

A Different Type of Housing Crisis: Allocating Costs Fairly and Encouraging Landlord Participation in Section 8

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The Section 8 Housing Choice Voucher Program ("Section 8") is an important effort to make quality housing accessible to low-income families. Although the federal program is voluntary, several states, cities, and local communities have responded to the problem of landlord rejection of Section 8 tenants with laws prohibiting discrimination based on a prospective tenant's source-of-income. Mandatory Section 8 facilitates the program's success but also raises significant equity issues when individual landlords face unusually high burdens as a result of mandated participation. Further, mandatory participation undermines incentives to implement an efficient program because it removes the need to attract voluntary participants. As such, an exception is a necessary and desirable complement to a mandatory Section 8 scheme. An exception could be constructed as a statutory exemption or affirmative defense, or created through a play-or-pay approach. Finally, encouraging rather than coercing landlord participation offers significant advantages in achieving the program's objectives and is an important balance to mandated participation.

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I. INTRODUCTION

The recent financial crisis has spurred calls for reform and greater accountability in housing. Although the present focus may be on sub-prime loans and foreclosures, our country also faces another type of housing crisis: a profound lack of affordable housing. The Section 8 Housing Choice Voucher Program (“Section 8”) addresses this dilemma by distributing government rent subsidies to qualifying families. Although the federal program is voluntary, several states and cities have passed laws prohibiting landlord discrimination against Section 8 recipients. These laws eliminate landlords’ ability to refuse Section 8 vouchers, effectively mandating their Section 8 participation within their jurisdictions. These laws raise the issue of whether compulsion, without exception, is the most equitable and effective way to achieve important social goals.

In the context of affordable housing, compulsion is an equitable and effective way to achieve societal goals. However, the importance of providing affordable housing must be balanced against the fairness issues that mandated Section 8 participation raises. To achieve a balance, this Note proposes a hardship exception for certain landlords as a necessary complement to mandatory Section 8 participation. Second, this Note questions mandatory landlord participation in Section 8 and considers the advantages of relying on incentives.

Part II introduces the Section 8 program, including the program’s goals, structure, and challenges. Part III provides an overview of the laws that prohibit discrimination based on source-of-income, effectively mandating landlord participation in Section 8 by prohibiting them from treating Section 8 recipients differently. Part IV argues that fairness requires some exception to mandated Section 8 participation for landlords facing an undue burden when compelled to accept Section 8 vouchers. Part V contemplates whether the judiciary or legislature is the appropriate body to implement an exception, and poses possible constructions of this exception. Finally, Part VI suggests that efforts to increase landlord participation in Section 8 should focus on incentives rather than coercion. Although an exception to mandatory Section 8 participation cures significant equity issues, a mandate still may not be the best way to increase affordable housing op-

tions. Communities should consider steps to strengthen the appeal of Section 8 to landlords before resorting to compelled participation.

II. INTRODUCTION TO SECTION 8

Even as incomes fail to keep pace with housing costs, there has been a significant decrease in efforts to provide affordable housing.¹ In 2007, approximately 17.9 million U.S. households were “severely” cost-burdened because of housing costs, meaning they paid over half their income just toward housing.² Our country’s most vulnerable members are particularly likely to suffer from the lack of affordable housing; nearly two-thirds of households with a severe cost burden include children, elderly, or disabled individuals.³ Although housing problems have painful implications for those struggling to make ends meet, housing issues impact everyone, with increasing relevance to companies, employers, and the overall economy.⁴ Section 8 operates within this context of great need for affordable housing.

A. THE GOALS OF THE FEDERAL SECTION 8 HOUSING PROGRAM

Section 8 helps low-income families afford decent housing and attempts to de-concentrate poverty and racial segregation.⁵ Sec-

1. Alliance for Healthy Homes, Crisis in Affordable Housing, http://www.afhh.org/comm_ar/comm_ar_crisis.htm (last visited Nov. 12, 2009) (stating that “[t]he affordable housing crisis is most manifest in the gap between household income and housing costs for many Americans”); National Alliance to End Homelessness, Fact Checker: Affordable Housing Shortage, <http://www.endhomelessness.org/content/article/detail/1658> (last visited Nov. 12, 2009).

2. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2009 26 (2009), <http://www.jchs.harvard.edu/publications/markets/son2009/son2009.pdf>.

3. DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, EXECUTIVE SUMMARY: THE EFFECTS OF THE FEDERAL BUDGET SQUEEZE ON LOW INCOME HOUSING (2007), <http://www.cbpp.org/cms/?fa=view&id=1039>.

4. Gary Emmons, *No Place Like Home: America’s Housing Crisis and Its Impact on Business*, HARV. BUS. SCH. BULLETIN (Feb. 2000) (citing F. Barton Harvey, chairman and CEO of the Enterprise Foundation), available at <http://hbswk.hbs.edu/archive/1404.html>.

5. 42 U.S.C. § 1437f(a) (2006); U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF PUB. & INDIAN HOUS., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 2-1 (2001) (“Providing opportunities for very low-income families to obtain rental housing outside areas of poverty or minority concentration is an important goal of the housing choice voucher program.”), <http://www.hud.gov/offices/adm/hudclips/guidebooks/7420.10G/7420g02GUID.pdf>.

tion 8 was first established under the Housing and Community Development Act of 1974, which responded to “unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families.”⁶ The program has dual aims: (1) “aiding low-income families in obtaining a decent place to live,” and (2) “promoting economically mixed housing.”⁷

Section 8 provides significant benefits for its recipients. Living in a neighborhood of concentrated poverty significantly increases the chances of individuals experiencing the adverse outcomes associated with low-income status.⁸ Poor families enjoy educational, social, and economic benefits from being housed within more affluent communities,⁹ possibly because of increased access to high-achieving schools, healthier living environments, and better employment opportunities. The profound impact of a more affluent environment is consistent with findings that “the class position of one’s family is probably the single greatest determinant of future success, quite apart from intelligence and determination.”¹⁰ Section 8 does not require that participants move to higher income communities; it merely provides a financial subsidy that makes such a move more economically feasible. And by facilitating a family’s move to a higher income area, Section 8 allows recipients to enjoy the countless benefits associated with a higher economic class.

Section 8 provides further advantages. Individuals living in areas of concentrated poverty often experience pervasive “environmental racism,” meaning that society attributes negative

6. Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 1437(a)(1)(A) (2006)).

7. § 1437f(a); U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 5, at 2-1.

8. See Jeff R. Crump, *The End of Public Housing as We Know It: Public Housing Policy, Labor Regulation and the US City*, 27 INT’L J. URB. & REGIONAL RES. 179, 181 (2003).

9. James E. Rosenbaum & Susan J. Popkin, *Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs*, in THE URBAN UNDERCLASS 28, (Christopher Jencks & Paul E. Peterson eds., 1991)); U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 5, at 2-1 (“Research from HUD’s moving to opportunity (MTO) demonstration and from the *Gautreaux* desegregation program in Chicago has shown that families with children moving from communities of high-poverty concentration to low-poverty communities tend to perform better in school (e.g., drop out rates are lower, grades are better, college attendance rates are higher). In addition, families report benefiting greatly from reduced crime and greater employment opportunities.”).

