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A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society

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A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society

JAMES A. KUSHNER*

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I. INTRODUCTION: THE FOUR GOALS OF THE FAIR HOUSING ACT

In celebrating and critically analyzing Title VIII,¹ it is essential to assess the goals of the Fair Housing Act. That Act has, I believe, four distinct goals. First, Title VIII is designed to provide a remedy for acts of housing discrimination. Second, through enforcement, Title VIII aims to deter discrimination, and reduce the incidence of housing bias. Third, Title VIII seeks to promote racial integration. Finally, the Fair Housing Act seeks a just society. In discussing the image of this just society, I make observations based on my scholarship interest in comparative urban planning, observations that are a new and unique contribution to the fair housing literature.

* Professor of Law, Southwestern University School of Law. Professor Kushner is the author of *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* (2d ed. 1995 & West Supp. 1998). This article is based on the author's speeches delivered at the University of Miami Law Review conference entitled "Fair Housing 1968-1998: Promises Kept, Promises Broken," held February 6 and 7, 1998 at the University of Miami School of Law in Coral Gables, Florida, celebrating the thirtieth anniversary of the Fair Housing Act and the tenth anniversary of the Fair Housing Amendments Act. The author's discussion of Hellersdorf in Berlin, Germany is the result of his participation as part of a delegation of public officials, academics, planners, architects, developers, and capital investors, sponsored and financially supported by the Property Forum at the University of Southern California. The author is especially indebted to the work of the forum's director, George Lefcoe, the Florine & Ervin Yoder Professor of Real Estate Law at the Southern California Law Center, who was magnificently instrumental in setting up seminars, tours and meetings with government officials, architects, planners, and developers in Berlin in the summers of 1990 and 1997. Professor Lefcoe also serves as Chair of the Graduate Program in Real Property Development at the University of Miami School of Law. The author is also indebted to Dietmar Otremba, the forward-thinking private sector developer of Hellersdorf, and our most generous host during two visits to Berlin. The author wishes to acknowledge the thoughtful comments on a draft of the article provided by Jacqueline F. Kushner, George Lefcoe, Bianca Estela Putters, and Florence Wagman Roisman. The author also wishes to acknowledge the research grant provided by the Southwestern University School of Law and support for this research provided by its dean, Leigh H. Taylor.

1. 42 U.S.C. §§ 3601-3619, 3631 (1994 & Supp. I 1995).

II. GOAL ONE: AN INDIVIDUALISTIC REMEDY FOR HOUSING DISCRIMINATION

The success of Title VIII in attaining its first goal, the provision of a remedy for acts of discrimination, must be celebrated. Title VIII has been enormously successful in establishing a vehicle for victims to challenge discriminatory acts and receive compensation for the injuries of housing bias. I have previously and exhaustively described the obligations, requirements, and enforcement mechanisms established under the fair housing laws,² and, specifically, the effectiveness of enhanced protection provided under the Fair Housing Amendments Act of 1988.³ Numerous factors have combined to convert Title VIII into a formidable civil rights weapon, including minimal obligations for the plaintiff to establish standing and to make out a prima facie case of discrimination, an expanded statute of limitations, elimination of restrictions on damages and attorney's fees, a greatly improved administrative enforcement alternative, and expanded Justice Department litigation presence.

It must be understood that Title VIII is primarily intended to benefit individuals. Moreover, few victims of housing discrimination are ever aware of their victimization; those few who are suspicious, or believe they are victims, are typically unaware of how to seek protection under the law. Most victims are unaware that laws exist to protect them; most are under intense pressure, as stress from the search for new shelter or for financing is added to family and work obligations. The additional burden of seeking counsel or administrative justice adds further pressure to the financial and emotional pain generated by a denial of civil rights. In most communities, for the minuscule few who are willing to seek a legal remedy for denial of their rights, there are few or no attorneys either experienced in fair housing or willing to handle such cases. Too often, ineffective counseling from community agencies and sporadic success in pursuing claims through state or local fair housing enforcement agencies make enforcement of rights under Title VIII elusive. While much more could be done to train attorneys, monitor community fair housing groups and enforcement agencies, and publicize the availability of protection and obligations under the law, Title VIII is probably the best of all of the civil rights enactments in addressing the concerns and injuries of individual victims, particularly where competent private or Justice Department attorneys are available to enforce their rights.

