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The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions

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THE CONTINUING CRISIS IN AFFORDABLE HOUSING: SYSTEMIC ISSUES REQUIRING SYSTEMIC SOLUTIONS

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I. INTRODUCTION

In 1960, my father bought the first home he ever owned. He was forty years old, with one child away at college and two still in high school. As a career military man, my father picked up his family every two or three years and moved lock, stock, and barrel to a totally new location. Until he first bought a house, our family had lived in rented houses, sometimes on military bases. He bought his first house in Manchester, New Hampshire, because there was no housing available on base, and very little rental housing was available in town. Buying the house was not part of a long-term strategy; we simply needed a place to live, and this house was what he found.[1]

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* Assoc. Prof. of Law, Univ. of Tennessee College of Law. I wish to express my appreciation to the University of Tennessee College of Law for supporting my scholarship with summer research grants and release time, and to my colleagues in the U.T. Legal Clinic for their support during my work on this article. My colleagues Dwight Aarons, Judy Cornett, Joan Heminway, Amy Morris Hess, Donald Leatherman, and Dean Hill Rivkin read and gave invaluable comments on a previous draft of the article. Special words of thanks go to my research assistant Riëtte van Laack and my mentor Carol McCrehan Parker. This article is dedicated to my father, CMSgt. Grant S. Williams, Sr., (USAF, Ret.), one of the original Tuskegee Airmen.

1. Until I "interviewed" him for this article, I knew the basic outlines of this story, but there were some very important details that I did not know, and I now realize that I had made a lot of false assumptions about my father and his homeownership story. My father retired from the military at the age of fifty-five and has been able to live comfortably without taking on another job, and I assumed that he had been able to accomplish this because he understood some fundamental principles about money and had a solid plan for his economic security. I assumed that from 1960, when he bought the first house, that he appreciated the value of homeownership, and had made a conscious decision favoring homeownership over rental. I thought of my father as someone for whom homeownership was the core of his economic security. As this narrative shows, however, my father's homeownership and his financial security may have resulted more from happenstance than from conscious planning. Nonetheless, my father has some basic understandings about money and housing that provide important lessons in economic security. Interview with CMSgt. Grant S. Williams, Sr., USAF, Ret., in Hampton, Va. (Dec. 27, 2002) (on file with the author).

My father bought his second house under similar circumstances.[2] He had been transferred to Langley Air Force Base in Hampton, Virginia, and he moved into temporary housing for thirty days. Again, he was looking for housing, and did not care whether he ended up with a rental or a purchase. He bought the house he now lives in for $32,950 in 1972. My father put down 5% and obtained an FHA mortgage at 7% for thirty years.[3] The four bedroom, two and a half bath home is in a nice neighborhood, and he has taken good care of it. It is now worth over $150,000. Even today, my father has trouble thinking of himself as owning an asset that is worth over $100,000, because that sounds like "an awful lot of money" to him.[4]

As it is for most Americans,[5] my father's house is his major asset. Unlike many Americans, however, my father is not buried under a mountain of debt.[6] Not only has he managed to pay off the mortgage on his house, but he has resisted the many offers that he gets to take out home equity loans, and he pays off the one credit card that he uses every month. My father is not wealthy, although he shares a lot of values in common with the true millionaires described in Stanley and Danko's *The Millionaire Next Door*.[7] Although all of his income is from his military pension and social security, he has a level of economic security that is surprisingly rare in this rich country.

This story about my father provides some important lessons about economic security, and suggests that homeownership plays an important role in achieving economic security for American

2. Between 1962 and 1972 my parents (and my younger sister, until she went away to college) lived in rented military housing at four different duty stations. In addition, my father spent two years in Vietnam during this period. *Id.*

3. *See infra* note 16.

4. Interview with CMSgt. Grant S. Williams, Sr., *supra* note 1. In the year 2000, when he paid off the mortgage, my father talked about holding a ceremonial mortgage burning. The ceremony never happened. I suspect that would have been a little too showy for him.

5. *See* Jack C. Harris, *Your Home as an Investment*, TIERRA GRANDE, No. 1613, Apr. 2003, at 2 (discussing homeownership as "a great core investment"), *available at* http://recenter.tamu.edu/pdf/1613.pdf.

6. *Americans Build Mountain of Debt, Savings Rate Slides*, BEACON NEWS ONLINE (Jan. 11, 2004), *at* http://www.suburbanchicagonews.com/beaconnews/archives/a11debtors.htm (explaining that many Americans are suffering under a mountain of debt and that the problem is escalating).

7. THOMAS J. STANLEY & WILLIAM D. DANKO, THE MILLIONAIRE NEXT DOOR: THE SURPRISING SECRETS OF AMERICA'S WEALTHY 2 (1996) (asserting that wealth is generally "the result of a lifestyle of hard work, perseverance, planning, and most of all, self-discipline").

families. Homeownership has played an important role for many middle-class people in achieving economic security,[8] and I argue in this article that it can do the same for people in poverty.

Since 1937, when the first federal legislation was enacted to provide housing for low income people,[9] there has been an acknowledged crisis in affordable housing.[10] The number of people in need of housing and unable to afford it through the private market system has continued to outstrip the number of housing units available to this population.[11] The federal government has enacted a range of programs, generally implemented through state or local housing agencies, to address the crisis.[12] In this article, I survey the affordable housing programs and closely examine a few of the most important ones, considering how successful each program has been in achieving its objectives, and in that process, assessing what role each program plays in our national housing policy.[13]

The government housing programs are aimed at people who have incomes that are significantly less than the median income in the area where they live.[14] Although my father is not poor,[15] and he was not a beneficiary of the affordable housing programs for

8. *See* DAVID RUSK, BROOKINGS INST., CTR. ON URB. & METRO. POL'Y, THE "SEGREGATION TAX": THE COST OF RACIAL SEGREGATION TO BLACK HOMEOWNERS 2 (2001) (stating that "[h]ome equity is the typical American family's most important financial asset, and an important vehicle for transmitting wealth from generation to generation"), *available at* http://www.brookings.edu/dybdocroot/es/urban/publications/rusk.pdf.

9. United States Housing Act of 1937 (Wagner-Steagall Housing Act), Ch. 896, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. §§ 1437 *et seq.* (2000)).

10. *See infra* notes 39-93 and accompanying text (providing an overview of the housing crisis).

11. *See, e.g.*, JENNIFER DASKAL, CTR. ON BUDGET & POL'Y PRIORITIES, IN SEARCH OF SHELTER: THE GROWING SHORTAGE OF AFFORDABLE RENTAL HOUSING 9 (1998) ("[In 1995,] the gap between the number of low-income renters and the number of rental units affordable to them was wider than at any point since comparable data first began being collected."), *available at* http://www.cbpp.org/615hous.pdf.

12. *See infra* App. of Affordable Housing Statutes, pages 478-80 (listing the federal programs enacted to address the housing crisis).

13. *Infra* notes 170-484 and accompanying text.

14. *See* 42 U.S.C. § 1437a(b)(2) (2002). For many housing programs, "'low income families' means those families whose incomes do not exceed 80 per centum of the median income for the area, . . . [and] 'very low income families' means low income families whose incomes do not exceed 50 per centum of the median family income for the area." *Id.*

15. *See* Florence Wagman Roisman, *Shaping American Communities: Segregation, Housing and the Urban Poor: Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351, 1352 (1995) (describing the importance of distinguishing among the terms "low income," "poor," and "welfare").

poor and low income people discussed in this article,[16] in the final analysis, as I consider what we need to do to address the crisis in affordable housing in this country, I nonetheless return to this story of my father.[17] I believe that his story is relevant to the discussion of the housing crisis, because we will solve the problem only when we are able to collectively learn the important lessons about economic security that my father has learned, and only when we commit ourselves to making those lessons available to low income people.[18] The concepts of poverty and economic security are more psychological than they are financial.[19] In this and subsequent articles on the topic of wealth and poverty, I will examine the characteristics that led my father to have a sense of economic security, and the characteristics that lead others with similar levels of income and resources to economic despair.[20] This article examines the government programs which have been designed to provide housing to low income people.[21] The main focus of the article

16. As a veteran, my father received the benefit of the Veteran's Administration ("VA") and Federal Housing Administration ("FHA") mortgage insurance programs. These programs are not specifically targeted at low income people and have, in fact, been major factors in the growth of middle class homeownership in the United States. *See* Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 86-88 (1998) (describing how the VA and FHA guidelines contained eligibility requirements such as lot size, which had the effect of encouraging suburban growth at the expense of the urban residential tax base).

17. *Infra* Part VI.

18. For an example of such an initiative, see U.S. DEP'T OF HOUS. & URB. DEV., BLUEPRINT FOR THE AMERICAN DREAM 2-3 (2002) [hereinafter HUD, BLUEPRINT FOR THE AMERICAN DREAM], *available at* http://www.hud.gov/news/releasedocs/blueprint.pdf; *see also* U.S. DEP'T OF HOUS. & URB. DEV., ECONOMIC BENEFITS OF INCREASING MINORITY HOMEOWNERSHIP 3-9 (2002), *available at* http://www.hud.gov/initi atives/blueprint/econreport-101502.pdf.

19. William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 7 (1985) (claiming that poverty is psychologically debilitating because psychological strength is dependent upon satisfaction of basic material needs and because psychological strength can be eroded by the humiliation resulting from popular attitudes toward poverty).

20. For one explanation of what leads low-income people to despair, see Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 89 (1995) ("The cycle of poverty created by the lack of opportunity in central cities is inescapable. Concentration of poverty, and the ensuing lack of jobs, adequate health care, decent housing and quality education that go with it, is a self-perpetuating cycle leading to powerlessness and despair.").

21. The Appendix to this article lists the major affordable housing programs that have been enacted by Congress since 1937. *Infra* App. of Affordable Housing Statutes, pages 478-80. The term "government programs" includes rent subsidies, home mortgage subsidies, tax credits, and other incentives to build, rehabilitate, manage, or invest in housing. It could include programs such as the home mortgage interest tax deduction and other incentives to produce market rate housing; however, this discussion will be limited to programs Congress specifically intended to increase housing for

is a comparison between the programs designed to provide rental housing and programs designed to promote homeownership.

I am primarily concerned with determining which of the existing programs do the best job of promoting economic security among the population they are designed to benefit. Therefore, I measure the success of a housing program by whether it promotes economic security. Nonetheless, in the course of this discussion, I will consider other definitions of success and how the programs measure up against them. Part II presents a framework for a discussion of affordable housing policy issues.[22] In this section, I outline the complex environment of affordable housing development, and the multiple interests that need to be involved in developing any coherent policy.

Part III gives a short history of public housing policies from 1937 to the end of the twentieth century.[23] Part IV discusses the major rental housing programs.[24] The public housing program discussed in Part III is briefly assessed here,[25] as are the HOPE VI,[26] Section 8,[27] Welfare Reform,[28] and Low Income Housing Tax Credits[29] programs. This section contains a discussion of the relationship between affordable housing and welfare reform, because the public policy of encouraging the poor to become self-sufficient, both in financial and housing terms, has been a driving force in the development of affordable housing policy.[30]

Part V describes programs designed to promote homeownership for low income families.[31] These include Mixed-Financed Development programs,[32] HOPE VI,[33] Non-profit and Community-based Developments,[34] and Low Income Homeownership initiatives.[35]

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low income people and which limit eligibility for participation to low income persons. Certain of the programs have been selected for a more in-depth discussion in this article.

22. *See infra* notes 39-101 and accompanying text (providing a history and overview of affordable housing programs).

23. *Infra* notes 102-158 and accompanying text (presenting a history of U.S. housing policies from 1937 to present).

24. *Infra* notes 170-345 and accompanying text.

25. *Infra* notes 170-197 and accompanying text.

26. *Infra* notes 198-205 and accompanying text.

27. *Infra* notes 206-268 and accompanying text.

28. *Infra* notes 269-300 and accompanying text.

29. *Infra* notes 301-345 and accompanying text.

30. *See infra* notes 269-300 and accompanying text.

31. *Infra* notes 346-484 and accompanying text.

32. *Infra* notes 346-367 and accompanying text.

33. *Infra* notes 368-416 and accompanying text.

34. *Infra* notes 417-437 and accompanying text.

In Part VI, I draw conclusions based on this comparative analysis and make a recommendation for the direction affordable housing policy should take.[36] I conclude that what we do not have, and what we need, is a National Affordable Housing Policy, with a clearly defined mission, accountable to multiple interests and taking into account a variety of measures of success.[37] To fulfill its mission the responsible entities will need the resources, expertise, and power to get the job done.

Finally, the Appendix of Affordable Housing Statutes is a quick reference guide to the major statutes in this area.[38]

II. THE AFFORDABLE HOUSING ENVIRONMENT

A. The Scope of the Crisis.

The United States has been in the midst of an affordable housing crisis for many years.[39] What exactly is meant by the "affordable housing crisis" depends on who is discussing the question, and the specific context of the discussion.[40] In this section, I provide an overview of the crisis from a variety of perspectives.

Affordable housing refers to housing intended for "low income" or "very low income" people.[41] In the year 2000, the average annual income of the households in the bottom 20% of U.S. households was $10,500.[42] The 1990s were a period of unprecedented growth in the United States economy;[43] the lowest 20% of households, however, saw almost no gains in income since 1975.[44]

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35. *Infra* notes 438-484 and accompanying text.

36. *Infra* notes 485-497 and accompanying text.

37. *See infra* notes 486-497 and accompanying text.

38. *Infra* App. of Affordable Housing Statutes, pages 478-80.

39. *See* HARV. JOINT CTR. FOR HOUS. STUDIES, THE STATE OF THE NATION'S HOUSING: 2002, at 3 [hereinafter JCHS] (stating that the rise in home prices represents a serious challenge for the nation's lowest income households), *available at* http://www.jchs.harvard.edu/publications/markets/Son2002.pdf; Kenneth Forton, Note, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating its Subsidy Requirement*, 28 B.C. ENVTL. AFF. L. REV. 651, 651-52 (2001).

40. *See infra* notes 41-93 and accompanying text (providing numerous social and economic lenses through which the housing crisis can be approached).

41. Families with incomes less than 80% of the area median income are considered "low income." 42 U.S.C. § 1437(a)(b)(2) (2002). Families whose incomes are less than 50% of the area median income are considered "very low income." *Id.* There are housing programs which are aimed at "moderate income" people; however, the discussion in this Article will be limited to housing for low income or very low income people.

42. JCHS, *supra* note 39, at 3.

43. *Id.*

44. *Id.*

The problem of housing affordability can be seen by looking at the high percentage of low income households who pay a disproportionate share of their incomes (more than 30% by some measures; more than 50% by others) for housing.[45] Of the 20 million lowest income households, over 24% pay between 30% and 50% of their incomes for housing and/or live in inadequate housing.[46] Most of the 7.2 million of the lowest income households pay more than half of their incomes for housing.[47]

It is a serious problem that the quality of housing available to low income people is generally substandard.[48] Reports of the deplorable housing conditions suffered by the urban poor date back to the late nineteenth century.[49] In 1992, the National Commission on Severely Distressed Public Housing found that approximately 6%, or 86,000 units of public housing, were severely distressed.[50] A complaint frequently made about public housing units is that they are not well maintained by the local public housing authorities, and that they are crime-ridden, unhealthy environments.[51] As a result, many of the people for whom the housing was intended refuse to live there, and thousands of public housing units stand vacant and uninhabitable.[52] Fourteen percent of the housing

45. *Id.* at 25.

46. *Id.*

47. *Id.* at 24.

48. *Id.* at 3.

49. *E.g.*, JACOB RIIS, HOW THE OTHER HALF LIVES 1-52 (Hill & Wang 1957) (1890) (providing descriptions of lower Manhattan neighborhoods and their conditions in the nineteenth century).

50. NAT'L COMM'N ON SEVERELY DISTRESSED PUB. HOUS., FINAL REPORT 15 (1992) [hereinafter NAT'L COMM'N].

51. *Id.* at B-2. The Commission defines "severely distressed public housing" in Appendix B to its Report. The term refers not merely to housing that fails to meet building code standards, but "housing exhibiting the presence of one or more of the following conditions: [f]amilies living in distress, [r]ates of serious crimes in the development or the surrounding neighborhood, [b]arriers to managing the environment, and [p]hysical deterioration of buildings." *Id.*

52. *Id.* at B-7, B-8. The Commission used high numbers of vacant units or units that had been frequently rejected by applicants as an additional measure of distress. *Id.* One of the more notorious failures in public housing was the Pruitt-Igoe project in St. Louis, Missouri, where HUD decided to demolish thirty-three buildings in 1972. *See* Alexander von Hoffman, *Why They Built the Pruitt-Igoe Project*, *available at* http://www.soc.iastate.edu/sapp/PruittIgoe.html (last visited Mar. 17, 2004). Alexander von Hoffman notes that:

> In 1972, after spending more than $5 million in vain to cure the problems at Pruitt-Igoe, the St. Louis Housing Authority, in a highly publicized event, demolished three of the high-rise buildings. A year later, in concert with the U.S. Department of Housing and Urban Development, it declared Pruitt-Igoe unsalvageable and razed the remaining buildings.

Id.

occupied by lower income families is structurally inadequate or overcrowded.[53] The existence of these conditions of distress in combination with inadequate housing illustrates the complexity of the problem. Housing alone will not solve the problem. Any effective solution must address the other concerns as well.

Another way to view the crisis is to note the disparity between the supply of low cost housing units and the number of low income households.[54] Only 9.1 million units rent for less than $4,800 per year,[55] or nearly half the income of the average household in the lowest income group.[56] Yet, there are over 10.3 million lowest-income renter households, and only 4.7 million of them are able to secure those low rent units.[57] There is also a significant disparity between the number of new affordable units produced each year and the increasing number of households in the low income category.[58] Waiting lists for public housing or for vouchers for subsidized housing are extremely long.[59] Unfortunately, the number of housing units available for low income people has been seriously eroded by demolition and tough admissions and evictions policies.[60]

At the same time that we face this shortage of affordable housing, we also face a concentration of poverty in our inner cities and in our low income housing developments, which has brought with it increased crime, drug activity, unemployment, poor education and a variety of social ills.[61] Some view the homogeneous nature of

53. JCHS, *supra* note 39, at 25.

54. *Id.* at 26.

55. *Id.*

56. *Id.*

57. *Id.*

58. John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 312 (2000).

59. *Id.* at 311; *see also* Xenia Pamulaklakin, *Long Wait for Section 8*, BRONX BEAT, Feb. 27, 1995 (discussing the five to six year wait for Section 8 applications to be processed by HUD), *available at* http://www.columbia.edu/cu/bb/oldstuff/bb0227.15.html. In New York City, there were 300,000 applicants on a waiting list for 61,000 Section 8 apartments, and 186,000 people on the public housing waiting list, while only 8,000 public housing units were vacated in a year. *Id.*

60. Ammann, *supra* note 58, at 313-16. While it is true that tough admissions and eviction policies have been put in place to address some of the social ills of low income housing, those policies play a large role in the disparity between the need for and the availability of low income housing.

61. *See* NAT'L COMM'N, *supra* note 50, at 48 (explaining that the worst of the low income housing serves the poorest people, and that those communities have seen "institutional abandonment in the areas of police protection, health care, employment and training, education, counseling, and youth programs"); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Pov-*

projects populated exclusively by low income people as a problem.[62] To others it is part of the natural process of upward mobility, where people with the resources to do so leave the inner cities for the suburbs.[63]

An extreme measure of the crisis in affordable housing can be seen by looking at the problem of homelessness.[64] The level of social services needed to address the housing problems of the homeless puts this group in a special needs category which is beyond the scope of this article, but which urgently needs to be addressed.[65]

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erty in Urban America, 143 U. PA. L. REV. 1285, 1285 (1995) (arguing that American housing law policy has promoted large concentrations of poor people in the inner cities). All of these social ills are problems that merit attention, and it is difficult to determine which of them should be tackled first. It is virtually impossible to separate them from "housing problems." Effective solutions demand comprehensive approaches. The choice to focus on the housing programs in this article is not meant to suggest otherwise.

62. *See* Schill & Wachter, *supra* note 61, at 1339 ("Overwhelming concentrations of poor households and half-abandoned buildings provide a hellish environment for residents.").

