in nontraditional settings.

For example, states have the option of covering rehabilitation services, targeted case management, and health home services. Rehabilitation services are medical or remedial services (mental health services to help patient behavior) that help individuals with physical or mental disabilities keep, regain, or improve their skills and functioning for daily living. Targeted case management services assist individuals in gaining access to needed medical, social, educational, and other services and can be targeted to specific beneficiary groups as defined by medical condition or geographic region. Health homes are comprehensive systems of care coordination and health home services that include care management and coordination, transitional care from in-patient to other settings, and individual and family support. States might choose to provide these services in the hopes that they will improve the residents' ability to function, including maintaining housing, and help better coordinate other available means of support and care.

Some of that care might be furnished by providers that specialize in serving the homeless. States are required to cover services offered by federally qualified health centers (FQHCs), which include health centers that are funded by the Health Care for the Homeless Program. In addition to providing typical primary care and prevention services, FQHCs that receive Healthcare for the Homeless grants, administered by the Health Resources and Services Administration, provide services that include substance abuse treatment; case management services; and enabling services that connect patients to other supports, such as translation services and patient education. Some of these providers have started innovative programs that administer care "outside of the four walls" of the health center or use paraprofessional outreach workers to connect with the patient population. Outreach efforts might include peer-support specialists who also have experienced homelessness or behavioral health issues.

Transitioning these models of care to the Medicaid payment structure can be complicated since Medicaid services are typically provided by medical professionals operating in a clinical setting. State requirements for licensure and Medicaid restrictions on the types of individuals who can provide and bill for services can create barriers to innovation in this area.

Home and Community-Based Services

States can include in their state plan, or request waivers from CMS to offer, home and community-based services, including housing-related services, to specific populations. These services could include housing transition and tenancy-sustaining services, such as assessments of housing needs and assistance in searching for and securing housing, as well as environmental modifications to make a specific location accessible. If an individual is transitioning from an institutional setting to a private residence, a state can cover community transition services under a 1915(c) waiver that can include security deposits for a lease or utilities, household furnishings, and moving expenses. Similar services can be provided to individuals who

do not require institutional-level care through coverage of home and community-based services in the state plan under 1915(i) authority.

The ACA created a new opportunity to cover person-centered attendant services under the Community First Choice option 1915(k). An enhanced federal match is provided for home and community-based services furnished to disabled individuals who qualify for institutional care. Covered services and supports can include items that increase an individual's independence and one-time expenses incurred during the transition from an institution to community housing. Five states have approved state plan amendments under this option: California, Maryland, Montana, Oregon, and Texas.

Other Waivers and Demonstrations

The ACA provided new authority for CMS to test innovative payment and service delivery models that have the potential to reduce expenditures under Medicare, Medicaid, and the Children's Health Insurance Program, while maintaining or enhancing the quality of beneficiaries' care. Models being tested include the Accountable Health Communities Model, which will support efforts to increase awareness of and access to services addressing health-related social needs and assess the impact of those efforts on total health care costs, health outcomes, and quality of care for Medicare and Medicaid beneficiaries. Housing instability and quality and utility needs are two of the core areas that will be included in the comprehensive screening for health-related social needs that will be part of the project along with referral to community services.

The ACA also strengthened the Money Follows the Person Rebalancing Demonstration Program, which is intended to reduce institutional care and increase use of home and community-based services. States participating in this program have the option of offering housing-related services. The most successful programs identified that the ability to cover one-time moving expenses and home and community-based services beyond what Medicaid typically covers and the need for additional support from transition coordinators as crucial elements. Forty-three states are participating in the program as of September 30, 2016.

Operational Issues

The brief summary above of some of the multitude of funding options for covering certain services under Medicaid highlights the operational complexity involved in ensuring that residents of supportive housing have access to needed services. For Medicaid to cover housing-related and other services, residents need to be eligible for Medicaid, and they have to be enrolled in the program. Individuals might not have the income and citizenship documentation necessary to prove eligibility and might not be able to obtain such documentation without a mailing address.

Basic principles that typically apply to Medicaid services would also apply to services received by residents of supportive housing. For example,

Medicaid beneficiaries have freedom of choice of providers and therefore generally cannot be required to choose only certain providers, such as those affiliated with their housing project. (There are exceptions to this restriction for managed care plans.) Also, states must make services available not only to residents of supportive housing projects but also to other Medicaid beneficiaries with similar needs; this can increase the scope and cost of covering such services.

Each of the options described above has its own specific requirements to obtain federal Medicaid funding, and only certain individuals can be served under many of these avenues. A supportive housing resident might qualify for services under more than one option. Determining whether and how an individual can be served can be complicated. In addition to determining coverage for Medicaid services, if available, those services also need to be coordinated with the services provided under other programs and authorities that address other needs, including housing itself, transportation, and nutrition.

To achieve desired savings either to reduce state spending or to have funds to reinvest in housing or supportive services, programs might have to target those populations for whom supportive housing is most likely to reduce Medicaid spending. Such populations include individuals who are likely to use institutional services. While there might be some data available on the services used for homeless individuals who previously had Medicaid coverage, it is not always possible to predict future use of services for transient populations because of limited information on previous needs or services used.

What Are States Doing?

To use Medicaid to support the broadest population that might be eligible for supportive housing, states need to have expanded Medicaid to include low-income, childless adults. Individuals in states that have expanded Medicaid eligibility are more likely to be able to use Medicaid to access supportive services. Thirty-one states and the District of Columbia have expanded their Medicaid programs since 2014, but nineteen states have not. Chronically homeless individuals in states that have not expanded access can likely qualify for Medicaid only if they can demonstrate that they have a disability that would qualify them for Supplemental Security Income (SSI). Qualifying for SSI can be particularly difficult for individuals without access to their medical records or other needed documents and with no address to which such documents could be delivered.

In 2012, almost all states had 1915(c) waivers to provide home and community-based services as an alternative to institutional care. (The four states that do not have 1915(c) waivers—Arizona, Hawaii, Rhode Island, and Vermont—cover home and community-based services under waiver authority for managed care.) However, in most states that were covering services under 1915(c) waivers, those services were available only to certain populations. The most commonly covered populations

are the elderly, people with intellectual or developmental disabilities, and people who are physically disabled. The population least likely to be eligible for 1915(c) waivers are those with mental illness, potentially limiting the availability of services to some residents of supportive housing.

A recent report from HHS describes how six states and localities have used Medicaid to provide services needed by residents living in supportive housing. The authors of the HHS report recognize the complexities of using Medicaid for this purpose but emphasize the value of Medicaid as a funding source for meeting the needs of supportive housing residents.

Some states are also tackling health care delivery system reforms that might incorporate nonmedical support services. Under Medicaid accountable care organizations (ACOs), provider organizations bear financial risk for the care furnished and are held accountable for the health outcomes of their assigned patient population. ACOs might receive capitated payments or a share of savings from reductions in Medicaid spending, creating a financial incentive to ensure that the patient's care is well coordinated and effective. ACOs in Washington, Oregon, and other states have social service provisions, including supportive housing, in their models.

Resources

Dawn E. Alley, Chisara N. Asomugha, Patrick H. Conway, and Darshak M. Sanghavi, "Accountable Health Communities—Addressing Social Needs through Medicare and Medicaid," *New England Journal of Medicine* 374, no. 1 (2016): 8–11.

Martha Burt, Carol Wilkins, and Gretchen Locke, *Medicaid and Permanent Supportive Housing for Chronically Homeless Individuals: Emerging Practices from the Field* (Washington, D.C.: Department of Health and Human Services, Aug. 20, 2014).

Centers for Medicare and Medicaid Services, *Coverage of Housing-Related Activities and Services for Individuals with Disabilities* (Baltimore, MD: CMS, June 26, 2015).

Ehren Dohler, Peggy Bailey, Douglas Rice, and Hannah Katch, *Supportive Housing Helps Vulnerable People Live and Thrive in the Community* (Washington, D.C.: Center on Budget and Policy Priorities, May 31, 2016).

Kelly M. Doran, Kyle T. Ragins, Andrea L. Iacomacci, Alison Cunningham, Karen J. Jubanyik, and Grace Y. Jeng, "The Revolving Hospital Door: Hospital Readmissions among Patients Who Are Homeless," *Medical Care* 51, no. 9 (2013): 767–73.

Daniel Flaming, Michael Matsunaga, and Patrick Burns, *Where We Sleep: The Costs of Housing and Homelessness in Los Angeles* (Los Angeles: Economic Roundtable, Nov. 1, 2009).

Sonya Gabrielian, Anita H. Yuan, Ronald M. Andersen, Lisa V. Rubenstein, and Lillian Gelberg, "VA Health Service Utilization for Homeless and Low-Income Veterans: A Spotlight on the VA Supportive Housing (VASH) Program in Greater Los Angeles," *Medical Care* 52, no. 5 (2014): 454–61.

Sandro Galea, Melissa Tracy, Katherine J. Hoggatt, Charles DiMaggio, and Adam Karpati, "Estimated Deaths Attributable to Social Factors in the United States," *American Journal of Public Health* 101, no. 8 (2011): 1456–65.

Stephen W. Hwang, James Weaver, Tim Aubry, and Jeffrey S. Hoch, "Hospital Costs and Length of Stay among Homeless Patients Admitted to Medical, Surgical, and Psychiatric Services," *Medical Care* 49, no. 4 (2011): 350–54.

A. Levanon Seligson, S. Lim, T. Singh, E. Laganis, E. Stazesky, S. Donahue, C. Lanzara, T. G. Harris, T. Marsik, C. M. Greene, F. R. Lipton, R. Myers, and A. M. Karpati, *New York/New York III Supportive Housing Evaluation: Interim Utilization and Cost Analysis* (New York: N.Y.C. Department of Health and Mental Hygiene, 2013).

Debra J. Lipson, Christal Stone Valenzano, and Susan R. Williams, *What Determines Progress in State MFP Transition Programs?* (Washington, D.C.: Mathematica Policy Research, Oct. 2011).

Angela Ly and Eric Latimer, "Housing First Impact on Costs and Associated Cost Offsets: A Review of the Literature," *Canadian Journal of Psychiatry* 60, no. 11 (2015): 475–87.

Roopa Mahadevan and Rob Houston, *Supporting Social Service Delivery through Medicaid Accountable Care Organizations: Early State Efforts* (Hamilton, N.J.: Center for Health Care Strategies, February 2015).

Debra J. Rog, Tina Marshall, Richard H. Dougherty, Preethy George, Allen S. Daniels, Sushmita Shoma Ghose, and Miriam E. Delphin-Rittmon, "Permanent Supportive Housing: Assessing the Evidence," *Psychiatric Services* 65, no. 3 (2014): 287–94.

Carol Wilkins, Martha Burt, and Gretchen Locke, *A Primer on Using Medicaid for People Experiencing Chronic Homelessness and Tenants in Permanent Supportive Housing* (Washington, D.C.: Department of Health and Human Services, July 23, 2014).

DIGEST OF RECENT LITERATURE

Historic Preservation in Declining City Neighbourhoods: Analysing Rehabilitation Tax Credit Investments in Six US Cities

Stephanie Ryberg-Webster and Kelly L. Kinahan, Urban Studies (February 2016)

This article argues that there is a real threat, whether by population decline, economic distress, and/or increased vacancy rates, to the preservation of historic buildings in six so-called "legacy cities"—Baltimore, Cleveland, Philadelphia, Providence, Richmond, and St. Louis. It describes these legacy cities and how recent property planning and policy have often led to the neglect of historic preservation. The authors thoroughly detail the benefits of historic preservation, including neighborhood revitalization, lower vacancy rates, and increased property values, in certain communities. Most notably, the article uses a study of federal historic rehabilitation tax credit (RTC) investments, which they call the "nation's most effective Federal program to promote community revitalization and encourage private investment through historic preservation." The authors discuss the results of this study, which examines RTC investments from 2000 to 2010 across numerous legacy cities in the United States. This study allows city planners and lawmakers to obtain a better understanding of locations for private investment in historic preservation that offer the best opportunity. The article concludes by stating that the federal RTC's main goal is to encourage the private sector to invest in the rehabilitation of historic buildings, thereby furthering the revitalization of neighborhoods across the United States, especially in weak market locations.

The Significance of Segregation in the 21st Century

Ingrid Gould Ellen, Justin P. Steil, and Jorge De la Rocca, City & Community (March 2016)

Many researchers have claimed that we have seen the "end of the segregated century." However, this article shows that the effects of segregation are still evident today in many U.S. metropolitan areas. The article explores the effects that segregation has on communities, most notably on access to employment opportunities and improved socioeconomic status. The authors go on to show that increases in segregation have led to

Contributors: Katherine Bailey, Omar Bareentto, Christina Fernandez, Hilary Jaffe, Crystal Kay, Kathryn Mullin, Theresa Omansky, Alec Rubenstein, and Sara Silverstein

significant inconsistencies in socioeconomic outcomes, such as college graduation and employment. Among the research cited are comparisons between Blacks and whites and the difference in exposure to neighbors who are college-educated or employed as well as to neighbors who live in poverty. The article explores the changes in Black, white, and Latino neighborhood environments from 1990 to 2010, correlating this exposure to certain characteristics of each neighborhood. The article postulates that while more research is needed to better show the specific effects that segregation has on communities, it is clear that the effects of segregation are well established in the twenty-first century.

Rental Housing: An International Comparison

Michael Carliner and Ellen Marya, Joint Center for Housing Studies of Harvard University (September 2016)

This report compares rental housing affordability among twelve advanced countries in North America and Europe, concluding that the United States and Spain exhibit the most severe and pervasive lack of affordability. The report notes that there has been very little research comparing housing affordability across countries because of the difficulty in obtaining and comparing data. For this study, the authors relied upon individual responses from household surveys. The report found that rental housing in the United States is less affordable than in other countries, primarily "due to greater income inequality, more limited housing assistance programs, and perhaps a housing supply consisting of units that are larger and better-equipped but that are consequently more expensive." The article observes that likelihood of renting varies with income, household size, whether individuals were born in the country in which they live, and age, and that those factors play a greater role in some countries than others in influencing rental habits. The authors conclude that, by a number of measures, the United States has a more severe issue of rental affordability challenges than all countries examined except Spain.

Of particular interest, the report examines the use of vouchers across countries. It notes that vouchers in the United States are generally more valuable, but available to a smaller number of households. It concludes that the requirement for housing to be inspected by government officials provides a substantial obstacle to the use of the vouchers in this country. It also observes that unlike the United States, which has a set number of vouchers available, most other countries provide them to anyone who qualifies, even if that means setting more stringent requirements for eligibility. The article concludes by noting that even if the subsidy were smaller, providing housing allowances to a greater number of households in the United States would help reduce severe rent burdens.

Producing Affordable Housing in Rising Markets: What Works?

Lance Freeman and Jenny Schuetz, Board of Governors of the Federal Reserve System (September 2016)

This article discusses the various policies that states and localities have adopted to directly provide or incentivize developers to provide affordable housing in rising markets. Such policies include using federal resources, such as the Low Income Housing Tax Credit (LIHTC) program, and various local housing policies, including inclusionary zoning, tax abatements, and tax increment financing. While research on these various affordable housing programs is limited due to the difficulty in collecting data and inconsistent recordkeeping by state and local governments, generally speaking, these programs have produced modest amounts of affordable housing and thus are unlikely to address the effects of rising housing costs. In order to design more effective affordable housing programs, the authors call for better data collection, standardized data reporting, and increased understanding of the political dynamics of state and local governments. They also recommend various policies, such as reducing the regulatory burdens of development to reduce the costs of building new housing, increasing density in certain neighborhoods, and developing/preserving affordable housing in high opportunity neighborhoods.

CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions

Michael Haber, Fordham Urban Law Journal (Vol. 43, No. 2)

This article examines the evolution of Community Economic Development (CED) from its beginnings as a grassroots, activist-driven, anti-poverty movement, into the market-based model that the author argues largely defines CED today. In so doing, the author discusses how the contemporary market-based model, which relies on complex regulatory frameworks and is heavily influenced by private outside funders, has forced many CED organizations to become apolitical and lose touch with their activist and community roots. As an alternative to the market-based CED model, the author draws upon the anti-authoritarian activism that formed the foundation of the Occupy Movement and the Movement for Black Lives as a model for community development. In particular, the author explores how the primary tenants of anti-authoritarian activism—autonomy, horizontalism, and prefigurativism—can be utilized to create "community counter-institutions" that are more politically engaged and confrontational and give direct community control back to the communities they serve.

Gentrification Response: A Survey of Strategies to Maintain Neighborhood Economic Diversity

New York University Furman Center (October 2016)

The first part of this article discusses various strategies utilized by states and cities to create and preserve affordable housing in gentrifying neighborhoods. The article examines the strategic use of city-owned land and discusses the ability of cities to (1) enter into long-term ground leases that include an affordability requirement, (2) impose deed restrictions that limit the use of land formerly owned by the city to affordable housing, and (3) create community land trusts. The article also evaluates the strategic use of other city tools and resources, such as housing subsidies, property tax benefits, inclusionary zoning, and affordable housing trust funds. The second part of the article looks at ways to assist tenants at risk of displacement. These strategies essentially fall into the categories of regulating the landlord/tenant relationship or providing assistance for households that move. The landlord/tenant relationship can be regulated by (1) capping the amount by which rents may be increased in privately owned, unsubsidized housing; (2) strengthening tenant rights through limiting the grounds for eviction; (3) requiring longer leases; and (4) providing legal and organizing services for tenants. Households that relocate can be aided by being given preference for subsidized housing and/or payments and counseling services to assist with the home search and application process. The article notes that each of these strategies has strengths and weaknesses, and many are already being utilized in various localities.

Real Estate Bubbles and Urban Development

Edward L. Glaeser, National Bureau of Economic Research, NBER Working Paper Series (December 2016)

This working paper examines the prevalence and underlying causes of real estate bubbles. It first revisits real estate booms and busts of the United States and Asia (primarily Japan, China, and the Asian Financial Crisis of 1997). Based on these case studies, the author crafts a theory of real estate bubbles that focuses on passive capital's preference for real estate over "built production facilities" and outlines additional factors that contribute to real estate often being the source of financial crises. The author argues that while it is possible for real estate bubbles to be welfare enhancing, this is unlikely given the fact that they typically result in foreclosures and financial dislocation that outweigh the gains from extra building. The working paper also analyzes the different approaches government can utilize in response to a real estate bust.

Poverty Concentration and the Low Income Housing Tax Credit: Effects of Siting and Tenant Composition

Ingrid G. Ellen, Keren M. Horn, and Katherine M. O'Regan, Journal of Housing Economics (December 2016)

This article examines whether the LIHTC program affects the concentration of poverty by examining the combined effects of siting choices and tenant composition and how neighborhoods and metropolitan areas change after LIHTC developments are constructed. Specifically, the article examines long-term changes, both in neighborhood poverty rates after the completion of LIHTC developments and in longer-term shifts in metropolitan area-level poverty concentration. Utilizing this approach, the article finds that poverty rates decline in high-poverty neighborhoods after the completion of LIHTC developments, but that LIHTC investments overall do little to reduce poverty concentration. The authors argue that this is likely because many policymakers focus solely on the location of the LIHTC development, as opposed to both the location of the developments *and* the variation in tenant composition across developments. The article suggests that policy choices, such as the presence of rental assistance, play a strong role in contributing positively to differences in occupant income levels across neighborhoods. The importance of this research is heightened by new evidence suggesting that growing up in neighborhoods of concentrated poverty may increase the likelihood of poverty in adulthood.

Rebellious Strains in Transactional Lawyering for Underserved Entrepreneurs and Community Groups

Paul R. Tremblay, Clinical Law Review (Fall 2016)

This essay assesses progressive transactional lawyering through the lens of Gerald Lopez's 1992 book, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice. Rebellious Lawyering*, the essay notes, shook the core of progressive lawyering with its sharp criticism of the role of lawyers within subordinated communities. According to this essay, at least one aspect of the landscape of public interest lawyering has indisputably changed since the publication of *Rebellious Lawyering*: a once litigation-heavy field has become more transactional with clients needing "less advocacy and more sophisticated technical support."

The essay first summarizes Lopez's critique, which rests in part on the belief that "the primary focus on lawyering strategies and short-term relief is not helpful in the long run" because it often encourages dependence on professional assistance and fails to connect an individual client to the larger community struggle. Lopez argues for "rebellious lawyering," one

that favors the lived experiences of the client over the professional and technical expertise of the lawyer. Accepting the Lopez critique, this essay applies the model to transactional lawyering and the services that "make entities and institutions function effectively." Despite a finding that the Lopez critique does not apply perfectly to this area of law, this essay argues that transactional legal services are, in fact, inherently rebellious and "can help accomplish much of what Lopez hopes rebellious lawyers would achieve in their work with subordinated communities."

A Seat at the Table: Changing the Governing Structure of Low Income Housing Tax Credit Program Administration to Reflect Civil Rights Values and Fair Housing

Raquel Smith, Columbia Journal of Race and Law (2016)

This note revisits the Fair Housing Act of 1968 (FHA) and Title VI of the Civil Rights Act of 1964 and their attempt to reduce unlawful discrimination in housing. In particular, the author focuses on the LIHTC program and argues that the lack of relevant regulation and guidance with respect to issues of fair housing fosters racial segregation in contradiction of the FHA's mandate to affirmatively further fair housing. The note argues that the lack of data, regulation, and guidance in connection with the LIHTC program and the discretion afforded to state housing finance agencies tends to encourage the development of affordable housing in racially segregated minority neighborhoods, limiting housing opportunities for low-income, minority families. The note examines relevant lawsuits in New Jersey, Connecticut, and Texas and proposes that the U.S. Treasury should (1) acknowledge the authority of the FHA and Title VI in implementing the LIHTC program, (2) form a federal governing body to ensure that state housing finance agencies are nondiscriminatory and remain in compliance with civil rights laws, and (3) require state housing finance agencies to form governing bodies inclusive of the communities they are serving.

Now is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification

Bethany Y. Li, Fordham Law Review (2016)

This article examines the negative effects of gentrification in cities, including the displacement of long-time residents, loss of social capital and community spaces, and increase in tenant harassment and mental health problems of residents. The article outlines how local municipalities have used zoning to gentrify neighborhoods through mechanisms such as upzoning low-income communities of color and downzoning affluent urban neighborhoods, leading to the perpetuation of poverty and segregation. To highlight this phenomenon, the author studies the rezoning of the East Village and Lower East Side neighborhoods of New York City, which promoted luxury development under the guise of affordable housing and

sustainability. In addition to community organizing where cities have reached a tipping point, the article argues that litigation strategies should be utilized to stem the flow of gentrification. These strategies include using the antidiscrimination provisions of the FHA to combat the discriminatory effects of zoning and redevelopment plans and to affirmatively furthering fair housing, as well as using the social welfare provisions of the various state constitutions to protect low-income individuals from displacement. The articles concludes with the suggestion that common law property principles be broadened to include the contributions and social capital residents have made in increasing the value of their communities.

The Price of Equality: Fair Housing, Land Use, and Disparate Impact

Jonathan Zasloff, Columbia Human Rights Law Review (2017)

In response to the Supreme Court's decision in *Texas Department of Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015), this article examines what "disparate impact" means under Title VIII of the FHA. Specifically, the article examines what policy justifications are "good enough" to overcome a claim that a local government's zoning regulation has a disparate impact on racial minorities. By analyzing circuit court cases and HUD's disparate-impact regulations, the author argues that the "intermediate scrutiny" standard is the proper standard for balancing land use policies and fair housing. Applying this standard, the article examines four common justifications for zoning regulations: public health, safety, and environmental concerns; traffic and parking; municipal finance; and property values. The article concludes that, in most cases, these justifications are not sufficiently supported by data or are not the least restrictive means and therefore are insufficient justifications to overcome a disparate impact claim. The article concludes with suggestions for how local governments might tip the balancing test in favor of zoning regulations being upheld.

Articles

Ten Years of Fighting Blighted Property in Memphis: How Innovative Litigation Inspired Systems Change and a Local Culture of Collaboration to Resolve Vacant and Abandoned Properties

Steven E. Barlow, Daniel M. Schaffzin, and Brittany J. Williams

I. Introduction.. 349
II. Building Litigation Capacity and Formulating a Litigation Strategy to Reduce Vacant and Abandoned Properties in Memphis................ 353

Steve Barlow (sbarlow@harkavyshainberg.com) is an attorney at Harkavy Shainberg Kaplan & Dunstan PLC and is a part-time City of Memphis Staff Attorney. He co-founded and serves as President of Neighborhood Preservation, Inc. Since January 2015, he has co-directed the University of Memphis Neighborhood Preservation Clinic.

Danny Schaffzin (dschffzn@memphis.edu) is an Assistant Professor of Law and the Director of Experiential Learning at the University of Memphis Cecil C. Humphreys School of Law. Since January 2015, he has co-directed the University of Memphis Neighborhood Preservation Clinic.

Brittany Williams (bjwllms4@memphis.edu) is an attorney and the City of Memphis-University of Memphis School of Law Neighborhood Preservation Fellow. A graduate of the University of Memphis Cecil C. Humphreys School of Law, she began her work on Neighborhood Preservation Act cases as a legal extern with the City of Memphis Attorney's Office in the fall of 2014.

The authors are grateful to Jordan Emily, a Neighborhood Preservation Clinic alumnus, for his tireless research assistance. Further, we acknowledge the leadership, support, and encouragement of Memphis Mayor Jim Strickland, Shelby County Mayor Mark Luttrell, and Shelby County Trustee David Lenoir. We are grateful for the continuing inspiration, suggestions, and guidance supplied by Kermit Lind and Joe Schilling. And we humbly recognize the foundation laid for our work by the Honorable Larry Potter, the visionary jurist who founded the Shelby County Environmental Court more than thirty years ago and has molded it into the national example that it continues to set today. Great thanks is also owed to Dean Peter Letsou for his unending faith in us and our innovative approach to clinical legal education. Finally, we must express our heartfelt appreciation for Patrick Dandridge, who directs Memphis Code Enforcement operations, for his confidence in us and our management of some of his department's most challenging issues.

A. The Escalation of Memphis's Problem Property Epidemic...... 354
B. The Pieces in Place to Prompt a Shift in Memphis's Strategic Approach...... 356
1. The Neighborhood Preservation Act (NPA)...... 356
2. The Shelby County Environmental Court...... 358
3. "Loud and Clear": Memphis Ramps Up Its Blight Elimination Litigation Strategy...... 359
C. The University of Memphis Neighborhood Preservation Clinic...... 361
III. Challenges Revealed in Litigating More Than 1,600 Cases Involving Blighted Properties...... 363
A. Who Is Really Responsible for Remedying the Property?...... 364
1. Ownership Challenges Posed by Tax Sale and the Associated Redemption Period...... 364
2. The Bankruptcy Issue...... 366
3. The Unrecorded (or Never Conducted) Foreclosure Sale... 367
4. Heirship...... 368
B. Is the Responsible Party Able to Remedy the Problem Property?...... 368
1. The "Right to Blight" Investor...... 369
2. Absentee Owners...... 370
3. Corporate Owners and Owners Through Mortgage Foreclosure...... 371
4. The "Dreamers"...... 372
C. What Is the Ultimate Remedy? Limitations of Appointing a Receiver to Do a Full Rehabilitation...... 373
D. What Do the Neighbors Want?...... 375
IV. Key Observations and Recommendations...... 377
A. Blighted Properties Present Multiple Complex, Intertwined Legal Issues...... 377
B. Multisector Partnerships Are Necessary...... 380
1. Broad Community Collaboration...... 380
a. The Opportunity Property Team...... 381
b. The Memphis Blight Elimination Charter...... 381
c. BEST...... 382
2. Local Government Commitment...... 382
a. Joint Mayors' Environmental Team...... 383
b. Tax Foreclosure and Other Shared Solutions...... 384
V. Next Steps...... 385
A. Develop a Probate Court Practice to Resolve Heirship Cases. 386
B. Effectively Address Properties That Are Not Vacant, Including Occupied Substandard Properties...... 386
C. Comprehensive Statewide Legislative Anti-Blight Agenda for 2018...... 387
VI. Conclusion...... 388

I. Introduction

In early 2008, Memphis attorneys Steve Barlow and Bill Whitman filed the first-ever civil lawsuit pursuant to the Tennessee Neighborhood Preservation Act (NPA)[1] on behalf of a local homeowner, Jan Rowe. Ms. Rowe had contacted Barlow in late 2007, frustrated that the out-of-state owner of five vacant and dilapidated duplexes in her neighborhood was not being held accountable for his neglect. The properties were partially boarded, overgrown with vegetation, and covered with graffiti. Ms. Rowe maintained that these conditions were negatively impacting the quality of life of her family and all nearby residents and were bringing down her property's value.[2]

Representing Ms. Rowe on a pro bono basis, Whitman and Barlow took the owner to court for violating community standards and for maintaining a public nuisance as defined in the NPA.[3] The lawsuit yielded results, and it yielded them fast. Within weeks of serving the owner, the case concluded with a settlement that committed the owner to full compliance in a short timeframe. The owner kept to the timeframe and, as part of the court-approved settlement, even made a donation to the neighborhood association.[4]

Encouraged by this success, Barlow filed a small number of additional cases in coming years. And in 2010, building on the early test cases, the City of Memphis launched an aggressive litigation strategy by filing of one hundred and thirty-eight civil lawsuits in a single day against negligent Memphis property owners.[5] Progress was being made, but all involved at the local level were looking for more systemic answers.

In 2011, the Center for Community Progress (CCP), a national organization committed to turning "Vacant Spaces into Vibrant Places,"[6] invited

1. TENN. CODE ANN. § 13-6-101 to -107 (LEXIS through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly). Specifically, the lawsuit alleged that the property was a public nuisance because it was in a condition that was not "fit and habitable." *Id.* § 13-6-106(a).

2. *C.f.* Toby Sells, *Lawyer Takes Big-Picture Approach to Fighting Blight in Memphis*, NEXT CITY (Feb. 18, 2016), https://nextcity.org/daily/entry/blight-steve-barlow-memphis-neighborhood-preservation (referencing Memphis's first NPA lawsuit in 2008).

3. *See infra* notes 33–38 and accompanying text.

4. Settlement Agreement (July 2008) (on file with authors).

5. Andy Meek, *'Hundreds More' Blight Suits on the Way*, MEM. DAILY NEWS (Dec. 23, 2010), https://www.memphisdailynews.com/news/2010/dec/23/hundreds-more-blight-suits-on-the-way/.

6. CCP is "the only national 501(c)(3) nonprofit organization solely dedicated to building a future in which entrenched, systemic blight no longer exists in American communities. The mission of Community Progress is to ensure that communities have the vision, knowledge, and systems to transform blighted, vacant, and other problem properties into assets supporting neighborhood vitality." CENTER

representatives from three cities in Tennessee to participate in the week-long "Community Progress Leadership Institute" at Harvard University.[7] From Memphis, Shelby County Environmental Court Judge Larry Potter, then director of Keep Tennessee Beautiful Sutton Mora Hayes, and attorney Steve Barlow participated. Although the Shelby County Environmental Court had been continuously operating since the 1980s under Judge Potter's leadership, the City of Memphis continued to struggle to address the large number of vacant or abandoned houses and buildings in its core. Memphis Mayor A C Wharton, Jr., who held office from October 26, 2009, to December 31, 2015, campaigned strongly on the issue of blighted properties.

The team members from Memphis—Potter, Hayes, and Barlow—were each looking for a better way to meet the challenge head-on. Barlow, having participated in several CCP conferences, knew that the national organization provided technical assistance for land banking as a significant part of its strategy for helping so-called "legacy cities" face the challenge of large scale abandonment of structures.[8] He hoped the Leadership Institute would provide direction on how to start a proper land bank for Memphis. After all, Frank Alexander, Sam Nunn Professor of Law at Emory University and a presenter and mentor at the Leadership Institute,[9] had been instrumental in the drafting and adoption of the Michigan Land Bank Act that gave rise to the highly successful Genesee County Land Bank in Flint, Michigan.[10]

FOR COMMUNITY PROGRESS, http://www.communityprogress.net (last visited Mar. 21, 2017). CCP organizes the "Reclaiming Vacant Properties" Conference every eighteen months, an event that has inspired the authors for many years. *About*, CENTER FOR COMMUNITY PROGRESS RECLAIMING VACANT PROPS. CONF. 2016, http://reclaimingvacantproperties.org/about/ (last visited Mar. 21, 2017).

7. *Leadership Institute to tackle abandonment of properties*, CENTER FOR COMMUNITY PROGRESS (Mar. 11, 2011), http://www.communityprogress.net/our-press-releases-pages-31.php?id=137.

8. *See, e.g.*, ALAN MALLACH & LAVEA BRACHMAN, LINCOLN INSTITUTE OF LAND POLICY, REGENERATING AMERICA'S LEGACY CITIES (2013), http://ti.org/pdfs/LegacyCities.pdf.

9. FRANK S. ALEXANDER, LAND BANKS AND LAND BANKING 3 (2011), http://www.communityprogress.net/filebin/Land_Banks_and_Land_Banking_Book.pdf.

10. Alexander described the Genesee County Land Bank as "the first of . . . the second generation of land banking." It is successful because the vacant properties are sold to identified, responsible owners rather than merely the first buyer to come along. Blake Thorne, *Ten years of fighting blight: Genesee County Land Bank was the model for the nation*, MLIVE (Nov. 30, 2014), http://www.mlive.com/news/flint/index.ssf/2014/11/genesee_county_land_bank_10_ye.html; *see also* W. Dennis Keating, *Urban Land Banks and the Housing Foreclosure and Abandonment Crisis*, 33 ST. LOUIS U. PUB. L. REV. 93, 95–97 (2013); Diana A. Silva, Note, *Land Banking as a Tool for the Economic Redevelopment of Older Industrial Cities*, 3 DREXEL L. REV. 607, 608 (2011).

At the very first opportunity, Barlow asked for a little time with Professor Alexander to talk about what it would take to start a land bank in Memphis like the one in Flint. Alexander obliged, and in an ensuing fifteen-minute conversation, interviewed Barlow about the specific challenges of vacancy and abandonment in Memphis. Alexander quickly moved to the heart of the matter:

ALEXANDER: *"What is your property tax foreclosure process like in Tennessee?"*

BARLOW: *"It takes at least 5 years from start to finish, many properties eligible for tax sale are not ever included in the sale, and even after the sale there is a one-year redemption period during which no work except to prevent waste may be completed by the buyer at tax sale."*

ALEXANDER: *"What is the status of code enforcement efforts in Memphis?"*

BARLOW: *"There are at least five separate city or county agencies that are involved in some form of code enforcement efforts across Memphis, and they have very limited communication with each other, much less coordination. They are all primarily just responding to citizen complaints, and the applicable ordinances are outdated and confusing, sometimes even contradictory."*

ALEXANDER: *"Memphis isn't ready for a land bank. If you don't fix the tax foreclosure process and fix code enforcement, your land bank would have very limited success. You have to get a high performing code enforcement operation going, and be sure that your tax foreclosure systems make sense, and then you can start thinking about a land bank."*

With that advice, Alexander influenced Memphis's blighted property reduction strategy for years to come. Although land banking remained an important long-term step, Barlow and the team returned to Memphis refocused on streamlined property tax foreclosure and enhanced code enforcement as the principal strategies in the city's effort to address neglected properties. As part of an ongoing technical assistance program of CCP, Professor Alexander analyzed and recommended changes to Tennessee's property tax foreclosure law.[11] Acting on the recommendations, a coalition of urban areas of Tennessee set out to make key improvements to the state law, including reducing the post-tax sale redemption period. Such improvements included reducing the length of time during which owners who have lost property in a tax sale may get their property back by right simply by catching up on taxes and reducing the amount of time

11. Memorandum from Frank S. Alexander, Sam Nunn Professor of Law, Emory University School of Law & Sara J. Toering, Project on Affordable Housing & Community Development, Emory University School of Law, Center for Community Progress, to Sutton Mora Hayes, Executive Director, Keep Tennessee Beautiful & David Massey, City of Knoxville, Tennessee CPLI Working Group (Nov. 29, 2011) (on file with authors).

it takes to proceed from tax delinquency to auction sale of tax delinquent property, especially in cases where the tax-delinquent property is deemed "vacant and abandoned."[12]

The improvements to code enforcement would have to happen at the municipal level. In 2013, Memphis embarked on a code enforcement restructuring effort with assistance from the Mayor's Innovation Delivery Team.[13] Code enforcement system changes had come up as an innovation challenge since a confusing system of property maintenance laws appeared to be hindering the revitalization of core neighborhoods and the reduction of blighted properties that the Team was trying to achieve via its "Neighborhood Economic Vitality" project.[14] Meanwhile, Memphis's steadily expanding public nuisance litigation strategy was bolstering code enforcement operations. The city's willingness to reinforce administrative code enforcement efforts by expanding litigation capacity using in-house lawyers, outside counsel, and law students and by staying committed to an aggressive litigation strategy demonstrated to all involved that the city was serious in its commitment to bring problem properties into compliance and to hold property owners accountable. In turn, the growing number of positive results from that litigation effort validated the need for a streamlined approach from the beginning to the end of the code enforcement process.

This Article describes the political, policy, and legal lessons learned while developing and implementing a citywide litigation strategy that has deployed specific legal tactics against more than 1,000 owners of vacant and abandoned properties in Memphis over the course of the last decade. Part II surveys the context in which the city's blight litigation capacity has been expanded and in which its strategy has been implemented, describing the escalation of Memphis's problem property epidemic and the forces that have joined together to combat it. In Part III, the authors identify the legal questions that should be answered for a distressed property to be put back to productive use. Part IV then explains the prevailing viewpoint in Memphis that vacant properties primarily present a legal challenge due to the multiple complex and intertwined legal issues that must be resolved to make progress and that the challenge of blighted

12. S.B. 3223, 107th Gen. Assemb., 2d Sess. (Tenn. 2012); Sohil Shah, *Saving Our Cities: Land Banking in Tennessee*, 46 U. MEM. L. REV. 927, 939–41, 956–57 (2016).

13. INNOVATE MEMPHIS, http://www.innovatememphis.com (last visited Mar. 8, 2017) ("In late 2011, Bloomberg Philanthropies awarded the city of Memphis a 3-year grant to establish the Mayor's Innovation Delivery Team."); *see also About*, INNOVATE MEMPHIS, http://innovatememphis.com/about/ (listing "restoring economic vitality to our core city neighborhoods" as one of the Innovation Team's goals).

