THE ELEPHANT IN THE HEARING ROOM: COLORBLINDNESS IN SECTION 8 VOUCHER TERMINATION HEARINGS

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INTRODUCTION

Before low-income families are "terminated" from the Section 8 voucher program and deprived of the federal housing subsidies that help them pay their rent, there is frequently an "informal" termination hearing. Termination hearings are high stakes situations for low-income families and the households that lose their Section 8 voucher are devastated. Loss of the family's subsidy combined with the lack of affordable housing in most communities means terminated families may become homeless. Moreover, the procedural protections of regular court proceedings are not present and, for practical and structural reasons, appeals are infrequent. Thus, not only can the consequences of voucher deprivation be dire, but also the likelihood of wrongful or erroneous deprivation of rights may be higher than in other situations.

In spite of the stakes involved for poor families, little scholarship has been devoted to understanding what goes on in informal Section 8 Voucher Program termination hearings. Many Voucher Program participants live at the intersection of multiple marginalized identities. The potential for decision-makers to, consciously or subconsciously, wield their considerable discretion to further marginalize or subordinate participants merits exploration. Further, terminations take place in the broader context of the American welfare system and, in the United States, "welfare" is a word associated with highly racialized, gendered, and class-based cultural myths. These myths may interact with other psycho-social mechanisms in the minds of decision-makers to the disadvantage of poor minorities in termination hearings. Indeed, while colorblind norms suggest that "race" is an inappropriate topic of conversation, it in fact lurks in

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the background of termination hearings. It is the elephant in the room that looms large over decisions about whether poor families will be able to pay their rent next month, and thus warrants our attention.

This paper explores some of the social and psychological mechanisms present in Section 8 Voucher Program termination hearings and argues that: a) subconscious cultural and racial bias are present in termination decisions and b) colorblindness prevents system actors with the power to counterbalance such biases from identifying and interrogating cultural assumptions. Because the stereotypes surrounding welfare are class-based, gendered and racialized in ways that specifically target poor Black women, this paper accords special attention to the disproportionate negative impact that these phenomena have on them.

To understand the role and implications of the various socio-psychological phenomena hypothesized and observed, this research employed brief, informal, open-ended interviews with former Section 8 program participants and brief, informal interviews with hearing termination officers. Former Section 8 participants were identified and contacted by a local non-profit organization that they were familiar with and asked if they would like to participate in the study. Section 8 termination hearing officers were contacted directly through local housing authorities.[1]

Part I of this Paper explores the nature and development of the current Section 8 Voucher Program and the evolution of American conceptions of welfare and welfare recipients within the last fifty years. In particular, the latter part of this section analyzes the construction of racialized, gendered, and class-based stereotypes of welfare participants. Part II scrutinizes the role of colorblindness and other socio-psychological phenomena in Section 8 termination hearings and examines the impact that these phenomena have on Section 8 Voucher Program participants and their families. Part III explores the policy implications of the observed phenomena and makes recommendations.

I. BACKGROUND

The Development and Evolution of "Section 8"

This background section will address the development and evolution of the "Section 8" voucher program, detail the procedural protections afforded to program participants and discuss changes in perceptions of welfare benefits and recipients as revealed by American political rhetoric.

In 1937, Congress enacted the United States Housing Act, creating the

1. Both samples were small non-random convenience samples selected in California. All Section 8 participants who were interviewed self-identified as Black. Three Section 8 termination hearing officers participated in the study. Section 8 termination hearing officers were Black, Hispanic, and White.

framework for the U.S. public housing system that emerged from the New Deal Era.[2] The statute was a response to worsening slum housing conditions among the poor and was designed to facilitate the construction of high-quality public units.[3] For the next thirty years, housing policy in the United States focused on providing project-based housing assistance.[4]

However, by the 1960s, public housing "projects" were characterized by high unemployment rates, high crime rates, delinquency, troubled schools, and drug abuse.[5] Critics of project-based housing argued that the private market was a more effective mechanism for providing housing to low-income families.[6] They maintained that low-income families should be given rent certificates that would enable them to obtain housing in the private market. These private units, which were more decentralized than traditional public housing, were thought to avoid concentration of the poor, support social mobility and desegregate communities.[7] In response to these critiques, Congress created the "Section 8 Housing Certificate program" in 1974 which gave participants public assistance to rent privately owned housing.[8] This program gave rise to the nation's current "Housing Choice Voucher Program" ("Voucher Program").

According to the Department of Housing and Urban Development ("HUD"), the Section 8 Voucher Program "pays rental subsidies so eligible families can afford decent, safe and sanitary housing... [and is] generally administered by State or local governmental entities called public housing agencies ("PHAs")."[9]

HUD provides funding for both the housing vouchers and the administration of local PHAs. It also promulgates the regulations governing Voucher Program requirements.[10] The regulations cover broad-reaching substantive policies including determining family eligibility, participant obligations, and PHA denial or termination of assistance.[11] Thus, the Section 8 Voucher Program, and its participants, are governed by a web of state and federal laws and regulations. The local PHAs, usually city or county agencies, implementing the Section 8 voucher program, have more discretion in some areas than in others.

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2. United States Housing Act of 1937, 42 U.S.C. § 1437 (2006).
3. RAYMOND J. STRUYK, MARGERY A. TURNER & MAKIKIO UENO, FUTURE U.S. HOUSING POLICY 58 (1988).
4. DAVID P. VARADY & CAROLE C. WALKER, NEIGHBORHOOD CHOICES: SECTION 8 HOUSING VOUCHERS AND RESIDENTIAL MOBILITY 7 (2007).
5. *Id.*
6. *Id.*
7. *Id.* at 8.
8. *Id.*
9. 24 C.F.R. § 982.1 (2009).
10. *See* 24 C.F.R. § 982.52 (2009).
11. 24 C.F.R. §§ 982.551-555 (2009).

Generally, to qualify for a voucher, a family's income must not exceed fifty percent of the median income for the area where they live.[12] Three-fourths of the vouchers are reserved for families with incomes that are less than thirty percent of the area median.[13] For example, in 2009, the median family income for Los Angeles County, California was $62,100.[14] Thus, most Los Angeles County families participating in the voucher program earned less than $18,630 per year.

Participating families generally pay thirty percent of their income in rent to a private landlord and the PHA pays the remaining amount "needed to rent a moderately-priced dwelling unit in the local housing market."[15] Participants may choose a home with a rental amount above what is considered standard by their local PHA, but they must pay the difference between their subsidy and their actual rent. If a participant moves to a new area, they can generally take their subsidy with them anywhere in the United States where there is a PHA administering the voucher program.[16]

The Section 8 voucher program is important to low-income communities for two primary reasons. First, there is significant lack of affordable housing in poor communities. From 1973 to 1983, 4.5 million units were removed from the national housing market and half of those units served low-income families.[17] During the same period, the United States began to abandon its public housing programs in favor of the Section 8 program. [18] Federal authorizations for housing subsidies declined by ninety percent while the number of single-person households increased dramatically. [19] As the number of affordable housing units fell rapidly, federal welfare programs were cut by $57 billion, and the number of poor families increased exponentially.[20] Today, affordable housing is consistently identified as one of the biggest problems faced by low-income communities.[21] In September 2009, over 93,000 applications were submitted for the 10,000 spots on a waiting list for Oakland, California's public or project-based housing properties.[22] One single mother,

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12. Housing Choice Vouchers Fact Sheet, http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm (last visited Nov. 20, 2009).

