

# Collateral Damage: A Public Housing Consequence of the “War on Drugs”

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*Often automatic upon a conviction, collateral consequences work to relegate individuals to the status of second-class citizen by the systematic deprivation of opportunity in all aspects of life. Shockingly, these penalties are not aimed solely at ex-offenders. Individuals arrested frequently are denied access to opportunity by virtue of their interaction with the criminal justice system. In the context of public housing, even an arrest is not required for the imposition of collateral consequences. Instead, a public housing agency employee, without having to satisfy any statutorily mandated burden of proof, may make a determination that a household member or guest has engaged in “drug-related criminal activity,” terminate the household from public housing assistance, and subsequently evict the family.*

*This Article hopes to add to the existing scholarship and advocacy regarding exclusionary federal housing policies. It is meant not only to supplement the collateral-consequences literature by identifying and examining additional issues in the administration of federal housing policy, but also to draw attention to the inequities inherent in the current system. More specifically, this Article explores federal termination policies and the way in which they are administered by local public housing authorities (PHAs). I argue that federal law grants an unwarranted amount of discretion to PHAs in assessing cause for exclusion from the program and also fails to provide sufficient statutory and regulatory guidance in the enforcement of PHA lease agreements. Reviewing alleged “drug-related criminal activity” lease violations through a criminal law lens may assist PHAs in making appropriate termination decisions. With*

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*Housing is a linchpin that everything else hangs on in your life—who[m] you associate with, where your kids go to school, whether you can keep a job. If you don’t have housing, that all falls apart.<sup>1</sup>*

## INTRODUCTION

The legislative initiative spawned by the “War on Drugs” agenda of the 1980s and 1990s ushered in an era of mass incarceration where America climbed her way to the number one spot in the world as the nation with the highest incarceration rate.<sup>2</sup> The “War on Drugs” also established a shadow system of civil penalties specifically targeted at individuals convicted, arrested, or suspected of drug use, possession, or distribution. Commonly referred to as “collateral consequences,” these penalties are administered outside the traditional criminal process and affect employment, education, civil liberties, and public benefits.<sup>3</sup>

1. CORINNE CAREY, HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 101 (2004) (quoting Katherine Stark).

2. ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATIONS LIST 1 (10th ed. 2013), [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf) [[http://web.archive.org/web/20141203052737/http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl\\_10.pdf](http://web.archive.org/web/20141203052737/http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf)].

3. See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 585, 594–99 (2006); see also Christopher Mele & Teresa A. Miller, *Collateral Civil Penalties as Techniques of Social Policy*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 9, 19–20 (Christopher Mele & Teresa A. Miller eds., 2005); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE

Such statutes and regulations are typically determined by federal courts to be “civil” and thus exempt from much of the constitutional protections associated with the criminal process.<sup>4</sup> The basic principle underlying these regulations is that any suspicion that a household member or guest is or has engaged in “drug-related criminal activity” ought to exclude the household from a number of federal benefits programs and employment.<sup>5</sup>

Often automatic upon a conviction,<sup>6</sup> collateral consequences work to relegate individuals to the status of second-class citizen by the systematic deprivation of opportunity in all aspects of life. Shockingly, these penalties are not solely aimed at ex-offenders. In the context of public housing, even an arrest is not required for the imposition of collateral consequences. Instead, a public housing agency employee, without having to satisfy any statutorily mandated burden of proof, may make a determination that a household member or guest has engaged in “drug-related criminal activity,” terminate the household from public housing assistance, and subsequently evict the family.<sup>7</sup>

This Article hopes to add to the existing scholarship and advocacy regarding exclusionary federal housing policies. It is meant to not only supplement the collateral consequences literature by identifying and examining additional issues in the administration of federal housing policy but also to draw attention to the inequities inherent in the current system. More specifically, this Article explores federal termination policies and the way in which they are administered by local public housing authorities (PHAs). I argue that federal law grants an unwarranted amount of discretion to PHAs in assessing cause for exclusion from the program and also fails to provide sufficient statutory and regulatory guidance in the enforcement of PHA lease agreements. Reviewing alleged “drug-related criminal activity” lease violations through a criminal law lens may assist PHAs in making appropriate termination decisions. With this, I recommend that a framework be established requiring PHAs to meet a statutorily mandated burden of proof prior to a “drug-related criminal activity” termination. This standard ought to focus on such activity through a criminal law frame.

Part I of this Article provides a brief overview of federal housing law. Beginning with the Housing Act of 1937, this section provides a historical backdrop by which to evaluate current housing policy and its implementation. Moreover, this part of the Article examines the impact of the “War on Drugs” on

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COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 20–22 (Marc Mauer & Meda Chesney-Lind eds., 2002).

4. *E.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010) (discussing the confusion amongst the lower courts regarding collateral consequences and the distinction between direct and collateral consequences of conviction); *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998) (discussing what limitation on liberties is sufficient to be considered “in custody” for purposes of granting a writ of habeas corpus).

5. *See* Pinard & Thompson, *supra* note 3, at 588.

6. *Id.* at 586.

7. 42 U.S.C. § 1437d(l)(6) (2012).

federal public housing policy. Part II hones in on current termination policies focused on “drug-related criminal activity” and examines the sociopolitical justifications for exclusionary policies. More importantly, this section discusses current law in the realm of public housing by examining federal statutes and regulations as well as case law at both the federal and state levels. This Article concludes by offering remarks on a potential remedy: statutorily requiring that a standard of proof be met before termination on the basis of “drug-related criminal activity.” Such a standard may be adopted from the Fourth Amendment “special needs” doctrine that has been applied by the U.S. Supreme Court in various administrative settings.<sup>8</sup>

It is important to note that this Article focuses solely on the federal public housing program.<sup>9</sup> It also surveys only those policies regarding drug-related criminal activity. Exclusionary policies based on conduct other than “drug-related criminal activity” are beyond the scope of this Article. For purposes of this Article, the phrase “drug-related criminal activity” is defined in accordance with federal regulation as “the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute, or use of a controlled substance the drug.”<sup>10</sup> The concern of this Article is the termination and eviction of households based on “drug-related criminal activity.”

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8. See *City of Ontario v. Quon*, 560 U.S. 746, 748 (2010); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (holding random drug testing of students engaged in extracurricular activities was a reasonable means of furthering the school’s interest in preventing drug use among children); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding coerced drug testing of pregnant mothers was unconstitutional absent a search warrant); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (finding random drug testing of student athletes was reasonable and did not violate the Fourth Amendment); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602 (1989) (finding drug tests for railroad employees was reasonable and did not require a warrant); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (permitting drug testing of U.S. Customs Service employees); *Camara v. Mun. Court*, 387 U.S. 523 (1967).

9. See generally 42 U.S.C. §§ 1437–1437e (codifying The National Housing Act); 24 C.F.R. pts. 5, 900–990 (2015) (codifying the Department of Housing and Urban Development’s general and permanent rules regarding the administration of public housing programs). There are approximately fifteen federal subsidized housing programs: (1) Section 8 Housing Choice Voucher Program, (2) Section 8 Project-Based Vouchers, Public Housing, Federally Assisted Multifamily Rental Housing Programs, (3) Section 221 (D)(3) Below-Market Interest Rate (BMIR) Program, (4) Section 236 Rental Program, (5) Section 202 Program for the Elderly and People with Disabilities, (6) Project-Based Rental Assistance Programs, (7) Section 8 Moderate Rehabilitation Program (RAP), (8) Home Investment Partnership Program, (9) Section 12 Rental Rehabilitation Program, (10) Section 17 Housing Development Program, (11) Low-Income Housing Tax Credit Program (LIHTC), (12) Section 515 Rural Rental Housing Program, (13) Farm Labor Housing Section 514 and 516, Shelter Plus Care (S+C) Program, (14) The Supportive Housing Program (SHP), (15) Housing Opportunities for Persons with AIDS (HOPWA) Program. CATHERINE BISHOP, NAT’L HOUSING LAW PROJECT, AN AFFORDABLE HOME ON RE-ENTRY: FEDERALLY ASSISTED HOUSING AND PREVIOUSLY INCARCERATED INDIVIDUALS app. 1, at 165–85 (2008), <http://www.reentry.net/ny/library/attachment.149254> [<http://perma.cc/3XND-XGLU>].

10. 24 C.F.R. § 5.100; see also The Controlled Substances Act, 21 U.S.C. § 802 (2012).

## I. FEDERAL HOUSING POLICY

## A. History

In the 1930s, the federal government began its significant intervention in homelessness and the lack of affordable housing in America. The 1920s housing bubble, created by rapid expansion in the residential housing market, burst, causing the National Mortgage Crisis of the 1930s and contributing to the “Great Depression.”<sup>11</sup> During this era, Americans experienced an intense period of not only unemployment but also chronic homelessness.<sup>12</sup> This, in effect, prompted the U.S. government to enact the National Housing Act of 1934 that served as the foundation of the federal public housing machine.<sup>13</sup>

While the 1934 Act was the foundational building block for the federal housing machine, the United States Housing Act of 1937<sup>14</sup> established the nation’s policy objectives. The 1937 Act declared that the federal government promised to commit federal dollars to alleviate housing pressures in the country.<sup>15</sup> Chief among the concerns was ensuring American citizens had access to “decent and affordable housing.”<sup>16</sup> After the 1937 Act, the strategy was to administer a federal housing program that was to be managed at a local level. Despite the rhetoric promoting government policies that were intended to ensure that low-income families had access to safe, affordable housing, Congress began an aggressive strategy of urban development and slum clearance.<sup>17</sup> Between 1953 and 1986, the

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11. See David Min, *How Government Guarantees Promote Housing Finance Stability*, 50 HARV. J. ON LEGIS. 437, 461–62 (2013).

