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Beyond Homelessness: An Entitlement to Housing

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I. INTRODUCTION

The time: early spring, 1967. The place: Oxford, Mississippi. Spring everywhere is the season of renewal, and of hope. The beauty of this Mississippi spring, and its promise, surpasses any that I have yet experienced—until I travel to “the Delta,” fifty miles west of Oxford.

I am midway through a two-week visit, one of a team of Columbia University professors teaching a poverty law course to “Ole Miss” law students. My subject is housing—housing for the poor—and one of my students, a Mississippi native, asks whether I would care to see a “River Rat” community of Delta residents. I readily agree even though I do not know what to expect. “River Rat” and “the Delta” are both unfamiliar terms.

We meet after class and drive to a nearby community to meet a local minister, who will be our escort. The three of us continue toward the Mississippi River. We turn off the highway onto a dirt road, and there, lying before me, is a scene of utter despair, one that could well have inspired pages of Erskine Caldwell’s *Tobacco Road*.¹

On either side of the road is a clutter of dilapidated shacks, home for some of the thousands of impoverished whites who live along the River. Automobile carcasses and other effluvia litter the grassless, muddy yards. I enter one of these shacks and can observe no sign of toilets or running water. A kerosene stove serves both for cooking and for reducing winter chill. In the living room, I see a battered sofa and two straight-backed chairs. In the one bedroom, I notice a bureau and a large bed heaped with clothing. In the dining room, I

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1. E. CALDWELL, *TOBACCO ROAD* (1932).

observe a few chairs and a table, the table buried under dirty dishes. An acrid stench fills the chamber. There are no other rooms. Four barefoot, unkempt, flimsily clad children—the oldest not more than eight-years-old—hover about us, their palms outstretched for the coins that our minister guide places in their hands. Their mother, still in her twenties, but already defeated, reveals a well-advanced pregnancy.

I draw on this grim, vivid memory to serve as a backdrop for my theme: While concern for the homeless is both fashionable and correct, to direct our attention only toward the homeless leaves untouched, and may draw attention from, a systemically far deeper national dilemma—that of housing indigency. We would not have called the River Rats “homeless,” and, indeed, in 1967, the word “homelessness” had yet to enter our everyday speech.² Still, the River Rats that I met that redolent March afternoon, although not homeless, suffered a life sorrow that differed, at most, only in small degree from that of the men, women, and children who tonight will sleep in cardboard boxes, temporary shelters, and welfare hotels. True, there are two to three million Americans who literally have no homes.³ There are, at the same time, more than fifteen million⁴ others who are housing poor. Although seeing the literally homeless wherever we turn has raised our consciousness level, the real challenge is

2. If we used the term “homelessness” at all, we almost certainly had in mind the streets of Calcutta or the squatter villages of many third-world nations.

3. Estimates as to the number of homeless Americans vary by several orders of magnitude. A 1984 Department of Housing and Urban Development (“HUD”) study placed the homeless population at 250,000 to 350,000 nationwide. Appelbaum, *Counting the Homeless*, in 2 HOMELESSNESS IN THE UNITED STATES 2-4 (J. Momeni ed. 1990). Criticism of the HUD study methodology appears in *id.* at 1-10. By contrast, National Coalition for the Homeless estimates place the national homeless population at two to three million. NATIONAL COALITION FOR THE HOMELESS, *AMERICAN NIGHTMARE: A DECADE OF HOMELESSNESS IN THE UNITED STATES* iii (1989).

In an effort to provide an accurate count, the Bureau of the Census recently conducted a special census of the Homeless. The findings are not scheduled for release until mid-1991. See, e.g., Navarro, *Census Peers into Corners to Count Homeless*, N.Y. Times, Mar. 21, 1990, at A1, col. 2.

The debate over the extent of homelessness is not altogether political. For example, the debate reflects differences in the criteria used to distinguish the homeless from the housed. Further it reflects differences in counting methods; some researchers count only persons who were homeless on a given date, others count persons who were homeless at least once during a twelve-month period. For several different criteria for defining homelessness, see La Gory, Ritchey, O'Donoghue & Mullis, *Homelessness in Alabama: A Variety of People and Experiences*, in 1 HOMELESSNESS IN THE UNITED STATES 3 (J. Momeni ed. 1989).

4. See generally P. CLAY, *AT RISK OF LOSS: THE ENDANGERED FUTURE OF LOW-INCOME RENTAL RESOURCES* (1987) (forecasting that 18.7 million persons will lack affordable housing by the year 2003 unless present trends are reversed).

whether we can raise our consciousness to a level that treats seriously the unmet housing needs of a vastly greater number of Americans.

This Article attempts to do just that. Section II sets forth statistical information that puts the plight of America's poor into perspective. It also discusses Congress' attempts to provide housing for every American family, and the failure of that goal. Section III sets forth four general proposals for creating a national entitlement to housing and suggests a coalition between the government and the private sector. Section IV concludes that, in a country as advanced as our own, we should be leading the way in solving the national housing problem—not simply reacting to its effects.

II. STATISTICAL DATA

Our nation once made a commitment to remedy the housing needs of the poor. The following statistics stand in stark contrast to that commitment:

(1) Governmental guidelines say that a family should spend no more than thirty percent of its income on housing, including rent or mortgage payments and utility bills.⁵ Most Americans spend less, some far less.⁶ Yet, nearly three out of four poor families in rural America pay more for housing than the government states they can afford. In 1985, one study found that seventy-two percent of rural poor homeowners spent more than thirty percent of their income on housing, forty-two percent spent more than half, and twenty-six percent spent more than seventy percent.⁷

(2) In the same year, the typical poor renter household paid sixty-five percent of its income for shelter.⁸ Eighty-five percent (5.8 million) of all poor rental households paid at least thirty percent of their income for rent and utilities, sixty-three percent (4.3 million) spent more than half, and forty-five percent (3.1 million) spent at least seventy percent.⁹

(3) Between 1970 and 1985, the number of low-rent units (units

5. CENTER ON BUDGET & POLICY PRIORITIES, *A PLACE TO CALL HOME* 1 (1989).

6. In 1979, governmental studies indicated that homeowners paid 19% of their income for shelter if their properties were mortgaged and only 12% if their properties were not mortgaged. 1979 CURRENT HOUSING REPORTS 67 (1979). In that same year, renters averaged 26% of their incomes for shelter. *Id.* By 1983, the percentages had increased for all groups: homeowners with mortgaged homes paid 20%, homeowners with non-mortgaged homes paid 13%, and renters paid 29%; Black and Hispanic renters paid even more in 1983: 32% for both groups. 1983 CURRENT HOUSING REPORTS 36 (1983).

