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NEW URBANISM: URBAN DEVELOPMENT AND ETHNIC INTEGRATION IN EUROPE AND THE UNITED STATES

JAMES A. KUSHNER*

I. INTRODUCTION

Ethnic and class-based residential segregation¹ is a worldwide problem that is worsening.² The last quarter of a century in the United States offers an interesting laboratory for initiatives and strategies to bring about an integrated society. That laboratory has demonstrated that, in the United States, civil rights enforcement, including desegregation efforts of legislatures and courts, has failed to mitigate dramatic racial segregation patterns. Surprisingly, only market-based initiatives have demonstrated opportunities for racial, ethnic, and class-based integration.

This study, based on a survey of strategies designed to ameliorate such segregation throughout the world, describes a range of policies that can be classified into one of two broad categories: those that have proven effective and those that appear to be ineffective. This article will focus on the strategy of New Urbanism,³ the sole strategy that holds the

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1. By segregation, the author here is referring to any neighborhood that lacks social cohesion and a sense of diversity, and is identified as predominantly or increasingly occupied by a dominant racial or ethnic group. Thus, segregation would be more like a *barrio*, reflecting any neighborhood, such as a predominantly white or European district as well as an African-American, Chinese or Islamic neighborhood, rather than a *favela*, reflecting a low income or distressed ethnic neighborhood. No attempt is made here to sort out the causes of segregation be they the result of *de jure* policies of government, private discriminatory policies, or purely *de facto* preferences of the dominant group.

2. See generally CITIES OF EUROPE: CHANGING CONTEXTS, LOCAL ARRANGEMENTS, AND THE CHALLENGE TO URBAN COHESION (Yuri Kazepov ed., 2004); INTERNATIONAL LAW AND THE RISE OF NATIONS: THE STATE SYSTEM AND THE CHALLENGE OF ETHNIC GROUPS (Robert J. Beck & Thomas Ambrosio eds., 2002); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); STUDIES IN SEGREGATION AND DESEGREGATION (Izhak Schnell ed. 2002); C. Hamnett, *Social Polarisation in Global Cities: Theory and Evidence*, 31 URB. STUD. 31 (1994); Ronald van Kempen & A. Sule Ozueken, *Ethnic Segregation in Cities: New Forms and Explanations in a Dynamic World*, 35 URB. STUD. 1631 (1998).

3. "New Urbanism" is defined in Part II.G.

potential for effective desegregation, and assess its potential for mitigating residential segregation.

II. ALTERNATIVE STRATEGIES FOR INTEGRATION

Until the second half of the last century, the United States pursued a policy of racial apartheid.⁴ Despite the elimination of the legally-mandated structure that established and maintained that segregation, private behavior patterns have continued to reflect racial bias in housing as well as in employment, education, and other aspects of life.⁵ Legislative and judicial efforts to remedy segregation in schools and public housing⁶ were Pyrrhic as *de jure* and *de facto* segregation continued on both fronts, largely enabled by “white flight”⁷ to the newly developing suburbs. As the population of affluent suburban towns grew, improvement in school quality, town prestige, and increased home prices established even more impenetrable barriers to integration. Private choice and limited court desegregation remedies also generated wider patterns of racial isolation. While segregation was installed by government policy, it is today maintained through exclusionary zoning, other cost-inflating land use controls, and the invisible hand of freedom of choice.⁸

Several alternative strategies have been implemented both within the United States and in other nations to reverse or prevent apartheid,

4. See JAMES A. KUSHNER, *APARTHEID IN AMERICA* (1980) (originally published as 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)) [hereinafter KUSHNER, *APARTHEID IN AMERICA*]. See also C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1957).

5. See generally JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* (2004).

6. *Id.* at 1285-1348 chap. 9.

7. “White flight” occurs when whites enroll their children in private and parochial schools in the face of desegregation orders and when whites elect to move to the suburban fringe in the face of minority entry into their residential neighborhoods, fearing a future decline in property values, educational opportunities, or community security. See generally KUSHNER, *APARTHEID IN AMERICA*, *supra* note 4; David J. Armor, *White Flight and the Future of School Desegregation*, in *SCHOOL DESEGREGATION* 187, 196-97 (Waller G. Stephen & Joe R. Feagin eds., 1980); Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965 (2000); James E. Ryan, *Schools, Race and Money*, 109 YALE L.J. 249 (1999); Paul Diller, Note, *Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 MICH. L. REV. 1999 (2001).

8. Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 VILL. L. REV. 595 (2002).

including: (1) a system of privately enforceable housing discrimination laws; (2) a system of government-administered enforcement of housing discrimination laws; (3) inclusionary land use and housing policies; (4) subsidized supply through new housing production; (5) subsidized housing access through demand subsidies; (6) affirmative action integration policies; and (7) New Urbanism planning design policies. In this part, I will briefly describe the efficacy of each strategy.

A. Privately Enforceable Housing Discrimination Laws

Since the passage of the Civil Rights Act of 1968, the United States has prohibited discrimination in housing and planning on the basis of race.⁹ In addition to national laws, the states and many local jurisdictions have enacted statutes and ordinances prohibiting racial discrimination in housing.¹⁰ Although the federal statute offered a private remedy for victims of discriminatory acts,¹¹ the law has primarily benefited the affluent homeseeker.¹²

The affluent have access to legal services and are often willing to pursue the enforcement of civil rights. In the search for housing, the less affluent are often pressured to complete quickly their immediate quest for replacement housing while continuing to provide for their families, because relocation is often involuntary and immediate as well as disruptive, inconvenient, and expensive. In addition, the targets of housing bias are typically unaware that they have been victims of discrimination.¹³ Should they suspect they have been victims of bias, they rarely have the time or the convenient access to agencies or legal resources to pursue litigation or administrative enforcement. Moreover,

9. 42 U.S.C. §§ 3601–3619, 3631 (1968 & Supp. IV 1992).

10. See JAMES A. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* (2d ed. 1995 & Supp. 2000) [hereinafter KUSHNER, *DISCRIMINATION IN REAL ESTATE*]. See, e.g., MD. CODE ANN. Art. 49B, §§1–42 (2005).

11. Title VIII was strengthened in 1988 by the Fair Housing Amendments Act. Pub. L. No. 100-430, 102 Stat. 1619. See generally James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989) [hereinafter Kushner, *Fair Housing Amendments*]. Title VIII was subsequently amended by the Housing for Older Persons Act of 1995. Pub. L. No. 104-76, 109 Stat. 787 (partial deregulation of senior citizen housing exemption).

12. James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 U. MIAMI L. REV. 931, 932 (1998) (arguing that the inefficiency of government agencies, the unavailability of legal assistance, and homeseekers' unawareness of their victimization diminish the likelihood that most will challenge discriminatory marketing) [hereinafter Kushner, *Comparative Vision*].

13. See Kushner, *Fair Housing Amendments*, *supra* note 11.

even lawyers specializing in civil rights are often ill-versed in fair housing law and are not inclined to engage in such disputes. Additionally, housing discrimination enforcement has suffered from the combination of an extremely weak activist movement battling an extremely powerful industry of real estate and banks.¹⁴

In 1988, the Federal Fair Housing Act was expanded to prohibit discrimination based on family status, thereby extending protection to families with children and to the disabled community.¹⁵ These populations have benefited substantially from the modification of home marketing and land use regulation practices and the availability of judicially enforceable remedies. As familial and disability discrimination in housing is more transparent and identifiable, a large percentage of enforcement resources have been diverted from the efforts to eliminate racial discrimination and segregation. Unfortunately, those of lower income generally have not been able to gain access to integrated housing opportunities.¹⁶ Furthermore, the laws have not lessened racial or economic isolation¹⁷ and have had little effect on deterring discrimination in the private market.¹⁸ Enforcement is simply too infrequent due to real estate practices whereby homeseekers are unaware of their victimization. In the rare situation where they suspect they have been victimized, homeseekers are typically unaware of their rights, lack knowledge of how to attain legal counsel or access to other resources for enforcement, or are fearful of exacerbating their difficult existence, including the current stressful search for shelter, to engage in a legal battle, and thus civil rights enforcement fails to deter discriminatory real estate practices. Although the United States Congress intended the laws to generate racial integration,¹⁹ that goal has simply not been achieved.

14. MARA S. SIDNEY, *UNFAIR HOUSING: HOW NATIONAL POLICY SHAPES COMMUNITY ACTION* 152-53 (2003).

15. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

16. Kushner, *Fair Housing Amendments*, *supra* note 11, at 1105-1106. *See also* SIDNEY, *supra* note 14, at 33 (rhetoric of fair housing movement always appealed to the free market with an image of middle class blacks as the target group).

