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Response to "Urban Policy and Families: How Concerns About Order Contribute to Familial Disorder

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RESPONSE TO “URBAN POLICY AND FAMILIES: HOW CONCERNS ABOUT ORDER CONTRIBUTE TO FAMILIAL DISORDER”

*Tim Iglesias**

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INTRODUCTION

Dr. Raphael Bostic argues that a phenomenon called the “social order dynamic” explains the negative effects on families of various past and current housing and land use policies.¹ Dr. Bostic defines social order dynamic in the following way: sometimes policymakers adopt policies to maintain the urban economic order, but “because domains rarely operate in isolation, efforts to maintain order along one dimension can exacerbate conditions and increase disorder in others.”² “Families, particularly those with low incomes, often live at the intersection of these conflicting forces,”³ and suffer negative effects because of such policies. Dr. Bostic’s article (“the Article”)

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1. *See generally* Raphael W. Bostic, *Urban Policy and Families: How Concerns About Order Contribute to Familial Disorder*, 43 FORDHAM URB. L.J. 969 (2016).

2. *See id.* at 969.

3. *See id.*

identifies examples of the social order dynamic, and then offers some suggestions for avoiding this dynamic or mitigating its effects, while still serving the original policy goal of maintaining the urban economic order.

This response to the Article consists of four parts followed by a brief conclusion. First, I clarify the Article's thesis and operationalize the social order dynamic by clarifying its elements. Second, I compare the Article's examples of the social order dynamic with the refined definition of the social order dynamic. Third, I explore the meaning of social order in the Article and its inextricable relationship to social welfare. Fourth, in light of these discussions, I consider the Article's proposed solutions to the problem and offer an alternative.

I. CLARIFYING THE THESIS AND OPERATIONALIZING THE "SOCIAL ORDER DYNAMIC"

The Article aims to identify the social order dynamic as a distinct policymaking or governance problem: a situation in which policymakers adopt a particular policy to bring social order into one particular dimension of urban life (i.e., the economic one).⁴ This policy, however, has the unintended effect of causing disorder in the "family" dimension of social life through some kind of spillover effect.⁵ In other words, it is a problem of externalities⁶ applied to policymaking. Because the Article invents a new phrase to name the problem it examines, I assume the problem is not just a standard application of the economic concept of externalities, nor is it just the traditional argument that every policy has unintended consequences. To follow and analyze the argument, it is necessary to flesh out the social order dynamic phenomenon—to make it operational and, therefore, testable.

The Article views cities in economic terms as "the spatial realization of firms and households responding to" economic incentives to invest or to spend.⁷ "[T]he focus of order in this context is the preservation of conditions that permit for an efficient

4. *See id.* at 970.

5. *See id.* at 970-71.

6. In traditional economic theory, "[e]xternalities occur when producing or consuming a good causes an impact on third parties not directly related to the transaction." Tejvan Pettinger, *Externalities-Definition*, ECON. HELP (Nov. 28, 2012), <http://www.economicshelp.org/blog/glossary/externalities/> [<https://perma.cc/VCE6-X2UF>].

7. Bostic, *supra* note 1, at 972. "[U]rban places are primarily a locus of commerce." *Id.*

functioning of urban markets, such that resources are primarily devoted to commerce and production.”⁸ This focus entails two goals: (1) limiting impediments to “establishing and operating businesses and buying and selling finished goods,”⁹ and (2) permitting “a maximal amount of private investment, so as to maximize the productive capacity of the regional economy.”¹⁰ In other words, the Article appears to embrace the standard economic view that governments create and maintain the conditions for well-functioning economic markets to maximize social welfare. It explains that certain “urban disamenities” (e.g., crime) create disorder, that this disorder leads to both private and public outlays to address it, and that these expenditures are inefficient because they represent money that could have been used for more productive purposes.¹¹

At some point, these forms of disorder and the inefficient expenditures they elicit present “the risk that the costs of urbanizing exceed the benefits of urbanizing”¹² (i.e. threaten the urban economic order). For this reason, policymakers may seek to avoid or mitigate “private activities that increase social costs”¹³ and that interfere with the desired social order. The focus of the Article is that these efforts by policymakers to maintain the desired social order (i.e., protect economic market functioning in urban areas) by reducing or eliminating externalities may themselves, unintentionally, impose negative effects on families.¹⁴ A further claim is that the negative impacts on families have a feedback loop that “can cause its own disorder and undermine the original intent” of the initial policy to maintain urban economic order.¹⁵

The Article identifies three characteristics that define the social order dynamic as:

[F]irst, one must be able to document that policymakers are focused on a single problem, and that the problem threatens social order in a fashion described above. Second, and importantly, the policymaker must either not be aware of the potential that the policy solution will adversely affect families or are not (or less) concerned about those

8. *See id.* at 973-74.

