

## **MOUNT LAUREL AND URBAN POSSIBILITY: WHAT SOCIAL SCIENCE RESEARCH MIGHT TELL THE NARRATIVES OF FUTILITY**

*David D. Trout\**

As the recent Wish-Eisdorfer study<sup>1</sup> indirectly demonstrates, *Mount Laurel*<sup>2</sup> is now history. The findings show that it is living history and continues to evolve, but, as a dynamic, *Mount Laurel* unfolds into the future with an observable past in its trail. What began in May 1971 with the filing in state court of a lawsuit alleging racial and economically discriminatory zoning denials in the provision of suburban housing, has swallowed much of land use planning law, notions of home rule, the exclusivity of property rights, the allocation of judicial and legislative power—all at the intersection of race, class and urban-suburban space. The more *Mount Laurel* becomes our history, the more it will be remembered differently by different people within it. My review today is limited to the way it will be recalled in New Jersey communities by the state's residents.

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\* Associate Professor of Law, Rutgers Law School-Newark. The author wishes to thank all of the conference participants for their helpful insights. Special thanks to my colleague John Payne for his thoughtful suggestions and the generosity of his time. All mistakes are my own.

<sup>1</sup> See generally NAOMI BAILIN WISH & STEPHEN EISDORFER, *THE IMPACT OF THE MOUNT LAUREL INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF APPLICANTS AND OCCUPANTS* (1996).

<sup>2</sup> The term "Mount Laurel" is here used more broadly than in the Wish-Eisdorfer study and well beyond what is often called the Mount Laurel Doctrine. The term encompasses the specific litigations that bear the township's name, as well as other related cases, the legislative response from the private sector, public interest community and the New Jersey legislature through the creation of the Council on Affordable Housing (COAH). Mount Laurel therefore refers to the peculiar institutionalization of a multifaceted process.

For ease of reference, the trilogy of New Jersey Supreme Court decisions in which the main features of the legal doctrine were articulated shall be referred to hereafter as "*Mount Laurel I*," Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), "*Mount Laurel II*," Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) and "*Mount Laurel III*," Hills Development Co. v. Bernards Township, 103 N.J. 1, 510 A.2d 621 (1986).

As we consider what *Mount Laurel's* objectives were and whether the process has met them, we must recognize at the same time how *Mount Laurel* will be told differently through different narratives.<sup>3</sup> Narratives function to sustain events in public consciousness, to define the reality of their existence, as well as to bury or mute their memory.<sup>4</sup> There will be stories with an African-American cast,<sup>5</sup> others that typify Latino experiences of the process and white versions, even dominant versions.<sup>6</sup> There will be urban narratives and suburban narratives<sup>7</sup>, legal

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<sup>3</sup> The use of narrative perspectives as a tool in legal analysis has been irregular but nevertheless frequent in a range of legal scholarship over the last decade or so. For examples of thoughtful approaches directly or indirectly relevant to this essay, see generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (illustrating how social reality is constructed through stories and pleading for counterstories); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (commenting and critiquing the "distinctive" mode of storytelling offered by critical race theorists); Charles R. Lawrence, III, *The Word and the River: Pedagogy As Scholarship As Struggle*, 65 S. CAL. L. REV. 2231 (1992) (describing paradigm of the Word and its possible functions in legal discourse and distinguishing between dominant and outsider narratives); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (applying the narrative tool of victims' stories in prosecutions for racist speech); Robin West, *Jurisprudence As Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985) (advocating the reading of legal theory as a form of narrative by drawing parallels between four literary and jurisprudential traditions); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989) (describing consistent cognitive elements in commonly used legal narratives).

<sup>4</sup> For example, a narrative of futility has echoed from different quarters regarding the War on Poverty. Conservative policymakers such as Newt Gingrich and Republican political candidates have regularly derided its aims as though, in practice, no public benefit resulted from any of the vast range of federal enactments during the mid- to late 1960s. Objective evidence of success in programs such as Head Start and Job Corps is, however, perhaps deliberately, ignored in these recitals of historical events. Arguably, the effect of these narratives is to reduce support for public programs aimed at the poor.

Similarly, the Watts uprising/riot of 1965 gave rise to the Report of the National Advisory Commission on Civil Disorders ("Kerner Commission Report"). As a result, the terror, personal loss and myriad circumstances of that and other urban explosions of the era have been encapsulated in the Kerner Commission Report. The event became synonymous with all postmodern urban riots, and the report itself defines a lexicon of normative, politically liberal discourse on issues of racial inequity. It is referred to as a metaphor for the perpetuation of racial division, particularly in cities. In contrast, the 1992 uprising/riot in South Central Los Angeles yielded no such defining document. Despite the event's greater devastation and its uniqueness in the contemporary state of U.S. cities, its public historical memory outside of Los Angeles has been largely muted.

<sup>5</sup> See Robert C. Holmes, *A Black Perspective on Mount Laurel II: Toward A Black "Fair Share,"* 14 SETON HALL L. REV. 944 (1984).

<sup>6</sup> For example, one Mount Laurel resident was quoted as saying, "No way do I feel I should subsidize a fifty-thousand dollar home for them. Nobody's doing it for me. . . . Nobody has a right to say anybody owes them anything." DAVID KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* 7 (1995).

and policy narratives. Many factors will determine the content of these stories. What social science research can tell us in trying to understand *Mount Laurel*—which is one goal of this essay—is really a question of compensating for the gaps in understanding left by the dominant legal narrative. The legal narrative emanates from the court decisions, even the subsequent legislative language, and typically speaks with no discernible community voice. Yet it is community voices that tell the different stories that compete for historical meaning. The first thing that social science can do is minimize the differences among them by plugging the gaps in the facts on which they are based.

All of this is especially important now when the meaning of *Mount Laurel* and its legacy is at risk of folding into one of two futility narratives. I use the term to describe narratives that, with more or less support, chronicle systematic failures of a legal and policy vision. Such narratives often trade on the narrator's long-held suspicions about the vision itself. In that way, futility narratives have the resonance of confirmed belief, giving the strength of I-told-you-so to each subsequent repeater. Although powerful opinion makers with the capacity to kill social change,<sup>8</sup> these narratives are often weak on facts. The two futility narra-

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The ironies abound in this common suburban narrative, which combine to make them symbolic of a dominant version. For one, the speaker assumes the position of the giver and ignores Mount Laurel's long history of African American residents and the original claimants' mere demand for a zoning variance not unlike those granted to large developers. The position of the taker is "them." They unfairly want subsidies, while what benefits the speaker receives from public sources, such as mortgage interest deductions, are his by right and merit.

At least one commentator has argued the existence of "master narratives" that on the one hand sustain white notions of black inferiority and on the other reinforce the necessity of segregation. The myths undergirding this narrative in the housing realm include dominant white imagery used by the real estate industry and notions that black successes in housing integration necessarily mean white losses. At its worst, the master narrative in housing leads to physical and symbolic acts of violence against blacks in white neighborhoods. See Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69 (1995). Professor Robinson further argues that "[t]he Fair Housing Act [Title VIII] cannot effectively redress housing segregation until it recognizes the impact of the relationship between master narrative of black inferiority, dominant white images, and the violence of neighborhood purity." *Id.* at 84. The *Mount Laurel* process and the New Jersey Fair Housing Act may suffer similar deficiencies in addressing housing desegregation.

<sup>7</sup> See *infra* note 46 for further discussion of common exclusion narratives with a suburban cast.

<sup>8</sup> The effect of futility narratives may be quite tangible. The conditions that gave rise to the *Mount Laurel* Doctrine are by no means unique to New Jersey. As the experience of the Doctrine's implementation is communicated in consistent futility narratives to interested parties, legislators, policymakers etc. in other states, the very idea of a constitutionally derived regional fair share obligation grows increasingly unattractive and impractical.

tives discussed here might be called "massive resistance" on the one hand and "abuse of power" on the other. The first relates to *Mount Laurel*'s perceived futility in integrating predominantly white suburbs. The second speaks to its perceived wrongheadedness in trying to bully through centralized policy solutions without regard for local interests. The ability of social science research, however, to unify the factual elements on which these and other narratives are based may considerably clarify where the process needs to go from here.

The other goal of this essay is to view all of this against two larger objectives that I have come to identify as the goals of the *Mount Laurel* process. The first asks, is racial and economic integration possible in New Jersey's white suburbs?<sup>9</sup> One can easily argue that this is the central issue of *Mount Laurel* on the basis of the case opinions,<sup>10</sup> commentators<sup>11</sup> and the personal biases of people both threatened or helped by *Mount Laurel*. Further, this is what *Mount Laurel* is all about primarily because this is what exclusionary zoning, the practice against which the original plaintiffs brought suit, is *not* about. Mount Laurel Township, like townships across the land, through its zoning ordinances deliberately erected barriers to building housing affordable to low-income households,<sup>12</sup> a great many of whom it was presumed would be, and indeed

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<sup>9</sup> New Jersey does have predominantly non-white suburbs. For a brief discussion, see, e.g., DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993), describing typical patterns of black suburbanization in older suburbs characterized by high population densities, low socioeconomic status and high indices of segregation from Whites.

