

## BETWEEN *RUCKER* AND A HARD PLACE: THE DUE PROCESS VOID FOR SECTION 8 VOUCHER HOLDERS IN NO-FAULT EVICTIONS

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## INTRODUCTION

By now, it's an old story. A woman, often elderly, is evicted from her public housing unit, not because she did anything wrong herself but because a guest, a child, or a grandchild used drugs within the vicinity of her apartment.<sup>1</sup> These evictions have become more common since the Supreme Court's 2002 decision in *Department of Housing and Urban Development v. Rucker*.<sup>2</sup> In *Rucker*, the Court addressed the scope of 42 U.S.C. § 1437d(l)(6), a law requiring that public housing authorities use leases that provide for termination for "any drug-related criminal activity" by public housing tenants, members of their household, or their guests on or off public housing premises.<sup>3</sup> The Court held that the law vested public housing authorities with the discretion to evict regardless of the tenant's knowledge of the prohibited activity.<sup>4</sup> This no-fault standard has been applied extensively in the nearly eight years since *Rucker*. Courts have expanded the holding both in reach and scope.

Numerous state courts have extended *Rucker* to sanction no-fault evictions for other criminal activity, including even nonviolent crimes such as forgery.<sup>5</sup> Further, they have applied *Rucker*'s no-fault standard to other federal programs, including the Section 8 housing choice voucher program.<sup>6</sup> In doing so, courts have overlooked the significant differences in administration between voucher programs and the public housing owned and operated by a government agency in *Rucker*. Finally, they have interpreted *Rucker*'s denial of an "innocent tenant" defense to justify preemption of other equitable defenses, such as "cure,"<sup>7</sup> because these defenses might pro-

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<sup>1</sup> See, e.g., *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 128 (2002) (evicting Pearl Rucker because her adult daughter "was found with cocaine and a crack cocaine pipe three blocks from Rucker's apartment"); *Powell v. Hous. Auth. of Pittsburgh*, 812 A.2d 1201 (Pa. 2002) (evicting an elderly woman whose grandsons committed a carjacking one mile away from her public housing unit).

<sup>2</sup> 535 U.S. 125 (2002).

<sup>3</sup> *Id.* at 127.

<sup>4</sup> *Id.* at 134.

<sup>5</sup> See, e.g., *infra* note 92 (discussing *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113 (Tenn. Ct. App. 2006), *cert. denied*, 128 S. Ct. 543 (2007)).

<sup>6</sup> 42 U.S.C. § 1437f (2000). The Section 8 program provides eligible recipients with rental assistance payments provided that their unit falls within a certain rental range and passes an annual quality inspection. For a more in-depth discussion of the contours of Section 8, see *infra* notes 95-114 and accompanying text.

<sup>7</sup> Cure is generally defined as "remov[ing] legal defects or correct[ing] legal errors." BLACK'S LAW DICTIONARY 410 (8th ed. 2004). In the housing context, this has usually meant removing the underlying cause of the eviction by voluntarily barring a disruptive guest. See *infra* note 88 and accompanying text.

vide a tenant a second chance to maintain her residence, a direct violation of the zero-tolerance standard known as the One Strike policy.<sup>8</sup>

Section 8 is arguably the largest and most important federal low-income housing program.<sup>9</sup> As such, any future challenges to *Rucker* will likely come from its tenants. Since Section 8 is only a voucher program, with the federal government providing subsidized funding for a portion of a participant's rent, it is the private landlord accepting the voucher who ultimately decides whether to evict a tenant for violating the terms of the lease.<sup>10</sup> In the wake of *Rucker*, cases extending its reach to Section 8 have granted landlords the same discretion as local public housing authorities to evict.<sup>11</sup> However, these cases fail to recognize that private landlords have different motivations than public housing authorities, and are less willing to accept alternatives to eviction. This false equivalence therefore disadvantages landlord-evicted Section 8 tenants, who do not benefit from the same safeguards afforded to the public housing tenants evicted in *Rucker* proceedings, but are nonetheless subjected to the same burdens.

