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HOME IS WHERE THE NO-FAULT EVICTION IS: THE IMPACT OF THE DRUG WAR ON FAMILIES IN PUBLIC HOUSING

*Peter J. Saghir**

INTRODUCTION

In 1990, Congress passed the Public and Assisted Housing Drug Elimination Act in response to its findings that drug dealers were imposing a “reign of terror” on federally subsidized housing communities.¹ In *Department of Housing & Urban Development v.*

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¹ Public and Assisted Housing Drug Elimination Act, Pub. L. No. 100-690, 102 Stat. 4181 (codified at 42 U.S.C. § 11901-11925) (2003). *See* 42 U.S.C. § 11901 (2003). The statute is congressional findings which states that:

(1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs; (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime; (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants; (4) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities; (5) closer cooperation should be encouraged between public and assisted housing managers, local law enforcement agencies, and residents in developing and implementing anti-crime programs . . . and (8) anti-crime strategies should be improved through the expansion of community-oriented policing initiatives.

Rucker, Chief Justice Rehnquist hijacked the language describing drug dealers and applied it to four tenants of the Oakland Housing Authority who had eviction proceedings brought against them for the criminal acts of third parties.² Shockingly enough, none of these tenants participated in the criminal activity, and three of the four of them had no knowledge the criminal activity of the third parties was even occurring.³

The lease governing their housing is saddled with 42 U.S.C. § 1437d(1)(6), a statutorily mandated clause permitting the local housing authority to evict tenants for the criminal acts of a third person (“Provision”).⁴ And according to the Supreme Court of the United States, the Provision permits eviction “whether or not the tenant knew, or should have known, about the activity.”⁵ While one might consider such a proposition outrageous and unfair, the Supreme Court affirmed the Provision’s bright-line no-fault rule, holding that it was not absurd and thus not a violation of the statute to permit the eviction of tenants who have no knowledge of the

Id.

² 535 U.S. 125, 127 (2002) (“With drug dealers ‘increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants,’ Congress passed the Anti-Drug Abuse Act of 1988.” (quoting 42 U.S.C. § 11901(3))). See *infra* Part I.B (discussing the facts of *Rucker v. Davis*).

³ See *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), *rev’d sub nom.* Dep’t of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002). The fourth plaintiff, Herman Walker, was a seventy-five year-old disabled man who required the attention of a caregiver. *Id.* at 1117. Mr. Walker received three lease violations in two months because his caregiver possessed cocaine in the apartment. *Id.* With the third violation, the housing authority instituted eviction proceedings against Mr. Walker despite Mr. Walker firing his caregiver. *Id.*

⁴ 42 U.S.C. § 1437d(1)(6) (2003).

Each public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.

Id.

⁵ *Rucker*, 535 U.S. at 130.

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criminal activity of a third party.⁶

Equating and grouping innocent tenants with drug dealers is unfair at best.⁷ The excessive crime in the country's public housing projects over the past thirty years has resulted in a low standard of living for its residents.⁸ While it is necessary for both our government and individual communities to implement solutions to reduce crime in public housing, the solutions and actions must be balanced so as not to adversely affect law-abiding tenants. Both the Provision and the Court's holding in *Rucker* fail to adequately

⁶ 42 U.S.C. § 1437d(1)(2) (2003) (prohibiting public housing authorities from including "unreasonable terms and conditions [in their leases]"); *Rucker*, 535 U.S. at 134 (finding "it was reasonable for Congress to permit no-fault evictions in order to 'provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs'" (quoting 42 U.S.C. § 11901(1) (2003)). See *Rucker*, 535 U.S. at 131 (holding that the tenant need not know of the drug-related criminal activity to be evicted for that drug-related criminal activity). The Department of Housing and Urban Development agreed and argued that such an interpretation was necessary. *Id.* at 133 n.4. *Contra* Evelyn Nieves, *Drug Ruling Worries Some in Public Housing*, N.Y. TIMES, Mar. 27, 2002, at A18; Robert Hornstein, Treena Kaye, & Daniel Atkins, *Bush Public Housing Versus Pearlie Rucker Public Housing: One Strike for the Poor and How Many for the Rest of Us?*, LEGAL TIMES, Mar. 18, 2002, at 66 (criticizing the impact of the Provision on the poor).

⁷ See *Rucker*, 535 U.S. at 134 (concluding that people who cannot control the criminal acts of a household member are themselves a threat to the community); HUD Public Housing Lease and Grievance Procedure, 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991) ("[A] family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.").

⁸ See Otto J. Hetzel, *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker*, 3 WASH. U. J.L. & POL'Y 415, 417 (2000) (characterizing public housing as "cesspools of crime and drug activity"); U.S. DEP'T OF HOUS. & URBAN DEV., IN THE CROSSFIRE, THE IMPACT OF GUN VIOLENCE ON PUBLIC HOUSING COMMUNITIES 14 [hereinafter IN THE CROSSFIRE] ("Persons residing in public housing are over twice as likely to suffer from firearm-related victimization as other members of the population. There is a strong correlation between income and violent crime; thus the low-income population in public housing is especially vulnerable to gun violence."), at <http://www.hud.gov/library/bookshelf18/pressrel/crossfir.pdf> (last visited Nov. 12, 2003).

balance those interests.⁹ Instead of protecting innocent tenants, the Provision and the Court's interpretation endanger this vulnerable group's health and safety by exposing them to the possibility of homelessness.¹⁰ Indeed, these law-abiding tenants are not only victims of the crime in their communities, but also of our government's ill-conceived policies.¹¹

This note focuses on the bad public policy that will likely result from the Court's strict liability interpretation of the Provision in *Rucker*.¹² Part I briefly looks at the Provision itself, the Supreme

⁹ See *Rucker*, 535 U.S. at 129-30 (permitting the eviction of a law-abiding tenant even where they were unaware of criminal activity and therefore unable to take preventive action); see also 42 U.S.C. § 1437d(l)(6) (2003) (permitting the eviction of tenants for the crimes of third parties).

¹⁰ See UNITED STATES CONFERENCE OF MAYORS, MAYOR'S NATIONAL HOUSING FORUM FACT SHEET ("The shortfall in affordable housing for the very poorest now stands at 3.3 million units. These numbers understate the shortage because higher-income households occupy 65% of the units affordable to the poorest families."), at http://www.usmayors.org/uscm/news/press_releases/documents/housingfactsheet_052102.pdf (last visited Nov. 12, 2003) [hereinafter U.S. MAYOR'S HOUSING FACT SHEET]; Judith Goldiner, *Congress Eyes Public-Housing Decontrol* (reporting median national income of public housing tenants is below \$6,500), at <http://www.tenant.net/Tengroup/Metcouncil/Apr96/brooke.html> (last visited Nov. 12, 2003). See also NATIONAL COALITION FOR THE HOMELESS, *Fact Sheet #1: Why Are People Homeless?* (Sept. 2002) ("A lack of affordable housing and the limited scale of housing assistance programs have contributed to the current housing crisis and to homelessness."), at <http://www.nationalhomeless.org/causes.html>.

¹¹ See 42 U.S.C. § 1437d(l)(6) (providing for the eviction of tenants for the criminal acts of a third party); IN THE CROSSFIRE, *supra* note 8, at 14 (reporting that despite overall declining crime rates in public housing, "[p]ersons residing in public housing are over twice as likely to suffer from firearm-related victimization as other members of the population"). See also *Rucker*, 535 U.S. at 127-28 (holding that a tenant may be evicted for the criminal acts of a third party even if the tenant did not know or should not have known of that activity); *infra* note 70 (citing the Department of Housing and Urban Development's "One Strike and You're Out" directive articulated by President Clinton).

¹² See *Rucker*, 535 U.S. at 130 (holding section "1437d(l)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests *whether or not the tenant knew, or should have known, about the activity*") (emphasis added).

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Court and Ninth Circuit's interpretations of the Provision, and examples of how courts have struggled with no-fault evictions.¹³ Part II defines innocent tenant and presents examples of tenants who have had eviction proceedings brought against them pursuant to the Provision or a similar clause.¹⁴ Part III focuses on the negative public policy the Provision creates by breaking up families, imposing on tenants an affirmative duty to engage in crime prevention and deterring recovery of people addicted to drugs. Additionally, Part III proposes that because an indigent tenant lacks meaningful choice in choosing living accommodations and is at a procedural disadvantage with no bargaining power when entering into the lease with the government for an apartment, the lease is arguably unconscionable. Finally, Part IV presents alternatives to the current strict liability policy that would ensure safe housing for the community while allowing individual tenants to feel secure in their homes and protected against arbitrary evictions.

I. THE POLICY OF SECTION 1437D(1)(6) AND *HUD V. RUCKER*

In response to Congressional findings that crime in public housing had reached intolerable proportions, Congress passed the Public and Assisted Housing Drug Elimination Act (the "Act") as part of the Anti-Drug Abuse Act of 1988.¹⁵ The Act included a

¹³ See, e.g., *Hous. Auth. of Joliet v. Chapman*, 780 N.E.2d 1106 (Ill. App. Ct. 2002) (holding that in light of *Rucker*, a tenant need not have knowledge of her son's criminal activity or control over his actions to violate her lease).

¹⁴ States have enacted provisions similar to section 1437d(1)(6). See, e.g., N.Y. REAL PROP. LAW § 231 (McKinney 2003):

Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises, or any part thereof shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied.

Id.

¹⁵ See *supra* note 1 (discussing Congressional findings); Public and Assisted Housing Drug Elimination Act, Pub. L. No. 100-690, 102 Stat. 4181

provision requiring public housing authorities to issue leases that provide for the termination of a tenant's lease if the tenant, a member of the tenant's household or guest engages in any criminal activity that threatens the peace and enjoyment of the premises by other tenants.¹⁶ In applying this provision, some courts have used a strict liability standard for eviction while others have required a showing that the tenant knew or should have known of the criminal activity to warrant eviction.¹⁷ The Ninth Circuit in *Rucker v. Davis* held that "Congress did not intend § 1437d(1)(6) to permit the eviction of innocent tenants."¹⁸ The Supreme Court reversed the Ninth Circuit and held that the local housing authorities have "the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."¹⁹ Since the Court's holding in *Rucker*, courts

(codified at 42 U.S.C. § 11901-11925) (2003).

¹⁶ See 42 U.S.C. § 1437d(1)(6).

¹⁷ See *Hous. Auth. of New Orleans v. Green*, 657 So. 2d 552, 552 (La. Ct. App. 1995) ("The question in this case is whether a Housing Authority of New Orleans [] tenant may be evicted because a guest in her apartment had illegal drugs without her knowledge. The answer is yes."); *Ann Arbor Hous. Comm'n v. Wells*, 618 N.W.2d 43, 45 (Mich. Ct. App. 2000) ("[W]e hold that a public housing tenancy may be terminated . . . regardless of whether the tenant had knowledge of the drug-related activity conducted on or off the premises by the tenant, a member of the tenant's household, or a guest or another person under the tenant's control."). *But see* *Kimball Hill Mgmt. v. Roper*, 733 N.E.2d 458, 465 (Ill. App. Ct. 2000) (requiring "tenant have some minimum connection with the criminal activity before she can be evicted"); *Charlotte Hous. Auth. v. Patterson*, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995) (holding "good cause for eviction does not exist when a public housing tenant is not personally at fault for a breach of the criminal activity termination provision of a public housing lease by a member of the tenant's household"); *Delaware County Hous. Auth. v. Bishop*, 749 A.2d 997, 1002 (Pa. Commw. Ct. 2000) ("[W]e refuse to hold a tenant strictly liable for unforeseeable criminal acts committed, without the tenant's knowledge, by family members who are not under the tenant's control.").

¹⁸ *Rucker v. Davis*, 237 F.3d 1113, 1127 (9th Cir. 2001) (en banc), *rev'd sub nom.* *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

¹⁹ *Rucker*, 535 U.S. at 136.

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have been forced to rethink their approaches to no-fault evictions.²⁰

A. The Provision

The Public and Assisted Housing Drug Elimination Act provides that:

Each public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.²¹

The Act was passed at a time when drugs and violence plagued public housing and local law enforcement lacked the resources to bring the dangers of these crimes under control.²² It provides grants to local housing authorities to implement measures to minimize the negative impact of drugs and crime on their communities.²³ In past years, program grants have been used to

²⁰ See *Hous. Auth. of the City of Pittsburgh v. Fields*, 816 A.2d 1099 (Pa. 2003) (reversing a lower court's holding that the tenant could not be evicted under section 1437d(1)(6) where her son was not under her control in light of "the decision of the United States Supreme Court in *Department of Housing and Urban Development v. Rucker*"). See also *infra* Part I.C (citing two courts confronted with the change since the Court's decision in *Rucker*).

²¹ 42 U.S.C. § 1437d(1)(6).

²² See 42 U.S.C. § 11901(2) (2003) (finding "public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime"); see also *id.* § 11901(5) (finding "local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities").