2. See JAMES A. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* (2d ed. 1995 & West Supp. 1998).

3. See James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989).

III. GOAL TWO: HOUSING DISCRIMINATION DETERRENCE

The second goal of Title VIII is to provide a deterrent to discrimination, thereby reducing the incidence of housing bias. Title VIII should be considered with its companion § 1982,⁴ which was given life by the 1968 U.S. Supreme Court ruling in *Jones v. Alfred H. Mayer Co.*,⁵ which held that *all* racial discrimination in property transactions, both private and public, violated the law. Title VIII and § 1982 have deterred a significant number of discriminatory housing practices that were not considered unlawful prior to 1968. Notwithstanding such a positive impact, the existence and enforcement of fair housing laws have not significantly abated an alarming and persistent pattern of discrimination.

In 1979, a national audit funded by the U.S. Department of Housing and Urban Development ("HUD") found that African-Americans seeking rental housing faced a 75% chance of encountering bias when visiting four rental agents, and that an African-American seeking to purchase a home had a 62% likelihood of encountering discrimination when visiting four different sales agents.⁶ The audit disclosed that two million acts of housing discrimination were perpetrated annually.⁷

Ten years later, HUD replicated the national testing of housing markets and discovered the pattern essentially unchanged. African-Americans and Hispanics experienced discrimination in at least half of their encounters with landlords and real estate agents: 56% for African-American renters, 50% for Hispanic renters, 59% for African-American home buyers, and 56% for Hispanic home buyers.⁸

The incidence of housing bias could be significantly reduced through improved and expanded enforcement,⁹ including more testing, better training and funding for fair housing counseling organizations, and establishing more organizations committed to litigating fair housing cases and expanding opportunities for training lawyers in the handling of

4. 42 U.S.C. § 1982 (1994).

5. 392 U.S. 409 (1968).

6. See ROBERT E. WIENK ET AL., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS (1979) (reporting rental bias by region: 59% in the Northeast, 80% in the North Central states, 73% in the South, and 79% in the West).

7. See *id.* at 64.

8. See MARGERY A. TURNER ET AL. HOUSING DISCRIMINATION STUDY: SYNTHESIS (1991); see also JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995). For additional studies, see sources cited in KUSHNER, *supra* note 2, at § 1.01; Kushner, *supra* note 3, at 1052-60.

9. For a critique of HUD's limited enforcement efforts, see James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUS. POL'Y DEBATE 537 (1992); James A. Kushner, *Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348 (1988).

housing discrimination cases.¹⁰ Additionally, an equally important initiative would be the passage of "sunshine laws," mandating that housing providers regularly report the racial makeup of their applicant and resident populations, as well as the presence of other individuals within the law's protected classifications.

Despite all efforts thus far, national and local housing market studies disclose persistently high levels of bias. While social scientists focus on number crunching, measuring the frequency of discrimination and the levels of integration, explanations for prejudice are largely left to conjecture.¹¹ Racial discrimination reflects the entrenched geographical separation in living patterns and repeated negative stereotypical images in the popular media, including both crime reporting emphasis and popular dramatic entertainment. These media portray African-Americans as a threat to predominantly white communities, or, at best, as a vastly different culture to which whites are unaccustomed and with which they are ill at ease. In *A Country of Strangers*, David Shipler has captured the declining quality of contact between the races in America.¹²

Lending bias studies present an even more disturbing picture of pervasive discriminatory patterns. The Home Mortgage Disclosure Act of 1975 ("HMDA")¹³ requires loan experience disclosure by census tract. Under the law, lenders are required to collect and submit data on race, gender, and income level of all loan applicants and recipients. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989,¹⁴ which is directed at regulating savings and loan ("S&L") associations following the S&L scandal of the 1980s, expanded the HMDA. The Housing and Community Development Act of 1992¹⁵ mandates public disclosure of the HMDA data.

The latest HMDA data discloses that African-American loan applicants are more than twice as likely as white applicants to be denied a mortgage loan.¹⁶ According to the 1996 HMDA data, based on 114.8 million applications from 9,300 lending institutions, the denial rate for

10. Examples include the John Marshall Law School Fair Housing Legal Support Center and the Fair Housing Clinic of Columbia Law School.

11. *But cf.* YINGER, *supra* note 8.

12. See DAVID K. SHIPLER, *A COUNTRY OF STRANGERS* (1997).

13. 12 U.S.C. §§ 2801-2810 (1994). The law was permanently extended by the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 565(b), 101 Stat. 1815, 1945 (1988), *repealing* 12 U.S.C. § 2811.

14. Pub. L. No. 101-73, § 1211, 103 Stat. 183, 524 (codified as amended at 12 U.S.C. §§ 2802-2804, 2807, 2810 (1994)).

15. Pub. L. No. 102-550, § 932, 106 Stat. 3672, 3889, (codified as amended at 12 U.S.C. § 2803 (1994)). The HMDA requirements and data collection and disclosure obligations are further defined in Regulation C, 12 C.F.R. pt. 203 (1997).

