

# FIGHTING THE HOUSING CRISIS WITH UNDERACHIEVING PROGRAMS: THE PROBLEM WITH SECTION 8

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## I. INTRODUCTION

The enactment of the Housing and Community Development Act of 1974 represented another attempt by Congress to achieve the national goal of a "decent home and suitable living environment for every American family."<sup>1</sup> Congress utilized three vehicles to organize its efforts to provide suitable housing: the United States Housing Act of 1937,<sup>2</sup> a program of federal mortgage insur-

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1. United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437 (1988 & Supp. 1990)).

2. The United States Housing Act of 1937 established the Public Housing Program. *Id.* The public housing program created local housing authorities to develop, own, and operate public housing projects for low income families. 42 U.S.C. § 1437f. The Act contemplates housing financed with proceeds from the sale of tax-free, housing authority bonds. The Department of Housing and Urban Development (HUD) then contracts with the housing authority to service the bond debt and to pay the difference between what tenants can afford to pay as rent and the cost of construction and operation. *Id.* §§ 1437c(2), 1437f. *See generally* FRED FUCHS, INTRODUCTION TO HUD-PUBLIC AND SUBSIDIZED HOUSING PROGRAMS: A HANDBOOK FOR THE LEGAL SERVICES ADVOCATE (1989).

ance,<sup>3</sup> and a leased housing program.<sup>4</sup>

In response to widespread criticism of its policies, Congress allocated additional funds to housing through the Housing and Community Development Act of 1974.<sup>5</sup> This was an attempt to alleviate the housing crisis.<sup>6</sup> The Act initiated a program which constituted the genesis of one of the largest federal housing programs ever, second only to the public housing program.<sup>7</sup> Title II of the 1974 Act expanded and modified the leased housing program by amending the Housing Act of 1937 through the addition of Section 8.<sup>8</sup> The Section 8 program provided low income families with direct cash assistance for the acquisition of "decent," affordable housing. The goal of Section 8 was to provide landlords with rental subsidies for each tenant who occupies a unit that complies with the standards for acceptable living conditions and rent limits, as promulgated by the Department of Housing and Urban Development (HUD).<sup>9</sup>

3. The National Housing Act of 1934, Pub. L. No. 479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701 to 1715z-20 (1988)), authorized federal mortgage insurance. Mortgage insurance programs were enacted to stimulate construction and housing development. HUD subsidized the mortgage interest so that a mortgagor paid only 1% interest to the lending institution. *See generally* J. PAUL MITCHELL, *FEDERAL HOUSING POLICY AND PROGRAMS* 8 (J.P. Mitchell ed., 1985).

4. Section 23 of the Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 455 (codified as amended at 42 U.S.C. §§ 1437f-1437ff (1988 & Supp. II 1990)) created a leased housing program. The Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301 (1988 & Supp. II 1990)) subsequently repealed § 23 of the 1965 Act, replacing it with what is currently known as the Section 8 program.

Under the old Section 23 program, public housing authorities leased private housing from existing landlords to provide a stock of housing to be subleased to low income tenants at affordable rents. *See generally* James M. Klein & John E. Schrider, Jr., *Procedural Due Process and the Section 8 Leased Housing Program*, 66 KY. L.J. 303, 304 n.2 (1977).

5. Housing and Urban Development Act of 1965, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301 (1088 & Supp. II 1990)). *See* MITCHELL, *supra* note 3, at 15.

6. 42 U.S.C. § 1437 (1988 & Supp. II 1990).

7. As of April 1986, the public housing program included 1.4 million units while the Section 8 program funded 1.2 million units. FORD FOUNDATION, *AFFORDABLE HOUSING: THE YEARS AHEAD*, 26 (1989).

8. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301 (1988 & Supp. II 1990)).

9. 42 U.S.C. § 1437f (1988 & Supp. II 1990) and implementing regulations at 24 C.F.R. §§ 811-99 (1992). In the legislative history Congress stated:

[T]he bill is written to permit eligible low income families to enter into lease agreements with owners of private accommodations. Public housing agencies may make

Initially, Section 8 had two purposes.<sup>10</sup> First, Congress envisioned the program as a means of achieving the nation's objective of adequate housing for low income families.<sup>11</sup> Second, Congress sought to enhance the socioeconomic diversity of the families living in this housing.<sup>12</sup> The policy statement of Section 8 reflects the general purposes of assuring the availability of decent and affordable housing for low income families.

Instead of working to achieve these objectives, Section 8 administrators and landlords found loopholes in the program and its implementing regulations.<sup>13</sup> As a consequence, landlords and Section 8 administrators effectively undermined Congress' mandated purposes, thus jeopardizing Section 8's ability to provide an adequate level of housing to low income families. Although the Section 8 program still has potential to achieve both objectives, the current administration of the program defeats its original purposes. This is an untenable outcome for a program touted as one of the only existing workable answers to the critical problems of the nation's homeless and underhoused.<sup>14</sup> With a declining number of federal dollars spent on

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housing assistance payments to owners of low income housing to cover the difference between rental payments made by low income families and the actual rent payable for the dwelling unit.

S. REP. NO. 693, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 713; FUCHS, *supra* note 2, at 69, 110.

10. When first created, the Section 8 rent subsidy program promoted newly constructed housing, substantially rehabilitated housing, and existing private housing. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301 (1988 & Supp. II 1990)). This article concentrates on the Section 8 program for existing private housing. For regulations regarding the Section 8 new construction and substantial rehabilitation programs, see 24 C.F.R. pts. 880, 881 (1992). There are now two Section 8 subsidy programs. Subsidies are paid through the Section 8 Existing Housing Program, 24 C.F.R. pt. 882 [hereinafter certificate program] and the Housing Voucher Program, 24 C.F.R. pt. 887 (1992) [hereinafter voucher program]. The programs are similar in intent and practice, except that the method for calculating the rental amount paid to the landlord differs. *See* 24 C.F.R. § 882.106 (1992) (certificate program) and 24 C.F.R. 887.351 (1992) (voucher program).

