

INJECTING A RACE COMPONENT INTO *MOUNT LAUREL*-STYLE LITIGATION

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The story of Mount Laurel—the township, the landmark case, the national symbol—implicates race as well as class. If the poor fare badly in this country, the black poor do much worse. Their realistic options for decent housing outside the ghetto, as well as for decent schools and jobs, are fewer, and the barriers to success are higher.¹

INTRODUCTION

The *Mount Laurel* decisions² remain a powerful example of the law's potential to address the housing needs of low-income communities. Yet at its core, the *Mount Laurel* series stands for more than just the creation of more affordable housing.³ The *Mount Laurel* remedy and its ultimate ratification by the New Jersey Legislature serve as a poignant reminder that without race-specific measures, we cannot adequately address the housing needs of *all* poor communities.⁴ Despite creating what

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[†] Editor's note: The author uses all lowercase letters to spell his name.

¹ DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* 5 (1995).

² *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A. 2d. 724 (1975) [hereinafter *Mount Laurel I*]; *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A. 2d. 390 (1983) [hereinafter *Mount Laurel II*]; *The Hills Dev. Co. v. Bernards Township*, 103 N.J. 1, 510 A.2d. 621 (1986) [hereinafter *Mount Laurel III*].

³ According to the New Jersey Supreme Court in *Mount Laurel II*, the Mount Laurel doctrine mandates that each community provide "a realistic opportunity" for it to have a "fair share of the present and prospective need for low and moderate income housing." *Mount Laurel II*, 92 N.J. at 204-07, 456 A.2d at 413-415.

⁴ Numerous studies document the virtues and pitfalls of Mount Laurel and the "fair" housing legislation that stemmed from its rulings. While these studies advance our knowledge of the circumstances surrounding the *Mount Laurel* trilogy, they often fail to proffer viable solutions to the plight of blacks in urban America and their efforts to gain adequate housing. Racism was at the core of the *Mount Laurel* scenario. Yet for the most part these studies critique neither the *Mount Laurel* court nor the New Jersey legislature. These studies fail to speak to the fact that, by ignoring the pervasiveness of racial

is arguably one of the most radical, far-reaching housing policies to date, *Mount Laurel* not only failed to remediate racial segregation, it may have exacerbated it. This Essay does not seek to vilify the efforts of the Mount Laurel court.⁵ It is imperative, however, to focus attention on the more significant flaws of the *Mount Laurel* holdings and the flaws of the 1985 housing policy that stemmed from these rulings.

A. *The Failings of New Jersey*

1. The Court

Twenty-six years ago, the *Mount Laurel* court had the opportunity to finally and affirmatively further the purposes of the Fair Housing Act of 1968: to provide minorities with effective relief from the vices of ra-

discrimination in New Jersey and the United States at large, the endeavors of the courts and legislatures did little good. For a study that makes a significant contribution to our understanding of the importance of race and racism in discussions of adequate housing and housing segregation in rural America, see NAOMI BAILIN WISH, PH.D. & STEPHEN EISDORFER, ESQ., *THE IMPACT OF MT. LAUREL INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF APPLICANTS AND OCCUPANTS* (1996). See also Florence Wagman Roisman & Philip Tegeler, *Improving and Expanding Housing Choices for Poor People of Color: Recent Developments in Federal and State Court*, 24 CLEARINGHOUSE REV. 312 (1990); Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795 (1991); Robert L. Holmes, *A Black Perspective on Mount Laurel II: Toward a Black "Fair Share,"* 14 SETON HALL L. REV. 944 (1984).

In their comprehensive analysis of the creation and demographics of Mount Laurel housing, Wish and Eisdorfer bring to light two alarming findings with respect to race. First, housing established through Mount Laurel initiatives did not ameliorate extensive patterns of housing segregation. Despite Mount Laurel, the suburban-urban schism has persisted in New Jersey with low-income communities of color relegated to the center cities, while whites are dramatically over-represented in the suburbs. Fair housing legislation has had little, if any, efficacy in creating options for the urban poor of the central city to move to the suburbs to obtain the benefits of suburban opportunity structures. The report states that, "while 81 percent of all suburban AHMS units are occupied by white households, 85 percent of all urban AHMS units are occupied by black or Latino households." *Id.* at 70.

Wish and Eisdorfer also document another disturbing trend in Mount Laurel housing: the overrepresentation of qualified whites and under-representation of qualified persons of color. "Blacks have only half the success rate of whites [in renting or purchasing low income housing]; Latinos have only one-third the success ratio." *Id.* at 59. This neglect of New Jersey's urban minority poor exacerbates their lack of access to suburban housing opportunities and their continued isolation.