This Note will examine the implications of these post-*Rucker* cases on the Section 8 program and argue that tenants in the program are placed in an unworkable legal bind. They are denied both the same procedural rights as other public housing tenants evicted in the wake of *Rucker* as well as the substantive defenses afforded to the private renter. This Note recommends some legislative and administrative solutions to this dilemma, but ultimately concludes that the best solution lies in the eviction courts themselves, where each tenant's unique circumstances can be more consistently considered.

Part I of this Note provides a history of federal public housing. It explains how the discretionary structure, which empowered public housing authorities to screen tenants, coupled with inadequate funding and discriminatory public policy to give these agencies the tools to act in an unfair and prejudiced manner. It traces the resultant "due process revolution," which set standards for screening and eviction that empowered public housing tenants. It then documents the rise of crime in public housing, which prompted legislative action and a return to increased discretion for public housing authorities.

Part II analyzes the *Rucker* case and the response it provoked from tenants, public housing authorities, the Department of Housing and Urban Development (HUD), and local and state courts. This Part examines how courts have, by and large, expanded *Rucker*'s holding.

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<sup>8</sup> See *infra* notes 67–73 and accompanying text.

<sup>9</sup> See *infra* notes 106–109 and accompanying text.

<sup>10</sup> See *infra* notes 120–122 and accompanying text.

<sup>11</sup> See, e.g., *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments*, 890 A.2d 249 (D.C. 2006); *Camco, Inc. v. Lowery*, 839 N.E.2d 655 (Ill. App. Ct. 2005).

Part III traces the expansion of *Rucker's* no-fault standard to the Section 8 housing choice voucher program. The application of *Rucker* to Section 8 has empowered private landlords with the same discretion to evict under the no-fault standard as public housing authorities.

Part IV depicts the unique dilemma facing Section 8 tenants. First, it describes the private motives and lack of public oversight of the Section 8 landlord when compared with the public housing authority. It then describes the problem facing Section 8 tenants whose landlord is seeking their eviction. These tenants are denied both the procedural rights they would normally receive when a public housing authority seeks eviction as well as the substantive rights given private tenants in the form of equitable defenses.

Part V suggests some solutions to level the playing field for Section 8 tenants. First, it recommends that Congress and local public housing authorities (PHAs) act to pressure local landlords either through administrative requirements or program incentives. It then suggests that a better solution may lie in the housing courts, which can more readily scrutinize the decisionmaking process undertaken by landlords prior to eviction.

#### I. A HISTORY OF AMERICAN PUBLIC HOUSING: CONFLICT OVER LOCAL DISCRETION, DUE PROCESS RIGHTS, AND CRIME

This Part will examine the history of federally-funded public housing programs, tracing their initial shift from empowering local housing agencies to strengthening tenants' rights, but ultimately swinging power back to local authorities in more recent years. This struggle to achieve the proper balance between local discretion and tenants' rights lies at the heart of the *Rucker* debate. Section A discusses the first thirty years of public housing and shows how almost from its inception, federal public housing was plagued by insufficient funding, which begat scarcity. As a result, selection for participation in public housing programs was a privilege reserved for the worthy poor. Section B then deals with the tenants' rights revolution of the 1960s, which helped tilt the balance of power away from the gatekeepers who controlled access to public housing to the tenants themselves. Section C details how the gains won in the "due process revolution" were soon overshadowed by the image of crumbling properties and rampant crime. Section D describes how Congress, responding to the crisis in public housing, passed the Anti-Drug Abuse Act of 1988, and in so doing reempowered public housing authorities to evict tenants tangentially involved in drug crimes. Section E describes how these new discretionary powers were reinforced by the One Strike policy, a zero tolerance standard that seemed to signal a return to the high level of discretion that local housing agencies once exercised.