17. Kushner, *Fair Housing Amendments*, *supra* note 11, at 1061-1068. *See also* James A. Kushner, *Comparative Vision*, *supra* note 12.

18. *Id.* at 933-937.

19. For a collection of the legislative history, *see* JAMES A. KUSHNER, *DISCRIMINATION IN REAL ESTATE*, *supra* note 10. For an excellent account of the enactment and administration of Title VIII, *see* CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960* (2005).

B. Government-Administered Enforcement of Housing Discrimination Laws

Although the national, state, and local fair housing antidiscrimination laws in the United States established government agencies to enforce the intent of the legislatures,²⁰ state efforts have been largely ineffective in eliminating housing discrimination in both the public²¹ and private²² sectors of the housing market. Agencies face both funding limitations and dependencies on victims who are willing to come forward and prosecute claims. Despite isolated and infrequent instances where the denial of housing rights has been vindicated, government-administered enforcement of housing discrimination laws has failed to achieve integrated communities.²³ The rare occurrence of fair housing enforcement, together with extremely low awards of compensation, have generated almost no deterrence to the continued widespread pattern of private sector housing and lending discrimination.

C. Inclusionary Land Use and Housing Policies

“Exclusionary zoning” is a reference to the land use regulatory scheme employed to render the suburbs prestigious and costly.²⁴ Various land use regulatory controls, such as requiring that only a single family house can be built on a lot that is a minimum of one acre, can dramatically inflate the cost of housing, excluding those of modest means. The existence of zoning that requires that large homes be built on large lots and served by expensive infrastructure has led to counterbalancing policies—also known as “inclusionary zoning”—aimed at reversing the impacts of “snob zoning” or “exclusionary” zoning. For

20. KUSHNER, DISCRIMINATION IN REAL ESTATE, *supra* note 10, at §§ 8.29-8.35. James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUSING POL’Y DEBATE 537 (1992) [hereinafter Kushner, *Federal Enforcement*].

21. See generally SIDNEY, *supra* note 14, at 140; James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL’Y REV. 348 (1988), reprinted in THE FAIR HOUSING ACT AFTER TWENTY YEARS (R. Schwemm ed., 1989); Kushner, *Federal Enforcement*, *supra* note 20. For literature on HUD subsidized and public housing site selection bias, see KUSHNER, DISCRIMINATION IN REAL ESTATE, *supra* note 10.

22. ROBERT E. WIEN ET AL., HOUSING DISCRIMINATION STUDY: SYNTHESIS (1991). See also JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995); Kushner, *Fair Housing Amendments*, *supra* note 11, at 1052-60.

23. Kushner, *Comparative Vision*, *supra* note 12, at 937-39. See KUSHNER, APARTHEID IN AMERICA, *supra* note 4. See also LAMB, *supra* note 19; MASSEY, *supra* note 2.

24. Annette B. Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 585 (1981).

example, units of local government concerned about inadequate housing opportunities for the non-affluent and communities concerned about attracting employers desiring housing for their workers or assuring housing for key workers, such as teachers, nurses, police, and firefighters, may require that a percentage of new developments include a percentage of affordable housing. These inclusionary techniques reflect the judicial and legislative policies of states in the United States desiring to overcome class-based exclusion; that is, the states use inclusionary zoning as an antidote to suburban exclusionary zoning and housing regulatory policies.²⁵ As a result of an array of discriminatory policies, such as large lot zoning,²⁶ the exclusion of apartments,²⁷ and subdivision and growth management policies that have had the effect of maintaining low density and high-cost housing,²⁸ the cities of the United States have developed in a pattern of the poor residing in the central city and older suburbs surrounded by communities of the affluent, largely white population.²⁹

Creative judges³⁰ and legislatures³¹ in the more densely populated states have generated a range of potential strategies seeking to include affordable housing within developing, newly constructed suburban areas—communities that, unregulated, would expand the traditionally exclusive suburbs. These strategies include the mandatory inclusion of a set minimum percentage of affordable housing,³² incentives such as beneficial tax treatment³³ or higher permissible densities to developers who include affordable housing in larger residential developments,³⁴ modest deregulation of land use to permit factory-built housing or mobile

25. See generally 1 JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* §§ 3:8-3:19 (2d ed. 2001 & Supp. 2004) [hereinafter KUSHNER, *SUBDIVISION LAW*].

