

Lessons from *Mt. Holly*: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias

EQUAL JUSTICE SOCIETY AND WILSON SONSINI GOODRICH & ROSATI*

I always loved my home and was glad that I could provide housing to my children, grandchildren, and great grandchild. I also always loved my neighborhood as there is a strong sense of community here for us. We have known many of our neighbors for many years and we raised our families together. . . . When in 2003 we heard about the Township's plans for redeveloping the Gardens, tearing down all the homes and making all of us move, I was very upset. I went to many Township meetings at which other residents and I told the Township that we love our community and want to keep our homes.¹

Many other Gardens residents and I have gone to several planning board and Township Council meetings at which Township officials reviewed and voted to adopt the proposed redevelopment plans for the Gardens. We objected to the designation of our community as blighted and to the proposed plans. The officials ignored our concerns and went ahead to adopt the plans and implement them. . . . I am very sad to see the Gardens community being destroyed by the Township. I do not want to give up either of my properties. I would like to be able to continue living in the Gardens and I would like to be able to pass on the houses to my children.²

Long-time residents of Mt. Holly Gardens were perplexed by the Township's decision to redevelop the community they loved. In an effort to save their neighborhood, residents came together and sued to stop its destruction. Six years after filing suit in federal court, the United States Supreme Court granted *certiorari*. The residents' case was scheduled for oral argument before the Supreme Court on December 4, 2013 in *Mount*

* Equal Justice Society attorneys Allison Elgart and Eva Paterson, with law clerk Braz Shabrell; Wilson Sonsini Goodrich & Rosati attorneys David Berger, Savith Iyengar, Jason Gumer, Jasmine Owens, and Ro Khanna.

1. Joint Appendix at 92, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 2013 WL 4714436 (U.S.).

2. *Id.* at 103.

*Holly v. Mt. Holly Gardens Citizens in Action, Inc.*³ Just weeks before the hearing, the parties settled. Yet the arguments plaintiffs and *amici curiae* raised in their briefing address critical issues in today's society, while also echoing arguments made to the Supreme Court in *Brown v. Board of Education*.⁴ Together, these arguments show that implicit bias—defined here as unconscious or unintentional racial attitudes and stereotypes—pervades decision-making, including housing- and development-related decision-making by municipalities, and causes great harm to all of its victims. The arguments and research set forth by plaintiffs and *amici* in *Mt. Holly* also demonstrate that identifying and preventing the harms caused by implicit bias can only occur if courts consider the disparate impact of housing decisions.

Residents of the Mt. Holly Gardens community (the “Gardens”), located in the Township of Mount Holly, New Jersey (“the Township”), filed suit in the United States District Court for the District of New Jersey to halt the Township’s decision to demolish all homes and redevelop Mt. Holly Gardens—one of the Township’s only predominantly African American or Latino neighborhoods—and redevelop the area. Most of the Gardens’ residents had lived in the neighborhood for many years, but ninety percent of them could not afford the proposed replacement homes.⁵

Of the Gardens’ 1,031 residents, approximately 20% were non-Hispanic Whites, 46% were Black, and 29% were Hispanic, representing the highest concentration of minority residents in the Township. Almost all of these residents were classified as “low income”; most were classified as having “very low” or “extremely low” income.⁶ Indeed, “almost all of [the Gardens’] residents earn[ed] less than 80% of the area’s median income, with most earning much less.”⁷ The Gardens’ residents were split evenly between renters (with a median monthly rental price of \$705) and homeowners (with a median monthly cost of homeownership of \$969). Eighty-one percent of the homeowners had lived in their homes for at least nine years, and 72% of renters had lived in their units for at least five years. Given these income levels and the cost of replacement homes, the Township’s decision to redevelop the Gardens effectively forced these mostly minority residents out of the community, and possibly out of the Township.

3. *Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013).

4. See *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954); See also Richard Kulgar, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (2004).

5. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 379 (2011).

6. *Id.* at 378.

7. *Id.*

Mt. Holly was the second time in two years that the Supreme Court agreed to review whether the Fair Housing Act (“FHA”) of 1968 allows plaintiffs to bring claims challenging official housing decisions and policies that were not the result of intentional discrimination, but nonetheless have a disproportionately harmful impact on minorities or other groups protected by the law. This “disparate impact” standard has allowed plaintiffs to bring claims to eliminate subtle forms of discrimination that persist in different parts of the housing market, including mortgage lending, home rentals, and sales, as well as local zoning and redevelopment. All federal appellate courts to consider the question—eleven in all—have concluded that the FHA allows plaintiffs to bring claims based on the disproportionate effect of governmental or private action, regardless of the motive behind that action.⁸ Further, in February 2013, the U.S. Department of Housing and Urban Development (“HUD”) issued final regulations that endorse disparate impact-based claims of housing discrimination.⁹ Given the unanimous view of all federal appellate courts that have considered this issue and HUD’s support for disparate impact claims, many commentators were concerned that the Supreme Court was looking to change the law through *Mt. Holly* by rejecting the disparate impact standard.¹⁰

While striking down the disparate impact standard would be a dramatic departure from longstanding housing discrimination law, the *Mt. Holly* settlement simply postponed the issue for another day. If the Supreme Court does eventually consider the issue—given that it has already tried twice despite the fact that there is no dispute among circuit courts—and if it accepts the argument that Congress intended the FHA to prohibit only purposeful discrimination, then victims of housing discrimination will lose a crucial tool for vindicating their rights.

Recent social science research substantiates this dire result. Studies show that proving subjective intent is fundamentally incompatible with the way biases actually manifest physiologically—even in well-meaning people—and that subconscious biases drastically impact decision-making in a way that harms minority groups, including in housing. The disparate impact standard is the only way to account for these biases and the harms

8. John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141, 174 (1996).

9. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,463 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

¹⁰ See Richard Wolf, *Housing Discrimination Case Puts High Court on Hot Seat*, USA TODAY (Sept. 8, 2013), <http://www.usatoday.com/story/news/politics/2013/09/08/supreme-court-housing-discrimination-civil-rights/2735317/>. See also Nikole Hannah-Jones, *How the Supreme Court Could Scuttle Critical Fair Housing Rule*, PRO PUBLICA (Feb. 8, 2013), <http://www.propublica.org/article/how-the-supreme-court-could-scuttle-critical-fair-housing-rule>.

they cause. It is therefore critical for civil rights advocates to highlight these implicit biases, relate them to very real harms, and advocate for the preservation of the disparate impact standard.

The Equal Justice Society and Wilson Sonsini Goodrich & Rosati filed a brief *amici curiae* on behalf of twenty-three sociologists, social and organizational scientists, and legal scholars from institutions as prominent and diverse as MIT's Sloan School of Management, Princeton University, Stanford University, Columbia Business School at Columbia University, and University of California, Berkeley. The *amici curiae* that participated in crafting the brief for the Court, and therefore contributing to this article, are sociologists, social and organizational psychologists, and legal scholars who study the sociological, physiological, and/or psychological effects of implicit bias. They are scholars who have published numerous books and peer-reviewed articles on topics such as the influence of implicit bias on perceptions of community disorder, criminality, and blight, individual decision-making in housing, and physiological and psychological responses to intergroup contact. The *amici's* intent was to acquaint the Court with current social science research on implicit bias and demonstrate the impact of such research in arguing for the necessity of the FHA's disparate impact standard.

This article is an adaptation of *amici's* brief and uses *Mt. Holly* as an illustrative example of implicit racial bias and its resulting harm on minority communities. The harm caused by this discrimination would be wholly without a remedy without the disparate impact standard. While *Mt. Holly* ultimately settled, this issue is likely to come before the Supreme Court again and the research discussed herein would be relevant to the Court's analysis.

Introduction

Congress enacted the FHA to end housing discrimination in the United States and remedy the damaging effects of residential segregation. Yet housing discrimination and problems from residential segregation persist.