11. 42 U.S.C. § 1437f(a) (1988 & Supp. II 1990).

12. *Id.*

13. *McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233 (S.D.N.Y. 1989) (permitting Section 8 tenants to bring a class action suit against the New York City Housing Authority seeking a change in procedures).

14. Without a housing subsidy, many low income families pay as much as 70% or 80% of their income for rent. The sharp rise in rental amounts, contrasted with the almost imperceptible rise in incomes and welfare grants for low income families, forces

housing homeless and low income families,<sup>15</sup> it is essential that funded programs be administered and enforced in such a way as to achieve maximum effectiveness. Congress must act to ensure that its original purposes for the Section 8 program are realized.

This article explores one loophole that must be closed by new legislation. This loophole enables landlords to benefit financially from participation in the Section 8 program without holding them accountable to their contractual obligations. The failure to enforce the landlords' contracts and the lack of statutory and regulatory enforcement by the Section 8 administrators deny participating tenants their rights under the program and effectively negate the original intent of the legislation creating the program.

## II. THE SECTION 8 EXISTING HOUSING PROGRAM AND ITS REQUIREMENTS

### A. *Eligibility*

The Section 8 housing subsidy approach is also referred to as the "Finders-Keepers" program.<sup>16</sup> The United States Department of Housing and Urban Development authorizes local agencies, called Public Housing Agencies (PHAs), to issue certificates and vouchers to eligible low income families. A low income family wishing to participate in the program applies to the local PHA, which administers the Section 8 program. The Section 8 administrator initially determines family income eligibility.<sup>17</sup> Section 8 assistance is available to lower income families, defined by HUD as families whose annual incomes do not exceed eighty percent of the median income for the area in which

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a large number of families into this situation, or even worse, homelessness. The National Housing Law Project, *The Law in the Life of a Low-Income Housing Tenant*, CLEARINGHOUSE REV., Special Issue 1992, at 44.

15. EDWARD B. LAZERE ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, A PLACE TO CALL HOME, THE LOW INCOME HOUSING CRISIS CONTINUES (1991). See also FORD FOUNDATION, *supra* note 7, at 12 (citing a decline in federal funding from \$30 billion in 1981 to less than \$8 billion in 1989).

16. 24 C.F.R. § 882.103 (1992) (certificate program); 24 C.F.R. § 887.201 (voucher program). See also DEPT. OF HOUSING AND URBAN DEVELOPMENT PUBLIC HOUSING AGENCY ADMINISTRATIVE PRACTICES HANDBOOK FOR THE SECTION 8 EXISTING HOUSING PROGRAM, 7420.7 (Nov. 2, 1979) at 3-1 [hereinafter HUD HANDBOOK].

17. 24 C.F.R. pt. 813 (1992) (certificate program); 24 C.F.R. § 887.151-.167 (1992) (voucher program).

the families live.<sup>18</sup>

In most localities, long waiting lists exist for a limited number of Section 8 certificates and vouchers.<sup>19</sup> Because demand far exceeds supply, the application process in most jurisdictions is only open for short periods each year.<sup>20</sup> Sixteen percent of the largest public housing authorities, those with over 2,500 units of subsidized housing, have closed their waiting lists.<sup>21</sup> Once on the waiting list, a tenant has little hope of receiving a certificate or a voucher unless he or she falls into one of the preference categories established by HUD.<sup>22</sup> PHAs are also allowed to adopt local preferences.<sup>23</sup> The preference categories include families that are displaced involuntarily from a home, those living in substandard housing, and those families paying more than fifty percent of their income for rent.<sup>24</sup>

For those eligible and patient enough to endure the process, the financial benefit is great. A Section 8 tenant family pays a fixed percentage of its income for rent.<sup>25</sup> To ensure their ability to afford the rent, a Section 8 tenant family pays either thirty percent of its monthly adjusted income,<sup>26</sup> or ten percent of its monthly income,<sup>27</sup> whichever is higher, or the family pays the shelter allowance portion of the family's

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18. 24 C.F.R. § 813.102 (1992) (certificate program); 24 C.F.R. § 887.151(a) (1992) (voucher program).

19. LAZERE, *supra* note 15, at 28-30.

20. A typical example of the Section 8 administrative process is evidenced in Syracuse, New York. In 1989, the application period for Section 8 certificates extended for three weeks. In that time, the waiting list grew to 1,979 households. COALITION FOR HEALTH AND WELFARE OF SYRACUSE AND ONONDAGA COUNTY, HUMAN NEEDS IN ONONDAGA COUNTY 1989: A STATUS REPORT 24 (1989).

21. LAZERE, *supra* note 15, at 29.

22. 24 C.F.R. § 882.219 (1992) (certificate program); 24 C.F.R. 887.157 (1992) (voucher program).

In Syracuse, New York approximately 4,900 low income families receive Section 8 rent subsidies, and about 4,900 low income families are on the waiting list for subsidies. Dan McGuire & Jon Craig, *One Legacy of Mulberry Square: On Welfare with \$27,000 in Hand*, SYRACUSE HERALD AMERICAN, Feb. 2, 1992, at A1.

23. 24 C.F.R. § 882.202 (1992) (certificate program) and 24 C.F.R. § 887.156 (1992) (voucher program).

24. *Id.*

25. PUB. L. No. 97-35, 95 Stat. 400 (1981) (codified at 42 U.S.C. § 1437a (1988 & Supp. II 1990)).

26. 24 C.F.R. § 813.107(a)(1) (1992).