12. Alex Markels, *Comparing Today’s Housing Crisis with the 1930s*, U.S. NEWS & WORLD REP. (Feb. 28, 2008, 1:30 PM), <http://money.usnews.com/money/personal-finance/real-estate/articles/2008/02/28/comparing-todays-housing-crisis-with-the-1930s> [<http://perma.cc/WMU8-87D3>]. The Great Depression was characterized by high-default rates and soaring loan to value ratios. *Id.*

13. National Housing Act (Capehart Act), ch. 847, 48 Stat. 847 (1937) (codified as amended at 12 U.S.C. §§ 1701 to 1750g and 42 U.S.C. §§ 1401 to 1440 (2012)).

14. United States Housing Act of 1937 (Wagner-Steagall Act), ch. 896, 50 Stat. 888, *amended by* Housing and Community Development Act of 1974, Pub. L. No. 93-383, sec. 201, 88 Stat. 633, 653 (codified as amended at 42 U.S.C. §§ 1401 to 1440).

15.

It is hereby declared to be policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.

*Id.* sec. 1, 50 Stat. at 888.

16. See *generally id.* sec. 1, 50 Stat. at 888 (codified as amended at 42 U.S.C. § 1437). “[T]he goal of providing decent and affordable housing for all citizens through the efforts and encouragements of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector.” 42 U.S.C. § 1437(d). Additionally, the Cranston-Gonzalez National Affordable Housing Act repeated this principle, stating that the housing goals of America continue to be committed “to decent, safe, and sanitary housing for every American.” Pub. L. No. 101–625, sec. 102, Stat. 4079, 4085 (1990) (codified as amended at 42 U.S.C. § 12702).

17. See Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended in scattered sections of 42 U.S.C.). Among other things, the Housing Act of 1949 increased the

federal government spent \$13.5 billion on urban renewal projects.<sup>18</sup> The Housing Act of 1949 mandated PHAs to establish eligibility requirements based on “income”<sup>19</sup> and prohibited PHAs from discriminating against welfare recipients.<sup>20</sup> In 1965, the Department of Housing and Urban Development Act was passed, establishing the U.S. Department of Housing and Urban Development (HUD) as a cabinet-level agency.<sup>21</sup>

The history of federal public housing legislation remains marred. The Housing Act of 1949’s urban renewal efforts are criticized on a number of fronts. Pundits point to poor planning and corruption in the administration of the federal public housing program generally.<sup>22</sup> Historically speaking, the most fervent critique is that urban renewal projects typically resulted in the destruction of minority-dominated communities.<sup>23</sup> These areas would then be replaced with more expensive housing, which the original inhabitants could not afford.<sup>24</sup> A major shift occurred during the Reagan Administration that would alter federal

authorization for the FHA mortgage insurance program, extended federal dollars to the construction of over 800,000 public housing units, committed funds to research housing issues, and permitted the FHA to finance rural homeowners. *Id.* sec. 106(c)(5), 63 Stat. at 417 (authorization); *id.* sec. 305, 63 Stat. at 428 (construction); *id.* sec. 401, § 301, 63 Stat. at 431–32 (research); *id.* sec. 501, 63 Stat. at 432–33 (rural finance). The Act intended to promote:

[T]he general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.

*Id.* sec. 2, 63 Stat. at 413.

18. DAVID RUSK, *INSIDE GAME OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* 90 (1999).

19. COMM. ON BANKING & CURRENCY, SUMMARY OF PROVISIONS OF THE NATIONAL HOUSING ACT OF 1949, S. Doc. No. 81-99, at 3638–41 (1st Sess. 1949).

20. *Id.* at 3640.

The title further requires: local authorities (1) to establish upper rental limits for admission to projects at least 20 percent below the lowest rents at which private enterprise unaided by public subsidy is providing an adequate supply of decent housing in the respective localities, (2) to provide maximum income limits for admission and continued occupancy, (3) to require the removal of families found to be ineligible as the results of periodic reexaminations of tenant incomes, (4) not to discriminate against welfare cases, and (5), subject to specific preferences stated below, to give preference to families having the most urgent needs.

*Id.*

21. See Department of Housing and Urban Development Act, Pub. L. No. 89-174, sec. 3, 79 Stat. 667, 667–68 (1965) (codified as amended at 42 U.S.C. § 3532 (2012)).

22. Tad DeHaven, *HUD Scandals*, CATO INST. (June 2009), <http://www.downsizinggovernment.org/hud/scandals> [<http://perma.cc/6PVS-Y76W>].

23. See, e.g., Arnold R. Hirsch, *Searching for a “Sound Negro Policy”: A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUS. POLY DEBATE 393, 404, 410–11 (2000) (discussing Redevelopment Project No. 1 on Chicago’s near South Side that determined that only 900 of the previously 3600 housed African Americans were eligible for public housing, which left over 2700 people displaced).

24. See *id.* at 410.

public housing programs and remain the national public housing policy to date: the “War on Drugs.”

*B. Current Legislation and the Impact of the “War on Drugs”*

Public housing in the United States is a creature of federal law. It is funded by the federal government, it is governed by federal statutes and regulations, and it is overseen by a federal cabinet level administrative agency. It is, however, administered by a local agency, a PHA, and usually state level courts.

The “War on Drugs” in the 1980s and 1990s, coupled with the “One Strike” legislation, culminated in a series of federal laws and regulations aimed at eliminating drug traffickers from public housing projects. PHAs have since been given almost unfettered discretion. The collateral effect of this effort has been the termination and eviction of innocent tenants and household members from public housing. Before delving into the specific law, it is essential to identify the political justifications underlying the enactment of statutes aimed at “drug-related criminal activity.”

The federal policy shift in the 1980s and 1990s toward a national campaign against drugs influenced a number of federal initiatives including those involving national housing policy. The “War on Drugs” served as the foundation for a heavy-handed approach toward drugs generally in federally assisted housing programs. Beginning with the Anti-Drug Abuse Act of 1988,<sup>25</sup> federal housing policy continues to be preoccupied with individuals engaged in “drug-related criminal activity.”

Four pieces of federal legislation form the basis of the federal government’s public housing drug policy in America. These include the Anti-Drug Abuse Act of 1988,<sup>26</sup> the Cranston-Gonzalez National Affordable Housing Act of 1990,<sup>27</sup> the Housing Opportunity Program Extension Act of 1996,<sup>28</sup> and the Quality Housing and Work Responsibility Act of 1998.<sup>29</sup> These laws have yet to be revisited or reformed in any meaningful way, despite the understanding that the “War on Drugs” was a war lost.<sup>30</sup>

The Anti-Drug Abuse Act of 1988 amended the United States Housing Act of 1937.<sup>31</sup> The amendment statutorily required PHAs to utilize leases that prohibit

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25. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C.).

26. *Id.*

27. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1989) (codified as amended in scattered sections of 42 U.S.C.).

28. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996) (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).

29. Quality Housing and Work Responsibility Act, Pub. L. No. 105-276, 112 Stat. 2518 (1998) (codified as amended in scattered sections of 42 U.S.C.).

30. Juan R. Torruella, *Déjà Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 175 (2011).

31. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 5101, § 6(l), 102 Stat. 4181, 4300 (codified as amended at 42 U.S.C. 1437d).

public housing tenants or other persons under the tenant's control from engaging in criminal activity "on or near public housing premises."<sup>32</sup> Such conduct was and currently is considered to be "cause" for termination and eviction.<sup>33</sup>

Drug abuse and drug activity are the target of the harshest exclusionary policies in the Cranston-Gonzalez National Affordable Housing Act of 1990 (Cranston-Gonzalez Act). The legislation expands the authority and discretion granted to PHAs in the way households are terminated when the PHA suspects a family member or guest is engaging in "drug-related criminal activity."<sup>34</sup> The Cranston-Gonzalez Act also prohibits a household from receiving public housing for a period of three years or a reasonable time if the household was previously evicted from public housing based on "drug-related criminal activity," unless the person of the offending action is rehabilitated.<sup>35</sup>

In President Clinton's 1996 State of the Union address, he declared "[f]rom now on, the rule for residents who commit crime and peddle drugs should be 'one strike and you're out.'"<sup>36</sup> The "One Strike" initiative encouraged PHAs to evict public housing residents who were suspected by PHAs of engaging in "drug-related criminal activity" either *on or off* the public housing premises. Later that year, the Housing Opportunity Program Extension Act of 1996 was signed into law, thereby codifying "One Strike" policies, including the "on or off such premises" clause of the statutorily required lease provision.<sup>37</sup>

The final pieces of "One Strike" are codified as part of the Quality Housing

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32. *Id.*

33. *Id.*

34. See Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, sec. 503, 104 Stat. 4079, 4184-85.

(a) GRIEVANCE PROCEDURE.—Section 6(k) of the United States

Housing Act of 1937 (42 U.S.C. 1437d(k)) is amended by striking the matter after the period at the end of paragraph (6) and inserting the following: "For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug related criminal activity on or near such premises, the agency may (A) establish an expedited grievance procedure if the Secretary shall provide by rule under section 553 of title 5, United States Code, or (B) exclude from its grievance procedure any such grievance, in any jurisdiction which requires that prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process (which the Secretary shall establish by rule under section 553 of title 5, United States Code). Such elements of due process shall not include a requirement that the tenant be provided an opportunity to examine relevant documents within the possession of the public housing agency. The agency shall provide to the tenant a reasonable opportunity, prior to hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination." The language of the statute greatly expands PHA discretion in determining which households are excluded from traditional PHA grievance procedures and quickly terminated. This is a significant change from earlier rules.

