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# A DECENT HOME FOR EVERY AMERICAN: CAN THE 1949 GOAL BE MET?

PETER W. SALSICH, JR.\*

## I. INTRODUCTION

If one were looking for an image to dramatize the severity of the contemporary housing crisis in America, two stories in the Sunday, November 22, 1992 edition of the *New York Times* would be strong contenders. The Metro section reported that a state supreme court justice in Manhattan ordered four New York City officials to spend the night on the waiting room sofas and floors of city offices where homeless families have had to sleep because shelters were filled to capacity.<sup>1</sup> On the same day, the Week in Review section carried a feature describing the "shiver of alarm" experienced by local government officials around the country because of a federal judge's ruling the previous week that Miami must set aside two "safe zones" where 6000 homeless people can live without fear of arrest. Housing advocates, while applauding the decision because of its vindication of the constitutional rights of homeless people, expressed dismay at the combination of legislative inaction and public impatience which led to the judicial intervention, calling the remedy "a zone of sanctuary that is also a zone of discard."<sup>2</sup>

The courts in New York and Miami were fulfilling a traditional role of American courts by protecting civil liberties and prodding governmental officials to act in the face of serious social problems. Nevertheless, the plight of the homeless in those cities is dramatic testimony to the Kerner Commission's prophetic warning predicting a nation dividing into two

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1. Raymond Hernandez, *A Detour in the Search for Shelter*, N.Y. TIMES, Nov. 22, 1992, § 1, at 44.

2. Larry Rohter, *Homelessness Defies Every City's "Remedy,"* N.Y. TIMES, Nov. 22, 1992, § 4, at 3.

societies: the haves and the have nots, the whites and the blacks.<sup>3</sup>

In his keynote Essay appearing in this issue, Professor Boger has crystallized in stark terms the extent of the housing crisis for low-income persons.<sup>4</sup> His characterization of housing in 1993 as "scarce, expensive, and segregated"<sup>5</sup> is a sobering reminder of how little of the Kerner Commission's housing strategy has been implemented and how far we have to go to achieve the goal of "a decent home and a suitable living environment for every American family," first articulated in the Housing Act of 1949<sup>6</sup> and reaffirmed in the Housing and Urban Development Act of 1968.<sup>7</sup> The record since 1968 is discouraging to say the least.

The Kerner Commission's key housing recommendations were as follows: (1) massively expand the supply of housing suitable for low-income families and (2) open areas outside of ghetto neighborhoods to occupancy by minorities.<sup>8</sup> During the 1970s, federal housing policy sought to encourage the production of affordable housing units through the Section 236 mortgage interest subsidy program<sup>9</sup> and the Section 8 new construction/substantial rehabilitation rental assistance program.<sup>10</sup> During the 1980s, however, the Reagan and Bush Administrations persuaded Congress to curtail sharply efforts to increase supply in favor of a limited program to increase effective demand for existing housing by providing certificates and vouchers to eligible, low-income persons.<sup>11</sup> As Professor Boger noted, the Commission's goal to add six million units of low- and moderate-income housing to the market over a ten-year period was distinguished by a singular failure of the country to come close to, let alone achieve, that goal.<sup>12</sup>

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3. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (Bantam Books 1968) [hereinafter KERNER COMM'N REPORT].

Editor's Note: The contributors to this symposium have used the terms "African American," "black," and "black American," often interchangeably, in their articles. The *North Carolina Law Review* has elected to defer to its contributors' choices in the absence of any universally accepted racial or ethnic designation.

4. John C. Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289 (1993).

5. *Id.* at 1331.

6. Housing Act of 1949, ch. 338, § 2, 63 Stat. 413, 413 (codified as amended at 42 U.S.C. § 1441 (1988)).

7. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 1601, 82 Stat. 476, 601 (codified as amended at 42 U.S.C. § 1441a (1988)) [hereinafter HUD Act of 1968].

8. KERNER COMM'N REPORT, *supra* note 3, at 260-63.

9. 12 U.S.C. § 1715z-1 (1988 & Supp. II 1990).

10. 42 U.S.C. § 1437f(b) (Supp. II 1990) (amended in 1983 to delete new construction and substantial rehabilitation in favor of existing housing).

11. *Id.* § 1437f(b), (o) (1988 & Supp. II 1992).

12. Boger, *supra* note 4, at 1332 n.188 (noting that newly constructed federally assisted housing units never exceeded 10% of annual total recommended by the Kerner Commission).

As to the second goal, substantial progress has been made in establishing a national prohibition against discrimination in housing through the enactment of the Fair Housing Act of 1968<sup>13</sup> and the Fair Housing Amendments Act of 1988.<sup>14</sup> Successful implementation of an integrated housing policy, however, continues to be distressingly slow because of entrenched opposition to housing integration in many communities and the exclusionary impact of restrictive local zoning practices.

This Essay will examine the shift in federal housing policy from a production emphasis during the decade after the *Kerner Commission Report* to the current policy of limited support that enables a few low-income persons to choose their own housing. The growth of state and local housing support programs, as well as the non-profit community housing development movement, will be also discussed. The Essay will argue for a reaffirmation of the national housing goal of a decent home for every American, a redirection of policy towards decentralization, and a redistribution of housing subsidies so that more of the funds reach those who need them most.

## II. A REVIEW OF FEDERAL HOUSING POLICY

Prior to the *Kerner Commission Report*, there were two basic federal urban housing programs: (1) public housing that provided rental units to low-income households through local public housing authorities<sup>15</sup> and (2) mortgage insurance to encourage banks to make loans for single-family homes and apartments designed for moderate- and middle-income people.<sup>16</sup> Both programs were established in the 1930s and played major roles in the post-World War II migrations of low-income, mostly minority families from the rural South to the urban North and of middle-income families from the cities to the suburbs. During the period between World War II and 1968, Congress adopted a national housing goal,<sup>17</sup> incrementally adding a series of programs to attract private capital to housing development, such as mortgage insurance for housing for moderate-income and displaced families,<sup>18</sup> below-market interest rate loans,<sup>19</sup>

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13. Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (1988 & Supp. II 1990)).

14. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3610-3614a, and amending §§ 3602, 3604, 3605, 3607, 3608, 3615-3619, & 3631 (1988 & Supp. II 1990)).

15. 42 U.S.C.A. §§ 1437-1440 (West 1978 & Supp. 1992).

16. 12 U.S.C. §§ 1707 to 1715z-20 (1988 & Supp. II 1990).

17. Housing Act of 1949, ch. 338, § 2, 63 Stat. 413, 413 (codified as amended at 42 U.S.C. § 1441 (1988)).

18. Act of Aug. 2, 1954, ch. 649, tit. I, § 123, 68 Stat. 599 (codified as amended at 12 U.S.C. § 1715f (1988 & Supp. II 1990)).

direct loans to nonprofit developers of housing for the elderly,<sup>20</sup> and limited rent supplements.<sup>21</sup>

### A. *Housing and Urban Development Act of 1968*

The *Kerner Commission Report* played a significant role in the enactment of the Housing and Urban Development Act of 1968, which established several major federal housing production programs. The programs of the 1968 Act were designed to fill a widening gap in housing policy between the public housing and federal mortgage insurance programs. The primary federal subsidy added by the 1968 Act was an interest subsidy by which the government made interest reduction payments to lenders who made loans to developers of housing for low- and moderate-income persons. The payments from the federal government were designed to reduce the cost of housing by reducing the effective interest rates of long-term mortgage loans to between one and five percent.<sup>22</sup>

The 1968 Housing Act programs resulted in the production of a substantial number of new housing units, both single family and multi-family, during the brief period before the programs were effectively shut down by the Nixon Administration in 1973. Reports of scandals in the administration of the programs in a number of cities, coupled with stories of low-income homeowners losing their homes because they were not able to afford the costs of operating them, provided impetus for the freeze.<sup>23</sup>

### B. *Housing and Community Development Act of 1974*

#### 1. Community Development Block Grants

In 1974 Congress enacted two major new programs. As an alternative to categorical grants subject to more rigid national standards, the Community Development Block Grant (CDBG) program provides grants to cities and states to enable them to implement a variety of local

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19. Housing Act of 1961, Pub. L. No. 87-70, tit. I, § 101(a), 75 Stat. 149 (codified as amended at 12 U.S.C. § 1715(d)(5) (1988 & Supp. II 1990)).

20. Act of Sept. 23, 1959, Pub. L. No. 86-372, tit. II, § 202, 73 Stat. 667 (codified as amended at 12 U.S.C.A. § 1701q (West Supp. 1992)).