9. *Id.* at 974.

10. *Id.*

11. *See id.* at 972-73.

12. *Id.* at 973.

13. *See id.* at 972.

14. The Article distinguishes policies that seek to protect market functioning (economic social order maintenance) from policies aimed at redistribution or equity. *See id.* at 971-75.

15. *See id.* at 975.

adverse effects. Finally, the policy choices made to maintain social order . . . must impose observable negative costs for families.¹⁶

Using the Article's analysis, I think it is more analytically accurate and useful to parse the characteristics into four as follows: first, policymakers were only interested in addressing a single problem (e.g., crime). Second, their concern about that problem is that it threatens the urban economic order; and the sole or primary objective of the policy is to maintain the urban economic order by means of addressing the problem that threatens it. Third, policymakers were either unaware of the policy's possible negative impact on families, or not concerned or less concerned about those possible effects than about their goal of maintaining the urban economic order. Fourth, these policies that are intended to promote social order in the intended single dimension of the urban economic order cause observable negative effects on families by spilling over into, and causing disorder in, what might be called the "family dimension."¹⁷

My parsing of the necessary characteristics divides the Article's first characteristic into two. The rationale behind this division is that claiming a policy has a single focal point as the target of its action is quite distinct from articulating that the concern behind the policy is that the problem threatens a desired social order.

II. TESTING THE ARTICLE'S EXAMPLES AGAINST THE "SOCIAL ORDER DYNAMIC" PARADIGM

The social order dynamic is a complex hypothesis because it has four required characteristics. Further, it makes important assumptions about social life. The Article offers numerous examples of the social order dynamic at work. This Part argues that considering the information given in the Article, none of the proffered examples actually meet all of the criteria.

The Article acknowledges that its thesis depends upon one being "able to document" that the challenged act of governance meets the characteristics of the social order dynamic.¹⁸ For this reason, it seems fair to test the relationship between the characteristics of the social order dynamic and the examples offered in the Article.

16. *Id.* at 974-75.

17. As discussed more thoroughly in Part III, the Article assumes that there are several distinct dimensions or domains that collectively comprise human experience. *Id.* The Article appears to use the terms "dimensions" and "domains" as synonyms. *See, e.g., id.* at 970. The Article appears to consider the economic order as distinct from a dimension in which families live.

18. *Id.* at 974.

Upon a close analysis, none of the examples fit all of the criteria completely, or at least it is impossible to confirm that any examples completely fit the social order dynamic paradigm because the Article does not provide sufficient evidence to demonstrate that all of the criteria are met. And, in some cases, the information the Article provides or is otherwise available to this author conflicts with one or more of the criteria. While each of the policies the Article discusses contains one or a few characteristics of the social order dynamic, there is a mismatch between the social order dynamic and the policy examples discussed in the Article. The only characteristic that every example meets is the fourth one—that the policy caused negative impacts on families.

The Article offers three historical examples from federal housing policy and three contemporary housing policy examples. This response considers how well each of them meet the four characteristics defined above.

The Article describes the establishment of the Federal Home Loan Bank system, the Home Owners Loan Corporation, and the Federal Housing Administration (FHA) as focused on “stabilizing the banking industry, mortgages, and the housing market” and serving to “reduce social disorder”¹⁹ in response to the Great Depression. While this example arguably meets the last two characteristics (i.e., the policies “were of limited use for renters and lower-income families”),²⁰ it fails on the first two. Certainly these institutions were created to reduce social disorder and to support an economic order, but the social order in view was not a single problem but rather a massive multifaceted complex of problems from unemployment to foreclosure. Additionally, the economic order in view was not specifically or exclusively the urban economy (which is the Article’s focus) but the national economy.

The Article asserts that “the early-years policies of the [Federal Housing Administration] represent a classic example of the social order dynamic.”²¹ It describes the FHA’s infamous redlining policies that “only extend[ed] loans to minority families in specific neighborhoods, mainly those with already large minority populations.”²² The Article suggests redlining was adopted “[i]n the name of preserving social order—blacks were thought to adversely

19. *Id.* at 977.

20. *Id.* at 977-98.

21. *Id.* at 978.