7. N.Y. Times, Dec. 18, 1989, at A15, col. 1.

8. CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 1-2.

9. *Id.* The poverty line in 1985 was \$8,573 for a family of three. *Id.* An extensive citation of authorities discussing the rental cost squeeze on poor households appears in Schill,

renting for less than \$250 per month in 1985 dollars) declined by 1.8 million (from 9.7 to 7.9 million).¹⁰ During the same period, the number of low-income renter households¹¹ (households with income less than \$10,000 in 1985 dollars) rose by 3.7 million (from 7.9 to 11.6 million).¹² In all, the number of low-income renter households (11.6 million) outstripped the supply of low-rent units (7.9 million) by 3.7 million households.¹³

(4) Even this one-sided comparison understated the actual shortage of low-rent units. More than ten percent of these low-rent units sat vacant because either they or their neighborhoods were deemed uninhabitable.¹⁴ Additionally, of the remaining 7.1 million occupied low-rent units, only two-thirds were actually tenanted by low-income households; moderate-income households occupied the remainder.¹⁵ In sum, 11.6 million low-income households competed for an available 4.8 million low-rent units.¹⁶

(5) The median gross rent for unassisted poor households, measured in constant 1989 dollars, rose forty-nine percent, from \$253 to \$376, between 1974 and 1987.¹⁷ By comparison, the median rent for all rental units during this same time rose by only sixteen percent, from \$353 to \$411.¹⁸

(6) Although we have no statistical measure on the extent to which individuals and families are forced to double-up,¹⁹ anecdotal evidence suggests that overcrowding has become rampant. The New York City Housing Authority, for example, estimates that as many as eighty percent of the 150,000 units that it operates contain at least one "illegal" occupant.²⁰

(7) Between 1980 and 1987, the home mortgage foreclosure rate

Privatizing Federal Low-Income Housing Assistance: The Case of Public Housing, 75 CORNELL L. REV. 878, 890 (1990).

10. CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 7.

11. The term "low-income" includes households at or below the poverty level and households whose incomes do not exceed 125% of the poverty level. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 7-8.

17. HARVARD JOINT CENTER FOR HOUS. STUDIES, *THE STATE OF THE NATION'S HOUSING* 1990, at 21 (1990).

18. *Id.* at 26.

19. For a definition of "double-up," see M. HOMBS, *CONTEMPORARY WORLD ISSUES: AMERICAN HOMELESSNESS* 172 (1990).

20. N.Y. Times, Dec. 31, 1989, at A1, col. 1. One author reported that at least 50% of the families in the New York City shelter system had at one time lived doubled-up; he further estimated that nationwide more than three million families were living with another

nearly tripled. In 1985, almost six percent of all mortgages were in default, a percentage not seen since the mid-1930's.²¹ Moreover, elderly homeowners, faced with mounting utility, tax, repair, and medical bills, often found themselves forced to sell in order to convert their equity into cash to pay these bills.

(8) Any improvement since 1985 has been marginal.²²

In placing these numbers in perspective, one is faced with a paradox. From 1982 to 1989, America experienced the longest peacetime expansion in history, with our gross national product increasing an average of four percent per year.²³ During the same time, housing conditions worsened. A further paradox helps to explain the first: As a nation, we once made a commitment to end housing indigency, a commitment which we have let atrophy in the last two decades. The original commitment stems from Franklin Roosevelt's second inaugural address in 1937. Speaking of his concern for that one-third of our nation that was "ill-housed, ill-clad, and ill-nourished,"²⁴ the President stated, "[t]he test of our progress is not whether we add more to the abundance of those who have too much; it is whether we provide enough for those who have too little."²⁵ A few months later, Congress enacted the United States Housing Act of 1937,²⁶ public housing's statutory bedrock.²⁷ Congress renewed its commitment in 1949 when, in launching the federal urban renewal program,²⁸ it vowed to realize as soon as feasible "a decent home in a suitable environment

household. Kozol, *The Homeless and Their Children* (pt. 1), NEW YORKER, Jan. 25, 1988, at 25; see CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 24.

Requests for emergency shelter received by the St. Louis Relocation Clearinghouse showed that most requests came from households doubled-up with family or friends. Kunz, *Homelessness in Missouri: Populations, Problems, and Policy*, in 1 HOMELESSNESS IN THE UNITED STATES, *supra* note 3, at 93 (noting that 60% of the 1983 requests and 68% of the 1984 requests came from doubled-up households).

21. U.S. DEP'T OF THE TREASURY, BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, at 498 (1989).

22. The overall quality of our nation's housing stock has greatly improved over the last decade and a half. See *infra* text accompanying notes 23-25; see also HARVARD JOINT CENTER FOR HOUS. STUDIES, *supra* note 17, at 20.

23. America experienced six years of overall growth from 1949 to 1955, with a 5.33% average gain. However, between 1953 and 1954, the nation experienced a one percent decline. ECONOMIC REPORT OF THE PRESIDENT, Feb. 1990, at 296.

24. Address by Franklin D. Roosevelt (Jan. 20, 1937).

25. *Id.*

26. September 1, 1937, c. 896, § 2 (codified at 42 U.S.C. § 1437 (1988)).

27. Contemporaries gave much of the credit for the Housing Act's enactment to Senator Robert Wagner, Democrat of New York. According to one account, President Roosevelt needed to overcome the embarrassment caused by the defeat of his Supreme Court-packing plan, and the Housing Act simply proved to be a handy vehicle. I. WELFELD, WHERE WE LIVE 158-60 (1988).

28. July 15, 1949, c. 338, tit. 1, § 100 (codified at 42 U.S.C. § 1450 (1988)).

for every American [family]."²⁹ Again in 1968, Congress established a ten-year goal "to meet all of the nation's housing needs and eliminate all of its substandard housing."³⁰

Certainly, we made some serious mistakes in all three of these programs. Moreover, in no instance did the performance fully match the rhetoric. But until World War II interrupted the progress made after 1937, and for most of the post-war era until the middle-to-late 1970's, housing conditions significantly improved.

More than twenty years have passed since either Congress or the Executive Branch has declared a universal entitlement to decent housing as a national goal. During much of this period, there has been almost no national will to examine the full dimension of our housing problem. We have directed most of our concern narrowly to the steps that would end our daily discomfort at the sight of the homeless.³¹

What mutes the sense of deeper urgency is the shifting nature of the housing problem. President Roosevelt's "ill-housed," as well as the River Rats with whom I visited in 1967, were literally that. Those families had shelter, but the shelter was primitive, unsanitary, unhealthful, and unsafe.³² Although ill-housing conditions have not disappeared, they have much abated. Governmental data indicate that today less than two percent of the nation's occupied housing units lack basic plumbing,³³ and the term "dilapidation" no longer appears in the nation's Census of Housing. Although on any given day, thousands of housing units in our larger cities bear code viola-

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

30. Housing and Urban Development Act of 1968, Pub. L. 90-448, 82 Stat. 476 (codified as amended at 12 U.S.C. § 1701 (1988)). One year later, the Nixon presidency began. Enthusiasm for public housing soon abated with the distractions of the Vietnam War and Watergate, and anxiety over the program's high costs.

31. According to a *Washington Post/ABC News* poll, two out of three Americans believe homelessness is a major national problem and seven out of ten said they would pay more taxes to build shelters for the homeless in their areas. *Wash. Post.*, Oct. 7, 1989, at B7, col. 1.

The political tide may be shifting, however. On August 1, 1990, the House voted 378 to 43, over warnings by the Secretary of HUD of a presidential veto, to authorize \$28 billion in housing expenditures. Zuckman, *Kemp Is Dealt Major Defeat on Home-Loan Program*, 48 CONG. Q. 2513, 2514 (1990). One major feature of the bill is a provision that would require HUD to provide rental aid to families whose lack of adequate housing would cause their children to be placed in foster care. *Id.* The Congressional Budget Office estimated that the program would cost more than one billion dollars in budget authority over the next five years. *Id.* The Senate authorization bill lacked the entitlement feature. *Id.*

32. As recently as 1960, 16.8% of all dwelling units lacked some plumbing. U.S. DEP'T OF HOUS. & URBAN DEV., 1978 STATISTICAL YEARBOOK 371 (1978).