13. *Id.*

14. *See* FY 2009 Section 8 Median Family Income Documentation System, http://www.huduser.org/datasets/il/index_il2009_mfi.html (last visited Nov. 20, 2009).

15. Housing Choice Vouchers Fact Sheet, *supra*, note 12.

16. *Id.*

17. JENNIFER WOLCH et al., ENDING HOMELESSNESS IN LOS ANGELES 6 (2007), *available at* http://college.usc.edu/geography/ESPE/documents/WEB_Research.pdf (last visited Nov. 22, 2009).

18. *Id.*

19. *Id.*

20. *Id.* at 7.

21. *See, e.g.*, BARBARA EHRENREICH, NICKEL AND DIMED 12 (2001).

22. Press Release, Oakland Housing Authority, Oakland Housing Authority Receives 93,000 Pre-Applications For Public Housing Wait List (Sept. 18, 2009), *available at* http://www.oakha.org/OhaNews/ohareceives93kwlapp.pdf.

who eventually lost her Section 8 voucher, recalled that she had been lucky because she only spent six months on the program waiting list before she received her Section 8 voucher. Many families wait years on lists before they receive a public housing unit or Section 8 voucher. Thus, vouchers are important to low-income communities because they provide a scarce but needed resource.

The second reason that the Section 8 Voucher Program is important to low-income communities is that vouchers may give low-income families the opportunity to move to neighborhoods with less poverty, less criminal activity and better schools.[23] Some contend that the Section 8 Voucher Program does not always help families move to better neighborhoods, noting that, in many cities, program participants live in the most disadvantaged parts of their community. However, studies of areas like Alameda County, California, suggest that low-income families are frequently able to successfully move to neighborhoods of higher socioeconomic status where they perceive improvements in their neighborhood conditions.[24] Thus, Section 8 vouchers are a unique, valuable and important public benefit for low-income families.

Terminating Section 8 Voucher Subsidies

Because Section 8 vouchers are a scarce and valuable resource for low-income families, losing a Section 8 voucher can be devastating for a participating family. As with the loss of other forms of public assistance, loss of a Section 8 voucher can result in homelessness, food insecurity, and decreased access to appropriate medical care.[25] Since Section 8 subsidies generally make a up a large portion of a participant's rental amount, loss of a subsidy combined with the virtual impossibility of finding affordable housing on short notice is almost certain to lead to homelessness. While terminated participants frequently live with family or friends after their Section 8 voucher is terminated, participants without such support networks may end up living in shelters or on the streets.

In *Goldberg v. Kelly*, the United States Supreme Court recognized welfare benefits as a statutory entitlement for persons qualified to receive them and identified termination of benefits as involving adjudication of important rights by state actors.[26] The Court held that procedural due process applies to termination of welfare benefits and that recipients are entitled to a pre-

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23. *See generally* VARADY ET. AL, *supra* note 3.

24. *Id.* at 109.

25. Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Hearings*, 32 N.Y.U. REV. L & SOC. CHANGE 131, 131 (2007) (noting the consequences of termination of welfare benefits and arguing that, "[w]hile death may be an uncommon outcome, low-income families frequently face hunger, homelessness, disability, or lack of medical care following loss of critical benefits.").

26. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

termination hearing.[27] It also noted that, "the pre-termination hearing need not take the form of a judicial or quasi-judicial trial."[28] Today, welfare recipients whose benefits are subject to termination can challenge the proposed termination in an administrative hearing. The administrative hearing structure is arguably the primary form of social justice for poor people.[29]

Under HUD regulations, a local PHA must provide a family with an "informal" or administrative hearing before it terminates the family's Section 8 assistance.[30] During these hearings, an officer selected by the PHA hears evidence presented by both the agency and the participant and makes a determination regarding whether termination is the appropriate course of action. Informal hearings lack the procedural protections of formal court proceedings.[31] Section 8 hearing termination officers, unlike judges, are generally not legally trained.[32] HUD regulations only require that the person conducting the hearing be neither the person who made or approved the decision under review nor that initial decision-maker's subordinate.[33] Thus, unlike judges—who are assigned to the parties' dispute by an ostensibly neutral actor—Section 8 termination hearing officers are selected by only one of the parties, the local agency. Hearing officers are frequently administrative employees of the local PHA who did not participate in the decision to propose termination, employees of neighboring PHAs, or employees of other local agencies.

In a Section 8 termination hearing, there is potential for erroneous deprivation as the state wields its considerable power and discretion to terminate the rights of a person who is, at least in theory, destitute and facing "brutal need."[34] It is problematic that the actor who is supposed to act as a check on the agency's power is selected by (and often from within) the agency itself. Further, hearing officers are supposed to review the actions of the agency for errors. Even when acting in good faith, it is extremely difficult for hearing officers, who may be agency employees, to neutrally scrutinize the conduct of their co-workers. As noted by United States District Court Judge John L. Kane Jr. in the slightly different context of administrative hearings regarding welfare

27. *Id.* at 264.

28. *Id.* at 266.

29. Brodoff, *supra* note 25, at 132.

30. 24 C.F.R. § 982.555 (2009). *See also* Davis v. Mansfield Metropolitan Housing Authority, 751 F.2d 180 (Ohio Ct. App. 1984).

31. *See generally* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1367-75 (1985) (detailing the elements of formal adjudicative processes that operate to reduce prejudice).

32. According to one hearing officer, most hearing termination officers in northern California are given 1-2 days of formal training that includes some training on the evidentiary rules attendant to the hearings and HUD/agency regulations and procedures.

33. *Id.*

34. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (noting that "[b]y hypothesis, a welfare recipient is destitute, without funds or assets" and facing "brutal need").

benefits, allowing agencies to appoint their own hearing officers is a bit like "...having the fox guard the hen house. Even the most benign fox can be expected to make supper every now and then."[35]

In addition to creating problems of neutrality, the fact that hearing officers are often agency employees may also threaten perceptions of legitimacy. Hearing officers and agency representatives from the same agency may exhibit familiarity and informality with each other that is palpable and perceptible to participants up for termination. This perception of a pre-existing relationship between the purportedly neutral decision-maker and the agency representative may undermine the legitimacy of the hearing in the eyes of the participant.

While "informal hearings" before termination of Section 8 benefits are actually quite "informal" (generally conducted at the local PHA office in a small conference room), they may have far-reaching legal and practical implications. Evidence is presented, witnesses are examined and cross-examined, and laws and regulations are interpreted and applied to the facts of the participant's case. Furthermore, some objections not raised in an initial hearing may be waived on appeal.