63. JCHS, *supra* note 39, at 3.

64. In New York City, the homeless shelter population recently reached a record high of over 38,000 individuals, including over 9,200 families. New York City Dep't of Homeless Svcs., *Historic Data*, at 2, 4, *available at* http://www.nyc.gov/html/dhs/pdf/histdata.pdf (last visited Mar. 10, 2004); *see* NEW YORK CITY DEP'T OF HOMELESS SERVS., THE SECOND DECADE OF REFORM: A STRATEGIC PLAN FOR NEW YORK CITY'S HOMELESS SERVICES 1 (2002) [hereinafter DHS, A STRATEGIC PLAN] (noting that as of 2002, the homeless population in New York City reached above 35,000, including approximately 7,000 families in shelters), *available at* http://www.nyc.gov/html/dhs/pdf/stratplan.pdf; *see also* Leslie Kaufman, *New York Reaches Deal to End 20-Year Legal Fight on Homeless*, N.Y. TIMES, Jan. 18, 2003, at A1 (describing the city's inability to deal with the homeless family crisis and the ensuing litigation).

65. Other special needs groups include the elderly, the mentally ill, children in the foster care system, children emerging from the foster care system, and persons with HIV/AIDS. *See, e.g.*, DHS, A STRATEGIC PLAN, *supra* note 64, at 12 (noting a need for "the Division of Policy and Planning [to] work with the New York State Office of Mental Health (OMH), New York City Department of Public Health (DPH), New York City Health and Hospitals Corporation and local hospitals, and New York State Office of Alcohol and Substance Abuse Services to develop adequate discharge and reentry plans and access to program shelters" to better serve the needs of the mentally-ill community); Dorothy E. Roberts, *Poverty, Race and New Direction in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y 63, 63 (1999) ("Social workers, sociologists, politicians, promoters of adoption, and promoters of family preservation all agree that something is terribly wrong with our child welfare system."); Robert C. McConkey III, Comment, *"Camping Ordinances" and the Homeless: Constitutional and Moral Issues Raised by Ordinances Prohibiting Sleeping in Public Areas*, 26 CUMB. L. REV. 633, 663 (1996) (observing that significant subpopulations among homeless persons include children, the elderly and the mentally ill); New Jersey Hous. & Mortgage Fin. Agency, *Special Needs Housing Programs*, *at* http://www.state.nj.us/dca/hmfa/specneed/#senior (last visited Mar. 10, 2004) (describing special services available to assist with the housing needs of the elderly, the physically and mentally disabled, and persons suffering from AIDS).

Patterns of racially segregated housing add another dimension to the affordable housing crisis.[66] Despite the enactment of laws that prohibit racial discrimination in housing,[67] residential racial segregation remains a fact of life in most parts of the United States.[68] In some views racism is one of the causes of the affordable housing crisis, or at the very least has contributed significantly to it.[69] Government-supported policies that promote residential racial segregation have been well documented.[70] The lasting patterns of residential segregation in this country have impacts on property values, the quality of education, and the social fabric of our communities.[71] Thus, an appropriate question to ask is whether good

66. *See* Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. POVERTY L. & POL'Y 35, 43-47 (2002) (detailing the history of racially segregated public housing).

67. Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (1968) (codified at 42 U.S.C. §§ 3601-19 (2000)) (prohibiting discrimination in the housing market based on race, color, religion, or national origin). The law "was enacted so as to bar all racial discrimination, private as well as public, in the sale and rental of real property." United States v. Henshaw Bros., Inc., 401 F. Supp. 399, 402 (E.D. Va. 1974).

68. *See* UNITED STATES CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000, at 18-91 (2002) [hereinafter U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION] (providing a detailed description of housing segregation patterns as they pertain to American Indians and Alaskan Natives, Asians, Native Hawaiians and other Pacific Islanders, African Americans and Hispanics), *available at* http://www.census.gov/hhes/www/housing/resseg/pdf/censr-3.pdf; JOHN R. LOGAN, STATE UNIV. OF N.Y. (Albany), SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS AND HISPANICS IN METROPOLITAN AMERICA 1-4 (2002), *available at* http://mumford1.dyndns.org/cen2000/SepUneq/SUReport/Separate_and_Unequal.doc.

69. *See, e.g.*, MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 16, 37-45 (1st ed. 1997) (presenting a study of race and wealth inequality that shows a strong link between state policy, increasing suburbanization, and the perpetuation of racial and wealth disparities); Hendrickson, *supra* note 66, at 66 ("Although the debate over the causal relationship between racial segregation, racism, and economic disadvantage is long-standing and ongoing, it is unquestionable that race plays an important, if not predominant, role in residential segregation. Residential progress is denied to African Americans, regardless of income levels, because of racial barriers to integrated living."); John W. Fountain, *Suit Says Chicago Housing Renewal Plan Perpetuates Segregation*, N.Y. TIMES, Jan. 24, 2003, at A18 (describing a lawsuit brought against the Chicago Housing Authority contending that it violated the Fair Housing Act and the Civil Rights Act of 1964).

70. OLIVER & SHAPIRO, *supra* note 69, at 38-45; *see also* Forton, *supra* note 39, at 654-55 (discussing the racially discriminatory effects of Boston's suburban housing development policies).

71. *See* HUMAN RELATIONS FOUND. & CTR. FOR URB. RESEARCH & LEARNING, MINDING THE GAP: AN ASSESSMENT OF RACIAL DISPARITY IN METROPOLITAN CHICAGO 5-8 (2003) (finding that housing segregation leads to disparity in property values and educational quality in Illinois, with students in lower-income areas having

affordable housing policy can or should aim to diminish the amount or effects of racial segregation.[72]

Another perspective on the affordable housing crisis is the role of the developers or builders, who find it less profitable to develop low income housing than market-rate housing because of the limited rents or purchase prices available from this population.[73] Driven purely by market forces, developers would build housing only to the extent that they can make a profit on it.[74] When the costs of development are greater than the revenue that can be generated by a property, there is no profit, and market forces would result in no affordable housing being built.[75] To counteract the effect of pure market forces, government programs provide subsidies in various forms. Examples are Section 8 rent subsidies,[76] Low Income Housing Tax Credits,[77] and down payment assistance for low income home owners.[78]

The affordable housing crisis is affecting state governments that have been contending with severe revenue shortfalls since the year 2001.[79] The social safety net of welfare, child care, job development, and Medicaid programs, as well as housing assistance is threatened by a lack of resources in states' budgets.[80] Housing policy and welfare policy are very closely related.[81] Affordable hous-

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higher dropout rates, expulsion rates, and poor test scores), *available at* http://www.hullhouse.org/gap/pdfs/mindingthegap.summary.pdf.

72. *See id.*; OLIVER & SHAPIRO, *supra* note 69, at 38-45; *see also* LOUISE HUNT ET AL., U.S. DEP'T OF HOUS. & URB. DEV., SUMMARY OF THE QUALITY HOUSING AND WORK RESPONSIBILITY ACT OF 1998 (TITLE V OF P.L. 105-276), at 2 (1998) (advocating facilitation of mixed income communities and deconcentration of poverty in public housing), *available at* http://www.hud.gov/offices/pih/phr/about/titlev.pdf.

73. *See* Mara Shalhoup, *The Czar of Housing: A Builder Friendly Task Force Offers up its Solutions to Atlanta's Housing Woes* (Sept. 4, 2002), *at* http://atlanta.creativeloafing.com/2002-09-04/news_feature.html (finding that because developers are hesitant to develop low-income housing, the best way to create more affordable housing is to make construction profitable for developers).

74. *See id.*; *Nevada Housing Division: Low-Income Housing Tax Credit Program*, *at* http://nvhousing.state.nv.us/tax_credit/tax%20credit%20index.htm (noting that Nevada has a low-income housing tax credit program that creates economic incentives for developers to produce low-income housing).

75. *See* Forton, *supra* note 39, at 654-55.

76. *See infra* notes 210-227 and accompanying text.

77. *See infra* notes 308-336 and accompanying text.

78. *See infra* notes 475-477, 481-482 and accompanying text.

79. JCHS, *supra* note 39, at 24 (finding that revenues in thirty-nine of the fifty states had declined by 10%).

80. *See id.* at 24-25.

81. *See* Schill & Wachter, *supra* note 61, at 1290 (discussing a scholar's argument that there is a relationship between social and spatial housing isolation and welfare dependency).

ing is a major issue for people who have very low incomes.[82] The same people who cannot afford to pay for housing at market rates are likely to need assistance for other basic necessities.[83] Since the Great Depression of the 1930s we have had in place some form of public assistance which sought to provide basic necessities of life, including shelter, to very low income people.[84] Since 1996, legal policies toward welfare have changed such that there is no longer an entitlement to receive monetary benefits.[85] This raises the question of whether there remains a safety net for basic shelter, and how the elimination of an entitlement to public benefits affects the policies articulated in our early housing legislation.[86]

Finally, it is worth examining the merits of developing affordable rental housing vs. affordable housing for homeownership.[87] Forty-eight percent of the lowest income families own their own homes.[88] Both renters and owners in the lowest household income group have serious affordability problems,[89] and many homeowners, particularly elderly homeowners who are burdened with increased health care costs, are paying over 50% of their incomes for housing and are vulnerable to losing the equity they have in their homes.[90]

82. JCHS, *supra* note 39, at 10 (noting that people who have low incomes face an enduring legacy of limited homeownership opportunities).

83. Joel F. Handler, *Ending Welfare as we Know it: The Win/Win Spin on the Stand of Victory*, 5 J. GENDER RACE & JUST. 131, 155 (2001) (finding that low-income people have difficulty getting health insurance and health care and most qualify for food stamps and Medicaid).

84. *See* Susan Bennett, *Heartbreak Hotel: The Disharmonious Convergence of Welfare, Housing and Homelessness*, 1 MD. J. CONTEMP. LEGAL ISSUES 27, 96 n.58 (1990) (noting that examples of these entitlement programs are the three shelter initiatives created in the 1997 Stewart B. McKinney Homeless Assistance Act, including the Emergency Shelter Grant, the Supportive Housing and the Supplemental Assistance to Facilitate and to Assist the Homeless).

85. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601 *et seq.* (2000)) (imposing strict time limits on eligibility for public benefits and fundamentally changing the government's approach to welfare).

86. *See id.*

87. *See* Judith Bernstein-Baker, *Promote Affordable Cooperative Housing in Philadelphia*, 61 TEMP. L. REV. 393, 393-94 (1988) (noting that low-income tenants have less housing options because of increased housing costs and the shortage of affordable housing, necessitating a consideration of other options, such as private rental housing and homeownership).

88. *See* JCHS, *supra* note 39, at 25 (noting that if elderly households are excluded from this statistic, the number of homeowners in the lowest income group would be 33%).

89. *See id.* (finding that over 24% of low-income homeowners are moderately burdened and 46% are severely burdened when trying to afford their homes).

90. *See id.* at 27 (discussing the additional problem of seniors who fall prey to unscrupulous lenders and the need for better financial options).

There is evidence that a dual financial market is developing, meaning that lower income home buyers do not have access to banks and other conventional financial services and products as do home buyers in the upper brackets.[91] Loans are being offered to the lower income buyers by mortgage companies at higher rates, significantly adding to the cost of housing for the lower income families.[92] One way to improve housing affordability would be to facilitate access to mainstream financial services and homeownership for the lower income group.

Yet, it is possible that the promotion of homeownership for low income people is creating a problem for renters and increasing the affordability gap.[93] Have we created a dichotomy between renters and homeowners that has unintended negative consequences? How do we address issues such as concentrations of poverty and the creation of a permanent underclass of low income people? How do we find ways for low income people to move out of poverty and into economic security?

The discussion in the sections that follow will attempt to weave together these various perspectives on the affordable housing crisis.

B. The Interest Groups

A full examination of the affordable housing crisis requires a close look at the interests of 1) the community of low income people who are the current and prospective occupants of affordable housing;[94] 2) neighbors and others whose property values, level of municipal services, and sense of community may be affected by the addition of affordable housing to a neighborhood;[95] 3) the fed-

91. *Id.* at 28 (noting that low-income home buyers to not get the same full benefit of conventional mortgage services).

92. *Id.* at 27-28.

93. NAT'L LOW INCOME HOUS. COALITION, RENTAL HOUSING FOR AMERICA'S POOR FAMILIES: FARTHER OUT OF REACH THAN EVER 2002, at Introduction, (noting that annual NLIHC studies of housing data reveal that the affordability gap widens each year, stating: "[T]he rapid expansion of single family houses . . . and sophisticated public relations campaigns in recent years have idealized home ownership to such an extent that . . . . [h]ome ownership is the preferred status and rental housing is inferior."), *available at* http://www.nlihc.org/oor2002.

94. *See, e.g.*, Susan Bennett, *"The Possibility of a Beloved Place": Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 284-89 (2000) (discussing resident management of low-income housing developments).

95. *See, e.g.*, GEORGE GALSTER, A REVIEW OF EXISTING RESEARCH ON THE EFFECTS OF FEDERALLY ASSISTED HOUSING PROGRAMS ON NEIGHBORING RESIDENTIAL PROPERTY VALUES 2-4, 14-15 (2002) (demonstrating that federally assisted housing has a minimal or sometimes a positive effect on neighboring property values,

eral,[96] state, and local public housing agencies;[97] 4) other public service agencies;[98] 5) the nonprofit and for-profit developers and sponsors,[99] 6) real estate business interests including builders, mortgage lenders, and other investors;[100] and 7) planners and environmentalists concerned with design issues and effects on the environment.[101] This article will touch upon the roles that these groups play in the process; however, there is a need for in-depth study of affordable housing examining the interactions among these interests.

III. PUBLIC HOUSING

A. A Brief History

The task of understanding the mass of statutes governing affordable housing programs in the United States is monumental.[102] The table in the Appendix to this Article presents the barest outline of

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despite popular beliefs to the contrary), *available at* http://www.realtor.org/research.nsf/files/galsterreport.pdf/$FILE/galsterreport.pdf

96. *See, e.g.*, Jack Summer, *United States Urban Policy: What is Left? What is Right?*, 27 U. MICH. J.L. REFORM 661, 670-74 (1994) (arguing that HUD's administration and personnel allow many HUD initiatives to be passed easily to Congress).

97. *See, e.g.*, Michael D. Weiss & Lauri Thamheiser, *Helter Shelter: The Disorganization of Public Housing Policy*, 51 WASH. U. J. URB. & CONTEMP. L. 189, 195 (1997) (arguing that local public housing authorities should be responsible for public housing management without the encumbrance of federal oversight).

98. *See, e.g.*, Stanley S. Herr & Stephen M. B. Pincus, *A Way to Go Home: Supportive Housing and Housing Assistance Preferences for the Homeless*, 23 STETSON L. REV. 345, 360-61 (1994) (discussing the need for public service agencies to offer support services, such as child care and educational and mental health support to public housing residents because of inadequate funding on the parts of HUD and state agencies).

99. *See, e.g.*, 12 U.S.C. § 1715z-1(a) (2002) (providing developers and owners of low-income rental properties with reduced mortgage interest payments in exchange for charging lower rents).

100. *See, e.g.*, Megan J. Ballard, *Profiting from Poverty: The Competition Between for-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 228-43 (2003) (analyzing the impact of competition for tax credits on LIHTC tenants and recommending that the competition be regulated); Peter W. Salsich, Jr., *Solutions to the Affordable Housing Crisis: Perspectives on Privatization*, 28 J. MARSHALL L. REV. 263, 291 (1995) (discussing joint ventures between nonprofit and for profits, and proposing some very innovative involvement of private investors in affordable housing production.).

101. *See, e.g.*, Quentin A. Paltrey, *Recent Legislation: Federal Housing Subsidies*, 37 HARV. J. ON LEGIS. 567, 575-77 (2000) (arguing for the incorporation of environmental protection and land-use planning in housing development policy).

102. *See* Harold A. McDougall, *Affordable Housing for the 1990's*, 20 U. MICH. J.L. REFORM 727, 727-33 (1987) (summarizing national housing policy from the New Deal until the beginning of the1990s).

several important Acts of Congress relating to housing for low income people.[103]

Beginning in the 1930s, in response to the dramatic increase in homelessness arising out of the Great Depression,[104] Congress enacted the first of many public housing programs.[105] The 1937 Housing Act provided for federal funding of local public housing agencies to develop, construct, and manage housing for low income people.[106] This legislation had the dual purposes of providing public housing for low income persons[107] and slum clearance.[108] These somewhat contradictory purposes resulted in a strange political coalition between social workers, who were most interested in housing poor people, and the private developers who were anxious to demolish blighted buildings and re-build housing for working people. This initial effort at forging a national housing policy was only partly successful because of opposition from private real estate interests and lack of funding for the public housing effort.[109]

Conflicts between those favoring public housing and those who wanted slum clearance persisted in the years after World War II,[110] delaying the enactment of new housing legislation. After becoming

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103. *Infra* App. of Affordable Housing Statutes, pages 478-80.

104. McDougall, *supra* note 102, at 727.

105. United States Housing Act of 1937 (Wagner-Steagall Housing Act), Ch. 896, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. §§ 1437 *et seq.* (2000) (the "1937 Housing Act"). An earlier public housing statute, Title 2 of the National Industrial Recovery Act, 40 U.S.C. §§ 401(a) *et seq.* (1933), which provided for construction and ownership by the federal government, was struck down as an unconstitutional exercise of the eminent domain power. United States v. Certain Lands in Louisville, 78 F.2d 684, 688 (6th Cir. 1935). The court held that condemnation for public housing was not a public use. *Certain Lands*, 78 F.2d at 690-91.

106. 42 U.S.C. §§ 1437, 1439 (2000).

107. 42 U.S.C. § 1437(a)(1).

108. 42 U.S.C. § 1441 (2000).

109. Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUS. POL'Y DEBATE 299, 306-07 (2000) [hereinafter Von Hoffman, *A Study in Contradictions*], *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1102_hoffman.pdf.

110. Alexander von Hoffman states that:

> The liberal coalition—including the Truman administration, social welfare groups, trade unions, housing organizations, and the U.S. Conference of Mayors—insisted that public housing was essential to an urban revival. Cities needed public housing, their leaders argued, to redevelop the slums and alleviate the post-war housing shortage. A conservative alliance of building, real estate, banking, and chamber of commerce organizations just as adamantly opposed providing funds for public housing as a 'socialistic' intrusion into the private market.

Id. at 307.

a major issue in the 1948 presidential campaign,[111] and after a very colorful Congressional fight,[112] the next major affordable housing legislation was enacted in 1949.[113] It contained lofty goals promising "a decent home and suitable living environment for every American family."[114]

Title I of the 1949 Act, which provided for urban redevelopment through slum clearance and new public housing construction,[115] met with mixed success during the 1950s.[116] Statutes enacted during those years[117] shifted away from a simple slum clearance approach to more comprehensive programs which involved rehabilitation of existing structures,[118] enforcement of building codes,[119] relocation of displaced residents,[120] and citizen participation in the urban renewal process.[121] During the 1950s and 1960s, public housing was a controversial program which received sporadic support from Congress and the Executive branch.[122] The 1949 Act authorized the construction of 810,000 new public housing units over the first six years, but it took over twenty years to achieve that goal.[123]

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111. *See id.* at 308 (explaining that President Truman raised the issue of Congressional inaction on public housing and slum clearance as part of his campaign strategy).

112. *See id.* at 307-09.

113. Housing Act of 1949, Ch. 338, 63 Stat. 413 (1949) (the "1949 Act").

114. 42 U.S.C. § 1441 (2000); Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 309 (referring to the objective of the 1949 Act).

115. Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 310 (noting that Title I authorized $1 billion in loans to aid cities in acquiring slum and blighted land for redevelopment).

116. *Id.* at 313 (explaining that initial urban redevelopment efforts under the act were inadequate and amendments to Title I were necessary).

117. *Id.*; Housing Act of 1954, 83 Pub. L. 560; 68 Stat. 590 (1954) (codified as amended in various sections of 12 U.S.C. §§ 1701 *et seq.* (1982)).

118. Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 313 (noting that the House and Home Financing Agency ("HHFA"), HUD's predecessor, determined that land in close proximity to or within slum clearance areas could be included in redevelopment projects, and that the 1954 Act "substituted the term 'urban renewal' for urban redevelopment to indicate a comprehensive program aimed not only at slums, but also at blighted and potentially blighted areas," and that the act "called for the rehabilitation and conservation of existing structures").

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 311 (explaining that President Truman cut back public housing during the Korean War, ordering the government to build only 30,000 public housing units, which was only one fifth of the average annual total of 135,000).

123. *Id.* at 310, 315.

