



1991

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### Recommended Citation

Barbara Sard, *Housing the Homeless through Expanding Access to Existing Subsidized Housing Programs*, 36 Vill. L. Rev. 1113 (1991).

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1991]

## HOUSING THE HOMELESS THROUGH EXPANDING ACCESS TO EXISTING SUBSIDIZED HOUSING PROGRAMS

BARBARA SARD<sup>1</sup>

**T**HIS article asserts that homelessness in America today is essentially a product of the lack of affordable housing for very low income people. “Macro” solutions in the form of increased incomes, an increased number of subsidies for housing and an increased supply of lower cost housing are vital. However, these “macro” solutions require years of political and legislative effort. If they are the only solutions to the problem, what are lawyers representing homeless clients today to do? Is there a legal strategy available to assist currently homeless clients in solving their central problem, namely, the lack of an affordable place to live?

The answer is: “Yes.” Through expanding access to existing housing subsidies, affordable housing can be made available for homeless clients. This Article first explains why expanding access for the homeless and imminently homeless to existing housing subsidies is a valuable, workable, and short-term solution to the immediate crisis—a lack of affordable housing. It then outlines six strategies legal advocates may pursue to expand access for all or sub-groups of the homeless to the existing housing subsidy resources in their community. Finally, the Article concludes with some questions about the value of this approach, and, as space allows, examines some limited and tentative answers.

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1. The ideas in this Article have been generated and refined from the work of the Homelessness Unit of Greater Boston Legal Services (GBLS). I am indebted to the Unit’s staff, particularly Dick Bauer and Steve Hitov, with whom I have worked to develop and implement the strategies discussed in this Article; to Dan Manning, GBLS Associate Director, for the opportunity and encouragement to do this work; and to the Massachusetts Coalition for the Homeless, which has been both the primary client in these efforts and the source of many of the ideas. Florence Roisman of the National Housing Law Project has provided both challenging critiques and helpful suggestions in the development of the underlying ideas of this Article, as well as the earlier drafts. Lisa M. Otero has provided invaluable research assistance. I am indebted to my husband, Burt Nadler, and my children, Cory and Max, for their forbearance and support during the substantial time this Article’s writing has taken from our family.

I. WHY EXPANDING ACCESS TO EXISTING HOUSING SUBSIDIES IS  
A WORTHWHILE APPROACH TO REMEDYING  
HOMELESSNESS

The current homelessness crisis in our society is primarily the result of the increasing gap between household income and housing costs. While individual "dysfunctions" may help explain which families or individuals are most vulnerable to the shortfall in the supply of affordable housing,<sup>2</sup> the predominant cause of the worst homelessness epidemic since the Great Depression is increasing poverty<sup>3</sup> at a time when there is a decreasing supply of low-cost housing.<sup>4</sup>

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2. For a discussion of how personal characteristics, such as physical health, mental health, social supports and criminal convictions increase the likelihood that an extremely poor individual will become homeless, see P. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 143-44 (1989). For profiles of the current homeless population, the economic forces that have shaped its plight and a discussion of how it differs from past homeless populations, see Hopper & Hamburg, *The Making of America's Homeless: From Skid Row to New Poor, 1945-1984*, in *CRITICAL PERSPECTIVES ON HOUSING* 12-13 (R. Bratt, C. Hartman & A. Meyerson eds. 1986); and M. HARRINGTON, *THE NEW AMERICAN POVERTY* (1984).

3. According to the Census Bureau statistics from 1986, 32.4 million people (13.6% of Americans), were officially "poor," meaning that their incomes fell below the federally-defined poverty level. I. SHAPIRO & R. GREENSTEIN, *HOLES IN THE SAFETY NETS: POVERTY PROGRAMS AND POLICIES IN THE STATES* 3 (1988). The persistence of a 13-14% poverty rate evidences the substantial worsening of poverty since the 1970s. S. DANZIGER, R. HAVEMAN & R. PLOTNICK, *ANTI-POVERTY POLICY: EFFECTS ON THE POOR AND THE NONPOOR* 9 (1986) (prepared for delivery at conference on "Poverty and Policy: Retrospect and Prospects" in Williamsburg, Va., Dec. 6-8, 1984). In 1973, the poverty rate was reduced to a low of 11.1%, down from the pre-war poverty level of 19%. *Id.* Currently, official poverty rates severely understate the number of Americans unable to afford housing. See M. HARRINGTON, *supra* note 2, at ch. 4. The poverty rate is premised on the 1950s consumption pattern in which the "average" family spent one-third of its income on food. *Id.* Largely because of the enormous increase in housing costs, only about one-fourth of family income is now available for food consumption. *Id.* In 1985, nearly half of all poor renters paid at least 70% of their incomes just for housing costs. P. LEONARD, C. DOLBEARE & E. LAZERE, *A PLACE TO CALL HOME: THE CRISIS IN HOUSING FOR THE POOR* xi (1989) (published by Center on Budget and Policy Priorities) [hereinafter LEONARD]. The number of poor and the rate of poverty have increased and poor families are now deeper in poverty: "Between 1975 and 1986, the proportion of poor people with incomes under one-half the poverty line surged from 29.9% to 39.2%." Center for Law & Social Policy, *Basic Poverty*, in *POVERTY PICTURE 1* (1988) (collection of fact sheets on poverty in United States). For families subsisting on Aid to Families with Dependent Children (AFDC), the purchasing power of such benefits "has eroded dramatically over time. From 1970 to 1987, the maximum benefit for a family of four fell 31.4% in the median state." I. SHAPIRO & R. GREENSTEIN, *supra*, at 8; see Sard, Roisman & Hartman, *Homeless: A Dialogue on Welfare and Housing Strategies*, 23 *CLEARINGHOUSE REV.* 104, 106 (1989).

4. *THE UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUN-*

The confluence of these forces means that either there is too little low-cost housing in a community for those who need it, or, there is virtually no private-market housing within the economic reach of the homeless.<sup>5</sup> The latter is particularly true in many

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GER AND HOMELESSNESS IN AMERICA'S CITIES: 1990, at 33 (1990) [hereinafter MAYOR'S REPORT: 1990]. The latest survey of 30 major cities by the United States Conference of Mayors cited the lack of affordable housing, unemployment and other employment-related problems such as poverty or the lack of income, and inadequate benefit levels in public assistance programs as respectively the first, fourth and fifth most frequently reported causes of homelessness. *Id.* Approximately one-third to one-half of the "new" homeless are estimated to be members of families with children. *Id.* at 25-27. This group is the fastest growing among the homeless. Hopper & Hamburg, *supra* note 2, at 30. The Joint Center for Housing Studies of Harvard University recently stated: "There can be no doubt that housing costs have risen faster than the incomes of the nation's growing number of poverty-level households, and outstripped the ability of income transfer programs to cover these costs." W. APGAR, D. DiPASQUALE, J. CUMMINGS & N. McARDLE, THE STATE OF THE NATION'S HOUSING 1990, at 27 (1990) [hereinafter APGAR].

5. The disappearance of rental units at the low end of the market is a national phenomenon. In early 1986, the Housing Allowance Project, Inc., based in Springfield, Massachusetts, surveyed private-market rents in Hampshire County, Massachusetts. Hampshire County is a predominantly rural area with one medium-sized city. The survey found that only approximately two percent of all units rented for less than \$350 per month and only one unit rented for less than \$300 per month. In 1970, there were 9.7 million units renting for less than \$250 per month; in 1985, there were 7.9 million such units. LEONARD, *supra* note 3, at 7. During the same 15 year period, the number of renter households with incomes under \$10,000/year increased from 7.3 million to 11.6 million. *Id.* In some areas, such low cost units have essentially disappeared. *Id.*; APGAR, *supra* note 4, at 10-15. In 1985, 64% of poor renters devoted more than half their incomes to housing. *Id.*; see also, C. DOLBEARE, OUT OF REACH: WHY EVERYDAY PEOPLE CAN'T FIND AFFORDABLE HOUSING (1990) (published by Low Income Housing Information Service). For example, in 1989, Alabama's average fair market rent (FMR) for a two bedroom apartment in a metropolitan community was \$370. C. DOLBEARE, *supra*, at Table 3. The FMR figure for each area in the United States is determined by the Federal Department of Housing and Urban Development (HUD), using the cost at the 45th percentile of standard quality rental housing units leased to persons who have moved within the previous two years, excluding public housing and units constructed within two years of the survey date. Fair Market Rent Schedules, 56 Fed. Reg. 14733, 14733 (1991). The Alabama FMR figure is 313.6% of \$118, the maximum AFDC grant for a three-person family, and 251.7% of \$147, the maximum AFDC grant for a four-person family. C. DOLBEARE, *supra*, at Table 3 (discussing AFDC grants in relation to average FMR). Reliable national data on the income of the single homeless does not exist. While some homeless individuals receive regular or sporadic income from employment, others receive federally-funded benefits based on age or disability under the Supplemental Security Income (SSI) program. The SSI program is enhanced by a state supplement in 27 states. I. SHAPIRO & R. GREENSTEIN, *supra* note 3, at 11. Although SSI benefits are more "generous" than AFDC, SSI benefits fall below the poverty line in all but four states. *Id.* at 12. One 1990 study compared the level of SSI benefits in 25 major metropolitan areas to the cost of one-bedroom apartments in the same communities. It found that in 12 of the cities, the entire monthly SSI grant was less than the FMR for a one-bedroom apartment. In the remaining areas, a disabled or elderly individ-

major urban areas, which experienced extreme inflation in housing costs in the 1980s.<sup>6</sup> Furthermore, it is clear that the private housing market alone cannot increase the supply of housing which the homeless or imminently homeless can afford.<sup>7</sup>

The solution to the income/housing gap lies in closing the gap from either, or both, directions. The gap can be closed by increasing the income of the homeless so they can afford existing housing or by increasing the supply of housing subsidies that the homeless and imminently homeless receive.<sup>8</sup> The housing stock

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ual would have from \$0.07 to \$2.77 left to spend each day after paying the rent. NATIONAL COALITION FOR THE HOMELESS, *THE CLOSING DOOR: ECONOMIC CAUSES OF HOMELESSNESS* 17 (1990). Some of the homeless have no income at all. Only eight states, as of 1987, provided state-funded general assistance to more than the elderly and disabled. See I. SHAPIRO & R. GREENSTEIN, *supra* note 3, at 13. Only a few of these assistance programs were comprehensive, and many have recently been cut back. Based on his research in Chicago, Rossi found the median annual income of the homeless to be \$1,198. P. ROSSI, *supra* note 2, at 40. This was comparable to nine other local studies which had found the average median annual income of the homeless to be \$1,127. *Id.* Michael Stone uses the term "shelter poverty" to describe the growing phenomenon of people paying so much of their incomes for housing that they are unable to afford other basic necessities. M. STONE, *ONE-THIRD OF A NATION: A NEW LOOK AT HOUSING AFFORDABILITY IN AMERICA* 1 (1990). He concludes that nearly 27 million households, containing 32% of the population, are unable to meet their non-shelter needs at even a minimum level of adequacy. *Id.* Stone further argues that the traditional measure of housing affordability as 25% or 30% of a family's income is inaccurate because differences in household size and income level create significant differences in amounts needed to cover non-shelter expenses and, consequently, in housing affordability thresholds. *Id.* at 4. Accordingly, using data from the 1970 Census of Housing and the 1975-87 American Housing Surveys, he has developed an index of "shelter poverty" to take into account the consumption dynamics that vary depending on household size and available income. *Id.* at 5, 11-13; see Stone, *Housing and the Dynamics of U.S. Capitalism*, in *CRITICAL PERSPECTIVES ON HOUSING* 41 (R. Bratt, C. Hartman & A. Meyerson eds. 1986) [hereinafter Stone, in *CRITICAL PERSPECTIVES ON HOUSING*]. In 1980, with an income of \$11,000 per year, a family of four could not afford to pay anything for housing if they met their other basic needs. *Id.* at 46.

6. Reeves, *Mid-Priced at \$47,200? Those Were the Days*, Chicago Tribune, Sept. 8, 1991, at 25 (median price for a home in 1980, \$47,200; in 1990, \$79,100).