10. PAULA S. ROTHENBERG, RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 93–94 (1992).

attributes to individuals from undesirable neighborhoods.¹¹ An employer, for example, may prefer applicants residing in more affluent communities because of assumptions about the types of people that live there. Such stereotypes can become a powerful force that prevents individuals from high poverty areas from obtaining the employment and resources necessary to relocate to a better environment. Therefore, providing funds to facilitate poor families' movement out of public housing complexes allows recipients to avoid the social stigma of living in public housing.¹²

B. THE STRUCTURE OF SECTION 8

The Secretary of Housing and Urban Development (HUD) provides federal funds to local public housing agencies, which, in turn, issue rent subsidies to qualifying Section 8 participants for use in the private market.¹³ To be eligible for Section 8, applicants must qualify as either an extremely low-income family (at or under 50% of the area's median income) or a low-income family (at or below 80% of the area's median income).¹⁴ In addition to meeting income limits, applicants must meet the public housing agency's "family" definition, be able to document citizenship or eligible immigration status, and not have been evicted for drug-related criminal activity within the previous three years.¹⁵

Once applicants are given a voucher, they must find an apartment that is appropriately priced and meets certain quality standards. This process can be challenging, and therefore programs that provide guidance and oversight may help maximize the benefit to participating families.¹⁶ Recipients must locate an

11. Kim Johnson-Spratt, *Housing Discrimination and Source of Income: A Tenant's Losing Battle*, 32 IND. L. REV. 457, 459 (1999) (citing Dr. Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 445 (1994)).

12. Mark A. Malaspina, Note, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 YALE L. & POL'Y REV. 287, 296 (1996).

13. 42 U.S.C. § 1437f(o)(1)(A) (2006); U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 5, at 2-1 (noting that the public housing agency ("PHA") "can improve access [to housing opportunities] through . . . encouragement and support for families in the housing search").

14. § 1437f(o)(4)(A)-(E); U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 5, at 5-2.

15. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 5, at 5-1; 5-3.

16. See Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 158 (1996) (citing James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and*

apartment that is priced between 90% and 110% of the fair market rental for the given area, as HUD calculates at least annually.¹⁷ Furthermore, the rent must be “reasonable in comparison with rents charged for comparable dwelling units in the private, unassisted local market.”¹⁸ In addition to satisfying limits on rent, the apartment must meet HUD’s housing quality standards.¹⁹ No assistance payments may be made until an inspection confirms compliance with these standards.²⁰

C. THE CHALLENGES OF SECTION 8

Section 8 has struggled to achieve its aims in the face of entrenched attitudes and social and economic patterns.²¹ The program has had limited success in increasing affordable housing and decreasing concentrated poverty partially due to factors such as participants’ preference to remain within their low-income neighborhood, lack of units that are appropriately priced and meet the HUD housing quality standards, and disincentives for local public housing authorities to facilitate moves outside their jurisdiction.²² Furthermore, the program is grossly underfunded.²³

Social Integration for Low-Income Blacks?, 71 N.C. L. REV. 1519, 1522 (1993) (describing Chicago’s *Gautreaux* program)).

17. § 1437f(o)(1)(B); U.S. DEPT OF HOUS. & URBAN DEV., *supra* note 5, at 7-2. A PHA may set payments at amounts higher or lower than 90–110% of the fair market rate with HUD approval. § 1437f(o)(1)(D).

18. § 1437f(o)(10)(A).

19. § 1437f(o)(8)(B); U.S. DEPT OF HOUS. & URBAN DEV., *supra* note 5, at 10-1 to 10-14 (listing quality standards such as performance requirements and acceptability criteria (sanitary facilities, food preparation and refuse disposal, space and security, thermal environment, illumination and electricity), as well as structure and materials (interior air quality, water supply, lead-based paint, access, site and neighborhood, sanitary condition, and smoke detectors)).

20. § 1437f(o)(8)(A).

21. Lisa M. Krzewinski, Book Note, *Section 8’s Failure to Integrate: The Interaction of Class-Based and Racial Discrimination*, 21 B.C. THIRD WORLD L.J. 315, 317 (2001) (reviewing STEPHEN GRANT MEYER, *AS LONG AS THEY DON’T MOVE IN NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* (2000)) (suggesting that Section 8’s failure to tackle issues of dual discrimination — based on race and class — has limited the program’s success).

22. Beck, *supra* note 16, at 159.

23. Laura Bacon, Note, *Godinez v. Sullivan-Lackey: Creating a Meaningful Choice for Housing Choice Voucher Holders*, 55 DEPAUL L. REV. 1273, 1273 (2006); RICE & SARD, *supra* note 3.

Beyond these practical constraints, discrimination against Section 8 participants is also a serious obstacle to achieving the program's aims.²⁴ As the House of Representatives noted, "[r]egardless of their eventual success or failure in finding housing, most recipients experience discrimination from at least one landlord because of their Section 8 status."²⁵ Section 8 does not require landlords to participate in the program; landlords can decline participation for any reason, thus allowing the decisions of individual landlords to shape the availability of housing opportunities.²⁶

Discrimination against Section 8 recipients is particularly problematic because the most appealing communities, which are likely to provide the greatest benefit to low-income residents, are often the communities in which Section 8 participants are most likely to face discrimination.²⁷ Many Section 8 participants struggle to find an apartment to rent because landlords from middle- and upper-class communities refuse to accept Section 8 vouchers.²⁸ Apartments in areas with high-achieving schools, a safe environment, job opportunities, and comprehensive social services are in high demand. These landlords have the least incentive to participate in Section 8 since they can easily fill their buildings with tenants that do not require rent assistance.

There are many reasons that a landlord might reject a Section 8 tenant. Valid reasons include behavioral patterns related to preserving the property's value and ability to pay. For example, a tenant that has previously been destructive to rental property could legally be rejected based on that conduct.²⁹ Reasons rationally linked to ensuring payment of rent suggest a valid, nondiscriminatory business judgment.³⁰ Landlords might also reject a

24. Beck, *supra* note 16, at 159.

25. *Id.* at 161–62.

26. *Id.* at 155–56.

27. *Id.* at 160–61.

28. Bacon, *supra* note 23, at 1273.

29. CONN. GEN. STAT. § 46a-64(a) to (c) (2009) (prohibiting lawful source-of-income discrimination, but exempting refusal to rent to a Section 8 participant based on “insufficient income”); Christopher P. McCormack, Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 583–84 (1986).

30. McCormack, *supra* note 29, at 583–84.

Section 8 tenant to avoid the requirements of the Section 8 program and the attendant bureaucracy.³¹

However, negative stereotypes regarding individuals receiving government assistance often motivate landlords' rejection of Section 8 recipients.³² In particular, landlords fear that renting to poor families would cause overcrowding, illegal activity, and damage to the unit.³³ Aside from low-income status, the stigma attached to accepting government assistance may also motivate landlord discrimination.³⁴ Moreover, landlords could avoid Section 8 participation to discriminate based on race, gender, family status, or other protected characteristics correlated with Section 8 participation.³⁵

III. MANDATED LANDLORD PARTICIPATION IN SECTION 8

Although the federal government does not mandate landlord participation in Section 8, several state and local governments have responded to landlord discrimination by mandating landlord participation within their jurisdiction. Unsurprisingly, these laws have faced judicial challenge, pushing courts to decide whether there should be any exception to mandatory participation, and whether such laws are permissible at all.