Some of the dangers inherent to informal hearings are analogous to the dangers faced by *pro se* litigants. Participants are tasked with presenting their "case" to a hearing officer. In addition to the traditional barriers to understanding statutes, federal regulations, and procedural rules, Section 8 recipients may have lower education levels, limited English proficiency, or mental disabilities that make it more difficult for them to navigate a hearing and effectively explain their case. Indeed, many of the characteristics that make a participant especially qualified for a Section 8 voucher are the very characteristics that will make it exceptionally difficult for them to effectively present their "case" in an informal hearing. Further, almost all Section 8 participants, by virtue or their qualification for the program, will be financially unable to retain an attorney to represent them in their hearing.

Free legal service organizations are generally the primary providers of legal representation in Section 8 termination hearings but these organizations have limited resources. Further, some areas do not have any free legal service providers. In the case of one study participant, a local legal service provider told her that she had "a good case" but they were unable to assist her because she was outside of their geographic coverage area. She attempted to retain another attorney but there was no free legal assistance provided in her city. Eventually, the participant found an attorney several hours away from her home that agreed to assist her for a fee, but she decided not to travel to meet with him. She represented herself in her hearing and, unfortunately, lost her case. Thus, even participants who diligently seek representation in their Section 8 hearing may be unable to retain an attorney for a number of reasons.

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35. Brodoff, *supra* note 25, at 158.

The right to appeal a termination is relatively limited. In many areas, the initial appeal goes to the Executive Director of the terminating PHA. Appeals from the final decision of the PHA Executive Director typically involve filing an administrative writ against the PHA in court.[36] Further, appellate courts may engage in exacting review of factual findings at the hearing level or may defer to the PHA's or hearing officer's determinations.[37] Thus, the development of the hearing record may be of critical importance on appeal.

Thus, Section 8 termination hearings are high-stakes situations for a disadvantaged population and termination decisions are infrequently reviewed or scrutinized. According to one hearing officer, the most common reasons for proposed termination of benefits include failure to provide documentation, alleged fraud (such as not notifying the housing authority that a family member has left the household), and alleged participation in criminal or drug related activity. As alluded to earlier, housing authorities and hearing officers have discretion in making most termination decisions. Thus, the nature of program participants' alleged offenses, coupled with decision-maker discretion allow hearing officers to exercise considerable discretion in ambiguous situations.

However, negative race/gender/class-based stereotypes about welfare and Section 8 recipients are prevalent. Indeed, stereotypes and cultural assumptions interfere with narrative formation and impact the way decision-makers interpret ambiguous situations. Further, cultural assumptions in the hearing room are unlikely to be noticed, interrogated, or addressed. Thus, these assumptions may have significant consequences for the low-income minority families who lose their Section 8 vouchers.

"Mere Charity": How Rights Became Responsibilities

In 1970, the United States Supreme Court recognized welfare benefits as an entitlement akin to a property right.[38] Justice Brennan, writing for the majority, firmly rejected the argument that welfare benefits are a "privilege" and not a "right."[39] He recognized that most wealth comes in the form of some sort of entitlement and equated welfare benefits with professional licenses, contracts, stock options, and subsidies to farmers.[40]

The key to understanding Brennan's articulated view of welfare benefits

36. Participants may also potentially file a "Section 1983" action under 42 U.S.C. § 1983. *See, e.g.*, Stevenson v. Willis, 579 F.Supp.2d 913 (N.D. Ohio, 2008) (holding a voucher recipient had a private right of action to enforce FHA provisions and implementing regulations requiring administrative grievance procedures with specific requirements).

37. THE NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS 14/130 (2004, 3d ed.).

38. Goldberg v. Kelly, 397 U.S. 254, 263 n.8 (1970).

39. *Id.* at 262.

40. *Id.* at 263 n.8 (1970) (noting that all of these things "are devices to aid security and independence.").

as a "right" may lie in his conception of poverty itself. Brennan noted "[w]e have come to recognize that forces not within the control of the poor contribute to their poverty." [41] He considered poverty to be caused, at least in part, by structural problems outside the command of the individual. He also connected the idea of welfare benefits as a right to American ideations of equality of opportunity, noting:

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'[42]

In the years following *Goldberg v. Kelly*, welfare in general, and Aid to Families with Dependent Children ("AFDC") in particular, became associated with negative stereotypes about Black single mothers and both racialized and gendered notions of morality reemerged in the public discourse. Dorothy E. Roberts observed, "[r]acial politics has so dominated welfare reform efforts that it is commonplace to observe that 'welfare' has become a code word for race. When Americans discuss welfare, many have in mind the mythical Black "'Welfare Queen' or profligate teenager who becomes pregnant at taxpayers' expense to fatten her welfare check."[43] In the 1990s, the "rights" discourse of the 1970s was replaced by an emphasis on "individual responsibility."

The re-conceptualization of AFDC was imbued with the troubling assumptions of the New Deal Era Reformers who designed the programs: first, women rely on male wage earners to meet the needs of their families and, second, the poor require close moral supervision.[44] Many people perceived women who "chose" to have children without a "suitable" wage-earning male to be completely irresponsible, and this reinforced class based stereotypes about moral supervision of the poor and invoked racialized imagery of lazy, overly sexual Blacks. Thus, gendered, racialized and class-based cultural myths created the "perfect storm" and by 1996 welfare benefits were no longer considered an "entitlement." With the passage of the Personal Responsibility Work Opportunity Reconciliation Act ("PRWORA"), welfare was transformed from a government obligation into "a reciprocal obligation, to be dispensed only after the poor—through work—demonstrated their responsibility."[45]

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41. *Id.* at 265.

42. *Id.*

43. Dorothy E. Roberts, *Welfare And The Problem Of Black Citizenship*, 105 YALE L.J. 1563, 1563 (1996) (book review) (emphasis added).

44. *See id.* at 1568.

45. Vicki Lens, *Confronting Government After Welfare Reform: Moralists, Reformers, and Narratives Of (Ir)Responsibility at Administrative Fair Hearings*, 43 LAW &

PRWORA announced the demise of a rights-based conception of welfare, declaring that it "should not be interpreted to *entitle* any individual or family to assistance"[46]

As welfare reform shifted the focus from "rights" to "responsibilities," welfare recipients were similarly reconceived in the American imagination. The poor, a group of complex and diverse people, were shuffled, once again, into simplistic categories. They were, "fit into terms, categories, and characteristics that are observable, assessable, and amenable to the management and information regimes of modern bureaucracy."[47] The "undeserving" poor person was re-embodied in the "Welfare Queen," and the lackadaisical teen mother or "urban girl."

While race was often not mentioned explicitly in the public discourse about welfare, the racial dimensions of constructed stereotypes were often just below the surface.[48] The most prominent stereotype of welfare recipients, "the Welfare Queen" image, is a synthesis of centuries-old representations and cultural mythology "draw[ing] on citizens' preexisting beliefs about women who exist at the intersection of marginalized race, class, and gender identities."[49] Ange-Marie Hancock's socio-historical analysis illustrates that the "Welfare Queen" stereotype conflates Blacks with welfare programs for the "undeserving poor", envisions Black women as lazy, poor mothers, overly fertile and unjustly exacting taxpayer dollars and highlights individual behavior as the primary cause of poverty.[50]

The "Welfare Queen" mythology is fixated on, and revolves around, poor Black women. Accordingly, while acknowledging that this stereotype harms other Section 8 participants by, among other ways, rendering their narratives invisible, this analysis pays special attention to the unique harms suffered by Black female participants, who are arguably the most burdened by the "Welfare Queen" stereotype.