Contemporary social science research reveals that much of this discrimination is not intentional or even conscious. This research demonstrates that *implicit* and *unconscious* biases taint a wide range of housing-related decisions and show why the disparate impact standard is particularly crucial to address these biases.

Implicit racial bias skews perceptions of disorder, criminality, and blight in neighborhoods. These biased perceptions affect decision-making—in municipal land use, displacement, redevelopment, and rehabilitation, and in housing sales and rentals—leading to significant harm to minority residents and homeseekers.

Implicit biases may help explain the striking disparity between the

perceptions held by residents who are disproportionately affected by discriminatory housing decisions and the municipalities making those decisions. In the case of *Mt. Holly*, residents describe a community they “always loved” (J.A. 92):¹¹ “peaceful” (CA3 J.A. 611), “safe and comfortable” (CA3 J.A. 627), and with “all the necessities of life” (J.A. 102), yet lacking “active social service support, code enforcement, and an aggressive program that would purchase existing rental properties and turn them into home ownership opportunities.” CA3 J.A. 2140. The municipality describes a community that is “blighted,” where “[n]one of the problems that caused the blight . . . [could] be remedied without redesigning and rebuilding the entire area.” Br. for Appellees at 36, *Mt. Holly Citizens in Action, Inc. v. Twp. of Mount Holly*, 2011 WL 2442671, at *36 (3d Cir. June 10, 2011) (No. 11-59). *Amici* believe that this disparity may lie in implicit racial biases that affect perceptions and decision-making and entrench housing segregation and inequity. These harms cannot be overlooked under the FHA, yet would be ignored without a legal standard grounded in proof of discriminatory impact.

When the issue is eventually brought before the Supreme Court, *amici* hope the social science research will lead the Court to recognize that the disparate impact standard is essential for courts to conduct the searching inquiry necessary to fully combat housing discrimination and comply with the FHA’s crucial objective of ending housing segregation.

I. The FHA’S Disparate Impact Standard Is Necessary

A. Congress Enacted the FHA to Eradicate Housing Discrimination

1. Congress and Federal Courts Have Long Recognized the FHA as a Means to Remedy the Harmful Effects of Housing Discrimination

The FHA serves to broadly remedy residential isolation and resultant inequity by prohibiting intentional and implicit discrimination, *i.e.*, policies and practices with an unjustified discriminatory impact, in housing.¹² In enacting the FHA, Congress emphasized the harmful effects of housing discrimination.¹³ “Racial discrimination in housing . . . is not conducive to good health, educational advancement, cultural development, or to

11. “CA3 J.A.” refers to the Joint Appendix submitted to the Third Circuit in *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011). “Pet. App.” refers to the appendix accompanying Petitioners’ certiorari petition to the U.S. Supreme Court. “J.A.” refers to the Joint Appendix submitted to the Supreme Court.

12. Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (1968).

13. 114 Cong. Rec. 2529 (1968) (statement of Sen. Tydings).

improvement of general standards of living” for isolated minorities” (statement of Senator Tydings of Maryland).¹⁴ Prohibiting housing discrimination was a means to remedy “hard-core unemployment” and improve the “deplorable state” of schools in segregated minority communities (statement of Senator Mondale, the bill’s sponsor).¹⁵ Congress understood that housing discrimination affected all Americans and hindered progress toward an ideal society.¹⁶

The U.S. Supreme Court has interpreted the FHA mindful of Congress’s concern that housing segregation creates inequities that pervade minority communities and affect many aspects of residents’ lives.¹⁷ The Court has also considered the harm to White residents from housing segregation. In *Trafficante v. Metropolitan Life Insurance Co.*, the Court recognized that White residents lose “the social benefits of living in an integrated community,” the “business and professional advantages which would have accrued if they had lived with members of minority groups,” and can suffer “embarrassment and economic damage in social, business, and professional activities from being ‘stigmatized’ as residents of a ‘white ghetto.’”¹⁸ Indeed, the Act’s purpose was and continues to be to eliminate the negative effects of housing discrimination on *all* Americans.

2. Housing Segregation Still Persists in the United States

The reality, however—as the facts in the *Mt. Holly* case demonstrate—is that the Act’s goal of achieving a “truly integrated and balanced” society remains unmet.¹⁹ The United States has integrated sluggishly over the past thirty years.²⁰

Americans of all races continue to experience high rates of racial isolation. While Whites, Blacks, and Hispanics represent 64%, 13%, and 16% of the general population, respectively, the average White resident now lives in a census tract that is 79% White, the average Black resident lives in a tract that is 46% Black, and the average Hispanic resident lives in

14. 114 Cong. Rec. 2529, *supra* note 13.

15. 114 Cong. Rec. 3133 (1968) (statement of Sen. Mondale).

16. *See* 114 Cong. Rec. 2524 (1968) (statement of Sen. Brooke).

17. *See Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 (1979) (acknowledging housing discrimination’s adverse effects on schools, property values, professional development, and social integration in isolated communities).

18. 409 U.S. 205, 208 (1972); *see also* Section C.1, *infra* (discussing scientific studies showing the demonstrable benefits of interracial interaction).

19. *See* 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).

20. *See* John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, US2010 Project (Mar. 24, 2011), available at <http://tinyurl.com/ofs4y6m>.

a tract that is 45% Hispanic.²¹ Blacks are more racially isolated than any other minority group, with 75% of Black families nationwide residing in only 16% of census block groups.²²

3. Housing Segregation and Racial Isolation Have Devastating Effects on Communities

Current residential segregation and racial isolation have tremendously negative effects on disadvantaged communities. “Segregation . . . isolates disadvantaged groups from access to public and private resources, from sources of human and cultural capital, and from the social networks that govern access to jobs, business connections, and political influence.”²³ Segregation also hinders isolated disadvantaged groups’ “ability to accumulate wealth and gain access to credit.”²⁴ Not only are these isolated communities less likely to receive adequate services, but they are also more likely to be affected by undesirable land uses (e.g., highways and chemical plants) and “expulsive zoning” that occurs, for example, through eminent domain.²⁵

B. Implicit Biases Perpetuate Housing Discrimination and Segregation

Social science research reveals that underlying implicit biases play a large role in housing decision-making that perpetuates segregation. Unlike explicit or conscious biases, implicit biases reflect attitudes and beliefs that “commonly function in an unconscious and unintentional fashion” and are “automatically activated by the mere presence (actual or symbolic) of the attitude object.”²⁶

21. Michelle W. Anderson & Victoria C. Plaut, “Implicit Bias and the Resilience of Spatial Colorlines,” in Justin D. Levinson & Robert J. Smith, *Implicit Racial Bias Across the Law* 27 (2012) (citing William H. Frey, *Census Data: Blacks and Hispanics Take Different Segregation Paths*, Brookings Institute: State of Metropolitan America No. 21 (Dec. 16, 2010), available at <http://tinyurl.com/lqrcqpr>, and U.S. Census Bureau, 2010 Census Briefs, *Overview of Race and Hispanic Origin: 2010*, Table 1 (Mar. 2011), available at <http://tinyurl.com/3gdko8e>).

22. See Craig Gurian, *Mapping and Analysis of New Data Documents Still-Segregated America*, Remapping Debate (Jan. 18, 2011), available at <http://tinyurl.com/4ac3k5z>.

23. Elizabeth Anderson, *The Imperative of Integration* 3 (2010).

24. *Id.*

25. See, e.g., Anderson & Plaut, *supra* note 21, at 27–28; Yale Rabin, “Expulsive Zoning: The Inequitable Legacy of Euclid,” in Charles M. Haar & Jerold S. Kayden, *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 101 (1989); James A. Kushner, *APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES* 37–41 (1980).

26. John F. Dovidio et al., *Why Can't We Just Get Along, Interpersonal Biases and Interracial Distrust*, 8 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL.* 88, 94 (2002).