⁵ See *Mount Laurel I*, 67 N.J. at 173, 336 A. 2d. at 724; *Mount Laurel II*, 92 N.J. 158, 456 A. 2d. 390 (1983); *Mount III*, 103 N.J. 1, 510 A.2d. 621 (1986). The *Mount Laurel* decisions sought to halt the improper use of state power to deny people the opportunity to choose where they live based solely on their incomes. The court stated that such misuses of power foster patterns of economic segregation and deny these lower-income persons access to employment opportunities in the suburbs.

cial residential segregation and discrimination.⁶ Consistent with earlier failed attempts to rectify racial inequalities, however, rather than recognize the clear relationship between minorities and poverty and the unique issues this creates, the New Jersey court opted to shift the emphasis away from protecting the rights of minorities.⁷ Making explicit reference to other characteristically middle-income or temporarily low-income groups—the elderly, young single persons, and large families—the court reasoned that minorities were not the sole category of persons excluded by the zoning scheme.⁸ The court asserted the importance of having housing regulations that are in line with the prospect of creating housing opportunities that are both fair and can effectively deconstruct the division between affluent suburban communities and depressed low-income central cities. The court stated that those municipalities failing to affirmatively act on their obligation to “provide the requisite opportunity for a fair share of the region’s need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.”⁹ The court looked to the economic integration of these suburban communities as a necessary and important step towards bettering the conditions of the regions disfavored poor. The court, however, ignored one crucial aspect of urban America: the problems of poverty differ along color lines.¹⁰

⁶ In recognition of rampant discrimination in the sale and rental of housing, Congress enacted the Fair Housing Act of 1968 to combat these practices. A generous review of the language of the Act reveals its reliance on two specific goals: to achieve residential integration and to systematically halt discrimination and its ability to polarize and isolate minority groups in urban America. For further discussion of the federal Fair Housing Act see Katherine G. Stearns, *Countering Implicit Discrimination in Real Estate Advertisements: A Call for the Issuance of Human Model Injunctions*, 88 NW. U. L. REV. 1200, 1205 (1994).

⁷ See KIRP ET AL., *supra* note 1, at 81 (“Justice Hall concluded, ‘must make *realistically possible* the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there.’” The authors go on to note that despite the boldness of this statement the *Mount Laurel* court failed to incorporate any language about taking affirmative steps to prevent racial discrimination in housing, even though this was the focus of the plaintiffs’ case).

⁸ See *Mount Laurel I*, 67 N.J. at 159, 336 A.2d at 717.

⁹ 92 N.J. 158, 208, 456 A.2d 390, 415 (1983) (speaking to the constitutional basis for *Mount Laurel* and the court’s role in clarifying the state’s constitutional obligation to ensure the enforcement of policies that recognize the fundamental importance of promoting the general welfare).

¹⁰ For a discussion of the predominance of urban minority poverty in America today see generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

This oversight diverted attention away from the problems of the minority poor, and in doing so squandered any prospects for racial integration.

2. The Legislature

The New Jersey Legislature has similarly failed to acknowledge the relationship between race and poverty. From its inception in 1985, the New Jersey Fair Housing Act (NJFHA or the Act) aspired, at best, to attain economic integration within New Jersey's developing suburban communities.¹¹ The Act promised to ensure that suburban municipalities shoulder their fair share of the cost of government benefits through the even distribution of New Jersey's low and moderate income housing supply.¹² Exclusion of a race component left the issue of residential segregation wholly to the local authorities' discretion,¹³ in effect precluding minorities from accessing the proposed benefits of the Act. A close reading of the Legislature's effort reveals that it was not sufficiently appreciative of the intricate relationship between race and poverty in American society.¹⁴ Operating under the false premise that race issues can be reduced to poverty issues, the policy makers generated yet another device incapable of providing minorities with sufficient relief from the effects of prior and continuing racial discrimination in the housing market.

The New Jersey experience illustrates that in order to address racial segregation, a fair housing strategy must not only be broad in scope, but also aggressive in substance. Legislating economic residential integration

¹¹ See N.J. STAT. ANN. § 52:27D-301 et seq. (West 1986 & Supp. 1994).

¹² *Id.* In their study, Wish and Eisdorfer note that NJFHA required each municipality to:

adopt and implement a housing plan that would address the municipality's fair share of the unmet regional need for housing affordable to low and moderate income households. It also created a state agency, the New Jersey Council on Affordable Housing (COAH), with the power to determine municipal fair share housing obligations Approval by the COAH of the municipal housing plan immunizes the municipality from litigation for a period of six years.

WISH & EISDORFER, *supra* note 4, at 5.

¹³ See generally John Charles Boger, *Toward Ending Racial Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1598-99 (1993). The New Jersey Fair Housing Act did not include express guidelines to ensure true economic and racial diversity would result. Accordingly, virtually all of the low and moderate income housing units resulting from the Act went to white applicants.

¹⁴ See John A. Powell, *Race and Poverty: A New Focus for Legal Services*, CLEARINGHOUSE REV. 299 (Special Issue 1993) (explaining that race issues and poverty issues cannot be explained away by focusing on one type of issue with the assumption that the other will be ameliorated. Powell argues that the refusal to recognize the intersection between race and poverty has limited and undermined efforts to fight racial discrimination and undo barriers facing the urban poor).

insufficiently remedies the severe racial segregation found in the metropolitan communities of the United States.¹⁵ This Essay posits that effective fair housing strategies must include a race component. Such strategies can serve as an initial yet dynamic building block in the integration of urban minorities into America's opportunity structures.¹⁶ A race component is imperative if we are to remedy decades of racial segregation that have isolated minorities from jobs, decent schools, adequate health care, and other opportunities for social and economic advancement.