SOC'Y REV. 563, 564 (2009).

46. *Id.* at 564 (citing the Personal Responsibility Work Opportunity Reconciliation Act, 42 U.S.C. § 601(b)).

47. JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 21 (2001).

48. *See* Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN'S J. LEGAL COMMENT. 299, 311-12 (2009).

49. ANGE-MARIE HANCOCK, POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 2 (2004).

50. *See generally id.* at 37-60.

II. THE TWO-THOUSAND POUND ELEPHANT IN INFORMAL TERMINATION HEARINGS

Stereotypes, Hyper-Surveillance, Over-Enforcement, and Moralizing

This Section will scrutinize the role of colorblindness and other socio-psychological phenomena in Section 8 termination hearings and examine the impact that these phenomena have on Section 8 Voucher Program participants and their families.

Shifts in the discourse surrounding welfare, and the fervent search for the mythical "Welfare Queen," coincided with increased surveillance of welfare recipients. As noted by John Gilliom, welfare recipients "live with surveillance as a totalizing and encompassing force which can critically affect their well-being."[51] In many states, Welfare recipients are required to complete lengthy applications each year, submit to biometrics, and take drug tests.[52] The interaction of race, class and gender in the "Welfare Queen" stereotype make low-income Black women subject to particularly pernicious forms of hyper-surveillance.

According to Jennifer Nash, "The cultural markers of black "dysfunctionality" are distributed in gendered ways. Black female bodies are subject to particular forms of cultural and legal hyper-surveillance; the black female body has been culturally located as the primary site of the reproduction of poverty and the primary space of deviant uncontrolled sexuality...."[53]

Thus, Black women receiving government assistance may be more closely monitored than other groups. The hyper-surveillance norms noted by Gilliom also appear in Section 8 regulations and informal termination hearings. Recipients of cash assistance appear to be more closely scrutinized than Voucher Program participants.[54] However, as previously mentioned, a web of state and federal laws and regulations governs voucher program participants. Under HUD regulations, PHAs have discretion regarding what information they may demand from participants. For example, program participants are required to "supply *any* information that the PHA or HUD determines is necessary in the administration of the program."[55] HUD regulations also require participants to regularly provide information regarding the composition of their household and promptly report compositional changes.[56] PHAs

51. GILLIOM, *supra* note 48, at 42.

52. *See generally* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 674-81 (2009).

53. Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 320-21 (2005).

54. Many PHAs do not require fingerprinting or drug tests.

55. 24 C.F.R. § 982.551(b)(1) (2009) (emphasis added).

56. *See* 24 C.F.R. § 982.551(h) (2009)

interpret this regulation differently, construing "promptly" to mean anything from within a few days to within a month.

In the context of Section 8 termination hearings, surveillance is sometimes coupled with over-enforcement. Over-enforcement may be cultivated by the perception among some hearing officers that they have an obligation to find the "bad actor" and determine whether they have "reformed their ways." These hearing officers may be analogous to the administrative law judges that Vicki Lens describes as "moralist judges." [57] Lens argues, "Moralist judges inject a sense of disapprobation and personal judgment in their hearings through both the questions they ask and the framing of issues. They are more apt to elicit and emphasize narratives of personal irresponsibility from the appellants." [58] "Moralist" Section 8 hearing officers may stringently enforce regulations aimed at addressing crime or ferreting out fraud and place a strong emphasis on the perceived responsibility of the participant.

For example, Monica Johnson[59] is a middle-aged Black single mother with a severely disabled son. She was terminated from the Section 8 program after 20 years because she allegedly failed to complete her annual program re-certification paperwork. While she was away from her home caring for a sick relative, she received several letters reminding her that she needed to complete her paperwork. She was, admittedly, very late in responding to her local PHA's multiple requests. Eventually, she completed what she thought was the required paperwork and confirmed with the PHA employee who accepted her forms said that she had filled them out correctly. A few weeks later, Ms. Johnson's PHA terminated her from the Voucher Program for not completing her paperwork on time. A heated dispute ensued about whether Ms. Johnson ever completed her paperwork and turned it in to the PHA.[60] Although Ms. Johnson requested an informal hearing to explain that she was caring for a very sick relative when she missed the housing authority's initial letter, she was never granted one.[61] After multiple requests for a hearing and several failed attempts to retain a free attorney, Ms. Johnson stopped trying to get her voucher reinstated. She later recalled:

My brother was in a real bad car accident and he had nerve damage throughout his body. Then my mom, with her diabetes, wasn't doing so well. So you know, I was like, back and forth... between the two. It was my fault. I'm not trying to place the blame nowhere else because it was due to my

57. *See* Lens, *supra* note 46, at 575-76.

58. *Id.*

59. The names of all participants have been changed.

60. *See* Lens, *supra* note 46, at 580-84 (2009) (detailing several case examples of "lost document" disputes in AFDC termination hearings and contrasting the approaches of "moralist" and "reformer" judges).

61. Ms. Johnson believes she requested her hearing in a timely manner and does not know why she was never allowed to meet with anyone from her local PHA.

negligence... but come on, cut me *some* slack... I know they say life is not fair and this is a very good example.

Ms. Johnson's story provides an example of surveillance but serves as a more prominent example of moralizing and over-enforcement. Ms. Johnson was required to submit a lengthy application and proof of income and was terminated for failing to fulfill her "responsibility" and complete her paperwork on time. Like many other Section 8 program participants, she was subjected to strict rules, closely monitored, and subjected to harsh penalties when she failed to act "responsibly."

Cognitive and Behavioral Distancing In the Section 8 Voucher Program

Hyper-survelliance, moralizing and over-enforcement may be closely linked to the tendency of the non-poor to psychologically distance themselves from the poor. Social Psychologist Bernice Lott defines distancing as "separation, exclusion, devaluation, discounting, and designation as 'other'" and posits that this response occurs at both the interpersonal and institutional level.[62] At the interpersonal level, actors frequently distance themselves from the poor by demeaning or discounting them.[63] Further, even among those who work with low-income groups, many still distance themselves from the poor, view them as an "other", harbor "beliefs in the dysfunctionality of poor families and... discount[] [their] strengths, skills, and wisdom."[64]

Lott also identifies stereotyping as a form of cognitive distancing and notes that, while many people engage in cognitive distancing from the poor by simply ignoring them, the most typical form of cognitive distancing is stereotyping.[65] The dominant conceptions of poor people include "negative beliefs about their characteristics, negative expectations about their behavior, and the attribution that their poverty is caused by their own failings."[66] These conceptions correlate with the "Welfare Queen" stereotype, which invokes negative conceptions about the poor as well as negative conceptions about Black women. Lott's work suggests that many non-poor subscribe to stereotypes about the poor and that even welfare recipients attempt to distance themselves from the poor by trying to distinguish themselves from other poor people.[67] Ms. Johnson, the single mother who lost her voucher because of issues with her submission of paperwork, repeatedly used distancing language in describing why she felt her PHA's actions were unfair. She noted that the penalty in her case was particularly harsh because she, unlike other

62. Bernice Lott, *Cognitive and Behavioral Distancing From the Poor*, 57 AM. PSYCHOLOGIST 100, 100 (2002).

63. *Id.* at 107.