The 1960s were growth years for public housing.[124] President Johnson made the development of affordable housing a key aspect of his administration's program,[125] and in 1965, he created the Department of Housing and Urban Development ("HUD") as a cabinet level agency.[126]

The 1960s also saw an increased emphasis on urban renewal.[127] In 1961, Congress authorized $2 billion in capital grants for urban renewal projects, and authorized another $5 billion by 1968.[128] These urban renewal projects were not solely for affordable housing development.[129] The projects included office buildings, parking lots, stadiums, and other efforts to revitalize urban areas.[130] The urban renewal program was criticized, because areas other than slums were redeveloped, and some of the people displaced were not able to return to housing on the sites.[131]

Instead of focusing on either urban renewal or the construction of public housing units as had the 1949 Housing Act, later housing legislation developed new approaches that incorporated market incentives in the effort to create affordable housing.[132] The 1961 Housing Act contained the Section 221(d)(3) program, which permitted the Federal Housing Administration ("FHA") to insure mortgages at below-market rates for affordable rental housing.[133] In the Housing Act of 1968, the Section 235 and Section 236 programs provided for direct interest rate subsidies to private develop-

124. *Id.* at 314 (noting that public housing and urban renewal programs introduced through the Housing Act of 1949 were expanded in the 1960s).

125. *See id.* (noting that President Johnson called for the HHFA to be elevated to a cabinet-level Department of Housing and Urban Development and he asked Congress to expand the government's housing programs).

126. *Id.* HUD, the successor agency to the House and Home Financing Agency ("HHFA"), was made a cabinet department by the Department of Housing and Urban Development Act of 1965, Pub. L. No. 89-174, § 3, 79 Stat. 667 (1965) (codified at 42 U.S.C. § 3531 (2000)).

127. Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 314 (noting that President Johnson called for 25,000 units of public housing to be rehabilitated in the 1960s).

128. *Id.* at 316-17.

129. *Id.* at 317.

130. *Id.*

131. *Id.* (citing an example in New York City where the government used eminent domain to seize and clear the Columbus Circle area where only 2% of it was occupied by slums).

132. *See id.* at 318-22; *see also infra* notes 133 and accompanying text (providing that the Section 221(d)(3) amendment to the National Housing Act of 1934 created affordable housing by allowing below-market rate mortgages).

133. Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 319; *see also* Housing Act of 1961, Pub. L. No. 87-70, § 101, 75 Stat. 149 (1961) (codified as amended at 12 U.S.C. §§ 1715l (2000)).

ers of housing for low income home buyers and renters, respectively.[134] Although these programs were publicly funded, the fact that the support went to businesses enabled them to be seen as private market solutions and quieted the criticisms of excessive government interference that the real estate and building industries had voiced regarding earlier public housing programs.[135] By the 1970s the Section 235 and 236 programs had produced more housing units than had been produced under the public housing programs.[136] The 1960s also saw the enactment of the Fair Housing Act of 1968,[137] which prohibited racial and ethnic discrimination in the sale and rental of public housing.[138]

The Housing and Community Development Act of 1974 created the Section 8 program,[139] probably the most successful rental housing program for low income people.[140] It provided subsidies for owners to construct and rehabilitate housing (project based) and vouchers that tenants could use in the rental units of their choice (certificate based).[141] The Section 8 program is discussed in detail below.[142]

Significant public housing was built in the late 1960s and 1970s.[143] Approximately 1,115,300 public housing units had been built or planned by 1970,[144] but construction halted in 1973 when President Nixon declared a moratorium on federal housing programs.[145] Always controversial, public housing was criticized for

134. Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 319 (explaining that in the early 1970s, the Section 235 and 236 programs, which provided incentives to private developers, produced more low-income housing units than other public housing initiatives).

135. *See id.*

136. *Id.*

137. Fair Housing Act of 1968, Pub. L. 90-284, tit. VIII, 82 Stat. 81 (1968) (codified at 42 U.S.C. §§ 3601-19 (2000)).

138. *Id.* § 3604.

139. Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. II, § 201(a), 88 Stat. 662 (1974) (codified as amended at 42 U.S.C. § 1437f (2000)) (the "Section 8 program"); *see also* Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 320 (noting that the Act provided for a system of housing allowances to reduce the rents of low-income households in privately owned buildings).

140. *See* Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 320 ("Since 1976, the Section 8 program annually produced many times the number of low income dwelling units developed under the 1949 act's public housing program." (citation omitted)).

141. *Id.*

142. *See infra* notes 206-268 and accompanying text.

143. Von Hoffman, *A Study in Contradictions*, *supra* note 109, at 314-15.

144. *Id.* at 315 (citing UNITED STATES CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 642 (1975)).

145. *Id.* at 320.

competing with private industry,[146] for creating concentrations of poverty by excluding working class and upwardly mobile families,[147] for perpetuating slums and blight with its poor design and inadequate maintenance,[148] for fostering dependency among the poor,[149] and for segregating tenants by race.[150]

There is ambivalence in our public policy on the question of which members of the population should be served by public housing.[151] Should public housing be reserved—largely or exclusively—for the lowest income people, or should it also be available to persons of higher income, the so-called "working poor"? Congress has answered this question in several different ways over the years.[152] The 1937 Housing Act stated its intent that public housing was to be provided for the lowest income people, who could not afford housing in the private market, and whose income was a maximum of five times their rent.[153] Nevertheless, there was an expectation that the costs of public housing would be covered by the rents.[154] In the 1949 Housing Act, Congress recommitted to housing the lowest income people.[155] The rent ceilings have gone up and down,[156] and funding levels for housing have fluctuated.[157] Since 1974, however, Congress has moved away from the goal of housing the lowest income people toward a goal of creating mixed-

146. *Id.* at 302.

147. *See, e.g., id.* at 302, 316 (describing the enforcement of income limits and the expulsion of stable and upwardly mobile tenants from public housing).

148. *Id.* at 323.

149. *Id.* at 302.

150. *Id.* at 315.

151. *See, e.g.*, Urb. Inst., *Chicago Risks 'Enormous Increases' in Homeless as Public Housing is Demolished* (Aug. 7, 2003), *at* http://www.urban.org/url.cfm?ID=900647 (discussing the loss of 14,000 family housing units that will result from a transformation of the city's public housing).

152. *See infra* notes 153-158 and accompanying text.

153. Housing Act of 1937 (Wagner-Steagall Housing Act), Pub. L. No. 75-412 § 2(2), Ch. 896, 50 Stat. 888 (1937); *see also* Hendrickson, *supra* note 66, at 39.

154. Von Hoffman, *A Study in Contradictions, supra* note 109, at 303 (explaining that shortly after passing the Housing Act of 1937, Congress cut off funding for public housing programs, continually refusing to provide such funding throughout World War II, and explaining that Congress did not change its position to authorize public housing again until it passed the Housing Act of 1949).

155. *See id.*

156. *See, e.g.*, Rent Stabilization Bd., *The Guide to Rent Control Chapters 1-3, at* http://www.ci.berkeley.ca.us/rent/geninfo/guide/guide1-3.htm (last visited Feb. 5, 2004) (explaining California's rent ceiling policy as amended by enactment of the Costa Hawkinson Rental Housing Act of 1995).

157. *See, e.g., id.* (explaining Annual General Adjustments necessary to compensate landlords for increases in maintenance costs and for inflation).

income projects and lessening the concentration of poor people in public housing.[158]

B. Summing Up the Problem and Looking Toward Solutions

The sad state of public housing in the United States was highlighted in 1989 when Congress created the National Commission on Severely Distressed Public Housing to identify the worst public housing in the country and to recommend a national action plan to address the problem.[159] The Commission's 1992 report found that approximately 6%, or 86,000 units of public housing, were severely distressed, and that traditional approaches to revitalizing that housing were not working.[160] During the early to middle years of the 1990s, the number of public housing units steadily *decreased* despite the increase in the low income population.[161]

Today we rely on a combination of government-operated public housing and privately-owned and operated subsidized housing as the most important source of housing for low income people. Public housing continues to be criticized for its deteriorated condition, for creating concentrations of poverty in the inner cities and for its accompanying poor quality of education, lack of access to jobs, increased crime, and a greater need for public services.[162] Possible solutions to these problems include improving the maintenance and operation of public housing projects, demolishing and rehabilitating inadequate units, and reducing the scale of housing projects by building lower-density developments and by developing mixed-income housing projects, where the housing would be occupied

158. Department of Housing and Community Development Act of 1987, Pub. L. 96-399, 101 Stat. 1815 (1988) (codified as amended at 42 U.S.C. § 1437f (o) (2000)).

159. *See* NAT'L COMM'N, *supra* note 50, *passim*.

160. *Id.* at 2; *see also* NAT'L HOUS. L. PROJECT ET AL., FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM i (2002), *available at* http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf.

161. *See* DASKAL, *supra* note 11, at 3.

162. *See, e.g.*, *Housing Affordability*, MICHIGAN IN BRIEF, Apr. 1, 2002, at ch. 5, *available at* http://www.michiganinbrief.org/edition07/Chapter5/Housing.htm.

> Much of the public rental housing was built in the 1930s and 1940s and badly needs replacement or major renovation, but government-funded new construction has nearly ended, and the U.S. Department of Housing and Urban Development (HUD) reports that federal funding for rehabilitation has been cut more than 60 percent over the past decade . . . . Moreover, as HUD acknowledges, conditions in many public housing developments are unacceptable: poor management, poor maintenance, deterioration, and high crime rates.

Id.

partly by low income households and partly by households with higher incomes.[163]

In 1986, Congress enacted the Low Income Housing Tax Credit ("LIHTC"),[164] which was intended to stimulate private investment in low income housing by awarding tax credits that reduce the cost of qualified housing developments.[165] The LIHTC, a private alternative to publicly owned and operated low income housing, was one of several solutions offered to address the failures of public housing.[166]

In addition to efforts to improve the supply and quality of rental housing available to low income people, there has been an increased reliance on programs that support homeownership by low income people.[167] Section IV below describes and assesses the ma-

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163. *See, e.g.*, U.S. DEP'T OF HOUS. & URB. DEV., PUBLIC HOUSING THAT WORKS, THE TRANSFORMATION OF AMERICA'S PUBLIC HOUSING (1996) [hereinafter HUD, PUBLIC HOUSING THAT WORKS] (describing a new model of affordable housing that allows flexibility and mixing of incomes to alleviate concentrations of poverty), *available at* http://www.huduser.org/publications/pubasst/transform.html; HIDE YAMATANI, U. PITT. SCH. OF SOC. WORK, HOPE VI EVALUATION REPORT ON OAK HILL COMMUNITY REVITALIZATION PROGRAM (2002), *available at* http://www.pitt.edu/~copc/hope6summary.doc.

> Based on the findings of this evaluation study, the HOPE VI initiative in Oak Hill is improving the living environment for public housing residents through the demolition, rehabilitation, reconfiguration, and replacement of obsolete public housing. Additionally, revitalized housing in Oak Hill is contributing to the improvement of the surrounding neighborhoods. Although future challenges surely await, the HOPE VI housing initiative has dispersed the concentration of very low-income families, and has contributed to the building of a positive community atmosphere.

Id.; Karen Ceraso, Nat'l Hous. Inst., *Is Mixed Housing the Key?: An Old Idea is Becoming Conventional Wisdow as Private and Public Affordable Housing Providers Create Mixed-Income Multifamily Housing*, SHELTERFORCE ONLINE, Mar.-Apr. 1995, *at* http://www.nhi.org/online/issues/80/mixhous.html. Ceraso notes that:

> Some housing activists have argued that scarce resources should be extended first to those who need them most; but the devastating consequences of concentrating and isolating the poor have led others to adopt strategies in which working families play an integral role. Advocates of mixed-income housing seek to create viable communities by also providing increased maintenance and security, and the social services needed to sustain the mix.

Id.

164. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 42 (2000)).

165. *See* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 27.5 (3d ed. 1999) (providing a description of the LIHTC).

166. *See infra* notes 198-268 and accompanying text (discussing the other low income rental housing programs). The LIHTC is discussed below. *Infra* notes 301-345 and accompanying text.

167. *See infra* notes 438-484 and accompanying text.

jor rental housing programs;[168] Section V discusses mixed-finance and homeownership programs.[169]

IV. RENTAL HOUSING PROGRAMS

A. Can Public Housing Succeed?

Our affordable housing policy has become a mix of publicly and privately owned and managed housing.[170] The programs have met with varying degrees of success.[171] To address the issue of concentration of poverty and to encourage working people to live in public housing units, the Housing and Community Development Act of 1974[172] relaxed the income eligibility requirements for tenants of public housing.[173] That Act also created the Section 8 voucher program,[174] which is described more fully in the next section.[175]

Public housing is rental housing that is owned and managed by a governmental subdivision or quasi-public authority.[176] There are approximately 1.3 million households living in public housing,[177] making public housing one of our most important affordable housing programs. Yet, as discussed above, our efforts in this area have met with limited success.[178]

In the 1980s, government turned away from public housing by decreasing funding for new public housing units and for the Department of Housing and Urban Development.[179] Traditional pub-

168. *Infra* notes 170-345 and accompanying text.

169. *Infra* notes 346-484 and accompanying text.

170. *See, e.g.*, *infra* notes 179-186 and accompanying text (describing government encouragement of the privatization of public housing since the 1980s via voucher programs and cuts in HUD funding).

171. *See infra* notes 179-197 (explaining some of the shortcomings of current affordable housing programs and pointing out housing authorities which have been relatively successful at servicing their residents).

172. Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. II, §§ 201-13, 88 Stat. 633 (1974) (codified as amended at 42 U.S.C. § 1437f (2000)).

173. *Id.* § 1437f(o)(4).

174. Section 8 allows private landlords to rent housing to eligible tenants who pay a maximum of 30% of their income as rent, and the local public housing agency pays a rent subsidy up to set market rent levels. *Id.* § 1437f(o).

175. *See infra* notes 206-268 and accompanying text.

176. *See* Roberto G. Quercia & George C. Galster, *The Challenges Facing Public Housing Authorities in a Brave New World*, 8 HOUS. POL'Y DEBATE 535, 537-41, *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0803_quercia.pdf.

177. *See* U.S. Dep't of Hous. & Urb. Dev., *HUD's Public Housing Program*, *at* http://www.hud.gov/renting/phprog.cfm (providing HUD's description of the public housing program and information on eligibility and application procedures).

178. *See supra* notes 170-177 and accompanying text.

179. John M. Kerekes, Note, *The Housing and Community Development Act of 1992: Affordable Housing Initiatives May Have Found a Home*, 18 SETON HALL

lic housing is no longer being built.[180] Our approach to transform and improve public housing is to tear down projects that are considered obsolete or deteriorated, and in some instances, to replace them with a smaller number of privately owned, publicly subsidized units.[181] The policy of not building new public housing units stems from a decision that traditional public housing leads to dense concentrations of poverty, high crime rates, and substandard living conditions.[182] Current approaches to the problem include demolishing housing and relocating people to privately owned housing,[183] requiring or encouraging the people living in public housing to go to work (or otherwise become self-sufficient),[184] encouraging more

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LEGIS. J. 683, 706 (1994) (citing S. Rep. No. 332, 102d Cong., 2d Sess., 4-8 (1992) on the affordable housing crisis and decreases in funding).

180. Alex Polikoff, BPI Senior Staff Counsel, *Public Housing Destruction: Is it Worth it?*, Speech at Nw. Univ. Inst. for Pol'y Research Colloquium (Nov. 4, 2002) (explaining that lack of money from Congress and lack of space for construction inhibit new construction of traditional style public housing).

181. *See* HUD, PUBLIC HOUSING THAT WORKS, *supra* note 163; Peter Dreier & John Atlas, *Housing Policy's Moment of Truth*, AM. PROSPECT, Sum. 1995, at 68 (outlining the Clinton Administration's plan to reinvent HUD through the elimination of almost all federally assisted housing projects and their replacement with housing vouchers to enable low-income people to buy in the new housing developments).

182. *See, e.g.*, Robert Pear, *Smaller Percentage of Poor Live in High-Poverty Areas*, N.Y. TIMES, May 18, 2003, at A26 ("Concentrations of poor people lead to a concentration of social ills that cause or are caused by poverty." (quoting political science professor Paul A. Jargowsky)).

183. *See, e.g.*, Alina Matas, *Plans for Liberty City Could Displace Longtime Residents*, PALM BEACH DAILY BUS. REV., Apr. 16, 2003, at A1 (describing Palm Beach County's plan to tear down an 850-unit public project and replace it with 371 new units, 80 of which would be reserved for public housing, and the rest of which would include 135 rent-to-own units and 156 condos, townhouses or single-family homes to be sold at market-rate prices, and explaining that homeownership would be made affordable by facilitating low-cost and subsidized mortgages).

184. *E.g.*, Cambridge Hous. Auth., *Special Community Service and Economic Self-Sufficiency Notice to All Cambridge Federal Public Housing Residents*, *at* http://www.cambridgehousing.org/chaweb.nsf/0/dde5ee73b6d0436f85256d9e006199fd?OpenDocument (last visited Feb. 21, 2004). The Cambridge Housing Authority notes that:

> On June 20, 2003, the U.S. Department of Housing and Urban Development issued a Notice to all Public and Indian Housing Authorities that reinstated a 1998 enacted Community Service and Self-Sufficiency Requirement for all non-exempt residents of the nation's public housing. This provision requires every non-exempt adult resident, ages eighteen through sixty-two, residing in federally subsidized public housing, to participate in voluntary community service or be enrolled in an economic self-sufficiency program for at least eight hours per month. . . . to assist adult public housing residents in improving their own economic and social well-being and to give residents a greater stake in their communities. This requirement is also intended to facilitate upward mobility, connect residents to their communities and provide[ ] adults with an opportunity to contribute to society using their skills and talents.

working people to move into public housing,[185] and blaming public housing residents for their plight.[186]

This approach to public housing policy fails to address the needs of the poorest people and those most in need of housing assistance. By demolishing high-rise developments and densely concentrated housing, we may be removing sources of blight and dilapidated housing; however, this approach overlooks those who are displaced by the demolition but who do not qualify for housing vouchers, or who are unable to find suitable alternative housing on the private market.[187]

A successful public housing program would provide temporary shelter or transitional housing for people who have recently become homeless. It would provide permanent shelter for the chronically homeless.[188] It would target people in the lowest income groups, determine the number of units of housing that need to be produced, and within a short time identify and produce the requi-

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Id.

185. *See, e.g.*, New York City Hous. Auth., *The Working Family Preference*, *at* http://www.nyc.gov/html/nycha/html/workfam.html (last visited Mar. 17, 2004) (explaining the New York City Housing Authority's Working Family Preference application program, which provides that 50% of new public housing vacancies will go to low-income working families to support the program's goals of restoring the "stability, diversity and healthy income mix originally intended for the population of public housing by reintroducing positive role models").

186. *See, e.g.*, CAROL J. DEVITA ET AL., URBAN INST., ASSESSING CIVIL SOCIETY IN LOW INCOME NEIGHBORHOODS IN WASHINGTON, D.C. 11 (2001) (attributing the schism between homeowners and public housing residents in the Washington Highlands Community in Washington, D.C. at least partially to homeowners blaming the public housing residents for the illegal activity in the community), *available at* http://www.ids.ac.uk/ids/civsoc/final/usa/USA6.doc.

187. *See* Fountain, *supra* note 69, at A18; Flynn McRoberts & Carlos Sadovi, *Dreams Back on Menu for South State Street*, CHI. TRIB., Dec. 21, 2003, at C1.

188. The problem of housing the homeless is beyond the scope of this article, but it has become an increasing problem, especially for the nation's large cities. A settlement was recently reached in the more than twenty year litigation against the City of New York over the provision of housing for the homeless. Kaufman, *supra* note 64, at A1 (discussing McCain v. Dinkins, 601 N.Y.S.2d 271 (App. Div. 1st Dep't 1993)). As part of the settlement of a law suit brought by The Legal Aid Society on behalf of the City's homeless population, the State court had been monitoring the shelter system and the services provided to the homeless since the 1980s. *McCain*, 601 N.Y.S.2d at 275. The plaintiffs argued that the City of New York had a legal obligation to provide shelter to the homeless. *Id.* at 274. The issue of housing for the homeless includes the question of how to provide housing for those with criminal records whose criminal records make them ineligible for public housing programs owned and managed by municipalities under the "One Strike Policy." 42 U.S.C. § 1437d(l)(6) (2004). Since it is unlikely that a privately managed program like Section 8 would work effectively with this population, programs specifically targeted to meet the housing and social needs of this group need to be developed. *See infra* notes 206-268 and accompanying text (describing the Section 8 program).

site number of units in each market through both public and private funding sources. A successful program would have in place a system to monitor and respond to the needs of its low income population.[189] It would also provide excellent maintenance and property management services supported by adequate resources to maintain the property in livable condition.[190]

In addition to addressing the housing needs of its people, a successful public housing program will also provide the social and economic services needed by its population.[191] The need for affordable housing is greatest among the lowest income people. That population brings with it a wide range of social problems.[192] The major issue that our public housing policy has failed to address is that a successful affordable housing program requires not only housing, but also a network of support services that confront the

189. For example, the Charlotte Housing Authority's Hope VI Program's Supportive Services Program attempts to respond to the needs of its residents while promoting self-sufficiency. Charlotte Hous. Auth., *CHA HOPE VI Program Supportive Services*, *at* http://www.sfrpc.com/ftp/pub/modelcity/hope_vi.pdf (last visited Feb. 21, 2004).

