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Adam P. Hellegers

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COMMENT

REFORMING HUD'S "ONE-STRIKE" PUBLIC HOUSING EVICTIONS THROUGH TENANT PARTICIPATION

ADAM P. HELLEGERS

I. INTRODUCTION: THE CONFLUENCE OF POPULAR AND LEGAL CONTROVERSY

With a garden overflowing with nasturtiums and three grandchildren in her care, Ann Greene seems like the last person anyone at the Alemany housing complex would call a criminal.

....

"It's not fair," said the 63-year-old Greene, holding the eviction notice she received on Friday. "I don't have any place to go. I haven't done anything wrong."¹

Vanessa Ballentine hoped to make a difference at Wilkes Villa by converting an abandoned apartment building into a learning center for children.

....

Now, because of [the criminal activity of] her own children, Ballentine is being evicted from her apartment and has been ordered to stay away from the center.²

¹ Catherine Bowman, *Son's Troubles May Cost Woman Her Apartment. She Fights 'One-Strike' Policy at S.F. Housing Projects*, S.F. CHRON., July 16, 1996, at A11.

² Molly Kavanaugh, *Tenant Who Spearheaded Kids' Center Faces Eviction*, PLAIN DEALER, Sept. 24, 1996, at 3B.

Any federal policy that results in the eviction of nasturtium-toting grandmothers and well-meaning community activists from public housing is bound to elicit criticism from both investigative reporters and public housing residents alike.³

In 1996, President Clinton announced during his State of the Union Address that “[c]riminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and pedal [sic] drugs should be one strike and you’re out.”⁴ How did the reach of the President’s national policy declaration expand to envelop the very “decent tenants” the President intended to protect?⁵

The U.S. Department of Housing and Urban Development’s controversial “one-strike” regulation, C.F.R. § 966.4, empowers local public housing authorities (“PHAs”) to terminate a resident’s tenancy for “any criminal activity that threatens the health, safety, or quiet enjoyment of the PHAs . . . premises . . . or (B) any drug-related criminal activity on or near the premises.”⁶ Section 966.4 extends far beyond evicting individuals for their own criminal actions; it creates a cause for termination of tenancy where a “tenant, any member of the household, a guest, or another person under the tenant’s control,” engages in criminal activity.⁷

Popular critique of this provision has *not* focused on the notion of eviction for criminal activity. In a 1995 national poll, 88% of the adult African-Americans surveyed agreed that peo-

³ See, e.g., Catherine Bowman, ‘One Strike’ Lease Angers S.F. Public Housing Tenants, S.F. CHRON., Oct. 4, 1996, at A21 (“This is the worst lease the Housing Authority ever put out,” said tenant Rosemary Ozan. “You’re putting people out, not giving them a chance.”).

⁴ President William J. Clinton, State of the Union Address (Jan. 23, 1996) (1996 WL 23253, at *8).

⁵ See Scott Gold & Sarah Lundy, *Family Says Housing Authority Law Is Unfair; “One Strike” Policy Puts Some on the Street*, SUN-SENTINEL (FORT LAUDERDALE), Palm Beach Edition, Oct. 17, 1996, at 1B (“Mr. Clinton had to mean it for someone who does something wrong . . . this is not that situation. Mr. Clinton certainly didn’t mean this.”).

⁶ 24 C.F.R. § 966.4 (f)(12)(i) (1997). PHAs exercise this authority by using tenant leases that identify such conduct as grounds for termination of tenancy. See *Rucker v. Davis*, No. C98-00781 CRB, 1998 U.S. Dist. LEXIS 9345, at *3-*4 (N.D. Cal. June 19, 1998), for an example of a closely conforming lease clause. See also *infra* Section II of this Comment for a normative description of the “one-strike” policy.

⁷ 24 C.F.R. § 966.4 (l)(2)(ii) (1997) (emphasis added).

ple living in public housing should be evicted if they are convicted of possession or sales of illegal drugs.⁸ Accordingly, media accounts are peppered with expressions of tenant support for “a federally mandated policy that calls for automatic eviction of tenants who commit crimes.”⁹ In this sense, the one-strike policy appears to enjoy a broad base of support.¹⁰

Considerable criticism is brought when tenants are evicted for “the crimes of others,” or for third party criminal activity.¹¹ Section 966.4 is constructed in such a way that leads to one of three possible circumstances for third party eviction. First, the criminal activity of someone under a tenant’s “control” may lead to a tenant’s eviction.¹² The statutory structure suggests that a person need not be a household member or guest to be under a tenant’s control.¹³ For example, the San Francisco Housing Authority served a notice of eviction on Ann Greene “because her 38-year-old son, Ladell Greene, was accused of possessing drugs four blocks away from the apartment complex,”¹⁴ even though he did not live with her, and was not visiting.¹⁵ Similarly, in *Chavez v. Housing Authority of El Paso*,¹⁶ Elfida Chavez was evicted after her son allegedly threatened two housing project

⁸ Omnifacts, Inc., *Public Opinion Online*, Roper Center at the University of Connecticut, July 21, 1995, available in LEXIS, NEWS GROUP FILE, BY INDIVIDUAL PUBLICATION.

⁹ See, e.g., Cindy Schroeder, *Eviction Policy Arguable; Residents Generally Applaud It*, CINCINNATI ENQUIRER, Sept. 28, 1996, at B1.

¹⁰ See Darlene McCormick, *Public Housing Rule Aired*, TAMPA TRIB., May 4, 1996, South Tampa 1 (“Public housing residents poured into a monthly board meeting at the Tampa Housing Authority Friday to let leaders know they don’t want drug dealers and criminals in their neighborhoods. But they don’t want government stepping on the innocent in an effort to clean up the neighborhoods, either.”).

¹¹ See *id.* However, there is significant popular support for this policy as well. See *Out The Door, ‘One-strike’ Eviction Targets MHA Crime*, COMM. APPEAL, Sept. 2, 1996, at 10A (“‘I’m in total agreement,’ said Rev. James Robinson, president of the MHA [Memphis Housing Authority] Citywide Residents Council. ‘I think it will call for lease-holders to start exercising a little more authority over their children and their households.’”).

¹² 24 C.F.R. § 966.4 (l) (2) (ii) (1997).

¹³ *Id.*

¹⁴ Bowman, *supra* note 1.

¹⁵ *Id.*

¹⁶ 973 F.2d 1245, 1247 (5th Cir. 1992).

security guards.¹⁷ Ms. Chavez's son was neither a household member nor a guest at the time he allegedly committed this criminal act, but public housing officials deemed him to be under his mother's control.¹⁸ While familial relations between tenants and criminal actors can be sufficient to establish the required "control" that may trigger eviction,¹⁹ some courts may require that the relationship consist of more than blood ties.²⁰

PHAs have also employed the one-strike policy to evict entire households for the criminal activity of one wayward household member, on the reasoning that section 966.4 triggers a termination of the entire tenancy, and does not just evict individuals for their own criminal behavior.²¹ For instance, in *Charlotte Housing Authority v. Patterson*,²² the Authority moved to evict Roxieanne Patterson and her two daughters for the alleged criminal behavior of a third child listed on the lease, her son Jonathan Givens.²³

Lastly, a notice of eviction may be served on a tenant for a guest's criminal activity.²⁴ In *Chicago Housing Authority v. Rose*,²⁵ the Chicago Housing Authority ("CHA") filed a complaint against Jacqueline Rose, seeking possession of her Cabrini-Green public housing apartment, after police found two shot-

¹⁷ *Id.* at 1248.

¹⁸ *See id.* at 1247. For a comprehensive treatment of *Chavez*, see Nelson H. Mock, *Punishing The Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495, 1508, 1522-23 (1998).

¹⁹ *See, e.g.*, *Turner v. Chicago Hous. Auth.*, 760 F. Supp. 1299, 1301 (N.D. Ill. 1991) (plaintiff tenants evicted because of criminal conduct committed by their allegedly nonresident and nonguest children).

²⁰ *See Chavez*, 973 F.2d at 1248 (asserting that mother's eviction for son's criminal activity would have been impermissible were it based merely on their parent-child relationship); *see also* *Tyson v. New York City Hous. Auth.*, 369 F. Supp. 513, 516-20 (S.D.N.Y. 1974) (holding that evicting a tenant "solely and exclusively because of the misdeeds of his adult child, who does not reside in the parental home," raises a valid claim for violation of a tenant's due process rights, namely the fundamental right of freedom of association guaranteed by the First Amendment).

²¹ *See, e.g.*, *Charlotte Hous. Auth. v. Patterson*, 464 S.E.2d 68 (N.C. Ct. App. 1995).

²² *Id.*

²³ *Id.* at 70. His name was removed from the lease in 1988, but added back in 1991. *Id.* Givens was arrested two times from 1990-1992, including for murder. *Id.* An eviction notice was served on May 12, 1992. *Id.* at 69.

²⁴ 24 C.F.R. § 966.4 (1)(2)(ii) (1997).

²⁵ 560 N.E.2d 1131 (Ill. App. Ct. 1990).

guns in her unit.²⁶ Her visiting half-brother admitted to stashing them there without Ms. Rose's knowledge or consent.²⁷

Both academic commentators and evictee litigants have seized upon the fact that HUD and local public housing officials assert that tenants who "did not know [of], could not foresee, or could not control [criminal] behavior,"²⁸ are still vulnerable to one-strike evictions.²⁹ Previous scholarly contributions have used the terms "no-fault" or "strict liability" interchangeably to describe this eviction standard;³⁰ in keeping with the latest jurisprudential trends, however, this Comment will describe this practice as the eviction of an "innocent" tenant.³¹

This Comment lays siege to the legal rationale supporting innocent evictions. Cut off from popular support, HUD's posi-

²⁶ *Id.* at 1132.

²⁷ *Id.* at 1133. Rose's eviction was invalidated after a jury finding that she neither knew nor should have known that her brother placed guns in her apartment. *Id.* at 1132-34. The appellate court affirmed the propriety of the jury instructions requiring this finding. *Id.* at 1138. The court interpreted the plain language of the word "permit" in Rose's CHA lease to mean that a tenant must authorize or consent to a guest's criminal activity for an eviction to be valid. *Id.* at 1136-37. For discussion on the Substantive Due Process Clause, see *infra*, note 79 and accompanying text. For a discussion of civil liberties challenges to innocent evictions, see *infra* note 95 and accompanying text.

²⁸ Public Hous. Lease & Grievance Procedures, 56 Fed. Reg. 51560, 51567 (1991) (to be codified at 24 C.F.R. pt. 966).

²⁹ For an example of a litigated challenge to this contention, see *Turner v. Chicago Hous. Auth.*, 760 F. Supp. 1299, 1304 (N.D. Ill. 1991) (plaintiff contesting that CHA leaseholder "is responsible for his or her guests and visitors as long as they are on CHA property, even if the guest leaves the CHA property and later comes back to the property without the tenant's knowledge"). For an example of a general academic critique of the one-strike policy, see generally Jason Dzubow, *Fear-Free Public Housing?: An Evaluation of HUD's "One Strike And You're Out" Housing Policy*, 6 TEMP. POL. & CIV. RTS. L. REV. 55, 56 (1997).

³⁰ See, e.g., Mock, *supra* note 18, at 1497 n.10 ("This Note uses the terms no-fault evictions and strict liability evictions interchangeably to describe evictions that hold a tenant strictly liable for the actions of third parties.").

³¹ See *Rucker v. Davis*, No. C98-00781 CRB, 1998 U.S. Dist. LEXIS 9345, at *4-*5 (N.C. Cal. June 19, 1998):

As defendants note . . . [the term strictly liable] is a misnomer because the tenant is not being held liable, rather, the tenant forfeits her interest in the leasehold. . . . The Court will refer to the termination of tenancies under such circumstances as the termination of the lease of an "innocent" tenant as it is conceded that the tenant is innocent of the drug-related criminal activity which is the cause of the lease termination and it is alleged that the tenant is also innocent of any knowledge of the drug-related criminal activity.