35. *Id.* sec. 501, 104 Stat. at 4080-81.

36. President William J. Clinton, Address Before a Joint Congress on the State of the Union (Jan. 23, 1996).

37. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-420, sec. 9(a)(1), § 6, 110 Stat. 834, 836 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.) (striking "on or near the premises" language and replacing with "on or off such premises").



and Work Responsibility Act of 1998 (QHWRA).<sup>38</sup> QHWRA primarily imports many of the rules that apply to the public housing program to the Section 8 programs.<sup>39</sup> It explicitly requires PHAs to include in lease agreements specific language regarding “drug-related criminal activity.”<sup>40</sup> According to HUD, one of the purposes of the QHWRA is the deregulation of PHAs generally.<sup>41</sup> Thus, QHWRA provides PHAs with almost unreviewable discretion without statutorily required parameters.

Legislation enacted in the past decade has done little in the way of reviewing and reforming current national housing policy. Instead, political rhetoric has focused on reactive programs aimed at relieving chronic homelessness. With this, the Bush and Obama Administrations have paid scant attention to defects in existing policies.

Today’s federal public housing policy remains “One Strike.” Issues with “One Strike” policies have emerged and have been percolating in the courts since the passage of the QHWRA. For example, HUD reported that in the first six months after “One Strike” was implemented, 19,405 applicants were excluded from housing based on alleged involvement in criminal activity.<sup>42</sup>

“One Strike” policies were celebrated by HUD as helping to “create an environment where young people, especially children, can live, learn, and grow up to be productive and responsible” citizens.<sup>43</sup> HUD anticipated that by barring people who were thought to currently engage or had in the past engaged in drug-related and other criminal activity, public housing would be safer and drug free.<sup>44</sup> Almost twenty years later, statistics show this is not the case. Newspapers are littered with stories documenting an increase in the crime rate in public housing communities.<sup>45</sup> One New York City journalist reported a twenty-six percent spike in crime rates from 2010 to 2012 in the Brooklyn and Queens public housing

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38. See Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2518 (codified as amended in scattered sections of 42 U.S.C.).

39. See generally *id.*

40. *Id.* sec. 545, § (a)(7), 112 Stat. at 2599–2600.

41. LOUISE HUNT ET AL., U.S. OFFICE OF PUB. & INDIAN HOUS., SUMMARY OF THE QUALITY HOUSING AND WORK RESPONSIBILITY ACT OF 1998, at 2 (1998), <http://www.hud.gov/offices/pih/phr/about/titlev.pdf> [<http://perma.cc/KRA3-EUJT>].

42. U.S. DEP’T OF HOUS. & URBAN DEV., MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE “ONE STRIKE AND YOU’RE OUT” INITIATIVE, at vi (1997), <https://www.ncjrs.gov/pdffiles1/Photocopy/183952NCJRS.pdf> [<https://perma.cc/6VN2-NBE6>].

43. U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE NO. PIH 96-16 (HA), “ONE STRIKE AND YOU’RE OUT” SCREENING AND EVICTION POLICIES FOR PUBLIC HOUSING AUTHORITIES 4 (1996) [hereinafter NOTICE NO. PIH 96-16 (HA)].

44. *Id.* at 5.

45. *E.g.*, Howard Husock, *Atlanta’s Public-Housing Revolution*, CITY J., Autumn 2010, [http://www.city-journal.org/2010/20\\_4\\_atlanta-public-housing.html](http://www.city-journal.org/2010/20_4_atlanta-public-housing.html) [<http://perma.cc/6RTT-RL9H>]; Letitia James, Letter to the Editor, *Crime in Public Housing*, N.Y. TIMES, May 8, 2014, at A26; Cindy Rodriguez, *Crime Rises in Public Housing*, WNYC NEWS (Aug. 28, 2012), <http://www.wnyc.org/story/233494-blog-crime-rises-public-housing/> [<http://perma.cc/YJN3-5KZB>].

developments.<sup>46</sup> A *New York Times* opinion written in May of 2014 reported a thirty-one percent increase in crime in New York City Housing Authority communities.<sup>47</sup> The crime rate in the Atlanta area public housing developments is also reported as remaining “high.”<sup>48</sup> Such reports call into question the vitality of the federal public housing legislation initiatives enacted during the “War on Drugs.”

## II. THE LAW: 42 U.S.C. § 1437d

This part of the Article will review the problem with terminations premised on “drug-related criminal activity.” This section analyzes 42 U.S.C. § 1437d—the “drug-related criminal activity” statute and termination procedure—along with the accompanying federal regulations and case law. After undergoing a close examination of the law and processes, it is apparent that modifications to the existing framework are necessary. The present statute creates a method of administration subject to arbitrary application and enforcement of the rules.

One of the key statutes in any discussion concerning termination of public housing assistance for drug-related activity is 42 U.S.C. § 1437d. Of particular significance are the sections governing specific statutorily mandated lease provisions regarding “drug-related criminal activity” (§ 1437d(l)(6)), drug and alcohol abuse (§ 1437d(l)(5)), and the administrative grievance procedure (§ 1437d(k)). These are discussed below.

### A. 42 U.S.C. § 1437d(l)(6)

The Anti-Drug Abuse Act of 1988 required PHAs to include a lease provision by which a tenant agreed that any criminal activity, including “drug-related criminal activity,” was cause for termination of the tenancy.<sup>49</sup> This was codified in 42 U.S.C. § 1437d(l)(6). The statute itself explicitly requires public housing leases to include the following language:

[A]ny 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 . . . .<sup>50</sup>

Thus, a tenant contracts with the PHA by lease agreement that he or she and his or her household members, guests, or “any other person under the tenant’s control” will refrain from engaging in behavior that may constitute drug-related

46. Rodriguez, *supra* note 45.

47. James, *supra* note 45, at A26.

48. Husock, *supra* note 45.

49. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 510, 102 Stat. 4181, 4300 (codified as amended at 42 U.S.C. § 1437d (2012)).

50. 42 U.S.C. § 1437d(l)(6) (emphasis added).

criminal activity either on or off the public housing project premises.<sup>51</sup> The federal regulations, enacted to provide guidance to PHAs on the enforcement of this specific lease provision, advise that PHAs need not meet the standard of proof required for conviction (proof beyond a reasonable doubt) or even arrest (probable cause).<sup>52</sup> In fact, there is no federal statutory or regulatory standard of proof requirement that PHAs must meet in order to terminate public housing assistance based on a violation of the “drug-related criminal activity” lease provision.

It should appear quite clear that there are a number of issues with the above mentioned lease provision including the PHA discretion, the standard of proof problems in terminations based on “drug-related criminal activity,” the definition of “on or off the premises,” and the tenant third party strict liability. The statute and accompanying regulations fail to provide guidance on a number of material terms in the mandated lease provision. A few terms are defined, but the regulations still leave questions as to the operationalization of the phrase in the enforcement of the lease term. Courts also struggle in their review of PHA decisions to terminate, demonstrating the difficulty in applying these federal laws to real life circumstances.

### 1. PHA Discretion

The PHA structure serves as a quasi-municipal administrative agency established and authorized by state statute.<sup>53</sup> The PHA is overseen by HUD, which is charged with administering federal statutory and regulatory requirements.<sup>54</sup> PHAs are overseen by a Board of Commissioners that typically includes at least one public housing tenant.<sup>55</sup> PHAs are responsible for establishing both an annual and a five-year plan describing the PHA strategy for addressing the needs of public housing communities.<sup>56</sup> These plans detail policies and protocols regarding admissions, termination, and occupancy,<sup>57</sup> and often are referred to as PHA “administrative plans.”

The federal regulation advising PHAs on when to terminate a household from assistance based on “drug-related criminal activity” directs PHAs to make the determination themselves.<sup>58</sup> The regulation states,

[PHAs] may terminate tenancy and evict the tenant through judicial action for criminal activity by a covered person in accordance with this

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51. *Id.*

52. *See* 24 C.F.R. § 5.861 (2015).

53. NAT'L HOUS. LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS 1/23 (3d ed. 2004).

54. *Id.* at 1/24.

55. *Id.* at 1/23; *see also* BISHOP, *supra* note 9, app. 1, § 1.4, at 168.

56. Quality Housing and Work Responsibility Act, Pub. L. No. 105-276, sec. 511, § 5A(a)-(b), 112 Stat. 2518, 2531-32 (1998) (codified as amended at 42 U.S.C. § 1437c-1 (2012)).

57. *Id.* sec. 511, § 5A, 112 Stat. at 2531-39.