64. *Id.* at 108.

65. *Id.* at 102.

66. *Id.*

67. *Id.* at 102-03.

participants, never had the police at her house and was not involved in illegal activity.

Further, distancing is frequently accompanied by moral exclusion, which suggests that certain out-groups, like the poor, are expendable, undeserving, or less than human.[68] "When people dehumanize others, they are not likely to experience empathy," and thus moral exclusion frequently serves to justify disparate treatment of groups like the poor. [69] Thus, distancing may serve to explain the lack of empathy sometimes accorded to participants in hearings, the heightened surveillance participants are subjected to, and the over-enforcement of regulations against them. It may also be indicated by hearing officer's use of terms such as "bad actor" and "suspects" when referring to participants. These mechanisms may interact and intersect with other psycho-social phenomena in termination hearings, particularly in the context of narrative formation.

Narrative Formation In Informal Hearings

In Section 8 termination hearings, narratives are developed and unfold as "re-representations of the past in the present, through which identities, moral orders and relational patterns are constructed and negotiated."[70] Narrative development is an intrinsic part of the informal hearing process. Most often, the agency representative in the hearing explains why the participant should be terminated from the Section 8 voucher program. The participant (or their advocate/attorney) then explains why the participant should be allowed to remain in the program. The hearing officer shapes the narrative that ultimately becomes his or her "decision" by framing questions posed to the participant and agency.

According to Isabelle Gunning, the first story told in informal proceedings becomes the, "primary narrative" and subsequent speakers generally adopt this narrative, employing the same interpretive framework and moral code.[71] Gunning reasons that this phenomenon is in part a function of how normal conversation operates and in part a function of the fact that the primary narrative has already defined good and bad characters. [72] Speakers suggested to be bad actors will adopt the primary narrative and its attached moral code and attempt to recast themselves as good characters.[73] Subsequent speakers, by repositioning themselves in primary narrative framework, legitimize the

68. *Id.* at 102.
69. *Id.*
70. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68 (1995) (quoting mediation scholars Sara Cobb and Janet Rifkin who described narratives in mediations).
71. *Id.* at 69.
72. *Id.*
73. *Id.*

primary narrative and lend credence to its suggested moral code.[74]

In Section 8 termination hearings, the PHA representative presents the primary narrative. Narratives draw on the themes and history of the larger society. Thus, in the context of Section 8 termination hearings, stereotypes like the "Welfare Queen" or "urban girl" and cultural myths like Black criminality may influence how agency representatives frame the primary narrative in termination hearings. A participant is framed as irresponsible because she lost her paperwork, lazy because she missed appointments, and scheming to defraud the system when she fails to report that a household member moved out. This may be true regardless of the hearing officer's race, as even a Black hearing officer interviewed appeared to engage in cognitive distinction by referring to participants as "suspects." This problem is compounded when participants attempt to challenge stereotype-based assumptions within the framework and moral code of the primary narrative.

Ms. Johnson's story, which was explained earlier in this section, and her attempt to distance herself from other Section 8 program participants, illustrates the difficulties attendant to challenging stereotypes within the moral code of the primary narrative. Ms. Johnson attempted to recast herself as a "good" character within the framework and moral code of the primary narrative. Her insistence that, unlike other participants, she was a law-abiding participant, challenged stereotypes about Black criminality and social deviance as to her case, but left the interpretive framework and moral code of the primary narrative and its other racialized assumptions intact. Thus, decision-makers were free to infer from the interpretative framework that, although not criminal, Ms. Johnson fit another racial stereotype.

Further, colorblindness is related to how stereotypes disrupt alternative narrative formation because it ensures that there is no channel in which to interrogate and challenge the race-based stereotypes that inform the primary narrative. Gunning describes this phenomenon as the power of race/gender taboos, explaining:

[N]egative cultural myths are deep and strong and can lead to irrational and damaging behavior. These deep fears are fairly characterized as "taboos." They are taboos because the term indicates not only that the fears are unconscious or subconscious attitudes from the "pretransition" period of childhood, but to underscore as well that these are attitudes which forbid action and reflection upon that which is forbidden.[75]

In the context of the Section 8 voucher program, where racial myths are exceptionally prevalent, "race" is a particularly taboo subject. Hearing officers frequently perceive race as an irrelevant and perhaps inappropriate subject in informal hearings. Indeed, one hearing officer, upon learning that there might

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74. *Id*
75. *Id.* at 72.

be questions about culture in her interview for this study, explained that she considered such questions inappropriate and "a bit strange." She declined to be interviewed. As one attorney noted, many hearing officers and lawyers alike, "don't think they're allowed" to bring up race in the context of Section 8 termination hearings.

In addition to hindering identification and critique of primary narratives shaped by stereotypes and cultural myths, colorblindness may be harmful in informal hearings to the extent that it discourages hearing officers from identifying and interrogating their own culture or class-based assumptions, critiquing the interpretive framework established by the primary narrative and considering alternative narratives. Perceptions and assumptions are particularly important in the context of the Section 8 voucher program, where HUD and local PHAs regulate and monitor behavior within program participants' homes and families that is intrinsically linked to cultural norms.

For example, Jane Jones is a young Black single mother who received a Section 8 Voucher while living in a California suburb. Ms. Jones attended a community college over two hours away from her home in another city and relied on her mother and mother's friends for transportation to and from her home. During an annual inspection of her home, a PHA inspector determined that Ms. Jones didn't have enough furniture. According to Ms. Jones, he suspected Ms. Jones was not living in her home because she didn't have enough furniture. He also noted that there did not seem to be any food in the home. Ms. Jones admitted that her home was sparsely furnished and complained that the inspector never looked in her refrigerator for food. However, according to her, "I couldn't afford furniture but there was a bed and T.V.... clothes, [and] shoes." Based on the inspector's report, the PHA proposed terminating Ms. Jones' Section 8 voucher. Although Ms. Jones explained that she relied on her mother and mother's friends for transportation to and from her home, seeking rides and frequently borrowing their cars, the PHA found this incredulous. As Ms. Jones recounted, her hearing officer "just didn't think it was possible," for Ms. Jones to travel two hours to and from school everyday. According to Ms. Jones, the hearing officer said that she found Ms. Jones' story more unbelievable in light of her "income."

Because the local housing authority believed that she was trying to defraud the system by not using her assisted unit as her primary residence, Ms. Jones lost her voucher.[76] She and her five-year old son were forced to move in with her mother. In spite of losing her home, Ms. Jones still completed her educational program at the local community college and received her associate's degree. Looking back, Ms. Jones just wishes the Housing Authority had realized, "I was sacrificing a lot. I had less than a year to go in school."

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76. *See* 24 C.F.R. § 982.551 (requiring an assisted unit be the primary residence of participating families).