33. By 1985, only 1.5% of all dwelling units lacked some plumbing. U.S. DEP'T OF HOUS. & URBAN DEV., 1989 STATISTICAL YEARBOOK 309 (1989).

tions,³⁴ housing quality no longer remains the pressing issue that animated both the rhetorical and programmatic commitments of a generation ago.

The systemic housing issue of the 1990's is affordability. Millions of lower-income households can no longer find suitable shelter within their means.³⁵ Were it not for the literally homeless, however, whose presence we cannot avoid, the issue of affordability would largely escape our notice. The homeless whom we see, unfortunately, are only the *visible* couriers warning us of a far deeper social malady that affects many millions more. Unseen is the four-year-old child going to bed hungry because her welfare mother must spend sixty percent of her monthly stipend for rent,³⁶ or the young working couple doubled-up in a small apartment with the wife's parents,³⁷ or the ten-year-long waiting list in many cities for public housing apartments.³⁸ Some have dubbed these hidden legions the pre-homeless.³⁹ The pre-homeless, tragically, describes those persons who may soon cross the narrow divide between shelter and the streets, unless we address the deeper issue—that of affordability.

How did we get into this mess? There are explanations. Most are familiar: the virtual end of new public housing starts,⁴⁰ neighborhood gentrification⁴¹ and the loss of single room occupancy and other

34. Leaky roofs and ceilings head the list of code violations, followed by plaster cracks and peeling paint. U.S. DEP'T OF THE TREASURY, *supra* note 21, at 710. Fewer than 10% of the violations involve inherently unsafe or unhealthful conditions, like open electrical circuits or rodent infestation. *Id.*

35. "High payment burdens have superseded structural inadequacy as the primary housing problem of the poor. . . ." HARVARD JOINT CENTER FOR HOUS. STUDIES, *supra* note 17, at 23.

36. See *Newsday*, Apr. 4, 1990, at 6, col. 1.

37. See Weaver, *Single Mothers Are Filling Shelters*, N.Y. Times, Mar. 1, 1987, at C1, col. 1. Jacqueline Weaver describes a single Connecticut mother who, although living in her mother's apartment, had been forced to hide with her child in the basement so that the landlord would not see and evict them. *Id.* The younger parent became homeless when her mother moved out of state. *Id.*

38. "[A] survey in 1986 counted 247,500 families on lists waiting for vacancies among 374,150 units in 64 cities. It also counted 32,555 elderly people on lists for 103,203 units for the elderly." N.Y. Times, Apr. 17, 1990, at A1, col. 4. Vacancies occur, however, with relative infrequency.

39. I borrow this term from Professor Stephen Wizner of Yale Law School, who first heard it from one of his students. This group is sometimes described as the "near homeless." See 1 HOMELESSNESS IN THE UNITED STATES, *supra* note 3, at xviii; Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387, 401 (1990-1991) (coining the term "pre-homeless").

40. In 1987, only 2,200 units of public housing were started, a sharp decline compared with 36,900 units in 1965, 52,000 units in 1961, and 20,000 units in 1980. ECONOMIC REPORT OF THE PRESIDENT, *supra* note 23, at 354.

41. For a definition of gentrification, see M. HOMBS, *supra* note 19, at 173.

rental units,⁴² housing abandonment,⁴³ the widening of poverty,⁴⁴ the shrinkage of all federal outlays for subsidized housing,⁴⁵ historically high mortgage interest rates,⁴⁶ the failure of welfare and housing allowances to keep pace with rising rental costs,⁴⁷ pervasive racial discrimination,⁴⁸ the displacement of factory jobs by much lower-paying

42. Single room occupancy units ("SRO's") are truly an endangered species; at least half of the nation's SRO's have disappeared in recent years. Hombs, *Social Recognition of the Homeless: Policies of Indifference*, 31 WASH. U.J. URB. & CONTEMP. L. 143, 144 n.3 (1987). We are losing from all causes about 500,000 low-rent units yearly. *Id.* at 144.

43. Experts are unable to agree on the reasons for housing abandonment. Rising poverty and localized unemployment, the withdrawal from poor neighborhoods of lenders and insurers, deteriorating services, and vandalism all seem to be contributing factors. Critics of government regulation also blame rent control and housing code enforcement. *See generally* Marcuse, *Housing Abandonment; Does Rent Control Make a Difference?*, in CONFERENCE ON ALTERNATIVE STATE AND LOCAL POLICIES, PUBLIC POLICY REPORT 4 (1981) (describing the effects of rent control on the housing market).

44. In March, 1988, 32.5 million Americans were living below the poverty level (\$11,611 yearly income for a non-farm family of four), and another 11 million persons were living just above the poverty level; twenty years earlier, the number of the poor and the near-poor was 24.7 million and 11 million, respectively. U.S. DEP'T OF THE TREASURY, *supra* note 21, at 452.

45. Federal housing outlays dropped steeply during the Reagan era, from \$32 billion in 1979, to \$8 billion in 1988. Boston Globe, Oct. 11, 1989, at 18, col. 3; *see* CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 28.

46. Between 1980 and 1987, the interest rate on conventional, existing-home mortgage loans ranged from a 1986 low of 10.09% to a 1981 high of 16.5%. In each of these years, the interest rate on conventional, new home mortgage loans was virtually the same, and the rate on Federal Housing Authority ("FHA") insured, secondary market mortgage loans was usually slightly lower. U.S. DEP'T OF THE TREASURY, *supra* note 21, at 503.

47. In 1984, the real value of Aid to Families with Dependant Children ("AFDC") benefits plus food stamps was 22% lower than it had been in 1972. W. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 94 (1987). "[N]o other group in American society experienced such a sharp decline in real income since 1970 as did AFDC mothers and their children." *Id.*; *see* N.Y. Times, Apr. 6, 1990, at A34, col. 1. In constant dollars, AFDC has been cut 26% since 1977. Wash. Post, Apr. 30, 1989, at 1, col. 1. In 31 states, the maximum AFDC in 1988 for a family of three was less than one-half of poverty level. *Id.* Including food stamps, benefits were below poverty level in 47 states. *Id.* In 1973, AFDC covered 84% of poor children; in 1987 it covered only 60%. *Id.*

48. Minorities often are discriminated against when trying to rent or buy housing. Fair housing laws on the federal and local levels attempt to address the problem, but progress is slow because the problem is so pervasive. The discrimination often is subtle. For example, a minority rental applicant may be required to submit a credit report, while a white applicant will not. L.A. Times, Feb. 20, 1990, at A1, col. 2. Black and Hispanic renters are forced to pay a higher fraction of their income than white renters for comparable housing. This discrepancy results in minority tenants suffering higher levels of substandardness. CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 54-55.

service jobs,⁴⁹ the suppression of the minimum wage level,⁵⁰ the shrinkage in household size,⁵¹ and a rapid rise in the number of households headed by single mothers—an especially vulnerable group.⁵² A few reasons, like the underfunding of public housing authorities,⁵³ the Social Security Administration's pervasive (and often illegal) denial of disability insurance benefits,⁵⁴ and the sometimes self-defeating role of tax-shelters,⁵⁵ may be somewhat less famil-

49. Between 1980 and 1987, manufacturing jobs fell from 20.285 million to 19.065 million, more than a five percent drop in seven years. U.S. DEP'T OF THE TREASURY, *supra* note 21, at 399-401. Service jobs during the same period rose from 17.89 million to 24.196 million. *Id.* Moreover, retail trade jobs, another low-wage category, grew from 15.035 million to 18.509 million, more than a 30% increase in the two groups combined. *Id.*

50. Between 1981 and 1989, the purchasing power of the basic minimum wage declined 36%. Wash. Times, Nov. 1, 1989, at A1, col. 3. Even the recent increase in the minimum wage, which took effect early in 1990, will not bring many workers at the minimum level above the poverty line. In fact, some will receive no net benefit from the increase because their food stamp allocation will be decreased to reflect the rise in the minimum wage. N.Y. Times, Mar. 29, 1990, at A1, col. 3.

