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Antisubordination Planning

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Abstract:

This article proposes strengthening equity planning by incorporating an antisubordination perspective. An antisubordination approach holds that planning must directly address durable categories of social inequality. Practically, an antisubordination approach requires rigorous evaluation of the impact of proposed policies on disadvantaged groups and the adoption of policies that most ameliorate existing disparities. Recent Supreme Court decisions regarding the Fair Housing Act provide support for an antisubordination approach by recognizing the significance of implicit bias, upholding the ability to bring claims on the basis of a policy's disparate impact, and confirming that cities can file suit to address shared harms.

Keywords: antidiscrimination; antisubordination; equity planning; planning theory; racial equity.

Introduction³

For the past half-century, planners concerned with racial and economic inequality have looked to the seminal works of Paul Davidoff (1965) on advocacy planning and Norman Krumholz (1982) on equity planning as guides. Yet our built environment continues to be shaped by a history of discriminatory laws and plans that contribute to wide geographical disparities in access to opportunity (e.g. Chetty et al. 2014; Rothstein 2017; Thomas and Ritzdorf 1997). Further, it is challenging to find the leverage to prioritize justice in a policy landscape

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characterized by a push for ever more entrepreneurial cities (Fainstein 2010; Marcuse et al. 2009). In short, “the promise of equity planning remains unrealized” (Zapata and Bates 2015, 245).

Taking a page from Davidoff’s (1965) *Advocacy and Pluralism in Planning*, which likened planners to legal advocates, this commentary suggests that the contemporary discussion of equity planning could be enriched by drawing on contemporary legal theory, in particular critical race theory and an antiradicalization perspective on equal protection and anti-discrimination (e.g. Crenshaw 1995; Delgado and Stefancic 2000). As discussed below, the recent Supreme Court decisions in *Texas Department of Housing and Community Affairs v. Inclusive Communities* (2015) and *Bank of America v. City of Miami* (2017) provide new leverage for planners seeking to effect more racially and economically just policies through an antiradicalization approach.

The continuing relevance of equity planning

Advocacy and equity approaches to planning emphasize that the problems of poverty have less to do with individual characteristics than with shared contexts, such as patterns of neighborhood disinvestment, and limitations on spatial and social mobility. Equity planners set forth a simple, yet elusive, goal: “Equity requires that locally responsible government institutions give priority attention to the goal of promoting a wider range of choices for those ... residents who have few, if any, choices” (Krumholz, Cogger, and Linner 1975). The challenge comes in translating these goals into equitable planning processes and outcomes, especially at a large scale (Forester 1988; Fainstein 2010).

In reflecting on the practice of equity planning, Krumholz (1982) emphasized that “equity planning is a way of addressing poverty and racial segregation” but expressed frustration

that “as a profession, planning has been too timid” (173; see also Fainstein 2010). He urged planners to bring to the political arena not just rhetoric, but “hard, relevant information” (173).

The timidity that frustrated Krumholz has persisted in planning practice since his landmark article, even as inequalities in income, in health, and in other areas of life remain spatial phenomena. Many basic institutions in the United States arose out of a context of genocide, slavery, denial of basic liberties, and persistent white supremacist terrorism. Metropolitan areas in the United States have been created with racial and economic segregation in mind—the separation of land uses, the drawing of municipal boundaries, the siting of transportation infrastructure, urban renewal, and the functioning of housing markets all too often have been used not just to encourage urban growth but also to avoid, in the now infamous words of the Federal Housing Administration, adverse influences that undermine “desirable neighborhood character” such as the “ingress of undesirable racial or nationality groups...” (1934: 309, 311; see also Jackson 1985; Sugrue 1996; Self 2005; Satter 2009; Glotzer 2015). The segregation by race and by class that these private actions and public policies encoded into our built environment continues to hinder socioeconomic mobility and to perpetuate disparities in access to opportunity (Chetty et al. 2014; De la Roca, Ellen, and Steil 2018). Addressing this long-standing entangling of social inequality and spatial inequality requires not timidity but bold, principled action.

One challenge for planners currently seeking to rely on equity planning as a guide for action, however, is that understandings of equity vary by group position. As Brand (2015) demonstrates, residents who are differently situated by neighborhood, race, and class define equity in dramatically different ways. Relatedly, Sarmiento and Sims (2015) point out that, in a context of unequal political and economic power, even urban development projects that seek to

engage community based organizations and create affordable housing often fail to actually produce equitable outcomes. When planners make decisions about the allocation of resources, they struggle to ensure both that there is a shared vision driving the decision and that equity will be at the forefront of that vision (Zapata and Bates 2015). Incorporating an antisubordination approach, I argue, can bring equity planning new clarity and leverage.