190. For example, the New York City Housing Authority offers residents the opportunity to comment on building maintenance and conditions by providing a hotline for tenant feedback. *See Frequently Asked Questions: For Tenants*, *at* http://www.nyc.gov/html/hpd/html/for-tenants/faqs-for-tenants.html ("Maintenance complaints about apartments in New York City Housing Authority (NYCHA) buildings may be directed to NYCHA's Central Office by calling 311.").

191. For example, the Cambridge Housing Authority offers services for adults, such as basic education, job training and computer training, and a youth program to provide life-skills and vocational training. Cambridge Hous. Auth., *at* http://www.cambridge-housing.org/chaweb.nsf/0/9581a1b252937ac385256d16004e5483?Open Document (last visited Apr. 27, 2004); *see also* New York City Hous. Auth., *Fact Sheet*, *at* http://www.ci.nyc.ny.us/html/nycha/html/factsheet.html (last updated Dec. 2, 2003) [hereinafter NYCHA, *Fact Sheet*]. The New York City Housing Authority states that:

> NYCHA doesn't just provide a place to live. There are a wide variety of programs offered by NYCHA that are geared specifically to special age or special needs groups such as children, teens, single-parents, seniors, substance abusers, and victims of domestic violence, among others. NYCHA oversees a network of over 400 community facilities that include community centers, senior centers, health care centers, day care and Head Start educational centers. Programs at many of these centers, to mention only a few, include sports, photography, painting, literacy classes and general education courses, computer training, arts and crafts, childcare feeding and lunch, and senior companion initiatives.

Id.

192. *See* William Julius Wilson, *"There Goes the Neighborhood"*, N.Y. TIMES, June 16, 2003, at A19 (discussing social scientists' attention to concentrated poverty, as it magnifies the social problems associated with poverty in general).

underlying issues of poverty.[193] The only way to defeat the social problems associated with poverty—crime, drug abuse, and family violence—is for people to have access to quality education, transportation, job opportunities, and counseling.[194] Not everyone in poverty will need all of these services, but part of any successful housing program has to be skilled case management service that can help people access the services they need.

Do such public housing successes exist? The New York City Housing Authority, which houses a population nearly as large as the city of Boston,[195] has been a success in management operations, crime reduction, welfare to work programs, and innovative design focused on the needs of community residents.[196] The Cambridge Housing Authority has created job development and youth education programs which have dramatically increased job placement rates and reduced drop-out rates.[197] Public housing in these cities remains a viable and even a desirable choice of housing for low income people.

The lesson in such stories is not that life in public housing is ideal, or that publicly owned rental housing is the best or the only way to provide affordable housing to low income people. The lesson is that if we as a society are willing to exercise the leadership and commit the necessary resources, public housing can serve an important need for people with no viable alternatives. Public housing is a vital part of a comprehensive affordable housing policy.

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193. *See, e.g.*, Steven Swanger, Testimony Before the Millennial Housing Commission Regarding Family Self-Sufficiency (July 25, 2001) (describing the difficulty in maintaining funding and sporadic support for the public-housing based support services offered by the Cambridge Housing Authority), *available at* http://www.mhc.gov/focus/swanger.doc.

194. *E.g.*, *id.* (concluding that the United States is in need of a national effort to expand skill training programs and other resources dedicated to increasing the economic and social mobility of public housing residents and make the programs and other resources a regular and integrated feature of the public housing system).

195. NYCHA, *Fact Sheet*, *supra* note 191 ("NYCHA is the largest public housing authority in North America. NYCHA's Conventional Public Housing Program has 181,000 apartments in 346 developments throughout the City . . . . serving about 174,800 families and 418,834 authorized residents."); AreaConnect, *Boston City, Massachusetts Statistics and Demographics (US Census 2000)*, *at* http://boston.areaconnect.com/statistics.htm (noting that as of the 2000 census, the population of Boston, Massachusetts was 589,141).

196. Rudolph W. Giuliani, Nat'l Ass'n of Hous. Redevelopment Officials Nat'l Conference Opening Address (July 25, 1997), *available at* http://www.nyc.gov/html/rwg/html/97/nahrol.html.

197. Swanger, *supra* note 193.

B. HOPE VI

In 1993, Congress enacted the HOPE VI Urban Revitalization Demonstration Program[198] discussed in the section below on homeownership.[199] A brief discussion is included here, because it is one response to the problem of deterioration in rental housing owned by public agencies.[200] The HOPE VI program provides grants to public housing authorities to demolish severely distressed public housing units and replace them with more attractive, economically viable housing, often combined with other needed social services.[201] The local public housing agency, acting with HOPE VI funding, relocates—by eviction, if necessary—existing tenants from the decayed units, demolishes the housing and rebuilds new housing.[202] There is some controversy, particularly at the local level, over 1) whether the deteriorated housing is replaced with a sufficient number of new units to house everyone who was displaced;[203] 2) whether the plans to make the new projects "economically viable" render the new housing not affordable and financially out of the reach of the people who were displaced;[204] and 3) whether the new developments are planned with sufficient involvement of the local community and the people who are most directly affected by it.[205]

198. HOPE VI was created by the Departments of Veterans Affairs and Housing and Urban Development in the Independent Agencies Appropriations Act, 1993 (Pub. L. 102-389), approved on October 6, 1992 by the 1993 Appropriations Act, and was originally known as the Urban Revitalization Demonstration ("URD"). *See* U.S. Dep't of Hous. & Urb. Dev., *About HOPE VI*, *at* http://www.hud.gov/pih/programs/ph/hope6/hope6_ab out.html (last updated Mar. 12, 2001) [hereinafter HUD, *About HOPE VI*]. HOPE is an acronym for Housing and Opportunity for People Everywhere. Sabrina L. Williams, *From HOPE VI to HOPE SICK?*, DOLLARS & SENSE, July/Aug. 2003, at 1 ("The name is sometimes an acronym for 'Housing Opportunities for People Everywhere,' although HUD formally calls it the Revitalization of Severely Distressed Public Housing program or alternately 'a chapter in the American Success Story that is public housing.'"), *available at* http://www.dollarsandsense.org/archives/2003/0703williams.html.

199. *Infra* notes 368-416 and accompanying text.

200. HUD, *About HOPE VI*, *supra* note 198.

201. *Id.*

202. *Id.*

203. *See* Michael S. FitzPatrick, Note, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. POVERTY L. & POL'Y 421, 444-45 (2000).

204. *See id.*

205. *See id.*

C. Section 8

The Section 8 program is a successful example of rental housing owned and managed by private entities, but closely regulated to target its benefits to low income people.[206] The Section 8 rental assistance program was enacted in 1974, to provide rental assistance payments to low income people living in privately owned housing.[207] By some measures Section 8 has been the most successful of the rental assistance programs, because it has encouraged the construction and rehabilitation of housing by private owners, and because it has directly placed over one million low income families in subsidized housing units.[208]

A report produced by HUD in the year 2000 outlines the history of the Section 8 program from 1974 when Section 8 was added to the Housing Act of 1937.[209] The Section 8 program had two major components: one which provided project-based assistance to subsidize the construction and substantial rehabilitation of housing for low income tenants,[210] and another which provided tenant-based assistance or rent subsidies associated with individual low income tenants.[211] After 1981, no new project-based subsidies were authorized, leaving the tenant-based program as the most significant rent subsidy program.[212]

The tenant-based subsidies were variously called certificates and vouchers, and the amounts of the certificate and voucher subsidies were calculated using different rent formulas.[213] The Section 8 certificate program provided rental assistance to low income families, allowing them to rent units on the open market in privately owned dwellings.[214] The program operated on the basis of fair market

206. U.S. DEP'T OF HOUS. & URB. DEV., SECTION 8 TENANT-BASED HOUSING ASSISTANCE: A LOOK BACK AFTER 30 YEARS 2, 13 (2000) [hereinafter HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE], *available at* http://www.huduser.org/publications/pubasst/look.html.

207. Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. II, §§ 201-13, 88 Stat. 633 (1974) (codified as amended at 42 U.S.C. § 1437f (2000)).

208. HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 1.

209. *Id.*; *see* 42 U.S.C. § 1437f(o).

210. HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 5.

211. *Id.* at 4-5.

212. U.S. DEP'T OF HOUS. & URB. DEV., STUDY ON SECTION 8 VOUCHER SUCCESS RATES: VOLUME I; QUANTITATIVE STUDY OF SUCCESS RATES IN METROPOLITAN AREAS 11 (2001) (indicating that tenant-based programs dominate today's Public Housing effort), *available at* http://www.huduser.org/publications/pdf/sec8success.pdf.

213. HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 5.

214. U.S. Dep't of Hous. & Urb. Dev., *Housing Choice Vouchers Fact Sheet*, *at* http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm (last updated July 19, 2001).

rents ("FMRs") established by HUD for the area.[215] Families paid a percentage of their incomes (initially 15%, later raised to 30%)[216] for rent, and HUD paid the difference between the tenant's payment and the FMR.[217] Tenants were generally not permitted to rent units at rents higher than the FMR.[218] The property owner was responsible for tenant selection, and had to maintain the property under quality standards set by HUD.[219]

In 1987, Congress enacted the Section 8 voucher program on a permanent basis, allowing families to rent housing that was more expensive than the FMR, if it chose to pay the additional costs.[220] Vouchers were also portable, meaning that a family could use a Section 8 voucher to live in any jurisdiction which had a Section 8 program.[221]

In 1998, the certificate program and the voucher program were consolidated into a single voucher program with a single set of regulations.[222] Under the merged program the portability feature was continued, and families were still permitted to rent units at higher than the FMR, as long as the tenant did not pay more than 40% of adjusted household income in rent.[223]

The Section 8 program has grown from 30,000 households participating in 1974 to 1.4 million families in 2000.[224] It has become the leading, and some say the most successful, method of providing housing for low income Americans.[225] Congress has steadily increased the number of Section 8 certificates and vouchers each year, except during Fiscal Years 1995 through 1998,[226] and local public housing authorities ("PHAs") have used available Section 8 vouchers to help them meet the needs to relocate families displaced by urban renewal and for other purposes.[227]

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215. *Id.* (explaining that fair market rents are determined by local public housing authorities ("PHAs")).

216. HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 5.

217. *Id.*

218. *Id.*

219. *Id.* at 12.

220. *Id.* at 5-6.

221. *Id.* at 6.

222. *Id.*

223. *Id.*

224. *Id.* at 8.

225. *See id.* at iii, 15-17 (explaining that "[t]he flexibility of the program design makes it the perfect tool for a wide variety of critical housing needs").

226. *Id.* at 8.

227. *Id.*

Important features of the Section 8 program include the tenant selection and occupancy policies[228] whereby PHAs may deny admission or assistance to individuals with a history of use or abuse of drugs or alcohol, or of criminal behavior that interferes with the peaceful enjoyment of the premises by other residents.[229] Section 8 leases must contain a provision authorizing the terminations of tenancies on these grounds, and owners can be sanctioned for refusing to terminate a tenant for these reasons, under the so-called "One Strike Policy."[230]

HUD's analysis shows that the Section 8 program has proven both effective and cost-efficient, and that it is an indispensable means of addressing the affordable housing crisis.[231] Referring to HUD's Worst Case Needs analyses of American Housing Survey data,[232] HUD reports that 5.4 million very-low income renter households need housing assistance either because of the high proportion of income paid for rent, overcrowding, or substandard physical conditions.[233] Of that number, 77% have severe rent burdens, but do not suffer from other housing deficits.[234] HUD sees an extension of Section 8 as a program that could immediately address the problem of these renters without a need to produce additional housing.[235] The problem is, thus, one of affordability, and not availability.[236]

Although the Section 8 program and public housing offer obvious benefits, many wait a long time to receive those benefits.[237]

> There is a national average time on the waiting list of 11 months for public housing and 28 months for Section 8 vouchers, but in

228. *Id.* at 12-13.

229. *Id.*

230. *Id.* at 12. *But see* Amy R. Bowser, Comment, *One Strike and You're Out—or Are You?: Rucker's Influence on Future Eviction Proceedings for Section 8 and Public Housing*, 108 PENN. ST. L. REV. 611, 627-31 (2003) (arguing that property owners have discretion in applying the "One Strike" policy to Section 8 tenancies.).

231. HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* 206, at ii.

232. The American Housing Survey ("AHS") collects data for HUD on the nation's housing every year. *See* United States Census Bureau, *Welcome to the American Housing Survey!*, *at* http://www.census.gov/hhes/www/ahs.html (last updated Oct. 27, 2003). Further information and many AHS reports can be accessed through the HUD website. U.S. Dep't of Hous. & Urb. Dev., *American Housing Survey*, *at* http://www.huduser.org/datasets/ahs.html (last updated July 11, 2003).

233. *See* HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 13.

234. *Id.*

235. *Id.* at 14.

236. *Id.*

237. Pamulaklakin, *supra* note 59.

> large cities the wait is much, much longer. In New York City a family must wait 8 years for public housing, and in Washington, D.C. or Cleveland, 5 years. In New York City or Washington, the wait for Section 8 is 8 years; in Los Angeles it is 10 years.[238]

These waiting periods likely understate the problem, since so many people in need of assistance are discouraged from applying by the length of the waiting lists.[239]

Comparing the operating costs of public housing and the Section 8 subsidy programs, HUD reports that "the marginal cost of public housing [is] more expensive by as much as $41 per occupied unit per month."[240] The difference in operating costs is explained by the fact that PHAs bear the full costs of management and operation of public housing, whereas those costs are borne by the private owner of Section 8 units.[241]

A major criticism of the Section 8 program is that it creates concentrations of poverty, much the same as public housing projects do.[242] HUD argues that the data do not support that conclusion.[243] HUD's Section 8 report cites a study which shows that Section 8 assistance programs "appear to reduce the probability that families will live in the most economically and socially distressed areas. . . [and Section 8 units] are rarely found in areas with extremely low incomes, high unemployment rates, or high concentrations of minority households."[244]

In their 2000 article on the Section 8 program, Maney and Crowley discuss various criticisms that have been leveled at the Section 8 program, including its administrative complexity, the lack of efficiency in administering the program, the problem of "re-concentra-

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238. HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 13.

239. *See* Pamulaklakin, *supra* note 59.

240. HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 15.

241. *Id.*

242. *See* Brian Maney & Sheila Crowley, *Scarcity and Success: Perspectives on Assisted Housing*, 9 J. AFFORDABLE HOUS. & CMTY. DEV. L. 319, 349 (2000) (criticizing the impact of the Section 8 program on the mobility of poor people and de-concentration of poverty), *available at* http://www.nlihc.org/mahn/sec8index.htm.

243. HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 17-21.

244. *Id.* at 19 (citing Sandra J. Newman & Ann B. Schanre, *". . . And a Suitable Living Environment": The Failure of Housing Programs to Deliver on Neighborhood Quality*, 8 HOUS. POL'Y DEBAT 703, 728 (1997), *available at* http://www.fanniemaefoundat ion.org/programs/hpd/pdf/hpd_0804_newman.pdf.

tion" of poverty, and discrimination against voucher holders.[245] Maney and Crowley recommend streamlining the process and doing a better job of collecting data on utilization of vouchers.[246]

Discrimination against voucher holders involves not only refusals to rent to tenants in racial minority groups, but also private owners' reluctance to rent to subsidized tenants because of the maze of government regulations involved.[247] This latter issue could be addressed by encouraging more nonprofit developers to participate in the program by reducing the program's administrative complexity.[248]

The performance of Section 8 programs varies greatly.[249] Some programs have improved efficiency by simplifying or reducing the number of steps landlords and tenants must take, including application, income verification, housing search assistance, and leasing.[250] There are some programs such as the Newark Housing Authority which have failed to use all the vouchers allocated to them, with the result that vouchers go unused while eligible tenants languish on a waiting list.[251] In Virginia, there is the additional

245. *See* Maney & Crowley, *supra* note 242, at 334-38. This helpful article contains detailed information about how the Section 8 certificate and voucher programs work, how the subsidies are calculated, and the complexities of program administration. *Id.* at 325-29.

246. *See id.* at 332-35, 341-42.

247. *See* Ammann, *supra* note 58, at 322 (providing that there is no requirement that a landlord accept a Section 8 tenant, and that "since in most urban areas a high percentage of families applying for Section 8 housing are minorities, they face very real discrimination by owners and managers").

248. Ammann and Salsich, in discussing a widening role for nonprofits in the development of affordable housing policy, point out that "[n]onprofits are more willing than private owners to accept subsidized tenants, but nonprofits also seek relief from complex regulatory schemes in hopes of enhancing their social mission." John J. Ammann & Peter W. Salsich, Jr., *NonProfit Housing Providers: Can They Survive the "Devolution Revolution"?*, 16 ST. LOUIS U. PUB. L. REV. 321, 327 (1997).

249. Peter W. Salsich, Jr., *Focus on: Urban America: Urban Housing: A Strategic Role for the States*, 12 YALE L. & POL'Y REV. 93, 102 (1994) [hereinafter Salsich, *Focus on: Urban America*] ("Many states are . . . moving to fill the low-and-moderate-income housing production vacuum with creative and impressive commitment of state resources.").

250. *See, e.g.*, John Goering, *The Impacts of New Neighborhoods on Poor Families: Evaluating the Policy Implications of the Moving to Opportunity Demonstration; (Session 3: The Impact of Housing on People and Places)*, 9 FED. RESERVE BANK OF N.Y. ECON. POL'Y REV. 113, 230 (2003) (describing HUD's Moving to Opportunity for Fair Housing Demonstration Program, a large federally funded social experiment designed to test whether improved neighborhood opportunities may significantly affect the life changes of low income public housing residents).

251. *See* Michael Janofsky, *A Dark Side of Expansion: Housing Costs Rise Rapidly*, N.Y. TIMES, Mar. 7, 1999, at 31 ("[T]he wait for a voucher had stretched to 10 years in Newark[, New Jersey]. . .").

problem that the agency loses available administrative fees by not utilizing all of its vouchers.[252]

Section 8, as well as other housing programs administered by federal, state, and local government agencies, has been plagued with "pervasive racial discrimination and segregation."[253] HUD needs to do much more to enforce the fair housing laws.[254]

Section 8 has the potential to provide great housing mobility for low income tenants.[255] Since vouchers are portable, tenants theoretically have the option of moving away from areas where poverty is concentrated.[256] It seems, however, that housing agencies often do little more toward encouraging low income tenants to move to more affluent neighborhoods than make the housing voucher available.[257] Maney and Crowley recommend that housing agencies provide additional services such as housing search assistance, transportation money to access jobs as needed, information about low-poverty neighborhoods, and outreach to owners to involve them in the Section 8 process.[258] Availability of job opportunities and public transportation, plus staff trained in providing encouragement to move out of their familiar neighborhoods to low-poverty areas are factors that encourage mobility of the Section 8 tenant population.[259]

Even for those vouchers that exist, not everyone is able to use them successfully.[260] Not all landlords will accept Section 8 tenants,[261] and a number of people with vouchers are unable to locate a residence in which they can use them.[262] Administrative problems, attitudes of owners and tenants, and a lack of information are also barriers to successful use of Section 8 vouchers.[263] HUD needs to provide incentives for local agencies to operate

252. Maney & Crowley, *supra* note 242, at 342.

253. *Id.*

254. *See id.*

255. *Id.* at 343-44.

256. *Id.*

257. *Id.*

258. *Id.* at 320-21.

259. *Id.* at 344. "[T]he section 8 program by itself does not ensure access to low-poverty neighborhoods, particularly for minority families. Supplementing vouchers with housing counseling and search assistance, among other things, can improve their performance. . . . Mobility . . . . should be combined with policies that further neighborhood revitalization." *Id.* at 349.

260. *Id.*

261. *Id.* at 350.

262. *Id.* at 338.

263. *Id.* at 335-39.

more efficiently and more equitably.[264] The program is generally successful, and could be even more so if more money were appropriated for vouchers, administrative reform and education of the community.[265]

The assessment of the level of success of the Section 8 program depends on one's perspective. From the perspective of the government regulators, success can be seen in the national lease-up rates for Section 8 projects and the program's proven ability to help large numbers of people live in decent housing.[266] From a different perspective, the picture looks very different. There remains an enormous amount of unmet need.[267] Frustrated by the system, some tenants turn back unused vouchers. Many others avoid the system altogether, discouraged by its complexity and the long wait for vouchers. This is a crisis begging for a solution.[268]

D. Affordable Housing and Welfare Reform

There is an interesting relationship between housing affordability and welfare reform, or self-sufficiency, as it is often referred to in the housing context.[269] In his 1997 article, Peter Salsich points out the coincidence of President Clinton signing into law sweeping welfare reform legislation[270] and a housing appropria-

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264. *Id.* at 350.