7. See Achtenburg & Marcuse, *The Causes of the Housing Problem*, in *CRITICAL PERSPECTIVES ON HOUSING* 4 (R. Bratt, C. Hartman & A. Meyerson eds. 1986). "[T]he principal reason [the housing problem exists] is that housing in our society is produced, financed, owned, operated, and sold in ways designed to serve the interests of private capital." *Id.*

8. The analysis is the same regardless of how "homeless" is defined. The narrow definition of homeless only includes those without any regular roof over their heads, except possibly a shelter. A broader meaning encompasses those without a roof they can call their own: "Home is 'the place where, when you go there, they have to take you in.'" Williams v. Department of Human Servs., 116 N.J. 102, 124, 561 A.2d 244, 255-56 (1989) (quoting New Jersey Governor Thomas Kean paraphrasing poet Robert Frost in *The Death of the Hired Man*). An even broader definition of "homeless" would include the "housing desperate,"

in some areas is such that increased incomes or housing purchasing power would substantially alleviate the problem.<sup>9</sup> Unfortunately, it is extremely difficult to muster the political will to expand and increase public assistance income maintenance programs that could provide such income. This problem is especially true in communities where housing costs have escalated.<sup>10</sup> Polit-

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those who pay such a high proportion of household income for rent that they are forced to deprive themselves or their families of basic necessities. See Stone, in CRITICAL PERSPECTIVES ON HOUSING, *supra* note 5, at 46. The "middle" group are those without a roof of their own but who are permitted to stay temporarily with friends or family. These accommodations are usually in overcrowded housing without sufficient bed space. These people are commonly called the "hidden homeless." Federal legislation and agency rules have omitted any reference to the doubled-up "hidden homeless," while only recognizing the needs of the "literally homeless" and the housing-desperate. For purposes of determining "federal preference" for federal housing resources, HUD adopted the general definition of homelessness found in 42 U.S.C.A. § 11302(a) (West Supp. 1991), which states:

- (a) For purposes of this Act, the term "homeless" or "homeless individual" or "homeless person" includes—
  - (1) an individual who lacks a fixed, regular, and adequate nighttime residence; and
  - (2) an individual who has a primary nighttime residence that is—
    - (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
    - (B) an institution that provides a temporary residence for individuals intended to be institutionalized; or
    - (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

42 U.S.C.A. § 11302(a) (West Supp. 1991). The definition of "homeless" promulgated by HUD was almost entirely taken verbatim from the above provision. For a discussion of preferences, see *infra* notes 49–66 and accompanying text.

9. There are some local housing markets without enough units (such as in the Northeast and in urban areas of California) so that subsidies alone are insufficient. Vacancy rates in these areas are extremely low and the great demand for apartment units of limited supply pushes up the prices of these units. In other areas of the country, such as cities in Texas, housing stands vacant while thousands are homeless. AFGAR, *supra* note 4, at 5. This is due to the costs of rental units exceeding incomes. For instance, gross rents reached \$446 in the Northeast by 1989 (up from \$362 in 1980) and \$490 in the West by 1986 (up from \$402 in 1980). *Id.* "With the stock of low-cost units continuing to shrink, rent levels will remain high. As a result, more and more low-income households must pay large shares of their income for marginally adequate housing." *Id.* at 2. In addition, the limited availability of rental housing as opposed to condominiums or houses, as well as discrimination in access to existing lower priced housing, contributes to this problem.

10. See Roisman, *Establishing a Right to Housing: An Advocate's Guide*, 20 HOUSING L. BULL. 65, 67 (1990). Roisman explains the AFDC standard of need and payment level and discusses various advocacy and litigation strategies for raising benefit levels as an answer to homelessness. *Id.* at 68–73. In the wake of the 1990–91 recession, these legal/political strategies face a hostile environment

ical barriers also exist regarding the creation of the job training, public employment and child care programs that are necessary to allow many of the homeless to increase their incomes through employment rather than through income transfers.<sup>11</sup>

Whether by choice or necessity, the primary solution to the income/housing gap driving the growing homelessness problem in America is to increase the amount of deeply subsidized housing available to the homeless and imminently homeless.<sup>12</sup> One obvi-

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created by widespread cutbacks in public assistance programs and benefit levels. *Id.* at 77-78. As housing expert Chester Hartman has stated: "To raise incomes to the point where everyone would have enough money to afford decent housing at private-market rates would require a piece of social engineering bordering on a revolution." Sard, Roisman & Hartman, *supra* note 3, at 108.

11. See generally D. ELLWOOD, POOR SUPPORT (1988). About 25% of single homeless individuals already work, but cannot afford housing. The United States Conference of Mayors states: "One-fourth or more of the homeless population were employed in full- or part-time jobs in Alexandria, Boston, Charleston, Charlotte, Denver, New Orleans, Phoenix, and Portland. Fifteen percent or less were employed in Chicago, Kansas City, Philadelphia, Seattle, and Trenton." MAYORS' REPORT: 1990, *supra* note 4, at 27. At the 1991 minimum wage of \$4.25 per hour, full-time, year-round minimum wage work yields a gross income of only \$8500 per year, or about \$700 per month. In 1990, there was no state where the FMR for a two-bedroom apartment in the state's lowest cost metropolitan community was less than 40% of full time, minimum wage earnings. See Fair Market Rent Schedules, 56 Fed. Reg. 14733, 14735 (1991); L. MIHALY, HOMELESS FAMILIES: FAILED POLICIES AND YOUNG VICTIMS 13 (1991) (published by the Children's Defense Fund). For a discussion of FMR, see *supra* note 5. In most states, such an apartment at fair market rent would cost more than 60% of minimum wage income. L. MIHALY, *supra*, at 13. For a further discussion of homeless income, see P. ROSSI, *supra* note 2, at 108-16.

12. Many housing advocates believe that it is preferable, as a policy matter, to close the income and housing gap from the housing side. They favor programs which subsidize, control and reduce housing costs. These advocates are skeptical that increased incomes alone will increase housing purchasing power. They believe that housing owners will respond by increasing housing prices to further enrich themselves. The costs of producing new housing may prevent increased incomes from creating sufficient "effective demand" to cause the market to increase the housing supply. Without additional supply, badly needed decent, new units will not be added to the housing stock and no market mechanism will be created to drive down housing prices. Furthermore, it is likely that in the long-run, assuming that substantial gaps between incomes and private-market housing prices remain, programs which merely subsidize housing costs will be far more expensive than programs which reduce those costs. Repeated appropriations of public funds will also be required because such programs do not increase the stock of publicly-owned housing. Whether increasing incomes will invariably lead to higher rental costs is a question of fact requiring further research, but the answer may vary with the degree of concentration of ownership in the local housing market serving the poor. See Sard, Roisman & Hartman, *supra* note 3, at 106; see also INST. FOR POLICY STUDY WORKING ON HOUSING, A PROGRESSIVE HOUSING PROGRAM FOR AMERICA (1987).

A "deep" subsidy is one that pays the difference between a percentage of tenant income—now 30% in the federal programs—and the full costs attributable to the housing unit. See 42 U.S.C.A. § 1437a(a) (West Supp. 1991). For an AFDC family with an income of \$500 per month (which is higher than the na-

ous way to accomplish this goal is to legislate an increase in deep subsidy housing programs and require all or some significant portion of the increased resources to go to the homeless and imminently homeless.<sup>13</sup> In light of the enormous shortfall between housing needs and housing supply, a strategy directed at increasing subsidized housing is vital. This nation cannot end the national disgrace of homelessness without a commitment to increase substantially the supply of subsidized housing.

However, generating the political will necessary to increase substantially the supply of deeply subsidized housing is perhaps as doubtful as the possibility of creating the political will to increase substantially the incomes of the poor.<sup>14</sup> The struggle to

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tional average), the tenant's share of rent and utilities would be limited to \$150 per month. The remainder of the rent (in the case of private housing) or the housing cost (in the case of public housing) is paid by the subsidy program. In contrast, a "shallow" subsidy reduces housing costs by a reduction in the mortgage interest rate, by syndication of tax credits and/or by reduction in the cost of the land or buildings. *See id.* § 1437d(d). These shallow subsidies reduce rental prices in comparison with entirely private market housing, but they cannot bring costs within 30%, or even 50%, of a very poor family's income when the costs of building or purchasing and operating housing are taken into account. *See Sard, Roisman & Hartman, supra* note 3, at 105 (nationally, public housing tenants paying 30% of their incomes for rent contribute less than half the operating costs for their units).

The growing problem of homelessness in America is evidenced by the United States Conference of Mayors' Report which states that:

During the past year [1989] requests for emergency shelter increased in the survey cities overall by an average of 24 percent, with four out of five of the cities registering an increase, 10 percent reporting that the number of requests remained the same, and another 10 percent reporting a decline in requests.

MAYORS' REPORT: 1990, *supra* note 4, at 2.

13. This simple statement of the "solution" to the income/housing gap which is driving the homelessness crisis in America does not address the important differences between the various deep subsidy programs. Further, it does not negate the value of additional shallow subsidies. Shallow subsidies can increase the supply of decent housing. This increased supply can then receive deep subsidies to house the very poor. The housing needs of working class and middle income households can also benefit from an increased housing supply. Programs serving this broader constituency may be the basis of a more effective political coalition.

14. Housing programs were a frequent target in the Reagan years, with the annual federal spending per poor person being slashed approximately 30% between 1976 and 1984. D. ELLWOOD, *supra* note 11, at 40-41. While subsidizing housing does not raise quite the value conundrums of subsidizing incomes, *see id.* at 18-19, there is no national consensus that the government should ensure minimally adequate housing opportunities. The hope of many housing advocates lies in the possible convergence of interests between low-income households and middle-income citizens who can no longer afford the American dream of home ownership. Dreier & Appelbaum, *American Nightmare: Homelessness*, 34 CHALLENGE 46 (Mar.-Apr. 1991). The Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079 (codified at 42



increase the total supply of deeply subsidized housing continues in these tight fiscal times. One must analyze, therefore, whether the existing supply of subsidized housing is being fully utilized and whether it is going to those legally entitled to and most in need of such subsidies.<sup>15</sup> Additional strategies are available to homeless people and their advocates to increase the proportion of the existing supply of subsidized housing which goes to the homeless and imminently homeless. These strategies can result in virtually immediate housing solutions for at least some of the homeless. They can also be used by lawyers and others working with individual homeless clients and client groups to help “solve” their clients’ problems.<sup>16</sup> This Article will outline six strategies to maximize access of the homeless and imminently homeless to existing housing subsidies. It will then briefly review some of the questions raised by such strategies. While this Article necessarily draws heavily on my experience in Massachusetts, the strategies should be replicable elsewhere.

## II. A SUBSTANTIAL, ALTHOUGH INSUFFICIENT, NUMBER OF SUBSIDIES DO EXIST

There are currently three major kinds of deeply subsidized

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U.S.C.A. §§ 12,701 - 12,898 (West Supp. 1991) and in scattered sections of 12 U.S.C. and 42 U.S.C.) [hereinafter Cranston-Gonzalez Act], the first authorization for major increases in federal housing programs since Reagan was elected, was finally signed into law in November, 1990. *Id.* It authorizes \$3.086 billion for housing and homelessness programs. 42 U.S.C.A. § 12724. However, no new funding was appropriated by Congress in fiscal year 1991.

15. Ensuring full utilization of already-funded subsidies is unlikely to cause any controversy, except perhaps on the part of the private owners and public housing authorities (PHAs) which have failed to use such subsidies. For further discussion of the failure of subsidized housing owners and PHAs to utilize available, contracted, federally-funded subsidies, see *infra* notes 36–48 and accompanying text. As the final section of this article briefly discusses, some housing advocates are opposed to strategies to adopt or enforce preferences. For a discussion of these strategies, see *infra* notes 111–22 and accompanying text. They believe that it is not worth distinguishing the “most needy” among the many housing-needy, and/or that such strategies will have a politically divisive effect on the coalition of groups potentially supportive of increased housing subsidy programs. Indeed, those who place primary emphasis on mustering political support for housing programs may prefer to see any possible preference accorded to those who are politically popular, unlike the homeless, in order to maintain or increase political support for the program.

16. Other potentially valuable litigation and legislative strategies also exist. These aim to leverage from the entitlement nature of the rights to emergency shelter or child welfare/foster care services, the legal duty, political need and financial resources to pay for housing subsidies for the targeted populations. For an excellent survey of such strategies developed by homeless advocates, see Roisman, *supra* note 10, at 73–77; see also, Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367 (1988).

federal housing programs. The first such type of program is the Section 8 “walk-around” rental subsidies.<sup>17</sup> These subsidies are issued by public housing authorities (PHAs), and can be used by the holder to rent a housing unit of acceptable quality. The second type of deep subsidy program is public housing, which consists of housing units owned and usually managed by a PHA. The tenant’s rent for a public housing unit is limited to thirty percent of income.<sup>18</sup> The third type of subsidy is privately owned, federally subsidized developments which have “project-based” subsidies available to some or all of the tenants who move into them.<sup>19</sup> Some states also fund deep subsidy housing programs which may be similar in program design to the federal programs.<sup>20</sup>

As of 1988, 2.3 million units received Section 8 subsidies, most of which were “walk-around” certificates or vouchers.<sup>21</sup> Also as of 1988, 1.4 million public housing units were managed

17. 42 U.S.C.A. § 1437f (West Supp. 1991). The federally-funded rental subsidy program is called the “Section 8” program because it appears as § 8 of the United States Housing Act. A Section 8 “existing housing” subsidy is often called a “walk-around” subsidy because the holder receives the subsidy certificate from a PHA and then walks around to find a landlord willing to enter into a contract with the PHA in which the PHA agrees to pay a portion of the rent equal to the amount beyond 30% of the tenant’s income. See 42 U.S.C.A. § 1437a(a)(1)(A) (West Supp. 1991). For Section 8 certificates, the allowable total rent is capped at the area FMR plus not more than 10% of the FMR. *Id.* § 1437f(c)(1). For Section 8 vouchers, the PHA share is determined by subtracting 30% of the tenant’s income from the applicable FMR. *Id.* § 1437(a)(1)(A). The landlord, however, is allowed to charge, and tenants may pay, above the FMR. *Id.* § 1437f(c)(1). For the definition of FMR, see *supra* note 5.