<sup>10</sup> *Mount Laurel I*, 67 N.J. at 196, 336 A.2d 737 (Pashman, J., concurring) ("Many people who settle in suburban areas do so with the specific intention of living in affluent, socially homogenous communities and of escaping what they perceive to be the problems of the cities"); see also *Mount Laurel II*'s now storied footnote 5 at 92 N.J. at 210 n.5, 456 A.2d at 415-16 n.5 (citing Kerner Commission Report language decrying two societies, "one black, one white—separate and unequal").

<sup>11</sup> See, e.g., CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 9 (1996) (linking suburban integration of the poor with the need for urban "deconcentration"); Rachel Fox, *The Selling Out of Mount Laurel: Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 *FORDHAM URB. L.J.* 535, 543, 563 (1988) (describing Mount Laurel Doctrine's emphasis on racial integration as "limited" and "implicit").

<sup>12</sup> See *Mount Laurel I*, 67 N.J. at 195, 336 A.2d at 736 (Pashman, J., concurring) (describing exclusionary zoning as a "misuse" of municipal power involving, inter alia, "the use of the zoning power by municipalities to maintain themselves as enclaves of affluence or of social homogeneity.") Justice Pashman specifically listed six zoning devices routinely used to exclusionary effect, including minimum house size requirements; minimum lot and frontage size requirements; prohibitions on multifamily housing; restrictions on the number of bedrooms; prohibitions on mobile homes; and overzoning for non-residential uses. See *id.* at 197-209, 336 A.2d at 737-43. See generally RICHARD F. BABCOCK & FRED P. BOSSELMAN, *EXCLUSIONARY ZONING: LAND USE REGULATION IN THE 1970s* (1973); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning*,

were, African American and Latino.<sup>13</sup> The original litigation and the thrust of several that followed was to undo the clear economic and *de facto* racial discrimination resulting from exclusionary zoning practices.<sup>14</sup> Thus, if a main objective of the *Mount Laurel* process was to facilitate economic and racial integration of suburbia, then the Wish-Eisdorfer study fills in some gaps and exposes others on the way to telling at least one story about *Mount Laurel's* successes and failures.

A second question, however, grows out of the probable failure of the first objective and asks, can a system of regionalized affordable housing obligations create effective mechanisms for community economic development in a state's central city neighborhoods? This objective reflects not only an appreciation for urban community ideals, but more importantly—and perhaps cynically—it assumes that there is formidable resiliency to the attitudes that produced exclusionary zoning and the *Mount Laurel* litigation in the first place.<sup>15</sup> It also recognizes that much of the subsequent *Mount Laurel* litigation dealt only indirectly with racial integration, and that the state legislation and related regulations that followed were not always preoccupied with it either.<sup>16</sup> Instead, the urban economic development objective of *Mount Laurel*, if one can plausibly be said to exist, would be rooted in meeting urban housing need. It is an objective that is reflected in the idea of regional contribution agreements

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*Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 476 (1971). See also *Mount Laurel II's* discussion of the fundamental socioeconomic impact and motivation of typical zoning schemes. Rebutting the Virginia Supreme Court majority in *Weymouth*, the New Jersey Supreme Court said, "It would be ironic if inclusionary zoning to encourage the construction of lower income housing were ruled beyond the power of a municipality because it is 'socioeconomic' when its need has arisen from the socioeconomic zoning of the past that excluded it." *Mount Laurel II*, 92 N.J. 158, 272, 456 A.2d 390, 449.

<sup>13</sup> See *supra* note 11.

<sup>14</sup> However, the court expressly declined to view the litigation as a "race case" despite conferring standing on one of four categories of plaintiffs, including the NAACP, who represented the "housing and other interests of racial minorities." *Mount Laurel I*, 67 N.J. at 159 n.3, 336 A.2d at 717 n.3. "We will, therefore, consider the case from the wider viewpoint that the effect of *Mount Laurel's* land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources." *Id.* at 159, 336 A.2d at 717.

<sup>15</sup> Commentators struggling with the historic inability to integrate white residential areas amid the persistence of black inner-city poverty increasingly seek a balance of approaches. See, e.g., John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487 (1993) (arguing for the importance of both but tipping the scales toward community revitalization).

<sup>16</sup> Indeed, nowhere in the language of the Act is there reference to considerations of race or of the direct relevance in the implementation of its provisions. See, e.g., N.J. STAT. ANN. § 52:27D-302 (West 1986) ("Legislative findings") or N.J. STAT. ANN. § 52:27D-303 (West 1986) ("Legislative declarations and intention").

(RCAs)<sup>17</sup>, and it arrived relatively late in the *Mount Laurel* process with passage in 1985 of the state's Fair Housing Act (FHA).<sup>18</sup> Ultimately, this objective nods to the Newarks and Camdens<sup>19</sup> of the state as well as the nation<sup>20</sup> and is concerned with how the ghettoized poor will recall *Mount Laurel*.

In the remainder of this essay, I will view each of these two objectives through the lens of the Wish-Eisdorfer study and consider the relative plausibility of each narrative. In the first part, I will argue that, although the study's findings on the realistic possibility of suburban racial and economic integration support a version of futility and persistent exclusion, what happens to that objective remains far from clear. Social science research does not yet fill enough gaps in our understanding of the *Mount Laurel* process for it to fairly represent the failure of integration or "mobility" strategies, and more research is therefore needed. I offer the unsubstantiated suggestion that this objective of *Mount Laurel* was significantly weakened in the administrative application, not the judicial formulation, of the *Mount Laurel* Doctrine (the Doctrine).<sup>21</sup> Undoubtedly, the results are troubling for the Doctrine. In the second part, however, I argue that inner-city economic revitalization became an unarticulated *Mount Laurel* objective at some later point in the process, particularly through the enactment of the FHA; indeed, for a variety of

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<sup>17</sup> See N.J. STAT. ANN. § 52:27D-312 (West 1986 & Supp. 1996). Under the RCA, a "sending municipality" may transfer up to 50% of its fair share obligation to a "receiving municipality" pursuant to a voluntary agreement freely negotiated between the municipalities and subject to the approval of COAH.

<sup>18</sup> See N.J. STAT. ANN. § 52:27D - 301 *et seq.*

<sup>19</sup> According to the United States Bureau of the Census, 25% of Newark residents and 35% of Camden residents had incomes below the federal poverty line in 1990.

<sup>20</sup> In their seminal study of racial segregation, *American Apartheid*, Douglas Massey and Nancy Denton use a dissimilarity index to indicate the percentage of blacks in a given city who would have to move out of predominantly black areas in order to achieve racial balance. See generally MASSEY & DENTON, *supra* note 9. A value approaching 100 represents extreme racial segregation. In 1980, for households with incomes under \$2500 (i.e., well below the federal poverty threshold), the dissimilarity index for blacks in Newark was 85.8. See *id.* at 86. In Detroit, a city with greater land mass as well as population, the corresponding figure was 88.6 in 1980. (Figures for more affluent blacks—i.e., those making more than \$50,000 per year—were 77.5 and 86.4, respectively.) See *id.* Massey and Denton define a ghetto as follows:

[A] ghetto is a set of neighborhoods that are exclusively inhabited by members of one group, within which virtually all members of that group live. By this definition, no ethnic or racial group in the history of the United States, except one, has ever experienced ghettoization, even briefly. For urban blacks, the ghetto has been the paradigmatic residential configuration for at least eighty years.

*Id.* at 19.

<sup>21</sup> But see Holmes, *supra* note 5.

mostly political reasons that became clearer as the *Mount Laurel* conflict raged into its second decade<sup>22</sup> the most realistic possibility of producing needed affordable housing for at least low and moderate income people of color in New Jersey would occur in the state's cities. Practitioners and scholars both tend to view this development as the cynical compromise that ultimately subverted the very meaning of *Mount Laurel*.<sup>23</sup> It may be. Or it may be that, rather than trying to harmonize two apparently contradictory objectives as occupying the same ground, the ground itself may have shifted during twenty-five years of border wars. Nevertheless, I argue that open acknowledgment of this often avoided *Mount Laurel* objective should stimulate focused social science research as a necessary means to improving urban economic development strategies in the communities where most low-income people of color live. Without more facts, an urban storyteller would be justified in concluding that even this objective of *Mount Laurel* has failed to do more than build some units of more affordable housing.