Building on these realizations, this Essay focuses on the implications of a race-conscious fair share housing strategy for racial minorities. Part I asserts that policy makers should recognize the interrelationship between poverty and race in housing. By bridging the perceived gap between the two, policy makers present themselves with an opportunity to devise an effective and realistic approach to the issues of housing, poverty, racism, and residential segregation. Such an accomplishment would be positive for both minority groups and society as a whole.

Part II explores contemporary definitions of segregation and integration and examines the societal importance of achieving integration. To date, neither segregation nor integration has been wholly successful in redistributing resources to persons of color. If we are to rely on strategies solely designed to bring wealth to the "ghettos" of the 1990s, we must recognize how great the wealth disparity is. Incredibly, sixty percent of all African Americans have a negative net worth.¹⁷ Thus, when we talk about investing enough in our urban inner cores to ameliorate racial inequalities, in essence we are talking about pouring limited resources into a virtually bottomless pit. This point is of particular relevance because although we recognize the connection between segregation

¹⁵ See Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 515 (1995) ("'Fair housing' activities that promote 'equal status' residential integration may assist in deconcentrating poverty by alleviating the stereotypes that lead to residential racial segregation and poverty concentration, but the proximate effect of such 'fair housing' activities will be to promote residential integration of moderate and higher income people and increase concentration among the poor. As Wilson has pointed out, to the extent that fair housing enforcement enables middle-income blacks to move into middle-income white communities and away from lower-income blacks, fair housing enforcement will increase, not decrease, poverty concentration among blacks.").

¹⁶ See generally, Roisman, *supra* note 15. In her essay the author explores the extent of residential racial segregation, its causes, its consequences and corrective policy responses. Roisman envisions policy recommendations that go beyond the formulation of general fair housing laws.

¹⁷ See generally, OLIVER & SHAPIRO, *supra* note 10, at 87.

and concentrated poverty, there is still ambivalence, even among many African Americans, as to whether segregation is a bad thing.¹⁸

Part III analyzes a proposed framework for an alternative fair housing strategy that responds to the failures of New Jersey's doctrine. Reflecting on the *Mount Laurel* decisions, it proposes race cognizant fair housing strategies with the goal of racial and economic integration. Racial residential segregation raises more than just legal questions and more than litigation is necessary to solve this nation's most stubborn problem. Certainly new legal approaches that are not based on a tort model are necessary; but perhaps even more important is a reexamination of what we mean by segregation and integration. Our misunderstanding of these terms limits our imagination and practice with respect to racial issues in this country.

This Essay concludes by presenting the positive effects of a race-specific federal housing strategy not only for minorities, but for society at large. In addition, it calls upon policy makers to step forward and take action to broaden the scope of present day fair housing strategies and to embrace those principles necessary to advance the cause of minorities.

I. RACIAL INEQUALITY CANNOT BE ADDRESSED THROUGH PURELY ECONOMIC INITIATIVES

It is not surprising that low-income persons of color did not benefit from the *Mount Laurel* litigation. Many people believe that we can address the issues of poverty for all poor people through approaches focused solely on achieving economic justice.¹⁹ Despite past failures of the courts and policy makers, many advocates today continue to assert that the proper approach to widening the opportunity base for minorities rests solely on income, and not race.

While these claims may have some intuitive appeal, race-neutral approaches to poverty cannot effectively address the concerns of low-income communities of color. Poverty is racialized. If the goal of fair

¹⁸ The debate about the relative merits of integration and segregation has a long rich history in the black community. In national terms, the pros and cons of each approach were thoughtfully and often sharply debated by W.E.B. DuBois and Booker T. Washington at the turn of the century. Booker T. Washington argued that Blacks should rely upon themselves for self help, whereas DuBois thought the most talented Blacks should learn from Whites, and then bring these attributes back to the Black community. Much of today's concerns over whether to integrate draws on some of the ideas raised by Washington and DuBois without the benefit of the depth of thought that they used to support their conclusions.

¹⁹ See *Mount Laurel II*, 92 N.J. 158, 217, 456 A.2d 390, 419 (1983) (discussing the parameters that define sufficient fulfillment by a municipality of its obligation to provide a realistic opportunity for low and moderate income housing).

housing legislation is to truly eliminate the perpetuation of *all* variations of residential segregation, complete reliance on economic integration is not the cure; nor is complete abstention from addressing the problems of racial injustice and racial residential segregation. Such tactics do nothing more than impose obstacles to the attainment of housing equality among the races. The needs of the minority urban poor population cannot be understood in terms of poverty or race alone, or through the simple combination of traditional understandings of race and poverty.