18. 42 U.S.C.A. § 1437a(a) (West Supp. 1991).

19. Most of the project-based deep subsidies, where the tenant’s rent is limited to 30% of income, are now subsidized through one of the Section 8 programs, such as Section 8 New Construction or Section 8 Substantial Rehabilitation. 24 C.F.R. § 880.101 (1991); 24 C.F.R. § 881.101 (1991). Generally, the private owners maintain the waiting lists and select the tenants for such developments. However, the Section 8 Moderate Rehabilitation program is a hybrid, in which the PHA maintains the waiting list and initially selects applicants for reference to the private owner, who has final decision regarding rental. 24 C.F.R. §§ 882.401, 882.513, 882.514 (1991).

20. In Massachusetts, for example, the state-funded “walk-around” program is authorized by MASS. GEN. LAWS ANN. ch. 121b, §§ 42–44A (West 1986 & Supp. 1991). Many states have housing finance agencies, which make loans for housing at below market rates. See The Bond Buyer, Dec. 6, 1982, at 9. However, housing created through such programs is not usually deeply subsidized unless it is paired with a subsidy funded through another program.

21. LEONARD, *supra* note 3, at 77. In addition, 203,000 units of privately owned housing with mortgages subsidized under the “Section 236” program were receiving Section 8 assistance. *Id.* For a general discussion of the costs of housing for the poor, see *supra* note 3.

by PHAs.<sup>22</sup> In addition to the privately owned housing with Section 8 subsidies included above, there are several hundred thousand privately owned units which are deeply subsidized with federal funds through other federal programs.<sup>23</sup>

Each year, Congress appropriates funds for a relatively small number of new subsidies.<sup>24</sup> A significant number of units and subsidies, however, becomes available annually, as current tenants leave or become ineligible for continued subsidy.<sup>25</sup> In Massachusetts, approximately ten percent of Section 8's turn over and are available for reissuance each year.<sup>26</sup> The turnover rate for public housing in Massachusetts appears to be somewhat less: State officials have estimated that approximately five percent of public housing units turn over each year.<sup>27</sup> There is a much higher turnover rate at the violence-plagued inner-city projects in Boston. Extrapolating from these rates, roughly 330,000 federally-funded deep subsidies and deeply subsidized public or privately owned units are available for reassignment each year.<sup>28</sup>

Even if all 330,000 deep subsidies were targeted annually to

22. *Id.* at 78.

23. LEONARD, *supra* note 3, at 78-79. Some of these are "Section 202" units for the elderly and handicapped. Further, there are more than 100,000 units of housing subsidized through Farmers' Home Administration programs which have deep subsidies. *Id.*

24. *See* Daily Rep. for Executives (BNA) at A-2 (Dec. 18, 1986) (discusses budget cuts at HUD).

25. *See* Washington Post, Sept. 7, 1991, at E1, col. 4 (national survey shows 36% of subsidized units were vacated in 1990).

26. EXECUTIVE OFFICE OF COMMUNITIES AND DEV. (EOCD), PERMANENT HOUSING FOR HOMELESS FAMILIES; A REPORT ON THE COMMONWEALTH RENTAL ASSISTANCE PROGRAMS FOR HOMELESS AND AT-RISK FAMILIES FY86-FY90 1 n.1 (1989). EOCD's estimate is based on the past experience in the c. 707 program and in the Section 8 program it administers. *Id.*

27. *See* Boston Globe, Jan. 18, 1989, at 19, col. 4 (each year 1,000 out of 13,000 families are placed from waiting list into Boston's 15,000 units). State-funded public housing units turn over at a rate of at least three to four percent each year in Massachusetts. Defendants' Amended Responses to Plaintiffs' Second Set of Requests for Admissions on Supplemental Complaint at 15, Massachusetts Coalition for the Homeless v. Secretary of Human Servs., Civil No. 80109, (Mass., Suffolk Super. Ct. 1990). This estimate does not include the larger number of federally-subsidized public housing units which are predominantly located in the major urban centers, and which, according to local housing officials, have a far higher turnover rate.

28. This assumes that the five percent turnover figure for public housing is applied to approximately 600,000 privately-owned deeply subsidized units as well as to the 1.4 million public housing units. It also assumes that the 10% turnover figure is applied to the 2.3 million Section 8 subsidies. Even if this estimate is high, it must be remembered that it does not include state-funded subsidies at all. Of course, this estimate of available units will be substantially undercut if the approximately 200,000 units subsidized through the Section 8 New Construction, Substantial Rehabilitation, or Loan Management Programs

the homeless and imminently homeless, the supply of affordable housing would still be grossly inadequate to meet the need.<sup>29</sup> Nonetheless, such a figure is significant. Ironically, it is more than sufficient to house the number of homeless estimated by the Reagan Administration in 1983.<sup>30</sup>

### III. SIX POTENTIAL STRATEGIES TO MAXIMIZE ACCESS FOR THE HOMELESS TO EXISTING HOUSING SUBSIDIES

This article's premise is that a relatively small proportion of the existing deeply subsidized housing resources which turn over each year are currently reissued to the homeless or the imminently homeless.<sup>31</sup> There are several reasons for this phenomenon. First, households with a fairly broad range of incomes are eligible for federally subsidized housing programs. For all deeply subsidized federal housing assistance programs, families with in-

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are eliminated from the subsidized housing stock. These units are "at risk" due to the owners' right to opt-out of their Section 8 contracts by 1994.

29. Some of the deeply subsidized housing developments, both public and privately owned, were originally restricted by federal law to tenants who were aged, disabled, or handicapped. 42 U.S.C. § 1437a(2)(D) (1978) (amended 1981). Section 573(a) of the Cranston-Gonzalez Act, by amending the definition of "family," will require that single persons, regardless of whether they are over 62, disabled or handicapped be eligible for federally-assisted housing programs. Cranston-Gonzalez Act § 573(a), 42 U.S.C.A. § 1437a(b)(3) (West Supp. 1991). This change will be effective once HUD promulgates implementing regulations, *id.*, and will remove a very substantial barrier to housing access for a number of the homeless. However, this provision does not alter the restriction of certain units or developments to the aged, disabled, or handicapped. *Id.* While the homeless and other federal preferences apply in elderly/handicapped public housing, the categorical eligibility restrictions apply to such housing even if there are limited numbers of categorically eligible preference holders applying for admission. *Id.* For a discussion of preferences regulations, see *infra* notes 49-66 and accompanying text.

30. P. Rossi, *supra* note 2, at 37-38. A 1984 HUD study numbered the homeless at 250,000 to 300,000. *Id.* Most advocates for the homeless consider this a gross undercount. *Id.* Given the difficulties of counting the homeless population, any estimate of the number of homeless is necessarily inaccurate. It is critical to remember that any such count is made at a single point in time, rather than assessing the number of people who experience homelessness over the course of a year. There is very little data on the duration of homelessness among various sub-populations of the homeless, although such data is critical for policy and planning purposes.

31. There is no federal data on the number of preference holders on PHA waiting lists. Interview with Jerry Benoit, HUD Director of Rental Assistance, (Oct. 29, 1990) [hereinafter Benoit Interview]. Based on available data in Massachusetts, I estimate that only 20% of the turnover of deeply subsidized housing resources are issued to the homeless each year. This includes all state and federally-funded housing resources, whether controlled by PHA's or by private owners.

comes up to fifty percent of the area median income are eligible.<sup>32</sup> For many programs, families with even higher incomes are eligible.<sup>33</sup> While many families nearer the upper end of these income limits undoubtedly have housing needs, they are unlikely to be currently or imminently homeless absent housing assistance. Second, Congress has defined the categories of applicants who must receive preference for federal housing resources far more broadly than the currently or imminently homeless or displaced, as applicants living in substandard housing or paying more than fifty percent of their income for housing costs also receive preference.<sup>34</sup>

Further, many homeless applicants are frequently excluded from participation in subsidized housing programs as a result of problem areas in housing resource distribution described below.<sup>35</sup> These problems may be usefully categorized into six areas

32. 42 U.S.C.A. § 1437a(b)(2) (West Supp. 1991). In the Boston area, that means that a family of three with an annual income of \$21,300 is considered to be in the "very low income" category, and financially eligible for all programs.

33. For example, for federal public housing, families with incomes up to 80% of the area median, or \$32,150 for a family of three in the Boston area, are eligible. 42 U.S.C.A. § 1437a(b)(2) (West Supp. 1991). Such "low income" families, as opposed to the "very low income" families with incomes less than 50% of the area median, may receive only 15–25% of public housing units. *Id.* § 1437n.

34. 24 C.F.R. § 882.219 (1991). For a discussion of these preferences, see *infra* notes 49–66 and accompanying text. While families living in substandard housing or paying more than 50% of their income for rent surely have serious, unmet housing needs, large segments of the population unfortunately continue in such situations for years without becoming homeless. Indeed, Congress did not even specify that the homeless were included in the federal preference categories until the enactment of the Cranston-Gonzalez Act. See Cranston-Gonzalez Act § 501, 42 U.S.C.A. § 1437d (West Supp. 1991). For a further discussion of the Cranston-Gonzalez Act, see *supra* note 17. Previously, HUD had used its discretion to include the homeless within the mandated preference category of those living in substandard housing. See 53 Fed. Reg. 1122, 1134–35 (1988).

35. The doubled-up homeless are largely excluded from federal preference. HUD appears to take the position that such families do not qualify as homeless under the federal definition, although it is probable that particular cases do fit within the federal definition based on their sleeping arrangements. For a further discussion on differing definitions of homeless, see *infra* note 70. Consequently, only those doubled-up applicants who, first, became homeless as a result of owner or other action (which fits within the "involuntarily displaced" federal preference category), and, secondly, who have not subsequently obtained "standard, permanent, replacement housing," are likely to qualify for federal preference. See *e.g.*, 24 C.F.R. § 882.219(c) & (d) (1991). However, it may be possible to prevail on arguments that applicants who are doubled up may fall within the federal definition of "substandard" housing, particularly where the living conditions are dramatically more crowded than the federal Housing Quality Standards would permit. In addition, any doubled-up applicant who is paying more than 50% of income to "rent" his shared living situation should qualify under the rent burden/paying more than 50% of income for rent and utilities preference category.

as a focus for challenge or reform. Successful efforts in these areas should result in a substantial increase in the resources allocated to those in dire need:

- 1) The failure of subsidized housing owners and PHAs to utilize available, contracted federally-funded subsidies;
- 2) the violation of the federal preference rules by many PHAs and subsidized owners;
- 3) the failure of most public housing authorities and subsidized owners to give top priority to the homeless;
- 4) the administrative maze through which subsidized housing resources are delivered, requiring literally hundreds of applications to be filed to maximize the opportunity for a homeless applicant to obtain available resources;
- 5) procedural barriers erected by the housing authorities and subsidized housing owners, which impact particularly harshly on the homeless; and
- 6) discrimination by many PHAs and subsidized housing owners against disabled and handicapped applicants who are not mobility-impaired.

A. *Subsidized Housing Owners and PHA's Fail to Utilize Available, Contracted Federally-Funded Subsidies*

When Section 8 New Construction and Substantial Rehabilitation projects were funded by the Federal Department of Housing and Urban Development (HUD) in the 1970s, HUD entered into contracts with the owners to subsidize the rent of families in a specified number of units through the Section 8 program.<sup>36</sup> Each family would pay only the percentage of family income for rent required under the Section 8 program.<sup>37</sup> Rather than utilizing all of these authorized subsidies, owners of an increasing number of projects have instead been renting what should have

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36. See 42 U.S.C. § 1437f(b)(2) (1978) (amended 1983). "[T]he secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing . . . ." *Id.*

37. *Id.* § 1437f.

been subsidized units at market rates.<sup>38</sup>

Some federal courts erected standing barriers to applicants' challenges to such under-utilization of subsidies.<sup>39</sup> It has been very difficult to remedy the problem through litigation and to make these already-funded subsidies available to needy families.<sup>40</sup> Through Section 555 of the Cranston-Gonzalez Act, Congress has now effectively reversed the prior appellate decision. Owners are legally obligated to use their full contract authority to rent to income eligible families.<sup>41</sup> Consequently, litigation to enforce the use of all available subsidies should now be possible. At least sev-

38. NATIONAL HOUSING LAW PROJECT, 21 HOUSING L. BULL., 48 (1991) (summarizing provisions of the Cranston-Gonzalez Act). I am unaware of any estimate of the number of unutilized subsidies nationwide. In one case litigated by GBLS, a developer was utilizing only 68 of the 108 subsidies called for in its contract with HUD. Such owners are probably acting out of a variety of motives. In a strong rental market, owners may be able to demand more for rent than HUD will pay under the Section 8 contract. Owners may be trying to achieve a more middle class clientele in their developments simply for the presumed desirability of such tenants. The owners also might anticipate "opting-out" of the Section 8 contract after 20 years, in the hopes of being able to maximize income through converting entire developments into market rate rental or condominiums. See Note, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155, 156 (1989). Congress has sought to address this problem, albeit imperfectly. See Cranston-Gonzalez Act §§ 601-613 (codified at scattered sections of 12 U.S.C. and 42 U.S.C.).