21. Act of Aug. 10, 1965, Pub. L. No. 89-117, tit. I, § 101, 79 Stat. 451 (codified as amended at 12 U.S.C. § 1701s (1988)).

22. HUD Act of 1968, §§ 235-236 (codified as amended at 12 U.S.C. §§ 1715z to 1715z-1 (1988)).

23. 1973 HUD ANN. REP. 7; see NATIONAL CTR. FOR HOUS. MANAGEMENT, INC., 3 REPORT OF THE TASK FORCE ON IMPROVING THE OPERATION OF FEDERALLY INSURED OR FINANCED HOUSING PROGRAMS 1-2 (1972).

public activities tailored to local conditions.<sup>24</sup> While the CDBG program has been extremely popular with local governments, tension among the legislative objectives of eliminating slums and blight, preventing blighting influences, providing decent housing and a suitable living environment, and expanding economic opportunities, "principally for persons of low and moderate income,"<sup>25</sup> has never been resolved satisfactorily. In recent years Congress has amended the CDBG program to impose an increasingly strict targeting requirement on the use of block grant funds.<sup>26</sup>

Under current legislation, CDBG funds may be used for twenty-five separate eligible activities, including supporting efforts to provide affordable housing. The emphasis of CDBG support for housing traditionally has been on rehabilitation of existing units, but as federal support for housing production has declined, limitations on the use of CDBG funds to support new construction have been relaxed.<sup>27</sup>

## 2. Section Eight

The other major program enacted in 1974 was the Section 8 program.<sup>28</sup> The Section 8 program was designed to replace the interest subsidy programs of the 1968 Act with a subsidy to the developer/owner patterned after the annual contributions contracts of public housing.<sup>29</sup> Section 8 subsidies are disbursed through an annual contributions contract between a developer/owner, the local public housing authority or state housing finance agency as administrator of the Section 8 funds, and the Department of Housing and Urban Development (HUD). The subsidy is the difference between a fair market rent established by HUD for the area in which the units or persons being supported are located and a rent paid by tenants which generally may not exceed thirty percent of

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24. 42 U.S.C. § 5303 (Supp. II 1990).

25. *Id.* § 5301(c) (Supp. II 1990).

26. *Id.* §§ 5301(c), 5304(b)(3) (Supp. II 1990) (requiring that at least 70% of the aggregate amount of CDBG funds received by a state or local government be used for "the support of activities that benefit persons of low or moderate income").

27. *See id.* § 5305(a) (1988 & Supp. II 1990).

28. Housing and Community Development Act of 1974, Pub. L. No. 93-383, sec. 201, § 8, 88 Stat. 633, 662 (codified at 42 U.S.C. § 1437(f) (1988 & Supp. II 1990)).

29. In an Annual Contributions Contract (ACC) HUD agrees to provide funds annually to pay certain costs: in public housing, the costs to amortize bonds sold to finance construction of housing units, 42 U.S.C. § 1437c(a)(1) (1988); in Section 8, the balance of an agreed upon rent ("contract rent") after tenants make their required payments (30% of income). *Id.* § 1437f(c)(3)(A) (Supp. II 1990). The maximum length of public housing ACCs is 40 years. *Id.* § 1437c(a)(1) (1988). The terms for Section 8 ACCs are fifteen years for the certificate program, *id.* § 1437f(d)(2)(A) (Supp. II 1990), and five years for the voucher program. *Id.* § 1437f(o)(5) (1988 & Supp. II 1990).

their income.<sup>30</sup> At one time, four types of housing were eligible for Section 8 support: new construction, substantial rehabilitation, moderate rehabilitation, and existing housing.

As a result of a policy shift during the 1980s from supply-side to demand-side subsidies,<sup>31</sup> along with disclosure of scandals in the administration of the Moderate Rehabilitation program,<sup>32</sup> the only active federal direct housing subsidy program at the beginning of the 1990s was the Section 8 Existing Housing program. Appropriations for this program have never permitted more than a small fraction of eligible persons to receive housing assistance. Under the Existing Housing program, rental assistance was provided in two ways: (1) certificates issued to property owners guaranteeing payments for fifteen years if the owner both rented to persons whose incomes were below eighty percent of the median income for the area and also maintained the property in accordance with local housing codes; and (2) vouchers issued to low-income persons guaranteeing payments for five years to owners renting acceptable units to them.<sup>33</sup> Scandalously long waiting lists for embarrassingly few vouchers illustrate the Existing Housing program's failure to make a measurable impact on urban housing needs.<sup>34</sup>

### C. *Low-Income Housing Tax Credit (1986)*

The Low-Income Housing Tax Credit (LIHTC), enacted as part of the Tax Reform Act of 1986, offers an incentive for equity investment in

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30. *Id.* § 1437a(a)(1) (1988). Rental payments are set at the greatest of the following: 30% of adjusted income, 10% of income, or welfare payments received that are designated for housing costs.

31. Supply-side subsidies seek to encourage production of more housing units by providing incentives to developers and lenders. Demand-side subsidies are designed to enable recipients to compete more effectively in the marketplace for existing housing units. *See generally* HENRY J. AARON, *SHELTER AND SUBSIDIES: WHO BENEFITS FROM FEDERAL HOUSING POLICIES* 44-52 (1972) (discussing economic effects of housing subsidies).

32. *See* COMMITTEE ON GOV'T OPERATIONS, *ABUSE AND MISMANAGEMENT AT HUD: TWENTY-FOURTH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS TOGETHER WITH ADDITIONAL VIEWS*, H.R. REP. NO. 977, 101st Cong., 2d Sess. 3-4 (1990); IRVING WELFELD, *HUD SCANDALS* 85-106 (1992); Michael A. Wolf, *HUD and Housing in the 1990s: Crises in Affordability and Accountability*, 18 *FORDHAM URB. L.J.* 545, 553-67 (1991).

33. 42 U.S.C.A. §§ 1437a(b)(2), 1437f(a), (c), (d)(2)(A), (o)(3)(A), (o)(5) (West 1978 & Supp. 1992).

34. The 1993 HUD appropriation provides funds for approximately 35,000 units and/or families to be assisted under Section 8, split about equally between the certificate and the voucher programs. In fairness, it should be noted that the Administration request of 82,000 units of assistance was more than double the amount actually appropriated in 1993. *Winners and Losers in HUD's FY93 Budget*, ROUNDUP (Low Income Hous. Info. Ser.) Oct. 1992, at 1, 3. As Professor Boger notes, a 4.1 million gap existed in 1989 between the number of low rent units and the number of low-income renters. Boger, *supra* note 4, at 1334 n.194.

low-income housing; Congress intended this credit to replace the real estate tax shelters largely eliminated by the Tax Reform Act.<sup>35</sup> Developers claim the credit annually for a period of ten years. The credit may amount to either: (1) the present value of up to seventy percent of the depreciable basis in newly constructed or substantially rehabilitated housing units that do not receive other federal subsidies and are rented to low-income persons; or (2) the present value of up to thirty percent for the acquisition cost of housing that is rehabilitated, and for certain subsidized housing.<sup>36</sup> The credit percentages are adjusted annually for ten years. For January 1992, the annual percentages were 8.70% with a seventy percent present value credit and 3.73% with a thirty percent present value credit.<sup>37</sup>

The LIHTC is the only active subsidy program designed to encourage private investment in the production of housing for low-income persons. Enacted as a temporary measure in 1986, Congress has extended its expiration date three times. Congress attempted to make the program permanent twice in 1992, but both acts were vetoed.<sup>38</sup> Another effort to extend the credit permanently is expected in 1993.

#### D. 1990 Cranston-Gonzalez National Affordable Housing Act

Enactment of the 1990 Cranston-Gonzalez National Affordable Housing Act,<sup>39</sup> the first major renewal or revisitation of federal housing policy in sixteen years, introduced an additional range of programs. The centerpiece of the statute is the HOME program, a housing block grant program patterned after the CBDG program. The HOME program pro-

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35. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189-2208 (codified at I.R.C. § 42 (1988 & Supp. II 1990)); see Jonathon Klein & Lynne Wehrli, *The Low-Income Housing Tax Credit: Federal Help for Low Income Housing*, BOSTON B.J., July-Aug. 1990, at 22-23. See generally Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203, 209 (1988) (critiquing the effectiveness of the LIHTC and proposing alternative ways to encourage private-sector development of low-income housing).

