

# The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society

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## INTRODUCTION

The limited equity cooperative is a form of housing tenure in which shareholder residents manage their buildings, within limits imposed by a charter, and have the right to get back what they have paid for their shares plus an allowance for improvements, if and when they decide to leave. The limited equity cooperative (hereinafter "LEC") is neither a common form, nor one that seems likely to become common in the near future. It is nonetheless a hardy if rare perennial.

In this article, I try to bring together three strands of generally progressive legal thought as means to understand the pros and cons of the LEC as a vehicle for subsidized low-income housing. The three strands are "alternative forms of property" thinking, critical legal studies (CLS) "contradictions analysis," and critical race theory (CRT). I will explain each of them in more detail in the course of the article.

Part I introduces this specific institutional form as one of the elements in a progressive housing agenda (and defends it against various criticisms). Part II shows how the apparently mundane activity of drafting the details of a LEC charter forces whoever is doing the drafting to choose among conflicting progressive objectives, and among conflicting progressive visions. Part III shows how, in the context of the LEC, critical race theory and critical legal studies discussions of race and class help define the parameters within which the decision maker performs these tradeoffs. The Conclusion briefly dis-

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cusses the utopian aspirations, as opposed to the pragmatic objectives, of the LEC movement.

## I. THE LEC AS AN ALTERNATIVE FORM OF PROPERTY

Why would a developer set up a limited equity cooperative? First of all, he or she would be acting in a long American tradition that combines a pragmatic approach to property law and theory with a set of utopian aspirations. This is the conception of property rights in which we see them as instruments for our social purposes and try to design them, rather than just accepting the traditional off-the-rack version of property as the one and only solution for all problems. Designer property fits within the general category of property, but with the sticks in the bundle modified in the hope of achieving results quite different from those that have flowed from the traditional model.

The goals that people in this tradition have tried to achieve through re-design have been various, depending on whether they are talking about agricultural land tenure systems, consumer coops, irrigation systems, retirement communities, marketing coops, or worker-owned firms.<sup>1</sup> This paper deals with third-way property—neither the traditional market form nor state ownership—in the area of urban residential housing. The LEC as a species of third-way property looks different according to whether we are talking about what we would consider the ideal form of housing tenure in a utopian society,<sup>2</sup> about the LEC as a vehicle for the privatization of formerly public housing in a post-communist or post-socialist economy,<sup>3</sup> or, as in this article, about the LEC as a vehicle for housing subsidies for low-income people in a developed capitalist economy.<sup>4</sup>

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1. See generally PROPERTY AND VALUES: ALTERNATIVES TO PRIVATE AND PUBLIC OWNERSHIP (Charles Geisler & Gail Daneker eds., 2000) [hereinafter PROPERTY AND VALUES]; A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMIES (Alexander et. al. eds., 1994); ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996); William H. Simon, *Social Republican Property*, 38 UCLA L. REV. 1335 (1991); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

2. See, e.g., Peter Salsich, *Toward a Property Ethic of Stewardship: A Religious Perspective*, in PROPERTY AND VALUES at 21.

3. See PROPERTY AND VALUES, *supra* note 1; Zhiyuan Cui, *Whither China: The Discourse on Property Rights in the Chinese Reform Context*, 16 SOCIAL TEXT 55 (Summer 1998); Stuart Grider, *A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation—A New Form of Property*, 27 U. MIAMI INTER-AM. L. REV. 453 (1996).

4. See David Abromowitz, *An Essay on Community Land Trusts: Towards Permanently Affordable Housing*, 61 MISS. L.J. 663 (1991); Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69 (1995); Deborah Kenn, *One Nation's Dream, Another's Reality: Housing Justice in Sweden*, 22 BROOK. J. OF INT'L L. 63 (1996); David H. Kirkpatrick, *Cooperatives and Mutual Housing Associations*, J. AFFORDABLE HOUS. & COM-

The LEC typically splits up the traditional property bundle in the following way: A non-profit entity, often a land trust, owns the land and has the right to enforce the rules that govern the coop that owns the building. The residents own shares in the coop. They can, within limits, manage it as they wish, but when a resident sells his or her unit, he or she gets back only what he or she has put in, with adjustment for inflation and sometimes a share of equity appreciation. Equity appreciation over and above the resident's share belongs to the coop and the land trust. If the market value of the shares is less than what the resident has paid for them, then the resident absorbs the loss, unless the coop charter has provided for a reserve fund of some kind to make up the difference between market value and shareholder contribution.

Residents accept the restrictions imposed by the LEC form for various reasons. They may regard them as desirable aspects of the unit, because they constitute the property as social, or based on the stewardship conception. More likely, they buy the shares because the small down payment (low share price) and low monthly payments make the unit significantly cheaper than market rate units of similar quality. They regard the obligations and restrictions as a necessary price to obtain equity, albeit limited equity. The low share price and low monthly charges are usually made possible by a subsidy package. The package may have many different elements, including low-income housing tax credits, below market land acquisition, mortgage subsidy by state or local authorities, and financing by non-profits, such as community development banks or land trusts.

By contrast with residents, developers of subsidized low-income housing typically have a complex agenda. If they are interested in the LEC form, it is likely to be because they believe it can simultaneously accomplish three distinct goals. These are affordability, participation (resident empowerment through self-management), and community responsibility. I will discuss affordability, participation, and community responsibility in that order, but, of course, a developer might rank them differently or have other objectives altogether.

#### A. Affordability

The first objective is affordability. This objective is to increase the supply of decent housing that the low-income part of the popula-

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MUNITY DEV. 1 (Spring 1992); WILLIAM SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* (2001).

tion can afford, beyond the supply that the private housing market, along with existing government construction, subsidy, and regulatory programs, will provide on their own. Although it sounds simple, the goal of affordability is actually quite complicated.<sup>5</sup>

We start from the observation that the poverty of the poor (say the bottom twenty percent of the income distribution) is reflected in their housing, in at least three ways. (1) They live in housing that, according to societal consensus, is relatively undesirable, whether because it was built bad (not much light and air); is badly maintained (heat only works sporadically, rodent infested, looks terrible, etc.); or is sited near undesirable environmental features (toxic waste sites, highways, factories, abandoned buildings, etc.), and far from desirable ones. (2) The poor don't consume very much of it, compared to richer people—they are relatively crowded, and many of the poor are homeless. (3) It takes up a lot of their income. Here the notion is that, for the poor, housing expenses are a first claim on income, and one that is indivisible. In a given housing market, there will be an effective minimum price for a rental apartment. These minimum prices are high enough so that when a poor family has paid the rent, the money left will buy only an inadequate level of food, clothing, and other necessities.

It might at first seem that this is no more than to say that the poor don't have enough money to buy good housing and still have money left over for other things. So the remedy should be to give them more money, and let them spend it any way they want. There are two responses from people who see affordability as an objective separate from the general objective of raising the incomes of the poor.

The first response is that society has a moral obligation to provide shelter (and food and clothing) to all its members that is distinct from its obligations to provide income in the abstract. Housing is a necessity, and a building block for other kinds of welfare. Everyone, including the children of the poor, should actually consume a minimal level, a decent level, of housing.

The second response is that there are major externalities from the provision of good housing for the poor. Good housing improves family life, and it improves neighborhood life. Bad housing is one (just

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5. See MICHAEL STONE, SHELTER POVERTY: NEW IDEAS ON HOUSING AFFORDABILITY (1993); Symposium, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1351 (June 1993).

one) of the elements in the environment that can produce downward spirals of living conditions. Bad housing drives out good housing. Good housing stabilizes, and it also can change incentives so that neighbors increase maintenance and generate an upward spiral.

These two lines of argument justify targeting subsidies for housing and providing it in kind, rather than providing equivalent cash and letting the poor decide. In other words, they justify a measure of paternalism. Of course, the degree of paternalism may be very small if the intervention mainly reduces the rent payments of the poor, leaving them more money to spend on other things. Moreover, the paternalism serves efficiency, as well as democratic and egalitarian aspirations. It aims to maximize the effect of subsidies by taking advantage of the externalities generated by housing improvements, and to give the poor a base from which to pursue their interests more effectively.

State, federal, and local governments play a major role in setting the incomes of the poor, and they provide in kind housing services through construction, subsidies, and regulation.<sup>6</sup> The premise of the LEC movement is that they don't do enough, and don't do what they do well enough, to make it unnecessary (or undesirable) for the non-profit sector to try to increase poor people's housing resources.

People interested in affordability achieved through third sector initiatives are unapologetic "do-gooders." We reject the notion that it is only the government that should pursue the public interest. The movement is therefore open to the classic American suspicion that there is something inherently wrong with allowing or encouraging entities without democratic political accountability to do things that affect the lives of citizens, unless, of course, they are doing those things for profit. And the movement is defensible as quintessentially American in its rejection of the idea that we should leave social improvement to the government rather than pitching in ourselves as private citizens at the grass roots level.

The LEC idea is not inconsistent with government subsidies to the coop movement, or government preferences that would increase the incentive to create this kind of housing. Moreover, there is no bright line between public housing and third sector housing. By a series of small steps, we can move from a very clearly non-government coop housing model to public housing. For example, the land may be

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6. See generally Harold McDougall, *Affordable Housing in the 1990's*, 20 U. MICH. J.L. REFORM 727 (1987).

owned not by a Land Trust but by the City, which has converted buildings on the land to limited equity coops under the terms of a local ordinance. Tenant management initiatives in public housing move that tenure form in the direction of the LEC.