22. *Id.*

impact property values.”²³ This example conflates the first two characteristics. The “single problem” being addressed, *namely*, blacks living in the same neighborhoods as whites, turns out to be the same as the overall primary goal of maintaining economic order due to the belief that “blacks were thought to adversely impact property values.”²⁴ This merging of the problem—that under the Article’s thesis is a phenomenon *separate* from the economic order—and the economic order itself being fostered renders this example opaque; redlining was itself an economic policy. On the third characteristic, this seems a clear case of policymakers being less concerned about the adverse effects on black families. It clearly meets the fourth characteristic as the historical record is clear that the policy “significantly hindered the ability of minority families to access neighborhoods with strong amenities, thereby limiting their ability to increase affluence and improve their quality of life.”²⁵

The Article offers the National Housing Act of 1949 as an additional historical example of the social order dynamic.²⁶ The Article argues that “urban renewal efforts clearly fit the framework,”²⁷ specifying the slum removal provision of Title I of the National Housing Act of 1949 itself. This proposed example elides the first and second characteristics of the social order dynamic because the specific policy that purports to be focused on solving a single problem (*namely*, the slum removal provision) is part of a larger statute with many purposes, including economic ones. While the degree to which the policymakers considered the negative effects on minority families can be argued, the disproportionate negative effects on these families referenced in the Article are indisputable.²⁸

The first contemporary example of the social order dynamic is the U.S. Department of Housing and Urban Development’s (HUD) policy that “if a member of a family receiving rental assistance is arrested and convicted of a drug-related or other crime, the entire family loses its assistance under most circumstances.”²⁹ While this example meets the first characteristic, because the policy was clearly enacted to address the problem of crime, it fails the second

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 978-79.

27. *Id.* at 980.

28. *Id.* at 978-81.

29. *Id.* at 981 (citing HUD Denial of Admission and Termination of Assistance for Criminals and Alcohol Abusers, 24 C.F.R. § 982.553(a) (2010)).

characteristic because, on the Article's own account, this policy's primary goal was to protect the health and safety of public housing residents.³⁰ While the Article briefly implies that concerns about economic order *must* have been "a major driver" of this policy because the public housing program involves billions of dollars,³¹ the Article does not offer any evidence for this assertion. If the maintenance of urban economic order is the primary motive and goal of the policy, as the social order dynamic contends, one would expect that this goal would be evident in the policy's express justifications. This example, as with all of the policies offered as examples, does meet the fourth characteristic because the Article provides solid evidence that the policy imposed disproportionate negative impacts on minority families, especially black families.³²

As its second contemporary example, the Article offers "the interaction of two policies . . . housing assistance and school assignment."³³ While the Article convincingly demonstrates that the consequences of these policies negatively affect lower-income families,³⁴ this example is a particularly stark mismatch with the social order dynamic hypothesis precisely because this example considers the *interaction between two policies*, one federal and one local, and not a policy with a single goal that is enacted primarily to maintain order in the urban economy.

The final example offered is the common local land use policy of limiting a parcel in a "single family zone" to a single residential unit which has the effect of excluding accessory units (also known as secondary units, in-law units, or granny flats).³⁵ Again, the Article itself demonstrates that this example does not fit the first characteristic of the social order dynamic by explaining that this policy is not aimed at a single problem but several, *namely* to "prevent the development of informal residences that could transform the neighborhood into a shanty town," to prevent "crime and other illegal activities," and "limiting the total population in a

30. *Id.* at 985 (citing HUD Denial of Admission and Termination of Assistance for Criminals and Alcohol Abusers, 24 C.F.R. § 982.553(a) (2010)) (explaining "the intent of these provisions" as "so that residents in their communities can also live in peace.").

31. *Id.* at 986.

32. *See id.* at 979.

33. *Id.* at 988.

34. *Id.* at 991-92.

35. *Id.* at 993-94.

neighborhood” to prevent overwhelming demands on existing infrastructure.³⁶

This example also fails the second characteristic. While the Article cites some evidence for the view that single family zoning was intended to serve urban economic order,³⁷ *Village of Euclid v. Ambler Realty*³⁸ and *Palo Alto Tenants’ Union v. Morgan*³⁹—two cases cited by the Article—articulated a wide range of public purposes underlying the creation of single family zoning, including the general welfare of the community and the “integrity of traditional families.”⁴⁰ Moreover, the plaintiffs in *Euclid* claimed that comprehensive zoning, including the single family element, *undermined* the regional economy by inappropriately interfering with natural economic development.⁴¹ As with all of the Article’s examples, the negative effects of the policy on some families are well documented.

