# HUD wants YOU to comment on their proposed rule about Disparate Impact in "Fair" Housing

Steven Blumrosen, October17, 2019, Bonita Springs, FL *

HUD has proposed new rules concerning Disparate Impact and "Fair Housing." [1]

There is an article about the Disparate Impact of the proposed HUD rules on a website called Curbed.org, a VOX Media production. [2]

Time for PUBLIC COMMENTS closes tomorrow, Friday, October 18, 2019!

The US Constitution gives us the right to peaceably assemble and petition our government. Our government is not just supporting us, HUD is now asking us for our help.

If you have a personal story about the effects of neighborhood on your life choices and successes, or you have a Ph.D. in community dynamics, or you are president of an organization that encourages people to do the best they can with what they've got – and you want them to have the best chance to grow up with the broadest range of choices and the most opportunities they can, think quickly about this and submit a comment, electronically, by tomorrow, Friday, October 18, 2019.

**Some Background**

In 2015, when **Julian Castro** was **President Obama**'s Secretary of Housing and Urban Development (HUD), the Supreme Court decided a case brought by an advocacy group in Texas called "Inclusive Communities."

Inclusive Communities alleged grants (public assistance to encourage contractors to build low income housing) were mostly being used to build housing in predominately minority neighborhoods. Housing for poor minorities sounds like a good idea. It sounds like a battle against poverty.

---

* The author, Steven Blumrosen, has been CIO of www.eeo1.com and its 40 state reports and a national report using a new methodology to identify with statistical precision, as of 1999, the amount of intentional job discrimination in MSAs by iindustry and occupation; and co-author of Slave Nation: How Slavery United the Colonies and Sparked the American Revolution (Sourcebooks, 2006) and "Restoring the Congressional Duty to Declare War," Rutgers Law Review, 2011 (www.warpowers.us)

Many hyperlinks in this article are in the clear rather than hidden behind clean easy to read text. I am revealing these links to provide an additional means to access them. If the link is not clickable, just copy it and paste the link into a browser URL address bar.

The sex of the children did not matter, and the race of the children did not matter. This process was sex and race neutral, or equal, on its face.

All that mattered, to take advantage of the opportunities, was the location of the children's residence.

**Separate is still not equal.**

Evidence showed that families who lived in housing built with these publicly assisted grants were mostly minorities.

Despite the fact that people could look around and see vast numbers of "white" people in poverty, the evidence showed higher percentages of black families in housing built with these grants. Evidence also showed that children living in families residing in areas that were not predominately minority - in other words, children who lived in families that resided in predominately "white" areas - had better chances to have more opportunities to find their passion and a path to success.

Finding passion and success sounds like a good idea. It has been the American Way from Horatio Alger to Marianne Williamson.

However, locating grant-funded housing mostly in black areas deprived those black families, including the next generation, of access to locational opportunities that come to people living in white areas. Thus, evidence showed a greater positive impact of grant-makers' decisions on one race over another. Their "beneficence" went to blacks in need of housing and they became gatekeepers who had a negative impact on blacks by limiting locational opportunities for black children.

This was a case that went all the way to the Supreme Court. That always takes time, enough time to make changes if the grantors wanted to provide greater locational opportunities to black families. By not settling the case and changing the location of affordable housing, the decision-makers determined to continue limiting the degree of opportunity available to children who grew up in the housing that their grants helped fund.

Inclusive Communities probably did not want to point fingers and accuse anyone of animus (hatred). That is highly divisive and does not lead to good community relations when a lawsuit ends.

Rather than using anecdotal accounts of personal acts of racism by the people who were making the grants, Inclusive Communities used statistics to help prove their case. Similar forensic use of statistics had been well established in Employment Law, where 2.5 standard deviations is evidence, almost beyond a reasonable doubt, of intent to discriminate. [3]

This is not a quota. Numbers, alone, do not make a quota. Strictly adhering to a pre-determined number may be a quota. Statistics are not quotas if they do not require strict adherence to

particular numbers and are used to help employers, and, now, providers of housing, measure and plan the effect of their decisions within a wide range of lawful behavior.

Over dissents by Justices Scalia and Thomas, Inclusive Communities won. The Supreme Court approved the use of statistics to evidence discrimination in housing.