Id.

tion that a tenant targeted for eviction need not have knowledge of or consent to a third party's criminal activity has been weakened before an arsenal of challenges in the form of constitutional objections,³² hostile lease interpretations,³³ and statutory silence on the matter.³⁴ This Comment forwards two arguments. First, an analysis of section 1437d(1)(5) of the Cranston-Gonzalez National Affordable Housing Act of 1990, which authorizes C.F.R. § 966.4, reveals that Congress was silent on whether tenants need to have knowledge of or consent to the third party criminal activity for which they are evicted.³⁵ This silence prevents courts from applying any statutorily created legal standard to evaluate HUD's regulatory interpretation of section 1437d(1)(5), beyond asking merely whether such lease termination conditions are "reasonable."³⁶ Second, Congress has the opportunity to fill this statutory gap by providing a mechanism for public housing tenants to determine the scope of the one-strike rule themselves, rather than abdicating that decision to the uncertain discretion of the judiciary.

³² See *Tyson v. New York City Hous. Auth.*, 369 F. Supp. 513, 518-20 (S.D.N.Y. 1974) (challenge to an eviction of tenants based on crimes committed by children no longer living with tenants states a claim for violation of tenants' substantive due process rights, and an eviction based on a relationship to a person who commits a crime violates the First Amendment right to freedom of association). For a discussion on other constitutional challenges to one-strike evictions, see Section III, *infra* notes 77-111 and accompanying text.

³³ See *Chicago Hous. Auth. v. Rose*, 560 N.E.2d 1131, 1136-37 (Ill. App. Ct. 1990) (construing the lease term "permit" to mean that, for an eviction to be valid, the defendant must have consented to, or authorized the presence of, explosives or weapons in their unit).

³⁴ See, e.g., 42 U.S.C. § 1437d(1) (Supp. III 1997):

Each public housing agency shall utilize leases which— . . . (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Id. See also *Rucker*, 1998 U.S. Dist. LEXIS 9345 at *18 (noting that 42 U.S.C. § 1437d(1)(5) is silent on whether tenant knowledge of or consent to third party criminal activity is required).

³⁵ See § 1437d(1)(5).

³⁶ *Id.* § 1437d(1) ("Each public housing agency shall utilize leases which—(1) do not contain unreasonable terms and conditions."). See *Richmond Tenants Organization v. Richmond Redevelopment and Housing Authority*, 751 F. Supp. 1204 (E.D. Va. 1990), for an example of a case applying this reasonableness standard.

The following section provides a backdrop and summary of crime in public housing and HUD anti-crime strategies, and then lays out the law and official policy surrounding the one-strike rule as it currently stands. Part III describes the constitutional challenges that have been aimed at innocent evictions and other aspects of the one-strike rule. Part IV outlines various past and recent judicial reactions to innocent eviction lease terms, the instrument through which the one-strike rule's strictures are imposed. This discussion demonstrates the diversity of approaches that currently exist when federal regulation meets PHA discretion in lease clause drafting. Part V focuses on two recent interpretations of section 1437d(1)(5), and concludes that the statute's silence on the issue of tenant knowledge or consent, coupled with an ambiguous accompanying legislative history, demonstrates that Congress did not intend to decide the knowledge question. Part V resolves that in the absence of a clear Congressional mandate, courts must rely on the more broad pronouncement of section 1437d(1), that "[e]ach public housing agency shall utilize leases which—(1) do not contain *unreasonable* terms and conditions,"³⁷ to decide whether failing to require tenant knowledge in eviction lease clauses amounts to an "unreasonable" lease term. This section concludes that the inherent uncertainty of a "reasonableness" standard allows courts to exercise considerable discretion in deciding whether to enforce innocent evictions.

Part VI suggests an alternative to leaving this issue up to the whim of a court's interpretive discretion. It proposes that section 1437d(1)(5) be amended to empower local public housing residents at each PHA to create a general rule determining the role of fault and knowledge of criminal activity in tenant evictions. This proposal finds support in (1) the language encouraging tenant consultation and citizen participation that can be found throughout HUD affordable housing legislation and policy,³⁸ (2) the advancement of tenant consultation as a method

³⁷ § 1437d(1) (emphasis added).

³⁸ See, e.g., H.R. REP. NO. 101-316, § 107, at 198-99 (1990), *reprinted in* 1990 U.S.C.A.N. 5793, 596D-61 (requiring citizen participation in the development of

for empowering inner city and public housing residents in much more ambitious arenas,³⁹ and (3) popular accounts demonstrating that public housing residents are capable of achieving localized consensus on this discrete issue.⁴⁰

In recent years, the scholarly and legal attention paid to innocent evictions has kept pace with increasing public housing tenant concern.⁴¹ This Comment concludes that public housing

localized public housing strategies). See also *infra* notes 198-99 and accompanying text.

³⁹ See generally Marvin Krislov, *Ensuring Tenant Consultation Before Public Housing Is Demolished or Sold*, 97 YALE L.J. 1745 (1988); Benjamin B. Quinones, *Redevelopment Re-defined: Revitalizing The Central City With Resident Control*, 27 U. MICH. J.L. REFORM 689 (1994).

⁴⁰ Compare Bowman, *supra* note 3 (most tenants at San Francisco PHA oppose third party criminal activity evictions) with *Out the Door*, *supra* note 11 (most MHA tenant leaders support innocent evictions).

⁴¹ For a citation to just about every state and federal decision involving innocent evictions in recent years, see Mock, *supra* note 18, at n.52 (litigative history demonstrates a general trend towards increased challenges to innocent evictions). The following is an expanded and updated version of Mock's history: Chavez v. Housing Auth. of El Paso, 973 F.2d 1245, 1248 (5th Cir. 1992) (holding that mother's eviction for son's criminal activity was not impermissibly based on their parent-child relationship but because he was under his mother's control); Henry v. Wild Pines Apartments, 359 S.E.2d 237, 238-39 (Ga. Ct. App. 1987) (ruling that a tenant could not be evicted without knowledge of or consent to a fight at her apartment by two acquaintances that took place while she was away); Housing Auth. v. Brown, 349 S.E.2d 501, 503 (Ga. Ct. App. 1986) (holding that a tenant should not be evicted when he did not know of or consent to the use of his apartment by others for criminal activity); Williams v. Hawaii Hous. Auth., 690 P.2d 285, 291-92 (Haw. Ct. App. 1984) (holding that a tenant's awareness of the violent acts of her children was necessary for eviction, but also that such awareness of and ability to prevent violent behavior of a household member should be inferred where there is a history of violent acts); American Apartment Management Co. v. Phillips, 653 N.E.2d 834, 840-41 (Ill. App. Ct. 1995) (interpreting a lease clause making a tenant responsible for the acts of guests or household members as requiring knowledge of the drug activity of her guest); Diversified Realty Group, Inc. v. Davis, 628 N.E.2d 1081, 1084-85 (Ill. App. Ct. 1993) (interpreting a section eight contract that held residents liable for the actions of their guests as including a knowledge-or-fault requirement); Mid-Northern Management v. Heinzeroth, 599 N.E.2d 568, 572-73 (Ill. App. Ct. 1992) (holding that when a tenant did not have knowledge and did not consent to the behavior of her son and had punished him for prior behavior, she could not be evicted); Chicago Hous. Auth. v. Rose, 560 N.E.2d 1131, 1136-37 (Ill. App. Ct. 1990) (interpreting a lease to require knowledge of or consent to the behavior of a third party, but holding that the presence in the apartment of the guns of the tenant's brother created a rebuttable presumption that the tenant knew of the guns); Housing Auth. of New Orleans v. Green, 657 So.2d 552, 554-55 (La. Ct. App. 1995) (holding that an eviction following the discovery of drugs hidden by a guest without the knowledge or consent of the tenant was proper, since the lease term "control" "means that the tenant 'controls' who has access to the

premises.”); *Gibson v. Housing Auth.*, 579 So. 2d 528, 530-31 (La. Ct. App. 1991) (holding that only household members who had engaged in illegal activity can be evicted); *Boston Hous. Auth. v. Bell*, 697 N.E.2d 130, 132 (Mass. 1998) (holding that if tenant demonstrates that she could not have foreseen and prevented household member’s violence, good cause for eviction does not exist); *DePopolo v. Brookline Rent Control Bd.*, No. 9209 CV 0204, 1993 WL 340693, at *3 (Mass. App. Div. Sept. 2, 1993) (holding that, when there was a history of dangerous behavior by a tenant’s son, the tenant did not overcome the inference that she could have foreseen or prevented the problem); *Hodess v. Bonfont*, 519 N.E.2d 258, 260 (Mass. 1988) (holding that the mere evidence of the relationship between a tenant and her sons was not enough to warrant a finding that the tenant could reasonably have foreseen and prevented a theft in another apartment by her two sons); *Spence v. O’Brien*, 446 N.E.2d 1070, 1073-74 (Mass. App. Ct. 1983) (holding that when tenant knew of a guest’s drug activities but did little to prevent those activities, the Boston Housing Authority had sufficient basis to evict her); *Spence v. Gormley*, 439 N.E.2d 741, 746 (Mass. 1982) (holding that when a tenant can show that she could not have foreseen or prevented a household member’s violation, there is not cause to evict); *Minneapolis Public Hous. Auth. v. Lor*, 578 N.W.2d 8, 10-11 (Minn. Ct. App. 1998) (holding that district court’s dismissal of housing authority’s unlawful detainer action was proper, in part because HUD regulations allow evicting power to consider the extent of participation by family members and exercise discretion to decide if eviction is inappropriate), *rev’d*, 591 N.W.2d 700 (Minn. 1999); *Syracuse Hous. Auth. v. Boule*, 676 N.Y.S.2d 741, 742 (N.Y. County Ct. 1998), *rev’d*, No. 1164, 99-183, 1999 WL 784142 (N.Y. App. Div., Oct. 1 1999) (holding that for good cause to evict, a public housing tenant must be personally at fault for a guest’s drug activity); *Adams v. Franco*, 638 N.Y.S.2d 1013, 1017-18 (Sup. Ct. 1996) (ruling that a PHA’s refusal to grant a remaining family member a lease after his mother committed a crime was “so shocking to basic notions of fairness as to constitute an abuse of discretion”); *Cabrera v. New York City Hous. Auth.*, 590 N.Y.S.2d 90, 91 (N.Y. App. Div. 1992) (ruling that when a tenant’s children were no longer living with her, she could not be evicted despite their drug offenses in the public housing complex); *Corchado v. Popolizio*, 567 N.Y.S.2d 460, 461-62 (N.Y. App. Div. 1991) (holding that “forfeiture of a significant property interest involves substantial due process concerns,” and noting that it would be “shocking to one’s sense of fairness to exclude non-offending tenants from public housing when an offending family member has been excluded from the household at the time of the hearing”); *Hines v. New York City Hous. Auth.*, 413 N.Y.S.2d 733, 735 (N.Y. App. Div. 1979) (stating that “[i]t would be shocking to one’s sense of fairness to terminate the tenancy of persons who have not committed nondesirable acts and who have not controlled those who have committed such acts”); *Charlotte Hous. Auth. v. Fleming*, 473 S.E.2d 373, 375-76 (N.C. Ct. App. 1996) (holding that since the tenant was not aware of her non-resident son’s presence in front of her apartment, he was not a guest, and the tenant was therefore not responsible for the son’s alleged criminal activity and could not be evicted); *Charlotte Hous. Auth. v. Patterson*, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995) (ruling that legislative history dictated that good cause for eviction does not exist under 42 U.S.C § 1437(d)(1)(5) if a public housing tenant is not personally at fault for the criminal activities of a member of the tenant’s household); *Allegheny County Hous. Auth. v. Liddell*, 722 A.2d 750, 755 (Pa. Commw. Ct. 1998) (district court’s decision that one household member should not be evicted for another’s criminal activity was an improper judicial substitution of authority judgment and discretion); *Barajas v. Housing Auth. of Harlingen*, 882

residents themselves have the most vested interest in creating policies that promote safe, functional public housing communities, and are best positioned to determine how far the rule must go in their own neighborhood to realize that objective. It would only be fitting for the controversy to be resolved by those who most clearly desire its resolution.⁴²

II. WHERE AND HOW THE ONE-STRIKE RULE STANDS

A. CRIME AND ANTI-CRIME STRATEGIES IN PUBLIC HOUSING AUTHORITIES

In the United States, crime statistics are recorded as broadly as statewide, and are broken down as narrowly as individual police precincts.⁴³ Unfortunately, however, no comprehensive set of statistics measures crime rates in federally supported public housing, either individually or in the aggregate.⁴⁴ The clear consensus among policymakers and law enforcement officials, however, is that crime levels are at their highest magnification

S.W.2d 853, 855 (Tex. App. 1994) (holding that the eviction of both household members following one's drug-related criminal activity was proper, since lease language unambiguously terminates tenancy for tenant criminal activity); *Moundsville Hous. Auth. v. Porter*, 370 S.E.2d 341, 343 (W. Va. 1988) (per curiam) (ruling that a beating of a tenant by her live-in companion did not rise to the level of seriousness necessary for her eviction, even though she did not exclude him from her apartment).