Research demonstrates that we “do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment” which subsequently influence our assumptions and motivate our actions.²⁷ Instead, implicit attitudes or implicit stereotypes of which we are not consciously aware often cause discriminatory biases.²⁸ Individuals experience these implicit biases toward a broad range of individuals from distinct racial, ethnic, socioeconomic, or gender groups.²⁹

For these reasons, it is entirely possible for implicit biases to run incongruently to attitudes and beliefs we maintain externally:

Implicit biases are . . . especially problematic, because they can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles. The very existence of implicit bias poses a challenge to legal theory and practice, because discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions.³⁰

Indeed, “[c]ontemporary sociological and psychological research reveals that discriminatory biases and stereotypes are pervasive, even among well-meaning people.”³¹

Social science research helps shed light on the pervasiveness and harmful effects of implicit biases in housing, hindering the goals of the FHA and preventing “truly integrated and balanced living patterns” for all Americans.

1. Implicit Biases Affect Perceptions of Disorder, Criminality, and Blight

Recent social science research shows that implicit biases manifest in perceptions of disorder, criminality, and blight. In housing and land use planning, these psychological perceptions inform government and individual actions and ultimately harm minority communities.

27. Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); see also Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005).

28. See Greenwald & Krieger, *supra* note 27, at 951.

29. See John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. IN ORGANIZATIONAL BEHAV. 39–69 (2009).

30. Greenwald & Krieger, *supra* note 27, at 951.

31. Hart, *supra* note 27, at 743.

a. Individuals perceive disorder in otherwise identical neighborhoods solely due to the presence of minority groups.

“Disorder” generally encompasses the observed or visual negative traits of a neighborhood or environment, such as graffiti, public intoxication, garbage, and abandoned cars.³² Perceptions of “disorder” affect at least two types of municipal decision-making: property regulation (e.g., building codes and nuisance laws), aimed at suppressing physical and social disorder to prevent urban decline; and land use (e.g., zoning laws), used to create orderly spaces that suppress disorder.³³

Recent social science research indicates that implicit biases taint individuals’ perceptions of disorder. This research shows that, even independent of actual visual signs of disorder, the racial composition of a neighborhood signals to perceivers what level of disorder is present in that neighborhood.³⁴ For example, research shows that among both White and Black populations, a neighborhood’s ethnic, racial, and class composition influences perceptions of disorder *beyond the actual, systematic observation of disorder*.³⁵ Racial composition was, in fact, the single biggest factor influencing perceived disorder—“approximately three times larger than that of observed disorder/decay, with controls for all personal characteristics and neighborhood ecology.”³⁶

This strong association of racial minorities with neighborhoods “with crime, disorder, neglect, and poverty” causes individuals’ perceptions of disorder to increase as the Black population increases.³⁷ This finding helps explain why land use decisions regarding “disorder suppression” frequently lead to displacement of racial minorities.³⁸

Studies show that for many, simply seeing Black (as opposed to White) residents in identical neighborhoods elicits more negative evaluations of the neighborhood’s conditions, e.g., property upkeep, housing cost, safety, future property values, and quality of schools.³⁹ Such

32. See Robert J. Sampson & Stephen W. Raudenbusch, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows”*, 67 SOC. PSYCHOL. Q. 319, 319 (2004); Nicole Stelle Garnett, ORDERING THE CITY, LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 55 (2009).

33. See Garnett, ORDERING THE CITY, *supra* note 32, at 3, 12.

34. See Anderson & Plaut, *supra* note 21, at 33.

35. See Sampson & Raudenbusch, *supra* note 32, at 319–20 (comparing survey responses with actually observed disorder in an effort to determine what factors most influenced perception).

36. *Id.* at 332.

37. Courtney M. Bonam, Jennifer L. Eberhardt & Hilary B. Bergsieker, *Polluting Black Space* 9, 36 (June 30, 2013) (unpublished manuscript) (on file with authors).

38. See Anderson & Plaut, *supra* note 21, at 34 (citation omitted).

39. *Id.* (citing Maria Krysan, Reynolds Farley & Mick P. Couper, *In the Eye of the*

perceptions are often bolstered by a false sense of legitimacy: “the more subtle nature of the race-associated reasons makes them more insidious because they appear to be ‘rational’ and not susceptible to the charge of racism.”⁴⁰ It is thus ever more important that courts have some mechanism to combat mistaken perceptions rooted in implicit bias.

b. Individuals associate criminal activity with neighborhoods based on the presence of minority groups.

Social science studies “consistently find[] that Americans hold strong associations between race and crime, and appear especially fearful about the risk of crime in the presence of black strangers.”⁴¹ Indeed, while “race can act as a proxy for a long list of characteristics, qualities, and statuses” in American society, “[t]he association with perhaps the most far-reaching effects is that of race as a proxy for criminality and deviance[.]”⁴²

These perceptions of individual criminality “have been shown to operate at more aggregate levels as well.”⁴³ Social science findings “shed light on an important component of implicit bias in property-related decision-making: the widespread—often implicit—perception of predominantly black neighborhoods as suffering from disorder and crime.”⁴⁴ For example, research reveals that the percentage of young Black men in a neighborhood is positively related to perceptions of crime, even after accounting for actual crime rates.⁴⁵ Indeed, “several studies have found that the percentage black in a population is positively associated with fear of crime and perceived severity of the neighborhood crime problem.”⁴⁶ Whites systematically and incorrectly associate the percentage of Black residents with higher crime rates.⁴⁷

Beholder, 5 DUBOIS REV.: SOC. SCI. RES. ON RACE 5 (2008), and Maria Krysan, Reynolds Farley, Mick P. Couper & Tyrone A. Forman, *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527 (2009).

40. Maria Krysan, *Whites Who Say They'd Flee: Who Are They and Why Would They Leave?*, 39 DEMOGRAPHY 675, 694 (2002).

41. Lincoln Quillian & Devah Pager, *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization*, 73 SOC. PSYCHOL. Q. 79, 82 (2010) (“*Estimating Risk*”)

42. Lu-in Wang, *Race as Proxy in Law & Society: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1014 (Spring 2004).

43. *Estimating Risk*, *supra* note 41, at 82.

44. Anderson & Plaut, *supra* note 21, at 34; *see also Estimating Risk* at 82 (“[T]here often exist strong mental associations between neighborhood racial composition and neighborhood crime.”).

45. *See, e.g., Anderson & Plaut, supra* note 21, at 32–33.

46. *Estimating Risk, supra* note 41, at 82 (citations omitted); *see also Bonam et al.* at 2, 36 (finding that Black neighborhoods are “highly associated with crime, disorder, neglect, and poverty” and “are perceived as under-resourced, dirty, and crime-ridden”).

47. *See Lincoln Quillian & Devah Pager, Black Neighbors, Higher Crime? The Role of*

c. Perceptions of disorder and criminality inform blight designations that motivate municipal decision-making.

The concept of “blight” reflects individuals’ perceptions of disorder and criminality.⁴⁸ “Blight” is the process whereby a previously functioning city, or part of a city, falls into a state of disorder and decrepitude; the related theory is that minor forms of public disorder lead to crime and a downward spiral of urban decay.⁴⁹ “A vague, amorphous term, blight [i]s a rhetorical device that enable[s] renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.”⁵⁰ Although the term was originally intended to refer to places, it soon “became associated with people—specifically the African Americans and immigrants who were most likely to live in dilapidated neighborhoods as a result of private sector discrimination.”⁵¹

Blight determinations motivate critical municipal decision-making. *See* Pritchett at 6 (noting that, in practice, “blight” designations enable the “relocat[ion of] minority populations and entrench racial segregation”). In 1954, the U.S. Supreme Court interpreted the “public use” requirement of the Takings Clause to permit municipalities’ use of eminent domain to redevelop “blighted” areas.⁵² Municipalities continue to use “blight” designations to justify redevelopment projects that eliminate minority communities and replace them with highways, public parks, sports stadiums, hospitals, or higher-end residential communities.⁵³ In post-FHA America, perceptions of disorder and criminality and the designation of minority neighborhoods as “blighted”—such as in *Mt. Holly*—thus risk

Racial Stereotypes in Evaluations of Neighborhood Crime, 107 AM. J. SOC. 717–67 (Nov. 2001).