#### I. SHAME AT THE END OF THE RAINBOW

In *Mount Laurel I*, the New Jersey Supreme Court began its articulation of the "fair share" doctrine by requiring some suburban municipalities to plan for regional housing need by creating through their land use regulations the realistic opportunity for "a variety and choice of housing" affordable to low and moderate income residents.<sup>24</sup> The court's recognition of exclusionary zoning as a social and economic evil was nearly as bold as its appreciation of regional welfare. Legally and intellectually, the first *Mount Laurel* opinion affirmed notions of collective responsibility under an expanded concept of the police power. As a subset of the state's police power on behalf of the general welfare, a municipality's delegated power to zone triggered obligations for regional welfare whenever its regulations had a "substantial external impact" beyond its own borders.<sup>25</sup> Frustration of such obligations through the enactment of zoning ordinances deemed exclusionary was a violation of the state constitution. Eight years later, *Mount Laurel II* significantly clarified and strengthened these obligations in the opinion we recognize as the *Mount Laurel Doctrine* itself. In *Mount Laurel II*, the Court required more than good faith efforts, but objective proof of progress toward meeting a specific fair share obligation.<sup>26</sup> Further, it expanded the "builder's rem-

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<sup>22</sup> See generally HAAR, *supra* note 11.

<sup>23</sup> See *infra* note 76.

<sup>24</sup> See *Mount Laurel I*, 67 N.J. 151, 174, 336 A.2d 713, 724-25 (1975).

<sup>25</sup> See *id.* at 177, 336 A.2d at 726.

<sup>26</sup> See *Mount Laurel II*, 92 N.J. 158, 220-21, 456 A.2d 390, 421 (1983).

edy”<sup>27</sup> as a market-driven tool of enforcement and streamlined the process for future litigation by creating a three-judge *Mount Laurel* “bar”<sup>28</sup> and promoting the innovative use of special masters.<sup>29</sup>

#### A. *Economic Integration of the Suburbs*

If the objective of the *Mount Laurel* process became the economic and racial integration of New Jersey’s suburbs, then the Wish-Eisdorfer study’s findings are clearly problematic.<sup>30</sup> As to economic integration, we learn that households with severe unmet housing need are “well-represented” in the Affordable Housing Management Service (AHMS) applicant pool, but that low-income and large households are underrepresented.<sup>31</sup> At first blush the findings seem somewhat encouraging yet unclear, because it is tempting to correlate low incomes with severe unmet housing need. However, when you add the finding that the New Jersey Council on Affordable Housing (COAH) regulations establish a regime in which mainly moderate income households are targeted, followed by households at the top of the low-income range,<sup>32</sup> the somewhat murky picture of qualified success becomes clearer. The poor, especially the very poor, simply were not targeted.<sup>33</sup> Thus, it should come as no surprise that they are underrepresented among beneficiaries. The research demonstrates that we have some *economic* integration, but not a lot and it is by no means radical.

Similarly, the findings show that there was little change across the urban-suburban boundary. Only 15% of previously urban households moved to suburbia.<sup>34</sup> “Outsiders” hardly penetrated the suburbs.<sup>35</sup> Sub-

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<sup>27</sup> See *id.* at 279, 336 A.2d at 452.

<sup>28</sup> See *id.* at 292-93, 336 A.2d at 459.

<sup>29</sup> See *id.* at 281-82, 336 A.2d at 453.

<sup>30</sup> Many of the Wish-Eisdorfer findings build on and duplicate a study performed in 1988 by Martha Lamar, John Payne and Alan Mallach of Rutgers University. The results of the so-called “Rutgers Study” of *Mount Laurel* housing may be found in Martha Lamar et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197 (1989). See also John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 669-70 (1996) (summarizing Rutgers Study findings as well as those by Robert Fitzpatrick in a 1993 study for the New Jersey Dep’t of Community Affairs entitled, *The Math of Mount Laurel*).

<sup>31</sup> See WISH & EISDORFER, *supra* note 1, at 68.

<sup>32</sup> See *id.*

<sup>33</sup> According to the study, AHMS staff counsel found that very low income applicant households are unlikely to afford AHMS housing without additional housing or income subsidies. “The effect of this policy is to reduce the number of very low income households in the AHMS applicant database.” *Id.* at 30.

<sup>34</sup> See *id.* at 69.

<sup>35</sup> See *id.*; *Mount Laurel II*, 92 N.J. 158, 209, 456 A.2d 390, 415 (1983).



urban applicants simply relocated within suburbs.<sup>36</sup> This represents a sort of stasis.<sup>37</sup>

It is worth stopping here to recall why economic integration of the suburbs is considered a good at all. As the United States becomes a nation in which a plurality of its population now lives in suburbs,<sup>38</sup> what began decades ago as a combination of white flight and the desire for pastoral quality of life elements is now the norm. That is, living in suburbs is defining the residential character of middle-class life itself. More than just an economic fact or a political fact,<sup>39</sup> this demographic shift may represent a fact about identity. But for our immediate purposes, it is the economic fact of suburban life that makes it a paramount good and fuels the push for suburban integration.<sup>40</sup> The suburbs are now home to the

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<sup>36</sup> See WISH & EISDORFER, *supra* note 1, at 69-73.

<sup>37</sup> This static result was not without its prophets. In a review of *Mount Laurel II* (following an earlier *Mount Laurel* symposium at Seton Hall School of Law), Robert Holmes cited demographic statistics demonstrating that, using the court's income guidelines alone, whites could benefit from construction of new *Mount Laurel* units at a ratio of 3.1:1 over blacks. See Holmes, *supra* note 5, at 950. "One could speculate from these demographic data that selection criteria left unmonitored could result in apparent significant success for the *Mount Laurel* mandate without accommodating a single black family." *Id.* Holmes argued that the essential flaw in the court's ruling was its deliberate failure to recognize the racial dimension of the plaintiffs' claims. See *id.* at 944-45. By characterizing the general welfare in class terms, rather than explicitly including race, the court left the doctrine open to unintended racial consequences.

Therefore, unless other criteria for reaching the protected class are advanced [low-income black home seekers without significant assets], facially neutral selection criteria which, when applied to applicants for "*Mount Laurel*" housing tend to upset the ratios set forth above, should be regarded as suspect and rejected as constitutionally impermissible. *Id.* at 951.

Holmes, however, did not object to housing preferences for poor applicants residing near new housing. See *id.* As the Wish-Eisdorfer study suggests, the use of such locational preferences may be a primary contributing factor to the persistent segregation. See WISH & EISDORFER, *supra* note 1, at 73.

<sup>38</sup> See HAAR, *supra* note 11, at 4. See generally KENNETH T. JACKSON, CRABGRASS FRONTIERS (1985).

<sup>39</sup> See Thomas B. Edsall, *Republicans Showed Muscle in Holding onto House; Some Analysts Say GOP Edge is Long Term*, WASH. POST, Nov. 17, 1996, at A8 (discussing Republican victory in 1996 House elections and narrowing Democratic political base in large cities); Richard Louv, *Soccer Moms? Political Stereotypes Miss the Mark*, SAN DIEGO UNION-TRIB., Nov. 6, 1996, at A5 ("[The 1996 presidential election was] the first election in U.S. history in which a majority of voters live[d] in the suburbs. . . ."); Karen DeWitt, *Suburbs, Especially in the South, are Becoming the Source of Political Power in the U.S.*, N.Y. TIMES, Dec. 19, 1994, at A9 (identifying suburbs as key to political power and source of increasing Republican dominance in coming years).

<sup>40</sup> Such economic facts were well known to the New Jersey Supreme Court in the articulation of the *Mount Laurel* Doctrine. See, e.g., *Mount Laurel I*, 67 N.J. 151, 172, 336 A.2d 713, 723 (1975) (noting the incongruity of developing municipalities wooing industry while passing zoning ordinances that prevent lower paid employees from living there). See also *Mount Laurel II*, 92 N.J. 158, 210-11 n.5, 456 A.2d 390, 415-17 n.5

economic investment that has abandoned cities,<sup>41</sup> especially inner cities. In an aspirational narrative spoken not so much by the urban poor but by some of their policy defenders, poor people of color need to move there.<sup>42</sup> From corporate parks to back-office facilities, manufacturing to service sector employment, retail stores and public services, safe streets and open space, inclusion in America increasingly demands residence in suburbia.<sup>43</sup> Perhaps nowhere is this profile of American life, present and future, better demonstrated than in the state of New Jersey, one of the most suburban states in the country.<sup>44</sup>

To linger here for another moment, a finding of modest economic integration appears to reflect a pattern of compromises between the law and its application. The original *Mount Laurel* litigation assumed the right of lower-income people *not* to be excluded, if not affirmatively included, from the variety of social and economic benefits that accrue simply by virtue of residency in middle-class suburban areas.<sup>45</sup> The response

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(1983) (suggesting that the availability of low-income housing may create job opportunities for poor unemployed workers).