26. E.g., *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965) (invalidating four-acre minimum lots).

27. E.g., *Fernley v. Bd. of Supervisors*, 502 A.2d 585 (Pa. 1985) (total exclusion per se invalid even in non-growth area).

28. KUSHNER, *APARTHEID IN AMERICA*, *supra* note 4, at 44-52.

29. Kushner, *Fair Housing Amendments*, *supra* note 11, at 1061-68; KUSHNER, *APARTHEID IN AMERICA*, *supra* note 4, at 1-5, 20-30, 44-52.

30. *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), *appeal dismissed*, 423 U.S. 808 (1975).

31. CAL. GOV'T CODE §§ 65302(c), 65580 (West 1997 & Supp. 2004) (requiring housing elements providing planning for housing market segments and economic groups within mandatory comprehensive plans).

32. *Home Builders Ass'n v. City of Napa*, 108 Cal. Rptr. 2d 60, 62 (Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002).

33. E.g., IOWA CODE ANN. § 15E.193B (West Supp. 2004) (providing an income tax credit for qualifying housing businesses).

34. E.g., *Cameron v. Zoning Agent*, 260 N.E.2d 143 (Mass. 1970).

homes,³⁵ and the development of apartments or more modest homes on smaller parcels of land.³⁶

Most of the inclusionary strategies were premised on the continued availability of generous state or national housing subsidies that would provide financing to support affordable housing. Unfortunately, political support for most forms of subsidy has waned³⁷ and local communities have had to rely upon limited federal tax credits³⁸ and innovative local programs, such as tax³⁹ or exaction-generated⁴⁰ redevelopment as a few progressive communities have done. An example of locally subsidized development is the housing trust funds created by cities and funded by charges to developers of unsubsidized commercial, industrial, or residential housing.⁴¹ Although these initiatives are responsible for increasing the supply of affordable housing in non-traditional locations, the results have been largely symbolic. Typically, the resulting affordable housing has been segregated within the community, thereby creating a microcosm of traditional class and racial segregation.⁴²

Even where inclusionary programs have been most successful, they have failed to generate ethnic or racial integration.⁴³ Indeed,

35. *S. Burlington County*, 456 A.2d at 450-51.

36. *E.g.*, *In re Adoption of Amendments to N.J.A.C.*, 772 A.2d 9 (N.J. Super. Ct. App. Div. 2001).

37. See Peter Dreier, *The New Politics of Housing*, 63 J. AM. PLAN. ASS'N 5, 5 (1997); Robert W. Burchell & David Listokin, *Influences on United States Housing Policy*, 6 HOUSING POL'Y DEBATE 559, 559 (1995); Deborah Kenn, *One Nation's Dream, Another's Reality: Housing Justice in Sweden*, 22 BROOK. J. INT'L L. 63, 72-75 (1996); Peter Salins, *Toward a Permanent Housing Problem*, 85 PUB. INT. 22, 32 (1986); James E. Wallace, *Financing Affordable Housing in the United States*, 6 HOUS. POL'Y DEBATE 785, 793-94 (1995).

38. See David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537 (1998); Allison D. Christians, *Breaking the Subsidy Cycle: A Proposal for Affordable Housing*, 32 COLUM. J.L. & SOC. PROBS. 131 (1999).

39. *Craig v. City of Poway*, 33 Cal. Rptr. 2d 528, 531-535 (Ct. App. 1994) (applying requirement that twenty percent of taxes allocated under state-authorized tax increment-financed redevelopment be targeted for low and moderate income housing).

40. Janet E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991).

41. *Commercial Builders of N. California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991).

42. See, e.g., Josh Getlin, *Home is Where the Hurt Was: After a Bruising Legal Fight, an Affluent New Jersey Town has Housing for the Poor. But it's Still a Struggle to Keep Doors of Acceptance Open*, L.A. TIMES, Nov. 5, 2004, at A1 (describing how Mount Laurel finally developed an affordable housing project, but one that is a virtual all-minority "project" segregated from the now exclusive highly affluent suburban community).