48. *See* Sections B.1.a-b, *supra*; Bonam et al. at 19 (noting that for many, “[t]he mere presence of Black people in a physical space activates an image of blighted physical space.”).

49. *See, e.g.*, James Q. Wilson & George Kelling, *The Police & Neighborhood Safety: Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29-38; George Kelling & Catherine Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (1996).

50. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 3 (2003).

51. Swati Prakash, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CALIF. L. REV. 1437, 1458 (2013) (citing *id.* at 6).

52. *Berman v. Parker*, 348 U.S. 26, 32–33 (1954) (allowing the demolition of a “blighted” and “ugly” neighborhood that was 98 percent Black so that it could be replaced with a “clean” and “carefully patrolled” community).

53. *See, e.g.*, Kushner, *supra* note 25, at 37–41 (1980); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 754 (1993) (“[While d]esigned for the ostensibly benign purpose of eliminating urban blight,” federal slum clearance programs instead have further exacerbated Black land use inequality by “uproot[ing] and dislocat[ing] thousands of black households and then confin[ing] the displacees to segregated and inferior relocation housing.”) (citation omitted).

perpetuating segregation and inequity in housing and land use.

Moreover, implicit biases thrive where decision-making leaves room for subjectivity. “[T]he potential for unconscious stereotypes and biases to intrude . . . is greatest when subjective judgments are involved.”⁵⁴ Indeed, at least one federal court has noted that officials’ “subjective decision-making processes” are “particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of—hence the difficulty of ferreting out discrimination as a motivating factor.”⁵⁵

Such subjectivity is problematic when, for example, municipalities disproportionately target poor and predominantly minority communities for removal and redevelopment through eminent domain without properly considering alternatives to displacement. In a 2009 study analyzing 184 areas targeted for private development through eminent domain, researchers concluded that “neighborhoods facing the prospect of eminent domain were poorer and had a greater concentration of minorities than the rest of the city.”⁵⁶

It raises serious concerns about economic and racial justice when land use decisions aimed at “disorder suppression” or combating blight disproportionately affect racial minorities.⁵⁷ Further, disorder-relocation and eminent domain policies have had “profoundly disappointing” results; after urban planners destroy “disorderly” communities “and scatter[] residents to the winds, many residents [have] difficulty even locating a new place to live.”⁵⁸ This was precisely the scenario in Mount Holly, where many residents planned their lives around their homes in the Gardens. For one long-term resident, “[t]he Gardens is what we have called home for almost 20 years,” but “after working hard all of their lives,” residents now worry about where to live after retirement. CA3 J.A. 560 (Decl. of Ana

54. Hart, *supra* note 27, at 745 (citation omitted).

55. *Thomas v. Troy City Bd. of Educ.*, 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004), *cited in* Hart, *supra* note 27, at 742-43.

56. See Br. for Amicus Curiae Institute for Justice in *Twp. of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc.*, 2013 WL 4781602 (U.S.) at 10 (citing Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 URB. STUD. 2447, 2453 (2009)).

57. See, e.g., Anderson & Plaut, *supra* note 21, at 34; Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 813, 819 (1999) (asserting that “categories of order and disorder have a pre-existing meaning that associates Blacks with disorder and lawlessness” and warning of “immeasurable” damage inflicted on Blacks by disorder suppression strategies “that incorporate racialized categories of orderly and disorderly people.”); Nicole S. Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1080, 1122 (2005) (“Unfortunately, disorder-relocation policies . . . single out poor, minority communities for enforcement . . .”).

58. Garnett, *ORDERING THE CITY*, *supra* note 32, at 46 (noting that for Black families, in particular, “the post-displacement situation [is often] ‘close to desperate’”).

Arocho). Another long-term resident and owner of two homes in the Gardens was hoping to “be able to pass on the houses to [his] children.” J.A. 106 (Decl. of Santos Cruz). Planning experts confirmed that 90% of existing residents would be unable to afford the newly-constructed homes proposed in the Township’s redevelopment plan and would likewise be unable to afford market-rate units anywhere else in the Township due to the utter scarcity of affordable housing in the area. Pet. App. 9a.⁵⁹

These Gardens’ residents are not unique in their hopes and aspirations. Their sentiments are shared with many individuals who live in designated “blighted” areas. An outsider labeling an area “blighted” does not remove an individual’s pride in her home, and the label may come from a biased perception that is not aligned with the reality of a neighborhood, as the research discussed here suggests.

Given the serious consequences of exercising eminent domain pursuant to “blight” designations, and social science research that demonstrates the effect of implicit biases on these decisions, particularly when subjectivity is involved, courts must have some mechanism to assess the role of implicit biases. As discussed in Section C.2, *infra*, the disparate impact standard provides this mechanism.

2. Implicit Biases Affect Perceptions of Minorities and the Spaces They Inhabit

Implicit biases affect decision-making due to subconscious perceptions of minorities as less desirable residents. These biases influence negative “race-space associations”—perceptions of a space based on the race of those who occupy it—and result in detrimental treatment in housing transactions based on individuals’ racial perceptions and stereotyping.⁶⁰

a. Negative race-space associations and stereotyping perpetuate segregation, adversely affect land value, and lead to disparities in harmful land use.

Negative race-space associations affect how people evaluate a “space”—e.g., conditions in a neighborhood—based on the race of those

59. The settlement agreement reached between the residents of Mount Holly Gardens and the Township addresses this problem, calling for the 20 remaining homeowners to get new townhouses or “replacement funds” in exchange for allowing the redevelopment of their existing homes. Seven households who elected to relocate out of the neighborhood will be compensated. See <http://www.aarp.org/aarp-foundation/our-work/legal-advocacy/info-08-2013/Mt-Holly-Citizens-in-Action-v-Township-of-Mt-Holly.print.html> (last visited Feb. 25, 2014).

60. See Anderson & Plaut, *supra* note 21, at 29, 34–36

who occupy it.⁶¹ Several studies suggest that neighborhood stereotypes of crime, municipal services, undesirable conditions, and other negative race-space associations affect important decisions about land values, neighborhood desirability, land use, and amenities.⁶²

Valuations of Land. Research strongly suggests the role of implicit bias in explaining the connection between property values and racial stereotyping of space.⁶³ In one study, participants evaluated a house for sale, with researchers varying the race of the family that “owned” the home by inserting a photograph of either a Black or White family.⁶⁴ The photos did not differ in dimensions of perceived social class, racial prototypicality, friendliness, or attractiveness of the families.⁶⁵ Despite evaluating otherwise identical houses, study participants rated the neighborhood as less desirable, estimated a lower value for the house, and liked the home less when it was owned by a Black family rather than a White family.⁶⁶

In another study, participants viewed a video of either a middle or working class neighborhood with actors of different races playing its inhabitants.⁶⁷ When participants were asked to give impressions and predictions about neighborhood conditions such as property upkeep, housing cost, safety, future property values, and quality of schools, results showed that for White participants, simply seeing Black (as opposed to White) residents in a neighborhood elicited more negative evaluations of neighborhood conditions—even though in all respects other than race the neighborhoods appearing in the video were identical.⁶⁸

Neighborhood Desirability. Negative race-space associations influence individuals’ perceptions of neighborhood desirability, including Whites’ views on where to live. Researchers have found that communities with relatively high concentrations of Blacks tend to be considered the least desirable among Whites, even in communities with relative affluence.⁶⁹ With respect to lower-income, mixed race and Black neighborhoods, Whites explained their perceptions of undesirability as related not to race,

61. *Id.* at 34.

62. See Anderson & Plaut, *supra* note 21, at 34.

63. See *Id.*

64. Bonam et al., *supra* note 37, at 15–16.

65. *Id.*

66. *Id.* at 18.

67. Maria Krysan, Kyle Crowder & Michael Bader, *Pathways to Residential Segregation*, in CHOOSING HOMES CHOOSING SCHOOLS: RESIDENTIAL SEGREGATION AND THE SEARCH FOR A GOOD SCHOOL 12 (Annette Lareau & Kimberly Goyette, eds.) (“*Pathways to Residential Segregation*”).