16. See [Current Developments] Fair Hous-Fair Lending (Aspen Law & Business) ¶11.2 (Nov. 1, 1997).

African-Americans was 48.8%, while the denial rate for whites was 24.1%.¹⁷ In 1994, the denial rate for African-Americans increased from 40.5%.¹⁸ By comparison, while the African-American lending rate was up 3.1% in 1996, it was the lowest rate in five years, while the lending rate for whites increased by 8.1%.¹⁹ After studying the HMDA data, the Comptroller of the Currency concluded that racial discrimination in lending persists.²⁰

Although the loan denial rate for African-Americans is rising, earlier HMDA data presents even more disturbing news. The 1991 HMDA data indicated that the African-American loan rejection rate for the highest income level was at 33.9%, as compared with 8.5% for whites.²¹ By comparison, the loan denial rate for African-Americans in the lowest income group was 48.2%, while the denial rate for whites in the lowest income group was 31.5%.²² Thus, whites in the lowest income category experienced a lower loan denial rate than did African-Americans in the highest income category.²³ Thus, Title VIII has simply failed to eliminate or significantly reduce the incidence of housing discrimination.

17. *See id.* The Native American denial rate for the same period was 50.2%, while the rate for Hispanics was 34.4%, and the denial rate for Asians was 13.8%.

18. *See id.* The denial rate for Native Americans was up 9%.

19. *See id.* The lending rate for Hispanics rose during this period 13.4%, loans to Native Americans increased by 11.4%, and loans to Asians increased by 8.2%.

20. *See* [Current Developments] Fair Hous-Fair Lending (Aspen Law & Business) ¶1.4 (Jan. 1, 1998). The Comptroller of the Currency, Eugene Ludvig, after ordering an investigation of the data, announced a 1.5% decline in conventional mortgage loans to African-American borrowers in 1996, but reported a denial rate for African-Americans of more than twice that of whites; Hispanics and Native Americans were rejected at a significantly higher rate, while the Comptroller reported a 9.3% increase in VA and FHA loans to blacks. He concluded that the statistics, were unexplained by regional variations or market dynamics. His economists suggested that the rate was reduced somewhat when the rates were adjusted for the income of applicants and economic inequality generally in the nation. According to the Comptroller, the sub-prime interest rate is increasing and African-Americans are more likely to borrow under that rate, with denial rates three times more than in the non-sub-prime market. According to the Comptroller's economists, low-income applicants are more likely to file multiple applications, and 32.2% of the applications fail to provide racial reporting data, due to the growing number of telephone and on-line applications.

21. *See* Glenn B. Canner & Dolores S. Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RESERVE BULL. 859, 872 at tbl. 6 (1991). Loan rejection rates at the highest income level for Asians was 11.25, while the denial rate for Hispanics was 15.8%, and 12.8% for Native Americans.

22. *See Minorities Continue to Receive Fewer Home Loans, Says Fed*, [Current Developments] 20 Hous. & Dev. Rep. (WGL) 507 (1992). By comparison, the denial rate in the lowest income category was 20.2% for Asians and 37.1% for Hispanics, while the rate in the highest income category was 13.6% for Asians and 19.8% for Hispanics, with similar rates for performance for all groups under conventional and government-backed loans.

23. *See Newspaper Reports High Rejection Rates for Blacks at S&Ls*, 4 [Current Developments] Fair Hous-Fair Lending (P-H) ¶10.4 (1989) (reporting that the rejection rate for high-income blacks exceeded the rate for low-income whites, according to a report of the *Atlanta Journal-Constitution* analyzing ten million loan applications).

In addition to traditional and innovative enforcement techniques,²⁴ significant reduction in the incidence of housing discrimination requires the use of affirmative action strategies. Although politically unpopular²⁵ and rendered constitutionally suspect by a series of judicial rulings,²⁶ affirmative action remains the one strategy that promises to remedy the entrenched scheme of discrimination. Only by assuring a set-aside of dwellings in every project and development can inroads be made in a field where specific victims cannot be identified. In the area of home financing, litigation against lending institutions is complex, expensive, and unlikely to be undertaken except as test case litigation. Victims simply lack access to realistic administrative or judicial relief. Only through mandating set-asides by lenders can efficient relief be provided to remedy the institution-wide bias identified through HMDA.