58. *Id.* secs. 576-577, 112 Stat. at 2639-41.

subpart if [PHAs] determine that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying a criminal conviction standard of proof of the activity.<sup>59</sup>

Thus, PHAs appear to have full discretion in making this determination. HUD has decided that the entities responsible for the direct administration of public housing “should have latitude for practical and reasonable day-to-day judgments whether household members have committed criminal activity or other activity that is grounds for denial or termination of assistance.”<sup>60</sup>

Federal regulations also provide a list of factors that PHAs may take into account when determining whether to evict a household.<sup>61</sup> The guidelines are clear that PHAs have full discretion in deciding whether to consider the factors in assessing terminations.<sup>62</sup> These provisions include consideration of the gravity of the “offending action,”<sup>63</sup> the acceptance of responsibility by the leaseholder,<sup>64</sup> the extent to which the leaseholder participated in the “offending action,”<sup>65</sup> and the effect the actions of the offending party has on “the integrity of the program.”<sup>66</sup> Other provisions suggest contemplation of greater community and societal needs including the greater housing needs of the community,<sup>67</sup> as well as the message that will be sent if the PHA fails to act.<sup>68</sup> Most importantly, the regulations include consideration of “[t]he effect of denial of admission or termination of tenancy on

59. 24 C.F.R. § 5.861 (2015).

60. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,778 (May 24, 2001) (to be codified at 24 C.F.R. pts. 5, 200, 247, 880, 882, 884, 891, 960, 966, 982); *see also* HUD v. Rucker, 535 U.S. 125, 134 (2002) (discussing Congress entrusting decision-making to PHAs: “[I]t entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from ‘rampant drug-related or violent crime,’ ‘the seriousness of the offending action,’ and ‘the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.’” (citations omitted)).

61. 24 C.F.R. § 5.852(a)–(c).

62. *See id.* The regulation in pertinent part provides:

If the law and regulation permit you to take an action but do not require action to be taken, you may take or not take the action in accordance with your standards for admission and eviction. Consistent with the application of your admission and eviction standards, you may consider all of the circumstances relevant to a particular or admission case . . . .

*Id.* § 5.852(a).

63. *Id.* § 5.852(a)(1).

64. *Id.* § 5.852(a)(6).

65. *Id.* § 5.852(a)(3).

66. *Id.* § 5.852(a)(7).

67. *See id.* § 5.852(a)(2).

(a) General. If the law and regulation permit you to take an action but do not require action to be taken, you may take or not take the action in accordance with your standards for admission and eviction. Consistent with the application of your admission and eviction standards, you may consider all of the circumstances relevant to a particular admission or eviction case, such as: . . . (2) The effect on the community of denial or termination or the failure of the responsible entity to take such action . . . .

*Id.*

68. *See id.* § 5.852(a)(2).

household members not involved in the offending action.”<sup>69</sup> The regulations permit PHAs to direct an applicant or tenant to sever a specific household member from the lease agreement so as to not disqualify the entire household for the actions of another individual.<sup>70</sup> The regulations thus give PHAs legal permission to allow households to maintain assistance or be admitted to the program in circumstances where one household member is thought to have engaged in “drug-related criminal activity” and others are “innocent tenants.”

HUD’s Public Housing Occupancy Guidebook provides that lease agreements and provisions are to be adjudged according “to the reasonableness test.”<sup>71</sup> The meaning, parameters, and application of “reasonableness” are left undefined and are not discussed further. In addition, the Public Housing Occupancy Guidebook states that lease terms are subject to judicial review in civil actions including evictions.<sup>72</sup> Despite judicial review, courts traditionally defer to a PHA decision, citing congressional intent to expand PHA discretion in the administration of federal public housing programs.<sup>73</sup> For example, in *Jamie’s Place I LLC v. Reyes*,<sup>74</sup> a tenant terminated from public housing based on the “drug-related criminal activity” of her sons was successful in challenging the eviction in state court.<sup>75</sup> After a jury found in favor of the tenant, the Housing Authority moved for a judgment notwithstanding the verdict.<sup>76</sup> The court granted the PHA’s motion, finding that the PHA had the requisite discretion to terminate households based on “drug-related criminal activity.”<sup>77</sup> Ultimately, the decision to terminate a household lies with the PHA.<sup>78</sup>

Federal legislation has invested an awesome amount of discretion in PHAs. Even though PHA determinations may be challenged in the judiciary, those decisions are rarely reversed. With the federal government authorizing such discretion, most PHA decisions will pass the reasonableness test, leaving many innocent and harmless public housing tenants homeless.

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69. *Id.* § 5.852(a)(4).

70. *Id.* § 5.852(b).

71. U.S. DEP’T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 190 (2003), <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf> [<http://perma.cc/G8BT-L7ZV>] [hereinafter HUD, THE GUIDEBOOK].

72. *Id.*

73. *See, e.g.*, HUD v. Rucker, 535 U.S. 125, 125 (2002).

74. *Jamie’s Place I LLC v. Reyes*, 25 Misc. 3d 1234(A) (N.Y. Civ. Ct. 2009), 2009 WL 4282852.

75. *Id.* at \*2.

76. *Id.*

77. *Id.* at \*5.

78. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,778–80 (May 24, 2001) (to be codified at 24 C.F.R. pts. 5, 200, 247, 880, 882, 884, 891, 960, 966, 982) (“[T]he Congress and the Department recognize that the entities that are responsible for direct administration of the assisted housing programs should have latitude for practical and reasonable day-to-day judgments whether household members have committed criminal activity or other activity that is grounds for denial or termination of assistance.”).

## 2. *Drug-Related Criminal Activity*

The phrase “drug-related criminal activity” is defined by both federal statute and regulation as the “manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug.”<sup>79</sup> Even with the definition of “drug-related criminal activity” provided, questions remain on the way it is established that a tenant or guest engaged in “drug-related criminal activity.” Without a federal statute or regulation providing a standard of proof for the PHA to employ in the actual decision to terminate, PHAs are left to their own devices in creating a protocol for PHA employees to apply.

The “drug-related criminal activity” lease provision applies to adult tenants. The question remains whether this lease term also applies to juveniles. This is due to the fact that juveniles engaging in low-level “drug-related criminal activity” are typically adjudicated as delinquents and theoretically not convicted of a crime. In deciding this issue, courts have determined that a juvenile act involving drug activity may constitute a violation of the lease provision.<sup>80</sup> In *Cincinnati Metropolitan Housing Authority v. Browning*, Ms. Browning’s fifteen-year-old son violated the Cincinnati Metropolitan Housing Authority (CMHA) curfew and was subsequently stopped and searched by the police.<sup>81</sup> The police officer discovered 3.51 grams of marijuana on Ms. Browning’s son.<sup>82</sup> He was cited for a juvenile offense that would have constituted an adult minor drug offense.<sup>83</sup> The juvenile court adjudicated him as a delinquent and suspended eligibility for a driver’s license until he completed a drug education program.<sup>84</sup> The CMHA terminated the household’s assistance. The Ohio appellate court concluded that although a juvenile cannot theoretically be convicted of a crime or considered a “criminal” until he or she is bound over to adult court, the act of the juvenile may still constitute a crime and criminal activity.<sup>85</sup> Therefore, the termination was held to be appropriate.<sup>86</sup>

The Public Housing Occupancy Handbook provides that “some sort of evidence will be required” to terminate a household on the basis of drug-related criminal activity.<sup>87</sup> It notes that the required standard of proof for civil actions, including evictions, is “the preponderance of the evidence.”<sup>88</sup> However, it does not require that the PHA must meet this standard. The Handbook instead asserts

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79. 24 C.F.R. § 5.100 (2015) (defining “drug-related criminal activity”); *see also* The Controlled Substances Act, 21 U.S.C. § 802 (2012).

80. *Cincinnati Metro. Hous. Auth. v. Browning*, No. C-010055, 2002 WL 63491, at \*4 (Ohio Ct. App., Jan. 18, 2002); *Hous. Auth. for Prince George’s Cty. v. Williams*, 784 A.2d 621, 626 (Md. Ct. Spec. App. 2001).

81. *Browning*, 2002 WL 63491, at \*2.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at \*4.

86. *Id.*

87. HUD, THE GUIDEBOOK, *supra* note 71, at 204.

88. *Id.*

that the “PHA cannot simply allege that criminal activity has occurred.”<sup>89</sup> It provides examples of the type of evidence on which a termination may be based, including “testimony by a medical examiner or forensic laboratory”<sup>90</sup> and “some proof” connecting drug-related criminal activity to the tenant.<sup>91</sup>

State administrative plans lack consistency as to what burden of proof must be met to evict a public housing tenant based on “drug-related criminal activity.” The Atlanta Housing Authority authorizes PHAs to evict when any member of the tenant’s household has been convicted of, arrested for, is under outstanding warrant for, or is “*reasonably believed* to be engaged in any . . . Drug-Related Offenses . . .”<sup>92</sup> The Hartford Connecticut Housing Authority Administrative Plan states that in making an eviction determination it will “consider all credible evidence” which includes, but is not limited to, convictions and arrests.<sup>93</sup> The Indianapolis Housing Authority permits the PHA to terminate assistance when a preponderance of the evidence standard is satisfied regardless of arrest or conviction.<sup>94</sup>

Tenants challenging the standard of proof and type of evidence required in order for PHAs to terminate federal housing assistance have been moderately successful. Two federal cases are instructive, although it is important to note that these challenges were brought under the Section 8 Program, not public housing. In the 1993 case of *Edgecomb v. Housing Authority*,<sup>95</sup> a federal district court in Connecticut stated that a hearing officer’s statement that “there was preponderance of the evidence that indicated a family member engaged in drug-related activity while on the Section 8 Program” was an insufficient basis to terminate the household.<sup>96</sup> For the court, more was needed: a statement of law and/or facts, evidence considered in the decision, or reasons for her determination.<sup>97</sup> Simply stating that the requisite burden of proof was met without more evidence and analysis was insufficient to terminate assistance. In 2008, the Eleventh Circuit decided *Ervin v. Housing Authority of the Birmingham District*.<sup>98</sup> In *Ervin*, the petitioner challenged a PHA termination based on “drug-related criminal activity.”<sup>99</sup> Ervin was granted an informal administrative hearing where hearsay evidence was offered to support the PHA claim that Ervin engaged in “drug-related criminal activity.”<sup>100</sup> The court determined that the hearsay evidence

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89. *Id.*

90. *Id.*

91. *Id.*

92. ATLANTA HOUS. AUTH., FY 2013 MTW ANNUAL IMPLEMENTATION PLAN 19 (2012) (emphasis added).

93. HARTFORD HOUS. AUTH., ADMINISTRATIVE PLAN 13-9 (2010).

94. IND. HOUS. AUTH., ADMINISTRATIVE PLAN 12-11 (2013).

95. *Edgecomb v. Hous. Auth.*, 824 F. Supp. 312 (D. Conn. 1993).