²³ See 42 U.S.C. §§ 11901-11925 (creating the Public and Assisted Housing Drug Elimination Act); 42 U.S.C § 11903(a). Providing funds to public housing and other low income housing projects for:

(1) the employment of security personnel; (2) reimbursement of local law enforcement agencies for additional security and protective services; . . . (5) the provision of training, communications equipment,

employ security personnel, develop programs to reduce and eliminate the use of drugs (including Youth Sports activities), make physical changes to improve security and train and equip voluntary tenant patrols.²⁴ While the program has contributed to a reduction in overall rates of crime, gun violence still remains a severe problem.²⁵

B. HUD v. Rucker

In *HUD v. Rucker*, the Supreme Court interpreted and applied section 1437d(1)(6) to four elderly tenants of the Oakland Housing Authority who were threatened with eviction because of the criminal acts of other household family members or guests.²⁶ Reversing the Ninth Circuit's decision, the Supreme Court held

and other related equipment for use by voluntary tenant patrols acting in cooperation with local law enforcement officials; (6) programs designed to reduce use of drugs in and around public or other federally assisted low-income housing projects, including drug-abuse prevention, intervention, referral, and treatment programs

Id. See also Jim Moye, *Can't Stop the Hustle: The Department of Housing and Urban Development's "One Strike" Eviction Policy Fails to Get Drugs Out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275, 281-82 (2003) (discussing the new funding and programs instituted under the Anti-Drug Abuse Act of 1988).

²⁴ DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, *Drug Elimination in Public and Assisted Housing*, at <http://www.hud.gov/nofa/suprnofa/sprprt4g.cfm> (content updated Dec. 5, 2000).

²⁵ *Living in Projects Raises the Risk of Being Shot*, N.Y. TIMES, Feb. 16, 2000, at 16 (discussing a report issued by the Department of Housing and Urban Development showing that while gun violence has increased, overall levels of crime are falling in public housing projects); see IN THE CROSSFIRE, *supra* note 8, at 2 ("An analysis of detailed crime-trend data for 55 public housing authorities . . . found that the crime rate declined in two-thirds of the authorities (37 of the 55) between 1994 and 1997."). *But see id.* at 14 ("The annual rate of victimization between 1995 and 1997 for residents of public housing was 10 per 1,000 persons. The rate for persons not in public housing was 4 per 1,000.").

²⁶ See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 128 (2002); see also *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2000) (en banc), *rev'd sub nom.* *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (noting the plaintiffs' ages: 63, 63, 71, and 75).

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that these tenants could be evicted pursuant to the Provision, regardless of whether or not they knew or should have known of the criminal acts.²⁷ The policy and application of the Provision is best understood with an appreciation for the distinctions between the Ninth Circuit and Supreme Court's interpretations of the Provision.

1. The Tenants

The four plaintiffs in *Rucker* were tenants of the Oakland Housing Authority: Pearlie Rucker, 63, Willie Lee, 71, Barbara Hill, 63, and Herman Walker, 75.²⁸ Ms. Rucker, a resident of public housing for sixteen years, had eviction proceedings brought against her after her mentally disabled daughter was found possessing cocaine several blocks from their home.²⁹ The eviction proceeding against Ms. Rucker was initiated despite routine searches she made of her daughter's room that came up negative for drugs.³⁰ Willie Lee, who lived in the public housing complex for twenty-five years, and Barbara Hill, who lived in the public housing complex for more than thirty years, had eviction proceedings initiated against them after their grandsons were found smoking marijuana in the parking lot of the housing complex.³¹ Neither Ms. Lee nor Ms. Hill was aware of their grandsons' drug use.³² The final plaintiff, Herman Walker, a partially paralyzed former minister, had lived in public housing for eight years.³³ The

²⁷ *Rucker*, 535 U.S. at 127-28.

²⁸ *Rucker v. Davis*, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *5-7 (N.D. Cal. June 24, 1998), *vacated*, 203 F.3d 627 (9th Cir. 2000), *amended by* 237 F.3d 1113 (9th Cir. 2000) (en banc), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

²⁹ *Id.* at *6.

³⁰ *Id.*; Kara Platoni, *Collateral Damage from the Drug War: Elderly OHA Tenants Hope the Supreme Court Will Allow Them to Stay in their Homes*, EAST BAY EXPRESS (California), Oct. 17, 2001.

³¹ *Rucker*, 1998 U.S. Dist. LEXIS 9345, at *6-7; Platoni, *supra* note 30.

³² *Rucker*, 1998 U.S. Dist. LEXIS 9345, at *7.

³³ *Id.* at *6; Emelyn Cruz Lat, *One Strike Evictions: First of Two Parts*, SAN FRANCISCO EXAMINER, Aug. 23, 1998, at A-10.

Oakland Housing Authority instituted eviction proceedings against Mr. Walker when his caregiver was found with cocaine in his apartment.³⁴ Even though he fired the caretaker upon being told that he was being evicted for her criminal conduct, the building manager told him it was too late and the housing authority would file suit anyway.³⁵

2. *The Ninth Circuit's Approach*

In *Rucker*, the Ninth Circuit found that the Provision “is not a picture of clarity and may be subject to varying interpretations.”³⁶ The Ninth Circuit concluded that the statute does not “expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted.”³⁷ Because of the ambiguity, the Ninth Circuit looked to the overall statutory scheme and noted that Congress has placed a number of restrictions on the ability of local housing authorities to evict tenants.³⁸

³⁴ Mr. Walker’s caregiver was found possessing cocaine in Mr. Walker’s apartment in three instances within two months. *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), *rev’d sub nom.* Dep’t of Hous. & Urban Dev. v. *Rucker*, 533 U.S. 125 (2002). After a stroke left him paralyzed, Mr. Walker hired a health care aide to assist him with cooking and bathing. *Hard Line in Public Housing*, L.A. TIMES, Mar. 29, 2002, at 14. Mr. Walker, at the time of hiring the aide, was unaware she was a cocaine user or that she hid drugs and a crack pipe in Walker’s apartment. *Id.* She was caught possessing the drugs during a security check of the building. *Id.*

³⁵ Cruz Lat, *supra* note 33 (“Walker recalls the manager telling him, ‘We’ll file suit and you won’t stand a chance. We win 98 percent of our cases.’”).

³⁶ *Rucker*, 237 F.3d at 1123. The Ninth Circuit held that HUD’s interpretation permitting the eviction of innocent tenants is inconsistent with congressional intent and must be rejected under the first step of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Rucker*, 237 F.3d at 1119. In *Chevron*, the court held that an agency’s interpretation of a statute should not be deferred to where Congress has spoken on the issue and the agency’s interpretation is contrary to congressional intent. *Chevron*, 467 U.S. at 842-43.

³⁷ *Rucker*, 237 F.3d at 1120.

³⁸ *Id.* (citing 42 U.S.C. § 1437d(1)(2) prohibiting leases with unreasonable terms and conditions and § 1437d(1)(5) forbidding housing authorities from

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The court also considered the civil forfeiture provision of the Controlled Substances Act, which appears in the same chapter and subtitle of the Anti-Drug Abuse Act of 1988 and is part of a single legislative scheme to combat drug abuse in public housing.³⁹ The Controlled Substances Act provided for an innocent owner defense and recognized an innocent owner as one who either did not know of the conduct giving rise to the forfeiture, or did all that could reasonably be expected under the circumstances to terminate such criminal conduct.⁴⁰ The Department of Housing and Urban Development argued to the court that the innocent owner defense applied only to civil forfeitures, not lease eviction proceedings, and that because they were two different statutes, the innocent owner defense was inapplicable to the Provision.⁴¹ The Ninth Circuit was unpersuaded and reasoned that although the statutes were different, they govern the same subject matter, were enacted at the same time in the same chapter of the same Act and thus, it was fair to presume the Congress meant them to be read together.⁴²

The Department of Housing and Urban Development also put forth a negative implication argument.⁴³ It argued that Congress's amendment of the civil forfeiture provision of the Controlled Substances Act to include an innocent tenant defense, when considered with Congress's failure to write such a defense into the Provision, indicates they did not intend for one to be available

terminating tenancies except for "serious or repeated violation of the terms or conditions of the lease or for other good cause").

³⁹ 21 U.S.C. § 881(a) (2003); *Rucker*, 237 F.3d at 1121. "The 'innocent owner' defense which then appeared in 21 U.S.C. § 881(a)(7) is now codified at 18 U.S.C. § 983(d) as part of the general rules for civil forfeiture procedures." *Id.* at 1121 n.1.

⁴⁰ 18 U.S.C. § 983(d) (2003). An innocent owner is one who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." *Id.* at § 983(d)(2).

⁴¹ *Rucker*, 237 F.3d at 1121-22.

⁴² *Id.* at 1122 ("When dealing with two different statutes which not only govern the same subject matter but were also enacted at the same time in the same chapter of the same Act, we presume Congress meant them to be read consistently.").

⁴³ *Id.*

under the Provision.⁴⁴ The Ninth Circuit rejected this argument because the civil forfeiture amendment and section 1437d(l)(6) were drafted by different Congresses and “[t]o say Congress could have drafted the defense more explicitly in § 1437d(l)(6) is not to say it did not do so at all.”⁴⁵ Thus, the Ninth Circuit found that the innocent tenant defense provided in the Controlled Substances Act indicated that Congress intended for the Provision to apply to innocent tenants under section 1437d(l)(6).⁴⁶

Additionally, the Ninth Circuit recognized that the Provision led to absurd results and stated that the court should not assume that Congress intended absurd results in passing a law.⁴⁷ The

⁴⁴ *See id.* The civil forfeiture provision states:

The following shall be subject to forfeiture to the United States All real property, including any right, title and interest (including any leasehold interest) . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter . . . except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(7). The innocent owner defense in 21 U.S.C. § 881(a)(7) is now codified at 18 U.S.C. § 983(d).

⁴⁵ *Rucker*, 237 F.3d at 1122.

⁴⁶ *Id.* at 1123.

⁴⁷ *Id.* at 1119, *citing* *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994). In *X-Citement Video*, the owner and operator of X-Citement Video was convicted for shipping 49 videotapes of Traci Lords performing in pornographic films before she was 18. *Id.* at 66. The Protection of Children Against Sexual Exploitation Act of 1977 makes it a criminal act to knowingly transport, ship, receive or distribute a visual depiction of a minor engaging in sexually explicit conduct. *Id.* at 67-68; *see* 18 U.S.C. § 2252 (2003). The issue before the Court was whether the term “knowingly” applied only to the transport of the material or to both the transport of the materials and the sexually explicit nature of the materials. *X-Citement Video*, 513 U.S. at 69. The Ninth Circuit held that the term “knowingly” applied only to the transport elements and the statute was unconstitutional because it lacked a scienter requirement relating to the sexually explicit nature of the materials. *Id.* at 67-68. The Supreme Court reversed and held that the term knowingly applies to both the transport and explicit nature of the materials. *Id.* at 69-70, 78. Otherwise, the Court noted, the statute would “produce results that were not merely odd, but positively absurd.” *Id.* at 70. As

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absurd results are illustrated by the cases that were before the court.⁴⁸ Ms. Rucker took steps to stop her daughter's drug abuse, yet still had eviction proceedings brought against her.⁴⁹ Additionally, Ms. Lee and Ms. Hill had eviction proceedings instituted against them when their grandchildren were found smoking marijuana in the parking lot, an act that can hardly be considered a serious offense.⁵⁰ Evicting such innocent tenants

an example, the Court explained that under the Ninth Circuit's interpretation, "a retail druggist who returns an uninspected roll of developed film to a customer 'knowingly distributes' a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct." *Id.* at 69. The Court concluded: "We do not assume that Congress, in passing laws, intended such results." *Id.* See *infra* text accompanying notes 81-86 (citing examples of absurd evictions).

⁴⁸ *Rucker*, 237 F.3d at 1124 ("We need look no further than the facts of this case for an example of the odd and unjust results that arise under HUD's interpretation."); see *infra* note 78 (criticizing the lack of geographical limits in applying the statute); see also *supra* Part I.B.1 (discussing the plaintiffs' in *Rucker*).

⁴⁹ *Rucker*, 237 F.3d at 1124 ("HUD conceded at oral argument that there was nothing more Pearlle Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless.").

⁵⁰ See *id.* at 1117 ("[The Oakland Housing Authority] sought to evict Lee and Hill because their grandsons were caught smoking marijuana together in the apartment complex parking lot."); CAL. HEALTH & SAFETY CODE § 11357(b) (West 2003) ("Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100)."); N.Y. PENAL LAW § 221.05 (McKinney 2003) ("Unlawful possession of mari[j]uana is a violation punishable only by a fine of not more than one hundred dollars."). See also NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, *Personal Use 1*, at http://www.norml.org/pdf_files/NORML_personal_use_introduction.pdf (last visited Nov. 30, 2003).

Since 1973, 12 state legislatures—Alaska, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio and Oregon—have enacted versions of marijuana decriminalization. In each of these states, marijuana users no longer face jail time (nor in most cases, arrest or criminal records) for the possession or use of small amounts of marijuana.

Id.; Clifford Krauss, *Chretien Leaves at Ease, Even If Bush Is Displeased*, N.Y. TIMES, Nov. 14, 2003, at A3 ("I don't think a kid of 17 years old who has a joint

undermines any incentive there could have been to take action against the wrongdoing.⁵¹

Finally, the Ninth Circuit noted potential Due Process concerns in that the tenant's interest in the home was taken even where the tenant's home was not connected to the criminal act.⁵² The

should have a criminal record," (quoting Canadian Prime Minister Jean Chretien discussing liberalizing drug laws)); James C. McKinley Jr., *Signs of a Drug War Thaw; As Fear Eases, Rockefeller Laws Seem Less Necessary*, N.Y. TIMES, Jan. 21, 2001, at 29 Metropolitan Desk ("In 1977, President Carter formally advocated legalizing marijuana in amounts up to an ounce."); Sam Howe Verhovek, *Alaska's Voters to Decide On Legalizing Marijuana*, N.Y. TIMES, Oct. 10, 2000, at A18 (discussing Alaskans' vote on Proposition 5 which would legalize marijuana consumption for anyone over 18).