Despite political and popular opposition and judicial distaste, the Supreme Court has repeatedly endorsed narrowly-tailored temporary affirmative action relief upon a finding of constitutional or civil rights statutory violations.²⁷ In fair housing cases, while courts and administrative agencies have awarded ever-increasing damages and attorney's fees, they have almost universally missed opportunities to achieve relief for other than specific named claimants. Administrative law judges in HUD proceedings are authorized to enter appropriate injunctive orders,²⁸ and federal courts possess broad equitable authority in pattern and practice cases brought by the Justice Department.²⁹ In private litigation,

24. See generally Kushner, *supra* note 3.

25. See, e.g., *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir.) (sustaining Proposition 209, the California Civil Rights Initiative, which was passed by the electorate and designed to prohibit preferential treatment and affirmative action of the basis of race and gender, *cert. denied*, 118 S. Ct. 397 (1997)). The Ninth Circuit, noting that together women and racial minorities constitute a majority, questioned whether a majority could be denied equal protection by a democratically-enacted measure. See *id.* at 704-05.

26. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (remanding with directions to the lower courts to apply a strict scrutiny analysis to determine the constitutionality of a federal program providing a 10% racial and gender contracting preference set-aside); see also *Shaw v. Hunt*, 517 U.S. 899 (1996) (invalidating a state congressional redistricting scheme which segregated voters by race, finding insufficient the state's asserted "compelling interests" ameliorating past discrimination and complying with Voting Rights Act); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating a city set-aside program requiring prime contractors to subcontract at least 30% of the dollar amount of city construction contracts to minority business enterprises); *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988) (invalidating under the Fair Housing Act integration maintenance policy by private landlords designed to achieve and maintain racial integration at an inner-city subsidized housing community). See generally JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION* (1988 & Supp. 1998).

27. See *Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 149; *United States v. Paradise*, 480 U.S. 149 (1987) (upholding an employment discrimination remedial promotion quota).

28. See 42 U.S.C. § 3612(g) (3) (1994).

29. See *id.* § 3614(d)(1)(A).

courts also possess broad injunctive powers,³⁰ including the authority to remedy lingering vestiges of discrimination.³¹ Where racial discrimination has been shown, courts have not only the power, but also the duty to render decrees which could eliminate the discriminatory effects of the past, as well as bar similar discrimination in the future.³² Despite the Supreme Court's repeated endorsement of albeit narrowly-tailored temporary affirmative action relief, such relief in fair housing cases is infrequently granted.

In every fair housing case, decrees and settlements or conciliation should include affirmative action set-aside components along with damages, attorney's fees, and other relief as the circumstances justify.

IV. GOAL THREE: THE PROMOTION OF RACIALLY-INTEGRATED LIVING PATTERNS

The third goal of Title VIII is to promote racially-integrated living patterns. It is this goal that the Fair Housing Act has most dramatically failed to further. I previously described how segregated our nation is,³³ and how it came to be segregated.³⁴ When considering what went wrong on the road to an integrated society, we should have been warned when Title VIII enforcement and administration were assigned to HUD. HUD and its predecessor agencies are most responsible for unleashing the major forces that led to today's racially separate societies.

HUD has an unbroken record of establishing all-white suburbs around lower-income minority central cities. It accomplished this feat through the use of the Federal Housing Administration (the "FHA"), by conditioning financing and mortgage insurance—a precondition for the post-World War II explosion of suburban subdivisions—on developers' establishing racially-restrictive covenants or imposing equitable servitudes on subdivision plats.³⁵ Even more well-known is HUD's role in locating sites for virtually all public housing in concentrated low-income

30. See *id.* § 3613(c)(1).

31. See *Louisiana v. United States*, 380 U.S. 145, 154-56 (1965); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

32. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969).

33. See KUSHNER, *supra* note 2; see also DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); Kushner, *supra* note 3, at 1061-68.

34. See James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 *How. L.J.* 547 (1979), reprinted in JAMES A. KUSHNER, *APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES* (1980).