39. See *Price v. Pierce*, 823 F.2d 1114, 1121-22 (7th Cir. 1987), *cert. denied*, 485 U.S. 960 (1988) (plaintiff/applicants were not third-party beneficiaries to contracts between HUD and private developers and, even if they were, HUD could modify the contracts without the applicant's consent).

40. GBLS did successfully litigate on behalf of an existing tenant in a development with Section 8 New Construction subsidies. The tenant had been able to afford a market-rent unit when she became a tenant, but later became disabled and requested a Section 8 subsidy from the owner to avoid being evicted for non-payment of rent. The owner initially denied that any Section 8 subsidies were available. GBLS intervention resulted in the discovery of substantial unused contract authority from HUD for Section 8 subsidies and a subsidy was awarded to the tenant, as well as to some new applicants. The tenant then sued for damages for the 10 months during which she had been charged market rent, after she should have been granted a subsidy. The case settled for substantial damages to the tenant. The agreement is available with names and amounts redacted (as per agreement) from Steven A. Hitov, GBLS, 68 Essex St., Boston, MA. 02111.

41. NATIONAL HOUSING LAW PROJECT, *supra* note 37, at 48. Section 555 of the Cranston-Gonzalez Act provides: "Any dwelling units in any housing constructed or substantially rehabilitated pursuant to assistance provided under section 8(b)(2) of the United States Housing Act of 1937, as such section existed before October 1, 1983, and with a contract for assistance under such section, shall be reserved for occupancy by low-income families and very low-income families." Cranston-Gonzalez Act § 555, 42 U.S.C.A. § 1437f (historical note) (West Supp. 1991). It is unclear what effect this provision will have on existing higher income tenants in units rented at market rate, who are bona fide, albeit unlawful, tenants of what ought to be subsidized units.

enty percent of the subsidized units which should become available under this law must go to federal preference holders, including the homeless.<sup>42</sup>

While the Cranston-Gonzalez Act amendments have made it far more straightforward to achieve full utilization of deep subsidies in privately owned developments, the mere enactment of this law is unlikely to alter an owner's desire to rent to more affluent tenants. Thus, enforcement may be necessary to realize the increased availability of subsidies that the law requires. It may be possible to induce or require a state agency or HUD to undertake such enforcement work.<sup>43</sup> Otherwise, highly laborious work would be required to determine whether there are unutilized subsidies in any particular development.<sup>44</sup>

Public housing authorities administering Section 8 tenant-based subsidy programs may also have contracted and funded available Section 8 subsidies that they are unlawfully failing to distribute. For the last several years, the Worcester (Massachusetts) Housing Authority failed to allocate over 340 Section 8 certificates and vouchers.<sup>45</sup> This was approximately thirty percent of

42. Cranston-Gonzalez Act § 501, 42 U.S.C.A. § 1437d (West Supp. 1991). The federal preference regulations promulgated by HUD, effective July 13, 1988, required that 100% of Section 8 "project-based" subsidies in privately owned developments be subject to the federal preference regulations. 53 Fed. Reg. 1122, 1125 (1988). This requirement, however, has been altered. Cranston-Gonzalez Act § 545, 42 U.S.C.A. § 1437f (historical note) (West Supp. 1991). The Act made only 70% of subsidized units subject to the federal preference regulations for tenant selection. *Id.* The remaining 30% are subject to a local preference plan to meet local housing needs, which must be developed by the PHA covering the geographic area, and require public input. *Id.* For a further discussion of the specifics of this provision, see *infra* note 55.

43. For example, the General Counsel of the Massachusetts Housing Finance Agency (MHFA) has agreed to "issue a directive to owners and managers of Section 8 developments which are financed by the Agency or have Section 8 contracts administered by MHFA to comply with requirements of Section 555 of the Cranston-Gonzalez National Affordable Housing Act of 1990." Letter from Edward T. Pollack, MHFA General Counsel to Steven A. Hitov, Esq., GBLS, (Jan. 30, 1991). At least in Massachusetts, many projects affected by this section also are subject to supervision by the state housing finance agency.

44. Data on subsidy utilization should be available from HUD through the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988), but HUD is slow to respond, and furthermore may charge for the information. Likely documents to contain the critical information for a subsidy utilization challenge are the Housing Assistance Payments (HAP) contract for each development and the owner's six-month billing requests to HUD.

45. Letter from Joel Feldman, Esq., Legal Assistance Corporation of Central Massachusetts, to John Mastropietro, Acting Regional Administrator, HUD Region 1, (Mar. 5, 1991); letter from Brian McQuade, Executive Director, Worcester Housing Authority, to John Mastropietro, Acting Regional Administrator, HUD Region 1 (Apr. 4, 1991); letter from Joel Feldman, Esq., Legal



its total portfolio.<sup>46</sup> In mid-1990, the Chelsea (Massachusetts) Housing Authority decided to stop issuing its available Section 8 subsidies.<sup>47</sup> Neither authority turned these funded resources back to HUD for reallocation to other PHAs who would be willing to use them. Available federal funds for deep subsidies simply went unutilized. When legal services attorneys placed the HUD Regional Office on formal notice of the blatant failure of these PHAs to comply with federal policy on utilization of contracted Section 8 resources and, at least in the Chelsea case, the probable racially discriminatory motivation for such failure, HUD did intervene, without litigation, and required the PHAs to issue and lease up available subsidies to applicants selected in accordance with federal law.<sup>48</sup>

*B. Violation of the Federal Preference Rules by Many Public Housing Authorities and Subsidized Owners*

Subsidized housing resources were traditionally distributed with little in the way of recognizable standards.<sup>49</sup> In response to the drastic cutbacks in federal funding for low income housing which began in the early 1980s, and the shortage of housing resources in relation to need, Congress directed that certain categories of applicant families be given preference over earlier, or

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Assistance Corporation of Central Massachusetts, to John Mastropietro, Acting Regional Administrator, HUD Region 1 (Apr. 26, 1991); letter from John Mastropietro, Acting Regional Administrator, HUD Region 1 to Brian McQuade, Executive Director, Worcester Housing Authority (May 17, 1991) [hereinafter Feldman Correspondence].

46. *Id.*

47. Letter from James M. McCreight, Esq., GBLS Housing Unit, to Marvin Lerman, Regional Counsel, HUD Region 1 (Dec. 20, 1990); letter from James M. McCreight, Esq., GBLS Housing Unit, to Susan Cohen, Esq., Attorney for Chelsea Housing Authority (Dec. 20, 1990); letter from Marvin Lerman, Regional Counsel, HUD Region 1, to James M. McCreight, Esq., GBLS Housing Unit (Jan. 11, 1991) [hereinafter McCreight Correspondence]. *See also* Boston Globe, Apr. 5, 1991, at 22, col. 3 ("Chelsea officials also joined those in Revere, Lynn and Brockton in endorsing pending legislation that would strip regional nonprofit agencies of the mandate to distribute and vouchers.").

48. *See* Feldman Correspondence, *supra* note 45; McCreight correspondence, *supra* note 47. The HUD handbook on public housing requires PHAs to maintain a sustaining occupancy rate of at least 95% of their Section 8 allocations. U.S. DEPT. OF HOUS. AND URBAN DEV., PUBLIC HOUSING AGENCY ADMINISTRATIVE PRACTICES HANDBOOK FOR THE SECTION 8 EXISTING HOUSING PROGRAM ch. 4, para. 10b (1979).

49. *See* *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 264-65 (2d Cir. 1968). Before the late 1960s, public housing resources were often awarded on the basis of nepotism, patronage, or some other method based on favoritism and/or prejudice. Decisions such as *Holmes* required that waiting lists be kept in chronological order. *See id.*

“standard,” applicants not qualifying for preference in the various federal housing programs.<sup>50</sup> In January of 1988, HUD finally promulgated regulations to implement these federal preferences.<sup>51</sup>

Under current law, federal preference is given to three categories of applicants: (1) those occupying substandard housing (including the homeless), (2) those involuntarily displaced, and (3) those paying more than fifty percent of their income for rent.<sup>52</sup> The substantial majority of federally-subsidized housing resources is required to go to applicants qualifying for one of these preferences.<sup>53</sup> PHAs and owners may use “local” preferences to rank applicants who are federal preference holders.<sup>54</sup> All applicants qualifying under at least one of the federal preference categories must come before applicants who do not qualify for federal preference, with minor exceptions.<sup>55</sup>

50. See Housing and Community Development Amendments of 1979, Pub. L. No. 96-153, 93 Stat. 1101, § 206 (mandating substandard and involuntary displacement preferences); Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, 97 Stat. 1153, § 203 (1984) (added preference for families paying more than 50% of income for rent).

51. 53 Fed. Reg. 1122, 1122 (1988). PHAs and owners were required to implement the preferences no later than July 13, 1988. *Id.* Implementation required notice to all persons on current waiting lists of how they could qualify for preference status. *Id.* In addition, all new applicants after July 13, 1988 had to have their preference status considered under the new preference rules. *Id.*

52. Cranston-Gonzalez Act §§ 501, 545, 42 U.S.C.A. §§ 1437d, 1437f (West Supp. 1991). The Cranston-Gonzalez Act retains the three categories of federal preferences previously mandated, while specifying that “families that are homeless or living in a shelter for homeless families” come within the “substandard” preference. *Id.* § 501, 42 U.S.C.A. § 1437d(c)(4)(A)(i). For a discussion of the definitions of homelessness, see *supra* note 8.

53. The federal preference regulations apply to all tenant-based Section 8 programs. See 24 C.F.R. § 882.219 (1991). They also apply to project-based subsidies in Section 8 New Construction, Substantial Rehabilitation, Moderate Rehabilitation, State Housing Agency and several other Section 8 sub-programs. See 24 C.F.R. §§ 880.613, 881.613, 882.219, 883.714 (1991). For public housing programs, see 24 C.F.R. §§ 905.305 (Indian housing), 960.211 (1991) (public housing); for the Rent Supplement Program which provides a deep subsidy to some units financed through mortgage subsidy programs, see 24 C.F.R. §§ 215.1 - 290 (1991).

54. For a discussion of preference ranking, see *infra* note 67-69 and accompanying text.

55. 24 C.F.R. § 882.209(a)(7) (1991). Prior to the Cranston-Gonzalez National Affordable Housing Act, 90% of “walk-around” Section 8 subsidies had to be awarded to families qualifying for a federal preference. *Id.* § 882.219(b)(2)(ii). However, § 545 of the Cranston-Gonzalez Act reduces the percentage of project-based Section 8’s which must be awarded to families qualifying for a federal preference to 70%, rather than the previous regulatory requirement of 100%. Cranston-Gonzalez Act § 545, 42 U.S.C.A. § 1437f(d) (West Supp. 1991); 24 C.F.R. § 880.613(b)(2) (1991). Similarly, § 501 of Cranston-Gonzalez lowered the required percentage of federal preference-qualifying

Proper implementation of the federal preference regulations gives preferred status to homeless applicants who meet the federal definition. It is potentially critical to homeless applicants' achieving relatively quick receipt of a housing subsidy that PHAs and subsidized owners grant federal preference to those homeless applicants who are entitled to it, and abide by the federal requirement that federal preference holders come before standard applicants.<sup>56</sup>

The only data HUD appears to keep on PHA implementation of the federal preference regulations is in the individual management audits of particular housing authorities.<sup>57</sup> HUD audits emphasize units or certificates wrongly issued rather than checking cases of applicants who may have been wrongly denied.<sup>58</sup>

The Greater Boston Legal Services (GBLS) Homelessness Unit has two years of experience representing applicants for federal preference at a variety of PHAs and private federally-subsidized owners in Eastern Massachusetts. From this experience, I believe that there may be widespread violation of the federal preference regulations.<sup>59</sup> For example, in a medium-sized housing

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applicants for public housing to 70%. Cranston-Gonzalez § 501, 42 U.S.C.A. § 1437d(c) (West Supp. 1991). This is down from the 90% figure which had been set by HUD to implement the previous congressional mandates to apply federal selection preferences to public housing. 24 C.F.R. 960.211(b)(2)(ii) (1991). HUD has not yet promulgated regulations to implement these statutory changes in the percent of applicants to whom the federal preference rules must be applied in the various federally subsidized housing programs.