36. I.R.C. § 42, 469(i)(3) (1988 & Supp. II 1992).

37. See CONGRESSIONAL BUDGET OFFICE, *THE COST-EFFECTIVENESS OF THE LOW-INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS* 4 (1992) (staff memorandum). A two-part, 15-year targeting requirement is imposed: (1) building rentals must meet a 40:60 or 20:50 ratio of percentage of units rented and percentage of median income; (2) rents may not exceed 30% of the applicable qualifying income standard. I.R.C. § 42(g), (i)(1) (1988 & Supp. II 1990).

38. *Tax Expenditures to Cost \$401.8 Billion in FY 1993, Senate Budget Report Says*, Daily Rep. for Executives, (BNA), Nov. 27, 1992, at 229.

39. Pub. L. No. 101-625, 104 Stat. 4079 (codified at 42 U.S.C. §§ 12701-12898 (Supp. II 1990)). Since the repeal of the Section 8 New Construction and Substantial Rehabilitation programs in 1983, federal housing policy has supported efforts to use the existing housing stock rather than building new units. See 42 U.S.C. § 12742(a) (Supp. II 1990).



vides funds to enable state and local governments to support affordable housing initiatives such as construction loans, short-term gap and bridge loans, and tenant-based rental assistance.<sup>40</sup> A 1992 amendment to the HOME program eliminated a bias against new construction that existed in the 1990 Act—a bias that represented a continuing drag on federal housing policy since 1982.<sup>41</sup> Three significant features of HOME both strengthen the program and make it more complex. First, local and state government recipients must prepare Comprehensive Housing Affordability Strategies (CHAS) that HUD must approve before HOME funds can be expended.<sup>42</sup> Second, fifteen percent of local HOME funds must be set aside for eighteen months for qualified nonprofit organizations called Community Housing Development Organizations (CHDOs).<sup>43</sup> Finally, local communities must provide matching funds through local tax revenues, bond proceeds, or contributions of land, labor, or materials equal to twenty-five percent of the total for rental assistance and rehabilitation, thirty-three percent of the total for substantial rehabilitation, and fifty percent of the total for new construction projects, subject to modification or waiver for communities in various stages of fiscal distress.<sup>44</sup>

The goal of the Bush Administration's housing policy, homeownership, was added to the 1990 Act in the form of the HOPE program (Homeownership and Opportunity for People Everywhere).<sup>45</sup> Through HOPE, HUD can make planning and implementation grants to enable consortia of developers, nonprofit agencies, tenant organizations, and individuals to acquire existing units of public housing and privately owned subsidized housing; acquisition may occur through a variety of ownership vehicles, including limited equity cooperatives, mutual housing associations and scattered-site, single-family fee ownership. Funds can be used for acquisition, rehabilitation, and, in limited situations, operation of subsidies by cooperatives and other ownership vehicles. Funds may also be utilized for downpayment assistance for individual homebuyers, as well as education and job training services. Nevertheless, CHAS and local match requirements described for the HOME program must still be met.<sup>46</sup>

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40. 42 U.S.C. §§ 12741-12742 (Supp. II 1990).

41. Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 203, 106 Stat. 3672, 3752 (1992).

42. 42 U.S.C. § 12705 (Supp. II 1990).

43. *Id.* § 12771; *see also* 42 U.S.C.A. § 12704(6) (West Supp. 1992) (definition of CHDO).

44. 42 U.S.C. § 12750 (Supp. II 1990).

45. Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, §§ 421-448, 104 Stat. 4079, 4162-80 (codified at 42 U.S.C. §§ 12871-12898 (Supp. II 1990)).

46. *See* 42 U.S.C. §§ 12871-12898 (Supp. II 1990).

### E. Tax Subsidies for Middle and Upper Income Homeowners

#### 1. Mortgage Interest Deduction and Other Tax Preferences

Congress has chosen to subsidize owner-occupied housing in a number of ways. Homeowners who itemize deductions on their tax returns can deduct the interest paid on residential mortgages of up to a million dollars, as well as the interest paid on home equity indebtedness of up to \$100,000.<sup>47</sup> Homeowners may benefit from additional tax preferences in the form of favorable capital gains treatment, including non-recognition of gain from the sale of a principal residence, if they reinvest the proceeds in a house of equal or greater value within two years.<sup>48</sup> Homeowners who are at least fifty-five also enjoy a one-time exclusion of \$125,000 of capital gain from the sale of a principal residence.<sup>49</sup> Finally, homeowners benefit from no depreciation of basis used in calculating gain and the stepped-up basis at death.<sup>50</sup>

In addition to the mortgage interest deduction, homeowners receive a substantial subsidy in the form of tax-free, imputed income; that is, homeowners are not taxed on the stream of imputed rental income reflecting the "market value of the housing services produced by [their] property," even though they can deduct the mortgage interest and property tax costs of operation of the property.<sup>51</sup> Renters, by contrast, may not deduct their rental payments and must pay their rent with after-tax dollars.

#### 2. Extent of Homeowner Tax Expenditures

Government spending for low-income housing has consistently been a fraction of the losses in revenues resulting from tax preferences to homeowners. A recent study calculated that in 1988, federal government subsidies to homeowners exceeded \$81 billion. This figure takes into account the effects of the mortgage interest tax deduction, deduction for property taxes, and exclusion of imputed rental income.<sup>52</sup>

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47. I.R.C. § 163(a), (h)(1)-(3) (1988).

48. *Id.* § 1034.

49. *Id.* § 121.

50. *Id.* § 1014.

51. James R. Follain & David C. Ling, *The Federal Tax Subsidy to Housing and the Reduced Value of the Mortgage Interest Deduction*, 44 NAT'L TAX J. 147, 148 (1991); see Joseph Isenbergh, *The End of Income Taxation*, 45 TAX L. REV. 283, 288-89 (1990).

It is interesting to note that in one of the precursors to the modern tax code, rent paid for a dwelling was deductible. Act of Mar. 3, 1863, ch. 74, § 11, 12 Stat. 713, 723. Certain types of interest were deductible as early as 1864, with all interest being deductible in 1870. Act of July 14, 1870, ch. 255, § 9, 16 Stat. 256, 258.

52. Follain & Ling, *supra* note 51, at 157.

According to the President's Budget for Fiscal Year (FY) 1993, the tax expenditures<sup>53</sup> for the mortgage interest deduction, the deduction of property tax on owner-occupied homes, the deferral of capital gains on proceeds reinvested in another home within two years, and the one-time exclusion of capital gains for individuals over fifty-five years total approximately \$72.8 billion.<sup>54</sup> In contrast, federal appropriations and tax expenditures for low-income housing assistance for FY 1993 amounted to about \$18 billion.<sup>55</sup>

In 1988, only twenty-nine percent of taxpayers claimed itemized deductions on their tax returns.<sup>56</sup> This figure is down from forty percent in 1986.<sup>57</sup> In 1985 the number of homeowners claiming mortgage interest deductions<sup>58</sup> was 28.1 million; despite an increase of several million in the number of homeowners, the 1991 Joint Committee on Taxation projected that the number of homeowners claiming the deduction would be only 24.1 million, 4 million less than the 1985 figure.<sup>59</sup>

The subsidies derived from the mortgage interest deduction heavily favor upper-income taxpayers. A study of 1988 tax receipts concluded that over half of the tax savings from this deduction accrued to people with incomes in the ninety-second percentile or higher.<sup>60</sup> Thus, the majority of federal government tax expenditures and appropriations benefit those who least need assistance.

### III. STATE AND LOCAL HOUSING PROGRAMS

One significant effect of the change in federal housing policy has been to engender truly creative thinking about housing in many states and municipalities. The first generation of state housing programs involved the sale of tax-exempt revenue bonds by state housing finance

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53. A tax expenditure is the amount of tax revenue foregone by the Treasury because a deduction or exclusion of income is allowed. See STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* 3 (1985).

54. Budget of the United States, Fiscal Year 1993, Tbl. 24-3, Pt. Two-39.

55. Allen D. Manvel, *Upside-Down Housing "Aid"?*, 53 TAX NOTES 743, 743 (1991).

56. *Id.* at 746.

57. *Id.* This is largely due to the increase in the standard deduction, capturing many homeowners at the low end of the income scale and lowering the marginal tax rates. *Id.* at 745-46.

58. This does not assume that only these taxpayers benefitted from the deduction preferences. Some of the individuals not itemizing may have used the subsidies in the past, but may no longer have the volume of deductions necessary to move out of the category for standard deductions. One might expect retirees to be in this category.