96. *Id.* at 316.

97. *Id.*

98. *Ervin v. Hous. Auth.*, 281 F. App’x 938 (11th Cir. 2008).

99. *Id.* at 941.

100. *Id.* at 941–42.

was insufficient to establish that Ervin did in fact engage in “drug-related criminal activity.”<sup>101</sup> “[T]he underlying reliability and probative value of the evidence” were not present.<sup>102</sup> In the Eleventh Circuit it is clearly established that the PHA carries the burden of persuasion and must establish a *prima facie* case.<sup>103</sup> In *Ervin*, the hearsay presented at the informal hearing and relied on as the basis of the termination were insufficient to establish a *prima facie* showing.<sup>104</sup>

### 3. “On or off Such Premises”

The “on or off such premises” clause in the lease provision also presents cause for concern. “Premises” is defined in the regulations as including “the building or complex or development in which the public or assisted housing dwelling unit is located, including common areas and grounds.”<sup>105</sup> The current regulations permit PHAs to terminate assistance based on activity that occurs not only on the public housing premises but also off the public housing premises.<sup>106</sup> This includes minor infractions for alcohol related offenses as well as nonviolent misdemeanor drug offenses that occur off the PHA premises and in no way affect public housing residents or the PHA property.

This is troubling in many respects. Most significantly, there is no clear definition of the geographic scope of the provision thus implicitly authorizing PHAs to make the determination on how far the provision actually reaches. This issue was brought to the forefront during the public comment period prior to the promulgation of the final rule on the provision.<sup>107</sup> Although answered in the context of the Section 8 program, the response is most likely applicable to the public housing program setting as well. The response given to the request to define the phraseology was that “[t]he courts will interpret these terms as part of endorsing or repudiating actions taken by PHAs under their standards.”<sup>108</sup> Therefore, the courts are left to decide the parameters of “on or off” the premises.

101. *Id.* at 942.

102. *Id.*

103. *Id.* at 941–42 (citing *Basco v. Machin*, 514 F.3d 1177, 1182 (11th Cir. 2008)).

104. *Id.* at 942.

105. 24 C.F.R. § 5.100 (2015).

106. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,803 (May 24, 2001) (to be codified at 24 C.F.R. pts. 5, 200, 247, 880, 882, 884, 891, 960, 966, 982). 24 C.F.R. § 966.4(f)(12) provides:

(f) *Tenant’s obligations.* 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 . . . .

107. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. at 28,781–84.

108. *Id.* at 28,784.



Prior to the 1996 Housing Opportunity Program Extension Act changing “on or near the premises” to “on or off such premises,” in the “drug-related criminal activity” provision of public housing lease agreements, a federal district court in Virginia determined the parameters of the lease provision and severed the “off” portion of lease term.<sup>109</sup> In *Richmond Tenants Organization, Inc. v. Richmond Development & Housing Authority*, the Eastern District of Virginia found the “off” portion of the lease provision unreasonable.<sup>110</sup> For the court, “[i]t is unreasonable to make misdemeanors, even if repeated, grounds for eviction, when the offense bears no relation to the housing development.”<sup>111</sup> On appeal, the Fourth Circuit affirmed.<sup>112</sup>

After the promulgation of the final rule codifying the “on or off the premises” phraseology of the lease provision, the question concerning scope remains. In *Department of Housing & Urban Development v. Rucker*, the U.S. Supreme Court upheld the lease provision, albeit without examining the constitutionality of the “on or off the premises” clause of the provision.<sup>113</sup> Nevertheless, the facts of respondent Rucker’s case involved the daughter of Pearlle Rucker and “drug-related criminal activity” occurring three blocks from the apartment.<sup>114</sup> Respondent Rucker’s daughter was discovered with a crack pipe and cocaine three blocks from Rucker’s unit.<sup>115</sup> The Court found no constitutional issue with the statute itself or with the PHAs operationalization of the statute. At the time of this publication, the research of the author shows that legal challenges to the “off the premises” provision after the U.S. Supreme Court decision in *Department of Housing & Urban Development v. Rucker* are few and success in litigating the issue is rare.<sup>116</sup>

In sum, it seems permissible to evict a public housing tenant suspected of engaging in “drug-related criminal activity” 1000 miles away from the public housing project or even in another country. Lease provisions in private rental agreements do not contain such sweeping language. One must question the fairness, wisdom, and reasonableness of such a far-reaching lease term.

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109. *Richmond Tenants Org., Inc. v. Richmond Redevelopment & Hous. Auth.*, 751 F. Supp. 1204, 1206 (E.D. Va. 1990), *aff’d*, 947 F.2d 942 (4th Cir. 1991).

110. *Id.*

111. *Id.*

112. *Richmond Tenants Org., Inc. v. Richmond Redevelopment & Hous. Auth.*, 947 F.2d 942 (4th Cir. 1991).

113. *HUD v. Rucker*, 535 U.S. 125, 133 n.4 (2002).

114. *Id.* at 128.

115. *Id.*

116. To date, I have only discovered one case that appears to successfully challenge the “off such premises” clause in the context of “criminal activity” generally, as opposed to “drug-related criminal activity.” *Hialeah Hous. Auth. v. Enriquez*, No. 06-1500-CC-21, 2006 WL 6871823 (Fla. Cir. Ct. July 26, 2006) (“Engaging in ‘grand theft auto’ in Tamarac, Florida, in another county from the public housing complex, does not threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.”); *cf.* *Kelly v. Topeka Hous. Auth.*, 147 F. App’x 723, 724–25 (10th Cir. 2005) (upholding termination based on “drug-related criminal activity” that occurred off of the premises).

#### 4. *Strict Liability and HUD v. Rucker*

The “drug-related criminal activity” lease provision is applicable not only to the tenant and the household members but also to “guests” and other persons “under the tenant’s control.” This, in effect, creates third-party strict liability for the household. It is important to understand that HUD distinguishes the grounds for eviction between a tenant’s “guest” and “other person under the tenant’s control.”<sup>117</sup> A tenant’s “guest” subjects the household to far more liability than a visitor or “other person under the tenant’s control.”<sup>118</sup> According to federal regulation, a “guest” is a person “temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant.”<sup>119</sup> The concept of an “other person under the tenant’s control” is defined as a “short-term invitee who is not ‘staying’ in the unit.”<sup>120</sup> This short-term invitee is under the tenant’s control and on the premises by virtue of the invitation and during the period of invitation.<sup>121</sup>

Prior to the U.S. Supreme Court’s decision in *Rucker*, lower courts grappled with the extent of tenant liability and whether an “innocent owner” defense could be read into the statute. In *Housing Authority of New Orleans v. Green*,<sup>122</sup> a tenant was terminated by the PHA because her daughter’s friend had hidden drugs in the tenant’s apartment. Despite the tenant’s lack of knowledge that drugs were in her apartment, the PHA evicted her.<sup>123</sup> The tenant had signed a lease with the PHA promising that her apartment would be drug free.<sup>124</sup> The Louisiana court found in favor of the PHA, determining that the tenant was strictly liable for the drug-related activity of her daughter’s friend.<sup>125</sup> A similar result occurred in *South San Francisco Housing Authority v. Guillory*,<sup>126</sup> where a family signed a lease agreeing that their home would be drug free. The entire family was evicted because the son possessed drugs within the home.<sup>127</sup> The court upheld the termination and found the family strictly liable for the acts of the son.<sup>128</sup>

However, some courts found in favor of the tenant. In *Housing Authority of the*

117. See Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,791–92 (May 24, 2001) (to be codified at 24 C.F.R. pts. 5, 200, 247, 880, 882, 884, 891, 960, 966, 982).

118. *Id.*

119. 24 C.F.R. § 5.100 (2015); see also Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. at 28, 777–78.

120. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. at 28, 777–78.

121. *Id.*

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

123. *Id.* at 554.

124. See *id.* at 553.

125. *Id.* at 555.

126. *City of S. S.F. Hous. Auth. v. Guillory*, 49 Cal. Rptr. 2d 367 (Cal. App. Dep’t Super. Ct. 1995).

127. *Id.* at 369.

128. *Id.* at 372.