Many, if not most, policies enacted by legislatures attempt to promote several goals, not just one. To show that the policies the Article offers as examples were only focused on one goal would require references to both the legislative findings and policies sections of statutes themselves articulating a single goal as well as to legislative history to confirm the single-minded intent of the policymakers. But, the Article does not provide such evidence. Rather it offers plausible policy reasons for each policy without giving a complete account. Frequently, policies claim to improve “general welfare” which cannot be equated to “urban economic order,” even if a thriving urban economy is likely to be part of general welfare. At most there is some evidence of economic motivation in all of the examples, but on the information provided, this economic interest is not necessarily directed toward promoting the efficient functioning of an urban economy, much less directed toward the economic details that the Article identifies (e.g., promoting investment).⁴²

36. *Id.* at 993.

37. *Id.*

38. 272 U.S. 365 (1926) (holding comprehensive zoning did not violate the federal Constitution).

39. 487 F.2d 883 (9th Cir. 1973) (upholding the constitutionality of single-family zoning ordinances).

40. Bostic, *supra* note 1, at 996.

41. *See Euclid*, 272 U.S. at 385 (alleging that the ordinance “has the effect of diverting the normal industrial, commercial and residential development [of the region].”).

42. Bostic *supra* note 1, at 974.

And some policies do not appear to be aimed at maintaining the urban economic order. For example, the Article characterizes local housing codes regulating the quality of housing conditions as “clearly motivated by a desire to maintain order,”⁴³ but then the Article itself identifies the concerns behind those policies as “public health implications of the slums and the moral character of their residents.”⁴⁴ In the next Part, I discuss how this policy and several others described in the Article seek not to *maintain* a social order, much less to help maintain the then existing urban economic order, but to *change* the existing social order to serve certain social and moral goals.

While the social order dynamic may explain the negative effects of some policies in some contexts, I am not persuaded that the examples offered in the Article fit this paradigm. Clearly, all of the policies had negative effects on at least some families, but the Article does not offer persuasive evidence or argument that the social order dynamic is the best explanation for how and why these policies had such negative effects. Because all of the policies had negative effects on families, the examples may fit the more traditional critiques of policy—that all policies have unintended consequences or externalities—rather than the social order dynamic as a particular, newly-identified phenomenon that is the focus of the Article. In the next Part, I discuss how the policies consistently serve certain families’ interests but not those of other families. This suggests that these examples are more consistent with critiques of urban policy as racist and classist.

III. PROBING “SOCIAL ORDER” AND ITS INEXTRICABLE RELATIONSHIP TO “SOCIAL WELFARE”

Obviously, social order is a critical concept at the heart of the Article.⁴⁵ Given that, it would be helpful to spell out more of what is being referenced and to make some distinctions. This Part argues that the Article’s conception of social order is incomplete or confused, at least in part, because it fails to acknowledge that any conception of social order is intertwined with a notion of social welfare. The Article’s reliance on an economic social order carries that model’s assumptions with it, but the author’s concerns seem to

43. *Id.* at 976-77.

44. *Id.* at 976.

45. “The overarching thesis of this analysis is that many urban policies primarily focus on maintaining social order” *Id.* at 970.

place him in an odd relationship to the traditional economic model, including by postulating the existence of a distinct “family order” and by his attention to equity issues. Finally, given the diversity of families and their distinct economic and social baselines, this Part questions the Article’s implicit assumption that a policy can serve the apparently monolithic “family order.”

As the prior Part demonstrated, it is not clear that most of these policies are aimed at any identifiable single “domain.” Nor is it obvious that “families” are a cognizably different “sphere” or domain from urban economics. To support the Article’s thesis persuasively, it needs a general social theory to underpin this analysis that would explain the relationship between the economy and other dimensions, such as a family dimension, as the Article envisions.⁴⁶

More fundamentally, what is social order? Of course, like any other concept there can be many understandings. In this author’s view, in a world of people with diverse views of the good life and distinct interests, there is no possible social order that is value-free or value-neutral. Social order only makes sense in a more concrete application: social order for whom? Social order always serves a more or less clear concept of social welfare. The Article acknowledges that an efficient market economy as a social order seeks to “maximize income and wealth in the economy” but “do[es] not ensure that [wealth and income] are distributed such that everyone receives enough to achieve a minimum quality of life.”⁴⁷ I would go further and argue that every *actual* social order favors the values and interests of some groups and disfavors others. Even a thin concept of social order as merely “maintaining stability” favors the interests of whoever benefits from the status quo.