14. The results of this effort were subsequently compiled into a report. *See* Report from Mark Frater & Doug Leeper, LeanFirm, Inc., to the City of Memphis, Tennessee (Apr. 17, 2015) (on file with authors).

property reduction is most successfully addressed through multi-sector partnerships. Part V describes the next steps the authors anticipate will be taken to further advance Memphis's strategy. Part VI concludes with encouragement for other cities hoping to turn the tide against the scourge of properties in distress.[15]

II. Building Litigation Capacity and Formulating a Litigation Strategy to Reduce Vacant and Abandoned Properties in Memphis

While the authors aim to share takeaways from Memphis's litigation-centered approach to tackling vacant and abandoned properties, it is first important to convey a clear picture of the context in which that approach has been executed. As in many "legacy cities," the second half of the twentieth century saw Memphis's core residential neighborhoods hollowed out by urban sprawl, annexation, and a stagnating housing market.[16] These changes resulted in a reduction of municipal resources since the population was sparse, leaving vast areas with aging and underutilized infrastructure behind.[17] Property owners, including homeowners, in core neighborhoods often did not have a choice to sell or leave due to economic realities and thus became ever more vulnerable to the predatory forces that wreaked havoc in last decade's housing crisis.[18] And thus, the seeds of a vacant property epidemic had been sown.

On the other hand, Memphis was fortunate to have strong and supportive high level political leadership willing to directly attack the challenge, combined with (1) the availability of a specialized housing court known as the Shelby County Environmental Court, (2) a strong statutory scheme under the Tennessee Neighborhood Preservation Act that provides two

---

15. The authors use the word "blight" cautiously and in an effort to clearly and simply communicate. The term is historically loaded and has very negative connotations to many people. Therefore, where possible, the authors have chosen to use the term "blighted property" to more precisely convey the property conditions many know as "blight." VACANT PROPERTIES RESEARCH NETWORK, CHARTING THE MULTIPLE MEANINGS OF BLIGHT: FINAL REPORT 10 (2010), https://www.kab.org/sites/default/files/Charting_the_Multiple_Meanings_of_Blight_FINAL_REPORT.pdf. The Report recommends the use of the term "blighted properties" rather than "blight," where "[b]light as a noun can shift attention away from the actions and actors that helped to create unfavorable conditions in cities. The phrase 'blighted properties' instead brings attention to an active process of blighting or neglecting and offers a more accurate representation of urban landscapes. The latter phrase also helps to avoid slippage from discussions about places to discussions about people. There is a long history of blight referring to communities of color." *Id.*

16. Daniel M. Schaffzin, *(B)Light at the End of the Tunnel? How a City's Need to Fight Vacant and Abandoned Properties Gave Rise to a Law School Clinic Like No Other*, 52 WASH. U.J.L. & POL'Y 115, 128–29 (2016).

17. *See id.* at 130–33.

18. MALLACH & BRACHMAN, *supra* note 8, at 2.

separate causes of action with appropriate remedies for a successful plaintiff, and (3) courageous and persistent litigators who were empowered to take risks and change systems. Together, these assets provided the building blocks for the success of the Memphis approach. As noted above, in early 2008, with Memphis already drowning in an ever-expanding sea of blighted homes, local attorneys Steve Barlow and Bill Whitman took a shot by filing a test set of NPA cases they hoped would bring even the slightest bit of relief.[19] A decade later, that shot still reverberates, having led to the development of a robust litigation team that has now filed more than 1,600 lawsuits and established itself as a centerpiece of a collaborative community approach to resolving blighted properties in Memphis.

A. The Escalation of Memphis's Problem Property Epidemic

To understand property vacancy and abandonment in Memphis, one must understand the systematic movement of people and resources away from the city's urban core. Between 1970 and 2010, the city experienced growth and expansion of territory through annexation even as its population remained static.[20] With dramatic decreases in population density, single family and multifamily housing in core and first ring suburban neighborhoods became under-utilized or abandoned. Housing demand and market values declined as populations steadily fled to newer homes and neighborhoods just a bit farther out. Owners of property in many of the depopulating core and first ring neighborhoods made what could be called "rational" economic decisions not to invest in property maintenance and not to keep current on property taxes because such investment would not be rewarded with any financial returns and could result in further economic losses.[21]

Over time deferred maintenance yields leaky roofs, which in turn cause structural failures and eventual collapse. Property maintenance code enforcement operations in Memphis, as in many cities, historically lacked a cohesive strategy and suffered from being under-appreciated as the "first responders" to the blighted property epidemic.[22] As property conditions gradually worsened, enforcement officers became even more thinly stretched, such that in the context of unprecedented property disinvestment their work came to seem an exercise in futility.[23]

---

19. Sells, *supra* note 2.

20. Steve Barlow et al., *Regulatory Created Blight in a Legacy City: What Is It and What Can We Do About It?*, 46 U. Mem. L. Rev. 857, 859 (2016) ("Illustrative of this challenge is the fact that between 1970 and 2010 the population of the City of Memphis increased by 4% while the geographic area of the city increased by 55%.").

21. *See id.* at 860–863; Schaffzin, *supra* note 16, at 131.

22. Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 Alb. Gov't L. Rev. 101, 150–52 (2009).

23. *See* Schaffzin, *supra* note 16, at 133.

In these same neighborhoods, as land and housing have been largely abandoned, tax sale auctions have not generated much income for the county or municipality and have not resulted in many transfers of property to new tax-paying owners. There is often no interested purchaser at tax sale.[24] Instead, from the perspective of a cash-strapped county or municipality that by law takes title to the real estate at tax sale if there is no bidder, tax sale auctions are perceived to result in additional responsibility and cost without any corresponding reward. Such burdensome outcomes test the political will of even the most visionary leaders, who are further challenged by the lack of demand for tax sale property and the high costs of initiating and conducting large tax sales. In this context, Memphis developed a backlog of tax-delinquent properties.[25] Many other cities across America faced this same challenge at the same time and, in direct response, developed local land bank authorities.[26]

After decades of economic decline and population displacement coupled with extremely limited property maintenance enforcement, the housing foreclosure crisis of the early 2000s dramatically increased the scale of the challenge. Preying upon the most vulnerable minority communities, lenders utilized risky subprime mortgage loans and misleading interest rates to seduce borrowers. The lenders then pursued foreclosure actions against the many owners who were unable or unwilling to pay off their loans on houses losing value.[27] In 2008, around the height of the crisis, lenders began foreclosure proceedings on more than 15,000 homes in the Memphis metropolitan area. Residents fled from their properties, forced out by banks with no plans to occupy or maintain them. By 2015, an estimated one-third of the homes owned in Memphis were worth less than the money owed on the loans borrowed to pay for them.[28]

---

24. Tenn. Code Ann. § 67-5-2501 (LEXIS through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly). Note that real property tax foreclosure sales in Tennessee result in the transfer of title to the property to the buyer upon confirmation of the sale by the court. Andrew Bernstein, *Tennessee Homeowners' Post Foreclosure Auction Right to Cure Under 11 U.S.C. §§ 1322(b) and (c)*, 27 U. Mem. L. Rev. 453, 482 (1997) (citing Marlowe v. Kingdom Hall of Jehovah's Witnesses, 541 S.W.2d 121 (Tenn. 1976)).

25. *See* Schaffzin, *supra* note 16, at 132–33.

26. *See e.g.*, Silva, *supra* note 10, at 616–21; Emily M. Morrison, Comment, *Bank On It: Preventing Re-Blight and Avoiding Costly Litigation in Modern Land Banking*, 48 U. Tol. L. Rev. 137, 139–50 (2016); Matthew J. Samsa, Note, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 Clev. St. L. Rev. 189, 213–31 (2008).

27. Kermit J. Lind, *Collateral Matters: Housing Code Compliance in the Mortgage Crisis*, N. Ill. U.L. Rev., 445, 451–53 (2012). See *infra* Section III.A.3 for a discussion of how the commencement of a foreclosure action does not always result in a transfer of the property to the lender.

28. Schaffzin, *supra* note 16, at 131.

Memphis remains immersed in its struggle to effectively resolve the deteriorated property conditions, vacancy, and abandonment that still plague so many of its neighborhoods, including many that were stable only ten years ago. Between 2008 and 2010, a citywide survey concluded that approximately 40,000 of its 200,000 residential properties were blighted.[29] Today, about 2,500 residential multifamily properties suffer from bad-to-severe property conditions generally stemming from unsatisfactory maintenance.[30] And the Memphis Blight Elimination Steering Team currently estimates that nearly 9,500 single-family houses and nearly 4,000 multi-family housing units are vacant, and many are abandoned.[31]

B. The Pieces in Place to Prompt a Shift in Memphis's Strategic Approach

In 2009, Shelby County Mayor A C Wharton Jr. made the fight against blighted properties the centerpiece of his campaign for Memphis mayor. Wharton was aware that local attorney Steve Barlow, a former community development corporation associate director in a South Memphis neighborhood that was among the hardest hit by the housing crisis, had gotten positive results through litigating claims against property owners using the Tennessee Neighborhood Preservation Act. Upon winning the election, then Mayor Wharton announced that the city would aggressively pursue a greatly expanded version of Barlow's NPA litigation strategy in the Shelby County Environmental Court, with the focus exclusively on the "worst of the worst" unoccupied vacant and abandoned properties.

1. The Neighborhood Preservation Act (NPA)

The Tennessee Legislature passed the NPA in 2004. The NPA gave the owners of residential properties affected by a nearby property that has fallen below "community standards" a cause of action to recover monetary damages equivalent to the loss of value against the owner of the blighted property.[32] In 2007, the Legislature expanded the NPA to additionally authorize "any nonprofit corporation" or "any interested party or neighbor" to sue the owner of a vacant and abandoned building for failure to comply with housing or building codes.[33] Under this new cause of action, a party that could

29. *Blight*, MEMFACTS, http://memfacts.org/neighborhoods/how-do-we-protect-our-neighborhood-against-decline/blight (last visited Mar. 8, 2017) ("The last citywide survey of residential properties was collected from 2008[–]2010 through a partnership with the University of Memphis (CBANA) and the City of Memphis. This survey, which included approximately 200,000 parcels, indicated that the City had a blight rate of 22%, approximately 40,000 residential parcels." For purposes of the survey, any visible code violations, including overgrown vegetation, was counted as "blighted.").

30. Report from the Memphis Property Hub (Mar. 3, 2017) (on file with authors).

31. *Id.*

32. TENN. CODE ANN. § 13-6-104(a) (LEXIS through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly).

33. *Id.* § 13-6-106(a).

demonstrate the vacant or abandoned building in question to be a "public nuisance" could now secure a court order requiring the property's owner to abate the nuisance condition, generally through rehabilitation or demolition.[34] The NPA broadly defines a "public nuisance" as including:

> [A]ny building that is a menace to the public health, welfare, or safety; structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, dangerous to human life, or no longer fit and habitable; . . . or is otherwise determined by the court, the local municipal corporation or code enforcement entity to be as such.[35]

In determining whether the property is a public nuisance, the court may consider the findings of local code enforcement personnel who have investigated the property's conditions.[36]

Upon certifying the subject property as a public nuisance under the NPA,[37] the court may enter "an order of compliance" requiring the owner to provide "a development plan for the abatement of the public nuisance." The development plan must include at least a projected timeline for and a demonstration of the owner's financial ability to complete the abatement.[38] Importantly, the court may also prohibit the transfer of the property until the abatement has been completed.[39] Once it has approved the development plan, the NPA calls for the court to oversee the owner's progress toward abatement and compliance with the plan at periodic status settings.[40]

In general, successful abatement of the nuisance through either rehabilitation or demolition will lead to the court's dismissal of the NPA lawsuit. If an

---

34. *Id.* Under the NPA:

> "[A]bate" or "abatement" in connection with any building means the removal or correction of any conditions that constitute a public nuisance and the making of any other improvements that are needed to effect a rehabilitation of the building that is consistent with maintaining safe and habitable conditions over its remaining useable life.

Id. § 13-6-102(1).

35. *Id.* § 13-6-102(9). The definition also incorporates by reference segments of Tennessee's criminal nuisance statute, which defines as a nuisance a place where conduct such as drug use or sales, prostitution, the unlawful sale of alcohol, or gang activity occurs. *Id.* § 29-3-101(a)(2).

36. *Id.* § 13-6-106(a).

37. The court will dismiss the action "if the building is not certified as a public nuisance by the municipal corporation or code enforcement entity where the building is located or by the court." *Id.* § 13-6-106(e). The owner can establish a complete defense to any NPA action if the owner can establish "that the failure to maintain the property is due to an act of nature, serious illness, or a legal barrier." *Id.* §§ 13-6-104(a), 106(e).

38. *Id.* § 13-6-106(f).

39. *Id.* This particular provision is crucial because of the ease with which owner-defendants might otherwise transfer title via quitclaim deed as a means of evading prosecution.

40. *Id.* § 13-6-106(n)(3).

owner does not comply with the development plan, however, the NPA authorizes the court to appoint a receiver to complete the abatement.[41] The NPA limits eligibility for receivership to municipal corporations (cities) or third party non-profit organizations appointed by the Environmental Court.[42]

2. The Shelby County Environmental Court

What is now known as the Shelby County Environmental Court was created in 1983 as a new division of the Memphis City Court devoted to the adjudication of its health, fire, building, and zoning codes.[43] In 1991, the Tennessee Legislature formalized the Shelby County Environmental Court, conferring upon it jurisdictional status equal to the county's other general sessions courts[44] and "the exclusive jurisdiction to hear and decide cases involving alleged violations of county ordinances, including alleged violations of environmental ordinances."[45] The Environmental Court's authority also includes the ability to issue injunctive orders in aid of its jurisdiction.[46]

Today, the Environmental Court hears all code violation cases,[47] cases seeking shutdown of properties in violation of Tennessee's Criminal Nuisance Statute,[48] and cases alleging claims under the NPA.[49] Larry Potter,

41. *Id.* § 13-6-106(h).

42. *Id.* § 13-6-102(10)(A).

43. *See History of the Environmental Court*, SHELBY CTY., http://www.shelbycountytn.gov/index.aspx?NID=2125 (last visited Sept. 10, 2016).

44. S.B. 1046, 97th Gen. Assemb., 2d Reg. Sess. (Tenn. 1991), http://www.shelbycountytn.gov/index.aspx?NID=2126.

45. *Id.* By intergovernmental agreement, the court also presided over all ordinance violations pertaining to housing and environmental issues from Memphis and other municipalities within Shelby County. *Id.*

46. *Id.* (authorizing the Environmental Court to order compliance with the law, both to remedy the problem at hand and prevent future violations from arising, through contempt sanction and possible ten-day jail sentence for defendants disobeying the court's orders).

47. *See Major Code Violations*, SHELBY CTY., http://www.shelbycountytn.gov/index.aspx?NID=2138 (last visited Nov. 6, 2016).

48. TENN. CODE ANN. § 29-3-101 (LEXIS through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly). For example, the Environmental Court has ordered the closing of dozens of crack houses, strip clubs, apartment complexes, and other entities deemed to constitute a public nuisance. *See, e.g.*, Bill Dries, *Club 152 on Beale Closed as Nuisance*, MEM. DAILY NEWS (May 17, 2013), https://www.memphisdailynews.com/news/2013/may/17/club-152-on-beale-closed-as-nuisance/ (Environmental Court closure of club for illegal drug activities); Bianca Phillips, *Fourteen Memphis Smoke Shops Shut Down*, MEM. FLYER (June 26, 2013, 3:12 PM), http://www.memphisflyer.com/NewsBlog/archives/2013/06/26/fourteen-memphis-smoke-shops-shut-down (detailing the Environmental Court shutdown of multiple businesses for possession and distribution of illegal synthetic drugs).

49. *See History of the Environmental Court*, *supra* note 43; S.B. 1046, 97th Gen. Assemb., http://www.shelbycountytn.gov/index.aspx?NID=2126.

the Environmental Court's judge since its founding, has created a national model for bringing a community's code and property-related matters into a single specialized court.[50] "In Memphis, more importantly, the Court represent[s] a single voice for NPA and related jurisprudence concerning blighted properties."[51]

3. "Loud and Clear": Memphis Ramps Up Its Blight Elimination Litigation Strategy

As part of a volunteer attorney team at first, and later with some philanthropic assistance in support of "impact litigation," Barlow first made use of the NPA in 2008 and 2009 to file fifteen or so lawsuits involving problem properties in the vicinity of East High School[52] and in the Memphis Medical District.[53] Almost without exception, the early test cases led to favorable outcomes, resulting in demolitions, enforceable settlements mandating a rehabilitation plan and timeline, or completion of full rehabilitation. While the option existed to file such cases in the Shelby County Chancery Court (the state court of equity), Barlow chose to file them in the specialized housing court that had concurrent jurisdiction to hear them: Judge Potter's Environmental Court.[54]

On the campaign trail in 2009, Mayor Wharton, based upon extensive input from voters, identified blight and crime as the two most important issues threatening Memphis's path forward. Wharton, himself a well-known attorney and law professor,[55] understood the role that the city's

50. Mayor Willie W. Herenton, *The Memphis Environmental Court*, UNITED STATES CONFERENCE OF MAYORS, http://legacy.usmayors.org/bestpractices/litter/Memphis.html ("Judge Potter travels extensively around the country, consulting and advising communities on [establishing] environmental courts. To date there are approximately 70 environmental courts across the U.S., many of which have been inspired by or patterned after the Memphis/Shelby County Environmental Court, which is considered to be a national model.") (last visited Mar. 14, 2017).

51. Schaffzin, *supra* note 16, at 138 (citing State *ex rel.* Gibbons v. Club Universe, No. W2004-02761-COA-R3-CV, 2005 WL 1750358 (Tenn. Ct. App. July 26, 2005)).

52. Andy Meek, *Eastview Neighbor Tries to Sue Blight Away*, MEM. DAILY NEWS (Apr. 30, 2008), https://www.memphisdailynews.com/editorial/Article.aspx?id=36829.

53. Andy Meek, *Barlow Leaves UNDC to Build Law Practice*, MEM. DAILY NEWS (Sept. 3, 2009), https://www.memphisdailynews.com/news/2009/sep/3/barlow-leaves-undc-to-build-law-practice/.

54. Mary Cashiola et al., *Blight Fighters*, MEM. FLYER (Nov. 4, 2010), http://www.memphisflyer.com/memphis/blight-fighters/Content?oid=2413126.

55. Mayor Wharton served as both the director of Memphis Area Legal Services (Shelby County's Legal Services Corporation entity) and the Public Defender for Shelby County. He also taught poverty law courses at the University of Mississippi School of Law for many years. *The Honorable A.C. Wharton*, HISTORY MAKERS, http://www.thehistorymakers.com/biography/honorable-c-wharton-jr (last visited Sept. 10, 2016).

Law Division could play in leading a coordinated assault on the mounting challenge of property neglect. Having observed the results of the early NPA cases, he believed that litigation was the best option to support the city as its people and neighborhoods were being wrecked by the forces driving increases in blighted properties: "The message is being heard loud and clear. If you own property in the city of Memphis, you will maintain that property or you will end up in court. Neglected and blighted houses are a cancerous rot in any neighborhood, and they will absolutely no longer be tolerated in my city."[56]

Within 100 days of launching "Mayor A C Wharton's Campaign to End Blight," the city filed 138 NPA lawsuits in 2010.[57] Some of the city's first NPA cases named the owners of multiple vacant properties and absentee owners who lived outside of Tennessee.[58] Wharton sought to hold accountable those owners who were financially able to rectify the nuisance conditions but had not done so.[59]

Mayor Wharton planned for the city to file 500 NPA cases in five years.[60] After its initial litigation barrage, the city filed eighty-six more NPA lawsuits in February 2012.[61] Early that same year, the City Attorney's Office, under the leadership of then City Attorney Herman Morris, Jr. and Senior Assistant City Attorney Patrick Dandridge, formed a "Legal Blight Strike Team," which included Barlow as a part-time staff attorney; two full-time assistant city attorneys, who handled blighted property litigation among their other responsibilities; and a Shelby County prosecutor who supported the Team through the occasional filing of cases under Tennessee's criminal nuisance statute. The city touted its emboldened litigation effort as the linchpin of its revitalized code enforcement strategy.[62] And in 2013, possessing clear evidence to demonstrate the importance of strong code enforcement in the fight against blighted properties, the city invested in systematic changes to its entire code enforcement operation.

---

56. Meek, *supra* note 5.

57. Tenn. Code Ann. §§ 13-6-102(5), 106(g); *see also* Cashiola et al., *supra* note 54.

58. Cashiola et al., *supra* note 54.

59. *Id.* ("The last thing we want to see in this effort is some senior citizen who doesn't have the financial means to fix up the house they've lived in for 40 to 50 years," Watkins said. "We've got to go after the big fish.").

60. Blight Litigation Launch Plan (on file with authors)

61. Andy Meek, *City, D.A. File More Suits, Legal Action to Fight Blight*, Mem. Daily News (Feb. 10, 2012), https://www.memphisdailynews.com/editorial/Article.aspx?id=66308.

62. *See* City of Memphis, *City of Memphis Blight Interdiction Task Force—Teams and Responsibilities* (on file with the author) ("Memphis is joining the ranks of the most progressive code enforcement operations in the country by establishing the Legal Strike Team for attacking blight in all of its forms with the most aggressive legal strategies available.").

By mid-2013, the city had approximately 200 NPA cases on file.[63] It also enacted that year an ordinance creating a Vacant Property Registry[64] requiring owners to register and mortgage holders to register and pay a $200 fee for properties that they own which are vacant, abandoned, and tax delinquent.[65] Even with an expanded team and additional revenue created by the registry, the city could not execute its litigation strategy to the full extent envisioned by Mayor Wharton. To do so, it turned to an unlikely partner: the University of Memphis School of Law.

C. The University of Memphis Neighborhood Preservation Clinic

From an early point, the city had engaged Cleveland State University School of Law Clinical Professor Emeritus Kermit Lind as a consultant in its code enforcement reassessment efforts. In the context of these efforts, Barlow sought Professor Lind's guidance about building the city's NPA litigation capacity. Professor Lind, who had devoted much of his career to clinical training in the area of community redevelopment, suggested the possibility of law student involvement. In August 2014, Barlow, who had previously supervised student externs from the University of Memphis School of Law, approached Professor Danny Schaffzin, the School of Law's Clinic Director, about the possibility of increased law student involvement in the city's NPA cases. Just four months later, in January 2015, the University of Memphis School of Law and the City of Memphis launched the Neighborhood Preservation Clinic.[66]

63. "To address blight in the city, the Legal Blight Strike Team was established, and this resulted in the successful rehabilitation or demolition in over 70% of its cases." *2014 GPLSD Award Nominees*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/government_public/2014_Award_Nomination_Summaries.authcheckdam.pdf (detailing accomplishments of City of Memphis Attorney's Office in support of nomination for ABA Hodson Award recognizing "sustained outstanding service or a specific extraordinary accomplishment by a government or public sector law office") (last visited Sept. 11, 2016).

64. *See* MEMPHIS, TENN., CODE OF ORDINANCES 48-24 to 48-27 (2013).

65. *See, e.g.*, Schaffzin, *supra* note 16, at 165; Elizabeth Butler, Note, *Second Chances for the Second City's Vacant Properties: An Analysis of Chicago's Policy Approaches to Vacancy, Abandonment, & Blight*, 91 CHI.-KENT L. REV. 233, 250 (2016); Matthew Connelly, Note, *Rejecting Federal Preference: Why Courts Should Not Exempt Fannie Mae and Freddie Mac Properties from Cities' Vacant Property Registration Ordinances*, 49 WASH. U.J.L. & POL'Y 181, 187–92 (2015).

66. See Schaffzin, *supra* note 16, for an in-depth discussion of the Clinic, its structure, its pedagogy, and its achievements.

Under the joint supervision of Barlow and Schaffzin, Clinic students investigate property ownership and conditions, communicate with field code enforcement professionals, prepare civil lawsuits, and assist in the prosecution of neglectful owners. Each Clinic student assumes the role of lead attorney for the thirty to forty NPA cases he or she is assigned during the academic semester. Clinic responsibilities include weekly court appearances, during which the law students present at hearings and status updates, negotiate with opposing counsel and parties, and do all else that is necessary to move the city's cases forward. To complement their casework, Clinic students participate in a weekly classroom session focused on the pervasive challenge of property vacancy and abandonment in Memphis. The seminar segment of the weekly class exposes the law students to substantive code enforcement and housing law, national models of legal strategies to address problem properties, practice and procedure in the Shelby County Environmental Court, and the issues of ethics and professionalism that arise in the context of their cases. The seminar also includes a case rounds component, during which students engage in an ongoing dialogue about the challenges they are experiencing while managing Clinic's cases.

Now in its fifth semester of operation, the Clinic has trained more than forty students and has emerged as a centerpiece of the blight-fighting effort in Memphis.[67] In late 2015, Memphis committed to funding a new City of Memphis-Law School Neighborhood Preservation Fellowship.[68] With proceeds from its Vacant Property Registry Fund, into which the owners of vacant, abandoned, and tax delinquent properties pay to register and have the city maintain those properties,[69] the city provided the law school with $150,000 to create a two-year attorney position based in the Clinic.[70] The law school and the city announced Brittany Williams, one

67. Jim Strickland, *Mayor Strickland's Weekly Update*, MEM. COMMC'NS (Aug. 19, 2016, 3:47 PM), https://content.govdelivery.com/accounts/TNMEMPHIS/bulletins/15e1fda (regaling the vital role that the Clinic has played in the city's anti-blight litigation effort).

68. Michelle Corbet, *City Adding $150,000 to Blight Fight*, MEM. BUS. J. (Feb. 5, 2016, 6:00 AM), http://www.bizjournals.com/memphis/print-edition/2016/02/05/memphis-adding-150k-to-blight-fight.html; *see also Williams Hired for Blight Fighting Fellowship*, MEM. DAILY NEWS (July 8, 2016), https://www.memphisdailynews.com/news/2016/jul/6/williams-hired-for-city-blight-fighting-fellowship/.

69. *See* MEMPHIS, TENN., CODE OF ORDINANCES Nos. 48-24 to 48-27.

70. *Williams Hired*, *supra* note 68. Under the terms of the funding agreement, the Fellow must be a University of Memphis School of Law graduate, preferably one who has successfully completed a semester in the Clinic or participated in the anti-blight litigation externship with the City of Memphis Law Division. *Id.*; *Brittany Williams Named Neighborhood Preservation Fellow*, U. OF MEM., http://www.memphis.edu/law/about/news/npc-fellow.php (last visited on Nov. 6, 2016).

of the authors of this article, as the first Fellow in January 2016.[71] And as of August 2016, the Clinic team now additionally includes two assistant city attorneys who split their time between the handling of NPA lawsuits and the prosecution of property owners under Tennessee's criminal nuisance statute.

Today, the Neighborhood Preservation Clinic team represents the city in all of its NPA litigation. Having filed 560 new NPA lawsuits since its January 2015 inception, the Clinic presently has more than 850 active lawsuits on file. All told, the city has filed more than 1,600 NPA lawsuits since 2008.

III. Challenges Revealed in Litigating More Than 1,600 Cases Involving Blighted Properties

Over the course of ten years of litigating NPA cases, the authors have found that the main impediment to resurrecting a derelict property is almost never its troubled condition alone. Often, complex legal questions pose a much more significant challenge to the resolution of a property's physical state. Within weeks of encountering a given property, the Clinic team can begin addressing these questions and starting the property on a road to improvement.

First and foremost comes the challenge of finding the party or parties legally responsible for maintaining the property. Once contact is established with the necessary party or parties, the focus shifts to navigating the chaotic circumstances affecting the owner, or owners, and the property, such as property tax delinquency, bankruptcy, foreclosure, and heirship. Next comes the task of determining if the defendant is capable of taking responsibility for the property. If the liable party cannot or will not resolve the problem, the plaintiff must determine the most appropriate remedy and pursue it. Meanwhile, since derelict properties exist in a neighborhood context and have a daily impact on the lives of nearby residents and occupants, due consideration should be given to their daily concerns, including vagrancy, overgrowth and vandalism, as well as their opinions about the most appropriate remedy.

Making decisions with so many variables, known and unknown, is a tricky proposition. The market value of the real estate at issue in the vast majority of these cases is very low or even negative once nuisance mitigation costs are factored in. Therefore, as an advocate for a client with extremely limited resources but with a duty to take action for the public health, safety, and welfare, taking control of the property is rarely a preferable remedy if an accountable owner can be found and held responsible.

71. *Williams Hired*, *supra* note 68.

A. Who Is Really Responsible for Remedying the Property?

Practitioners who are familiar with vacancy and abandonment of real estate know that the very act of establishing contact with a responsible party greatly enhances the likelihood of success at resolution of issues at the property. Every property has a story, and an owner can tell you that story. Once you understand the story, you stand a far greater chance of addressing the various issues within it that have caused the property to fester in troubled condition.

But what if the name on the most recently recorded deed is not the "real" owner? Or what if the "owner" is a defunct out of state or out of country limited liability company without a registered agent? Commonly, even after litigators will have good service of an NPA lawsuit on the owner whose name is listed on the deed, that person sincerely believes, rightly or wrongly, that he or she no longer owns the property because it was lost at tax sale or in a bank foreclosure or because it was given up in bankruptcy. Sometimes the foreclosure or bankruptcy referred to will have taken place many years before. Often the property tax delinquency will be multi-year. And frequently, a significant obstacle to addressing a long-neglected property will be heirship—who is responsible for the property if all owners listed on the deed are deceased, and no one lives there now. All of these challenges are compounded when not one living person with a current or former interest in the property is reachable.

1. Ownership Challenges Posed by Tax Sale and the Associated Redemption Period

In Tennessee, as a general rule, property tax becomes delinquent to such an extent that the property may be sold in a public auction by the tax collector after two full years of nonpayment.[72] The notice, litigation, and auction process of implementing a tax sale of property takes about a year after that. Until recently, even after the sale of the property in tax sale, a one-year "redemption period" applied, during which the original owner could redeem the property by paying taxes owed.[73] This four-plus-year long process, combined with the large number of properties delinquent in property taxes and the limited capacity of the government entities responsible for conducting tax sales, has resulted in a large inventory of property that has been abandoned for many years by the owner but trapped in a sort of tax sale limbo.[74]

72. Tenn. Code Ann. § 67-5-2005 (through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly).

73. The law has been changed to provide for a thirty-day redemption period in cases where the property is abandoned. *Id.* § 67-5-2701(a)(1)(C), (2); S.B. 331, 109th Gen. Assemb. (Tenn. 2015).

74. Frank S. Alexander & Leslie A. Powell, *Neighborhood Stabilization Strategies for Vacant and Abandoned Properties*, 34 No. 8 Zoning and Planning Law Report 1 (Sept. 2011) (noting the accepted understanding that "property tax enforcement

Until the tax delinquent property is sold at auction and the redemption period has expired, the owner of record has an absolute right to take back title to the property. Purchasers at auction typically wait out the redemption period before making any repairs other than to prevent waste of the property, as is expressly allowed by statute. Many times, however, the owner of record has either no interest or no ability to bring the taxes current (if pre-tax sale) or to redeem the property (if post-tax sale and in the redemption period).

In the courtroom, when faced with this situation, the city argues that the owner must be held accountable or that a third-party receiver must be appointed. But this does not always yield practical results. What if the tax sale is scheduled for seven months from now and the owner cannot afford to catch up with the taxes, much less make repairs? Should the city request that the court order the demolition of the dilapidated unlivable structure immediately? If so, the cost of the demolition will be added to the multi-year property tax delinquency, and there will be a vacant lot, owned by someone without financial resources to maintain it. Moreover, the property will be worth even less, but will still have many years of taxes, fines, and penalties as well as the cost of demolition attached as a lien. While the house that was a public nuisance is demolished, a new problem has been created.

Instead, should the city postpone the pursuit of any remedy until after the tax sale is conducted in seven months? But what if the tax sale is canceled[75] or if there is no private bidder at the tax sale auction?[76]

Alternatively, under current Tennessee law, the city could move for the court to appoint a receiver to take over the property and complete a full rehabilitation at the receiver's expense. In cases where the property tax debt exceeds the value of the property, the court may give the receiver's lien priority over property taxes.[77] But even when this extraordinary super-priority over taxes is provided for the receiver, there are many properties in Memphis where investing what it takes to fully rehabilitate a long-abandoned house in an economically distressed neighborhood is not feasible. It is not uncommon to have a case in which average condition

proceedings in the United States . . . are largely inefficient and ineffective. It can take anywhere from two to seven years to complete a property tax foreclosure, and even then the purported new owner of the property lacks insurable and marketable title. Throughout this time frame the underlying properties decay and become greater liabilities to the community.").

75. A tax sale in Shelby County may be canceled for a variety of reasons, such as partial payment of taxes, failure to obtain adequate service of process on all owners and lienholders of record, or some legal challenge to the sale.

76. The authors have observed many tax sales, and it is clear to them that the vast majority of properties sold in most tax sales are taken by county government through a "forced bid" process.

77. TENN. CODE ANN. § 13-6-106(k).

houses nearby the subject property are selling for $10,000 to $15,000, yet the repairs required to bring the neglected property back to livable condition would cost a minimum of $25,000.

2. The Bankruptcy Issue

Many times in Memphis, where consumer bankruptcies are among the highest in the nation per capita,[78] property owners will appear in court and announce that they no longer own the property because they "gave it up" in bankruptcy. This is often the earnest belief of the owner. But, even if the assertion that the property was abandoned in a bankruptcy proceeding is accurate, such property is sometimes not taken by the lender despite the lift of the automatic stay that is authorized by the bankruptcy court. The debtor in the bankruptcy case is often advised by his bankruptcy counsel that the property will be taken by the bank and that he "no longer has to worry about it." As for the debt, this is accurate advice, since the debt is discharged at the end of the bankruptcy case. But if there is no voluntary transfer or the property to the lender (in a "deed-in-lieu of foreclosure" transaction) or foreclosure sale once the stay is lifted, the title remains in the name of the debtor.[79]

In these situations, litigators in Memphis have pursued consensual resolution whereby either the lender releases the lien on the property to allow the debtor to proceed to sell or repair the property, or the lender moves forward with a foreclosure of the lien and either sells or takes title to the property to capture any value that may remain. In a situation where the property is long-neglected and where value is likely at or below zero, a lender has no incentive to exercise its remedies and is more likely to voluntarily release its lien on the property to avoid further liability. In Shelby County Environmental Court, adding the lender[80] as a defendant, or merely putting the lender on statutorily required notice, has on more than one occasion led to the lender assuming responsibility for completing

78. Ronald Mann, *National Bankruptcy Research Center November 2011 Bankruptcy Filings Report*, NBKRC, https://www.nbkrc.com/november2011_news.aspx (last visited Feb. 7, 2017); Laura McMullen & Courtney Miller, *Nation's Highest Bankruptcy Rates Found in the South*, NERDWALLET (Aug. 15, 2016), https://www.nerdwallet.com/blog/studies/states-counties-highest-bankruptcy-rates/.

79. Andrea Boyack & Robert Berger, *Bankruptcy Weapons to Terminate a Zombie Mortgage*, 54 WASHBURN L.J. 451, 451 (2015) (citing *In re* Spencer 457 B.R. 601, 612 (E.D. Mich. 2011); *In re* Moore, 477 B.R. 918 (Bankr. S.D. Ga. 2012); *In re* Brown, 477 B.R. 915 (Bankr. S.D. Ga. 2012); In re Watt, 520 B.R. 834, 837 (Bankr. D. Or. 2014)).

80. In all NPA litigation, when the owner is unwilling or unable to abate the public nuisance, the plaintiff may provide any party that has a legal interest in the property in question with notice of the receivership proceedings. *See* TENN. CODE ANN. § 13-6-106(g). Such notice is designed to give such lienholders the opportunity to abate the nuisance at the property themselves and avoid losing the priority of their lien position to a court-appointed receiver. *See id.*

the rehabilitation of the problem property conditions. Without exception, proper resolution of cases in which the owner is unwilling or unable to make repairs to the property will involve notice upon all lienholders of record, since the statute requires such notice on all "interested parties" and since ultimate conveyance of clear and marketable title is an essential element of the satisfactory resolution of a public nuisance case.

3. The Unrecorded (or Never Conducted) Foreclosure Sale

Much has been written about the challenge of "zombie title."[81] A mortgage is foreclosed, or a foreclosure is commenced, and the owner, knowing that he or she has no ability to pay to stop the foreclosure, simply moves out. Thereafter, the foreclosing lender does not record the deed once the foreclosure is completed.[82] Alternatively, if the foreclosure is never completed and the lender decides to "charge off" the debt, the lender never releases the mortgage lien on the property, so it continues to encumber the property indefinitely.

This set of circumstances can be a challenge in Memphis when attempting to enforce property conditions at such properties because owners of record earnestly believe that they no longer own the property. Sometimes, the "owner" is right, but there is no evidence in the public records of the completion of the foreclosure sale. In both situations, the city impleads the lender as a defendant to the NPA lawsuit. Commonly, a bank that has never proceeded with foreclosure will simply release the lien rather than assuming responsibility for rehabilitation or dealing with the hassle of further litigation. In those instances, when NPA litigation reveals that

81. *See, e.g.*, Judith Fox, *The Foreclosure Echo: How Abandoned Foreclosures Are Re-entering the Market Through Debt Buyers*, 26 LOY. CONSUMER L. REV. 25, 43–44 (2013) ("[A] truer form of 'zombie title' has entered the market—a home that is foreclosed, never set for sale, and then 'un-foreclosed' by the lender. The note and mortgage are inexplicably re-born."); David P. Weber, *Zombie Mortgages, Real Estate, and the Fallout for the Survivors*, 45 N.M.L. REV. 37, 42–43 (2014) ("Many of the borrowers, upon receiving notice of foreclosure and/or a notice of eviction, improperly assume the title to the property has long since passed to the lender or a third party until they are served with default tax notices or arrested for outstanding warrants related to the failure to maintain the property."); Marissa Weiss, *Attack of the Zombie Properties*, 47 URB. LAW. 485 (2015) ("Zombie properties are properties that have been abandoned in the wake of foreclosure; however, the foreclosure process is never completed. Therefore, the zombie title owner still legally possesses the property, although [he is] not taking responsibility for it.").