Antisubordination planning

Anticlassification and antisubordination perspectives

In introducing advocacy planning, Paul Davidoff (1965) pointed to the Supreme Court’s equal protection decisions as “open[ing] the way for the vast changes still required” to create “an enlightened and just democracy” (331). He suggested that planners should consider themselves to be “advocate[s] in the model of lawyer as legal advocate” (1965, 333).

At the time that Davidoff was writing, the Supreme Court’s understanding of equity was itself in flux, however. The Court at that moment was pulled between two understandings of the Fourteenth Amendment’s Equal Protection Clause: one rooted in an anticlassification theory and one rooted in an antisubordination theory (Fiss 1976).

An anticlassification theory of equal protection proscribes classifications on the basis of arbitrary characteristics and looks to individual intent to prevent discriminatory actions that are based on racial or other prohibited animus. From the anticlassification perspective, for a law to be invalidated, a racially discriminatory purpose must be proven—disproportionate impact alone is not enough (see *Washington v. Davis*, 426 U.S. 229 (1976)). In other words, policies that have a disproportionate adverse impact on a disadvantaged group are permissible so long as those policies make no explicit distinctions on the basis of sex, race, national origin, or other protected characteristics and so long as a discriminatory intent in enacting the policy cannot be proven (see

Village of Arlington Heights v. Metropolitan Housing Development Corporation (429 U.S. 252 (1977)).⁴ Policies or practices that include classifications on the basis of sex, race, or other protected characteristics or that are explicitly intended to benefit those disadvantaged groups are prohibited, from an anticlassification perspective (see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).⁵

An antistatutory theory of equal protection, by contrast, looks to the shared effects of an action in order to address persistent group disparities in a social system in which some are systematically disadvantaged (see *Shelley v. Kraemer*, 334 US 1 (1948)). From the antistatutory perspective, the Equal Protection Clause should be understood to prohibit laws or practices that aggravate or perpetuate the subordinate position of a disadvantaged group, defined as a (a) social group, (b) that has been in position of historical subordination, (c) and whose political power is circumscribed (Fiss 1976, 154-157). In other words, policies or

⁴ In the urban planning context, an example of such a policy might be the type of exclusionary land use law challenged in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (429 U.S. 252 (1977)). In *Arlington Heights*, a non-profit affordable housing developer contracted to buy land in the Village of Arlington Heights in order to build racially integrated low- and moderate-income townhomes with support from the Department of Housing and Urban Development's Section 236 mortgage subsidy program. At that time, Arlington Heights was 99 percent white and there was no land zoned for multifamily units that met the requirements of the Section 236 program. After public debate regarding the proposal and the fact that the housing would be racially integrated, the Village refused to rezone it to allow the development to proceed. The Court of Appeals found that the "ultimate effect" of the rezoning denial was racially discriminatory, but the Supreme Court allowed the exclusionary zoning law to stand, holding that under the Equal Protection Clause of the Constitution "official action will not be held unconstitutional solely because it results in a racially disproportionate impact" *Arlington Heights*, 429 U.S. at 264-65.

⁵ For instance, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a contractor challenged the City of Richmond's plan to support minority business enterprises by requiring prime contractors to whom the city awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to a business with a majority owner who is African American, Latino, Asian American, or Native American. The Richmond City Council adopted the plan to be remedial in nature and to promote wider participation by minority business enterprises in the construction of public projects, given that 50 percent of Richmond residents were African American but less than one percent of construction contracts in the previous five years had been awarded to minority business enterprises. The Supreme Court struck down the plan, holding that the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," that the City of Richmond had failed to demonstrate a compelling governmental interest justifying the plan, that the plan was not narrowly tailored to remedy any claimed effects of prior discrimination, and therefore the plan was unconstitutional pursuant to the Equal Protection Clause. *Croson*, 488 U.S. at 494.

practices that have a disproportionate adverse impact on a disadvantaged group should be prohibited, regardless of intent or classification (see *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015)).⁶ Policies or practices that are intended to address structural inequalities and that disproportionately benefit historically disadvantaged groups should be encouraged.