51. For example, from 1970 to 1980 the population of New York City declined by 10%, but the number of households declined by just two percent. Sternlieb & Hughes, *Demographics and Housing in America*, POPULATION BULL., Jan. 1986, at 1, 14.

52. From 1980 to 1988, the proportion of children in single-parent households rose from 15% to 19%. Wash. Post, Feb. 16, 1989, at A7, col. 3. For Blacks, the increase was from 46% to 54%. *Id.* For Hispanics, the proportion increased from 21% to 30%. *Id.* Ninety percent of single-parent households are headed by women; moreover, over half (51.4 %) of all single-parent families living in rental housing have poverty-level incomes. HARVARD JOINT CENTER FOR HOUS. STUDIES, *supra* note 17, at 4.

53. The current backlog of urgent public housing modernization need ranges between \$10.5 billion and \$21 billion. M. STEGMAN, *THE ROLE OF PUBLIC HOUSING IN A REVITALIZED NATIONAL HOUSING POLICY* 18 (1988). A recent survey of the nation's 35 largest public housing authorities ("PHA's"), conducted by the Council of Large Public Housing Authorities ("CLPHA"), estimated that 138,000 units, or 12% of the nation's total, were becoming unviable. *Id.* This includes 40 to 60 seriously troubled high-rise projects, built an average of 34 years ago, with present vacancy rates in excess of 15%. *Id.* In some cities, local authorities already have demolished entire projects because renovation was seen as too costly. N.Y. Times, Dec. 8, 1989, at A20, col. 1; N.Y. Times, May 14, 1989, at B1, col. 1.

According to the National Association of Housing Redevelopment Officials, the nation required \$3.53 billion in 1989 to rehabilitate existing units of public housing and to establish maintenance reserves. Wash. Post, Feb. 15, 1989, at A23, col. 4. In that same fiscal year, Congress authorized a one billion dollar expenditure. *Id.*

54. Under the Reagan Administration, many thousands of genuinely disabled individuals were illegally denied their rightful benefits. See L.A. Times, Feb. 21, 1990, at A1, col. 6; L.A. Times, Dec. 4, 1988, at A4, col. 1. In *Stieberger v. City of New York*, 615 F. Supp. 1315, 1315 (S.D.N.Y. 1985), a New York district court issued a preliminary injunction requiring a change in the termination hearings procedures. The United States Court of Appeals for the Second Circuit vacated the injunction, 801 F.2d 29 (2d Cir. 1986), limiting it to the guidelines established in *Schisler v. Heckler*, 787 F.2d 76 (2d Cir. 1986). See Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U.L. REV. 1 (1987).

55. As a result of changes in the treatment of depreciation introduced in the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, the cost recovery writeoffs for newly built commercial and market-rate rental projects became as inviting to tax shelter

iar. But, attention to the past is useful only as it illuminates the future. Recriminations, however much deserved, cannot produce a single unit of housing.

We have used the phrase "housing entitlement" as if its meaning were self-evident. For the literally homeless, an entitlement has meant little more than temporary shelter, clean linens, a warm meal,⁵⁶ and, in the case of families with school-age children, some educational continuity.⁵⁷ Limiting our aspirations to this definition, however, does not bring us very far because apart from the meanness of so limited a goal, we would continue to ignore the deeper problem of homelessness: the pervasive lack of affordable housing. As a humanitarian nation, we need to have a far more concrete commitment to provide housing to our citizens, and a realistic and workable plan to achieve that goal.

III. HOUSING ENTITLEMENT PROPOSALS

I propose that we guarantee to every American household a basic level of housing that meets current federal standards of quality and affordability.⁵⁸ Affordable shelter must be seen as a fundamental

investors as writeoffs for subsidized housing. Understandably, investment dollars gravitated toward the non-subsidized, higher yield developments.

56. In *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979), *aff'd mem.*, 118 A.D.2d 1054, 499 N.Y.S.2d 567 (App. Div. 1986), the court ordered the governmental defendants to draft and submit a plan for the feeding and shelter of homeless men. *Id.* In the consent decree later entered, specific provisions dealt with minimum space and service requirements in New York City's homeless shelters. Final Judgment by Consent, *Callahan*, No. 42582, reprinted in PRACTICING LAW INST., THE RIGHTS OF THE HOMELESS 223 (1988). *McCain v. Koch* extended *Callahan* to include homeless women and children, and required shelters to meet an acceptable standard of cleanliness, warmth, amenities, and space. 127 Misc. 2d 20, 484 N.Y.S.2d 985 (Sup. Ct. 1984), *modified*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (App. Div.), *appeal granted*, 121 A.D.2d 997, 503 N.Y.S.2d 997 (App. Div. 1986), *later proceeding*, 68 N.Y.2d 713, 497 N.E.2d 679, 506 N.Y.S.2d 312, *rev'd*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987); *see also* *Hodge v. Ginsburg*, 303 S.E.2d 245, 247 (W. Va. 1983) (holding that homeless persons are entitled to shelter, food, and medical care). According to one author, "[m]ost poor laws leave the type or level of services that the government is to provide to the discretion of public officials," but "the court could consider what the needs of the poor were at that time and how much relief the lawmakers intended to provide." Chackes, *Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Homeless*, 31 WASH. U.J. URB. & CONTEMP. L. 155, 192-93 (1987).

57. *But see* *Savage v. Aronson*, 214 Conn. 256, 256-57, 571 A.2d 696, 697 (1990) (reversing a trial court's order that would have allowed homeless families to remain in welfare hotels beyond a 100-day limit so that homeless children might remain in the same school). *See generally* Morawetz, *Welfare Litigation to Prevent Homelessness*, 16 N.Y.U. REV. L. & SOC. CHANGE 565 (1988) (discussing advocacy approaches for the homeless); Wizner, *supra* note 39 (discussing *Savage* in detail and outlining methods of advocacy for the homeless).

58. The standard for affordability, we have seen, is the "30%" rule. *See* CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 1. The standard for quality should be compliance with local housing codes, although the program could allow for some "slippage,"

right, as part of that entitlement to an adequate standard of living that every humane society—certainly one as fortunate as our own—should wish to assure every one of its residents.⁵⁹ The phrase “fundamental right” has constitutional overtones, but I am not asserting the need for an entitlement of constitutional dimension. As a constitutional pragmatist, I accept the United States Supreme Court’s view that the present Constitution contains no shelter protection.⁶⁰ Further, I do not believe that either this reading of the text or the text itself will change within any time soon.⁶¹ Even if the Constitution did embody a shelter guarantee, we have learned from the school and prison cases how difficult, ad hoc, and time-consuming it is for the courts to mandate institutional reform.⁶² The entitlement, if there is to be one,

as long as the noncompliance does not compromise health and safety. For example, handicapped access requirements, while ideally desirable, are often terribly costly, especially when they require every unit in an apartment building to be equipped for the (often remote) possibility that someday a handicapped person will occupy the unit. Equipping a smaller number of units might comfortably serve the needs of the handicapped.