LECs do represent a specific choice about how to design in kind housing subsidies to the poor. They stand in contrast to other policies, such as: the provision of housing vouchers through which the government supplements the rents that the poor can pay while leaving them free to choose their private landlords; government-owned and operated new housing construction; government subsidies to private builders of new low-income rental housing; government subsidies for low-income home buyers, and for construction of affordable home ownership opportunities. They also contrast with other non-profit initiatives, such as rental housing subsidized by churches or other non-profits, and charitable support for sweat equity programs that give the participants fee simple title.

Like public housing and subsidized private rental housing, LECs create low-income housing that will be available for the indefinite future. This represents a decision to allocate the subsidy built into the coop to a series of people who will occupy the unit over its lifetime, rather than concentrating the subsidy once and for all on the first occupant. Like home ownership initiatives, LECs provide residents with governance rights that go well beyond those of private sector tenants. Like home ownership and subsidized private rental housing, LECs rely on entrepreneurial rather than political initiative, and on private rather than public service management methods.

If we create lots of cheap home ownership opportunities, through subsidies and sweat equity programs, for example, we help some of the most competent poor people better their situation. They become full owners of their new homes and can sell them at whatever the market will bear. A cooperative sector that gives low-income residents unrestricted shares in their apartments creates the possibility that, if the neighborhood gentrifies, they will be similarly enriched by the increase in their equity. But when the subsidized low-income homeowner or cooperative shareholder sells, the units will no longer be affordable for any other low-income buyers. The subsidy improves the possibilities of upward social mobility for the sellers, thereby marginally increasing the chances for low-income people to join at least the lower middle class.

By contrast, when current LEC residents die or move up or out, they are replaced by other low-income people, rather than by whoever will bid the most for the unit in the market as it exists when the resident decides to sell. This design strategy stems from distrust of the notion that the market will, over the long run, cure the “transitional” problem of bad living conditions for the poor. It seems more likely that the income inequality and the racial and cultural differences that define American poverty will persist for the indefinite future. LECs will be available into that indefinite future. The federal government subsidy programs of the late 1960s and 1970s took the opposite approach, and time-limited the affordability obligations of subsidized developers, giving rise to the “expiring use” crisis of the 1980s when the time limits ran out. The point is not just to help people move up through the market system, but also to counter the tendency of the market to generate, through the combination of employment instability, neighborhood instability, and the various forms of racial and class discrimination, an endlessly renewed sector of urban misery.

Of course, we could achieve the goal of creating a permanent, non-profit, affordable housing sector through subsidized rental tenure, rather than through LECs. In order to explain the LEC form, we need to add the further objectives of resident empowerment and community responsibility.

## B. Participation

The second basic objective is that the occupants of low-income housing should participate in the management of their buildings.<sup>7</sup> The background is a critique of the landlord-tenant relationship as it typically exists in the low-income rental market. It seems to have many undesirable characteristics: tenants are passive, without choice in how the building will look, in the level of maintenance versus other uses of rental income, in decisions about who should fill vacancies, and decisions about who should be evicted or subject to lesser sanctions for anti-social behavior. Landlord-tenant relations seem to vary between patriarchal, with landlords operating with excessive day-to-day power over tenants, and alienated and bureaucratic in large buildings. Renter status is often month-to-month, but even year leases give only

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7. See Mark Fenster, *Community by Covenant, Process and Design*, 15 J. LAND USE & ENVTL. L. 3 (1999); Laura M. Padilla, *Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals, and Built-In Community*, 13 WIS. WOMEN'S L.J. 179, 184 (1998); Susan Saegert & Gary Winkel, *Paths to Empowerment: Organizing at Home*, 24 AM. J. PSYCHOLOGY 517 (1996).

the most limited incentive for the tenant to put money or even effort into maintenance, let alone improvements.

LEC advocates value participation for its own sake, as a form of self-management, but we also value it for the effects we hope it will encourage. Participation is a form of training or preparation for citizenship in a democracy. Properly organized, it furthers the autonomy of stigmatized and oppressed groups. When it combines with (limited) equity to create the expectation of long-term occupancy in a stable environment, it creates incentives for residents to invest in their units. This, in turn, should and sometimes does generate positive neighborhood effects, or externalities, and sometimes can be a factor in upward spirals.

There is thus an overlap, but not identity, of the arguments for LECs and the general argument for home ownership, as opposed to renting, that has characterized American social policy since the 19th century. Both tenure forms encourage residents to invest, but cooperators can get back only what they put in, and are legally enmeshed with their fellow residents, rather than operating simply as local property owners.

The LEC will have an initial charter that lays out the terms of cooperation, specifying the rights and duties of shareholders and the powers and obligations of the Coop Board and the Land Trust. When the shares are sold and the building occupied, the cooperators will have some power to modify the rules governing their interaction as simultaneous residents and managers of the building. But the mere fact of having to change an existing arrangement places severe obstacles in the way of tenants substantially altering the initial set up.

Moreover, there will be limits on the residents' legal power to modify the charter without the consent of the Land Trust. For example, the residents won't be able to get rid of the maximum income qualification for new residents. They won't be able to sell their interests in the building to a private for-profit landlord and convert themselves into tenants, or to turn themselves into limited equity condominium owners, even if they all agree that either option would be preferable to having to deal with one another as self-managers. Given the shortage of affordable housing, the developer is offering an incentive, in the form of affordability and limited equity, that induces residents to enter an arrangement—the cooperative as opposed to fee simple or rental—that they might not have chosen if other things were equal. It is true that they can sell their shares and go elsewhere, per-



haps to similarly subsidized rental, if they ultimately find the arrangement undesirable. This exit option, though real, nonetheless imposes costs and risks of its own.

It would require an odd position indeed, combining radical individualism with paternalism, to say that the poor should not be allowed to choose the LEC option if they want it. But it seems important to recognize from the beginning that the developer is doing something more than simply increasing options, as would be the case if the units were offered without a subsidy, at a price reflecting the actual costs of operating under this particular legal regime. LEC development gambles that the people offered the incentive of the subsidy will make the coop arrangement work, and reap the inherently somewhat speculative benefits, rather than seeing themselves as having been manipulated or misled.

### C. Community Responsibility

A third basic idea is that the owners of property in general, and urban residential property in particular, ought to operate with more regard to residents, to the communities in which the property is located, and to the environment, than they now do.<sup>8</sup> Of course, legislation, regulations, and judge-made rules already impose many duties on owners of private residential property. Moreover, public housing authorities operate under a complex set of federal and local regulations. An important idea behind advocacy of LECs is that the community responsibility objectives behind these existing regulations can be better achieved by building duties of stewardship into the definition of the property rights of the people who will be involved with the housing.

#### 1. The Non-Profit as Steward

There are two principal ways in which the LEC does this. The first is that the owner of the land is a non-profit entity mandated by its charter to act as a steward of the property. The second is that the residents are shareholders with limited rights, rather than fee owners, and the equity they don't get remains available to the non-profit to use for the good of the community.

The gamble here is that the non-profit entity will behave in fact differently than and better than a commercial landowner operating

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8. See SIMON, *supra* note 4.

under the existing legal regime with respect to resident welfare, neighborhood interests, and the environment. The people who control the non-profit, we believe, will very often take it as their mission to manage the land to further what they figure out, within their limitations, to be the public good, or the interests of the community. There are quite a few concrete situations in which they are likely to define these general ideals differently than we would expect a for-profit landowner to define his or her objectives. So we anticipate that there will actually be different decisions from the two types of owner.

A for-profit landowner could tear the building down and devote the land to a non-residential use, including a use that would be environmentally or socially detrimental to the neighborhood, yet not in violation of the law of nuisance or local land use regulations. Landlords may be racist or have economic interests in racial discrimination, and existing anti-discrimination law is unlikely to be an effective check on racially motivated action. A landlord could also gentrify the building, or let it deteriorate, when these strategies were profit maximizing, to the detriment both of the sitting tenants and of the neighborhood.

A non-profit landowner with full legal power could do these things too, and might enlist the coop's share-owning residents to participate when they might benefit financially, or act against the interests of residents. Nonetheless, we anticipate, realistically, that this is less likely to happen under a non-profit owner than under for-profit ownership. This expectation is partly based on what we think the people who undertake to manage non-profits are likely to do of their own accord, but not only on that. The charter typically builds in legal obligations to the community, the residents, and the environment. The people who manage the non-profit will be fiduciaries, public officials, or community representatives selected with some accountability to a local constituency. The explicit terms of the charter of the LEC, plus the usual legal and political mechanisms of accountability, create some hard incentives for the non-profit to behave differently than the for-profit.

## 2. Neighborhood Dynamics

In recent years, there has been more and more recognition that the housing circumstances of the poor are a function not just of their incomes in relation to the resource costs of housing (building materials, fuel, labor, etc.), but also of the dynamics of the neighborhoods

where they live.<sup>9</sup> In particular, it is important to recognize three dynamic configurations: hyper-stable low-level equilibrium; downward spirals of disinvestment and abandonment; and upward spirals, or gentrification. A low level equilibrium is hyper-stable when the neighborhood responds to investment in ways that counteract its positive potential, for example, through vandalism or street crime, and does *not* respond by actions like imitative reinvestment and increased respect for public spaces. Upward and downward spirals are likely to be responses to national trends or random shocks, but greatly amplify the impact of the stimulus through self-reinforcing feedback loops.

This means that reductions in the available affordable housing stock in the neighborhood can occur not just because the poor don't have enough money to pay the resource cost of providing them housing, but also because the neighborhood's dynamics prevent the low-income residents from realizing anything like the full value of the money they put into housing. Housing that would be viable and affordable in a stable neighborhood may be eliminated by abandonment in a downward spiral, or shifted to upper income use in an upward spiral. Investment in a bad neighborhood that would be adequate to support affordable housing, or even to generate an upward movement across the board, may be destroyed if the neighborhood response is negative.