All policies are intended in some measure to promote some conception of social welfare. And any conception of social welfare relies, at least implicitly, on some conception of social order necessary or sufficient to enable it. The two concepts are interdependent. The critical issue is what conception of social welfare are the policies promoting? And what view of social order do they think is needed (or best) to get there?

The Article contends that the policies are geared to promoting an urban economic order. Unfortunately, beyond a general articulation of promoting investment and reducing costs in urban markets, the

46. My understanding of the dominant school of contemporary economics (the neoclassical or Chicago School Economics) would not provide such a theory.

47. Bostic, *supra* note 1, at 971-72.

Article omits a more complete description of the content of the social order being promoted by the policies it examines. The traditional economic theory upon which the Article relies includes both a version of a preferred social order (i.e., efficient markets) and a version of social welfare (i.e., the individualistic consumption of resources to fulfill preferences) that such order serves. The Article's reliance on this theory is curious because traditional economic theory is typically uninterested in distributional consequences or "equity,"⁴⁸ yet all of the negative consequences on families that the Article identifies are distributional in nature.

Upon careful consideration of the examples that the Article offers, a clear pattern emerges of what conception of social welfare is behind the social order being promoted. Generally, none of the policies were "anti-family" *per se* in that they harmed *all* families. Nor were they arbitrary policies that were blind to their effects on families. Rather, each of the policies were directly aimed at promoting a classist and/or racist conception of social order that served the interests of *some* families at the cost of the interests of *other* families. Specifically, they served middle and upper class white families while harming lower-income families and families of color.

It appears undisputed that the FHA's intentionally discriminatory redlining policies served the interests of white families but not families of color.⁴⁹ Urban renewal and slum removal provisions predictably served white and middle class families over those of low-income families and families of color. The limitation on formerly incarcerated people living in public housing mostly negatively affects African American families and communities.⁵⁰ And, a great deal of literature has argued that single family zoning districts had a clear socio-economic social order in mind.⁵¹ This should not be a surprising

48. See Dr. Bostic's distinction between efficiency and equity, noting "[t]he redistribution need arises because competitive markets maximize income and wealth in the economy but do not ensure that they are distributed such that everyone receives enough to achieve a minimum quality of life. Thus, those concerned with equity might find that the distribution of resources across families is suboptimal and look to policy to improve the situation." *Id.*

49. *Id.* at 978 ("In the name of preserving social order-blacks were thought to adversely impact property values-the FHA instituted a policy whereby it would only extend loans to minority families in specific neighborhoods, mainly those with already large minority populations.") (citations omitted).

50. *Id.* at 988 (commenting that because a large percentage of African Americans are incarcerated, "[t]his suggests that the individual impacts discussed above are being felt at a large scale").

51. See, e.g., Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively*

finding. Urban land use and housing policy has often been criticized as being deployed to create or maintain a classist and racist social order.⁵²

The Article's examples amount to a critique of housing and other urban policy as consistently biased to serve the interests of white and middle- or upper-income families, despite the Article's qualification that "very few policymakers have goals that are actively pernicious to families, particularly lower-income families."⁵³

The Article implicitly raises the fundamental question: is it possible to have a single coherent, consistent family-friendly policy in housing? As the Article notes, there are different kinds of families: low- and moderate-income, minority and white, homeowners and renters, nuclear families and intergenerational families, traditional families and non-traditional families.⁵⁴ In fact, "family" itself can be defined differently, and it appears that families in the United States are getting more diverse. Each of these families has different, sometimes conflicting, interests regarding housing and other goods. In other words, families' interests in housing are generally not monolithic. Therefore, an analysis should not essentialize families: different families have different interests and they conflict, so some policies serve "families" but not all families. Perhaps no policy can serve all types of families. Perhaps the Article's implicit assumption that policies aimed at maintaining urban economic order could be expected to serve all families equally is naïve. Probably most policies will have diverse effects on different kinds of families, both because of the baseline of their wealth, income, and other measures of well-being, based upon prior policies, and because of their current needs and interests.

Private Residential Areas, 1916-1926, 56 U. PITT. L. REV. 367, 375-76 (1994). See generally INTEGRATING SPACES: PROPERTY LAW AND RACE (Alfred Brophy et al. eds., 2011). Notably, the judge in the district court opinion in the *Euclid* case that was reversed by the U.S. Supreme Court found it obvious that comprehensive zoning was a form of socio-economic engineering. See *Amber Realty Co. v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924).