265. *Id.* at 351.

266. *See* HUD, SECTION 8 TENANT-BASED HOUSING ASSISTANCE, *supra* note 206, at 45.

267. Maney & Crowley, *supra* note 242, at 349.

> There are currently 1.4 million vouchers in circulation, but . . . an additional 5.3 million renter households have 'worst case housing needs.' That is, they do not receive housing assistance, have incomes below 50 percent of the local median, and pay more than half of their income for rent or live in severely sub-standard housing.

Id.

268. *Id.* at 338-39.

269. *See, e.g.*, U.S. DEP'T OF HOUS. & URB. DEV., THE WIDENING GAP: NEW FINDINGS ON HOUSING AFFORDABILITY IN AMERICA (1999) ("Particularly serious are the [financial] pressures faced by millions of American families in the transition from welfare to work—families for whom housing is typically the number one cost burden."), *available at* http://www.hud.gov/library/bookshelf18/pressrel/afford/afford.html; Peter W. Salsich, Jr., *Welfare Reform: Is Self Sufficiency Feasible Without Affordable Housing?*, 2 MICH. L. & POL'Y REV. 43, 69 (1997) [hereinafter Salsich, *Welfare Reform*] (arguing that welfare-recipient families are likely to fail in achieving self-sufficiency under the new reform structure, unless greater attention is paid to, and resources are allocated for, the housing needs of low-income families).

270. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-93, 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601 *et seq.* (2000)) (eliminating the federally funded program of entitlement to public assistance benefits and substituting a much more restrictive, time-limited program re-

tions bill cutting the number of new Section 8 certificates and vouchers to zero,[271] with both events occurring during the 1996 presidential campaign.[272] The stated purposes of welfare reform were to:

> (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; [and] (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage . . .[273]

The new law continued payment of benefits to parents of dependent children, but eliminated public assistance as an entitlement and required parents to do community service work[274] and engage in work within two years of the time they began receiving assistance.[275] It set a five year limit on the total time a parent could receive assistance.[276] Moving people off welfare to work was the goal and the strategy.[277]

The connection between housing and self-sufficiency is suggested by the first stated purpose that children be cared for "in their own homes or in the homes of relatives."[278] Welfare reform sets up short time limits for families to receive financial assistance and then requires that they go to work and become self-supporting.[279] A parallel argument—that housing assistance should be temporary—has also been used to support the position that recipients of housing assistance should be moved from subsidized rental housing to self-sufficiency in an unsubsidized rental, or even home ownership.[280]

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quiring recipients of public assistance to become employed within twenty-four months of starting to receive assistance).

271. Department of Veterans Affairs and Housing & Urban Development, and Independent Agencies Appropriations Act of 1997, Pub. L. No. 104-204, 110 Stat. 2874 (1996) (codified in various sections of 12 U.S.C. §§ 1715z *et seq.* (2000)).

272. Salsich, *Welfare Reform*, *supra* note 269, at 43.

273. 42 U.S.C. § 601(a)(1)-(2).

274. 42 U.S.C. § 602(a)(1)(B)(iv) (2000).

275. 42 U.S.C. § 602(a)(1)(A)(ii).

276. 42 U.S.C. § 608(a)(7)(A) (2000).

277. 42 U.S.C. § 602(a)(1)(A)(i).

278. *See* 42 U.S.C. § 601(a)(1).

279. *See* 42 U.S.C. § 602(a)(1)(A)(i).

280. Salsich notes that:

> Some critics of the public housing and Section 8 programs argue that the emphasis on long-term subsidized rental assistance is based on a 'fundamental misunderstanding of the role which housing plays in social and economic life.' Ownership opportunities rather than rental assistance should be emphasized to help people 'move up the ladder from one type (of housing) to another,' a study by a market-based public policy research organization concluded.

If these goals are to be achieved, more attention needs to be paid to the housing needs of low income families.[281] It is essential that there be a stable housing situation, or else it is unlikely that former welfare recipients will succeed in finding and holding jobs.[282] A causal relationship between poor educational performance and inadequate housing has not been established, but children without decent housing often experience problems in school.[283] If there were an adequate supply of decent affordable housing plus needed social services, then a critical need could be addressed. The major housing problem for low income people is affordability, meaning that many people are unable to find adequate housing at a price they can afford.[284] Admittedly, the existing number of rent vouchers does not reach all the families needing rental assistance.[285] The

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Salsich, *Welfare Reform*, *supra* note 269, at 52 (internal citations omitted); *see also* Howard Husock, *Broken Ladder: Government Thwarts Affordable Housing*, POL'Y REV., Mar.-Apr. 1997, at 46 (suggesting the cultivation of privately owned low and moderate-income housing), *available at* http://www.policyreview.org/mar97/husock.html.

281. Salsich, *Welfare Reform*, *supra* note 269, at 69.

282. *Id.* at 45.

283. *See* Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 WIS. L. REV. 1221, 1222-23 (2000).

> Roxanne's eight-year-old son, Rashaun . . . is doing well in school despite the fact that he does his homework alone and frequently sleeps on the floor in an apartment that is empty, except for one bed, a kitchen table, and a small television . . . . Even though Roxanne lacks basic furniture[,] . . . the Ohio Department of Human Services counts Roxanne among the 300,000 self-sufficient adults whom welfare professionals have successfully helped find jobs and removed from the public assistance rolls since welfare reform began in 1997.

Id. (internal citations omitted); Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1291-92 (2003) ("As a Harvard University study concludes, '[s]chools with high poverty concentrations have lower school test score averages, few advanced courses, fewer teachers with credentials, inferior courses and levels of competition, and send fewer graduates on to college.'").

284. U.S. DEP'T OF HOUS. & URB. DEV., BEYOND SHELTER: BUILDING COMMUNITIES OF OPPORTUNITY 10 (1996) ("The primary housing problem in the U.S. today is not an inadequate supply of decent housing, but lagging affordability due to stagnant incomes and rising housing costs."), *available at* http://www.housing.infoxchange.net.au/library/ahin/housing_design/items/00002-upload-00001.pdf.

285. Salsich, *Welfare Reform*, *supra* note 269, at 56-57.

> HUD's . . .analysis . . . identifies almost 15 million people as being eligible for housing subsidies but notes that less than five million of those people actually receive such subsidies. . . . [Also,] HUD studies [show] that almost five million households in America are paying more than half of their income for housing, even though at least two million are working.

Id.

elimination of new vouchers would exacerbate the problem.[286] It is unrealistic to expect that a welfare recipient will be able to find work and afford market rate housing without assistance.[287] In the absence of rental assistance, a family earning the minimum wage cannot afford to pay the rent levels required for basic adequate housing.[288]

Assuming that it had achieved its self-sufficiency goals, welfare reform should have decreased the need for housing subsidies.[289] In fact it has *increased* that need.[290] People currently on welfare and receiving a housing subsidy, where they are required to pay 30% of their income for housing, are likely to have their incomes reduced when they lose their welfare benefits.[291] Public assistance recipients' incomes would be reduced when they are no longer eligible for public benefits because they have been on public assistance for longer than the law allows,[292] and if they are unable to obtain employment which pays them more than they were receiving on public assistance. Thus, 30% of the lower income would require more of a subsidy to permit the family to remain in their home.[293] In 1996, HUD estimated a need for $2.3 billion in additional subsidies through 2002 because of lowered welfare benefits.[294]

For people who are on welfare but not receiving housing assistance (estimated at about 75% of welfare recipients),[295] the loss of welfare benefits and failure to achieve self-sufficiency may lead to a new wave of homelessness.[296] Without their welfare benefits, this group will be even less likely to be able to afford housing.[297]

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286. *See id.*

287. *See id.*

288. Salsich does a calculation based on the minimum wage to show that in 1997 a rent level of $257.50 (including utilities) per month would be affordable (30% of income) for a minimum wage worker, but that the 1995 national average rent was $402 per month. *Id.* at 56. Looking at it another way, a worker would need to earn an annual income of $16,080 (as opposed to the $10,300 minimum wage) to afford housing at $402 per month. *Id.* at 55-56.

289. *Id.* at 51 (stating that passage of the welfare reform legislation raises serious questions about future national housing policy).

290. *Id.* at 53.

291. *Id.*

292. PRWORA established a five-year cap on the number of years that federal funds can be used to provide public assistance. 42 U.S.C. § 608(a)(7)(A) (2000).

293. Salsich, *Welfare Reform*, *supra* note 269, at 53.

294. *Id.* (citing *Welfare Reform May Boost Need for Housing Subsidies*, 24 CURRENT DEVS. HOUS. & DEV. REP. (BNA) 424 (1996)).

295. *Id.* at 44.

296. *Id.*

297. *Id.*

Housing needs to be addressed as an aspect of welfare reform in order for the crisis in affordable housing to be fully addressed.[298] Only by carefully assessing and addressing the housing and financial assistance needs of low income people will we arrive at policies that will solve the affordable housing crisis.[299] Some nonprofit and community based developers and local governments have implemented programs that show promise in this area, as discussed below.[300]

E. Low Income Housing Tax Credits ("LIHTC")

A variety of economic forces during the 1970s and 1980s led the federal government to adopt several market-oriented measures that became part of "Reaganomics."[301] In the affordable housing area the Low Income Housing Tax Credit was one of the most prominent measures.[302] A response to the failures of public housing and other government efforts to solve the housing crisis, the LIHTC gave an incentive to private investors to put their resources into low income rental housing.[303] It marked a major addition to the federal government's approach to affordable housing by adding direct subsidies to private developers of housing for low income people.[304] The LIHTC has produced close to one million units of affordable housing,[305] and has seen the development of an entire

298. *Id.* at 62.

299. *Id.*

300. *Id.* at 62-63; *infra* notes 417-437 and accompanying text.

301. *See Reaganomics*, WIKIPEDIA (2002), *at* http://en.wikipedia.org/wiki/Reaganomics.

302. The LIHTC was enacted as part of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 42 (2000)), and it was permanently funded in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified at 26 U.S.C. §§ 1391-97D (2000)) (amended by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 951-952, 111 Stat. 788, 885 (1997)).

303. *See* BITTKER & LOKKEN, *supra* note 165, ¶ 27.5 (discussing the projects which qualify for the tax credit, computation of the tax credit, and special requirements relating to it); JEAN L. CUMMINGS & DENISE DIPASQUALE, CITY RESEARCH, BUILDING AFFORDABLE RENTAL HOUSING: AN ANALYSIS OF THE LOW-INCOME HOUSING TAX CREDIT 4 (1998) (describing the basic nature and underlying purpose of the LIHTC program and introducing a detailed empirical study of LIHTC's effects over the past ten years), *available at* http://www.cityresearch.com/lihtc/cr_lihtc.pdf.

304. CUMMINGS & DIPASQUALE, *supra* note 303, at 5.

305. BENNETT L. HECHT, DEVELOPING AFFORDABLE HOUSING: A PRACTICAL GUIDE FOR NONPROFIT ORGANIZATIONS 4 (2d ed. 1999). "Substantially all of the affordable rental housing that has been built since 1986 has been created with the use of the low income housing tax credit." *Id.*

industry which specializes in putting these deals together.[306] It is doubtful whether the LIHTC has been cost effective, and how well it has done in alleviating the housing crisis.[307]

High development costs and low rents make unsubsidized construction and operation of low income housing a marginal investment.[308] Tax credits, which are much more valuable to investors than are business tax deductions,[309] can contribute to a higher return on investment. Investors earn tax credits by investing in low income housing projects through the use of tax syndications.[310] To afford the investor limited liability, the syndication is set up as a limited partnership, which may include a nonprofit sponsor as the general partner, a for-profit or nonprofit developer, a construction contractor, a property manager, and the investor(s).[311] Vital to the transaction are the various service providers, such as lawyers, accountants, and lenders who provide loan funding, negotiate the terms, provide legal opinions, and document the deal.[312]

The state housing agencies are also critical players in the LIHTC process.[313] They administer the program under guidelines spelled out in the Internal Revenue Code, regulations and administrative

306. An excellent source of information for the LIHTC industry is the website of the public accounting firm Novogradac & Co. LLP and its Affordable Housing Resource Center. Novogradac & Co. LLP, *Affordable Housing Resource Center*, *at* http://www.nov oco.com/resource.shtml (last visited Feb. 1, 2004). The site contains news articles and links to reports about the LIHTC; it follows the latest legislative activities, and offers conferences, workshops, and publications on the topic. *Id.*

307. CONG. BUDGET OFFICE, THE COST EFFECTIVENESS OF THE LOW INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS: A CBO STAFF MEMORANDUM (1992), *reprinted in* 56 TAX NOTES 493 (1992) [hereinafter CBO] (concluding that "the government can provide assistance of equal value to tenants through housing vouchers at a fraction of the cost of credits.").

308. *See Government Programs to Encourage Private Investment in Low-Income Housing*, 81 HARV. L. REV. 1295, 1295-96 (1968) (claiming that because the costs of materials, labor and financing for construction or rehabilitation are high and rents are low throughout the industry, low-income housing cannot yield a competitive rate of return).

309. *See* CUMMINGS & DIPASQUALE, *supra* note 303, at 3. For every dollar of tax credits received, the investor's federal income taxes are reduced by one dollar. *Id.* In contrast, for every dollar of expense that qualifies as a tax deduction, the investor's taxes are reduced by the marginal tax rate. For 2003, the highest marginal corporate tax rate is 35%. 26 U.S.C. § 11(b) (2004).

310. CUMMINGS & DIPASQUALE, *supra* note 303, at 3.

311. Jim Schaafsma, *Focus on the Low Income Housing Tax Credit (LIHTC) Program* (Mich. Poverty L. Program), *available at* http://www.mplp.org/materials/Newsletter/03W inter/housing1.htm (last visited Feb. 5, 2004).

312. Janet Stearns, *The Low Income Housing Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203, 218-19 (1988).

313. Salsich, *Focus on: Urban America*, *supra* note 249, at 103.

guidance.[314] Tax credits are allocated to each state using a formula based on the state's population.[315] Currently at least $1.75 per capita in tax credits are allocated to each state.[316] The state agency creates a qualified allocation plan for making awards of LIHTCs.[317] In this plan, the agency sets selection criteria where various factors, such as the project's location or its ability to meet the special needs of certain populations of tenants, must be included.[318] The state agency conducts a highly competitive application process to determine which projects will be awarded LIHTCs.[319] The application cycle varies from state to state.[320] Most states' programs are oversubscribed.[321]

In order to qualify for an allocation of tax credits[322] a building must become a part of a qualified project within the first year of the ten year credit period, and must remain a qualified project continuously for the credit period plus five years,[323] must consist of residential rental property and the owner must set aside a percentage of the units to be occupied by low income people.[324] The owner of the project is eligible for the tax credit for each of the ten years beginning the year the project is placed in service or the following year.[325]

If the building is placed in service within the first year of the ten-year credit period, and it otherwise meets the requirements as a qualified building, the amount of the annual credit to which the

314. 26 U.S.C. § 42(m) (2000).

315. *Id.*

316. 26 U.S.C. § 42(h)(3) (2000). For calendar years beginning in 2003, the amounts used under 26 U.S.C. § 42(h)(3)(C)(ii) to calculate the State housing credit ceiling for the low income housing credit is the greater of $1.75 multiplied by the State population or $2,030,000.

317. 26 U.S.C. § 42(m)(1)(B). For a basic overview of the process, see Brad Elphick et al., *Low Income Housing Tax Credit Basics—Optimizing Opportunities*, PowerPoint presentation at Novogradac & Co. LLP's 9th Annual Tax Credit Developers Conference (Jan. 8, 2003) (on file with the author).

318. 26 U.S.C. § 42(m)(1)(C).

319. Elphick et al., *supra* note 317.

320. *See id.*

321. *See id.*

322. *See* BITTKER & LOKKEN *supra* note 165, at 27-67 (providing a full discussion of buildings qualifying for the LIHTC and the computation of the credits).

323. 26 U.S.C. § 42(c)(2) (2000).

324. The "minimum set aside requirements" are that at least 20% of the units are rent restricted and occupied by persons with incomes not greater than 50% of the area median income, 26 U.S.C. § 42(g)(1)(A) (2000), or at least 40% of the units are rent restricted and occupied by persons with incomes not greater than 60% of the area median income. *Id.* § 42(g)(1)(B).

325. 26 U.S.C. § 42(f)(1) (2000).

owner is entitled is calculated by multiplying the "applicable percentage" by the "qualified basis."[326] The applicable percentage is published by the IRS every month, and is set so that the present value of the credits is 70% of the building's qualified basis for buildings which are newly constructed and not federally subsidized,[327] and 30% of the qualified basis of existing or federally subsidized buildings.[328] The qualified basis is the portion of the project cost which is allocated to the units set aside for low-income tenants.[329] To encourage development in "qualified census tracts" and "difficult to develop areas,"[330] the eligible basis for projects in such areas is increased by 30%.

The amount actually invested in the project by the investor is negotiated between the investor and the developer.[331] The credits are typically "sold" to investors for less than a dollar a credit.[332]

While the investor claims the tax credits over the ten year period beginning in the year the project is placed in service,[333] the project is required to remain in compliance, that is, by restricting the rent levels and income levels of the tenants for the number of low income units committed to at the outset, for fifteen years.[334] The owner and property manager are thus required to monitor tenant incomes for this entire period to make sure that the property remains in compliance.[335] Failure to maintain compliance can result in recapture of the tax credits taken.[336]

Although LIHTCs are highly regulated, involving oversight by HUD, the IRS, and the individual state housing agencies, it is not easy to determine how well the credits have succeeded in producing units of low income housing or what the costs of that housing

326. 26 U.S.C. § 42(a) (2000).

327. 26 U.S.C. § 42(b)(2)(B)(1) (2000).

328. *Id.* § 42(b)(2)(B)(2).

329. 26 U.S.C. § 42(c)(1) (2000).

330. 26 U.S.C. § 42(d)(5)(C) (2000) (areas so designated by HUD because of their high percentage of low income residents or high construction, land, or utility costs in relation to area median gross income).

331. Elphick et al., *supra* note 317; *see also* Ted M. Handel & David C. Nahas, *Leveraging the Low-Income Housing Tax Credits Program*, 26 L.A. LAW. 23, 24 (2004) (discussing the mechanics of tax liabilities to investors under the LIHTC program).

332. *See* Ballard, *supra* note 100, at 216-19 (describing an example of how the LIHTC works, including the sale of tax credit to for profit developers).

333. 26 U.S.C. § 42(f)(1) (2000).

334. 26 U.S.C. §§ 42(g)(2), (h)(6), (i)(1) (2000).

335. *See* Martha B. Taylor, *The Future of the RTC Affordable Housing Disposition Program*, 5 J. AFFORDABLE HOUS. & CMTY. DEV. L. 131, 136 (1996).

336. 26 U.S.C. § 42(j) (2000); *see* BITTKER & LOKKEN *supra* note 165, at 27-71 (discussing the recapture rule and the computation of the amount recaptured).

have been.[337] Since a major goal is to stimulate private industry to construct low income housing that would not have been constructed otherwise,[338] it would be interesting to know how many such units of housing have been produced. The most recent report prepared for HUD[339] contains detailed information about LIHTC projects showing patterns by characteristics and location,[340] but it does not contain cost data or analysis. The report "contains information on nearly 19,700 projects and more than 935,000 housing units placed in service between 1987 and 2000 . . . . An average of about 1,300 projects and 88,000 units were placed in service in each year of the 1995 to 2000 period."[341] The data collected in this report focuses on locational characteristics, such as the number of urban, suburban, and rural units produced and comparisons of projects by region and project size.[342]

The LIHTC has been criticized for failing to stimulate sufficient housing production, lack of cost effectiveness, and failing to meet the housing need of the poorest families.[343] Clearly there is a need for further study and analysis of the data that has been produced. Since the tax credits are allocated by state housing agencies, there is no centralized official repository of information, and the Abt Associates database has been created in part to provide a source of information on which further research can be done.[344] It would be

337. *See* David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 548 (1998) (discussing the difficulty of measuring the costs and benefits of the LIHTC because of the lack of official information, but suggesting that the available data indicate a general shortcoming in cost-effective low-income housing production).

338. *See id.* at 562-63 (outlining the objectives of LIHTCs in the context of proposing improvements to the approach); *see also* Allison D. Christians, *Breaking the Subsidy Cycle: A Proposal for Affordable Housing*, 32 COLUM. J.L. & SOC. PROBS. 131, 142 (1999) (summarizing Congress' introduction of the LIHTC in 1986 and providing a comprehensive overview of the program).