Private landlords, including land trust and cooperatives, participate in neighborhood dynamics whether they want to or not. They decide how they will respond to anticipated changes, upward or downward, and the responses feed or impede the changes, or have no effect. The familiar negative logic of collective action, or prisoner's dilemma scenario, may be a major factor here.

Individual landowners may consider their properties to be viable or even quite profitable on the assumption that things remain as they have been, but choose to disinvest, sell at a loss, or abandon because

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9. The discussion of neighborhood change that follows is derived from the housing economics literature. The pieces that have influenced me the most are MATTHEW EDEL, *FILTERING IN A PRIVATE HOUSING MARKET* (Edel & Rothenberg, eds., 1972); CHARLES L. LEVEN ET. AL., *NEIGHBORHOOD CHANGE: LESSONS IN THE DYNAMICS OF URBAN DECAY* (1976); Rolf Goetze, *UNDERSTANDING NEIGHBORHOOD CHANGE* (1979); Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 *J. URBAN AND CONTEMPORARY LAW* 195 (1985); Peter Marcuse, *Neutralizing Homelessness*, 88 *SOCIALIST REV.* 1 (1988). See also Duncan Kennedy, *The Effect of the Warranty of Habitability*, 15 *FLA. L. REV.* 485 (1987); Duncan Kennedy, *A Framework For Analyzing Typical U.S. Low Income Housing Markets in Light of "Informality" Analysis*, 4 *J.L. SOC'Y* (forthcoming Fall 2002).

they anticipate that others will do the same, and that the last out will be left holding the bag of losses. They may calculate that what they do will not affect the outcome, except as a small contribution to a large trend. Since nothing they do will change the outcome, they will likely feel that they should do whatever is necessary to minimize their losses, on the assumption that all other owners will behave in the same way. As a result, all owners bail out, leaving everyone worse off than they would have been had they been able to reach an agreement that none of them would bail.

The mere fact of non-profit ownership does not eliminate the possibility of a neighborhood prisoner's dilemma, and the Land Trust will have a responsibility to protect its investment, just like the for-profit landlord. On the other hand, the Land Trust has a commitment to the general improvement of the neighborhood rather than a narrow bottom line, and should be willing to invest more than a for-profit landlord in counteracting downward spirals. For example, in a downward spiral, the Land Trust might put resources into organizing to stem decline, rather than adopting a short run, least-cost escape strategy. The equity of the cooperators, even though limited, gives them a stake in the neighborhood beyond that of renters, and therefore an interest in countering a downward spiral beyond that of renters.<sup>10</sup>

On the up side, the combination of a non-profit land trust with limited equity in the shareholders means that equity generated by the increase in neighborhood land values is available for use in the public interest, rather than appropriated by the for-profit landlord, or by the fee simple condo or home owner. If the building is worth twice the sum represented by the residents' shares, then there is the possibility of realizing and allocating some of that excess equity. One possibility would be to rent vacant units at market, or sell them outright, and use the proceeds to subsidize a larger number of new affordable units in other buildings. A second possibility would be to buy out the residents and sell the whole building. Or the equity can stay put, preserving an affordable sector even in a rapidly gentrifying neighborhood that would otherwise become homogeneously upper income.

#### D. Typical Objections

In spite of all of the above, it is a common intuition that a non-profit cannot be as good an instrument for the welfare of the commu-

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10. See SIMON, *supra* note 4.

nity as a for-profit entity. This intuition takes a number of different forms. The first: “*without the profit motive, the property will be badly or inefficiently managed.*” As a general matter, a good portion of the economy is non-profit, and managed within the same range from good to bad as the for-profit sector. Think of non-profit private schools, universities, hospitals and clinics, as primary examples, not to speak of charities, churches, and synagogues with their various satellite operations (including a lot of housing). Of course, there is a serious set of problems that arise when we try to empower residents through self-management, as discussed *infra* Part III, but these have to do with a particular mode of non-profit operation, rather than with the non-profit form in the abstract.

A second objection: “*If the non-profit disregards the bottom line, it will be economically nonviable, or just a mechanism for subsidies; if the non-profit does pay attention to the bottom line, it is no different than a for-profit.*” This argument is based on a loose use of the notion of a bottom line. The bottom line for the non-profit is to maximize LEC objectives for any given allocation of capital. High on the list of objectives is that the LEC should be financially viable, in the specific sense that it must generate at least enough monthly income to pay the building’s carrying charges. If it doesn’t, the non-profit will face a choice between providing an *operating* (as opposed to a *one shot capital*) subsidy, and losing the building. The non-profit must indeed be totally attentive to the bottom line thus defined. However, such attentiveness will not require the non-profit to make the same choices that a for-profit landlord would make. The reason for this is that the capital subsidy gives the non-profit a margin between the building’s monthly costs and those of a for-profit building, and there are no stockholders motivated to realize this margin for themselves. The non-profit allocates the money that this margin represents among the various social objectives we have been discussing.

A third objection: “*If the form were economically viable, why wouldn’t it already be common?*” True, the private housing market does not generate a limited equity sector. This does not indicate or even suggest that such a sector will be inefficient if and when non-profit entities with one-shot subsidies bring it into operation. A sale of low-income housing tax credits, a mortgage subsidy from the state, below market land acquisition, funds generated by office building linkage requirements, bank low interest loan commitments in response to Community Reinvestment Act challenges, or a share of re-

volving capital funds from the non-profit banking sector—all amount to one-shot allocations of capital to this particular purpose.

This allocation is based on the view of the donors, whether public or private, that the capital will have a total return, *evaluated according to the donor's ideas about what counts as a return*, higher in this use than in alternative uses, just as is the case with other subsidy or charity decisions. If the residents pay their taxes, maintain the building, and pay off the mortgage, so that the expectations of the donors are fulfilled, then the standard argument for the efficiency of private choices applies here as elsewhere. The donors and the residents chose this form because it best fulfilled their purposes, given their alternatives. The point of LECs is to provide more long-term affordability, resident empowerment and community responsibility than private landlords or Public Housing Authorities (PHAs) currently provide. We expect them to come into existence only when private or public providers of one-shot capital subsidies prefer this form over alternative ways to pursue their ends. Their limited extent indicates limited donor interest and resources, but it does not indicate that they have failed a “market test” of viability.

A fourth objection: “*LECs are second class home ownership for the poor.*” Because the LEC form is complex, there is a danger that residents won't understand it, and will believe they are getting something closer to standard private market fee simple, condo title than is actually the case. That danger argues for full disclosure and highly informed consent. Supposing there is informed consent, it would seem that the standard argument applies once more: the residents choose the LEC form because, even with the restrictions, the combination of low share price, low carrying charges, and ownership features (and possibly social aspects as well) seems to them a better deal than what they can get in the rental, fee simple, condo or home ownership markets.

A final variant is that whatever the residents may think about it, their true or real interests would be better served if the donors allocated the capital so as to provide them (the low-income beneficiaries) either with fully public housing or with subsidized home ownership opportunities. As I've explained above, the basic motives for choosing the LEC tenure form are the desire to spread the subsidy over time, rather than concentrating it on a first recipient of fee simple title, the desire to provide a higher level of participation in property management than tenants get in either private subsidized or fully pub-

lic housing, and the desire for community responsibility in property management.

It is a question worthy of careful consideration whether it wouldn't be better to abandon these objectives, in favor of the view that what the poor need is upward social mobility, and that in the 21st century United States, as in the 20th century United States, that means home ownership rather than inherently unworkable empowerment schemes. And it is another question worthy of serious consideration whether the progressive goal shouldn't be the ultimate decommodification of housing by making all of it public. These questions seem best addressed *infra* Part III, when I analyze the underlying conflict of strategy and vision within critical race theory (CRT) and within critical legal studies (CLS) thinking about race and class.

## II: HOW THE DESIGN OF THE COOP TRADES OFF CONFLICTING OBJECTIVES

### A. Legal Structure of a Limited Equity Coop

With the emphasis on the places where tradeoffs are likely, the design of a limited equity coop looks something like the following:

(1) The land is owned by a non-profit publicly oriented entity. For example, by a land trust, public agency, hybrid entity combining elements of political (public officials, such as the City Council), community (some system for ad hoc resident elections to a Board), and non-profit (a charitable foundation or trust) control. I have been calling it the Land Trust, but it might be a Community Development Corporation or a non-profit Neighborhood Development Bank. In any case, the Land Trust leases the land to the coop, which owns the building. The Land Trust has the power to enforce the various restrictions on residents that are built into the limited equity coop structure and a residual right to the building if it ceases to be a LEC.

(2) Residents buy shares in the coop. The shares give occupancy rights, but also come with various obligations and limitations. There will be a duty to occupy—no absentee ownership is allowed—and a duty to obey the rules laid down in the charter and by the Coop Board. An important legal vulnerability arises from the institution of the group mortgage, which makes all the units security for payment of the carrying charges.

A resident's ownership interest is subject to limitations of several different kinds: (a) A limit on the price on resale that goes to the

resident. The resident can usually recoup the initial equity investment plus amortization payments, corrected for inflation, the value of improvements (with some limit to prevent "goldplating," i.e., improvements that make the unit unaffordable), and possibly some share of appreciation. (b) A limit on alienability that gives the coop a right of first refusal, so it can buy any unit a resident wants to sell, and sell it itself, to guarantee that new buyers meet the definition of low-income status imposed in the lease from the Land Trust and also to secure the coop's privilege of determining its own membership. There may also be a limit on the right to pass the property along after death, by will or otherwise. (c) A limit on subletting designed to prevent the shareholder from realizing equity appreciation without selling. (d) A provision limiting the resident's ability to decide collectively to terminate the limited equity feature and cash in on equity appreciation.