⁴² See U.S. DEP'T OF HOUS. AND URBAN DEV., *SAFE COMMUNITIES WEIGH HEAVILY IN SHOPPING (SIC) ATTITUDES TOWARD PUBLIC HOUSING* (Federal Document Clearing House, May 21, 1997) available in LEXIS, NEWS GROUP FILE, ALL (hereinafter *Safe Communities*). "In 16 focus group meetings with current [public housing] residents and individuals on the waiting list, respondents said that they are more concerned with how safe, secure and drug-free an environment is rather than what color their neighbors are." *Id.*

⁴³ See generally, e.g., FEDERAL BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES 1996: UNIFORM CRIME REPORTS* (1997). This comprehensive statistical evaluation reports crime on the national, regional, state, and county level.

⁴⁴ See The White House, *VP Announces \$217.3m in Grants to Fight Crime and Drugs in Public and Assisted Housing*; M2 PRESSWIRE, Nov. 10, 1997, available in LEXIS, News Database, Wire Service Stories. ("No separate statistics exist for crime in public and assisted housing."). Some individual PHAs, however, do measure crime rates in individual projects. See, e.g., Martha Carr, *Crime Down in St. John Public Housing; Rules Tightened; Police Reinforced*, THE TIMES-PICTAYUNE, Jan. 29, 1999, at B1. ("Arrests in the complexes dropped more than 22 percent last year, from 244 in 1997 to 190 in 1998, a report released by the Housing Authority shows.").

within concentrated public housing communities.⁴⁵ Because “[c]rime persists as our Nation’s dominant fear[,] if we listen to opinion polls,”⁴⁶ the popular view of crime in public housing is that it is the worst of our worst—that PHAs are suffering from the most intense concentration of our country’s greatest social dilemma.⁴⁷

HUD’s responsibility to fund and oversee local PHAs nationwide⁴⁸ makes it both an effective and rare conduit through which the federal government can approach the problems of crime. Although the federal government’s political incentive to battle crime is great, its opportunities are limited, as law enforcement powers are exercised primarily on the state and local level.⁴⁹ But, PHAs depend on HUD approval to receive much

⁴⁵ See The White House, *supra* note 44. (“[Public housing developments] have historically suffered some of the highest crime rates.”). See also *Safety and Security in Public Housing: Field Hearing Before the Subcomm. on Hous. and Community Dev. of the Comm. on Banking, Fin., and Urban Affairs—House of Representatives*, 103d Cong. 96 (1994) (statement of Representative Gutierrez) (“It is a crisis that, I believe, has become the greatest challenge facing our nation—how do we protect our homes, our streets, our families from crime and violence?”). See also *id.* at 9 (statement of Senator Moseley-Braun) (“[I]n many federally financed public housing projects, the level of violence has reached epidemic proportions, threatening on a daily basis the lives of the majority of the tenants who are law abiding.”).

⁴⁶ HENRY G. CISNEROS, *DEFENSIBLE SPACE: DETERRING CRIME AND BUILDING COMMUNITY* 3 (1995).

⁴⁷ See Rob Teir, *Tenants’ Privacy Held Captive by Crime*, NAT’L L.J., May 9, 1994, at A21. There is also the notion that some cities’ public housing developments are the worst of that worst. See The White House, *Vice Pres. Announces New Four-Part Strategy to Fight Crime and Drugs in Public Housing*, M2 PRESSWIRE, June 9, 1997, available in LEXIS, News Database, Wire Service Stories. (“[I]t intensifies law enforcement activities in the ‘worst of the worst’—the 13 cities with some of the most troubled public housing authorities in American today.”). Some public officials, however, would argue that this reputation is undeserved. See *Safety and Security in Public Housing*, *supra* note 45, at 2 (statement of Chairman Gonzalez) (“One of the things that has become identified with [public housing] is this undeserved reputation of being a center of misbehavior and violence and the like. The overwhelming majority of public housing developments are not.”).

⁴⁸ See, e.g., 42 U.S.C. § 1437 (1998).

⁴⁹ See U.S. DEP’T OF HOUS. & URBAN DEV., *THE STATE OF THE CITIES 1998* at 35-36 (1998) [hereinafter *STATE OF THE CITIES*] (“Although crime is mainly a local and State responsibility, the last 5 years show that the Federal Government can play an important role in reducing crime.”). Virtually all of President Clinton’s anti-crime initiatives only offer fiscal support to local crime prevention efforts. See *id.* at 36. For example, the Community Oriented Policing Services (COPS) and Community Prose-

needed funding for maintenance and development.⁵⁰ This relationship empowers HUD to direct PHA policy by tying funding to HUD-approved anti-crime programs.⁵¹

Currently, HUD supports five strategies for reducing crime and drugs in public housing.⁵² Two of these programs, the Priority City Initiative and the Priority City Prevention Initiative, bring together local and federal law enforcement officials and the directors of the nation's most troubled PHAs to create innovative law enforcement and crime prevention strategies.⁵³ Two other grant programs, the Housing Drug Elimination Program and Operation Safe Home, involve public housing residents in combating crime and drugs.⁵⁴ The Housing Drug Elimination Program offers grants to PHAs that are used to fund local tenant anti-crime patrols, community drug prevention, intervention and treatment programs, tenant job training for security guard work, as well as increased law enforcement, security, and physical safety improvements that enhance security.⁵⁵ Similarly,

cutors Initiative provide grants to hire more police officers and encourage prosecutorial innovation within existing local agencies, respectively. *See id.*

⁵⁰ *See* U.S. DEP'T OF HOUS. & URBAN DEV., "ONE STRIKE AND YOU'RE OUT": POLICY IN PUBLIC HOUSING 3-4 (1996) [hereinafter ONE STRIKE]. This HUD-issued guide advises individual PHAs on the one-strike policy in general, as well as HUD's evaluation-based incentive program to encourage implementation. *Id.* "Under such a performance evaluation system, a high-scoring, high-performing PHA would receive less federal oversight and may be eligible to receive additional formula funds . . . ; a PHA with a failing PHMAP score would be ineligible for such additional funding and could ultimately face a HUD takeover of its management." *Id.* at 4.

⁵¹ *See generally* STATE OF THE CITIES, *supra* note 49, at 36 (naming HUD programs that provide funding to PHAs). "HUD empowers public housing authorities (PHAs) and their local partners with tools to target crime and drugs in public housing." *Id.*

⁵² *See* The White House, *supra* note 47. ("Vice President Gore today joined Attorney General Janet Reno and Housing and Urban Development Secretary Andrew Cuomo in announcing a new four-part strategy to protect public housing residents from the scourge of crime and drugs."). The fifth strategy, one-strike housing evictions, was not mentioned in this White House press release.

⁵³ *See id.*

⁵⁴ *See* STATE OF THE CITIES, *supra* note 49, at 36. Resident involvement in, and even management of, their public housing developments is quite common, and is discussed at length *infra* Part VI.

⁵⁵ U.S. DEP'T OF HOUS. & URBAN DEV., *Cuomo Awards \$5,826,420mn to Fight Drugs and Crime in Public and Assisted Housing in Connecticut*, M2 PRESSWIRE, Oct. 28, 1998, available in LEXIS, News Database, Wire Service Stories. *See also* The White House, *supra* note 44 (providing a percentage breakdown for what types of programs are funded by Drug Elimination Grants).

Operation Safe Home “targets the collective resources of federal, state, and local law enforcement agencies, public housing staff, and residents to stamp out the worst infestations of gangs, drugs, and violent crime in public housing developments and the surrounding neighborhoods.”⁵⁶ Safe Home provides dollars for local strategies that combine tenant vigilance and information with aggressive law enforcement tactics that result in raids, arrests, and convictions.⁵⁷

The fifth program is easily distinguished from the other four in that its implementation involves neither law enforcement nor public housing tenants. The fifth program has been dubbed by President Clinton “One Strike and You’re Out.”⁵⁸

B. “ONE STRIKE, YOU’RE OUT”—THE TERMS OF A NATIONAL POLICY

After first proposing the one-strike policy during his January 23, 1996 State of the Union Address,⁵⁹ President Clinton made the policy official that following March by announcing: “This policy today is a clear signal to drug dealers and to gangs: If you break the law, you no longer have a home in public housing, ‘one strike and you’re out.’ That should be the law everywhere in America.”⁶⁰

In fact, the President’s strongly worded challenge created no new law.⁶¹ One housing authority director commented that since the one-strike policy was announced, “We really haven’t changed anything. It just has a catchy little ring to it.”⁶² Prior to

⁵⁶ See *Safe Communities*, *supra* note 42.

⁵⁷ See U.S. DEP’T OF HOUS. AND URBAN DEV., PUBLIC HOUSING THAT WORKS: THE TRANSFORMATION OF AMERICA’S PUBLIC HOUSING 36-37 (1996) [hereinafter PUBLIC HOUSING THAT WORKS] (describing Operation Safe Home’s cooperative efforts to target “the worst infestations of gangs, drugs, and violent crime in public housing developments and their surrounding neighborhoods”).

⁵⁸ The White House, *supra* note 44.

⁵⁹ See Clinton, *supra* note 4, at *8.

⁶⁰ Remarks Announcing the “One Strike and You’re Out” Initiative in Public Housing, 32 WEEKLY COMP. PRES. DOC. 582, 583 (Mar. 28, 1996).

⁶¹ See Dzubow, *supra* note 29, at 56.

⁶² Laurel Walker, *One-Strike-You’re-Out Approach; Housing Authority Already Tough; Essentially, Eviction Policy Already is in Effect in Waukesha*, Director Says, MILWAUKEE J. SENTINEL, Oct. 1, 1996, at Waukesha 2. See also McCormick, *supra* note 10, at South

any mention of a one-strike policy, the Cranston-Gonzalez National Affordable Housing Act of 1990 empowered PHAs to evict tenants in response to criminal activity:

Each public housing agency shall utilize leases which— . . . (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.⁶³

HUD regulations give administrative force to this legislative mandate.⁶⁴

Consequently, most individual PHAs include similar language in tenant leases.⁶⁵ These lease provisions "make involvement in drugs or serious criminal activity a basis for barring people from moving into public housing and for eviction."⁶⁶

However, neither section 1437d(1)(5) nor its regulatory counterpart require that PHA leases conform to the one-strike mold.⁶⁷ HUD does, however, encourage the one-strike policy's

Tampa 1 ("But Tampa Housing Authority Attorney Ricardo Gilmore explained the new policy doesn't substantially change rules at the agency.").