82. Tennessee is a non-judicial foreclosure state, in which, after publication of notice and a foreclosure sale that is cried out on the courthouse steps, a foreclosing lender may record a substitute trustee's deed vesting title in the foreclosing lender or of the successful bidder at the foreclosure sale. Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 WAKE FOREST L. REV. 1205, 1270 (2013) (citing TENN. CODE ANN. § 35-5-101 (Supp. 2013); Lively v. Drake, 629 S.W.2d 900, 904 (Tenn. 1982)).

the lender has foreclosed and taken title but not recorded its deed of conveyance, the lender has sometimes proceeded to demolish the property or sell or donate it with the court's permission.

4. Heirship

It is often the case that the owner of record of the problem property is deceased. Tennessee's intestacy statute places title in the heirs of an intestate decedent automatically upon death without the necessity of any court process.[83] But what does this mean in situations where such real estate is a liability and not an asset, and multiple heirs have moved on and done some living and dying of their own since the original owner of the property died?[84]

Like the issue of ownership itself, progress is often triggered by finding a single responsive heir. In intestacy situations involving multiple heirs, finding that one accountable heir can lead to a more complete understanding of the history of the property; better insight into the reasons that the property has fallen into disrepair; and information, including contact addresses and phone numbers, about other heirs and interested parties. Ensuring proper notice to all heirs is also important to achieving clean and marketable title to the property by the litigation's end. At this point, in Memphis, litigators attempt actual notice of NPA litigation on all known heirs. If this is not achieved, the city often utilizes alternative remedies, such as administrative condemnation proceedings or property tax foreclosure to achieve compliance or forced transfer of title.

B. Is the Responsible Party Able to Remedy the Problem Property?

In cases where the owner of a vacant and abandoned property is identified, the type of owner often is an indicator of the likelihood of achieving

83. Tenn. Code Ann. § 31-2-103 (LEXIS through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly).

84. *See* Heather Way, *Informal Homeownership in the United States and the Law*, 29 St. Louis Pub. L. Rev. 113, 151–59 (2010) (discussing the processes and problems associated with taking ownership of a property through inheritance). The authors have been surprised at the range of individuals and organizations working to address the many challenges to property associated with heirship. *See, e.g.*, Unif. Partition of Heirs Prop. Act (Unif. Law Comm'n 2010); Louisiana Appleseed, *Protect Your Property: Heir Property in Louisiana* (2011), https://www.appleseednetwork.org/wp-content/uploads/2012/05/Protect-Your-Property.pdf; Ctr. for Heirs Prop. Preservation, http://www.heirsproperty.org (last visited Mar. 21, 2017). While we discuss the issue only in the context of the City of Memphis's strategy to address vacant properties through litigation, there is an impressive body of scholarship offering guidance on heirship challenges generally. *See, e.g.*, David A. Marcello, *Housing Redevelopment Strategies in the Wake of Katrina and Anti-Kelo Constitutional Amendments: Mapping a Path Through the Landscape of Disaster*, 53 Loy. L. Rev. 763, 801 (2007); Way, *supra*, at 151–59.

a successful outcome through litigation and a predictor of the challenges that will present on the way to case resolution. Perhaps unsurprisingly, a relatively small number of responsible parties are both willing and financially able to take the steps necessary to bring a problem property back into a state of productive use. In the author's experience, small local real estate investors—individuals or entities that own five properties or fewer for portfolio purposes—and local individuals who own little, if any, other real estate besides the vacant and abandoned property at issue (maybe the home that they actually would like to repair and then occupy) are the most responsive NPA defendants. With the exception of the group described below as "the dreamers," these local owners tend to be more directly involved in bringing the property back to life. They are on the ground in Memphis to either do the necessary work themselves or to arrange for the work to be done without the assistance of a manager or the distraction of large numbers of other properties to occupy their time or resources. They know their properties and the communities around them, and they come to know code enforcement personnel, the city's attorneys, and the court. For many of these reasons, they are seemingly more incentivized to address the problems that their properties are causing and they work diligently to that end. It is not uncommon for smaller local owners to fix the properties in four to six months from the filing of the lawsuit with little additional pressure from the court or the city.

But problem property owners come in all forms, shapes, and sizes. In particular, the following categories of known owners seem to pose the greatest barriers to progress in Memphis's NPA lawsuits.

1. The "Right to Blight" Investor

In Memphis, as in many communities, historical code enforcement practices included tolerance of open violations due to resource restraints and lack of cohesive strategy.[85] Investors familiar with this history, many of them local owners with larger property inventories, are often surprised to learn that merely keeping their vacant properties boarded and secured is no longer enough to fend off an NPA lawsuit. The city's current Code

85. Schilling, *supra* note 22, at 150; *see also* Lind & Schilling, *infra* note 99, at 833–39 ("Schilling and Lind have issued a call to action for local governments and their partners to design, adopt, and support a strategic approach to code enforcement. . . . Strategic code enforcement relies on improving operational, administrative, and legal processes so that code enforcement systems are more nimble, time-and-cost efficient, and, as a result, effective."). *See generally* Kermit Lind, *VPRN Research & Policy Brief No. Five: Data-Driven Systems* (2016) (discussing and advocating for a more efficient code enforcement strategy that relies on modern technology and data collection); Alan Mallach, *VPRN Research & Policy Brief No. Three: Neighborhood Change* (2015) (discussing how and why neighborhoods change over time).

Enforcement Director, former Senior Assistant City Attorney Patrick Dandridge, has termed this investor response as one grounded in a supposed "right to blight." Many investors, having operated over time without real pushback about the handling of their distressed properties, wonder openly why the city is now choosing to focus on properties and violations it previously ignored. They condemn the city's efforts—whether through code enforcement on the front end or NPA litigation as a last resort—as impediments to their right to put their own business interests before the interests of the community.[86]

In litigation, the city is able to respond to the "right to blight" argument on a case-by-case basis, emphasizing how the vacant property at issue is a public nuisance and a threat to the health and safety of the community around it. Having a local court that specializes in housing code violations serves as a mechanism through which those arguments can be reinforced and the investors held accountable. The results are such that the authors are beginning to see an openness on the part of larger investor groups to working with the city as a means of avoiding litigation.[87]

2. Absentee Owners

Absentee owners of vacant and abandoned properties cause continual challenges in the city's NPA cases. As in many jurisdictions, the absentee owners against whom the city brings suit have often never seen the properties at issue and are otherwise unfamiliar with the Memphis market. In fact, the absentee investor has little reason, if any, to care about surrounding properties or residents.[88] In some cases, the city goes to great lengths to obtain personal service on vacant property owners who live in other

86. Kermit J. Lind, *Perspectives on Abandoned Houses in a Time of Dystopia*, 29 Prob. & Prop. 52 (Mar./Apr. 2015) ("They are not shy about telling code policing officials and communities that compliance with local housing maintenance codes is not in their business plan.").

87. It is worth noting that, in the authors' experience, the tone of NPA litigation and of court proceedings is first and foremost an effort among parties, with full cooperation of the court, to collaborate in problem solving. Factual and legal issues are rarely contested since the city's approach has been to attack the worst of the worst first and since the ultimate source of the city's enforcement power is the police power, by which the city is given great latitude to enforce standards to protect the health, safety, and welfare of its citizens. There are certainly adversarial proceedings on issues of law and fact, but less often than problem solving sessions in which all involved seek common ground for resolution of a clearly identified problem—an out-of-compliance piece of real estate.

88. See Lind, *supra* note 86 ("Absentee owners and commercial housing *investors*, on the other hand, see their vacant houses as either productive or nonproductive commodities, if they look at them at all.").

states and other countries.[89] Even when service is perfected, absentee owners often attempt to use distance as a delay tactic.

An owner is more likely to succeed in rejuvenating a dilapidated house in a distressed Memphis neighborhood if the rehabilitation is done expeditiously and the property is occupied quickly upon completion. Many absentee owners who are cooperative in litigation nonetheless face greater challenges if only because they are not on the ground to monitor the property and the work that needs to be done to bring it into compliance. The authors have observed that absentee-owned properties are more frequently vandalized during the rehabilitation process. Absentee owners often struggle to find and manage competent contractors to perform the necessary work. In the hope of curbing the cycle of vacancy and nuisance perpetuated by these problems, the city often uses litigation to encourage absentee owners to identify a local individual or company for oversight of the property and its maintenance.

3. Corporate Owners and Owners Through Mortgage Foreclosure

Commonly, the fact that a property is owned by a corporation, rather than an individual, poses a significant obstacle to achieving compliance in NPA litigation. Many vacant properties are owned by corporations that are no longer operating actively. While the city can identify and put the defunct corporate owner on notice of its lawsuit, there is usually little hope that the owner or its members will be willing to put substantive effort or resources into nuisance abatement. Quite frequently, the corporation or partnership holds no assets other than the problem property. Thus, the owner has next to no incentive to invest in the rehabilitation of the property and can rely on a functional judgment proof status.

Many of the city's cases involve lenders that have come to own distressed properties through foreclosure. In cases where banks are the owners, most challenges arise after proper service. Asserting the "right to blight" arguments identified above, lenders tend to favor keeping their properties boarded and minimally maintained until they can sell. In response, the city asks the court to require the lender to make the property habitable or propose a buyer that will do so.

Still, the authors have found that lenders, in particular those larger banks that have come to hold title to many thousands of problem properties all over the United States, tend to do things only when compelled by the court and only after active efforts to resist taking any action whatsoever. Oftentimes different local or national law firms or property management firms will represent the same bank in different cases, creating confusion. But litigators work closely with defense counsel for lenders, often drafting very specific orders that provide a clear and indisputable

89. Among others, the city has filed lawsuits against owners in California, Hawaii, Israel, New Zealand, and Singapore.

roadmap to bringing the property into compliance, which will survive the scrutiny of decision makers "up the corporate food chain" from the courtroom litigator handling the matter in court in Memphis.

4. The "Dreamers"

Some of the city's most challenging lawsuits involve a category of well-intentioned owners the authors have come to identify as "dreamers." Although a property may have lingered in a desperate state for many years, its owner, when faced with litigation, will nonetheless ask to be given the chance to rehabilitate the property. When pressed as to "why now," the owner will express a belief in the potential of the property itself or communicate a connection to the property that seems to go beyond its brick and mortar.[90] Often the property is the childhood home of the owner or a relative's first home. While the owner may have a compelling rationale for wanting to abate the property's nuisance condition, he or she rarely has the financial resources or the requisite ability to do so. By the time the city files an NPA case, other forces for many years may have rendered the neighborhood surrounding the "dreamer's" house desolate and unmarketable.

In practice, the city must balance the emotional tie an owner may have to a property with the realities of its distressed conditions. Here, the city presents to the court the extensive cost and effort that would be required for the property to be brought back into productive use. If the owner is able to show a financial ability to perform the required rehabilitation and to make some progress toward that rehabilitation from one court setting to the next, the city will generally not ask for a receiver to be appointed to abate the nuisance more quickly. After an owner has been given a reasonable amount of time to rehabilitate the property, however, the city presents the court with the plain facts of the case: the length of the time the case has been active, how much money the property owner has invested in the property, the potential cost to complete the renovation of the property, whether there has been substantial change in the property's conditions since the litigation began, the current condition of the property, and other relevant information about the neighborhood or case. This perspective is informative not only for the court but also for the defendant, who is usually getting a reality check from both litigators and others in his or her life. Frequently the defendant has not fully evaluated the property

90. See Mindy Thompson Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It (2d ed. 2016), for an excellent treatment of the psychology of losing one's childhood home, neighborhood, or other memorable "place."

at issue in such a systematic manner. In many cases, the property is an unbearable burden for the dreamer owner. The city is forced to handle this type of defendant and property on a case-by-case basis, always bearing in mind the special obligations of municipal attorneys who represent the city, but whose city is comprised by property owners!

C. What Is the Ultimate Remedy? Limitations of Appointing a Receiver to Do a Full Rehabilitation

Under Tennessee law, if the owner or any other interested party (e.g., a mortgagee) is unable or unwilling to abate the public nuisance at the property in litigation, the court is authorized to appoint a receiver to do so.[91] "Abate" is a defined term in the NPA that means, in pertinent part, "to effect a rehabilitation of the building that is consistent with maintaining safe and habitable conditions."[92] In court, when a defendant asks what the city wants them to do with property, the city's position is that the owner is expected to abate the nuisance, and that, under the law, abatement means either full rehabilitation or demolition of the nuisance property. Because these cases often involve owners who cannot or will not abate, and if no interested party steps forward to abate the nuisance—the authors can recall only one instance in which an interested party has done so—the court is authorized to appoint a receiver to "abate the public nuisance."

The court appointed receiver must be a nonprofit organization that has been vetted by the court and must submit a plan, including a budget and timeline, for the abatement.[93] Once the receiver completes the abatement plan, the owner of the property has 180 days to pay the receiver back, plus a 10 percent receiver's fee, or the receiver is authorized to auction the property off to recover the expenses incurred and the fee.[94]

This statutory scheme has made it virtually impossible to identify nonprofit receivers willing and able to take the risk of being a court ordered receiver. In the first place, there are a limited number of nonprofit organizations in Memphis with interest in taking on blighted property rehabilitation projects under any circumstances, and those that may be interested have very limited budgets to do so.

Secondly, the city has repeatedly heard from nonprofit housing developers in Memphis over ten years that there is no shortage of problem properties that are available to them for little or no cost. In fact, many

91. TENN. CODE ANN. § 13-6-106(h) (LEXIS through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly).

92. *Id.* § 13-6-102(1).

93. *See id.*

94. *Id.* § 13-6-106(k)–(l).

of the organizations frequently turn down offers of the donation of title to blighted single-family properties.

Thirdly, there is the question of resources and risk to the receiver. Many nonprofit developers depend upon bank financing to complete development projects. In cases of development as a court-appointed receiver, however, bank financing is not straightforward since the receiver does not hold title to the property. The risk of putting the limited resources of a nonprofit housing developer into a court receivership is high. While the receiver's investment of time and resources is significant, its return on that investment is at best uncertain. If the owner does not repay the receiver the costs that the receiver incurred to abate the nuisance plus a statutorily mandated 10 percent receiver's fee, the receiver may ask the court to authorize an auction of property. At auction, the receiver will recover the abatement costs and the receiver's fee from the purchaser. Or the receiver may end up as the high bidder and walk away owning the property for the money spent to repair it. Depending upon the mission and resources of the nonprofit receiver, such uncertainty may not be tolerable.

The authors' conclusion—borne out by the difficulties experienced in identifying ready and willing third-party receivers to perform the abatement function contemplated by the NPA—is that it is unreasonable to expect a nonprofit receiver to spend its own money to fully rehabilitate property owned by another without more certainty about what the receiver will have at the end of the process.

The authors are now working on an approach, and potentially an amendment of Tennessee statute, that would authorize a sale of the property by the nonprofit receiver while the property is in an unimproved state. The receiver's responsibility would simply be to secure and maintain the property and prevent waste while scheduling the property for auction sale. The auction sale, however, should not be an open public auction because the court's duty under the statute is to ensure that the nuisance is abated, i.e., the property is fully rehabilitated. Thus, any potential purchaser at auction would have to be vetted and the receiver would have a responsibility to monitor after the auction until the court's purposes are fulfilled. The City of Baltimore utilizes a receivership auction process that Memphis is evaluating as a model for amending the NPA.[95]

To date, this challenge of the receiver remedy has not had a significant impact on the effectiveness of the city's NPA litigation. In the vast majority of cases brought to date, the properties at issue have either been fully

95. Balt., Md., Building, Fire, and Related Codes § 121 (2015). For a review of other states' receivership schemes, including their strengths and weaknesses, *see* Alan Mallach, Bringing Buildings Back: From Abandoned Properties to Community Assets (2d ed. 2010).

rehabilitated by the owner or demolished by the city as receiver where the only feasible abatement of the nuisance was demolition. Going forward, however, there appears to be an opportunity to increase the effectiveness of NPA litigation in Memphis by way of a new definition of a court appointed receiver's obligations.

D. What Do the Neighbors Want?

Since 2010, the City of Memphis has been the plaintiff in almost all NPA litigation in Memphis. As attorneys for the City of Memphis, the authors have always felt a special duty to neighbors, nearby residents, and the general public who express concerns about the progress of a property nuisance case in the court. After all, in representing "the City," don't the authors represent "the residents"?

With some frequency, a neighboring owner or a neighborhood association representative will contact the attorneys handling an NPA case for the City of Memphis seeking an update and providing input on progress toward rehabilitation at the property in question. Such input comes in several forms. Sometimes, an individual will simply want to provide the attorneys handing the case with information, such as the amount of time that the property has been vacant, how long there has been a broken window facing their home, or the last time they saw the owner at the property. Other times, a person or neighborhood association will want to take an active role in the court case, either as a witness for the city or as a sort of court "watchdog." In one memorable case, a group of neighbors came month after month with recent 8×10 color photographs showing evidence of a rat infestation in an abandoned house in their neighborhood.

These more active neighbors or groups of neighbors, while always initially welcomed by the city's legal team, can become a real challenge to manage as a case develops. On the one hand, the nearby neighbors are the most directly harmed by the poor property condition and are the most knowledgeable about the history of the property's decline and the neglect of the property conditions. As such, they can provide valuable testimony that is both rich in detail and persuasive. On one occasion, a senior citizen testified that the burned-out house that the owner was requesting more time to repair, despite months of inactivity, had been the hiding place for an armed fugitive who was captured in the burned out house the weekend prior. The house was ordered demolished without further testimony.

On the other hand, neighbors of the problem property often harbor inappropriate prejudices, unrealistic expectations of the court process—especially the length of time that the court process will take to give neighbors relief—and/or historically bad relationships with the owner that can boil over in the courtroom setting. In one case, a group of neighbors made continued use of Facebook and Twitter to express their dissatisfaction about the perceived lack of progress in the case, which was offensive to city leadership and insulting to the court.

While there is certainly no easy solution to this frequent challenge, it is important to clearly set expectations from the beginning with individuals and groups who wish to become involved in these cases. Litigators and the court must make clear to such advocates that their structured input is welcomed and that reasonable efforts will be made to keep them informed, but that there are expectations of them as well. The litigators represent the municipality, not individuals or neighborhood groups. Therefore, the city's attorneys cannot be directed in their litigation strategy by the desires or opinions of these advocates and they are not duty bound to report, or seek input in, every development in a case. A few examples may serve to make this point more clearly:

- One neighborhood association insisted on receiving a written update following every court report and a status report of every development. The legal team did not have the capacity to accommodate this request and advised the association that it would be welcome to send a representative to any and all court hearings and to receive copies of any documents submitted to the court by requesting them from the court clerk. The team had to make clear to this neighborhood association that the city attorney directed the litigation team, not the association. This was not an easy thing for a group of neighborhood activists to accept, but it was the only feasible approach for the litigation team.
- In one case, the owner occupant of a house next door to the property in litigation was not willing to accept the fact that the judge had authorized a longer than usual timeframe for the rehabilitation of the property in light of the health and financial condition of the owner of the property. The property was in safe, secure condition but was not attractive due to cosmetic concerns. Progress was being made, but at a slow pace in line with what the court had ordered. The owner had a very difficult time accepting the court's order. She frequently came to the courtroom to observe court reports on the case and at one point sought permission to address the court on the progress of the repairs at the property, which the court allowed. It became clear in her comments that she had severe prejudice against the owners of the property and that there was not likely anything that the owners could do that would satisfy her concerns.[96]

Careful management of expectations of neighbors is an important but not very obvious component to management of a large docket of blighted property cases on behalf of a municipality. Individuals and neighborhood groups have to be educated about the process in the hopes that their expectations can be set at a realistic level. The "City" does not control

96. In more than one case, the court has asked for one or more neighbors to be removed from the courtroom because of outward hostility toward the owner.

what happens in court, but simply advocates for the repair or demolition of problem properties. Court processes can take a long time, particularly where property rights are at issue. At times, the city's position will be at odds with the neighbor's desire because the neighbor is not the client.

In the end, once a severely neglected property condition is resolved, regardless of what has happened along the way, nearby neighbors almost always forget what it took to get there and are happy and relieved that their concerns were addressed. Memphis litigators commonly advise neighborhood associations that the litigators cannot control how long the process will take, but can promise to persevere until the problem is fully resolved in court.

IV. Key Observations and Recommendations

A. Blighted Properties Present Multiple Complex, Intertwined Legal Issues

In the course of teaching law students how to handle litigation on behalf of the City of Memphis against the owners of dilapidated property, the authors have come to appreciate just how many areas of law are implicated in any given case. Cases commonly turn on questions of corporate structure, civil procedure, probate and estates, evidence, family law, real property, and secured transactions.[97] Moreover, blighted properties occur in the context of a complex system in which local ordinances, state laws, regulatory mechanisms at all levels, real estate markets, and lending and enforcement practices of private parties all come into play. As touched on above:

- Speculators in real estate take title, usually sight unseen, with no intent of repairing or even using the real estate. This phenomenon is relatively new and growing; existing laws are inadequate to protect owners and investors who care about the neighborhood.
- Debt servicers, mortgagees, and investors take title to property through foreclosure and then fail to maintain or sell their owned inventory or refuse to foreclose on real property, opting instead to abandon their interest in the property.
- Owners of rental property have failed to adequately invest in maintenance due to declining values, insolvency, and/or reckless disregard for renters' rights.
- State laws governing tax foreclosure do not yield marketable title rapidly.
- Tax delinquency frequently leads to complete loss of a house to vandalism or the elements.

97. Schaffzin, *supra* note 16, at 159–60.

- The cost to abandon real property may be less than the cost to repair and maintain it.
- Reuse of abandoned property is often impossible or unattractive to investors due to title clearance, delinquent tax, and land use issues.
- The tools available to protect neighborhoods from further decline are inadequate or obsolete.
- Health, safety, and environmental code enforcement operations, property tax collection efforts, and property reutilization programs lack the capacity, resources, or both to meet this challenge successfully.
- Local government resources are decreasing while the demand for local government services is increasing because blighted property raises the costs to deliver services while diminishing the value of the tax base.

The authors believe that the most effective responses are those that have a devoted legal team in the lead, one that recognizes the importance of addressing each question of law and that creatively pursues appropriate legal and equitable resolutions to the systemic obstacles that otherwise cause problem properties to persist. But lawyers should not be alone in the fight: code enforcement professionals, affordable housing developers, public health experts, engineers, city planners, urban anthropologists, social workers, criminologists, business experts, and a host of other professions and expertise are needed. The law gives the well-crafted interdisciplinary team the structure and focus required to make the most progress in the most expeditious fashion possible.

In Memphis at this time, building on that fundamental principle, there is a legal team that includes two lawyers who are directly employed by the City of Memphis, two lawyers who are employed by the law school, and two lawyers who are employed jointly by the City of Memphis Legal Division and the Shelby County District Attorney's Office. This team of lawyers is supplemented by no fewer than eight upper-level law school students who manage cases on behalf of the city during the fall and spring academic semesters. Importantly, the primary source for identification of problem properties in the first place, the City of Memphis Division of Public Works' Department of Neighborhood Improvement and Code Enforcement, is directed by a lawyer (Patrick Dandridge, whose coining of the "right to blight" defense is cited above) who spent eight years as a Senior Assistant City Attorney and legal advisor to Memphis Code Enforcement prior to becoming deputy director of the Department.

There are other examples of successful operations in the field of blighted property reduction headed by robust legal teams. The City of Baltimore, for example, has a code enforcement operation, headed by an experienced lawyer, that contains multiple lawyers who work hand in hand with the code enforcement inspectors and investigators in the enforcement

of property maintenance codes.[98] In fact, Baltimore has been highlighted repeatedly as a national model for effective code enforcement in a challenging market environment with high occurrence of vacancy and abandonment.[99] And in other cities, such as San Diego[100] and Kansas City,[101] lawyers lead different but effective strategies for their particular communities that are aimed at countering distressed properties.[102]

Among the most important lessons that other municipalities should learn from Memphis is the importance of a robust, aggressive, and well supported litigation team to support and advise the property maintenance code enforcement team. Any struggling code enforcement operation should consider adding one or more dedicated and experienced municipal attorneys to the team. The litigation tactics described herein require litigation capacity. Strategic code enforcement at its best is steered by an attorney who understands the importance of property maintenance issues to the community and to the strength and success of the municipality and who is fully supported by the highest levels in municipal governance.

98. *See CELS: More About Us*, BALTIMORE HOUSING, http://www.baltimorehousing.org/cels_more (last visited Mar. 3, 2017).

99. Kermit Lind & Joe Schilling, *Abating Neighborhood Blight with Collaborative Policy Networks—Where Have We Been? Where Are We Going?*, 46 U. MEM. L. REV. 803, 834–35 (2016).

100. Joseph Schilling & Naomi Friedman, *The Revitalization of Vacant Properties: San Diego, California Case Study* (Int'l City/Cty. Mgmt. Ass'n 2002), http://www.mayors.org/brownfields/library/Revitalization_of_Vacant_Properties.pdf; Int'l City/Cty. Mgmt. Ass'n, *Vacant Properties: Revitalization Strategies*, 34:3 IQ REP. 1, 1–18 (Mar. 2003).

101. Legal Aid of Western Missouri demonstrates a lawyer-driven approach, whereby Legal Aid represents neighbors of problem properties. *See, e.g.*, Lisa Benson, *Residents in KC neighborhood tired of looking at abandoned homes, overgrown yards*, KSHB (Oct. 13, 2013), http://www.kshb.com/news/local-news/residents-in-kc-neighborhood-tired-of-looking-at-abandoned-homes-overgrown-yards; *Special Projects*, LEGAL AID OF WESTERN MISSOURI, http://lawmo.org/what-we-do/special-projects/ (last visited Mar. 14, 2017) (listing "Abandoned Housing Act Project (Kansas City)" among its special projects); Peter Hoffman, *Legal Aid of Western Missouri's Economic Development Project: Bringing Self-Empowered Revitalization to Distressed Neighborhoods*, 24:3 J. AFFORDABLE HOUSING & CMTY. DEV. L. 403 (2016).

102. *See* Lind & Schilling, *supra* note 99, at 835–37 (referencing participation by Memphis, New Orleans, Atlanta, and Detroit code enforcements' participation in broader strategic discussions that included the use of legal remedies); Marilyn L. Uzdavines, *Barking Dogs: Code Enforcement Is All Bark and No Bite (Unless the Inspectors Have Assault Rifles)*, 54 WASHBURN L.J. 161, 182–83 (2014) (discussing New Orleans' successful use of "superliens" to reduce blight); *see also Code Compliance and Environmental Litigation*, DALLAS CITY ATTORNEY, http://www.dallascityattorney.com/Code_Compliance.html (last visited Feb. 14, 2017) (describing recent successes in Dallas of the use legal remedies for code violations).

B. Multisector Partnerships Are Necessary

1. Broad Community Collaboration

No single entity or division of government will be able to "solve" the challenge of blighted properties in a community experiencing a high level of vacancy, abandonment, and real property neglect. Likewise, no single political or civic leader will "solve" the challenge of blighted property in most urban environments in the twenty-first century. All impacted parties must work together to understand the problem in their community and develop and implement approaches to bring about improvements.

In 2011, under the "coaching" of Kermit Lind,[103] an effort was launched in Memphis to establish such a coordinated and collaborative team to address blighted properties in a sustained and meaningful way. Then Mayor A C Wharton, Jr. had recently begun his first full term and was challenging his team to address the "blight" that he so frequently heard about as a threat to his constituents—a concern raised nearly as frequently as crime during his campaign.[104] As noted above, the national vacant property organization, the Center for Community Progress, was already providing some technical assistance to Memphis and other Tennessee cities,[105] and the Mayor's Innovation Delivery Team had started work to address the market failure reflected in many Memphis core neighborhoods by abandoned commercial structures.[106]

Professor Lind advised Memphis's leadership team to meet on a regular basis to simply start communicating better about the nature of the problem locally and about what could be done to improve processes and eventually property conditions. Lind recommended three things. First, he advised that the city get a better understanding of the data about blighted properties—where are they, who owns them, and how much of what type exists. Second, he suggested that everyone who is interested in solving the problem get together at least monthly just for the purpose of sharing stories and challenges and starting to work together with some coordination. Lastly, Professor Lind recommended a detailed system scan of Memphis's code enforcement processes. He also suggested that a clinical program at the law school be established to train developing lawyers and expand the capacity of the Memphis legal team accordingly.

103. Kermit J. Lind is a Clinical Professor Emeritus at Cleveland State University's Cleveland-Marshall College of Law and one of the leading legal scholars on blight. *See Emeriti/ae Faculty*, Cleveland-Marshall College of Law, https://www.law.csuohio.edu/facultystaff/eva/emeritusprof (last visited Feb. 14, 2017).

104. A C Wharton, Jr., Mayor of the City of Memphis, Tenn., Remarks at Reclaiming Vacant Properties Conference (Oct. 19, 2010).

105. *See supra* note 11 and accompanying text.

106. *See supra* note 13 and accompanying text.

a. The Opportunity Property Team

Upon Lind's advice, the City of Memphis formed the Opportunity Property Team (OPT) in 2011 to facilitate regular communication and information and data sharing among those working to bring redress to problem properties. The City of Memphis hired, as part of the Executive Division team, a very part-time coordinator (10 hours/month) whose job it was to call together the OPT monthly, coordinate its agenda, keep notes, and keep communication open among its members. Lunch was always served, and the location varied but was never in a government office. A core group of thirty to forty OPT members typically participated.

The OPT put together by consensus a "Blight Elimination Strategy," which included steps the team could take together to improve the legal framework, enhance processes, increase access to data, and move forward in the efforts to eliminate blighted properties from Memphis's neighborhoods. The strategy was never formally adopted (except by the OPT),[107] but was fully implemented within 18 months of completion. The monthly coordinating effort had paid off and relationships had been established that were productive. And importantly, all involved saw an opportunity to build on their shared success.

b. The Memphis Blight Elimination Charter

In the summer of 2015, Kermit Lind and Joe Schilling,[108] a leading expert on vacant and abandoned properties who had worked on code enforcement in Memphis through the National Vacant Properties Campaign, presented recent developments in the field to the OPT. Based on blight strategic planning efforts in cities such as Detroit and Flint, Schilling suggested Memphis consider taking a slightly different tack by adopting a series of operating principles under the concept of a charter similar to work he had done with other cities around sustainability. A "charter" for the elimination of blighted property could be useful to help all the various actors in Memphis formalize the coordinated approach that was emerging in the community. Schilling mapped out a collaborative process that would include a steering committee and culminate in the formal endorsement of the charter at a citywide summit. The summit would also highlight the city's successful programs and progress and make clear that Memphis was in some ways already engaging in successful and nationally replicable approaches to reducing blighted properties in an urban setting. A local nonprofit organization formed in 2010, Neighborhood Preservation,

107. *Blight*, MEMFACTS, http://memfacts.org/neighborhoods/how-do-we-protect-our-neighborhood-against-decline/blight (last visited Feb. 14, 2017).

108. Joseph Schilling is a Senior Research Associate at the Urban Institute and leading scholar on blight. *See Joseph Schilling*, URB. INST., http://www.urban.org/author/joseph-schilling (last visited Feb. 14, 2017).

Inc., which had been involved in the OPT as a member, committed to sponsoring the charter planning process and convening the summit.

Beginning in the early fall of 2015 and continuing into early 2016, a committed group of approximately thirty representatives of all areas of Memphis government, charity, and private sector worked together over a series of carefully coordinated meetings to develop the Memphis Neighborhood Blight Elimination Charter. On March 17, 2016, the City of Memphis, Shelby County, and each of the cross-sector drafting entities formally adopted the Charter at a "Blight Elimination Summit" held at the University of Memphis Cecil C. Humphreys School of Law. Memphis Mayor Jim Strickland and Shelby County Mayor Mark Luttrell, as well as David Lenoir, the Shelby County Trustee tax collector for Shelby County, attended and announced their support and ongoing involvement as part of the Blight Elimination Steering Team formed by the Charter to continue the work of the Opportunity Property Team following its adoption.

c. BEST

The Memphis Blight Elimination Steering Team (BEST), initially largely comprised of those individuals and organizations who partnered to draft the Blight Elimination Charter, began its work immediately following the Charter's adoption. Within six weeks, BEST issued the Memphis Blight Elimination Action Plan.[109] The Plan identified specific and achievable goals with deadlines for completion that members of BEST agreed to work toward accomplishing together. With Neighborhood Preservation, Inc. (NPI) remaining in the convening role, the BEST team continues to meet monthly and timely complete the tasks set out in the Action Plan. At the Blight Summit 2.0, scheduled to take place in May 2017, BEST expects to release a status report on the initial action plan and a new action plan outlining consensus projects and activities running through December 2018.

2. Local Government Commitment

Without the sustained involvement of high-level local government leadership, the amount of progress spurred by the collaboration described above would not have been possible, and those involved would have been frustrated due to slow and inconsistent results. After all, local government wields the police power, undoubtedly the most powerful weapon available to reduce blighted properties. By the same token, local government alone, without high level commitment and support from local business, philanthropic, and nonprofit leadership, would not have been able to achieve the same success. Memphis has achieved progress only as a result of a core cross-sector team that sincerely agreed on a path forward to

109. The full text of the Memphis Blight Elimination Action Plan is available at http://www.memphisfightsblight.com/wp-content/uploads/2016/12/Blight_Elimination_Charter-Action_Plan.pdf.

address the longstanding problem of blighted property in our city, that trusted each other to be working toward the same commonly beneficial goals, and that stayed in regular communication with each other in formal and informal ways. Relationships matter in this work—the resolutions to most of the challenges faced daily in the battle against blighted property are not straightforward technical resolutions that can be taught. While some common themes emerge frequently, there is always a new twist that requires adaptation and innovation. A highly functioning team with a diverse skill set and unwavering commitment is required to achieve consistent positive results.

a. Joint Mayors' Environmental Team

Before the Opportunity Property Team or any of the other collaborative efforts listed above, Memphis and Shelby County had the "E-Team." This group has been in existence since at least the early 1990s and still meets monthly to discuss tactical solutions to particularly challenging problem property issues. In concept, it began as a cross-training effort encouraged by Shelby County Environmental Court Judge Larry Potter, who saw a variety of inspectors reporting to his court on a regular basis. He suggested to some of them that they should learn at least a little bit about what the other inspectors appearing in his courtroom knew. For example, health inspectors should learn from plumbing inspectors, and they each should learn from commercial building inspectors. Over time, this began to happen. By 2010, it was an institution. Mayor Wharton, during his tenure as mayor, decided that it was important enough for him to participate personally every month. Since that time, the E-Team has been the forum for cross-disciplinary problem solving for some of the most intractable vacant and abandoned properties in Memphis.

The E-Team differs from the Blight Elimination Steering Team in its purpose and goals. Primarily, it functions as the intergovernmental, inter-agency tactical trouble shooting team. In 2016, with newly elected Memphis Mayor Jim Strickland taking office and new leadership in other government positions, the "E-Team" was updated to build in more accountability and formality. Still, its core function—monthly cross-fertilization—continues. The "E-Team" remains a monthly opportunity for direct, face-to-face communication among the following functions of local government: police, code inspection, nuisance litigation, neighborhood organizing, litter patrol, dumping regulation, the health department, environment and conservation, community development and housing, and even finance and tax collections.[110]

110. E-Team Purpose Statement (on file with authors).

b. Tax Foreclosure and Other Shared Solutions

Another example of successful collaboration to address a primary root cause of blighted property in Memphis and Shelby County is the progress toward an improved system of property tax foreclosure. This process is governed by state law and carried out by both city and county governments, each of which is responsible for collection of its own delinquent property taxes. As noted above, until 2015, the process for taking any property to tax sale, even an expressly abandoned property, was extraordinarily long. In Tennessee, any property may be auctioned off, via a court ordered auction, after nonpayment of taxes for longer than two full years.[111] But that sale is subject to a post-sale redemption period.[112] Due to court lead time and process time and management of a high volume, the typical path from express abandonment to a new owner outside of the redemption period has often been in excess of five years. This meant that even for a person who literally walked into the government offices and declared under oath that "I shall never return to this property nor pay my taxes ever again," the property would languish untended for a minimum of a five-year process. Such express abandonment is an unfortunate reality in Memphis. Many leaders were eager to find a better way forward.

Memphis's collaborative team, in this case led by the city government and supported by the county government, the elected county Trustee, the Chamber of Commerce, the Memphis Area Association of Realtors, the Memphis Homebuilders, and others came up with a solution in the form of a bill at the state legislature, which amended those provisions. As passed, the bill provided for a faster track to tax foreclosure and a thirty-day redemption period in cases of clear abandonment. Additionally, the bill shortened the redemption period, regardless of whether a property is abandoned, based upon the number of years of tax delinquency. The longer the tax delinquency, the less time after a tax sale is allowed to the taxpayer to redeem his property. Memphis and Shelby County were absolutely of one voice in the Tennessee Legislature in requesting these important changes and achieved them. More recently, other joint legislative fixes have been achieved, and in Tennessee, urban areas are demonstrating more and more coordination on needed state law improvements to assist in the reduction of blighted properties.[113]

111. Tenn. Code Ann. § 67-5-2005 (LEXIS through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly).

112. *Id.* § 67-5-2701.

113. For example, an ongoing effort coordinated by five urban areas of Tennessee to strengthen statewide land bank authorities is underway.

V. Next Steps

In Memphis, as in every community where the needs for revitalization exceed the resources available, strategic choices about the allocation of resources must be made. These decisions must be made on the basis of data as interpreted through the lens of community goals and aspirations. An early product of the Blight Elimination Action Plan, the Memphis Property Hub and its availability to local practitioners in a user-friendly and mappable format via the Policy Map platform, provides the foundation of data upon which the leadership in Memphis must base decisions about the allocation of resources.[114] For the first time, this tool provides all publicly available data about blighted properties in Memphis to practitioners in one data warehouse. Early in 2017, all of the data was made available through the Policy Map online mapping and analysis portal. This readily available information at the real estate parcel level makes data-driven decision making possible.

While every derelict problem property matters, the community cannot respond in the same way to every problem. Triage is in order, and the protocol for such triage will guide the collaborative decision making process. There will be a need to respond to blighted property in a more targeted manner, using market value analysis as the guide.[115] Very tough choices must be made about where to deploy limited resources, or Memphis will not make meaningful progress toward the elimination of blighted properties. Once the market value analysis is complete and adopted by the Blight Elimination Steering Team, members of the team will have a rational and measured basis for advocating for the deployment of resources in targeted ways for dramatically improved impact.