339. SANDRA NOLDEN ET AL., ABT ASSOCIATES INC., UPDATING THE LOW INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2000, at i (2002), *available at* http://www.huduser.org/Datasets/LIHTC/report952k.pdf. Abt Associates created a national database of LIHTC properties placed in service from 1987 through 1994, and this report is a third update of the original. *Id.* at ii.

340. *Id.* at 37.

341. *Id.* at 36.

342. *See id.* at 66 (describing the properties of the LIHTC database, detailing the source of information and the use of geographic indicators to code the data).

343. Cohen, *supra* note 337, at 548-49, 552-60.

344. NOLDEN ET AL., *supra* note 339, at 2.

> The goals of this research project are to: (1) collect data from LIHTC allocating agencies on tax credit projects placed in service after 1994; (2) describe the characteristics of these projects and their local areas; and (3)

useful, as well, to have data on the costs of the housing produced as compared to the amounts of tax credits awarded and as compared to the costs of producing housing using other means. Early data showing that the costs of housing using the LIHTC is much higher than comparable housing whose benefits are provided using Section 8 vouchers needs to be updated.[345]

V. MIXED-INCOME PROJECTS AND HOMEOWNERSHIP PROGRAMS

A. Mixed-Financed Development

The story of affordable housing development during the 1980s is a story of disinvestment by the federal government, devolution of the responsibility for housing upon state and local government, and an increasing sense that the private enterprise with government subsidies could do a better job of addressing the continuing crisis than government did at any level.[346] The Community Development Block Grant ("CDBG") program had been enacted in the 1970s, and represented early efforts of the federal government to withdraw from direct involvement in the management and operation of affordable housing development.[347] Funds were allocated to local governments as block grants with few strings attached.[348]

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provide a clean, documented data file that can be used as a reliable sampling frame for future, more in-depth research.

Id.

345. *See* CBO, *supra* note 307, at 496. The CBO explains that:

HUD has estimated that newly constructed housing costs twice as much as housing vouchers, which draw primarily from the existing housing stock. The HUD-commissioned study of early experience with low-income housing credits estimated that, for units not receiving other subsidies, the present value of low-income housing credits for the 15-year set-aside period was 1.8 times what it could cost to provide vouchers to allow tenants to rent similar units. The cost of the credit reflects the combined average cost of newly constructed and substantially rehabilitated housing, both of which are more expensive than existing unimproved housing.

Id.

346. *See, e.g.*, Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 907-16 (1990) (advocating a market-based approach to the availability of public housing based on the availability of maximal tenant choice and the use of vouchers to obtain private housing).

347. Department of Housing and Community Development Act of 1974, Pub. L. 93-383, § 101, 88 Stat. 633 (1974) (codified as amended at 42 U.S.C. § 5301 (2000)).

348. *See, e.g.*, Duane A. Martin, *The President and the Cities: Clinton's Urban Aid Agenda*, 26 URB. LAW. 99, 103 (1994) (discussing the federal allocation of funds to local governments as block grants with "no strings" during the Nixon administrations).

Planning and implementation of housing and other programs were undertaken consistent with local priorities.[349] It was hoped that modest levels of government funding could be leveraged with private market funding to construct affordable housing.[350]

Other major programs, such as the HOME Investment Partnerships,[351] the LIHTC discussed in the previous section,[352] and the designation of certain areas as Empowerment Zones or Enterprise Communities,[353] together with CDBG and Section 8 rent subsidies[354] have become primary development vehicles. All of them depend on a mixed-finance approach where projects are funded with some government dollars or guarantees, but generally far more dollars are invested through conventional loans, private capital investment, and bond financing.[355] The increased involvement of non-profit organizations, which are private organizations with a public purpose and which enjoy financial support from the government in the form of a tax exemption, and others in the affected community has also been a feature of this mixed-finance approach.[356]

This approach certainly allows for more flexibility in the types of projects that can be developed, with less administrative complexity, and theoretically could result in developments that respond more closely to local conditions and needs.[357] The continuing housing

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349. *Id.*

350. *Id.* at 109.

351. Cranston-Gonzalez National Affordable Housing Act (Home Investment Partnerships Act ("HOME")), Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified as amended at tit. II, 42 U.S.C. §§ 3535(d), 12701, 12721 *et seq.* (2000)).

352. *See supra* notes 301-345 and accompanying text.

353. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified at 26 U.S.C. §§ 1391-97D (2000)) (amended by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 951-952, 111 Stat. 788, 885 (1997)). "Empowerment Zones" and "Enterprise Communities" were designated distressed areas where economic development was encouraged by making tax incentives and decreased regulation available to businesses. *Id.*

354. *See supra* notes 210-227 and accompanying text.

355. *See generally* Ballard, *supra* note 100, at 219 (explaining that "[t]ypically, a developer will turn to one or more conventional mortgages, grants and/or equity provided by the developer or limited partners to fill [the] gap" between the amount provided by the government and the amount needed to finance the project).

356. *See id.* at 224

> [L]awmakers chose not to throw their lot entirely with for-profit developers; legislators recognized the value of nonprofits in developing low-income housing when they enacted the T[ax] R[eform] A[ct]. The legislation requires state agencies allocating tax credits to set aside at least 10% of their credits for projects sponsored by nonprofit developers.

Id.

357. *See id.* at 221-25.

crisis, however, reflects that market forces are insufficient to drive the level of housing development that is needed, and that the federal government acting through HUD must continue to play a critical role in the process if the housing crisis is to be alleviated.[358]

In fact, at the same time that the federal government is devolving responsibilities upon local municipalities, HUD continues to exercise a complicated role in housing development as an essential party in the financing and approval of the deal, as a monitor of housing quality standards, an auditor ensuring compliance with financing regulations, as a policeman monitoring tenant eligibility, and also as a protector of tenants' rights through the web of regulations that specify lease terms for subsidized housing tenants and due process rights prior to eviction.[359] HUD continues to face challenges in the management of its responsibilities.[360] It is not surprising, then, that HUD seems to lack the ability to accomplish its lofty goals of providing affordable housing to every needy family. HUD must continue to improve on its record of production and oversight of affordable housing development.

An entire industry of affordable housing experts has grown up during the past two decades.[361] These include attorneys, bankers, accountants, financial advisors, lenders, bond underwriters, construction contractors, planners and architects, and state and local

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358. *See generally id.* at 228-44.

> When government retreats from its traditional role as a provider of social services and relies on the private sector to fill the gap, nonprofit organizations will compete with for-profit actors for the benefits associated with implementing social programs. In crafting programs to outsource social services, policy makers must recognize the potential for this competitive dynamic and keep in mind the users of social services, whose needs stand to be impaired by unregulated competition.

Id. at 230.

359. In support of the many affordable rental housing programs, HUD "insures lenders against risk of developer defaulting on loan,"; "inspects throughout construction and contracts with inspectors for assistance,"; "pays landlord the difference between the fair market rent and the tenant's portion of the rent,"; "inspects properties to ensure they meet HUD's housing quality standards,"; and "regulates and monitors PHA performance," among other things. U.S. GEN. ACCT. OFF., MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, GAO-03-103, at 16-17 tbl. 1 (2003).

360. A GAO study found that "HUD has made progress since January 2001 in addressing identified weaknesses in its high-risk program areas and management challenges but significant challenges remain. GAO is maintaining the department's single-family mortgage insurance and rental housing assistance program areas as high risk at this time." *Id.* at i.

361. *See* Ballard, *supra* note 100, at 212 (noting that private for profit entities have become more involved in affordable housing development as government has moved away from direct involvement.)

housing development agencies.[362] While they all pursue their interests in their bottom lines and other institutional concerns, relatively little attention is paid by these players to the recipients of their activity. It is entirely appropriate that these parties address their own interests in the housing development process, but the fact remains that the homeless and other low income people who need affordable housing have few advocates who are at the table participating in the decision making.[363] Non-profit housing developers and community organizations are playing an increasing role, and may be in a position to express the interests of the people in the community, but they have comparatively little power in this market-driven process.[364]

There is an urgent need to consider the overall goal and to reframe the affordable housing discussion into a discussion about economic security. What will it take to solve the housing crisis and meet the needs of low income people? People need to have their housing needs addressed. But they also need to attain a level of stability in their lives so that they and/or their children can become productive members of society. The route to economic stability for most Americans includes homeownership.[365] Many of the mixed-finance, mixed-income housing projects include housing for people with a range of incomes, and also include homeownership opportunities, both for low income people and for persons with somewhat higher incomes.[366] President George W. Bush and others in his administration have made some recent strong statements supporting increased levels of homeownership for low income people.[367] It is a goal and strategy worth serious consideration.

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362. *See generally id.* at 218, 225-27 (discussing the multiple costs that are included in a tax credit application, and the competitive role played by the Nat'l Ass'n of Home Builders).

363. *See* Herr & Pincus, *supra* note 98, at 357 (noting that "[t]he homeless are the latest intended beneficiaries of the preference system" for placement in public housing and that in many ways, those with the greatest need are the least served by the government system).

364. *See* Ballard, *supra* note 100, at 228-44.

365. *See* Glenn Haege, *The American Dream—Home Ownership—Continues to Increase Daily*, DETROIT NEWS, Dec. 20, 2003, 1 (describing the importance of homeownership to economic security), *available at* http://www.detnews.com/2003/homeimprovement/0312 /20/index.htm; *see also* Harris, *supra* note 5, at 2.

366. *See, e.g.*, *infra* App. of Affordable Housing Statutes, pages 478-80 (providing examples of federal programs enacted to address the housing crisis).

367. *See, e.g.*, PRES. GEORGE W. BUSH, A HOME OF YOUR OWN: EXPANDING OPPORTUNITIES FOR ALL AMERICANS 2 (2002) (proposing $200 million annually for the American Dream Downpayment Fund to help an estimated 40,000 low-income families with downpayment and closing costs, noting that: "The single biggest barrier to

B. HOPE VI

The housing programs of the 1990s promoted the use of multiple sources of financing and encouraged projects that would combine rental and ownership uses within the same development.[368] HOPE VI is an important program whose aim was to revitalize communities.[369] Responding to the many failures of public housing, Congress enacted HOPE VI to change the way public housing was constructed and operated.[370] HOPE VI operated as a demonstration project from 1993 to 1998, and then received permanent funding under the Quality Housing and Work Responsibility Act of 1998 ("QHWRA").[371] The new program changed public housing financing by permitting a more flexible use of housing funds by local housing agencies.[372] PHAs were allowed to bid for funds to demolish distressed housing projects, relocate tenants from those projects, and partner with private investors to develop public housing using a mixed-finance approach.[373] Agencies were not limited to using funds to construct and operate housing for low income people.[374] A percentage of the residents could be persons with higher incomes, even people who could afford market rents or who could afford to buy their own homes.[375] The program's goals were to improve living conditions for public housing residents by replacing obsolete projects with revitalized public housing, decrease the concentration of very low income families in public housing, and

homeownership is often accumulating funds for a downpayment."), *available at* http://www.whitehouse.gov/infocus/homeownership/homeownership-policy-bookwhole.pdf.

368. *See* Gordon Cavenaugh, *Ending Severely Distressed Public Housing—A Congressional Initiative, A HUD Challenge*, 3 J. AFFORD. HOUS. & CMTY. DEV. L. 13, 14 (1993) (discussing the genesis of the HOPE VI program).

369. *Id.*

370. Department of Veterans Affairs and Housing & Urban Development, and Independent Agencies Appropriations Act of 1993, Pub. L. 102-389, tit. II, 106 Stat. 1571, 1579-81 (1992) (codified as amended in 42 U.S.C. § 14371 (1996) (repealed 1998)).

371. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, tit. V, 112 Stat. 2518 (codified at 42 U.S.C. § 1437v (2000)).

372. HUNT ET AL., *supra* note 72, at 2.

373. *Id.*

374. *See* 42 U.S.C. § 1437v(d)(1) (2000).

375. *Id.*

build sustainable communities.[376] It has proved a controversial addition to the federal government's arsenal of housing programs.[377]

Between fiscal years 1993 and 2000, HOPE VI funded 318 Planning, Demolition, and Revitalization grants totaling $4,288,097,410.[378] Those awards funded demolition of almost 97,000 severely distressed public housing units, and produced over 61,000 revitalized dwellings.[379] The fact that the program produced 36,000 fewer units than the number of units demolished, highlights one of FitzPatrick's main criticisms of the program.[380] He also argues that HOPE VI projects continue to be sited in disadvantaged areas isolated from the surrounding communities, and residents still lack adequate social services.[381] He concludes that "the housing market would be far better off if HUD scrapped the program."[382]

HOPE VI funds the demolition of deteriorated and obsolete public housing units, and replaces them, generally with a smaller number of newly constructed units.[383] The proponents of HOPE VI acknowledge that HOPE VI will shrink the stock of traditional public housing, and fails to come close to addressing the dire need for low income housing.[384] However, they see the lowering of housing density and the fact that some of the units are replaced

376. HUNT ET AL., *supra* note 72, at 2 (stating that the purpose of this title is to: 1) deregulate PHAs; 2) provide more flexible use of federal assistance to PHAs; 3) facilitate mixed income communities; 4) decrease concentrations of poverty in public housing, etc.).

377. CTR. FOR CMTY. CHANGE, ENPHRONT, A HOPE UNSEEN: VOICES FROM THE OTHER SIDE OF HOPE VI, at 4 (2003), *available at* http://www.communitychange.org/ho using/HOPEVI/HOPEVIfull.doc; *see also infra* note 380 (presenting articles by HOPE VI detractors and supporters).

378. HUD, *About HOPE VI*, *supra* note 198.

379. *Id.*

380. FitzPatrick, *supra* note 203, at 444. In his note, Michael FitzPatrick criticizes the HOPE VI program for reducing the number of affordable housing units and not achieving the goals of self-sufficiency for tenants. *Id.* Responding to FitzPatrick's critique, Patrick Clancy and Leo Quigley see the HOPE VI program as one of HUD's most promising tools. In their article, Clancy and Quigley promote HOPE VI in glowing terms. "Drawing upon lessons from five years of work with this evolving public housing transformation tool, [they argue] that HOPE VI presents important opportunities to create mixed-income housing, revitalize neighborhoods, reconnect public housing with local real estate markets, and support families striving to achieve self-sufficiency." Patrick Clancy & Leo Quigley, *HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. POVERTY LAW & POL'Y 527, 527-28 (2001).

381. FitzPatrick, *supra* note 203, at 445.

382. *Id.* at 448.

383. *See* HUNT ET AL., *supra* note 72, at 2.

384. *See* Clancy & Quigley, *supra* note 380, at 527.

with housing for the working poor and market-rate renters as providing better housing options.[385] The mixed-income model, with its addition of residents who do not come from traditional public housing, is one of the features most heavily favored by HOPE VI proponents.[386] Creating developments to house persons from different income groups is their solution to the problem of concentration of poverty.[387]

The options for the people who are displaced from public housing by the demolition are replacement housing in the new construction or housing vouchers that enable them to seek housing from private landlords.[388] Both options are seen as better housing solutions for low income people that outweigh the loss of units.[389]

Other criticisms of the HOPE VI program have been the early failures to implement self-sufficiency programs.[390] A significant portion of HOPE VI's grant was intended to fund family support programs, primarily job training and placement, but also child care and substance abuse treatment.[391] Early efforts in this area have been disappointing.[392] PHAs have not done well at tracking families that had to be relocated, so it is difficult to know what happened to them.[393] Many of the job placement efforts were short term, focusing on entry-level jobs with little follow-up to determine whether workers were able to remain in jobs or advance to better positions over time.[394]

The response to this criticism is that housing agencies are not good at providing these kinds of social services, and there has been a lack of coordinated services by agencies in the community.[395] This is a new area relying on action by private agencies and local initiative, and some uneven results are to be expected.[396] HOPE VI supporters say that the failure is not one of program structure at

385. *Id.* at 531.

386. *Id.* at 536-37.

387. *Id.*

388. *Id.* at 532.

389. "While obtaining significant additional resources for new housing production remains a challenge, HOPE VI provides a template for investing these resources in ways that stimulate neighborhood revitalization." *Id.* at 533.

390. FitzPatrick, *supra* note 203, at 445.

391. *See* Clancy & Quigley, *supra* note 380, at 533-34.

392. *Id.*

393. *Id.* at 433.

394. *Id.*

395. *Id.* at 434.

396. *Id.*

the federal level, but needs to be corrected with better local implementation.[397]

Rather than focusing on the disappointments of the HOPE VI program and its failure to produce uniformly wonderful results for its low income beneficiaries, supporters are encouraged by the possibilities for leveraging private funds and injecting capital into the affordable housing market.[398] They see it as a flexible tool that is "the single most potent antipoverty program in HUD's arsenal today. . . . Beyond providing vital financial resources, HOPE VI makes three critical contributions to community development: it (1) encourages bold of visions neighborhood revitalization; (2) brings mayors back into public housing decision-making; and (3) introduces private sector resources into distressed neighborhoods."[399]

HOPE VI is a great program for affordable housing developers.[400] It infuses new sources of capital, and allows housing developers to replace uninspiring, dangerous public housing projects with creatively designed new communities mixing "public housing capital funds, Low Income Housing Tax Credits, and HOME or CDBG dollars . . . [and providing] housing opportunities for public housing residents, low income renters, the working poor, and market rate families."[401] Successful communities require "not only housing, but also schools, retail and commercial amenities, parks and recreation space, transportation access, physical security, and community building."[402] HOPE VI is a vehicle for providing these kinds of coordinated services in previously dilapidated communities, and it is spawning new industries of developers and investors ready to do the work.[403]

It remains to be seen how well these programs work: are a sufficient number of former residents able to qualify for housing in the new community, or does most of the housing go to another group of needy people?[404] Are the needs of the displaced residents ade-

397. "This ineffectiveness, however, is failure of local implementation rather than a structural flaw in HOPE VI. Implementation of self-sufficiency programming has lagged behind the real estate development program due, in part, to the historical separation of these functions." *Id.*

398. *Id.* at 536.

399. *Id.*

400. *Id.* at 537.

401. *Id.*

402. *Id.*

403. *Id.*

404. If one group of needy people is displaced in favor of another group that is equally needy, is there any real difference? There is no problem if the displaced peo-

quately met through the housing voucher program? Are these projects able to overcome the NIMBY phenomenon?[405] What is the real cost of the social services needed by the low income residents of the projects, and how will those costs be met in the future? There is a need for a study from the perspective of the low income beneficiaries of the program—both those who found housing within the revitalized development and those who were displaced by it—as to how significantly their lives have been affected by this bold vision of neighborhood revitalization.

HOPE VI supporters have great expectations about the results that can be achieved by channeling development resources to the local level, creating exciting partnerships between local PHAs, mayors, city planning and renewal agencies,[406] and giving a lesser role to the federal government.[407] It is very interesting, however, to note what role community residents or organizations play in these partnerships.[408] There is apparently an assumption that the people's interests will be voiced and protected by the institutional players.[409]Including private investors in the partnership can be expected to result in higher quality construction and management of the development.[410] Market forces can be expected to produce economies, realistic implementation plans, and high standards.[411] Private investor participation in partnership with local government

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ple have adequate alternative housing and exercise some degree of choice in moving to other housing. On the other hand, it does not seem fair if the displacement is involuntary and the displaced persons have to relocate to housing that is as bad as or worse than what they came from. Although a program like HOPE VI requires some families to be displaced, the program should recognize the negative effects of displacement on families, and give some degree of priority to former residents—all other things being equal.

405. "Not In My Back Yard" ("NIMBY") has been the objection of many local community residents seeking to resist the location of low income housing projects in their neighborhoods. *See* GALSTER, *supra* note 95, at 9 (providing a study of the impact of affordable housing on neighboring property values and discussing "NIMBY" neighborhood opposition to such projects); Cassandra Netzke, *Rethinking Revitalization: Social Services in Segregation and Concentrations of Poverty*, 23 HAMLINE J. PUB. L. & POL'Y 145, 176 (2001).

406. *See* Jeanne Goldie Gura, *Preserving Affordable Homeownership Opportunities in Rapidly Escalating Real Estate Markets*, 11 J. AFFORDABLE HOUS. & CMTY. DEV. L. 78, 81, 88 (2001).

407. *Id.*

408. *Id.*

409. *Id.*

410. *See* Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned from the D.C. Housing Authority's Hope VI Projects*, 10 J. AFFORDABLE HOUS. & CMTY. DEV. L. 353, 353-54 (2001).