⁶³ 42 U.S.C. § 1437d(l)(5) (1997).

⁶⁴ 24 C.F.R. § 966.4(f)(12)(i) (1997). See *supra* notes 6 & 21 and accompanying text for regulatory language.

⁶⁵ See *Rucker v. Davis*, No. C98-00781 CRB, 1998 U.S. Dist. LEXIS 9345, at *3-*4 (N.D. Cal. June 19, 1998). For example, one lease states:

[T]enant, any member of the household, or another person under the tenant's control, shall not engage in (i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other public housing residents or threatens the health and safety of the housing authority employees . . . or (ii) Any drug-related criminal activity on or near the premises . . .

Id.

⁶⁶ The White House, *supra* note 44. It should be noted that the one-strike policy includes empowering PHAs to exclude public housing applicants on the basis of prior criminal activity. See *ONE STRIKE*, *supra* note 50, at 5 ("The first essential element of a One Strike policy is to ensure that those who engage in illegal drug use or other criminal activities that endanger the well-being of residents are not allowed to live in public housing."). See also *PUBLIC HOUSING THAT WORKS*, *supra* note 57, at 34-35. ("[S]tricter admission policies . . . include comprehensive background checks on applicants, cooperation with courts and law enforcement agencies to gain access to criminal records, and a fair and flexible tenant selection process that may involve current public housing residents."). This Comment will focus on the one-strike policy's eviction prong.

⁶⁷ See 42 U.S.C. § 1437d(l)(5) (1997). See also 24 C.F.R. § 966.4(f)(12)(i) (1999); Stephen G. Reed, *Families Affected By "One Strike"; Two Mothers Have Had Their Children*

application by using it as a criterion to evaluate individual PHAs; enforcing the policy can lead to higher scores on PHA performance evaluations, which might lead to less federal oversight and even additional funding.⁶⁸ HUD officials have commented publicly that failing to implement the one-strike policy will result in more strict federal agency supervision for a local PHA.⁶⁹

In addition to refraining from requiring one-strike lease language, HUD also asserts that complicated cases involving innocent evictions “will require discretion on the part of public housing managers.”⁷⁰ HUD regulations make it clear, however, that PHAs are not *required* to exercise discretion, but have the *option* to do so:

In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity.⁷¹

Essentially, PHAs are given discretion to decide whether they should exercise discretion when evaluating a one-strike eviction.⁷² This option, however, is *not* available to courts that

Banned From the Complex Due to Drug-Related Offenses, SARASOTA HERALD-TRIB., July 11, 1996, at 1B (“The policy is not a strict requirement. Local housing authorities—which oversee subsidized apartment complexes nationwide—decide whether to implement the policy.”).

⁶⁸ See Mock, *supra* note 18, at 1503. See also ONE STRIKE, *supra* note 50, at 3-4.

⁶⁹ See Reed, *supra* note 67, at 1B (“But those that don’t [implement the policy] face stricter [sic] supervision by the Department of Housing and Urban Development, according to information from HUD.”).

⁷⁰ Office of Communications, The White House, *Cisneros Briefing on Public Housing Policy*, Mar. 27, 1996, available in 1996 WL 139523. HUD Secretary Henry G. Cisneros continued: “I have . . . been involved in sweeps of buildings where we found drugs in a grandmother’s apartment. And she said she didn’t know anything about it, that her grandson was responsible for it, and some discretion was applied in that case.” *Id.* See also Reed, *supra* note 67, at 1B (“‘Housing authorities are given some flexibility to handle eviction cases on an individual basis,’ said a HUD statement ‘In exceptional cases, alternatives may be considered, such as allowing a household to remain in public housing if the offending member of the household moves and agrees not to return.’”).

⁷¹ 24 C.F.R. § 966.4(l)(5)(i) (1999).

⁷² See *Barajas v. Housing Auth. of the City of Harlingen*, 882 S.W.2d 853, 856 (Tex. App. 1994) (“Section 966.4(l)(5)(i) does not require that the Housing Authority consider the circumstances of each and every case, nor does it require that the Housing

review PHA evictions. One Pennsylvania court has held that a judicial review that takes evicted tenants' extraordinary or mitigating circumstances into account amounts to an improper substitution of PHA discretionary authority.⁷³

The option to exercise case-by-case discretion may allow public housing officials to soften the impact of the one-strike rule. Applying discretion does *not*, however, provide any legal justification for the policy itself, and does not respond to any constitutional, jurisprudential, or statutory interpretive challenges to innocent evictions. An individual PHA decision to exercise its innocent eviction power selectively can promote equitable resolutions in seemingly intractable situations;⁷⁴ however, the eviction power *itself* still exists without restriction, no matter how much the blow is softened in practice.⁷⁵ Therefore, an analysis of the constitutional issues, lease terms, and attempts at statutory interpretation are necessary to any comprehensive evaluation of the one-strike policy and its approach to innocent evictions.⁷⁶

Authority consider all of the specified factors. [It] grants . . . discretion to decide whether it wants to consider 1) the circumstances of a case and 2) the specified factors." (emphasis added).

⁷³ See *Allegheny County Hous. Auth. v. Liddell*, 722 A.2d 750, 753 (Pa. Commw. Ct. 1998) (holding that trial court's decision that one household member should not be evicted for another's criminal activity was an improper judicial substitution of authority judgment and discretion).

⁷⁴ See McCormick, *supra* note 10, at South Tampa 1 ("Gilmore said current leases give the authority the option of taking a family situation into account.").

⁷⁵ See Dzubow, *supra* note 29, at 59 ("However, if the PHA does not have authority to evict the family, the fact that agencies choose not to evict families who lack knowledge of a family member's criminal activity is not constitutionally adequate protection.").

⁷⁶ See Robert Hornstein, *Mean Things Happening In This Land: Defending Third Party Criminal Activity Housing Evictions*, 23 S.U. L. REV. 257, 260-64 (1996). Hornstein offers a practitioner's guide for arguing third party criminal activity eviction cases, advising public interest lawyers to distinguish their client's case on the facts and make "a defense from something other than whole cloth, from the facts." *Id.* at 271. Even Hornstein felt compelled to review the constitutional and other legal issues involved, *id.* at 260-64, although ultimately he recommends that actual litigants take a different tack. *Id.* at 271-72.

III. CONSTITUTIONAL CHALLENGES TO ONE-STRIKE EVICTIONS

Not all constitutionally grounded challenges to the one-strike policy focus on the eviction of tenants who claim to be innocent. Tenant evictions triggered by criminal activity have been challenged as violations of the Double Jeopardy,⁷⁷ Excessive Fines,⁷⁸ and both the Substantive⁷⁹ and Procedural Due Process⁸⁰ Clauses of the Constitution. In one such case, a New Jersey District Court heard the plaintiff's claim that his eviction from a Bayonne Housing Authority apartment following a conviction for possession of drug paraphernalia amounted to Double Jeopardy,⁸¹ Excessive Fines,⁸² and Substantive Due Process⁸³ violations.⁸⁴ First, the plaintiff claimed he was being punished twice and fined excessively for the same criminal activity. A prerequisite and necessary element to both the Double Jeopardy and Excessive Fines claims was a finding that the state action, the eviction, was intended in part as punishment and not for

⁷⁷ See *Taylor v. Cisneros*, 913 F. Supp. 314, 316 (D.N.J. 1995).

⁷⁸ See *id.* at 316-17.

⁷⁹ See *Tyson v. New York City Hous. Auth.*, 369 F. Supp. 513, 515-16 (S.D.N.Y. 1974).

⁸⁰ See *Ruffin v. Kemp*, No. 90-C2065, 1992 U.S. Dist. LEXIS 10320, at *2-*3, (N.D. Ill. July 7, 1992).

⁸¹ U.S. CONST. amend. V. ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."). According to the court in *Taylor v. Cisneros*, "[t]he Double Jeopardy Clause has been applied to the states via incorporation in the Fourteenth Amendment's Due Process Clause." *Taylor*, 913 F. Supp. at 321 n.12 (citing *United States v. DiFrancesco*, 449 U.S. 117, 131 n.12 (1980)).

⁸² U.S. CONST. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

⁸³ U.S. CONST. amend. XIV, § 1. ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). Federal courts apply a "rational basis" standard to determine whether a non-suspect class's Substantive Due Process rights have been abrogated. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

⁸⁴ See *Taylor*, 913 F. Supp. at 316-17. *Taylor* was evicted under the New Jersey "Anti-Eviction Act," N.J.S.A. 2A:18-61.1(n). *Id.* at 316. This statute grants the same eviction powers as 42 U.S.C. § 1437d(d)(5), except that it requires good cause for private landlords to evict as well. *Id.* at 317. The statute preempts federal law. *Id.* Implicitly referring to this preemption power, Nelson Mock proposes that state legislatures adopt statutory defenses that protect tenants by prohibiting innocent evictions, as has been done in North Carolina. See *Mock*, *supra* note 18, at 1525. See also N.C. GEN. STAT. § 42-64(a) (1998).

remedial purposes.⁸⁵ The court held that the statute invoked eviction powers “to protect tenants from drugs and other related criminal activity” and that “[e]victing an insidious tenant is a rational and effective means of protecting all other tenants from activity antithetical to their health, safety and welfare.”⁸⁶ The court found that the remedy went “no further than necessary to effectuate the statute’s purpose,”⁸⁷ and was not intended to be punitive. It held that there was no second punishment in violation of the Double Jeopardy clause, no excessive fine, and no “punishment so plainly arbitrary and oppressive as to violate the due process clause.”⁸⁸

Another line of cases feature litigants who have sought to attack one-strike evictions on procedural due process grounds. These cases challenge PHAs for failing to offer adequate pre-eviction grievance hearings.⁸⁹ In 1990, the 1937 Housing Act⁹⁰ was amended to “allow elimination of pre-eviction administrative procedures only in cases where certain types of criminal activity is involved.”⁹¹ HUD’s regulations posit that such administrative hearings are not required if the HUD Secretary determines that the state where a PHA is located offers pre-eviction court grievance procedures that satisfy a list of applicable due process procedural requirements.⁹² The Secretary employs a list of HUD-promulgated due process guidelines to guide this determination.⁹³ Since section 1437d(k)’s amend-

⁸⁵ *Taylor*, 913 F. Supp. at 319, 321, 323. The court relied on *United States v. Halper*, 490 U.S. 435 (1989), which formulated this “punishment vs. remedial” test. “State action violates neither the Double Jeopardy Clause nor the Excessive Fines Clause unless it constitutes punishment.” *Taylor*, 913 F. Supp. at 319.

⁸⁶ *Id.* at 321.

⁸⁷ *Id.* at 322.

⁸⁸ *Id.* at 323.

⁸⁹ See *Wells v. Nelson*, No. 91-3693, 1992 U.S. App. LEXIS 1200, at *1-*2, (6th Cir. Jan. 28, 1992); *Ruffin v. Kemp*, No. 90-C2065, 1992 U.S. Dist. LEXIS 10320, at *2-*3, (N.D. Ill. July 7, 1992); *Housing Auth. of the City of Jersey City v. Kemp*, No. 90-1410, 1990 U.S. Dist. LEXIS 19595, at *1-*2, (D.N.J. Dec. 13, 1990).

⁹⁰ Codified at 42 U.S.C. § 1437d (1997).