52. See, e.g., Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 553-65 (2007) (arguing that "housing as providing social order" is one important frame for understanding housing law and policy).

53. See Bostic, *supra* note 1, at 1006.

54. A more complete list of family diversity would include the following: traditional "nuclear" families versus non-traditional families; intergenerational families; families of different and mixed "races;" families of different levels of income and wealth; renters and homeowners; immigrants and current citizens or legalized residents; families living in urban, suburban and rural areas; families with members in prison and families without members in prison, etc.

In conclusion, these policies are better explained by the particular conception of “social welfare” that the policymakers had in mind (consciously or unconsciously) than by the social order dynamic. More information about the origin of these policies—both the stated justifications and a more complete contextualized historical account—could reveal hidden or even unconscious reasons why these policies were enacted.

IV. SOLVING THE GOVERNANCE PROBLEM WITH A “FAMILY IMPACT STATEMENT” POLICY

The Article purports to identify the social order dynamic as a particular kind of governance problem.⁵⁵ This Part first argues that while the Article does not convincingly identify the social order dynamic as a novel governance problem, its proposed solutions are still valuable. Second, the examples discussed in the Article do reveal a *different* governance problem—the systematic favoring of middle class white families’ interests over those of lower-income families of color in urban and housing policy. And, third, a “family impact statement” could be a politically practical and effective solution to that governance problem.

Despite my conclusion that the Article’s examples do not actually exemplify the social order problem, it appears to me that solutions that the Article proposes would likely mitigate the social order dynamic problem to the degree it exists.⁵⁶ In fact, the proposals—such as sharing information, incentives for coordination, and avoiding over-specialization—aimed at promoting better policy making by avoiding narrow and parochial mindsets are eminently reasonable and very useful, even if not based on the Article’s problem analysis.

While the Article initially identifies the social order dynamic as the governance problem, it later nods to certain political realities as the more fundamental cause of the inequities that are the focus of its concern. Specifically, it states:

[P]olicy makers prioritize social order over the well-being of lower-income families, who often are not their main constituents. Their only attention to such populations is in the context of problems, and so they are disinclined to give priority until they become such a large problem that ignoring them becomes impossible This is

55. Bostic, *supra* note 1, at 974-75 (describing the social order dynamic as a problem of policy-making) and at 1002 (offering solutions to this governance problem).

56. *See id.* at 999-1004 (discussing the Article’s proposed solutions to the social order dynamic).

exacerbated by realities of political campaigns, in which wealthier interests who typically have the most to gain by preserving and enforcing social order are the main financiers of elected officials.⁵⁷

In other words, the reason policymakers address the problems they do in the way they do is because they view their political interests as being best served by taking care of relatively wealthy and regularly involved constituents (read: white and middle class families). In this sense, the policies the Article discusses and their effects do derive from a governance problem, but a much more commonly recognized one: that our elected officials serve the needs and interests of the people they perceive as their primary constituents, sometimes called the capture of elected officials by well-organized and funded interests.⁵⁸

To the degree that social order dynamic and this governance problem exist, a “Family Impact Statement” (FIS) modeled on the National Environmental Policy Act (NEPA)⁵⁹ may be the best realistic solution. This type of policy aims to prevent or mitigate the likely negative effects of policies on a favored domain (e.g., the environment) by forcing the production of certain information about the likely negative effects of a proposed policy, requiring public consideration of these effects before the policy is enacted, and enabling the revision of a proposed policy to eliminate or reduce the negative effects through this public examination.⁶⁰ This type of regulation is already widely in use in the environmental and health realms.⁶¹ While NEPA imposes a national requirement, many states have enacted their own equivalent laws.⁶²

57. *Id.* at 1006.

58. “According to the broad interpretation, regulatory capture is the process through which special interests affect state intervention in any of its forms.” Ernesto Dal Bo, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y, 203, 203 (2006).

59. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(f) (2012).

60. Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 435-436 (2003) (describing how NEPA works).

61. For an analysis of the use of impact statements in the environmental context, see SERGE TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM* (Stan. Univ. Press 1984). For a discussion of health impact statements, see CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/healthyplaces/hia.htm> [https://perma.cc/3285-5UYH].