### A. *The First Discretionary Period: Early Public Housing*

Federal public housing began with passage of the U.S. Housing Act of 1937.<sup>12</sup> That Act envisioned a decentralized public housing program and to that end authorized the establishment of local public housing authorities (PHAs) to build, own, and operate new housing.<sup>13</sup>

The first decade of federal public housing suffered from insufficient funding. Responding to pressure from private real estate developers,<sup>14</sup> Congress crafted the Housing Act with provisions to ensure that there was no increase in the overall supply of housing units.<sup>15</sup> Public housing, therefore, was a scarce commodity for those tenants carefully selected by local PHAs.<sup>16</sup>

Federal regulations set standards for tenant eligibility,<sup>17</sup> supplemented by further guidelines instituted by local PHAs<sup>18</sup> and individual project managers.<sup>19</sup> The screening criteria and discretion were often used to exclude single-parent households,<sup>20</sup> families with illegitimate children, individuals or families with criminal records,<sup>21</sup> and even individuals who demonstrated

<sup>12</sup> Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437 (2006)); *see also* Gertrude S. Fish, *Housing Policy During the Great Depression*, in *THE STORY OF HOUSING* 217 (Gertrude S. Fish ed., 1979) (summarizing the purpose of the Housing Act of 1937).

<sup>13</sup> Robyn Minter Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 *URB. LAW.* 573, 577 (1998). By 1945, fifty PHAs had been established in thirty states, generating 160,000 housing units. BERTA FELDMAN & SUSAN STALL, *THE DIGNITY OF RESISTANCE: WOMEN RESIDENTS' ACTIVISM IN CHICAGO PUBLIC HOUSING* 29 (2004).

<sup>14</sup> FELDMAN & STALL, *supra* note 13, at 29. "The most important consideration is, that public housing projects should not be brought into competition with private industry." *United States Housing Act of 1936: Hearings Before the S. Comm. on Education and Labor*, 74th Cong. 17 (1936) (statement of Sen. Robert F. Wagner), *reprinted in* *FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT* 245 (J. Paul Mitchell ed., 1985). Although Senator Wagner's statement refers to the Housing Act of 1936, the Housing Act of 1937 differed little from its predecessor, which failed in large part due to election year politics. *See* Fish, *supra* note 12, at 215.

<sup>15</sup> The Housing Act provided for "equivalent elimination," in which a unit of slum housing would be demolished for every unit of public housing built. FELDMAN & STALL, *supra* note 13, at 29.

<sup>16</sup> The Housing Act of 1937 was targeted at helping very-low-income families. To achieve this goal, it limited tenant income so as not to exceed five times the rent and authorized the U.S. Housing Authority to set specific dollar limits on tenant income. R. ALLEN HAYS, *THE FEDERAL GOVERNMENT AND URBAN HOUSING: IDEOLOGY AND CHANGE IN PUBLIC POLICY* 94 (1995).

<sup>17</sup> *See* FELDMAN & STALL, *supra* note 13, at 30 (outlining the federal standard requiring that eligible families be capable of paying rent and have a "satisfactory character").

<sup>18</sup> *See* Smyers, *supra* note 13, at 579 (describing the "technical" and "desirability" requirements imposed by local PHAs); Fish, *supra* note 12, at 220 (citing the careful screening process used by local PHAs to remove those with "unpleasant social histories or living habits").

<sup>19</sup> *See* Smyers, *supra* note 13, at 578.

<sup>20</sup> FELDMAN & STALL, *supra* note 13, at 30.

<sup>21</sup> *Id.* (discussing family structure criteria); Smyers, *supra* note 13, at 579–80 (discussing criminal history criteria).

improper housekeeping.<sup>22</sup> Thus, the perception and reality of public housing was that of a privilege<sup>23</sup> or reward for the worthiest among the poor.<sup>24</sup>

The image of public housing changed in the decades after World War II in the wake of the Housing Act of 1949,<sup>25</sup> which instituted the modern urban renewal program. The bill authorized over one billion dollars in loans and grants to be made available to local public agencies to eradicate slum housing and replace it with private or public redevelopment projects.<sup>26</sup> Because urban renewal programs were targeted at poorer areas, they disproportionately affected African-American neighborhoods.<sup>27</sup> The elimination of slum housing uprooted residents who, due to real estate redlining, restrictive covenants, and outright hostility from white communities,<sup>28</sup> had little place else to go. Public housing gave priority for admission to these displaced individuals<sup>29</sup> and also placed limits on tenant incomes.<sup>30</sup> As a result, from the 1950s on, public housing came to be populated increasingly by very poor, black tenants.<sup>31</sup> This demographic change increasingly linked public housing concerns to the emerging civil rights movement.