27. 24 C.F.R. § 813.107(a)(2) (1992).

public assistance budget.<sup>28</sup> Monthly adjusted income equals one-twelfth of the anticipated annual income of the family from all sources minus certain allowances detailed in the regulations set forth by HUD.<sup>29</sup> Monthly income equals one-twelfth of annual income without the allowances.<sup>30</sup> Thus, low income families do not have to choose between food, shelter, and clothing in allocating their limited resources.<sup>31</sup>

The few families who manage to acquire Section 8 certificates or vouchers face several hurdles in obtaining affordable, decent housing. Within sixty days of receiving the certificate, the eligible family must locate a landlord willing to participate in the program.<sup>32</sup> Those families who manage to find a landlord who is both willing to participate in the program and has an available unit gain an appreciation of the program's nickname, the "Finders-Keepers" program. Unfortunately, the nickname is only partially accurate. Families must find an apartment that qualifies for the program and a landlord willing to accept a Section 8 certificate or voucher. Once the family finds such an apartment, however, it is not as secure for the family as the nickname implies. Finding a Section 8 apartment is only the beginning. "Finders" are not necessarily "keepers." Keeping the apartment depends upon the landlord's compliance with minimal obligations.<sup>33</sup> This insecurity runs contrary to the intent of the program.

### B. *Good Cause For Eviction*

Federal money spent on housing for low income families should guarantee secure, stable housing, even when the housing is privately owned.<sup>34</sup> The national goal of a decent and suitable home for all persons "implies an atmosphere of stability, security, neighborliness, and

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28. 24 C.F.R. § 813.107(a)(3) (1992). This is true in states where the shelter allowance allocated by public assistance equals what is charged for rent. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3 (1991).

29. 24 C.F.R. § 813.102 (1992).

30. *Id.*

31. LAZERE, *supra* note 15, at 5-7. *See also* Peter W. Salsich, Jr., *Nonprofit Housing Organizations*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 249 (1989).

32. 24 C.F.R. § 882.209(d)(1) (1992) (certificate program); 24 C.F.R. § 887.165 (1992) (voucher program).

33. *See infra* note 51 for an outline of the landlord's statutory obligations under a Section 8 contract.

34. *McQueen v. Druker*, 317 F. Supp. 1122 (D. Mass. 1970).

social justice.”<sup>35</sup> Arbitrary loss of housing and the resulting financial, emotional, and societal hardships reflect precisely the evils subsidized housing aims to prevent.<sup>36</sup>

To establish security in housing for low income families, courts consistently hold that a governmental subsidy for housing is a property right protected by the Due Process Clause of the Constitution.<sup>37</sup> Once a tenant is certified as eligible for subsidized housing and acquires that housing, a constitutionally protected right to continued occupancy exists. Due process dictates that a tenant may not be evicted from subsidized housing without good cause.<sup>38</sup> Thus, a tenant in the Section 8 program has a right to automatic lease renewal, unless the landlord demonstrates “good cause” for eviction.<sup>39</sup> Protection of the tenant’s due process rights requires that the landlord satisfy a state court that “good cause” exists to evict the tenant.<sup>40</sup>

Prior to 1983, there was an “individual unit loophole” in the program. This loophole enabled participating landlords to evict tenants from a Section 8 subsidized unit upon expiration of the lease term. Landlords could terminate their participation in the Section 8 program for a single apartment, rent the apartment at private market rates, and transfer the Section 8 obligation to another apartment in the same building or another building owned by the landlord.<sup>41</sup> In *Mitchell v. U.S. Dep’t of Housing and Urban Development*, the district court for the Northern District of California closed this loophole.<sup>42</sup> Effective

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35. *Id.* at 1129-30. Succinctly put, “simply providing housing, without also providing some certainty in that housing, cannot be considered to accomplish the objectives of Congress in enacting the Housing Act.” *Id.*

36. Klein & Schrider, *supra* note 4, at 344. *Mitchell v. U.S. Dep’t of Hous. and Urban Dev.*, 568 F. Supp. 701, 708 (N.D. Cal. 1983).

37. *See, e.g.*, *Thorpe v. Durham Hous. Auth.*, 393 U.S. 268 (1969); *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919 (11th Cir. 1982); *Joy v. Daniels*, 479 F.2d 1236, 1242 (4th Cir. 1973).

38. *Jeffries*, 678 F.2d at 921.

39. 24 C.F.R. § 882.215(c) (1992) (certificate program); 24 C.F.R. § 887.213 (1992) (voucher program). *See also* *Rushie v. Berland*, 130 Misc. 2d 816 (N.Y. App. Term 1986); Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880 (1973).

40. *Swann v. Gastonia Hous. Auth.*, 675 F.2d 1342 (4th Cir. 1982).

41. *Mitchell v. U.S. Dep’t Hous. and Urban Dev.*, 569 F. Supp. 701, 707 (N.D. Cal. 1983).

42. *Id.* at 708. The court stated that “[a] landlord can ‘play musical chairs’ with the apartments in the complex and thereby completely circumvent the explicit Congressional requirement that a tenancy not be terminated unless good cause is shown.” *Id.*

March 29, 1984, HUD amended its regulations to comply with the decision in *Mitchell* and eliminated the individual unit loophole.<sup>43</sup> HUD sought to preclude any exemptions from the "good cause" requirement.<sup>44</sup>

Unfortunately, landlords who sought to circumvent the judicial and regulatory requirement of good cause for eviction found another loophole loosely woven into the fabric of the regulations. This loophole presents an even greater challenge to HUD and public housing administrators. An adequate response requires Section 8 administrators to enact and adhere to strict new policies, which they have been unwilling to do thus far. This absence of tough enforcement by administrators and the lack of legislative efforts to close the loophole undermines the Section 8 program's intent to provide low income families with secure, decent housing.