59. It is both remarkable and disturbing that the United States, almost alone among the western democracies, has failed to ratify the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Among the human rights embodied in the International Covenant is the universal entitlement to an adequate standard of living, including adequate food, clothing, and housing: *Id.* at article 11. Implicit in ratification of the covenant is the expectation that each state party will strive to meet the covenant’s goals. In the immediate context, ratifying parties would be forced to report, at four-year intervals, their housing policies and their headway in meeting housing needs. *Id.*

60. *Lindsey v. Normet*, 405 U.S. 56 (1972); see also *Williams v. Barry*, 708 F.2d 789, 793 (D.C. Cir. 1983) (Bork, J., concurring). In *Williams*, Judge Bork, concurring in the decision, wrote that “no one has plausibly maintained that there is a constitutional . . . right to city-provided shelter.” *Id.*

61. Professor Akhil Amar argues that the thirteenth amendment implies a notion of some minimal constitutional entitlement to property. See Amir, *Forty Acres and A Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990). His claim is that the amendment is intended to ensure that the nation will not allow a degraded caste of people to exist in our society, that the vision contemplates a right to minimum sustenance and minimum shelter, and that Congress bears a correlative duty, under section two of the amendment, to enforce this right by “appropriate legislation.” *Id.*

A few state constitutions contain the seeds of a right to shelter but, to date, they have established little more than a claim for relatively short-term, emergency relief. See, e.g., *Indiana ex. rel. Van Buskirk v. Wayne Township*, 418 N.E.2d 234, 246 (Ind. App. 1981) (stating that “due process” requires that township trustees provide poor relief assistance); *Butte Community Union v. Lewis*, 219 Mont. 426, 429, 712 P.2d 1309, 1311 (1986) (holding that although state constitution did not establish a fundamental right to welfare, classifications that abridged benefits would be subject to heightened scrutiny); *Maticka v. Atlantic City*, 216 N.J. Super. 434, 524 A.2d 416 (Super. Ct. App. Civ. 1987); *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979), *aff’d mem.*, 118 A.D.2d 1054, 499 N.Y.S.2d 567 (App. Div. 1986); *Hodge v. Ginsburg*, 303 S.E.2d 245 (W. Va. 1983). Having similar “episodic” potential are various federal and state welfare and educational statutes which, coupled with good lawyering and sympathetic judges, may result in more humane shelter conditions.

62. See *Meachum v. Fano*, 427 U.S. 215 (1976) (prison case); *Griffin v. County School Board*, 391 U.S. 430 (1968); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 694-95, 1488-93

requires legislation—and not a single program—but a multi-frontal attack on each dimension of the problem.

In the course of any discussion about entitlements, we cannot avoid the nagging question: How is the entitlement to be paid for? This is a question that must worry us in an era of massive federal deficits, fiscally crippled states and cities, and a flood of other urgent priorities in education, medical care, crime control, and infrastructure repair. We could help to finance a housing entitlement were we to redirect a small part of the current fifty-seven billion dollar annual housing subsidy that chiefly benefits the higher-income homeowners, in the form of the income tax deduction for mortgage interest and property taxes,⁶³ but that subsidy is a sacred cow we cannot milk.⁶⁴ We must assume that new dollars will not come easily and that proposals for spending them must be cost-effective.

The proposals that I make fall into four general categories: preserving the present supply of subsidized units, increasing the supply of low-cost units, strengthening the effective demand of low-income households, and attending to the specialized needs of certain disadvantaged groups. The proposals are eclectic: the first two groups are supply oriented,⁶⁵ while the third group is demand-sided. The pro-

(2d ed. 1988) (discussing the difficulty of courts in administering prison reform and school desegregation).

63. The tax expenditure for home mortgage interest is estimated at \$46.595 billion for the current fiscal year while the estimated expenditure for property taxes on owner-occupied homes is \$12.430 billion. OFFICE OF MANAGEMENT & BUDGET, FISCAL 1991 BUDGET OF THE UNITED STATES A76 (1990).

64. State and local governments could save money immediately by converting dollars spent on transient shelter—in some cases several thousands of dollars monthly to a welfare motel—into far less costly permanent housing. In his *New Yorker* articles, Jonathan Kozol tells of a woman living in the Martinique Hotel shelter, who could not afford to lease on her \$270 monthly housing allowance an apartment renting for \$365. At the time, the City was paying \$63 per night, or \$1,900 per month, for her to remain at the hotel. See Kozol, *supra* note 20, at 27.

65. In a truly provocative essay, Robert Ellickson argues that homelessness is not mainly attributable to breakdowns on the supply side of the housing market. Ellickson, *The Homelessness Muddle*, 99 PUB. INTEREST 45, 53-54 (1990). Moreover, he argues that paradoxically, increases in government shelter programs have increased the count of homeless people. *Id.* at 59. To support the claim that the homeless population rises as new shelters open, Professor Ellickson observes (correctly) that newly opened shelters draw people not only from the streets but also from existing housing, albeit from arrangements that, concededly, are as fragile or non-permanent as a doubling-up with relatives or institutional confinement. *Id.* Ellickson reasons therefrom that cities might be acting too generously in providing emergency shelter. *Id.* at 59-60. Additionally, he argues that by defining homelessness broadly, and offering emergency aid to households turned out by primary tenants (friends or relatives) or evicted for non-payment of rent, governments are "creating perverse incentives." *Id.* at 55-56.

As an alternative to building more shelters, Ellickson would adopt Peter Rossi's suggestion of a program of Aid to Families with Dependent Adults. See generally Rossi, *The Family, Welfare And Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 281 (1989)

posals do not rely primarily upon either the government or private industry; instead, each sector has a distinctive role in achieving the universal entitlement. In that regard, "private industry" is not limited to the real estate industry. It also includes a broad array of social welfare agencies, churches, labor unions, and schools. The proposals draw on home ownership and its near equivalent, tenant management, to help achieve the ultimate goal of basic housing for every American household. The "filtering"⁶⁶ mechanism will only play a limited role

(describing a program for aid to families with dependent adults). That is, Ellickson supports public-assistance payments that would help families house and feed adult members incapable of supporting themselves. Ellickson, *supra*, at 46-47. In the near term, this may be a more humane and cost-effective option. Shelter life is intolerable and a poor bargain. But for the longer term, the proposal assumes that most adults would prefer to live doubled-up, subject to the grace of a friend or relative, rather than to have the psychological comfort of their own home or apartment. More fundamentally, the proposal would allow the government to remain indifferent to that preference rather than to provide the conditions for a universal housing entitlement.

Ellickson condemns homeless advocates, such as Robert Hayes, Jonathan Kozol, and the late Mitch Snyder, for insisting that "housing, housing, housing" would cure the problem of homelessness. *Id.* at 59. However, more widely available, "affordable" housing, coupled with enhanced services for those requiring extra-shelter support, would dramatically shrink the legions of the homeless and near homeless. Ellickson simply ignores the mass of data that show that the affordable housing supply, relative to the growing demands upon it, is well below the level of a decade ago.