56. The length of time an otherwise qualified federal preference holder has to wait for a subsidized housing resource depends on the supply of housing resources, both new and turnover, in relation to the number of federal preference holders with either earlier application dates and/or higher preference ranking. For a discussion of this issue, see *infra* notes 67-73 and accompanying text. In Massachusetts, homeless applicants generally wait between two and 18 months, depending on the relative priority given to homeless applicants by the PHA or subsidized owner and the number of federal preference holders on the particular waiting list. In Boston, as in many other major urban centers, preference holders, particularly those ranked with the lowest preference, may wait several years for a Section 8 subsidy or a public housing unit. See Boston Globe, Jan. 18, 1989, at 19, col. 4 (some applicants wait as long as six years).

57. Benoit Interview, *supra* note 31.

58. See, e.g., U.S. DEP'T OF HOUSING AND URBAN DEV., HUD REPORT: BOSTON HOUSING AUTHORITY MANAGEMENT REVIEW AND OCCUPANCY AUDIT 83-84 (Nov. 1990) [hereinafter HUD REPORT].

59. There are no reported cases concerning the application of the federal preference regulations since their promulgation (in contrast to the failure of HUD to have issued regulations to implement the statutory amendments). However, few legal services programs have focused attention on preference issues, in large part because few programs give priority to representing applicants for subsidized housing, as opposed to public or private housing tenants being evicted from their housing or suffering bad conditions. In addition, it is likely that most

authority near Boston, GBLS discovered that forty-one percent of the Section 8 certificates awarded in the first eighteen months after the federal preference regulations went into effect went to non-federal preference holders.<sup>60</sup> The PHA admitted that it had federal preference holders on its waiting list at the time.<sup>61</sup>

Such a violation of the fundamental rule of "federal preference holders first" can occur for a variety of reasons beyond the straightforward legal violation which appears to have occurred at this PHA. At many PHAs in Massachusetts, GBLS has found that the PHA's federal preference "system" does not facially comply with federal law. This is largely because the PHA omits any mention of groups who are mandated by the federal regulations as federal preference holders,<sup>62</sup> or because it explicitly places some groups, deemed to have "local" preference but not fitting into any of the federal preference categories, in a ranking above federal preference holders.<sup>63</sup> We have also found PHAs that deny

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cases of incorrect application of preference rules are resolved at the administrative level, as the HUD regulations require that applicants denied preference status be afforded the opportunity for a "meeting" with the PHA or owner. 24 C.F.R. § 882.219(k) (1991). Whether such a "meeting," which has lesser protections than the informal "review" which must be accorded applicants who are denied eligibility, comports with constitutional due process requirements in light of the potentially critical effect of a preference determination on the likelihood of receipt of subsidized housing, is a question that no court has yet decided. See 24 C.F.R. § 982.216(a) (1991). There is no federally provided right of judicial review of preference determinations. However, it appears virtually certain that a challenge to a denial of a federal preference, at least by a PHA, could be brought in federal court as well as in a state court of general jurisdiction. See *Pruticka v. Posner*, 714 F. Supp. 119, 124 (D.N.J. 1989) (local housing authority has obligation to implement congressional preference guidelines); *Drake v. Pierce*, 691 F. Supp. 264, 275 (W.D. Wash. 1988) (HUD conduct found illegal when it approved housing plans that did not comport with statutory preferences), *summary judgment granted*, 698 F. Supp. 1523 (W.D. Wash. 1988).

60. Letter from Tony Pereira, Director of Applications, Brookline Housing Authority, to Barbara Sard, (Feb. 15, 1990).

61. *Id.*

62. In light of the GBLS Homelessness Unit's mandate to serve the homeless, it has paid particular attention to the omission of homeless applicants from PHA preference plans. GBLS has found that the Chelsea Housing Authority omitted any mention of homeless applicants from its application forms and applicant information material, although the homeless were included in the formal plan submitted to HUD. Fall River and Waltham Housing Authorities are among those which have omitted groups of the homeless from their federal preference categories. The housing authorities limited the federal preferences to categories of "no-fault" homeless without any HUD approval for an altered definition. See 24 C.F.R. § 882.219(a)(3) (1991). The Revere Housing Authority plan granted federal preference status only to those federal preference holders who were also local residents. HUD had approved this plan until GBLS submitted a written complaint to HUD, at which point HUD required the PHA to alter its plan to conform with federal law.

63. The Quincy and Revere Housing Authority plans placed categories of

federal preference status to applicants who come within the federal definitions.<sup>64</sup>

These practices result in applicants who are legally entitled to federal preference status being denied such status, and in all likelihood, also being denied subsidized housing. Such practices also make it possible for applicants without federal preference to obtain more of the available subsidies. In addition, if a PHA closes its waiting list for Section 8 applicants when its waiting list contains any standard applicants, or if it has a ranked preference system and its list contains applicants with less than first preference, it is likely that the PHA is unlawfully denying the right of an applicant claiming federal preference status to be placed on the waiting list.<sup>65</sup> As a consequence of such unlawful closing, applicants entitled to federal preference status are substantially delayed in receiving housing assistance or are totally denied such assistance.

Aggressive representation of applicants for subsidized housing resources can remedy these violations and enforce homeless applicants' rights as federal preference holders. However, it would be more efficient if HUD more seriously assumed its role as grantor of federal funds. Actions may otherwise have to be

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local residents without federal preference status above federal preference holders, without any limitation to the 10% "local" preference then permitted by federal law.

64. We have generally been able to prevail in such cases at an administrative hearing. In one unreported case which required filing of a lawsuit against the PHA, our client, a mentally disabled woman who was imminently, but not yet homeless, was a tenant in an illegal Single Room Occupancy (SRO) building. She paid most of her SSI check for rent. Nonetheless, the PHA denied her federal preference under the "rent burden" or paying more than 50% of income for rent category, apparently because the PHA did not consider payment for an illegal SRO to be "rent." Under pressure from the federal judge at a pre-trial conference the PHA settled. This settlement included paying our client damages of more than the difference between the rent she was paying and what her rent in public housing would have been if she not been denied preference status. It also reserved the issue of whether GBLS could recover attorneys' fees under 42 U.S.C. § 1988 (1988). See *Periello v. Medford Hous. Auth.*, Civil No. 90-12561-Z (D. Mass. 1991).

65. See 24 C.F.R. § 882.209(a)(7) (1991). Section 882.209(a)(7) appears to authorize the practice of PHAs closing their waiting lists for Section 8 subsidies. *Id.* Yet, it actually prohibits PHAs from closing their lists to applicants claiming federal preference when there is anyone on the list of lower (or no) preference status than the applicant being denied the ability to apply. *Id.* It is still a common practice for PHAs to open their Section 8 list for a few days or months and then close the list until all the eligible persons who applied within the arbitrary "window," or at least the preference holders who applied within such window, are served. This probably violates the rights of homeless applicants qualifying for federal preference status to be permitted to apply for and receive a subsidy prior to applicants with lower or no federal preference right.

brought against a very large number of PHAs, with the possibility for class or group defendant actions. More aggressive congressional supervision could induce such action on HUD's part. It could also be a worthwhile strategy to sue HUD for failing to properly implement the federal housing laws in situations where a violation of the federal preference rules has a racially discriminatory effect.<sup>66</sup>

C. *Failure of Most Public Housing Authorities and Subsidized Owners to Give Top Priority to the Homeless*

Those agencies and owners administering federally subsidized housing programs have the authority, under the HUD regulations, to rank the federal preference categories.<sup>67</sup> Homeless applicants would benefit substantially if homelessness were ranked as the top preference category.<sup>68</sup> Public housing authori-

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66. See, e.g., NAACP, Boston Chapter v. Harris, 607 F.2d 514, 527 (1st Cir. 1979), *on remand sub nom.* NAACP, Boston Chapter v. Kemp, 721 F. Supp. 361, 365 (D. Mass. 1989) (HUD found liable when it "did not condition its provision of federal funds . . . on construction of affordable integrated public housing").

67. 24 C.F.R. §§ 882.219(b)(2)(iii), 880.613(b)(2) (1991). This ranking can be an ordering of entire federal categories, parts of categories or of persons qualifying for federal preference who also meet a local preference category, such as residency, veterans' status or some other PHA or state-determined qualification, so long as the ranking system does not interfere with fair housing duties. For a discussion of the applicable law governing preference requirements, see *supra* notes 49-66 and accompanying text. HUD has noted that a PHA's discretion to determine such ranking is not unlimited and that a PHA must demonstrate to HUD that it has the administrative capacity to make the complex case-by-case determinations that are required by a ranking system with many narrowly-defined categories. Memorandum from Lawrence Golberger, Director, HUD Office of Elderly and Assisted Housing, to David T. Forsberg, Regional Administrator & Housing Commissioner (May 9, 1990). In addition, PHA's exercise of its discretion to rank preference categories, particularly by giving additional weight to "local" applicants with federal preferences over other preference holders, must not violate the fair housing requirements of Title VII of the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1988).

68. Similar benefit probably would result even if homeless applicants were ranked after those involuntarily displaced. There is a relatively small number of applicants displaced by natural forces, urban renewal-type activities, owners taking the property off the rental market, or abuse. In most jurisdictions, the largest group of preference applicants is likely to be those paying more than 50% of income for rent. An elaborate example of a type of "homeless first" ranking system is what the Massachusetts state housing agency, EOCD, has established for the 13,000 federal Section 8 subsidies it administers through a network of regional non-profit agencies. Since July of 1988, EOCD has had in effect various plans for ranking the federal preferences which have given first preference to those deemed homeless "through no fault of their own." The current preference rules, in effect since July of 1990, give first preference to eight narrowly defined groups of applicants deemed to be not at fault for their homelessness, as well as to seven narrow groups of applicants deemed to be imminently at risk of homelessness. In addition, first preference may be given to homeless applicants

ties could also require that the homeless receive all or most of the thirty percent of units with project-based assistance for which they have discretion to set local, non-federal preference for admission.<sup>69</sup>

HUD does not keep any centralized records, and it issues no reports of what preference systems have been adopted by PHAs. Thus, we don't know the percentage of PHAs or owners administering federal housing resources who accord top preference to the homeless within a ranked preference system. If the Massachusetts experience is typical, most PHAs and private owners of federally subsidized units do not rank the federal preferences at all. Of those that do have a ranked system, the homeless were ranked first in few cases.

There are two approaches to accomplishing top ranking of homeless applicants for federal housing resources in particular areas: Persuasion or mandate. Persuasion may be grounded on public policy/relative need arguments alone.<sup>70</sup> It may also be en-

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who do not fit within the narrowly defined categories if, in the judgment of the administering agency, the applicant was not at fault for their homelessness or can demonstrate mitigating circumstances. Some local housing authorities in Massachusetts have adopted similar preference systems for their federal resources. This targeting, even with all the problems inherent in the definitional limitations, has resulted in nearly all of the EOCD administered turnover and new Section 8 subsidies going to homeless or, recently, imminently homeless applicants. This is in spite of the problems inherent in the definitional limits. The proportion of Section 8 subsidies administered by local housing authorities going to homeless applicants has also increased. Data compiled from GBLS's clients' experience and a survey done by the Massachusetts Coalition for the Homeless of shelter and housing advocates working with homeless families in state-funded shelters show that the waiting time for homeless applicants qualifying for first preference at one of the EOCD non-profit administering agencies ranges from approximately four to 18 months. This waiting period depends on requested bedroom size and the number of qualified first preference applicants in relation to the number of resources.

69. Cranston-Gonzalez Act § 545, 42 U.S.C.A. § 1437f (West Supp. 1991). PHAs will now set the preferences governing the 30% of awarded units exempt from the federal preference rules in privately owned developments within their jurisdiction. *Id.* § 545(c), 42 U.S.C.A. § 1437f (historical note) (West Supp. 1991). This provision's effect is particularly unclear where there are PHAs with overlapping jurisdiction over a particular geographical area. For example, the Massachusetts state housing agency is also a PHA operating a statewide Section 8 program.

70. A PHA may also decide, based on its policy view and/or what it perceives as the particular needs in its area, to request that HUD approve an altered definition of "homeless." See 24 C.F.R. § 960.211(a)(2) (1991). If the PHA does not request an altered definition, it must comply with HUD's definition. *Id.* The Boston Housing Authority (BHA) categorizes as homeless those applicants who are doubled-up in the home of another as well as those who sleep in shelters or in the street. Such "homeless" applicants receive second preference. Only certain applicants facing court-ordered evictions and displacement by natural disas-

hanced by a fiscal "incentive." This occurs when the costs of emergency shelter are reduced by targeting housing resources at the families who would otherwise be sheltered at enormous state expense.<sup>71</sup> A mandate can be achieved through administrative rule-making, a supervisory state housing agency, legislation,<sup>72</sup> or

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ter and code enforcement receive first preference. HUD has recently taken the position, despite its previous approval of the BHA preferences, that such doubled-up families do not come within the federal definition of "homeless." HUD notified BHA that BHA will either have to seek federal approval for an altered definition or use its "local" preference share to serve doubled-up applicants. BHA is both disputing HUD's finding, arguing that doubled-up applicants do come within the federal definition of "homeless," and, simultaneously, seeking HUD approval for an altered definition of homeless. BHA wants to continue to use its 10% local preference for applicants who were evicted for non-payment when they were paying between 40 and 50% of their income for rent. HUD REPORT, *supra* note 58, at 84-85. Such an expansion of the federal definition of "homeless" could be enormously beneficial. Many extremely housing-needy applicants are doubled up, with the reluctant agreement of family or friends, rather than choosing to sleep in shelters or on the streets, either because of the lack of available housing or shelters, or because of repugnant conditions in shelters.