<sup>41</sup> See HAAR, *supra* note 11, at 5; DAVID RUSK, CITIES WITHOUT SUBURBS 5-7 (1993); Sue Kirchoff, *Suburbs Play Role in Success of U.S. Welfare Reform*, REUTERS N. AMER. WIRE, Oct. 17, 1996 (identifying the suburbs as source of two-thirds of new jobs created during the 1980s).

<sup>42</sup> This idea is sometimes responsible for characterizing efforts to move the urban poor to thriving suburbs as "mobility" strategies, rather than integration. "Mobility" becomes shorthand for economic mobility similar to the historic migrations of groups in the United States toward areas of greater employment opportunities. The term is considered more descriptive of the strategy's objectives without suffering from the misdescription of "integration," which under such scenarios is frequently one way. See, e.g., Florence Wagman Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 335 (1993) (discussing both resident-based and unit-based housing mobility programs across the nation).

<sup>43</sup> For a concise listing of some of the specific public and private "goods" traditionally associated with suburban membership, see Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 567 (1995) (quoting ANTHONY DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA 26 (1973)).

<sup>44</sup> See, e.g., KIRP ET AL., *supra* note 6, at 23 ("That is another way of saying that it is the most municipally fragmented state in the nation.").

<sup>45</sup> See, e.g., *Mount Laurel II*, 92 N.J. 158, 209, 456 A.2d 390, 415 (1983), in which the New Jersey Supreme Court, in setting forth the constitutional underpinnings of the fair share idea, expresses the inclusion ideal as participation in place-based benefits that presumably exist (at least in New Jersey) outside of cities. Thus, the court found the municipal obligation to zone poor residents into upper-income areas in the state's effective control of the use of land. "The government that controls this land represents everyone. While the state may not have the ability to eliminate poverty, it cannot use that condition as a basis for imposing further disadvantages." *Id.*, 456 A.2d at 415.

Interestingly, the Court goes on to "imagine" the situation that would obtain in the absence of such a state obligation:

[P]oor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted;

from middle-class suburban residents was to regard such a prospect as an invasion and a certain corruption of cherished rights associated with middle-class membership.<sup>46</sup> Initially, the law was unsympathetic to middle-class antipathy to undesirables, but, as the research now demonstrates, the *application* of the law—primarily through COAH<sup>47</sup> and AHMS—worked a compromise.

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poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simple because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.

*Id.* at 209-10, 456 A.2d at 415. As further noted by the Court in reference to Newark and Camden, however, it is a vision which closely resembles reality for the bulk of New Jersey's urban poor. *See id.* at 210-11 n.5, 456 A.2d at 415-17.

For a brief discussion of the related notion of whiteness as a property right, see *infra* note 52.

<sup>46</sup> Despite a common, almost predictable ring, suburban narratives of exclusion invoke a complicated set of assumptions about membership and the rationales justifying use of authority to exclude others. For example, in Westchester County, across the Hudson River from New Jersey, the Village of Mount Kisco has sought to intensify efforts to exclude the growing numbers of mainly Central American residents who have come first as day laborers. The day laborers live in overcrowded rental apartments and subdivided homes, sometimes in violation of housing code provisions typically designed to protect poor tenants. Mount Kisco police have recently started late-night raids in which Hispanic residents are photographed in their homes, ordered to remove belongings and taken to shelters. Hispanic advocates call it official harassment, and cite to several other examples since the Hispanic population increased from 5% in 1980 to 12% in 1990. But the narrative from resident decision makers in the town is instructive. In the words of Martin McGrath, a longtime member of the Mount Kisco Planning Board, enforcement of local ordinances against the influx of Hispanics is a matter of the fair allocation of taxpayer burdens. "The more you move into the village proper, you see the people sitting on the benches. You see them walking around the village. You know they're not Mount Kisco people. They're Hispanic. We don't have that many in town. Remember one thing[,] We're all in good faith. We have our Christian image. Everyone's a human being. But I don't see that that gives them the right to overburden our facilities: water, sewage, garbage." Celia W. Dugger, *Immigrants and Suburbia Square Off, Hispanic Residents of Mount Kisco Say They're Being Harassed*, N.Y. TIMES, Dec. 1, 1996, at A47.

<sup>47</sup> Under the state's Fair Housing Act, COAH has the power to (1) define the state's housing regions; (2) estimate present and prospective need for low and moderate income housing; (3) adopt guidelines by which municipalities determine their fair share of regional housing need and methods of adjusting the fair share; (4) provide population and housing projections; and (5) limit the total number of units a given municipality is required to build. *See* N.J. STAT. ANN. § 52:27D-307 (West 1986).

Some commentators have argued that various provisions of the Act, but especially the combination of COAH's regulatory power and administrative role effect a lessening of the original burden the court put on municipalities, a result effectively endorsed by the court itself in *Mount Laurel III*, 103 N.J. 1, 510 A.2d 621 (1986). As Professor Haar stated, "[B]y the very creation of a new administrative agency, by specifying formulas that would allow exceptions from the fair share allocation developed by the trial courts,

Unfortunately, the research does not tell us why. It does not yet examine how the *definitions* of affordability in the regulations<sup>48</sup> could, in practice, yield such an underrepresentation of low-income families. Although suggesting they are a cause, the research does not yet describe the process by which those affordability thresholds were actually *administered* or, for that matter, monitored. It leaves tremendous room to speculate as to why penetration by urban outsiders was so mild and minimal.

Here again, social science research should guide our understanding of cultural, political and psychological resistance to new compositions of community. Narratives at the heart of social and economic conflict often diverge on the level of attitudes, normative beliefs, and psychic needs. The law's long history of inadequacy in explaining, let alone remedying, these important dimensions of societal rupture is especially evident in the *Mount Laurel* process. For all of the overreaching that critics of the New Jersey Supreme Court alleged it had undertaken in formulating the *Mount Laurel* Doctrine, the Court rarely went into detail about the underlying psycho-social forces at work in preventing economic integration of the suburbs through exclusionary zoning and other means. To do so within its major opinions as well as in the aftermath, as Professor Haar argues,<sup>49</sup> might have engaged the populace in a deeper debate about the values at risk and at stake in *Mount Laurel* and strengthened public perceptions of the court's authority along the way. However, where the court went quiet the New Jersey legislature went completely dumb. The FHA speaks not at all to the psycho-social dimensions of *Mount Laurel*. Although this is nothing new to legislative drafting, such silence helps explain the apparent futility of the Act in reversing old patterns of economic exclusion while contributing to the divergent free for all of narrative meanings given *Mount Laurel*. Empirical social science research on subjects such as specific suburban attitudes toward inclusion, the role of public representative bodies in safeguarding private interests, distinctions between attitude sets of suburban residents of old wealth and those of relatively new, as well as perceptions about suburban life among inner-city residents would better help us to understand both the nature of re-

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by ordering a moratorium on the builder's remedy, and by adding the regional contribution agreement as an acceptable compliance mechanism, the FHA can be read as a direct blow to the courts." HAAR, *supra* note 11, at 95-96.

<sup>48</sup> See N.J. STAT. §52:27D-304 (1996); cf. N.J. STAT. § 40A:12A-3 (1996); see also Mt. Laurel II, 92 N.J. at 222, n.8, 456 A.2d at 422, n.8.

<sup>49</sup> See HAAR, *supra* note 11, at 162-64.

sistance to and the possibilities for suburban economic integration by closing significant gaps in our understandings.<sup>50</sup>

### B. *Racial Integration of the Suburbs*

As to racial integration of the suburbs, the study uncovers a new minimum. The vast majority of white applicants were suburban and they stayed there; two-thirds of white applicants who were urban actually left a city to become suburban too.<sup>51</sup> On the other hand, the vast majority of black applicants were urban, and only 5% moved to suburbs.<sup>52</sup> The same was true of Latinos, among whom a mere 2% moved to suburbia.<sup>53</sup> A significant number of suburban blacks even *left suburbia* for urban housing.<sup>54</sup> Consequently, suburban households are 81% White, accord-

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<sup>50</sup> The call for more extensive social and psychological research into the public attitudes, particularly of suburban whites, about economic (and racial) integration should be limited as much as possible to New Jersey and distinguished from some very interesting and important legal scholarship on the subject of whiteness as a property interest. Indeed, the first qualifier modifies the latter. I am arguing that a full understanding of exclusionary resistance in New Jersey in spite of *Mount Laurel* cannot be had without more detailed, systematic understanding of local attitudes, their content, references and dynamics in the state's peculiar culture.