The gap between the opportunities available to white Americans and black Americans persists today. As a nation, we continue to allocate resources along racial lines.²⁰ While many recognize the continued economic gap between blacks and whites, there is often a failure to recognize that it is more than money that separates the two groups. Even Whites and Blacks who live in relative economic parity experience significant differences in their lives and conditions.²¹

Particularly true for persons with little or no income and wealth, the experience of poverty is very different for Blacks and Whites.²² Although low-income Whites are more numerous than low-income Blacks, poor Whites rarely live in areas of concentrated poverty.²³ In 1990, more than twice as many Whites as Blacks lived in households with incomes below the poverty level, yet almost six times as many low-income Blacks as low-income Whites lived in high-poverty metropolitan census tracts.²⁴ For a low-income African American living in a medium to large sized metropolitan area, there is a nearly one-in-two chance that they will live in a high poverty, racially segregated neighborhood.²⁵ Conversely, about

²⁰ See generally OLIVER & SHAPIRO, *supra* note 10.

²¹ See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1995) (examining and describing the racism suffered by middle and upper income well educated Blacks).

²² More important than income disparities, the disparity in wealth between Whites and Blacks is shocking. When pooled together, Blacks in this country have a net financial worth of zero. See OLIVER & SHAPIRO, *supra* note 10, at 86.

²³ See DAVID T. ELLWOOD, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* 201 (1988).

²⁴ See Paul A. Jargowsky, *Ghetto Poverty Among Blacks in the 1980s*, 13 J. POL'Y ANALYSIS & MGMT. 288, 293 (1994) (finding that although only 3% of the 17 million low-income Whites live in ghetto tracts, 36% of the 8.2 million low-income Blacks live in ghetto tracts). According to Jargowsky and many others, a "ghetto" census tract is a tract within which 40% or more of the residents of a single racial or ethnic group live in households with incomes below the poverty level. See *id.* at 293-94.

²⁵ See *id.* at 295 (finding that "of the 6.6 million poor blacks living in metropolitan areas, nearly 3 million lived in ghettos"). According to John Kasarda, in 1990 in the nation's 100 largest cities, 5.5 million people lived in extreme poverty or ghetto census tracts. This represented a dramatic 43% increase from 1980 and doubled the figure from 1970. Of the 5.5 million ghetto residents, 3.1 million were Blacks, representing 57% of the total ghetto population and 24% of the total Black (regardless of income) population in

one in sixteen low-income Whites living in metropolitan areas also live in concentrated poverty.²⁶ For all income levels, high-poverty census tract residents were 11.8% White and 52.5% Black.²⁷

II. DEFINING AND UNDERSTANDING THE HARMS OF RACIAL RESIDENTIAL SEGREGATION

Where one lives plays a profound role in accessing those factors that better one's life chances and guarantee one's "full participation in the mainstream of American life."²⁸ Residents of racially segregated communities are relegated to a disadvantaged world uncharted by the dominant majority. Low-income African Americans and Latinos find it increasingly difficult to escape these enclaves²⁹ while middle class members of all racial groups and low-income whites continue to leave. This heightens the intensity of the seclusion.³⁰ The minority poor in concentrated poverty³¹, furthering the decay of minority communities and guaranteeing their economic dislocation.³²

Before policy makers can address the necessity of race-inclusive housing strategies they must first recognize residential segregation in general, and concentrated poverty in particular, as a social issue with serious implications.³³ An examination of contemporary implications of these problems illuminates the link between residential isolation and the separation from public services, job opportunities, and adequate education.

the largest 100 cities. See John D. Kasarda, *Inner-City Concentrated Poverty and Neighborhood Distress: 1970 to 1990*, 4 HOUSING POL'Y DEBATE 253, 263 (1993).

²⁶ See Jargowsky, *supra* note 24, at 63.

²⁷ See *id.* at 293.

²⁸ See MASSEY & DENTON, *supra* note 10, at 110.

²⁹ Their movement is also frustrated by a combination of individual and institutional acts such as discrimination, redlining, and zoning. See MASSEY & DENTON, *supra* note 10, at 109-14.

³⁰ See *id.* at 60-83. "Residential segregation is the principal organizational feature of American society that is responsible for the creation of the urban underclass." See *id.* at 9.

³¹ See *id.* at 115-148; see also WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); George C. Galster & W. Mark Keeney, *Race, Residence, Discrimination, and Economic Opportunity: Modeling the Nexus of Urban Racial Phenomena*, URB. AFF. Q. 24 (1), 87-117 (Sept. 1988).

³² See *id.* at 160-162.

³³ See *id.* at 14-15, 139-41, 218-21 (discussing the ramifications of social isolation) and 146 (discussing the burden of political isolation); see also Rose Helper, *Success and Resistance Factors in the Maintenance of Racially Mixed Neighborhoods*, in HOUSING DESEGREGATION AND FEDERAL POL'Y, (J. Goering ed.) (Chapel Hill: Univ. of North Carolina Press 1987).

A. The Specific Harms of Segregation

A formal understanding of the roles of segregation and integration is important for our thinking about eventual movement towards a racial democracy.³⁴ Segregation plays an intricate role in undermining Blacks' access to the social and economic benefits the majority of American society has been afforded.³⁵ Lack of adequate educational opportunities,³⁶ isolation from adequate housing,³⁷ inferior public services, declining housing values in isolated, low income communities of color,³⁸ and isolation from decent job markets³⁹ are merely an introduction to the symptoms of this problem.⁴⁰

Segregation perpetuates an intense divide between urban low-income minorities consigned to live in communities where a critical number of their neighbors are poor and whites and other Americans that live in working and middle class communities. This polarization extends to income and opportunity, separating urban citizenries from the surrounding suburbs and preventing access to wealth accumulation by residents of isolated poor communities of color. These exclusions in turn block access to market participation.