A. SOURCE-OF-INCOME ANTI-DISCRIMINATION LEGISLATION

There must be some protection for Section 8 recipients given the program's important objectives. The federal government has taken a few limited steps. For example, Section 1437f(t) of the Housing and Community Development Act of 1987 prohibited landlords participating in Section 8 from discriminating against Section 8 renters.³⁶ This provision was criticized because burdening rentals with an antidiscrimination provision created a disin-

31. See, e.g., *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302–03 (2d Cir. 1998).

32. *Johnson-Spratt*, *supra* note 11, at 460.

33. *Id.*

34. *Beck*, *supra* note 16, at 162.

35. *Id.* at 155; *Johnson-Spratt*, *supra* note 11, at 466; *Malaspina*, *supra* note 12, at 313.

36. 42 U.S.C. § 1437f(t)(1)(a) (1987), *repealed by* Veterans Affairs and HUD Appropriations Act, Pub. L. 105-276 (1998).

centive for landlords to participate in Section 8.³⁷ It has since been repealed.³⁸ Still, landlords can receive a tax credit for providing low-income housing when they agree to rent to Section 8 participants who are otherwise qualified tenants.³⁹ Further, recipients of government assistance are protected against discrimination regarding their credit applications under the Equal Credit Opportunity Act of 1974.⁴⁰ However, Congress has not extended unqualified discrimination protection to Section 8 holders, despite arguments supporting such a provision.⁴¹

Several state and local governments have offered greater protections to recipients of government assistance by passing laws prohibiting discrimination against individuals based on their source of income. Such legislation ranges from explicitly including⁴² or excluding⁴³ Section 8 from source-of-income protection to more ambiguous statutes.⁴⁴

37. Beck, *supra* note 16, at 167.

38. § 1437f(t)(1)(a).

39. 26 U.S.C. § 42 (2006).

40. Pub. L. No. 90-321, 88 Stat. 1521 (codified as amended at 15 U.S.C. § 1691(a)(2) (2006)) (“It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . because all or part of the applicant’s income derives from any public assistance program . . .”).

41. Beck, *supra* note 16, at 171 (arguing that federal legislation would be more consistent and ultimately effective).

42. City ordinances providing explicit protection against discrimination based on Section 8 participation include: CORTE MADERA, CAL., MUN. CODE §§ 5.30.020–.040 (2009); S. F, CAL., POLICE CODE art. 33, § 3304(a) (2009); and WOODLAND, CAL., CODE § 6A-4-60(c)(1)(C) (2009). County ordinances providing explicit protection against discrimination based on Section 8 participation include: HOWARD COUNTY, MD., CODE Title 12, subtitle 2, §§ 12.200–218 (2009); and KING COUNTY, WASH., CODE § 12.20.040(A) (2009). State statutes providing explicit protection against discrimination based on Section 8 participation include: ME. REV. STAT. ANN. tit. 5, § 4582 (2009); and MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 2009).

43. City ordinances explicitly excluding Section 8 holders from source-of-income protections include IOWA CITY, IOWA, CODE tit. 2, §§ 2-1-1, 2-5-1 (2009). County ordinances explicitly excluding Section 8 holders from source-of-income protections include: BENTON COUNTY, OR., CODE § 28.020(2)(d) (1998); and COOK COUNTY, ILL., CODE § 42-37(b)(3) (2009). State statutes explicitly excluding Section 8 holders from source-of-income protections include OR. REV. STAT. § 659A.421(1)(d) (2009).

44. City ordinances that do not explicitly address discrimination based on Section 8 participation include: BOROUGH OF STATE COLLEGE, PA, CODE, ch. 5, pt. E, §§ 501-02 (2009); WEST SENECA, N.Y., CODE § 71-3 (2008); and CHL., ILL., CODE § 5-8-020 (2009). County ordinances that do not explicitly address discrimination based on Section 8 participation include: MONTGOMERY COUNTY, MD., CODE §§ 27-12, 27-11(b)-(g) (2009); and MULTNOMAH COUNTY, OR., CODE §§ 15.340, 15.342 (2009). State statutes that do not explicitly address discrimination based on Section 8 participation include N.D. CENT. CODE § 14-02.5-02 (2008).

Source-of-income protections have been challenged on the grounds that Section 8 is a voluntary program and these statutes effectively mandate participation, and that federal statute preempts and renders them void under the Supremacy Clause.⁴⁵ Although there is no express language in the statute indicating that the program is voluntary, it specifies that under Section 8 “the selection of tenants shall be the function of the owner.”⁴⁶ Several courts have interpreted this language to mean that participation in Section 8 is voluntary.⁴⁷ Despite challenges, judicial treatment of source-of-income protections has generally been favorable, as courts have found that federal law does not preempt such statutes.⁴⁸

B. JUDICIAL TREATMENT OF A DEFENSE OR EXCEPTION TO MANDATED PARTICIPATION

Source-of-income-protection statutes raise the issue of whether mandated Section 8 participation could ever be too burdensome for individual landlords, such that they must equitably (and maybe constitutionally) be exempted from participation. Judicial treatment of this issue has not been sympathetic to landlords, as “[m]ost of the courts that have addressed an administrative burden defense have rejected it.”⁴⁹ Nevertheless, courts have varied

45. U.S. CONST. art. VI, cl. 2; *see Cruz Mgmt. Co. v. Wideman*, 633 N.E.2d 384, 389 (Mass. 1994); *see also Att’y Gen. v. Brown*, 511 N.E.2d 1103, 1105 (Mass. 1987).

46. 42 U.S.C. § 1437f(d)(1)(A) (2006).

47. *See Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 296 (2d Cir. 1998) (“Participation by landlords is voluntary; they lawfully may refuse to accept applications from Section 8 beneficiaries.”); *see also Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1282 (7th Cir. 1995) (noting that Section 8 is a “voluntary federal program”).

48. *See, e.g., Comm’n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 245 (Conn. 1999); *Brown*, 511 N.E.2d at 1106–07 (“It does not follow that, merely because Congress provided for voluntary participation, the States are precluded from mandating participation absent some valid nondiscriminatory reason for not participating. The Federal statute merely creates the scheme and sets out the guidelines for the funding and implementation of the program by the United States Secretary of Housing and Urban Development (HUD) through local housing authorities. It does not preclude State regulation.”); *Montgomery County v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr.*, 936 A.2d 325, 338 (Md. 2007); *Franklin Tower One, L.L.C. v. New Mexico*, 725 A.2d 1104, 1108 (N.J. 1999) (noting that that federal courts have generally allowed states to impose greater restrictions on top of federal laws, and that the federal legislation establishing Section 8 “explicitly contemplate[d] that the states will work with the federal government to implement the . . . program”).

49. *Glenmont Hills Assocs.*, 936 A.2d at 340.

in their approach to whether such a defense is ever appropriate under source-of-income statutes.