The fundamental premise of an antistatification (sometimes also called an antistatification) approach is that equal citizenship cannot be fulfilled in a context of pervasive social stratification and that true equal protection of the laws requires the reformation of institutions or practices that reproduce the subordinate social status of historically oppressed groups (Balkin and Siegel 2003; see also Young 1990).⁷ In the United States, it is essential to take into account the historically specific circumstances that continue to inscribe durable, categorical inequalities along ascriptive, arbitrary lines that have been given social significance, such as sex, gender, sexuality, race, or ethnicity (Tilly 1998).

⁶ The examples above suggest that Supreme Court equal protection jurisprudence after the Warren Court has generally been more consistent with an antistatification approach than with an antistatification one. In interpreting the Fair Housing Act as compared to the Equal Protection Clause, however, federal court decisions have been more consistent with an antistatification approach. For example, in *United States v. City of Black Jack*, 508 F.2d 1179, 1182 (8th Cir. 1974), the Eighth Circuit Court of Appeals considered a challenge to an exclusionary zoning law similar to the one that the Supreme Court refused to strike down in *Arlington Heights*. In 1969, the Inter Religious Center for Urban Affairs began planning the development of 108 two-story townhouses for persons of low and moderate income. The Center selected a site in an unincorporated part of St. Louis County that was designated in the County plan for multi-family construction and that was 98 percent white. The expected residents of the planned homes were predominantly African American. The following year, the white residents of the area incorporated into the City of Black Jack and promptly passed a zoning ordinance prohibiting the construction of any multi-family dwellings. The court held that “[e]ffect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because whatever our law was once, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme” (*Black Jack*, 508 F.2d at 1185 (internal quotations and citations omitted)). The court further held that since the zoning ordinance was shown to have a racially discriminatory effect it could not be justified by the City of Black Jack’s claimed interests in road and traffic control, prevention of school overcrowding, and prevention of devaluation of adjacent single-family homes.

⁷ The antistatification perspective has been explored by numerous legal scholars, especially those identified with the field of critical race theory and feminist legal theory, but has been largely overlooked by urban planning scholars. See, among others, MacKinnon 1979; Bell 1987; Lawrence 1987; Matsuda 1991; Sturm 2001; Balkin and Siegel 2003; Goldberg 2004; Bagenstos 2006; Barnes and Chemerinsky 2011).

For example, political philosophers such as Susan Moller Okin (1989) have described in detail the pervasiveness of patriarchy as a political and social system concealed through the supposedly “natural” relegation of women to apolitical domestic spaces. While laws upholding male dominance have been eroded, tradition, socialization, and material disparities, including the planning of our cities and towns, continue to reinforce injustice and material inequality (Hayden 1983; Wright 1981).

The political philosopher Charles Mills (2003), has similarly described the United States as a context in which “racialized and vastly disproportionate concentrations of wealth, cultural hegemony, and bureaucratic control are...reinforced by white political majoritarianism” (179). The enduring political, economic, and social structures of the United States, including its built environment, continue to reflect a history of white domination and constitute a racialized political and social system (Crenshaw 1988; Bonilla-Silva 1997; Oliver and Shapiro 2006).

Justice in planning requires, among other commitments, a commitment to creating a society in which one’s life chances are independent of ascriptive characteristics (Steil and Delgado 2018). The realization of a society in which no one is unfairly advantaged or disadvantaged because of arbitrary characteristics such as sex, gender, sexuality, race, or ethnicity must begin from an explicit recognition that these categories of inequality continue to serve as systematic, asymmetrical, and enduring structures of power and domination, not solely the basis for individualized prejudices. The dismantling of these asymmetrical structures of power requires more than just an anticlassification approach to planning—it requires an antisubordination approach. Yet, the decision making processes behind planning decisions usually do not assess whether policies have an adverse impact on a group on the basis of income, race, ethnicity, sex, or gender and rely heavily on an analysis of policies’ overall fiscal impact.

To the extent that planning institutions today do evaluate the civil rights impact of decisions, they generally follow an anticlassification approach in which policies should not be based on racial or other prohibited animus, but approve of rezonings, economic development policies, or other planning actions that benefit the city overall, even if they have an adverse impact on a historically disadvantaged group.