71. This has certainly been the case in Massachusetts. State law requires that families without "feasible alternative housing" receive temporary emergency shelter. MASS. GEN. LAWS ANN. ch. 18, § 2(D) (West Supp. 1991). The cost of this temporary emergency shelter averages \$2700 per month and the shelter cannot be terminated merely due to the passage of time. Massachusetts Coalition for the Homeless v. Secretary of Human Servs., 400 Mass. 806, 820-22, 511 N.E.2d 603, 612-13 (1987). In *Massachusetts Coalition for the Homeless*, the Massachusetts Supreme Judicial Court held that while it is desirable to move families from transient shelters into more permanent housing as quickly as possible, the Superior Court judge erred when he enjoined the Department of Public Welfare "from placing AFDC families in hotels, motels and emergency shelters for more than a total of ninety days." *Id.* Subsequently, based on a renewed prayer for preliminary relief in a supplemental complaint, the trial judge entered a preliminary injunction against a 90-day limit on emergency shelter benefits for families. *Massachusetts Coalition for the Homeless v. Secretary of Human Servs.*, Civil No. 80109 (Mass. Suffolk Super. Ct. Feb. 28, 1990).

72. Frank Keating, General Counsel of HUD, stated: "We find nothing in the United States Housing Act of 1937 or other Federal law which would constitute a legal impediment to PHAs following State-directed preferences for the homeless . . ." Letter from Frank Keating, General Counsel of HUD, to Alex Bledsoe, then Deputy Secretary of EOCD (Jan. 12, 1990). The letter also stated that whether a state housing agency, rather than a state legislature, could impose such state-required preference for the homeless on PHAs was a question of state, not federal law. *Id.* The Massachusetts Coalition for the Homeless filed legislation in the 1991 legislative session to create a state program of "transitional rental allowances" for homeless families in state-supported shelters. H.R. 1767, 177th Gen. Ct., 1991 Mass. (introduced February 5, 1991 and currently in House Committee on Ways and Means); S. 455, 177th Gen. Ct., 1991 Mass. (introduced January 30, 1991 and currently in Senate Committee on Ways and Means). Funds would be those otherwise spent for such shelters. The legislation would require PHAs to grant first preference to such families who were otherwise eligible for state or federal housing programs. *Id.*



court order.<sup>73</sup> Politics will probably dictate whether administrative or legislative advocacy is likely to be fruitful in a particular state. To the author's knowledge, no court has issued such a mandate. However, it is within a court's equitable power to do so where executive branch liability for homelessness of a particular group has been found, and where appropriated funds are available to fashion a remedy.

#### D. *Balkanized Administration of Subsidized Housing Programs*

When a person in the United States wishes to apply for Social Security benefits, he or she goes to the Social Security Administration office serving the local area.<sup>74</sup> The benefits the person is eligible to receive are the same regardless of where the person lives.<sup>75</sup> The time it takes to receive benefits post-application is unlikely to vary based on where the person applies. The same situation occurs for persons wishing to apply for unemployment compensation or public assistance benefits, although the benefits vary in each state.<sup>76</sup>

In contrast to virtually all these other major governmental benefit programs for individuals, anyone wishing to apply for subsidized housing has to make literally hundreds of applications in any particular state in order to maximize the chances of receiving benefits. This can be true even in a state where the only subsi-

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73. On remand from the decision in *Massachusetts Coalition for the Homeless*, plaintiffs are currently seeking an order requiring the defendant state officials (the Secretaries of Administration and Finance, EOCD, the Executive Office of Human Services (EOHS) and the Commissioner of the Department of Public Welfare (DPW)) to submit to the court a proposed plan to maximize the coordination between the emergency shelter programs for homeless families and the subsidized housing programs. See Supplemental Complaint & Prayer for Relief, *Massachusetts Coalition for the Homeless v. Secretary of Human Servs.*, Civil No. 80109 (Mass., Suffolk Super. Ct.) (filed February 1990), *on remand from* 400 Mass. 806, 511 N.E.2d 603 (1987). The emergency shelter programs are administered by DPW and supervised by EOHS. MASS. GEN. LAWS ANN. ch. 18, § 2(D) (West Supp. 1991). The subsidized housing programs are under the Secretary of EOCD. MASS. GEN. LAWS ANN. ch. 23B, § 3 (West 1981 & Supp. 1991). Plaintiffs are seeking to make available the maximum possible number of subsidized housing units and rental subsidies to families in DPW-funded shelters who have been homeless for more than 90 days, within already appropriated fund limits and in the shortest possible time, in keeping with the prior decision of the Massachusetts Supreme Judicial Court. See *Massachusetts Coalition for the Homeless*, 400 Mass. 806, 511 N.E.2d 603.

74. See U.S. SOCIAL SECURITY ADMIN., 54 SOCIAL SECURITY BULLETIN (1991).

75. *Id.*

76. See N.Y. Times, Mar. 8, 1991, at A20, col. 3.

dized housing programs are federally-funded.<sup>77</sup>

Such balkanized distribution of a basic resource is a product of the localized system of funding conduits established by Congress for federal housing dollars. In the first thirty years of federal housing programs, funding essentially went into public housing programs through contracts with public housing authorities established pursuant to state law.<sup>78</sup> The jurisdiction of a PHA generally follows city or town lines, although regional or even statewide PHAs are possible.<sup>79</sup> There are approximately 2,000 PHAs that administer a federal Section 8 program.<sup>80</sup> In some states, an applicant must file separate applications at literally hundreds of PHAs to maximize his or her chance of receiving a "walk-around" Section 8 subsidy<sup>81</sup> even though such subsidies can now be used anywhere in the state (and in some contiguous areas of neighboring states).<sup>82</sup> Complicating matters further, PHAs frequently require a separate application to be filed for their public housing and Section 8 project-based programs, in addition to the application for "walk-around" Section 8 certificates and vouchers. Then, in addition to the hundreds of PHAs at which one might wish to submit one or several applications (to receive a "project-based" subsidized unit at one of the potentially hundreds of privately owned, federal or state-subsidized developments in the area), a separate application must be made to each project.<sup>83</sup>

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77. For a discussion of this application problem, see *infra* notes 90–100 and accompanying text.

78. See 42 U.S.C. § 1437f(b)(1) (1978) (amended 1988).

79. Some states, including Massachusetts, Connecticut, Indiana and possibly others, have established a state-wide PHA. In Massachusetts, the purpose is to administer federal Section 8 and state-funded housing subsidies with state-wide mobility. This was prior to such statewide "portability" being required by federal law. See 42 U.S.C.A. § 1437f(r)(1) (West Supp. 1991). While this is a laudable goal, the state-wide PHA was established in addition to the local housing authorities, rather than instead of them. One consequence is a layer of eight regional agencies that administered the Section 8 program for the state PHA on top of the 240 local housing authorities which administer state and/or federal resources for a state as small as Massachusetts.

80. Benoit Interview, *supra* note 31.

81. The number of PHAs administering Section 8 programs is not evenly distributed throughout the states. In Massachusetts, approximately 120 PHAs administer a federal Section 8 program. The Massachusetts pro-rata share would be 40 if there were the same number of PHAs in each state.

82. 42 U.S.C.A. § 1437f(r) (West Supp. 1991).

83. A city or state could alter this situation and establish a mechanism for submitting applications in some central location. This procedure would not violate owners' rights under federal law to make the tenant selection decision, although current federal regulations could possibly be interpreted to give to owners the exclusive right to accept applications as well as to make tenant selection decisions. See 24 C.F.R. § 880.603 (1991) ("The owner must accept appli-

Thus, there are hundreds of PHAs or private developments one should apply to in order to maximize the chances of receiving a housing subsidy. Furthermore, each PHA or private developer is permitted by federal law to adopt its own system for ranking the federal preferences.<sup>84</sup> State-funded resources may be distributed under different rules than the federal preferences. While PHA plans and rules are technically publicly available,<sup>85</sup> there is no one place to get them. No governmental agency gathers them all and no governmental agency is required to collect turnover and waiting list information. Consequently, it is impossible for a homeless applicant, desperate for housing, to act like the proverbial rational person and apply at those agencies/developments where she is likely to have the best chance of receiving housing, in light of the fit between her circumstances and the applicable tenant selection rules, as well as the relative availability of new or turnover resources in the bedroom size she needs.

While major urban centers may have waiting lists that are years long (even for federal preference holders),<sup>86</sup> the experience in Massachusetts has been that PHAs in smaller communities frequently have relatively few federal preference holders on their waiting lists. A homeless applicant legally entitled to preference may be able to receive a housing subsidy fairly quickly from an outlying community, in the suburban ring or even in a distant rural area. A Section 8 "walk-around" subsidy can then be used to rent housing in the urban area of origin or any other community

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cations for admission to the project . . ."). Since federal law does not establish any such central or regional mechanism, in the absence of any requirement of state or local law, separate applications must now be submitted to each development.

84. For a discussion of preference rankings, see *supra* notes 67–69.

85. 24 C.F.R. § 960.204(d)(2) (1991). All of the PHAs tenant selection plans must be filed with the regional HUD field office. The plans could be obtained through a Federal Freedom of Information Act request. See 5 U.S.C. § 552(a)(3) (1988). The tenant selection policies and procedures used by PHAs in their public housing programs must be posted in each PHA office and made available to an applicant or tenant upon request. *Id.*; 24 C.F.R. § 960.204(d)(2) (1991). PHAs generally use the same federal preferences for their public housing and their Section 8 programs, although they do follow different tenant selection procedures in each program. Section 8 tenant selection policies and procedures must be contained in a PHA's Administrative Plan for Section 8. 24 C.F.R. § 882.204(b)(3)(ii)(B). The HUD Regional Office may have the tenant selection plans used by private owners administering Section 8 project-based subsidies. It must publicly make those plans available. See 5 U.S.C. § 552(a)(3) (1988).

86. For further discussion, see, I. SHAPIRO & R. GREENSTEIN *supra* note 3, at 30.

in the state to which the person wishes to move.<sup>87</sup>

While federal law permits this balkanized "system" of distributing federal housing resources, it does not require it. States could require all PHAs and private owners with federally-subsidized resources to comply with a state-ordered system for ranking federal preference holders. States could also require PHAs and owners to submit information about the likely availability of units to a central or regional clearinghouse. Litigation could provoke them to mandate such reporting.<sup>88</sup> States could also reduce the barriers created by balkanized administration by requiring PHAs and private subsidized owners to accept applications by mail and to use the same application form. This could then be photocopied and sent out to the long list of distributors of subsidized housing resources.<sup>89</sup>

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87. For example, some homeless families from Eastern Massachusetts applied to the PHA in the small Western Massachusetts town of Williamstown. They were assisted by a DPW-provided housing search worker. DPW provides workers to families in DPW-funded emergency shelters to help them negotiate the maze of housing agencies and rules. The families had heard that the PHA had Section 8's available and no preference holders on their waiting list. The homeless families received Section 8 subsidies in a fairly short space of time and were able to use them to rent apartments in Eastern Massachusetts. This use of the Section 8 certificates was facilitated by the enactment of Cranston-Gonzalez. Cranston-Gonzalez Act § 551, 42 U.S.C.A. § 1437f(r) (West Supp. 1991) (making Section 8 certificates portable anywhere in state, not only between contiguous metropolitan areas). The amendment was inserted by Representative Frank at the request of the attorney for the homeless families, Judith Liben of the Massachusetts Law Reform Institute (MLRI). This portability feature of Section 8 subsidies is a critical value for those urban minority families wishing to integrate the suburbs. See Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 473-74 (1988) (discussing attempts to integrate new construction by Chicago Housing Authority into suburban and white areas).

88. States could take such actions based on their legal authority under state law to direct PHAs and private owners administering federally-subsidized housing in a manner consistent with federal law. Their reason for acting could be part of an anti-homelessness strategy, a remedy for racial discrimination, or any other legitimate reason. The Massachusetts Coalition for the Homeless is currently pursuing such a clearinghouse as a remedy for alleged violations by the state welfare agency of its declared duty to provide homes, and not merely shelters, for AFDC recipients and alleged violations by the state housing agency of its statutory mandate to coordinate emergency and transitional housing programs. See MASS. GEN. LAWS ANN. ch. 23B, § 3 (West 1981 & Supp. 1991). For a discussion of the Supplemental Complaint currently pending in *Massachusetts Coalition for the Homeless*, see *supra* note 73.