(3) Residents manage the building. Residents set and collect monthly charges, make maintenance and improvement decisions, choose how to fill vacancies (within the limits in the charter), and make and enforce rules of resident behavior. These rules will lie somewhere between the largely compulsory, state-defined regime governing landlord-tenant relations in the jurisdiction, and the rules of a typical fully private residential coop or condominium. Resident administration of the regime will be subject to limited review by the land trust or other owner of the land to prevent (a) goldplating, meaning improving the building or individual units to the point at which units will not be affordable when current residents decide to sell them; (b) deterioration, meaning a collective decision to under-maintain or maintain abusively so that the building loses its character as socially decent housing; and (c) abusive or discriminatory management decisions.

The full legal structure will be more complex than the one described, because I've restricted myself to the provisions of a coop charter that most obviously require the drafter to make tradeoffs among the objectives that lead to choosing the limited equity form in the first place.

## B. Conflicts and Tradeoffs

My goal in this part is to describe the ways in which the three general objectives may come into conflict, and the ways in which each generates sub-goals, or questions of definition, that must be resolved by the designer of a LEC charter. I do not think that there is a single



best solution to any of the design problems I discuss, for two reasons. First, the solution depends on the circumstances. Second, the solution depends on how the developer weighs the conflicting objectives, and on the developer's commitments as between the conflicting interpretations of the best way to achieve each objective. These deeper conflicts are explored further *infra* in Part III.

My goal is not charter terms (though I've tried my hand at them in the past), but a check list of issues that will be resolved, one way or the other, whether they are recognized or not, in the hope that they will be better resolved in a considered than in an unconsidered way. A second goal, of a quite different kind, is to suggest ways in which what appear to be issues of detail, arising after we have decided to design a LEC, reproduce the very same political and philosophical dilemmas that we thought we were resolving by choosing this form in the first place.<sup>11</sup>

1. Conflicts Over How to Define Affordability

a. *The allocation of the subsidy between present and future residents*

As we saw in Part I, we choose the LEC form because we want to spread the subsidy over time, allocating it to a series of low-income residents, rather than concentrating it once and for all on the initial recipient. In choosing a particular set of rules for the LEC, the drafter of the charter will have to decide just how much goes to the first and how much to subsequent residents. The drafter resolves this conflict of interest when he decides how to set the price at which a resident can sell his or her share. For example, there is the question about how much to restrict recovery for improvements to avoid the goldplating that renders a unit unaffordable. There is the question of how much, if any, of the equity appreciation to allocate to the resident.<sup>12</sup> And there is the difficult question of how seriously to restrict the right to sublet (to avoid a situation in which a resident appropriates an in-

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11. The discussion that follows is a fairly typical instance of the critical legal studies (CLS) mode of policy analysis in which we first identify the typical argument bites within a sector of legal discourse, and then trace the way in which they "nest," or recur within the choices that are supposed to resolve them. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE PART III* (1997) [hereinafter KENNEDY, *ADJUDICATION*]; Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

12. See SIMON, *supra* note 4.

crease in the value of the unit by moving out and renting it to someone who can afford a market rent).

A strong orientation to the interests of sitting tenants suggests allocating a part of market appreciation to them, especially to the extent that it is the product of general price rather than local real estate market inflation. But there are many distinct options: (1) using the money as an insurance fund to cushion the impact of employment and other kinds of instability on resident ability to pay, or to make it possible to buy back residents' shares at their initial purchase price even if the market value of the units has fallen; (2) using the money for collective coop purposes, such as improving common areas; (3) permitting a measure of goldplating; and, (4) increasing residents' equity on resale.

In each case, the drafter allocates the possible benefits of market appreciation of the unit toward the current low-income residents and away from future low-income residents. This choice will have implications for the way the Land Trust participates in the life of the community. The more the charter allocates the benefits of rising land values to the Land Trust, the more opportunity there will be to use appreciation, realized, for example, by the sale of vacated units at market, for social objectives, ranging from increasing the total supply of affordable housing to trying to stem downward spirals or slow upward ones.

b. *Allocation among needy applicants in the present*

There is a second allocational issue that is just as difficult. Given the scarcity of affordable housing for the poor and probable future cutbacks in government assistance to poor renters, there is likely to be a large demand for subsidized LEC units. The various subsidizing agencies, whether the federal or state government or non-profit providers of below market loans, will have their own different definitions of what counts as low income, and of what counts as affordable for different low-income groups. The developer will choose among different kinds of subsidies, and then, within the limits established by the lenders, choose between applicants whose incomes are high enough so that the unit will be affordable to them with a relatively small subsidy, and applicants whose incomes are so low that they require deep subsidies.

The problem of how to allocate the subsidy among present applicants is dramatically illustrated by the demand of homeless advocacy groups, in the late 1980's and early 1990's, that public housing should

be housing of last resort, and give priority to homeless over housed applicants. At the other extreme is the notion that the Land Trust should require the coop to allocate the unit to the most qualified tenant within the eligible pool, defined as people with incomes below some percentage of the local median. In this model, sometimes called “creaming the applicant pool” or “cherry picking,” the coop takes the applicant who is at the top of the queue, ranking tenants according to criteria such as income, employment, education, credit history, references, and ability to contribute to building management, and screening out applicants with identifiable behavior problems.

The developer is likely to anticipate that creaming means minimizing the amount of necessary subsidy per unit, and maximizing the number of units for a given subsidy, by contrast with the last resort strategy. For this reason, the conflict is not simply over which part of the target group gets the help—it costs more to help the very needy. Moreover, a choice along the spectrum of target populations has implications for the goals of participation and community responsibility, as will be clearer as we now turn to tradeoffs in those areas.

## 2. Conflicts Over How to Define Participation

Realistically speaking, we have a class and race system, so that many of the people the coop movement would like to benefit are lower class or underclass, many unemployed or on welfare, and many of them are people of color, mainly African Americans and Hispanics. Low-income people of color are in many ways a victim group—victims of various kinds of racism, but also of class bias, and of the ways in which the economy structures jobs and government benefits arbitrarily and irregularly. We also recognize realistically that each American ethnic and racial group, native born whites very much included, has its own culture of poverty, no matter how strongly radicals and minority activists once denied it, and that many in these otherwise diverse cultures have problems of addiction, family disorganization, illiteracy, high crime rates, and domestic and child abuse that are different than and in some respects more severe than those of other social groups.

The combination of the ideal of participation with the specific social characteristics of those most in need of affordable housing generates another set of tradeoffs in deciding how to deal with conflicts between residents and management. It may be useful to understand these as on two dimensions. First, there is a conflict over the best strategy of empowerment, a conflict between what we might loosely call a

“tenants’ rights” and a more “collectivist” approach. Second, there is an at least potential conflict between maximizing the supply of affordable housing through LECs and maximizing the institution’s contribution to empowerment. The choice of solutions for these conflicts will in turn have an impact on the goal of community responsibility.

a. *Tenants’ rights vs. collectivism*

Tenant lawyers generally see themselves as protecting tenant interests in two ways. First, by zealous advocacy to prevent eviction, whether for non-payment or late payment of rent, or for alleged bad conduct, whether the conduct involves the physical condition of the building or relations with other tenants. Second, by the long-term effort to reform landlord-tenant law to make it more favorable to tenant interests, by, for example, outlawing self-help eviction, abolishing tenancy at will (so that all tenants have a right to a grace period before eviction), establishing a warranty of habitability (making the obligation to pay rent conditional on performance of the warranty), permitting rent withholding as a response to the landlord’s breach of warranty, enacting security deposit laws, establishing due process rights for public housing tenants, securing rights to appeal evictions before execution and without bonding requirements, and so forth.

These efforts have gradually transformed the regime of summary process that characterized the law from the late 19th century through the 1960’s into a much more tenant-friendly regime. In states that have adopted the reforms, a tenant who is well represented can often make it difficult, expensive, and time-consuming for a landlord to evict him or her, whether for non-payment of rent or for nuisance behavior. The most important tenant protections are non-waivable. An agreement in the lease for eviction on terms more favorable to the landlord is not legally enforceable.

By contrast, standard private coops are usually free, under loose, ad hoc judicial supervision, to specify by contract the procedures for the collection of monthly carrying charges, and to make their own rules both about resident conduct and about the procedures for enforcing those rules. Likewise, they are usually free to specify the terms under which individual shareholders can force the Coop Board to perform its obligations. It should be kept in mind, however, that state courts have the power to impose non-waivable terms in contracts in general, and are likely to see the LEC resident as occupying a status somewhere in between that of tenant and that of coop shareholder,

rather than as unequivocally in the category of shareholder.<sup>13</sup> The drafter of the LEC charter has far more options than a landlord drafting a lease. But he or she may find his or her decisions summarily rejected by a court if they are perceived as “going too far” in a pro-management direction. In such a case, the court is likely to treat the LEC charter as “really” a lease, and therefore subject to the non-waivable rules of landlord-tenant law.

In designing the rules for a LEC, tradeoffs have to be made, within the above limits, on several dimensions. First, should the shareholders as a collective, represented by the Coop Board, have strong coercive powers, with limited due process, to enforce resident payment obligations and rules of behavior, or should the LEC charter emphasize due process and values of leniency and forgiveness for the individual resident? Should we emphasize collective responsibility of the occupants of a unit, for example by terminating the shares of families for misbehavior of individual members, or rather treat the shareholder as not responsible for family member behavior?

Second, there is the question of the Coop Board’s obligations to the individual residents. The choice is between seeing the LEC as the legitimate representative of the common resident interest, or as a management at least potentially opposed to the interests of individual unit owners. The question is posed clearly when a LEC resident sues the LEC alleging, say, failure to repair common areas, or non-negligent failure to provide heat to the standard required by the local housing code. The charter can try to make sure that such suits fail, leaving the resident no effective recourse other than the LEC governance mechanism, or treat the resident more like a tenant in a rental unit, entitled to outside intervention against landlord violation of compulsory lease terms.