### III. THE LOOPHOLE IN THE SECTION 8 PROGRAM

The Section 8 program is designed to ensure the national goal of decent, safe, and sanitary housing for low income families.<sup>45</sup> HUD regulations require that all Section 8 housing comply with housing quality standards, which guarantee decent conditions in the apartments rented by Section 8 tenants.<sup>46</sup> The federal government, understandably, does not want to subsidize housing in which tenants are subjected to dangerous, unhealthy, or unsafe conditions. Public housing agencies that contract with HUD to administer Section 8 programs are required to inspect the apartments prior to leasing them, to reinspect them at least annually, and to certify that the apartments continue to comply with the minimum housing quality standards (HQS) promulgated by

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43. Housing Assistance Payments Program, 49 Fed. Reg. 12,215, 12,234 (1984) (codified at 24 C.F.R. pt. 882 (1992)). See also, *Rushie v. Berland*, 130 Misc. 2d 816 (N.Y. App. Term, 1986).

44. Housing Assistance Payments Program, 49 Fed. Reg. 12,234 (1984). "The Department has decided that the final rule will not provide or permit any exemption of the owner from the good cause requirement for termination of tenancy." *Id.*

45. Congress has repeatedly expressed this goal. See National Housing Act, 12 U.S.C. § 1701 (1988 & Supp. 1991); 42 U.S.C. §§ 1404a, 1441, 1441a; 12 U.S.C. § 1701t; Housing and Community Development Act of 1978, Pub. L. No. 95-557, § 203, 92 Stat. 2080; Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1972 (codified at 42 U.S.C. § 1437).

46. 24 C.F.R. § 882.109 (1992) (certificate program); 24 C.F.R. § 887.251 (1992) (voucher program).

HUD.<sup>47</sup> After an apartment is approved by a Section 8 administrator, and before the tenant moves into the apartment, the PHA, the landlord, and the tenant enter into a series of contractual agreements.<sup>48</sup> The landlord and tenant enter into a lease agreement subject to PHA approval.<sup>49</sup> The PHA and the landlord enter into a housing assistance payments contract (HAP) providing for rental subsidy payments to the landlord on behalf of an eligible tenant family.<sup>50</sup> The landlord signs both documents, which include specific provisions requiring that the landlord maintain the apartment in accordance with the housing quality standards.<sup>51</sup> If an apartment fails an inspection because it is not decent, safe, or sanitary, the PHA notifies the landlord and requires that the apartment be brought into compliance with the housing quality standards.<sup>52</sup> If the landlord fails to repair the apartment, the PHA must stop the rental subsidy payments or terminate the housing assistance payment contract with the landlord.<sup>53</sup> The tenant family is then faced with the choice of moving to another apartment, subject to a Section 8 inspection, or staying in an unsubsidized and substandard

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47. 24 C.F.R. § 882.116(o) (1992) (certificate program); 24 C.F.R. § 887.257 (1992) (voucher program).

48. 24 C.F.R. § 882.102 (1992) (certificate program); 24 C.F.R. §§ 887.209, 887.301 (1992) (voucher program).

49. 24 C.F.R. § 882.209(k) (1992) (certificate program); 24 C.F.R. § 887.209(a) (1992) (voucher program).

50. 24 C.F.R. § 882.105 (1992) (certificate program).

51. The standard lease provides:

The Landlord shall maintain the dwelling unit, equipment and appliances, and common areas and facilities, to provide decent, safe and sanitary housing in accordance with the housing quality standards (24 CFR Section 882.109) for the Section 8 Existing Housing Certificate Program, including the provision of all the services, maintenance and utilities set forth in the Lease.

HUD HANDBOOK, *supra* note 16, at Appendix 24-A.

The standard Housing Assistance Payments Contract provides:

The Owner agrees to maintain and operate the Contract Unit and related facilities to provide decent, safe and sanitary housing in accordance with 24 CFR Section 882.109, including the provision of all the services, maintenance and utilities set forth in the Lease. If the PHA determines that the Owner is not meeting this obligation, the PHA shall have the right, even if the family continues in occupancy, to terminate or reduce housing assistance payments or to terminate this Contract.

HUD HANDBOOK, *supra* note 16, at Appendix 26-A.

52. HUD HANDBOOK, *supra* note 16, at 5-24.

53. *Id.* at 5-9a.2. DEPT. OF HOUSING AND URBAN DEVELOPMENT PUBLIC HOUSING AGENCY ADMINISTRATIVE PRACTICES HANDBOOK FOR THE SECTION 8 EXISTING HOUSING PROGRAM, § 7420.7, at 5-9a (Nov. 2, 1979).

apartment.<sup>54</sup>

In practice, many Section 8 administrators elect to terminate the rental subsidies when landlords fail to comply with the housing quality standards rather than suspend payments in an effort to gain compliance from the landlords.<sup>55</sup> In either event, the tenant family faces an uncertain and insecure situation. If the subsidy is terminated, the tenant family must move in order to retain its Section 8 benefits. Because decent, affordable housing for low income families is so scarce in most cities, losing the right to apply the subsidy to an apartment is usually equivalent to losing the subsidy.<sup>56</sup> If the subsidy is suspended, the landlord may elect to evict the tenant family for nonpayment of rent. Although suspension of the subsidy is due to the wrongdoing of the landlord, the tenant family is forced to suffer through an eviction proceeding and ultimately a possible eviction.<sup>57</sup>

Case law fails to provide decisions definitively preventing a family from being evicted when a PHA stops making the subsidy payments. Thus, despite HUD's position that the families receiving Section 8 subsidies should not be evicted, they face a constant threat of just that result.<sup>58</sup> As a consequence of insufficient common law and administrative protections, landlords can circumvent the requirement of good cause for eviction. Landlords who lack good cause, but who wish to evict tenant families, need only allow the apartment to fall below the minimum housing quality standards.<sup>59</sup>

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54. 24 C.F.R. § 882.211(c) (1992). This regulation provides:

If the Owner fails to maintain a dwelling unit in Decent, Safe and Sanitary condition, the PHA may exercise any of its rights and remedies under the Contract, including termination of housing assistance payments (even if the Family continues in occupancy) and termination of the Contract. If the PHA determines to terminate the Contract, and the Family wants to move to another dwelling unit with assistance under the PHA's Section 8 program, the PHA shall issue another Certificate to the Family (unless the PHA denies issuance of a Certificate in accordance with § 882.210).