For example, for code enforcement operations to be strategic, they must be structured to fit the particular neighborhood market. In some neighborhoods, very little to no intervention by code enforcement will be required, and that intervention will need to happen only on a responsive or reactive basis. The limited resources of code enforcement operations should not be invested in strong market neighborhoods unless and until called in. For severely economically distressed neighborhoods with very low population remaining, a similar limitation on the expenditure of code enforcement resources should likely be imposed. Every available code inspector in the City of Memphis working around the clock could never resolve every property maintenance issue in certain parts of Memphis. The strategy in such distressed neighborhoods should likely be to seek a level of stability and order, removing the most dangerous structures, and securing

114. *See* MEMPHIS PROPERTY HUB, http://mempropertyhub.com (last visited Mar. 14, 2017).

115. *See* ON THE EDGE: AMERICA'S MIDDLE NEIGHBORHOODS (Paul C. Brophy ed., 2016); Karen Pooley & Charles Buki, czb, LLC, Remarks at the Memphis Housing Policy Briefing (Jan. 18, 2017).

or cleaning up the rest as possible. But in transitional neighborhoods, those that are at a key potential tipping point, very intense allocation of resources in code enforcement should be deployed because such investment will most likely bring the highest return on investment in the form of repopulated neighborhoods, preservation of residents, and an invigorated property tax base.[116] The Memphis strategy is developing, and leadership is conscious of the need to understand the housing market context in which code enforcement actions take place. As code enforcement becomes more and more strategic, other programs will be required to grow along with code enforcement to avoid unintended negative consequences.

A. Develop a Probate Court Practice to Resolve Heirship Cases

If a property has been abandoned by the heirs of a decedent, Tennessee law and local Memphis ordinances provide very few options. The city is authorized to demolish a structure that is more than 50 percent dilapidated. But what about a solid brick house in the middle of a transitional neighborhood where the neighbors have been cutting the grass since the resident who lived there for forty plus years passed away three years ago? Sadly, this is a story that has repeatedly been told in the Shelby County Environmental Court.

Memphis litigators hope to pilot a process in the local probate courts to put all heirs on notice and direct a sale of the abandoned property with a clear title to any interested purchaser. This effort to resolve a single problem property is often necessary if abandoned homes are to be saved from deteriorating to the point of no return. Demolishing homes in distressed neighborhoods should be a last resort, and in Memphis, a process for dealing with the high volume of abandoned houses that are tied up due to heirship issues will be a priority in coming years.

B. Effectively Address Properties That Are Not Vacant, Including Occupied Substandard Properties

In 2016, the Tennessee legislature amended the Neighborhood Preservation Act to allow for a civil public nuisance cause of action against the owner of *occupied* property in an uninhabitable condition. While there is, sadly, a significant volume of occupied substandard property within Memphis, significant challenges exist in the enforcement of such cases. The most obvious challenge has to do with the availability of quality affordable housing in Memphis.

According to the 2016 National Low Income Housing Coalition Affordable Housing Gap Analysis, Memphis is short 17,587 units of housing for families at or below 15 percent Area Median Income (AMI) and is short

116. *See* Lind & Schilling, *supra* note 99, at 833–39.

33,965 units of housing for families at or below 30 percent AMI.[117] Put another way, for every 100 families at or below 15 percent AMI, there are thirteen units of housing available (twenty-five per 100 at 30 percent AMI, and fifty-five per 100 at 50 percent AMI).[118] And the units available may or may not be at an acceptable level of quality by modern standards. Reports of impoverished families living without utilities, heating or air conditioning systems, hot water, or with severe pest problems abound. A recent assessment of affordability conducted by Charles Buki as a part of Innovate Memphis and NPI's Housing Policy Briefing Series suggests that Memphis has 70,000 families who cannot afford to rent a house at the median rental value in the Memphis market.[119]

In this context, how should code enforcement respond? Is it appropriate to leave alone severe code violations committed by the landlords of very low income families because proper enforcement might otherwise leave the family with nowhere to go? This is a very real and daily challenge faced in Memphis today.[120] There are no easy answers. Other communities have established rental property inspection or registration programs to raise minimum standards of habitability in their communities, and the Memphis Blight Elimination Steering Team is actively evaluating options for a locally appropriate approach.[121]

C. Comprehensive Statewide Legislative Anti-Blight Agenda for 2018

Memphis is working with other urban areas in Tennessee to develop a comprehensive blight reduction agenda for the 2018 state legislative session. There are ninety-four counties in Tennessee, and urban areas comprise only a small minority of them. While a number of rural areas and small towns in Tennessee have a demand for blighted property cleanup

117. National Low Income Housing Coalition, *The Gap: The Affordable Housing Gap Analysis 2016*, App. B (2016), http://nlihc.org/sites/default/files/Gap-Report_print.pdf.

118. *Id.*

119. Pooley & Buki, *supra* note 115.

120. Generally, "housing costs should not exceed 30 percent of a household's total income," but, in Memphis, more than 60 percent of the available rental units do. *Housing Affordability Burden for U.S. Cities*, GOVERNING, http://www.governing.com/gov-data/economy-finance/housing-affordability-by-city-income-rental-costs.html (last visited Mar. 21, 2017). Eighteen percent of all households in Memphis "spend at least half their income on housing costs." Janet Viveiros & Lisa Sturtevant, *The Housing Affordability Challenges of America's Working Households*, HOUSING LANDSCAPE 2014 (Ctr. for Housing Pol'y Feb. 2014), http://www2.nhc.org/Landscape%20Metro%20PDFs/Memphis.pdf (last visited Mar. 21, 2017).

121. *See, e.g., Healthy Housing Through Proactive Rental Inspection*, CHANGE LAB SOLUTIONS, http://www.changelabsolutions.org/publications/PRI-programs (last visited Mar. 22, 2017); *Using Code Enforcement as a Tool for Public Health*, CHANGE LAB SOLUTIONS, http://www.changelabsolutions.org/news/using-code-enforcement-tool-public-health (last visited Mar. 22, 2017).

strategies, rural and small town needs are different in many ways from urban blighted-property challenges. Rather than continuing a piecemeal approach to state legislative fixes, urban leaders across the state have decided to work together to formulate a comprehensive legislative reform package that would give urban areas what they need to deal with the scourge of vacancy, abandonment, and neglect of property.

While the comprehensive package is being developed, some important elements have been identified. For example, the receivership process as described above must be simplified in the law to permit a sale of property by a receiver early in the process. Changes to the property tax foreclosure process must be made so that the tax sale will more consistently yield marketable and insurable title. A local land bank act that passed in 2014 will need to be strengthened to ensure that there is a close connection between tax sale process and the local land bank that is in the best position to maximize value of distressed real estate. Also, a dedicated stream of revenue to support the operation of local land banks must be established. Changes to state law to address other chronic challenges described above, such as heirship property resolution and clarity of post-foreclosure title of real estate, will be considered as well. This statewide coalition hopes to see legislation in 2018 that obtains all of the foreseeable, needed changes. Whether all are passed the first time around remains to be seen. But those involved understand that perseverance with a clear vision will be required to reach the lofty goal of blighted property elimination across Tennessee.

VI. Conclusion

Community Development and Revitalization as a professional field in law, public policy, and planning has come to include the making and enforcing of property maintenance codes to promote sustainable, healthy, safe, and desirable neighborhoods. Removal, prevention, and revitalization of blighted properties are all critical items on the agendas of legacy city neighborhoods and other places where housing markets have been upended in the last decade. Memphis and other cities such as Cleveland, New Orleans, Baltimore, and Detroit are leading the way by demonstrating measures that can work to achieve parts of the agenda. Litigation under the NPA for the past ten years has provided a successful core strategy to build on. Memphis benefitted immensely from the lessons learned by those working on similar issues in other cities.

Memphis's efforts began to coalesce when leadership took seriously one simple message from peer cities: enhance the frequency of communication between and among the agencies and organizations that are working to address blighted properties in your community. Blighted properties present a complex web of legal and procedural challenges, and resolving them at any satisfactory scale will require a shared vision, coordination, and collaboration at an unprecedented level between and among government agencies, nonprofit organizations, foundations, and the private sector. This

shared vision and collaboration will be possible only if a core group of leaders are regularly convening—probably on a monthly basis—if for no other reason than to share information and identify shared challenges.

The records of the Memphis Blight Elimination Charter[122] and of the Vacant and Abandoned Property Action Council in Cleveland[123] show the hard work, perseverance, and courage required to *begin* the efforts that must be sustained indefinitely in any urban community that wants to get serious about eliminating blighted properties at a large scale over the coming years.

122. Memphis Blight Elimination Charter, http://memphisfightsblight.com (last visited Feb. 14, 2017).

123. *See* Lind & Schilling, *supra* note 99, at 825–27.

Disparate Impact Liability Under the Fair Housing Act After *Inclusive Communities*

Daniel Sheehan

Introduction 391
I. *Inclusive Communities* and the New Disparate Impact Test 393
A. Facts of *Inclusive Communities* 393
B. Court Proceedings 394
II. The Making of the New Disparate Impact Framework 398
A. Two Types of Disparate Impact Cases Prior to *Inclusive Communities* 399
1. Disparate Impact Liability in Housing Barrier Cases 400
2. Disparate Impact Liability in Housing Improvement Cases 402
B. Justice Kennedy on Integration, Revitalization, and the FHA 405
C. *Inclusive Communities* and the Conflict Between Integration and Revitalization 407
D. Fashioning of the New Disparate Impact Framework 409
1. Plaintiff's Prima Facie Case 409
2. Defendant's Rebuttal 412
3. Plaintiffs' Defense 414
III. Disparate Impact Litigation After *Inclusive Communities* 414
A. Revitalization and Integration as Poverty Alleviation Strategies 414
B. Effects of *Inclusive Communities* on Revitalization and Integration Strategies 416
Conclusion 420

Introduction

In 2015, the Supreme Court held in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* that the Fair Housing Act (FHA) encompassed disparate impact liability.[1] The decision followed in the wake of a series of cases, including *Parents Involved in Community*

1. 135 S. Ct. 2507 (2015).

Daniel Sheehan (danielsheehan@gmail.com) is Yale Public Interest Fellow at the Los Angeles City Attorney's Office. He is 2016 graduate of Yale Law School and received his undergraduate degree in 2010 from Stanford University.

Schools v. Seattle School District No. 1[2] and *Ricci v. DeStefano*,[3] that had severely restricted "minority-protective" judicial review of state action.[4] Given this background, when the *Inclusive Communities* decision was handed down, it was hailed as a surprising and decisive victory for advocates of civil rights and residential integration and as a decisive defeat for private developers in the housing market.[5]

This article argues that the exuberance with which the *Inclusive Communities* decision has been greeted is premature. The majority opinion, written by Justice Kennedy, affirms that the FHA encompasses disparate impact liability for public and private actors, but it tightly constrains that liability. Disparate impact claims under the FHA have been an effective tool for curbing actions by developers and housing authorities that had sustained and perpetuated residential segregation. This article argues that, confronted with an unfamiliar type of disparate impact claim in *Inclusive Communities*, Justice Kennedy fashioned a framework for evaluating such claims that will make it more difficult to challenge policies that perpetuate segregation in the future. In trying to preserve disparate impact liability for policies that perpetuate segregation while limiting liability for policies that aim to revitalize poor communities, Justice Kennedy constructed a framework that will make it difficult for courts to evaluate policies in which the promotion of integration trades off against the revitalization of poor communities. In such cases—like the fact pattern at issue in *Inclusive Communities*—the new framework is likely to favor policies that promote revitalization over integration as a strategy for addressing poverty.

Part I describes the *Inclusive Communities* litigation. It focuses on the language of Justice Kennedy's opinion, aiming to clarify the structure of the new framework for evaluating disparate impact claims under the FHA. Part II explains how and why Justice Kennedy fashions this framework. It argues that *Inclusive Communities* presents a unique disparate impact theory that is a mix of the theories at play in prototypical "housing barrier" and "housing improvement" cases. In trying to fashion a framework that will permit liability for the former but limit it for the latter, Justice Kennedy creates a judicial artifact that applies awkwardly to both

2. 127 S. Ct. 2738 (2007).

3. 129 S. Ct. 2658 (2009).

4. *See generally* Reva B. Siegel, *Foreword: Equality Divided*, 127 Harv. L. Rev. 1 (2013); *see also* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747 (2011).

5. *See, e.g.*, Editorial, *Affordable Housing, Racial Isolation*, N.Y. Times, June 29, 2015, at A18; Emily Badger, *Supreme Court Upholds a Key Tool Fighting Discrimination in the Housing Market*, Wash. Post, June 25, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/06/25/supreme-court-upholds-a-key-tool-fighting-discrimination-in-the-housing-market; John Fund, *The Supreme Court's Disparate-Impact Decision Is a Disaster*, Nat'l Rev., June 26, 2015, http://www.nationalreview.com/article/420339/supreme-courts-disparate-impact-decision-disaster-john-fund.

cases and to the new type of case presented by *Inclusive Communities*. Part III explores the implications that the new disparate impact framework will have for efforts to integrate American communities. It argues that the new framework will favor revitalization of poorer communities over integration of such communities with more affluent communities.

I. *Inclusive Communities* and the New Disparate Impact Test

A. *Facts of* Inclusive Communities

The federal government provides tax credits, administered by state agencies, to subsidize and encourage the development of low-income housing.[6] States are responsible for determining the criteria that are used to identify which developers receive the tax credits, although they are bound by statute to include certain criteria.[7] In Texas, the Texas Department of Housing and Community Affairs (TDHCA) administers tax credits for low-income housing development.[8] The criteria selected by TDHCA for the distribution of tax credits to developers, and the weights given to different criteria, prioritize the statutorily mandated criteria, although state law permits the consideration of additional criteria as long as those criteria do not receive more weight than the statutory criteria.[9]

The U.S. District Court for the Northern District of Texas found that between 1999 and 2008, there was a disparity between the number of tax credits awarded for proposed low-income housing units in heavily white areas and the number of credits awarded for units in heavily African American areas in metropolitan Dallas. In that period, TDHCA approved tax credits for 49.7 percent of proposed non-elderly low-income housing units located in U.S. Census tracts containing fewer than 10 percent Caucasian residents.[10] In the same time frame, TDHCA approved tax credits for only 37.4 percent of proposed non-elderly low-income housing units located in Census tracts containing more than 90 percent Caucasian residents.[11] Moreover, 92.29 percent of the total low-income housing units in Dallas that received tax credits under the program were located in Census tracts containing fewer than 50 percent Caucasian residents.[12]

The Inclusive Communities Project, Inc. (ICP), a Dallas housing nonprofit, brought suit against TDHCA in 2008, alleging that its practices, including the determination of the criteria used to distribute tax credits, had the purpose and effect of denying racial minorities opportunities to live in

6. *See* 23 U.S.C. § 42 (2012).

7. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

8. *Id.*

9. *Id.* at 2513–14.

10. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 499 (N.D. Tex. 2010).

11. *Id.*

12. *Id.*

neighborhoods that were predominantly white.[13] ICP argued that TDHCA's policies had purposefully discriminated against African American residents of Dallas in violation of the Fourteenth Amendment and 42 U.S.C. § 1982, which require that states give all U.S. citizens the same rights to lease property as white citizens.[14] Further, it argued that those policies created a disparate impact on African Americans in violation of the FHA, which makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected characteristic (§ 804(a)) and "to discriminate against any person in" making certain real-estate transactions "because of race" or other protected characteristics (§ 805(a)).[15] ICP alleged that TDHCA's criteria for tax credits resulted in a disproportionate allocation of tax credits for housing in heavily African American areas of metropolitan Dallas, perpetuating segregated housing patterns in a manner that the FHA disallows. ICP sought a modification of the selection criteria for the tax credits that would encourage construction of low-income housing in predominantly white communities in and around Dallas.[16]

B. Court Proceedings

The district court held that ICP had failed to prove its claims of purposeful discrimination,[17] but held that ICP had proved its disparate impact claim.[18] The court concluded that the statistical disparity in the allocation of low-income housing tax credits was sufficient to establish a prima facie case of disparate impact.[19] The court then placed the burden on TDHCA to rebut the prima facie showing.[20] The court assumed the legitimacy of TDHCA's stated interest in distributing tax credits in an "objective, transparent, predictable, and race-neutral manner,"[21] but it determined that TDCHA had "failed to meet [its] burden of proving that there are no less discriminatory alternatives."[22]

While the appeal was pending, the Department of Housing and Urban Development (HUD) issued a regulation clarifying its interpretation of the

13. *See id.* at 492–93.

14. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 317 (N.D. Tex. 2012).

15. *Id.*

16. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

17. *Inclusive Cmtys. Project*, 860 F. Supp. 2d at 321.

18. *Id.* at 331.

19. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 499–500 (N.D. Tex. 2010).

20. *Inclusive Cmtys. Project*, 860 F. Supp. 2d at 322–23.

21. *Id.* at 323.

22. *Id.* at 331.

FHA.[23] The regulation declared that liability under the FHA could be established "based on a practice's discriminatory effect."[24] A practice is discriminatory if it "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[25]

In addition, the regulation instituted a burden-shifting framework for establishing a discriminatory effect claim.[26] Under the regulation, a plaintiff must prove a prima facie case of discriminatory effect.[27] The burden then shifts to the defendant to prove that the practice in question is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[28] If the defendant meets that burden, the burden shifts back to the plaintiff, which may prevail upon proving that the interests identified by the defendant "could be served by another practice that has a less discriminatory effect."[29]

The Fifth Circuit reversed and remanded the district court's judgment for the plaintiffs.[30] The opinion, written by Judge James E. Graves, Jr., reaffirmed the Fifth Circuit's recognition that the FHA encompasses disparate impact liability.[31] At the same time, in light of the HUD regulation, Judge Graves held that the district court had applied the wrong burdens to the claim. Rather than requiring the defendant to prove that no less discriminatory alternative practice existed that served its interests, the plaintiff should have been required to prove that a practice with a less discriminatory effect existed.[32] Fifth Circuit Judge Edith Jones, specially concurring, stated that she believed that the plaintiffs, in establishing a prima facie case, "could not rely on statistical evidence of disparity alone"[33]; they needed to prove causation by "isolat[ing] the policy that caused the disparity."[34]

The Supreme Court affirmed the Fifth Circuit, holding that the FHA encompassed disparate impact liability and that imposing such liability—in a limited way—was permissible under the Equal Protection Clause of the

23. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500 (2014)).

24. *Id.* at 11482.

25. *Id.* (codified at C.F.R. § 100.500(a)).

26. *Id.*

27. *Id.* (codified at C.F.R. § 100.500(c)(1)).

28. *Id.* (codified at C.F.R. § 100.500(c)(2)).

29. *Id.* (codified at C.F.R. § 100.500(c)(3)).

30. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of House. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014).

31. *Id.* at 280.

32. *Id.* at 282.

33. *Id.* at 283 (Jones, J., specially concurring).

34. *Id.* at 284.

Fourteenth Amendment.[35] The first question Justice Kennedy addressed was whether the language and history of the FHA itself encompassed disparate impact liability. He held that it did. Reviewing the Court's interpretation of Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*[36] and the Court's interpretation of the Age Discrimination in Employment Act of 1967 in *Smith v. City of Jackson*,[37] Justice Kennedy stated that statutes encompass disparate impact liability "when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[38] He also held that recognition of disparate impact liability was consistent with the FHA's purpose, which was as enacted "to eradicate discriminatory practices within a sector of our Nation's economy."[39]

More important than these questions of statutory interpretation, however, was Justice Kennedy's discussion of the constitutional limits on disparate impact liability. Justice Kennedy noted that it was important to limit disparate impact liability to "avoid the serious constitutional questions that might arise" under the FHA were it not constrained.[40] In clarifying the limits on disparate impact, Justice Kennedy restated the framework for liability so as to make it significantly more defendant-friendly than it previously had been.[41]

Justice Kennedy's new framework for disparate impact liability under the FHA, following the HUD regulations released prior to the Supreme Court's consideration of the case, contains three steps. First, a plaintiff must establish a prima facie case of disparate impact. Previously, federal appellate courts had held a plaintiff alleging a FHA disparate impact claim had to show only that a "particular facially neutral practice actually or predictably impose[d] a disproportionate burden upon members of [a] protected class."[42] Justice Kennedy emphasizes that a plaintiff must "point to a defendant's policy or policies causing that disparity," and he layers in a new burden, requiring that plaintiffs must meet a "robust causality requirement" that "protects defendants from being held liable for

35. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

36. 401 U.S. 424 (1971).

37. 544 U.S. 228 (2005).

38. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2518.

39. *Id.* at 2511.

40. *Id.* at 2522.

41. *Id.* at 2522–25.

42. Hack v. President & Fellows of Yale College, 237 F.3d 81, 98–99 (2d Cir. 2000); *see also* Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 934 (2d Cir. 1988); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–50 (1st Cir. 2000); Pfaff v. U.S. Dep't of Hous. & Urb. Dev., 88 F.3d 739 (9th Cir. 1996); Orange Lake Assocs., Inc. v. Kirkpatrick, 21 F.3d 1214, 1228 (2d Cir. 1994).

racial disparities they did not create."[43] As Part II.D argues, the shift in language from requiring plaintiffs to identify a "practice" to requiring plaintiffs to identify a "policy" may be significant. Moreover, the "robust causality" requirement had not appeared before in FHA disparate impact cases.[44]

Second, a defendant can rebut the prima facie case by establishing that the policy in question was necessary to achieve a "valid interest."[45] Justice Kennedy asserts that this standard is analogous to Title VII's "business necessity" standard.[46] However, courts will likely interpret a "validity" inquiry as being more deferential to the decisions of a housing authority than a "necessity" inquiry is to the decisions of an employer.[47] The "validity" standard echoes the standard that the Court established for defeating a prima facie disparate impact case set out in *Wards Cove Packing Co. v. Atonio*.[48] In that case, the Court stated that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[49] In the Civil Rights Act of 1991, Congress added a statutory provision that rejected and replaced the *Wards Cove* standard, stating that where an employment practice causes

43. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2523 (2015).

44. The "robust causality" language appears to be new disparate impact law entirely, although the requirement that a plaintiff point to specific "policy or policies" had appeared in at least one prior employment disparate impact case, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Although he does not cite the case, Justice Kennedy draws on Justice O'Connor's language when she asserts that a plaintiff in an employment disparate impact case was responsible for not just identifying a statistical disparity, but for "isolating and identifying the specific employment practices that are allegedly responsible" for the disparity. *Id.*

45. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522.

46. *Id.*

47. *See* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Calif. L. Rev. 671, 704 (2016) (observing that since the U.S. Supreme Court's decision in *Wards Cove Packing v. Atonio*, 490 U.S. 642 (1989), federal courts have treated the "business necessity" standard as lying "somewhere in the middle of two extremes," but that the Supreme Court's formulation of the "valid interest" standard in *Inclusive Communities*, as framed by the dicta about "artificial, arbitrary, and unnecessary barriers," *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2512, was by contrast "decidedly defendant-friendly").

48. 490 U.S. 642 (1989). *See* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 Cornell L. Rev. 1115, 1139–40 (2016) (observing the similarities between the "valid interest" standard in *Inclusive Communities* and the "legitimate . . . goals" standard in *Wards Cove*).

48. *Inclusive Cmtys. Project*, 135 S. Ct. at 2522.

49. *Wards Cove Packing*, 490 U.S. at 659.

a disparate impact, the employer must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[50] While this new statutory provision "still left considerable uncertainty about core interpretive questions" in the standard,[51] there is "little question that Congress increased the burden of justification on employers in such cases."[52] As Parts II.D and III argue, resuscitating a version of the *Wards Cove* standard will give defendants greater protections from disparate impact liability than they have heretofore enjoyed.

In the final step of the new disparate impact framework, the plaintiff can prevail by showing "that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.'"[53] While this merely confirms the guidance from HUD[54] and the ruling of the Fifth Circuit,[55] it nonetheless constituted a further constraint on the liability of government actors and private developers beyond what the trial court in the *Inclusive Communities* litigation had imposed.[56]

II. The Making of the New Disparate Impact Framework

The new disparate impact framework that Justice Kennedy constructs is a response to the unique fact pattern and theory of liability that he was confronted with in *Inclusive Communities*. The *Inclusive Communities* case contained elements of, but was distinct from, the two general types of cases in which federal courts had previously applied FHA disparate impact liability: "housing barrier" cases and "housing improvement" cases. *Inclusive Communities* was a mixed case, and Justice Kennedy opted to develop a disparate impact framework that would govern both types of cases (as well as future mixed cases). The result was an awkward framework that may direct outcomes contrary to Justice Kennedy's stated interests in promoting integration.

50. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

51. Melissa Hart, *From Wards Cove to Ricci: Struggling Against the "Built-in Headwinds" of a Skeptical Court*, 46 Wake Forest L. Rev. 261, 271 (2011).

52. Bagenstos & Selbst, *supra* note 47, at 1140.

53. Tex. Dep't of Hous. & Cmty. Affairs, 135 S. Ct. at 2518 (quoting Ricci v. DeStefano, 557 U.S. 557, 578 (2009)).

54. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500 (2014)).

55. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of House. & Cmty. Affairs, 747 F.3d 275, 282–83 (5th Cir. 2014).

56. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 322–23 (N.D. Tex. 2012) (placing burden on *defendant* to prove that there are no less discriminatory alternatives, meaning that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact").

A. Two Types of Disparate Impact Cases Prior to Inclusive Communities

Recent scholarship that Justice Kennedy cites in his opinion has distinguished between two types of housing regulations that may create disparate impact liability.[57] "Housing barrier" regulations include policies that prevent construction of housing for minorities, confine housing for minorities to poor neighborhoods, or deny minority renters or homeowners freedom of movement in the housing market.[58] Cases involving these sorts of regulations are what Justice Kennedy is referring to when he describes certain cases as being at the "heartland" of disparate impact liability.[59] Because housing barrier regulations maintain racial segregation, the imposition of disparate impact liability in such cases aims at promoting integration. By contrast, "housing improvement" policies are "designed to improve the condition of housing and/or the surrounding neighborhood" by imposing code standards on housing in poor communities or by demanding the demolition and replacement of housing units.[60] Housing improvement policies thus represent efforts to revitalize poor communities. In recent years, plaintiffs have attempted to impose disparate impact liability on housing improvement regulations under the theory that such regulations are likely to displace poor tenants.[61]

The difficulty that Justice Kennedy faces is that the government policy at issue in *Inclusive Communities* lies between the prototypes of housing barrier and housing improvement cases. Justice Kennedy explicitly affirms the Fifth Circuit's holding that the FHA encompasses disparate impact liability for housing barrier cases, which are at the "heartland" of disparate impact liability.[62] Such liability, he writes, is important to "our Nation's commitment to achieving an integrated society."[63] He is concerned, however, about the use of disparate impact liability in housing

57. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 360–63 (2013) (cited in Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015)).

58. *Id.* at 360–61.

59. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

60. Seicshnaydre, *supra* note 57, at 361.

61. *See, e.g.*, Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010); *cert. granted*, 132 S. Ct. 548 (2011). Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013).

62. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2511 (2015).

63. *Id.* at 2525.

improvement cases, and he wants to constrain such liability.[64] Fashioning a single framework that covered both of these types of cases would be difficult enough, but the plaintiff's "novel theory of liability"[65]—which lies between these two types of cases—poses an even more complicated test case for a new disparate impact framework. Given the fact pattern before the Court, Justice Kennedy constructs a new disparate impact framework that is likely to dampen efforts to integrate America's communities.[66]

1. Disparate Impact Liability in Housing Barrier Cases

A traditional housing barrier case involves a government policy that makes it difficult for racial minorities to access housing in heavily white neighborhoods, thus maintaining residential segregation.[67] The prototypical example of a housing barrier regulation is a zoning ordinance. Appellate courts prior to *Inclusive Communities* routinely invalidated such ordinances when they had disparate impacts. Justice Kennedy cites these cases approvingly in affirming the importance of disparate impact liability.

An early and typical housing barrier case, cited by Justice Kennedy in *Inclusive Communities*, was *United States v. City of Black Jack*.[68] A non-profit organization revealed a plan to build 108 two-story townhouses in unincorporated Black Jack, Missouri, to create housing opportunities for residents of the St. Louis metropolitan area who were stuck in poor and segregated communities.[69] Black Jack soon incorporated itself as a city and enacted a zoning ordinance that prohibited the construction of multifamily dwellings in what was then an overwhelmingly white city.[70] The effect of Black Jack's ordinance "was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units."[71]

The Eighth Circuit considered a disparate impact challenge to the ordinance, and it analogized the issue to the Title VII disparate impact framework for employment cases. The *Black Jack* opinion was the first to apply the "artificial, arbitrary, and unnecessary" language from *Griggs* to the FHA context. In *Griggs*, African American employees at a power generating plant brought a disparate impact claim under Title VII of the Civil

64. *Id.* (the Court "does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns").

65. *Id.* at 2522.

66. *See infra* Part III.

67. *See generally* Seicshnaydre, *supra* note 57, at 360–61.

68. 508 F.2d 1179 (8th Cir. 1974).

69. *Id.* at 1182–83.

70. *Id.* at 1183.

71. *Id.* at 1186.

Rights Act of 1964 against their employer, challenging the employer's requirement that they possess a high school diploma or pass an intelligence test to transfer jobs at the plant.[72] The court ruled for the employees, holding that the Civil Rights Act required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[73] In *Black Jack*, the Eighth Circuit reiterated the language of *Griggs*, holding that "such barriers must also give way in the field of housing."[74] The FHA prohibits direct barriers to housing construction that have the effect of perpetuating segregation and are not necessary to achieve some other government interest. The discretion of local governments, the court held, "must be curbed where the clear result of such discretion is the segregation of low-income [b]lacks from all [w]hite neighborhoods."[75] The Supreme Court declined to grant certiorari.[76]

Two subsequent cases, also cited in *Inclusive Communities*, exemplify housing barrier disparate impact liability as understood by Justice Kennedy. In *Huntington Branch, NAACP v. Town of Huntington*, the plaintiffs challenged a local zoning ordinance that had constrained the private construction of multifamily rental units to an area already heavily inhabited by racial minorities.[77] One of the plaintiffs had proposed the development of 162 multifamily units in violation of the ordinance.[78] These units were expected to be inhabited by racial minorities in a neighborhood that was 98 percent white.[79] The Second Circuit found that the plaintiffs had met their prima facie burden by showing both a "disproportionate harm" to blacks and a "segregative impact on the entire community."[80] It further found the defendant's justifications for the zoning ordinance "insubstantial."[81] The court's remedy involved removing the zoning barrier that limited private development of multifamily housing to the heavily minority area,[82] and the Supreme Court affirmed the invalidation of the zoning ordinance "without endorsing the precise analysis" of the Second Circuit.[83]

72. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

73. *Id.* at 431.

74. United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

75. *Id.*

76. *Id.*

77. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 928 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988).

78. *Id.* at 930–31.

79. *Id.*

80. *Id.* at 937–38.

81. *Id.* at 940.

82. *Id.* at 942.

83. *Huntington Branch*, 488 U.S. at 18.

In a recent case, *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, a federal district court struck down a series of measures enacted by St. Bernard Parish in New Orleans that had restricted multifamily housing units and single-family rentals.[84] One measure limited the rental of single-family residences to blood relatives.[85] The parish was over 88 percent white and less than 8 percent black, and white families owned 93 percent of all owner-occupied houses in the parish.[86] A fair housing organization challenged the regulations under a disparate impact theory because they disproportionately made housing in the parish inaccessible for black and Hispanic families; the district court ruled in its favor.

The cases above clarify the ingredients for a classic housing barrier case, in which a government policy directly prohibits the construction, sale, or rental of buildings in a heavily white neighborhood that would likely be occupied by racial minorities. The remedy in a housing barrier case is an injunction eliminating the housing barrier regulation, which will ease the movement of minority households into such neighborhoods. The plaintiffs thus advance disparate impact claims in these cases to facilitate the integration of communities.

2. Disparate Impact Liability in Housing Improvement Cases

A traditional housing improvement case involves a government policy that aims to improve the conditions of housing units by, for example, enforcing housing code provisions or implementing a redevelopment plan that involves the demolition and reconstruction of housing in a putatively blighted neighborhood.[87] The disparate impact in a housing improvement case consists of the disproportionate displacement of racial minorities from houses they had occupied, usually because code enforcement causes landlords to increase rent costs or because a redevelopment plan will result in higher housing costs. Prior to *Inclusive Communities*, the Supreme Court had granted certiorari to two housing improvement cases to resolve whether the imposition of FHA disparate impact liability in those cases

84. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563 (E.D. La. 2009).

85. St. Bernard Parish, La., Ordinance SBPC #670-09-06 § I(A) (Sept. 19, 2006) (prohibiting the rental of single-family residences "by any person or group of persons, other than a family member(s) related by blood within the first, second or third direct ascending or descending generation(s), without first obtaining a Permissive Use Permit from the St. Bernard Parish Council").

86. *See* Affidavit of Dr. Calvin P. Bradford at 5–6, Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563 (E.D. La. 2009) (No. 06-07185).

87. *See generally* Seicshnaydre, *supra* note 57, at 361.

was correct.[88] Both cases were resolved before oral argument,[89] but they are helpful illustrations of how disparate impact liability works in revitalization cases.

Magner v. Gallagher concerned vigorous enforcement of the housing code in St. Paul, Minnesota.[90] The plaintiffs, who owned buildings that were rented to predominantly low-income, heavily minority households, challenged the city's code enforcement scheme, which targeted rental housing.[91] As described by the court, the city's scheme included increased enforcement of regulations governing "rodent infestation, missing deadbolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails or handrails."[92] The plaintiffs argued that the code enforcement scheme imposed new maintenance costs and fees on them, forcing them to raise rents and thus decreasing the amount of affordable housing available in St. Paul.[93] The Eighth Circuit, reversing the district court's grant of summary judgment for the City of St. Paul, held that the plaintiffs had met their prima facie burden.

Unlike the regulations at issue in a typical housing barrier case, the code enforcement scheme at issue in *Magner* did not involve any bans against the construction, sale, or rental of housing. The plaintiffs' argument asked the Eighth Circuit "to make an additional inferential step between the regulation and the asserted impact."[94] The disparate impact theory in the case involved a showing that the code enforcement scheme caused an increase in the plaintiffs' maintenance costs and that this increase in costs caused the plaintiffs to raise rents or withdraw housing so as to make housing in St. Paul unavailable to low-income minority tenants. The court acknowledged the extra inferential step, holding that although there was "not a single document that connects the dots of Appellants' disparate impact claim, it is enough that each analytic step is reasonable and supported by evidence."[95]

---

88. Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010); *cert. granted*, 132 S. Ct. 548 (2011). Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013).

89. Magner v. Gallagher, 132 S. Ct. 1306 (Feb. 14, 2012) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court); Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (Nov. 15, 2013) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

90. Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010); Magner v. Gallagher, 132 S. Ct. 548 (2011) (granting petition for writ of certiorari to the Eighth Circuit).

91. Gallagher v. Magner, 619 F.3d 823, 828–29 (8th Cir. 2010).

92. *Id.* at 830.

93. *Id.* at 834–35.

94. Seichsnaydre, *supra* note 57, at 376.

95. Gallagher v. Magner, 619 F.3d 823, 835 (8th Cir. 2010).

This two-step, or second-order, disparate impact theory is different in type from the direct theory at issue in integration cases. In revitalization cases, a government policy simply changes the incentives, or decision calculus, for the plaintiff landlords. In response to the code enforcement scheme, the landlords could simply have absorbed the increased costs by accepting lower profits from the rental houses. In addition, even if maintenance cost increases did need to be passed on to tenants, the court need not have assumed that any increase in rent made housing *per se* unaffordable. The court could have at least required that the plaintiffs present evidence as to the number of individuals who were no longer able to afford to live in their buildings.

Magner settled before the Supreme Court could hear oral argument on FHA disparate impact liability. The Court had another opportunity to review the disparate impact standard soon after in *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*[96] The Township of Mt. Holly had planned to redevelop Mt. Holly Gardens, the township's only predominantly minority neighborhood, by demolishing 329 houses that had been occupied by predominantly low-income residents and replacing them with 520 new houses, of which 56 would be deed-restricted affordable housing units.[97] The plaintiffs alleged that over 22 percent of all African American residents and over 32 percent of all Hispanic households in Mt. Holly would be affected by the demolitions while less than 3 percent of white households would be affected.[98] The plaintiffs also claimed that 21 percent of African American and Hispanic households in the entire county would be able to move into to the redeveloped property, while 79 percent of white households would be able to move into the property.[99]

The district court granted summary judgment for the Township, and the Third Circuit reversed. While the Third Circuit noted that upholding a disparate impact claim in this case would "render the Township powerless to rehabilitate its blighted neighborhoods,"[100] it also argued that disparate impact claims need not require a showing that a policy perpetuates segregation; it found precedent in other circuit courts' decisions for the type of housing improvement claim at issue in the case.[101] As in *Magner*, the Supreme Court granted certiorari to determine whether the FHA encompassed disparate impact liability, but again the parties settled before oral argument.[102]

---

96. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375 (3d Cir. 2011).

97. *Id.* at 378–79.

98. *Id.* at 382.

99. *Id.*

100. *Id.* at 385.

101. *Id.* (citing Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988)).

102. Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (Nov. 15, 2013) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

These cases clarify the ingredients of a classic housing improvement case, which differ from those for a housing barrier case. While a prototypical housing barrier case involves a government policy that directly prevents the construction, sale, or rental of buildings in desirable neighborhoods, a prototypical housing improvement case "requires[s] the court to make an additional inferential step between the regulation and the asserted impact."[103] To establish a prima facie disparate impact claim in a housing improvement case, a plaintiff makes a two-step argument.[104] First, the plaintiff argues that the government policy has some effect on intermediate actors. This could be increasing maintenance costs for landlords or directing a redevelopment agency to demolish housing and replace it with more expensive housing. Second, the plaintiff argues that the ways in which these intermediate actors respond to these policies have displaced racial minorities from housing they had heretofore occupied. While the remedy for a disparate impact claim in the housing barrier context involves "the creation of housing opportunities where they might not have previously existed," the remedy for a disparate impact in the housing improvement context "is usually preventing displacement from housing opportunities where they already exist."[105] Plaintiffs thus advance disparate impact claims in these cases to keep neighborhoods affordable for existing tenants and homeowners.