The contributions made by legal theorists who posit the existence of a perceived property right in whiteness itself go a long way in helping us to understand what may in fact be material manifestations of processes in the collective unconscious of white communities. The property rights in whiteness, these authors argue, range from the individual and personal to the collective and structural. Examples of the former include daily expectations of being perceived as competent in job settings or enjoying the very presumption of individuality rather than as a member of a group. In the latter, white neighborhoods are perceived as synonymous with being positive and valuable, thereby influencing actual property values through appraisal patterns. Overall, these property rights are enjoyed through a majoritarian transparency, which renders normal and invisible the privileges that accompany white exclusivity. See generally, Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595 (1989); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1596, 1636-48 (1995); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995). Compelling though they are, these assertions are not often based on empirical social science data drawn from specific populations and hence they are subject to the same critique of being overly speculative as any other narrative, or at least misdescriptive of a particular population. It is entirely possible, however, that the research I am calling for here might confirm many of the theoretical assertions about the importance of protecting whiteness as property.

<sup>51</sup> See WISH & EISDORFER, *supra* note 1, at 70.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

ing to the study, and urban households are 85% Black.<sup>55</sup> The pattern is unmistakable and again represents a sort of stasis.

Perhaps the final nail in the coffin containing *Mount Laurel's* ideals is a finding which combines race, class, and space: Black and Latino low-income applicants for *suburban Mount Laurel* housing were turned down at a significantly higher rate than their white counterparts. This is a measure of *occupancy*, and it requires special emphasis. For instance, moderate-income black applicants were almost twice as likely to actually occupy a unit than a low-income black applicant.<sup>56</sup> The same disparity for Latinos jumped to four-fold.<sup>57</sup> However, the success ratios for low- and moderate-income white applicants and occupants are the same.<sup>58</sup> These incongruities might somehow be explained by the differences in requirements for sales rather than rental housing. More sales than rental housing would presumably be available in suburban areas, and credit histories and the need for downpayments could theoretically disadvantage Black and Latino applicants relative to whites, even of similar incomes. But the study finds otherwise, compounding the mystery. Indeed, among low-income occupants, most live in rental units located in urban areas.<sup>59</sup> Yet while 88% of low-income black tenants and 84% of Latinos remain in cities, only 6% of low-income whites live in urban rental units.<sup>60</sup> The overwhelming majority of the latter group who occupy *Mount Laurel* rental housing resides in the suburbs.<sup>61</sup> Clearly something is very much amiss.<sup>62</sup>

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<sup>55</sup> See *id.*

<sup>56</sup> See WISH & EISDORFER, *supra* note 1, at 58.

<sup>57</sup> See *id.* at 59.

<sup>58</sup> See *id.* at 58.

<sup>59</sup> See *id.* at 60.

<sup>60</sup> See *id.*

<sup>61</sup> See WISH & EISDORFER, *supra* note 1, at 60.

<sup>62</sup> The study speculates that "[t]hese disparities may also indicate that something in the application, screening, purchase or rental process inhibits or impedes minorities from acquiring low income housing in general." *Id.* at 59. While such factors undoubtedly contribute, a global explanation about how and why applicants receive the information about *Mount Laurel* housing seems more compelling. Being the most segregated from mainstream information networks, poor blacks and Latinos are in the worst position to learn of available low-income housing, let alone the requirements for obtaining it under competitive conditions. See *infra* note 70. Moreover, the private marketing system by which most *Mount Laurel* housing reaches the public helps to guarantee that suburban housing remains predominantly white. Developers who market their housing have little incentive to seek out distant applicants with unpopular demographic profiles. Thus, black and Latino applicants remain excluded from suburbia because they have little or no access to the private "market" for *Mount Laurel* housing there. (I must cede most of the credit for this point to my colleague, Prof. John Payne.)

### C. Resulting Narratives of Futility

One could tell this as the story of this generation's massive resistance.<sup>63</sup> In this narrative, mild economic integration is simply code for whites only, albeit moderate-income whites. The mythology of the city—black, Latino, impoverished, infested and thoroughly despised as a place *and* as a symbol of its inhabitants—goes pretty much unchanged. White homeowner association attitudes, well organized behind political lobbyists able to assert their interests with receptive elected officials, did not change. This resistance represents an ongoing crisis in race and ethnic relations. Attempts to take suburban residents beyond individual considerations in order to promote collective, regionalized identities have not caught on; the only community they recognize beyond their own is the city, and it is simply demonized. *Mount Laurel* did not work, and the stamina and will to try again were drained by a brutal twenty-five year process. This, of course, is the narrative from the perspective of promoting racial and economic diversity in suburbia. The study provides the facts, according to this view, and the facts show that *Mount Laurel* was a monumental failure.

Yet even an abuse-of-power narrative, one in opposition to the massive resistance story and suspicious of racial and economic integration of suburbia, could begin with the assertion that *Mount Laurel* was a monumental failure—as well as a costly one.<sup>64</sup> Like the failed War on Poverty, so this narrative goes, social engineering by policymaking elite attempt to bully change without dealing with root causes. These include rampant crime, poverty, and poor education in cities that are not the responsibility of suburban residents to fix. The judges were wrong in trying to redistribute social goods in such an undemocratic fashion (so power was rightfully returned to the legislative branch). To the extent that *Mount Laurel* relied on non-redistributive remedies—i.e., market forces—the results show that it has achieved its aims without disrupting the fabric of communities. But at undue cost, which should not be wasted again.

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<sup>63</sup> The historical term “massive resistance” refers to the efforts of Southern leaders, particularly governors, to defy school desegregation requirements set forth by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Despite such official opposition, the Court hoped to reinforce its order to desegregate in *Cooper v. Aaron*, 358 U.S. 1, 6 (1958).

<sup>64</sup> Preoccupation with “costs” appears to be a hallmark of many dominant narratives with respect to resource sharing and economic inequality. See, e.g., *infra* note 48. Costs, however, are closely associated with values, both social and economic. Thus, through the subtle use of innocuous terms, dominant narratives can achieve a covert dichotomy where suburbs are understood as places of good and inner cities as bad. See *infra* notes 69-71 and accompanying text.

Fortunately, there is a problem with either version of events and their meanings that social science can help to resolve in the future. That racial and economic prejudice continued to infect the process is undeniable. But we do not really know at what junctures such prejudice was able to weaken the resolve against it or to subvert a scheme of inclusion. The Wish-Eisdorfer study suggests that many households of color were priced out of housing that whites were able to afford.<sup>65</sup> But the findings are not conclusive, only suggestive. The study further suggests that the practice of giving preference for housing in a region to applicants who work or/and live in that same region may have inadvertently locked in already segregated housing patterns.<sup>66</sup> In that sense, households of color were largely "placed out" of suburban units. But so far we cannot say for sure. Much more importantly, we really do not know how applicants got information about housing in each of the six regions or on a town-by-town basis.<sup>67</sup> This information is critical, because we could learn that inadequate information and marketing—a hallmark of poverty status in this country<sup>68</sup>—simply prevented people from learning of housing for which they were eligible. On the other hand, if we learn that they knew and were eligible but declined the housing, research rather than speculation about cultural tendencies and the neutral operation of markets should tell us why. We just do not have the whole story about how specific applicants in the *Mount Laurel* placement process found their way. Until we have such information, we would be wise to refrain from general condemnations of integration strategies and from conclusions that *Mount Laurel* was a failure. The answer may be that we do not yet know because we have not yet tried.

Finding out is critical, because the failure to integrate New Jersey's areas of greatest economic vitality would represent more than a missed opportunity for the fulfillment of moral aspirations. The imperatives that

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<sup>65</sup> See, e.g., WISH & EISDORFER, *supra* note 1, at 72 ("The fact that COAH pricing regulations in effect during the relevant period essentially targeted moderate income housing at various levels in the moderate income range, but only at the very top of the low income range—i.e., households at or very near the upper limit of 50 percent of the median household income—may have exacerbated disparities.")

<sup>66</sup> See WISH & EISDORFER, *supra* note 1, at 27 & 73.

<sup>67</sup> The study speaks to this concern in noting, for example, that some projects are advertised primarily, if not exclusively, by developers, and "the location and characteristics of applicants may be the extent and nature of the advertising." See *id.* at 28-29. However, the study is not sufficiently specific in describing this and other means by which applicants receive notice of available housing through AHMS or, for that matter, other relevant sources.