Third, the developer can build an outside management company into the structure, taking many of the Coop Board’s powers and obligations away from it. Professional management may compensate for the limited self-government capacities of the residents and safeguard the interests of the Land Trust and the mortgage lenders, but at the expense of the participation values that motivate LECs in the first place.

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13. Duncan Kennedy, *Paternalist and Distributive Motive in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

What makes this such a difficult set of choices is that there is no consensus in the low-income advocacy community as to what strategies for empowerment work best. On the one hand, there is the notion that we empower poor people by making them rights holders, securing their autonomy as individuals or as families against the various institutions that are interested in disciplining or just controlling them, and increasing their incomes. This idea favors a combination of the "tenants' rights" approach, which paradoxically makes the resident shareholder look more like an owner, with delegation to an outside management company.

On the other hand, there is the notion that the poor need not just money and rights understood as security, but experiences of group self-government that are transformative—that empower in the strong sense of changing capacities for self-mastery and effective common agency. This notion is oriented not just to creating groups that represent, but groups that act on their members, and so favors the more "collective" approach, with weak resident protections against eviction, weak resident powers to force Coop Board action, and a weak management company (if any). It is important to remember that the choice the developer makes among these options will be difficult, if not impossible, for the residents to change, even with consent of the Land Trust.

b. *Participation vs. maximizing the supply of affordable housing*

As I suggested in the discussion of affordability, depending on how these tradeoffs are resolved, there may be a second tradeoff between the goal of participation and that of maximizing the supply of affordable housing. Creaming the resident applicant pool, so that residents are chosen from the top of the queue, is likely to reduce the costs of participation, because the residents will be better educated and have more management skills. Reducing the costs of participation increases the number of units that will be generated by a given subsidy.

There is likely to be disagreement about what style of participation is best from the point of view of preserving the assets available for affordable ventures. The model closest to the private rental market would be one in which there was a management company with large powers independent of the Coop Board, and a regime of strong residents' rights modeled after tenants' rights. At the other extreme, there is a powerful Coop Board, and weak resident rights. Which will

require a deeper subsidy? The individualist strategy, combining residents' rights with outside management, may allow individual residents to endanger the whole building, by failing to pay, by anti-social behavior, or by taking the building to court, without the resident association having adequate tools to defend itself. The more collectivist approach to management may founder where residents lack the necessary technical skills, or the kind of social and political skills necessary to generate consensus.

c. *The group mortgage*

This conflict is rendered particularly acute by the institution of the group mortgage, which, as mentioned above, means that the interests of all residents are security for the performance of each individual mortgagor. The virtue of the group mortgage is that it increases the credit worthiness of the LEC over what it would be if each resident were responsible only for his or her own mortgage payments. So the group mortgage may mean more and cheaper financing, and therefore more units, for a given subsidy.

At the same time, the group mortgage makes the internal governance mechanism and the choice of a mode of participation crucial to the viability of the whole coop. It therefore creates pressure for a management form that will effectively guarantee that individual residents will meet their obligations. In private rental and public housing, individual tenant nonpayment or destructive behavior impacts other tenants' finances only indirectly, through the landlord's or the Public Housing Authority's rent, investment, and maintenance decisions. In the group mortgage context, bad actors can jeopardize the whole building in the short term. If the Land Trust plays the buffer role of the landlord or Public Housing Authority (PHA), then the individual resident's bad behavior jeopardizes the supply of non-profit low income housing. (Or simply reduces the supply, if the Land Trust requires coops to deal with the risk of default by accumulating reserves, thereby reducing the monthly income available for amortization.)

d. *The choice of scale: single building coops vs. multiple building coops*

One way to reduce the dangers of the group mortgage is to increase the number of units in a given coop. The more units the coop cross-collateralizes, the less the impact of any individual shareholder's

failure to pay, the less the risk for the bank, and the less the risk for the Land Trust in its role as back stop. Increasing the size of the coop may detract from the goal of empowerment through self-government, since size dilutes participation. But opening up the question of the scale of the coop highlights a new set of governance options as well.

We commonly begin by thinking of a LEC as a building. But the coop can consist of several buildings, single-family homes, or a mixture. And the coop structure can include a division of governance authority between the building as a unit and the coop as a whole, as well as a division between the coop and the Land Trust. For example, in a multi-building coop, goldplating might be controlled by the requirement of coop approval of improvements, while leaving buildings as units responsible for choosing among income qualified new residents, and for enforcing conduct rules.

All of the decisions we have discussed, both in this section on participation and in the previous one on affordability, will generate further conflicts and trade-offs with the goal of community responsibility, to which we now turn.

### 3. Conflicts in the Definition of Community Responsibility

There is a conflict between designing the Land Trust and the LEC so that they will function as a neighborhood strategic actor and designing them so as to guarantee to the utmost the interests of the residents. The conflict between the two approaches plays out both in the choice of how to govern surpluses and losses generated by changes in the value of the building, and in the choice of scale discussed in the last paragraph.

#### a. *What happens to gains and losses*

The coop's ownership structure, and in particular the limits on the price residents can collect for their units, is designed to allow a public appropriation of the increase in the value of the building in the event that market forces increase its value faster than the shareholders' interest appreciates. I pointed out above that the division between the individual resident and the coop or the Land Trust is also the division between present and future beneficiaries of the one shot capital subsidy. But it is also division of control over the use or non-use of the accumulated equity (or for that matter accumulated losses) in the present, as well as in the future, with the alternatives including



denying anyone access to the surplus, so that it stays in the building to guarantee affordability, and making it available for strategic action.

b. *The choice of coop scale*

The scale choice will also either facilitate or impede the Land Trust's adoption of a community-oriented strategy in the face of neighborhood instability (or low level hyper-stability). The more units a Land Trust can influence, or that a single coop can influence, the more chance there is of responding effectively to spirals or stagnation. At the same time, binding buildings together in a larger coop structure enmeshes the individual residents even further than is implicit in the coop structure at the building level, and makes all vulnerable to strategic mistakes by the central decision makers.

c. *Strategic actor or protector of resident interests*

In the simplest model, equity stays put in the coop. There is no possibility of realizing any part of it, and the Land Trust renounces any possibility of influencing neighborhood dynamics through its disposition. The result should be at least tendentially to make the LEC a stabilizing force. The owners (the Land Trust and the coop) will not sell or convert to profitable non-residential uses when there is an upward spiral, so the units remain affordable. This might have a braking effect on the spiral, or simply reduce the total loss of affordable housing through gentrification. In a downward spiral, the inability of the Land Trust to maneuver to cut its losses means that it won't bail out, and so won't exacerbate the prisoners' dilemma.

Toward the other end of the spectrum, the Land Trust can retain significant power to realize and redeploy equity appreciation for community purposes. One could imagine selling a unit in a building in a gentrifying neighborhood, for the high new market price, or mortgaging the non-resident equity interest, and using the proceeds to create two LEC units in a lower priced neighborhood, possibly with neighborhood stabilization objectives. A successful coop might expand by adding buildings purchased by loans secured by the surplus equity. At the extreme, the Land Trust is a major neighborhood actor, working against downward spirals and against displacement through gentrification, as well as influencing the handling of neighborhood environmental, aesthetic, and social issues.

d. *Relation to affordability and participation goals*

Minimizing freedom of action with respect to the surplus equity and the scale of the coop, as opposed to constituting the Land Trust as a strategic neighborhood actor, will have implications for affordability, but it is not at all clear what they will be. Pinning the Land Trust down might lead to disaster, or just to lost opportunities. Unleashing it could lead to disaster and lost opportunities as well. The implications for participation are somewhat clearer: if the Land Trust is a strategic actor, it may act against the interests of coop residents, and the value of participation suggests giving the coop some say in what strategic course is adopted. On the other hand, empowering the coop creates a risk of paralysis, and so forth. It seems unnecessary to play out the analysis any further.

III: THE LEC IN THE CRUCIBLE OF RACE AND CLASS  
(CRT AND CLS)

So far, I have outlined a set of complex choices that remain to be made after the developer has opted for the LEC form. In this section, I suggest a larger context of political debate that will condition those choices. The body of literature that seems most relevant is that generated by CLS<sup>14</sup> and CRT.<sup>15</sup> For purposes of bringing this work to bear on the design of a LEC, here is a summary of the most salient choices on the table.

The first issue: The developer could target the subsidy to help the most deserving, competent, and potentially upwardly socially mobile of the poor to move up into the lower middle or middle class. Or the developer could target the subsidy to help the very poor, more likely demoralized and less upwardly mobile (the underclass), to improve or transform their lives at the bottom of the rigid American race/class hierarchy, without imagining that they will assimilate to the mainstream multicultural American middle class model.

The second issue: The developer could choose a model of tenants' rights, professional management, and "juridification" (reliance on courts for resolution of disputes). Or the developer could choose a model of the coop as a collective in which rights and duties are loosely defined (through standards rather than rules) and residents must use

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14. See generally David Kairys, *THE POLITICS OF LAW* (3d ed., Pantheon 1998).

15. See Kimberle Crenshaw, et. al., *CRITICAL RACE THEORY: CRUCIAL DOCUMENTS THAT SHAPE THE MOVEMENT* (1995).

the political process of coop governance to accomplish their objectives. Paradoxically, the tenants' rights strategy makes the resident look more like a "normal" property owner than does the "coop as collective" model.

The third issue: The developer could design the coop as part of a community-oriented strategy of mobilization, particularly for defense both against downward spirals and against gentrification. Or the developer could design it merely as a stabilizer, devoted to securing the best interests of the residents, even when those diverge from the interests of the community.