68. See Krysan et al., *In the Eye of the Beholder*, *supra* note 39; see also Krysan et al., *Does Race Matter in Neighborhood Preferences*, *supra* note 39, at 527–59.

69. Maria Krysan, *Community Undesirability in Black and White: Examining Racial Residential Preferences Through Community Perceptions*, 49 SOC. PROBS. 521, 534 (2002).

but rather “congestion, traffic, people, noise, and crime.”⁷⁰

Land Use. Implicit biases not only affect residential valuations and desirability, but can also guide municipal decisions that negatively impact a community. A study asking White participants to decide the placement of a chemical plant found that the racial composition of a neighborhood was the decisive factor in deciding the location of the plant.⁷¹ Study participants were less likely to oppose the construction of a chemical plant in a residential area when the neighborhood was predominantly Black, even when controlling for perceptions of house values, environmental concerns, and participants’ explicit feelings toward Blacks.⁷² It is unlikely that the average American would intentionally choose to make someone suffer from the adverse effects of a chemical plant solely based on race. However, implicit biases can and do generate behavior that departs from a person’s “avowed or endorsed beliefs or principles.”⁷³

These findings unfortunately track reality in the United States and can affect minority communities in long-lasting ways. Deciding where to place chemical plants, toxic waste sites, and other environmental hazards can adversely affect minorities’ quality of life and health.⁷⁴ A report based on national data collected over a twenty-year period shows an overconcentration of industrial and toxic waste facilities in communities of color.⁷⁵ The disparity is so high that “[r]ace continues to be an independent predictor of where hazardous wastes are located, and it is a stronger predictor than income, education and other socioeconomic indicators.”⁷⁶ Research has demonstrated that “[b]y concentrating blacks and some other minorities in the worst-quality neighborhoods, segregation also contributes to dramatic racial disparities in exposure to environmental hazards, access to healthy food choices, and exposure to crime and other sources of environmental stress, thereby helping to produce profound and persistent racial disparities in health.”⁷⁷

All of these factors contribute to racial isolation and inequity, the

70. *Community Undesirability*, *supra* note 69, at 531; *see also Pathways to Residential Segregation*, *supra* note 67, at 11 (finding that in addition to their own biases, the discriminatory behavior of landlords and real estate agents is further influenced by the real or perceived biases of existing community members who prefer not to share residential space with minority neighbors).

71. Bonam et al., *supra* note 37, at 30–31.

72. *Id.* at 34.

73. Greenwald & Krieger, *supra* note 27, at 951.

74. *See, e.g.*, Bonam et al., *supra* note 37, at 35; *see also Anderson & Plaut*, *supra* note 21, at 35–36; Bullard et al. at xii; *Pathways to Residential Segregation*, *supra* note 67, at 8–9.

75. Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: 1987–2007* xii (Mar. 2007), available at <http://tinyurl.com/ohs83c8>.

76. *Id.*

77. *See Bullard* *supra* note 75; *see also Pathways to Residential Segregation*, *supra* note 67, at 8–9 (internal citations omitted).

precise harms that Congress sought to remedy through the FHA. The discriminatory decisions that lead to the racial isolation and inequity are often not blatant or openly targeted at minorities; rather, they are rooted in implicit bias.

b. Raced preferences in housing transactions have devastating effects on minority homeseekers and show that minorities are perceived as undesirable residents.

Social science research suggests that implicit biases may be responsible for racial disparities in access to and location and quality of housing. Recent studies show that modern discriminatory behavior often occurs through subtle raced preferences in housing transactions, where minorities seeking housing receive unequal assistance from landlords, realtors, and institutions.⁷⁸ Even when housing providers and lending institutions are not consciously making biased decisions, their actions and behavior are often primed by stereotypes and subconscious or unconscious perceptions of minority homeseekers throughout the housing process.

Implicit biases limit minority homeseekers' ability to access the housing market. Implicit biases surface during minorities' preliminary efforts to obtain housing. Research shows that housing providers disfavor minority homeseekers when receiving even simple written inquiries about available units due to "subconscious reactions to the names of applicants."⁷⁹ The "[c]ultural and semantic attributes associated with names have the potential to activate stereotypes" in housing providers' subconscious minds.⁸⁰ Studies show that individuals may associate race and other social and demographic characteristics—such as gender, age, and socioeconomic status—based solely on abstract qualities such as an individual's name.⁸¹ By associating the name of a homeseeker with his or her perceived race, these housing providers may act on subconscious stereotypes even before they seek any substantive information about the potential applicant.⁸²

78. See Margery A. Turner & Stephen L. Ross, *How Racial Discrimination Affects the Search for Housing*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 81, 84–85 (Xavier de Souza Briggs, ed., 2005).

79. Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 *J. APPLIED SOC. & PSYCHOL.* 934, 938 (2006). Other studies demonstrate similar results based on voices or dialects during phone inquiries. See, e.g., Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 *URB. AFF. REVIEW* 452, 454 (2001); Thomas Purnell, William Idsardi & John Baugh, *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 *J. LANGUAGE & SOC. PSYCHOL.* 10, 14–15 (1999).

80. *Id.* at 935.

81. See Carpusor, *supra* note 79, at 936.

82. See *Id.* at 937, 949.

Studies show that housing providers demonstrate preferences for homeseekers with “White-sounding” names. Researchers have found large disparities in the rate of email responses that housing providers send to otherwise identical inquiries that vary only in the name attached to them.⁸³ These housing providers significantly favor inquiries from White-sounding names (e.g., “Patrick McDougall” or “Brett Murphy”) over identical inquiries from non-White sounding names (e.g., “Tyrell Jackson” or “Tremayne Williams”).⁸⁴ Housing providers also respond more quickly, write longer emails, and use more positive and descriptive language with homeseekers with White-sounding names.⁸⁵ Further, they are more likely to invite follow-up correspondence, use a formal greeting and polite language, provide contact information, and offer showings when responding to “White” homeseekers’ inquiries.⁸⁶

Implicit biases may influence housing agents’ decisions to provide less information and offer less assistance to non-White homeseekers. After minority homeseekers access the housing market (for example, by meeting with a real estate agent or visiting an available unit), implicit biases may again resurface though the information and assistance they receive. Housing agents often provide less information to and make fewer sales efforts for minorities.⁸⁷

Housing agents signal less positive comments about available units (e.g., “spacious” or “gets good light”) and use more negative or discouraging language (e.g., acknowledging defects or commenting on the high price).⁸⁸ Studies have also found statistical significance in the decreased likelihood that agents will perform certain tasks when interacting

83. See Carpusor and Loges, *supra* note 79, at 943–46; Andrew Hanson, Zackary Hawley & Aryn Taylor, *Subtle Discrimination in the Rental Housing Market: Evidence from E-mail Correspondence with Landlords*, 20 J. HOUSING ECON. 276, 279–82 (2011).

84. See Hanson et al. at 279–83; Carpusor & Loges at 943–47 (examining 1,115 emails sent to landlords with advertised apartment vacancies and finding that compared to a White-sounding name, inquiries sent from an Arab-sounding name (“Said Al-Rahman”) were three times more likely to be discouraged from visiting an apartment for rent, while inquiries from a Black-sounding name (“Tyrell Jackson”) were four times more likely to be discouraged).

85. Hanson et al., *supra* note 83, at 279–82.

86. *Id.*

87. See, e.g., Seok Joon Choi, Jan Ondrich & John Yinger, *Do Rental Agents Discriminate Against Minority Customers? Evidence From The 2000 Housing Discrimination Study*, 14 J. Housing Econ. 1, 22–24 (2005); Jan Ondrich, Alex Stricker & John Yinger, *Do Landlords Discriminate? The Incidence and Causes of Racial Discrimination in Rental Housing Markets*, 8 J. HOUSING ECON. 185, 193–99 (1999).