Segregation impedes a potential employer's access to lower income labor pools reducing job opportunities for poor minorities.⁴¹ Segregated

³⁴ Racial segregation has taken the place of formal Jim Crow laws in maintaining white hierarchy and black subordination. See generally, MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION* (1987); HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

³⁵ See generally A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989).

³⁶ See EDWARD W. HILL & HEIDI MARIE ROCK, RACE AND INNER-CITY EDUCATION IN THE METROPOLIS IN BLACK AND WHITE: PLACE POWER, AND POLARIZATION 108 (George C. Galster & Edward W. Hill eds., 1992); john a. powell, *Is Race Integration Essential to Achieving Quality Education for Low-Income Minority Students, in the Short Term? In the Long Term?*, POVERTY & RACE 7 (Sept./Oct. 1996) [hereinafter *Short Term*]; see generally MASSEY & DENTON, *supra* note 10; WILSON, *supra* note 30.

³⁷ See MASSEY & DENTON, *supra* note 10, at 130-32 (providing an example to illustrate the effects of residential isolation and inadequate housing).

³⁸ See *id.* at 131.

³⁹ See *id.* at 160-62.

⁴⁰ For further discussion of the issue of racial residential segregation and its implications see generally HILL & ROCK, *supra* note 35; WILSON, *supra* note 30, at 13, 112-28; *Short Term*, *supra* note 35; Stearns, *supra* note 6; john a. powell, *Race and Democracy in America: Exclusion and Inclusion in Modern Electoral Politics*, COLORS MAG. 24-29 (Fall 1996).

⁴¹ See MASSEY & DENTON, *supra* note 10, at 160-62; Christopher Jencks & Susan E. Mayer, *Residential Segregation, Job Proximity, and Black Job Opportunities*, in INNER-CITY POVERTY IN THE UNITED STATES 187-202, 217-18 (Laurence E. Lynn, Jr. & Michael G.H. McGeary eds., 1990) (questioning whether minorities fare better economically

communities confine Blacks' personal contacts and friendships to those within their immediate surroundings. Confinement to inner-city circles of interaction imposes significant limitations upon one of the more important avenues by which people gain employment: networking.⁴² Employers are rarely inclined to venture into these neighborhoods to recruit potential employees.⁴³

Further, relatively few jobs are obtained through canvassing or responding to employment advertisements.⁴⁴ Friends, relatives, and casual acquaintances are the primary sources through which job information is disseminated. When these sources are equally segregated, the intensity of the isolation and the "clear disadvantage in the competition for employment" become evident.⁴⁵ The outcome of this self-perpetuating spiral of constraint and deprivation is a "dependent black community within which work experience is lacking and linkages to legitimate employment are weak."⁴⁶

B. Integration vs. Assimilation

The debate on the value of integration has not focused on integration and segregation, but rather on assimilation and segregation. Consequently, attacks ostensibly on integration have largely been attacks on assimilation instead. Both segregation and assimilation are problematic. They both work under the implicit assumptions of dominance, racial hi-

when they live in close proximity and have ready access to metropolitan labor pools). Discussing black employment opportunities in the United States, Andrew Hacker writes:

Black men, women, and children were brought to this country for a singular purpose: to work. . . . In the years following emancipation, former slaves found that their services would not necessarily be needed. . . . The capitalist system has been frank in admitting that it cannot always create jobs for everyone who wants to work. This economic reality has certainly been a pervasive fact of black life. For as long as records have been kept, in good times and bad, white America has ensured that the unemployment imposed on blacks will be approximately double that experienced by whites. Stated very simply, if you are black in America, you will find it at least twice as hard to find or keep a job.

ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 107-08 (1995).

⁴² See MASSEY & DENTON, *supra* note 10, at 160-62; BLACKS IN RURAL AMERICA 7-8, 119-35 (James B. Stewart & Joyce E. Allen-Smith eds., 1995); Jencks & Mayer, *supra* note 40, at 189-202, 217-18; see generally WILSON, *supra* note 30, at 121, 122-24, 147-49.

⁴³ See MASSEY & DENTON, *supra* note 10, at 160-62.

⁴⁴ See *id.*

⁴⁵ See *id.* at 162.

⁴⁶ *Id.*

erarchy, and a deficient racial other.⁴⁷ True integration envisions a more inclusive society premised on social and political egalitarianism. Accordingly, merely rhapsodizing about the theoretical value of a racially integrative society will not do justice to its transformative potential. Rather, we must manipulate the potential of theory into a reality consistent with the virtues of integration: integration is respectful of the value of difference.⁴⁸

While language cognizant of the need for integration is a start, it is not enough. The *Mount Laurel* doctrine is illustrative of this fact. The race component still remains the pivotal point upon which any legislative commitment to promoting racial residential integration must be centered. Policy makers cannot escape this fact. Integration must be understood as integration into opportunity structures and the dismantling of racial hierarchy.