89. GBLS and MLRI have drafted a bill on behalf of the Massachusetts Coalition for the Homeless, a portion of which would make such changes in PHA admissions procedures. MCH may pursue a similar remedy against private subsidized owners in Boston through a local ordinance because sufficient simplification of admissions procedures was not secured in the *NAACP v. Kemp* litigation. For a discussion of this case, see *supra* note 66. Housing authorities in Massachusetts are required to mail applications to would-be applicants, and PHAs and private developments subsidized by the state housing finance agency are re-

While such state-level strategies only tinker with the federally-created balkanized system, which can be best altered by changing federal law, implementation of clearinghouses and streamlined application processes should help illuminate the sharp inconsistency between the nature of current housing subsidy programs, in which approximately half of the resources are portable income subsidies, and the outdated, localized manner in which housing resources are now distributed. Such reforms should also serve to highlight the need for change.

#### E. Procedural Barriers Erected by PHA

Achieving access to existing subsidized housing resources requires surmounting a number of procedural barriers which create particular difficulty for the homeless. First, PHAs frequently refuse to take any applications for their Section 8 programs (even from federal preference holders) on the grounds that their lists are "closed."<sup>90</sup> Second, people who do manage to get their names on the waiting list are frequently "purged" for failure to respond to a letter sent to an old address.<sup>91</sup> This occurs even though the PHA had no resource to offer the person at the time the letter was sent but was simply "updating" its list. Third, those who do make it through to the eligibility determination process confront a seemingly endless stream of verification requirements which inevitably winnows down the number of applicants able to complete the course.<sup>92</sup> Homeless persons often cannot compete in this "paper chase." Finally, the notices and appeal procedures

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quired by state regulation to accept applications by mail. MASS. REGS. CODE tit. 760, § 5.06(1) (1989); MASSACHUSETTS HOUSING FINANCE AGENCY, MHFA HANDBOOK para. 15D(4) (1986).

90. For a discussion of waiting list practices, see *supra* note 68.

91. See *Washington Post*, Sept. 15, 1988, at D7, col. 3 (applicants were dropped from list after failing to respond to three requests to update their applications).

92. One of the GBLs Homeless Unit's earliest clients presented a perfect example of the type of "Catch-22" which PHA verification requirements often create. Our client had been homeless for two years. His Single Room Occupancy (SRO) building owner had abandoned the building and it was subsequently condemned. His hometown PHA was in a working class suburb outside of Boston, which required him to provide verification from his former landlord of his suitability as a tenant before they would approve him for public housing. He could not provide this verification because his landlord was gone; the landlord's abandonment was why he had become homeless. Our office intervened and threatened to sue if the PHA didn't at least issue a decision on our client's eligibility based on his having provided all of the requested verification which he could. The PHA accepted our client as a tenant and he was housed within 10 days.

used by many PHAs and private subsidized owners lack the basic rudiments of due process. Applicants, therefore, are frequently unable to effectively utilize the appeal process to vindicate their right to receive subsidized housing resources.

None of these procedural barriers are required by federal law, although some, such as the purging of the lists, appear to be encouraged by HUD.<sup>93</sup> Other barriers may be motivated in part by concerns of administrative efficiency. None was designed explicitly to exclude the homeless.<sup>94</sup> Unfortunately, PHAs are following in the steps of other bureaucracies seeking to limit the number of applicants found eligible, without publicly admitting that they are narrowing the eligibility rules. The effect is that the perceived need for subsidized housing is substantially less than the reality.<sup>95</sup>

By creating such procedural hurdles, PHAs may be purposely trying to exclude those unable to negotiate the obstacle course. These are the least literate, the least articulate, the least mobile (to get around to the required verification sources) and those without stable addresses. These people are likely to be the poorest of the applicants, disproportionately language and/or racial minorities and the handicapped.<sup>96</sup> Such exclusionary tactics

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93. U.S. DEP'T OF HOUSING AND URBAN DEV., PUBLIC HOUSING HANDBOOK 7465.1 Rev-2, § 2-3 (1979). The handbook recommends annual updates of the waiting list to determine if the applicant is still interested in housing. *Id.* The HUD Management Review Report criticized the Boston Housing Authority for failure to perform such annual updates. HUD REPORT, *supra* note 58, at 81.

94. For example, homeless advocates who assisted homeless applicants for public housing at the Boston Housing Authority became aware that homeless applicants in particular were adversely affected by BHA verification requirements. BHA required that applicants list all of their "residences" in the prior five years and provide verifications other than from relatives from each location. Most homeless applicants have stayed in a very large number of places over a short period of time. Most have also stayed with relatives for some period of time before resorting to shelter or the streets. These requirements, which originated prior to the current homeless crisis, particularly adversely affected the homeless. This problem, among others, was brought to the BHA's attention in on-going discussions about improving access to BHA's housing for the homeless. The BHA official in charge readily conceded that BHA had never looked at their admission practices from the perspective of the homeless, despite the fact that a very large proportion of BHA applicants currently are homeless. The BHA agreed to alter many of these adverse practices.

95. The history of such practices in the welfare system is well-documented. See, e.g., Brodtkin & Lipsky, *Quality Control in AFDC as an Administrative Strategy*, 57 SOC. SERVICE REV. 1, 11 (1983) (strict verification requirements before applications accepted; strict deadline requirements terminated assistance to those needing help in the application process); Leiwant & Hasen, *Caselaw on AFDC Verification Problems*, 21 CLEARINGHOUSE REV. 215 (1987).

96. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591, 594-97 (1987-1988). If the manner in

may be motivated simply by localism—a desire not to distribute scarce housing resources to people not seen as “theirs”<sup>97</sup>—and/or by racial or class prejudice. Advocates for the housing-needy and the homeless should expose such policies as having no proper place in government-funded housing programs and should work to eliminate them.<sup>98</sup>

These procedural barriers are all subject to legal challenge.<sup>99</sup> They could also be altered by state-level rulemaking or legislation, as briefly suggested above, or by changes in federal regulations or statute. Such changes would benefit not only homeless applicants, but all applicants for public and subsidized housing resources. Why have few such challenges been brought? Probably because subsidized housing admissions issues have not been a primary focus of legal effort since initial, basic reforms were accomplished in the late 1960s and early 1970s, after federally-funded legal services were first available. These reforms include waiting lists, proscribing arbitrary exclusions of classes of potentially eligible applicants and rudimentary notice and hearing requirements.<sup>100</sup>

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which a public assistance program is administered has a disproportionate negative impact on the handicapped, a claim may be stated under 29 U.S.C.A. § 794 (West Supp. 1991). It may also be stated under applicable local law. *See Rensch v. Board of Supervisors*, No. C595155 (Cal., L.A. County Super. Ct.); *City of Los Angeles v. County of Los Angeles*, No. C655274 (Cal., L.A. County Super. Ct.). For discussion of *Rensch*, see Blasi, *supra*, at 596 (discussing bureaucratic impediments that can be implemented to restrict access to entitlement programs, even among those eligible for their benefits).

97. This view is common despite the fact that Section 8 and public housing are entirely federally funded, and few localities contribute their own funds to PHAs. An exception to this is the property-tax exemption for federally-funded public housing.

98. Depending on particular local conditions, claims based on racial discrimination law could result in remedies which increase the supply of subsidized housing resources in the community, and increase access to existing resources. *See Roisman & Tegeler, Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts*, 24 CLEARINGHOUSE REV. 312, 328–29 (1990).

99. In addition to possible challenges based on discriminatory effect, these procedural barriers could be challenged on due process principles, under the fourteenth amendment to the U.S. Constitution. U.S. CONST. amend XIV; *see Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982) (applicants for Section 8 subsidies do receive protection of the due process clause).

100. *See e.g., Holmes v. New York City Hous. Auth.*, 398 F.2d 262 (2d Cir. 1968) (lack of any objective procedures under which a housing authority doles out housing held in violation of due process); *Davis v. Toledo Metro. Hous. Auth.*, 311 F. Supp. 795 (N.D. Ohio 1970) (evidentiary hearing required when an applicant has been declared ineligible for public housing); *Colon v. Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134 (S.D.N.Y. 1968) (applicant cannot be denied access to housing by a housing authority solely on the basis of

From the perspective of clients who are housing-desperate, overcoming these procedural barriers, particularly after the implementation of the federal preferences, is often the means to solving the clients' most critical problem. Such advocacy can help numerous individual clients as well as applicants overall. It can also eliminate structural barriers to homeless applicants' being able to benefit equally from publicly-funded housing programs.

F. *Discrimination Against Non-Mobility Impaired Disabled and Handicapped Applicants*

A significant proportion of the homeless meet the federal definitions of "disabled" or "handicapped."<sup>101</sup> This is particularly true of homeless people without minor children. They meet the basic "categorical" eligibility requirement which federal law had in effect until October 1, 1991, on single applicants for housing. These people are also eligible for special "elderly/handicapped" housing resources,<sup>102</sup> in addition to "family" housing.<sup>103</sup>

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her status as a welfare recipient); *Thomas v. Hous. Auth. of Little Rock*, 282 F. Supp. 575 (E.D. Ark. 1967) (applicant cannot be denied housing solely on the basis of her status as an unwed mother). See generally THE NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS ch. 2 (1985).

101. 42 U.S.C.A. § 1437a(b)(3) (West Supp. 1991) (defining disabled and handicapped). Federal law has, until October 1, 1991, generally limited public and subsidized housing resources to "families" which are households of two or more unless one member is 62 or older, disabled or handicapped. *Id.* Some federally-subsidized developments are restricted to elderly, disabled, or handicapped households. For further discussion of these programs, see *supra* note 29. For Congress's definition of "handicap" in the Fair Housing Amendments of 1988, see 42 U.S.C.A. § 3602(h) (West Supp. 1991). The definition of "handicap" in § 3602(h) is substantially preferable for the handicapped homeless and probably applies to federally subsidized housing programs despite the less favorable definition of 42 U.S.C. § 1437a(b)(3) (West Supp. 1991). See 24 C.F.R. 100.201 (1991).

Approximately one-third of the single adult homeless are estimated to suffer from severe mental illness. See National Resource Center on Homelessness and Mental Illness, *Exploring Myths About "Street People,"* 2 ACCESS 2 (1990). An additional small number suffer from other non-mobility-impairing disabling or handicapping conditions other than alcohol or drug addiction. P. Rossi, *supra* note 2, at 42. Various studies have estimated that approximately one-third of the single adult homeless suffer from substance abuse. *Id.* at 42-43. Some of these people also suffer from chronic, severe mental illness. *Id.* at 43.

102. See 42 U.S.C.A. § 1437f(p) (West Supp. 1991) (shared housing for elderly and handicapped).

103. In addition to federally funded resources, states may also fund so-called "elderly/handicapped" housing. In Massachusetts, there are more than 30,000 units of state-funded public housing which are restricted to the elderly and handicapped by state law. This is mandated under what are known in Massachusetts as the Chapter 667 and 689 programs enacted by 1954 Mass. Acts 667 and 1974 Mass. Acts 689, respectively. A significant number of very poor,



Some local housing authorities and private subsidized owners have unlawfully restricted "elderly/handicapped" housing to the elderly and the mobility-impaired handicapped who need the alleged "special amenities" of such housing. In doing so, they have prohibited access to other handicapped and disabled persons.<sup>104</sup> These unlawful practices have resulted in subsidized housing units remaining vacant in some areas because applicants aged sixty-two and over may not wish to go into the available units because of the neighborhood in which they are located.<sup>105</sup> Based on their circumstances, relatively few elderly applicants are entitled to federal preference<sup>106</sup> compared with the actually

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housing desperate families with children also qualify as handicapped under federal housing law because the family's "head" or "spouse" qualifies as handicapped. See 24 C.F.R. § 812.2 (1991). Such families should therefore be considered for admission to "elderly/handicapped" housing. They are often excluded because their family size requires a unit of more than two bedrooms. Such units rarely exist in such housing. Consequently, they are forced to wait on the much longer "family" housing lists, despite the congressional decision to make housing more available for handicapped families than for others. If the type of housing built by PHAs and private subsidized owners results in depriving such handicapped families with children of their rights under federal law, such families may have a claim that their rights under federal fair housing law are being violated on two counts: as handicapped, and, as families with children. 42 U.S.C.A. § 3604(a) & (f)(2) (West Supp. 1991).