35. See Kushner, *supra* note 2, at 16-30.

African-American central city communities.³⁶ In addition, the FHA supervised the approval of sites for subsidized housing designed for low-to-moderate income families in the same, or surrounding, neighborhoods or in declining modest-income neighborhoods. This hastened the flight of white residents to the suburbs and led to the expansion of poverty and the concentration of the poor within the ever-expanding central cities. HUD is also famous for the "Negro removal" of its urban renewal programs. These programs facilitated inner-city white migration to the suburbs, destroyed many older neighborhoods and their housing stock, and displaced African-Americans in a pattern of racial concentration within the same neighborhoods where public housing and subsidized housing projects were targeted.³⁷

Along with the flight of whites and the middle class to the suburbs and beyond, businesses relocated; stores, restaurants, theaters, offices, and the economic base of the community shifted beyond city borders. The central city school districts could no longer afford quality education; the city became incapable of delivering adequate city services or safe streets. Douglas Massey and Nancy Denton measured and eloquently assessed the resulting hypersegregation of cities containing a concentration of the underclass.³⁸

While racial separation is the dirty little secret that America is ashamed to acknowledge,³⁹ the impact of this segregation has been devastating to the poor inhabiting the city and has destabilized the city itself.⁴⁰ Our transportation and housing patterns require private automobiles to get to employment in the outer suburbs, the edge cities of the nation.⁴¹ As welfare is cut and job access evaporates, less money is

36. *See id.*

37. *See id.* at 23-25; *see also* Roberta Achtenberg, *Keynote Address to Symposium, Shaping American Communities: Segregation, Housing & the Urban Poor*, 143 U. PA. L. REV. 1191, 1193-94 (1995) (acknowledging federal responsibility for racial segregation in government-related housing); Florence Wagman Roisman, *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, 1353-54, 1356-58 (1995).

38. *See* MASSEY & DENTON, *supra* note 33.

39. Like Turkey's failure to teach its youth about its Armenian holocaust, or East Germany's history lessons that it was the "bad capitalist Germans" of West Germany who performed the atrocities of World War II's holocaust, American schools generally fail to teach students about the history of slavery and its legacy in contemporary race relations. Any voices addressing these issues are marginalized by allegations that it is ancient history no longer practiced by American society, that the fact of slavery is used solely to rationalize poor performance by minorities, through a strategy of seeking preferences and blaming others rather than taking advantage of America's opportunities.

40. *See* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996); James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209 (1982).

41. *See* JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991).

available for rent, and landlords watch their properties deteriorate as maintenance and operation costs increase. Reduced property values drive the cycle of further reduction of essential tax revenues.

Title VIII, which has spawned a number of interesting programs to attract small amounts of affordable housing to the suburbs, has unfortunately played a significant role in the destabilization of America's cities. Title VIII enabled the growing successful African-American middle class to escape the declining city, taking with them capital, jobs, role models, and leadership, to concentrated older suburbs that have resegregated as minority communities, just outside the metropolis.

V. GOAL FOUR: THE JUST SOCIETY

Finally, the Fair Housing Act aims to create a more just society. This fourth goal may be reflected in the individualistic quality of Title VIII, in that under and through enforcement of the law, one may live wherever one chooses, regardless of skin color or other protected status. If theoretical liberty and liberty under law is the goal of a just society, the Fair Housing Act is a rousing success.

America, however, is not a just society. If it were, both rich and poor would enjoy security and reasonable access to opportunity. The urban poor are a population disproportionately composed of people of color. They are relegated to communities without the tax base to provide safe streets, quality education, or even a semblance of job training and apprenticeship, which could lead to a decent standard of living through secure employment. This is simply unacceptable in the land of a world-class economic and political society. The pattern of community development based upon low-density suburban homes, requiring automobiles for access to employment, is inconsistent with the notion of a just society, if an increasingly significant portion of the population is priced out of that access.⁴²

The pattern of development in America's cities also fails to serve the nation's middle class.⁴³ The suburbs were designed around a \$2,000 automobile and a house selling for under \$10,000. In such a society, a decent wage was earned by the head of the household, while a homemaker was available to supervise and chauffeur children, maintain the home, and serve the family's quest for the pastoral quiet security of the country.

This contrasts sharply with the edge-city village of the twenty-first

42. See Yale Rabin, *Highways as a Barrier to Equal Access*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (1973).

43. See James A. Kushner, *Growth Management and the City*, 12 YALE L. & POL'Y REV. 68 (1994); see also ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994).

century. Today, the American suburban family requires a minimum of two cars requiring costly maintenance, insurance, and operation. Where families have two heads of household, both are likely to be employed, leaving children stranded in a subdivision far from community institutions and without supervision. The purchase and maintenance of a home is both more costly and time-consuming than desired by modern suburban dwellers. Moreover, automobile use makes living in the suburbs more dangerous for its youth. In fact, the risk of early death is greater in the suburbs than in the central city.⁴⁴ Not only is it necessary to rethink the fair housing credo, it is essential to reexamine how we build and rebuild communities. In contrast, other western industrialized nations go about community development and the evolved thinking of leading planners and architects focus the planning ideology on a plane that is converging with the four goals of fair housing.⁴⁵