See also, 24 C.F.R. § 887.261 (1992) (vouchers).

55. Telephone Interview with Michael Hanley, Housing Attorney of the Greater Upstate Law Project (Feb. 27, 1992). The Greater Upstate Law Project is the New York State support center for Legal Services offices.

56. *Id.* See also NATIONAL HOUSING LAW PROJECT, *supra* note 14, at 45; LAZERE, *supra* note 15, at 7, 27 (discussing the problems caused by low availability).

57. See generally *Antur Realty Corp. v. Rivera*, 442 N.Y.S.2d 732 (N.Y. Civ. Ct. 1981) (discussing process for evicted tenant); *Granford Realty Corp. v. Valentin*, 337 N.Y.S.2d 160 (N.Y. Civ. Ct. 1972) (same).

58. 49 Fed. Reg. 12,215, 12,226-27 (1984) (codified at 24 C.F.R. § 882 (1992)).

59. *McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233 (S.D.N.Y. 1989).

Moreover, Section 8 administrators, who are eager to keep the landlords in the Section 8 program regardless of the cost, implicitly assist landlords in this endeavor.<sup>60</sup> Rather than maintain the integrity of the Section 8 program and protect tenant families, Section 8 administrators and HUD succumb to the demands of private enterprise.<sup>61</sup> Private landlords are assured fair market rents<sup>62</sup> for their apartments, as long as they participate in the Section 8 program. The government subsidizes these rents in exchange for a promise from the landlords that they will provide safe, secure housing to low income families. It is an empty promise, however, and one which landlords break freely with the help of Section 8 administrators.

#### IV. CLOSING THE LOOPHOLE

##### A. *The Eviction Defense*

Tenant families, caught between landlords who refuse to repair substandard conditions and Section 8 administrators who refuse to pay subsidies for substandard apartments, often find themselves faced with eviction for nonpayment of rent. Despite the clear inequity of evicting the tenant family, the fast-paced, swift-handed dispensing of justice often ignores the complex legal arguments necessary to establish a tenant's due process rights in the Section 8 program and to avoid eviction.<sup>63</sup> Although claims under the Constitution and federal regulations are often unsuccessful, other methods of recourse exist. State law affords tenants affirmative defenses and counterclaims in the eviction proceeding. These include breach of the warranty of habitability<sup>64</sup> and retaliatory eviction.<sup>65</sup>

Where the repairs are necessary to protect the health or safety of the tenant family, courts allow the tenant to make the repairs and deduct

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60. See Scott K. Morris, Note, *The New Leased Housing Program: How Tenantable a Proposition?*, 26 HASTINGS L.J. 1145, 1162 n.91, 1179 (1975) (discussing the landlords' favorable position in the Section 8 scheme). See also Klein & Schrider, *supra* note 4, at 312.

61. *Id.* See also NATIONAL HOUSING LAW PROJECT, *supra* note 14, at 45.

62. Salsich, *supra* note 31, at 249.

63. See, e.g., The City Wide Task Force on Housing Court, 5 Minute Justice or "Ain't Nothing Going on but the Rent!", (Nov. 1986) (unpublished manuscript, on file with the *Washington University Journal of Urban and Contemporary Law*).

64. N.Y. REAL PROP. LAW § 235-b (McKinney 1992).

65. N.Y. REAL PROP. LAW § 223-b (McKinney 1992).

the cost of the repairs from the rent.<sup>66</sup> This arguably preserves the Section 8 tenant's rent subsidy by maintaining housing quality standards in the apartment. However, it potentially subjects the family to eviction.<sup>67</sup>

A tenant family who chooses not to make repairs on its own, but rather withholds rent due to the uninhabitable conditions, assumes the same risk. When the landlord attempts to evict for nonpayment of rent, the tenants must defend their state law right to a habitable apartment. A growing number of states protect that right through an express warranty of habitability applicable to residential leases.<sup>68</sup> These warranties exist in most states.<sup>69</sup> In New York, for example, there is an express warranty in all residential leases. New York's Real Property Law § 235-b provides that landlords warrant leased premises to be "fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health, or safety."<sup>70</sup> The tenant's obligation to pay rent depends upon and is determined by the landlord's maintenance of the premises in a habitable condition.<sup>71</sup> In *Park West Management Corp. v. Mitchell*, the New York Court of Appeals concluded that the shortage of low and middle income housing necessitated the enactment of a warranty of habitability to protect powerless tenants against their landlords.<sup>72</sup> The New York Court of Appeals recognized that landlords lack the incentive to voluntarily maintain the premises because there is almost no threat of vacancies.<sup>73</sup> Similarly, the failure of Sec-

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66. See, e.g., *Hauptman v. 222 East 80th St. Corp.*, 418 N.Y.S.2d 728 (N.Y. Civ. Ct. 1979) (permitting self-help and rent reduction); *Garcia v. Freeland*, 314 N.Y.S.2d 215 (N.Y. Civ. Ct. 1970) (same).

67. See generally *Schweiger v. Superior Court of Alameda County*, 476 P.2d 97 (Cal. 1970) (noting eviction for non-payment of rent); *Aweeka v. Bonds*, 97 Cal. Rptr. 650 (Cal. App. 1971) (same).

68. ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 3:16 (1980) (noting states that have protected tenants' rights through express warranties of habitability).