An antisubordination approach to planning

What would constitute an antisubordination approach to planning? First, it would foreground the analysis of durable, socially constructed categories of inequality, such as sex, gender, sexuality, race, ethnicity, or disability in evaluating planning actions. Second, it would recognize the significance of institutional structure, conscious discrimination, and unconscious bias in shaping planning policies and actions. Third, it would prioritize addressing these categorical inequalities by prohibiting actions that exacerbate existing disparities and favoring those policies that ameliorate them.

The first step towards antisubordination planning is to recognize the significance that ascriptive categories of inequality continue to wield in shaping life chances, in addition to continuing disparities on the basis of class. The persistent, and often unconscious, reliance on categorical boundaries perpetuates distinctions between insiders and outsiders, facilitates opportunity hoarding by privileged groups, and ultimately comes to serve as a justification for inequality across categorical lines (DuBois 1903; Drake and Cayton 2015 (1945); Harvey 1974; Tilly 1998).⁸ The goal of antisubordination planning goes beyond preventing discrimination,

⁸ The sociologist Charles Tilly (1998, 74) identifies opportunity hoarding as a central mechanism in the reproduction of inequality and defines it as situations in which “members of a categorically bounded network acquire access to a resource that is valuable, renewable, [and] subject to a monopoly” and exclude others from access to those resources or the benefits arising from them. In the planning context, one salient form of opportunity hoarding is residential segregation through municipal fragmentation or exclusionary zoning, as seen recently for instance in the effort by wealthy individuals in Gardendale, Alabama to secede from the Jefferson County in order to exclude black children from their school system (see *Stout v. Jefferson County Board of Education*, No. 17-12338, 2018 WL 827855, at *19

supporting diversity, or fostering tolerance. Instead, it seeks to advance material and social equality across those socially constructed categories that have long been used to perpetuate exploitation. Focusing on subordination brings attention to the agonistic relations that structure democracy and questions the legitimacy of customs and policies that rationalize the social position of established groups (Siegel 2004; Mouffe 2013).⁹ Proposing what seems to be “differential solicitude” for some groups runs contrary to a common notion of equality as treating each person the same. It rests instead on the idea that equal citizenship cannot be truly realized in a context of pervasive social stratification and that justice requires not simply formal inclusion or identical treatment but “attending to the social relations that differently position people and condition their experiences [and] opportunities” (Young 2000, 83). An antisubordination approach thus foregrounds discussion of power and focuses attention on those disparities plausibly connected to historic and continuing exploitation.

Second, an antisubordination approach focuses attention on the role that institutionalized structures and that bias, both conscious and unconscious, have played and continue to play in planning practice. The defense to decades of injurious planning policies, such as urban renewal, is often one of innocent intent—that the policy was meant with the best of intentions even if its unexpected consequences were regrettable (although the historical record suggests that intentions

(11th Cir. Feb. 13, 2018)). David Harvey (1974) makes a related argument about the role that finance capital plays in the urbanization process, facilitating geographically distinct housing sub-markets to realize class-monopoly rent. Others earlier made similar points about the creation of durable social inequalities and the opportunity hoarding and exploitation that can arise from geographically uneven development based on those inequalities, from W.E.B. DuBois (1903) in *Souls of Black Folk* to St. Clair Drake and Horace Cayton (2015(1945): 127-128) in *Black Metropolis: A Study of Negro Life in a Northern City*, where they describe racial residential segregation as “fundamentally a reaction against the specter of social equality” combined with a white “economic interest that results in the concentration of Negroes within the Black Belt” of Chicago.

⁹ Instead of concealing conflict in the name of the public interest, an antisubordination approach recognizes the ubiquity of power and conflict in planning practice. Drawing on Chantal Mouffe and Ernesto Laclau (1985), I would suggest that planning can be strengthened by acknowledging both the ineradicability and the importance of agonistic conflict—principled disagreement rooted in respect for the other party. Recognizing the mobilizing power of these passions, a central challenge in planning theory and practice is to create spaces to channel these contests between ideas into democratic fora (Honig 1993).