### B. *The Due Process Revolution in Public Housing*

In the 1960s, the civil rights movement inspired a variety of housing reforms, including a renewed scrutiny of the conditions in public housing.<sup>32</sup>

<sup>22</sup> FELDMAN & STALL, *supra* note 13, at 30. Indeed, proper housekeeping was perceived as significant enough that Herbert Emmerich, the Commissioner of the Federal Public Housing Authority—the administrative arm of the U.S. Housing Authority—marked it as an important indicator of a “sense of responsibility” alongside prompt rental payments and a “community or civic sense.” HERBERT EMMERICH, PUBLIC HOUSING—YESTERDAY . . . TODAY . . . TOMORROW 3 (1943).

<sup>23</sup> FELDMAN & STALL, *supra* note 13, at 30.

<sup>24</sup> LAWRENCE J. VALE, RECLAIMING PUBLIC HOUSING 5 (2002).

<sup>25</sup> Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 (2006)).

<sup>26</sup> Title I of The Housing Act of 1949, *reprinted in* Fish, *supra* note 12, at 261.

<sup>27</sup> Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUSING POL’Y DEBATE 299, 318 (2000) (Fannie Mae Found., Washington, D.C.) (noting “the frequency of government-cleared tracts in African-American neighborhoods”).

<sup>28</sup> See Leonard S. Rubinowitz, *Crimes Without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2002) (detailing the various extralegal methods through which whites excluded and expelled blacks from their communities).

<sup>29</sup> VALE, *supra* note 24, at 5.

<sup>30</sup> Von Hoffman, *supra* note 27, at 316.

<sup>31</sup> By 1977, over fifty percent of family public housing developments were predominantly African-American. The percentage was higher in large cities where there was a higher concentration of African-Americans. SUSAN J. POPKIN ET AL., THE HIDDEN WAR: CRIME AND THE TRAGEDY OF PUBLIC HOUSING IN CHICAGO 25 (2000).

<sup>32</sup> The decade saw a wave of protests against discriminatory housing policies, particularly in Northern cities. See RHONDA Y. WILLIAMS, THE POLITICS OF PUBLIC HOUSING: BLACK WOMEN’S STRUGGLES AGAINST URBAN INEQUALITY 207–29 (2004) (tracing the history of public housing activism in Baltimore in the 1960s and ’70s). On the public housing front, a lawsuit was filed by Dorothy Gautreaux in 1966 against the Chicago Housing Authority and HUD for racially segregating its public housing in violation of the Civil Rights Act of 1964. See ALEXANDER POLIKOFF, WAITING FOR GAUTREAU,

Throughout the 1950s and '60s, PHAs and project managers had significant discretion over the administration of local housing programs, giving them considerable sway over their tenants.<sup>33</sup> However, as public housing grew and PHAs were required to give top priority to the poorest of the poor, this discretion declined.<sup>34</sup> Fewer project managers were available to keep tabs on tenants, and the standards for oversight diminished.<sup>35</sup> Moreover, many PHA actions, particularly evictions, seemed arbitrary and capricious.<sup>36</sup>

Starting in the mid-1960s, state and federal courts adopted the view that public housing tenants had a property interest in their government benefits which entitled them to certain due process rights.<sup>37</sup> A landmark case, *Thomas v. Little Rock Housing Authority*, struck down a screening criterion which denied unwed mothers public housing as a rule, regardless of their individual circumstances.<sup>38</sup> The ruling was followed in other districts, eliminating classwide restrictions against individuals with criminal pasts<sup>39</sup> and bad housekeeping histories.<sup>40</sup>

A STORY OF SEGREGATION, HOUSING AND THE BLACK GHETTO (2006) (documenting the history of the lawsuit and its ultimate resolution in the form of a metropolitan voucher plan validated by the U.S. Supreme Court).