About that time, The Atlantic published an article about the social context of the decision, Supreme Court vs. Neighborhood Segregation." [4] HUD, led by **Secretary Julian Castro** reviewed its rule and decided that the Department's rule was in line with the Supreme Court decision. Now, Ben Carson, the current Republican HUD Secretary in President Trump's cabinet, wants to change the rule.

Why?

You may know people who would want to answer that question and would be willing to quickly comment on it by following the procedures at https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard"!

The Vox article on the potential disparate impact of the proposed rules is at https://www.curbed.com/2019/8/19/20812039/disparate-impact-hud-fair-housing-ben-carson.

Vox (not Fox) makes clear that statistics can reveal the likely disparate impact of a decision by Ben Carson and his boss, even if the rule seems neutral on its face.

Sometimes, statistics are useful to decision-makers because they may reveal effects of "implied (unstudied) bias" of culture and the norms the law was meant to change.

In this situation, the likely impact of the proposed rules is known and the decision is, therefore, intentional.

I would like to directly acknowledge the issue raised by Justice Clarence Thomas in his dissent.

As restated by the American Bankers Association, "According to Justice Thomas, there is no legitimate basis for disparate impact liability. Instead, the Justice argues that a plaintiff must show clear intent to discriminate and Congress never intended and never sanctioned a disparate impact theory of liability. In fact, the Justice states that, 'We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.'" [5]

While I might not comfortably take on a sitting Supreme Court justice, it is easy to "question authority" when it comes to the lobbying organization that proclaims it "proudly serves America's Banks." The banking lobbyists take the Supreme Court justice's words out of context when they provide the pithy quote that "We should not automatically presume that any

institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent."

Do the bankers' lawyers and lobbyists really want to make the only Black Supreme Court Justice look so inept when it comes to lawyering? Everyone knows, from watching television – even if they have not graduated law school, survived the hectic pace of a legal career, administered two large Federal agencies, and sat on the Supreme Court – that there are usually at least three lawyers in a courtroom: Judge, Prosecutor AND Defense Counsel.

We are not living under a Constitution that permits "rubber stamp" courts. We live with a Constitution that requires due process and equal protection of the laws. To do that, in many cases we have the right to a jury trial, and we enable all parties to a court case to defend themselves.

That means, a plaintiff in a civil case or a prosecutor in a criminal case must present their evidence first. If the court deems it sufficient, then the defendant defends themselves.

In other words, as bankers' lawyers and lobbyists should know, there is no automatic presumption of guilt, which is actually what the Justice says: "We should not automatically presume that any (defendant) is guilty of discrimination until proved innocent."

The presumption is innocent until proven guilty.

If someone brings a lawsuit against a bank, then they must establish that there are sufficient facts and rules of law to survive what is called "summary judgment." If the Court does not summarily throw the case out for lack of evidence, then the bank may defend itself by presenting facts and arguments about the law.

For example, in a case like this, plaintiffs may (if they have it and the court allows) present evidence of animus. Perhaps they can show that grant-making decision-makers go out regularly to a fancy restaurant and tell jokes demeaning black people and then go to a private home, put on blackface, and make decisions about grants. Evidence of animus may raise the level of antagonism in the community.

Forensic statistics, on the other hand, are simply statements of fact that show the degree to which the group being observed is distant from the norm. Whether the group is "Blacks" or the group is "international financiers making more than $50 Million a year," for example, and the group is far from the norm, they are called "outliers." That is a neutral term that means, simply, they are far from the norm.

The Supreme Court has accepted 2.5 standard deviations below the norm as very convincing evidence that the disparity did not occur by accident; 2 standard deviations is convincing; and, 1.6 standard deviations may be credible.

Neither evidence of animus nor evidence of negative standard deviations is accepted by a court as true until the defense presents their evidence and arguments and the court decides against the defendant by “a preponderance of the evidence” in a civil case or “beyond a reasonable doubt” in a criminal case.

Bankers’ lawyers and lobbyists may have to bill many hours to figure out how to convince a court that there is a non-discriminatory reason for statistical evidence of 2.5 standard deviations, or more. Yet, that does not make the presumption of guilt automatic.

Interestingly, the American Bankers Association says Thomas says "a plaintiff must show clear intent to discriminate."

**Intent** is exactly what is proven by statistics. Extreme statistics demonstrate results that most often are from informed structural design and not by accident. For most purposes, then, the results can be considered intentional.