The debates within critical race theory, and between CRT— and CLS — identified writers, have a lot of relevance to these issues, and at the same time a certain quality of distance, abstraction, or even denial, at least as it now seems to me.

#### A. Targeting the LEC Subsidy and the "Talented Tenth" Debate

The highly respectful dialogue between John Calmore and John Powell about "ghetto enrichment" vs. "fair housing" is relevant to the first issue, of how to allocate subsidies between different classes of poor people.<sup>16</sup> As part of general advocacy of dispersal of ghetto communities through housing and educational desegregation, Powell emphasizes the importance of choice for minorities, including the choice to exit the ghetto, either to a predominantly minority middle class community or to an integrated community.<sup>17</sup> (He is particularly concerned with access to good education.) He is against the notion that the interests of those who would leave if not subjected to racial discrimination in the housing market should be sacrificed to the interests of those who will stay in the ghetto and be worse off as a result of the exit of the better off.<sup>18</sup>

Calmore emphasizes, first, that putting resources into dispersal through fair housing law will mainly benefit the upwardly socially mo-

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16. See, e.g., JOHN POWELL, EXAMINING THE RELATIONSHIP BETWEEN HOUSING, EDUCATION, AND PERSISTENT SEGREGATION (The Institute on Race and Poverty: A Report to the McKnight Foundation, June 1997) [hereinafter POWELL, RELATIONSHIP]; John Calmore, *A Call to Context: The Professional Challenge to Cause Lawyering* 67 FORDHAM L. REV. 1927 (1999) [hereinafter Calmore, *Call to Context*]; John Calmore, *Fair Housing vs. Fair Housing*, 14 CLEARINGHOUSE REV. 7 (1980) [hereinafter Calmore, *Fair Housing*]; John Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337 (1996) [hereinafter Powell, *Segregation*].

17. See Powell, *Segregation*, *supra* note 16; POWELL, RELATIONSHIP, *supra* note 16.

18. See Powell, *Segregation*, *supra* note 16; POWELL, RELATIONSHIP, *supra* note 16.

bile at the expense of the more disadvantaged, and that it will dilute minority political power, dispersing elites and reducing the capacity of ghetto residents to mobilize to protect their interests.<sup>19</sup> This debate gets added urgency from William Julius Wilson's analysis of the "concentration effects" produced by the departure of the black middle class from the ghetto beginning in the 1960's.<sup>20</sup> According to Wilson, the class-segregated communities of the "truly disadvantaged" reproduce a variety of "pathologies," in part, because of the absence of black middle-class role models and black middle-class contacts.<sup>21</sup>

In our context, the issue presents itself somewhat differently. Allocating LEC units to those who need deeper subsidies may reduce the number of subsidized units, for two reasons: by increasing the amount of initial capital subsidy per unit (so that monthly charges are affordable for the target group), given lower income residents, and by increasing the costs or difficulties of LEC resident participation in governance. Moreover, subsidizing the upwardly socially mobile does not remove them from poor neighborhoods, assuming the LECs are sited there (though LEC residency may be the first step on the way out). These factors somewhat reduce the power of the Calmore critique in this context. But here's the rub: the underlying difference of approach is deep enough so that it is unlikely that anyone committed to either position will think that these particularities of the LEC context should tip the balance. The heat of the debate comes from factors that apply fully to LEC's.

First, there is the question whether the LEC subsidies are likely to be wasted if not directed to the upwardly socially mobile. There is no consensus among CRT or CLS writers about the nature of class divisions either within minority communities or within the various white communities. In one view, there are diverse cultures of poverty, so that helping the very poor, whatever their race or ethnicity, emphatically requires more than just non-discrimination and job access. There is a real danger that directing LEC subsidies to the very poor is just to waste them, whereas targeting them by "creaming the pool" or "cherry picking" holds out a much greater chance of success.

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19. See Calmore, *Fair Housing*, *supra* note 16; Calmore, *Exploring*, *supra* note 16; Calmore, *Call to Context*, *supra* note 16. Calmore has become more balanced in his approach, i.e., more sympathetic to those departing the ghetto, with the passage of time.

20. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1983) [hereinafter WILSON, *DISADVANTAGED*]; WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* (1987) [hereinafter WILSON, *WORK DISAPPEARS*].

21. WILSON, *DISADVANTAGED*, *supra* note 20; WILSON, *WORK DISAPPEARS*, *supra* note 20.

The upward mobility strategy is based on recognition that the total amount of subsidies will never be enough to transform the lives of the masses of the poor. The only plausible long run strategy for the poor, in this view, is triage, chipping away, hoping to reduce the size of the poor population at the margin. Eventually there will be few enough of the poor left so that it is plausible to make a large societal investment in "upgrading their human capital," so that they too can be integrated, socially and economically, into the mainstream

The response might be twofold. The main thing the very poor need in order to no longer be poor is to be freed of racial oppression and given access to economic opportunity. The anticipation that they will waste the subsidies is largely based on a stereotype.<sup>22</sup> Moreover, non-profit community-based affordable housing initiatives have a moral obligation to the whole community, not just those capable of exiting and likely to do so. In the long run in which triage reduces the mass of the poor to manageable proportions, today's poor will most certainly be long dead.

Suppose we define success of the subsidy as, at a minimum, the creation of a viable affordable unit whose occupant does not deteriorate the quality of life for his or her neighbors, and on the upside as the use of the subsidy to significantly improve the overall quality of life of the resident. Even if the rate of success is lower for very poor than for upwardly mobile poor residents, the allocation is justified by the obligation of the community, represented by the Land Trust, to do what it can for the most needy, as opposed to those more able to help themselves. (Note the analogy to the argument, mentioned above, for making public housing, housing of last resort for the homeless.)

A second, distinct disagreement that is likely to influence one's view of how to target LEC subsidies as between the upwardly mobile and the very poor has to do with the participation ideal that is one of the motives for any LEC scheme. Some of those committed to participation will see the attempt to combine residents from different subcultures of poverty—the upwardly mobile with the very poor—as analogous to denying them exit from the ghetto through fair housing. Given the collective, interdependent character of neighborhood and building life, the only hope for creating decent environments, characterized by the middle class values and behaviors that the upwardly

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22. For discussion of the various culture of poverty theses and their implications see John Calmore, *Exploring Michael Omi's Messy Real World of Race*, 15 *LAW & INEQ.* 25 (1997); John Calmore, *Racialized Space and the Culture of Segregation*, 143 *U. PA. L. REV.* 1233 (1995).

mobile poor want, is to exclude the very poor. Or at least to restrict their numbers far enough, in the name of the mixed income concept, to avoid concentration effects and let the upwardly mobile have secure control, both of formal apparatuses and of the informal life of the project.

In the other view, this position again relies on stereotypes, and is moreover a typically uptight, black or white, bourgeois phobic reaction to the legitimate particularities (as opposed to pathologies) of the cultures of the different poor communities.<sup>23</sup> Participation is a value for its own sake, but it is also a means to empowerment. The LEC should have it as an affirmative goal to create contexts for personal transformation through the admittedly often draining and unpleasant process of group formation and skills building. To the limited extent we decide to subsidize the very poor, we should try to do it in ways that have at least the possibility of this kind of empowerment built into them. The point is not to help them become in their turn upwardly mobile, but to help them develop the capacities for organization and mobilization they need to defend their interests in a system that systematically oppresses them.

Put in stark terms, the tension here is the same as that which motivated the early W.E.B. Du Bois to formulate his "talented tenth" strategy, aimed to provide high quality educational and other resources to the minority of the black population most likely to be able to participate effectively in mainstream American life.<sup>24</sup> Critical race theory doesn't provide answers, but it poses the question with a richness that was largely absent in legal discussions of race before the 1960's.

It is a mistake, it seems to me, to see this debate as internal to the African American intelligentsia. The issue of whether to skim or to mobilize has divided the white left in the United States, and the left in Europe, for a hundred years (since the recognition of the social problem generated by capitalist economic development). It is worth noting that the moderate leftists, center-leftists, or social democrats, who have won elections and developed legislative reform strategies over

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23. There is a long tradition of African American critique of the African American bourgeoisie's aversion to the very poor. See E. FRANKLIN FRAZIER, *BLACK BOURGEOISIE* (1957); CORNEL WEST, *PROPHECY DELIVERANCE!: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY* (1982); Regina Austin, *The Black Community and Its Lawbreakers*, 65 S. CAL. L. REV. 1769 (1992).

24. 1 W.E.B. DU BOIS, *The Talented Tenth*, in *THE SEVENTH SON: THE THOUGHTS AND WRITINGS OF W.E.B. DU BOIS* 385 (Julius Lester ed., 1971).

the last hundred years, have almost always (not absolutely always) chosen the skimming approach. For the more radical advocates of mobilization, it seems obvious that one reason for this has been their fear that mobilization would jeopardize their place in the larger political/economic capitalist system within which they have real, however limited, access to state power.

#### B. The Definition of Participation and “The Rights Debate”

The “rights debate”<sup>25</sup> between some CLS writers and some CRT writers is clearly relevant to the “tenants’ rights” vs. “coop as a collective” debate. In the rights debate, Patricia Williams<sup>26</sup> and Richard Delgado<sup>27</sup> each argued that minorities, in general, are rightly oriented to legal regimes that provide clear, formally realizable, and easily administrable rules, which define legally enforceable rights. They criticized critical legal theorists like Peter Gabel,<sup>28</sup> Frances Olsen,<sup>29</sup> Mark Tushnet,<sup>30</sup> William Simon<sup>31</sup> and myself, who argued that, at least as a matter of utopian aspiration, leftists should favor moving in the direction of regimes of standards (e.g., good faith, reasonableness) combined with small scale collective governance, and oppose reliance on regimes of judicially enforceable individual rights as the answer.