Fair housing can be viewed as a component of what is generally referred to as "sustainable communities."⁴⁶ To environmentalists, the term sustainable communities refers to environmental policies of nondegradation and to economic and development decisions that are designed to renew resources and improve air and water quality.⁴⁷ On the regional level, sustainable development calls for transit-oriented development patterns, providing for increased trips by pedestrians, bicyclists and transit users, and reduced automobile use. Coincidentally, this is also what many home seekers desire. Sustainable communities envision being able to walk to a village center main street for shopping, along and through attractive parks and pedestrian walkways with bicycle lanes. Ideally, a community should be linked by transit to other transit villages, some of which are higher density with mixed uses of shops, offices, and housing, with vibrant street and cafe life, while others are centers of

44. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961); James Gerstenzang, *Cars Make Suburbs Riskier Than Cities, Study Says*, L.A. TIMES, Apr. 15, 1996, at A1 (Valley ed.) (reporting that more deaths and injuries resulted from cars in suburbs than from guns and drugs in urban settings; in 1995 in the Pacific Northwest, urban deaths occurred at a rate of 16 per 1,000 residents, while the rate was 19.2 in the suburbs; although crime death rates were 10 per 1,000 in cities and only 1 of 1,000 in suburbs, driving death rates were 18.2 per 1,000 in suburbs as compared to 6 of 1,000 in urban settings); Michael E. Lewyn, *Are Spread Out Cities Really Safer? (Or, is Atlanta Safer than New York?)*, 41 CLEV. ST. L. REV. 279 (1993).

45. See James A. Kushner, *Growth for the Twenty-First Century: Tales from Bavaria and the Vienna Woods: Comparative Images of Urban Planning in Munich, Salzburg, Vienna, and the United States*, 29 URB. LAW. 911 (1997), reprinted as modified, 6 S. CAL. INTERDISC. L.J. 89 (1997); James A. Kushner, *A Tale of Three Cities: Land Development and Planning for Growth in Stockholm, Berlin, and Los Angeles*, 25 URB. LAW. 197 (1993).

46. See SIM VAN DER RYN & PETER CALTHORPE, *SUSTAINABLE COMMUNITIES* (1986).

47. See, e.g., PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, *SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE* (1996); John Dembach, *Dialogue—U.S. Adherence to its Agenda 21 Commitments: A Five Year Review*, 27 ENVTL. L. REP. 10504 (1997).

manufacturing and commerce.⁴⁸

Within the neighborhood, sustainable development calls for local biological water and sewer treatment as an alternative to large expensive treatment plants and delivery systems with all-too-frequent environmentally damaging dumping. It calls for community parks which allow more climate-friendly landscaping, recycling of water, and less maintenance, water usage, and polluting surface water runoff, as compared to broad private lawns.

At the individual home and building level, sustainable communities reflects green architecture. Green architecture looks to climate-responsive design, using natural ventilation and natural light, as well as solar power for both heating and electricity generation. Green-architecture-designed homes and offices are both efficient and aesthetically pleasing, utilizing materials that provide longer life and less damage to the environment.

A further element of sustainable communities and green planning is that a stable city requires that each of its neighborhoods be sustainable and liveable.

The community of Hellersdorf in Berlin, Germany presents an interesting illustration of a sustainable community at the neighborhood level. Hellersdorf was a socialist suburban village of 130,000 on the northern political boundary of the city of Berlin within the former eastern sector of East Germany. Hellersdorf was not a pretty village, although it was a transit village, lying at the end of an S-Bahn, or surface train line. There was a complete lack of color and foliage in a village of uniformly-drab concrete apartment blocks, each building having at least one flat windowless wall. Hellersdorf had no city services, no telephones, and the apartment units were, like the whole of East Germany, deteriorating and in need of major rehabilitation. A pedestrian-friendly village center was non-existent; by American standards, Hellersdorf lacked even a decent restaurant.

When the Berlin Wall came down in 1989 and millions of East Germans migrated to the West in search of better housing and jobs, a third of Hellersdorf's units were vacated in the exodus. Undoubtedly, if Hellersdorf were located in an American city, it would have become a slum and the market would have awaited its final decline when a developer would purchase the land at low cost, bulldoze the structures, and perhaps redevelop the community for upper-income housing.