69. NATIONAL HOUSING LAW PROJECT, *supra* note 14, at 45.

70. N.Y. REAL PROP. LAW § 235-b (McKinney 1992).

71. *Park West Management Corp. v. Mitchell*, 391 N.E.2d 1288 (N.Y. 1979), *cert. denied*, 444 U.S. 992 (1979).

72. *Park West*, 391 N.E.2d at 1292.

73. *Id.* "Because there is but a minimal threat of vacancies, the landlord has little incentive to voluntarily make repairs or ensure the performance of essential services." *Id.*

tion 8 administrators to enforce the minimum housing quality standards and the paucity of available Section 8 apartments ultimately harm the tenants whom the program aims to protect.<sup>74</sup>

A Section 8 tenant family who withholds rent and asserts the state law warranty of habitability faces a greater risk of eviction than a tenant in an unsubsidized apartment. Any abatement of rent could be applied to the subsidy rather than the amount owed by the tenant family, thereby benefiting the Section 8 administrator rather than the tenant family. *Park West* established that the measure of damages in a breach of warranty of habitability case is the difference between the amount of rent originally agreed upon and the present actual market value of the premises.<sup>75</sup> There is no precedent to guide judges in applying state law to the federal Section 8 program. The court might abate the portion of the rent financed through subsidies; it might abate the tenant's portion of the rent; or it may apportion any rent abatement between the two.

Finally, the defense of retaliatory eviction provides additional recourse for a Section 8 tenant who is faced with eviction for nonpayment of rent after the Section 8 administrator terminates the rent subsidy because of the landlord's failure to repair.<sup>76</sup> As a prerequisite to a retaliatory eviction claim, the tenant must prove that he or she filed a complaint with the Section 8 program administrator challenging the quality of the apartment; and that the Section 8 administrator investigated the claim, notified the landlord of the violations and terminated the subsidy.<sup>77</sup>

In New York State, Real Property Law § 223-b creates a defense of retaliation for both nonpayment and holdover eviction proceedings.<sup>78</sup> A landlord may not attempt to evict a tenant for a good faith health or safety complaint to a governmental agency. In addition, the landlord may not evict where the tenant takes action to enforce rights under a

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74. NATIONAL HOUSING LAW PROJECT, *supra* note 14, at 45.

75. *Park West*, 391 N.E.2d at 1295.

76. SCHOSHINSKI, *supra* note 68, § 12:1. *See also* *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (permitting tenant to proceed on retaliatory eviction theory); *Hosey v. Club Van Courtland*, 299 F. Supp. 501 (S.D.N.Y. 1969) (same); *Schweiger v. Superior Court*, 476 P.2d 97 (Cal. 1970) (same).

77. SCHOSHINSKI, *supra* note 68, § 12:5.

78. N.Y. REAL PROP. LAW § 223-b (McKinney 1992).

rental agreement or laws protecting tenants.<sup>79</sup> If the landlord serves a notice to quit or substantially alters the rental agreement within six months of the tenant electing one of these actions, a rebuttable presumption exists that the landlord is acting in retaliation for the tenant's actions.<sup>80</sup> Although the presumption is not available in a proceeding for the nonpayment of rent, the defense of retaliatory eviction applies so long as the tenant demonstrates retaliation, either through direct evidence, such as an admission by the landlord, or circumstantial evidence, such as the timing of a termination for a rent increase notice.<sup>81</sup>

### B. *The Judicial Solution*

The tenant family, faced with subsidy termination, may attempt to prevent eviction for nonpayment of the rent subsidy by bringing an affirmative action against the landlord and the Section 8 administrator. The HAP contract specifically states that the landlord shall maintain the apartment in accordance with the housing quality standards specified by HUD.<sup>82</sup> Allowing participating landlords to breach this agreement and to benefit from such a breach undermines the Section 8 program. As a result of the lack of enforcement by HUD and local administrators, tenants pursue private actions as third party beneficiaries to the HAP contracts. They have sought redress in the courts to enforce the contracts.

Traditional contract law allows a third party to enforce a contract entered into between others for the third party's benefit.<sup>83</sup> The third party must show that he or she was the intended or direct beneficiary of the agreement to have enforceable rights under the contract.<sup>84</sup> A beneficiary is "intended" if the contracting parties meant to benefit him or her.<sup>85</sup>

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79. The protection against retaliation also extends to participation in a tenants' organization. See N.Y. REAL PROP. LAW § 230 (McKinney 1992).

80. N.Y. REAL PROP. LAW § 223-b (McKinney 1992).

81. *Kew Garden Assoc. v. Regan*, 431 N.Y.S.2d 260 (N.Y. Civ. Ct. 1980).

82. 24 C.F.R. § 882.209(k) (1992) (certificate program); 24 C.F.R. § 887.209(a) (1992) (voucher program).

83. *Laurence v. Fox*, 20 N.Y. 268 (1859) (permitting third party enforcement of a contract). See also 22 N.Y. JUR.2D *Contracts* § 271 (discussing traditional role of third party beneficiary enforcement of contracts).

84. *Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir. 1981) (discussing standing requirements in an action brought by a third party beneficiary).

85. Robert S. Adelson, Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875, 878 (1985).

Whether a Section 8 tenant family has status as an intended third party beneficiary of the HAP contract depends upon congressional intent behind the Section 8 program, HUD's intent in administering the program, and the intent expressed in the language of the HAP contract.