59. James M. Poterba, *Taxation and Housing: Old Questions, New Answers*, 82 EMPIRICAL PUB. FIN. 237, 239 (1992).

60. *Id.*

agencies in the 1960s and 1970s to stimulate housing production.<sup>61</sup> These activities were followed in the 1980s by a second generation of housing trust funds and related programs designed to respond to the curtailment of federal housing programs.<sup>62</sup>

Housing finance agencies administer more than 600 programs in all fifty states. Activities include downpayment assistance and below-market-rate loans to first time homebuyers, gap loans and grants to nonprofit community housing developers, and construction and permanent loans to for-profit and nonprofit developers.<sup>63</sup> While a relatively small number of states have appropriated state funds to supplement the traditional reliance on tax-exempt housing bond proceeds, all states have gained valuable experience in administering housing programs and determining how best to respond to local needs.

Connecticut has established an innovative housing program. It authorizes the state to provide housing grants and loans to municipalities that enter into a regional housing compact, provided that the compact contains regional goals for the development of adequate, affordable housing and balances these developmental gains with environmental, economic, transportation, and infrastructure concerns.<sup>64</sup> State grants and loans are available through a housing partnership program with municipalities that reduce regulatory barriers to, and provide support for, affordable housing. Connecticut has established a variety of funds, including a housing trust fund and a housing infrastructure fund, to provide both supply-side and demand-side housing assistance.<sup>65</sup>

New Jersey enacted a Fair Housing Act in 1985.<sup>66</sup> The Act was adopted in response to several state supreme court cases which held that every municipality in a growth area of the state has a constitutional obligation to provide, through its land use regulations, a realistic opportunity for the construction of a fair share of its region's present and prospective needs for housing for low- and moderate-income families.<sup>67</sup> The Act established a state Affordable Housing Council to identify housing needs

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61. See Peter W. Salsich, Jr., *Housing Finance Agencies: Instruments of State Housing Policy or Confused Hybrids?* 21 ST. LOUIS U. L.J. 595, 597-98 (1978).

62. See, e.g., NATIONAL COUNCIL OF STATE HOUS. AGENCIES, STATE HFA PROGRAM CATALOGUE (1992) (a five-volume reference cataloging more than 600 programs).

63. *Id.*

64. CONN. GEN. STAT. ANN. §§ 8-336f, 8-336l, 8-384 to -387, 8-395 (1989 & West Supp. 1992).

65. *Id.*; see also *id.* § 8-395 (West Supp. 1992) (providing tax credit for businesses that contribute to nonprofit housing programs).

66. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986), *upheld in* Hills Dev. Co. v. Bernards Township, 103 N.J. 1, 40, 510 A.2d 621, 642 (1986).

67. Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 199, 456 A.2d

and adopt procedures for allocating municipal fair share housing needs.<sup>68</sup> The Act also provides for state appropriations to be channeled through the State Department of Community Affairs and the New Jersey Mortgage and Housing Finance Agency to make grants and loans to municipalities to help them meet their low- and moderate-income housing needs.<sup>69</sup> An example of an innovative local program is a church-city coalition in Syracuse, New York, established to develop and market affordable housing through a community land trust.<sup>70</sup>

A significant complement to state housing programs is the growing number of state requirements that local governments engage in formal analysis of local housing needs as a condition to exercising their zoning power. For example, prior to local zoning, Florida requires that six aspects of local housing be analyzed: (1) housing needs of current and expected future population, (2) elimination of substandard housing, (3) improvement of existing housing, (4) provision of adequate sites for future affordable housing with supporting infrastructure and public facilities, (5) provision for relocation housing, and (6) identification of housing to be conserved, rehabilitated, or replaced.<sup>71</sup>

#### IV. HOUSING POLICIES SINCE THE *KERNER REPORT*

Federal housing policies since the *Kerner Commission Report*, and for that matter since the first housing legislation of the Depression era, have been a mixed bag. Most Americans enjoy the best housing in the world. One of the true success stories of the past fifty years has been the increase in the standard of housing quality enjoyed by the vast majority of people in the United States.<sup>72</sup>

At the same time, however, an increasing number of persons at the lower end of the economic scale have not seen their housing conditions improve, and in many cases, have actually experienced a decline in housing quality. This is particularly true for the growing number of persons

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390, 410, 413 (1983); *Southern Burlington County NAACP v. Mount Laurel*, 67 N.J. 151, 174, 336 A.2d 713, 724-25, *appeal dismissed and cert. denied.*, 423 U.S. 808 (1975).

68. N.J. STAT. ANN. §§ 52:27D-305, -307 (West 1986).

69. *Id.* §§ 52:27D-320 to -321 (West 1986).

70. *Syracuse Church-City Coalition Links Housing, Land Trust*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 622 (Dec. 7, 1992).

71. FLA. STAT. ANN. § 163.3177(2)-(7) (West 1987); *see also* CAL. GOV'T CODE § 65302 (West 1983 & Supp. 1993) (requiring zoning ordinances to be in accordance with land use and housing elements of master plan); N.J. STAT. ANN. § 40:55D-62 (West 1991); OR. REV. STAT. § 197.175(2)(a) (1991) (requiring cities and counties to prepare comprehensive plans in compliance with goals approved by the Land Conservation and Development Commission).

72. *See* James W. Rouse & David O. Maxwell, *Forward*, in *BUILDING FOUNDATIONS, HOUSING AND FEDERAL POLICY* vii (Densie D. Pasquale & Langley C. Keyes eds., 1990).

who fall into "service-dependent" categories, such as single parents with small children, persons with disabilities, elderly persons who have become frail, and persons who have lost their homes through natural disasters.<sup>73</sup> Moreover, many Americans still experience segregation in housing, despite comprehensive fair housing legislation in 1968 and again in 1988.

The federal role in housing began almost sixty years ago.<sup>74</sup> Since that time, a variety of approaches have been tried, including direct loans and grants for acquisition and development, grants to reduce operating expenses, subsidies to lenders to reduce interest rates, and a number of tax credits and deductions. Despite billions of dollars and a mind-numbing range of programs, direct housing assistance to low-income persons does not appear to have been accepted by the American public. At the same time, the truly massive subsidies available to middle- and upper-income homeowners through the tax code are viewed by most recipients of those tax benefits as untouchable entitlements rather than subsidies.

Government programs have been characterized by a lack of direction and an ambivalence over the role of government. Programs have fluctuated continually between emphasizing the production of new units and increasing effective demand for existing units, and between direct subsidies through appropriations and indirect subsidies through tax concessions. Congress, as well as the public, has been impatient. If a particular housing program did not solve housing problems within a few years, it was junked in favor of a new one. The twenty-five year progression in programs featuring below-market-rate loans, rent supplements, interest reduction payments, Section 8 housing assistance payments for newly constructed, rehabilitated, and existing housing, the low-income housing tax credit, and the new HOME block grant program is a case in point.

The debate continues about the most effective use of federal housing funds. The Congressional Budget Office compared the cost effectiveness of housing tax credits and housing vouchers and concluded that vouchers will provide "assistance of equal value to tenants at a fraction of the cost of credits."<sup>75</sup> It remains a fact, however, that local public housing authorities report a scarcity of landlords willing to participate in the certificate and voucher programs, and many recipients return their certificates and vouchers unused because of an inability to locate decent units. This has led the National Housing Law Project to argue for converting the tax

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73. See EDWARD B. LAZERE ET AL., *A PLACE TO CALL HOME: THE LOW INCOME HOUSING CRISIS CONTINUES* 39 (1991).

74. United States Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C.A. §§ 1437-1437ee (West 1978 & 1992)).

75. CONGRESSIONAL BUDGET OFFICE, *supra* note 37, at 2.

credit into a direct grant program, rather than simply substituting more vouchers for credits.<sup>76</sup> The direct grant program would be available to developers and owners who agree in advance to participate in the Section 8 programs.

Owners clearly have been favored over renters when the housing incentives in the tax laws are included in an assessment of national housing policy. This same favoritism is evident in the regulatory bias of local land use laws, which favor single-family detached housing over rental housing.<sup>77</sup> A promising corollary of this favoritism is the growing interest in new forms of ownership and control of assisted housing such as community housing development organizations (CHDOs), cooperatives, community land trusts, and other forms of co-housing. Similarly, public housing resident management corporations may make it possible for more low-income persons to experience the benefits of homeownership.

#### V. A PROGRAM FOR SHARING THE AMERICAN DREAM—THE PIECES ARE IN PLACE, BUT NEED TO BE TRIED TOGETHER

The housing block grant and homeownership components of the Cranston-Gonzalez National Affordable Housing Act of 1990<sup>78</sup> and the Housing and Community Development Act of 1992<sup>79</sup> have provided a legislative framework for an effective national housing policy designed to reach those persons without access to decent housing. A long-term, patient commitment to implement the national housing policy and reaffirm the 1949 housing goal by substantially increasing funding allocations is the missing ingredient.