The call for more housing does not lead, exclusively, to a supply side solution. Ellickson correctly stresses the value of demand side programs, *id.* at 59-60, although I suspect that he would be none-too-generous in advocating them. But I would turn his criticism that "no magic sword will slay homelessness" against him if he believes that we should put all our resources into the demand side. See *id.* at 58. For a complete critique of Ellickson, see generally Wizner, *supra* note 39 (attacking Ellickson's position as ignoring the short-term problems of homeless people).

66. See generally Schill, *supra* note 9, at 614. Filtering requires steady upward progression among the consumers on the housing ladder, which in turn requires some rough correspondence between the incremental supply at each rung of the ladder and the surplus effective demand at the rung below. Because location is such an important aspect of housing demand, the necessary correspondences also must be location-specific, which weakens the theoretical potential for the filtering mechanism. So, too, do exclusionary practices. Still, the mechanism seems to have worked fairly well until the late 1970's. Swanstrom, *No Room at the Inn: Housing Policy and the Homeless*, 35 WASH. U. J. URB. & CONTEMP. L. 81, 90 (1989). More recently, the suburban housing market (where much of the incremental supply is found) and the urban rental market have become so disconnected that construction in the former no longer seems much to influence conditions in the latter. *Id.* at 92. The imperfection in the filtering process is evident in the comparative absorption rate of apartments three months after they become available. In 1988, this rate was 65% for all rental apartments, but 83% for units renting at \$350 monthly or less. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Pub. No. H-131-88A (1988).

One author has made an intriguing proposal directed at aging householders who are "locked into" their under-utilized, single-family homes. See I. WELFELD, *supra* note 27, at 225-26. He would subsidize persons who agreed to sell their homes and invest the proceeds in a smaller, less expensive condominium, where they would live at least nine months a year. *Id.* at 228-29. To protect such persons against the peril of out-of-control rises in shelter costs, government would agree to subsidize any non-debt service costs (real estate tax, insurance, and

in these proposals, however, because it would delay the universal entitlement far too long. Consider the proposals in detail:

(1) *We should seek to preserve relatively intact the present supply of subsidized units.*

(a) Perhaps two-thirds of the nation's 1.3 million public housing units⁶⁷—many built more than thirty years ago—show the strains of aging and deferred maintenance.⁶⁸ A recently commissioned congressional study estimates a cost of twenty billion dollars to modernize our public housing inventory.⁶⁹ It would be a shame not to do so because public housing remains, in most cities, a well-managed, cost-effective form of low-income housing that enjoys an even greater cost advantage over other forms of subsidized development because the buildings remain in public ownership after they are paid for.⁷⁰ Of course, twenty billion dollars is a large amount in the aggregate, but at roughly \$20,000 per unit,⁷¹ this is far less than the replacement cost of these units.⁷²

(b) The Department of Housing and Urban Development ("HUD") projects the potential loss through market-rate conversion within the next decade of more than one million federally subsidized units.⁷³ Many of the units receive subsidies for specified periods (usu-

operating expenses) that exceeded 20% of household income. *Id.* at 229-33. He would install certain controls on the amount of subsidy to prevent abuses. By augmenting the supply of sales housing, especially in older neighborhoods, and by making it easier for first-time homebuying families to obtain affordable housing, this plan might add to the units in the filtering pipeline. *Id.* at 236-39.

We should also loosen the grip of restrictive local building and zoning codes that add considerably to the cost and availability of newly built housing. Today, Levittown-sized homes would be illegal in much of the country. Additionally modular housing, kit housing, and such modern innovations as pre-wired wall panels are illegal in many areas. Two million new houses a year are needed to meet the demands of would-be first-time buyers, while only about 1.5 million homes are built, mostly for owners of the existing stock who are trading up. TAX NOTES, Sept. 7, 1987, at 943.

67. M. STEGMAN, *supra* note 53, at 1.

68. *Id.* at 14-16.

69. *Id.*

70. *Id.*

71. As of 1988, the per unit cost for the most troubled units, those needing a thorough modernization, would average \$28,000. *Id.* at 19-20. This work might include the removal of several floors from high-rise buildings, the reconfiguration of building interiors, and even selective demolition. Less troubled units would cost less than \$20,000 to renovate. *Id.*

72. The 1988 development cost per public housing unit was \$68,857. *Id.* In its fiscal 1991 budget, the Bush Administration proposed that one billion dollars be authorized for the modernization of public housing units and another \$1.8 billion for public housing operating subsidies. Wash. Post, Feb. 17, 1990, at E1, col. 4.

73. By the end of fiscal 1994, nearly one million section 8 certificate and voucher contracts will expire. CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 40-41. During the 1990's, 368,000 subsidized units under the section 236 and section 221(d)(3) programs also will become eligible for refinancing. *Id.*

ally five or fifteen years) under the section 8 certificate⁷⁴ or voucher⁷⁵ programs.⁷⁶ Other units are subsidized under the section 236⁷⁷ or section 221(d)(3)⁷⁸ programs, whose sponsors may, after twenty years, refinance and pay off the federally insured mortgages thereby freeing the units from occupancy controls.⁷⁹ If the section 8 subsidies are not renewed, or if the section 236 owners elect to refinance, many of the program beneficiaries, unable to pay market rentals or condominium sales prices, will be forced out. Congress should enact legislation both to renew the section 8 subsidies⁸⁰ and to extend the section 236 occupancy control to thirty years,⁸¹ which would preserve this housing supply for another decade.

74. See Sept. 1, 1937, ch. 896, tit. I, § 8, as added Aug. 22, 1974, Pub. L. No. 93-383, tit. II, § 201(a), 88 Stat. 662 (codified at 42 U.S.C. § 1437f (1988)).

75. See *id.* § 8(o) (codified at 42 U.S.C. § 1437f(o) (1988)).

76. The distinction between the section 8 certificate and voucher programs is as follows. The programs are alike in that tenants choose their own units from the existing, generally private, housing market. HUD issues the subsidy commitment to the local public housing agency, which in turn agrees to pay the subsidy to the landlord of the unit selected by the tenant. CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 76-77. Under the certificate program, tenants pay 30% of their adjusted household income for rent, and the subsidy makes up the difference between the tenant contribution and the actual rent of the unit selected. *Id.* Tenants subsidized by certificate may only rent a unit for amounts at or below the HUD determined "fair market rent." *Id.* Under the voucher program, tenants may rent a unit at any price. However, the subsidy covers the difference between 30% of the tenant's adjusted household income for rent and the HUD "payment standard" for the unit. *Id.* If the tenant rents a unit for a rental below the payment standard, the subsidy will effectively reduce his rental below the 30% ratio. *Id.* If the tenant rents a unit for a rental above the payment standard, however, he will pay more than the 30%. *Id.*

77. 12 U.S.C. § 1715z (1988) (designed to assist low-income renters and occupants of cooperatives through interest subsidies).

78. *Id.* § 1715(d)(5) (designed to assist private enterprise to provide rental housing for moderate-income families, with a preference to displacees of government action).

79. *Id.*

80. The Congressional Budget Office has estimated that a \$73 billion appropriation would be required to extend the one million expiring contracts for 15 years. CENTER ON BUDGET & POLICY PRIORITIES, *supra* note 5, at 39-40. The Office of Management and Budget estimates a \$8.618 billion appropriation for 1991. *Id.* at 40.

81. In 1987, Congress passed a two-year moratorium on prepayment of federally-backed mortgages, which expired at the end of 1989. 12 U.S.C. § 1715 (1988). Congress has since extended the moratorium through September 30, 1990. 12 U.S.C.A. § 1715 (West 1989 & Supp. 1990).