<sup>68</sup> See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 55-62 (1987) (describing how a product of the social transformation in the concentration of very poor families in neighborhoods with high jobless rates is social isolation from information, specifically job, networks).



moved the New Jersey Supreme Court in *Mount Laurel I and II* were at least economic and moral.<sup>69</sup> Yet together these motive forces encompass a necessary benefit that integration has always implied: the breakdown of a self-legitimizing social hierarchy based on race by which both privilege and exclusion are systematized. The prospect of *Mount Laurel's* failure as an instrument of de-segregation would validate social constructions of value in the state whereby white suburbs are understood in the dominant narrative as being good and normal, while black cities are bad and aberrant.<sup>70</sup> As one thoughtful scholar has observed, "[b]reaking down the walls of exclusion therefore has the effect of breaking down white dominance as well as making white spaces less white."<sup>71</sup>

## II. MOUNT LAUREL AND URBAN POSSIBILITY

### A. Community Economic Development

A corollary to suburban impossibility is urban possibility. On its face, the *Mount Laurel* Doctrine, a contemporary regional integration scheme, may not appear susceptible of intra-urban interpretation. Indeed, the promotion of urban deconcentration would seem inconsistent with urban revitalization, and the latter was never openly embraced by the New Jersey Supreme Court. Perhaps for that reason, the Wish-Eisdorfer study is silent in demonstrating whether the Doctrine has succeeded at all in what I identify as the second *Mount Laurel* objective, aiding the revitalization of central city neighborhoods through *Mount Laurel's* creation of regionalized housing obligations. It would have been well beyond the scope of the research, but it is critical research nonetheless. Because at some point in the compromise process between the New Jersey Supreme Court's decisions and the application of the law, the interests of the state's cities were brought into the mix.<sup>72</sup> The principal mechanism is the

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<sup>69</sup> See, e.g., *Mount Laurel I*, 67 N.J. 151, 221, 336 A.2d 713, 749 (1975) ("Just as diversity strengthens and enriches the country as a whole, so will it strengthen and enrich a suburban community.") (Pashman, J., concurring). It is harder to ascertain the legislature's motives behind passage of the FHA, although the Act's preamble includes some of the New Jersey Supreme Court's *Mount Laurel* language.

<sup>70</sup> See RUSK, *supra* note 43, 29 (briefly dichotomizing white suburbs as "good" and black inner cities as "bad").

<sup>71</sup> Mahoney, *supra* note 52, at 1680 (emphasis supplied). See also Calmore, *supra* note 15, at 1271-73.

<sup>72</sup> See, e.g., *In re Township of Warren*, 247 N.J. Super. 146, 164, 588 A.2d 1227, 1236 (App. Div. 1991).

Harold McDougall has argued that the *Mount Laurel* Doctrine has taken explicit account of cities since at least the *Mount Laurel II* opinion. See generally Harold McDougall, *Mount Laurel II and the Revitalizing City*, 15 RUTGERS L.J. 667 (1984). Specifically, Professor McDougall favorably viewed the court's refusal to exclude large cities

RCA by which, in theory, cities benefit financially from the continued resistance of predominantly white suburbs to the in-migration of city residents.<sup>73</sup> Whatever one may think of this process of bargaining away a legal and perhaps social obligation,<sup>74</sup> it has funded new affordable hous-

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from "developing municipality" obligations as a clear signal that the court foresaw the Doctrine's application as a possible tool of urban revitalization. *See id.* at 668, 675-78. The principal mechanism for building housing in the state's larger municipalities would be inclusionary zoning measures mentioned by the court, such as set-asides and density bonuses, rather than RCAs (which would not arrive for another decade). *See id.* at 683-91. The principal danger presented by the court's endorsement of inclusionary zoning, however, was the displacement of poor residents through resulting gentrification. *See id.* at 678-83.

<sup>73</sup> Prior to the adoption of a rule prohibiting transfer of any fair share obligation for less than \$20,000 per unit, Douglas Opalski found that by March 1992 RCAs had resulted in the transfer of \$60 million from suburban to urban areas for the rehabilitation of about 2500 units and the construction of 700 new units.

The bargaining practice has created its own market with its own bidding wars. For example, the City of Newark had negotiated an RCA with Parsippany-Troy Hills in which the latter would pay \$6.6 million for a total of 294 new and rehabilitated units. The suburb reneged when it was able to strike the same deal with the City of Elizabeth for only \$5.1 million. *See HAAR, supra* note 11, at 215. The RCA market mechanism clearly relies on what could be regarded as internecine counterbidding among the poorest cities in the state. *See Fox, supra* note 11, at 569 nn.133-136 & 559 n.98.

<sup>74</sup> Professor Haar has argued that, despite the apparent repudiation of the Mount Laurel Doctrine's explicit suburban integration objective, the RCAs reflect a necessary compromise between the courts and the legislature.

[W]ithout a mechanism like the RCA, one has to wonder whether the legislature would have enacted any statute that supported the production of low- and moderate-income housing in suburban areas. So perceived, RCAs appear as a safety valve to a doctrine of integration so potentially disruptive of perceived local prerogatives that the entire ship of low-income housing production could sink without such a concession. RCAs allow a move in the right direction after all, just at a slower, more politically realistic pace.

HAAR, *supra* note 11, at 113-14.

Nevertheless, Haar recognizes that RCAs marked the formal transition between the racial and economic integration objective of Mount Laurel and what I optimistically suggest is the start of the community economic development objective. "By dint of the legislation, the option of buying out of the affordable housing obligation displaced the goal of integration and population redistribution." *Id.* at 114.

Others have been less sanguine. Professor McDougall argues that the RCA scheme encourages suburban municipalities to make the "rational" decision to transfer fair share units while receiving cities make "desperate" ones to enter such agreements. *See Harold A. McDougall, Compensation for Exclusionary Zoning*, 60 TEMP. L. Q. 665, 689. The transaction showcases the unequal bargaining power between the two. *See id.* at 681-84. Cities simply have little choice but to seek out additional sources of financing. Unfortunately for cities, revenues from RCAs do not cover many of the costs associated with housing development, such as cost overruns, occupant preparation, and post-development costs. *See id.* at 687-88; *see also, Fox, supra* note 11, at 565-572 (criticizing RCAs as a substantive retreat from the Doctrine's terms as well as pointing specifically to the problems of unregulated bidding among cities and the potential for misuse of funds)

ing in the state's cities.<sup>75</sup> This is an explicit objective of community economic development, and, at some point, it became an implicit objective of *Mount Laurel*.

The term community economic development needs clarification because it has come to mean so many things in so many different quarters. The use of the word "community" before the term economic development has served to distinguish the concept from, say, downtown development of business corridors; "community" therefore connotes low income, usually people of color and, until fairly recently, involving the work of non-profit organizations. Much of the work of these community-based nonprofit organizations has focused on developing or rehabilitating affordable housing, and has required little emphasis in law. Hence, the pioneers of contemporary community economic development tend to be non-profit community development corporations (CDCs), which have gained expertise in housing development by working with, and leveraging resources from, public and private institutions, such as the Ford Foundation's Local Initiatives Support Corporation (LISC), a national intermediary that raises capital for local projects by providing housing tax credits. Housing-centered work has expanded somewhat to additional needs in low-income neighborhoods. As the network of social services-oriented organizations and advocates has branched out beyond housing, umbrella groups with distinct legal expertise, such as the National Economic Development and Law Center<sup>76</sup> in Oakland, California, and a variety of Legal Services Corporation offices, have come to play important roles in providing tax and other legal advice.

The greatest challenge to the different disciplines involved in the work of rebuilding economically abandoned, urban communities has been creating jobs, especially through a substantial increase in capital investment. The other term commonly associated with community economic development, "empowerment," is often used to reflect this critical aspect of neighborhood revitalization. The dual emphasis on jobs and housing is expressed in both public and private models of community economic development, from the Clinton Administration's passage of empowerment

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<sup>75</sup> As of February 1995, COAH had approved 39 RCAs around the state by which a total of almost \$81 million and 4172 units had been transferred from suburbs to cities. See HAAR, *supra* note 11, at 115. Overall, the price per unit has ranged from a low of \$11,500 (paid by Hamilton to Trenton) to \$27,500 (paid by Hopewell to Trenton and by Franklin to Perth Amboy). See *id.* at 233. Newark has led the way with six RCAs, transferring 732 units at an average price of \$18,335 per unit. See *id.*

<sup>76</sup> See NATIONAL ECONOMIC DEVELOPMENT AND LAW CENTER, COUNSELING ORGANIZATIONS IN COMMUNITY ECONOMIC DEVELOPMENT (1995).

zone legislation<sup>77</sup> to fully decentralized, grass roots "buy black" campaigns that involve complicated assumptions of the cultural and economic benefits that might flow from "recycled dollars" within ethnically and economically homogenous neighborhoods.<sup>78</sup> In between lie many other models designed to bring economic vitality and social stability to neighborhoods of intense poverty, large-scale economic disinvestment and political marginalization.<sup>79</sup> Finally, advocacy organizations concerned with racial and economic discrimination against entire urban communities also do the work of community economic development by, for example, bringing Community Reinvestment Act protests against banks that shirk investment, lending and retail services in low-income areas of the metropolitan regions in which they do business.<sup>80</sup> More recently, commentators and policymakers have come to appreciate the importance of giving equal weight to long-existing social service concerns in community economic development strategies,<sup>81</sup> thereby rejecting the either-or ethos (investment or people) that has dominated policy debates for so long.