The primary issue is whether Congress intended to create an enforceable benefit for Section 8 tenant families.<sup>86</sup> The Seventh Circuit answered this question affirmatively in *Holbrook v. Pitt*.<sup>87</sup> The court emphasized that the Section 8 program is aimed at assisting low income families to obtain decent housing.<sup>88</sup> Furthermore, the court concluded that HUD's expressed intent for the Section 8 program was to benefit participating low income families. The Seventh Circuit based this conclusion on a review of the contract terms, which specify that HAP payments are made "on behalf of" tenant families.<sup>89</sup> The Court of Appeals found a breach of contract by HUD and awarded retroactive benefits to the appellants as third-party beneficiaries of the contracts.<sup>90</sup>

The Ninth Circuit<sup>91</sup> and the United States Court of Appeals for the District of Columbia<sup>92</sup> have both addressed this same issue and concurred with the Seventh Circuit. In *Ressler v. Pierce*,<sup>93</sup> the appellants were applicants for Section 8 benefits who alleged that their due process and equal protection rights were violated by the lack of procedural safeguards in the application process.<sup>94</sup> The Ninth Circuit determined that Section 8 applicants are entitled to due process of law because they comprise a class of individuals who are the intended beneficiaries of the Section 8 program.<sup>95</sup>

In *Ashton v. Pierce*,<sup>96</sup> the Court of Appeals for the District of Co-

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86. *Id.* at 883.

87. *Holbrook*, 643 F.2d at 1270.

88. *Id.* at 1271. The court stated "if the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt." *Id.*

89. *Id.* at 1272.

90. *Id.* at 1276.

91. *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982).

92. *Ashton v. Pierce*, 716 F.2d 56 (D.C. Cir. 1983).

93. 692 F.2d 1212 (9th Cir. 1982).

94. *Id.*

95. *Id.* at 1216.

96. 716 F.2d 56 (D.C. Cir. 1983).

lumbia approached the issue in a case involving enforcement of regulations regarding lead-based paint in public housing projects. The court held that tenants had a right under the Annual Contributions Contract between HUD and the public housing authority to enforce responsibilities of the parties to the contract.<sup>97</sup> The court determined that the contract's only logical purpose was to benefit tenant families.<sup>98</sup> The court concluded that even a clause in the contract which stated that "nothing in this contract shall be construed as creating or justifying any claim against the Government by any third party" did not undermine the tenants' right to enforce the terms of the contract.<sup>99</sup>

Recent state and federal decisions are consistent with the reasoning of *Holbrook* and *Ashton*. A Massachusetts court opined that "it would be bizarre indeed to conclude that the plaintiffs, the quality of whose abode was the very subject of the contract, were somehow not intended beneficiaries under the contract."<sup>100</sup> The California Court of Appeals determined that the tenants had a right to sue as third party beneficiaries of the contract between the landlords and the Section 8 administrator.<sup>101</sup>

HUD attempted to circumvent this precedent by including a clause in the HAP contract preventing third party beneficiary claims.<sup>102</sup> Through the reauthorization of the Section 8 program, Congress specifically responded to this additional clause by enacting Title I of the Housing and Community Development Act of 1987.<sup>103</sup> Congress eliminated any doubt that it intended to afford a private right of action to injured Section 8 tenants. As noted by the Southern District of New York in *Glover v. Crestwood Lake Section 1 Holding Corp.*,<sup>104</sup> the legis-

97. *Id.* at 65-66.

98. *Id.* The court explicitly stated that:

[T]he mutual promises contained in the Contract were intended by the parties to benefit appellees . . . . Indeed, it is difficult to imagine any purpose for the Contract other than to benefit the tenants of public housing . . . . Thus, appellees are third-party beneficiaries of the Contract and may enforce the duties arising under it.

*Id.*

99. *Id.*

100. *Ayala v. Boston Hous. Auth.*, 536 N.E.2d 1082, 1090 (Mass. 1989).

101. *Zakaria v. Lincoln Property Co.* No. 415, 229 Cal. Rptr. 669, 674 (Cal. App. 1986).

102. HUD HANDBOOK, *supra* note 16, at app. 26-A.

103. Pub. L. No. 100-242, 101 Stat. 1815 (codified as amended at 42 U.S.C. § 1437 (1988 & Supp. II 1990)).

104. 746 F. Supp. 301 (S.D.N.Y. 1990).

lative history of the Section 8 reauthorization makes it clear that a private right of action is available under the Section 8 statute.<sup>105</sup>

The federal courts permit tenants to enforce their rights with respect to apartments which do not meet housing quality standards. In *Wallace v. Holy Temple Homes*, the District Court for the Western District of Missouri granted tenants standing to sue as third party beneficiaries of the housing assistance payments contract.<sup>106</sup>

In *McNeil v. NYC Housing Authority*,<sup>107</sup> Section 8 tenants brought a class action against the New York City Housing Authority (NYCHA). The tenants challenged the NYCHA's suspension and termination of Section 8 housing subsidies caused by landlords' failures to make repairs to apartments that violated HUD's housing quality standards.<sup>108</sup> The plaintiffs asserted that NYCHA's suspension or termination of the subsidies violated the United States Housing Act, federal regulations, and their own due process rights.<sup>109</sup> The court granted a preliminary injunction, staying eviction proceedings against the plaintiffs.<sup>110</sup> The court found that the parties intended the contractual provisions of the HAP contract to benefit the plaintiffs, thereby giving the plaintiffs standing to sue.<sup>111</sup> As third party beneficiaries of the HAP contract, the plaintiffs could sue to enforce their right to apartments which complied with the housing quality standards.<sup>112</sup>

Although the court failed to reach the merits of this case,<sup>113</sup> the di-

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105. *Id.* at 309, citing H.R. REP. NO. 122, 100th Cong., 1st Sess. (1987), reprinted in 1987 U.S.C.C.A.N. 3317, 3369. The House Report on the reauthorization bill states: The Committee intends, and has always intended, that applicants and tenants who are adversely affected by violations of these statutory provisions should have a cause of action to enforce the statute in federal court. . . . Because the courts have been somewhat unreceptive to private causes of action, the Committee wishes to clarify its long-standing intention in favor of private enforcement.