B. Justice Kennedy on Integration, Revitalization, and the FHA

Justice Kennedy's opinion evinces a belief that housing barrier cases and housing improvement cases are not equal under the FHA. In affirming the Fifth Circuit's headline ruling that the FHA encompasses disparate impact liability and in highlighting the legitimacy of "heartland" housing barrier cases, the opinion suggests that the Court sees housing barrier regulations as proper targets of litigation under the FHA.[106] At the same time, in imposing sharp limits on the use of disparate impact liability for housing improvement regulations, the opinion suggests that the Court sees such regulations as illegitimate targets of litigation under the FHA.[107]

103. *See* Seicshnaydre, *supra* note 57, at 376.

104. *See, e.g.*, Gallagher v. Magner, 619 F.3d 823, 835 (8th Cir. 2010) ("[T]he evidence shows that the City's Housing Code enforcement temporarily, if not permanently, burdened Appellants' rental businesses, which indirectly burdened their tenants. Given the existing shortage of affordable housing in the City, it is reasonable to infer that the overall amount of affordable housing decreased as a result.").

105. Seicshnaydre, *supra* note 57, at 361.

106. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2521–22 (2015).

107. *Id.* at 2522–24.

The language of Justice Kennedy's opinion suggests that the FHA manifests a commitment to integrating America's traditionally segregated communities. The opinion's discussion of the origins of the FHA makes this clear. Justice Kennedy begins his recounting of the history of the FHA's enactment by noting that although "*[d]e jure* residential segregation by race was declared unconstitutional almost a century ago . . . its vestiges remain today, intertwined with the country's economic and social life."[108] Describing the history of white flight, restrictive covenants, steering, and redlining, he notes that by the 1960s, when the FHA was passed, "policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs."[109]

Justice Kennedy further contextualizes the FHA's passage by describing it as a response to the findings of the Kerner Commission. He describes the Commission's report as finding that "both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities."[110] In the opinion's concluding paragraph, noting our nation's "continuing struggle against racial isolation," Justice Kennedy explicitly affirms that the FHA "must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal,' "[111] and he affirms the FHA's "continuing role in moving the Nation toward a more integrated society."[112]

This language makes clear that Justice Kennedy sees the FHA as targeted at ending the segregated ghettos in which black Americans overwhelmingly lived in the 1960s. A conviction of integration as a moral imperative for the United States extends beyond the terms of the FHA; Justice Kennedy had expressed a conviction in such an imperative in earlier opinions. Most prominently, in his concurrence in *Parents Involved* (quoted in part in *Inclusive Communities*), Justice Kennedy asserted that "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."[113]

This full-throated commitment to building a racially integrated society forms the background to Justice Kennedy's approach in *Inclusive Communities*. It helps to explain his efforts to preserve the use of disparate impact liability to remove the kinds of government-enacted obstacles to mobility

108. *Id.* at 2515.

109. *Id.*

110. *Id. at* 2516 (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 13 (1968)).

111. *Id.* at 2525 (2015) (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968)).

112. *Id.* at 2525–26.

113. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007).

that are at issue in prototypical housing barrier cases such as *City of Black Jack*, *Huntington*, and *St. Bernard Parish*. Seeing the importance of disparate impact liability to integrating communities in cases like these, he affirms the Fifth Circuit's headline holding: that the FHA encompasses disparate impact liability.

At the same time, Justice Kennedy evinces a firm belief that the FHA was not intended to prevent governments and developers from revitalizing poor, heavily minority communities. He asserts that it would be "paradoxical" if FHA disparate impact liability were used "to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable."[114] In asserting that disparate impact liability must be limited, he takes direct aim at the line of cases involving such liability for housing improvement efforts:

> If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes.[115]

Moreover, although he does not tip his hand as to exactly how he would have evaluated *Magner* had it not settled before oral argument at the Court, he suggestively notes "that *Magner* was decided without the cautionary standards announced in this opinion."[116] He is concerned that, without safeguards, disparate impact liability "might displace valid governmental and private priorities, rather than solely 'remov[ing] . . . artificial, arbitrary, and unnecessary barriers.' "[117]

Justice Kennedy thus seems to believe that while FHA disparate impact liability is a legitimate means of encouraging the integration of America's communities, it ought not be used to prevent housing authorities or private developers from revitalizing housing in poor, heavily minority communities. This leads him to develop a framework for disparate impact liability that sharply limits its ambit.

C. Inclusive Communities *and the Conflict Between Integration and Revitalization*

The fact pattern and theory of liability in *Inclusive Communities* look, at first glance, like a traditional housing improvement case. The plaintiffs allege a second-order theory of disparate impact: they argue that TDHCA's tax credit formula puts pressure on developers to build in certain places

114. Tex. Dep't of Hous. & Cmty. Affairs, 135 S. Ct. at 2523.
115. *Id.* at 2424.
116. *Id.*
117. *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 426, 431 (1971)).

rather than others and that this pressure in turn results in more housing being built in poorer, predominantly minority communities than in wealthier, predominantly white communities. The remedy sought in *Inclusive Communities*, as in the housing improvement cases, is an injunction that will change the decision calculus of a third party, rather than an injunction that will remove a per se barrier to building, selling, or renting housing. Moreover, the injunction sought in *Inclusive Communities* would have curtailed the revitalization of predominantly minority neighborhoods through the construction of new affordable housing.

However, as in a traditional housing barrier cases, the expected effect of the plaintiffs' injunction would be to promote the integration of communities. Had TDHCA lost on remand,[118] the remedy would have involved changing the tax credit formula to make it more likely that housing for racial minorities will be created in predominantly white communities in which such housing did not previously exist. Unlike the ordinances at issue in *City of Black Jack*, *Huntington*, and *St. Bernard Parish*, the policy at issue in *Inclusive Communities* does not directly prevent the construction, sale, or rental of buildings; it merely provides financial incentives that may nudge third parties (private developers) to build in one area rather than another. However, as in the classic housing barrier cases, the expected result of the litigation is the integration of communities. The plaintiffs' argument is that by disproportionately awarding tax credits for affordable housing projects in poorer, predominantly minority areas, TDCHA is effectively confining racial minorities to slum-like, blighted housing conditions. Meanwhile, residents of the metropolitan area who are not dependent on affordable housing are able to live in neighborhoods not characterized by slum-like conditions. To the extent that there is a disparate impact, it is differential access by racial group to nice neighborhoods, rather than merely differential access to a roof over one's head. In this way, the theory of disparate impact liability in *Inclusive Communities* resembles that of a housing barrier case rather than a housing improvement case.

Inclusive Communities is best thought of as a third type of FHA disparate impact case, distinct from the traditional housing barrier and housing improvement cases. The policy at issue involves a trade-off between revitalization and integration. The formula for the tax credits will favor *either* construction of affordable housing in poorer, predominantly minority communities (revitalization) *or* construction of such housing in wealthier, predominantly white communities (integration). A formula favoring

118. The U.S. District Court for the Northern District of Texas eventually dismissed the plaintiffs' claim on remand, on the grounds that they had failed to prove a prima facie case of disparate impact. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 2016 U.S. Dist. LEXIS 114562 (N.D. Tex. Aug. 26, 2016).

revitalization will result in less integration and vice versa. As in a traditional housing barrier case, the imposition of disparate impact liability (and subsequent shifting of the tax credit formula) in *Inclusive Communities* would result in the integration of communities, rather than in merely preventing displacement from the communities in which residents currently live. However, as in a traditional housing improvement case, the imposition of liability would limit an effort to revitalize poorer communities.

The unique posture of *Inclusive Communities* is difficult for Justice Kennedy. As described above, Justice Kennedy's opinion attempts to fashion a disparate impact framework to uphold liability for housing barrier regulations while limiting liability for housing improvement regulations. He has difficulty fashioning a test for policies that only promote integration *at the expense of* revitalization or vice-versa.

D. *Fashioning of the New Disparate Impact Framework*

Justice Kennedy is thus confronted in *Inclusive Communities* with a fact pattern that contains elements of a housing barrier case and elements of a housing improvement case. He aims in his opinion to protect the use of disparate impact liability for housing barrier cases while sharply limiting such liability for housing improvement cases. As this section argues, the result is a framework that will make it more difficult for plaintiffs to bring disparate claims against both housing barrier and housing improvement regulations. When applied to policies that involve trade-offs between the promotion of integration and revitalization, the new framework will favor revitalization over integration.

1. Plaintiff's Prima Facie Case

Justice Kennedy's reworking of the disparate impact framework begins with the standards governing a plaintiff's prima facie case. Prior to *Inclusive Communities*, most circuits had set relatively low bars for a plaintiff to establish a prima facie case; proving that there existed a statistical disparity of some degree between the treatment received by two racial groups was generally sufficient.[119] Some courts, however, had held plaintiffs to

119. *See, e.g.*, Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–50 (1st Cir. 2000) ("merely to show a disparate racial impact" creates a prima facie case, shifting the burden to the defendant to offer a valid justification); Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 934 (2d Cir. 1988) ("a prima facie case is established by showing that the challenged practice of the defendant actually or predictably results in racial discrimination; in other words that it has a discriminatory effect") (internal quotations omitted); Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375, 382 (3d Cir. 2011) ("a prima facie case may be established where gross statistical disparities can be shown") (internal citations and quotations omitted); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 (4th Cir. 1984) ("correct inquiry is whether the policy in question had a disproportionate impact

a higher burden in proving the prima facie case by requiring them to identify with specificity a policy or practice that caused the disparity.[120] Justice Kennedy's opinion in *Inclusive Communities* raised the requirements for a prima facie case substantially, making it much easier for courts to dispose of plaintiffs' complaints through motions to dismiss or motions for summary judgment.

Justice Kennedy sets out what appear to be at least three distinct requirements that a plaintiff must meet to establish a prima facie case of disparate impact, two of which are new.[121] First, a plaintiff must show that there is a statistical disparity in the effects of a policy that adversely impacts a minority group.[122] This part of the test is familiar. Second, a plaintiff must be able to identify "a defendant's policy or policies causing that disparity" with sufficient specificity.[123] What is important here is the

---

on the minorities in the total group to which the policy was applied"); Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1989) (simple statistical evidence of disparity is sufficient for prima facie case); Oti Kaga, Inc. v. South Dakota Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003) (prima facie case requires that plaintiffs "show a facially neutral policy has a significant adverse impact on members of a protected minority group"); Keith v. Volpe, 858 F.2d 467, 482 (9th Cir. 1988) (to establish a prima facie case, "a plaintiff must show at least that the defendant's actions had a discriminatory effect"); Hallmark Developers, Inc. v. Fulton Cty., 466 F.3d 1276 (11th Cir. 2006) ("Typically, a disparate impact is demonstrated by statistics.").

120. *See, e.g.*, Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996) (reversing summary judgment for plaintiff who did not "identify an alleged discriminatory policy, procedure, or practice of [defendant]"); Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n, 508 F.3d 366 (6th Cir. 2007) (plaintiff proves a prima facie case by "identifying and challenging a specific [housing] practice, and then show[ing] an adverse effect by offering statistical evidence of a kind or degree sufficient to show that the practice in question has caused the adverse effect in question") (internal quotations omitted); Cinnamon Hills Youth Crisis Ctr., Inc. v. St. George City, 685 F.3d 917, 922 (10th Cir. 2012) (plaintiff must show "that a specific policy caused a significant disparate effect on a protected group. . . . This is generally shown by statistical evidence . . . involving the appropriate comparables necessary to create a reasonable inference that any disparate effect identified was caused by the challenged policy and not other causal factors") (internal quotations and citations omitted).

121. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522–24 (2015). Note that at least one federal district court has interpreted *Inclusive Communities* as imposing *four* independent burdens on plaintiffs at the prima facie stage, the fourth being that a plaintiff must establish that the policy at issue was "artificial, arbitrary, and unnecessary." City of Miami v. Bank of Am. Corp., No. 13-24506-Civ-Dimitrouleas, 2016 WL 1072488, at *4 (S.D. Fla. Mar. 17, 2016).

122. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015) (establishing that a showing of statistical disparity is necessary but not sufficient to establish a prima facie case).

123. *Id.*

distinction between a policy or policies and a decision or series of decisions that do not evince an underlying policy.[124] Third, a plaintiff must meet a "robust causality requirement" linking the challenged facially neutral policy to the adverse statistical disparity at issue.[125] Such a requirement, Justice Kennedy asserts, "protects defendants from being held liable for racial disparities they did not create"[126] and prevents race from being "used and considered in a pervasive way" that "would almost inexorably lead" governmental or private entities to use "numerical quotas" from which "serious constitutional questions then could arise."[127]

By mandating that plaintiffs "point to a defendant's policy or policies" and that they meet a "robust causality" requirement, Justice Kennedy is attempting to limit the use of disparate impact liability in housing improvement cases. The "policy or policies" requirement does not make sense for housing barrier cases, in which it is manifestly clear which policy is preventing developers from constructing, selling, or renting housing. It makes more sense as a requirement for housing improvement cases, in which plaintiffs are advancing a second-order disparate impact theory. When a third party with discretion over the construction, sale, or renting of housing chooses to remove housing from the market or to raise the cost of housing, its decision may be influenced by a number of different factors, including a number of different government policies. A requirement that plaintiffs specify the policy or policies that are a "but for" cause of the third party's making housing unavailable is at least conceptually coherent.

The "robust causality" requirement also makes sense only in the context of the second-order disparate impact theories advanced in those cases. In traditional disparate impact employment cases, as well as housing barrier cases, requiring a showing of causality does not make sense because the policy at issue directly and inherently impacts two groups differently. *Griggs* provides a clear example. Individuals took a test for promotions at work, and two different protected classes received different scores that resulted in differential access to promotions.[128] The Court did not need to concern itself with any third party or "inferential step." In the housing context, the zoning ordinances at issue in *City of Black Jack*, *Huntington*, and *St. Bernard Parish* also provide clear examples. In each case, a government policy explicitly banned the construction, sale, or rental of housing that would have been inhabited by members of a protected

124. *Id.* ("a one-time decision may not be a policy at all"); *see also* Azam v. City of Columbia Heights, Civil No. 14-1044 (JRT/BRT), 2016 WL 424966, at *11 (D. Minn. Feb. 3, 2016) (citing *Inclusive Communities* for the proposition that "a single decision generally is not an identifiable policy capable of supporting a disparate impact claim").

125. Tex. Dep't of Hous. & Cmty. Affairs, 135 S. Ct. at 2523.

126. *Id.*

127. *Id.* (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)).

128. Griggs v. Duke Power Co., 401 U.S. 426 (1971).

class. There was no intermediate actor whose decisions intervened between the government policy and the availability of housing. In housing improvement cases, a "robust causality" requirement makes more conceptual sense because the alleged disparate impact involves two steps. A government policy has some effect on the decision calculus of a third party (such as housing developers), and this shift in the decision calculus may result in a disparate impact on members of a protected class. Given the multiple inputs to the intermediate actor's decision calculus, requiring a showing of causality is at least conceptually coherent.

The two new requirements for establishing a prima facie case that Justice Kennedy adds to the disparate impact framework make sense only in light of the mixed housing barrier/housing improvement posture of the policy at issue in *Inclusive Communities*. Had he been presented with a traditional housing barrier case featuring a direct theory of liability, the "specific policy or policies" requirement and the "robust causality" requirement would be inapposite. It is only because the *Inclusive Communities* policy features elements of the second-order theory of liability generally seen in housing improvement cases that these requirements make their way into the new disparate impact framework. As Part III argues, these new requirements will make it more difficult to hold entities liable for disparate impact violations in cases in which policies involve trade-offs between promoting integration and revitalization.

2. Defendant's Rebuttal

Justice Kennedy also modifies the structure of disparate impact liability at the second stage of the analysis, in which the defendant rebuts a prima facie case. Drawing an analogy to the "job-related" and "business necessity" standards governing Title VII disparate impact claims, he holds that private developers or governmental entities can rebut a plaintiff's prima facie case of disparate impact by proving that the policy or policies in question were "necessary to achieve a valid interest."[129] While Justice Kennedy paints this requirement as equivalent to the Title VII business necessity standard, it appears to be less stringent than the standards courts had previously used for adjudicating defendants' responses to prima facie cases.

The "valid interest" test is framed by Justice Kennedy's admonition that disparate impact liability exists to remove "artificial, arbitrary, and unnecessary barriers"[130] rather than to "displace[] . . . valid governmental policies."[131] Here, he is directly referencing the language from *Griggs* that was first applied to housing barrier disparate impact cases in *City of Black Jack*. Seeking to craft a framework that will preserve disparate impact

129. Tex. Dep't of Hous. & Cmty. Affairs, 135 S. Ct. at 2523.
130. *Id.* at 2522 (quoting Griggs v. Duke Power Co., 401 U.S. 426, 431 (1971)).
131. *Id.*

liability for housing barrier cases while limiting its use in housing improvement cases, he uses language meant to protect government policies that aim to improve communities. He makes clear that disparate impact liability faces constitutional challenge if it is shaped so that it can be wielded to "force housing authorities to reorder their priorities."[132] He reiterates shortly after that disparate impact liability cannot be used as an instrument for plaintiffs to "second-guess which of two reasonable approaches" to tax credit allocation a housing authority is permitted to use.[133]

In these passages, Justice Kennedy subtly reshapes the basic structure of disparate impact liability. In *Griggs*, the Supreme Court stated that the "touchstone" for disparate impact liability was "business necessity," meaning that "[i]f an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."[134] Under this precedent, if a defendant employer met its burden of showing that the practice in question was "job related," a plaintiff could still prevail upon showing that there existed "a legitimate alternative that would have resulted in less discrimination."[135] This framework, which requires that a defendant show that a practice is the least discriminatory means of achieving a legitimate goal, had also governed FHA disparate impact claims in federal appellate courts prior to *Inclusive Communities*.[136]

Under this framework, a defendant could not prevail merely by showing that a challenged practice was "reasonable." The framework set forth in *Inclusive Communities* changes this. By prohibiting "second-guess[ing]" of government policies, Justice Kennedy recognizes that a showing that a practice is "reasonable" can serve as a final defense to disparate impact liability.[137] Recognition of "reasonableness" as a defense to liability will likely make it more difficult to impose disparate impact liability on defendants than it was prior to the *Inclusive Communities* decision, when defendants would have to establish not only that a practice was reasonable, but that it was also the least discriminatory means for achieving a legitimate objective. As Part III argues, this refashioning of the disparate impact

132. *Id*

133. *Id* at 2522.

134. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

135. Ricci v. DeStefano, 557 U.S. 557, 578 (2009); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (allowing plaintiff to prevail in a disparate impact case by showing "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest").

136. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1187 (8th Cir. 1974) (requiring that a defendant, in order to avoid the imposition of liability, establish that there exist no "less drastic means . . . available whereby the stated governmental interest may be attained").

137. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

framework will likely result in courts lending support revitalization programs at the expense of integration in circumstances in which the two are in conflict.

3. Plaintiffs' Defense

Finally, Justice Kennedy reaffirms the last step of the burden-shifting framework that the HUD regulations had established. After a defendant has rebutted a prima facie disparate impact claim by showing that it was necessary to achieve a valid interest, the plaintiff can still win by proving "that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.'"[138] This confirms to the guidance from HUD[139] and the ruling of the Fifth Circuit,[140] but it constrains the liability of government actors and private developers to a greater degree than would the standard used by the trial court in the *Inclusive Communities* litigation.[141] More importantly, as discussed above, it is unclear how this final safe harbor for plaintiffs is affected by Justice Kennedy's admonition that disparate impact liability cannot be used to "second-guess which of two reasonable approaches" a government entity can use.[142] If reasonableness is truly a defense to liability, as Justice Kennedy intimates, this last step of the analysis may be a dead letter.

III. Disparate Impact Litigation After *Inclusive Communities*

A. Revitalization and Integration as Poverty Alleviation Strategies

The plaintiffs' challenge to the tax credit program in *Inclusive Communities* speaks to a long-standing tension between two approaches to helping low-income Americans: a place-focused revitalization approach, which aims at improving the quality of life in those communities, and a people-focused integration approach, which encourages mobility out of those communities to break up patterns of segregation.[143]

138. *Id.* at 2518 (quoting Ricci v. DeStefano, 557 U.S. 557, 578 (2009)).

139. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500 (2014)).

140. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of House. & Cmty. Affairs, 747 F.3d 275, 282–83 (5th Cir. 2014).

141. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 322–23 (N.D. Tex. 2012) (placing burden on defendant to prove that there are no less discriminatory alternatives, meaning that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact").

142. Tex. Dep't of Hous. & Cmty. Affairs, 135 S. Ct. at 2522.

143. *See* Henry Korman, *Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs*, 14:4 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 292, 293 (2005); Michael J. Vernarelli, *Where Should HUD Locate Assisted Housing? The Evolution of Fair Housing Policy*, *in* HOUSING DESEGREGATION AND FEDERAL POLICY (John M. Goering ed., 1986); Owen M. Fiss, *What Should Be Done for Those Who Have Been Left Behind?*, *in* A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 3 (Joshua

A place-focused revitalization approach aims at improving the quality of life in low-income communities. Such an approach encourages investment in low-income, predominantly minority communities in an attempt to "mak[e] separate equal."[144] Xavier de Souza Briggs has characterized the goal of a revitalization approach as "reducing [the] terrible social costs [of segregation] without trying to reduce the extent of segregation itself to any significant degree" by "transform[ing] the mechanisms that link a person's place of residence to their opportunity set."[145]

By contrast, a people-focused integration approach aims at moving people from lower-income communities into higher-income communities. In contrast with a revitalization approach, the integration approach aims at "reducing segregation by race and class" by "invest[ing] in changing where people are willing and able to live."[146] By encouraging mobility between communities, such an approach aims at break up patterns of segregation. Integration is often pushed through litigation that attacks barriers to that mobility.[147]

Disparate impact liability has been used both to advance integration strategies and to place limits on revitalization strategies. In housing barrier cases, disparate impact liability can be used to promote integration by eliminating policies and practices that established barriers to inter-community mobility. In housing improvement cases, disparate impact liability can be used to limit the reach of revitalization programs by eliminating policies and practices that may displace those living in low-income communities.

Significant debate remains over the relative merits of revitalization and integration approaches to poverty. Proponents of integration strategies have argued that desegregation of housing is the most effective means of providing poor individuals with access to educational and economic opportunities that are linked to geography.[148] They have also criticized

Cohen et al. eds., 2003); J. William Callison, *Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act*, 46 U. Mem. L. Rev. 1039, 1039–41 (2016).

144. Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 Ind. L. Rev. 555, 557 (2008).

145. Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, *in* The Geography of Opportunity: Race and Housing Choice in Metropolitan America 310, 329 (Xavier de Souza Briggs ed., 2005).

146. *Id.*

147. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 928 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563 (E.D. La. 2009).

148. *See* J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. Cal. Rev. L. & Social Justice 213, 222–24 (2010); *see also* Fiss, *supra* note 143; Nicholas Lemann, "The Myth of Community Development," N.Y. Times, Jan. 9, 1994, § 6, 27.

a focus on community revitalization programs for failing to take into account "structural racism, power, and social class inequality in its approach to inner city development."[149] Critics of integration approaches have observed that the result of integration—increased diversity in communities—is correlated with lower levels of civic engagement and "social capital," as well as greater distrust among neighbors.[150] In supporting revitalization approaches, some have argued that building subsidized housing in high-poverty neighborhoods will over time attract higher-income people to such neighborhoods, decreasing the concentration of poverty and capturing many of the benefits of integration.[151] This article does not pass judgment on which approach, revitalization or integration, is preferable as a general strategy. Instead, it argues that the new disparate impact framework set forth in *Inclusive Communities* will tend to encourage the revitalization approach over the integration approach. In so doing, it aims to clarify the stakes of implementing that framework.

B. *Effects of* Inclusive Communities *on Revitalization and Integration Strategies*

The new formulation of the disparate impact framework in Justice Kennedy's *Inclusive Communities* opinion will make it more difficult for plaintiffs to prove disparate impact claims in both housing barrier cases and housing improvement cases.[152] The new framework will thus tend to frustrate efforts to integrate communities through litigation, and it will tend to protect from litigation efforts to revitalize low-income communities. In this sense, the new framework can be thought of as tending to favor revitalization over integration as a strategy for alleviating poverty.

Moreover, for an important set of cases, the new disparate impact framework may have a particularly strong tendency to favor revitalization over integration as a strategy. Some housing policies require agencies to allocate finite sets of resources between different anti-poverty strategies. The LIHTC program at issue in *Inclusive Communities* is an example of such a program. The LIHTC program required the TDHCA to make decisions on how to

149. Henry Louis Taylor, Jr. & Sam Cole, Ctr. for Urban Studies, *Structural Racism and Efforts to Racially Reconstruct the Inner-City Built Environment* 1 (2001), http://www.thecyberhood.net/documents/papers/taylor01.pdf.

150. *See* James A. Kushner, *Symposium: The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation: Urban Neighborhood Regeneration and the Phases of Community Evolution After World War II in the United States*, 41 Ind. L. Rev. 575, 599–600 (2008); Michael Jonas, *The Downside of Diversity: A Harvard Political Scientist Finds That Diversity Hurts Civic Life. What Happens When a Liberal Scholar Unearths an Inconvenient Truth?*, Boston Globe, Aug. 5, 2007, at D1.

151. *See* Callison, *supra* note 143, at 1039–41 n.2.

152. *See supra* Part II.D.

allocate a finite number of tax credits.[153] Different methods of allocation could promote integration (by favoring projects that would build new affordable housing in higher-income communities) or promote revitalization (by favoring projects that would build new affordable housing in lower-income neighborhoods).[154] In allocating tax credits, TDHCA faces a strict trade-off between the two approaches: more credits for revitalization projects mean fewer credits for integration projects.

Plaintiffs challenging allocations of tax credits will tend to treat such cases as housing barrier cases, with their aim being to promote the integration of communities. Defendants will tend to treat such cases as housing improvement cases, with their aim being to protect revitalization programs. If these cases are brought as disparate impact cases, courts applying the disparate impact test set forth in *Inclusive Communities* will likely have a tendency to side with defendants because the new framework is decidedly defendant-friendly when applied to housing improvement cases.[155]

Regarding the plaintiffs' theory in *Inclusive Communities* itself, Kennedy writes that "on remand . . . [it] may be seen simply as an attempt to second-guess which of two reasonable ap-proaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing."[156] Such "second-guess[ing]" is disfavored by the disparate impact test, and at least two of the prongs of the new test—the requirement that a plaintiff's case target only an "artificial, arbitrary, and unnecessary barrier" to housing and the low "valid interest" bar for the defendant's rebuttal—are vehicles to dismiss such second-guessing. Moreover, as noted above, the fact that "reasonableness" seems to be a safe harbor for defendants may mean that even if plaintiffs could show that an integration-promoting policy was preferable (i.e., less discriminatory) than a revitalization policy, it may not matter. As long as the revitalization policy is reasonable, it will pass muster under the new framework.

This effect is compounded by the fact that, although Justice Kennedy is an avowed supporter of integration,[157] he is wary of writing into disparate impact law a preference for integration over revitalization. He professes

153. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513–14 (2015); TEX. GOV'T CODE ANN. §§ 2306.6710(a)–(b).

154. *Id.* at 2514.

155. *See supra* Part II.D.

156. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

157. *See id.* at 2525–26 (acknowledging "the Fair Housing Act's continuing role in moving the Nation toward a more integrated society"); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007) (asserting that the United States "has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children") (Kennedy, J., concurring in part and concurring in the judgment).

agnosticism about the relative value of integration and revitalization as strategies for helping racial minorities, asserting "it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice-versa."[158] Without citing any provision or legislative history of the FHA, he asserts that it would be "paradoxical" to construe it to "impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable."[159] He further notes that the FHA does not "decree a particular vision of urban development" and thus cannot be interpreted to put public or private actors in a "double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities."[160]

Justice Kennedy even goes as far as to describe specific factors that public and private actors can cite as "legitimate concerns" that would meet the valid interest test. Government actors can cite "cost and traffic patterns" and "preserving historic architecture" to defend against disparate impact claims in the zoning context, and private developers can cite "market factors."[161] Although he professes not to be instructing the Fifth Circuit how to evaluate the merits of the *Inclusive Communities* case on remand, Justice Kennedy suggests that in this case and others like it, government actors and private developers have wide latitude to favor revitalization over integration.

Other elements of new disparate impact framework will also make it difficult for plaintiffs to bring successful claims in LIHTC cases. The new layers in the plaintiff's prima facie burden—the requirement that plaintiffs specifically identify "policy or policies" and meet a "robust causality" requirement—provide new channels for courts to dismiss claims earlier in proceedings and will require plaintiffs to do more work up front. While the requirements are targeted at cases seeking to impose disparate impact liability for "housing improvement" barriers, in at least one case that has come down since *Inclusive Communities*, a court has used these requirements to grant summary judgment to defendants in a classic integration (reverse redlining) case.[162]

Even in cases where a disparate impact case challenging a revitalization policy succeeds, and a court orders a remedy favoring an integration policy, that court may be limited in how it can shape that remedy. Per Justice Kennedy's dicta in *Inclusive Communities*, remedial orders will need to

158. *Id.* at 2523.
159. *Id.*
160. *Id.*
161. *Id.*
162. City of Los Angeles v. Wells Fargo, No. 2:13-cv-09007-ODW (C.D. Cal. July 17, 2015).

be "race-neutral" if at all possible, and they will likely need to avoid "racial targets or quotas" in order to withstand constitutional review.[163] Plaintiffs may need to be creative in the remedies they ask for so as not win the disparate impact battle only to lose the broader war.

Thus, in cases challenging LIHTC allocations—and in cases challenging other zero-sum trade-offs between integration and revitalization strategies—the new disparate impact framework will tend to protect revitalization programs at the expense of efforts to integrate communities. Even though challenges to LIHTC allocations constitute only a subset of FHA disparate impact litigation, judicial decisions about such allocations are particularly important because the LIHTC program is the primary source of funding for new affordable housing units.[164] Already, LIHTC tax credits have been used more for revitalization projects than for projects that would integrate communities. A 2004 analysis of the distribution of LIHTC credits in the 1990s found that central cities, in which poverty rates are much higher than the national or suburban average, received 58 percent of all LIHTC-subsidized units built during the 1990s despite containing in aggregate only 38 percent of the residents of their metropolitan areas.[165] As a result, as of 2008, 22 percent of residents of LIHTC-subsidized units lived in neighborhoods with poverty rates above 30 percent.[166] The new disparate impact test will tend to protect this distribution of tax credits under the LIHTC program—a distribution that is consistent with a revitalization strategy, rather than an integration strategy.

The new disparate impact framework need not be fatal to those seeking to push states to substitute pro-integration policies for pro-revitalization policies. For example, future plaintiffs in trade-off cases may be able to successfully argue that a housing policy that favors revitalization over

---

163. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015).

164. *See* Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 n.1 (1998) (citing U.S. Gen. Acct. Office, *Tax Credits: Opportunities to Improve Oversight of the Low Income Housing Program* § 2 (Mar. 1997) (LIHTC program is "currently the largest federal program to fund the development and rehabilitation of housing for low-income households")); *see also* LANCE FREEMAN, BROOKINGS INST., SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990S 2 (2004), http://www.brookings.edu/~/media/research/files/reports/2004/4/metropolitanpolicy-freeman/20040405_freeman.pdf (observing that during the 1990s, the LIHTC program "emerged as the primary vehicle for new affordable housing construction as funds for other new development slowed to a trickle").

165. *See* FREEMAN, *supra* note 164.

166. MARGERY AUSTIN TURNER & G. THOMAS KINGSLEY, URBAN INST., FEDERAL PROGRAMS FOR ADDRESSING LOW-INCOME HOUSING NEEDS. A POLICY PRIMER 7 (2008), *available at* http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411798-Federal-Programs-for-Addressing-Low-Income-Housing-Needs.PDF.

integration needs to be part of a concerted plan of neighborhood revitalization that goes beyond housing access. Such a program would need to include support for good jobs, safe neighborhoods, adequate infrastructure, and schools on par with those in wealthier communities, while maintaining affordability for low-income families.[167] Absent such a concerted program, plaintiffs may be able to succeed in establishing that a policy favoring revitalization over integration constitutes an "artificial, arbitrary, and unnecessary" barrier to the quality housing that an integration policy would make available. Plaintiffs may alternatively succeed in establishing that such a threadbare revitalization policy does not serve any "valid interest" of the government's when compared to a pro-integration policy. However, the language of *Inclusive Communities* endorsing "two reasonable approaches" to the problems facing poor, heavily minority communities makes it doubtful that many courts will be receptive to such arguments.[168]

Conclusion

Inclusive Communities is not a victory for proponents of integration strategies for America's cities. Justice Kennedy's opinion preserves disparate impact liability for the classic integration cases, such as those involving exclusionary zoning, but it sharply limits disparate impact liability for the cases in which it will matter most in the future, in which efforts to promote of integration will compete with efforts to revitalize poor communities. Prior to *Inclusive Communities*, disparate impact liability could be used as a tool to pressure government agencies and private actors to work to integrate communities, rather than to accept segregation and to try to improve the conditions of life in poor communities. The workings of the new disparate impact framework—from the extra requirements in the plaintiff's prima facie burden to the ease with which defendants can use "reasonableness" as a defense to liability—will substantially relieve the pressure to promote integration.

While fair housing advocates face a tough road ahead, the door has not fully closed on disparate impact. Creative lawyering, as well as shifts in the Court's jurisprudence, may reveal that the tentative conclusions about the future of FHA disparate impact claims described here are too pessimistic. This article is intended as the beginning, rather than the end, of a conversation about housing policy and racial segregation.

167. *See* Richard Rothstein, *The Supreme Court's Challenge to Housing Segregation*, Am. Prospect, July 5, 2015, http://prospect.org/article/supreme-courts-challenge-housing-segregation.

168. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522.

Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act

J. William Callison

I. Introduction 421
II. The *Inclusive Communities* Case 424
III. Observations 428
A. Robust Causality 429
B. Protections for Defendants When the Burden Does Shift 430
C. Limited Remedy 431
1. Disparate Impact Also Limps When Applied as a Tool to Eliminate Consideration of Race 432
2. *Inclusive Communities* May Change the Focus of Fair Housing Litigation to Discriminatory Intent 433
IV. Conclusion 434

I. Introduction

Housing, and in particular affordable housing, is a critical element of urban revitalization for at least two reasons. First, the placement and design of a revitalized community will depend on the extent that it is residential and affordable in nature. Second, the availability of financial resources may depend, at least to some degree, on whether affordable housing is part of the overall revitalization effort.[1]

Both the placement question and the finance question have been part of the affordable housing and community revitalization dialog for many years. Some have argued that the emphasis should be on community development strategies that upgrade the places where people are already living; others have argued that mandates of justice dictate residential

1. *See* J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. Cal. Rev. of Law & Soc. Just. 213 (2010) (discussing project financing using low-income housing tax credits).

J. William Callison (william.callison@faegrebd.com) is a partner in the Denver office of Faegre Baker Daniels LLP. He served as chair of the Forum of Affordable Housing & Community Development Law in 2015–16. *This article was originally published in the* University of Memphis Law Review, *Volume 46:4 (Summer 2016).*

integration and changing where people can choose to live.[2] In my view, it is necessary to determine which approach is to be taken, or more likely to determine the appropriate balance between the two approaches, as part of

2. One community development goal encourages investment in low-income communities, thus "making separate equal." *See* Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 555, 557–58 (2008) (noting the 1968 Kerner Commission report's declaration that the country was "moving toward two societies, one black, one white—separate and unequal"; stating that the progressive fair housing and community development movements "have seemed to operate in parallel universes and, at worst, have reflected tension and even conflict that belie their common commitment to social and racial justice"; and arguing that this is a false dichotomy that must be overcome). Another view encourages geographic desegregation. *See* Owen M. Fiss, *What Should Be Done for Those Who Have Been Left Behind?*, *in* A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 3 (Joshua Cohen et al. eds., 2003). These issues predate the 1968 Fair Housing Act. *See* THURSTON CLARKE, THE LAST CAMPAIGN: ROBERT F. KENNEDY AND 82 DAYS THAT INSPIRED AMERICA 258–60 (2008) (comparing Eugene McCarthy's and Robert Kennedy's urban plans); ARTHUR MEIER SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 785–89 (1978) (discussing Kennedy's Bedford-Stuyvesant plan). For a historian's perspective, see THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 181–209 (1996). S*ee also* Philip D. Tegeler, *The Persistence of Segregation in Government Housing Program*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197 (Xavier de Souza Briggs ed., 2005) (noting that the most important low-income housing development programs are largely unregulated from a civil rights perspective; stating that this reflects a growing emphasis on community revitalization strategies (upgrading the places where disadvantaged people are already living) while efforts to promote residential integration (changing where people can and do choose to live) have faced repeated and seemingly intractable obstacles). Xavier de Souza Briggs argues that public debate over housing policy tends to ignore a "crucial distinction":

> Framed as a question of strategy, the distinction is this: Should we emphasize reducing *segregation* by race and class (through what I term "cure" strategies), or should we emphasize reducing its terrible *social costs* without trying to reduce the extent of segregation itself to any significant degree (via "mitigation" strategies)? Put differently, should we invest in changing where people are willing and able to live, or should we try to transform the mechanisms that link a person's place of residence to their opportunity set? . . . For ethical and practical reasons, it is hard to imagine choosing one strategy, always and everywhere, instead of the other. . . .

Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 310, 329 (Xavier de Souza Briggs ed., 2005).

In a more positive vein, although building subsidized housing in high-poverty neighborhoods may initially heighten poverty concentration, it can be argued that over time there will be a lessening of poverty concentration as neighborhoods improve and higher-income people move into them. In this view, the LIHTC program is a tool for both neighborhood revitalization and neighborhood integration.

any overall community revitalization plan. As with other discussions of this nature, the law plays a significant role in resolving affordable housing siting questions, raising questions involving both the Fourteenth Amendment's Equal Protection Clause and the Fair Housing Act of 1968 (FHA).