⁹¹ *Ruffin*, 1992 U.S. Dist. LEXIS 10320, at *3. See also 42 U.S.C. § 1437d(k) (1997).

⁹² See 24 C.F.R. § 966.53(c) (1997).

⁹³ *Id.*

ment, no challenges to the revised grievance procedure exemption have resulted in a published federal court decision.⁹⁴

Constitutional challenges were also leveled against innocent evictions long before the one-strike policy became a Clinton Administration catch-phrase.⁹⁵ One such decision, *Tyson v. New York City Housing Authority*,⁹⁶ held that evicting a tenant "solely and exclusively because of the misdeeds of his adult child, who does not reside in the parental home,"⁹⁷ stated a claim for violation of a tenant's due process rights, namely the fundamental right of freedom of association guaranteed by the First Amendment.⁹⁸ This First Amendment protection is applied to state actions via Fourteenth Amendment Due Process.⁹⁹ The court also found a valid Substantive Due Process claim, finding that "[t]here must be some causal nexus between the imposition of the sanction of eviction and the plaintiffs' own conduct."¹⁰⁰

By relying on a "causal nexus" test, *Tyson* creates a threshold standard for evictee behavior in cases of non-resident, non-guest criminal activity: that there must be a direct connection between the criminal activity cited and the tenant's own conduct for an eviction to stick. *Tyson*, however, does not apply to the other forms that innocent evictions may take, including eviction

⁹⁴ Lexis search conducted October 20, 1998. Boolean search in FEDCTS library: "1437d(k) and evictl" The 3 cases cited above, *supra* note 89, were based on evictions for first party criminal activity evictions served prior to the 1990 amendment.

⁹⁵ For a comprehensive review of civil liberties challenges to innocent evictions dating back to the 1970s, see Dzubow, *supra* note 29, at 58-61. From his analysis, Dzubow concludes "[i]t is difficult to draw a general rule from the sparse case law available on the subject of evicting families for the actions of one member of their household or of a guest." *Id.* at 61.

⁹⁶ 369 F. Supp. 513 (S.D.N.Y. 1974).

⁹⁷ *Id.* at 516.

⁹⁸ *Id.* at 518-20. See U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech.").

⁹⁹ U.S. CONST. amend. XIV, § 1. See *Fiske v. Kansas*, 274 U.S. 380 (1927) (holding that Due Process Clause protects First Amendment freedom of speech); see also *DeJonge v. Oregon*, 299 U.S. 353 (1937) (holding that Due Process Clause protects First Amendment freedom of assembly). No Supreme Court case has specifically incorporated the entire Bill of Rights into the Fourteenth Amendment's State Due Process Protections, nor has the First Amendment's right to freedom of association been specifically incorporated. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 772 (1988).

¹⁰⁰ *Tyson*, 369 F. Supp. at 519.

following a guest's criminal activity, or eviction of an entire family for the crime of one member listed on the lease. More importantly, *Tyson* also does not discuss the constitutional issues implicated by evictions of tenants without *knowledge* of third party criminal activity. *Tyson* does not decide whether knowledge is required for an eviction to stand; it merely asserts that something more than a familial relationship is necessary to connect the tenant to the criminal actor.¹⁰¹

One case, *Turner v. Chicago Housing Authority*,¹⁰² did evaluate the issue of tenant knowledge of third party criminal activity by applying the *Tyson* causal nexus test to a Substantive Due Process challenge.¹⁰³ The *Turner* court agreed with both the Housing Authority and the evicted tenant plaintiffs that "to succeed on their substantive due process claims, plaintiffs must show that defendants' actions (1) deprived plaintiffs of their property (2) for an irrational or invidious purpose."¹⁰⁴ The court also found that it would be an irrational deprivation "to evict one of the plaintiffs based on the conduct of a third party when there is no *causal nexus* between that plaintiff and the third party."¹⁰⁵ The court declined, however, to hold that "unbeknownst-to-tenant" guest criminal conduct demonstrated an insufficient nexus on its face, and remanded the issue to trial for a finding of fact.¹⁰⁶

The constitutional issues pertinent to tenant evictions are not always adjudicated consistently. While some courts may find that constitutional issues are fact sensitive,¹⁰⁷ other courts may refrain from making such inquiries entirely.¹⁰⁸ Illinois state courts, for example, have recognized that "a court should not decide a case on constitutional grounds if it can be determined on other grounds."¹⁰⁹ Furthermore, an Illinois court held that a

¹⁰¹ *Id.*

¹⁰² 760 F. Supp. 1299 (N.D. Ill. 1991).

¹⁰³ *Id.* at 1309.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1309 (citing *Tyson*, 369 F. Supp. 518-19) (emphasis added).

¹⁰⁶ *Id.* The remanded state trial court decision is unpublished.

¹⁰⁷ See, e.g., *id.*

¹⁰⁸ See, e.g., *Chicago Hous. Auth. v. Rose*, 560 N.E.2d 1131, 1135 (Ill. App. Ct. 1990).

¹⁰⁹ *Id.* (citing *Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.*, 157 Ill. App. 3d 713, 716 (Ill. App. Ct. 1987)).

lease interpretation requiring some tenant knowledge of the criminal activity rendered any due process causal nexus inquiry unnecessary.¹¹⁰ It is not uncommon, therefore, for constitutional concerns to take a back seat to other plaintiff claims, as is often the case when an issue of lease interpretation arises.¹¹¹

IV. INNOCENT EVICTION LEASE INTERPRETATIONS

Many innocent eviction cases look primarily at the language of the relevant lease clauses to divine the breadth of a housing authority's eviction power.¹¹² This approach was common prior to the 1990 codification of U.S.C. § 1437d(1)(5), when the scope of criminal activity eviction clauses (and their language) was left purely to individual PHA preference.¹¹³ For example, in *Spence v. O'Brien*,¹¹⁴ the court interpreted a lease clause that provided for termination of tenancy "in the event the tenant uses the premises for immoral or illegal purposes."¹¹⁵ The court held that the provision warranted eviction following a guest's criminal activity only if the tenant was aware of and able to prevent a guest's illegal conduct, regardless of the tenant's own personal involvement.¹¹⁶ In *Housing Authority of Decatur v. Brown*,¹¹⁷ the Decatur Housing Authority issued a more exacting provision, requiring that a tenant "refrain from illegal activity" and "conduct himself and cause other persons on the premises with his consent to conduct themselves in a manner which would not disturb his neighbors' peaceable enjoyment . . . and [which] would be conducive to maintaining the project in a decent, safe and sanitary condition."¹¹⁸ Even with this more strict provision, the court in *Brown* held that neither "the bare occurrence of a

¹¹⁰ *Id.* at 1135.

¹¹¹ *See infra* notes 112-30 and accompanying text.

¹¹² *Rose*, 560 N.E.2d at 1136-37.

¹¹³ *See* *Housing Auth. of Decatur v. Brown*, 349 S.E.2d 501 (Ga. Ct. App. 1986); *See also* *Henry v. Wild Pines Apartments*, 359 S.E.2d 237 (Ga. Ct. App. 1987); *Spence v. O'Brien*, 446 N.E.2d 1070 (Mass. App. Ct. 1983).

¹¹⁴ 446 N.E.2d 1070 (Mass. App. Ct. 1983).

¹¹⁵ *Id.* at 1073 n.6.

¹¹⁶ *Id.* at 1074.

¹¹⁷ 349 S.E.2d 501 (Ga. Ct. App. 1986).

¹¹⁸ *Id.* at 502.

violation of law alone,"¹¹⁹ nor the arrest of persons in the tenant's apartment whose presence he did not consent to gave the Authority good cause for eviction.¹²⁰

The passage of the Cranston-Gonzalez National Affordable Housing Act created a national policy for one-strike evictions,¹²¹ but did not require that lease clauses be uniform in scope or language.¹²² As a result, a variety of approaches (and lease phrases) are currently used.¹²³ For instance, the New York City Housing Authority Termination of Tenancy Procedures do "not permit termination of the tenancy where the [criminal] offenders have removed from the household."¹²⁴ Accordingly, one court allowed a petitioning tenant to retain her tenancy, since she had removed her crack-possessing adult children from the premises.¹²⁵ In *Chicago Housing Authority v. Rose*,¹²⁶ the Chicago Housing Authority's lease provided that "permitting weapons on the premises,"¹²⁷ was a lease violation, and grounds for eviction. The court defined the common usage of the lease term "permit" as "to consent to . . . allow, tolerate . . . [or] authorize,"¹²⁸ and held that its presence in the lease supported the trial

¹¹⁹ *Id.* at 503 (plaintiff tenant's guest was brought in on a misdemeanor arrest for possession of a small amount of marijuana for personal consumption).

¹²⁰ *Id.* In addition, prior to the 1990 codification, state courts in both Georgia and Hawaii held that a tenant must have knowledge of third party criminal activity for a public housing eviction to stand. *See* *Housing Auth. v. Brown*, 349 S.E.2d 501, 503 (Ga. Ct. App. 1986) (holding that a tenant should not be evicted when he did not know of or consent to the use of his apartment by others for criminal activity); *see also* *Williams v. Hawaii Hous. Auth.*, 690 P.2d 285, 291-92 (Haw. Ct. App. 1984) (holding that a tenant's awareness of the violent acts of her children was necessary for eviction, but also that such awareness of and ability to prevent violent behavior of a household member should be inferred where there is a history of violent acts).

¹²¹ 42 U.S.C § 1437d(1)(5) (1997).

¹²² *Id.* *See also supra* notes 70-76 and accompanying text (section 1437d(1)(5) and HUD policy allow individual PHAs discretionary application of one-strike evictions).

¹²³ *See Rose*, 560 N.E.2d at 1131; *see also* *American Apartment Management Co. v. Phillips*, 653 N.E.2d 834 (Ill. App. Ct. 1995); *Cabrera v. New York City Hous. Auth.*, 590 N.Y.S.2d 90 (N.Y. App. Div. 1992); *Corchado v. Popolizio*, 567 N.Y.S.2d 460 (N.Y. App. Div. 1991).

¹²⁴ *Cabrera*, 590 N.Y.S.2d at 91 (citing *Brown v. Popolizio*, 166 A.D.2d 44, 56 (N.Y. App. Div. 1991)).

¹²⁵ *Id.*

¹²⁶ 560 N.E.2d 1131.

¹²⁷ *Id.* at 1135.

¹²⁸ *Id.* at 1136.

court's instruction that "in order to find for the CHA, the jury had to find that the defendant knew or should have known of the presence of the guns in her apartment."¹²⁹ *Rose* demonstrates that when PHA leases use terms indicating awareness or consent, a knowledge requirement is necessary to warrant an eviction, at least in Illinois state court.¹³⁰

V. KNOWLEDGE OR CONTROL STATUTORY INTERPRETATION

Many PHA leases fail to contain convenient "consent" language; rather, they more closely adhere to their ambiguous statutory and regulatory parentage.¹³¹ As a result, courts looking to determine whether there is a knowledge prerequisite for tenant eviction must look to section 1437d(1)(5) and section 966.4 to search for Congressional instruction on the matter. The most recent judicial attempts to interpret these provisions employ the frequently evoked administrative law doctrine first applied by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*,¹³² and conclude that Congress did not address "the issue of the tenant's knowledge of or ability to control the wrong-doer's criminal behavior."¹³³ For example, the decision recently handed down on a denial of a motion to dismiss in *Rucker v. Davis*¹³⁴ posits that section 1437d(1)(5)'s phrase "any guest or other person under the tenant's control,"¹³⁵ refers only to the potential identity of the third party criminal actor.¹³⁶ This clause only acknowledges that the criminal behavior of a guest or person under a tenant's control may trigger eviction; it

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See, e.g., *Minneapolis Public Hous. Auth. v. Lor*, 578 N.W.2d 9 (Minn. Ct. App. 1998) (noting that housing authority lease language on eviction for criminal activity resembles language of 42 U.S.C. § 1437d(1)(5) and 24 C.F.R. § 966.4(f)(12)(ii)).