were often not so benign (see for instance Sugrue 1996; Self 2005)). Some of the earliest zoning ordinances in the United States were explicitly driven by bias and were consciously designed to keep African-American households out of white neighborhoods (Silver 1997; Steil 2011). As the Baltimore Mayor said in support of that city's 1910 racial zoning ordinance, its "intention is to protect our people in the possession of their property" from "colored famil[ies] . . . mov[ing] into a neighborhood" (New York Times 1910, 2). Conscious bias has driven many planning actions from these early zoning ordinances to today, such as continuing efforts by white homeowners to secede from diverse county school systems or city jurisdictions (e.g. *Stout v. Jefferson County Board of Education*, 882 F.3d 988, 1009 (11th Cir. 2018)). But a claim of innocent intent (accurate or not) should be no defense to planning policies that exacerbate existing disparities in access to opportunity. Research in social psychology has probed the cognitive processes that make socially constructed categorizations, such as race or gender, socially and materially meaningful (e.g. Greenwald and Banaji 1995). Measures of the strength of associations between groups and stereotypes consistently finds widespread negative attitudes towards traditionally disadvantaged or stigmatized groups, even among those who outwardly express positive attitudes (Lane, Kang, and Banaji 2007). These implicit biases predict actions in the real world and are particularly powerful exactly because people are unaware of them—implicit biases exert influence despite conscious attitudes or intentions (Kang and Lane 2010). While attention has been focused on the significance and effects of implicit attitudes in a range of contexts, from courtrooms (Kang et al. 2011) to classrooms (Steele 1997), there has been little discussion of the effects of unconscious bias in the practice of planning.

Third, to actually address inequality, an antisubordination approach would 1) require rigorous evaluation of the effect of a potential policy on historically disadvantaged groups, 2)

prohibit planning actions that exacerbate disparities in access to opportunity, and 3) favor those policies that reduce disparities. Instead of a calculus based primarily on a cost benefit evaluation, an antisubordination approach would begin by examining the effect of a policy on disparities along socially constructed categories of inequality, such as sex disparities in pay or racial disparities in access to high-performing schools, and carefully examine policy alternatives that accomplish the same legitimate policy ends but do more to reduce inequality. Indeed, traditional cost benefit approaches fail to account for all that is lost as a result of practices that widen disparities or omit an antisubordination approach.¹⁰ Antisubordination then requires selecting the policy that contributes most to reducing inequality while also accomplishing the other legitimate, non-discriminatory policy goals.

The Federal Transit Administration (2012) guidance to grantees regarding compliance with Title VI of the Civil Rights Act and the Executive Order 12898 related to Environmental Justice provides an example of how planning actions can be more systematically evaluated for disparate impacts on the basis of race and class. Pursuant to the Federal Transit Administration's 2012 guidance, all transit providers must develop performance standards to ensure compliance

¹⁰ For instance, Charles Lawrence (1992) compellingly describes the importance of an antisubordination perspective in the context of speech and the First Amendment's application cross burning in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992). Lawrence writes that "When hate speech is employed with the purpose and effect of maintaining established systems of caste and subordination, it violates . . . [the core value of] . . . full and equal citizenship expressed in the Fourteenth Amendment's Equal Protection Clause" and that by silencing its victims, hate speech threatens the value of free expression itself (Lawrence 1992, 792). Lawrence (1992, 794) reminds readers that in *Brown v. Board of Education*, the Supreme Court found de jure racial segregation of schools unconstitutional "not because the physical separation of black and white children is bad or because resources were distributed unequally among black and white schools" but "because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children." Lawrence (1992, 802-803) argues that existing First Amendment doctrine "ignores the ways in which patriarchy silences women, and racism silences people of color" and as a result we as a society lose the insight and beauty of those silenced voices. Instead, Lawrence (1992, 804) suggests that courts "must take into account the historical reality that some members of our community are less powerful than others and that those persons continue to be systematically silenced by those who are more powerful."

(including evaluation methods to measure disparate impacts) and large transit agencies must conduct an equity analysis each time they implement a major fare or service change. If a fare or service change would result in a disparate adverse impact for protected classes relative to the overall population served, then the agency must take steps to avoid, minimize, or mitigate those impacts. Although imperfect, this approach from the transit context at least requires that when an agency proposes a major change it must first evaluate disparate impacts on low-income communities and communities of color. Pairing even more robust, systematic analyses of disparate impacts with commitments to choosing policies that reduce existing disparities could be an example of an “equality directive” that city or state agencies could adopt to shift toward an antistatubordination approach (Johnson 2012).

The recent Supreme Court decisions in *Inclusive Communities* and *City of Miami* create an opportunity to advance an antistatubordination approach to housing and community development and, by strengthening support for attention to policies’ disparate impacts, provide a tool for planners to make “more apparent the values underlying plans, and . . . [the] definitions of social costs and benefits more explicit” (Davidoff 1965: 331). The Court decisions themselves and the discussion below focus on race, but the logic behind the argument advanced here applies to other categories of inequality as well.