The primary narrative established in Ms. Jones case appeared to be imbued with myths drawn from the "Welfare Queen" stereotype. The PHA urged that Ms. Jones was not using her unit as her primary residence and was thereby defrauding the system. Jones believed that perhaps the PHA thought that she was just receiving a subsidized unit in the area, and not actually using it, to bide her time until she had been in the program long enough to be eligible to transfer her voucher to an area closer to her school. The underlying suspicion that Ms. Jones was somehow "cheating" the system and was undeserving closely mirrors imagery from the "Welfare Queen" stereotype. The primary narrative established by the PHA, Ms. Jones as the single mom on welfare, "trying to get over" on the system, appeared to hinder the interrogation of powerful alternative narratives. Hence, while it seemed somewhat implausible that Ms. Jones would be able to commute two hours to school several days a week, it also seemed somewhat implausible that, on a limited income, she maintained two separate households for a year for the sole purpose of defrauding the Section 8 program.

The powerful alternative narrative—the struggle of a single mother trying to support a small child and go to school in a distant city—was ignored. Indeed, this narrative, with its underlying insinuation that perhaps Ms. Jones subscribed to some strain of the protestant work-ethic, is patently inconsistent with the interpretive framework created by the "Welfare Queen" stereotype, which suggests that the Black single mother on welfare is pathologically slothful. Nonetheless, this potential alternative narrative, Ms. Jones as a hard-working, diligent mother trying to improve her situation through education, invokes rhetorical imagery with positive connotations in the American social context.

Because race was ostensibly ignored, an alternative, culture-based explanation for the perceived "incredulity" in Ms. Jones' testimony with respect to how she managed to commute—the role of family and extended family in some Black communities—was also ignored.

It would be imprudent and, indeed, inaccurate to essentialize Black Section 8 recipients and suggest that they all share the same cultural norms. However, it would be equally imprudent and inaccurate to not acknowledge that many Black Section 8 participants, and their extended families, have a cultural orientation where extended families play a very significant role.

Research suggests that, generally speaking, extended family plays a more prominent role in Black families than in White families. For example, a study by Hayes and Mendel suggests that Blacks interact with more of their kin, have a greater number and more diverse types of relatives living with them, and receive more help from kin than Whites.[77] Further, Stack has proposed that

77. Jualynne Elizabeth Dodson, *Conceptualizations and Research of African American Family Life in the United States*, *in* BLACK FAMILIES 51, 60 (Harriette Pipes McAdoo ed., 4th ed. 2004).

Blacks employ extended family and a reciprocal network of sharing, in part, as a strategy for meeting physical, emotional and economic needs and counterbalancing a lack of economic resources.[78]

In addition to literature that suggests extended families' roles are magnified within the Black community, personal narratives also supports this claim. Darlene Clark Hine's first-person exploration of "The 'Know-It-All' Aunt and Her Three Nephews" elaborates on the crucial and distinctive role of extended families in Black communities through her analysis of a single, upper-middle-class Black woman taking care of her nephews to fulfill the expected duties of an extended family member.[79] According to Hines, cultural norms within Black families dictate that extended family members are expected to go through great lengths to help each other. Hine explains the unwritten values and expectations that often inform the institutionalized Black family by stating:

In those earlier times of social and economic crises, members of the black family were expected to circle the wagons and fight till death or victory. Individuals were expected to share their resources with others in dire straits. The whole family was expected to provide protection to those most vulnerable to violence and assistance to those caught or trapped in webs of social pathology. [80]

Hine's narrative underscores that unwritten values and expectations of reciprocal assistance within extended families are still integral and active elements of the Black cultural context.[81]

Some scholars suggest that the role extended families play is magnified within low-income communities, irrespective of race. Such scholars might argue that where communities experience a high degree of powerlessness, there is also a high orientation towards a magnified view of the role of extended family. Accordingly, some may urge that the importance of extended families is perhaps more closely linked to socio-economic status than race. However, Harriette Pipes McAdoo suggests that, for Black families, "reciprocal extended family assistance patterns transcend[ ] economic groups and continue[ ] to be practiced even when families move[] from poverty to a middle-income level."[82] Hine's story of a Black upper-middle class history professor who upends her world to help her three nephews, affirms McAdoo's thesis that reciprocal extended family assistance norms transcend socio-economic categories.[83]

This brief literature review is supported by findings in interviews with

78. *Id.*

79. *See generally* Darlene Clark Hine, *Family First, Then the World: The "Know-It-All" Aunt and Her Three Nephews*, *in* BLACK FAMILIES 238 (Harriette Pipes McAdoo ed., 4th ed. 2004).

80. *Id.* at 239.

81. *Id.* at 239-47.

82. Dodson, *supra* note 78, at 60.

83. *See generally* Hine, *supra* note 80, at 68.

hearing termination officers and program recipients. For instance, Ms. Jones' family's behavior and their provision of transportation assistance may be explained by a high orientation towards an extended family system. Jones' hearing termination officer may have found Jones' mother's behavior unlikely because she adhered to different cultural norms and assumptions about the role of extended family. Further, Ms. Johnson, who lost her voucher because she purportedly failed to complete her required paperwork and whose story is detailed earlier in this section, also relates an account that serves as an example of high orientation towards an extended family support system. Ms. Johnson, like Hine, upended her life to care for her relatives. The insignificance accorded to Ms. Johnson's concern for her family member's illnesses again suggests that at least some termination hearing officers may have different cultural assumptions and values revolving around the role of family and community than the participants whose behavior they scrutinize. This is exceptionally problematic in the context of Section 8 termination hearings, where most of the behavior at issue will revolve around the home and family and where this behavior is particularly likely to be informed by cultural norms.

Because race is taboo and hearing termination officers likely attempt to decide cases in a "color-blind" manner, there are no effective mechanisms for identifying or interrogating cultural assumptions, or for acknowledging racialized, class-based, and gendered stereotypes. This presents several barriers to all Section 8 participants, especially Black women. The lack of proper interrogation techniques—and the inability to even identify cultural assumptions during termination hearings—may work to the detriment of Black women who may be viewed through the interpretive filter created by the "Welfare Queen" and similar stereotypes. As a consequence, many Black women in the Section 8 voucher program are doubly harmed during termination hearings. First, the interpretive framework created by the "Welfare Queen" and other stereotypes stifles counter-narrative development. Second, colorblindness renders invisible positive race/culture based explanations for participant behavior. Thus, ironically, in some instances, the only "Black culture" taken into account in termination hearings consists of un-interrogated and unconscious racial stereotypes. In effect, many Section 8 participants are within a category of people "who are outsiders and whose stories lack the power to create fact,"[84] supporting Lott's thesis that a primary response to poor people is distancing.[85]

The invisibility of Black women's narratives in Section 8 termination hearings and the presence of a powerful stereotype as an interpretive filter are affirmed by a modest interrogation of the behavior and behavioral incentives of

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84. Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 502, 506 (Richard Delgado ed., 1995).

85. Bernice Lott, *Cognitive and Behavioral Distancing From the Poor*, 57 AM. PSYCHOLOGIST 100 (2002).

hearing termination officers. For example, one hearing officer stated that housing authorities lose federal funding when they terminate a participant. This may create a modest financial incentive for housing authorities to keep participants in the program instead of terminating them as a means to maintain their funding.[86] Moreover, one hearing officer suggested that, "losing a voucher takes a lot of work," and noted that hearing officers are often acutely aware of the negative impact that a termination decision will have on a family. Another officer stated that he was required to assess a program participant's culture because "every possible item" might make a difference in determining whether the participant should be allowed to remain in the program.