43. *Id.* Mount Laurel, New Jersey presents a paradigm example of segregated inclusion. Portland, Oregon, by comparison, has aggressively sought to generate neighborhoods with both mixed uses and mixed incomes.

providing affordable housing for majority ethnic populations in the suburbs may simply exacerbate regional patterns of racial segregation as the central city population is composed increasingly of poor, minority ethnic populations.⁴⁴ Although a few northeastern United States have judicially established a remedy for organizations or developers to challenge exclusionary zoning,⁴⁵ and an increasing number of states legislatively mandate comprehensive planning that includes adequate housing for those of lower income,⁴⁶ no initiatives have generated an adequate and accessible supply of affordable housing.⁴⁷ Most of the affordable housing generated through inclusionary initiatives has been developed in a racially or ethnically segregated land use pattern.⁴⁸ In addition, as most assisted or subsidized housing and most apartments are constructed in the central city and not in the suburbs, class, as well as racial, segregation has been exacerbated by programs to develop affordable housing.

The impact, if any, of suburban inclusionary zoning programs has been to further generate urban sprawl. As urban sprawl lowers average density to a point that public transport is rendered uneconomic while employment centers are dispersed throughout the suburbs, the resulting automobile-dominated land use pattern exacerbates the economic impact of urban ethnic segregation.⁴⁹

D. Subsidized Supply Through New Housing Production

Although subsidies for housing production have been largely eliminated in the United States, the experience of the last quarter century has shown that just as housing production alone does not reduce housing cost,⁵⁰ housing production alone will not generate racial, ethnic, or class-

44. Paul B. Fischer, *Racial and Locational Patterns of Subsidized Housing in the Chicago Suburbs*, 1 GEO. J. ON POVERTY L. & POL'Y 384 (1994).

45. KUSHNER, SUBDIVISION LAW, *supra* note 25, §§ 3:8–3:19.

46. *Id.*

47. Marc T. Smith, Charles J. Delaney & Thomas Liou, *Inclusionary Housing Programs: Issues and Outcomes*, 25 REAL EST. L.J. 155 (1996) (isolated programs reach but a small portion of the housing stock).

48. Sheryll D. Cashin, *Building Community in the Twenty-First Century: A Post-Integrationist Vision of the American Metropolis*, 98 MICH. L. REV. 1704, 1719 (2000).

49. See generally DOM NOZZI, ROAD TO RUIN: AN INTRODUCTION TO SPRAWL AND HOW TO CURE IT (2003). See also JAMES A. KUSHNER, THE POST-AUTOMOBILE CITY: LEGAL MECHANISMS TO ESTABLISH THE PEDESTRIAN-FRIENDLY CITY (2004).

50. Juli Ponce, *Land Use Law, Liberalization, and Social Cohesion Through Affordable Housing in Europe: The Spanish Case*, 36 URB. LAW. 317, 319-20 (2004). See also JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2004

based residential integration.⁵¹ Housing opportunities developed in the affluent suburbs tend to be marketed to non-minority homeseekers while urban housing development in the United States tends to be occupied by ethnic minority group members.⁵² This is generally the European experience as well since social housing units in many countries have become marked as housing for ethnic immigrants.⁵³ European cities might reduce ethnic isolation through developing housing for more affluent households in what have become traditionally minority-dominated neighborhoods.

E. Subsidized Housing Access Through Demand Subsidies

During the past two decades, American housing subsidies have been converted from public and subsidized production programs to voucher programs that give lower income families rent subsidies that provide greater access to the private rental market.⁵⁴ These programs rarely result in ethnic integration.⁵⁵ Suburban landlords have failed to participate in the program and participating housing providers are often located in districts stigmatized by poverty and ethnic segregation.⁵⁶

Chicago has carried out such a "mobility" program as a remedy for its past policy of segregating public housing whereby all public

(2004), available at <http://www.jchs.harvard.edu>.

51. Cf. Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. 977 (1998) (reporting entrenched patterns of racial segregation in cities with stagnant housing markets). 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).

52. See, Sheryll D. Cashin, *Building Community in the Twenty-First Century: A Post-Integrationist Vision of the American Metropolis*, 98 MICH. L. REV. 1704 (2000) (reviewing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999) and noting that the racial integration experience of affordable housing in the developing suburbs is disappointing with more than eighty percent of New Jersey's suburban affordable housing units occupied by whites).