⁵¹ See Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (reasoning that the strict liability inherent in "no-fault" evictions maximizes deterrence). It could be argued, however, that not evicting tenants who take steps to stop criminal activity would maximize deterrence, as the tenants may more readily get involved if they know it will save them from eviction. Evicting innocent tenants even where they took action to stop the prohibited conduct (as did Pearlle Rucker in searching her daughter's room and warning her of the possibility of eviction, *Rucker*, 237 F.3d at 1117) creates a disincentive for tenants to get involved for they will have nothing to gain by doing so. Thus, prohibiting their eviction where they take action creates an incentive to get involved and maximizes deterrence. Additionally, absurd results would be less likely, and the Provision more reasonable, if the housing authorities were *obligated* to consider all circumstances relevant to a particular case before evicting the tenant. See HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003) (stating that in considering whether to evict, the housing authorities "*may* consider all circumstances relevant to a particular case" as opposed to *shall* consider the relevant circumstances) (emphasis added). Among the circumstances that *may* be considered are the "seriousness of the offending action," "extent of participation by the leaseholder in the offending action," and "the effects that the eviction would have on family members not involved in the offending activity." *Id.* See *infra* Part IV (discussing alternatives to the harsh no-fault eviction standard).

⁵² *Rucker*, 237 F.3d at 1125 ("HUD's interpretation of § 1437d(l)(6), which would permit the deprivation of a tenant's property interest when the property was not used in the commission of a crime and when the tenant did not know of the illegal activity, would raise serious due process questions."). See Nelson H. Mock, Note, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495, 1522-23 (1998) (explaining that to establish a substantive due process claim, a tenant must show

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Department of Housing and Urban Development argued that the Supreme Court's decision in *Bennis v. Michigan*⁵³ disposed of any due process concerns because *Bennis* held that depriving an innocent owner of a property right does not violate due process.⁵⁴ Central to the *Bennis* Court's holding, however, was the fact that the property was used in connection with the criminal activity.⁵⁵ Contrarily, in *Rucker*, the leased premises were not used in connection with the crime.⁵⁶ Although the Ninth Circuit found that the evictions "raise serious due process questions," it did not reach

the housing authority, a state actor, "(1) deprived the tenant of property (2) for 'an irrational or invidious purpose'" (quoting *Long Grove Country Club Estates, Inc. v. Long Grove*, 693 F. Supp. 640, 657 (N.D. Ill. 1988)).

⁵³ 516 U.S. 442 (1996).

⁵⁴ In *Bennis*, the Court upheld the forfeiture of a car, *id.* at 453, against a wife's due process claim, where the car, which was jointly owned with the husband, was forfeited as a public nuisance, *id.* at 446, when the husband used it to engage in sexual activity with a prostitute, *id.* at 443. In *Rucker*, the Ninth Circuit reasoned that the tenants had a property interest in their homes under *Greene v. Lindsey*, 456 U.S. 444, 451 (1982). *Rucker*, 237 F.3d at 1125. In *Greene*, the Court held that public housing tenants had a property interest and were deprived of that interest when they were not given adequate notice before final eviction proceedings were instituted against them. *Greene*, 456 U.S. at 456.

⁵⁵ See *Bennis*, 516 U.S. at 453. "[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." *Id.* at 446. "The *Bennis* automobile, it is conceded, facilitated and was used in criminal activity." *Id.* at 453. See also *id.* at 455 (Thomas, J., concurring) (stressing that in the case of an innocent owner and civil forfeiture, courts should strictly apply "historical standards for determining whether specific property is an 'instrumentality' of crime" before the property is forfeited).

⁵⁶ *Rucker v. Davis*, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *6-7 (N.D. Cal. June 24, 1998), *vacated*, 203 F.3d 627 (9th Cir. 2000), *amended by* 237 F.3d 1113 (9th Cir. 2000) (en banc), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) (finding *Rucker's* daughter was three blocks from their apartment and Lee and Hill's grandsons possessed marijuana in a parking lot of the housing complex). Herman Walker is an exception in that his premise was used in connection with the criminal activity because his caregiver, upon whom he was dependent, brought cocaine into the apartment. *Rucker*, 237 F.3d at 1117.

that issue.⁵⁷ Instead, the court held “that if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(1)(6) does not authorize the eviction of such a tenant.”⁵⁸

3. *The Supreme Court’s Approach*

Despite the Ninth Circuit’s concerns over the enforcement of section 1437d(1)(6) against innocent tenants, the Supreme Court reversed, unanimously holding that the Provision “unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity.”⁵⁹ The Court found that a plain reading of the statute would not lead to absurd results, there was no need to consult legislative history, and the statute does not violate the Due Process Clause of the Fourteenth Amendment.⁶⁰

The Court grounded its holding in the plain language of the statute, which provides that: “any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”⁶¹ The Court reasoned that Congress’s decision not to impose any knowledge qualification in the statute, “combined with its use of the term ‘any’ to modify ‘drug-related criminal activity,’

⁵⁷ *Id.* at 1125-26. “It is also a settled principle of statutory interpretation that whenever possible, a statute should be construed to avoid substantial constitutional concerns.” *Id.* at 1124.

⁵⁸ *Id.* at 1126. In reaching its holding, the court construed the term “control” as “a limitation on the breadth of the [P]rovision.” *Id.* The Provision states in relevant part: “any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” 42 U.S.C. § 1437d(1)(6) (2003).

⁵⁹ *Rucker*, 535 U.S. at 130.

⁶⁰ *Id.* at 132-33, 135.

⁶¹ 42 U.S.C. § 1437d(1)(6); *Rucker*, 535 U.S. at 130.

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precludes any knowledge requirement.”⁶² In addition, the Court found it important that under the statute, any drug related activity is grounds for termination, “not just drug-related activity the tenant knew, or should have known, about.”⁶³ Because the Court found the statute unambiguous, the Court did not consult the legislative history.⁶⁴

Not only did the Supreme Court find the statute unambiguous, but it also found it reasonable and not a violation of section 1437d(1)(2), which prohibits public housing authorities from including “unreasonable terms and conditions [in their leases].”⁶⁵ While one might conclude that evicting a tenant for something they did not do is unreasonable and, thus, a violation of section 1437d(1)(2), the Court found the statute reasonable because it does not require the eviction of the tenant.⁶⁶ Instead, the Court found, it vests in the local housing authority the decision to evict based on “the seriousness of the offending action,” and “the extent to which the leaseholder has . . . taken all reasonable steps to prevent or

⁶² *Rucker*, 535 U.S. at 130-31 (citing *United States v. Monsanto*, 491 U.S. 600, 609 (1989)); 42 U.S.C. § 1437d(1)(6).

⁶³ *Rucker*, 535 U.S. at 131; 42 U.S.C. § 1437d(1)(6).

⁶⁴ *Rucker*, 535 U.S. at 133. Had the Court consulted the legislative history of section 1437d(1)(6), the Court would have found a Senate Report expressly speaking to the issue of knowledge. *See Rucker v. Davis*, 237 F.3d 1113, 1123 (9th Cir. 2001) (en banc), *rev'd sub nom.* *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (finding no House or Senate reports accompanied the original version of § 1437d(1)(6), but finding Senate Report issued when the Provision was amended in 1990). That Senate Report states:

The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. REP. NO. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941.

⁶⁵ *Rucker*, 535 U.S. at 133-34 n.5. *See* 42 U.S.C. § 1437d(1)(2) (2003) (“Each public housing agency shall utilize leases which . . . do not contain unreasonable terms and conditions.”).

⁶⁶ *Rucker*, 535 U.S. at 133.

mitigate the offending action.”⁶⁷ That discretion, the Court concluded, makes the Provision reasonable and, thus, not a violation of section 1437d(1)(2).⁶⁸ Finally, the Court dismissed any Due Process concerns because tenants receive notices of eviction and are given the opportunity in the eviction proceedings to dispute whether the lease provision was actually violated.⁶⁹

C. The Influence of Rucker on Courts Struggling with No-Fault Evictions

Prior to *HUD v. Rucker*, both state and federal courts were split over whether Congress intended this “zero tolerance” policy.⁷⁰ Since *Rucker*, courts have been forced to rethink their approaches

⁶⁷ *Id.* at 134. See HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003).

⁶⁸ *Rucker*, 535 U.S. at 133-34.

⁶⁹ *Id.* at 136.

⁷⁰ Compare *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 512-13 (Tenn. 2001) (prohibiting the eviction of innocent tenants from federally subsidized housing), with *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 701 (Minn. 1999) (permitting landlords to evict tenants in federally subsidized housing who are unaware of criminality); compare *Rucker v. Davis*, 237 F.3d 1113, 1127 (9th Cir. 2001) (en banc), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) (prohibiting innocent tenants from being evicted) with *Burton v. Tampa Hous. Auth.*, 271 F.3d 1274, 1275 (11th Cir. 2001) (permitting federally subsidized landlords to evict tenants despite tenants' having no knowledge of criminality). The zero tolerance policy was articulated by President Clinton as the “One Strike and You're Out” policy. See United States Department of Housing & Urban Development Directive No. 96-16, Notice PIH 96-16 (HA) (issued Apr. 12, 1996) (discussing the “One Strike and You're Out” policy announced by President Clinton on March 28, 1996, <http://www.hud.gov/offices/pih/publications/notices/96/pih96-16.pdf> (last visited Dec. 1, 2003)). The “One Strike and You're Out” provision “requires public housing authorities to implement strong tenant screening, admissions, and evictions rules that mandate exclusion from public housing and lease termination for persons who engage in criminal activity, including drug-related activity.” IN THE CROSSFIRE, *supra* note 8, at 13 (discussing the zero tolerance “One Strike and You're Out” policy requiring “public housing authorities to implement strong tenant screening, admissions, and evictions rules that mandate exclusion from public housing and lease termination for persons who engage in criminal activity, including drug-related activity”).

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to no-fault evictions.⁷¹ For instance, before *Rucker*, in *Housing Authority of Joliet v. Keys*, Illinois's Appellate Division held that "where a tenant could not realistically exercise control over the conduct of a household member or guest due to lack of knowledge or some other reason, section 1437d(1)(6) [did] not authorize the eviction of that tenant."⁷² However, in the wake of *Rucker*, the same court held that according to the Supreme Court's interpretation of the Provision, local public housing authorities have discretion to terminate the lease of a tenant when a member of the household or a guest causes a violation of the lease by engaging in drug related criminal activity, "regardless of whether the tenant knew, or should have known, of the drug-related activity."⁷³

Similarly, before *Rucker*, New Jersey recognized an "innocent lessee exception" to eviction proceedings commenced for a third-party's criminal activity.⁷⁴ In *Oakwood Plaza Apartments v. Smith*,

⁷¹ See *Hous. Auth. of Joliet v. Chapman*, 780 N.E.2d 1106, 1107-08 (Ill. App. Ct. 2002); *Hous. Auth. of the City of Pittsburgh v. Fields*, 816 A.2d 1099 (Pa. 2003) (reversing a lower court's holding that the tenant could not be evicted under section 1437d(1)(6) where her son was not under her control in light of "the decision of the United States Supreme Court in *Department of Housing and Urban Development v. Rucker*").

⁷² *Hous. Auth. of Joliet*, 761 N.E.2d at 344. In *Housing Authority of Joliet*, the local housing authority brought an action to evict Patricia Keys from her home when her adult grandson confessed to robbing and shooting an individual at Keys' residence. *Id.* at 340. Keys was a patient in the hospital when the crime occurred. *Id.* Nonetheless, one month later the housing authority served Ms. Keys with a notice to terminate her tenancy. *Id.* The court found that Ms. Keys, described by the trial court as "an elderly woman in a walker, [whose] court appearances had to be scheduled consistent with her appointments for dialysis," did not have control over her adult grandson. *Id.* at 344 (citation omitted). The court affirmed the trial court's holding that "a tenant 'without notice and without control over guests or family members cannot lose his or her lease hold [sic] interest in the property.'" *Id.* at 340.

⁷³ *Id.* at 344. See *supra* Part I.B.3 (discussing the Supreme Court's interpretation in *Rucker*).

⁷⁴ See N.J. STAT. ANN. § 2A:18-61.1-61.12 (West 2003):

No lessee or tenant . . . may be removed by the Superior Court from any house . . . except upon establishment of one of the following grounds as good cause . . . the tenant or lessee of such leased premises,

New Jersey's Appellate Division held that to justify eviction—the “ultimate sanction”—a court must find the tenant permitted the guest to be in the apartment, and the tenant knew the guest was violating the state drug laws.⁷⁵ The court specifically recognized that to hold otherwise would run contrary to the remedial purpose of the act—to “address [a] critical shortage of residential housing and to prevent ‘the dispossession of tenants who are paying their rent and generally complying with their obligations as tenants.’”⁷⁶ After *Rucker*, New Jersey's innocent lessee exception was severely weakened, for the New Jersey courts were free to uphold evictions of tenants unaware of the criminal activity of a household guest or member.⁷⁷

II. MEET THE INNOCENT TENANT

The Provision fails in large part due to its broad reach.⁷⁸ To

knowingly harbors or harbored therein a person who committed such an offense [i.e., use, possession, manufacture, dispensing or distribution of an illegal narcotic], or otherwise permits or permitted such a person to occupy those premises for residential purposes

Id. at § 2A:18-61.1(p) (emphasis added).