Some courts have completely rejected the possibility of an administrative burden defense. For example, the Connecticut Supreme Court considered a case where a landlord refused to accept Section 8 vouchers despite a state statute⁵⁰ prohibiting landlords from discriminating against prospective tenants because of their lawful source-of-income.⁵¹ The landlord defended nonparticipation in Section 8 based on objections to various HUD-mandated lease terms. The court rejected this defense, finding that it “should not read into a remedial statute an unstated exception that would undermine the legislature’s manifest intent to afford low income families access to the rental housing market.”⁵²

The New Jersey Supreme Court came to a similar conclusion regarding the availability of an administrative burden defense.⁵³ In *Franklin Tower One*, the landlord resisted Section 8 participation despite a New Jersey statute that prohibited landlords from refusing to rent or lease a house or apartment based on source of lawful income.⁵⁴ The landlord did not want to participate because of the “bureaucracy” associated with the program.⁵⁵ The court concluded that allowing hardship defense would be inappropriate because “[t]o permit a landlord to decline participation in the Section 8 program in order to avoid the ‘bureaucracy’ of the program would create the risk that ‘[i]f all landlords . . . did not want to ‘fill out the forms’ then there would be no Section 8 housing available.”⁵⁶ Connecticut and New Jersey have both unequivocally resisted the administrative burden defense.

Maryland has accepted the possibility of a valid hardship defense, but stipulated that the burden imposed on the landlord would need to satisfy an extraordinarily high constitutional threshold.⁵⁷ The Maryland Court of Appeals found that the defense

50. CONN. GEN. STAT. §§ 46a-64c (2009).

51. *Comm’n on Human Rights & Opportunities*, 739 A.2d 238.

52. *Id.* at 250.

53. *Franklin Tower One, L.L.C. v. New Mexico*, 725 A.2d 1104, 1114 (N.J. 1999).

54. *Id.* at 1106–07.

55. *Id.* at 1107.

56. *Id.* at 1114 (quoting *Templeton Arms v. Feins*, 531 A.2d 361, 365 (N.J. Super. Ct. App. Div. 1987)).

57. *Montgomery County v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr.*, 936 A.2d 325, 341–42 (Md. 2007).

would only be available to a landlord in the case of “a burden so severe as to constitute a taking of its property or the violation of due process.”⁵⁸ Thus, the court conceded that the burden imposed by a county statute prohibiting discrimination against Section 8 recipients should be limited. However, it established that landlords must satisfy a demanding test before their nonparticipation could be excused.

Finally, an Illinois appellate court and the Massachusetts Supreme Court have been receptive to a hardship defense, reasoning that there should be a distinction between an objection to Section 8 tenants themselves and an objection to the financial and administrative burdens associated with the Section 8 program.⁵⁹ The Illinois appellate court reviewed a decision of the City of Chicago Commission on Human Relations (“City of Chicago Commission” or “Commission”) that noted that a landlord could defend nonparticipation in Section 8 by demonstrating that his objection is to the financial burden rather than to Section 8 itself.⁶⁰ The Commission’s test stated that the landlord must show Section 8 imposed more than a *de minimis* burden.⁶¹ Although the Commission and the Illinois appellate court found that the landlord had not demonstrated such a burden, the case indicates that more than trivial burden can excuse nonparticipation under the City of Chicago statute.

The Massachusetts court also found that the state’s anti-discrimination law allows for an administrative burden defense, vacating a grant of summary judgment because there were issues of material fact relating to this defense.⁶² However, this case also raised the issue of legislative resistance. In response to the case, the Massachusetts legislature passed a law specifically prohibiting an administrative burden defense.⁶³

58. *Id.* at 341 (“Short of that . . . the kind of administrative burden generally posited by landlords is not a viable defense because it does not reach that Constitutional threshold.”).

59. *Godinez v. Sullivan-Lackey*, 815 N.E.2d 822, 827 (Ill. App. Ct. 2004); *Att’y Gen. v. Brown*, 511 N.E.2d 1103, 1109–10 (Mass. 1987).

60. *Godinez*, 815 N.E.2d at 827.

61. *Id.*

62. *Brown*, 511 N.E.2d at 1109–10.

63. MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 2009).

IV. FAIRNESS REQUIRES AN EXCEPTION TO MANDATED SECTION 8 PARTICIPATION

As the above mentioned cases demonstrate, low-income housing jurisprudence has hardly embraced an exception to mandated participation. However, the cases primarily considered whether an exception could be derived from statutory law, not whether such an exception would be desirable. Additionally, although there have been some decisions suggesting opposition to an exception, there are also cases suggesting receptivity to an exception when there are adequately compelling landlord burdens.

A hardship defense is inappropriate when landlord objections to Section 8 go no deeper than minor bureaucratic inconveniences. However, consider a hypothetical landlord who would experience an unusually significant burden because of mandated participation in Section 8. The hypothetical landlord, Mrs. Smith, is an elderly woman who recently inherited a small home. Mrs. Smith already has her own home and therefore does not desire to live in the inherited house. She does not own any property other than her home and the inherited house. Further, Mrs. Smith does not want to sell the inherited home at this time because of unfavorable conditions in the housing market. However, Mrs. Smith is retired and has only minimal savings, using social security payments to cover most of her living expenses. Faced with increasing financial demands, Mrs. Smith decides to rent out the inherited house to generate some additional income.

Mrs. Smith soon receives a response to her ad in the local paper from a Section 8 recipient. Although Mrs. Smith is unfamiliar with the program, she is a recipient of some government aid herself and is happy to accept Section 8 vouchers so that the prospective tenant can afford the rent. Mrs. Smith offers the prospective tenant the house, turns away further inquiries, and removes her ad from the paper. She is eager to have the tenant move in as soon as possible, as she is struggling to cover her day-to-day living expenses.

Although Mrs. Smith and the tenant complete the required paperwork promptly, the local public housing agency is overburdened. Several months pass before the requisite inspection is conducted, causing Mrs. Smith financial problems. Mrs. Smith wants to honor her commitment to the tenant, but she is fru-

strated because the housing agency's delay was much longer than the time it would have taken for a non-Section 8 tenant moved in.

The public housing agency eventually conducts the initial inspection and approves the house, so the tenant happily moves in. However, the public housing agency is frequently late in paying the subsidized portion of the rent, causing Mrs. Smith further financial problems. Mrs. Smith becomes increasingly frustrated with her attempts to resolve the situation with the public housing agency as her calls are often left unreturned. Mrs. Smith eventually decides that Section 8's financial and practical stresses are more than she can handle. She sadly informs her current tenant that she will no longer accept the vouchers and begins to seek a new tenant that can afford the rent without federal assistance.

Section 8 was a substantial burden to Mrs. Smith and even though the aims of Section 8 are extremely important, they cannot be accomplished at such a significant burden to one individual. Several factors compel the conclusion that there should be some exception to accommodate Mrs. Smith's particular circumstances. First, she is a blameless actor: she harbors no ill will toward Section 8 recipients and has incurred considerable expense and inconvenience in a good-faith effort to accommodate her tenant and participate in the program. The fact that she has acted blamelessly means a hardship defense to encompass her situation is equitable and politically viable. Further, Mrs. Smith's financial situation makes participation in Section 8 a prohibitively high economic and administrative burden. Arguably, landlords that are so financially vulnerable that they cannot withstand routine complications should not be landlords. However, if Mrs. Smith can demonstrate that she can withstand the typical demands of renting and is only unable to incur excess costs of the Section 8 program, she is entitled to relief.