104. Such restriction violates federal anti-discrimination law. See 42 U.S.C.A. § 3604(f)(2) (West Supp. 1991); 24 C.F.R. § 100.1-100.65(a) (1991). It may violate applicable state law as well. See, e.g., MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982 & Supp. 1991). See generally, MENTAL HEALTH LAW PROJECT, RIGHTS OF TENANTS WITH DISABILITIES UNDER THE FAIR HOUSING AMENDMENTS ACT OF 1988: A GUIDE FOR ADVOCATES, CONSUMERS AND LANDLORDS (1990). Some cases decided prior to the Federal Fair Housing Act Amendments of 1988 upheld exclusion of the non-elderly from so-called "202" (named after § 202 of the National Housing Act of 1982) privately-owned, federally-subsidized housing. See, e.g., *Knutzen v. Nelson*, 617 F. Supp. 977 (D. Colo. 1985) (housing authority can deny housing to applicant who is not member of targeted group), *aff'd sub nom.* *Knutzen v. Eben Ezer Lutheran Hous. Center*, 815 F.2d 1343 (10th Cir. 1987). It is questionable whether such cases are still good law. HUD Region 1 recently took the position that the prohibition on familial status discrimination means that a development cannot exclude families with children unless the housing falls into an exemption called "housing for older persons." Memorandum of HUD Region 1, *Effect of the Fair Housing Act on Eligibility for HUD-Assisted Elderly/Handicapped Developments* (Apr. 11, 1991). No federal developments or programs had, as of May, 1991, been designated by the HUD Secretary as meeting the definition of "housing for older persons."

105. Approximately 300 liveable units owned by BHA in "elderly/handicapped" developments are vacant. Boston Housing Authority has now agreed with counsel from GBLs that it will revise its admissions procedures for these developments. For a discussion of the laws governing their decision, see *supra*, note 93-94 and accompanying text.

106. Benoit Interview, *supra* note 31. For the period July, 1989, through October, 1990, 85% of the applicants offered BHA "Elderly" Housing were standard applicants. They did not hold or claim a federal preference. BOSTON HOUSING AUTHORITY, BHA RESPONSE TO HUD MANAGEMENT REVIEW 52. (Dec.

homeless or precariously housed disabled or handicapped. Even if there were not units standing vacant, eliminating such discrimination should result in relatively rapid offers of "turnover" housing resources to applicants with federal preference status.<sup>107</sup>

It is not enough to remove such blanket exclusions of the non-mobility impaired disabled and handicapped from housing for which federal law makes them eligible. It will also be necessary, in order to open up such housing resources as well as all other "family" housing resources to many of the now homeless, to eliminate "tenant suitability" standards. These standards have a discriminatory impact on the handicapped, particularly the mentally handicapped. Recently, advocates for mentally handicapped applicants won a landmark case on this issue.<sup>108</sup> Although the judgment technically only applies to the local PHA, HUD has written instructions to all PHAs to follow the court's ruling that the Fair Housing Act and Rehabilitation Act apply to

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1990) (Boston Housing Authority response to HUD REPORT, *supra* note 58). In contrast, only 15% of the offers of family housing went to standard applicants. *Id.* Even this number is legally questionable in light of the allegedly years-long waiting list maintained by BHA for preference holders. This extraordinarily high percentage of offers to standard applicants for "elderly" housing may understate the number of federal preference holders seeking elderly housing. A BHA rule states that an applicant claiming federal preference status must apply on a city-wide list. If an applicant rejects the first apartment offered, their name is moved to the bottom of the list. Standard applicants, however, are entitled to list three developments at which they would like to live. HUD may invalidate this differential treatment (or GBLs may challenge it) as violative of the Fair Housing Act.

107. Many housing advocates, as well as PHA managers, are concerned on a practical level that it is not good housing policy to "mix" substantial numbers of handicapped, particularly the mentally handicapped tenants with elderly residents of public or subsidized housing. They fear that such mixing will result in diminished quality of life for both the aged residents and the disabled and lead to disproportionate "housing failure" for the handicapped. These concerns should only affect the remedy sought, such as "reasonable accommodations" to assist the mentally handicapped to maintain their tenancies, not whether advocates seek to enforce the rights of the handicapped to public and subsidized housing.

108. *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990). The three plaintiffs were denied housing by the Rochester Housing Authority. *Id.* at 1003. The first plaintiff was 31 years old and had been diagnosed as a schizophrenic. *Id.* at 1004. The second plaintiff was elderly and physically disabled. *Id.* The third plaintiff was elderly, physically disabled and diagnosed as a schizophrenic. *Id.* The plaintiffs claimed that the housing authority's "ability to live independently" standard was applied, with respect to disabled persons, arbitrarily and subjectively. *Id.* They claimed, therefore, that the practice violated federal statutes and regulations. *Id.* The court found that the housing authority's actions had a "discriminatory effect" and an "adverse impact." *Id.* at 1007. The court further held that the housing authority's justifications were "without merit," and therefore, the practice violated the Fair Housing Act and the Rehabilitation Act. *Id.* at 1007, 1011.

PHAs.<sup>109</sup> HUD has also agreed that the court's decision is required by the Fair Housing Act Amendments, which HUD is bound to uphold.<sup>110</sup> Realistically, however, there will not be automatic compliance with these instructions. HUD is notorious for failing to supervise PHAs, and particularly private owners. Actual enforcement will require state and local-level vigilance. In addition, it is common for PHAs and private subsidized owners to systematically exclude applicants on suitability grounds, such as denials for alleged prior damage to apartments or prior records of "bad" tenancies, despite proof of subsequent rehabilitation from whatever caused the "bad" acts (i.e. failure to pay rent). These denials may be challengeable on handicap discrimination grounds. Needless to say, this is a fertile area for creative legal work.

#### IV. SOME LONG-TERM QUESTIONS ABOUT THE MERIT OF FOCUSING ON SUBSIDY ELIGIBILITY

In any single year, and perhaps over an even longer time frame, advocacy targeted at who gets available subsidized housing resources is, admittedly, a strategy which does not get beyond a zero-sum game, except in the instances when available subsidies are not being used. Therefore, focusing on access and eligibility issues on behalf of the homeless, particularly preference rules, is potentially divisive to the broader constituency for increasing the supply of housing benefits and affordable housing programs.<sup>111</sup> It may be sufficient justification that obtaining housing subsidies for otherwise homeless clients is a critical service to our arguably most needy clients.<sup>112</sup> However, when colleagues challenge this work as "merely rearranging the deck chairs on the Titanic," it would be preferable to have a better response than "all the applicants are not equally likely to drown."<sup>113</sup>

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109. See *id.* at 1011.

110. Memorandum from HUD to PHAs, *PHA Determination of "Ability to Live Independently" as a Criterion for Admission to Public Housing* (Dec. 31, 1990).

111. Advocacy aimed at procedural fairness, such as adequate notices, reasonable verification requirements, and fair hearings, presumably is to the benefit of all applicants, although such efforts may not be positively received by all non-profit housing developers in their role as landlords.

112. Legal services programs are generally restricted from representing clients whose income exceeds 125% of the federal poverty line. Therefore, many applicants for public and subsidized housing programs (the less needy ones) are financially ineligible for our services.

113. One could also counter as to why this challenge should apply to the validity of representing applicants for a limited resource, but not to the defense

Although there is not yet evidence to prove it in the housing context, recent experience in other social welfare programs suggests that there is a potentially expansive dynamic which can result from making visible the "holes in the safety net." For example, concerted publicity about the Reagan Administration's cut-off of Supplemental Security Income and Social Security Disability benefits to tens of thousands of mentally handicapped recipients finally prompted judicial and congressional sanction.<sup>114</sup> This ensured that the disabled continued to receive benefits.<sup>115</sup> In the mid-1980s, Congress redressed a few of the eligibility restrictions it had imposed in the Aid for Families with Dependent Children and Food Stamp programs after hearing evidence that the harm inflicted was more severe than intended.<sup>116</sup>

Similarly, one desired result of the struggle to expand subsidized housing priority for the homeless is that increasing the number of applicants entitled to preference will make the need for subsidized housing even more visible, with a consequent increase in resources to respond to the need. It is true that homelessness is already the most visible part of the housing crisis. However, many policy-makers and members of the public nonetheless believe that the homeless are without housing because they are somehow not "housing-ready," or they do not want housing.<sup>117</sup> Such detractors from the fundamental claim to housing should be undercut by cold proof of the numbers of applicants found eligible and entitled to priority status for subsidized housing whose needs cannot be met.

In addition, to the extent that housing authorities, legislators, and/or better off applicants on the waiting lists object to the homeless being served "instead of" others, the challenge is to enlist the energy of these potentially more politically influential groups in the struggle to expand the supply of resources. Such

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of tenants facing eviction from the same limited resource. Many legal services programs devote substantial resources to such eviction defense.

114. See *The Macneil/Lehrer Report: Cutting Disability—Is it Fair?* (television broadcast, Feb. 14, 1983) (300,000 persons dropped from disability rolls by 1983).

115. *Id.* (claimants dropped from rolls could continue to collect benefits while they appealed).

116. Congress raised the gross income limitations on eligibility of the working poor for AFDC and extended families were allowed to receive increased Food Stamps. 42 U.S.C. § 602(a)(18) (1988) (amended in 1984).

117. See, e.g., GAO REPORT, HOUSING CONFERENCE: NATIONAL HOUSING POLICY ISSUES 65-66 (1989) (remarks of Dr. James Stimpson, Deputy Assistant Secretary of HUD) (discussing the difficulties in housing homeless single men).

hoped for alliances may require that new resources be targeted to broader eligibility groups than the already homeless. If the resources can truly be expanded more than homeless advocates could accomplish on their own, such an alliance is generally beneficial.<sup>118</sup>

The second major question raised by pursuing strategies to increase access to public and subsidized housing is whether increased centralization and standardization of programs and rules is really going to help low income and homeless applicants over the long-run. Advocacy pressure towards centralization of formerly locally-administered programs and increased specification of eligibility rules and procedures has been a key element of the welfare rights strategy for the last twenty-five years.<sup>119</sup> Some proponents of progressive welfare programs have criticized these strategies for rigidifying welfare decisionmaking.<sup>120</sup> Rules can be as exclusionary as unfettered discretion. However, experience shows that the politically disfavored are generally best off when programs for their benefit are administered at a level more distant from local prejudice, and when decisions must be made in accordance with rules subject to review.<sup>121</sup>

Even if one accepts these general lessons drawn from the social welfare context, there is still a question whether the nature of housing programs requires or suggests a different answer than that in the welfare context. Arguably, the local nature of housing construction programs, with the inevitable issues of zoning, neighborhood mix, and the like, require as much locally-based

118. It was in this spirit that the Massachusetts Coalition for the Homeless supported a proposal put forth by a number of housing advocacy groups and later adopted by EOCD. They proposed that some applicants imminently at-risk of homelessness share top priority with the homeless under new tenant selection regulations for the state-funded rental assistance program and that 10% of the resources go to applicants on the standard list. *See* MASS. REGS. CODE tit. 760, § 44 (1989). Such provisions do create more common ground between advocates for the homeless and tenants' groups. But this effort to make common ground with the housing authorities proved to be useless. Fifteen housing authorities successfully sued to invalidate the preference rules under the governing state statute. *Arlington Hous. Auth. v. Secretary of Communities & Dev.*, 409 Mass. 354, 566 N.E.2d 600 (1991).

119. *See* Sard, *The Role of The Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367 (1988); Hovemann & Demkovich, *Making Some Sense Out of the Welfare "Mess"*, NAT'L J., Jan. 8, 1977, at 44 (discussing efforts to reform the ad hoc federal welfare system).

120. *See, e.g.*, Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198, 1199 (1983) (current welfare practice boils down to three basic themes: "formalization of entitlement," "bureaucratization of administration" and "proletarianization of the work force").

121. *See generally* Sard, *supra* note 119.

support as can be mustered. Accepting this as fact for construction programs, "walk-around" subsidies such as the federal Section 8 program are still essentially income maintenance programs in a housing guise: They are income supplements earmarked for housing needs. Program beneficiaries are dispersed in the community, in whatever private units they can locate. No local support for building additional housing is necessary. Consequently, whatever arguments for local administration of housing construction programs there may be, they do not appear to apply to programs which operate strictly as rent subsidies.<sup>122</sup>

This discussion of the long-term implications of strategies to increase access to existing subsidies and public/subsidized housing is necessarily preliminary. A more thorough analysis of similar strategies used in other social welfare programs would help evolve strategies to reform the administration of housing programs to meet the needs of our most low income citizens. While such inquiry continues and while efforts to increase housing resources go on, advocates should not overlook the substantial promise which the above strategies hold for creating real housing opportunities for homeless clients.

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122. Whether increasing the supply of rent subsidies to be used to pay uncontrolled rents to private landlords (as opposed to the construction, substantial rehabilitation or purchase of publicly or non-profit owned housing) is a good use of public housing dollars represents a serious issue of housing policy though beyond the scope of this article. However, the potentially greater accessibility of these income-maintenance-like housing subsidies to the politically and socially disfavored, such as the homeless and traditional victims of prejudice such as racial and ethnic minorities, is a vital element of such an analysis. For further discussion of this topic, see Sard, Roisman & Hartman, *supra* note 3; Polikoff, *supra* note 87.