¹³² 467 U.S. 837 (1984). For a comprehensive look at the *Chevron* doctrine and its prominence in administrative law, see GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 541-645 (1998).

¹³³ See *Rucker v. Davis*, 1998 U.S. Dist. LEXIS 9345, at *18, (N.D. Cal. June 19, 1998).

¹³⁴ *Id.* The trial itself is currently pending.

¹³⁵ 42 U.S.C. § 1437d(1)(5) (1997).

¹³⁶ *Rucker*, 1998 U.S. Dist. LEXIS 9345, at *18.

does not speak to whether the statute requires the tenant to have *knowledge* of that actor's behavior for an eviction to stand.¹³⁷

Modern administrative law doctrine requires courts to rely on *Chevron*¹³⁸ and its two-step approach to judicial review of agency statutory interpretation:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter [and the clear interpretation of the statute is adopted] [*Second*,] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹³⁹

To give *Chevron's* first step force, a reviewing court may invalidate an administrative regulation which conflicts with the clear congressional intent of an authorizing statute.¹⁴⁰ However, the fact that a statute is silent on a precise issue (*e.g.*, whether knowledge is required for tenant eviction) does not in and of itself preclude any agency interpretation and subsequent regulatory promulgation from withstanding *Chevron* scrutiny.¹⁴¹ If, under step two, the court finds an agency's interpretation of a silent or ambiguous statute to be "permissible," the agency's construction is given force.¹⁴²

However, even when a court determines that the statutory language *is* clear, it may still find some ambiguity if the language's clear meaning does not conform to the strongly stated congressional intent found in the Act's legislative history. For example, in *Charlotte Housing Authority v. Patterson*¹⁴³ the tenant mother and her two daughters were evicted following the arrest of her son, a fellow household member, on murder charges.¹⁴⁴ The plaintiff argued that section 1437d(1)(5) did not allow a

¹³⁷ *See id.*

¹³⁸ 467 U.S. 837 (1984).

¹³⁹ *Id.* at 842-43 (emphasis added).

¹⁴⁰ *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987).

¹⁴¹ *See Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 869 (D.C. Cir. 1996) ("Although courts have, on rare occasions, managed to divine some meaning from silence, a silent statute cannot preclude its reasonable interpretation by the agency that administers it.").

¹⁴² *See Chevron*, 467 U.S. at 843.

¹⁴³ 464 S.E.2d 68 (N.C. App. 1995).

¹⁴⁴ *See id.* at 70.

public housing tenant to be evicted “when she was not personally at fault for a breach of the lease by a member of her household.”¹⁴⁵ The lease used language very similar to section 1437d(1)(5): “I also understand that if I, members of my household, our guests or visitors, and other persons under our control, engage in criminal activity . . . on or near CHA property, the CHA may end my lease.”¹⁴⁶ The court observed that while neither the lease nor its governing statute made any mention of personal fault, it did state clearly that criminal activity ends the entire tenancy, and does not just eject the criminally active tenant.¹⁴⁷

The court continued, however, to contrast this seemingly clear interpretive result with the 1990 Cranston-Gonzalez Act’s legislative history.¹⁴⁸ It first cited a Senate committee report declaring that “eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.”¹⁴⁹ The court then funneled the perceived contradiction between statutory language and legislative history through Supreme Court precedent:

[e]ven if the plain language of the statute appears to settle the question, a Court still looks “to the legislative history to determine . . . whether there is clearly expressed legislative intention contrary to the language which would . . . question the strong presumption that Congress expresses its intent through the language it chooses.”¹⁵⁰

¹⁴⁵ *Id.* at 71. See *supra* note 23 and accompanying text for a description of household member Jonathan Givens’ criminal activity.

¹⁴⁶ *Id.* at 69-70. The lease contained other clauses listing specific examples of tenant, guest, or persons under control of household member actions that constituted criminal activity. *Id.* at 69.

¹⁴⁷ *Id.* at 72. See 42 U.S.C. § 1437d(1)(5) (1997) (“[A]ny criminal activity . . . engaged in by a public housing tenant, [or] any member of the tenant’s household . . . shall be cause for termination of tenancy.”) (emphasis added).

¹⁴⁸ *Id.* at 71-72.

¹⁴⁹ *Id.* at 72 (citing S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990)). The report continued: “The Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would no exit [sic].” *Id.*

¹⁵⁰ *Id.* at 556 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)). The importance of legislative history in reviewing an agency’s statutory interpretation is by no means a settled issue. Compare *Cardoza-Fonseca*, 480 U.S. at 421 (more than 10 pages devoted to a discussion of the relevant statute’s legislative history) with *Wagner*

The *Patterson* court interpreted the statute based on a “clearly expressed legislative intent that eviction is appropriate only if the tenant is personally at fault for a breach of the lease,”¹⁵¹ choosing to rely more heavily on legislative history than the agency’s interpretation or the plain meaning of the statute.¹⁵²

The *Rucker v. Davis* decision, however, rejected both *Patterson*’s take on the plain meaning of section 1437d(1)(5) and its interpretation of the relevant legislative history, finding both to be “either silent or ambiguous” on the issue of tenant knowledge or control.¹⁵³ In *Rucker v. Davis*, two independent plaintiffs consolidated their claims after each was evicted for the criminal activity of members of their household of which neither had knowledge.¹⁵⁴ While *Patterson* acknowledged that certain Senate reports expressed Congress’ clear intent to protect tenants from eviction in the absence of knowledge of or control over criminal activity,¹⁵⁵ the *Rucker* court accepted the defendants’ contrary argument that the senators making these comments “simply did not prevail in their attempts to include language in the statute which would have protected ‘innocent’ tenants.”¹⁵⁶ While the

Seed Co. v. Bush, 946 F.2d 918 (D.C. Cir. 1991) (very little attention to legislative history employed in *Chevron* statutory analysis). See also LAWSON, *supra* note 132, at 580-98. Of course, some members of the Supreme Court think that legislative history is wholly irrelevant to any statutory interpretation. See, e.g., U.S. v. Estate of Romani, 523 U.S. 517, 534 (1998) (Scalia, J., concurring) (“I have in the past been critical of the Court’s using the so-called legislative history of an enactment (hearings, committee reports, and floor debates) to determine its meaning. . . . Today, however, the Court’s fascination with the files of Congress (we must consult them, because they are there) is carried to a new silly extreme.”).

¹⁵¹ *Patterson*, 464 S.E.2d at 72.

¹⁵² See *id.*

¹⁵³ *Rucker v. Davis*, 1998 U.S. Dist. LEXIS 9345, at *17-*18 (N.D. Cal. June 19, 1998).

¹⁵⁴ See *id.* at *5-*6. Plaintiff Pearlie Rucker, her grandchildren and great-grandchild were evicted after her mentally disabled daughter (who lived with her) was caught possessing cocaine three blocks from their apartment, and her adult son, who did not live in the apartment, was caught with cocaine in his possession eight blocks away. *Id.* Plaintiff Herman Walker, a disabled 75-year-old, was evicted after his live-in caregiver and his guests were found to have possessed cocaine in Walker’s apartment, without Walker’s knowledge or awareness. *Id.*

¹⁵⁵ See *Patterson*, 464 S.E.2d at 72 (citing S. Rep. No. 316, 101st Cong., 2d Sess. 179(1990)). See also *supra* notes 151-52 and accompanying text.

¹⁵⁶ *Rucker*, 1998 U.S. Dist. LEXIS 9345 at *17.

desire to protect innocent tenants was reflected in the *statement*, the court failed to find evidence demonstrating that the *statement's* intent could be found in the *statute*.¹⁵⁷

However, the court *also* rejected the defendants' two-pronged contention that the Cranston-Gonzalez Act's legislative history demonstrates Congress *did* intend to permit innocent tenant lease termination, choosing instead to find that the history was inconclusive.¹⁵⁸ First, the defendants had introduced a now-expired emergency supplemental appropriations measure,¹⁵⁹ which directed the HUD Secretary to issue waivers for eviction administrative grievance procedures for household members not involved in criminal activity.¹⁶⁰ They argued that this indicated that Congress thought innocent tenants (i.e., those not involved in criminal activity) *could* be evicted, and were only deserving of additional procedural protection.¹⁶¹ The court rejected this argument by countering that even if Congress had intended a knowledge or control requirement, additional grievance procedures could still have been necessary "since the statute would permit terminating the leases of tenants who knew of the activity but were not personally involved."¹⁶²

Second, the court denied that floor debate language reflecting Congressional concern over drug use in public housing by people not on public housing leases¹⁶³ "equate[d] with an intention to permit termination of the leases of 'innocent' tenants."¹⁶⁴

Finding the statute and the legislative history to be inconclusive, the court moved on to the second *Chevron* step—assessing whether HUD's statutory interpretation was permissible.¹⁶⁵ Since no rule on tenant knowledge could be extracted from section 1437d(1)(5), the court retreated to the more broad coverage found in another section of the same statute—section

¹⁵⁷ *See id.*

¹⁵⁸ *See id.* at *17-19.

¹⁵⁹ Pub. L. No. 101-45, § 404(a), 103 Stat. 97, 128-29 (1989).

¹⁶⁰ *See Rucker*, 1998 U.S. Dist. LEXIS 9345, at *17.

¹⁶¹ *See id.* at *17.

¹⁶² *Id.* at *18.

¹⁶³ *Id.* at *17-18 (citing 134 Cong. Rec. 33148 (daily ed. Oct. 21, 1988)).

¹⁶⁴ *Id.* at *18.

¹⁶⁵ *See id.* at *19.

1437d(1)(1)'s edict that "[e]ach public housing agency shall utilize leases which—(1) do not contain unreasonable terms and conditions."¹⁶⁶ To divine an objective approach through which to apply this reasonableness standard, the court turned to "[t]he only federal court which has addressed what constitutes an 'unreasonable' lease term in a published opinion,"¹⁶⁷ the Eastern District of Virginia in *Richmond Tenants Organization v. Richmond Redevelopment and Housing Authority*.¹⁶⁸

In *Richmond*, the court interpreted section 1437d(1)(1) "to require that lease terms be rationally related to a legitimate housing purpose."¹⁶⁹ It held that off-premises misdemeanor marijuana or alcohol charges were not "reasonably related to a housing problem"¹⁷⁰ and found that a lease clause requiring tenants to "refrain from the illegal use, sale, or distribution of drugs and alcoholic beverages on *or off* the premises,"¹⁷¹ or face eviction, was unreasonable.

The *Rucker* court, meanwhile, declared that under *Richmond's* reasonableness standard it could not on a motion to dismiss find

as a matter of law that terminating the leases of "innocent" tenants is unreasonable. The Court simply cannot conclude—without any evidence before it—that the statute is not overbroad by permitting evictions of tenants who themselves had no knowledge and no reason to know of the drug-related criminal activity of another, or of tenants who had no ability to control the alleged wrong-doer.¹⁷²

Determining that the lease term's reasonableness was a question of fact properly decided at the trial level, the court denied the defendant's motion to dismiss and issued a preliminary injunction on eviction proceedings prior to trial.¹⁷³

¹⁶⁶ 42 U.S.C. § 1437d(d)(1) (1998).

¹⁶⁷ *Rucker*, 1998 U.S. Dist. LEXIS 9345 at *19-*20.

¹⁶⁸ 751 F. Supp. 1204 (E.D. Va. 1990).

¹⁶⁹ *Id.* at 1205.

¹⁷⁰ *Id.* at 1206 (emphasis added).

¹⁷¹ *Id.* (emphasis added).