Under these circumstances, an exception is equitably appropriate. Without an exception, there would be an unfair redistribution of the costs of Section 8 because individual landlords would be forced to bear the additional expenses caused by inefficient public housing agencies.⁶⁴ Admittedly, laws such as minimum wage, rent-control ordinances, and safety laws involve wealth redistribution where private individuals bear the cost of

64. Beck, *supra* note 16, at 186.

public policy that benefits other segments of the population.⁶⁵ Additionally, landowners may be better able to shoulder these costs than Section 8 recipients.⁶⁶ However, at some point, this burden becomes too high for society to reasonably expect an individual to absorb. Our government frequently recognizes that individuals cannot be asked to bear an unreasonable burden for the general good. The government cannot take private property for public use without just compensation,⁶⁷ there is an undue hardship defense in reasonable accommodation cases under the Americans with Disabilities Act,⁶⁸ and there is a business necessity defense in Title VII disparate impact employment cases.⁶⁹ Similarly, there should be a defense or exemption that recognizes that Section 8 participation might impose an unacceptably high burden on a given landlord.

Further, Mrs. Smith's situation is the exception rather than the rule. Allowing her and those similarly situated to decline participation would not have an overly detrimental impact on the availability of housing for Section 8 recipients. But any defense or exception must be defined narrowly to avoid swallowing the program.⁷⁰ The New Jersey Supreme Court expressed its fear of such a result, arguing that "[t]o permit a landlord to decline participation in the Section 8 program in order to avoid the 'bureaucracy' of the program would create the risk that [i]f all landlords . . . did not want to 'fill out the forms' then there would be no Section 8 housing available."⁷¹ Despite these concerns, however, the successful use of similar defenses in analogous legal contexts⁷² attests to the feasibility of a narrow exception co-existing with an effective anti-discrimination regime.

Additionally, the changes made by the Quality Housing and Work Responsibility Act ("QHWRA") to the Section 8 program

65. *Id.* at 182.

66. *Id.* at 186.

67. U.S. CONST. amend. V.

68. Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112(b)(5)(A) (2006).

69. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006).

70. Bacon, *supra* note 23, at 1302 (noting that the *Godinez* administrative burden exception "has the potential, if applied incorrectly, to swallow the protection of the ordinance").

71. *Franklin Tower One, L.L.C. v. New Mexico*, 725 A.2d 1104, 1114 (N.J. 1999) (internal quotation marks omitted).

72. *See, e.g.*, § 12112(b)(5)(A); § 2000e-2(k)(1)(A)(ii).

have reduced the need for a defense by removing some of the aspects of Section 8 that were most problematic for landlords. These changes suggest that an exception will only be necessary under unusual circumstances. Prior to the reforms, landlords frequently defended nonparticipation by pointing to “onerous or unacceptable conditions attached to the Federal program.”⁷³ In response, “[s]ome of the objections raised in earlier cases were recognized by Congress and eliminated from the program” including the “endless lease” and the “take-one, take-all” provisions.⁷⁴

An exception is desirable because it would preserve incentives that promote administrative efficiency, accountability, and legislative reform of the particularly burdensome aspects of the program. When landlord participation in Section 8 is voluntary, the onus is on the government to design and operate an efficient and attractive program. If the government fails to do so, landlords will not elect to participate. Conversely, mandated Section 8 participation removes that disincentive because the government can secure the same number of housing units regardless of program design or housing authority performance.

For these reasons, the case of Mrs. Smith illustrates that uniformly denying landlords the ability to decline Section 8 participation is inequitable and undesirable. An exception is an important and necessary aspect of Section 8 jurisprudence.

V. POSSIBLE CONSTRUCTIONS OF AN EXCEPTION

Having established that there are strong equitable and practical arguments supporting an exception to mandated Section 8, the next consideration is whether courts could read an exception into current source-of-income laws, or whether an exception would require legislative amendment. Additionally, the advantages and disadvantages of different constructions of an exception must be contemplated. Possibilities include a statutory exemption for some landlords, an affirmative defense, or both.

73. *Montgomery County v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr.*, 936 A.2d 325, 339 (Md. 2007).

74. *Id.* at 339 & n.10 (noting that Congress repealed the endless lease and take-one, take-all provisions to “remove disincentives for owner participation and to expand the number of housing choices available to Section 8 families”).

A. JUDICIAL RECOGNITION V. LEGISLATIVE AMENDMENT

There are two routes through which such a defense or exception could be established. First, courts could read an implicit exception into the source-of-income statutes. Second, legislatures could amend these statutes to explicitly provide an exception. As previously discussed, several courts and administrative bodies have been receptive to finding an implicit exception in source-of-income statutes. In Maryland, a hearing examiner found that “there might be some set of requirements that would be so onerous as to constitute an undue interference with a landlord’s property rights.”⁷⁵ On appeal, the circuit court reversed, finding that the landlord’s decision to avoid Section 8 participation was not due to discrimination against Section 8 recipients but to a genuine desire to avoid the “administrative hassle of the program.”⁷⁶ The court of appeals also supported the idea of a limited exemption for landlords facing significant loss due to the program.⁷⁷ Further, Massachusetts and Illinois explicitly noted the availability of an administrative burden defense.⁷⁸

Despite finding some case law support, it is inappropriate for courts to read an exception into source-of-income laws. Courts that read an exception into source-of-income laws assume that they are intended to target discrimination based on Section 8 status when the landlord’s objection is centered on animus or negative stereotypes of individuals who receive Section 8 funds; however, these courts are also assuming that source-of-income laws are not intended to prohibit discrimination when the landlord’s motivation is financial or practical burdens associated with participating in the program.

For example, the City of Chicago Commission utilized a test to determine whether the landlord’s participation in Section 8 would impose more than a *de minimis* burden.⁷⁹ This test was intended to “avoid discrimination complaints when the landlord is object-

75. *Glenmont Hills Assocs.*, 936 A.2d at 340.

76. *Id.* at 333.

77. *Id.* at 341.

78. *Godinez v. Sullivan-Lackey*, 815 N.E.2d 822, 828 (Ill. App. Ct. 2004); *Att’y Gen. v. Brown*, 511 N.E.2d 1103, 1108 (Mass. 1987).

79. *Godinez*, 815 N.E.2d at 827.

ing to a financial burden,⁸⁰ implying that a landlord's rejection is not "discrimination" if motivated by financial concerns. Under this approach to source-of-income laws, a landlord does not violate a source-of-income statute if he is truly objecting to the tenant's Section 8 status because of program burdens. Therefore, this test attempts to expose whether the landlord's proffered "legitimate, non-discriminatory basis for rejecting the tenant" (i.e., the desire to avoid financial or administrative costs) is genuine or merely pretext for animus toward Section 8 recipients.

However, neither the language of source-of-income statutes nor the overriding purpose of such legislation supports this judicially-created distinction. Source-of-income protections do not explicitly target "bad faith" discriminators, but rather prohibit landlords from rejecting any tenants based on their Section 8 status. Legislators could have authorized landlords to refuse a tenant due to Section 8 burdens; their failure to act should establish that discrimination based on the program's inconveniences is not treated differently the bad-faith discrimination. In other words, the absence of an explicit distinction between bad-faith and financially motivated discriminators makes the defense unavailable without legislative action.