The outline of a "federal" housing policy that includes a crucial role for the states is sketched in the remainder of this Essay. Space constraints and the need for continued discussion of specifics require that the details be left for another day.

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76. NATIONAL HOUS. LAW PROJECT, CHANGING FEDERAL HOUSING POLICY 11 (1992) [hereinafter CHANGING POLICY]; see also NATIONAL HOUS. LAW PROJECT, A SUGGESTED FRAMEWORK FOR NATIONAL HOUSING PROGRAMS 17-21 (1987) (submitted to the Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Banking, Finance and Urban Affairs) (suggesting "shift[ing] . . . from a system of subsidizing long-term financing to one of capital grants," avoiding limited capital subsidies, and eliminating tax shelter subsidies).

77. See, e.g., Edward H. Ziegler, *The Twilight of Single-Family Zoning*, 3 UCLA J. ENVTL. L. & POL'Y 161 (1983).

78. Pub. L. No. 101-625, 104 Stat. 4079 (codified at 42 U.S.C. § 12701-12898 (Supp. II 1990)).

79. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (to be codified at 42 U.S.C. § 5301).

A. *Restoring Housing to the National Domestic Agenda and Renewing Commitment to Homes and Communities*

The Kerner Commission concluded its report with the observation that it had "uncovered no startling truths, no unique insights, no simple solutions."<sup>80</sup> A perspective twenty-five years later yields the same conclusion. The Kerner Commission's main recommendation for national action remains as important in 1993 as it was in 1968: "[T]he need is not so much for the government to design new programs as it is for the nation to generate new will."<sup>81</sup>

It is a truism that decent housing provides an essential foundation for stable families and revitalized neighborhoods. Housing was on the national "front burner" for a few years after the *Kerner Commission Report* spurred enactment of the 1968 Housing Act,<sup>82</sup> but the national attention was diverted by Vietnam and Watergate, and then dissipated through a perception that housing programs were doomed to failure because of the intractable nature of the problems of marginalized people and communities. The flurry of legislative activity since 1990 is evidence of a reawakening of interest in housing, but the paucity of appropriations indicates that a basic commitment has not yet been made.

B. *Reallocating Housing Subsidies So That More of the Funds Reach the Impoverished*

A concern of the Kerner Commission<sup>83</sup> that continues to frustrate housing advocates twenty-five years later is the large gap between need and resources for housing programs directed to low-income persons as compared to those serving middle- and upper-income groups. Studies published in 1991 and 1992 noted that while a large number of families are receiving federal housing subsidies from HUD or Farmers Home Administration programs (5.5 million), an estimated additional 5.1 million families are eligible for assistance, but do not receive any.<sup>84</sup> This comes at a time when the main thrust of federal housing policy has been toward demand-side programs (Section 8 certificates and vouchers). When first

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80. KERNER COMM'N REPORT, *supra* note 3, at 483.

81. *Id.* at 412-13.

82. HUD Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (1968); *see supra* text accompanying note 22.

83. KERNER COMM'N REPORT, *supra* note 3, at 28 (contrasting the performance of the public housing program over a 31-year period—800,000 units produced—with the performance of the FHA mortgage insurance program over a similar 34-year period—insured mortgages for 10 million new housing units for middle- and upper-income persons).

84. CHANGING POLICY, *supra* note 76, at 9 (citing CENTER ON BUDGET & POLICY PRIORITIES & LOW INCOME HOUS. INFO. SERV., A PLACE TO CALL HOME 32 (1991)).



proposed in the 1970s, these programs were justified as "fairer" than the Section 236 and Section 8 New Construction supply-side programs because more people supposedly would be served by the certificates and vouchers. Frustration deteriorates into cynicism when urban areas have long waiting lists for public housing and subsidized units, but receive only enough certificate or voucher allocations to provide assistance to a few hundred new families per year.<sup>85</sup> Not only has the supply of available units diminished,<sup>86</sup> but the certificate and voucher programs have not met the additional demand because of insufficient appropriations.

Some progress in closing the gap between need and availability will be made by reallocating funds for existing shallow subsidy programs, such as HOME, the Low-Income Housing Tax Credit, and CDBG, to the deep subsidy Section 8 Certificate and Voucher programs; progress could also be made by requiring landlords who accept the benefits of the shallow subsidies also to accept the deep subsidies, as advocated by the National Housing Law Project.<sup>87</sup> Major improvement in the present housing crisis, however, will require addressing the basic imbalance between the tax subsidies available to middle- and upper-income homeowners and the rental subsidies available to low-income landlords and tenants.

### 1. Capping the Mortgage Interest Tax Deduction

One major difference between the national backdrop for the *Kerner Commission Report* and for this anniversary symposium is a huge federal deficit in 1993 that did not exist in 1968. The Kerner Commission emphasized that the "great productivity" of the economy and a "highly responsive" federal revenue system combined to "produce truly astounding automatic increases in Federal budget receipts," provided the economy continued to function at its capacity.<sup>88</sup> By contrast, the deficit hangover of the 1990s inhibits serious discussion of new social initiatives. Any proposal to increase spending for housing risks dismissal as frivolous, unless

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85. See, e.g., CENTER ON BUDGET & POLICY PRIORITIES, ST. LOUIS, MISSOURI: A PLACE TO CALL HOME 22-23 (1992) (reporting that in 1992, more than 29,000 households were on waiting lists maintained by the city of St. Louis and the five counties in the St. Louis metropolitan area; these governments currently administer federal housing assistance through public housing and rental assistance programs to approximately 21,500 households).

86. Boger, *supra* note 4, at 1331-34.

87. CHANGING POLICY, *supra* note 76, at 9. "Shallow" subsidies, such as tax credits to investors and below-market-rate loans to developers, reduce the cost of housing but only to a level that is affordable by persons in the 68th percentile of median income range. "Deep" subsidies, such as Section 8 rental assistance payments, enable persons whose incomes are well below the 50th percentile of median income range to afford decent housing.

88. KERNER COMM'N REPORT, *supra* note 3, at 411.

advocates of the proposal consider and account for its impact on the deficit.

Significant deficit reduction is not likely to occur until programs benefitting persons who can function effectively without the benefit are considered in the deficit reduction debate. One such program is the package of tax preferences available to homeowners. A serious, long-term commitment to housing for low-income persons could be funded by placing a cap on this benefit and earmark the additional revenues generated by this cap to assist low-income families in meeting their housing needs.

Various caps on the mortgage interest deduction have been proposed.<sup>89</sup> Presidential candidate H. Ross Perot's economic plan called for a \$250,000 cap.<sup>90</sup> The Joint Committee on Taxation estimated that \$14.7 billion could be raised by a \$300,000 cap between 1993 and 1997.<sup>91</sup> The Congressional Budget Office (CBO) concluded that limiting the interest deduction to \$20,000 per joint return, \$10,000 per return for married couples filing separately, and \$12,000 for individuals could generate \$8.2 billion from 1991 to 1995.<sup>92</sup> According to the CBO, these limitations would allow full interest deduction on mortgages as large as \$200,000 under 1990 interest rates, an amount almost double the average size of new mortgages closed in 1989.<sup>93</sup>

Another approach would be to require taxpayers to deduct the interest from the bottom of their income schedule.<sup>94</sup> A similar proposal examined by the CBO would limit the tax benefit of deductions to the lowest marginal rate, or a flat fifteen percent. The CBO calculated that this would raise \$52.9 billion from 1991 to 1995.<sup>95</sup>

Legitimate concerns about perceived unfairness as well as the economic consequences<sup>96</sup> of imposing such a cap could be addressed by

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89. All of the following proposals were offered in the context of deficit reduction, not subsidy redistribution.

90. H. Jane Lehman, *Where Candidates Stand on Housing*, CHI. TRIB., Nov. 1, 1992, at 2B.

91. Joint Comm. on Taxation, *Issues Involved in Possible Revenue Options to Reduce the Deficit* (JCX-20-92), June 4, 1992 (staff memorandum).

92. CONGRESSIONAL BUDGET OFFICE, *REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS* 357 (1990).

93. *Id.* at 358.

94. Interest payments of less than \$32,450 would be deducted at a 15% rate (for married individuals filing joint returns), then at a 28% rate for amounts up to \$78,400, and finally at a rate of 31% for amounts up to the \$1 million plus \$100,000 limit.