88. See John Yinger, *Evidence on Discrimination in Consumer Markets*, 12 J. ECON. PERSP. 23, 32 (1998); Ondrich et al. at 193–97; Hanson et al. at 279–81. White homeseekers also experience more overall helpfulness and facilitation with sales than do minorities. Yinger, *Evidence on Discrimination in Consumer Markets*, at 23–40; Ondrich et al., *supra* note 87, at 187, 193–97; Choi et al., *supra* note 87, at 22–24.

with Black and Hispanic clients, such as mentioning financial incentives, asking about personal needs, offering financial assistance, extending invitations to view advertised units, and making follow-up calls.⁸⁹

Implicit biases influence mortgage providers' lending patterns with minorities. Implicit biases and raced preferences in housing transactions are especially detrimental to minority homeseekers' ability to obtain mortgages, which further limits the timing, location, and quality of available housing options. When purchasing a home, minority homeseekers often obtain financial arrangements that are inferior to equally qualified Whites.⁹⁰ In fact, patterns of subprime lending are seen both among rich and poor minorities.⁹¹ Thus, by controlling for class, studies disprove the arguments often made about socioeconomic status by showing that racial bias does in fact affect lending and related financial practices.⁹²

* * *

These findings are critical to understand the shifting forms of persistent discrimination in housing. Although blatant discriminatory practices may be less common, research shows that well-qualified minorities face longer and more costly searches that effectively restrict their housing options.⁹³ More importantly, the above-mentioned studies confirm that minorities continue to be viewed and treated as less desirable residents and neighbors.⁹⁴ These findings indicate that implicit biases against minorities exist and lead to disparities that simply cannot be attributed to

89. See, e.g., Ondrich et al., *supra* note 87, at 193-203; Yinger, *Evidence on Discrimination in Consumer Markets*, *supra* note 88, at 30-32; Hanson et al., *supra* note 83, at 279-81.

90. See William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 101-23 (Xavier de Souza Briggs, ed., 2005).

91. *Id.* at 102-03.

92. Compare Br. for *Amici Curiae* Am. Civ. Rights Union, at 11, 12, with Apgar & Calder at 102-03 (finding that high-income Black borrowers had 12% fewer prime loans than equally qualified Whites; low-income Black families had a much higher share of subprime purchase loans than the overall comparable population; and 42% of refinance loans to low-income Blacks living in low-income Black neighborhoods were subprime, compared to just 27% among equally low-income borrowers from non-Black neighborhoods).

93. HUD Executive Summary 2013 at 1; John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* ch. 6 (1995) (estimating that the 3-year cost of housing discrimination in the sales market is about \$7.8 billion for Blacks and \$4.4 billion for Latinos).

94. See, e.g., *Pathways to Residential Segregation*, *supra* note 67, at 11 (finding that landlords and real estate agents are often influenced by the biases of residents and other customers who prefer not to share residential space with minority neighbors); see also Ondrich et al., *supra* 87, at 185, 197-203.

purely economic factors.

The detrimental nature of these implicit biases also illustrates the importance of the disparate impact standard. The standard is necessary because homeseekers' inquiries may elicit "subconscious reactions" and "activate stereotypes" beginning at the most preliminary stages of the homeseeking process.⁹⁵ Research illustrates that racial discrimination is not limited to overt, direct-contact interactions, but rather involves implicit biases that influence decisions that otherwise appear to be neutral. These biases may help explain why housing providers, agents, and lenders disfavor non-White homeseekers. Given the prevalence of implicit biases and the perceptions of residential undesirability that they elicit, which likely also infect municipality decision-making,⁹⁶ the disparate impact standard is crucial to combat *all* forms of discrimination.

C. Social Science Research Confirms that the Disparate Impact Standard Is Necessary to Address Implicit Biases and Attendant Harms

The aforementioned social science research exposes implicit bias as a very real and pervasive form of discrimination that perpetuates multigenerational harm to both individuals and society.

1. Segregation Reinforces Implicit Biases that Drive Housing Discrimination, and Integrated Communities Combat These Biases

Researchers have specifically identified the existence and pervasiveness of implicit bias through experiments that measure individuals' physiological discomfort with and negative psychological responses to intergroup interaction. These studies show, for example, that physiological discomfort can frequently be linked to lack of exposure to meaningful diversity. This lack of exposure may result from housing segregation.

Social science research shows that initial interactions with individuals from different racial, socioeconomic, or gender groups can stimulate anxiety and distress.⁹⁷ This initial anxiety manifests physiologically in cardiovascular reactivity, increased production of cortisol (commonly called the "stress hormone"), and changes in the regularity of heart rate per

95. Carpusor & Loges, *supra* note 79, at 935, 949.

96. See Section B.1.c, *supra*.

97. See Jim Blascovich, Wendy B. Mendes, Sarah B. Hunter, Brian Lickel & Neneh Kowai-Bell, *Perceiver Threat in Social Interactions With Stigmatized Others*, 80 J. PERSONALITY & SOC. PSYCHOL. 253, 254 (2001).

breathing cycle.⁹⁸

Researchers have also observed physiological discomfort in brain activity. Studies show that specific areas of the brain called amygdalae—a pair of small subcortical nodes—activate when we feel fear, threat, anxiety and distrust.⁹⁹ A pioneering functional MRI (fMRI) study showed a measurable increase in the activation of the amygdala when White participants viewed Black male faces versus White male faces.¹⁰⁰ The measurable physiological responses associated with distress, fear, threat, anxiety and distrust may help explain why social science studies show that individuals illogically perceive disorder and criminality simply based on the presence of minority groups.

While lack of exposure to different races causes physiological stress, social science research demonstrates that increasing diversity has well-documented physiological benefits that can serve to mitigate implicit biases over time. Studies show that making local environments more diverse can result in decreased implicit bias.¹⁰¹ Exposure to diversity helps regulate cardiovascular threat response, measured by vascular contractility and lowered circulatory resistance to blood flow.¹⁰² Previous interracial contact predicts better recovery from an autonomic nervous system (ANS) stress response, enabling faster return to a regular heart rate, and quicker neuroendocrine recovery (measured by changes in cortisol levels), rapidly ceasing the production of excess cortisol.¹⁰³ Data also suggests that interracial contact significantly decreases the release of cortisol (the “stress hormone”), measured in saliva, over the course of multiple interracial interactions.¹⁰⁴

Social science research also shows psychological benefits: interracial interactions reduce implicit and explicit prejudices in the development of interpersonal relationships. Having past intergroup contact significantly

98. See *Id.* at 254; Elizabeth Page-Gould, Wendy B. Mendes & Brenda Major, *Intergroup Contact Facilitates Physiological Recovery Following Stressful Intergroup Interactions*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 854, 855 (2010).

99. See Sergi G. Costafreda et al., *Predictors of Amygdala Activation During the Processing of Emotional Stimuli: A Meta-Analysis of 385 PET and fMRI Studies*, 58 BRAIN RES. REV. 57, 60, 62 (2008); Frank Van Overwalle, *Social Cognition and the Brain: A Meta-Analysis*, 30 HUM. BRAIN MAPPING 829, 849 (2009).

100. See Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729–36 (2000).

101. See Nilanjana Dasgupta & Luis M. Rivera, *When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Outgroup Members on Implicit Attitudes and Behavioral Intentions*, 26 SOCIAL COGNITION 112, 120–21 (2008).

102. See Blascovich et al., *supra* note 97, at 263.

103. Page-Gould, *Intergroup Contact*, *supra* note 98, at 854–56.

104. Elizabeth Page-Gould, Rodolfo Mendoza-Denton & Linda R. Tropp, *With a Little Help From My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts Through Cross-Group Friendship*, 95 J. PERSONALITY & SOC. PSYCHOL. 1080, 1085, 1089 (2008).

lowers a range of prejudice measures (including cognitive, social distance, and affective indicators).¹⁰⁵ Further, repeated interracial interactions produce more positive emotional experiences comparable to those of participants engaging in same-race interactions.¹⁰⁶

These analyses indicate that interracial interactions help reduce bias, anxiety, and other negative emotional responses. By preserving the disparate impact standard as a way to tackle discrimination violations and consequently increase the presence of underrepresented groups in communities otherwise effectively segregated or isolated on the basis of implicit biases, courts may allow for the kind of meaningful intergroup contact that has been shown to mitigate implicit biases and their significant negative physiological and psychological effects.