Judicial creation of such a distinction would be inconsistent with the legislation's purpose. These laws aim to increase the housing opportunities available to voucher recipients and thus facilitate Section 8's objectives. This purpose strongly suggests that legislatures did not intend to distinguish between different reasons for discriminating based on Section 8 status. Whether landlords reject a recipient because they think they are lazy and untrustworthy, or because they cannot afford the financial implications of participating in Section 8, it produces the same result: fewer housing options for Section 8 participants.

Further, one legislature has explicitly rejected an implicit distinction between tenants refusing a Section 8 participant because of Section 8 participation itself and because of the burdens associated with the Section 8 program. The Massachusetts legislature responded to *Brown*, which read an administrative burden defense into the state's anti-discrimination law, by amending the

80. *Id.*

law to explicitly prohibit such a defense.⁸¹ Given the purpose of source-of-income protections, it is inappropriate for courts to develop a defense based on a distinction pointedly absent from the legislation's language. Additionally, employing a distinction between bad-faith discriminators and those motivated by financial concerns would be a significant departure from discrimination jurisprudence regarding race, sex, and other protected groups, which does not require bad faith.⁸²

Creating an exception is outside the judiciary's authority given the language and purpose of such statutes. Legislatures, however, are well positioned to incorporate protection for severely burdened landlords into existing laws. The New Jersey Supreme Court agrees; having acknowledged the concern that mandatory Section 8 participation could be more of a burden for owners of smaller rental buildings as compared to owners of large apartment buildings, the court indicated that the legislature would be the appropriate forum to "reconsider the scope of the statute's application."⁸³

B. SMALL-APARTMENT OWNER EXEMPTION TO MANDATED SECTION 8

One possibility is to create specific exemptions for groups of landlords most likely to face an unreasonable burden. One city has already adopted this approach. In March 2008, the New York City Human Rights Law was amended to prohibit housing discrimination based on lawful source-of-income, including rent subsidies.⁸⁴ Owners of buildings with five or fewer rental units

81. MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 2009).

82. *See, e.g., Ricci v. DeStefano*, 129 S. Ct. 2658, 2676 (2009) ("Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of 'practices that are fair in form, but discriminatory in operation.'" (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971))).

83. *Franklin Tower One, L.L.C. v. New Mexico*, 725 A.2d 1104, 1114 (N.J. 1999) ("[W]e anticipate that the impact of our decision will not impose significantly greater burdens on owners of small buildings than on owners of larger ones. Nothing in the record before us suggests that compliance with the requirements of the Section 8 program is more onerous for the owner of a three-family house than for the owner of a large apartment building. . . . Moreover, if we have misperceived the effect of the application of N.J.S.A. 2A:42-100 to owners of smaller rental housing units, the Legislature is free to reconsider the scope of the statute's application." (citations omitted)).

84. N.Y. CITY ADMIN. CODE § 8-107(5)(a) (2009).

are exempted from this prohibition.⁸⁵ However, if an owner has at least one building with six or more units in New York City, then the anti-discrimination provision covers all of the owner's buildings.⁸⁶

This New York City law therefore exempts owners whose income is derived from relatively few rental units. These owners are particularly likely to experience a high burden due to mandated Section 8 participation. With fewer units, having one Section 8 tenant could cut into a larger percentage of the owner's profits. The owner is likely to have a smaller total income, making even the same amount of lost income a more serious burden. Mrs. Smith is an example of a landlord that Section 8 participation particularly burdens but would be automatically exempted under a small landlord provision such as the one in New York City.

C. AFFIRMATIVE DEFENSE TO MANDATED SECTION 8

Alternatively, legislatures could create an administrative burden defense where parties could show that their rejection of a Section 8 recipient was due to objections to the program's costs and inconveniences rather than bad-faith discrimination. However, as previously discussed, such a defense runs counter to the purpose of the source-of-income statutes and would be dangerously broad, since any landlord could assert a desire to avoid government bureaucracy.

A more appropriate defense would specify the level of burden that a party would have to show to defend against a discrimination claim. The City of Chicago Commission proposed a standard where the party would have to show that the Section 8 program resulted in more than a *de minimis* burden.⁸⁷ Other possibilities include a "substantial financial burden" or "unreasonable burden" standard. Legislatures could choose a standard that is sensitive to local housing conditions by considering level of need for Section 8 housing in their jurisdiction.

85. § 8-107(5)(o).

86. § 8-107(5)(o)(ii).

87. *Godinez v. Sullivan-Lackey*, 815 N.E.2d 822, 827 (Ill. App. Ct. 2004).

Under a statutory defense approach, a court would excuse Mrs. Smith's nonparticipation if she experienced a burden severe enough to meet the legislatively-set standard. Relevant factors for judicial consideration may include her ownership of only one rental unit, her advanced age, her good-faith efforts to comply with the program, and the poor performance of the public housing agency. All of these factors make the program unusually burdensome for Mrs. Smith, militating against mandated participation.

The Fourth Circuit has offered a possible legal framework for applying a statutory defense. In *Peyton v. Reynolds Associates*, the court considered whether a landlord already participating in Section 8 violated a federal provision that prohibited currently participating landlords from discriminating based on Section 8 status (this provision has since been repealed).⁸⁸ The landlord objected to several program requirements — specifically, that leases with Section 8 tenants must be for at least a year and units must meet federal quality standards.⁸⁹ The court employed a three-step, burden-shifting analysis borrowed from employment discrimination law.⁹⁰ First, the plaintiff must make a prima facie case of discrimination, which is accomplished by showing that he was denied housing on the basis of prohibited discrimination.⁹¹ If the plaintiff makes out a prima facie case, the defendant is then afforded the opportunity to articulate an adequate business necessity for rejecting the tenant.⁹² At this stage, the defendant could be required to show that his reason for rejecting the pros-

88. 955 F.2d 247 (4th Cir. 1992). Although the legal context is somewhat different from the one in which an administrative burden defense would apply, it is functionally similar. In both contexts, a statute would still prohibit discrimination based on Section 8 status, but the applicable statute would be a source-of-income protection on the state or local level rather than an aspect of the federal Section 8 legislation.

89. *Id.* at 249.

90. Adopting this legal analysis is appropriate in housing discrimination jurisprudence. For example, the Title VII discrimination analysis is used in examining discrimination claims under the Fair Housing Act. *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1053 (9th Cir. 2007); *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) (“We apply Title VII discrimination analysis in examining Fair Housing Act (‘FHA’) discrimination claims. Most courts applying the FHA, as amended by the [Fair Housing Amendments], have analogized it to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., which prohibits discrimination in employment.” (quoting *Larkin v. Mich. Dep’t of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996) (alteration in original))).

91. *Peyton*, 955 F.2d at 252.

92. *Id.*

pective tenant was an administrative or financial burden, which reached the statutorily-designated level of severity.

Under the last step in the *Peyton* approach, if the defendant meets this burden, the plaintiff must demonstrate that the defendant's proffered reason is merely pretext: that the landlord's objection was truly to the prospective tenant's Section 8 status and not to the burden associated with the program.⁹³ As previously discussed, a distinction between bad-faith discriminators and those genuinely concerned with the burden of participation is inappropriate given the statutory purpose of increasing public housing, not just deterring undesirable discrimination. Therefore, at this last step, the plaintiff should instead have the opportunity to demonstrate that the defendant's proffered burden does not in fact reach the statutorily-designated level of severity.