The carefully crafted statute, known as the Emergency Low-Income Housing Preservation Act, conditioned the owner's right to prepay his insured mortgage and to withdraw from the program upon his filing an acceptable "plan of action." *Id.* This plan would detail, inter alia, the impact of prepayment on existing tenants and on the supply of lower income housing in the community as a whole. *Id.* Upon receipt of the plan of action, HUD could offer the owner economic incentives to remain in the program. *Id.* The incentives would be sufficient to ensure that the property owners received a "fair return" on their investment. *Id.* An owner unenticed by the incentives might yet withdraw from the program provided—a large proviso indeed—that HUD found such action would "not materially increase economic hardship for current tenants . . . [or] involuntarily displace current tenants

(2) *We should seek relatively costless ways to increase the supply of low-rent units.*

(a) We should relax zoning laws, especially in older urban and suburban neighborhoods, to allow the owners of single-family homes to install housekeeping units for single persons and childless couples. Such conversions would not only expand the supply of lower-cost units, but also could provide income for the often financially-strapped owners of single-family homes.⁸²

(b) Many larger cities hold substantial inventories of structurally sound, tax-foreclosed properties that are suitable candidates for renovation. New York City, for example, has launched a ten-year

(except for good cause) where comparable and affordable housing [was] not readily available.”
Id.

In *Orrego v. HUD*, 701 F. Supp. 1384 (N.D. Ill. 1988), a federal court upheld the law against denial of due process and uncompensated taking claims. In so ruling, the court stated:

We hold that the Emergency Preservation Act does not unconstitutionally deprive Joint Venture of a property right. Joint Venture continues to own 833 W. Buena, and will continue, under the Act, to receive reasonable rental returns. It purchased [the building] in 1984, and except for the expected ability to prepay and raise rents akin to the other [local] leases, 833 W. Buena substantially retains the same legal status as before. Private defendants refer to the right to prepay the mortgage after 20 years as “absolute,” but nothing in the regulatory agreement, note or NHA, surrendered Congress’ “enduring” right to exercise its sovereign authority over the federal housing programs. Even if Joint Venture relied upon its ability to prepay when it purchased 833 W. Buena, the provision allowing prepayment was “simply part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.”

Id. at 1396-97. A second challenge to the Act also failed on the ground that the plaintiffs had not exhausted the HUD procedures before seeking redress. *Thetford Properties IV v. HUD*, 907 F.2d 445 (4th Cir. 1990).

Although the Constitution does not contain a provision affecting federal contracts parallel to Article I, section 10, which bars states from passing any law “impairing the obligation of contracts,” both the due process and just compensation clauses of the fifth amendment would prevent the federal government from freely impairing its own contractual obligations. *See* U.S. CONST. amend. V. Professor Schill argues that current proposals that would require public housing authorities to sell units to incumbent tenants at deep discounts would be an invalid impairment of the contract between HUD and the local authority. *See* Schill, *supra* note 9, at 659-71. He would extend his reasoning, I believe, to the legislation at hand. Although some of the United States Supreme Court Justices might agree, the fall-back requirement that owners receive a “fair return” should save the statute in view of the current shortage of affordable housing.

82. *See* N.Y. Times, Apr. 16, 1990, at A19, col. 4, in which Howard Husock of Harvard University’s Kennedy School of Government wrote that “[h]igher density, owner-occupied housing with its own rental units represents a way for suburbs both to live up to their civic obligations to provide for those in need and to provide homes.” *Id.*

However, New York City has recently amended its zoning ordinance to curb this type of conversion in outlying boroughs. New York City Zoning Resolution § 23-90 (1990). The rationale against the creation of small apartments in one- and two-family homes was to preserve neighborhood integrity and to avoid an overload on city services. *See id.*

plan to create more than 80,000 new apartments in formerly vacant buildings throughout the City's poorest neighborhoods. Under the City program, private developers, nonprofit groups, or construction companies hired by the City would rebuild the abandoned structures at an average cost of \$65,000 per apartment.⁸³ The City has promised to provide \$38,000 of this cost through its capital budget; the \$27,000 balance, coming from market-rate financing, is sufficiently low to enable some homeless families, families on welfare, and others earning less than \$19,000 per year to occupy the renovated units.⁸⁴ New York City intends to spend on low-cost housing more than five times that of the next ten largest cities combined.⁸⁵

(c) Several major cities have established linkage programs as a technique for funding below market-rate housing. Voluntary programs, such as New York City's inclusionary housing program,⁸⁶ provide zoning bonuses for developers who agree to build on-site units or to arrange for new off-site units for lower-income households.⁸⁷ Other programs, like the Boston and San Francisco linkage programs, are mandatory. Boston, for example, requires developers to pay a linkage fee on square footage over the 100,000 square foot threshold as a condition precedent to obtaining discretionary zoning relief.⁸⁸ San Francisco's linkage program permits office development in excess of 25,000 square feet only if the developer agrees to provide a specified number (calculated by formula) of low-income housing units or contribute to a special housing fund.⁸⁹

83. N.Y. CITY DEPT OF HOUS. PRESERVATION AND DEV., *NEW AFFORDABLE HOUSING FOR NEW YORKERS: AN INITIAL LOOK AT HOUSEHOLDS RECEIVING APARTMENTS UNDER NEW YORK CITY'S TEN YEAR PLAN* (1989) (executive summary).

84. The year-end 1989 report on the program found that the median income of the first 677 assisted households was \$20,800, who paid a median rent of \$530 monthly. *Id.* Nearly two-thirds of the tenants receiving apartments had previously lived in doubled-up or overcrowded accommodations. *Id.* Nearly one-third came from public housing or other governmentally-aided housing. 40% of the program households were headed by single parents. *Id.*

85. *Id.*

86. New York City Zoning Resolution § 23-90 (1990).

87. This section establishes an inclusionary housing program "to promote a mixture of low to upper income housing within [gentrifying] neighborhoods." *Id.* It provides floor/area ratio ("FAR") bonuses to the developer who agrees to create and maintain lower-income units either on-site or within a short distance off-site. N.Y. Times, Feb. 23, 1987, at B3, col. 1. The bonuses are generous, ranging from 2.0 for preservation to 4.0 for off-site (private-site) improvements. *Id.*

88. BOSTON, MASS., ZONING CODE art. 26A-3 (1986).

89. SAN FRANCISCO, CAL., PLANNING CODE § 313.3-.7 (1990); Hoefflich & Thies, *Rethinking American Housing Policy: Defederalizing Subsidized Housing*, 1987 U. ILL. L. REV. 629, 643-45.

(3) *We should strengthen the effective shelter demand of lower income families.*

(a) We should begin to narrow the widening gap between shelter costs and housing allowances.⁹⁰

(b) Voucher and rent certificate programs for use in existing housing offer many advantages over new production-oriented programs. They cost roughly half as much per subsidized household,⁹¹ can allow the family to remain in their apartment or neighborhood, tend to strengthen lower-income neighborhoods, and give recipients greater mobility because the benefit is portable and not project-specific. These programs are not as effective, however, for minority participants⁹² or in tight housing markets.⁹³ At current funding levels, fewer than 90,000 new households are assisted yearly. At this pace, two-thirds of all eligible households are unlikely to receive assistance in the near future.⁹⁴

(c) Avoidable evictions should be forestalled both for humanitarian and cost-effective reasons. Far too often, rental non-payment results from systemic slippage: the tenant simply has failed quickly enough to procure the shelter allowance that would keep him in place. The tenant's ignorance, or his lack of effective representation in seeking aid, or the slowness of bureaucratic response, leads to a needless eviction. Also, although sometimes understandably, tenants who have received shelter allowances use them otherwise and default on their rent. Once evicted, the tenant may cost the public far more than

90. An analysis based on fiscal 1984 data reported that the national weighted average of shelter allowance to the HUD fair market rental of relevant accommodation was only 62%. S. NEWMAN & A. SCHNARE, *SUBSIDIZING SHELTER: THE RELATIONSHIP BETWEEN WELFARE AND HOUSING ASSISTANCE* 29-30 (1988).