95. CONGRESSIONAL BUDGET OFFICE, *supra* note 92, at 357.

96. Cf. Follain & Ling, *supra* note 51, at 157 ("If discounted at 10 percent, the present value of the subsidy to owner-occupants is over a quarter of the value of the average house."); see also Gene Steuerle, *Limits on the Home Mortgage Interest Deduction*, Tax Notes, vol. 58,

phasing in the cap over a period of eight to ten years. Current homeowners could thereby amortize their "investment" in their mortgage interest tax deduction over a period corresponding roughly to the average time between moves by homeowners. For example, if Congress eliminated twelve percent of the deduction subject to the cap each year, the cap would be reached in slightly more than eight years. An alternative method of cushioning the impact would be to make the cap prospective in nature by imposing it after a home is purchased. Still another alternative would be to convert the deduction to a tax credit equal to the middle-class tax bracket percentage (twenty-eight percent), up to a maximum of \$200. In addition to arguing that a credit would be available to more people, advocates estimate that it could generate at least \$20 billion annually.<sup>97</sup>

The cap should be set at a level that would attempt to distinguish between use of the tax code to encourage homeownership and use of the tax code to accumulate wealth. While more money might be raised for assisted housing programs or deficit reduction efforts by eliminating the mortgage interest tax deduction entirely, that is not recommended because such a drastic measure has the potential of discouraging homeownership. It is worth noting, however, that Canada, which has achieved approximately the same percentage of home ownership as the United States, does not allow a deduction for mortgage interest, although it does provide some capital gains preference.<sup>98</sup> The Office of Management and Budget has estimated that an additional \$12 billion in revenue would be recoverable if the property tax deduction were eliminated.<sup>99</sup> Tax reform advocates proposed elimination of the property tax deduction from 1985, but Congress deleted that feature from the Tax Reform Act of 1986 because of fears that high property tax states such as New York would be harmed disproportionately.<sup>100</sup>

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no. 6, (Feb. 8, 1993) at 787 (arguing that mortgage interest payments are deductible "mainly because the real tax expenditure toward housing cannot be measured easily"); Joseph A. Snow, *My Home, My Debt: Remodeling the Home Mortgage Interest Deduction*, 80 KY. L.J. 431 (1992) (analyzing proposals for modifying or eliminating the mortgage interest tax deduction and arguing for its retention with respect to principal residences).

97. ARLENE ZAREMBKA, *THE URBAN HOUSING CRISIS* 155 (1990). Zarembka notes that the tax loss from mortgage interest reduction would be reduced by \$20 billion annually. *Id.*

98. CONGRESSIONAL BUDGET OFFICE, *supra* note 92, at 357.

99. Budget of the United States, *supra* note 54, Tbl. 24-3, Pt. Two-39.

100. Paul Houston, *Major Fight Likely Over Killing Deductions for State, Local Taxes*, L.A. TIMES, May 30, 1985, at 13; Susan Kellam, *Congressmen Join Tax Fight*, N.Y. TIMES, June 23, 1985, § 11 LI, at 1.

## 2. Endowing a Low-Income Housing Investment Trust Fund

Funds derived from the cap on mortgage interest tax deductions should be split between deficit-reduction efforts and endowment of a Low-Income Housing Investment Trust Fund. This fund should be a dedicated fund similar to the Highway Trust Fund.<sup>101</sup> The seriousness of the current deficit problem requires that any new tax revenues be allocated at least partially for deficit reduction. A major portion of revenues generated by a cap on mortgage interest tax deductions, however, should be applied to benefit directly the people with the greatest housing needs.

As highways are a crucial part of the infrastructure of this nation, so decent homes are part of the infrastructure of stable families. The cap on mortgage interest deductions is premised on the philosophy that tax policy support for home ownership should be based on the opportunity that ownership gives people to control the environment in which they live, rather than as a means of generating wealth. Because of the great need that low-income persons have for assistance in obtaining decent housing, money generated by a cut in housing tax expenditures should either be used to reduce the deficit or for other types of housing programs.

## 3. Decentralizing Spending Decisions

One of the recurring criticisms of federal policies of the past fifty years is that the centralized control of the purse strings through HUD, coupled with the decentralized operation of the public housing program, has produced a situation of divided responsibility in which accountability and public support has been lost. The bureaucratic layers of HUD (area, regional, and national offices) interact with local public agencies (housing authorities) that depend on state and municipal governments for their legal existence but which, for the most part, are independent of these governments. The resulting "top-down" method of operation is inefficient, unresponsive, and inflexible, and has led to a serious lack of public support for the public housing and assisted housing programs, as well as isolation of public housing and its residents.<sup>102</sup>

While federal housing production programs have steadily declined in importance in the eyes of both national policy makers and the general public, the period since the *Kerner Commission Report* has been a time of

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101. See Surface Transportation Revenue Act of 1991, Pub. L. No. 102-240, 105 Stat. 2203 (codified in scattered sections of 23 U.S.C., 26 U.S.C., & 49 U.S.C.) (extending highway-related taxes and trust fund).

102. See, e.g., *Subsidy Reductions, HUD Restructuring Proposed By Progressive Policy Institute*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 644, 644-45 (Dec. 21, 1992); THE FINAL REPORT OF THE NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING 10-31, 108-09 (1992) [hereinafter THE FINAL REPORT].

innovation at the state and local levels. The growth and maturation of state housing finance agencies, coupled with twenty years' experience with the decentralized CDBG program and enactment of the HOME Investment Trust Fund block grant program,<sup>103</sup> have produced an environment in which a renewed commitment to housing for low-income persons could flourish.

Rather than channel money from a National Housing Trust Fund to HUD for distribution through the existing bureaucracy, Congress should establish a new form of distribution, through the states, patterned after the decentralized distribution system for the Highway Trust Fund. The distribution system should be "outside the beltway" so that it is closer to the problems than is Washington. It should also be capable of taking a broader view than that of the cities because of the extreme isolation that low-income persons have experienced and because of the need for more affluent suburban communities to share the burdens of the cities.<sup>104</sup> The states are the logical choice.

The states are in a position to distribute federal housing funds in much the same way that they distribute federal highway funds. They are closer, and thus more accountable, to people in the communities affected by federal assistance than is a federal bureaucracy.<sup>105</sup> They operate a range of sophisticated affordable housing programs from first time homebuyer assistance to shelters for the homeless, and are able to exert leverage on local governments to enter into cooperative regional approaches to sharing the burdens of housing programs and reducing the isolation of beneficiaries of those programs.<sup>106</sup> In addition, they control the real culprit of segregated housing patterns—the zoning power.<sup>107</sup> Old patterns of neglecting urban issues have been replaced in many states

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103. Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, § 218, 104 Stat. 4079, 4109-10 (codified at 42 U.S.C. § 12748 (Supp. II 1990)).

104. I am indebted to Thomas P. Costello, a former executive director of the St. Louis Housing Authority, for helping crystallize the idea of shifting the decision-making authority to the states.

105. An eloquent argument for "dividing the job" between the federal government and the states by devolving a host of "productivity" programs, including housing and community development, to the states was made by Alice M. Rivlin, Deputy Director of the Office of Management and Budget in the Clinton Administration. ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM* 110-125 (1992); see also John R. Nolon, *Reexamining Federal Housing Problems in a Time of Fiscal Austerity: The Trend Toward Block Grants and Housing Allowances*, 14 URB. LAW. 249, 265-70 (1982) (explaining impact on state and local governments of Block Grant Programs).

106. For example, Connecticut has established a state housing fund for distribution to local communities that enter into regional fair housing compacts. CONN. GEN. STAT. § 8-387 (West Supp. 1992); see *supra* text accompanying notes 64-65.

107. See, e.g., *Britton v. Town of Chester*, 595 A.2d 492, 496 (N.H. 1991) (holding that the state zoning enabling act did not permit municipalities to zone out forms of housing, such as

by the creative efforts of leaders forced to respond to the withdrawal of federal urban aid.

Decentralizing the distribution system does not mean that the federal government should get out of the housing business. Rather, as suggested by the trust fund and tax reform proposals, its role should be increased but changed to one of funding, and articulating and implementing national standards for use of federal housing funds. The national standards should include: (1) a mandate to seek an end to housing segregation and the isolation of low-income households; (2) creation of true regional housing markets by removal of artificial barriers to affordable housing; (3) close attention to management issues, including balanced tenant selection policies that both emphasize tenant responsibility and recognize the stresses that accompany life on a limited or nonexistent budget, and provision of social services such as day care, family counseling, and locational education commensurate with the needs of the tenant population; and (4) opportunities for the development of tenant management and tenant ownership.