The *Inclusive Communities* and *City of Miami* cases

The cases

In *Inclusive Communities*, a Dallas non-profit organization, The Inclusive Communities Project, sued the Texas Department of Housing and Community Affairs (DHCA), alleging that the qualified allocation plan through which the Texas DHCA distributed Low Income Housing Tax Credits for affordable housing development discriminated by concentrating subsidized

housing in low-income, predominantly black and Latino neighborhoods, and limiting access to opportunity for black and Latino households.

The Fair Housing Act makes it unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin” (42. U.S.C. § 3604(a)). The issue in *Inclusive Communities* was whether the phrase “otherwise make unavailable or deny . . . because of race” encompasses claims based on the consequences of an action rather than the actor’s intent. In other words, the question before the Court was whether claims of discrimination based on a policy’s disparate impact—meaning a disproportionate negative effect on a group, when less discriminatory alternative policies are available—are redressable through the Fair Housing Act.

A five justice majority upheld the viability of disparate impact claims. Although the Supreme Court had earlier held that disparate impact claims were not encompassed by the Constitution’s Equal Protection Clause (see *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (429 U.S. 252 (1977))), the Court had approved of Congressionally created disparate impact provisions in statutes prohibiting discrimination in employment (see *Griggs v. Duke Power*, 401 U.S. 424 (1971)) and discrimination based on disability (*Smith v. City of Jackson*, 544 U.S. 228, 235 (2005)). The Court noted that at the time Congress amended the Fair Housing Act (the Fair Housing Amendments Act of 1988, 102 Stat. 1619) all nine Courts of Appeals that had considered the question had concluded that the Fair Housing Act encompassed disparate impact claims—suggesting that Congress did not disagree with the appellate courts’ disparate impact interpretation. The Court further relied on the fact that disparate impact claims are “consistent with the FHA’s central purpose” of providing a clear national policy against discrimination in

housing and are important “in moving the Nation toward a more integrated society” (*Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2511, 2526 (2015)). The *Inclusive Communities* decision supports an antistatutory approach by upholding courts’ power to consider not just the intent of a policy’s enactors but also the policy’s actual effects, and to strike down policies based on measurable disparities if those disparities are caused by an identifiable policy and there is a less discriminatory alternative available.

The decision also recognizes the significance of implicit bias, noting that disparate impact liability “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment” (*Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2512 (2015)). Indeed, the decision groups implicit biases together with concealed intentional discrimination, recognizing that both are equally harmful, regardless of intent. This recognition of the importance of implicit biases creates the potential for renewed attention to the broader antistatutory principle that is the foundation of civil rights statutes like the Fair Housing Act and that seeks to address group-based status inequalities even without proof of any malicious intent.

In 2017, the Supreme Court heard a claim by the City of Miami against Bank of America and Wells Fargo for the city’s increased costs and decreased tax revenues caused by foreclosed and abandoned homes against which the banks had made racially discriminatory, high-cost loans. The questions before the Court were 1) whether cities (as opposed to individuals) can sue under the Fair Housing Act for damages suffered as a result of discriminatory lending by banks, and 2) whether Miami sufficiently alleged that the banks’ discriminatory lending directly caused the

city's increased expenses and decreased tax revenues. The Court ruled that cities do have standing to sue under the Fair Housing Act because of the harms that the cities themselves experienced as a result of the discriminatory lending. The decision left lower courts to consider the question of whether there was a sufficiently direct relation between Miami's injuries and the banks' lending practices. The Court's holding is important because it reaffirms that the Fair Housing Act was intended to encompass suits by collective entities, such as cities or non-profit organizations, seeking to address shared injuries such as lending policies that (intentionally or not) create disparate impacts on the basis of race or hinder a city's efforts to create integrated, stable neighborhoods (*Bank of America Corporation v. City of Miami, Fla.*, 137 S. Ct. 1296, 1304 (2017)).

These two decisions create an impetus for planners to consider the role that implicit attitudes may play in planning decisions, as well as creating leverage for incorporating antidisubordination principles into the evaluation of planning policies. Together, the decisions and the Department of Housing and Urban Development's (HUD's) 2015 Affirmatively Furthering Fair Housing (AFFH) Rule (80 Fed. Reg. 42271, July 16, 2015) create an unprecedented opportunity to address a century of exclusionary policies embedded in land use and housing codes (Dreier, Mollenkopf, and Swanstrom 2014).