⁷⁵ *Oakwood Plaza Apartments v. Smith*, 800 A.2d 265, 267 (N.J. Super. Ct. App. Div. 2002), *quoting* *Hous. Auth. of Hoboken v. Alicea*, 688 A.2d 108, 110 (N.J. Super. Ct. App. Div. 1997) (characterizing eviction from public housing as the “ultimate sanction”). In *Alicea*, the court held that a tenant must not only “‘permit’ a drug offender to occupy the leased premises, but must also tolerate the offender’s occupancy of the premises knowing that such person has violated the [Comprehensive Drug Reform Act].” *Alicea*, 688 A.2d at 110.

⁷⁶ *Alicea*, 688 A.2d at 110.

⁷⁷ *See Oakwood Plaza Apartments*, 800 A.2d at 267. Instead the court emphasized the Supreme Court’s recognition that various factors should be evaluated when deciding whether to evict. *Id.* at 268. The factors are: the seriousness of the violation, the effect of the eviction on the household members not involved in the criminal activity, and the willingness to remove the wrongdoing household member from the lease as a condition for continued occupancy. *Id.* at 268.

⁷⁸ *See Rucker v. Davis*, 237 F.3d 1113, 1124 (9th Cir. 2001) (en banc), *rev’d sub nom.* *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (criticizing the lack of geographical limits in applying the statute). The Department of Housing and Urban Development acknowledged “the statute

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illustrate this point, it is important to understand who is subject to liability under the Provision. Not only is the person accused of committing the crime subject to eviction for their criminal acts, but so also is the tenant of record, who may be unconnected to and lack any knowledge about the criminal activity.⁷⁹ This person is often referred to as the innocent tenant whom the Ninth Circuit described as a tenant who “did not know of or have any reason to know of such activity or took all reasonable steps to prevent the activity from occurring.”⁸⁰

These innocent low-income public housing tenants are exceptional victims of their circumstances: Not only do they have high rates of crime, including violent crime, to fear, but the threat of homelessness as well.⁸¹ The innocent tenant is Rosario Albino, a

would apply and permit eviction of an entire family if a tenant’s child was visiting friends on the other side of the country and was caught smoking marijuana, even if the parents had no idea the child had ever engaged in such activity and even if they had no realistic way to control their child’s actions 3,000 miles away.” *Id.*

⁷⁹ See 42 U.S.C. § 1437d(l)(6) (2003). “[A]ny drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” *Id.*; see also *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (holding “any drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about”).

⁸⁰ See *Rucker*, 237 F.3d at 1115-16; see also 18 U.S.C. § 983(d)(2) (2003) (stating that an innocent owner is one who “(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property”). In *Rucker*, Rucker did not know of her granddaughter’s drug use, regularly searched her room for evidence of drug use, and warned her and others that drug use on the premises could result in eviction. *Rucker v. Davis*, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *6 (N.D. Cal. June 24, 1998), *vacated*, 203 F.3d 627 (9th Cir. 2000), *amended by* 237 F.3d 1113 (9th Cir. 2000) (en banc), *rev’d sub nom.* *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002). Similarly, Lee and Hill were not aware of any prior illegal drug activity by their grandsons and warned them that such prohibited conduct could result in eviction. *Id.* at *7.

⁸¹ See *Rucker*, 237 F.3d at 1115. The Ninth Circuit stated:

Many of our nation’s poor live in public housing projects that, by many

sixty-eight year-old widowed mother of eight with a total monthly fixed income of \$411.⁸² The court found her only fault was “in raising two daughters who went astray and got involved in narcotics.”⁸³ The innocent tenant is Ms. Green, “an exemplary tenant of the housing complex” and “volunteer on the Resident Council Board for the complex” who was evicted from her apartment when her daughter’s friend secretly brought drugs into the home.⁸⁴ And finally, the innocent tenant is Teri Wells, who was evicted from her home where she and her children had lived for nine years when her brother, who was staying with her on a temporary basis after living in a homeless shelter, was found selling narcotics in the vicinity of her home.⁸⁵ That she had no knowledge of the activity and asked her brother to leave upon his arrest was not enough to keep the housing authority from evicting her.⁸⁶

Eviction proceedings do not necessarily result in evictions, though.⁸⁷ In the case of the respondents in *Rucker*, for instance, the

accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children. What these tenants may not realize is that, under existing policies of the Department of Housing and Urban Development [], they should add another fear to their list: becoming homeless

Id. See also HUD USER, U.S. DEP’T. OF HOUS. & URBAN DEV., *Gun-Related Violence: The Costs to Public Housing Communities* (“In 1998 there were an estimated 360 gun-related homicides in 66 of the Nation’s 100 largest public housing authorities.”), at http://www.huduser.org/periodicals/rrr/rrr_3_2000/0300_1.html (last visited Nov. 12, 2003); NATIONAL COALITION FOR THE HOMELESS, *Fact Sheet #1: Why Are People Homeless?* (Sept. 2002) (“Two trends are largely responsible for the rise in homelessness over the past 20-25 years: a growing shortage of affordable rental housing and a simultaneous increase in poverty.”), at <http://www.nationalhomeless.org/causes.html>.

⁸² *Lloyd Realty Corp. v. Albino*, 552 N.Y.S.2d 1008 (Civ. Ct. N.Y. County 1990).

⁸³ *Id.* at 1011.

⁸⁴ *Hous. Auth. v. Green*, 657 So. 2d 552, 553 (La. Ct. App. 1995).

⁸⁵ *Ann Arbor Hous. Comm’n v. Wells*, 618 N.W.2d 43, 44 (Mich. 2000).

⁸⁶ *Id.* at 44-45.

⁸⁷ See, e.g., *infra* note 89 (citing cases that did not result in eviction). While

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Oakland Housing Authority dismissed the eviction proceedings against three of the four tenants.⁸⁸ Additionally, in New York, several eviction proceedings have been dismissed at the trial level,⁸⁹ however, some are not overturned until appealed. In *Brown*

no-fault evictions might be vacated on appeal, certainly not all are vacated and even where they are, the family has nonetheless been put in a dangerous position bordering on homelessness. *See, e.g., Lloyd Realty Corp.*, 552 N.Y.S.2d at 1009 (acknowledging the merits of a narcotics eviction program, but also recognizing “concern regarding evictions from residential premises of innocent family members including those who are senior citizens, disabled tenants and tenants with infant children, especially in light of the present acute housing shortage”).

⁸⁸ Lakiesha McGhee, *2 of 4 ‘Evicted’ Oakland Tenants Can Stay*, OAKLAND TRIB., Apr. 5, 2002, at Front Page (reporting that one week after the Supreme Court’s decision in *Rucker*, the Oakland Housing Authority dropped eviction proceedings against Lee and Hill). The case against *Rucker* was dismissed in 1998. *Id.* The Oakland Housing Authority is still reviewing the case against Herman Walker. OAKLAND HOUSING AUTHORITY, OHA Reviews Cases (Apr. 4, 2002), at <http://www.oakha.org/rucker.html>.

⁸⁹ *See, e.g., Lloyd Realty Corp.*, 552 N.Y.S.2d at 1008. In *Lloyd Realty Corp.*, petitioner landlord sought to recover possession of the tenant’s premises after a “buy and bust” operation resulted in the arrest of the tenant’s daughter and daughter’s friend for selling narcotics in front of the subject premises. *Id.* at 1009. Rosario Albino, the tenant, lived in the apartment for fifteen years. *Id.* She was sixty-eight, widowed, suffered from hypertension and bronchial asthma, had no knowledge of the drug activity, and received a total monthly income of \$411 from Social Security Widow’s Pension and Supplemental Security Income. *Id.* at 1009, 1011. The court reasoned that to uphold such an eviction, it must be shown that Mrs. Albino knew of the illegal drug activity and thus acquiesced in the use of the premises for such purposes. *Id.* at 1010. The court did not find that the evidence supported such a finding. *Id.* Additionally, the court found that “that the eviction of a senior citizen who has no knowledge nor involvement of the illegal drug activity conducted in her apartment will [not] further serve the purpose of the narcotics eviction program. *Id. See, e.g., 1895 Grand Concourse Assocs. v. Ramos*, 685 N.Y.S.2d 580 (Civ. Ct. Bronx County 1998). In *1895 Grand Concourse*, the landlord sought to recover possession of the respondent tenant’s premises alleging respondent has been using the premises for the illegal sale of drugs. *Id.* Tenant, Theresa Ramos, resided in the apartment for the last twenty-five years with her seven children and husband. *Id.* at 582. She was never arrested prior to the charges underlying this case and those charges against her were dismissed. *Id.* She did not sell nor did she consume drugs. The landlord sought recovery when a search of the premises resulted in the police finding cocaine. *Id.* at 581. A detective involved in the search testified that the search

v. Popolizio, for example, Rachel Brown's tenancy was terminated when her son, who had not lived with her for six months, was arrested on housing grounds for possession of a controlled substance in the seventh degree, a Class A misdemeanor.⁹⁰ The possession was his first arrest, and he pled to disorderly conduct, a violation.⁹¹ Ms. Brown had lived in the same apartment for nearly twenty years and at the time of the eviction proceedings resided there with her twin minor daughters, another son and his family.⁹² The Appellate Division vacated the housing authority's decision as contrary to the law and an abuse of discretion.⁹³ The court noted that the housing authority's management manual did not authorize termination of tenancy for misdemeanor non-desirable acts, such as the one here, unless there are other factors of an undesirable nature on the tenant's record.⁹⁴ The court found that Ms. Brown's record contained no complaint of any kind during her twenty-year tenancy.⁹⁵ Thus, the court found the hearing officer's determination "arbitrary and capricious, contrary to law, and the penalty imposed constituted an abuse of discretion."⁹⁶

In *Robinson v. Martinez*, Tawana Robinson had eviction proceedings brought against her when she violated a stipulation she entered into with the housing authority to exclude her son from

did neither indicate any sale of narcotics from the premises nor any information that drugs were being sold in the apartment. *Id.* at 581-82. Ms. Ramos's husband also credibly testified that he was using the cocaine for his personal consumption and that no one in his family knew about his consumption. *Id.* at 582. The court dismissed the landlord's action to recover the premises because no evidence was presented indicating that narcotics were sold from the premises and no evidence was presented showing that Ms. Ramos knew or should have known of her husband's drug use. *Id.* at 583.

⁹⁰ 569 N.Y.S.2d 615, 617 (N.Y. App. Div. 1991); see N.Y. PENAL LAW § 220.02 (McKinney 2003). A class A misdemeanor is punishable by a fine of up to \$1,000. *Id.* at § 80.05.

⁹¹ *Brown*, 569 N.Y.S.2d at 617, 622.

⁹² *Id.* at 617.

⁹³ *Id.* at 622.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

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the premises.⁹⁷ The housing authority instituted termination proceedings after she permitted her son, who was seriously ill, to spend the night at her apartment so that she could assure that he went to a doctor's appointment for his bone disease at a hospital across the street from the project.⁹⁸ The Appellate Department, however, found the penalty of termination "shockingly disproportionate" in light of her twenty-one-year residency, her compelling explanation for allowing her son to stay only for one night and the fact that her son's stay there did not compromise the health or safety of other tenants.⁹⁹

While one might argue these cases demonstrate that courts serve as an effective check on the often harsh decisions of housing authorities, one must consider the number of cases that are not appealed for lack of resources.¹⁰⁰ In addition, courts often uphold evictions of innocent tenants even when they are challenged. In *Syracuse Housing Authority v. Boule*, for example, Ann Boule was evicted for the criminal activity of her baby sitter.¹⁰¹ Ms. Boule was on her way to work when her usual baby-sitter became unavailable.¹⁰² To avoid jeopardizing her employment, she called the child's father at the last minute to baby-sit while she worked.¹⁰³ Unbeknownst to Ms. Boule, while she was at work, the father

⁹⁷ 764 N.Y.S.2d 94 (N.Y. App. Div. 2003). In March 1997, her son moved out of the apartment as part of an earlier settlement agreement with the housing authority in connection with an eviction proceeding brought against the tenant for her son's unlawful possession of marijuana. *Matter of Robinson v. Finkel*, Decision of Interest, 228 N.Y. L.J. 18 (2002). See *supra* Part III.C (explaining the policy of exclusion).

⁹⁸ *Robinson*, 764 N.Y.S.2d at 95-96.

⁹⁹ *Id.*

¹⁰⁰ See 42 U.S.C. § 2996 (2003) (finding, in connection with the creation of the Legal Services Corporation, that "there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program").

¹⁰¹ *Syracuse Hous. Auth. v. Boule*, 701 N.Y.S.2d 541, 541 (N.Y. App. Div. 1999).

¹⁰² *Syracuse Hous. Auth. v. Boule*, 658 N.Y.S.2d 776, 777 (Syracuse City Ct. 1996), *aff'd*, 3 676 N.Y.S.2d 741 (Onandaga County Ct. 1998), *rev'd*, 701 N.Y.S.2d 541.