53. See generally CITIES OF EUROPE: CHANGING CONTEXTS, LOCAL ARRANGEMENTS, AND THE CHALLENGE TO URBAN COHESION (Yuri Kazepov ed., 2004).

54. See generally Andrea D. Haddad, Note, *Subsidized Housing and HUD Projects: Economic Confinement on Low-Income Families*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243 (2005).

55. *Chicago Study Finds Economic, Racial Segregation in Voucher Use*, 32 HOUSING & DEV. REP. 746, 746-747 (Nov. 22, 2004) (reporting study of the Chicago Fair Housing Alliance, PUTTING THE "CHOICE" IN HOUSING CHOICE VOUCHERS, available at <http://www.cafha.org>). See also James A. Kushner & W. Dennis Keating, *The Kansas City Housing Allowance Experience: Subsidies For the Real Estate Industry and Palliatives For the Poor*, 7 URB. LAW. 239 (1975).

56. See generally Kristine L. Zeabart, Note, *Requiring a True Choice in Housing Choice Voucher Programs*, 79 IND. L.J. 767 (2004) (finding dispersal ineffective).

housing was excluded from white and middle-class neighborhoods and tenants were assigned to existing and new projects on waiting lists compiled by the race of the applicant with applicants assigned to projects occupied by those of the same race.⁵⁷ Very few cities have followed Chicago's lead to locate affordable housing for minority public housing tenants in the suburbs.⁵⁸ While such programs are promising in that African American participants experience an improvement in housing and school quality while contributing to neighborhood diversity, they have not been widely replicated.⁵⁹

F. Affirmative Action Integration Policies

Although the United States Supreme Court has previously endorsed integration in housing⁶⁰ and schools,⁶¹ its subsequent rulings have eliminated the possibility of judicially or legislatively driven integration in housing⁶² or secondary⁶³ and higher education.⁶⁴ The United States courts have adopted a virtually "colorblind" policy that

57. Janet K. Levit, *Rewriting Beginnings: The Lessons of Gautreaux*, 28 J. MARSHALL L. REV. 57 (1994); Leonard S. Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 N. ILL. U.L. REV. 589 (1992). See *Hills v. Gautreaux*, 425 U.S. 284 (1976).

58. James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUS. POL'Y DEBATE 231 (1995).

59. Dolores Acevedo-Garcia et al., *Does Housing Mobility Policy Improve Health?*, 15 HOUSING POL'Y DEBATE 49 (2004).

60. *Shelley v. Kraemer*, 344 U.S. 1 (1948) (invalidating enforcement of racially restrictive covenants excluding integrated housing occupancy). See also *Huntington Branch NAACP v. Town of Huntington*, 488 U.S. 15 (1988) (affirming per curiam ruling of suburban racially discriminatory exclusion of proposed integrated apartments); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (finding standing for neighbors and housing discrimination testers to challenge housing discrimination under federal housing discrimination statute).

61. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating state mandated school segregation). See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (ordering aggressive affirmative action in remedying intentional school desegregation in constructing integration plans).

62. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (requiring proof of intentional discrimination as a prerequisite to finding a constitutional violation allowing a desegregation remedy in the virtually all-white suburbs).

63. *Milliken v. Bradley*, 418 U.S. 717 (1974) (refusing to approve desegregation between virtually all-minority central cities and virtually all-white suburbs absent extremely burdensome proof of a virtual conspiracy).

64. *Compare Grutter v. Bollinger*, 539 U.S. 306 (2003) (permitting modest affirmative action by allowing race to be a slight factor in admissions to law school) with *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating program offering an advantage to minority applicants to higher education).

prohibits considering race when providing education,⁶⁵ employment,⁶⁶ or economic opportunities.⁶⁷

The death knell for integration policies in housing came from the United States Court of Appeals for the Second Circuit in *United States v. Starrett City Associates*,⁶⁸ in which the court invalidated the use of racial quotas designed to achieve or maintain an integrated housing settlement.⁶⁹ *Starrett City* would preclude both housing managers and zoning officials from utilizing race-based policies to create or maintain racial integration. Despite the statement by a prominent proponent of the law that Title VIII, the Fair Housing Act, was designed to replace ghettos with “truly integrated and balanced living patterns,”⁷⁰ judicial interpretation of the law has established Title VIII as a virtually insurmountable barrier to attaining an integrated neighborhood or housing settlement, let alone full realization of an integrated society.⁷¹ Thus, any racial or ethnic integration must be fortuitous and coincidental rather than the result of government or private policy.