2. Courts Need the Disparate Impact Standard to Address All Forms of Discrimination, Including Implicit Bias

Social science research demonstrates that in order to truly address implicit bias—and thus all forms of discrimination in housing, as Congress intended—courts must be able to apply disparate impact analysis. The FHA makes it unlawful to “make unavailable or deny” housing to a protected class “by, among other things, action that limits the availability of affordable housing.”¹⁰⁷ Its paramount aim is to combat conduct that perpetuates segregation.

The research above shows that such conduct need not be intentional or consciously undertaken. This is precisely why the disparate impact standard is critical. Disparate impact claims “permit federal law to reach ‘[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation[, which] can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns.’”¹⁰⁸ Accordingly, all of the courts of appeals that have considered the matter have concluded that plaintiffs can show the FHA has been violated through policies that have a disparate impact on a minority group.”

Courts must conduct a “searching inquiry” of whether unlawful discrimination has influenced the decisions that lead to disparate

105. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751–83 (2006) (conducting a meta-analysis of over 200 studies).

106. See Negin R. Toosi, Nalini Ambady, Laura G. Babbitt & Samuel R. Sommers, *Dyadic Interracial Interactions: A Meta-Analysis*, 138 PSYCHOL. BULL. 1, 16, 18 (2012).

107. (42 U.S.C. § 3604(a)); Pet. App. 14a (citations omitted).

108. *Id.* (citing *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289–90 (7th Cir. 1977)).

treatment.¹⁰⁹ By focusing a legal inquiry on a municipality's intent at the moment a redevelopment decision is made, "the law fails to recognize that discrimination 'can intrude much earlier, as cognitive process-based errors in perception and judgment subtly distort the ostensibly objective data set upon which a decision is ultimately based.'"¹¹⁰ Thus, an inquiry as to whether a decision disproportionately affects a community of color is necessary because many biased decisions are not identifiable as intentional discrimination.¹¹¹

Further, in sensitive situations—for example, those involving race or other protected categories—measuring disproportionate impact that may be attributable—at least in part—to implicit bias is even more valuable than measuring explicit bias.¹¹² Indeed, recent social science research confirms that implicit biases appear to be supplanting explicit racism.¹¹³ As a result, discrimination today "is most likely to occur in contexts where it can be justified as something other than discrimination."¹¹⁴ Recent sociological and psychological research confirms that implicit biases "are pervasive, even among well-meaning people."¹¹⁵

The facts of *Mt. Holly* endorsed a "searching inquiry" into the role of implicit bias in the Township's decision to redevelop the Gardens. The redevelopment plan disproportionately affected minority residents. According to the residents' statistical expert, "African-Americans would be 8 times more likely to be affected by the project than Whites, and Hispanics would be 11 times more likely to be affected."¹¹⁶

109. Pet. App. 22a (citations omitted).

110. See, e.g., Hart *supra* note 27, at 746 (quoting Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1211 (1995)) (discussing employer intent).

111. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("[W]e know from our experience that, more often than not, people do not act in a totally arbitrary manner, without any underlying reasons[.]").

112. See Greenwald & Krieger, *supra* note 27, at 954–55 ("Implicit measures of bias have relatively greater predictive validity than explicit measures in situations that are socially sensitive, like racial interactions, where impression-management processes might inhibit people from expressing negative attitudes or unattractive stereotypes.").

113. See Toosi et al., *supra* note 106, at 5 ("With the emergence of more inclusive social norms, explicit expressions of racial attitudes have gradually become less biased; however, people often harbor more racially prejudiced views than they are willing to report.") (citations omitted); *id.* at 19 (noting that self-reported "negative affect" in interracial interactions is higher in realistic field studies than lab studies, suggesting that "participants are less likely to try to present themselves in a more positive light when no experimenter is present") (citation omitted); Hart, *supra* note 27, at 747 ("[R]esearchers in the past decade have come to recognize [] a pervasive 'conflict between the denial of personal prejudice and the underlying unconscious negative feelings and beliefs.'") (citing Dovidio et al. at 90).

114. Hart, *supra* note 27, at 747.

115. *Id.* at 743.

116. Pet. App. 16a, 19a ("[T]he Residents can establish a *prima facie* case of disparate

Further, the Township appeared to have failed to adequately consider rehabilitation as an option, which may thus reflect unlawful implicit assumptions about residential (un)desirability. The residents' expert "noted that the Township had not performed a comparative cost analysis showing that total demolition, relocation, and new construction was less feasible than an alternative focused on rehabilitation"¹¹⁷ and "had failed to make an active effort to locate a developer with experience in neighborhood rehabilitation."¹¹⁸ Another planning expert confirmed in 2005 that the redevelopment plan at that time—which included "optional rehabilitation" of some original homes—"was deficient because it only allowed rehabilitation as an option, without requiring or even encouraging it."¹¹⁹ Importantly, the residents' planning expert opined that "the 'blighted and unsafe' conditions could be remedied in a far less heavy-handed manner that would not entail the wholesale destruction and rebuilding of the neighborhood."¹²⁰ Yet the plan that was before the U.S. Supreme Court in *Mt. Holly* did not include any rehabilitation whatsoever.¹²¹ Even if by these actions the Township did not intend to discriminate, courts have recognized that "a thoughtless housing practice can be as unfair to minority rights as a willful scheme."¹²² Indeed, as detailed above, implicit biases are activated automatically and without conscious effort or awareness and can have a substantial influence on the behavior of decision-makers in municipalities.¹²³

The disparate impact standard gives courts a tool to ferret out potential discrimination where a protected group is "disproportionately burdened" by municipal action. It also allows courts to conduct a proper analysis of legitimate bases for displacement where municipal decision-makers might have been improperly influenced by implicit bias.¹²⁴ In *Mt. Holly*, amici argued that the disparate impact standard was crucial to begin the discussion of whether implicit bias tainted the Township's decision based on the *appearance* of blight, rather than a proper evaluation of blight, and

impact by showing that minorities are disproportionately burdened by the redevelopment plan or that the redevelopment plan '[falls] more harshly' on minorities.") (quoting *Doe v. City of Butler*, 892 F.2d 315, 323 (3d Cir. 1989)).

117. Pet. App. 26a.

118. Pet. App. 27a.

119. Pet. App. 9a.

120. Pet. App. 26a.

121. Pet. App. 9a.

122. Pet. App. 23a (quoting *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976)).

123. See Hart, *supra* note 27, at 743 (noting that implicit biases are held even by individuals whose "consciously held beliefs are strongly egalitarian.").

124. See *Berman*, 348 U.S. at 32–34; see also Greenwald & Krieger, *supra* note 27, at 966–67 ("[W]hen racially neutral causes and explicit bias can be rejected as causal explanations for racially disparate outcomes, implicit race bias must be regarded as a probable, even if not definitively established, cause.").

the projected increase in property value coming from replacing the mostly minority community with homes at price points they could not afford.

Without the disparate impact standard to reveal potential implicit biases, reviewing courts would allow these biases to continue to influence decision-making in a way that could also increase racial animus. By favoring displacement over community improvement, the Township's decision created the appearance of biased decision-making. If implicit biases played a role in the Township's decision and hindered its formulation of alternatives to displacement, a court operating without the disparate impact standard would be forced to conspicuously refuse to even attempt to assess the Township's decision, thereby allowing a protected group to be harmed on the basis of discrimination. This scenario not only publicly legitimizes discrimination, but it also perpetuates segregation through disproportionate displacement of minority communities—in direct contravention to the FHA. Moreover, this scenario is not unique to the Township—it plays out in towns and cities across the country. Redevelopment decisions often disproportionately harm low-income communities of color and displace long-time residents because of unaffordable housing prices in the redeveloped area.