¹⁰³ *Id.*

invited two other people to the house where they sold drugs and were subsequently arrested.¹⁰⁴ While the lower court held that evicting the mother, the tenant of record, was unwarranted since she was unaware of, did not consent to and could not foresee the criminal activity, the Appellate Division affirmed the eviction of Ms. Boule and applied a strict liability standard.¹⁰⁵ The Appellate Division found the housing authority is not bound to exercise discretion or consider mitigating circumstances where there is a violation of section 1437d(1)(6).¹⁰⁶

Similarly, in San Francisco, a mother and father were evicted from their federally subsidized apartment for failure to ensure that no drug-related activity took place on the premises.¹⁰⁷ During a routine search of their son's jacket hanging in a closet, the police found four packets of narcotics.¹⁰⁸ Despite no evidence that the parents knew of, controlled, acquiesced in or had reason to know of their son's possession of narcotics in the apartment, the eviction was upheld.¹⁰⁹ The court reasoned that the eviction was proper because the parents were not being evicted for the conduct of their son, but for their failure to fulfill their commitment in the lease to

¹⁰⁴ *Id.* The court found:

The following further facts are stipulated: respondent did not know Mr. Troutman had invited the other two persons upon the premises and she did not give permission for them to be present; none of the three persons arrested reside at the apartment; respondent was unaware of the presence or sale of the drugs on the premises; respondent was not in any way involved in the possession or sale of the drugs; respondent was not criminally charged regarding this incident; respondent believed that Mr. Troutman did not have a criminal record; and neither neighbors nor the Housing Authority notified respondent of the criminal activity during its occurrence.

Id.

¹⁰⁵ *See id.* at 780 (applying a balancing approach at the trial level); *but see Boule*, 701 N.Y.S.2d at 542 (applying strict liability approach in the appellate division).

¹⁰⁶ *Boule*, 701 N.Y.S.2d at 542.

¹⁰⁷ *San Francisco Hous. Auth. v. Guillory*, 49 Cal. Rptr. 2d 367, 372 (Cal. App. Dept. 1995).

¹⁰⁸ *Id.* at 369.

¹⁰⁹ *Id.* at 369-70, 372.

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ensure and prevent any drug activity from occurring on the premises.¹¹⁰

III. IT'S JUST BAD PUBLIC POLICY

The Provision implements poor public policy in several ways. First, the Provision puts tenants at risk by implying an affirmative duty on tenants to prevent and stop criminal behavior of third parties.¹¹¹ Second, the Provision inhibits the recovery of tenants who are substance abusers by denying them one of the most fundamental components of recovery—family.¹¹² Third, the provision breaks up families by conditioning their continued occupancy on permanently excluding the third party, who often is a family member.¹¹³ And finally, the Provision is unconscionable and renders the lease an unconscionable contract.¹¹⁴

A. The Provision Unfairly Imposes an Affirmative Duty on Public Housing Tenants to Prevent and Stop the Criminal Behavior of Third Parties

While one may have a moral duty to prevent harm, the law distinguishes this from causing harm, punishing only the latter affirmative action.¹¹⁵ Generally, one is not liable for failing to act.¹¹⁶ Under the Provision, however, tenants are under an

¹¹⁰ *Id.* at 372 (holding “drug-related activity by any member of a tenant household is cause per se for termination of the lease where, as here, the housing authority receives federal funds”).

¹¹¹ *See infra* Part III.A.

¹¹² *See infra* Part III.B.

¹¹³ *See infra* Part III.C.

¹¹⁴ *See infra* Part III.D.

¹¹⁵ *See, e.g.*, Thomas Morawetz, Book Review, *The Jurisprudence of Duty and Obedience*, 88 COLUM. L. REV. 1135 (1988).

¹¹⁶ RESTATEMENT (SECOND) OF TORTS § 314 (1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”); *Id.* at Illustration 1 (“A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a

affirmative obligation, subject to termination, to ensure no tenant, member of the household or guest under the tenant's control engages in criminal activity.¹¹⁷ Courts have expressly upheld this duty of tenants to ensure that no other tenant or guest engages in a criminal drug activity.¹¹⁸

This requirement is unfair because, as seen with the elderly and disabled plaintiffs in *Rucker*, not all residents are capable of ensuring that a member of the resident's household, guest or other person does not engage in criminal activity.¹¹⁹ Moreover, it is poor

word or touch without delaying his own progress. *A* does not do so, and *B* is run over and hurt. *A* is under no duty to prevent *B* from stepping into the street, and is not liable to *B*.”); see *L.S. Ayres & Co. v. Hicks*, 40 *N.E.2d* 334, 336 (*Ind.* 1942) (“One is not bound to guard against a happening which there is no reason to anticipate or expect.”).

¹¹⁷ See HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4(f) (2003). The lease shall provide that the tenant shall be obligated:

(12)(i) To assure that no tenant, member of the tenant's household, or guest engages in: (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or (B) Any drug-related criminal activity on or off the premises; (ii) To assure that no other person under the tenant's control engages in: (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or (B) Any drug-related criminal activity on the premises; (iii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents.

Id. This obligation is a great burden in light of the Supreme Court's ruling that the phrase under control “means control in the sense that the tenant has permitted access to the premises.” See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002).

¹¹⁸ See *Burton v. Tampa Hous. Auth.*, 271 F.3d 1274, 1276 (11th Cir. 2001) (“Embodied within this agreement is the understanding that it is the resident's obligation to ensure that no member of the resident's household, guest, or other person under the resident's control shall engage in any criminal activity on THA premises.”); see also *Remeeder H.D.F.C., Inc. v. Francis*, No. 2000-1406 K C, slip op. at 1 (N.Y. App. Term Dec. 6, 2001) (comparing 42 U.S.C. § 1437d(1)(6) (2003) with 42 U.S.C. § 1437d(1)(5) (2003) and concluding that “both versions of the federal statute seem to make tenants the guarantors of the conduct by other household members, guests, or other people under a tenant's control”).

¹¹⁹ *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), *rev'd*

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public policy to expect a civilian to endanger himself by implying a duty to spot illegal drug activity and stop it.¹²⁰ In fact, Congress has recognized this danger and protected against it in other contexts.¹²¹ Such impositions on people not qualified to fulfill these tasks will likely lead to incorrect reporting of crimes as well as potentially dangerous situations for the civilians involved.¹²²

sub nom. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (noting Pearlle Rucker was 63, Willie Lee, 71, Barbara Hill, 63, and Herman Walker, 75 and disabled). See Stacy Finz, *Evictions of Seniors Assailed in Court; One Strike Policy Called Racist, Classist*, SAN FRANCISCO CHRON., Sept. 20, 2000, at A20 (describing how Herman Walker, who is partially paralyzed, requires around the clock care); see also Part I.B.1 (discussing the plaintiffs in *Rucker*).

¹²⁰ See *Rucker*, 535 U.S. at 134 (remarking "a tenant who 'cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project'"); see also Michael A. Cavanagh & M. Jason Williams, *Low-Income Grandparents as the Newest Draftees in the Government's War on Drugs: A Legal and Rhetorical Analysis of Department of Housing and Urban Development v. Rucker*, 10 GEO. J. POVERTY LAW & POL'Y 157 (2003).

The Court's reflection thus blames the victims. The full force of the United States government, consisting of the courts, the military, and the police, has been unable to stop drug crime for more than thirty years The Court simply fails to explain how poor elderly grandmothers and disabled persons are, single-handedly, to rid the PHAs of drug dealers.

Id. at 164-65.

¹²¹ See 18 U.S.C. § 983(d)(2)(B)(ii) (2003) (setting forth an innocent owner defense, the statute states: "A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger"); see also William Raspberry, *Clean Up Public Housing With One Strike*, TIMES UNION, Apr. 1, 2002, at A9 ("A rule requiring eviction under any and every circumstance of family-member involvement with criminality would be just another example of 'zero tolerance' gone mad.").

¹²² See Cavanagh & Williams, *supra* note 120, at 165 ("The Court simply fails to explain how poor elderly grandmothers and disabled persons are, single-handedly, to rid the PHAs of drug dealers."); 18 U.S.C. § 983(d)(2)(B)(ii) (stating in connection with a civil forfeiture defense that "[a] person is not required . . . to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger").

Nonetheless, the Chief Justice remarked that if a tenant cannot control the criminal activity of someone else, the tenant is a threat to the community, and the threat warrants eviction.¹²³ According to this reasoning, a paralyzed minister is a threat to the community because he did not stop his caregiver, upon whom he was dependent, from storing drugs in his apartment.¹²⁴ By the Court's logic, it seems the only people who are truly "safe" enough to live in public housing are people with detective-like skills and the courage to confront criminals about their illegal behavior and subdue them when they pose a physical or criminal threat.

Finally, a grandparent or parent should be entitled to the presumption that their children are not engaged in a criminal activity.¹²⁵ It is unfair to hold someone liable for what amounts to

¹²³ See *Rucker*, 535 U.S. at 134. The Supreme Court reasoned:

[T]here is an obvious reason why Congress would have permitted local public housing authorities to conduct no-fault evictions: Regardless of knowledge, a tenant who "cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project."

Id. (quoting HUD Public Housing Lease and Grievance Procedure, 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991)). In an apparent attempt to soften the harsh language, the Federal Register states that "If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit." 56 Fed. Reg. 51560. While this might work with someone who is not a member of the family or whom is not wanted on the premises, the idea that a family that desires to stay united should simply call the housing authorities to remove the offender, especially in the case of a low-level crime like smoking marijuana, is absurd. See *supra* note 50 and accompanying text (citing California statute classifying possession of marijuana as a misdemeanor and New York statute classifying it as a violation). Furthermore, even if the tenant calls upon the housing authority to remove the offender, the tenant may still be evicted. See *supra* note 51 (explaining that courts are not obligated to consider all circumstances relative to a particular eviction case, but may consider them in its discretion).

¹²⁴ See, e.g., *Rucker*, 535 U.S. at 131-33 (explaining that a tenant's eviction may rest solely on his or her having provided an individual engaged in drug-related activity with "access to the premises").

¹²⁵ See Daniel E. Witte, Note, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996

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failing to report their son or daughter because they *might* be using drugs.¹²⁶ Such a duty should not be imposed upon a familial relationship where trust is an essential component to the health of the relationship.¹²⁷

BYU L. REV. 183, 221 (1996) (“In the realm of family law, the presumption ‘that children ordinarily will be best cared for by those bound to them by the ties of nature’ serves a similar function as the presumption of ‘innocent until proven guilty’ Without such basic presuppositions, an existing orderly and secure society cannot long maintain itself.”) (citations omitted).

¹²⁶ See *Rucker*, 237 F.3d at 1117 (“Lee and Hill contend they had no prior knowledge of any illegal drug activity by their grandsons.”). Because plaintiff’s Barbara Hill and Willie Lee had no knowledge of their grandson’s marijuana use they had no reason to either report the situation to the housing authority or attempt to have them excluded from the household. See also HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003) (“Exclusion of culpable household member. The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.”). Nonetheless, it is clear that it would be to their advantage, insofar as being able to maintain their residences, to just report their grandsons because it is possible they may be using drugs.

¹²⁷ See *Harkness v. Fitzgerald*, 701 A.2d 370, 373 (Me. 1997) (“As a general rule, parent and child relationships are based on trust”); *In re A. & M.*, 403 N.Y.S.2d 375, 380 (N.Y. App. Div. 1978).

The role of the family, particularly that of the mother and father, in establishing a child’s emotional stability, character and self-image is universally recognized. The erosion of this influence would have a profound effect on the individual child and on society as a whole. Child psychologists and behavioral scientists generally agree that it is essential to the parent-child relationship that the lines of communication remain open and that the child be encouraged to “talk out” his problems. It is therefore critical to a child’s emotional development that he know that he may explore his problems in an atmosphere of trust and understanding without fear that his confidences will later be revealed to others.

Id.; Wendy Meredith Watts, *The Parent-Child Privileges: Hardly A New Or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 604 (1987) (“In order for parents to exercise their rights to raise their children and instill in them morals and values, society must encourage a mutual trust between parent and child.”); Michael D. Moberly, *Children should be Seen and not Heard: Advocating the Recognition of a Parent-Child Privilege in Arizona*, 35 ARIZ. ST. L.J. 515, 532 (2003) (“[T]he ability to provide effective parental guidance largely depends

B. The Provision Inhibits Recovery Where The Tenant Being Evicted Is Addicted To Illegal Drugs

While the criminal activities at issue in *Rucker*, smoking marijuana and possession of cocaine, arguably present dangers to other tenants, the crimes are generally consequences of substance abuse.¹²⁸ This addiction-driven behavior is not similar to “drug dealers . . . imposing a reign of terror on . . . housing tenants,”¹²⁹ and this difference is recognized in the way criminal courts have prosecuted these crimes.¹³⁰ While drug abuse has largely been considered a criminal issue, it is now being considered and treated more consistently as a medical issue.¹³¹ Yet, the Provision, seemingly overlooking the medical aspects of drug abuse, still provides that tenants may be evicted for using or abusing drugs or having guests who do so.¹³²

upon the existence of loyal and trusting family relationships.”); Jeff Murrah, *Why Should I Trust You?*, (“Trust is an essential part of family life. In . . . [the] parental relationships, there must be trust. Each person needs to be able to count on each other, and have that sense of safety that comes from trust within the home. When trust is established in families, everyone benefits.”), at <http://www.myparentime.com/articles/articleS43.shtml> (last visited Dec. 1, 2003).

¹²⁸ See *Rucker*, 535 U.S. at 128.

¹²⁹ 42 U.S.C. § 11901(3) (2003).

¹³⁰ Asa Hutchinson, *Drug Policy In America—A Continuing Debate: An Effective Drug Policy To Protect America’s Youth And Communities*, 30 FORDHAM URB. L.J. 441, 451-52 (2003) (“State criminal laws concerning drug possession focus on rehabilitative and restorative programs, rather than automatic incarceration for drug users.”).