Accordingly, based on the potential modest economic incentive and the obvious socio-economic detriment to terminated participants, hearing officers should, at least theoretically, be oriented to find against termination, and responsive to narratives giving affect to that orientation. Nonetheless, several hearing officers interviewed, including the officer whose comments are quoted above, repeatedly characterized participants as "bad actors" and "suspects," even when referring to them in the abstract. This language suggests that some officers distance themselves from the low-income Section 8 participants they assess by "otherizing" them. These observations, coupled with the impotence of potentially powerful alternative narratives of Black women in a system that should be oriented in favor of maintaining their Section 8 voucher, suggests that the interpretive framework in termination hearings is heavily influenced by stereotypes. Furthermore, these stereotypes are pervasive and hinder the formation of alternative narratives. Interviews with termination officers illustrate that colorblindness allows stereotypes and cultural assumptions to lurk in the background, un-interrogated, while rendering alternative narratives invisible—creating often insurmountable obstacles for Black women attempting to maintain their Section 8 voucher.

Colorblindness and Perceptions of Termination Hearings Among Minority Participants

In analyzing the Court's willful and conspicuous silence on race in *Williams v. Walker Thomas Furniture Company*, a case involving a Black single mother on welfare, Marjorie Floresta declared, "[r]ace is the two thousand pound elephant in the room, trumpeting stridently while the court pretends to ignore it...."[87] In the informal hearing room, no less than in the

86. In theory, the housing authority or local administrative agency would lose HUD funding associated with the participant's rent payment and administrative fees connected to that particular participant until a new person is given that voucher. However, as a practical matter, it is likely that another participant might receive that voucher very quickly and that a PHA might not actually lose any money.

87. Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, And Culture In Contracts*, 14 MICH. J. RACE & L. 1, 29-30 (2008) As detailed by Florestal, "Williams—a poor,

Williams courtroom, race is the "elephant in the room" and ignoring it has serious economic, social, and political implications.

Race is ever-present in Section 8 termination hearings. Race sometimes informs the cultural orientation of Section 8 program participants and termination hearing officers. It is also present in the racialized stereotypes that inform the socio-policital context in which Section 8 termination hearings take place. Moreover, race is often willfully ignored, within Section 8 hearings even where relevant, because race is something people have been socialized not to "see".[88]

Interviews with Section 8 beneficiaries underscore the covert ways in which race permeates the termination hearing process. For example, Patricia Williams asserts, "[i]n a sense, race matters are resented and repressed in much the same way as matters of sex and scandal: the subject is considered a rude and transgressive one in mixed company, a matter whose observation is sometimes inevitable, but about which, once seen, little should be heard nonetheless."[89] Other idealized versions of colorblindness, presently rooted in the concept of a post-race society, suggest that identifying race/ethnic differences or naming race is inappropriate because people are equal and identifying race undermines equality.[90] In these ways, the two primary premises underlying colorblindness are that race has no relevance to a person's behavior or decisions and that individuals should not and perhaps do not notice each other's race.[91]

In the context of legal or quasi-legal proceedings, where equality is a pervasive value, people may be imminently uncomfortable identifying or discussing race. Termination hearing officers and other actors often "don't think they're allowed" to bring up race in the context of Section 8 termination hearings. The practice of denying overt attention to race within termination proceedings affirms Williams' thesis that discussing race is frequently considered transgressive.

Nonetheless, in institutions tasked with protecting the legal interests of minorities, ignoring race where it has salience serves to preserve the status quo

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black, mother of seven, separated from her husband, and dependent on welfare—purchased a number of items on credit from the Walker Thomas Furniture Company. After more than four years of steady repayment, having paid off $1,400 of the $1,700 balance, Williams defaulted on the loan. The Company invoked its security interest under a clause in the contract allowing it to repossess all the items Williams had purchased."

88. PATRICIA J. WILLIAMS, SEEING A COLORBLIND FUTURE: THE PARADOX OF RACE 8 (1998).

89. *Id.*

90. Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness To Color Insight*, 86 N.C. L. REV. 635, 648 (2008).

91. Janet Ward Schofield, *The Colorblind Perspective in School: Causes and Consequences*, *in* MULTICULTURAL EDUCATION 247, 252 (James L. Banks & Cherry A. McGee Banks eds., 2001).

and further disadvantage marginalized groups. On this subject, legal scholar Ian Haney López suggests:

Invoking the formal antiracism of the early civil rights movement, colorblindness calls for a principled refusal to recognize race in public life. Yet, in practice, colorblindness advances an abstracted conception of race that allows the Court to be aggressive, not in fighting racism, but in preserving the racial status quo.... Colorblindness as an ideology is committed to protecting racial inequality; its intellectual heart, however, is not a theory of racial inferiority, but of race as an abstract, meaningless category.[92]

Far from an "abstract, meaningless category," race has salience in the context of Section 8 termination hearings. Sometimes, race correlates with the cultural and social norms that inform participant behavior. Moreover, a review of substantive literature and primary interviews supports the claim that racial stereotypes surrounding welfare program participants are pervasive and undermine some program participants' ability to obtain a fair hearing. In termination hearings, willful obliviousness to race allows stereotypes to shape narratives without interrogation and conceals racial and cultural bias. Beyond preserving the status quo, colorblindness may serve to farther marginalize poor minorities, especially in their plight to maintain social services like affordable housing. Further, strategic colorblindness may have negative implications for the perceived legitimacy of informal hearings in minority communities.

Relevant psychology studies further demonstrate the ways that the colorblind perspective causes greater racial bias.[93] Jennifer A. Richeson and Richard J. Nussbaum employed an Implicit Association Test (IAT) in their study to determine whether the colorblind perspective is associated with greater racial bias as compared with the multi-cultural perspective (which advocates considering and sometimes celebrating group difference).[94] Richeson and Nussbaum found that, as they hypothesized, relative to the multicultural perspective, exposure to the colorblind perspective generated a greater automatic racial bias and a greater explicit racial bias.[95]

In addition to both fostering and concealing racial bias, and rendering cultural assumptions and alternative narratives invisible, colorblindness undermines the legitimacy of termination hearings for all participants. Minorities may perceive color-blind hearing officers with mistrust if they appear to be avoiding race, even where it is relevant.[96] This may engender

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92. Ian Haney López, *Race And Colorblindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61, 70.

93. See sources cited in Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417, 417 (2004).

94. *Id.* at 419.

95. *Id.* at 420-21.

96. *See generally* Valerie Purdie-Vaughns, Claude M. Steele, Paul G. Davies, Ruth Diltmann, & Jennifer Randall Crosby, *Social Identity Contingencies: How Diversity Cues Signal*

misunderstandings and mistrust during informal hearings and may adversely impact minority participants' perception of whether the hearing process is fair.