III. ALTERNATIVE FAIR HOUSING STRATEGIES

The housing options of low-income communities of color can be improved through strong legal remedies. Promising foundations for a more comprehensive housing initiative already exist in many different shapes. Although badly enforced and structurally problematic, the federal Fair Housing Act was this nation's first real recognition that the crisis of the inner cities required not only the elimination of discrimination but also some degree of racially-integrated housing.⁴⁹ Similarly, federal law already permits many pro-integrative measures, particularly those enacted in response to historical racism.⁵⁰

⁴⁷ See generally THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE: RACIAL OPPRESSION AND SOCIAL CONTROL* (1994); *Short Term*, *supra* note 35; JOHN A. POWELL, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 *HAMLIN J. PUB. L. & POL'Y* 337, 353-54.

⁴⁸ See generally HILL & ROCK, *supra* note 35; MASSEY & DENTON, *supra* note 10; *Short Term*, *supra* note 35.

⁴⁹ Senator Mondale, the chief sponsor of the Fair Housing Act, stated that the proposed law was intended to replace ghettos with "truly integrated and balanced living patterns." 114 CONG. REC. 3422 (1968) (quoted in *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973). See also 114 CONG. REC. 2270-2284 and 3421-3426 (1968) (discussing the legislative intent of the Fair Housing Act).

⁵⁰ Federal desegregation jurisprudence is limited, however, by its narrow understanding of causation, which requires the plaintiff to establish a conscious, racially discriminatory intent before awarding a remedy. See Charles Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 321 (1987) (critiquing the tendency of federal law to dichotomize discrimination claims into two exclusive categories—disparate impact and invidious discrimination). In the housing context, as elsewhere, the federal courts require a demonstration of some past discriminatory act in order to obtain relief. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976) (approving a remedy where the Department of Housing and Urban Development

Housing options in state courts are even greater. With *Mount Laurel*, state constitutional law has already carved out a direction for expanding housing options for low-income communities of color. Other states have also taken steps to reduce barriers that currently exist for inner city residents seeking housing in the suburbs. In addition, other state constitutional measures have *Mount Laurel*-style affirmative requirements on the part of government.

Yet these initiatives have not eliminated racial segregation even though it has been nearly thirty years since the enactment of the original Fair Housing Act.⁵¹ Despite this legislation and other housing efforts, we have yet to give true meaning to the notion of racial residential equality. An evaluation of these past efforts reveals a consistent retreat from the overriding objective of the Act: to avert the potential for destructive city-suburb polarization rooted in *both* racial and economic inequality.

It is telling that while these attempts at achieving the proclaimed "fair share" are committed to residential integration, all have failed, or more likely, refused to understand that the issue of racial segregation cannot be explained or remedied by exploring the issue of poverty alone. As noted in Part I, were policy makers to recognize the intersection between race and poverty, there would be a greater likelihood that they would more adequately address those obstacles facing the minority poor.

The continued failure of policy makers to create aggressive fair housing strategies conscious of the importance of race will prevent the transformation of racially isolated communities into racially integrated, stable metropolitan areas.⁵² Proper injection of a racial component into a fair housing strategy would foster a stable integrative process premised on the flow of racially diverse homeseekers demanding and eventually occupying units in formerly racially homogeneous neighborhoods; thus promoting racially diverse communities.⁵³ Examination of policy tools proffered as alternatives to current fair housing strategies reinforces this claim.

was found to have aided and abetted racial segregation in the Chicago Housing Authority).

⁵¹ The federal Fair Housing Act was enacted in 1968. See 42 U.S.C. §§ 3601-3631 (1994).

⁵² See generally HILL & ROCK, *supra* note 35.

⁵³ See *id.* at 271.

A. *Building from Mount Laurel*⁵⁴

Land use regulation is governed by state legislatures and state constitutions. However, these responsibilities are delegated without oversight to municipal officials whose loyalties lie solely with their neighborhood constituents. Accordingly, many state legislatures have abdicated their responsibility for the emergence of a land use system that is arbitrarily segregated by race. *Mount Laurel* is only one in a series of cases that address this phenomenon and the obligations imposed by general welfare clauses.

The term "general welfare" is broad, elastic, and extremely ambiguous. Courts dealing with land use regulation have invariably manipulated its meaning to fit their immediate concerns. As one scholar aptly noted, the meanings of general welfare tends to disappear as social conditions change and as knowledge about the relationship between government regulations and human well-being grow.⁵⁵ How then do we decipher its true meaning?

In *Mount Laurel I*, the New Jersey Supreme Court understood the general welfare clause to recognize the fundamental importance of housing.⁵⁶ The court held that to affirmatively promote the general welfare, we must go beyond the boundaries of a single municipality and promote the welfare of people living in the same region.⁵⁷ The court concluded that *developing municipalities* must fulfill the general welfare obligation inherent in the equal protection and substantive due process guarantees of the New Jersey Constitution⁵⁸ by providing affirmatively, through land-

⁵⁴ Because of this article's placement within a *Mount Laurel* symposium, the following overview of the *Mount Laurel* trilogy is terse. For a more thorough presentment of the *Mount Laurel* cases and the New Jersey Fair Housing Act, see, e.g., Cynthia N. McKee, *Resurrecting Mount Laurel: Using Title VIII Litigation to Achieve the Ultimate Mount Laurel Goal of Integration*, 27 SETON HALL L. REV. 1338 (1997).