¹³¹ WASH. STATE BAR ASS’N, *Resolution Regarding Drug Abuse Policies in Washington State* (advising that “‘low-level’ drug crimes, such as simple possession, should be approached as health problems not criminal problems”), http://www.kcba.org/drug_law/WSBA.pdf (Dec. 11, 2001).

¹³² See 42 U.S.C. § 1437d(1) (2003) (“For purposes of [§ 1437d(1)(6)], the term ‘drug-related criminal activity’ means the illegal . . . use, or possession with intent to . . . use . . . a controlled substance.”); see also *Rucker*, 237 F.3d at 1117 (eviction proceedings instituted against two tenants for smoking marijuana); HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (providing for the termination of a tenant’s lease for abusing alcohol where the “abuse or pattern of abuse . . . threatens the health, safety, or right to

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Evictions conducted against substance abusers are unreasonably harsh because substance abusers need the stability of a home to recover—not homelessness.¹³³ Addiction to mood altering substances such as alcohol or cocaine is a chronic disease classified with cancer, AIDS and other illnesses, which produce long-term physical, psychological and social damages.¹³⁴ While there is no cure for addiction, it may be effectively treated through abstinence and sobriety.¹³⁵ It is well accepted that a vital component to the addiction recovery process is communication.¹³⁶ One of the most effective forms of communication geared toward recovery involves the family.¹³⁷ Yet, the strict and unforgiving parameters of the Provision do not allow one the proper means to recover. Because the Provision impresses an affirmative duty on a tenant of record to ferret out criminal activity, one who is suffering

peaceful enjoyment of the premises by other residents”).

¹³³ See CONN. CLEARING HOUSE, WHEELER CLINIC, *Facts About Drug and Alcohol Addiction, Treatment, Recovery, and Use* (“Family and friends can play critical roles in motivating individuals with drug and alcohol problems to enter treatment, stay in it, and maintain sobriety. Family therapy is also important, especially for adolescents. Additional support is available through the recovery community in the form of 12-step programs.”), at http://www.ctclearinghouse.org/FactSheets/fs_treatment_facts_about.pdf (2001).

¹³⁴ TERENCE T. GORSKI & MERLENE MILLER, *STAYING SOBER: A GUIDE FOR RELAPSE PREVENTION* 39-40 (1986); see AMERICAN COUNCIL ON ALCOHOLISM, *What is Alcoholism* (defining alcoholism as a fatal addictive disease), at <http://www.aca-usa.org/acadefinition.htm> (page last updated July 23, 2003).

¹³⁵ GORSKI & MILLER, *supra* note 134, at 50 (“Total abstinence is necessary to recover from an addiction Abstinence is a necessary first step for recovery.”).

¹³⁶ ANNE GELLER, M.D., *RESTORE YOUR LIFE: A LIVING PLAN FOR SOBER PEOPLE* 152 (1991).

¹³⁷ *Id.* at 152. See James Garrett, Judith Landau & Robert Shea, *The ARISE Intervention: Using Family and Network Links to Engage Addicted Persons in Treatment*, 15 J. OF SUBSTANCE ABUSE TREATMENT 333, 333 (1998) (“The most well-known and widely applied [treatment alternative to self-help groups for substance abusers] is the ‘Intervention’ approach . . . [which] proceeds by enlisting and convening as many of a chemically dependent person’s (CDP’s) significant others as possible in an effort to induce the CDP to enter treatment.”).

from addiction or relapsing is unlikely to come forward and ask a family member or friend in the public housing project for help for fear of being reported and subsequently evicted.¹³⁸ While recovery is most successful when it is discussed openly in the family unit, the Provision deprives families of the ability to openly address the use of illegal drugs because it creates the risk of eviction.¹³⁹ Thus, substance abusers are deprived of the family as a valuable component of their recovery.¹⁴⁰

¹³⁸ See Platoni, *supra* note 30 (“As a matter of fact, [the Provision] puts tenants in a situation where they’re afraid to reveal any activity in their homes or address the issue because they know the moment they say anything, the housing authority could move to evict them.” (quoting Catherine Bishop of the Oakland-based National Housing Law Project)). Relapse is typical during the recovery process and is in some ways to be expected. See also GORSKI & MILLER, *supra* note 134, at 112.

¹³⁹ See GELLER, *supra* note 136, at 152-55 (discussing how open lines of communication with family members contributes to the success of an individual’s recovery from alcohol and drugs).

¹⁴⁰ Indigent families often lack access to affordable health services as compared to wealthy families and thus are already at a disadvantage. See HENRY J. KAISER FAMILY FOUNDATION, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *Key Facts* (Jan. 2003), at <http://www.kff.org/uninsured/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14185> (last visited Dec. 1, 2003).

Low-income Americans (those who earn less than 200% of the federal poverty level, or \$28,256 for a family of three in 2001) run the highest risk of being uninsured. Over a third of the poor and more than a quarter of the near-poor lack coverage. The poor and the near-poor comprise two-thirds (66%) of the uninsured population.

Id. That disadvantage is only amplified when these families are denied the most simple and basic means to assist in the rehabilitation of addicts within the family. A family that owns their home is able to recover as a family because they are not forced to choose between either excluding a family member to prevent eviction or including him to help him recover. The Provision and its rules apply only to individuals leasing public housing. See 42 U.S.C. § 1437d(1)(6) (2003) (“Each *pubic housing agency* shall utilize leases”) (emphasis added). The lease Provision effectively denies this same benefit of recovering as a family to the poor who are only able to rent through public housing programs and cannot afford to own. This disparate treatment of families based on wealth and ownership of property is bad public policy. Compare plaintiff Rucker’s daughter and Florida Gov. Bush’s daughter: both residents of

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C. The Provision Breaks Up Families Through Permanent Exclusion

One of the more devastating effects of the Provision is that it divides and breaks up families. Tenants are sometimes given the option to exclude the offending person as a condition to their continued occupancy.¹⁴¹ This option effectively is a choice between losing your home or breaking up your family. This decision may not be a difficult choice where the individual you are agreeing to exclude is someone you do not want to visit your home. Such a decision, however, is extremely difficult when the person you are being asked to exclude is your child, spouse or caretaker; but, under the current policy, one who refuses to permanently exclude will likely be evicted.¹⁴²

Powell v. Franco illustrates how tenants are forced to choose

housing funded by taxpayers and both had problems with alcohol or drugs, but the disparate treatment—eviction for a poor elderly woman with no knowledge of her daughter’s drug use, versus medical treatment for a privileged young woman with a history of substance abuse and addiction. See Arianna Huffington, *I Strike, You’re Out on the Street*, L.A. TIMES, Apr. 2, 2002, at B13.

¹⁴¹ See HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003) (“Exclusion of culpable household member. The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.”).

¹⁴² See *Featherstone v. Franco*, 742 N.E.2d 607, 610 (N.Y. 2000) (terminating tenant’s lease when tenant “refused a possible mitigated sanction predicated upon [her 18 year old son’s] . . . permanent exclusion [from the apartment]”); *Patrick v. Hernandez*, 765 N.Y.S.2d 508, 508 (N.Y. App. Div. 2003) (affirming the housing authority’s termination of a tenant’s lease for violating, on at least one occasion, a stipulation to permanently exclude her son from the home); *Holiday v. Franco*, 709 N.Y.S.2d 523, 527 (N.Y. App. Div. 2000) (annulling the housing authority’s termination of a tenant’s lease for violating a stipulation to exclude her son where the son came to the home on one occasion without the tenant’s knowledge and the tenant was in her late sixties, resided in New York City Housing Authority premises since 1957 with an unblemished record and her household included a disabled daughter); see also *Robinson v. Martinez*, 764 N.Y.S.2d 94 (N.Y. App. Div. 2003) (illustrating the difficulty with excluding a family member from one’s home). See *supra* text accompanying notes 97-99 (discussing the facts of *Robinson v. Martinez*).

between breaking up their family and most likely homelessness.¹⁴³ In *Powell*, New York's Appellate Division reversed a determination by the housing authority that the tenants permanently exclude their son as a condition to remain in housing.¹⁴⁴ The court held that conditioning the tenants' continued occupancy upon permanently excluding their son was shocking to its sense of fairness where the son pled to disorderly conduct, performed five days of community service, the incident was isolated and the family was otherwise law-abiding and stable.¹⁴⁵ While some might argue it is drug use that breaks up families, it is also true that the recovery process can strengthen the family in many ways.¹⁴⁶ Indeed, families fulfill a critical role for delinquent youths as systems of emotional support and models of appropriate behavior.¹⁴⁷ Disrupting the family unit negatively impacts

¹⁴³ 684 N.Y.S.2d 226, 226 (N.Y. App. Div. 1999) (finding the housing authority "required the permanent exclusion of petitioners' son, Kenneth, as a condition of their continued occupancy in public housing").

¹⁴⁴ *Id.* In *Powell*, the tenants' son was arrested after he was seen making several "hand-to-hand" exchanges with individuals and was found with what the arresting officer believed was crack cocaine. *Id.*

¹⁴⁵ *Id.* at 226-27. While the Appellate Division was able to protect the family in this instance, it is important to note that the case was nonetheless brought against the indigent family. In this case, the family was fortunate to secure representation, yet many poor families are unable to afford representation in civil cases, and thus, are unlikely to challenge such inappropriate applications of permanent exclusion. See *Di Angelo v. Illinois Dep't of Pub. Aid*, 891 F.2d 1260, 1262 (7th Cir. 1989) ("Indigent civil litigants have no constitutional right to counsel at the expense of another—whether of the adversary or of the private bar."). On one hand, it makes sense to have public housing managers responsible for recommending eviction in that they are on site everyday and are in touch with the severity of the problems that exist. On the other hand it places a great deal of power and responsibility in the hands of a group of people responsible for managing buildings who are not necessarily capable of making difficult and sensitive decisions regarding crime, the elderly and families. While the courts can serve as a check on potential abuses, this is only effective if the people can afford to utilize the courts. This is uncertain where people are indigent.

¹⁴⁶ GELLER, *supra* note 136, at 164-65.

¹⁴⁷ Debra A. Madden-Derdich, Stacie A. Leonard & Gordon A. Gunnell, *Parents' and Children's Perceptions of Family Processes in Inner-City Families*

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delinquent behavior.¹⁴⁸

D. The Provision Is Unconscionable Rendering the Lease an Unconscionable Contract

The Court has characterized the government's role in connection with public housing "as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required."¹⁴⁹ This characterization, however, is over-simplified and inaccurate. The government is not simply a landlord,¹⁵⁰ and the tenants had

with Delinquent Youths: A Qualitative Investigation, 28 J. MARITAL & FAM. THERAPY 355, 356 (2002).

¹⁴⁸ *Id.* (findings supported previous empirical research highlighting the importance of family interaction processes in the lives of delinquent youths). See UNITED STATES DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *Risk Factors for Delinquency: An Overview*, ("Family characteristics such as poor parenting skills, family size, home discord, child maltreatment, and antisocial parents are risk factors linked to juvenile delinquency."), at http://www.ncjrs.org/html/ojjdp/jjjournal_2003_2/page3.html (last visited Nov. 28, 2003).

¹⁴⁹ Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134-35 (2002) (finding "'no-fault' eviction is a common 'incident of tenant responsibility under normal landlord-tenant law and practice'" (citation omitted); see Hous. Auth. v. Chapman, 780 N.E.2d 1106 (Ill. App. Ct. 2001) (finding that a tenant assumed the obligations of a valid contract in signing a lease for public housing); HUD Public Housing Lease and Grievance Procedure, 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991) ("As in a *conventional tenancy*, a public housing tenant holds tenure of the unit subject to the requirements of the lease . . .") (emphasis added).

¹⁵⁰ See 42 U.S.C. § 1437(a)(1)(A) (2003) ("It is the policy of the United States . . . to promote the general welfare of the Nation . . . as provided in this Act . . . to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families."). Unlike a landlord in a simple lease assignment who enters into agreements with the expectation of profits, the government did not create public housing to generate income. See U.S. DEP'T OF HOUS. & URBAN DEV., *What is Public Housing* ("Public housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities."), at <http://www.hud.gov/renting/phprog.cfm> (last updated Dec. 5, 2000).

virtually no choice but to agree to the contracts' terms.¹⁵¹ In light of the tenants' absence of choice and the leases' grossly unfavorable terms, the Court is arguably enforcing unconscionable contracts.¹⁵²

¹⁵¹ See *Rucker v. Davis*, 237 F.3d 1113, 1125 (9th Cir. 2001) (en banc), *rev'd sub nom.* *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) ("There is certainly no bargained-for-exchange in public housing leases. The form of public housing leases is almost entirely dictated by HUD."); see also *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 327 (1942) (Frankfurter, J., dissenting). Justice Frankfurter stated:

"[I]f one party has the power of saying to the other, 'that which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." . . . The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases.

Id. (citations omitted).