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<sup>77</sup> See Revenue Reconciliation Act of 1993, Pub. L. No. 103-66 §§ 13301-13303, 107 Stat. 312, 543 (codified at 26 U.S.C. §§ 1391-1394, 1396, 1397 (1993)).

<sup>78</sup> See generally TIMOTHY BATES, *BANKING ON BLACK ENTERPRISE* 31-72 (1993); Jeremiah Cotton, *Towards a Theory and Strategy for Black Economic Development*, in *RACE, POLITICS, AND ECONOMIC DEVELOPMENT*, (James Jennings ed., 1992); Michael Mitchell, *Harlem's Economic Paradox*, N.Y. TIMES, Dec. 13, 1995 (discussing "buy black" sentiments at the root of fatal fire and commercial landlord dispute on Harlem's 125th Street shopping strip).

<sup>79</sup> See, e.g., Michael E. Porter, *The Competitive Advantage of the Inner City* (Nov. 1, 1994) (unpublished draft on file with the author) (discussing myriad failures of traditional social advocacy approaches to neighborhood revitalization and arguing instead for new strategies utilizing free market approaches such as industry "clustering" and both indigenous and regional advantages); DAVID F. BEATTY ET AL., *REDEVELOPMENT IN CALIFORNIA* 25-64 (2d ed. 1995) (describing adoption and implementation of redevelopment plans under California's Redevelopment Law).

<sup>80</sup> The Community Reinvestment Act, 12 U.S.C. §§ 2901-22907 (1988), imposes lending and other service obligations on banks as a condition of their federal charter. Its uneven use as an advocacy tool for redlined low-income communities has been the subject of substantial scholarly attention. See Gary M. Swidler, Note, *Making the Community Reinvestment Act Work*, 69 N.Y.U. L. REV. 387 (1994); Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463 (1994).

Redlining is not limited to disinvestment by banks. In communities where residents are largely dependent on cars, such as many parts of California, redlining by automobile insurance companies has had devastating effects on the economic opportunities available to consumers. See, e.g., *City of Compton v. Bunner*, 197 Cal. App.3d 617 (Cal. Ct. App. 1988) (challenging California's insurance law on state equal protection grounds); Gary Williams, *The Wrong Side of the Tracks: Territorial Rationing and the Setting of Automobile Liability Insurance Rates in California*, 19 HASTINGS CONST. L.Q. 845 (1992).

<sup>81</sup> See, e.g., Peter R. Pitegoff, *Urban Revitalization and Community Finance: An Introduction*, 27 MICH. J. L. REFORM 613, 617-25 (1994) (overview discussing policies that

What emerges from this tangle of threads is that community economic development is, and must be viewed, in comprehensive ways. It is the sum of its many parts—housing, lending, food, public services, and institutions, health care, etc.—and more. Ultimately, community economic development combines the work of building and investing with healing and participating. To succeed, it will require jointly harnessing a volatile dynamic of tangible and intangible, individual and collective, local and regional, public and private, for-profit and non-profit, all against a background of intense poverty and historic and contemporary discrimination.

The relationship of this dynamic to the *Mount Laurel* process is, I hope, growing clearer. As noted, community economic development strategies often begin with affordable housing and branch out to include improved municipal services,<sup>82</sup> better access to essential consumer goods and services<sup>83</sup> and, most importantly, proximity to jobs.<sup>84</sup> These are precisely the benefits of a robust economic infrastructure that many low-income people of color and their advocates expected to gain by suburban residency under the Doctrine.<sup>85</sup> Instead, the affordable housing element

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combine social goals with housing and credit financing methods); Susan Fainstein & Ann Markusen, *The Urban Policy Challenge: Integrating Across Social and Economic Development Policy*, 71 N.C. L. REV. 1463, 1468-82 (1993).

In fact, one of the distinguishing factors between the Clinton Administration's empowerment zone legislation and enterprise zone proposals submitted by Jack Kemp and others during the preceding administration is the emphasis on social service needs. In addition to the familiar tax incentives to business investors and employers, the former provides, inter alia, millions of dollars in Title XX Social Security Bloc Grants. 24 C.F.R. § 597.200(d)(12)(i)(A)-(C) (1994). For a brief comparison of the major provisions, see Ellen P. Aprill, *Caution: Enterprise Zones*, 66 S. CAL. L. REV. 1341 (1993).

<sup>82</sup> Several economic development strategies have included equality of municipal services litigation. See e.g., *Baugh v. City of Milwaukee*, 823 F. Supp. 1452 (E.D. Wis. 1993) (fire inspections); *Ammons v. City of Dade*, 594 F. Supp. 1274 (M.D. Fla. 1984) (sewage and street repaving). See generally Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 779-82 (1993).

<sup>83</sup> See e.g., DAVID D. TROUTT, *THE THIN RED LINE: HOW THE POOR STILL PAY MORE* (1993) (comparing the infrastructure of basic goods and services in low- and middle-income neighborhoods of Oakland and Los Angeles, California).

<sup>84</sup> These rationales underlie the Clinton Administration's "Moving to Opportunity Demonstration Program" whereby residents of areas of concentrated poverty qualify for Section 8 housing certificates as well as housing counseling from nonprofit organizations. Under the program, residents seek housing in middle class, predominantly suburban settings. See Housing and Community Development Act of 1992 § 152, Pub. L. No. 102-550, 106 Stat. 3762 (1992) and related regulations at 58 Fed. Reg. 43,458 (1993). See also Roisman, *Housing Mobility and Life Opportunities*, *supra* note 44.

<sup>85</sup> The urban economic development objective is foreshadowed at several junctures in the Mount Laurel saga, including early references to the meaning of economic integration contained in the first litigation. At oral argument in Mount Laurel I, for example, Justice Hall responded to a township attorney's denial that Mount Laurel has any responsibility

of the Doctrine has been turned back to the cities in which they live through the mechanism of the RCA, launching a new set of burning questions, such as: Do those contributions facilitate sustainable economic development of those inner-city neighborhoods? What evidence do we have so far? What exactly is the proximity of such housing to available employment, and to what extent do residents actually find sustained employment there? What's missing? Should the RCA rules be amended to require the contributing municipality to do more, both in terms of covering additional but typical housing costs as well as creating regional economic growth relationships?<sup>86</sup> For example, could concurrent obligations be imposed on suburban municipalities whereby they must take affirmative steps to coordinate aspects of their local economies with cities in their regions?<sup>87</sup> If we cannot yet link people, can we link the markets on which they depend?

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for meeting housing need outside its borders by saying, "That's really what this case is all about." HAAR, *supra* note 11, at 21. What evolved was a doctrine concerned with fulfilling the poor's need for development with suburban integration. However, the township's obligation, as history now shows, could just as logically have been satisfied by directing development resources into the state's cities.

In Mount Laurel II, the New Jersey Supreme Court made several references to the development-oriented benefits that would theoretically accrue to low-income residents once they had moved to suburbia. These benefits were at the root of some of the inclusionary zoning techniques discussed in the opinion. For example, incentive zoning and mandatory set-asides both create means by which low-income residents may live in the same housing alongside upper-income residents with the goal of "provid[ing] adequate access and services for the lower income residents and at the same time protect[ing] as much as possible the value and integrity of the project as a whole." 92 N.J. 158, 268, 456 A.2d 390, 446 (1983). The latter concern, protecting property "value and integrity", represents an attempt at balance whose controversy in the suburban realm may be without rival. Arguably, the inability to strike such a balance is what led to renewed attempts to re-direct Mount Laurel to New Jersey's cities.

<sup>86</sup> Presently, COAH's regulations require the sending municipality to write a check—or checks, if paying in installments—but little else in order to be certified as discharging up to half of its fair share obligation through an RCA. See N.J. ADMIN. CODE tit. 5 § 92-11.2 (1996). Indeed, both the regulations and the terms of typical RCAs require more of the receiving municipality by way of compliance procedures, regular submissions, auditing as well as substantive requirements that require administrative outlays than the sending municipality. See *id.*; Interview with Ron Cuneo, Principal Planner, Council on Affordable Housing (Jan. 17, 1997) (notes on file with the author). Even COAH's enforcement and oversight of RCA responsibilities under N.J. ADMIN. CODE tit. 5 §§ 91-11.6 and 5:92-11.6 goes mainly to preventing fraud (of which there is apparently little evidence so far) by the receiver than anything else. See *id.* The scope of the sending municipality's connection to the receiving one is essentially a cash-per-unit transfer.