*City of Hoboken v. Alicea*,<sup>129</sup> a tenant was terminated by the PHA because her son was arrested and later convicted of possessing drugs in the apartment building where the tenant lived. The court refused to uphold the PHA's determination, reasoning that the tenant did not permit her son to live in her apartment and did not know that her son was engaging in illegal activity.<sup>130</sup> In *Syracuse Housing Authority v. Boule*,<sup>131</sup> a tenant was evicted by the PHA for the drug-related criminal activities of her babysitter's guest.<sup>132</sup> The court determined that the tenant had not given the babysitter permission to invite guests to the apartment, and furthermore, had no knowledge that the babysitter and his guests sold drugs from the tenant's home.<sup>133</sup> Thus, the court concluded that the tenant had not violated the lease provision requiring that the tenant's apartment be drug free.<sup>134</sup>

In *Rucker*, the Court determined that the policy of no-fault evictions of recipients in public housing for the drug-related crimes of others did not violate due process.<sup>135</sup> Because of the mandated lease provision utilized by PHAs, the Court concluded that the PHA was acting as a landlord enforcing a lease provision.<sup>136</sup> The Court further found that the failure of Congress to implement a scienter qualification in the statute coupled with the use of "any" to modify the phrase "drug-related activity" precluded a knowledge requirement on the part of the tenant.<sup>137</sup> Thus, no "innocent owner" defense is available to public housing tenants.

*Rucker* is the seminal case considering the constitutionality of the "drug-related criminal activity" lease provision. The rule that it established, that no-fault evictions are permissible in the public housing context, proved to be a win for PHAs. Despite the Supreme Court ruling, state courts, uncomfortable with strict liability and enormous PHA discretion, are utilizing their state codes to authorize a "right to cure" for public housing tenants confronting termination.<sup>138</sup> This "right to cure" provides tenants with an opportunity to remedy the lease violation. PHAs challenging the "right to cure" argue that state statutes permitting a "right to cure" are preempted by the decision in *Rucker* as well as federal regulations.

One of the first cases deciding this issue was heard by the court of appeals of Kentucky in 2009.<sup>139</sup> In *Housing Authority of Covington v. Turner*, public housing tenant Clarissa Turner was given a fourteen-day notice to vacate the premises

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129. *Hous. Auth. v. Alicea*, 688 A.2d 108, 108 (N.J. Super. Ct. App. Div. 1997).

130. *Id.* at 110.

131. *Syracuse Hous. Auth. v. Boule*, 658 N.Y.S.2d 776 (City Ct. 1996), *rev'd*, 701 N.Y.S.2d 541 (N.Y. App. Div. 1999).

132. *Id.* at 777.

133. *Id.* at 780.

134. *Id.*

135. *HUD v. Rucker*, 535 U.S. 125, 136 (2002).

136. *See id.* at 132.

137. *Id.* at 125–26.

138. *See Hous. Auth. v. Turner*, 295 S.W.3d 123, 127 (Ky. Ct. App. 2009); *Milwaukee City Hous. Auth. v. Cobb*, 849 N.W.2d 920, 922 (Wis. Ct. App. 2014).

139. *See Turner*, 295 S.W.3d 123.

based on the discovery of both rock and powder cocaine in a room where Turner's nephew slept and kept his possessions when he visited his aunt.<sup>140</sup> At the time Turner's unit was searched, she was at work and had no knowledge of any such drugs in her apartment.<sup>141</sup> She testified that she did not learn that her nephew had been arrested until the eviction and that she ordered him to stay away from her apartment and the public housing community in which she resided.<sup>142</sup> Her nephew did not return.<sup>143</sup> Nevertheless, the PHA continued with the termination finding Turner in violation of the "drug-related criminal activity" lease provision.<sup>144</sup> The lease agreement itself incorporated the Uniform Residential Landlord and Tenant Act (URLTA), which provides tenants with the opportunity to remedy a breach of the rental contract.<sup>145</sup> The PHA argued that URLTA was preempted by federal law.<sup>146</sup> The Kentucky Court of Appeals disagreed<sup>147</sup>:

In this case we conclude there is no prohibition in the federal law against affording a public housing tenant the right to remedy the breach, no irreconcilable conflict between the statutes, and that the application of the state statute does not defeat the objectives of the federal statute. To the contrary, the Supreme Court expressly left discretion to the states and local authorities when it stated that the local authorities are in the best position to consider "the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action . . ." <sup>148</sup>

For the court, the "right to remedy" was not preempted and Turner had in fact cured the breach of the lease agreement.<sup>149</sup> Thus, the PHA was incorrect in terminating her leasehold.

A more recent case decided by the Wisconsin Court of Appeals in 2014 also held that a "right to cure" was not preempted by federal law.<sup>150</sup> In *Milwaukee City Housing Authority v. Cobb*, public housing tenant Felton Cobb, sixty-two years old and disabled, was terminated by the PHA.<sup>151</sup> The termination was premised upon a "drug-related criminal activity" lease violation whereby it was alleged that Cobb had used marijuana.<sup>152</sup> A security officer testified that he smelled the odor of marijuana emanating from Cobb's unit.<sup>153</sup> Cobb testified that he did not use marijuana.<sup>154</sup> The Wisconsin Court of Appeals determined that a Wisconsin

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140. *Id.* at 124.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 125.

146. *Id.*

147. *Id.*

148. *Id.* (quoting *HUD v. Rucker*, 535 U.S. 125, 134 (2002)).

149. *Id.* at 128.

150. *Milwaukee City Hous. Auth. v. Cobb*, 849 N.W.2d 920, 928 (Wis. Ct. App. 2014).

151. *Id.* at 922.

152. *Id.* at 921–22.

153. *Id.* at 922.

154. *Id.* at 921–22.

statute permitting tenants a five-day right to cure prior to eviction was applicable.<sup>155</sup> The statute was not explicitly incorporated into the lease. The court determined that the federal law does not occupy the entire field.<sup>156</sup> The court also reasoned that federal preemption is mentioned only once in the “One Strike” policies, noting that a conviction need not be established for a PHA to terminate a household based on unlawful criminal activity.<sup>157</sup> Moreover, federal law expressly authorizes PHAs to rely on state eviction law and processes.<sup>158</sup>

In light of the Supreme Court’s upholding no-fault evictions in *Rucker*, scholars and advocates are developing creative legal arguments to level the playing field between public housing tenants and the enormous discretion of the PHA. While *Rucker* remains a viable doctrine, state courts are finding their state statutes helpful in remedying an unfair PHA termination decision as well as an unreasonable reading of a PHA lease term. Challenges to lease provisions ought to continue, but it is essential to also develop a workable framework for PHAs to employ in making these termination decisions initially.

#### B. 42 U.S.C. § 1437d(l)(7): Drug and Alcohol Abuse

Federal statutes and regulations require that PHA leases include a provision that provides that any household member illegally using drugs, as determined by the PHA, is also grounds for termination of the tenancy.<sup>159</sup> Federal housing law considers any drug use to be drug abuse, despite the fact that drug use itself does not necessarily denote drug abuse.<sup>160</sup> Alcohol abuse is also grounds for termination.<sup>161</sup> Individuals determined by the PHA to be “currently engaging” in

155. *Id.* at 922; see also WIS. STAT. § 704.17(2)(b) (West, Westlaw through 2013 Act 280, published Apr. 25, 2014) (“If a tenant under a lease for a term of one year . . . breaches any covenant or condition of the tenant’s lease . . . the tenant’s tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice.”).

156. *Cobb*, 849 N.W.2d at 924–25.

157. *Id.* at 927.

158. *Id.*

159. 42 U.S.C. § 13662 (2012). The statute provides in pertinent part:

(a) In general. Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing (as applicable), shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that allow the agency or owner (as applicable) to terminate the tenancy or assistance for any household with a member—

(1) who the public housing agency or owner determines is illegally using a controlled substance; or

(2) whose illegal use (or pattern of illegal use) of a controlled substance, or whose abuse (or pattern of abuse) of alcohol, is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

*Id.*; see also 24 C.F.R. § 982.553(b) (2015).

160. U.S. DEPT. OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., RESULTS FROM THE 2003 NATIONAL SURVEY ON DRUG USE & HEALTH: NATIONAL FINDINGS 4 (2004). In fact, the U.S. Department of Health and Human Services statistics reveal that only a small percentage of those who use drugs actually become drug abusers or addicts.

161. 42 U.S.C. § 1437d(l)(6)–(7); 24 C.F.R. § 982.553(b)(3); see also Lakota Cmty. Homes, Inc.

drug abuse or alcohol abuse are ineligible for public housing.<sup>162</sup> Lease provisions require that the drug and/or alcohol abuse interfere with the “health, safety, or right to peaceful enjoyment of the premises” by other tenants.<sup>163</sup> The Code of Federal Regulations define the phrase “currently engaging in the illegal use of a controlled substance” as, “the illegal use of a controlled substance that occurred recently enough to justify a reasonable belief that an applicant’s illegal use of a controlled substance . . . by the applicant is a real and ongoing problem.”<sup>164</sup> Federal regulation further authorizes PHAs to determine whether an individual is “currently engaging in, or has engaged in during a reasonable time before the admission decision [in criminal activity].”<sup>165</sup> An individual is currently engaging in drug use if the “[i]llegal use of a drug occurred recently enough to justify a reasonable belief that there is continuing illegal drug use by a household member.”<sup>166</sup> The regulation fails to provide what constitutes a “reasonable time” and the meaning of “reasonable belief.”<sup>167</sup>

Federal regulations assert that evidence of rehabilitation may be offered to demonstrate that a tenant or household member is no longer abusing drugs or alcohol.<sup>168</sup> According to the federal regulations there are at least three ways in which a tenant may establish rehabilitation, including (1) successful completion of a supervised alcohol or drug abuse program; (2) the tenant or household member is considered otherwise rehabilitated and no longer using alcohol or drugs; and (3) the tenant or household member is currently participating in a supervised alcohol or drug abuse program and is not currently abusing alcohol or drugs.<sup>169</sup> Of course, consideration of evidence of rehabilitation is discretionary. PHAs are not statutorily mandated to consider it.