Justice Thomas does not need the banking lobby to speak for him. The soft-spoken, often silent, jurist has stated his position for the record in his opinions and for the public in YouTube videos. He suggests the use of certain words is required by the anti-discrimination-in-employment statute, Title VII of the Civil Rights Act of 1964, as amended.

In his dissent in Inclusive Communities, Justice Thomas wrote "the foundation on which the Court builds its latest disparate-impact regime — Griggs v. Duke Power Co. ... is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims ... represents the triumph of an agency’s preferences over Congress’ enactment and of assumption over fact. Whatever respect Griggs merits as a matter of stare decisis, I would not amplify its error by importing its disparate-impact scheme into yet another statute. ... We should drop the pretense that Griggs’ interpretation of Title VII was legitimate.' The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact.' Ricci v. DeStefano ... (2009). It did not include an implicit one either."

Certain segments of the media have taken these words as their rallying cry. However, the justice did not stop there. Justice Thomas went on to say:

"Title VII’s operative provision ... addressed only employer decisions motivated by a protected characteristic. That provision made it 'an unlawful employment practice for an employer (to) — “discriminate against any individual ... because of such individual’s race, color, religion, sex, or national origin .... We have repeatedly explained that a plaintiff bringing an action under this provision 'must establish "that the defendant had a discriminatory intent or motive"’ for taking a job-related action.' Ricci."

That, as the Justice who had the run of a good library when integration came to his hometown and was Chair of the EEOC (1982-90, under Republican presidents Ronald Reagan and George H. W. Bush) is more the crux of the matter. [6] As I understand what Justice Thomas said in his

writings and on camera, he accepts the text of the statute as a directive and must find that an act is done "**because of**" someone's race, color, religion, sex, or national origin.

How do we know what is in someone's heart or mind? We hear what people thought they saw, but eyewitness testimony is fragile. We look at what people wrote, but writings are often done for a particular, and perhaps different, purpose. We see what they did. For example, a supervisor may give employees of one racial group more opportunities to earn a promotion, than are given to employees of another group. To see what someone intended, we look at whether one race is favored over another by whether they receive promotions at a higher rate.

Another example is that at one time (before 1964) there were Federal contractors with no black employees. Wouldn't it have been a good idea to ask how that could be, other than "**because of**" the race of the employees and the race of those who were not employees? That could have been seen in statistics.

Statistics can prove, by a preponderance of the evidence, that "*because of*" the intent to favor one race over another, more housing credits went to build low income housing in minority areas and, thereby, deprived black children of opportunities children have in areas that are predominately white.

Clarence Thomas, himself, in a relatively relaxed interview with Julian Bond, gave an example that shows the importance to him of such semantics (at 49:47), "I had these wonderful programs. When you run a fairly decent size organization, you have some latitude. You put, say women or minorities, in programs that would enhance their careers. These weren't like giving preferences. It was getting that pool ready, expanding it, to move into upper management, whether it was at EEOC or other agencies. And, the good news about that is that in the long run it actually worked, that they went off and they did other things. People were taking them away from us." So, the programs he chose to talk about were not preferences. They were opportunities. And, they were open to women and minorities, who did their work to his satisfaction. [7]

This sounds strange coming from a man who wrote his dissent in Inclusive Communities and says in a YouTube video called "Clarence Thomas on Racism" that "I have never understood the notion that we could continue to focus on race in order to get over it. I never understood that we have to continue to identify, to be race-conscious in order not to be race-conscious." [8]

Apparently, it is a matter of sequence. End racism and, then, there is no need for race-conscious preferences or expanding the pool of eligible applicants. See "color" and "sex" first; help employees fashion opportunities to advance their careers; and, eventually, there will be no need to worry about color and sex.

We have come a long way! Yet, we are not there yet. Perhaps, because of the wonderful programs Justice Thomas talks about, there are more women, people of color, and women of color in higher management positions. According to the data on www.eeo1.com, about 8 Million women and people of color were better off, as of 1999, than they would have been with the policies in effect before 1964. If this trend continues, perhaps we will see the day when we

realize we are not thinking about color. However, if there is a reversal, we may be race-divisive for another 70 years. That is about how long the US lived through Jim Crow segregation and, also, about how long we have been working toward integration.