Despite the fact that Berlin was greatly overextended in developing

48. See MICHAEL BERNICK & ROBERT CERVERO, *TRANSIT VILLAGES IN THE 21ST CENTURY* (1997); PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* (1993); DOWNS, *supra* note 43.

its infrastructure to accommodate the relocation of the German capitol from Bonn following the reunification of Germany, and despite a high unemployment rate and a limited municipal budget, the city never hesitated in acting to stabilize one of its worst neighborhoods. The city planted 15,000 trees, modified building facades to introduce variation and color, and brought in top mural artists to paint attractive varied mural designs on each building. In partnership with a large developer, Berlin rehabilitated the 130,000 housing units and commenced a program to privatize one-quarter of the public housing, offering subsidies to purchasing tenants. The private developer also undertook a massive commercial mixed-use project to build a multi-screen entertainment complex with offices, shops, and restaurants around and over the S-Bahn line.

The Hellersdorf experience demonstrates that, through mixing income groups within public housing, it is possible to bring about the de-stigmatization of neighborhoods. Today, Hellersdorf has a 100% occupancy rate with a waiting list, and each building has families in apartments facing an inner courtyard of new landscaping and modern playground and recreation facilities. Each building has a distinctive and attractive central courtyard. Thus, Hellersdorf has been transformed into a sustainable transit village. Berlin is now more stable and presents an attractive site for private investment, secure that neighborhoods will not be abandoned or investment dishonored.

By comparison, in the last decade, Los Angeles has spent billions of dollars on expensive transit improvements in subways, guideway trams, fixed-rail trolleys, and light-rail trains running on traditional rail corridors. Of nearly 200 transit stops, not one has been replanned as a transit village with shops, restaurants, housing, parks, offices, and pedestrian zones.⁴⁹ Every light-rail transit stop is in a stark industrial district with a parking lot for transit users to switch from train to car for the final drive to a typically suburban single-family subdivision.

It is time that federal transit subsidies be conditioned on integrated land-use replanning around transit stops. A comprehensive plan amendment should include decisions on which stops should be high-density, designed around housing and commercial activity. Other stops should be set aside for lower density around new-urbanism-designed communities with single-family homes on small lots with front porches arranged

49. See Marlon Boarnet & Randall Crane, *L.A. Story: A Reality Check for Transit-Based Housing*, 63 J. AM. PLAN. ASS'N 189 (1997) (explaining the lack of transit villages in the system of 232 existing and proposed Southern California rail transit stations as the result of pressure on local government to generate sales and business taxes rather than property taxes, and to use transit primarily for economic development goals calling for the retention of industrial land uses).

around a New-England-style village town center.⁵⁰ Other stops should emphasize mixed-use industrial employment centers.

For areas not served by fixed-rail transit, transit villages can be planned around quality express bus service that would provide superior service, as compared to lower-density areas that might be served by slower local buses or jitneys. In the inner city, transit villages could be linked with empowerment zones⁵¹ to provide industrial centers, and mixed-use neighborhoods of varying densities, affording vibrant community centers containing restaurants, cafes, stores, entertainment, and housing. The time has come to abandon policies of triage, where neighborhoods containing concentrations of the poor are ignored in favor of more affluent communities.⁵²

Additional funding mechanisms available to most communities include redevelopment programs to assemble land,⁵³ and financing tech-

50. See MICHAEL N. CORBETT, *A BETTER PLACE TO LIVE: NEW DESIGNS FOR TOMORROW'S COMMUNITIES* 32-37 (1981); PETER KATZ, *THE NEW URBANISM: TOWARDS AN ARCHITECTURE OF COMMUNITY* (1994).

51. The empowerment or enterprise zone program is a program to encourage economic development and investment by cutting taxes within a zone and providing subsidies to attract investment. See Otto J. Hetzel, *Some Historical Lessons for Implementing the Clinton Administration's Empowerment Zones and Enterprise Communities Program: Experiences from the Model Cities Program*, 26 *URB. LAW.* 63, 67 (1994) (Small Business Investment Corporation owners allowed tax break on capital gains; tax incentives of \$3,000 per employee for training and \$20,000 total equipment tax credits; possible social service block grants to provide up to \$100 million in community services for each zone, and financing). The four main criteria for judging the applications for grants (strategic plans) are Economic Opportunity, Sustainable Community Development, Community-Based Partnerships, and a Strategic Vision for Change. Economic Opportunity includes "creating jobs within the community, attracting private investment, and expanding access for residents to jobs throughout the region, so residents can become self sufficient." *Id.* at 71 n.17. Sustainable Community Development requires a comprehensive strategy incorporating physical development, such as "safe streets, clean air and water, lifelong learning and a commitment to personal, family and civic responsibility." *Id.* at 71. The Strategic Vision for Change is a long-term goal for the community's future which builds on strengths "and coordinates a response to the needs of the community by integrating economic, physical, human, and other strategies." *Id.*; see also Jason DeParle, *Clinton Proposes Assistance to Troubled Neighborhoods*, *N.Y. TIMES*, May 5, 1993, at B9 (Los Angeles ed.) describing the Clinton Administration's emphasis on "empowerment zones" to attract economic development and job creation, yet without sufficient tax incentives to attract businesses); Mildred Wigfall Robinson, *Empowerment Zones and Enterprise Communities Under the Omnibus Budget and Reconciliation Act of 1993: A Promising Concept with Some Modifications*, 11 *J.L. & POL.* 345 (1995). The Omnibus Budget Reconciliation Act of 1993 authorizes the creation of "empowerment zones" and "enterprise communities." P.L. No. 103-66, § 13301, 107 Stat. 312, 543-48; see also Ellen P. Aprill, *Caution: Enterprise Zones*, 66 *S. CAL. L. REV.* 1341 (1993).