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v. Randall, 675 N.W.2d 437, 442–43 (S.D. 2004) (holding that abuse of alcohol by a minor does not preclude an eviction by the PHA).

162. 24 C.F.R. § 5.853.

163. 42 U.S.C. § 1437d(k)–(l)(6).

164. *Id.* § 1437d(j); 24 C.F.R. § 960.204(a)(2)(i).

165. 24 C.F.R. § 5.855(a)(1)–(4).

166. *Id.* § 960.204(b).

167. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,778–80 (May 24, 2001) (to be codified at 24 C.F.R. pts. 5, 200, 247, 880, 882, 884, 891, 960, 966, 982).

168. 24 C.F.R. § 5.852(c)(1) (“In determining whether to deny admission or terminate tenancy for illegal use of drugs or alcohol abuse by a household member who is no longer engaged in such behavior, you may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (42 U.S.C. [§] 13661). For this purpose, you may require the applicant or tenant to submit evidence of the household member’s current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.”).

169. 42 U.S.C. § 13661(b)(2); *see also* Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. at 28,785.

## C. 42 U.S.C. § 1437d(k)

Federal law requires an administrative grievance procedure for tenants in circumstances concerning the termination of public housing benefits.<sup>170</sup> Terminations typically require PHAs to follow traditional administrative procedures, which include an informal hearing followed by a written decision by the PHA hearing officer.<sup>171</sup> There are exceptions to this “traditional” administrative process depending on the underlying lease violation.

In order for the grievance procedure to be triggered, three main requirements must be met. First, the dispute must relate to a PHA action or failure to take action.<sup>172</sup> The PHA remains the adverse party in any grievance procedure including tenant complaints of PHA employees and personnel.<sup>173</sup> Second, the complaint must be related to either the lease agreement or PHA policies and regulations.<sup>174</sup> This includes tenant actions for challenging guest policies<sup>175</sup> and substandard conditions,<sup>176</sup> as well as PHA actions for nonpayment of rent.<sup>177</sup> And third, the PHA action or inaction has an adverse effect on the tenant.<sup>178</sup>

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170. 42 U.S.C. § 1437d(k)(1)–(6).

171. Human Rights Watch recognized other structural inadequacies in the administration of HUD policies. *See* CAREY, *supra* note 1. Lack of representation, lack of information, and inadequate time to appeal are common experiences in public housing. *See id.* at 91–92. More importantly, Human Rights Watch recognized that the process of attempting to appeal is ineffective. *See id.* at 94–101. The administrative process encompasses an informal hearing where a PHA official, usually a director of a specific housing authority, serves as the Administrative Law Judge (ALJ). *Id.* at 94. Applicants denied or residents evicted are permitted to bring representation, which may be a nonlawyer, and is typically a case worker. *Id.* at 86. Those without a representative are at a disadvantage, with many players in public housing recognizing that those that secure a representative “are often able to overcome a denial of eligibility.” *Id.* at 86–87. The difficulty involved in a public housing applicant or recipient securing a lawyer is common knowledge. *Id.* at 87. Legal Aid offices across the country take such cases, but their resources are limited, they are beleaguered by the demand, and oftentimes individuals are unaware of how to contact such organizations and other advocacy groups. *Id.* at 87–89. The transient nature of this demographic, coupled with the lack of information coming from the PHAs, also poses problems for outreach. *Id.* at 87, 90. Despite the federal requirement that PHAs notify applicants and those being evicted of the PHA’s action and the reason (boilerplate) for the PHA’s action, some PHAs fail to comply. *Id.* at 90. In cases where the applicant or recipient would like to appeal, the deadline to appeal, oftentimes ten days, is impracticable. *Id.* at 91. At the hearing itself, the hearing officer may fail to consider evidence of mitigation, including proof of rehabilitation. *Id.* at 94. While this creates a clear conflict of interest, many tenants do not challenge this aspect of a hearing. In one case, tenants were successful in demonstrating that the PHA had failed to comply with regulations that governed the selection of hearing officers. Further disadvantaging the applicant or recipient, there is unlikely to be a record or transcription of the hearing itself. *Id.* at 99. The “arbitrary or capricious” standard used in challenging decisions of the federal administrative bodies is a difficult one to meet when the plaintiff is a convicted felon. *Id.* There is no federal right to appeal the actual denial.

172. 42 U.S.C. § 1437d(k).

173. NAT’L HOUS. LAW PROJECT, *supra* note 53, at 13/4.

174. *Id.*

175. Saxton v. Hous. Auth., 1 F.3d 881, 884–85 (9th Cir. 1993).

176. Samuels v. Dist. of Columbia, 770 F.2d 184, 189, 201–02 (D.C. Cir. 1985), *subsequent order and final judgment*, 669 F. Supp. 1133 (D.D.C. 1987).

However, federal law permits PHAs to follow a different procedure in cases concerning a termination “involv[ing] any activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any violent or drug-related criminal activity on or off such premises, or any activity resulting in a felony conviction . . . .”<sup>179</sup>

PHAs are permitted to follow an “expedited” procedure in cases concerning both “violent” and “drug-related criminal activity” that occurs *on or off* the premises.<sup>180</sup> Thus, PHAs are permitted to exclude the termination from the administrative process.<sup>181</sup> In the expedited grievance process, PHAs are permitted to adopt special procedures regarding expedited notice, expedited scheduling, and expedited decision.<sup>182</sup> HUD is required to publish in the Federal Register a notice listing the judicial eviction procedures for which HUD issued a due process determination and subsequently undergo the legal analysis underlying each of these determinations.<sup>183</sup> It is important to understand that neither the statutes nor the regulations require PHAs to exclude evictions related to “drug-related criminal activity” from the traditional grievance process. The language used is discretionary.<sup>184</sup> In the event that the PHA decides to exclude the eviction from the grievance process, it may do so only if HUD made a prior determination that the state judicial eviction procedure provides adequate due process protections.<sup>185</sup> Adequate due process requires a hearing that encompasses four elements of due process that include adequate notice, right to counsel, right to cross-examine and present a defense, as well as a “decision on the merits.”<sup>186</sup>

When an eviction action is instituted in state court, the PHA must comply with a number of proof and pleading requirements as well as both state and federal law governing the termination process. PHAs are required to prove compliance with the lease agreement, required notices, and grievance procedures.<sup>187</sup> In *Thorpe v. Housing Authority of Durham*,<sup>188</sup> the U.S. Supreme Court determined that PHAs must prove compliance with federal regulations on lease

177. *Id.*; see also *Case Developments—Housing Authority Agrees Not to Bring Eviction Suits for Alleged Nonpayment of Rent Prior to Grievance Hearing*, 20 CLEARINGHOUSE REV. 836, 851 (1986) (summarizing *Compton v. Danville Redev. & Hous. Auth.*, No. 86-0054-D (W.D. Va. Aug. 26, 1986)).

178. 24 C.F.R. § 966.50 (2015).

179. 42 U.S.C. § 1437d(k)(6) (2012) (emphasis added).

180. 24 C.F.R. § 966.55(g)(3).

181. *Id.* § 966.55(g)(1).

182. *Id.* § 966.55(g)(3).

183. *Id.* § 966.51(a)(2)(iii); see Notice of HUD Due Process Determination, 61 Fed. Reg. 13,276 (Mar. 26, 1996).

184. See 24 C.F.R. § 960.204(a).

185. See Notice of HUD Due Process Determination, 61 Fed. Reg. 13,276.

186. 24 C.F.R. § 966.53(e)(1)–(4).

187. See, e.g., *Thorpe v. Hous. Auth.*, 386 U.S. 670, 673 (1967) (per curiam); *Milam v. Hous. Auth.*, 199 S.E.2d 107 (Ga. Ct. App. 1973); *Chi. Hous. Auth. v. Harris*, 275 N.E.2d 353 (Ill. 1971); *Hous. Auth. v. Isler*, 318 A.2d 432 (N.J. Super. Ct. App. Div. 1974); *Moon v. Spring Creek Apts.*, 11 S.W.3d 427 (Tex. App. 2000).

188. *Thorpe*, 386 U.S. at 673, and after remand, 393 U.S. 268 (1969).



terminations, notices, meetings, and grievance procedures before a court may grant the PHA a judgment of possession.<sup>189</sup> However, the Court has yet to decide whether PHAs may evict tenants without good cause and thus arbitrarily.<sup>190</sup> The Court deliberately left this question open in *Thorpe*.<sup>191</sup> HUD attempted to administratively resolve the issue by providing that a PHA may not terminate a lease “other than for violation of the terms of the lease or other good cause.”<sup>192</sup> As amended, the law finds that “good cause” exists if tenants, household members, guests, and others in the tenant’s control engage in “drug-related criminal activity” that threatens the health, safety, and right to peaceful enjoyment of the premises of other tenants.<sup>193</sup> The law also imposes a federal statutory right to discovery for public housing tenants in eviction processes, whether administrative or judicial.<sup>194</sup> HUD has left the issue of determining “good cause” in the case of state court evictions to the judiciary.<sup>195</sup> In such circumstances, courts regularly require that the PHA carry the burden of proving by the preponderance of the evidence that “good cause” exists.<sup>196</sup> However, the courts have not gone as far as requiring the PHA to prove the violation by clear and convincing evidence.