Until tomorrow, October 18, the question HUD has posed to us is whether their proposed rule keeps us on the trend toward race and sex equality or whether it will make things more difficult to reach a place where the only statistical "outliers" are groups not protected by Federal anti-discrimination laws.

---

1. HUD Proposed Rule on Disparate Impact: https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard, accessed 10/7/2019.

2. Curbed article about the disparate impact they foresee of HUD's proposed rule: https://www.curbed.com/2019/8/19/20812039/disparate-impact-hud-fair-housing-ben-carson, accessed 10/7/2019.

3. The Reality of Intentional Job Discrimination in Metropolitan America – 1999, Chapter 5, "Measuring and Proving Intentional Job Discrimination," http://www.eeo1.com/1999_NR/Chapter05.pdf, accessed 10/9/2019.

4. The Atlantic published an article about the social context of the Inclusive Communities decision, "Supreme Court vs. Neighborhood Segregation," https://www.theatlantic.com/business/archive/2015/06/supreme-court-inclusive-communities/396401/, accessed 10/8/2019.

5. American Bankers Association, ABA Staff Analysis: Supreme Court of the United States Holding on Disparate Impact Texas Department of Housing & Community Affairs v. Inclusive Communities Project July 2015, https://wabankers.com/images/wba/pdfs/SA-disparateImpact2015.pdf, accessed 10/8/2019.

6. "the Justice who had the run of a good library when integration came to his hometown," YouTube, https://www.youtube.com/watch?v=gfAZUYCZSLQ, accessed 10/8/2019, at the University of Virginia's Explorations in Black Leadership:

   Julian Bond, asking Justice Thomas about Earl Warren and the Supreme Court's unanimous 1954 decision in Brown v. Board of Education (Topeka), "As you grew older, did you have some idea of what it might mean, what it could mean, as opposed to what it may have turned out to mean?"
   Clarence Thomas answered: "You know, my grandfather was an interesting man. He, of course, dominated our lives. And, he felt that as rights were vindicated, we had an obligation to measure up, to use them. I'll give you a separate example. When the Savanah public library finally desegregated and we were allowed to go to the main library, his point was that we were obligated to use it. That is, we have to show up, no matter what. And, we have to read books, because we finally had a right to do so. So, when it came to education, as the rights became available, we had an obligation to use them properly. So, he would say to me, in 1964 … "Don't shame me. And, don't shame the Race." In other words, you **have** to perform. (Emphasis by interviewee's demeanor in the video.)

   One of Julian Bond's follow-up questions: "What do you think it has turned out to mean, the Brown decision, all these years later?"

   Clarence Thomas: "Oh, I think it really did something that could have been done back when *Plessy* was decided in the 1890s. That is, to affirm something that is clear in the 14th Amendment, that all citizens have the same rights. All citizens of the United States. And, made it possible, I guess in a practical way, for us all to have, or at least to have the possibility to have, the same education."

   Later, Justice Thomas was very protective of his views on Affirmative Action. Brown v. Board of Ed. opened the door. Then, there was the Civil Rights Act of 1964, as amended, that provided some definition and enforcement possibilities. Affirmative Action is a remedy the justice does not seem to like because it provides "structural injunctions, where you set up a broad system rather than deal with the case before you."

As I recall, "affirmative action" started as a comprehensive plan to resolve a number of difficult concerns that arose in the construction industry in Philadelphia in the summer of 1967. An agreement was reached that set a vision AND required affirmative steps to resolve the matter by setting specific goals and timetables to take action to end unlawful employment discrimination. A Revised Philadelphia Plan was implemented in 1969 "by the Department of Labor Assistant Secretary for Wage and Labor Standards Arthur Fletcher that required government contractors in Philadelphia to hire minority workers." (https://definitions.uslegal.com/r/revised-philadelphia-plan/, accessed 10/9/2019)

In other words, what has come to be known as "Affirmative Action" was a specific remedy for a particular case. The idea of setting specific goals and timetables worked so well, it went national. Still, details are often worked out on a case-by-case basis.

7. Ibid.

8. "Clarence Thomas on Racism," https://www.youtube.com/watch?v=2rUZIllM5HU, accessed 10/7/2019.

Clarence Thomas interviewed by Julian Bond:
Explorations in Black Leadership Series