52. See Kushner, *supra* note 40, at 222; see also William C. Baer, *On the Death of Cities*, 45 *PUB. INTEREST* 3, 15-17 (1976), reprinted in part in ROGER MONTGOMERY & DANIEL R. MANDELKER, *HOUSING IN AMERICA* 338 (2d ed. 1979).

53. See JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* § 6.07 (1991 & Supp. 1998).

niques such as tax-increment financed redevelopment⁵⁴ that both subsidize the redevelopment process and capture the enhanced tax revenues. These techniques result in increased property values following the redevelopment. The tax increment would allow financing of neighborhood amenities and provide subsidies for generating affordable housing. In addition, impact fees imposed on unsubsidized housing and non-empowerment-zone commercial, industrial, and residential development may be used to fund additional affordable housing that can be integrated with moderate-income housing to avoid restigmatization and resegregation of transit village development.⁵⁵ Additionally, such fees may be used to fund job training programs.⁵⁶ Congress and local government could also direct community development block grant funding toward transit villages.⁵⁷

In Los Angeles, the Red, Blue, and Green line subway, trolley, and guideway systems, all have stops in lower-income minority communities. With the city's recent empowerment zone approval, those stops would be interesting sites for transit villages. Other nodes within African-American and Latino neighborhoods could be designated as empowerment zone transit villages, served by high-quality express buses and linked to employment, entertainment, commercial, and housing centers. A transit village redevelopment strategy would be further advanced if state and local governments would cooperate in restricting the continued development of inefficient and hyper-subsidized conversion of non-urbanized land to sprawling single-family traditional communities,⁵⁸ instead targeting infrastructure subsidies and programs such as Low Income Housing Tax Credit allocations,⁵⁹ to transit village zones. Just as state and federal legislation should condition infrastructure and transit subsidies on planning that integrates land use and transit, communities should be obligated to establish urban growth boundaries⁶⁰ that could restrict sprawl and encourage economic development within empowerment and transit village zones.

Richard Sander's analysis of census data reports that residential

54. See *id.* § 6.07(1).

55. See *id.* § 6.03(6)(a), (b).

56. See Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 536 (1988) (describing Boston ordinance assessing fees of \$1 per square foot for footage in excess of 100,000 square feet, to be used for job training).

57. See 42 U.S.C. §§ 5301-5317 (1994); CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT 343-76 (2d ed. 1989); KUSHNER, *supra* note 2, at 530-66.

58. See KUSHNER, *supra* note 53, ch. 2, § 5.01[5] (describing growth management techniques including urban growth boundaries).

59. See 26 U.S.C. § 42 (1994) (providing subsidy benefit to generate affordable housing in 20% of project units).

60. See KUSHNER, *supra* note 53, § 5.01(5).

communities that enjoyed the greatest decline in racial segregation were those that had the largest amount of new housing development. Conversely, cities with a stagnant housing market experienced an entrenched pattern of racial segregation.⁶¹ Launching an extensive program of newly constructed villages around transit would create an opportunity under the Fair Housing Act for people of all colors and ethnicities to have some degree of choice in the type of communities in which they would reside. Such a redesigned community development pattern would offer extraordinary opportunity for increased integration, reduced automobile use and dependency, enhanced employment access, the possibility of reconstruction of the city's tax base, and a realistic hope of extending sustainable communities throughout the region.

The convergence of ecological theory and notions of justice with policies for economic and community development strikes a popular chord as we enter the twenty-first century and points towards a new fair housing credo.⁶²

61. See Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. ____ (1998); see also Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23 (1994).

62. See CHARLENE SPRETNAK, *THE RESURGENCE OF THE REAL: BODY, NATURE AND PLACE IN A HYPERMODERN WORLD* (1997).