91. In 1979, new construction under the section 8 program required a monthly subsidy of \$250, compared with \$130 per month for section 8 existing housing. CONGRESSIONAL BUDGET OFFICE, *CURRENT HOUSING PROBLEMS AND POSSIBLE FEDERAL RESPONSES* xv-xvi (1988).

92. The voucher program appears to be successful for twice as many white families as minority families. See Weicher, *Private Production: Has the Rising Tide Lifted All Boats?*, in *HOUSING AMERICA'S POOR* 48-50 (P. Salins ed. 1987).

93. In some cities, only 30% to 45% of voucher holders have succeeded in finding qualifying units. *Id.* In such places, the local housing authority might help by keeping lists of participating landlords. We might also wish to consider whether to lower the program standards so that units having relatively minor code violations would qualify. *Id.*

94. In 1987, of the nation's seven million renter households with incomes below the poverty line, only 2.3 million received housing assistance. HARVARD JOINT CENTER FOR HOUS. STUDIES, *supra* note 17, at 22. Another 1.5 million were receiving non-income housing assistance. *Id.* The remaining 3.2 million received no assistance. *Id.* Nearly 80% of persons without subsidies paid more than 50% of their income for housing. *Id.* The Congressional Budget Office estimates that 25% to 33% of eligible low-income households received assistance in 1988. CENTER FOR BUDGET & POLICY PRIORITIES, *supra* note 5, at 34 n.1.

whatever sums would have kept his shelter intact. Similarly, persons may become (or remain) homeless because they lack the one or two months' rental security deposit that landlords require for a new tenancy.

"Rental banks," which could provide tenants with security deposits or rent to avoid default while they seek governmental aid, might lessen eviction and extended homelessness. Tenants could receive non-interest bearing loans, which could be recycled as the loans are repaid. Also, the use of "vendor rent payments"⁹⁵ may be an appropriate measure to forestall eviction.

(4) *We must attend to the specialized needs of certain disadvantaged groups.*

The mentally ill, the substance abuser, and the physically abused form a large and troubled subset of those in need of housing.⁹⁶ Their condition complicates our already immense housing problem. Shelter alone will not enable such troubled persons to lead non-destructive lives or to realize their potential. Thus, along with shelter, we also must install a network of medical, psychological, and social support to meet their special needs.⁹⁷

Homelessness, moreover, aggravates the prior condition. Experience with the chronically mentally ill, for example, reveals that if the disturbed person loses his home, the path back into permanent shelter is often rocky. The loss of shelter is emblematic of a deeper loss of attachment—to family, friends, or a job—that so often afflicts the mentally ill. Simply replacing the residence, without helping the defeated person overcome his sense of disaffiliation and failure, is unlikely to provide any long-term benefit.

"The Bridge" is a community-based mental health agency on New York City's upper-west side.⁹⁸ It has provided counselor, recreational, and socializing services to deinstitutionalized men and women since 1954.⁹⁹ It has operated a housing program for its mem-

95. Under a vendor rent payment, the welfare agency would write the check for the tenant's shelter allowance co-payable to the landlord and the tenant.

96. A carefully executed Ohio study in which trained field interviewers extensively interviewed nearly one thousand homeless persons found that 20.8% admitted to problem drinking and 29.9% admitted having one or more prior psychiatric hospitalizations. Roth, *Homeless in Ohio: A Statewide Epidemiological Study*, in 1 HOMELESSNESS IN THE UNITED STATES, *supra* note 3, at 157; see also Burt & Cohen, *A Sociodemographic Profile of the Service-Using Homeless: Findings from a National Survey*, in 2 HOMELESSNESS IN THE UNITED STATES, *supra* note 3, at 17, 31-32 (19% of the 1,704-person sample reported at least one night's stay in a mental hospital at some time in their lives).

97. La Gory, Ritchey, O'Donoghue & Mullis, *supra* note 3, at 18.

98. See *Bridge Is a Way Back for Mentally Ill*, *Newsday*, July 27, 1989, at 23, col. 4.

99. *Id.*

bers since the early-1980's, as single room occupancy housing became scarce around The Bridge neighborhood. For the last five years, Bridge members have included persons who are not only mentally ill, but who are also homeless as well. Early attempts to place homeless members in Bridge housing directly from shelters ended in failure. Some members regressed, while others simply disappeared. Further experience has taught The Bridge staff that for mentally ill persons, the successful transition from shelter to permanent housing may require as long as a year of careful preparation. During this period, the member attends The Bridge daily. There, he learns to affiliate—with his program leader, the agency, his group, and, in time, other individuals. He begins to acquire the level of self-esteem and confidence needed to assume the responsibilities, however minimal, that come with having one's own home. Even after the member moves into an apartment, with all of the strength and support he has gathered, the initial euphoria often turns into fright and foreboding until the critical readjustment is made. Once the crisis has passed, the member is ready for a more normalized life which may include, under Bridge auspices, remedial education and vocational training.¹⁰⁰

IV. CONCLUSION

In the United States, we have neither embraced a domestic constitutional right to housing, as have such western democracies as Sweden¹⁰¹ and the Netherlands,¹⁰² nor do we now profess that our citizens have "the fundamental right, regardless of economic circumstances, to enjoy adequate shelter at reasonable costs," as does our neighbor Canada.¹⁰³ Moreover, we have not authorized our government to take "extraordinary steps" to alleviate any housing shortage, as has Germany.¹⁰⁴ In none of these countries, nor in any other western democracy, with the exception of Great Britain (whose current government shares this government's political vision),¹⁰⁵ does the extent

100. Four members of The Bridge staff have described the transition process in an unpublished paper. The paper describes the six phases through which most homeless members pass as they move from shelter into permanent housing: Phase I Contact, Phase II Commitment, Phase III Acceptance—Contracting I, Phase IV Actualization—Contracting II, Phase V Adjustment, and Phase VI Integration into Community Living. The Bridge Staff, *Successful Transition of the Inner City Homeless Mentally Ill to Community Residence Programs* (1990) (unpublished monograph detailing the transition program administered by The Bridge).

101. Art. 2, The Instrument of Government.

102. GRW. NED., Art. 22 (Constitution of the Kingdom of the Netherlands 1983).

103. See L. SMITH, *ANATOMY OF A CRISIS* 41 (1977).

104. G.G., Art. 13, para. 3 (The Basic Law of the Federal Republic of Germany).

105. N.Y. Times, May 20, 1990, at D3, col. 1.

of homelessness even begin to approach the dimensions of our own. Homelessness will not begin to recede until our government, the President and the Congress, look beyond the immediate crisis to the systemic problems that have produced and will prolong it. To solve those problems, we must once again regard affordable housing as everyone's right.