¹⁷² *Rucker*, 1998 U.S. Dist. LEXIS 9345 at *20-*21.

¹⁷³ *See id.* at *40. The injunction was served on June 19, 1998.

VI. AMENDMENT PROPOSAL: TENANT DECISION OVER JUDICIAL DISCRETION

A. THE CURRENT STANDARD'S DISCRETIONARY DANGER

As the *Rucker v. Davis* decision stands, the propriety of an innocent eviction hinges on an individual court's factual interpretation of an alarmingly broad standard: whether a lease term is "reasonable."¹⁷⁴ That *Richmond* defines the reasonableness standard as whether the lease term "is reasonably related to a housing problem"¹⁷⁵ does not reduce the breadth of a court's discretion and potential for inconsistency.

That such a large policy controversy will be decided inconsistently seems even more likely when one considers how fact-sensitive innocent eviction trials already are.¹⁷⁶ One commentator and public interest attorney with experience in trying one-strike innocent eviction cases argues that the outcome of an innocent eviction contest will often turn on the defense attorney's development of the facts of the eviction and her client's life.¹⁷⁷ Moreover, the uncertainty of outcome inherent in any jury trial¹⁷⁸ virtually guarantees that the legality of innocent evictions in a particular jurisdiction will depend on a discretionary legal standard, the facts of the particular situation, the effectiveness of the trial attorneys, and jury discretion.¹⁷⁹

¹⁷⁴ 42 U.S.C. § 1437d(d)(1) (1998).

¹⁷⁵ *Richmond*, 751 F. Supp. at 1206.

¹⁷⁶ See Hornstein, *supra* note 76, at 270-76. Note also how fact sensitive the outcome of litigated constitutional issues can be, *supra* note 106 and accompanying text.

¹⁷⁷ *Id.* at 268 ("You need to develop the facts to learn about your client and your client's life. Otherwise, the local housing authority will be able to define who your client is, and their definition will not be very flattering.").

¹⁷⁸ Hornstein strongly recommends opting for a jury trial, reasoning that jurors are more likely to be swayed by an evicted plaintiff's personal predicament. *Id.* at 271-72.

¹⁷⁹ *Id.* For an example of when a reasonableness standard is applied inconsistently on a case by case basis, see STEFANIE LIEBERMAN, RESOLVING CASES OF NAZI-LOOTED ART 49 (1999) (on file with author). When an original owner of a piece of stolen art brings a suit for conversion against its current possessor, courts have determined that the statute of limitations on that claim begins to accrue at the point when a reasonable original owner should have known of the work's location. See *O'Keeffe v. Snyder*, 416 A.2d 862, 870 (N.J. 1980). The point at which a reasonable original owner would have conducted a duly diligent search is calculated by the court on a factual,

B. PROPOSAL

1. *The Amendment*

While the multifaceted uncertainty of the reasonableness standard can be used to the advantage of either party,¹⁸⁰ this Comment proposes that this popular and legal controversy will not be settled without a clear statutory mandate. To date, Congress has not given section 1437d(1)(5) voice with respect to whether knowledge or control is required in one-strike tenant evictions. A statutory amendment to that provision of the statute could allow both public housing residents and HUD officials to trade judicial uncertainty and inevitable litigation for tenant empowerment. *Elected tenant committees, drawn from the ranks of public housing tenant and community organizations, should be empowered to create a general rule determining the role of fault and knowledge of criminal activity in tenant evictions.*¹⁸¹

The scope of the created rule would only have to conform to the very general constitutional parameters established by prior case law.¹⁸² For example, the rule would be wise to stay within the constitutional boundaries set by *Tyson v. New York City Housing Authority*,¹⁸³ where it was held that a tenant eviction based solely on the criminal activity of an adult child who does not reside with the tenant states a claim for a violation of substantive due process rights.¹⁸⁴ Similarly, *Turner v. Chicago Housing Authority*¹⁸⁵ held that that a tenant's substantive due process rights require there to be a "causal nexus between that plaintiff and the third party"¹⁸⁶ for an eviction to be valid. The court in *Turner* held that if a tenant is unaware of a guest's criminal conduct, a trial court may find that that nexus does not exist.¹⁸⁷

case-by-case basis. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 917 F.2d 278 (7th Cir. 1990).

¹⁸⁰ See *id.*

¹⁸¹ The body's structure could be akin to that of a condominium or co-op board.

¹⁸² See *supra* notes 77-111 and accompanying text.

¹⁸³ 369 F. Supp. 513 (S.D.N.Y. 1974).

¹⁸⁴ *Id.* at 518-20. See *supra* notes 96-101 and accompanying text for a more detailed treatment of the *Tyson* decision.

¹⁸⁵ 760 F. Supp. 1299 (N.D. Ill. 1991).

¹⁸⁶ *Id.* at 1309 (quoting *Tyson*, 369 F. Supp. at 518-19).

¹⁸⁷ See *id.*

While tenant boards would have to be mindful of these potential constitutional limits,¹⁸⁸ any tenant-promulgated amendment would pose no greater constitutional concern than the one-strike rule does currently, where eviction power exists essentially unfettered.¹⁸⁹

Moreover, any legal challenge to this localized rule would be not only more difficult to make, but also less likely to prevail, since public housing residents would promulgate the standard themselves. Many innocent eviction challenges are based on the notion that PHA officials are abusing their discretion by applying an unjust law.¹⁹⁰

2. Tenant Organization Structure

At HUD's own instigation, many tenant committees already exist in structure and function nationwide.¹⁹¹ One of the more prominent and powerful tenant organizations operates at the Chicago Housing Authority's Henry Horner Homes development.¹⁹² At Horner, an eight member, tenant elected¹⁹³ Local

¹⁸⁸ One suggestion is for Congress to include in the amendment itself limits to the tenant board's created rule that are mindful of *Tyson* and *Turner*-like boundaries.

¹⁸⁹ See 42 U.S.C. § 1437d(l)(5) (1997).

¹⁹⁰ See Hornstein, *supra* note 76, at 273.

¹⁹¹ See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., COMMUNITY BUILDING IN PUBLIC HOUSING: TIES THAT BIND PEOPLE AND THEIR COMMUNITIES 32-33 (1997) [hereinafter *Ties that Bind*]. This policy guide for local public housing officials advises PHAs that "[t]o begin to build community in public housing, a necessary step is to create a representative community organization Public housing residents form the core of this group" *Id.* Such tenant organizations are active in virtually every PHA. See, e.g., Schroeder, *supra* note 9, at B1 (interviewing Newport Housing Authority Residents Council board members on their views of the one-strike policy); see also McCormick, *supra* note 10, at South Tampa 1 (interviewing the Robles Park Resident Council President and other tenant leaders on the one-strike policy's fairness).

¹⁹² See Maudlyne Ihejirika, *Land Plans Fuel Contests; CHA Residents Elect Councils*, CHICAGO SUN-TIMES, Jan. 30, 1993, at 3 ("CHA residents vote today to elect some 900 representatives to 19 resident advisory councils."). Resident Local Advisory Councils ("LACs") have existed since 1971 and operate beneath an umbrella tenants' organization, the Central Advisory Council ("CAC"). Patrick Reardon, *CHA Councils Don't Aid Tenants, Critics Contend*, CHICAGO TRIB., Oct. 4, 1987, at C1. In the past, LAC's have been criticized for being perceived as a "rubber stamp for the CHA's management and a political arm of Mayor Harold Washington," according to a wide range of critics." *Id.*

¹⁹³ Telephone Interview with Sarah Ruffin, LAC board member and Horner Homes resident (Feb. 18, 1999) [hereinafter Ruffin Interview]. Between tenant elec-

Advisory Council (LAC) oversees and approves the Horner Homes' complete redevelopment, a transition from a series of high rise apartment buildings to a community of mixed income dwellings.¹⁹⁴

According to LAC member Sarah Ruffin, the LAC regularly decides complicated redevelopment and neighborhood planning issues by majority vote.¹⁹⁵ In making these decisions, the LAC often polls residents or listens to their views at open public meetings, so that the LAC's actions will really be the residents' decision. According to Ms. Ruffin, "LAC members will be totally involved, but will let [residents] speak for themselves on [an] issue."¹⁹⁶ For example, in February 1999, the LAC solicited residents' opinions on which Horner buildings should remain standing, and which should be torn down and replaced with newer structures. "So far, more want their buildings to come down."¹⁹⁷ In Ms. Ruffin's opinion, the LAC's administrative structure would be capable of defining the scope of the one-strike rule's reach through the same procedure.¹⁹⁸

tions, Horner LAC board member vacancies are filled by appointment by LAC President Mamie Bone.

¹⁹⁴ The LAC makes many of these decisions in conjunction with the Horner Redevelopment Council ("HRC"), a body put in place as part of a court approved federal consent decree that ensures that Horner's redevelopment is tenant-run. See Deborah Nelson, *CHA Wins OK To Replace High Rises*, CHICAGO SUN-TIMES, Apr. 5, 1995, at 31 (reporting that a federal judge signed a consent decree allowing CHA to demolish Horner Homes high rises, in exchange for tenant control over Horner Homes' redevelopment and relocation plans). According to Ms. Ruffin, HRC's creation was one of the terms of the ensuing settlement between HUD and Horner residents. Apparently, many LAC members also sit on HRC, and many redevelopment plans are decided jointly.

¹⁹⁵ See Ruffin Interview, *supra* note 193.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* In addition, in January 1999, the LAC voted to rehabilitate one of the larger Horner apartment buildings with one, two, and three bedroom units, to provide housing for different-sized households.

¹⁹⁸ To be sure, Ms. Ruffin did *not* think the LAC would be capable of handling one-strike eviction cases individually. She felt that the decision to evict a mother for her child's criminal actions, although proper, would be "very hard." Ms. Ruffin added that she "wouldn't want that responsibility." Moreover, Ms. Ruffin felt that a board member's personal or familial relationship with a potential evictee would make the decision even more difficult. Ms. Ruffin *did*, however, think the LAC would be capable of making a one-time decision that would set the scope of the policy that CHA would implement. See Ruffin Interview, *supra* note 193.

C. CITIZEN PARTICIPATION AS A FEDERAL GOAL

This legislative reform of the one-strike knowledge requirement would be consistent with the language that encourages citizen participation and tenant consultation that can be found in recent Congressional public housing legislation. For example, section 107 of the 1990 Cranston-Gonzalez National Affordable Housing Act ("Citizen Participation")¹⁹⁹ requires each PHA submitting a housing strategy to

hold one or more public hearings to receive views on housing needs . . . provide citizens . . . with reasonable access to records regarding any past uses of assistance under this Act . . . [A] participating jurisdiction would be required to give citizens and other interested parties reasonable notice and opportunity to comment A participating jurisdiction would be required to consider the comments and views of citizens and other interested parties when preparing a final housing strategy[.]²⁰⁰

This general spirit advocating tenant involvement is peppered throughout the 1990 Act and its committee reports.²⁰¹

A more recent statement of HUD public housing policy not only incorporates notions of tenant participation, but values the public housing residential community as a PHA's primary asset: "[a]s traditional sources of revenue diminish, public housing managers are re-examining a previously little-used resource: the energy and efforts of residents of public housing themselves."²⁰² Not only does facilitating tenant involvement in public housing community building enable PHA managers to tap into a resource of shared interests,²⁰³ HUD argues, it improves the lives, prospects, and opportunities for autonomy for residents themselves.²⁰⁴ Moreover, HUD asserts, individual PHA programs and

¹⁹⁹ S. REP. NO. 101-316, at 198-99 (1990).