411. *Id.*

agencies will lead to mixed-income communities where people with a range of incomes will want to live side by side.[412]

In this area, also, it would be interesting to study how mixed-income communities actually work in practice. What are the guiding forces behind these communities? How are they structured to maintain their mixed-income character? Since pure, or at least purer, market forces result in neighborhoods that are highly segregated by race, income and class, how must market forces be manipulated to result in a successful mixed income community? If the goal of moving low income people from dependence to self-sufficiency involves having some portion of the low income population achieve homeownership, how can the HOPE VI program be used to accomplish that goal?

Clancy and Quigley briefly describe their success in developing a mixed-income HOPE VI project in Louisville, Kentucky.[413] They stress the importance of early and effective planning and involving all the key stakeholders, including community groups.[414] Reading their account as well as a news article by Neal Peirce creates a great deal of excitement about the possibilities for HOPE VI as a tool for low income housing development.[415] Hopefully, the promise of this and other projects will be realized and fully documented in research studies.[416]

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412. *Id.*; *see also* Dana L. Miller, *Hope VI and Title VII: How a Justifying Government Purpose Can Overcome the Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277, 1284 (2003).

413. *See* Clancy & Quigley, *supra* note 380, at 541. Clancy & Quigley describe Park DuValle in Louisville, Kentucky, as "an example of what can be accomplished with a bold vision for redevelopment" and explain that:

> In a stunning turnaround, the new development is home to both very-low income families and doctors and lawyers with $300,000 incomes. The $200 million effort transformed a once neglected segment of the city into Louisville's premier mixed income neighborhood. The new Park DuValle, covering 125 acres, links 650 rental residents and 450 homeowners with civic, recreational, and retail facilities.

Id.

414. *Id.*

415. *Id.*; Neal R. Peirce, *Metamorphosis of a Neighborhood: Louisville's Miraculous Story*, FLA. SUSTAINABLE CMTYS. CTR. WORLD / NAT'L NEWS (2000), *available at* http://sustainable.state.fl.us/fdi/fscc/news/world/0009/louis.htm (posted Sept. 3, 2000).

416. For example, an abstract of a forthcoming doctoral dissertation, available at HUD's Office of University Partnerships website, explains that:

> [u]sing the Park DuValle site as a case study, this dissertation will provide (1) an analysis of the social, economic, and political processes that gave rise to conditions of distress in Cotter-Lang Homes [the public housing project that was demolished to make way for Park DuValle] and its surrounding

C. Nonprofit and Community-Based Development

During the 1980s and 1990s, there was a confluence of factors that led to dramatic shifts in the strategies that were adopted to address the affordable housing crisis,[417] including drastic cuts in federal funding for housing, economic recessions, an increased reliance on private industry to provide affordable housing, together with the continuing increase in a low income population with serious housing needs.

One result of these changes has been an enormously increased role for nonprofit organizations and community groups in the development of affordable housing.[418] Many housing programs provide for significant amounts of federal funds to be directed to nonprofit organizations.[419] There are special challenges faced by nonprofit organizations when they act as real estate developers, due to the fact that they generally do not have experience in as-

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community, and (2) an assessment of the Park DuValle HOPE VI revitalization's effectiveness in remedying these conditions.

Abstract, *Distressed Public Housing and HOPE VI Revitalization: An Analysis of Park DuValle in Louisville, Kentucky* (2003) (unpublished thesis sponsored by HUD's Office of University Partnerships), *available at* http://www.oup.org/scholar/hanlon.html (last updated Aug. 28, 2003); *see also* U.S. Dep't of Hous. & Urb. Dev., *About OUP*, *at* http://www.oup.org/about/about.html (last updated Apr. 25, 2003). HUD has also recognized that:

> [T]he crucial role that America's institutions of higher education can play in rebuilding communities large and small, HUD established the Office of University Partnerships (OUP) in 1994 to encourage and expand the efforts of institutions of higher education that are striving to make a difference in their communities through funding opportunities. Whether the institution has a venerable history of reaching out to lower income neighborhoods or is just beginning to explore the potential of such partnerships, OUP can help increase the scope, effectiveness, and sustainability of its community-building efforts.

Id.

417. *See* Miller, *supra* note 412, at 1280-83 (discussing the factors leading up to the current approach to the affordable housing issue).

418. *See* HECHT, *supra* note 305, at 5 (discussing the evolving role of nonprofit organizations in affordable housing development during the 1980s and 1990s).

419. For example, the McKinney Act Homeless program, 42 U.S.C. § 11301 (2002), funds homeless shelters operated by nonprofit agencies; the HOME program, 42 U.S.C. § 12771 (2000), provides assistance to community organizations; and the Community Development Block Grant program, 42 U.S.C. § 5303 (2000), permits nonprofits to develop both rental and for sale housing. In addition, HUD has made it easier for nonprofits to acquire multi-family buildings, *FHA Multifamily Procedures For Nonprofit Mortgagors Revised*, 24 CURRENT DEVS. HOUS. & DEV. REP. (BNA) 273 (1996); nonprofits operate programs under Housing for Persons With AIDS ("HOPWA"), 42 U.S.C. § 12901 (1992); HUD funds agencies that serve as approved counseling and fair housing agencies, 42 U.S.C. § 3616a (1994); and the Low Income Housing Tax Credits program sets 10% of all credits are set aside for groups partnering with non-profits, 26 U.S.C. § 42 (2000).

sembling the financing for these projects, or in construction, management, or operation of real estate projects.[420] The major challenge for these groups, as it is for the for-profit developer, is to put together sufficiently inexpensive sources of funds and keep the costs down so that its housing units remain affordable to the population it serves.[421] By eliminating the element of profit in the transaction, and by generating significant amounts of donated funds as a part of the financing of their projects, nonprofit developers control costs and make an important contribution to the transaction.[422] A number of organizations provide nonprofit groups with the technical assistance needed to work in this area.[423]

The self-sufficiency movement, which is one of the hallmarks of welfare reform relies heavily on the work of nonprofit organizations.[424] These organizations provide the job training and welfare-to-work programs to assist people who are required to leave the

420. *See* Robert A. Nasdor, *Legal Support for Affordable Housing Development*, N.J. LAW., Oct. 1993, at 24 (explaining that nonprofit organizations face challenges because there is a general preference on the part of local government agencies for working with for-profit developers).

421. *Id.*

422. *Id.*

423. Examples of such groups are the Enterprise Foundation and the Local Initiatives Support Corporation ("LISC"). Nat'l Ass'n of Hous. & Redevelopment Officials, *About the NAHRO Access Alliance*, *at* http://www.nahro.org/access/alliance/about.cfm (last visited Mar. 7, 2004).

> Working with partners and a national network of more than 1,900 nonprofit organizations in 700 locations, Enterprise [Foundation] provides low-income people with affordable homes, safer streets and access to jobs and childcare. . . . Enterprise has raised and committed more than $3.5 billion in equity, loans and grants to help build or renovate more than 120,000 homes."; "Headquartered in New York City, LISC is the nation's largest community-building organization. Since 1980, LISC has raised more than $4 billion from largely private-sector sources for investment in community development initiatives. This investment has leveraged another $6 billion in additional investment, helping more than 2,200 community nonprofits develop 110,000 quality homes, build 14 million square feet of commercial and industrial space, and create 40,000 jobs. Through 38 local urban program offices and in 68 rural communities, LISC is helping neighbors build communities.

Id; *see also* Ammann & Salsich, *supra* note 248, at 351. Additionally, HUD maintains a section of its website with information for nonprofit organizations, and Bennett Hecht's book provides a step-by-step description of the development process for nonprofit organizations. HECHT, *supra* note 305, at 8-11; U.S. Dep't of Hous. & Urb. Dev., *Grantees / Non-profits*, *at* http://www.hud.gov/groups/grantees.cfm (last updated Nov. 6, 2003).

424. Ammann & Salsich, *supra* note 248, at 335.

welfare rolls.[425] There is a clear connection between having adequate housing and being able to get and keep a job.[426]

Nonprofit organizations that manage affordable housing developments must make a decision about the services to be provided to their residents.[427] Successful management of an affordable housing project involves far more than collection of rent and maintaining the premises in good repair.[428] A set of comprehensive services could include child and/or elderly day care services, budget and financial counseling, job training, and job search assistance.[429] The funding for such services is generally not built into the project finances and has to be raised separately.[430] A non-profit organization must decide not only the level of services it will provide, but also whether it will contract out the provision of some or all of the services, and how any such services will be paid for.[431]

The agencies that provide a broad range of services to their clients have been more successful than those that provide affordable housing alone.[432] These additional services add costs,[433] but contribute to the success of the project with lower vacancy rates and increased family stability.[434]

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425. *Id.* at 328-29.

426. Salsich, *Welfare Reform*, *supra* note 269, at 51-52.

427. Ammann & Salsich, *supra* note 248, at 346.

428. *See, e.g.*, *id.* at 346-47 (explaining that affordable housing residents in St. Louis County are provided with social workers to assist them with issues such as transitional housing, mental health and substance abuse).

429. *Id.*

430. *Id.* at 335-36.

431. *See* HECHT, DEVELOPING AFFORDABLE HOUSING, *supra* note 305, at 602-26 (discussing the processes of developing a comprehensive management plan, setting management standards, selecting and evaluating a management company).

432. Ammann & Salsich, *supra* note 248, at 352.

433. *See* Salsich, *Welfare Reform*, *supra* note 269, at 62-63. Salsich notes that:

> the Ecumenical Housing Production Corporation (EHPC), a non-profit corporation . . . [which] owns over 180 scattered-site single family units in St. Louis County for Section 8 eligible families, [footnote omitted] . . . [and provides] a full range of management services, . . . such as educational referral, housekeeping and budgeting, counseling, daycare, family enrichment programs, job training, and job internships. . . . $150-200 per month per unit is required for the "holistic" aspects of its management activities.

Id.; Swanger, *supra* note 193 (describing the difficulty in maintaining funding and sporadic support for the public-housing based support services offered by the Cambridge Housing Authority).

434. *See, e.g.*, NYCHA, *Fact Sheet*, *supra* note 191 (explaining that the New York City Housing Authority, which "is the largest public housing authority in North America" with "181,000 apartments in 346 developments[,]" provides its approximately "174,800 families and 418,834 authorized residents" with "a wide variety of programs . . . geared specifically to special age or special needs groups such as chil-

Despite the valiant efforts of the nonprofit organizations and the public-private partnerships, the crisis continues.[435] One reason may be that self-sufficiency will not work for everyone. Most policy makers acknowledge that most of the elderly and disabled who are on assistance will not be able to join the work force and become truly self-sufficient.[436] Others who receive assistance are unemployable because they are single parents of small children, lacking in job skills, or have no access to public transportation.[437]

D. Low Income Homeownership

1. *An Idea Whose Time Has Come?*

Homeownership is a big part of the American Dream; owning a home is a sign that one has entered the economic mainstream.[438] The benefits of homeownership include the increase in real wealth that occurs when property values and equity increase, the sense that families and neighborhoods are more stable with homeowners rather than renters, and the ability to take advantage of tax incentives available to homeowners.[439] With generally steady increases in real estate values since 1926,[440] and by starting with a lower-priced home and "trading up" for increasingly expensive homes, families have used homeownership as an effective method to build assets.[441]

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dren, teens, single-parents, seniors, substance abusers, and victims of domestic violence, among others").

435. FitzPatrick, *supra* note 203, at 433-35.

436. A 1995 GAO study, based on a sample of data from 1989 and the results of a 1995 HUD study, found that 35% of households receiving assistance had an elderly head of household, and 13% of households receiving assistance had a head of household who was disabled. U.S. GEN. ACCOUNTING OFFICE, HUD-ASSISTED RENTERS, RCED-95-167R, at 2-5 (1995), *available at* http://www.gao.gov.

437. *See* Ammann & Salsich, *supra* note 248, at 335-38.

438. *See* Haege, *supra*, note 365.

439. The mortgage interest deduction, 26 U.S.C. § 163(h)(3)(A) (2002), and the exclusion from gross income of the gain from the sale of a primary residence (up to $250,000 for individuals and $500,000 for married couples), 26 U.S.C. § 121(a) (2002), are major tax subsidies available to homeowners.

440. The annual returns on real estate from 1926 to 1996 outpaced the Dow Jones Industrial Average. John F. Dorfman, *How to Make $61 Million Slowly*, WALL ST. J., Sept. 30, 1999, at C1.

441. *See generally* OLIVER & SHAPIRO, *supra* note 69, at 108-09 (explaining that "home equity represents the largest share of accumulated wealth"); Harris, *supra* note 5, at 2 ("Owning a home can be a great core investment . . . provid[ing] substantial returns for a number of years, not just during . . . hot markets.").

Unfortunately, for a variety of reasons homeownership has been largely unavailable to low income families.[442] The barriers to homeownership include unattainable down payment requirements, as families living paycheck to paycheck are often unable meet all their monthly obligations, much less save anything toward a down payment on a house,[443] a history of "redlining" by commercial lending institutions,[444] white flight[445] and long-standing patterns of racial segregation which have resulted in decreased property values in areas occupied by minorities,[446] government policies that support the suburbanization of America and the resulting lack of ac-

442. JCHS, *supra* note 39, at 26 ("[E]xcluding the elderly, the homeownership rate among lowest-income households would be just 33 percent.").

443. *See id.* at 24-28 (describing the economic hardships faced by the low-income community making it difficult for those who do not own homes to accumulate savings and making those who do own homes vulnerable to losing them).

444. The term comes from a practice that banks and other mortgage lenders had in drawing a red line around certain neighborhoods where they refused to make loans. *See* Bill Dedman, *The Color of Money: Atlanta Blacks Losing in Home Scramble; Banks, S&Ls Favor City's White Areas by Margin of 5-1*, ATLANTA J. & CONST., May 1, 1988, at 1, *available at* http://powerreporting.com/color/color_of_money.pdf. Dedman explains that:

> Redlining is an illegal practice of refusing to lend in certain neighborhoods on the basis of race, ethnic composition or any other standards other than creditworthiness. The definition comes from the alleged practice of drawing a red line on a map around certain neighborhoods to designate them as off limits.

Id.; Glenn B. Canner & Dolores E. Smith, *Expanded HMDA Data on Residential Lending: One Year Later*, FED. RESERVE BULL., Nov. 1992, at 801-24A (demonstrating that the practice of redlining was a nationwide problem). Although "redlining" is no longer openly practiced, there continues to be concern about mortgage approval practices and discrimination in lending. *See, e.g.*, STEPHEN L. ROSS & JOHN YINGER, THE COLOR OF CREDIT (2002) (analyzing minority-white loan approval data and revealing patterns that are not justified on business grounds).

445. Dannielle Gordon, *'White Flight' Taking Off in Chicago Suburbs*, CHI. REP., Dec. 1997 ("Mimicking the patterns of segregation that shaped Chicago, whites in the inner-ring suburbs with growing African American populations are fleeing these areas for towns and villages beyond Cook County. . . . Trends identified by the Reporter . . . . reflect what Chicago's neighborhoods experienced long ago: When blacks move in, whites move out."), *available at* http://chicagoreporter.com/1997/12-97/1297main.htm; *see also* U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION, *supra* note 68, at 3-4 (noting that African Americans are still the most residentially segregated racial group in the United States despite declining segregation since 1980).

446. *See* Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1993 (2000) (discussing the phenomenon of "resegregating" neighborhoods and proposing measures that would support racial integration).

cess to jobs and public transportation for poor people,[447] and the widening wealth gap.[448]

Increasingly it is recognized that the solution to the problem of poverty in the United States lies in creating opportunities to build wealth, and not just opportunities to earn higher incomes.[449] Homeownership provides people with a chance to build equity, live in more stable neighborhoods, and provide a better foundation for their children.[450] For most Americans, their primary residence represents the largest asset that they will ever own.[451] The home can be a basis for economic security and a path than can lead out of poverty.[452]

The promise of low income homeownership is the possibility of an escape from poverty.[453] Changes in housing policy are needed to open up those possibilities. What is needed is a massive institutional commitment to the reality of low income homeownership, not the largely ineffective programs that are now in place. Evi-

447. Oliver and Shapiro's study of race and wealth inequality shows a strong link between state policy, increasing suburbanization, and the perpetuation of racial and wealth disparities. OLIVER & SHAPIRO, *supra* note 69, at 16, 37-45. In particular, they discuss how specific policies of the Federal Housing Authority, the Social Security Administration, and the Internal Revenue Service have exacerbated racial and economic inequality. *Id.* at 38-45.

448. The top 20% of households in the United States measured by income own more wealth than the bottom 80% combined. UNITED STATES CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 1998 AND 2000, at tbl. C (2003), *available at* http://www.census.gov/prod/2003pubs/p70-88.pdf.

449. OLIVER & SHAPIRO, *supra* note 69, at 32.

> Most people use income for day-to-day necessities. Substantial wealth, by contrast, often brings income, power, and independence. Significant wealth relieves individuals from dependence on others for an income, freeing them from the authority structures associated with occupational differentiation that constitute an important aspect of the stratification system in the United States.

Id.

450. *See* Reginald Leamon Robinson, *Poverty, the Underclass, and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1403-04 (2001) (comparing the ability of blacks and whites to gain equity and to "ensure educational opportunities for their children").

451. *See* OLIVER & SHAPIRO, *supra* note 69, at 108-09 (explaining that "home equity represents the largest share of accumulated wealth").

452. *See* Michael Lollar, *Lewis Shares Knowledge of Route Out of Poverty*, COMMERCIAL APPEAL, Mar. 28, 1999, at F7. *But see* Dan Nnamdi Mbulu, *Affordable Housing: How Effective are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U.J. GENDER SOC. POL'Y & L. 387, 394 (2000) (arguing that public housing provides a long-term solution to homelessness).

453. *See, e.g.*, Lollar, *supra* note 452, at F7 (providing residents' accounts of their experiences in buying their own homes). *But see* Mbulu, *supra* note 452, at 394 (arguing that public housing provides a long-term solution to homelessness).

dence of such a commitment would be programs that provide down payment assistance, that work with people over the long term to improve their credit status and money management skills, and that measure their success by numbers of people who actually become homeowners.

Despite its promise, homeownership is a solution that does not work for everyone. A successful affordable housing program must also include a massive re-commitment to provide decent adequate rental housing for those who cannot make it as homeowners.

2. *Programs that Support Homeownership*

Despite the fact that some CDBG funds have been available to support homeownership for low income people since the 1970s,[454] homeownership has been largely unavailable to low income people.[455] Affordable housing for low income people has generally meant *rental* housing.[456]

The federal programs that provide grants to promote homeownership include HOPE VI,[457] Youthbuild,[458] Homeownership Zones Initiative ("HZI") Funds,[459] and the Habitat for Humanity Initiative ("HHI").[460]

In addition to the discussion above,[461] a concise summary of the HOPE homeownership programs is contained in a footnote in an article by Peter Salsich.[462] A wealth of information on the HOPE

454. CDBG funds can be used for down payment assistance for low income home buyers. Nat'l Low Income Hous. Coalition, *Community Development Block Grants (CDBG)*, *at* http://www.nlihc.org/advocates/cdbg.htm (last visited Mar. 7, 2004).

455. *See* NAT'L LOW INCOME HOUS. COALITION, AMERICA'S NEIGHBORS: THE AFFORDABLE HOUSING CRISIS AND THE PEOPLE IT AFFECTS 10 (2004) [hereinafter NLIHC] (exposing the housing crisis among extremely low, very low and low income people), *available at* http://www.nlihc.org/research/lalihd/neighbors.pdf; *see also* Sheila Crowley, Testimony Before the House Comm. on Fin. Servs., Subcomm. on Hous. & Cmty. Opportunity (June 17, 2003), *available at* http://www.nlihc.org/press/pr061703.html.

456. *See* NLIHC, *supra* note 455, at 1.

457. 42 U.S.C. § 1437l (1996) (repealed 1998).

458. National Affordable Housing Act, 1992 Act amendments, tit. I, Subtitle D, § 164, 106 Stat. 3723 (1992); 42 U.S.C. § 12899 (2000).

459. HZI grants and loan guarantees were awarded in 1996 and 1997 to assist in construction of homes, homeownership counseling and other services near major employment centers. U.S. Dep't of Hous. & Urb. Dev., *Homeownership Zones Initiative (Hoz)*, *at* http://www.hud.gov/progdesc/homezone.cfm (last updated Dec. 5, 2000). No funds have been awarded through this program since Fiscal Year 1997. *Id.*

460. HUD provides funds through HHI, or SHOP ("Self-Help Homeownership Opportunity Program") for land and infrastructure improvements for low income families. 42 U.S.C. § 12805 (d) (2) (2000).

461. *See supra* notes 368-416 and accompanying text.