⁵⁵ William D. McElyea, *Playing the Numbers: Local Government Authority to Apply Use Quotas in Neighborhood Commercial Districts*, 14 ECOLOGY L.Q. 325, 351 (1987).

⁵⁶ See generally *Mount Laurel I*, 67 N.J. 151, 336 A.2d 724 (1975).

⁵⁷ See *id.* at 174-75, 336 A.2d at 725, 727-28 (citing N.J. CONST. art. I para. 1; *Kunzler v. Hoffman*, 48 N.J. 277, 225 A.2d 321 (1966); *Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough*, 42 N.J. 556, 202 A.2d 161 (1964)). For a discussion of regionalism, see Note, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1635-59 (1978).

⁵⁸ The New Jersey Supreme Court interpreted the Equal Protection Clause of the New Jersey Constitution as embodying a general welfare obligation. See *Mount Laurel I*, 67 N.J. at 175-76, 336 A.2d at 725. The Equal Protection Clause, N.J. CONST. art. I para. 1, reads as follows: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

use policies and regulations, a realistic opportunity for meeting their fair share of the regional need for low- and moderate-income housing.⁵⁹

In *Mount Laurel II*,⁶⁰ the New Jersey Supreme Court affirmed and broadened the theory it adopted in *Mount Laurel I*. The court ruled that the *Mount Laurel* doctrine⁶¹ applied to *all municipalities*, not just to developing municipalities or to parties to the lawsuit.⁶² Because zoning is part of the police power and thus must be exercised for the general welfare, the court reasoned that, *in the absence of legislative action*, the judiciary must take it upon itself to uphold this constitutional obligation.⁶³ Although now left to the legislature,⁶⁴ the *Mount Laurel* doctrine provides a potential framework for addressing racial segregation.⁶⁵

⁵⁹ *Mount Laurel I*, 67 N.J. 151, 174, 179-80, 336 A.2d 724, 727-28 (1975).

⁶⁰ *Mount Laurel II*, 92 N.J. 158, 456 A.2d 390 (1983).

⁶¹ See *supra* notes 5-6 and accompanying text.

⁶² See *Mount Laurel II*, 92 N.J. at 243-44, 456 A.2d. at 433. It should be noted that the only limitation to this ruling is that the housing obligation does not extend to areas where the State Development Guide Plan (SDGP) discourages growth (for example, open spaces, rural areas, prime farmland, conservation areas, limited growth areas, specific woodland areas, and certain coastal zone areas). See *id.* at 215, 456 A.2d at 418. The SDGP represents the determination of the State, through the executive and legislative branches, on how best to plan its future. See *id.*

⁶³ See *id.* at 490.

⁶⁴ Arguably, *Mount Laurel III* allows for a watered down version of earlier *Mount Laurel* requirements. This does not limit the possible application of the *Mount Laurel* doctrine, however. The ratification of the New Jersey Fair Housing Act by *Mount Laurel III* only stands as one possibility with a wide range of *Mount Laurel* initiatives.

⁶⁵ New Jersey serves as a model for other states. At least two state courts outside of New Jersey explicitly adopted its approach when upholding the legality of Fair Share initiatives. See *Kaufman v. City of Danbury Zoning Comm'n*, 1993 WL 316792, at *9 (Conn. Super. Ct. 1993), *aff'd*, 653 A.2d 798 (Conn. 1995) ("There can be little doubt that the legislature has, through these amendments to section 8-2, introduced into Connecticut a version of the *Mount Laurel* Doctrine."); *Britton v. Town of Chester*, 595 A.2d 492, 495-96 (N.H. 1991) (affirming the Superior Court's proclamation that the "'Mount Laurel' doctrine is applicable in the State of New Hampshire."). The dissent in a Minnesota Supreme Court opinion also embraced the *Mount Laurel* doctrine. See *Almquist v. Town of Marshan*, 245 N.W.2d 819, 836 (Minn. 1976) (Kelly, J. dissenting).

In addition, legislation in California and New Hampshire provide examples of Fair Share-like measures adopted in other states. See CAL. GOV'T CODE § 65580 (West 1983 & Supp. 1987):

Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community. . . . The Legislature recognizes that in carrying out this responsibility, *each local government has the responsibility to . . . cooperate with other local governments and the state in addressing regional housing needs.*

Id. (emphasis added); N.H. REV. STAT. ANN. § 674:2(III) (1986 & Supp. 1994) (The Master Plan that guides the development of each municipality shall include "[a] housing section which analyzes existing housing resources and addresses *current and future*

Mount Laurel certainly represents the most aggressive inclusionary housing law to date, but it is not alone in its construction of state constitutional law. Analytically speaking, *Mount Laurel* is very similar to education adequacy suits.⁶⁶ In contrast to most constitutional provisions that set out limits to governmental action, *Mount Laurel*, like adequacy suits, establishes affirmative duties on the part of the state and other governmental agents to act.