D. COMPARISON OF AN EXEMPTION AND A DEFENSE

An automatic exemption and an affirmative defense offer different advantages and disadvantages. A legislative exemption would function as a bright-line rule, producing clarity and minimal transaction costs. Determining whether, for example, a landlord owned a building with more or less than 5 apartments should rarely be complicated or require litigation. However, clarity and low transaction costs must be balanced against the inevitable arbitrariness of a set cut-off.

Alternatively, a statutory defense would be better able to appreciate the inevitable complexity of balancing a social good with an individual burden and the inherently individual process of weighing the costs to a particular landlord in a particular situation. However, a statutory defense would require greater judicial involvement, possibly resulting in inconsistency and unclear expectations.

Legislatures might consider incorporating both a bright-line exemption and a more flexible statutory defense in order to automatically exempt a small group of landlords that are particularly likely to experience a significant burden (such that litigating these cases is not worth the transaction costs), while preserving a more flexible standard for more complex cases.

93. *Id.*

E. PLAY-OR-PAY APPROACH

While an automatic exemption or affirmative defense offers viable possibilities in addressing the equitable issues associated with mandated Section 8 participation, another potential approach merits consideration. Developed in the context of environmental regulations,⁹⁴ a play-or-pay approach is a promising prospect for a more efficient system of providing affordable housing under a “mandatory” model. This approach would allow landlords to be exempt from a mandatory regime if they pay another landlord to participate in their place.

Under a play-or-pay system, the government would designate a required level of Section 8 participation for all landlords. This level could be calculated based on a percentage of the landlord’s total amount of Section 8-eligible housing. The landlord would then have the option of participating in Section 8 at that level, or paying another landlord to fulfill this obligation for him by providing his share of Section 8 housing.

Many individual factors may make the costs of Section 8 participation exceptionally high for some landlords. Landlords operating in districts with an efficient, responsible public housing authority face lower administrative costs. Additionally, landlords that are repeat players in Section 8 or are generally more experienced renters are likely to meet the requirements more efficiently. Finally, landlords with more units are able to benefit from economies of scale by implementing systems for managing the extra administrative costs associated with Section 8 system participation.

Landlords able to participate in Section 8 at a cost below the market rate of selling this obligation are likely to meet not only their own requirements, but also assume other landlords’ shares for a profit. On the other hand, landlords whose costs exceed the market cost of paying another landlord to provide additional Section 8 housing will opt to pay another landlord to take on their Section 8 obligations, assuming that they are able to fill their available units with non-Section 8 tenants.

94. Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 538 (2000).

Under this model, Mrs. Smith is likely to abstain from participation and pay another landlord to meet her obligations because her individual situation makes participation unusually costly for her. She is under the jurisdiction of an inefficient public housing authority, has no experience with Section 8, is a generally inexperienced landlord, and is a small renter with only one property. As such, it is more efficient for her to pay someone else to provide her share of Section 8 housing than to attempt to do so herself.

A play-or-pay system has significant risks, however. First, this approach could concentrate Section 8 housing units rather than disperse them amongst other non-Section 8 renters. Because some landlords are better-positioned to serve Section 8 tenants efficiently, those landlords will have a profit incentive to assume other landlords' obligations. To the extent that these landlords have large, concentrated properties, a play-or-pay system risks concentrating Section 8 tenants in those buildings. Additionally, a play-or-pay system risks allocating the least desirable housing to Section 8 tenants, as landlords with desirable property and thus plenty of potential tenants are less likely to participate in Section 8.

However, these risks can be mitigated with appropriate limits on selling Section 8 obligations. Landlords could be limited on the total amount of additional Section 8 obligations they can acquire from other landlords to prevent concentration of Section 8 tenants. Further, landlords could be required to sell their obligation to other landlords with comparable units within their geographic area, as judged by the market rate of those units. This requirement would ensure that the most desirable housing does not become inaccessible to Section 8 recipients.

A play-or-pay approach addresses the problem of undue burden by providing a market solution for landlords whose costs of participation would be exceptionally high. Additionally, this approach responds to "dissatisfaction with rigid governmental commands," and is consistent with an "unmistakable movement in the direction of more flexible economic instruments, which are likely to be far more efficient."⁹⁵ Although a play-or-pay system may involve greater governmental administration than an automatic exemption or affirmative defense to mandatory participa-

95. *Id.* (referring particularly to environmental regulations).

tion, allowing the market to allocate the responsibility to provide a public good to those best able to do so efficiently merits consideration.

A similar approach has already been successfully applied in another aspect of affordable housing regulation. In the area of mandatory inclusionary zoning, a housing developer must either build a certain percentage of affordable homes within a new development or pay to have affordable homes developed elsewhere.⁹⁶ The success of a play-or-pay system in this context suggests its potential usefulness in a mandatory Section 8 scheme as well.

VI. EFFORTS TO INCREASE LANDLORD PARTICIPATION IN SECTION 8 SHOULD FOCUS ON INCENTIVES RATHER THAN COERCION

The need for a defense or exemption to source-of-income statutes highlights the issue of landlord resistance to Section 8 and raises the question of whether coercion or incentives is the best way to accomplish the program's aims. Some level of legal compulsion is probably necessary to protect Section 8 recipients, and supplementing source-of-income laws with some type of exception (as previously discussed) resolves the most problematic cases of mandatory participation. However, coercion should not be the sole, or even primary, mechanism for accomplishing the program's objectives. Proper incentives can increase Section 8 participation and has several advantages over more coercive methods.

Increasing housing opportunities through source-of-income statutes is a viable tool for improving the success of the program.⁹⁷ However, it is an imperfect approach that is unlikely to be an effective solution on its own. Drawbacks include inconsistent results in enforcing these laws in court⁹⁸ and the high costs of

96. See Brain R. Lerman, Note, *Mandatory Inclusionary Zoning — The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 390 (2006).

97. See, e.g., *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997); *Green v. Sunpointe Assocs., Ltd.*, No. C96-1542C, 1997 WL 1526484 (W.D. Wash. May 12, 1997); *Glover v. Crestwood Lake Section 1 Holding Corps.*, 746 F. Supp. 301 (S.D.N.Y. 1990); Krzewinski, *supra* note 21, at 327.