The decisions, however, will not enforce themselves, and, even if they may allow an antidisubordination approach, they do not require one. The trial court in *Inclusive Communities* ultimately dismissed the suit, determining that the non-profit had "not sufficiently identified a specific, facially-neutral policy that has caused a statistical disparity" (*Inclusive Communities Project v. Texas Department of Housing and Community Affairs*, 08-cv-546, 16, N.D. Tex. August 26, 2016) and the Supreme Court in *City of Miami* sent the case back for a more stringent

evaluation of the relationship between the bank's discriminatory lending and the city's harms. Skeptics may argue that civil rights advocates are winning the battles of maintaining disparate impact liability and broad standing under the Fair Housing Act, while losing the war of actually being able to win cases that truly address racial inequality as the courts raise the standard for proving causation to increasingly high levels. These concerns are only accentuated by changes in the Court's composition and HUD's efforts to revise the AFFH Rule (83 Fed. Reg. 40713, Aug. 16, 2018).

Regardless of how the conflict in courts over establishing causality turns out, advancing an antistatutory approach in planning practice will require mobilization by community organizations, courageous planning, and creative civil rights lawyering to take the fundamental principles sketched out in these cases and transform them into a systematic effort to address the spatial dimensions of categorical inequality. The AFFH rule, though now suspended by the current administration, creates openings for community mobilization and innovative planning by requiring municipalities to incorporate more robust citizen participation in analyses of fair housing and by providing data to community members to enable the public to more easily identify existing disparities in access to opportunity.

The United States has never systematically addressed the local government fragmentation and exclusionary local laws that facilitate opportunity hoarding and reproduce inequality. The *Inclusive Communities* and *City of Miami* decisions and the AFFH rule are far from a systematic rethinking of local governance, but they do together create new leverage for advocates to advance an antistatutory approach to planning.

Action by planners to prevent new public policies that widen disparities in access to opportunity will not alone create racial justice. Indeed, racial inequality is perpetuated as much

or more today by the creation of markets that benefit the already wealthy as it is by discriminatory public policies. The state may be blamed for too much in progressive narratives, and therefore also be expected to be able to accomplish more than it can. But public policies at the local, state, and federal levels are a crucial starting point in advancing both racial and economic justice, and ensuring that our public actions increase equality of access to opportunity instead of diminishing it. An antistatist approach to planning and urban policy could be used as one form of support for progressive social movement organizations that can press for larger policy changes and greater economic democracy.

Antistatist not colorblindness

Social science research suggests that race already plays a significant role in almost every housing decision, for instance, in shaping how potential homebuyers see the desirability of neighborhoods (Quillian 2002; Charles 2006; Krysan et al. 2009); how likely a borrower is to receive a high-cost loan, regardless of credit score (Faber 2013; Bayer, Ferreira, Ross 2014; Hwang, Hankinson, and Brown 2014; Steil, Albright, Rugh and Massey 2018); or how quickly the value of housing is likely to appreciate (Oliver and Shapiro 2006; Flippen 2004; Newman and Holupka 2015). Ignoring the continuing legacy of white supremacist laws or spatial structures will not ameliorate these inequalities. As Justice Sotomayor (joined by Justice Ginsburg) wrote in dissent in *Schutte v. Coalition to Defend Affirmative Action*, “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination” (134 S. Ct. 1623, 1676 (2014)).

Indeed, both African Americans and Latinos continue to experience high levels of residential segregation, and, more importantly, higher levels of residential segregation by race

continue to be associated with significant differences in neighborhood opportunities and individual outcomes (Steil 2011; Steil, De la Roca, and Ellen 2015). Unfortunately, the *Inclusive Communities* opinion never articulates a concern for racial justice or even true equality of opportunity, expressing instead unease about “racial isolation” (*Inclusive Communities* 2015, 23-24). Framing the issue as one of racial isolation reduces entrenched white supremacy and racialized inequality to a problem of where particular black bodies are placed in space. Further, as Mary Pattillo has suggested, a single-minded focus on “integration as the means to improve the lives of Blacks stigmatizes Black people and Black spaces and valorizes Whiteness as both the symbol of opportunity and the measuring stick for equality” (Pattillo 2019: 30).