States should be free to permit a mix of new construction and rental assistance activities to be developed and adjusted to suit local housing conditions. State housing plans and local CHAS plans could play crucial roles in the development of flexible strategies.

Congress should require states to follow a targeted approach to assure that priorities for expenditures of National Housing Trust Funds are based on need. States should be free, however, to add flexibility to the targeting strategy by encouraging mixed-income and mixed-use developments to reduce the isolation of low-income households, and to permit the funds to be used in conjunction with efforts to provide integrated housing choices in suburban neighborhoods.

#### 4. Establishing "Permanently Affordable" Housing

Despite a persistent belief that governmental support for housing can be temporary, a number of factors suggest that such a belief is unrealistic. Complex demographic changes in family structures, persistent racial and economic segregation of housing, increasing longevity, social policies favoring independence over institutionalization for disabled persons, and the large number of people who have lost jobs and ways of life because of the transformation from an industrial-based to a service-based economy indicate that an effective housing policy for the 1990s and beyond must include the assumption that a large stock of housing units

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apartments and smaller houses, that would be affordable to low- and moderate-income persons).

should remain affordable to low-income persons for the foreseeable future.<sup>108</sup>

The failure to recognize the reality of long-term housing needs has been a major contributor to the impatient attitude with which most Americans view governmental housing programs. Recent federal housing policy has shown encouraging signs of changes in outlook. For example, amendments to the LIHTC legislation requiring tax credit applicants to enter into revocable agreements with state housing agencies to retain the units for low-income use for at least thirty years,<sup>109</sup> enactment of the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRA)<sup>110</sup> with its mechanism for transferring ownership of assisted housing from profit-motivated to nonprofit entities in order to preserve the low-income status of the units, and the growing popularity of community land trusts as vehicles for preserving housing affordability illustrate the growing recognition of long-term needs.<sup>111</sup> These efforts should be supported and strengthened with three principles in mind:

(1) Control of the quality and environment of housing, rather than investment opportunity, is the dominant motivation of stable householders.<sup>112</sup>

(2) Long-term affordability programs must establish a reasonable market take-out mechanism for investors who are willing to put private capital into affordable housing efforts but who wish to realize a return on their investment over a far shorter time frame. One approach might be to waive any recapture penalties and perhaps even regular exit taxes if a profit-motivated owner transfers to a qualified nonprofit housing organization affordable housing units that have been maintained adequately so

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108. The term "permanently affordable" housing often is used to mean that subsidies, price restrictions, or both will remain in effect for the expected useful life of the building. *See, e.g.*, 12 U.S.C. § 4112(c) (Supp. II 1990) (defining "remaining useful life" of a low-income housing project to be a minimum of 50 years).

109. 26 U.S.C.A. § 42(h)(6)(D), (E) (West Supp. 1992).

110. Pub. L. No. 101-625, 104 Stat. 4249 (codified at 12 U.S.C. §§ 4101-4125 (Supp. II 1990)).

111. In community land trusts, the ownership of housing is split between the land and the buildings, with nonprofit organizations dedicated to long-term affordability holding title to the land and entering into long-term ground leases with the building owners. David M. Bromowitz, *Community Land Trusts and Ground Leases*, A.B.A. J. AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT L., Spring 1992, at 5, 5.

112. A survey of housing attitudes by the Federal National Mortgage Association (Fannie Mae) noted that control and security issues outweighed economic advantages as reasons for desiring to own a home. "[B]arely half of adults consider the tax advantage of homeownership an important argument for owning a home." FANNIE MAE NATIONAL HOUSING SURVEY 7 (June 1992).

that the nonprofit organization does not have to expend funds to repair and renovate the units.<sup>113</sup>

(3) A successful long-term affordability program should include a transfer mechanism to allow low-income families to retain their units as their income increases. A repeated flaw of federal housing programs has been the insistence that affordable housing units be physically occupied by low-income persons. What is needed instead is a constant inventory of affordable housing units in a setting that encourages diversity in housing and provides role models for others. For example, members of a welfare family renting a public or assisted housing unit who obtain a job and begin to move up the economic ladder should be able to stay and purchase the dwelling unit, perhaps by first joining a limited equity cooperative, and later by converting to a condominium or purchasing the fee simple if the unit is detached. The funds used to purchase the unit in this manner can then be used to add another unit to the affordable housing inventory. In effect, families would filter up rather than housing units trickling down.

### 5. Revitalizing Public Housing

Public housing is an enigma. While generally considered a failure by most Americans, it remains home for thousands of families who have little or no choice but to stay.<sup>114</sup> Public housing began as a noble experiment in federalism; states would authorize municipalities to borrow money to build public housing units, the federal government would reimburse cities for their production costs, and municipalities would manage the units with rental income received from tenants. Yet it was fatally flawed because most municipalities created independent housing authorities that operated outside the general purpose of local government rather than becoming integral parts of those structures. As a result, many local housing authorities had to fend for themselves politically, instead of being able to function within the political shield of their constituent munic-

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113. A creative example of the possibilities for using state resources is the sale of taxable bonds to finance the purchase of a 15-year-old apartment complex for the elderly in Rhode Island. In return for the bond financing, the new owners pledged a portion of annual gross rents to an affordability preservation fund, to be used for rental assistance in the event a Section 8 subsidy contract is not renewed when it expires. NAHRO, *State Reports*, 49 J. HOUSING 308, 308 (1992).

114. In calling attention to the magnitude of the problems of the estimated 86,000 units of public housing that are "severely distressed," the National Commission on Severely Distressed Public Housing noted that 94% of the approximate 1.4 million public housing units "continue[] to provide an important rental housing resource for many low-income families and others." THE FINAL REPORT, *supra* note 102, at 2.



ipality.<sup>115</sup> Public housing became the refuge for millions of migrating families, but the demographic changes occasioned by that migration overwhelmed the basic structure of public housing in the center cities.<sup>116</sup>

Severely distressed public housing is a visible presence in many American cities. No housing policy can succeed without coming to grips with that fact. Simply pouring more money into the existing, flawed system will only add to the millions of dollars of housing funds that go underutilized or unspent.<sup>117</sup>

The maturing community-based housing movement offers a framework for revitalizing public housing. As a component of a decentralized housing delivery system, Congress should replace the centralized relationship between HUD and local public housing authorities with a new relationship in which states and local communities enter into partnerships with public housing authorities. During a transition period, state and local governments would audit the public housing inventory through the CHAS process<sup>118</sup> and convene meetings of public housing tenants, neighboring residents, local government officials, and civic leaders to identify or organize community-based housing organizations capable of taking title to clusters of public housing units that can be renovated into livable communities. Public housing authorities would go out of business if all of their units could be absorbed by community-based housing organizations. Where governmental management of housing for people with special needs is necessary, public housing authorities could fulfill this role, but they should be brought into the local government structure as part of a housing and community development department responsible for integrating special-needs housing into overall community develop-

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115. The story of the compromises struck in the public housing legislation to overcome doubts about the legality of direct federal intervention in housing and vociferous opposition from the real estate industry is told in LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 94-113 (1968).

116. Public housing residents in the 1940s and 1950s were characterized as "poor, but [generally] employed and accustomed to urban living," but by the 1960s, the population had shifted to "a very high proportion (over 50%) of female headed households of one kind or another on public assistance." ROBERT MORONEY, *HOUSING POLICY IN SOCIAL POLICY AND SOCIAL WORK: CRITICAL ESSAYS ON THE WELFARE STATE* 91-92 (Walter de Gruyter ed., 1991) (quoting from studies conducted in 1966 and 1971).

117. See, e.g., Lindsey Gruson, *Billions in U.S. Housing Aid Are Unspent by Poor Cities*, N.Y. TIMES, June 15, 1992, at A16 (reporting that an informal HUD review of two major housing and community development programs found \$7.2 billion in unspent federal funds through the end of 1991).

118. While not recommending the type of change proposed here, the National Commission on Severely Distressed Public Housing declared that "[t]he Federal Government cannot expect to apply the same laws, regulations, and administrative practices effectively to more than 3,000 different PHAs and approximately 1.4 million units of public housing nationwide." THE FINAL REPORT, *supra* note 102, at 5.

ment planning. Those housing units, such as high rise towers, that are incapable of being used effectively in a community-based housing program should be sold or demolished.