¹⁵² "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). Generally, the unconscionable contract requires inequality "so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense." See *Christian v. Christian*, 365 N.E.2d 849, 855 (N.Y. 1977) (quoting *Mandel v. Liebman*, 100 N.E.2d 149, 152 (N.Y. 1951)). Courts have utilized the language of unconscionable contracts when they have been confronted with strict liability evictions. See *Holiday v. Franco*, 709 N.Y.S.2d 523, 526 (N.Y. App. Div. 2000) (finding tenants expulsion from her home "shocking to the conscience" where her excluded son was found in her apartment on a single occasion and the tenant was a longtime tenant, cared for her disabled daughter and had an unblemished record as a tenant); *Spand v. Franco*, 663 N.Y.S.2d 813, 813 (N.Y. App. Div. 1997) (holding eviction of petitioner was "shocking to one's sense of fairness" where petitioner was involved in one isolated incident, had no other violations and there was no indication that she posed any risk to other tenants or property); *Charlotte Hous. Auth. v. Patterson*, 464 S.E.2d 68, 72-73 (N.C. Ct. App. 1995) (holding that to evict the tenant and her daughters "with no evidence of fault on their part for the shooting would . . . indeed shock our sense of fairness"); *Brown v. Popolizio*, 569 N.Y.S.2d 615, 622 (N.Y. App. Div. 1991) ("It would be shocking to one's sense of fairness to terminate the tenancies of persons who have not committed 'undesirable acts' and have not had control over those who have committed such acts."); *New York City Hous. Auth. v. Watson*, 207

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Standards developed in the common law doctrine of unconscionability generally govern whether a clause in a real estate lease is unconscionable.¹⁵³ Courts generally do not enforce unconscionable contracts.¹⁵⁴ A contract is unconscionable where there is both procedural and substantive inequality.¹⁵⁵ The key components rendering the clause or the entirety of a contract unconscionable are, first, lack of meaningful choice and, second, unreasonably favorable terms to the party seeking enforcement.¹⁵⁶

N.Y.S.2d 920, 924 (App. Term 1960) (Hofstadter, J., dissenting) (arguing that affirming the housing authority's eviction of a family based solely on the criminal activity of the father when the father was incarcerated "shocks the conscience"). Thus, it can be fairly said that courts have brought the common law doctrine of unconscionability to bear on the issue of no fault evictions.

¹⁵³ Halprin v. 2 Fifth Ave. Co., 422 N.Y.S.2d 275, 279 (N.Y. County Super. Ct. 1979), *rev'd on other grounds*, 427 N.Y.S.2d 258 (N.Y. App. Div. 1980), *aff'd*, 434 N.E.2d 244 (N.Y. 1982).

¹⁵⁴ See Scott v. United States, 79 U.S. 443, 445 (1870) ("If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."). See also *Bethlehem Steel Corp.*, 315 U.S. at 326 (Frankfurter, J., dissenting)

Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? . . . Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases.

Id. at 326-28.

¹⁵⁵ See *Williams*, 350 F.2d at 449; see also *Sablosky v. Gordon Co.*, 535 N.E.2d 643, 647 (N.Y. 1989) (explaining that an unconscionable contract is a contract where both substantive and procedural unfairness exist); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

¹⁵⁶ See *Williams*, 350 F.2d at 449 ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the

In determining whether meaningful choice exists, one must consider the totality of the transaction, and if there is a gross inequality of bargaining power, meaningful choice is not present.¹⁵⁷

Meaningful choice implies an alternative—a decision after considering more than one option.¹⁵⁸ Yet, public housing tenants are essentially presented with two options: the Provision in the lease, or, if they choose not to sign the lease, homelessness, which is no option.¹⁵⁹ The procedural inequality is also manifest in the circumstances surrounding the formation of the contract, including the circumstances of the parties at the signing of the contract.¹⁶⁰ People can wait up to ten years for public housing.¹⁶¹ And wait

other party.”).

¹⁵⁷ See *id.* (stating the unreasonableness or unfairness of the terms of the contract must be considered in light of the circumstances that existed when the contract was made); see also *Christian v. Christian*, 365 N.E.2d 849, 855 (N.Y. 1977) (noting that an unconscionable contract has been described as one where “no (person) in his (or her) senses and not under delusion would make on the one hand, and as no honest and fair (person) would accept on the other” (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889))).

¹⁵⁸ WEBSTER’S NEW WORLD COLLEGIATE DICTIONARY 258 (4th ed. 1999).

¹⁵⁹ See *Weidman v. Tomaselli*, 365 N.Y.S.2d 681, 687 (Rockland County Ct. 1975), *aff’d*, 386 N.Y.S.2d 276 (App. Term 1975) (“The Court takes judicial notice that food, clothing, shelter, and employment are necessities of life. The respondents must seek and obtain housing for themselves and for their infant daughter. The respondents do not have the alternative of foregoing shelter, nor is any natural shelter, such as a cave, available to them.”); see also *Featherstone v. Franco*, 703 N.Y.S.2d 11, 13 (App. Div. 2000) (Rubin, J., dissenting) (finding “public housing is a last resort for many of its residents”), *aff’d*, 742 N.E.2d 607 (N.Y. 2000).

¹⁶⁰ See *Villa Milano Homeowners Ass’n v. Il. Davorge*, 102 Cal. Rptr. 2d 1, 7 (Cal. Ct. App. 2000) (noting that procedural inequality analysis in an unconscionable contract focuses on oppression which is found where there is “an absence of real negotiation or a meaningful choice on the part of the weaker party”).

¹⁶¹ See U.S. MAYOR’S HOUSING FACT SHEET, *supra* note 10, at 2 (finding families in some large cities wait ten years or more for an available unit of public housing); Kathleen McGowan, *Nation’s Poorest Wait (and Wait) for Housing Help* (finding the typical wait for public housing in New York City can be up to eight years), at <http://www.tenant.net/Tengroup/Metcounc/Apr99/poorest.html> (last visited Oct. 23, 2003).

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they must for there is a serious lack of affordable housing alternatives.¹⁶² Under such conditions the sharp imbalance between the bargaining power of the waiting tenant and that of housing authority is exacerbated—the longer the wait, the greater the desperation and the weaker the bargaining strength of the tenant.¹⁶³ Further, the tenants are neither able to bargain out the harsh Provision, nor are they likely to be in a position to rent on the private market.¹⁶⁴ Finally, the lease is virtually entirely dictated by the Department of Housing and Urban Development.¹⁶⁵ These factors, when considered as a whole, demonstrate a lack of meaningful choice that significantly contributes to the procedural unfairness.¹⁶⁶

¹⁶² See U.S. MAYOR'S HOUSING FACT SHEET, *supra* note 10, at 2 (noting how public housing and subsidized apartments fall far short of the need and waiting lists for public housing have grown to about 1 million households); NATIONAL COALITION FOR THE HOMELESS, *The Affordable Housing Crisis and Homelessness in New York City, The Problem and the Solutions* ("According to Census Bureau statistics, in 1999 there was shortage of nearly 390,000 affordable apartments for extremely-low-income renter household in New York City (*i.e.*, households earning less than \$16,100 per year). In contrast, in 1970 there was actually a surplus of more than 270,000 affordable apartments for extremely-low-income renters."), at <http://www.coalitionforthehomeless.org/home/downloads/nychousing01.pdf> (updated Sept. 2002).

¹⁶³ See *supra* note 161 and *infra* note 166.

¹⁶⁴ See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 128-29 (2002) (finding HUD regulations administering § 1437d(l)(6) "require lease terms authorizing evictions" even where the tenant had no knowledge of the criminal activity); see also U.S. MAYOR'S HOUSING FACT SHEET, *supra* note 10 (noting the widening public housing gap between supply and demand and that no significant new public housing has been built in the past twenty-five years); *id.* ("Almost 2 million low- and moderate- income working families pay more than half of their income on rent or live in severely inadequate housing.").

¹⁶⁵ *Rucker v. Davis*, 237 F.3d 1113, 1126 (9th Cir. 2001) (en banc), *rev'd sub nom.* *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (finding that there is "no bargained-for-exchange in public housing leases" . . . and "public housing leases [are] almost entirely dictated by HUD").

¹⁶⁶ See *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting). Justice Frankfurter stated:

[T]he courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the

The unfavorable terms of the public housing lease are manifest in the fact that it allows tenants to be evicted not for their own criminal acts, but instead, for the criminal acts of third parties.¹⁶⁷ The unreasonable terms are hardly more apparent than in *Rucker*, where, despite efforts by the plaintiffs to prevent criminal activity, eviction proceedings were still pursued by the local housing authority.¹⁶⁸ In light of the advanced age of the people evicted and that the tenants had neither participated in nor committed criminal activity, the Provision's effect shocks the conscience.¹⁶⁹ It is

economic necessities of the other. "And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."

Id. (citation omitted).

¹⁶⁷ *Rucker*, 237 F.3d at 1124 ("HUD conceded at oral argument that there was nothing more Pearlle Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless."). See *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting) ("Fundamental fairness prohibits the punishment of innocent people.").

¹⁶⁸ See *Rucker v. Davis*, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *5-8 (N.D. Cal. June 24, 1998), *vacated*, 203 F.3d 627 (9th Cir. 2000), *amended by* 237 F.3d 1113 (9th Cir. 2000) (en banc), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) (finding Ms. Rucker regularly searched her daughter's room for evidence of drug and alcohol activity; Ms. Hill and Ms. Lee were not alleged to have knowledge of their grandsons' marijuana use and in fact warned them that such conduct could result in eviction); see also *Rucker*, 237 F.3d at 1117 (Mr. Walker fired his caregiver, upon whom he was dependent, short after receiving an eviction notice). Admittedly, the housing authorities are not required to evict tenants and "may consider all circumstances relevant to a particular case," HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003), however, this discretion may create a greater level of insecurity in that the tenants may be subject to the whims of the housing authority. See *supra* note 51 (discussing how housing authorities are not required to consider mitigating factors before evicting, but may do so in their discretion).

¹⁶⁹ See *supra* note 152 (citing courts that have utilized the phrase, "shocks the conscience," in connection with no-fault evictions). The shocking effect of the provision is illustrated by the eviction proceedings instituted against Mr. Walker who was elderly, partially paralyzed and a former minister. Cruz Lat, *supra* note 33 (describing Mr. Walker as a "former minister, . . . 75, partially paralyzed in his left arm, and suffer[ing] from severe arthritis"). Nonetheless, he

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unlikely that the majority of law abiding public housing tenants or fair-minded citizens find such evictions reasonable—especially where the innocent tenant is elderly or infirm and has been a good tenant for over twenty years.¹⁷⁰ The Provision contained in the lease is an example of poor public policy.¹⁷¹

apparently constituted a threat to the community and needed to be removed just like the drug dealers. Jim Herron Zamora, *'One Strike' Tenants Keep Apartments in Oakland; 3 of 4 Evictions Dropped Although Law Upheld*, SAN FRANCISCO CHRON., Apr. 5, 2002, at A21 (Joe Gresley, executive director of the Oakland Housing Authority stated: "Mr. Walker's continued occupancy of an apartment in a building housing other seniors poses a threat to other residents of the building.").

¹⁷⁰ See *Rucker*, 237 F.3d at 1126; *Brown v. Popolizio*, 569 N.Y.S.2d 615, 622-23 (N.Y. App. Div. 1991) ("It would be shocking to one's sense of fairness to terminate the tenancies of persons who have not committed 'undesirable acts' and have not had control over those who have committed such acts."); see also Emelyn Cruz Lat, *Oakland Tenants Sue Over 1 Strike Eviction Policy*, SAN FRANCISCO EXAMINER, Mar. 4, 1998, at A-9 ("At a gut level it strikes you as incredibly unconscionable to throw seniors out on the street who had been good tenants for a long period of time for something they had no knowledge of or participation in." (quoting Anne Tamiko Omura, of the Eviction Defense Center)).

¹⁷¹ Additionally, it may be argued that the leases the tenants are entering into are nothing more than oppressive and unfair contracts of adhesion. CORBIN ON CONTRACTS § 1.4 (noting that contracts of adhesion are part of our society to be neither condemned nor praised but analyzed and that courts are to protect the adhering party from oppression by a stronger party). While contracts of adhesion are necessary in our society and play an important role in minimizing transaction costs, by their nature they are created with the most favorable possible terms to the party offering the form. CORBIN ON CONTRACTS § 1.4. In *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), the plaintiff bought a car through a standardized purchase agreement and the steering broke; however, the defendant car dealer disclaimed all warranties—implied and express. *Id.* at 80. The court held the disclaimer void. *Id.* at 95. Signing a contract without reading it is done at one's own risk. But where the loss of important rights are involved, there are overriding public policy considerations that protect ordinary people from loss of those rights. *Id.* at 92. In *Henningsen*, an inequality in bargaining power between the "Big Three" automakers and car buyers created a lack of competition leaving the buyer without meaningful choice or alternative options. *Id.* at 87. The court found that "the disclaimer of an implied warranty of merchantability by the dealer, as well as the attempted elimination of all obligations other than replacement of defective parts, are violative of public

IV. FINDING AN ALTERNATIVE

The individual rights of tenants appears to be an afterthought in Congress' enactment of the Provision and the Court's subsequent interpretation in *Rucker*.¹⁷² A better policy, however, is one that will protect the leasehold interest of the innocent public housing tenant and assure them that so long as they live within the law, they will be safe in their homes from both criminals and the government.¹⁷³ Because the Supreme Court has ruled on the issue of knowledge, the following suggestions are necessarily directed toward Congress.¹⁷⁴

A. No Strict Liability Requirement in Leases

Congress should eliminate the strict liability requirement in the leases each tenant signs.¹⁷⁵ Congress could do this in one of two ways: by writing a knowledge requirement into the statute or by enacting a provision expressly providing an innocent lessee exemption.¹⁷⁶ The innocent lessee exemption could mirror the

policy and void." *Id.* at 97. Similarly, it is contrary to public policy to have people sign leases allowing them to be evicted for the criminal act of another when they are presented with no other realistic options. It could be seen as oppressive and unfair to say to a desperate and indigent person: "Here is the lease—take it or leave it" knowing full well they have no option but to take it, and with it, the unreasonable Provision. *See supra* text accompanying notes 153, 159-66 (discussing the lack of meaningful choice for tenants).