For example, in a series of studies, Apfelbaum, Sommers and Norton found that many Whites engage in strategic colorblindness to avoid appearing racially biased.[97] That is, Whites avoid mentioning race or acknowledging racial difference, even where it may be relevant, in order to avoid appearing prejudiced.[98] However, Apfelbaum and his colleagues also found that Whites' efforts to avoid appearing racially biased by not "seeing race" often backfired because it led Blacks to view them as *more* racially prejudiced.[99] Further, other research has shown that colorblindness, manifested by ignoring or minimizing group differences, tends to be correlated with minority psychological disengagement in the workplace.[100] Thus, "emphasizing minimization of group differences reinforces majority dominance and minority marginalization."[101] Therefore, while White hearing officers may perceive colorblindness as a socially appropriate (and perhaps required) way to avoid appearing racist in termination hearings, minorities may perceive colorblindness as an attempt to conceal racism or reinforce majority dominance. This may result in negative implications for the perceived legitimacy of informal hearings in minority communities.

Many critical race scholars suggest that, "the law may act as an instrument of subordination as well as one of empowerment."[102] The law is recognized as an instrument of historical oppression that serves to silence and marginalize ethnic minorities and situate them in opposition to legal norms that do not implicitly consider or accommodate cultural differences.[103] As noted earlier, administrative hearings are the primary form of civil justice for poor communities. If these hearings fail to foster confidence in the hearing process, minorities may disengage from this system as a result of its perceived illegitimacy. This disengagement and distrust in the legal system may have an

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Threat or Safety for African Americans in Mainstream Institutions, 94 J. PERSONALITY & SOC. PSYCHOL. 615 (2008) (arguing that setting cues "can determine—independent of any personal experience in the setting—the extent to which a person will trust and feel comfortable in a given setting" and finding that colorblindness coupled with low minority representation cues made African-American professionals distrust a setting).

97. Evan P. Apfelbaum, Samuel R. Sommers, & Michael I. Norton, *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918, 918-22 (2008).

98. *Id.*

99. *Id.* at 929. However, both Blacks and Whites perceived colorblindness as a favorable inter-group approach where race was deemed irrelevant. Thus, a central question in determining the appropriateness of employing a colorblind approach is whether race is clearly relevant.

100. Victoria C. Plaut, Kecia M. Thomas, & Matt J. Goren, *Is Multiculturalism or Color Blindness Better for Minorities?*, 20 PSYCHOL. SCI. 444, 445 (2009).

101. *Id.*

102. EVANS, *supra* note 84, at 504.

103. *Id.* at 503.

impact on the ability or minority communities to secure and maintain civil justice.

Implications, Limitations, and Policy Recommendations

Race sometimes plays a significant role in the Section 8 termination hearing process. First, race often relates to the cultural norms and values of Section 8 program participants. Second, colorblindness, which dictates that termination officers should not "see" or "think about" race, causes hearing officers to ignore race where it has real analytical value and may help them understand participant behavior. As a consequence the "Black culture" that comprises the actual cultural framework for many participants is rendered invisible by colorblindness. However, evidence suggests that un-interrogated and unconscious racial stereotypes, especially the "Welfare Queen" stereotype, may be present in the termination hearing process. Accordingly, some participants may have their benefits unjustly terminated by a PHA because cognitive and behavioral distancing, cultural bias, and colorblindness converge to render their narratives invisible to decision-makers.

Further, structural problems further complicates the integrity of the termination hearing process. Termination hearing officers are often selected from within the agency, which may de-legitimize the hearing termination process in the eyes of participants who would otherwise seek justice through this mechanism.

Although this research has outlined the ways in which race is implicit within the Section 8 termination hearing process, this study was limited in its exploration and employed a non-random convenience sample. As such, the limitations of this study support the need for future research on this subject. Future studies should seek to determine the extent to which hearing termination officers subscribe to colorblind norms generally and in termination hearings and the frequency with which stereotype themes appear in termination hearings. In addition, this field may benefit form a study on the impact of myths of Black criminality and their potential impact on participants and decion-makers.

To the extent Americans value the American Justice system and believe that it acts as an agent for positive social change to the benefit of marginalized groups,[104] minority perceptions of the American Justice system, and their attendant relationship to minority employment of civil legal remedies should be recognized. Negative perceptions should be remedied through structural and institutional reforms of government agencies and their processes that are

104. This principle is arguable. Many argue that, in the words of Audre Lorde "the master's tools will never dismantle the master's house." The debate about the value of traditional legal instruments in upending social hierarchy and fostering social justice is beyond the scope of this paper.

inclusive of minority communities. Further, since administrative hearings are a primary form of social justice for many poor people, threats to perceptions of fairness and legitimacy in this system should be addressed. This is especially true of minorities who disengage from the civil legal process because of negative associations with the legal framework and its actors. HUD should evaluate participant perceptions with respect to the fairness of PHA hearing processes and institute public policy reforms consistent with these findings. The agency should also require local PHAs to elicit participant feedback and take remedial steps if a significant number of program participants feel the hearing process is unfair. As a practical matter, most participants terminated from the Section 8 program are likely to be unhappy with the way their termination hearings were decided. However, this does not necessarily mean that all participants, or even all terminated participants, will have a negative view of the termination hearing process itself. Eliciting and actually responding to feedback about the hearing process will send the message to participants that their opinions are valued and validated and that HUD and local PHAs desire and expect for the hearing system to serve the community's needs.

Further, allowing PHAs to select their informal hearing officers from among their own employees creates a potential conflict of interest for the hearing officer and also may damage perceptions of neutrality. As many PHAs already obtain hearing officers from outside agencies, HUD should require all PHAs to contract with outside agencies to obtain hearing officers. This would eliminate the most serious potential conflicts of interest that presently pervade the system, though it might present challenges to small or geographically isolated PHAs.

Finally, hearing officers and PHA Executive Directors should be trained to identify dominant negative stereotypes about welfare participants in general and other historically subordinated groups (i.e. Black women) in particular. They should be encouraged to reflect on these stereotypes and consider how they may be influencing the narrative development in hearings or their own perception of the facts. One primary problem identified by this study was the failure of both participants and hearing officers to recognize and interrogate cultural assumptions. Training hearing officers, and the Executive Directors who may review their decisions, to actively consider the role of cultural assumptions, would likely help officers better identify counter-narratives. Instead of dismissing a particular narrative as unbelievable, hearing officers may, instead, ask questions that reveal a different cultural orientation than the one in which they were analyzing the suspect behavior. This would sharply reduce the number of Section 8 voucher program participants unjustly terminated from the program.

CONCLUSION

Affordable housing in the U.S. is scarce, magnifying the importance of viable public housing solutions, and underscoring the grave impact losing a home or Section 8 voucher, especially for minority communities. Section 8 termination hearings are characterized as having little judicial oversight, unremedied cultural bias, and being susceptible to error. The continued trend by PHAs to implement a colorblind ideology within the hearing termination process is harmful. It discourages officers from interrogating their cultural assumptions and identifying or considering alternatives. In addition, relevant race, gender, and class-based stereotypes disrupt alternative narrative formation in informal hearings and disproportionately affect Black participants. Because the great harm caused by an error in an informal hearing is unlikely to be reviewed or remedied, PHAs should seek to make hearing officers more effective at making decisions that minimize the risk of erroneous deprivation.