*Id.*

106. *Wallace v. Holy Temple Homes, Ltd.*, No. 89-0404-CV-W-1, 1989 U.S. Dist. LEXIS 114439 at \*6 (W.D. Mo. Nov. 29, 1989).

107. 719 F. Supp. 233 (S.D.N.Y. 1989).

108. *Id.* at 240.

109. *Id.*

110. *Id.* at 256.

111. *Id.* at 249.

112. *McNeill*, 719 F. Supp. at 248-49.

113. Telephone interview with Scott Rosenberg, Attorney, Legal Aid, Civil Appeals & Law Reform Unit (Feb. 5, 1992). Rosenberg represented the plaintiffs.

lemma faced by Section 8 tenants in New York City occurs nationwide. A creative approach is necessary to solve this dilemma.

### C. *The Legislative Solution*

Protecting Section 8 tenants from eviction without good cause requires a tightening of the statutes and regulations governing the Section 8 housing program. The first step is to amend the regulations to permit suspension rather than termination of the Section 8 subsidies. Although suspending rather than terminating the Section 8 benefits should motivate landlords to remedy the violations of the housing quality standards, suspension of benefits fails to prevent landlords from attempting to evict tenants for nonpayment of a rent subsidy. In this situation, however, the tenants have a stronger defense to the eviction action.<sup>114</sup>

Requiring landlords to receive approval from the PHA before initiating an eviction proceeding protects tenants from eviction actions based on nonpayment of subsidies. This requirement effectively prevents landlords from attempting to evict families while the subsidies are suspended due to the landlords' failure to effect repairs. Also, this proposed requirement prevents landlords from allowing the property to deteriorate below minimum housing quality standards in the hope of triggering a termination of subsidies and thus facilitating an eviction action for nonpayment of rent.

These amendments incorporate an express warranty of habitability into the federally subsidized housing program, thus guaranteeing tenants residing in federally subsidized housing at least the same protection enjoyed by tenants residing in nonsubsidized housing.<sup>115</sup> Additionally, a regulatory warranty of habitability emphasizes that a tenant's obligation to pay rent in the Section 8 program depends upon the landlords' maintenance of apartments in accordance with the minimum housing quality standards.

The 102d Congress considered legislation that addressed many of these proposed solutions.<sup>116</sup> The provision detailing enforcement of

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114. Under current practice, if the unit falls below Section 8 standards, the Section 8 administrator terminates subsidy payments. As a result, the landlord has grounds to evict the tenant for failure to pay rent. However, if the subsidy is only suspended, the tenant can defend against an eviction by assuring the landlord of resumed rent payments once the unit is restored to Section 8 standards.

115. SCHOSHINSKI, *supra* note 68, at § 13:1.

116. H.R. REP. NO. 760, 102d Cong., 2d Sess., 7424 (1992).

the Section 8 housing quality standards passed the House Banking Committee, but failed to get through the conference committee.<sup>117</sup>

Perhaps the simplest and most effective solution is for local Section 8 administrators to take their enforcement responsibilities seriously and to hold the participating landlords to their contractual agreements. The HAP contract specifically states that the landlord shall maintain the apartment in accordance with the housing quality standards specified by HUD.<sup>118</sup> Allowing participating landlords to benefit from a breach of this agreement makes a mockery of the Section 8 program. If the PHA ignores its responsibility to enforce the HAP contract, tenants should be allowed to enforce the HAP contract. Regulations should permit tenants to sue as third party beneficiaries to the HAP contract.

## V. CONCLUSION

The opportunities for decent and affordable housing for low income families are few and far between in this country. The possibilities for a secure and liveable home environment for low income families are even

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117. Telephone interview with Roberta Youmans, Legislative Expert of the National Housing Law Project (Oct. 13, 1992). The House Report contained a proposed draft. H.R. REP. NO. 1017, 102d Cong., 2d Sess. (1992). The proposed legislation provided:

Each assistance contract shall also provide that, if the agency (or the Secretary) determines that a unit assisted under this Section fails to comply in any material respect with standards for housing quality for units so assisted, the agency (or the Secretary) may withhold some or all of the assistance amounts under this Section with respect to such unit and promptly—

- (A) use such amounts to make necessary repairs or contract to have such repairs made;
- (B) release any withheld amounts to the owner after repairs are made by the owner, in an amount not exceeding the cost of the repairs;
- (C) release any withheld amounts to the applicable State or local housing agency after repairs are made by such agency, in an amount not exceeding the cost of the repairs; or
- (D) upon the request of the tenant, release any withheld amounts to —
  - (i) the tenant to reimburse the tenant for the reasonable cost of any necessary repairs performed or paid for by the tenant; or
  - (ii) such person secured by the tenant and approved by the agency (or the Secretary) to make such necessary repairs. If an agency (or the Secretary) withholds any assistance amounts pursuant to the preceding sentence, the agency (or the Secretary) may not terminate the assistance contract unless and until the tenant has relocated to decent, safe, and sanitary housing.

*Id.*

118. HUD HANDBOOK, *supra* note 16.

more remote.<sup>119</sup> The national goal of “a decent home and suitable living environment for every American family”<sup>120</sup> remains out of reach, despite decades of attempts at achieving this goal. Without a serious review of federal expenditures; without legislation designed to assure that those dollars are used to fund programs that work as intended; and without strict enforcement of the programs designed to achieve the goal, the housing crisis in this country will worsen. With adequate legislation, regulation, and enforcement, the Section 8 program could be a significant factor in achieving this national goal. There are scarce government dollars being spent to alleviate a problem of widespread proportions.<sup>121</sup> Those dollars should be spent wisely.

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119. LAZERE, *supra* note 15, at 1-2.

120. *See supra* note 1 and accompanying text for a discussion on the goals of the Housing Act of 1937.

121. LAZERE, *supra* note 15, at 30.

## **NOTES**