²⁰⁰ *Id.*

²⁰¹ See, e.g., Representative Brooks, *Just Saying No Is Not Enough: HUD's Inadequate Response to the Drug Crisis in Public Housing*, H. R. REP. NO. 100-702, at 3 (1990) ("While HUD General Counsel . . . stated that '[a]ny solution to the drug problem would have to be desired, and developed, locally,' we believe that drug abuse is a national problem that demands a national response as well as active local involvement.").

²⁰² *Ties that Bind*, *supra* note 191, at 1.

²⁰³ *Id.* at 13 (noting that public housing managers should take advantage of residents' determination to combat crime and other neighborhood issues).

²⁰⁴ *Id.* at 13. "Community building encourages residents to take on leadership and responsibility rather than be passive recipients of services." *Id.* at 1. "Community building works because it builds the capacity of residents to: Take charge of their own

policies are more likely to be accepted and successful if residents are identifying their community's goals and designing implementation strategies themselves.²⁰⁵

Empowering tenants to set the parameters of the one-strike policy's reach fits logically into HUD's own rhetoric for advocating tenant involvement. Such reform enables individual PHAs to take advantage of their residents' desire to prevent crime, fosters a sense of independence and community involvement among involved residents, and encourages residents to take ownership of the one-strike rule, thus increasing acceptance, compliance, and cooperative reporting of criminal activity.

While HUD policy and practice is replete with the language of tenant participation, no previous legislation has mandated that public housing residents play a controlling role in individual PHA operation, beyond the weak citizen participation clause found in section 107 of the 1990 National Affordable Housing Act.²⁰⁶ Members of Congress have, however, repeatedly affirmed their belief in the efficacy of tenant management programs.²⁰⁷

To hold Congress to its rhetorical commitment, academics and redevelopment advocates have called for the statutory ratification of more meaningful consultation and decisionmaking authority for public housing tenants.²⁰⁸ For example, Marvin Krislov argues "that meaningful tenant consultation must occur before HUD approves the demolition or sale of public hous-

lives. Support each other's efforts to improve life for themselves and their children. Participate constructively in the life of the community, thereby improving conditions and prospects for all." *Id.* at 13.

²⁰⁵ *Id.* at 14 ("Through resident participation in setting goals and designing implementation strategies, residents assume ownership of the process. They are then more likely to participate in the programs that are developed and likely to experience a greater percentage of success than with a top-down approach.").

²⁰⁶ 42 U.S.C. § 1437 (1998).

²⁰⁷ See, e.g., *Wasteful Management of HUD Funds in Public Housing Tenant Programs: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations*, 104th Cong. (1997) (statement of Rep. Shays) ("Resident management can improve public housing living conditions significantly and enhance the lives of public housing residents. During my visit to Chicago's Cabrini-Green public housing development, I saw firsthand what trained, motivated resident leadership can do to reduce crime and to stimulate economic development."). See also Senator Moseley-Braun, *Techniques for Revitalizing Severely Distressed Public Housing*, S. REP. NO. 103-160, at 18 (1993) ("I think tenant management has shown itself to be successful where it's been tried . . .").

²⁰⁸ See generally Krislov, *supra* note 39.

ing.”²⁰⁹ He analyzes a 1983 amendment to the Housing Act of 1937 prohibiting HUD “from authorizing the demolition or sale of any public housing unless the PHA’s application ‘has been developed in consultation with tenants and tenant councils, if any, who will be affected by the demolition or disposition.’”²¹⁰ Krislov concludes that this statutory language should be strengthened by developing detailed standards for meaningful tenant consultation that would “fulfill congressional intent and would serve important policy goals.”²¹¹

Perhaps more ambitious than Krislov’s call for a clarification of congressional intent is Benjamin Quinones’ contention that urban “redevelopment must be planned and implemented by the residents of the redevelopment area.”²¹² Quinones cites a successful community-resident controlled redevelopment, led by the Dudley Street Neighborhood Initiative in Boston,²¹³ and concludes that resident-controlled redevelopment eliminates the negative external controlling influences of downtown urban elites and allows a community to serve itself.²¹⁴ When compared to the scope of Quinones’ proposal or the Horner LAC’s decisionmaking authority, merely authorizing a public housing tenant committee to resolve one discreet policy issue seems eminently achievable.

²⁰⁹ *Id.* at 1747.

²¹⁰ *Id.* at 1746 (citing 42 U.S.C. § 1437p(b)(1) (Supp. IV 1986)).

²¹¹ *Id.* at 1749.

²¹² Quinones, *supra* note 39, at 693.

²¹³ *Id.* at 753-58. One book chronicles the creation and development of the Dudley Street Neighborhood Initiative (DSNI), an organization that combined the efforts of an inner-city Boston neighborhood’s residents with other local organizations, agencies, and developers to “create[] their own bottom up ‘urban village’ redevelopment plan and buil[d] an unprecedented partnership with the city to implement it.” PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE 4* (1994). The resident-majority DSNI board implemented a complicated and comprehensive 13-point revitalization plan, ranging from vacant land acquisition and redevelopment financing to local job training and neighborhood business development. *Id.* at 57, 109-10. The Dudley Street area did not include any public housing developments.

²¹⁴ Quinones, *supra* note 39, at 771-72. Ironically, many “downtown elites,” including Riley Foundation Board members and *pro bono* corporate lawyers, sat on the DSNI board, and ensured that residents had the necessary financing and technical building to make the Dudley Street revitalization a success. MEDOFF & SKLAR, *supra* note 213, at 53-58.

Moreover, it is important to stress that Horner's success is not an isolated one. In fact, there are currently fourteen federal housing projects across the country operated solely by tenant-management organizations.²¹⁵ Three of these tenant-run housing developments have recently experienced trouble in the form of accusations of corruption and mismanagement.²¹⁶ However, Bromley-Heath, the nation's first tenant-managed public housing complex, recently settled its problems with the Boston Housing Authority, and retained control of the 1,500 apartment complex it has managed exclusively for 25 years.²¹⁷ In many PHAs, tenant management is not a pipe dream, but a reality; requiring all PHAs to settle this controversy by empowering residents in *every* authority might enable more PHAs to realize HUD's resident management community building goals.

D. ABILITY TO BUILD A LOCAL CONSENSUS

Lastly, popular outcry over the one-strike policy has demonstrated that while PHA tenant opinion varies on the issue of innocent evictions, often a localized consensus is expressed at PHA tenant meetings and in newspaper articles.²¹⁸ For example, while San Francisco public housing residents have turned up at hearings *en masse* to protest one-strike evictions for third party

²¹⁵ See T. Trent Gegax & Evan Thomas, *A Poverty Pioneer's Woes*, NEWSWEEK, Dec. 7, 1998, at 36.

²¹⁶ See Pamela Ferdinand, *Tenant-Run Housing Takes a Hit in Boston; Takeover, Drug Probe Shake Model Project*, THE WASHINGTON POST, Nov. 24, 1998, at A3. In recent years, tenant-run projects in Chicago (LeClaire Courts), St. Louis (Cochran Gardens), and Boston (Bromley-Heath) have been taken over by their controlling housing authorities amid allegations of neglect and financial mismanagement. No comparison has been made between the incidence of tenant-run authority mismanagement and mismanagement among agency controlled PHAs.

²¹⁷ See Judy Rakowsky, *Bromley, CHA reach agreement; Tenants to regain control of project*, BOSTON GLOBE, Jan. 30, 1999, at B1. ("Housing officials said they took over the development because tenant managers were not evicting drug dealers, as required by law.")

²¹⁸ See McCormick, *supra* note 10.

criminal activity,²¹⁹ public housing tenants in Memphis generally support such measures.²²⁰

Undoubtedly, determining the scope of the one-strike rule involves difficult decisions, and an overwhelming resident consensus cannot always be expected. Horner LAC board member Sarah Ruffin,²²¹ for example, feels that evictions for third party criminal activity are fair if the tenant *knows* of her guest, fellow household member, or son's actions. She acknowledges, however, that while many of her fellow Horner residents might agree with her, many others might find this stance too harsh, especially because they "love their children."²²² While Ruffin tells all of her relatives not to visit her if they are going to deal drugs "because I could be evicted," she recognizes that not all residents would feel like they could separate themselves from their children for any reason, especially if they are minors.²²³ Ruffin also applauds CHA's current discretionary practice of not evicting an entire household for one member's criminal activity if that member is taken off of the lease immediately.²²⁴ Even though she worries about how resident opinion might differ on what she considers a difficult decision, Ruffin sees room for compromise, and is confident that the LAC and its resident constituents could come to a resolution.²²⁵

²¹⁹ See Bowman, *supra* note 3 ("More than 100 people attended the first hearing on the proposed rules yesterday. Although some praised the lease, most residents argued that it violates their rights and must be changed.").

²²⁰ See *Out the Door*, *supra* note 11, at 10A ("The new policy is a serious but necessary step Many public housing residents, weary of the drugs, gangs and guns that often make normal life impossible within the close confines of a development virtually ruled by criminals, will welcome the new policy.").

²²¹ Telephone Interview with Sarah Ruffin, *supra* note 193.

²²² *Id.*

²²³ *Id.* Making a distinction between minors and adults introduces a possible compromise position with regard to knowledge of a third party's criminal behavior.

²²⁴ *Id.* However, she also alleges that CHA usually fails to exercise their one-strike authority. Ruffin says that CHA rarely evicts anyone for criminal activity; usually, even drug dealers are evicted for non-payment of rent. *Id.*

²²⁵ *Id.*

VII. CONCLUSION

In recommending that PHAs create and implement one-strike policies, HUD officials have declared that resident participation and approval is essential to the policy's acceptance and effectiveness: "[t]o be truly effective, a One Strike policy must reflect a genuine community compact among residents, housing officials, local courts and law enforcement agencies to build safe, strong and inspiring communities for families and children."²²⁶ To meet this rhetorical goal, opinionated residents in many PHAs are given the opportunity to voice their concerns at open PHA meetings²²⁷ or as members of PHA boards with tenant participants.²²⁸

These meetings do not determine policy, however. Rather, they are intended to "get the word out about the policy,"²²⁹ and do not affect implementation. One San Francisco reporter noted that even though "[t]he lease is still being reviewed by a committee set up by the Housing Authority that includes tenants . . . agency officials have quietly begun to move forward [with the one-strike policy]."²³⁰ Whatever inclusive overtures are made, the fact remains that PHAs reserve the authority to determine the scope of their own eviction powers, regardless of the residents' input.²³¹

For tenant opinion to amount to more than empty appeasement, section 1437d(1)(5) must be amended to give residents substantive decisionmaking authority. Such reform would

²²⁶ *One Strike*, *supra* note 50, at 3.

²²⁷ See McCormick, *supra* note 10, at South Tampa 1.

²²⁸ See Bowman, *supra* note 1, at A11.

²²⁹ See Darlene McCormick, *Meetings on 1-strike regulations postponed*, THE TAMPA TRIBUNE, Aug. 20, 1996, at South Tampa 1.

²³⁰ Bowman, *supra* note 1, at A11.

²³¹ An "include residents, but retain final control" approach is stated more explicitly in HUD materials advising PHAs to involve tenants in the one-strike screening process. See *One Strike*, *supra* note 50, at 6:

Because they have a clear and immediate stake in the outcome of tenant selections, current public housing residents sometimes are the toughest screeners of new admissions. Some PHAs have successfully used resident screening advisory committees. *These committees may advise PHAs, but PHAs must remain responsible for the final decision to admit or decline a potential tenant.*

Id. (emphasis added).

enable both Congress and HUD to live up to their stated objective to engage tenants in the management and development of public housing communities. Moreover, a departure from the existing statutory language would discourage a reviewing court from employing the inherently discretionary reasonableness standard it currently enjoys. The proposed amendment takes a controversial policy decision away from the courts and places it in the hands of public housing tenants, the very people who are most directly affected by the one-strike policy.