An antisubordination approach replaces a narrow focus on racial isolation with a focus on race (or other categorical inequalities) and power. Instead of seeking some equal distribution of black bodies in space, an antisubordination approach takes into account the history of white supremacy in the spatial organization of the United States and focuses on minimizing current disparities in access to opportunity both by supporting policies that give individuals the choice to move to neighborhoods with higher levels of resources and the choice to remain, invest in, and work to create those resources where they already are.

W.E.B. DuBois (1919: 113) noted the importance of simultaneously fighting racist exclusion and investing in institutions in black communities: “Unless we had fought segregation with determination, our whole race would have been pushed into an ill-lighted, unpaved, unsewered ghetto. Unless we had built great church organizations and manned our own southern schools, we should be shepherdless sheep.” The challenge, then, is to advocate untiringly for opening access to affordable housing in exclusionary, high-opportunity communities while also improving access to high-performing schools and jobs in the areas where low-income people

live, with attention to the risks of “belittl[ing] the internal strengths of African American communities and underestimate[ing] the force of racism in white communities” (Thompson 1998, 198). What antisubordination planning would do with regards to racial inequality is bring a focus on racial justice to the forefront of planning decisions that have long been shaped by race without acknowledging it.

An antisubordination approach to planning in no way replaces the need for planners to focus also on the role that the built environment and urban policy play in creating and recreating economic inequality. A society could be racially just or just in terms of sex or gender, in which life chances are independent of race, sex, or gender, but still unjust in other ways, such as the distribution of wealth and economic power (Mills 2003). A society could also be economically equal, but unjust in other ways, such as the distribution of political power by race, sex, or gender. In reality, of course, it is neither economically, nor racially, nor gender just, nor just by sex, thus the need in the United States for both an antisubordination approach with attention to durable categories of inequality and a simultaneous focus on the distribution of economic power and opportunity. Requiring an assessment of the disparate impacts of policy changes can and should take both race and class into account.

Conclusion

The enduring racial caste structure of the United States is powerfully connected to the spatial organization of inequality. Indeed, a particular conception of blackness and black threat was a central part of the making of modern U.S. metropolitan areas as white homeowners, white landlords, and white real estate brokers sought to exclude and to exploit non-white individuals (e.g. Muhammad 2010; Self 2005; Sugrue 1996).

To understand justice and what it requires of us, we must understand how systemic unjust advantage is continuously reproduced (Connolly and Steil 2009). Planning has played a central role in the creation of racial disparities, from explicit zoning based on race to support for racial covenants and discriminatory lending, from urban renewal to contemporary gentrification and displacement. But urban planning has not taken a clear stand to address these racial disparities, or even to systematically recognize the role of planning in the white supremacist construction of U.S. urban and suburban space. As Mills (2003), has emphasized, white supremacist social and economic structures are upheld not by “claims to knowledge so much as claims to ignorance—a nonknowing that is not the innocent unawareness of truths to which there is no access, but a self and social shielding from racial realities that is underwritten by the official social epistemology” (190). Indeed, a recognition and effort to address these disparities is fundamental to the health of democracy. The “core citizenly responsibility is to prove oneself trustworthy to fellow citizens,” Danielle Allen (2004) has written, and “in order to prove oneself trustworthy, one has to know why one is distrusted” such that the “the politics of friendship requires of citizens a capacity to attend to the dark side of the democratic soul” (10).

Langston Hughes wrote in his 1923 poem “Justice”:

That Justice is a blind goddess.
Is a thing to which we black are wise:
Her bandage hides two festering sores
That once perhaps were eyes.

The *Inclusive Communities* and *City of Miami* decisions mean that courts can keep at least one eye open to the effects of public policies on disparities in access to opportunity. Courts, however, are a blunt instrument. Community engaged planning is a more productive path to addressing disparities in access to opportunity. Equity planning has been an important tool for planners advancing social justice, and a continuing focus on economic disparities and class

exploitation is essential. The next iteration of equity planning should also incorporate an antistatutory perspective. The *Inclusive Communities* and *City of Miami* decisions provide support for community engaged planning that foregrounds a focus on disparities in access to opportunity across durable categories of inequality, that recognizes institutionalized asymmetries of power and unconscious biases that perpetuate those disparities, and that prioritizes policies that reduce inequality even if they may have higher costs than policies that exacerbate it. Planners have a powerful role to play in challenging inequality and subordination in its multiple forms if we take up the challenge.

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