62. For a discussion of NEPA and state equivalents, see Iglesias, *supra* note 60, at 435-36.

There are several reasons to believe that an FIS would both be politically feasible and effective in considering and serving the needs and interests of diverse families. This kind of policy has a strong theoretical grounding in the “reflexive law” tradition.⁶³ Such a policy is consistent with the Article’s argument because it would incorporate a procedural step in the policymaking process to specifically consider potential negative effects on families thereby preventing or mitigating any adverse consequences of the social order dynamic.⁶⁴ And, Professor Clare Huntington’s book, *Failure to Flourish*, which provides the conceptual backdrop for this Colloquium, points to (but does not develop) this suggestion.⁶⁵ Indeed some versions of a family impact analysis are already being used in some jurisdictions and by some organizations.⁶⁶

One reason why this type of regulation may be politically realistic in the current difficult policy realm is because it does not prescribe a particular outcome or policy choice. Rather, it only requires the production, distribution, and consideration of relevant information on the potential significant impacts of a policy on what the Article calls a particular domain or dimension. In a democracy rooted in liberal rationalism, it is hard to oppose a requirement for the provision and consideration of relevant information.⁶⁷ The fact recognized by the

63. See *id.* at 496-501. In that article, I proposed such a solution to housing affordability and other housing problems. *Id.* Housing impact statements are now becoming popular. See generally Brentin Mock, *The Growing Trend of Affordable Housing Impact Statements*, CITYLAB (Jan. 8, 2016), <http://www.citylab.com/housing/2016/01/the-growing-trend-of-affordable-housing-impact-statements/423333/> [<https://perma.cc/Q6V9-UJ2Z>].

64. “[C]onsistent creation of policies that do not suffer from the ‘social order dynamic’, in which policies are pursued to create and maintain social order without making allowances for collateral impacts, requires attention to the issue and a policy-making infrastructure that creates incentives for decision-makers to do so.” Bostic, *supra* note 1, at 1007.

65. See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 184-85 (2014).

66. See, e.g., MARCIA G. ORY, *POLICY AND THE AMERICAN FAMILY: A MANUAL FOR FAMILY IMPACT ANALYSIS* (1978); Marcia G. Ory, *Family Impact Analysis: Concepts and Methodologies*, 8 POL’Y STUD. J. 941 (1980); Theodora Ooms, *Taking Families Seriously: Family Impact Analysis as an Essential Policy Tool*, https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/06/pf_fis02supp-report1.pdf [<https://perma.cc/3XBM-N5HA>]; *A Checklist for Assessing the Impact of Policies on Families*, Policy Institute for Family Impact Seminars, <http://aces.nmsu.edu/ces/familyimpactseminar/documents/family-impact-checklist.pdf> [<https://perma.cc/5RT4-Z24P>]. See generally FAM. IMPACT INST., PURDUE UNIV., <https://www.purdue.edu/hhs/hdfs/fii/hello-world/> [<https://perma.cc/QJ9B-DBHE>].

67. Of course, there are debates about the actual relevance of information produced in environmental impact statements and the relative benefits compared to the costs.

Article that revising policies already in place is slow and difficult⁶⁸ is further support for family impact statements because, if effective, they would prevent policies with significant negative effects on families from being enacted in the first place.

An FIS would also be helpful to respond to the historical problem of lower-income and minority families suffering negative effects of urban policies documented by the Article. Given the past policies and current economic situation of lower-income and minority families, even explicitly and intentionally “pro-family” urban policies will have different actual effects on different families. By producing information about the impact of a proposed policy on the whole range of families and requiring a public discussion about this information, the FIS would require the production of information that would not otherwise have been created or assembled (e.g., about the disparity of impacts between different kinds of families). The availability and dissemination of such information could promote a more thoughtful and careful public debate about the balancing of costs and benefits to different types of families. Given the enhanced awareness about the negative effects of past policies (as the Article demonstrates), an FIS has the potential to avoid a repeat of these awful results.

The diversity of actual families’ needs and interests is both a reason supporting the need for an FIS and a potential limit to its efficacy. In addition, the “culture wars context” regarding families would certainly complicate any actual use of FIS. For example, New Urbanist policies⁶⁹ (which are endorsed in *Failure to Flourish*⁷⁰) have been opposed by conservatives as overly intrusive government intervention in the private lives of families as well as overregulation of private property rights.⁷¹ Because of the varied and conflicting interests of the wide range of types of families, some skepticism about whether there can be a single coherent, consistent family-friendly policy in housing is justified.⁷²

68. Bostic, *supra* note 1, at 999.

69. “As an alternative to sprawling development, New Urbanism encourages the development of compact, urban, walkable, diverse, and sustainable communities that promote a sense of connectedness among residents. New Urbanism preserves the traditional neighborhood structure, with a large central public space, a range of homes, shops and businesses within a ten-minute walking distance, and physically attractive surroundings and architecture intended to create a sense of enjoyment and belonging for residents.” HUNTINGTON, *supra* note 65, at 182.