462. Salsich, *Focus on: Urban America*, supra note 249, at 135 n.226.

VI programs is available from the HUD website[463] and from the website of the Housing Research Foundation, where it is possible to find information on all of the HOPE VI grants that have been made to local housing agencies since 1993.[464] What is difficult to determine is what have been the results of the homeownership grants from the perspective of low income home buyers. How many low income families have been able to purchase homes through HOPE VI? What services were needed to help those families qualify for homeownership? Has homeownership for those families led to increased economic security? What has been the rate of foreclosure for those families? How does homeownership through HOPE VI compare with homeownership for low income families accomplished through other programs such as Habitat for Humanity or non-profit development programs? These and many such questions need to be addressed in research studies.

Habitat for Humanity International is a private nonprofit organization which builds homes for low income families using sweat equity and volunteer help.[465] Since 1976, it has built over 50,000 homes in the United States, and over 150,000 homes worldwide.[466]

> The Homeownership and Opportunity for People Everywhere (HOPE) program, enacted in 1990, is the centerpiece of the federal government's efforts to provide home-ownership opportunities for low-income persons. The program authorizes loans, grants and other financial and technical assistance to help low-income residents form cooperative associations and acquire title to publicly- and privately-owned assisted housing units.

Id.; *see also* Pub. L. 101-625, tit. IV, 104 Stat. 4079, 4148-80 (1990) (codified at 42 U.S.C. § 1437aaa (2000)). Six HOPE programs exist: HOPE I, public and Indian housing homeownership, 42 U.S.C. §§ 1437aaa-1 to aaa-8 (2000); HOPE II, ownership of multifamily units, 42 U.S.C. §§ 12871-12800 (2000); HOPE III, homeownership of single family homes, 42 U.S.C. §§ 12891-12898 (2000); HOPE IV, job opportunities for low-income young adults in housing construction and rehabilitation ("Youthbuild"), 42 U.S.C. §§ 12899-12899g (2000); HOPE V, demonstration program to test the effectiveness of combining Section 8 housing assistance with support services to assist frail elderly persons with independent living, 42 U.S.C. § 8012 (2000); and HOPE VI, competitive grants to fund innovative local programs to recast severely distressed public housing projects into economically and racially integrated communities, 42 U.S.C.A. § 14371 (1996) (repealed 1998). "Severely distressed public housing has one or more of the following conditions: distressed families, high crime rates in the surrounding neighborhoods, barriers to effective management, and deteriorated buildings." Salsich, *Focus on: Urban America*, *supra* note 249, at 135 n.226 (citing NAT'L COMM'N, *supra* note 50, at B-2).

463. U.S. Dep't of Hous. & Urb. Dev., *Hope VI*, *at* http://www.hud.gov/offices/pih/progr ams/ph/hope6/about/description.cfm (last updated Apr. 3, 2002).

464. Housing Research Found., *HOPE VI: What's New?*, *at* http://www.housingresearch.org/hrf/hrfhome.nsf/FSHomeHope?OpenFrameSet (last visited Feb. 1, 2004).

465. *See* Habitat for Humanity Int'l, *A Brief Introduction to Habitat for Humanity International*, *at* http://www.habitat.org/how/tour/1.html (last visited Feb. 1, 2004).

466. *Id.*

Habitat makes its homes affordable to low income home buyers by using volunteer labor (provided by the home buyers and others) to build the houses, by selling the homes at no profit, and by offering 0% mortgages.[467] Small amounts of government funding (less than 15% of Habitat's revenues in 2002) are available from HUD's Habitat for Humanity Initiative.[468] Those grants are used to pay for land and infrastructure, such as utility hookups, roads, and sidewalks.[469]

Habitat and the other nonprofit organizations which build housing for low income people recognize that in addition to building and selling houses, they are also in the business of building communities.[470] Home buyers receive training in construction, budgeting, home maintenance, and working within a homeowner's association.[471] The organization creates an ongoing relationship with the home buyers, which is different from the usual relationship between a buyer and seller or the mortgagor and mortgagee. The nonprofit developer maintains an interest in the success of the venture that outlasts the closing of the sale.[472]

While there are many success stories about the volunteers who spend their Saturdays building homes for Habitat, and home buyers who stand with pride to have their pictures taken in front of their new homes,[473] questions remain. How is it working? What is happening to the families who buy those homes? Is this a firm step on the road out of poverty? How does the rate of foreclosure on Habitat Homes compare to the foreclosure rate for other properties in the area? How does homeownership for this population relate to the broader issue of economic security?

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467. *Id.*

468. Habitat for Humanity Int'l, *Strategy in Action: Annual Report of FY2002*, *at* http://www.habitat.org/giving/report/2002 (last visited Feb. 28, 2004); *see also* HABITAT FOR HUMANITY INT'L, FISCAL YEAR 2002 FINANCIAL STATEMENTS 3-4 (2002) [hereinafter HABITAT, FISCAL YEAR 2002], *available at* http://www.habitat.org/giving/report/2002/HFHI FY2002Financials.pdf.

469. HABITAT, FISCAL YEAR 2002, *supra* note 468, at 12.

470. Mark Lassman-Eul, *Sweat Equity: Labor of Hope, Investment for Tomorrow*, HABITAT WORLD, Aug.-Sept. 2001, at 1 ("A Habitat homeowner, by being on site with a diversity of new friends and neighbors, has the chance to connect with the community in powerful ways. People work together to move outside of their comfort zones, cross traditional dividing lines within a community and shatter stubborn stereotypes."), *available at* http://www.habitat.org/hw/aug-sept01/feature1.html.

471. *See id.*; *see also Hard Work Yields More Than Houses*, HABITAT WORLD, Aug.-Sept. 2001, *available at* http://www.habitat.org/hw/aug-sept01/feature2.html.

472. *See* Lassman-Eul, *supra* note 470.

473. *See* Habitat for Humanity Int'l, *True Stories*, *at* http://www.habitat.org/true (last visited Mar. 8, 2004).

What seems clear is that homeownership for low income people holds enormous promise, and while there are great challenges, the goal of homeownership leading to increased economic security is worth pursuing.[474]

3. *Proposals to Support Low Income Homeownership*

Low Income and Minority Homeownership is definitely the watchword of the day. In 2002, President Bush announced a goal to create 5.5 million new homeowners by 2010.[475] June was National Homeownership Month 2003, and it was broadly celebrated at the HUD website and in public appearances by HUD Secretary Mel Martinez.[476] HUD has identified four target areas which are expected to achieve this goal: 1) educating more people in the home buying process; 2) addressing the affordability issue; 3) providing more down-payment and closing cost assistance; and 4) offering more home financing options for low to moderate-income Americans.[477]

Under existing government programs, homeownership options are frequently part of new projects.[478] These developments target complex markets and involve very complicated financing structures.[479] Projects can include a mix of rental and ownership properties, with some low income residents and some moderate-income residents and with some rental subsidies and some market-rate rentals or sales.[480] They often are financed with a mix of con-

474. In their book on homeownership, Retsinas and Belsky assembled a group of research papers examining such questions as whether low income homeowners are better off than renters, and whether homeownership is better for families and for the neighborhood. The researchers conclude, with grand caveats, that homeownership is better, and the federal government, the mortgage industry, and local governments should persevere in their efforts to bridge the gap in homeownership between lower income and upper income families. LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL 11 (Nicolas P. Retsinas & Eric S. Belsky eds., 2002).

475. BUSH, *supra* note 367, at 1-2; *see* David E. Sanger, *Bush Calls Transformed Area a Model Program for Housing*, N.Y. TIMES, June 18, 2002, at A20 (noting that Bush described a once-blighted neighborhood of Atlanta as a model for government efforts to help 5.5 million black and Hispanic families purchase homes in the next eight years).

476. *See* U.S. Dep't of Hous. & Urb. Dev., *2003 Homeownership Month Archives*, *at* http://www.hud.gov/initiatives/homeownership/archives.cfm (last updated Oct. 14, 2003).

477. HUD, BLUEPRINT FOR THE AMERICAN DREAM, *supra* note 18, at 2-3.

478. *See, e.g.*, *supra* notes 368-416 and accompanying text (discussing HOPE VI).

479. *See supra* notes 346-367 and accompanying text (discussing Mixed Finance Development).

480. *See, e.g.*, *supra* notes 368-416 and accompanying text (discussing HOPE VI).

ventional financing, including Low Income Housing Tax Credits, HOME Partnership funds, and Section 8 rent subsidies.

One program that provides down payment assistance is the Individual Development Account, which permits people to save for a down payment on a house, sometimes with matching funds provided by the state or federal government.[481] In Fiscal Year 2003, $74.5 million in HOME funds was appropriated for down payment assistance.[482]

The Administration has proposed a Single Family Low Income Housing Tax Credit Program as part of its budget for 2004.[483] This proposed legislation would operate in a very similar manner to the LIHTC but would be available for development of homes for qualified home buyers, and not just renters.[484]

VI. RECOMMENDATION AND CONCLUSION

There is no single solution to the housing problems that we face. Rental housing programs have fallen far short of our goals, and homeownership will not work for everyone. The answer, in my view, is to take a comprehensive approach that both recognizes the interests of all the participants in the process and focuses on improving the situation of low income residents over the long term.

Here, I return to the story of my father with which I introduced this article. The power of his story is that he has achieved a level of economic security that ought to be attainable for every American. Not everyone will be able to retire at the age of fifty-five as he did,

481. Individual Development Accounts ("IDAs") were proposed in 1991 as a way to reform welfare policy to permit welfare recipients to accumulate assets. MICHAEL SHERRADEN, ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY 23 (1991).

482. *See* 24 C.F.R. § 92.602. The American Dream Downpayment Initiative ("ADDI") was signed into law on Dec. 16, 2003. ADDI authorizes up to $200 million annually for fiscal years 2004-07 for downpayment assistance under the HOME program.

483. BUSH, *supra* note 367, at 7 (highlighting White House support for the Single Family Low Income Housing Tax Credit and other home ownership initiatives). The Community Development Tax Credit Act was introduced by Senator Kerry in April 2003. *See* Senator John Kerry, Statement Upon the Introduction of S 875, the Community Development Homeownership Tax Credit Act (Apr. 10, 2003), *available at* http://www.novoco.com/Legislations/Policy_Correspondence/Kerry_Statement_S875.pdf.

484. Stockton Williams, Vice President of Pub. Pol'y, Enterprise Found., Testimony before the U.S. Dep't of Hous. & Urb. Dev., Subcomm. on Veterans Affairs, Hous. & Urb. Dev., and the Indep. Agencies Comm. on Appropriations (Apr. 4, 2003), *available at* http://www.enterprisefoundation.org/resources/policyinfo/federal/federalpublicpolicy/testimony/Testimony_2004budget.htm.

but a lot more of us could be homeowners and could turn that asset into a basis of social and financial security. My father's values include providing a stable home for his family, regular saving, eliminating credit card debt, and maintaining a good credit rating. To the extent that values like these can become the values of our low income citizens, it may be possible to increase their families' level of financial security. Policies that promote and support increased levels of homeownership could also help to accomplish that goal.

Because not all of us have the financial skills to live on a budget or save money or plan for the future, many low income families may not succeed as homeowners. Therefore, decent, affordable rental housing must be made available for those low income families who are not at the stage where homeownership will work for them.[485] The goal for those families should also be increased levels of economic security, combined with financial planning and training for the next generation.

The search for an affordable housing policy continues. We have a national commitment to provide decent homes for all;[486] we have some rental programs that work reasonably well;[487] and we have promises and strong efforts by the Administration to create more homeownership.[488] However, the wide array of programs and policies that are parts of our housing policy in no way resemble a coordinated, single-minded effort. For example, HUD's role is unclear, as it has suffered from scandals in the past and it continues to suffer from serious management challenges.[489]

It is very interesting that the affordable housing industry has become a group of professional people who are putting together deals worth millions of dollars, while the communities they serve continue to suffer. Many of the people they are building the housing for are out of work or are single mothers with small children

485. *See supra* note 93 and accompanying text (describing the adverse effect that promotion of low income homeownership can have on renters who are not able to close the affordability gap).

486. *See* Vice Pres. Al Gore, *A National Commitment to Community Development*, SHELTERFORCE ONLINE, Iss. 74 (Mar./Apr. 1994), *at* http://www.nhi.org/online/issues/74/go re.html.

487. *See, e.g.*, *supra* note 140 and accompanying text (discussing the success of the Section 8 rental program).

488. *See* BUSH, *supra* note 367, at 1-2.

489. *See supra* notes 189-197 and accompanying text (discussing the management challenges posed by the many social and economic needs of the low income community); *see also* Michael Winerip, *H.U.D. Scandal's Lesson: It's a Long Road From Revelation to Resolution*, N.Y. TIMES, July 22, 1990, § 4, at 20 (discussing the aftermath of the HUD scandals in the late 1980s).

who are being required to take minimum-wage jobs.[490] Their children are in schools that are not training them to be productive citizens.[491] Their communities receive inadequate public services like garbage collection, street maintenance, and fire and police protection. In the mainstream world it appears that crime rates are down, and the war on drugs is being won. Low income communities are experiencing something quite different.

Despite recent expressed interest in the Bush administration in increasing low income homeownership,[492] movement toward homeownership for low income people has been slow, because it is so difficult to build housing for low income people at costs that make it affordable to these persons.[493] However, there have been some government subsidized efforts[494] and some efforts by nonprofit housing developers[495] which are very interesting. Further study is needed to explore the economic impact and changes in world view that homeownership creates for poor people.

There are some successes to point to, particularly among nonprofit housing developers, and community organizations.[496] If we are to address the crisis in affordable housing we will need to make a far greater commitment to providing a full range of social and supportive services than we have been willing to so far. It is clear that in a world where low income families are being required to become self-sufficient, we must provide far more than housing to deal with the affordable housing problem.[497]

Economic security, and not only decent housing, should be our goal. Homeownership is available in this country to a far greater percentage of our population than anywhere else in the world. We need to reach a point where more people have access to homeown-

490. *See* Communications Workers of Am., *Living Wage Campaign: Every Worker Deserves a Home* (July 2003), *at* http://www.cwa-union.org/news/CWANewsDisplay.asp?ID=1268.

491. *See* Dep't of Education, *Impact of Inadequate School Facilities on Student Learning*, *at* http://www.ed.gov/offices/OESE/archives/inits/construction/impact2.html (last updated Apr. 3, 2000).

492. HUD, BLUEPRINT FOR THE AMERICAN DREAM, *supra* note 18, at 4.

493. Rob Portman, *Affordable Housing a Cornerstone of Healthy Neighborhoods*, NATION'S BUILDING NEWS ONLINE, July 28, 2003, *at* http://www.nbnnews.co m/NBN/issue s/2003-07-28/Housing+Forum/2.html.

494. *See id.*

495. ENTERPRISE FOUNDATION, COMMUNITY SOLUTIONS: NONPROFIT HOUSING DEVELOPERS' SUCCESSFUL USE OF FEDERAL PROGRAMS, (June 1995), *available at* http://www.enterprisefoundation.org/policy/monographs/pubpol3.asp.

496. *See id.*

497. *See supra* notes 189-197.

ership. We need to develop ways to use homeownership and our housing policy in general to promote economic security.

VII. APPENDIX OF AFFORDABLE HOUSING STATUTES

Year Enacted	Popular Name Statutory Citation	Brief Description
1937	Wagner-Steagall Housing Act United States Housing Act of 1937, Ch. 896, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. §§ 1437 *et seq.* (2000)).	This basic public housing program was enacted to permit local public housing agencies to construct and manage rental housing for low-income people.
1949	Housing Act of 1949 United States Housing Act of 1949, Ch. 338, 63 Stat. 413 (1949) (codified as amended in various sections of 42 U.S.C. §§ 1441 *et seq.* (2000)).	This Act provided for urban redevelopment through slum clearance and new public housing construction. It is frequently cited for stating the "goal of a decent home and a suitable living environment for every American family."
1961	Section 221(d)(3) & Section 221(d)(5) Programs United States Housing Act of 1961, Pub. L. No. 87-70, § 101, 75 Stat. 149 (1961) (codified as amended at 12 U.S.C. §§ 1715l, 1715n, 1720 (2000)).	This was a mortgage insurance program analogous to the FHA, which provided below market interest rates and created a secondary mortgage market for owners of moderate income properties (d)(3) and low income rental properties (d)(5).
1965	Department of Housing and Urban Development Act Department of Housing and Urban Development Act of 1965, Pub. L. No. 89-174, § 3, 79 Stat. 667 (1965) (codified at 42 U.S.C. § 3531 (2000)).	This Act created HUD as a cabinet level department.
1968	The 235 Program Department of Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 101(a), 82 Stat. 477 (1968) (codified at 12 U.S.C. § 1715z (2000)).	This program established a low down-payment, below market interest rate homeownership program for moderate income families.
1968	The 236 Program Department of Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201, 82 Stat. 476, 498 (1968) (codified at 12 U.S.C. § 1715z-1 (2000)).	This was a mortgage insurance program designed to promote the construction of low income rental housing by reducing mortgage interest payments for the owners of projects.
1968	Fair Housing Act of 1968 Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (1968) (codified at 42 U.S.C. §§ 3601-19 (2000)).	This act prohibits discrimination in the housing market based on race, color, religion or national origin. It was enacted to bar all racial discrimination, private as well as public, in the sale and rental of real property.

1974	Community Development Block Grant ("CDBG") Program Department of Housing and Community Development Act of 1974, Pub. L. 93-383, § 101, 88 Stat. 633 (1974) (codified as 42 U.S.C. §§ 5301 *et seq.* (2000)).	This program passed funding through HUD to local municipalities, enabling them to develop revitalization plans which were aligned with local initiatives.
1974	Section 8 Project Based Assistance Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. II, §§ 201-13, 88 Stat. 633 (1974) (codified as amended at 42 U.S.C. § 1437f (2000)). The Section 8 voucher program is codified at 42 U.S.C. §1437f(o).	This program provides rental assistance to families in newly constructed or existing housing where at least 30% of the units are rented to very low income families. Families pay 30% of their incomes as rent, and the owner receives the difference between that amount and the fair market rent as a rent subsidy.
1986	The Low Income Housing Tax Credit ("LIHTC") Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 42 (2000)). Permanently funded in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified at 26 U.S.C. §§ 1391-97D (2000)) (amended by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 951-952, 111 Stat. 788, 885 (1997)).	This program intended to stimulate investment in low income housing development by providing a tax credit for eligible housing developments to the developers.
1987	Section 8 Voucher Program Department of Housing and Community Development Act of 1987, Pub. L. 96-399, 101 Stat. 1815 (1988) (codified as amended at 42 U.S.C. § 1437f(o) (2000)).	This program provides "tenant-based assistance," which means portable rental assistance where the eligible family can select suitable housing and move to other suitable housing using the same voucher.
1990	Cranston-Gonzalez National Affordable Housing Act, or Home Investment Partnerships Act ("HOME") Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified as amended in various sections of the U.S.C.). The HOME Program is codified as amended at tit. II, 42 U.S.C. §§ 3535(d), 12701, 12721 *et seq.* (2000).	Under the HOME Program, funds for affordable rental and homeownership housing development are distributed to local governments as CDBG funds. A hallmark of the program was the creation of public/private partnerships between local governments and for-profit and non-profit agencies.

1993	HOPE VI Department of Veterans Affairs and Hous. & Urb. Dev., and Independent Agencies Appropriations Act of 1993, Pub. L. 102-389, tit. II, 106 Stat. 1571, 1579-81 (1992) (codified as amended in 42 U.S.C. § 1437l (1996) (repealed 1998)). HOPE VI was funded in 1999 via the Quality Housing and Work Responsibility Act of 1998 ("QHWRA") (described below).	HOPE VI was created by the Department of Veterans Affairs and the Department of Housing and Urban Development. It was originally known as the Urban Revitalization Demonstration Project, and the program was intended to enable local public housing agencies to demolish its deteriorated and expensive-to-maintain housing and to promote homeownership and a move toward self-sufficiency for low income people.
1996	Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") Pub. L. No. 104-93, 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601 *et seq.* (2000)).	This was a major welfare reform law which eliminated an entitlement to public assistance benefits and aimed to move people from welfare to self-sufficiency.
1998	Quality Housing and Work Responsibility Act of 1998 Pub. L. No. 105-276, tit. V, 112 Stat. 2518 (1998) (codified at 42 U.S.C. § 1437f (2000)).	This act consolidated the Section 8 certificate and voucher programs.
1999	HOPE VI Appropriation Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, tit. V, § 535, 112 Stat. 2461, 2518 (2000) (codified at 42 U.S.C. ' 1437v (2000)).	This appropriation provided permanent funding for the HOPE VI program, which began in 1993 as the Urban Revitalization Demonstration Project.