#### CONCLUSION

The different rationales underlying many of the legislative initiatives concerning public housing programs are no longer viable or have been proven to be inaccurate. These policy justifications include the safety of public housing communities, a normative philosophy rewarding those that “play by the rules,” and the demand for federal subsidized housing. With public housing being a scarce and valuable resource, to some extent, these policy justifications are used to ration it. This, however, defeats the purpose of recent federal initiatives and contradicts recent studies concerning crime in public housing. By employing a new criminal-law-focused framework in PHA termination decisions, the inconsistencies inherent in current federal policies will begin down a road of resolution and uniformity.

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189. See *Thorpe*, 386 U.S. at 673.

190. See *Thorpe*, 393 U.S. at 284 n.49.

191. See *id.*

192. U.S. DEP’T OF HOUS. & URBAN DEV., CONSOLIDATED ANNUAL CONTRIBUTIONS CONTRACT, NO. 53011, at 17 (1969).

193. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, sec. 545, § 7(C)–(D), 112 Stat. 2461, 2599–2600 (amending drug eviction provisions); Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, sec. 9, 110 Stat. 834, 836 (amending 42 U.S.C. § 1437d (2012)).

194. 42 U.S.C. § 1437d(k)–(l)(7).

195. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,568 (Oct. 11, 1991) (codified at 24 C.F.R. pt. 966); Section 8 Housing Assistance Payments Program; Existing Housing, 49 Fed. Reg. 12,215, 12,234–35 (Mar. 29, 1984) (codified at 24 C.F.R. pt. 882).

196. See *Brown v. Popolizio*, 569 N.Y.S.2d 615, 619 (N.Y. App. Div. 1991) (deciding that the PHA had the burden of proving offending son occupied the PHA unit).

In enacting federal public housing legislation, policymakers and interest groups articulated a number of justifications. The primary articulated reason offered is and always has been the safety of public housing residents.<sup>197</sup> In passing the Anti-Drug Abuse Act of 1988, and later the National Affordable Housing Act of 1990, Congress explicitly found that “drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants” and that this “not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment . . . .”<sup>198</sup> Defenders of this legislation emphasize the need for a safe environment for children and point to the potential for violence associated with drug-related activity.<sup>199</sup> Thus, individuals with criminal histories indicating any engagement in drug-related activity are excluded from participating in federal public housing. This may include innocent household members, harmless residents, and juveniles making adolescent mistakes. Interestingly, Human Rights Watch discovered that many times it is not ex-offenders who create a safety threat or problems for management.<sup>200</sup>

There is also a normative philosophy underlying many of these policies. There is the belief that those suspected of breaking the law will not reform. They will continue to disobey authority and present a problem for society. Thus, they are not deserving of federal public housing assistance. HUD Directive No. 96-16 distributed in 1996 reflects this sentiment<sup>201</sup>:

Because of the extraordinary demand for affordable rental housing, public and assisted housing should be awarded to responsible individuals . . . . At a time when the shrinking supply of affordable housing is not keeping pace with the number of Americans who need it, it is reasonable to allocate scarce resources to those who play by the rules . . . . By refusing to evict or screen out problem tenants, we are unjustly denying responsible and deserving low-income families access to housing and are jeopardizing the community and safety of existing residents who abide by the terms of their lease.<sup>202</sup>

Preference for those tenants who “play by the rules” fails to consider the family unification goals of Congress and HUD. Family unification objectives have recently been emphasized as an important initiative by the Obama Administration.<sup>203</sup> Such preferences also undermine the recent legislation enacted in the Second Chance Act of 2007 and prisoner reentry aims.<sup>204</sup> Congress

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197. 42 U.S.C. § 11901(3)–(4).

198. *Id.*

199. *Id.*; see also NOTICE NO. PIH 96-16 (HA), *supra* note 43.

200. CAREY, *supra* note 1, at 38.

201. NOTICE NO. PIH 96-16 (HA), *supra* note 43, at 2–3.

202. *Id.*

203. Letter from Shaun Donovan, Sec’y, U.S. Dept. of Hous. & Urb. Dev., to Pub. Hous. Auth. Exec. Dir. (June 17, 2011) (on file with the UC Irvine Law Review).

204. Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended in scattered sections of 42 U.S.C. (2012)).

committed federal expenditures to “provid[e] coordinated supervision and comprehensive services for offenders upon release from prison, jail, or a juvenile facility, including *housing* and mental and physical health care to facilitate reentry into the community, and which, to the extent applicable, are provided by community-based entities.”<sup>205</sup> Encouraging a housing “preference” for those who “play by the rules” fails to consider the reentry needs of ex-offenders and juveniles being released at a rate of over 700,000 per year.<sup>206</sup> Former HUD Secretary Shaun Donovan issued a statement regarding the importance of reuniting new releasees with their families and reminded PHAs of their discretion, “when considering housing people leaving the criminal justice system.”<sup>207</sup> Secretary Donovan explicitly encouraged PHAs “to allow ex-offenders to rejoin their families in the Public Housing . . . programs, when appropriate.”<sup>208</sup> With this, the normative frame that supports the “play by the rules” dogma ought to be revisited in light of recent federal legislation.

The current demand for public housing is enormous. There are thirty-seven million people who live at or below the federal poverty level and are competing for affordable housing.<sup>209</sup> Currently, there are approximately 7.5 million federally assisted housing units.<sup>210</sup> Increasing the supply of affordable housing does not appear to be a priority of either the federal or state governments.<sup>211</sup> Human Rights Watch has called federal and state policies regarding public housing a “triage” system.<sup>212</sup> Terminating households with criminal histories “has proven to be a politically cost-free way to entirely cut out a large group of people from the pool of those seeking housing assistance.”<sup>213</sup>

The policy justifications motivating current federal public housing legislation are no longer viable in light of recent research and federal legislation. The operationalization of the statutorily mandated “drug-related criminal activity” lease provision has proven to be both pernicious and ineffective.

As discussed above, the “drug-related criminal activity” lease provision presents many problems, particularly when considering that PHAs are without a statutorily mandated standard of proof by which to make termination decisions. This results in the termination of households that are otherwise innocent or

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205. *Id.* sec. 101, § 2976(b)(3), 122 Stat. at 661 (emphasis added); *see also* CAREY, *supra* note 1, at 21.

206. *See* WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULL. NO. NCJ-228417, PRISONERS IN 2008, at 1 (rev. ed. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> [<http://perma.cc/EM5G-3L4S>].

207. Letter from Shaun Donovan, *supra* note 203, at 1.

208. *Id.*

209. CARMEN DENAVAS-WALT ET AL., U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, P60-231, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 13 (2006).

210. BISHOP, *supra* note 9, at 5.

211. CAREY, *supra* note 1, at 2.

212. *Id.*

213. *Id.*

harmless. By employing a proper standard of proof, PHA decisions may result in an appropriate outcome and proportional consequences for “drug-related criminal activity” lease violations. It is imperative that any such framework review the alleged offending drug activity through a criminal-law lens, as the activity itself is criminal and the possible deprivation, the loss of public housing, is serious. A criminal-law focus offers a more protective analysis in considering the interests of the PHA as well as the individual’s interest in maintaining public housing assistance.

A “special needs” inquiry may be an appropriate standard for PHA employees to utilize in making drug-related disqualification determinations. It is a flexible standard that may be used in a variety of different contexts. Moreover, the “reasonable belief” provisions in federal housing statutes and regulations provide already existing language for which to build a consistent and coherent standard. Finally, the deprivation at risk, housing, is basic to all citizens living under a modern and civilized government.

Fourth Amendment jurisprudence contains a number of doctrines that may be useful and applicable to the public housing context. One such doctrine is the “special needs” doctrine.<sup>214</sup> While there is no precise category or definition of “special needs,” the doctrine is applicable in cases where a standard less than probable cause is required, and a warrant is not needed.<sup>215</sup> The doctrine is applied to searches and seizures concerning something other than a criminal investigation, usually outside the scope of the day-to-day criminal problems confronting law enforcement.<sup>216</sup> Thus, “special needs” searches are commonly referred to as “regulatory searches” or “inspections.”<sup>217</sup> The U.S. Supreme Court has applied the “special needs” doctrine to Fourth Amendment issues in a variety of contexts including housing inspections,<sup>218</sup> welfare benefit searches,<sup>219</sup> “searches” in public schools,<sup>220</sup> government employment,<sup>221</sup> and drug testing in a variety of circumstances.<sup>222</sup> Therefore, “special needs” may be a fruitful starting point in

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214. ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: INVESTIGATION 212 (2d ed. 2013).

215. *Id.*

216. *Id.*; see also WAYNE R. LAFAVE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: INVESTIGATION 191 (2d ed. 2009).

217. CHERMERINSKY & LEVENSON, *supra* note 214, at 212; LAFAVE ET AL., *supra* note 216, at 191.

218. See *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967).

219. See *Wyman v. James*, 400 U.S. 309 (1971).

220. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

221. See *City of Ontario v. Quon*, 560 U.S. 746, 748 (2010).

222. See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (holding random drug testing of students engaged in extracurricular activities was a reasonable means of furthering the school’s interest in preventing drug use among children); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding coerced drug testing of pregnant mothers was unconstitutional absent a search warrant); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (finding random drug testing of student athletes was reasonable and did not violate the Fourth Amendment); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S.

creating and establishing an appropriate framework for PHAs to employ in “drug-related criminal activity” terminations.

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602 (1989) (finding drug tests for railroad employees was reasonable and did not require a warrant); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (permitting drug testing of U.S. Customs Service employees).