70. *Id.* at 180-82.

71. See, e.g., Rick Henderson & Adrian T. Moore, *Plan Obsolescence*, REASON, June 1998, at 42.

72. One possibility is policies that enable housing stability. The Article does nice work in gathering several studies about the value of housing stability. Whether

Of course, much of the efficacy of an FIS would depend upon how it was designed and implemented.⁷³ Importantly, the traditional impact statement-type regulation does not require policymakers to enact a policy that has no harmful effects on the subject population. Rather, if they decide to enact a policy that will have negative effects, they are required to draft and adopt a statement explaining why they are going forward despite the negative impacts.⁷⁴ In other words, they could not pass a policy that has negative impacts without at least an awareness of the negative effects as they might have done in the past. This means that an FIS would not *necessarily* improve the results of urban policies for lower-income and minority families. However, the explicit recognition by decision-makers of their knowledge of the tradeoffs that they are making may provide a certain sense of satisfaction, and possibly even political accountability.

The other benefit of an FIS requirement to lower-income and minority families is that it provides a formal, guaranteed opportunity for them to assert their interests and views about how potential tradeoffs in a proposed policy will affect them. They will have an opportunity to oppose or attempt to revise a harmful policy before it is enacted. This benefit responds to the Article's acknowledgment that lower-income and minority families are often not an integral part of the policymaking process.⁷⁵ However, the actual value of this opportunity is integrally dependent upon that community's capacity to organize itself to participate effectively in the political process so that it can take advantage of the opportunity. This capacity is at least partially dependent upon the economic, social, and political resources of this community. Therefore, there is something of a catch-22 involved. If these communities are already disempowered in part due to prior policies that negatively affected them, they are less able to take advantage of this new opportunity. The Article's explicit recognition that wealth has a disproportionate impact in urban

having the opportunity for "housing stability" is a commonly shared interest of all families is an open question worth investigating.

73. For an analysis of factors that contribute to the efficacy of this kind of regulation, see Iglesias, *supra* note 60, at 472-74.

74. *See, e.g.*, Guideline 15093 for the California Environmental Quality Act, 14 Cal. Code Regs. §§ 15080-15097, <http://resources.ca.gov/ceqa/guidelines/art7.html> [<https://perma.cc/V53R-R69H>] (enabling an agency to adopt a "Statement of Overriding Consideration" if it elects to approve a project that will have significant but unmitigated environmental impacts).

75. Bostic, *supra* note 1, at 1006.

policymaking highlights this limitation on the actual value of an FIS requirement.⁷⁶

So, while an FIS requirement would probably be a good policy that is consistent with the argument and analysis in *Failure to Flourish*, it is important to recognize that it would not be a cure-all.⁷⁷ It promotes information-gathering, conversation, and debate—all of which are appropriate where interests of different families may diverge—but it does not change the current balance of economic and political power in a community. It only creates a possibility of better policies through better information and public debate.

CONCLUSION

I am open to the possibility that the social order dynamic the Article describes does occur in some contexts and that the suggested solutions are valuable things to improve our policy-making and governance. However, I think these points are only loosely related to the particular housing policies the Article analyzes. Even if the social order dynamic exists, it is not clear how common or important it is in explaining how and why so many housing and land use policies regularly harm some families, especially low-income families and people of color. To the degree that the social order dynamic or some variation of it is a problem, the best solution would be a “family impact statement” policy.

There is some indication in the Article that its focus on the social order dynamic hopes to avoid hard conversations about equity by framing the problem as a governance issue based upon the social order dynamic. I believe we cannot avoid the equity issue by focusing on the social order dynamic as a governance issue; rather, because social order and a conception of social welfare are inextricably linked, we must wrestle with the equity issues directly. An FIS requirement would create the occasion for such conversations. And this solution would be more efficacious if participants can learn to “talk purple,” that is, in ways that transcend current cultural wars, as Professor Huntington recommends.⁷⁸

76. *Id.*

77. This discussion is consistent with the recognition of the “limits of flourishing family law” in *FAILURE TO FLOURISH*. HUNTINGTON, *supra* note 65, at 203-21. Professor Huntington recognizes three types of limits: political resistance, the limits of application, and limits of what law can actually do. *Id.*

78. *Id.* at 211-14.