Effective involvement of all elements of the community is a necessary ingredient to successful revitalization of public housing. While transfer of control to isolated public housing tenants without access to resources necessary for proper management is not the answer, transfer of control to nonprofit community development corporations that include public housing residents as well as neighborhood, church, and business leaders may provide the spark for success. Such organizations can supply three necessary ingredients for revitalizing public housing: (1) a framework through which public housing residents can take control over their environment, (2) access to necessary community resources and support services, and (3) removal of the barriers that dislocate public housing from the surrounding neighborhood and prevent it from becoming a community asset to which residents can point with pride.

Despite widespread publicity about homeownership alternatives for low-income persons, the lessons of previous federal and state efforts are that family stability and a predictable income of at least \$17,000 to \$20,000 are necessary for a successful home ownership program based on the fee simple concept, whether that be in scattered site or condominium configurations.<sup>119</sup> With the national median income for renters in 1989 at \$18,192, but at only \$6571 for public housing tenants and \$7,060 for Section 8 certificate and voucher holders,<sup>120</sup> it is apparent that programs encouraging traditional forms of home ownership for public housing tenants and recipients of Section 8 certificates and vouchers risk perpetuating a "cruel hoax if they are not coupled with substantial education, training and job opportunities."<sup>121</sup>

On the other hand, the limited equity cooperative may well be a workable ownership vehicle for very low-income families. This is particularly true if cooperatives are subsidized adequately, coupled with social services, education, and job opportunities, and located in mixed-income

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119. See, e.g., *Results of Programs to Sell Units to Public Housing Residents Examined*, 16 [Current Developments] Hous. & Dev. Rep. (BNA) 896, 896-97 (Mar. 6, 1989) (discussing the report prepared by the Council of Large Public Housing Authorities (CLPHA) and research reports submitted to HUD by Dr. Michael Stegman).

120. *Study Finds Assisted Rents Often Exceed 40 Percent of Income*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 390, 390 (Sept. 28, 1992); U.S. Census, *Current Population Survey* (Mar. 1991).

121. Cf. Michael Stegman, *The New Mythology of Housing*, TRANS-ACTION, Jan. 1970, at 55, 61 (arguing that encouraging homeownership "without moving toward reducing levels of unemployment and underemployment might be the cruelest hoax yet perpetuated on the low-income population").

settings to reduce the sense of isolation that often characterizes the public and subsidized housing experience.

## 6. Integrating Housing with Economic Development

There is little argument that jobs paying living wages would do more to improve housing opportunities for low-income persons than any housing program yet devised. For over fifty years, federal housing policy has been driven by the impact that housing production can have on job development.<sup>122</sup> For a variety of reasons, housing policy generally has followed the filtering theory by intervening near the top of the market.

The goal of housing for low-income persons, where the housing crisis is, must be kept separate from the jobs goal. Otherwise, the familiar shift in focus will take place and tax dollars meant to improve housing quality for low-income persons will be ratcheted upwards to people in the moderate- to middle-income levels. While there are good arguments for providing housing assistance for persons at the 80-140% of median range, that group is not in a housing crisis and that group is not homeless. While job development programs are an essential ingredient of a revitalized economy, housing policy for low-income households should not be driven by a desire to create jobs.

Two economic development movements that are particularly compatible with a decentralized, low-income-focused housing policy are the community development corporation (CDC) and the microenterprise movements. Nearly two thousand community development corporations are in existence, with an increasing number using revolving loan funds to help small businesses finance start-up and expansion activities, along with their traditional housing and economic development activities. Following the lead of the South Shore Bank in Chicago, a number of banks have established bank CDCs or community investment corporations (CICs).<sup>123</sup> The Housing and Community Development Act of 1992 established a demonstration program to make grants and loans available to selected "community investment corporations" to "demonstrate the feasibility of facilitating the revitalization" of targeted areas by improving access to capital.<sup>124</sup> The financial community, along with government at

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122. See, e.g., MORONEY, *supra* note 116, at 88-89 (citing studies that 22,000 to 25,000 jobs will be created by each \$1 billion spent on housing construction and that an additional 276,000 jobs per \$1 billion expenditure will result from the multiplier effect).

123. See, e.g., *CDCs Begin to Focus on Business Development Finance*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 392, 292-93 (Sept. 28, 1992); *Two Southern Banks Establish Bank CDCs*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 315 (Aug. 31, 1992).

124. Community Investment Corporation Demonstration Act, Pub. L. No. 102-550, § 853, 106 Stat. 3859, 3859-64 (1992) (codified at 42 U.S.C.A. 5305 (West Supp. 1991)).

all three levels, should encourage the CDC/CIC movement as a means of generating resources for a broad neighborhood reinvestment program that includes community based housing activities.

Microenterprises, defined as commercial enterprises that have "five or fewer employees, one of which is the owner,"<sup>125</sup> can be vehicles for low-income residents to use their talents to provide some of the essential support services for housing, such as day care, housecleaning, grounds-keeping, etc. Legislation enacted in 1992 authorizes microenterprises to receive federal assistance through the CDBG and Small Business Administration programs.<sup>126</sup>

### 7. Removing Barriers of Race and Class

The most intractable aspect of the low-income housing crisis is the persistence of racial and class segregation despite decades of judicial and legislative pronouncements against it. The issue is both moral and legal, and requires moral suasion as well as legal enforcement. A collaborative federal-state-local initiative focusing on ending segregation in two key elements of the housing development process—financing and land use regulation—is an essential part of a renewed housing effort. Lenders can make or break local housing initiatives by their response to requests for credit. The Community Reinvestment Act of 1977<sup>127</sup> provides a framework for a major effort to persuade lenders to remove artificial barriers to financing of low-income housing and neighborhood revitalization activities.<sup>128</sup> A similar collaborative effort to persuade municipalities to remove artificial zoning barriers should also be undertaken. The states are in a position to take the lead because, as repositories of the police power, they have ultimate control over local zoning decisions.

These efforts should be coordinated on a regional level by a coalition of neighborhood organizations, perhaps through the vehicle of the CHAS review process.<sup>129</sup> In addition, they must be accompanied by a sophisticated effort to involve churches and other community institutions in educational efforts to reduce the fear of "others" that underlies so much of the exclusionary mentality.

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125. Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 807, 106 Stat. 3672, 3849.

126. *Id.* at 3847-50 (amending 42 U.S.C. §§ 5302, 5305); Microlending Expansion Act of 1992, Pub. L. No. 102-366, 106 Stat. 989 (amending 15 U.S.C. § 636(m)).

127. 12 U.S.C. §§ 2901-2905 (1988 & Supp. II 1990).

128. See also Marion A. Cowell, Jr. & Monty D. Hagler, *The Community Reinvestment Act in the Decade of Bank Consolidation*, 27 WAKE FOREST L. REV. 83, 87-94, 97-100 (1992) (discussing the development of the Act and the need for strengthened enforcement).

129. 42 U.S.C. § 12705 (Supp. II 1990).

## VI. CONCLUSION

The 1949 goal of decent housing for every American family can be met if current housing subsidies are reallocated so that about fifty percent of the approximately \$100 billion total benefits low-income households who are unable to afford homeownership, instead of the twenty to twenty-five percent that they currently receive. An additional \$20 billion per year reallocated to low-income housing programs by a revision of the tax code could make possible a combination of demand-side vouchers and supply-side grants for construction rehabilitation averaging \$5000 per year. This would enable an additional four million households to receive housing assistance, thus substantially closing the estimated gap between the total number of eligible low-income families and the number who actually receive housing assistance. If this amount were supplemental by state and local housing trust funds, the gap might be narrowed further still.

The phase-in contemplated for the recommended tax changes would necessitate incremental increases in the number of new households assisted. But even a ten percent phase-in during the first year (400,000 households) would represent a ten-fold increase over the number of households (35,400)<sup>130</sup> newly able to receive rental assistance in FY 1993.

Massive new "top down" construction programs are not recommended; nor is continued withdrawal by the federal government. Rather, existing housing subsidies should be reallocated to increase the dollars allocated to programs for low-income households. Decisions on types of programs, location of housing, and methods of subsidy should be decentralized to the states, subject to broad national policies emphasizing the goals of ending housing segregation and isolation of low-income households, expanding housing locational choices to regional market levels, linking social services with other management objectives, and encouraging homeownership opportunities where feasible.

State housing programs have matured to the point where a distribution system is in place that can respond effectively to local needs while confronting the reality that regional approaches are necessary to break down the barriers to full integration of housing. The experiments have been conducted. The resources are available. Do we have the will to act?

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130. See *supra* note 34 and accompanying text.