Even more importantly, both *Mount Laurel* and adequacy suits require inter-district remedies. In contrast to federal desegregation lawsuits, for instance, *Mount Laurel* and adequacy suits go beyond municipal boundaries to remedy inequalities.⁶⁷ Also, in contrast to federal provisions that usually review violations on a case-by-case basis,⁶⁸ *Mount Laurel* and adequacy suits provide system-wide approaches.

Notably, the absence of a fixed definition makes "adequacy,"⁶⁹ like "general welfare," a mutable term. Because of its broad definition adequacy speaks to equality and a duty on the part of the state to do what it can to provide the basic needs for educational opportunity. Similarly, in *Mount Laurel*, the general welfare clause imposed a duty to provide the basic needs for housing opportunity.

Implicit in this basic need for housing opportunity ought to be the requirement of racial integration. The zoning power granted to municipalities under the police power cannot include the power to segregate. But this is what many zoning provisions have done. Legally, the state cannot delegate constitutional responsibilities to municipalities without remaining accountable to whether these responsibilities are met.

An improved *Mount Laurel* approach would go beyond requirements of low-income housing and would mandate pro-integrative measures. In addition, such an approach would create housing affordable to very low-

housing needs of residents of all levels of income of the municipality and of the region in which it is located. . . .") (emphasis added).

⁶⁶ For an overview of education adequacy suits, see <<http://www.umn.edu/irp/adequacy.html>>.

⁶⁷ See generally *Mount Laurel I*; *Mount Laurel II*.

⁶⁸ See generally Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHIKENT L. REV. 795 (1991) (discussing the inability of federal legislation to adequately address the systemic nature of segregation); Boger, *supra* note 13, at 1581 (discussing the deficiency of a case-by-case approach).

⁶⁹ State courts have interpreted all sorts of language to establish a set of substantive norms constitutive of educational adequacy. See, e.g., Opinion of the Justices, 624 So.2d 107, 155 (Ala. 1993) (affirming and appending lower court order holding standards of adequacy dictated by Education Clause of Alabama Constitution, which states "the Legislature shall maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years").

income people as well as those people fitting the rather modest definitions of moderate and low income used in New Jersey.

*B. Attacking Racial Residential Segregation Through the
"National Fair Share Act"*⁷⁰

Carefully examining the crucial deficiencies in design and application of New Jersey's Fair Housing Act, John Charles Boger's National Fair Share Act⁷¹ places responsibility on local municipalities to affirmatively act to end racial segregation. The National Fair Share Act's approach links the necessity for express racial goals with an obligation to affirmatively market housing units to low-income communities of color.⁷² Although essential to the achievement of the task of racial residential integration, as discussed in Part I, racial goals alone are not enough. Scholars who have written on residential segregation agree: low-income community residents, who are disproportionately minorities, will not benefit significantly from housing strategies that fail to incorporate explicit economic goals in conjunction with express racial goals.⁷³

At this writing the constitutional implications of a national race-based housing strategy have not been explored by the Supreme Court.⁷⁴ It can be argued, however, that the National Fair Share Act complies with strict scrutiny. For decades policy makers have presented America with anemic efforts to combat the social ill of racial residential segregation under the rubric of federal housing policies. The National Fair Share Act presents policy makers with a unique tool to overcome the metropolitan racial divide. It is a vehicle "that would create new market incentives to support integrative housing choices and provide market disincentives to discourage segregative choices."⁷⁵

These affirmative measures to improve the prospects of racial integration and avert acts of racial discrimination are compelling government interests. Enormous social and economic burdens on all citizens, re-

⁷⁰ See generally Boger, *supra* note 13.

⁷¹ See *id.* at 1574, 1602-16.

⁷² See *id.* at 1612-15.

⁷³ See WILSON, *supra* note 30, at 109-24.

⁷⁴ See Boger, *supra* note 13, at 1612 n.155 (citing a number of scholars who emphasize that "floor" quotas, and affirmative marketing in low-income communities of color are constitutionally permissible, and make reference to the fact that the Supreme Court has yet to decide this issue and that lower courts are divided on their constitutionality). Analysis under the Equal Protection Clause of the Fourteenth Amendment is analogous with that used under the due process clauses. Although the Equal Protection Clause only applies to the states, the Supreme Court redefined the Due Process Clause of the Fifth Amendment to act as an equal protection guarantee applicable to federal government actions.

⁷⁵ *Id.* at 1573.

ardless of race, are the invariable byproducts of a racially segregated society. Integration is necessary, not only for the benefit of minority groups, but for society at large. The overwhelming result of residential integration is: access to job markets, decent public services, adequate educational facilities. Integration as a compelling state interest extends beyond legal arguments and constitutional commands. Integration transforms the parameters of opportunity for America's urban dispossessed and fully embodies the foundation of this country: democracy. Integration remains a compelling governmental interest when we give careful consideration to a not so distant future that continues to force racial minorities outside of the public sphere to suffer the imposition of a marginalized identity and the trials of racial hierarchy.