In my doubtless biased view, Williams and Delgado each ignored the basic CLS claim that rules and standards, juridified individualist and informal collective regimes, respond to Americans’ typically contradictory preferences with respect to making ourselves vulnerable to other people. All one can do in situations of internal contradiction of this kind is choose ad hoc compromises, while hoping for transcendence in the long run.<sup>32</sup> In the LEC context, for example, it doesn’t

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25. For summaries see KENNEDY, ADJUDICATION *supra* note 11, at 299-338 (1997); Daria Roithmayr, *Left (Over) Rights*, 22 CARDOZO L. REV. 1113 (2001).

26. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

27. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987).

28. Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

29. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

30. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

31. William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986).

32. This is the “irrationalist” or “decisionist” position within CLS. See generally KENNEDY, ADJUDICATION, *supra* note 11, at 339; Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147 (2001); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

make sense to argue that minorities or people of color are intrinsically more favorable to and better served by regimes of judicially enforceable rules defining individual rights along with professional management and juridification. It would make no more sense to argue, as Delgado's position suggested, that as between people of color formality is dispensable because of the vibrant community that characterizes their interactions.<sup>33</sup>

Whatever may be the case when we are discussing relations between powerless minorities and powerful majorities (e.g., police/suspect, case worker/welfare recipient, or landlord/tenant interactions), as soon as we take up the design of a LEC in which the residents are all poor and the majority of them are likely to be people of color, it is plausible that if we polled them they would split. Some would strongly favor the rules/individualism model, and others the opposite.

As a preliminary matter, but only as that, as we will see shortly, it seems that the "tenants' rights" approach resonates with the upward social mobility strategy. It makes the residents look more like owners than the "coop as collective" model, and it promises them protection for their individual interests against the possible arbitrariness of the LEC's governance structure, including both the Coop Board and the Land Trust. Well-defined rules, professional management, and juridification protect the resident's investment of hard earned savings in the unit, and provide independence vis à vis the life style choices and other preferences of fellow residents, while minimizing the amount of time and effort that have to be devoted to running things. Time and effort better devoted to getting ahead as best one can in the larger economic and social system.

On the other side, the "coop as collective" model resonates with the idea that the coop is, first, part of a community whose members recognize their inter-dependence and a shared culture forged in adversity, not just a collection of atomized individuals. Second, it resonates with a strategy of mobilization in which new forms of group living promise to raise consciousness and provide a base for action in and of the community.<sup>34</sup>

Since the conflicts provoked by the Community Action Programs of the Johnson Administration, with their requirement of maximum feasible participation of the poor, there has been, as far as I can tell, a

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33. Delgado, *supra* note 28.

34. See discussion *infra* Part III.C.



deep split among activists and intellectuals interested in these matters over how to tilt, and how far, toward one approach or the other.<sup>35</sup> To one side, it looks as though the participation ideal is utopian, often destructive of the very values it espouses, and vulnerable to the evils of elitist manipulation by professionals skilled at bureaucratizing, of chaos when the limited organizational and managerial abilities of the poor are over-strained, and of demagoguery and internal abuse when bad actors manage to seize the vulnerable procedures that supposedly guarantee participation.

To the other side, professional management companies and courts seem likely to be hostile to the participatory aspirations of the LEC, and to collaborate with those residents who want to turn it into nothing more than another form of low-income housing. To my mind, the most interesting, and the richest in description, of the work on this topic is Lucie White's.<sup>36</sup>

Speaking, again, realistically, the people who will decide this will be those with the power to condition the subsidies that make the LEC attractive, and those who develop the LEC. I don't think they can plausibly rely on any supposed generic preference of people of color for one kind of solution or the other. Moreover, I do not think it is plausible to take either solution to its logical extreme. In short, I think the decision makers, whether they are white or black or Latino, whether they have authentic ghetto roots or hereditary elite status in their respective communities, will have to make up their own minds based on their values and their politics, without being able to appeal to notions either of community or of identity to solve the problem for them.

### C. The LEC as Strategic Actor vs. Resident Interest Protector

The strategic actor idea has all the ambiguity of other strategies based on the idea of mobilization. It is risky, it presupposes a common interest beyond the building and also presupposes that the Land Trust will decide when to pursue that interest, and it smacks of elitism or paternalism. The Land Trust, however formally representative of the community, is almost certain to be dominated by well-educated

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35. See, e.g., Alexander Polikoff, *Beyond Ghetto Gilding*, BOSTON REVIEW (Summer 2000) at <http://bostonreview.mit.edu/BR25.3/polikoff.html>.

36. Lucie White, *Global Forces, Life Projects, and the Place of Care*, in GLOBALIZING INSTITUTIONS (Jane Jenson ed., 2000); Lucie White, *Ordering Voice, Rhetoric and Democracy in Project Head Start*, in THE RHETORIC OF LAW 185 (Austin Sarat & Thomas R. Kearns, eds. 1994).

professionals rather than by the disadvantaged residents and community members in whose interests it will claim to be choosing and executing a strategy.

On the other hand, defining itself as the representative of the residents, and disregarding the interests of the community as a whole, risks playing into a downward spiral, hurting the residents themselves over the long run. In an upward spiral situation, maximizing the residents' interests means collaborating in gentrification, with possibly disastrous displacement effects for the larger constituency that is supposed to benefit from affordable housing initiatives.

The strategic actor conception will make it hard for residents to know where they stand, because it relies on situational good judgment rather than on rules, and it provides no final arbiter to which residents can appeal against what they think is a misguided strategic decision. It conceives the Land Trust as part of a community-oriented strategy rather than part of an individual rights-creation strategy, and assumes that proactive intervention, as opposed to passive minimizing of resident losses, is desirable in itself. It takes the goal of community responsibility or stewardship much more seriously than does the opposite conception.

#### D. The Deeper Political Conflict Underlying the Three Debates

As I have presented them so far, it seems obvious that the upward mobility approach aligns loosely with the "tenants' rights" and "residents' interests" approaches to internal governance and neighborhood role. The notions of mobilizing the very poor, of the "coop as a collective," and of the neighborhood strategic actor also seem mutually supportive. In this section, I speculate that this alignment derives from the existence of a deeper level of division within CRT and CLS writings, between conflicting or contradictory ideas about what a progressive social policy looks like in a situation of race and class stratification in a modern post-industrial economy.

The underlying, not very much theorized conflict would be, to my mind, between:

Attitude I: The goal of racial liberation is to eliminate discrimination, both its present diffuse, pervasive reality, and its historical effects. The problem is that a racist system treats similar individuals differently, and oppresses people as group members. The solution is to put minorities in the position they would have been in if they had

operated under the same legal regime as the majority operated under, both the formal law in the books and the informal law in action. Beside anti-discrimination, the two clear implications are affirmative action in employment and education, and reparations. Reparations, in turn, mean both reparations for slavery, and reparations for the large economic benefit that whites as a group have derived at the expense of blacks from the operation of the system according to racist rules of the economic game.<sup>37</sup> This might be described as the left liberal strand in critical race theory.

It is not at all classically liberal, because it is based on the ideas that race is a group phenomenon, and that there is group responsibility of whites to blacks based on the historical and present collective implication of whites in the oppression of blacks. It is also race conscious rather than color blind, and it is neither intrinsically assimilationist (in Cornel West's sense<sup>38</sup>) nor "integrationist." Demanding non-discrimination, affirmative action, and reparations is in fact consistent with highly valuing black culture, and with resisting the dispersal of black residential communities, the dissolution of black enterprises, and a widespread practice of racial intermarriage. (It is also consistent with the opposite, assimilationist and integrationist approaches.)

But it is liberal in that it is based on applying to the white community the standards of justice and injustice, legality and illegality, that have characterized the white community's own dominant internal ideology. It treats the rules of the game in the white community, which combine a property and contract regime with limited government intervention through tax and transfer to redistribute in favor of the poor, as just. Or at least as sufficiently just so that we can use the failure to live up to the standards of modern liberalism as a way to measure wrongs to blacks, both the wrong of slavery and the wrong of discrimination within the post-slavery economy and society. And it treats the rules of the game as sufficiently just so that the white losers in the game played according to these rules have no claim of injustice that they can set off against or oppose to the minority claim that whites are collectively responsible to blacks. There is no suggestion that poor whites have claims that are close enough to those of blacks as a group to form the basis of an alliance.

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37. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993).

38. WEST, *supra* note 23.

Moreover, this first approach is liberal in that it embraces dominant liberal ideals with respect to upward social mobility, meritocracy, ostensible preference for rules over standards, devotion to legally enforceable, justiciable rights, professionalism, and, finally, intense distrust of collectivism and mobilization.

Attitude II: A quite different approach would say that the rules that apply within the white community have the problem that they generate radical injustice within the white community. If we imagine that the same rules had applied to blacks, there might very well have emerged an even more radically unjust, hierarchical class division within the black community than actually exists. That is, differences among blacks in education, income, wealth, and employment might well be even more stark than they now are. Moreover, leveling the playing field through a combination of anti-discrimination, affirmative action, and reparations today might well have the effect of accentuating the current divisions within the black community. Unless, that is, the reparations were used self-consciously to develop programs that would help minority communities in ways that undermine rather than accentuating their internal cultural differences and economic inequalities. This might be described as the radical strand in critical race theory.

For the radical strand, the ideal is to forge minority communities that resist collectively, rather than by acquiring individual entitlements defined in the terms of the mainstream. The ideal is to base resistance on a revaluation of the cultures that developed in oppressed communities in response to oppression, and to link resistance to a wider program of transformation of the whole political/economic modern capitalist system within which the different resisting communities are embedded.