In order to claim that the siting of housing violates the Equal Protection Clause, a plaintiff must be a member of a constitutionally protected class and must plead, and ultimately prove, that the complained-of action or inaction constituted "disparate treatment" resulting from a "[racially] discriminatory purpose."[3] Stated differently, an Equal Protection Clause claim cannot be based on disproportionate effect absent a showing of intent. Since most actors have the sophistication to avoid announcing their discriminatory intent, proof of intent generally relies on circumstantial evidence.[4] Proving intent is thus exceedingly difficult, and housing discrimination cases generally cannot be brought as a constitutional matter. In addition, discriminatory practices often occur due to structural, systematic causes that are entirely without specific intent; in such cases, a disparate treatment claim would fail.

Based on the general unavailability of equal protection claims in the housing arena, the focus of this article is on the FHA, particularly on the application of the disparate impact theory under the FHA. Courts have recognized that statutory claims can be brought under the FHA using a disparate impact theory, which directs tribunals to consider the racial effects of facially neutral, unintentional practices.[5] In a disparate impact case, the plaintiff does not need to show intentional discrimination.[6] Instead, the plaintiff needs to demonstrate that the defendant has engaged in practices that have a "disproportionately adverse effect on minorities" or other statutorily protected group and show that the practices or policies

---

3. See *Washington v. Davis*, 426 U.S. 229, 238–39 (1976), for a discussion on employment discrimination. See *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), for a discussion of plaintiff's burden in cases alleging housing discrimination.

4. Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973), the Supreme Court adopted a burden-shifting analysis which, in order to prove discriminatory intent, plaintiffs must disprove legitimate reasons offered by the defendant for the defendant's actions. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–56 (1981) (holding that a defendant need only "articulate legitimate, nondiscriminatory reason" to rebut an allegation of intent); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993) (explaining that even if trial court disbelieves defendant's offered legitimate purpose, verdict does not automatically follow).

5. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), for a decision regarding employment discrimination. For a decision regarding housing discrimination, see *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974). A 2009 Supreme Court case limited Title VII's disparate impact doctrine with respect to employment discrimination, creating concern whether the doctrine ultimately could withstand constitutional scrutiny. Ricci v. DeStefano, 557 U.S. 557, 584–85, 593 (2009).

6. *See Ricci*, 557 U.S. at 577.

are not justified by a legitimate governmental rationale.[7] Given the infirmity of constitutional discrimination claims, if there were no disparate impact basis, there would likely be significantly fewer civil rights claims brought under the FHA. Historically, all federal appellate courts have recognized claims for FHA violations under a disparate impact theory.[8] Since the courts of appeals were unanimous in the conclusion that the FHA can be violated through disparate impact, there was concern that the U.S. Supreme Court's repeated acceptance of these cases on *certiorari* indicated that the Court was likely to reverse the field and hold that disparate impact claims are not cognizable under the FHA.[9] It did not do so, as the next part of this article demonstrates.

II. The *Inclusive Communities* Case

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[10] the Inclusive Communities Project (ICP), a nonprofit corporation that promotes housing integration in the Dallas area, alleged that the Texas Department of Housing and Community Affairs (TDHCA) violated FHA sections 804(a)[11] and 805(a)[12] by allocating too many low-income housing tax credits (LIHTC) for housing in inner-city neighborhoods and too few for housing in predominantly white, suburban neighborhoods.[13] ICP argued that TDHCA's allocation plan ceased

7. *Id.*

8. Most of the appellate cases are cited in *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519 (2015).

9. *See* Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc., 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (June 17, 2013) (No. 11-1507); Magner v. Gallagher, 636 F.3d 380 (8th Cir. 2011), *cert. granted*, 132 S. Ct. 548 (U.S. Nov. 7, 2011) (No. 10-1032).

10. *Inclusive Cmtys.*, 132 S. Ct. 2507.

11. Section 804(a) provides: "It shall be unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (2014).

12. Section 805(a) provides: "It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a) (2014).

13. *See* Callison, *supra* note 1, at 231–33 (discussing LIHTC allocations). From 1989 to 2008, TDHCA allocated LIHTCs for 49.7 percent of proposed non-elderly housing projects in areas where white individuals and families made up less than 10 percent of the population, while allocating LIHTCs for 37.4 percent of non-elderly housing projects in areas where more than 90 percent of the population was white. In Dallas, 92.29 percent of all housing units built using LIHTC financing were located in majority-minority census tracts. *Inclusive Cmtys.*, 135 S. Ct. at 2514.

to prioritize the goal of desegregation and caused minorities to be segregated in poor areas of Dallas.[14] TDHCA argued that it legitimately prioritized high-poverty neighborhoods, which often require investment and have outdated housing stock.[15] The district court accepted ICP's statistical evidence of a disparity in LIHTC allocations and concluded that ICP had established a prima facie disparate impact case.[16] The district court then shifted the burden to TDHCA to prove that its stated interests in the allocation were legitimate and that less discriminatory alternatives were not available.[17] The court assumed the legitimacy question but held that TDHCA failed to prove there were no less discriminatory alternatives to the challenged allocations.[18] The court subsequently issued a remedial order requiring TDHCA to add additional selection criteria for its LIHTC allocations, including awarding points for projects constructed in neighborhoods with good schools and disqualifying projects located in high crime areas.[19]

On appeal, the Fifth Circuit assumed that ICP established its prima facie case and addressed only the issue of whether the trial court had applied the appropriate burden-shifting standard to TDHCA.[20] The appellate court noted that different appellate courts had applied different standards and that following the district court's decision HUD had issued fair housing regulations setting forth a burden-shifting standard.[21] The Fifth

14. Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

15. Inclusive Cmtys. Project Inc. v. Tex. Dep't & Cmty. Affairs, 860 F. Supp. 2d 312, 319 (N.D. Tex. 2012). Building low-income housing in high-poverty neighborhoods arguably perpetuates segregation by economic class, and ICP argued that it perpetuated racial segregation as well.

16. *Inclusive Cmtys.*, 135 S. Ct. at 2514. The district court also held that ICP failed to prove its intentional discrimination claims. *Inclusive Cmtys.*, 860 F. Supp. 2d at 319.

17. Inclusive Cmtys. Project, Inc. v. Tex. Dep't & Cmty. Affairs, 747 F.3d 275, 279–81 (5th Cir. 2014).

18. *Id.* at 279–80.

19. *Id.* at 280.

20. *Id.* at 280–81.

21. *Id.* at 280–82. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11482 (Feb. 15, 2013) (to be codified at 23 C.F.R. pt. 100). The HUD regulations interpret the FHA to encompass disparate impact liability and establish a burden-shifting framework for disparate impact claims. *Id.* A plaintiff must first make a prima facie case of disparate impact and cannot make such a case if a statistical discrepancy is caused by factors other than the defendant's practice. *Id.* After a plaintiff makes a prima facie showing, the burden shifts to the defendant to show that the challenged practice is necessary to achieve one or more substantial, legitimate, and nondiscriminatory purposes. *Id.* The plaintiff can then present evidence that the same purposes can be accomplished without discriminatory effect. *Id.* Although the *Inclusive Communities* decision generally follows

Circuit adopted HUD's approach and remanded the case so that the trial court could consider and apply the HUD regulations.[22]

The concurring opinion stated that, on remand, the trial court also "should reconsider the State's forceful argument that [ICP] did not prove a facially neutral practice that caused the observed disparity" in LIHTC allocations.[23] It noted that Supreme Court employment discrimination decisions had required more than statistical evidence of a disparity to establish a prima facie case and to shift the burden and that "plaintiff must specifically identify the facially neutral policy that caused the disparity" in order to avoid dismissal of the case.[24] The concurring opinion also noted that there are numerous criteria for allocating LIHTCs and that the allocation process is "anything but simple."[25] In particular, the concurrence stated that the LIHTC statute advantages projects "located in low income census tracts or subject to a community revitalization plan" and that ICP essentially seeks "a larger share of the fixed pool of tax credits at the expense of other low-income people who might prefer community revitalization."[26] As will be seen, the concurring opinion heavily influenced the Supreme Court's ultimate decision.

The U.S. Supreme Court granted *certiorari* to review the following question: "Whether disparate impact claims are cognizable under the Fair Housing Act?"[27] Writing for a five-to-four majority, Justice Kennedy applied traditional canons of statutory interpretation to conclude that disparate impact claims are legally cognizable, but also noted important limitations on the use of disparate impact theory that demonstrate the Court's current conception of the relationship between race and law.[28]

With respect to cognizability, TDHCA argued that statutory differences between the Age Discrimination in Employment Act (ADEA), which the Court previously held supports disparate impact liability, and the FHA, demonstrate that disparate impact liability is unsupported by the FHA.[29]

---

the approach taken in the HUD regulations, it is not grounded in deference to the regulatory agency. *Inclusive Cmtys.*, 747 F.3d at 282.

22. Inclusive Cmtys. Project, Inc. v. Tex. Dep't & Cmty. Affairs, 747 F.3d 275, 282–83 (5th Cir. 2014).

23. *Id.* at 283–84 (Jones, J., concurring).

24. *See id.* at 283.

25. *Id.* at 284.

26. *Id.*

27. Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

28. *Id.* at 2525.

29. *See* Smith v. City of Jackson, 544 U.S. 228 (2005). In *Smith*, a plurality of the Court held that section 4(a)(2) of the Age Discrimination in Employment Act (ADEA), which prohibits acts that "otherwise adversely affect" an employee because of his or her age supports a disparate impact claim and held that "the text focuses on the effects of the action on the employee rather than the motivation

The Court rejected this argument and held that there was sufficient evidence of congressional intent that the FHA supports disparate impact claims.[30] Specifically, the Court stated that the phrase "otherwise made unavailable" in FHA section 804(a) "refers to the consequences of an action rather than the actor's intent."[31] The Court also noted that FHA was amended in 1988 after nine courts of appeal had concluded that the FHA encompassed disparate impact claims. This constituted "convincing support" for a conclusion that Congress accepted and ratified the disparate impact rulings.[32] Finally, the Court recognized that the FHA's "central purpose" was served by recognizing disparate impact liability because it roots out systemic problems that have the effect of perpetuating segregation.[33] In addition, it "plays a role in uncovering discriminatory intent" by allowing "plaintiffs to counteract unconscious prejudices and disguised *animus* that escapes easy classification as disparate treatment."[34]

However, in *dictum* the Court articulated "cautionary standards" and stated "disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, *e.g.*, if such liability were imposed based solely on a showing of statistical disparity."[35] The Court warned against taking an approach to disparate impact liability that "may be seen simply as an attempt to second-guess which of two reasonable approaches [TDHCA] should follow in the sound exercise of its discretion" in making LIHTC allocations.[36] Instead, housing authorities and private developers should be given leeway to explain the valid interests served by their policies.[37] Similarly, courts should not "impose onerous costs on actors who encourage revitalizing

for the action of the employer." *Id.* at 235–36. A concurring opinion in *Smith* noted that ADEA section 4(a)(1)'s "because of" language required discriminatory intent and thus did not support disparate impact liability. *Id.* at 251. TDHCA argued that since the FHA does not contain "otherwise adversely affect" language but only "because of" language, FHA violations require a showing of discriminatory intent. *Inclusive Cmtys.*, 135 S. Ct. at 2519.

30. *Inclusive Cmtys.*, 135 S. Ct. at 2519–20.

31. *Id.* at 2511. This "results-oriented language" was similar to provisions in Title VII of the Civil Rights Act of 1984, which was construed to allow disparate impact claims in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and ADEA section 4(c), discussed in *Smith*, 554 U.S. 288.

32. Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2520 (2015).

33. *Id.* at 2521–22.

34. *Id.* at 2522.

35. *Id.* at 2524, 2512. The fact that the Court's stated limitations on disparate impact analysis are dicta, and thus probably do not have stare decisis effect, points to the importance of the Court's composition in future fair housing cases.

36. *Id.* at 2522.

37. *Id.* These can include objective factors, such as cost and traffic patterns, and subjective factors, such as historical preservation. *Id.* at 2523.

dilapidated housing in our Nation's cities merely because some other priority may seem preferable."[38] The Court thus adopted a deferential attitude toward TDHCA's decisions.

Citing to its earlier decision in *Wards Cove Packaging Co. v. Antonio*, the Court stated "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[39] Further, the Court stated that "policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers' " to housing.[40] This "barrier" requirement stands in contrast to the previous "facially neutral policy" requirement.[41] Thus, imbalance, without more, does not establish a prima facie case of disparate impact. In the Court's view, a robust causality requirement prevents race from being used in a pervasive way that would "almost inexorably lead governmental or private entities to use numerical quotas" resulting in "serious constitutional questions" by "perpetuat[ing] race-based considerations rather than mov[ing] beyond them."[42] Thus, if ICP were unable to show a causal connection between TDHCA's policies and a disparate impact, for example, because federal law concerning LIHTC allocation priorities limits TDHCA's discretion, the case should be dismissed. The Court further noted that "remedial orders must be consistent with the Constitution" and must "concentrate on the elimination of the offending practice" through race-neutral means.[43] The Court affirmed the Fifth Circuit's decision and remanded the case "for further proceedings consistent with [its] opinion."[44]

III. Observations

Disparate impact theory lives. The Court ruled five-to-four that disparate impact claims are recognized under the FHA. *Inclusive Communities* demonstrates that although disparate impact litigation, at least with respect to race,[45] is a costly, burdensome, and low probability strategy, it remains a

38. Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

39. *Id*. (citing Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).

40. *Id*. at 2522 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

41. *See* Gallagher v. Magner, 619 F.3d 823, 833 (8th Cir. 2010) (holding that plaintiffs "must show that facially neutral policy had significant adverse impact on members of a protected group").

42. *Inclusive Cmtys.*, 135 S. Ct. at 2523–24.

43. Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015).

44. *Id*. at 2526.

45. It is important to note that the FHA prohibits discrimination based on race, color, national origin, religion, sex, familial status, and disability. *See* 42 U.S.C. §§ 3604–3606, 3617 (2002). *Inclusive Communities* permits disparate impact claims

strategy nonetheless.[46] Potential disparate impact liability creates risk for governmental and private actors, which may cause them to negotiate the fair housing thicket by including racial integration factors in their calculations. In addition, favorable results may be achievable through the settlement of disparate impact claims.

When applied as a tool to force racial desegregation in housing, the disparate impact theory is weak.

A. *Robust Causality*

Other than its holding that disparate impact claims are actionable under the FHA, another important component of the *Inclusive Communities* decision is the Court's statement that a disparate impact claim relying on statistical disparities must fail if the plaintiff fails to allege facts or produce statistical evidence demonstrating a causal connection between the defendant's "policies" and the disparity. It is unclear whether this "robust causality requirement," which is phrased by the Court in racial and constitutional terms, applies only in the case of race-based claims, or whether it extends to other FHA claims that do not implicate constitutionally protected categories. It seems likely that *Inclusive Communities* is limited to race and can be expanded only to other constitutionally protected classes, based on the Court's citation to *Wards Cove Packing Company* and its references to racial imbalance and racial disparities.

In addition, although Justice Kennedy's decision states a broad "robust causality" requirement, *Inclusive Communities* offers little guidance concerning application of robust causality. The guidance that is offered in the majority opinion does little other than indicate that judgments, such as those made by TDHCA, should not be subject to challenge without adequate safeguards, that "prompt resolution" of disparate impact cases is important, and that decisions that do not equate to "policies" may not be an appropriate subject of disparate impact litigation. Since developers likely do not have "policies" concerning one-time decisions about affordable housing location, micro-level location-based claims may not be cognizable even when the location disparately affects minorities. Larger institutions, such as governmental entities, banks, and insurance companies, are more likely to have placement, financing, lending, and insurance underwriting "policies" that bring disparate impact analysis into play.

However, even with respect to governments and large institutions, the "policy" requirement can be important. Since the *Inclusive Communities*

---

based on the six factors other than race: color, religion, sex, disability, familial status, and national origin. *Inclusive Cmtys.*, 135 S. Ct. at 2518.

46. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 393–94 (2013) (concluding that plaintiffs received positive decisions in fewer than 20 percent of disparate impact cases and that the success rate has dropped since the 1980s).

decision, one trial court has considered the robust causality requirement. In *City of Los Angeles v. Wells Fargo & Co.*, the City of Los Angeles argued that Wells Fargo engaged in discriminatory and predatory lending practices that resulted in a disparate number of residential home foreclosures in Los Angeles.[47] The court granted summary judgment for Wells Fargo because the city failed to point to a policy or policies that caused the disparity:

> First, the City fails to actually identify any policy that created an artificial, arbitrary or unnecessary barrier. Instead, the City argues that the *lack* of a policy [e.g., adequate monitoring policies] produced the disparate impact. There is no authority that suggests that disparate impact claims are designed to impose new policies on private actors. Guidance from the Supreme Court is unambiguous that disparate impact claims must solely seek to *remove* barriers . . .
>
> Second, the City is essentially advocating for racial quotas . . . Such a policy is inapposite to instructions from the Supreme Court. . . . The City . . . advocates for the implementation of "serious constitution concerns.[48]

Previous fair lending cases relied on alleged statistical disparities to proceed past the dismissal stage; the courts' imposition of a positive "policy" requirement can be a formidable obstacle to a disparate impact case.

The Court's emphasis on an early causation showing, coupled with its limitations on the use of statistical discrepancies, renders housing disparate impact claims particularly difficult. For example, the Court noted that "[i]f a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a *prima facie* case, there is no liability."[49] In effect, this could mean that district courts may mandate more robust statistical controls to eliminate alternate causes for a disparity. It is also unclear how courts will engage in multivariate analysis in which multiple factors, including nonracial factors, have a statistically significant effect to make these determinations.

B. Protections for Defendants When the Burden Does Shift

Even if a plaintiff pleads and presents a prima facie disparate impact claim, the Court emphasized that "[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies."[50] Thus, "[e]ntrepreneurs

47. City of Los Angeles v. Wells Fargo & Co, No. 2:13-cv-09007-ODW, 2015 WL 4398858, at *1 (C.D. Cal. July 7, 2015). The city argued that Wells Fargo engaged in "reverse redlining" by extending mortgage credit or predatory terms to minority borrowers in minority neighborhoods on the basis of race and ethnicity. *Id.*

48. *Id*. at *8.

49. Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

50. *Id*. at 2522.

must be given latitude to consider market factors" and zoning officials "must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture)."[51] Since "[t]he FHA does not decree a particular vision of urban development,"[52] it seems likely that a determination to revitalize an urban core, even if it means concentrating or deconcentrating affordable housing serving protected classes, would satisfy a "valid interest" test. However, it remains to be seen the type and strength of interest that is required to meet the "valid interest" test.

Further, the court reaffirmed the lower court ruling that, after the defendant provides a "valid interest" served by its policy, the plaintiff has the burden of demonstrating that the justification is a pretext or must be rejected.[53] To meet that burden, the plaintiff must demonstrate "that there is 'an available alternative . . . practice that has less disparate impact and serves the [defendant's] legitimate needs.' "[54] In this equation, however, it is not sufficient for the plaintiff to second-guess the policies since "the FHA is not an instrument to force housing authorities to reorder their priorities."[55]

In conclusion, while *Inclusive Communities* did not eliminate disparate impact as a cause of action under the FHA, it severely limited the scope of the theory and expanded the discretion of the policy-making defendant.

C. Limited Remedy

Even if a disparate impact claim succeeds on the merits, *Inclusive Communities* demonstrates that available remedies may be severely limited in order to "be consistent with the Constitution."[56] Thus, remedial orders should concentrate on elimination of the offending practice and, if additional measures are adopted, "courts should strive to design them to eliminate racial disparities through race-neutral means."[57] It is likely that remedial orders imposing or perhaps even referring to, racial targets or quotas would be constitutionally offensive.[58]

51. *Id*. at 2523.

52. *Id*.

53. *Id.* at 2523 (stating that "so too must housing authorities and private developers be allowed to maintain a policy if they can prove it necessary to achieve valid interest.").

54. *Id.* at 2518 (quoting Ricci v. DeStefano, 557 U.S. 557, 557, 558 (2009)).

55. Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

56. *Id.* at 2524.

57. *Id.*

58. *Id*. at 2525. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701,789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

1. Disparate Impact Also Limps When Applied as a Tool to Eliminate Consideration of Race

As noted above, the majority decision in *Inclusive Communities* is highly deferential to governmental actions. Although this means that it will be difficult for plaintiffs to argue that governmental and private action insufficiently addresses racial desegregation, it also means that other plaintiffs will have a difficult case when arguing that governmental and private actions are unlawful simply because they are motivated by racially integrative purposes. In this way, Justice Kennedy's decision in *Inclusive Communities* can be viewed as adopting the position he articulated in his concurring opinion in *Parents Involved v. Seattle School District No. 1*.[59]

In *Parents Involved*, Justice Kennedy wrote that state actions that do not racially classify individuals are not constitutionally suspect simply because their purpose is racial integration.[60] This distinction between classification and purpose is constitutionally important, but the Court has never defined the term "classification."[61] By ruling that the FHA provides for disparate impact liability in some race-based cases, the Court essentially ruled that disparate impact law is itself constitutional and disavowed the "color blindness" argument espoused by Chief Justice Roberts and other members of the Court.[62] However, having done so, the Court

---

59. *Parents Involved*, 551 U.S. at 789; *see also* Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013).

60. *Parents Involved*, 551 U.S. at 788–90 (stating that governmental actors "may pursue the goal of bringing together students of diverse backgrounds and races through other means [i.e., not racial classifications], including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in targeted fashion; and tracking enrollments, performance and other statistics by race.") .

61. *See* Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 Harv. L. Rev. 1 (2013). The Court has held that racial classifications trigger strict constitutional scrutiny. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The disparate treatment case demonstrates that discriminatory intent can cause a facially neutral policy to be treated as a racial classification, thereby triggering strict scrutiny. *Id.* The Court had not, at least until *Inclusive Communities*, decided whether disparate racial impact triggered strict constitutional scrutiny. *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (stating that "the war between disparate impact and equal protection will be waged sooner or later, [and] it behooves us now to begin thinking about how—and—on what terms—to make peace between them").

62. *See Parents Involved*, 551 U.S. at 748 (stating that "[t]he way to stop discrimination based on race is to stop discriminating on the basis of race"). On the other hand, the Court also did not adopt an anti-subordination theory, which might allow explicit racial consideration if used to benefit a marginalized racial group. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L. J. 1278, 1281 (2011).

focused on issues involving the application of the disparate impact theory and stated that considering race in an effort "to foster diversity and combat racial isolation" is a legitimate purpose for a policy.[63]

Notwithstanding the legitimacy of racial considerations, Justice Kennedy's opinion is clear that "we must remain wary of policies that reduce homeowners to nothing more than their race"[64] and that race cannot be used in a "pervasive way" that would lead to the use of numerical quotas.[65] In essence, *Inclusive Communities* creates an environment of disparate impact law that allows governmental and other actors to consider race, unless consideration tips to classification and quotas. This is the flip side of the Court's limitations on using disparate impact theory to force the policymaker's hand since that might lead to prohibited racial classification and quotas. In either event, *Inclusive Communities* is deferential to governmental and private actors that can state some legitimate purpose for policies that do not cross over the line to constitute "classification." Stated differently, *Inclusive Communities* demonstrates that it will be very difficult both to force action to create racial integration and to forestall action that does purposefully encourage racial integration.[66]

2. *Inclusive Communities* May Change the Focus of Fair Housing Litigation to Discriminatory Intent

As noted above, under *Inclusive Communities*, it may prove exceedingly difficult for plaintiffs to allege and succeed on a disparate impact claim. Arguably, this may put pressure on "disparate treatment" arguments that actions or inactions, which might not meet the "policy" requirement, intentionally discriminate on the basis of race and, therefore, fail under the Equal Protection Clause's strict scrutiny standard. In this regard, one should not ignore the Court's statement that the "recognition of disparate-impact liability . . . plays a role in uncovering discriminatory intents" and that such intent can include both "disguised animus" and "unconscious prejudices."[67] This reference to "unconscious bias" may lead to further development of disparate treatment law.

63. Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (stating that "[w]hen setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor from the outset").

64. *Id.*

65. *Id.* at 2523.

66. *Id.* at 2525 (explaining that disparate impact claims encourage "race-neutral efforts to encourage revitalization of communities that have long suffered the consequences of segregated housing patterns" and promote efforts "to foster diversity and combat racial isolation with race-neutral tools").

67. *Id.* at 2522.

IV. Conclusion

As a doctrinal matter, *Inclusive Communities* affirms the understanding of equal protection Justice Kennedy articulated in the *Parents Involved* case—namely, state actions that do not classify individuals based on race do not violate the Constitution only because they are motivated by racially integrative purposes. Thus, disparate impact theory does not surrender to equal protection theory as long as disparate impact does not stray into classification waters. *Inclusive Communities* thereby gives a fuzzy and perhaps unstable roadmap, but a roadmap nonetheless, to guide state and private actors in making housing placement and financing decisions. It is clear that in the Court's view, disparate impact does raise constitutional questions, but these questions involve the application and not the existence of disparate impact theory. The focus will now likely shift to particular questions of whether consideration and purpose slide into prohibited classifications.

It seems clear that the Court has steered a path between the anti-subordination theory, in which explicitly racial considerations would be constitutional if used to benefit a marginalized class, and color-blind theory, in which all explicit racial considerations would be presumptively unconstitutional. *Inclusive Communities* attempts to straddle these approaches and supports a pragmatic view permitting racial considerations while retaining a renunciation of racial classifications and quotas. Race may be considered, but consideration must be expressed by using race neutral proxies and tools.

2017 STUDENT WRITING COMPETITION AWARD

Fair Housing's Trap Door: Fixing the Broken Disparate Impact Doctrine under the Fair Housing Act

Kerri Thompson

Abstract

Fair housing advocates were relieved when the Supreme Court recently confirmed that disparate impact claims can be brought under the Fair Housing Act. But allowing these claims actually does little for people who have housing discrimination claims. Instead, the strict burden-shifting test used to apply disparate impact theory opens a "trap door," allowing courts to dispose of most disparate impact theory claims with summary judgment. This interpretation is contrary to the legislative intent of the Fair Housing Act of 1968, which aimed for "truly integrated and balanced living patterns." Claimants were very successful in the 1970s when they challenged cities' bans on low-income housing that resulted in keeping minorities who would live in those housing developments out of all-white neighborhoods. But over the years, housing discrimination has become subtler, and the strict burden-shifting test has not evolved to reach those subtler forms of discrimination. This Note proposes amending the Fair Housing Act to include a four-factor balancing test that would better adapt the law to the current practices that perpetuate segregation across the United States. Today, the balanced living patterns Congress sought are more the exception than the rule. The current national conversation about racial inequality and segregated cities demands response. This Note proposes to revitalize the Fair Housing Act and provide a way to better alleviate some of the subtler discrimination seen in housing today.

Kerri Thompson (thompson.kerri.ann@gmail.com) expects to receive her J.D. degree in May 2017 from The George Washington University Law School. This paper placed first in the 2017 Student Paper Competition Award of the Forum on Affordable Housing & Community Development Law.

I. Congressional Intent, the Courts' Response, and Subsequent Detachment........ 440
  A. Congressional Intent for the Fair Housing Act of 1968........ 441
  B. Courts Interpret the Fair Housing Act........ 443
    1. Early Fair Housing Act Cases........ 443
      a. *United States v. City of Black Jack*: Use of the Prima Facie Test in Housing Discrimination Claims........ 445
      b. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*: Use of the Balancing Test in Housing Discrimination Claims........ 448
    2. Disparate Impact Theory Develops and Detaches from the Fair Housing Act........ 450
      a. Outcomes Shift as the Political Landscape Changes........ 450
      b. *Village of Bellwood v. Dwivedi:* The Fair Housing Act Does Not Apply........ 452
II. Interpreting the Fair Housing Act Today........ 454
  A. Statutory Purpose of the Fair Housing Act Remains Relevant Today........ 454
  B. The Fair Housing Act Today........ 455
  C. Courts' Interpretations of the Fair Housing Act Today and HUD's Codification of Disparate Impact Theory........ 456
    1. *Bonasera v. City of Norcross*........ 456
    2. The Department of Housing and Urban Development (HUD) Codifies Disparate Impact Theory........ 459
    3. *Francis v. Kings Park Manor, Inc*........ 461
    4. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*: The Trap Door Under the Fair Housing Act........ 464
III. Proposal........ 466
  A. Proposed Solution........ 466
  B. Analysis of Amendments........ 467
    1. Factor-Based Test........ 467
    2. Strength of Discriminatory Effect........ 469
    3. Evidence of Discriminatory Intent........ 469
    4. Defendant's Interests........ 470
    5. Other Contextual Factors........ 470
  C. Test Cases........ 470
    1. *Bonasera v. City of Norcross*........ 470
    2. *Francis v. Kings Park Manor*........ 471
    3. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*........ 472
  D. Other Solutions........ 473
  E. Proposed Amendment Would Send a Message to the Courts.... 473

After his neighbor repeatedly threatened him and verbally attacked him with racial epithets, Donahue Francis told the landlord about

it.[1] Francis had been to the police, but the man threatening his safety was still his neighbor, and he seemed intent on making Francis feel unsafe, going so far as to take photos of the inside of Francis's apartment.[2] The landlord did not respond to Francis's urgent letters, and the tense situation continued until the threatening neighbor voluntarily moved out.[3]

Francis took the matter to court, filing suit under the Fair Housing Act,[4] claiming that by knowing of this situation and refusing to act, the landlord had discriminated against him because of his race.[5] But he faced an impossible choice. He could bring a disparate treatment claim, saying that the landlord had intentionally discriminated against him. For a disparate treatment claim, a plaintiff must prove that a housing practice intentionally treats similarly situated people differently.[6] But proving intent is notoriously difficult,[7] and it is unclear whether one must show that the defendant acted with express racial animus in order to show intent.[8] The man making the threats plainly showed racial animus, but the landlord showed nothing by doing nothing.[9]

Alternatively, Francis could bring a disparate impact claim, demonstrating that the landlord's actions had a segregative effect or that it restricted housing options.[10] If the plaintiff meets this burden (which is difficult),[11] the burden shifts to the defendant to prove that "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[12]

---

1. Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420, 424–25 (2015).

2. *Francis*, 91 F. Supp. 3d at 425.

3. *Francis*, 91 F. Supp. 3d at 424–25.

4. Fair Housing Act, 42 U.S.C. 3604(b) (2012) ("[I]t shall be unlawful . . . to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race . . ."). Francis also filed suit against the man making the threats and filed other claims, including breach of contract against the landlord. *Francis*, 91 F. Supp. 3d at 424. This case and these claims will be discussed further *infra* Part II.

5. *Francis*, 91 F. Supp. 3d at 423.

6. Reinhart v. Lincoln Cty, 482 F.3d 1225, 1229 (10th Cir. 2007) (quoting Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995)).

7. *See* United States v. Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974); *see also* Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 UCLA L. REV. 701, 768 n.243, 770 (2006).

8. *See* Selmi, *supra* note 7, at 779–80.

9. *See Francis*, 91 F. Supp. 3d at 424–25, 429.

10. Bonasera v. City of Norcross, 342 F. App'x 581, 585 (11th Cir. 2009) (per curiam). The tests and standards for disparate impact claims have varied across circuits and will be discussed *infra* Part I.

11. *See infra* Part II for a discussion of burden of proof and the difficulty of surviving a motion for summary judgment.

12. 24 C.F.R. § 100.500(c)(2) (HUD's 2013 codification of disparate impact theory).

But individuals like Donahue Francis do not fit into either mold. To prove disparate treatment, Francis would have to prove that the landlord did respond to a similar complaint brought by a nonminority person,[13] but a nonminority person would likely not be similarly situated and would not face the same kind of racial epithets and threats expressed here by Francis's neighbor. To prove disparate impact, he would have to show that the landlord's failure to act was a practice that "caused or predictably [would] cause a discriminatory effect" on African Americans, not only himself.[14]

Disparate impact claims are intended to reach subtle forms of racism that go beyond cases where decision-makers have admitted to racial prejudice motivating their decisions.[15] They are intended to get at "what's really going on" when a state of mind is too difficult to prove.[16] But although disparate impact claims may seem "easier" to prove than proving intentional discrimination, the opposite is true in practice.[17]

In the summer of 2015, the Supreme Court ruled that disparate impact claims may be brought under the Fair Housing Act, meaning that plaintiffs can show that a pattern or practice has a discriminatory effect, and that plaintiffs need not show discriminatory intent in order to bring a Fair Housing Act claim.[18] Housing advocates cautiously celebrated the

13. Different jurisdictions have used different tests for disparate impact and disparate treatment. *See, e.g.*, *Bonasera*, 342 F. App'x at 585 (both disparate treatment and impact claims failed because Bonasera could not show that authorities were ignoring non-minorities who were also violating the housing code, even though she proved that the authorities had enforced the code against only Hispanics); Armendariz v. Penman, 31 F.3d 860, 868–69 (9th Cir. 1994) (disparate impact claim failed because plaintiff provided no data on the areas the authorities had *not* chosen for housing code inspection "sweeps").

14. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015). Although different circuits have used different tests for disparate impact, the theory is aimed at capturing a discriminatory effect on groups, not individuals. *See, e.g.*, *Bonasera*, 342 F. App'x at 585.

15. *See* United States v. Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974). *But see* Selmi, *supra* note 7, at 706 (arguing that disparate impact actually very bad tool for subtle forms of discrimination).

16. Selmi, *supra* note 7, at 705 n.19, 706–07. *See also Black Jack*, 508 F.2d at 1185 ("Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because 'whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.'") (quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc)).

17. *See* Selmi, *supra* note 7, at 706–07; Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1147–48 (2013).

18. *See Inclusive Communities*, 135 S. Ct. at 2521.

Inclusive Communities[19] decision.[20] Their caution was well founded: even if disparate impact claims are allowed, they almost never work.[21]

The doctrines of disparate impact, as well as disparate treatment, have detached from the original congressional purpose of the Fair Housing Act. The Department of Housing and Urban Development's recent codification of the application of disparate impact halts legitimate claims with a burden-shifting test that is too difficult for many plaintiffs with meritorious claims to meet.[22] The test for a discriminatory impact, cobbled together from employment discrimination cases through the 1970s and 1980s, is a bad fit for today's subtler discrimination cases. The test for discriminatory intent is notoriously difficult to pass, and a plaintiff who brings both claims is not likely to succeed with either.[23]

The strict burden-shifting test used in disparate impact claims by some courts has, over the years, resulted in a trap door under the Fair Housing Act of 1968, which captures the unwary plaintiff and allows the legislative intent of the Act to fall through. An analysis of forty years of federal appellate court disparate impact cases concluded "plaintiffs have obtained positive outcomes in only twenty percent of their [Fair Housing Act] disparate impact claims considered on appeal."[24]

This Note proposes that Congress amend the Fair Housing Act to include a pragmatic four-factor balancing test that addresses both discriminatory impact and discriminatory intent: (1) the strength of plaintiff's showing of discriminatory effect; (2) whether there is any evidence of discriminatory intent; (3) the defendant's interest in taking the action at issue; and (4) whether other contextual factors involving the perpetuation of segregation strengthen or weaken the plaintiff's claim.[25] Amending the

---

19. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

20. *See, e.g.*, Alana Semuels, *Supreme Court vs. Neighborhood Segregation*, ATLANTIC (June 25, 2015), http://www.theatlantic.com/business/archive/2015/06/supreme-court-inclusive-communities/396401/; Rigel C. Oliveri, *Disparate Impact and Integration: With TDHCA v. Inclusive Communities the Supreme Court Retains an Uneasy Status Quo*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 267, 267 (2015).

21. *See* Stacy Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L.R. 357, 357 (2013); Elizabeth L. McKeen et al., *Robust Causality and Cautionary Standards: Why the Inclusive Communities Decision, Despite Upholding Disparate-Impact Liability, Establishes New Protections for Defendants*, 132 BANKING L.J. 553, 554 (2015).

22. *See* McKeen et al., *supra* note 21, at 559–61.

23. *See* Seicshnaydre, *Good Intentions*, *supra* note 17, at 1175, 1193 (disparate impact claims as back-up plan when motivation too well-hidden; statistics show that, for the most part, they do not work).

24. Seicshnadyre, *Appellate Analysis*, *supra* note 21, at 357.

25. This test is a modification of the four-factor balancing test used in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), discussed *infra* Part III. It should also be noted that the Fair Housing Act

Fair Housing Act to include this test would remove the confusion of impact and intent,[26] as well as the trap door of the prima facie case. Instead, today's subtler discrimination claims could be evaluated on the merits, giving plaintiffs a chance to present their evidence contextually, together with other factors in the case. With these amendments, Congress can continue the recent developments of taking racism, segregation, and discrimination seriously and restoring the congressional goal of "truly integrated and balanced living patterns."[27]

Part I discusses the legislative intent of the Fair Housing Act of 1968 and how the interpretations of the courts shifted from the early years of successful outcomes for plaintiffs to later interpretations that gradually detached from the legislative intent of the Act. Part II discusses the relevance of the Fair Housing Act today and how courts have continued the trend of diverging from the outcomes Congress intended the Act to have. Part III proposes that although action could be taken to focus on getting plaintiffs to meet the strict burden-shifting requirement of the law as it currently stands, a better solution is to amend the Act to include a test that will produce a more just result to Fair Housing Act discrimination disparate impact claims.

I. Congressional Intent, the Courts' Response, and Subsequent Detachment

Congress intended for the Fair Housing Act to be broad, inclusive, and enforceable.[28] In the first years after the Act was passed, the courts

---

protects many different groups from discrimination in housing: it is unlawful to refuse housing "to any person because of race, color, religion, familial status, or national origin." 42 U.S.C. § 3604(a) (2012). This Note focuses on the statutory purpose of fostering integration and prohibiting racial discrimination.

26. Disparate impact and disparate treatment have been analyzed extensively by other authors. *See, e.g.*, Selmi, *supra* note 7, at 778–79; Seicshnaydre, *Good Intentions*, *supra* note 17, at 1142 n.10. This Note focuses on amending the Act to capture cases that the legislative intent of the Fair Housing Act doubtlessly intended to capture, both by collapsing the doctrine and by replacing the burden-shifting model with a balancing test.

27. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968)). Recent developments in taking racism and segregation seriously include HUD's rulemaking from July 2015, aimed at using data to return to Congress's goal of "affirmatively furthering fair housing." *See* 24 C.F.R. §§ 5, 91, 92, 570, 574, 576, 903 (2015); Press Release U.S. Dep't of Housing & Human Dev., HUD Announces Final Rule on Affirmatively Furthering Fair Housing, (July 15, 2015), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-084.

28. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208, 210–12 (1972) (stating that "[t]he language of the Act is broad and inclusive," and the Court could "give vitality to [the Fair Housing Act] only by a generous construction . . ." The Court emphasized that the Act must be enforceable, holding that even people who are not directly discriminated against still have standing to sue because the

interpreted the statute broadly. But in later cases, the courts began to interpret the statute more narrowly, leading to a significant drop in successful outcomes for plaintiffs.[29] Generally, the courts shifted from finding reasons for the Fair Housing Act to apply to finding reasons for the Act *not* to apply, departing from the intent of the Act.[30]

A. Congressional Intent for the Fair Housing Act of 1968

In the midst of social turmoil, Congress passed the Fair Housing Act with the intent of remedying the ongoing problems of segregation, violence, and inequality that culminated in riots from 1963 to 1967.[31]

This legislative intent can be seen in how the Fair Housing Act maintained its strength despite opposition that attempted to weaken the statute.[32] Fair housing was first mentioned in 1967 in a bill [33] that proposed that someone who interfered with another person's housing transaction "because of his race" could be fined and imprisoned.[34] A senator attempted to remove the language "because of his race" from the bill, claiming that this subtraction would "make [the bill] apply to all crimes and bring equal justice for all."[35] In practice, this subtraction would considerably weaken the bill by making it too vague.[36] This failure to remove the language reflects the overall intent of Congress to refuse to weaken the bill.[37]

In fact, the bill gained strength as it morphed,[38] despite fervent opposition. Housing discrimination was discussed at length in congressional

---

term "person aggrieved" is defined as "any person who claims to have been injured by a discriminatory housing practice.") (quoting 42 U.S.C. § 3610(a) (1968)).

29. Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 393 (stating that the "perfect success rate" of the 1970s cases dropped to 13 percent of appellate cases having successful outcomes for plaintiffs in the 1990s).

30. *See infra*, Part I.B.2.

31. *See* Nat'l Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 1 (1968) (hereinafter Kerner Commission); Shatema A. Threadcraft, *New York City Riot of 1964*, Encyclopedia of American Race Riots 480 (2007).

32. For an overview of the narrative of the Fair Housing Act's legislative history, see Jean Eberhardt Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 Washburn L.J. 149 (1968).

33. H.R. 2516, 90th Cong. (as proposed Jan. 17, 1967). Ultimately, fair housing provisions were removed from this bill, *see* Dubofsky, *supra* note 32, at 149 n.2; H.R. 2516, 90th Cong. (as amended June 29, 1967), but fair housing provisions were successfully included in a later omnibus bill that stemmed from Senator Mondale's proposed bill, S. 1358. *See* Dubofsky, *supra* note 32, at 149.

34. H.R. 2516, 90th Cong. (as proposed Jan. 17, 1967).

35. Dubofsky, *supra* note 32, at 151.

36. *Id.*

37. *See id.*

38. *Id.* ("[R]ather than compromising the basic bill, more provisions might be added.").

hearings.[39] Opponents to the bill brought up arguments that are in themselves evidence of the challenges faced by proponents of civil rights and by African Americans even after the Civil Rights Act of 1964: for example, a past president of the American Psychological Association testified as to the immature, childlike, and primitive nature of African Americans and suggested that whites "are full of the idea that they are guilty for something that they have never done."[40] A senator opposed parts of the bill that forbid advertising the sale of housing to preferred buyers of a certain race or faith because expressing such "preferences . . . is perfectly natural."[41] The same senator suggested that an entirely white part of Chicago is so composed due to self-selecting preference. A representative of a nonprofit religious organization concurred, adding, "They certainly do [prefer it that way]. They proved that with guns, and rocks, and clubs, a couple of years ago. They definitely want to keep it that way."[42]

Two events were enough to overcome even such strong opposition to the Fair Housing Act.[43] First, the National Advisory Commission on Civil Disorders (known as the Kerner Commission) published a report on the causes of the race riots.[44] Famously, the report began, "Our Nation is moving toward two societies, one black, one white—separate and unequal."[45] Second, Martin Luther King, Jr. was assassinated on April 4, 1968. After over a year of debate since the first fair housing bill was introduced,[46] the bill sped through Congress and was signed into law by President Johnson seven days later.[47]

As enacted in 1968, the Fair Housing Act made it unlawful to "make unavailable or deny" any dwelling to any person "because of race, color, religion, or national origin"[48] or to discriminate against any person in providing services in connection with renting or selling a dwelling.[49] The statute also made it unlawful to intimidate anyone exercising a right granted by the Fair Housing Act.[50]

---

39. *See generally Civil Rights Act of 1967: Hearing on S. 1026, S.1318, S. 1359, S. 1462, H.R. 2516 and H.R. 10805 Before the Subcomm. on Constitutional Rights of the Senate Comm. of the Judiciary*, 90th Cong. (1967).

40. *Id.* at 162–63.

41. *Id.* at 125.

42. *Id.* at 127.

43. *See* Dubofsky, *supra* note 32, at 149–50.

44. Kerner Commission, *supra* note 31, at 1.

45. *Id.*

46. H.R. 2516, 90th Cong. (as proposed Jan. 17, 1967); *see* Dubofsky, *supra* note 32, at 149 n.2.

47. *Supra* note 32, at 160.

48. Fair Housing Act, Pub. L. No. 90-284, § 804(a), 82 Stat. 83 (1968).

49. *Id.*

50. *Id.*

The "broad and inclusive" language[51] that survived outspoken opposition and made it into the Fair Housing Act in 1968 speaks to Congress's original intent for the Act to have a strong impact on African Americans,[52] by not only providing housing, but also better employment opportunities and education as a result of access to better housing.[53] Passing the Fair Housing Act sent the message that protecting equal access to every neighborhood was more important than the perception of falling property values held by opponents who argued that property values would decline by building integrated housing.[54] By making nondiscrimination mandatory, the Fair Housing Act was also intended to level the playing field for homebuilders, addressing the concerns of businesses with nondiscriminatory policies that faced competition from companies that discriminated.[55]

Ultimately, the purpose of the Fair Housing Act was "to replace the ghettos 'by truly integrated and balanced living patterns,'"[56] and courts interpreted the Act broadly in accordance with this broad purpose.

B. Courts Interpret the Fair Housing Act

1. Early Fair Housing Act Cases

In *Trafficante v. Metropolitan Life Company*,[57] the first housing discrimination case to reach the Supreme Court, the Court held that Congress intended for the statute to be interpreted broadly.[58] The Court arrived at this interpretation by examining the language used: the statute states that the

---

51. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

52. Much of the congressional hearing focused, but not exclusively, on African American civil rights. The statute in 1968 protected people based on their "race, color, religion or national origin" and in 1988 was amended to include protections based on disability and familial status. *See* Robert G. Schwemm, Housing Discrimination Law and Litigation § 5.3 (last updated June 2015).

53. Dubofsky, *supra* note 32, at 153.

54. *Id.* at 153, 155 (Southern states arguing that they did not want to enact fair housing legislation because of the negative effect on white property values). In a congressional hearing, testimony from a religious nonprofit organization stated bluntly that the property value arguments are "conspiracies to perpetuate and extend slums and ghettos." *Hearing on S. 1026*, *supra* note 39, at 120.

55. "Integration has certainly not hurt us . . . (but) any homebuilder who chooses to operate on an open occupancy basis, where it is not customary or required by law, runs the grave risk of losing business to his competitor who chooses to discriminate." Dubofsky, *supra* note 32, at 153 (quoting 114 Cong. Rec. S1453 (Feb. 20, 1968)). These economic arguments are also not unfamiliar today. *See* Amicus Brief, Texas Apartment Ass'n, Texas Dep't Housing & Comm. Affairs, No. 13-1371, at 15–22 (describing how landlords would suffer economically from disparate impact claims).

56. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 2706 at 3422).

57. *Id.*

58. *See id.* at 210.

Attorney General may file suit against "any person or group of persons" and defines "person aggrieved" as "any person who claims to have been injured in a discriminatory housing practice."[59] Using "any" implied that the statute should be construed as broadly as is constitutionally permissible.[60] The Court also analogized to cases brought under other, earlier employment discrimination statutes, holding that Congress intended for both statutes to be interpreted broadly.[61] The Court held that those who indirectly suffered from discrimination in housing practices also had an interest in fair housing and had standing to sue under the Act.[62]

Although courts consistently interpreted the Fair Housing Act broadly in the early years,[63] their tests for how the Act applied diverged. This divergence occurred because, while the Supreme Court's precedent instructed lower courts to interpret the Act broadly,[64] Congress had not specified any test for how to apply the Fair Housing Act.[65]

Without a test specified in the statute, courts began to diverge in their interpretations,[66] and this divergence was complicated by an employment discrimination case, *Griggs v. Duke Power Company*,[67] that gave rise to disparate impact theory. In *Griggs*, an employer gave IQ tests in order to screen candidates for a job, even though the IQ test did not relate to requirements for the job; the result was to disqualify black applicants at a higher rate than white applicants.[68] The Court held that although the practice of giving such tests was not discriminatory on its face, it had a discriminatory effect and therefore violated the employment discrimination provision of the Civil Rights Act (Title VII) because "Congress directed the thrust of [Title VII of the Civil Rights Act, guaranteeing equal

59. *See id.* at 208–09.

60. *See id.* at 209.

61. *See* Schwemm, *supra* note 52, § 7.4

62. *See Trafficante*, 409 U.S. at 211.

63. *See* Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 393.

64. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (allowing claims of disparate impact even without discriminatory intent in employment discrimination cases).

65. *See* Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 364. *See also* Seicshnaydre, *Good Intentions*, *supra* note 17, at 1146 (explaining that Congress provided a burden-shifting test for employment discrimination cases in the Civil Rights Act of 1991, but the Fair Housing Act did not include the same test). *But see* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015) (holding that antidiscrimination laws, including the Fair Housing Act, "must be construed to encompass disparate-impact claims").

66. *See* Seicschnaydre, *Appellate Analysis*, *supra* note 21, at 401 n.239, 403 (noting that some courts use a burden-shifting test and some use a four-factor balancing test and that the burden of justification is not yet settled).

67. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

68. *Id.* at 427–28.

employment opportunities] to the *consequences* of employment practices, not simply the motivation."[69]

The early fair housing discrimination cases demonstrate a consistency with the broad congressional intent to remedy segregation and inequality and to create "integrated and balanced living patterns,"[70] even though the lower courts had no specific instructions from Congress on how to apply the Fair Housing Act.[71] Some courts developed a burden-shifting model, testing for a "prima facie" case of housing discrimination before shifting the burden to the defendant to justify the practice that led to discrimination.[72] Some courts followed a balancing test model, weighing the strength of the plaintiff's claim and the strength of the defendant's defense at the same time to reach a decision on the merits of the case.[73] But in the early years, both models followed the congressional intent for the Fair Housing Act to have broad reach, and both models combined intent and impact tests to reach a positive result for plaintiffs.

a. United States v. City of Black Jack*: Use of the Prima Facie Test in Housing Discrimination Claims*

In one of the earliest Fair Housing Act discrimination cases that brought up the idea of a discriminatory effects test,[74] *United States v. City of Black Jack*,[75] the Eighth Circuit supported the statutory purpose of the Fair Housing Act by using both intent and effect in its application of the Act and by including contextual factors in evaluating the claim.[76] A nonprofit organization intended to build housing in an unincorporated area for low- and moderate-income families living in the "ghetto areas of St. Louis,"[77] but as soon as news of the housing development became public, residents of the unincorporated area assembled, made plans to incorporate into the neighboring city of Black Jack, and quickly passed a zoning ordinance that prohibited multi-family housing.[78] The United States claimed that the zoning ordinance violated the Fair Housing Act and filed suit against the newly incorporated city.[79]

69. *Id.* at 432 (emphasis in original).

70. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968)).

71. *See* Seicshnaydre, *Appellate Analysis*, *supra* note 21.

72. *Id*. at 401 n.239, 403 (explaining that the Second Circuit applied a burden-shifting test).

73. *Id.* (noting that the Seventh Circuit applied a balancing test).

74. *Id.* at 365.

75. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

76. Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 366 n.40, 367 (citing *Black Jack*, 508 F.2d at 1185.

77. *Black Jack*, 508 F.2d at 1182.

78. *Id.* at 1183.

79. *Id* at 1181.

The Eighth Circuit emphasized the statutory purpose of the Fair Housing Act in its analysis: the Act was passed "to eliminate the badges and incidents of slavery" pursuant to the Thirteenth Amendment, and it was "designed to prohibit 'all forms of discrimination, sophisticated as well as simple-minded.'"[80] This statutory purpose provided reason to read the Fair Housing Act broadly and inclusively, as the Supreme Court had done in the first fair housing case.[81]

The Eighth Circuit called the analysis a "prima facie case" test, but used contextual factors in order to evaluate the claim.[82] The test came from *McDonnell Douglas Corp. v. Green*,[83] an employment discrimination case. The use of the prima facie test is problematic because the prima facie case was designed to address intentional discrimination, not discriminatory effect.[84] Despite its original purpose of intentional discrimination claims, the court here set out the prima facie case for discriminatory effect: first, the plaintiff must establish a prima facie case by proving that the defendant's action resulted in racial discrimination, but does not need to prove any discriminatory intent.[85] The court's precise language stated, "the plaintiff *need prove no more than* that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect."[86] The court included the context of the general living conditions of African Americans in St. Louis and St. Louis County in its analysis, finding that when compared with whites, a higher percentage of African Americans lived in substandard housing.[87] The court included this contextual factor because local zoning officials "must be curbed" if their discretion results in segregation.[88]

The statutory purpose of the Fair Housing Act also provided reason for the court to include both intent and effect in the analysis of the discrimination claim. Although the court held that discriminatory intent was not necessary for a successful claim, the court also held that the discriminatory

80. *Id.* at 1184 (quoting Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974)).

81. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968)).

82. *Black Jack*, 508 F.2d at 1184. The court borrowed this test from *Williams v. Matthews Co.*, 499 F.2d 819, 827 (8th Cir. 1974), a case decided about six months previously, which itself had borrowed the test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), an employment discrimination case.

83. *Green*, 411 U.S. 792.

84. *See* Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1531 (7th Cir. 1990) (explaining that the *McDonnell-Douglas* test was created for disparate treatment (intentional discrimination claims under Title VII).

85. *Black Jack*, 508 F.2d at 1185.

86. *Id.* (emphasis added).

87. *Id.* at 1183.

88. *Id.* at 1184 (citing Banks v. Perk, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972)).

effect was made "more onerous" by the policies enacted by federal, state, and local government to *deliberately* keep St. Louis segregated.[89]

The court then proceeded to the second step of the burden-shifting test—whether the defendant had a compelling interest in taking the action—but held that "the City does not use and has no need to use the ordinance for the government purposes suggested."[90] Ultimately, the court concluded that the prima facie test was met[91] because the zoning ordinance had the effect of preventing 85 percent of African Americans from living in Black Jack at a time when 40 percent of African Americans were confined to substandard housing.[92]

By stating the rule for housing discrimination cases in terms of how little the plaintiff must prove, the court treated the prima facie case as a conduit for the plaintiff's case to move forward, instead of presenting the prima facie case as an obstacle to be surmounted.[93] The court used statistics documenting the segregation of the surrounding communities to show that when a decision contributes to the segregation of an area that is already deeply segregated, policies that contribute to perpetuating that segregation will be found to be discriminatory.[94] Both steps of this analysis, presenting the prima facie case as a doorway instead of a barrier and presenting contextual data regarding current levels of segregation, support Congress's intent for the Fair Housing Act to remedy a separate but unequal society.[95]

89. *Id.* at 1186 ("The discriminatory effect of the ordinance is more onerous when assessed in light of the fact that segregated housing in the St. Louis metropolitan area was 'in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state and local governments.'" (quoting United States v. City of Black Jack, 372 F. Supp. 319, 326 (E.D. Mo. 1974))).

90. *Id.* at 1187.

91. *Id.* at 1184.

92. *Id.* at 1186.

93. *Cf.* Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 360–61. In her analysis of the early Fair Housing cases, Professor Seicshnaydre differentiates housing barrier cases that prevent minorities from living in a certain area from housing improvement cases that claim to improve a neighborhood through demolition and other means. She found that the early cases were more successful for plaintiffs, suggesting that it was because housing barrier cases are more likely to have positive outcomes for plaintiffs. *Id.* at 363. Instead of focusing on the kinds of cases before the court, the analysis of this Note focuses on the courts' reasons to allow the early claims to go forward, compared to later cases, where the courts find reasons to *prevent* the claims from going forward.

94. *See Black Jack*, 508 F.2d at 1186 (holding that the district court had erred because "[i]t failed to take into account either the 'ultimate effect' or the 'historical context' of the City's action" (citations omitted)).

95. *See* Kerner Commission, *supra* note 31, at 1.

b. Metropolitan Housing Development Corp. v. Village of Arlington Heights*: Use of the Balancing Test in Housing Discrimination Claims*

The Seventh Circuit also supported the statutory purpose of the Fair Housing Act by including both intent and effect in its application of the Act and by including contextual factors in evaluating the claim. The Seventh Circuit, however, used a four-factor balancing test to evaluate the discrimination claim instead of a burden-shifting model.[96] In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[97] a religious order intended to build an integrated housing development of town homes for low- to moderate-income households in a suburb of Chicago.[98] The property was zoned for single-family homes, and the development could not be built unless Arlington Heights rezoned the land for multifamily dwellings.[99] The district court found that there was no discriminatory intent in the Village Board's decision not to rezone.[100] The Seventh Circuit affirmed that there was no discriminatory intent, but held that the lack of it did not defeat the claim.[101]

The Seventh Circuit considered the broad purposes of Congress in enacting the Fair Housing Act and, like the Eighth Circuit in *Black Jack*, did not consider a lack of intent to be determinative.[102] The court reasoned that to focus on intent too strictly would permit racial discrimination that is not overt and would fail to catch the majority of discrimination as overt discrimination would become rarer.[103]

Instead, the Seventh Circuit included intent as a factor in an analysis that balanced the plaintiff's and the defendant's evidence.[104] The court affirmed the lower court's finding that there was no discriminatory intent. But as in *Black Jack*, the court also acknowledged that intent does play a role in finding a violation of the Fair Housing Act: if conduct has the "necessary and *foreseeable* consequence of perpetuating segregation," it can be as harmful as intentional discrimination.[105] This focus on foreseeability

96. Metro. Housing Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

97. *Id.* at 1283. The case went from the Seventh Circuit to the Supreme Court to decide the equal protection claim and was remanded to the Seventh Circuit to decide the Fair Housing Act claim. The Seventh Circuit opinion, on remand from the Supreme Court, is the opinion with the four-factor test.

98. *Id.* at 1285–86.

99. *Id.* at 1286.

100. *Id.*

101. *Id.* at 1287.

102. *Id.* at 1289–90; United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cr. 1974).

103. *Arlington Heights*, 558 F.2d at 1290.

104. *Id.*

105. *Id.* at 1289–90 (emphasis added); *Black Jack*, 508 F.2d at 1185.

retains a focus on state of mind and, therefore, on discriminatory intent, not merely discriminatory effect.[106]

The court also included three other factors in its balancing test: (1) the strength of discriminatory impact, (2) "the defendant's interests in taking the action," and (3) whether the plaintiff wants the defendant to actually provide housing or just wants to stop the defendant from interfering with someone else providing housing.[107] A "facially neutral" decision can have a discriminatory effect if it "has a greater adverse impact on one racial group than on another" or if it "perpetuates segregation."[108] Statistics about the effect of the decision on different protected groups fit into the discriminatory effect category: if all or most of the group who would be affected by a decision is a protected group, there would be a strong argument for discrimination.[109] In *Arlington Heights*, the court reasoned that the plaintiff's claim was not very strong because of the people who were eligible to live in the low-income/moderate-income housing development, 60 percent were white, and thus the impact on minority groups was not as strong as it was on whites.[110]

The defendant's interests in taking the action include whether a government agency is acting within "the scope of its authority" and whether a private entity is acting "to protect private rights."[111] Because villages have broad discretion in making zoning policy, the court held that it was acting within the scope of its authority, and so this factor weighed against finding liability under the Fair Housing Act.[112] The final factor, whether the plaintiff wants the defendant to actually provide housing or just wants to stop the defendant from interfering with someone else providing housing,[113] weighed in favor of the plaintiff in this case, because the nonprofit organization sought to restrain the village from interfering with its intent to provide housing and was not requesting for housing to be built.[114] The court found that the balancing test merited remanding the case to further consider the factors.[115]

106. Seicschnaydre, *Good Intentions*, *supra* note 17, at 1195–96 (focusing on foreseeability retains a focus on state of mind and therefore discriminatory intent).

107. *Arlington Heights*, 558 F.2d at 1290.

108. *Id.*

109. *See id.*

110. *Id.*

111. *Id.* at 1293.

112. *Id.*

113. *Id.* at 1290.

114. *Id.* at 1293.

115. The court specifically wanted the district court to determine if the property at issue was the only property suitable for an integrated affordable housing complex or whether suitable property that was properly zoned could be found elsewhere. *Id.* at 1295–96.

Arlington Heights is also important for its interpretation of the statutory language "because of race."[116] The court reasoned that it is possible for someone to act "because of race" if it is foreseeable that discrimination between races will result from the act.[117] The court supported this broad interpretation of foreseeability with an analogy to employment discrimination: the Supreme Court had already held that Title VII, the employment discrimination section of the Civil Rights Act, contemplated discriminatory effect as well as discriminatory intent, and it used the same "because of race" requirement.[118]

By using a balancing test and by broadly interpreting the statutory language, the court provided a method to evaluate housing discrimination cases holistically, taking both evidence of intent and contextual factors that perpetuate segregation into account. The court supported the statutory purpose of the Act to create "'integrated and balanced'" communities, stating that close cases must be decided in favor of integrated housing.[119]

2. Disparate Impact Theory Develops and Detaches from the Fair Housing Act

a. Outcomes Shift as the Political Landscape Changes

In later cases, successful outcomes for plaintiffs significantly dropped.[120] The reasoning of the courts changed: instead of starting with congressional intent and providing reasons why the Fair Housing Act should apply, courts began to provide reasons why the Act should not apply, focusing on what *could* happen instead of on the intent for the legislation to have a broad reach.[121] In the 1970s, when lower courts considering disparate impact claims under the Fair Housing Act tied their analyses closely to the legislative intent of the Act and interpreted the Act broadly, plaintiffs had a "perfect success rate."[122] But by the 1990s, plaintiffs had positive outcomes in only 13 percent of appellate cases.[123]

The cause for this shift away from plaintiff-friendly courts in Fair Housing Act cases cannot be attributed to one source, but broad trends and changes in the political and legal landscape can be identified. A reaction against the Civil Rights movement developed concurrently with the

---

116. *See* Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 409; *Arlington Heights*, 558 F.2d at 1288.

117. *See Arlington Heights*, 558 F.2d at 1288.

118. *Id.* at 1288–89.

119. *Id.* at 1289, 1294 (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972)).

120. Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 393.

121. *See, e.g.*, Vill. of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc. 135 S. Ct. 2507 (2015).

122. Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 393.

123. *Id.*

movement's progress.[124] The school busing integration conflicts provided a chilling example of the violence executed against those who sought to exercise their rights.[125] Politicians both advanced the causes of civil rights and used the movement to garner support for their own agendas.[126] For example, the Nixon administration supported minority-hiring rights, but also fueled the resentment of "reverse discrimination" during the school busing conflicts.[127] The trend can also be seen in enforcement of civil rights. In the 1960s and 1970s, the federal government created social regulatory agencies to enforce civil rights.[128] But the Reagan administration then included those social regulatory agencies in its push for deregulation.[129] A political change might also be tracked to Reagan's appointment of over 300 judges, many of whom were conservative, to federal courts.[130] By the mid-nineties, polls showed some public resentment of "minority preference policies."[131]

An amendment to the Fair Housing Act in 1988, which aimed to strengthen enforcement and remedies for successful claims, did not change the courts' tendency to place high burdens on plaintiffs bringing Fair Housing Act claims.[132] The trend of unsuccessful claims in appellate courts had begun before the amendment and continued afterward.[133] The trend has continued until today, leading to dismal outcomes for plaintiffs: by the 2000s, successful plaintiff outcomes had dropped to 8.3 percent.[134]

---

124. *See, e.g.*, Bruce Gellerman, *'It Was Like A War Zone': Busing in Boston*, WBUR.ORG (Sept. 5, 2014), http://www.wbur.org/2014/09/05/boston-busing-anniversary.

125. *See id.*

126. *See, e.g.*, Hugh Davis Graham, *The Civil Rights Act and the American Regulatory State*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 49–50 (Bernard Grofman ed. 2000) (describing Nixon's policies as an integral part of federal civil rights policy, but also contributing to fostering resentment of "reverse discrimination" and "racial quotas").

127. *Id.* at 50.

128. *Id.* at 44 (listing social regulatory agencies created in the 1960s and 1970s, such as the Equal Employment Opportunity Commission, Environmental Protection Agency, and Occupational Safety and Health Administration).

129. *Id.* at 55.

130. *Id.* at 56. *See also* Yvette M. Barksdale, *Panel II: The Appointment Power: Advise and Consent*, 47 CASE W. RES. 1399, n.36 (1997).

131. Graham, *supra* note 126, at 43, 60–63. *See also* Paul Burstein, *The Impact of EEO Law: A Social Movement Perspective*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT, *supra* note 126.

132. *See* Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 393; Schwemm, *supra* note 52, § 5.4.

133. *See* Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 393.

134. *See id.* at 393–94.

b. Village of Bellwood v. Dwivedi: *The Fair Housing Act Does Not Apply*

Village of Bellwood v. Dwivedi[135] provides an example of a shift in reasoning from why the Fair Housing should apply, based on the legislative purpose of the Act, to why it should not apply, for hypothetical reasons.[136] In this case, the district court found that a real estate brokerage firm was racially discriminating when testers (who pose as customers to investigate whether a broker steers members of different racial groups to areas where the same racial group lives) sent by a nonprofit organization were racially "steered," meaning black customers were shown homes in black communities and white customers were shown homes in white communities.[137] In reviewing the claim under the Fair Housing Act, the Seventh Circuit announced that the Act was not intended to cover these kinds of "mistakes."[138] Using its own hypothetical as its reasoning, the court concluded that liability for racial steering under the Fair Housing Act[139] requires the broker to act intentionally because of the customer's race.[140]

According to the court, the first reason the Fair Housing Act was not violated was a hypothetical that emphasized the concept of "tipping": the court concluded that "[m]any people in Bellwood are concerned that if the percentage of blacks in the community continues to increase, a point will soon be reached where the remaining whites become so uncomfortable that they exist en masse, making the community all black."[141] The court did not provide a source for this information,[142] but developed a hypothetical based on the concept. If many African Americans approached real estate agents and wanted to live in integrated communities, and if the agents continued to place them in the integrated communities, eventually the community would "tip" from integrated to predominantly African American because whites would leave.[143] The agents' actions would therefore have the effect of perpetuating segregation. The Seventh Circuit suggested that if African Americans are sold

135. Vill. of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990).

136. The issue before the court was whether the jury was properly instructed that the plaintiff need not show intentional discrimination in order to establish a Fair Housing Act claim. *Id.* at 1529.

137. *Id.* at 1525.

138. *Id.* at 1530.

139. 42 U.S.C. §§ 3604(a), (b) (1988) (forbidding discrimination in the provision of housing services); *Bellwood*, 895 F.2d at 1527.

140. *Bellwood*, 895 F.2d at 1528.

141. *Id.* at 1525.

142. The idea of racial "tipping" may originate from social science theory that posited that racial segregation was inevitable. *See* William Easterly, *The Tipping Point: Fascinating But Mythological?*, VOX (Ctr. for Econ. Pol'y Research July 13, 2009), http://www.voxeu.org/article/tipping-point-fascinating-mythological.

143. *Bellwood*, 895 F.2d at 1530.

homes in integrated neighborhoods, eventually the neighborhood will become too African American for whites, who will become uncomfortable and leave. This logic does not hold up unless one assumes that racial segregation is inevitable.[144] To assume this is to directly countervail the legislative purpose of the Act to foster "integrated and balanced" communities. Nowhere in the legislative history of the Act does it say that Congress intended to make communities more integrated until those communities reach a racial tipping point of resegregation. It therefore seems out of place for the court to have based its decision in this real case supported by real evidence from testers on a hypothetical reason.

The Seventh Circuit's second reason the Act was not violated was that the Act was not intended for racial steering purposes.[145] The court concluded that the Fair Housing Act "does not require a broker to endeavor to make his customers better people" by refusing to give them information about the racial populations of communities.[146] But it is intuitive that the court ought to rely on what Congress intended the statute to do, rather than to speculate about what Congress did not intend. The Fair Housing Act does indeed endeavor to make communities more integrated, regardless of whether that requires real estate brokers or anyone else to become "better people."

A third reason the court did not find liability under the Act was that the plaintiffs never provided a reason why the defendants would have wanted to discriminate against African Americans.[147] Although this factor was not determinative, the court placed an impossible burden on the plaintiff to come up with a rational reason for racial discrimination. The burden is impossible to carry because racism is not rational.[148] It is intuitive that a single plaintiff who encountered discrimination against a single real estate agent would have extreme difficulty in giving a rational reason for racial discrimination.[149]

---

144. *See* Easterly, *supra* note 142.

145. *Bellwood*, 895 F.2d at 1530 ("[N]othing in the language or sparse legislative history of the statute supports an inference that it was intended either to make real estate agents speculate about the possible effects on racial patterns in housing of truthful answers to inquiries by their customers . . .").

146. *Id.* at 1531.

147. *Id.* at 1532.

148. *See generally* THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 3 (1997) (debunking "racial science" and tracing the influence of race theory as used by whites against nonwhites); *id.* at 32–53 (tracing development of the classification of mankind into races in the eighteenth century); *id.* at 373 (racism was "made respectable" in the 1920s by academic writers).

149. *See* Tilden J. LeMelle, *Forward* to RICHARD M. BURKEY, RACIAL DISCRIMINATION AND PUBLIC POLICY IN THE UNITED STATES xi (1971) (arguing that racial discrimination stems from a "preconceived reified notion " in the discriminator's mind of the target as "a thing whose worth is determined only by how it serves the interests of the

By focusing on reasons *not* to find liability under the Fair Housing Act, the analysis of the Seventh Circuit departed from the legislative purpose of the Act and from courts' previous interpretations of the Act as "broad and inclusive."[150]

II. Interpreting the Fair Housing Act Today

A. Statutory Purpose of the Fair Housing Act Remains Relevant Today

Congress's intent for the Act to eradicate segregation and build "integrated and balanced communities"[151] remains relevant today because segregation has not been eradicated and balanced and integrated communities are the exception, not the rule.[152] The current national conversation about racial inequality and segregated cities[153] comes out of a return to racially segregated poverty in American cities.[154] The same need for better housing, employment, and education for people living in neighborhoods isolated by poverty that spurred Congress to pass the Fair Housing Act in 1968[155] remains urgent today. But people who are interested in moving to new neighborhoods face the same fears from their would-be neighbors: integrated neighborhoods lead to declines in property value.[156] The lack

discriminator"). The plaintiff would need to know exactly how the discriminator thinks of him, which is even harder to prove than intent to discriminate "because of race."

150. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210–12 (1972).

151. Dubofsky, *supra* note 32, at 153.

152. *See* Paul A. Jargowsky, *Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy* (Century Found. Aug. 7, 2015), http://apps.tcf.org/architecture-of-segregation ("We are witnessing a nationwide return of concentrated poverty that is racial in nature . . ."); *Mapping Segregation*, N.Y. TIMES (July 8, 2015), http://www.nytimes.com/interactive/2015/07/08/us/census-race-map.html?_r=0 (map representing living patterns according to census data).

153. Issues of segregation as well as police brutality rose to prominence throughout 2014 and 2015 after the death of several African Americans spurred the BlackLivesMatter movement. *See, e.g.*, Claire Foran, *A Year of Black Lives Matter*, ATLANTIC (Dec. 31, 2015), http://www.theatlantic.com/politics/archive/2015/12/black-lives-matter/421839/; Steven W. Thrasher, *Black Lives Matter Has Showed Us: The Oppression of Black People Is Borderless*, GUARDIAN (Aug. 9, 2015), http://www.theguardian.com/commentisfree/2015/aug/09/black-lives-matter-movement-taught-black-oppression-borderless-michael-brown; Zach Newman, *"Hands Up, Don't Shoot": Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 HASTINGS CONST. L.Q. 117 (2015).

154. Jargowsky, *supra* note 152.

155. *See supra* Part I.

156. *See, e.g.*, Progress Dev. Corp. v. Mitchell, 286 F.2d 222, 227 (7th Cir. 1961). Before the Fair Housing Act was enacted, the Chicago suburb of Deerfield condemned the proposed site of an integrated housing development for a village park. Deerfield residents received phone calls offering to buy their homes at 50 percent to 75 percent of their market value immediately after news of the integrated

of change in this disheartening situation speaks to the need for a revitalization of the Fair Housing Act to achieve Congress's end.

But courts today are not interpreting the Fair Housing Act in accordance with congressional intent. First, they are reading the statute narrowly, instead of broadly and inclusively.[157] Second, the application of the burden-shifting model of a prima facie case results in plaintiffs' cases being dismissed on summary judgment before their evidence can be evaluated on the merits and in the context of the case.[158] Courts are not taking contextual factors into account, a problem that causes plaintiffs to have extraordinarily low outcomes in disparate impact cases, which is exacerbated by HUD's codification of the problematic burden-shifting model.[159]

B. The Fair Housing Act Today

The Fair Housing Act today[160] makes it unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[161]
>
> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.[162]

---

development became public. *Id.* at 227. Fifty-four years later, the same Chicago suburb again prevented integrated housing from being built in the 94 percent white community. *See* Natalie Moore, *Despite Mandate, Affluent Suburbs Fail to Build Affordable Housing*, WBEZ CHICAGO: WBEZ NEWS (Oct. 12, 2015), https://www.wbez.org/shows/wbez-news/despite-mandate-affluent-suburbs-fail-to-build-affordable-housing/6977652e-6737-4e88-8d1e-394ed0c96cfe; *see also* JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING 195 (2013).

157. *See, e.g.*, Bonasera v. City of Norcross, 342 F. App'x 581, 583–84 (11th Cir. 2009); Francis v. Kings Park Manor, 91 F. Supp. 3d 420, 428 (E.D.N.Y. 2015).

158. See, e.g., *Bonasera*, 342 F. App'x at 585; *Francis*, 91 F. Supp. 3d at 432–33.

159. For example, the Second Circuit recently held that the HUD decision abrogated precedent that used the Arlington Heights factors because the Supreme Court "implicitly adopted" HUD's approach. *See* Mhany Mgt. v. Cty. of Nassau, No. 14-1634-cv(L), 2016 U.S. App. LEXIS 5441, at *87, *104 (Mar. 23, 2016).

160. The last major amendments of the Fair Housing Act were enacted in 1988 and included extending the statute of limitations, adding intimidation claims under 42 U.S.C. § 3617, eliminating the cap on punitive damages, and increasing HUD's enforcement powers. *See* Schwemm, *supra* note 52, § 5.3, 5.4.

161. 42 U.S.C. § 3604(a) (2012). This provision is at issue in *Bellwood*, *Bonasera*, and *Inclusive Communities*. The provision is identical to that passed in 1968 with the addition of disability and familial status.

162. 42 U.S.C. § 3604(b). This provision is at issue in *Bellwood*, *Bonasera*, and *Francis*.

The Fair Housing Act also makes it unlawful:

> for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.[163]

The Fair Housing Act also makes it unlawful:

> to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.[164]

C. *Courts' Interpretations of the Fair Housing Act Today and HUD's Codification of Disparate Impact Theory*

Recent cases demonstrate that narrow interpretations of the Fair Housing Act that set up the prima facie case as an obstacle and separate intent from impact do not further Congress's intent to create "integrated and balanced communities."[165] Instead, these interpretations result in negative outcomes for plaintiffs whom the Fair Housing Act was meant to protect.[166] The prima facie case was codified in 2013 by Department of Housing and Urban Development, solidifying a burden-shifting test that has led to overwhelmingly negative outcomes for plaintiffs.[167] Courts have continued to use the prima facie case as an obstacle (for example, *Francis v. Kings Manor*,[168] decided in March 2015), and the Supreme Court cited to the HUD regulation in applying the standard in *Texas Department of Housing and Community Development v. Inclusive Communities, Inc.* in June 2015.[169]

1. *Bonasera v. City of Norcross*

In *Bonasera v. City of Norcross*,[170] Ayda Bonasera, a Hispanic woman, began renting rooms in her house to Hispanics.[171] She lived in a majority white neighborhood in Norcross, Georgia.[172] Her neighbor complained to

163. 42 U.S.C. § 3605(a). This provision is at issue in *Inclusive Communities.*

164. 42 U.S.C. § 3617. This provision is at issue in *Francis*.

165. Trafficante v. Met. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968)).

166. *See* McKeen et al., *supra* note 21, at 553.

167. Implementation of the Fair Housing Act's Discriminatory Effects Standard, Final Rule, 78 Fed. Reg. 11463 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100). *See* McKeen et al., *supra* note 21, at 553, n.22.

168. 91 F. Supp. 3d 420 (E.D.N.Y. 2015).

169. 135 S. Ct. 2507, 2514 (2015).

170. Bonasera v. City of Norcross, 342 F. App'x 581 (11th Cir. 2009) (per curiam).

171. *Id.* at 583.