98. *Johnson-Spratt*, *supra* note 11, at 464 (noting that the case law is “diverse in its results and remedies” and arguing that “tenants cannot rely on a state statute to guide them if they face discrimination based upon their source of income”).

judicial enforcement.⁹⁹ Difficult administrative processes for filing a housing discrimination claim, as well as victims' belief that proving their claim will be unsuccessful, discourage reporting.¹⁰⁰ Further, while source-of-income laws will deter some landlords from discriminating against Section 8 recipients, they will only deter "overt discrimination" in other cases.¹⁰¹ Increasing economic incentives and decreasing costs and inconvenience associated with Section 8 avoids some of the significant disadvantages and limitations of compelling landlord participation. Improvements in the program that make it more economically attractive to landlords are a powerful tool for trying to increase participation.¹⁰²

The Quality Housing and Work Responsibility Act of 1998 ("QHWRA") took important steps in eliminating aspects of the program that functioned as "disincentives for owner participation" in the program.¹⁰³ However, Section 8 can still be improved in ways that would make it more appealing to landlords. In 2004, six years after the QHWRA reforms, the National Apartment Association urged the federal government to take legislative action to preempt state and local laws mandating Section 8 participation, arguing that reforming Section 8 to "make the program more attractive to the marketplace" is the best way to cause the "demand for voucher residents [to] grow and the choice for voucher residents [to] be greater."¹⁰⁴

Several areas of reform should be considered. First, bureaucracy is a frequent cause for complaint that decreases landlord willingness to accept vouchers.¹⁰⁵ Landlord concerns regarding

99. *Id.* at 467.

100. *Id.* at 466–67.

101. Bacon, *supra* note 23, at 1297.

102. See Krzewinski, *supra* note 21, at 326 (suggesting that HUD could simplify the removal of disruptive tenants and eliminate the quality standards and inspections); U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 5, at 2–6 ("The best way to recruit new owners is to operate the housing choice voucher program effectively and treat owners professionally. This includes minimizing the time required to inspect units and to start HAP payments, applying program rules consistently, being timely and predictable in all program processing, maintaining effective and prompt communications with owners . . . and making payments accurately and on time.").

103. *Montgomery County v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr.*, 936 A.2d 325, 339 n.10 (Md. 2007) (noting that the Act eliminated the endless lease and take one, take all provisions).

104. National Apartment Association, NAA Capital Conference: Finance and Housing, Pg. 62 Vol. 28 No. 3 ISSN: 0744-1681, March 1, 2004.

105. *Id.*; Beck, *supra* note 16, at 165.

“red tape” are valid, and government agencies should make procedural efficiency and simplicity a priority.¹⁰⁶ Another disincentive to participation is the requirement that units meet the housing quality standards and submit to yearly inspection.¹⁰⁷ Although some have argued that landlords should not rent units below basic living standards regardless of the Section 8 status of the tenant,¹⁰⁸ others have advocated for the elimination of the housing quality and inspection system of Section 8, which would allow recipients “to make their own determinations regarding housing quality” and increase housing available to Section 8 participants.¹⁰⁹ Delays in the initial inspection¹¹⁰ and payment¹¹¹ also function as an economic disincentive for landlords that should be avoided.

Improvements in the program, especially those aimed at increasing efficiency and responsiveness, are likely to require additional personnel and oversight, therefore increasing the need for government funds. Greater governmental expenditure, however, does not necessarily mean an overall increase in the cost of Section 8. Program inefficiencies already exact a cost that Section 8 recipients and landlords bare. In cases in which Section 8 tenants are more costly than non-Section 8 tenants, anti-discrimination protections shift costs from Section 8 holders (in the form of decreased housing opportunities and increased costs associated with their housing search) to landlords (in the form of increased expense and inconvenience because of the program’s requirements).¹¹² Efforts to decrease the cost and inconvenience

106. National Apartment Association, *supra* note 106. *But see* Johnson-Spratt, *supra* note 11, at 461 (“This administrative concern, however, in no way comes close to the weighing concern of providing affordable housing to needy families.”).

107. National Apartment Association, *supra* note 106 (identifying inspections as one of the “largest impediments to wider participation”); Beck, *supra* note 16, at 165–66.

108. Johnson-Spratt, *supra* note 11, at 461.

109. Malaspina, *supra* note 12, at 304.

110. 42 U.S.C. § 1437f(o)(8)(C) (2006) (specifying that initial inspections should take place within fifteen days of a tenant’s or landlord’s request, although public housing agencies serving more than 1250 families only need to inspect the unit within a “reasonable period”).

111. § 1437f(o)(10)(D) (specifying that public housing agencies are statutorily required to make “timely payments” of rent and may be subject to penalties for late payment). *But see* Johnson-Spratt, *supra* note 11, at 460 (arguing that reliable Section 8 rent payment is an economic advantage for landlords).

112. Beck, *supra* note 16, at 182–83.

to landlords would shift burdens associated with Section 8 toward the government and to the public through taxes.

This shift is not only equitably appropriate, but symbolically beneficial as well. As Justice Scalia recognized, creating redistribution of wealth from a small segment of the population is inequitable; rather all taxpayers should bear the burden.¹¹³ Lack of decent, affordable housing is a public burden, and “public burdens . . . should be borne by the public as a whole.”¹¹⁴

Educational efforts that correct misunderstandings about the program and emphasize the economic benefit to landlords are also an important aspect of increasing housing opportunities for Section 8 recipients. Public Housing Agencies should make active efforts to reach landlords that would provide housing opportunities outside of high poverty and minority concentration.¹¹⁵ Landlords’ resistance to Section 8 can be minimized through educational efforts that dispel concerns about the program based on the former structure of the program.¹¹⁶ Emphasizing economic incentives for participation is another option for increasing landlord participation.¹¹⁷

Mandated participation inherently involves considerable judicial involvement as well as high transaction costs, and funding further limits testing and enforcement. In contrast, stimulating voluntary participation through incentives creates enthusiastic, motivated landlords with significantly less need for policing. Voluntary participation further removes concerns and complaints about the allocation of unfair burdens on individual landlords. Anti-discrimination laws and corresponding penalties are an important aspect of a successful Section 8 program but should be

113. *Pennell v. City of San Jose*, 485 U.S. 1, 21–22 (1988) (Scalia, J., concurring in part and dissenting in part).

114. *Id.* (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

115. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 5, at 2-4 to -6 (specifying that HUD suggests the following techniques PHAs can utilize in this effort: “[p]eriodic seminars or meetings with current and prospective owners explaining and updating the program”; “[o]wner’s newsletters”; “[o]wner’s surveys”; “[o]wner advisory committee”; “[j]oin associations of owners/managers of rental property”; “[s]taff speaker’s bureau”; “[o]wner fairs,” “[p]rogram video”; “[d]irect advertising”; “[p]ositive news stories about the program”; “[d]irect personal contact with owners”; “[r]eferrals of vacant units”; “[p]romise of follow-up”; and “[p]rompt program information for prospective owners”).

116. *See Beck*, *supra* note 16, at 164–66 (noting landlords’ pervasive misconceptions about the program).

117. *See Krzewinski*, *supra* note 21, at 460 (arguing that Section 8 recipients provide economic advantages to landlords because of the reliability of their rent payments).

well-balanced by efforts to attract voluntary landlord participation through incentives and outreach efforts.

VII. CONCLUSION

Adequate housing should be viewed as a basic human right, the violation of which is particularly egregious given our nation's affluence. Developing effective, equitable housing programs requires confronting discrimination and devising a fair allocation of the costs associated with reform. By sharing costs equitably and respecting individual rights as well as other important social priorities, Section 8 can foster goodwill toward the program and its recipients. Furthermore, by favoring encouragement over coercion, the program will decrease the need for monitoring and enforcement and will benefit from landlord enthusiasm and support. Hopefully, the country's current receptiveness to "change" will facilitate greater concern and investment in housing issues, setting the nation on a new path toward greater equity and inclusiveness.