Each attitude has serious internal problems. For the left liberal attitude, there is the problem that the ideal of joining the system by embracing mainstream ideals (*not* including color blindness or integrationism, as explained above) points in two directions. It favors an “upward mobility” + “tenants’ rights” + “residents’ interests” model in many situations, for relatively obvious reasons. But there are other situations in which upward social mobility, security of person and property, and neighborhood quality seem to depend on abandoning that perspective for the opposite one.

As we have seen, individual tenants’ rights may empower the bad actors in the building, permitting them to jeopardize everyone’s inter-

est in the payment of the group mortgage and shielding anti-social behavior. In this situation, LEC shareholders firmly in the upwardly socially mobile camp may find themselves switching to an informalist collective attitude. Likewise, when it seems that the neighborhood prisoner's dilemma will create incentives for everyone to bail out to avoid being the last person, caught with the bag of declining property values in a downward spiraling neighborhood, the neighborhood strategic actor concept may seem the only hope.

That this is the case is interestingly illustrated by the emergence of tough love anti-due process thinking, first in Boston in the debates about the legitimacy of expedited eviction procedures, and about the eviction of residents held responsible for acts of family members, in the context of tenant management initiatives in public housing.<sup>39</sup> More recently it has resurfaced in the writings of Tracey Meares and Dan Kahan on Chicago public housing initiatives that restrict due process rights in order to fight criminal and specifically gang dominance in public housing.<sup>40</sup> In these cases, there is intense debate about what residents really want, and neither side can plausibly claim to speak for the community.<sup>41</sup>

For the more radical attitude, the problem is the vague and utopian character of the aspiration to find ways out of what seems the overwhelming stability and power of the dominant system. First, there is the raw power of force that supports the system. Second, there is the more subtle, but perhaps more important ideological hegemony that it has achieved for the upwardly mobile members of oppressed communities, that is, for the very elites that seem indispensable for successful mobilization of oppressed groups seen as collectivities. But even if there were more of a will, the way is not clear. In short, what exactly does it mean to ask that resources made available either as reparations or as part of the general tax and transfer systems of the welfare state should alleviate rather than exacerbate internal class differences and promote the possibility of mass mobilization?

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39. See *Perez v. Boston Housing Authority*, 400 N.E.2d 1231 (Mass. 1980).

40. Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

41. See Carol S. Steiker, *More Wrong Than Rights*, BOSTON REVIEW (Apr./May 1999) at <http://bostonreview.mit.edu/ndf.html#Rights>; Bernard E. Harcourt, *Matrioshka Dolls*, BOSTON REVIEW (Apr./May 1999) at <http://bostonreview.mit.edu/BR24.2/harcourt.html>.

The two attitudes outlined are not mutually exclusive. It is not necessary to choose between them. Most people seem to participate to some extent in both. It is possible to compromise between their seemingly inexorable demands. More, it seems to me that it is not only possible, but necessary and desirable to compromise them as soon as one is speaking of a concrete policy initiative like the LEC, given the internal problems of each. The more radical attitude is my own, but I definitely do not hold it definitely. I see it as transcending the left liberal attitude, but as requiring constant revision, limitation and modification in the left liberal direction in the face of the actual circumstances.

So for any particular LEC proposal, I would want to go as far as possible in the more radical direction, but be willing to draw back in the direction of upward mobility, "tenants' rights," and "residents' interests" to the extent the situation demanded it. In other words, teasing out the deeper conflicts that play out in designing any particular LEC doesn't solve those conflicts, or indicate unequivocally what LEC design is best. What it does is provide orientations, arguments, and larger understandings within which to choose more intelligently.

### CONCLUSION

By way of a conclusion, it may be useful to return to the question: Why LECs, rather than subsidized non-profit rental or home ownership opportunities? I answered above that the shareholders likely choose the LEC because the developer offers it at a subsidized price. The donors and the non-profit developer choose it for its mix of long term affordability, participation, and community responsibility features. In the design of the details, these values have to be traded off over and over again, and each value turns out to be open to a variety of interpretations, or to comprise sub-goals that must be traded off as well.

I approached this process of tradeoff in a pragmatic way, treating the LEC in general, and the specific form chosen by the designer, as solutions to the practical problem of what to do with available subsidies for low-income housing. The choices made are inevitably influenced by a context that includes our current lopsided maldistribution of income, our class and race system, our social problems, and the dim prospects for their substantial amelioration in the near future. In this specific context, the objections to the LEC form that I canvassed in

Part I above seem weak, and the case for a much-expanded LEC sector quite strong.

It is worth asking, and trying very briefly to answer, a somewhat different question: Does the LEC form represent an ideal? Is it the housing tenure form that we would prefer in an imagined utopian future society? The conventional mainstream utopia is one in which people who work hard can, if they want to, attain single-family home ownership. How does the development of a LEC sector relate to that project?

In the discussion thus far, it was easy for me to ignore my own housing preferences and choices. The role I adopted was that of the policy analyst hoping to clarify the choices facing the designer of LECs for today's world. Home ownership is expensive, and would allocate the whole subsidy to the first occupant; subsidized rental comes with minimal incentives to improve, and no participation rights; the LEC seems a good compromise. It is irrelevant that I am the co-owner occupant (with my wife) of a single-family house in an urban neighborhood, have the great bulk of my savings tied up in equity in that house, that it has increased greatly in value since we bought it, and that we would probably choose condo over either rental or coop tenure, if they were comparably priced and home ownership not an option.

When we shift the discussion, from choosing the beneficiaries and the form of subsidies for the poor in our existing society, to utopia, these personal choices become relevant. My ideas about utopian housing arrangements are influenced by my personal situation, although my actual choices have been no less contextually determined than the policies for the poor we have been discussing thus far. In designing a utopia, one is much freer than one is in the real world, to try to implement a particular value orientation. For me, this would be an orientation to spiritual and cultural development, and to communal self-realization, over economic betterment, once a culturally relative minimum level is achieved. It is a bias against materialism, and also against the values of competitive capitalist acquisition as a way of life.

I am speaking of a general tilt rather than anything as coherent, demanding, or specifiable in detail as a philosophy. But the bias suggests an attitude toward one's housing, and toward the design of utopian housing schemes for society as a whole. It suggests that it is important to secure housing minima, and then to encourage the pleasures people can derive from improving the use value of their

housing, and from participating in collective decision making about the building or the neighborhood where they live. It suggests less concern (than a person with a different bias would feel—not *no* concern) for making sure that residential housing is available as a vehicle for conspicuous consumption and speculative investment, and less concern for making sure that people leave one other alone within their respective spheres of right.

Of course these are by no means universally accepted values, but we are talking about utopia, not revolution. They are not, contrary to what is often said, particularly elite or elitist goals, since they are common, to a greater or lesser degree, to the world's mass religions, as well as to a part of the secular intelligentsia worldwide. LECs might be a useful element, though only an element, of a utopian scheme that attempted to realize these values more fully than they would be realized in the more mainstream utopia of universal single-family home ownership, graduated in quality, and spatially segregated according to income and class.

The creation of a right to housing, and decommodification, are the two most familiar alternative ideas in this area.<sup>42</sup> The right to housing usually means an entitlement, vis à vis the state or federal government, to a minimum of shelter, regardless of ability to pay and behavioral suitability. It is not a utopian idea, except in the sense that we are a long way from realizing it, since it proposes a minimum, rather than a housing ideal. Decommodification, on the other hand, is utopian: it proposes that, in a good society, the group (not necessarily a large group or a central government, but necessarily some local or more remote collectivity) would plan the community, design, construct, and maintain its housing stock, and allocate it on the basis of need. You could have a right to shelter in a decommodified system, or not.

In such a scheme, it would make sense that participants were shareholders in LECs. The form we have been discussing, particularized through all those detailed choices in design, would allow different groups and sub-groups to work out their own versions of use value, participation, and community responsibility (and of conspicuous consumption, through the definition of goldplating restrictions). We

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42. See Emily Achtenberg & Peter Marcuse, *Toward the Decommodification of Housing*, in *CRITICAL PERSPECTIVES ON HOUSING* (Rachel Bratt et al. eds., 1986); Chester Hartman & Michael Stone, *A Socialist Housing Alternative for the United States*, in *CRITICAL PERSPECTIVES ON HOUSING* (Rachel Bratt et al. eds., 1986).



could define the right to housing as a universal right to participate as a shareholder, with the collective financing the whole initial payment, if necessary. The LEC form would give the members possessory and participation rights in whatever housing the collective allocated to them according to need. I can easily imagine voting that LECs be the main form of tenure in the decommodified sector (though, of course, there would be all kinds of special needs requiring other forms as well).

In my utopian version, however, the decommodified LEC sector would co-exist with a commodified housing sector, to which people could resort if they wanted to spend surplus income on housing (in accord, of course, with the egalitarian, communitarian, and environmental requirements of the utopia in question). They might want to consume more than what was allocated to them on the basis of need, or to live in communities designed and governed according to principles different from those animating the collectively built community. They might also want to use their private residences to gamble, speculate, or empire-build in the real estate market. They might even create a fully private LEC sector. The commodified sector would serve not just freedom of choice, but also the orientation to play, creativity, and rebellion that complements the more sober orientation served by the LEC sector.

Revisiting my own preferences, and trying to get a sense of what I would prefer in my own utopia, I think it would depend on the historically contingent evolution of its different parts, and that my preferences might very well vary from time to time. But I would want to spend at least some substantial time on the LEC side, and maybe all my time. So there is a utopian as well as a pragmatic, utilitarian argument for LECs, at least to my mind, and it doubtless influences those of us who favor this form as a vehicle for affordable housing under our present far-from-utopian circumstances.