172. *Id.*

the city at a meeting, expressing concern about "'the neighborhood going down' and [about] 'seven vehicles in [Bonasera's] driveway, numerous male Mexicans living there, gang types, looked like gang types. . . .'"[173] The city cited Bonasera for violating a zoning ordinance that prohibited using her property for something other than "one-family residences and related uses."[174] Bonasera brought claims under the Fair Housing Act, arguing that by enforcing this ordinance only against Hispanics, the city was treating people unequally on the basis of race in a way that affected the availability of housing, and the City's enforcement of the ordinance was intentionally discriminatory because the city knowingly implemented racial animus against Hispanics by enforcing the statute based on racist comments.[175]

The Eleventh Circuit affirmed summary judgment against Bonasera by reading the Fair Housing Act narrowly, using the prima facie case as an obstacle for the plaintiff to overcome (instead of focusing on the minimum necessary to survive summary judgment, as the Eighth Circuit did in *Black Jack*).[176]

First, in its analysis of the intentional discrimination claim, the court read the Act narrowly by not considering the congressional intent of the Act at all and instead focusing on evidence Bonasera was missing instead of analyzing the evidence she presented. *Bonasera* continued the trend seen in *Bellwood*: the court focused on reasons *not* to find liability, instead of reasons the plaintiff's case would advance the statutory purpose of the Act.[177] The court reasoned that the neighbor who made the racially stereotyping comments had had a good faith belief that Bonasera was violating an ordinance.[178] In addition, the neighbor had previously complained about violations of the ordinance by non-Hispanics.[179]

But these reasons did not compel the inference that the neighbor was *not* treating Bonasera differently because of her ethnicity. Indeed, his comments at the public meeting weighed towards finding that he *was*, in fact, treating her differently because she was Hispanic. The court reasoned that the neighbor was acting in good faith despite his remarks.[180]

This reasoning, i.e., that good faith trumps any intent to treat the person differently, can be contrasted with the reasoning in *Arlington Heights*.[181] In that case, the Seventh Circuit held that an act is "because of race" if it foreseeably results in discrimination between two races and that the person's

173. *Id.* at 584.
174. *Id.* at 583.
175. *Id.* at 584.
176. *See supra* Part I.
177. *See supra* notes 136–51 and accompanying text.
178. *Bonasera*, 342 F. App'x at 584.
179. *Id.*
180. *Id.*
181. Metro. Housing Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288 (7th Cir. 1977).

individual did not matter.[182] Here, the neighbor acted because of race when he used stereotypes and prejudiced language in his explanation for why he wanted the code to be enforced.[183] Enforcing the code previously against non-Hispanics did not sanitize the remarks about "the neighborhood going down" and "gang types": those remarks foreseeably resulted in discrimination between Hispanics and non-Hispanics precisely because he was differentiating between two groups using prejudiced language.[184] Under the *Arlington Heights* test, the neighbor was discriminating, and the city knowingly acted on that discrimination by enforcing the ordinance against Bonasera.[185] At the very least, whether the neighbor's good faith was, in fact, good faith, or whether it was motivated by racial prejudice, presented a genuine issue of material fact, and that summary judgment was not appropriate for Bonasera's intentional discrimination complaint.[186]

Second, for Bonasera's disparate impact claim, the Eleventh Circuit used the prima facie case as an obstacle for the plaintiff to overcome, instead of focusing on the minimum necessary to survive summary judgment, as the Eighth Circuit did in *Black Jack*.[187] In order to meet her burden of proving a prima facie case for discriminatory effect, Bonasera had to prove that the decision had a segregative effect or restricted housing options for a protected group.[188] Bonasera's evidence that the city's enforcement policy had the effect of restricting housing options for a protected group was that the city had enforced the single family home limitation only against Hispanics: 100 percent of citations were against Hispanics.[189] But the court reasoned that this was not enough evidence to withstand a motion for summary judgment because the city had enforced the ordinance only twice before.[190] In order to prove that the city's enforcement had a different effect on minorities than on non-minorities, Bonasera would have to prove

182. *See id.*

183. It could even be said that the use of this language of stereotype and prejudice does reflect intent, going further than the *Arlington Heights* facts where the court did not find intent. *See* Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 386–87 on the combination of intent and impact in *Bonasera*.

184. *See Arlington Heights*, 558 F.2d at 1288.

185. *See* Seicshnaydre, *Appellate Analysis*, *supra* note 21, at 386–87.

186. *See* William W. Schwarzer et al., The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure 6 (Fed. Judicial Ctr. 1991) (commenting that the majority of courts require the moving party to disprove the plaintiff's claim in order to grant summary judgment).

187. Bonasera v. City of Norcross, 342 F. App'x 581, 585 (11th Cir. 2009) (per curiam). *See supra* Part I. In the Eleventh Circuit, evidence of disparate impact was a factor the court used to support a claim of disparate intent.

188. *Bonasera*, 342 F. App'x at 585.

189. *Id*

190. *Id.*

that the city was aware of violations by white homeowners and ignored them.[191] This was a very high burden for a plaintiff to meet: she would have to find white homeowners who would admit to violating the ordinance and not getting caught by the authorities.[192] Instead of simply examining the available evidence—that the code was enforced 100 percent against Hispanics and zero percent against whites—she would have to prove a negative:[193] how the City did not enforce the code.

Courts are no longer dealing with a city that incorporated specifically to enforce zoning rules that would prevent integrated housing from being built, as in *Black Jack*.[194] By focusing on the defendant's similar treatments of minorities and nonminorities, as well as the city's general lack of enforcement of the ordinance, the court too easily affirmed summary judgment for the defendant instead of furthering Congress's intent to eradicate discrimination in the availability of housing for all protected groups by weighing into the evidence that Bonasera actually had.

2. The Department of Housing and Urban Development (HUD) Codifies Disparate Impact Theory

The next step in the detachment from the legislative intent behind the Fair Housing Act was HUD's codification of disparate impact theory in 2013. This is relevant because HUD is tasked with the government's enforcement of the Fair Housing Act, investigating discrimination claims and bringing them before administrative courts.[195]

HUD supported the use of a burden-shifting test, but that test had changed over time: from the test used in *Black Jack* demonstrating how little the plaintiff needed to prove in order to establish a prima facie case,[196] to a test that placed heavy evidentiary burdens on plaintiffs in order to survive summary judgment and that did not take contextual factors into account.[197] Although HUD parsed the burden-shifting test and explained in detail the

191. *Id.* at 586.

192. Even if she did find white homeowners who had not been cited for violation, the city could raise the defense that they did not know about the violations. Then, Bonasera would have to prove that the city did know about the violations and did not cite the white homeowners.

193. *See* Implementation of the Fair Housing Act's Discriminatory Effect Standard, 76 Fed. Reg. 70921, 70924 (proposed Nov. 16, 2011) (codified at 24 C.F.R. pt. 100) (quoting Hispanics United of DuPage Cty. v. Vill. of Addison, Ill. 988 F. Supp. 1130, 1162 (N.D. Ill. 1997)).

194. *See supra* notes 74–95.

195. *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity*, THE LEADERSHIP CONFERENCE: CIVILRIGHTS.ORG 13 (Dec. 2008), http://www.civilrights.org/publications/reports/fairhousing/enforcement-hud.html#_ednref89.

196. *See supra* notes 74–95.

197. *See, e.g.*, Bonasera v. City of Norcross, 342 F. App'x 581, 585 (11th Cir. 2009) (per curiam).

reasons for the plaintiff to carry the burden of proof,[198] no weighty consideration was given to using a factor test. The rulemaking mentioned *Arlington Heights* as an example of a court that used a different test for the Fair Housing Act, but no analysis was undertaken as to whether the factor test is effective or how it compares to the burden-shifting test.[199]

Under HUD's burden-shifting test, first, the plaintiff must show a prima facie case: that the action caused or predictably will cause a discriminatory effect.[200] If the plaintiff's proof is a statistical disparity, there will be no liability if the disparity is caused by something other than the defendant's action.[201] This is the first limit on plaintiffs: causation.[202] Second, the defendant has the burden of proof to show that the practice is "necessary to achieve [a] . . . substantial, legitimate, nondiscriminatory interest."[203] This is the second limit on plaintiffs: legitimate interests defense.[204] Third, the plaintiff must then show that the defendant could serve those interests differently with a less discriminatory effect.[205] This is the third limit on plaintiffs: naming the alternative.[206]

Many of the comments solicited by HUD in response to the Notice of Proposed Rulemaking responded to the particulars of the burden-shifting test: specifically, after the plaintiff has made a prima facie case of discrimination and after the defendant has proven a legitimate interest in the practice, who should have to prove the third step, i.e., whether there is a different practice that the defendant could put into place that would have a less discriminatory effect.[207] HUD claimed that by placing on the defendant the burden of proving necessary, legitimate nondiscriminatory business interests, and placing on the plaintiff the burden of proof for a less discriminatory alternative, "neither party is saddled with proving a negative."[208] But as could be seen in *Bonasera*, plaintiffs do have to "prove a negative" in

198. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard (Final Rule), *supra* note 167.

199. *See id.* at 11462 nn.31–33.

200. *Id*. at 11460.

201. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

202. *See* McKeen et al., *supra* note 21, at 559.

203. Implementation of the Fair Housing Act's Discriminatory Effects Standard (Final Rule), *supra* note 167.

204. *See* McKeen et al., *supra* note 21, at 560.

205. Implementation of the Fair Housing Act's Discriminatory Effects Standard (Final Rule), *supra* note 167.

206. *See* McKeen et al., *supra* note 21, at 561–62.

207. *See, e.g.*, Brian Gilmore, Michigan State University College of Law Housing Clinic, Comment Letter on Implementation of the Fair Housing Act's Discriminatory Effect Standard, at 3 (Jan. 15, 2012).

208. Implementation of the Fair Housing Act's Discriminatory Effect Standard (Proposed Rule), *supra* note 193, at 70924 (quoting Hispanics United of DuPage Cty. v. Vill. of Addison, Ill. 988 F. Supp. 1130, 1162 (N.D. Ill. 1997)).

making their prima facie case before even moving onto the second and third step of burden-shifting.[209] In order for the plaintiff to prove that the city authorities were treating her differently, she would have to prove that they were not enforcing the ordinance against nonminorities in violation. The evidence she had was that the city had enforced against only Hispanics. She lacked the proof of non-enforcement; she could not prove a negative.[210]

HUD expressed legitimate reasons to codify the application of disparate impact doctrine: to finalize HUD's own interpretations in its adjudication and to eliminate uncertainty in the law with a consistent, federal standard for the doctrine.[211] But the reasons HUD provided for choosing the burden-shifting test were weak: HUD always used it in past adjudications, some courts used it, and its use is consistent with burden of proof in employment cases.[212] Using the test in the past is not a valid reason for using it in the future, and although some courts used the burden-shifting models, others did not.[213] By codifying the burden-shifting test as the standard for disparate impact claims under the Fair Housing Act, HUD's rule served to codify the detachment of the interpretation of the Fair Housing Act from the purpose of the Act: to eliminate segregation and to promote "integrated and balanced living patterns."[214]

3. *Francis v. Kings Park Manor, Inc.*

In *Francis v. Kings Park Manor, Inc.*,[215] the Eastern District of New York continued the trend of narrowly interpreting the Fair Housing Act instead of following the "broad and inclusive"[216] interpretation, resulting in an

209. *See* Bonasera v. City of Norcross, 342 F. App'x 581, 586 (11th Cir. 2009) (per curiam).

210. *See also* Craig Gurian, Anti-Discrimination Center, Comment Letter on Implementation of the Fair Housing Act's Discriminatory Effect Standard (Jan. 17, 2012).

211. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard (Final Rule), *supra* note 167.

212. Implementation of the Fair Housing Act's Discriminatory Effect Standard (Proposed Rule), *supra* note 193, at 70923. *But see* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 128 (1976) (explaining differences between Title VII and Title VIII).

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

214. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968)). The HUD rulemaking is also significant in its impact for the courts' interpretation of the Act because the Supreme Court cited to it in *Inclusive Communities*. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

215. Francis v. Kings Park Manor, 91 F. Supp. 3d 420 (E.D.N.Y. 2015). *See also supra* Introduction.

216. *Trafficante*, 409 U.S. at 211.

inconsistent and illogical result for the plaintiff. Donahue Francis, an African American male, filed suit against the property management company of his apartment complex when—after his neighbor repeatedly threatened him, insulted him, and even took photos of the inside of his apartment—he complained to the management company about fears for his safety, and the management company did not respond to his complaint.[217] The court dismissed Francis's case for failure to state a claim either under the section of the Fair Housing Act that makes it unlawful to discriminate against any person in provision of services in connection with a dwelling because of race,[218] or the section that makes it unlawful to intimidate any person in the exercise of rights guaranteed by the Fair Housing Act.[219]

The Eastern District of New York stated that the two sections at issue require a showing of discriminatory intent in order to proceed, even though another section of the Act[220] does permit disparate impact claims without any showing of intent.[221] Furthermore, the court found that it is not even clear whether the protection from harassment for exercising their rights under the Fair Housing Act protects people after they have already moved into the dwelling.[222]

By requiring intent, and specifically racial animus, in order to find liability under the Fair Housing Act, the court returned to the difficult situation already addressed in *Black Jack* and in *Arlington Heights*: without the "smoking gun" of racist statements of some kind directly from the defendant, intent is impossible to find.[223] Even *Bellwood*, which held that racial steering required intent, suggested that "[a] person who serves as a conduit for another person's discrimination can, it is true, be guilty of

217. *Francis*, 91 F. Supp. 3d at 423–25.

218. 42 U.S.C. 3604(b) (2012).

219. 42 U.S.C. 3617 (2012); *Francis*, 91 F. Supp. 3d at 433.

220. *See Francis*, 91 F. Supp. 3d at 433 (referring to 42 U.S.C. 3604(a), making it unlawful to make a dwelling unavailable to any person because of race).

221. It should be noted that although this case was decided shortly before *Inclusive Communities* made clear that disparate impact claims under the Fair Housing Act do not require intent, *Inclusive Communities* does not change the analysis here. In *Inclusive Communities*, the Court held that claims relying on statistical disparities must contend with a "robust causality requirement" but did not address claims that do not rely on a statistical disparity in order to claim that a practice has a discriminatory effect. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

222. *Francis*, 91 F. Supp. 3d at 427–28. The court cites other district courts in the Second Circuit that support post-acquisition discrimination liability, but in providing a list of courts that support this, narrowly views them as only prohibiting "certain types of post-acquisition" discrimination, as though the list of precedent were an exclusive list instead of a starting point for future analyses of post-acquisition discrimination.

223. *See* Selmi, *supra* note 7, at 768.

intentional discrimination . . ."[224] In *Francis*, the court found that the defendant, the property management company, had notice that Francis was being harassed and did not act. By not acting and thus allowing the reprehensible behavior to take place, the property management company was acting as a conduit for intentional discrimination.[225] But the court suggested that Francis made only a "naked assertion"[226] against the property management company and that racial animus could not be imputed to the company for its failure to respond to an act, even though the verbal attacks with racial epithets and threats were plainly motivated by race.[227] By terming his claim a "naked assertion," the court countervailed the legislative intent of the Fair Housing Act and specifically the intent of the anti-harassment provision, which was enacted to protect individuals who moved to new neighborhoods and faced negative and sometimes violent responses to integration, ranging from physical assaults to cross-burning.[228]

The narrow interpretation of the Fair Housing Act in this case not only contravenes Congress's intent to promote integration and the safety of those who move into new neighborhoods; it also provides an inconsistent and illogical result for the plaintiff. Here, the court also ruled on Francis's breach of contract claim, finding that he had a valid claim for breach of the implied warranty of habitability.[229] The court stated that the implied warranty requires a landlord to protect tenants from "conditions that are dangerous, hazardous or detrimental to their life, health or safety" and cited case law that requires landlords to protect their tenants from third party harassment.[230] By allowing this harassment claim to survive the motion to dismiss, the court essentially admitted that Francis's safety was in jeopardy. His safety was in jeopardy because someone was threatening him "because of race." Yet the court found that the landlord's failure to protect

224. Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1530 (7th Cir. 1990).

225. *See Bellwood*, 895 F.2d at 1530. *See also* United States v. City of Black Jack, 508 F.2d 1179, 1184 n.3 (8th Cr. 1974) (holding that showing local officials are "effectuating the discriminatory designs of private individuals" is sufficient to find an "improper purpose"/intentional discrimination) (quoting Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970)).

226. *Francis*, 91 F. Supp. 3d at 433.

227. *See Black Jack*, 508 F.2d at 1184 n.3 (interpreting opposition "expressed in racial terms" as well as "racial criticism" to mean that race played a role in decision-making and may be evidence to support intentional discrimination). *See also* Selmi, *supra* note 7, at 779 ("[C]ases involving stereotyping or other forms of subtle discrimination are properly defined as involving intentional discrimination . . .").

228. *See, e.g.*, Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case Out of It?*, 61 CASE W. RES. L. REV. 865, 866, n.11 (2011).

229. Francis v. Kings Park Manor, 91 F. Supp. 3d 420, 436 (E.D.N.Y. 2015).

230. *Id.* at 436–37.

his safety from such a threat was not "because of race." Such a result is inconsistent.

4. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*: The Trap Door Under the Fair Housing Act

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[231] the Supreme Court affirmed that disparate impact claims are cognizable under the Fair Housing Act.[232] The decision demonstrates that a burden-shifting test leads to an outcome that contravenes congressional intent to eliminate segregation. A nonprofit organization for affordable housing claimed that the Texas Department of Housing and Community Affairs' policy of distributing tax credits so that affordable housing was being built only in areas that were predominantly nonwhite had the effect of perpetuating segregation.[233] The trial court found a prima facie case for disparate impact because the department disproportionately approved tax credits in nonwhite areas compared to white areas of Dallas and because 92 percent of affordable housing in Dallas was in areas where residents were less than 50 percent white.[234]

The Supreme Court held that these statistics were not enough for a prima facie case of discrimination for two reasons: first, the Texas Department of Housing and Community Affairs made a reasonable decision in allocating the tax credits, and the Fair Housing Act was not intended to force housing authorities to "reorder their priorities."[235] Second, a plaintiff relying on a statistical disparity must prove that the defendant's conduct caused that disparity.[236] The Court put up this "robust causality" requirement as a barrier, reasoning that this interpretation places "adequate safeguards at the prima facie stage" and avoids the consequences of allowing too many cases to go forward at the prima facie stage.[237] Allowing this litigation, in which plaintiffs can bring claims based on statistical disparities, would cause governments and private entities to make decisions on where to build housing based on racial quotas; making such policy decisions based on racial quotas would raise equal protection issues.[238] In addition, the Court applied the burden-shifting test codified by HUD. Although HUD's interpretation is not binding on the Court,[239] HUD's

231. 135 S. Ct. 2507 (2015).
232. *Id.* at 2515–21.
233. *Id.* at 2514.
234. *Id.* at 2514.
235. *Id.* at 2522.
236. *Id.* at 2523.
237. *Id.* at 2523.
238. *Id.* at 2522.
239. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard (Final Rule), *supra* note 167, at 11461 ("The Fair Housing Act gives HUD the authority and responsibility for administering and enforcing the Act, including the

interpretation gained traction when the Court cited to it in its application of the burden-shifting test.[240]

The Court's reasoning resembles that of *Bellwood*. The hypothetical situation the Seventh Circuit imagined in *Bellwood* was racial tipping: if too many real estate agents sell too many homes to African Americans in a racially integrated neighborhood, whites will eventually leave.[241] In *Inclusive Communities*, the Court's hypothetical situation was that housing authorities eventually will make decisions based on racial quotas to avoid causing a statistical disparate impact on minority groups and therefore avoid liability under the Fair Housing Act.[242] The Court did not go into detail about how that would happen in practice. Perhaps the Court was contemplating a Texas Department of Housing and Community Affairs that, after a positive outcome for the plaintiff in this case, decides to allot more tax credits to developments in predominantly white areas than predominantly nonwhite areas. But doing so would raise no constitutional question about racial quotas because the housing authority would merely be choosing a "reasonable approach[] . . . in the sound exercise of its discretion":[243] in other words, it would be just as legitimate for the housing authority to make the opposite decision without the effect of perpetuating segregation.[244]

The Court's "robust causality" standard for a prima facie case of discrimination[245] does not give cause for housing advocates to celebrate;[246] rather, it is the final step in the detachment of the interpretation of the Fair Housing Act from its purpose to eliminate segregation.

Congress has previously dealt with the same issue of detachment from the original purpose of the statute in the employment discrimination context. In *Wards Cove Packing Company v. Antonio*,[247] the Court held that the plaintiff held the burden of proof for a discrimination claim even after establishing a prima facie case.[248] The Court broadened the range of the

---

authority to conduct formal adjudications of Fair Housing Act complaints and the power to promulgate rules to interpret and carry out the Act.").

240. *Inclusive Communities*, 135 S. Ct. at 2514–15.

241. *See supra* notes 144–45.

242. See *Inclusive Communities*, 135 S. Ct. at 2522.

243. *Id.* at 2522.

244. *See* Brief for Respondent at 28, 39, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015), http://www.scotusblog.com/case-files/cases/texas-department-of-housing-and-community-affairs-v-the-inclusive-communities-project-inc/ (citing U.S. Attorney General).

245. *Inclusive Communities*, 135 S. Ct. at 2523; *see also* McKeen et al., *supra* note 21, at 553.

246. *See, e.g.*, Semuels, *supra* note 20.

247. 490 U.S. 642, 661 (1989).

248. *See* Amos N. Jones & D. Alexander Ewing, *The Ghost of* Wards Cove*: The Supreme Court, the Bush Administration, and the Ideology Undermining Title VII*, 21 HARVARD BLACKLETTER L.J. 163, 168 (2005).

employer's defenses to a claim and narrowed its interpretation of the statute.[249] Congress responded by passing the Civil Rights Act of 1991, which restored the previous interpretation of the Act, placing the burden of proving business necessity on the defendant.[250]

The Civil Rights Act of 1991 was not a cure-all.[251] For example, it did not specify the kinds of proof that should be used in disparate impact discrimination claims.[252] In order to ensure courts follow through with both the spirit and the letter of the law,[253] Congress should have included more specific instructions on how the courts are to interpret not only who has the burden of proof, but also standards for meeting the burden of proof.

III. Proposal

A. Proposed Solution

Under the Fair Housing Act today,[254] it is unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[255]
>
> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.[256]

It is unlawful:

> for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.[257]

---

249. *Id.* at 168.
250. *Id.* at 172.
251. *Id.* at 173.
252. *See id.*
253. *See id.*
254. The last major amendments of the Fair Housing Act were enacted in 1988 and included extending the statute of limitations, adding intimidation claims under 42 U.S.C. § 3617, eliminating the cap on punitive damages, and increasing HUD's enforcement powers. *See* Schwemm, *supra* note 52, §§ 5.3, 5.4.
255. 42 U.S.C. 3604(a) (2012). This provision is at issue in *Bellwood*, *Bonasera*, and *Inclusive Communities*.
256. 42 U.S.C. 3604(b). This provision is at issue in *Bellwood*, *Bonasera*, and *Francis*.
257. 42 U.S.C. 3605(a). This provision is at issue in *Inclusive Communities.*

It is unlawful:

> to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.[258]

In order to restore the intended purpose of the Fair Housing Act, Congress should amend the sections of the statute that pertain to discriminating because of race by including a standard for litigating Fair Housing Act claims, clearly setting out a test for courts to apply:

A. For the purposes of Section 804,[259] 805,[260] 806,[261] 807,[262] and 818[263] of the Fair Housing Act of 1988, a court shall consider the following factors when evaluating a discrimination claim of disparate treatment or disparate impact:
   1. Whether the plaintiff has shown a discriminatory effect.
   2. Whether there is evidence of discriminatory intent.
   3. Whether the defendant has an interest in taking the action that is subject of the complaint.
   4. The context relevant to the matter at hand.

B. The court shall apply the factors as follows:
   1. In considering whether a plaintiff has shown discriminatory effect, the plaintiff may use statistics that cause a segregative effect or restrict housing options. The court may weigh any relevant statistical evidence against the defendant's interests and statistical evidence regarding the matter at hand.
   2. In considering evidence of discriminatory intent, use of racially biased or prejudiced language shall be presumed to be evidence of discriminatory intent unless rebutted.

B. Analysis of Amendments

1. Factor-Based Test

Amending the Fair Housing Act to include a factor-based test instead of a burden-shifting model would further the goal of "truly integrated and balanced living patterns"[264] because it would curtail the ability of

258. 42 U.S.C. 3617. This provision is at issue in *Francis*.
259. Fair Housing Act, 102 Stat. 1620, Pub. L. No. 100-430 (1988) (codified as amended at 42 U.S.C. §3604 (2012)).
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968)).

courts to interpret the statute so narrowly as to contravene its purpose and would allow courts to include contextual factors in deciding the subtler discrimination cases that courts face today.[265] Disparate treatment and disparate impact would not be separate inquiries; rather, the intent factor would inform whether a court could find disparate impact liability.[266] The factor-based test will allow plaintiffs' evidence to be evaluated without any significant added burden to the courts or to the defendant: the defendant's interest is still weighed into the analysis, and the court could better spend the time it was using in trying to find the prima facie case by simply evaluating disparate impact claims holistically. The prima facie case in practice is not an "adequate safeguard"[267] but rather is a route to summary judgment: a way for courts to analyze why *not* to proceed with the next steps of the test, instead of considering all factors at the same time.

The first three factors are taken from the *Arlington Heights* four-factor test. The fourth factor in that case was whether the plaintiff seeks to compel the defendant to affirmatively provide housing or wishes to restrain the defendants from interfering with others who wish to provide housing.[268] Because the fourth factor was more specifically designed to deal with cases like *Black Jack* and *Arlington Heights*, the factor here is changed to a catchall provision for contextual factors.

Changing the test would change the analysis from a series of hurdles (or "safeguards") to a balance of factors that can accommodate cases where discrimination is not obvious.[269] It provides a way to evaluate both direct and indirect racial harassment, as in *Francis*, as well as a way to evaluate the statistics of code enforcement, as in *Bonasera*.[270] The amended statute would better serve Congress's intent to eradicate

265. *See Arlington Heights*, 558 F.2d at 1290 (applying a four-factor test that includes intent but does not allow lack of intent to defeat a claim because "[a] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared.").

266. *See* Selmi, *supra* note 7, at 778–79 (noting that some scholars have suggested merging disparate impact and disparate treatment, including intent in a disparate impact analysis).

267. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc. 135 S. Ct. 2507, 2523 (2015).

268. Metro. Housing Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

269. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) (finding obvious discrimination when city incorporated in order to ban low income housing).

270. *See supra* notes 279–86, 231–48.

segregation by providing a broader avenue for plaintiffs to bring discrimination cases.

These amendments also include important limitations. "The court may weigh any relevant statistical evidence against the defendant's interests and statistical evidence." This means that the court also has the opportunity to evaluate factors that weigh against the plaintiff. In this way, a court could still grant summary judgment for the defendant in a frivolous case, just as a prima facie case would. But by more holistically evaluating the factors, the court can more accurately determine if there is a genuine issue of material fact before granting summary judgment.

2. Strength of Discriminatory Effect

The strength of discriminatory effect factor accommodates statistics: how the action complained of affects a protected group. By specifically allowing any relevant statistical evidence from both plaintiff and defendant, the court can assess a case where the statistics do not speak toward *proportionate* effect, but they do speak to a strong effect nonetheless. For example, in *Bonasera*, 100 percent of code enforcement was against Hispanics, and no statistics were provided on whether the authority failed to enforce against non-Hispanics in violation.[271]

3. Evidence of Discriminatory Intent

This factor allows a court to simultaneously consider intentional discrimination and discriminatory effect and encourages the court to take a closer look at intent in any case where racial epithets or threats play a role. In *Bonasera*, the complaining neighbor expressed his concern about "gang types" and "the neighborhood going down."[272] By allowing the court to consider this type of language at any link in the chain (limited by the defendant's evidence) that resulted in the plaintiff's claim against this defendant, the court can better identify subtle discrimination where the defendant may not have used such language, but the language nonetheless played a role in the defendant's actions (or inaction, as in *Francis*).[273]

Because this factor is far-reaching, it is also cautiously worded: essentially, racial epithets may be considered even if not directly stated by the defendant. If the defendant acted as a conduit for discrimination,[274] the lack of direct statements will not necessarily defeat the plaintiff's claim.

---

271. *See supra* notes 188–94.

272. *See supra* notes 174–87.

273. *See supra* note 218.

274. *See supra* notes 225–26. *See also* United States v. City of Black Jack, 508 F.2d 1179, 1184 n.3 (8th Cr. 1974) (showing local officials are "effectuating the discriminatory designs of private individuals" is sufficient to find an "improper purpose"/ intentional discrimination) (quoting Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970)).

4. Defendant's Interests

By considering the defendant's interests as a factor, this change removes stage three of the prima facie case from the analysis.[275] Neither the plaintiff nor the defendant must prove that a nondiscriminatory alternative serves the same interests. This step is no longer necessary if the entire context of the defendant's and plaintiff's arguments are taken into account.

5. Other Contextual Factors

This is a catchall factor designed to allow courts to bring in relevant context in order to focus on the intent of the statute and analyze whether any external factors weigh toward one outcome. For example, in *Black Jack*, the court took into account the general differences in living conditions between African Americans and whites, not only in the City of Black Jack, where affordable housing was to be built, but in the surrounding areas where African Americans were disproportionately living in segregated, overcrowded, and substandard housing.[276] The court also took into account that the effect of Black Jack's policies were made worse by building onto previous intentionally discriminatory policies enacted by government at the local, state, and federal level.[277]

C. Test Cases

1. *Bonasera v. City of Norcross*

Bonasera[278] would have a different outcome under the Fair Housing Act's proposed amendments. The court would not grant the city summary judgment because the court could consider all of the factors.

First, the strength of the discriminatory effect should be measured based on the statistics the plaintiff had, instead of focusing on what she did not have. Taking a closer look at the 100 percent code enforcement against Hispanics, the court could still find that the strength of impact weighs against the plaintiff because the code had been enforced only twice.[279]

Second, evidence of discriminatory intent weighs in favor of Bonasera because the neighbor who initially complained did not restrict his complaint to her violation of zoning law; he talked about "gang types" at her residence "bringing the neighborhood down."[280] The city served as a conduit for that intentional discrimination[281] by investigating and citing Bonasera. A city could still enforce a code even if the person complaining

275. *See supra* notes 206–07.
276. *See* United States v. City of Black Jack, 508 F.2d 1179, 1183 (8th Cr. 1974).
277. *See supra* note 89.
278. Bonasera v. City of Norcross, 342 F. App'x 581 (11th Cir. 2009) (per curiam).
279. *See supra* notes 188–94.
280. *Bonasera*, 342 F. App'x at 584.
281. *See supra* notes 225–27.

uses racial language and could avoid serving as a conduit by justifying the enforcement through other, nonracial reasons. Because this is a factor test, the strength of the defendant's argument could still serve as a barrier to a successful claim, but neither side would survive summary judgment.

Third, the defendant's interest in taking the action also weighs in favor of Bonasera. Cities have an interest in enforcing their zoning laws, but the fact that the City of Norcross enforced them so rarely speaks to the relative insignificance of this ordinance. The second and third factors can also weigh together: the court should ask whether acting on someone's racially motivated complaint was really serving the interest of the city that did not seem to enforce its zoning ordinance except against Hispanics.

Fourth, the catchall factor for *Bonasera* might include changing demographics in Norcross and in surrounding communities. The court might analyze whether Hispanics in search of housing had many options other than renting rooms from private residence owners such as Bonasera.[282]

Overall, under a factor test, finding in favor of Bonasera would further the purpose of the Fair Housing Act, most importantly by emphasizing that racially motivated code enforcement is discriminatory and that the city cannot hide behind indirectness if it knowingly acted on it.

2. *Francis v. Kings Park Manor*

Francis[283] would have a different result under the Fair Housing Act's new amendments because they would prohibit too narrow a reading of the Act. The first factor, strength of discriminatory effect, is not as important here. The opinion does not mention whether Francis had any statistical evidence about the racial composition of the apartment complex or the responsiveness of the property management company, but statistics would not make sense here, because Francis is complaining about individual treatment. This factor does not weigh in Francis's favor. For evidence of discriminatory impact, as in *Bonasera*, the court in *Francis* could take a closer look at the use of racial epithets to determine whether the defendant's action or inaction had any connection to racial animus, even if expressed by another person. By not acting, the property management company was acting as a conduit for intentional discrimination.[284] For the defendant's interests, in this case the defendant had no evidence for why it did not respond to Francis's complaint. The court in *Francis* did not find that fact important, but under this analysis, it weighs in the plaintiff's favor. As to other contextual factors, it would make the most sense to bring into the analysis is Francis's claim for breach of contract.[285] The

282. No data was included in the opinion about the surrounding area, but if any information was included in the briefing, the court could factor that in.

283. Francis v. Kings Park Manor, 91 F. Supp. 3d 420 (E.D.N.Y. 2015).

284. *See supra* notes 225–27.

285. The fact that Francis complained three times over several months also weighs against the defendant for this factor. *Francis*, 91 F. Supp. 3d at 424–25.

court found that his complaint was meritorious enough under the breach of warranty of habitability, and the fact that his safety was at risk because of inaction in response to action taken "because of race" weighs toward Francis.

Finding in favor of the plaintiff in *Francis* would further the purpose of the Fair Housing Act by emphasizing a lack of tolerance in the judicial system for inaction that was indirectly initiated by racial animus and that resulted in continual racial harassment. Eliminating segregation also entails eliminating any harassment that stems from integrated living patterns.[286]

3. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*

In *Inclusive Communities*,[287] strength of discriminatory effect would allow the statistical disparity presented by the Inclusive Communities Project to be analyzed based on the strength of the impact rather than on causation. Strength of impact weighs in favor of the plaintiff because the statistical evidence provided suggests that the effect of allotting tax credits to black neighborhoods and not to white neighborhoods ensures that housing patterns remain segregated.[288] The Court should also weigh into its analysis the strength of the specific effect, not stopping at noting whether a disparity exists. Segregated housing "is deeply corrosive both for the individual and for his community. . . . It means inferior public education, recreation, health, sanitation and transportation and facilities."[289]

For intent, there is no outright racial animus in the Texas Department of Housing and Community Affairs' decision to allocate more tax credits to black neighborhoods than to white neighborhoods. But the Court should still include in its analysis the fact that previous governmental policies in Dallas intentionally created the racially segregated living patterns that currently exist.[290] The Dallas City Charter, for example, gave the city the power to keep residences, schools, churches, and other facilities separate for black and white citizens.[291] Although this is not the same kind of intent to discriminate found in *Bonasera* or *Francis*, the past policies were intentionally designed to segregate Dallas.[292] The intent factor here serves

286. *See generally* Bell, *supra* note 156.

287. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

288. *See supra* notes 234–35.

289. Brief for Respondent at 10, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015), http://www.scotusblog.com/case-files/cases/texas-department-of-housing-and-community-affairs-v-the-inclusive-communities-project-inc/ (citing U.S. Attorney General).

290. *Id*. at 12.

291. *Id*. at 14.

292. *See id*.

as a powerful counterweight to the "robust causality" requirement that maintains the prima facie case as a "safeguard."[293]

For the defendant's interests, the Court followed the trial court in assuming the defendant's interests were legitimate.[294] For other contextual factors, the Court should consider changes in the defendant's policies that speak to a discriminatory effect. From 1991 to 1993, the Texas Department of Housing and Community Affairs considered whether a development would provide desegregated housing as part of its criteria in dispensing tax credits.[295] It stopped using this criterion despite the continuation of segregated housing patterns. It is this kind of long term decision-making that ultimately resulted in 92 percent of affordable housing in Dallas being located in nonwhite areas.[296]

Overall, *Inclusive Communities* would have a different outcome if the factor test were used, and this result would better serve the purpose of the Fair Housing Act.

D. Other Solutions

Other solutions include general boosts to plaintiffs that are aimed at providing better proof in litigation. For example, nonprofit housing groups could be given more funding in order to increase the use of enforcement testing—sending out two persons, one of a group protected under the statute and one not, to apply for an apartment, for example, to test for intentional discrimination in real estate transactions.[297] But this would not address the problem that the burden of proof is still too high to meet. As can be seen in *Bonasera*, even if a plaintiff has the resources to pay for statistical analysis, statistics are not enough to prove a disparate impact claim. The "robust causality" factor from *Inclusive Communities* also poses a great hurdle, and so expanding the resources of nonprofit organizations, while helpful in bringing more claims, would not in itself result in better outcomes for plaintiffs if the Fair Housing Act were not also amended.

E. Proposed Amendment Would Send a Message to the Courts

Amending the statute would not only provide courts with a test to apply: it would also send the strong message that the Fair Housing Act

293. *Inclusive Communities*, 135 S. Ct. at 2523.

294. *Id*. at 2514; 860 F. Supp. 2d. 312, 326 (trial court)

295. Brief for Respondent at 16.

296. *Inclusive Communities*, 135 S. Ct. at 2514.

297. *See A Matter of Place*, FAIR HOUSING JUSTICE CENTER (2013) http://www.fairhousingjustice.org/resources/film/ (advocating better funding for private fair housing groups in order to bring more individual complaints and conduct more enforcement testing).

was intended to be interpreted broadly.[298] Congress would employ the same strategy it did when enacting the Civil Rights Act of 1991 in order to correct the Court's dismantling of disparate impact theory in the employment discrimination context in *Wards Cove*.[299] By specifying the test to be used in order to prove a plaintiff's case, courts would have to decide future cases in both the spirit and letter of the law.[300]

By amending the Act with a specific test, Congress would send the message that courts should not use this factor-based test simply to reach the same outcomes they had reached before.[301] The courts will not use the context factor to swallow the rule because the clear legislative intent of amending the statute is to interpret the Fair Housing Act more broadly and to decide close cases in favor of integrated housing.[302]

Conclusion

The interpretation of the Fair Housing Act detached gradually from the purpose of the Act. At the time of HUD's codification in 2013, the question at issue was whether disparate impact claims were viable at all.[303] Now, the landscape has changed. The Supreme Court ruled that disparate impact claims are viable.[304] The next step is for Congress to reassert the purpose of the Fair Housing Act by amending it to better achieve "balanced and integrated living patterns"[305] by taking contextual factors into account, and by not separating impact from intent. Doing so will have the immediate effect of allowing plaintiffs to proceed past summary judgment and have the chance to have their evidence weighed instead of rejected.

---

298. *See* Cornelius J. Murray IV, *Comment: Promoting* "Inclusive Communities"*: A Modified Approach to Disparate Impact Under the Fair Housing Act*, 75 La. L. Rev. 213, 237, 249 (2014) (proposing an amendment to the Fair Housing Act to include disparate impact claims and a "modified burden-shifting approach," before *Inclusive Communities* was decided).

299. *See* Jones & Ewing, *supra* note 248, at 165.

300. *Id.*

301. *Id.* (noting that one problem with the 1991 Act was that the statute's ambiguity allowed courts the flexibility to continue to decide cases as they were deciding them before the statute).

302. *Arlington Heights*, 558 F.2d at 1289, 1294 (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 2-5, 211 (1972)).

303. *See supra* notes 197–200.

304. *See supra* note 233.

305. Brief for Respondent at 15.