¹⁷² 42 U.S.C. § 1437d(1)(6) (2003); Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

¹⁷³ 88-09 Realty LLC v. Hill, 737 N.Y.S.2d 227, 231 (N.Y. App. Term 2001) (Patterson, J., dissenting) (affirming the important objective of combating the drug crisis, but recognizing that "[i]t can and should be accomplished . . . without the need to dispossess a tenant who is wholly unconnected to any illegal activities").

¹⁷⁴ *Rucker*, 535 U.S. at 130.

¹⁷⁵ *See* § 1437d(1)(6). "[A]ny criminal activity . . . engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." *Id.*

¹⁷⁶ Such a requirement would be similar to New York's knowledge or acquiescence requirement, *see infra* note 181, or New Jersey's Anti-Eviction

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innocent owner defense set forth in the Controlled Substances Act.¹⁷⁷ Pursuant to the exemption, a tenant would not be evicted where he did not know of the conduct or was aware of it and did all that could reasonably have been expected to stop the activity.¹⁷⁸ An innocent lessee exemption surely would have protected Pearlle Rucker who, at sixty-three, took affirmative steps to prevent criminal activity by searching her daughter's room for any possible contraband.¹⁷⁹ It also would have protected Mr. Walker, who fired his aide.¹⁸⁰ A knowledge requirement could be similar to the knowledge or acquiescence requirement which has been utilized by New York courts.¹⁸¹ Pursuant to the requirement, a tenant would not be evicted unless they knew of or acquiesced in the criminal conduct.¹⁸² Such a requirement would have protected Ms. Hill and

Act, N.J. STAT. ANN. § 2A:18-61.1-61.12 (West 2003). That statute permits eviction of a tenant or lessee who “knowingly harbors or harbored [in the leased premises] a person who committed [a drug offense], or otherwise permits or permitted such a person to occupy those premises for residential purposes, whether continuously or intermittently.” *Id.* at § 2A:18-61.1(p).

¹⁷⁷ See *supra* notes 38-39 (discussing the innocent owner defense in the Controlled Substances Act).

¹⁷⁸ *Id.*

¹⁷⁹ *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) (“Rucker asserts that she regularly searches her daughter's room for evidence of alcohol and drug use and has never found any evidence or observed any sign of drug use by her daughter.”).

¹⁸⁰ Bob Egelko, *HUD's Drug Rule Overturned; Appeals Court Says One Strike Rule Evicts Tenants Unfairly*, SAN FRANCISCO CHRON., Jan. 25, 2001, at A6 (reporting how Herman Walker fired his caretaker as soon as he could find a replacement, as he needed around the clock care).

¹⁸¹ See *Remeeder H.D.F.C., Inc. v. Francis*, No. 2000-1406 K C, slip op. at 5 (N.Y. App. Term Dec. 6, 2001) (Patterson, J., dissenting) (“in order to demonstrate ‘use’ of the premises for illegal purposes . . . a tenant must have knowledge of and acquiesce to the use of the demised premises for such an illegal activity” (quoting *Clifton Ct. v. Williams*, N.Y. L.J., May 27, 1998, at 28)); *220 W. 42 Assocs. v. Cohen*, 302 N.Y.S.2d 494, 498 (N.Y. App. Term 1969) (“In the case of the tenant the illegal acts must be established by landlord, which must also show either participation or acquiescence by the tenant.”).

¹⁸² See *220 W. 42 Assocs.*, 302 N.Y.S.2d at 498.

Ms. Lee who did not know of their grandsons' drug use.¹⁸³

Although strict liability eases enforcement and saves the cost of trying each case individually, it threatens *all* tenants, even those who take action to eradicate the possibility of wrongdoing.¹⁸⁴ The innocent tenant is the one who suffers most directly by the strict liability standard. All of the tenants in *Rucker*, it can be argued, were exemplary tenants in that they did not look the other way, but took action.¹⁸⁵ Nevertheless, under the strict liability standard, this does not amount to much, and in all of their cases eviction proceedings were brought against them.¹⁸⁶

B. Provide Legal Services

While the strict liability standard may be easily remedied through Congressional action, public housing tenants are not a group exercising much political clout, so the realistic possibility of Congress actually responding may be remote.¹⁸⁷ In light of this, the local housing authorities, which have discretion to bring eviction proceedings, are urged to ensure that housing managers and housing court judges are properly trained to administer the laws

¹⁸³ *Rucker v. Davis*, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *7 (N.D. Cal. June 24, 1998), *vacated*, 203 F.3d 627 (9th Cir. 2000), *amended by* 237 F.3d 1113 (9th Cir. 2000) (en banc), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

¹⁸⁴ See Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125, 134 (2002) ("Strict liability maximizes deterrence and eases enforcement difficulties.").

¹⁸⁵ See *supra* Part I.B.1 (describing the plaintiffs in *Rucker*).

¹⁸⁶ See *Rucker*, 1998 U.S. Dist. LEXIS 9345.

¹⁸⁷ See Richard H. McAdams, *New and Critical Approaches to Law and Economics (Part II) Norms Theory: An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 360-61(2000) (discussing public choice theory and "rent-seeking" where "lobbying groups influence legislators with campaign contributions and other favors"); see also Jody Freeman, *The Private Role In Public Governance*, 75 N.Y.U. L. REV. 543, 561 (2000) ("Public choice theory understands administrative decisions as the product of interest group pressure brought to bear on bureaucrats seeking rewards such as job security, enhanced authority, or the favor of powerful legislators upon whom the agency depends.").

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justly by requiring them to consider mitigating circumstances.¹⁸⁸ Few decisions can be truly just and fair where the tenant being evicted lacks the resources to challenge the eviction. One of the surest ways to prevent these often-unjust evictions and lend them a degree of legitimacy is to provide the indigent tenants with legal services, which are often lacking in civil matters.¹⁸⁹ While this would increase the administrative burden, it is a burden we ought to bear in light of the seriousness of the issue—homelessness.¹⁹⁰

In *Brown v. Popolizio*, for instance, Cozyella Coe, an innocent tenant, had termination proceedings brought against her when her twenty-year-old son was arrested on project grounds for unlawfully possessing cocaine with intent to sell.¹⁹¹ Ms. Coe contacted a legal services organization to represent her, but they were unable to do so, and after one adjournment, the judge decided to go forward with the case.¹⁹² Ms. Coe did not object to any of the testimony,

¹⁸⁸ By justly, I mean carefully applying the factors set forth in 24 C.F.R. § 966.4 (2003). Those factors are:

PHA termination of tenancy for criminal activity or alcohol abuse
Consideration of circumstances. In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

Id.

¹⁸⁹ Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1254-55 (2003) (arguing that legal advocacy can help prevent homelessness resulting from eviction proceedings brought in housing court's across the country, and that while the landlords have legal representation, the majority of tenants do not).

¹⁹⁰ See *supra* notes 10, 161, & 164 (discussing the shortage of affordable housing).

¹⁹¹ 569 N.Y.S.2d 615, 617-19 (N.Y. App. Div. 1991).

¹⁹² *Id.* at 618. After receiving the termination notice, Ms. Coe contacted a community legal services organization, however they were unable to assist her because they were understaffed. *Id.* at 617. The matter was adjourned and the organization later took her case, however the volunteer attorney was unable to prepare for the case due to her inexperience and limited schedule. *Id.* at 617-18.

nor did she cross-examine witnesses, present witnesses, testify on her own behalf or present a closing argument.¹⁹³ Nonetheless, the hearing officer recommended termination of tenancy.¹⁹⁴ On appeal, the appellate division held the housing authority's imposition of the maximum penalty, eviction, to be excessive.¹⁹⁵ This result demonstrates that pursuing such senseless evictions is a waste of judicial resources and is disruptive to the family by putting it in serious jeopardy of becoming homeless.

C. Institute Second-Chance Policy

While evicting only the criminal actor may be better than evicting the whole family, even evicting the actor when he engages in low-level criminal activity splits the family unit.¹⁹⁶ The break-up of the family may be a factor in furthering criminal activity and may perpetuate the cycle of violence in the public housing communities.¹⁹⁷ A more sensible approach that would still allow the housing authorities to take action to protect residents and at the same time preserve the family unit would be a second chance policy when non-violent crimes are at issue. The focus would be more on rehabilitation and less on punishment. Again, while this may create more of an administrative burden and increased costs, they are costs that should be borne in order to enhance the stability of families, which will in turn benefit communities by reducing the

Counsel for the housing authority refused to consent to another adjournment and the matter proceeded despite Ms. Coe's lack of counsel and inability to represent herself. *Id.* at 618. When asked if she was prepared to represent herself Ms. Coe said "no" but the Hearing Officer proceeded in any event because she was unable to suggest a way she might obtain an attorney. *Id.*

¹⁹³ *Id.* at 618.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 621-22.

¹⁹⁶ See *supra* Part III.C (discussing the policy of permanent exclusion as a condition to continued occupancy).

¹⁹⁷ OFFICE OF JUSTICE PROGRAMS, UNITED STATES DEPARTMENT OF JUSTICE, *Profile of Jail Inmates 1996* (reporting 6 in 10 inmates grew up in homes without both parents), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji96.pdf> (revised June 4, 1998).

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likelihood of criminal activity occurring.¹⁹⁸

For example, if someone is caught using drugs the offender should have the option to participate in a state mandated program of rehabilitation or job training—a tactic similarly employed by community courts.¹⁹⁹ The court could focus on whether the tenant is complying as a measure of whether the tenant should be entitled

¹⁹⁸ *Preventing Youth Violence And Crime: The Role of Families, School and Government: Hearing Before the Subcomm. on Early Childhood, Youth and Families of the Comm. on Education and The Workforce*, 106th Cong. 106-54 (1999) (statement of Dr. Darnell Jackson, Director, Office of Drug Control Policy, Michigan Department of Community Health), *available at* <http://commdocs.house.gov/committees/edu/hedcew6-54.000/hedcew6-54.htm> (last visited Nov. 18, 2003). Dr. Jackson stated:

I think we need a clearer recognition that government alone cannot possibly be a surrogate parent for every troubled youth. Nothing can replace the role of communities, churches, faith, and family. Not surprisingly, a University of Maryland study released last month confirms children of parents who keep close tabs on their whereabouts and have knowledge of who their friends are, are less likely to use alcohol, get involved in drug usage, and more likely to be peer leaders in their groups; so clearly the most important role in deterring antisocial behavior of youth is with the parents.

Id.; see also CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, *Best Practices of Youth Violence Prevention: A Sourcebook for Community Action* 41 (“Parents’ interactions with each other, their behavior toward their children, and their emotional state have been shown to be important predictors of children’s violent behavior Marital conflict and a lack of communication between parents have also been identified as risk factors for youth violence.”), *at* <http://www.cdc.gov/ncipc/dvp/bestpractices/chapter2a.pdf> (revised June 2002).

¹⁹⁹ See CENTER FOR COURT INNOVATION, *Demonstration Projects Midtown Community Court*, *at* http://www.courtinnovation.org/demo_01mcc.html (last visited Nov. 12, 2003).

Midtown Community Court sentences low-level offenders to pay back the neighborhood through community service while at the same time offering them help with problems that often underlie criminal behavior. Residents, businesses and social service agencies collaborate with the Court by supervising community service projects and by providing on-site social services, including drug treatment, health care and job training.

Id.

to continued occupancy of the premises. If it is shown that the tenant is not complying with the program or is repeatedly offending, then the privilege of opting to participate in the program can be revoked and eviction proceedings instituted. If the offense involves the selling of narcotics on housing grounds, the court should give the tenant one chance, but also sentence the tenant and require community service to be performed inside the housing community.

D. Community Based Crime Reduction and Prevention Strategies

A final suggestion is merely to encourage public housing authorities to continue community-based crime reduction and prevention strategies that have already significantly reduced crime in housing communities.²⁰⁰ Among the effective strategies employed by housing authorities which experienced declining crime rates were partnerships with the police department to provide additional security and investigative services in targeted communities, a community policing program utilizing foot patrols, crime prevention demonstrations and screening of new applicants' backgrounds.²⁰¹ In light of the success of these alternative strategies employed to reduce crime, there is not a need for the strict no-fault eviction policy of section 1437d(1)(6). These methods of crime prevention demonstrate that safety can be achieved without innocent tenants forfeiting the security of their home.

CONCLUSION

While the government has taken steps to protect tenants living in public housing, the policy of strict liability negatively affects

²⁰⁰ IN THE CROSSFIRE, *supra* note 8, at 10. In Birmingham, Alabama, assaults in public housing developments fell 27 percent, from 533 in 1992 to 389 in 1996. *Id.* Similarly, in Forth Worth, Texas, violent crime in public housing was reduced by 37 percent, from 536 in 1993 to 340 in 1997. *Id.* at 11.

²⁰¹ IN THE CROSSFIRE, *supra* note 8, at 10-11.

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law-abiding tenants by subjecting them to eviction. Where housing is scarce, as it is in many of our large urban centers, subjecting these innocent and often elderly tenants to homelessness is as big a threat as any drug dealer. Congress is unlikely to rewrite the Provision soon in light of the lack of political clout public housing residents possess due to their minority and poor status.²⁰² Thus, the burden is upon the local housing authorities to exercise care and discretion in handling eviction proceedings. Housing authorities have a duty to ensure that families and elderly persons are not displaced for the actions of third parties, over which they had no control. We need not choose between protecting the individual rights of tenants and ensuring their safety.

²⁰² *See supra* note 187 (discussing public choice theory).