<sup>87</sup> Under N.J. ADMIN. CODE 5:91-11.4, both the sending and receiving municipality must forward to the county planning agency its master plan and zoning ordinances. This enables the planning agency to review aspects of the proposed RCA for their impact on regional planning, with specific reference to the comprehensive regional master plan. Interview with Ron Cuneo, *supra* note 88. This review proceeds on the basis of a checklist. *Id.* However, the checklist is concerned specifically with (i) access to employment

We really do not have answers to these and related questions yet, in part because this objective has not been openly embraced. These are among the many questions, however, we look to social science to answer for us in gauging how successfully *Mount Laurel* achieved an objective that has evolved from the underside of its early aims. These are community economic development questions. The RCA regulatory scheme, as currently configured, reflects an extremely (and unjustifiably) limited community development objective: rehabilitating and building affordable housing units. This is superficial in its scope compared to the justices' underlying concerns expressed in *Mount Laurel I* and *II* and clearly requires more.

### *B. Beyond Regional Contribution Agreements*

One aspect of the urban narrative already seems certain, however: the broader objectives of community economic development in New Jersey's cities will not be satisfied by the generation of new and rehabilitated affordable housing through RCAs as currently drafted. Housing development is one good, and it is frequently associated with general neighborhood improvement. But it rarely involves the reconceptualization of local markets, institutions and services that is entailed in what I have described as community economic development. Nor can housing development alone redefine the nature of relationships between poor families and, for example, their political representatives or their schools, so that quality of life concerns and prospects for greater life options are broached in a regular dialogue between entities that understand and reinforce each other as part of a continuing community fabric. These are, however, precisely the kinds of public and private goods available to residents of middle income suburban neighborhoods. A membership symbolically pledged through housing, residents of New Jersey's economically stable townships receive a great deal more than a roof over their heads.<sup>88</sup> They participate directly and indirectly in the goods and

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opportunities; (ii) consistency with the current land use element in each municipality (mainly transit); (iii) consistency with the current transportation elements; and (iv) water quality management. (Checklist available from COAH Office of Public Information) Although important, these items on their face do not create any affirmative obligations on the part of the sending municipality to integrate any of its local economic development planning with the receiving institution. While such integration may not always be feasible, the failure to provide for its consideration at the RCA approval stage represents a glaring oversight that compounds the burdens on the receiving municipality. *See infra* notes 90-96 and accompanying text.

<sup>88</sup> As Roger Montgomery and Daniel Mandelker have stated:

Housing denotes an enormously complicated idea. It refers to a whole collection of things that come packaged together, not just four walls and a roof, but a specific location in relation to work and services, neighbors and

services reproduced through the community social and economic infrastructure. Arguably, these townships, like suburbs across the country, were *built* on these assumptions of collective benefits and continue to be *designed* this way.<sup>89</sup> Membership, as we have seen, has been systematically denied to others chiefly out of concerns that such benefits would be diminished if particular outsiders were allowed to participate.<sup>90</sup> Thus, it would be a foolish hope indeed to expect that the mere donation of some units of affordable housing would engender a process of reconstructed markets, institutional relationships, employment opportunities and citizen participation in communities whose design, if one can be found, and resulting make-up consistently gives rise to failure.

Because such a result could be fairly regarded as the ultimate perversion of the *Mount Laurel* Doctrine, the late-emerging community economic objective must have called for more. That is, even the provision in the FHA establishing RCAs must be read together with the judicial edicts in *Mount Laurel I* and *II* to require some regionalization of not just the need for affordable housing, but the need for membership in communities in which there exists a dynamic and working infrastructure of public and private goods and services. The questions that necessarily follow are for both law and social science. The legal inquiry begins with how the New Jersey Legislature's passage of the FHA can be read consistently with what I argue is the clearly motivating force behind the judicial doctrine that declared the existence of locally-based fair share obligations of a regional scope. This is a matter of both interpretation and effectuation of legislative purpose. The social science inquiry begins with how suburbs and cities in New Jersey can formally regionalize economic opportunities.<sup>91</sup>

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neighborhood, property rights and privacy provisions, income and investment opportunities, and emotional or psychological symbols and supports.

HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 3 (Roger Montgomery & Daniel R. Mandelker eds., 2d ed. 1979). This "package" also includes access to information networks that often serve as the defining character of employment opportunities and the realistic chance of self-sufficiency. See Wilson, *supra* note 70.

<sup>89</sup> See EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 56-98, (Yale Univ. Press 1994); LEO MARX, THE MACHINE IN THE GARDEN 5 (Oxford Univ. Press 1964).

<sup>90</sup> Conversely, Massey and Denton argue that even the white poor, by not having to live in the same concentrated poverty as the black poor, benefit from racial segregation and exclusion. See MASSEY & DENTON, *supra* note 9, 128-29.

<sup>91</sup> In this vein, commentators have argued the necessity of more regionalized government whereby the city-suburban decision making divide is subsumed by "metropolitan" government with broader authority for the interests advanced by economic development generally. See, e.g. RUSK, *supra* note 43, at 33-35, 89-119 (arguing that "elastic" metropolitan areas have greater authority and incentives for decreasing seg-



It is likely that these questions will be answered with greater reliance upon regional land use and economic planning processes, including, but not limited to, the continued use of RCAs. In order to generate the kind of community economic development discussed earlier, it is imperative that low-income residents and their neighborhoods are connected with the jobs, goods, and services located in local economies in other parts of the state. Again, this is where the Doctrine and the Act stopped short, leaving us with only RCAs. As we have seen, these agreements are not sufficiently regional in their scope.<sup>92</sup> It would be consistent with *Mount Laurel's* emphasis on land use controls to re-examine the role of regional economic and land use planning on community economic development. Moreover, given the subsidies that more affluent municipalities arguably enjoy as a result of RCA transfers, it is incumbent upon those same municipalities not simply to contribute units of affordable housing to cities with high concentrations of poverty, but additionally to share in the larger economic burdens those cities carry.<sup>93</sup>

I am therefore proposing that the seeds of urban revitalization may be contained in some of *Mount Laurel's* earliest assumptions about community economic stability. Many of those assumptions were confined unnecessarily within suburban borders, despite a greater relevance. What is clear since the filing of the law suit in 1971 is that the New Jersey Supreme Court was prophetic in focusing on suburban growth within the context of regionalized economic relationships. What remains far from clear is how the most marginalized communities in the state can participate in this larger dynamic.<sup>94</sup> Given the Wish-Eisdorfer study's findings

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regation, controlling land use and promoting economic growth than characteristic of "inelastic" old cities surrounded by suburbs).

<sup>92</sup> *Id.*

<sup>93</sup> The subsidy is primarily what many affluent communities feared in the first place: Higher taxes for expanded public services, such as police and public school facilities. More affluent communities enjoy lower tax rates, because these higher costs are not absorbed through local revenues. Instead, these costs are shifted to cities with high poverty concentrations, which then suffer chronic fiscal shortages in part because local revenues cannot possibly cover the higher costs. See Fox, *supra* note 11, at 539-41 & n. 29. Although this is a common feature of exclusionary zoning, it was not remedied by the FHA. The suggestion made here is not unlike linkage fees and other exactions levied against the beneficiaries of land use controls.

<sup>94</sup> This is especially pressing given that New Jersey's development has not been exclusively "suburban" since the Supreme Court first joined *Mount Laurel* issues in 1971. Much of the state's employment and residential development has emerged in quasi-urban, quasi-suburban areas of the state near regional interchanges such as Interstates-78 and 287. The sometimes bucolic office parks being built in these twilight zones of formidable new commerce were planned in order to maximize the myriad benefits of regionalized economies, including proximity to established urban centers (e.g., New York City), air travel and ground transportation; executive and employee "quality of life" priorities; and lower-cost, lower-density commercial real estate. White collar employment opportunities

on the probable failure of integration strategies as the primary means of nexus, we are wise to direct some of those critical social science resources at more effectively planning for economic relationships where people live.

#### CONCLUSION

It is tempting to look upon the entire experience of Mount Laurel as social science research, except that people are still living it. From its inception, Mount Laurel promised to be a story of exclusion, race, class, urban vs. suburban space, development, and community. These are powerful and often illusory constructs, and it would be hard for anyone to tell it the same way twice. It is still being told. What is necessary to the telling is continued research so that we may better satisfy its objectives and, hopefully, find common ownership in its history.

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appear to dictate many of these business planning choices. However, as successful as these pockets of development have been, there is little evidence showing consideration of how to include nearby residents of traditional inner cities, such as Newark and Elizabeth, New Jersey. See JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 21-68 (1991).