Although suburban communities are free to develop high density apartments and require inclusionary zoning so as to attract a larger share of those of modest means, the fiscal effects from the high cost of facilities including schools, infrastructure, and increased service demands will typically discourage such behavior. Integrated housing patterns in the suburbs must be entirely fortuitous and, as in the case of integrating neighborhood change in the last century, is likely to be a temporary

65. *E.g.*, *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000) (invalidating high school diversity transfer program); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (*per curiam*), *cert. denied*, 529 U.S. 1050 (2000) (invalidating kindergarten diversity program).

66. *Washington v. Davis*, 426 U.S. 229 (1976) (requiring proof of intent to challenge public employment policies as discriminatory under the equal protection clause); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528 (7th Cir. 1997) (invalidating minority teacher consent decree hiring goals).

67. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating public works minority contract set-aside program). Although the Supreme Court has not directly addressed affirmative action or integration in the housing context, it has repeatedly ruled that it would review all racial classifications using the strict scrutiny standard. *Johnson v. California*, 73 U.S.L.W. 4137 (U.S. Feb. 23, 2005) (applying strict scrutiny to temporary prison racial segregation for security purposes).

68. 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988).

69. *Id.*

70. 114 CONG. REC. 3422 (1968) (statement of Senator Mondale), *quoted with approval in* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (finding generous standing of litigants to challenge acts of discrimination through Title VIII).

71. Kushner, *Fair Housing Amendments*, *supra* note 11, at 1113-19.

condition as white residents relocate to suburbs on the urban fringe or reclaim attractive central city neighborhoods through gentrification.

Although the United States courts, ironically, have blocked integration programs as being discriminatory, other countries have employed this strategy to successfully promote integration. For example, Singapore has effectively utilized integration quotas in its housing allocation program to successfully achieve ethnic residential integration.⁷² In Vienna, where non-discrimination laws have not been adopted, some private housing associations have dedicated their efforts toward integrating settlements by designing projects around diverse occupancy and deliberately integrating European and Turkish residents.⁷³ Affirmative action integration efforts, whether administered on a wide scale, such as in Singapore or on a small scale, such as those innovative efforts in particular cities or housing projects, such as in Vienna, provide the greatest promise for achieving residential housing integration; however, legal and political opposition make such policies unavailable.

Even though the most effective integration strategies are constrained by legal and political limitations, modest affirmative action housing marketing plans are nevertheless available and constitute valuable integration tools. Specific examples of these marketing strategies include advertising, recruiting, and the making of agency referrals.⁷⁴ For example, courts might approve advertising campaigns designed to attract minority residents to nontraditional neighborhoods, such as advertisements for suburban housing opportunities included in minority-targeted media, or programs to encourage applications through referrals by social and governmental agencies in minority communities. Real estate brokers and agents might be encouraged to refer homeseekers to nontraditional housing opportunities. Short of using race as a criteria for admission or participation, courts are likely to approve of programs to promote diverse housing patterns. Unfortunately, there exists slight motivation—at best—to undertake these initiatives.

72. Aya Gruber, Recent Development, *Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System*, 38 HARV. INT'L L.J. 236 (1997).

73. See generally CITY OF VIENNA, SUMMARY REPORT FOR THE UNITED NATIONS ECONOMIC COMMITTEE FOR EUROPE'S COMMITTEE ON HUMAN SETTLEMENTS (2004), available at http://www.europaforum.or.at/data/media/med_binary/original/1112795288.pdf.

74. South-Suburban Hous. Ctr. v. Greater South Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991). See generally, Dorn Bishop, Comment, *Fair Housing and the Constitutionality of Government Measures Affecting Community Ethnicity*, 55 U. CHI. L. REV. 1229 (1988).