By providing a way to account for municipalities' implicit biases that disproportionately affect minority communities, the disparate impact standard works to combat all forms of discrimination and provides a means to eliminate implicit biases in future generations. Given the goal of the FHA to eradicate the harms caused by segregation, the role implicit biases play in perpetuating this segregation, and the clear benefits of integrated and diverse communities in combating implicit bias, advocates should argue for the U.S. Supreme Court and other federal courts to interpret the FHA to include the disparate impact standard.

Appendix: List of *Amici Curiae*¹²⁵

Michelle Wilde Anderson is an Assistant Professor of Law at the University of California, Berkeley. She is a scholar of land use, local government law, and local government finance. Her current research focuses on the governance of high-poverty neighborhoods by township and county governments, as well as restructuring options like dissolution and bankruptcy for struggling municipalities. She serves on the Executive Committee at the Thelton E. Henderson Center for Social Justice.

Dr. Evan Apfelbaum is a social psychologist and Assistant Professor

125. Descriptions of amici are as of submission of the amicus brief in *Mt. Holly* in October 2013. Affiliations are listed for identifications purposes only. *Amici* submitted the amicus brief in their individual capacities alone, and not on behalf of any institution or organization.

of Organization Studies at MIT Sloan School of Management. Dr. Apfelbaum has extensively researched the implications of race-blind versus race-conscious practices in contexts ranging from cross-race interactions and organizational teams to the educational system and the law.

Dr. Laura Babbitt is a social psychologist and post-doctoral scholar at Tufts University. Her research has examined the psychological factors that influence interracial interaction outcomes, making use of both experimental and meta-analytic techniques. Her current research investigates intergroup dynamics in apparel factories, in connection with the International Labor Organization.

Dr. Michael Bader is an Assistant Professor of Sociology at American University. He researches cities and ways in which people interact within the built environment. His scholarship focuses on the causes and consequences of racial and economic segregation, neighborhood inequality, and health and nutrition disparities.

Dr. Hilary B. Bergsieker is an Assistant Professor of Psychology at the University of Waterloo. Her research examines stereotyping, prejudice, and interpersonal dynamics of interracial interactions, with a focus on distrust and asymmetric experiences between racial groups.

Dr. Jim Blascovich is a Professor of Psychology at the University of California, Santa Barbara and the Co-Director of the Research Center for Virtual Environments and Behavior. His two main areas of research are social motivation and social influence within technologically mediated environments. He is a past President of both the Society for Personality and Social Psychology, Inc. and the Society of Experimental Social Psychology.

Dr. Courtney Bonam is an Assistant Professor of Psychology at the University of Illinois, Chicago and a research affiliate of the Institute for Sustainable Economic, Educational and Environmental Design. Her research focuses on implicit racial stereotyping; environmental justice; racial disparities in access to high quality physical space; as well as the experiences and perceptions of multiracial people.

Dr. Camille Zubrinsky Charles is the Edmund J. and Louise W. Kahn Term Professor in Social Sciences at the University of Pennsylvania. She is the author of *Won't You Be My Neighbor? Race, Class, and Residence in Los Angeles*. She currently serves as the Director of the Center for Africana Studies at the University of Pennsylvania and on the editorial boards of the *American Sociological Review* and *Du Bois Review: Social Science Research on Race*. Her research interests are in the areas of urban inequality, racial attitudes and intergroup relations, racial residential segregation, minorities in higher education, and racial identity.

Dr. Kyle Crowder is a Professor of Sociology at the University of Washington. His research focuses on the dynamics and consequences of residential stratification. A central focus of his most recent work has been

on the micro-level residential processes shaping persistent patterns of residential segregation and environmental inequality.

Dr. Nilanjana Dasgupta is a Professor of Psychology at the University of Massachusetts at Amherst. Dr. Dasgupta is an experimental social psychologist whose research focuses on biases in implicit attitudes and beliefs; how implicit bias affects judgments and behavior toward others and the self; and social contexts that change implicit bias. She applies her work to education, organizations, and legal theories of discrimination.

Dr. Jennifer L. Eberhardt is an Associate Professor of Psychology at Stanford University and the Co-Director of SPARQ – a center aimed to highlight Social Psychological Answers to Real-World Questions. Her research focuses on race and inequality. Her most recent work examines the ways in which race is associated with crime and physical space.

Dr. Reynolds Farley is a Research Professor Emeritus at the Population Studies Center and a Professor Emeritus of Sociology at the University of Michigan. His research focuses on population trends in the United States, with an emphasis on racial differences, ethnicity, and urban structure. His current work includes an investigation of the residential consequences of revitalization in the Northeastern and the East North Central States.

Dr. Maria Krysan is a Professor in the Department of Sociology and the Institute of Government and Public Affairs at the University of Illinois, Chicago. Her research focuses on racial residential segregation and racial attitudes.

Dr. Douglas S. Massey is the Henry G. Bryant Professor of Sociology and Public Affairs at Princeton University. He is the co-author of *American Apartheid: Segregation and the Making of the Underclass*, which won the Distinguished Scholarly Publication Award from the American Sociological Association. He currently serves on the Council of the National Academy of Sciences and is the President of the American Academy of Political and Social Science.

Dr. Rodolfo Mendoza-Denton is an Associate Professor of Psychology at the University of California, Berkeley. His research focuses on intergroup relations and the negative impact of stigmatization and lack of inclusion on minority students' educational outcomes.

Dr. Elizabeth Page-Gould is an Assistant Professor of Psychology at the University of Toronto. Dr. Page-Gould's research has primarily taken an experimental and longitudinal approach to understand the role that cross-ethnic friendship plays in psychological and physiological thriving in diverse contexts.

Dr. Thomas Pettigrew is a Professor Emeritus of Social Psychology at the University of California, Santa Cruz. With over 400 publications, he is an expert in Black-White relations in the United States and has conducted

intergroup research in Australia, Europe, and South Africa. He formerly served as the President of the Society for the Psychological Study of Social Issues.

Dr. Victoria C. Plaut is a Professor of Law and Social Science and Affiliated Psychology Faculty at the University of California, Berkeley. Dr. Plaut has conducted extensive empirical research on diversity and intergroup relations and has investigated the relationship between implicit bias and property.

Dr. Katherine W. Phillips is the Paul Calello Professor of Leadership and Ethics in the Management Division at Columbia Business School at Columbia University. Dr. Phillips has published numerous papers on the effects of diversity on work team process and performance, including empirical work on how diversity increases cognitive processing of information and motivation.

Dr. Lincoln Quillian is a Professor of Sociology at Northwestern University and a faculty fellow at Northwestern's Institute for Policy Research. Dr. Quillian's current work focuses on the causes and consequences of residential race and income segregation in American cities. His past work includes studies of migration patterns among neighborhoods that contribute to poverty concentration, racial attitudes, and segregation in social networks.

Dr. Jennifer Richeson is a MacArthur Foundation Chair and a Professor of Psychology and African American Studies at Northwestern University. Her research focuses on psychological phenomena associated with diversity with an emphasis on antecedents and consequences of prejudice and stereotyping from both traditionally stigmatized and dominant groups. Her current work includes research on the dynamics and consequences of interracial contact and diversity.

Dr. Samuel R. Sommers is an Associate Professor of Psychology at Tufts University. An experimental social psychologist, Dr. Sommers' research examines issues related to stereotyping, prejudice, and group diversity. His scholarly work focuses on two often overlapping topics: race and social perception, judgment, and interaction; and the intersection of psychology and law.

Dr. Linda R. Tropp is a Professor of Psychology at the University of Massachusetts at Amherst. Dr. Tropp has conducted extensive research on the effects of intergroup contact, including metaanalytic, experimental, and longitudinal studies on the expectations, experiences, and outcomes of contact among diverse racial and ethnic groups.