G. New Urbanism Planning Design Policies

New Urbanism reflects the United States' version of the European compact city where the mixing of shops and residences in the urban center is designed to generate city life and attract pedestrians toward a higher density, less automobile-dominated community.⁷⁵ New Urbanist neighborhoods, both in cities and in suburbs, are increasing housing supply and reducing exclusion by generating more multifamily, subsidized and affordable housing.⁷⁶ Where New Urbanism is linked with public transport, such as light rail or other convenient and efficient public transport access, what I refer to as "Smart New Urbanism," even modest increases in housing prices are partially offset by lower commuting, energy, and infrastructure costs, such as the reduced need to extend utilities and roads or construct parking facilities.⁷⁷ As the Portland, Oregon experience demonstrates, minority homeseekers will participate in the market to a higher degree than they will participate in traditional suburban developments, especially when higher density urban structures, including a significant number of multifamily housing that is served by efficient and convenient public transport, is available.⁷⁸ Portland has simply generated a larger supply of rental apartments in attractive locations served by convenient light rail as compared to other American cities, permitting more affordable rents and a higher level of residential racial integration through an open market.⁷⁹

New Urbanism is the most promising strategy as it is based on the least need for regulation and is a developer-driven strategy. Multifamily housing generates larger profits for developers and together with improved public transport can offer improved access and a substantially improved and more affordable quality of life by freeing the participant

75. James A. Kushner, *Smart Growth, New Urbanism, and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. & POL'Y 45, 52, 61-65 (2002/2003) [hereinafter Kushner, *Smart Growth*]. See generally PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* (1993); PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* (2001); MICHAEL N. CORBETT, *A BETTER PLACE TO LIVE: NEW DESIGNS FOR TOMORROW'S COMMUNITIES* (1981); ANDRÉS DUANY ET AL., *SUBURBAN NATION* (2000); PETER KATZ, *THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY* (1994); Eric M. Braun, *Growth Management and New Urbanism: Legal Implications*, 31 URB. LAW. 817 (1999).

76. ARTHUR C. NELSON, ET AL., *THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE* (Brookings Institution discussion paper 2002) (reporting on Portland studies). <http://www.brookings.edu/es/urban/publications/growthmang.pdf>.

77. Kushner, *Smart Growth*, *supra* note 75, at 54-55.

78. NELSON, *supra* note 76.

79. *Id.*

from the extraordinary expense of transportation by personal automobile. Even for those households dependent upon intra-suburban commutes not served by public transport, New Urbanism transit-served communities allow households to depend on a single personal automobile.⁸⁰ The United States experience of the last generation demonstrates that privately and publicly enforceable antidiscrimination laws do not encourage ethnic and racial minority group attraction to suburban communities where housing is too expensive and multifamily housing is discouraged or limited to unattractive districts and sites. Inclusionary housing has not proven popular, widespread, or effective in generating integrated communities; subsidized housing is virtually an endangered phenomenon and typically segregative in targeting sites; participating landlords in the central city are in lower income census tracts; and affirmative action is simply illegal and unconstitutional under the current legal regime as well as unpopular within both majority and minority populations.

III. CONCLUSION

This paper has reviewed seven possible strategies to achieve ethnic and income-minority residential integration and reduce residential segregation, including: (1) a system of privately enforceable housing discrimination laws; (2) a system of government-administrated enforcement of housing discrimination laws; (3) inclusionary land use and housing policies; (4) subsidized housing supply through new housing production; (5) subsidized housing access through demand subsidies; (6) affirmative action integration policies; and (7) New Urbanism planning design policies. Each of these strategies offers some hope for mitigation of the problem of residential segregation. Realistically, each of the strategies should be simultaneously implemented to achieve the maximum integration effect. Implemented alone, none of these strategies is likely to significantly reduce or reverse the worldwide pattern of worsening ethnic and class residential segregation. The public and private enforcement of anti-discrimination laws are too haphazard, inclusionary zoning and planning initiatives too rarely and minimally enacted, new construction of subsidized housing opportunities too expensive, and the use of housing vouchers too segregative to generate meaningful integration. Only affirmative action integration policies and

80. See Kushner, *Smart Growth*, *supra* note 75.

New Urbanism planning design policies offer a realistic hope of significant mitigation.

For most nations and communities, either due to legal impediments or political realities, affirmative action integration policies implemented on a broad scale are unrealistic. New Urbanism, which offers higher density apartments designed for pedestrians around efficient public transport, generates more affordable housing and significant opportunities for residential racial integration. Thus, the strategy of New Urbanism emerges as the one strategy that is the most politically feasible and effective in the pursuit of residential integration.