Similar reform inspired by the civil rights movement led to a revolution in landlord-tenant law and the institution of landlord-tenant ordinances in most major cities. See Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 546-50 (1984) (tracing the drastic changes in landlord-tenant ordinances to the "climate of activism" created by the civil rights movement of the 1960s).

<sup>33</sup> Smyers, *supra* note 13, at 580-82 (describing the "gatekeeper" role played by a project manager); Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642, 658 (1966) (observing that although public housing selection was rule-bound, the rules were broad and came without "meaningful review"). It should be noted, however, that unlike the public housing built under the Housing Act of 1937, public housing built in the wake of the Housing Act of 1949 lacked many of the community facilities and social services that had been a hallmark of the earlier bill and that had put tenants in close relation with one another and their project manager. Von Hoffman, *supra* note 27, at 312.

<sup>34</sup> See Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" From Public Housing Projects*, 77 YALE L.J. 988, 989-91 (1968) (citing the "senseless fashion" in which restrictions were imposed and eviction or other disciplinary actions were taken prior to 1968).

<sup>35</sup> For a case-study perspective both on how these less-rigorously selected tenants were perceived by older tenants and on the stigma that eventually attached itself to living in public housing in Baltimore, see WILLIAMS, *supra* note 32, at 130-36.

<sup>36</sup> See Note, *supra* note 34, at 989-90 (highlighting several notable examples of arbitrariness, including one PHA's assertion that a tenant's seeing-eye dog violated its no pets policy).

<sup>37</sup> Central to this insight were a series of articles penned by Yale Law Professor Charles Reich beginning in 1964. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965), and Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

<sup>38</sup> 282 F. Supp. 575 (E.D. Ark. 1967).

<sup>39</sup> See, e.g., *Manigo v. New York City Hous. Auth.*, 273 N.Y.S.2d 1003 (N.Y. Sup. Ct. 1966); Smyers, *supra* note 13, at 590 n.82 (citing *Tucker v. Norwalk Hous. Auth.*, Civ. No. B-251 (D. Conn. 1971)).

<sup>40</sup> See, e.g., *Hous. Auth. of Milwaukee v. Mosby*, 192 N.W.2d 913 (Wis. 1972). HUD took note of these judicial decisions, issuing a circular in 1968 to all PHAs requiring that they eliminate policies denying admission to particular classes. Smyers, *supra* note 13, at 590.

In addition to the reforms in screening procedures, evictions came under due process scrutiny from the courts.<sup>41</sup> In 1970, the Supreme Court in *Goldberg v. Kelly* laid out the standard for procedural due process that applies to the termination of government benefits (such as public housing), requiring that a recipient be given notification and an “opportunity to be heard”<sup>42</sup> in a setting where he may “confront and cross-examine witnesses.”<sup>43</sup> Most significantly, the notification and hearing had to take place *before* benefits could be terminated.<sup>44</sup>

These due process mandates coupled with administrative directives from HUD and Congress created a seismic shift in how PHAs were managed; project managers increasingly came under the control and direct central supervision of PHAs.<sup>45</sup> The victory for due process, however, was soon overshadowed by the growing crime epidemic in public housing.

### C. Crime and Public Housing

While tenants in public housing gained new rights to their homes, crime increasingly plagued public housing projects.<sup>46</sup> Crime had risen in public housing to such a rate that in 1988 an estimated 7,000 serious crimes took place on public housing properties.<sup>47</sup> The public image of notorious public housing projects such as the Cabrini-Green Homes in Chicago and the Van Dyke Houses in New York,<sup>48</sup> covered extensively by the news media and cited by canny politicians,<sup>49</sup> contributed to the perception that drug trafficking and crime were endemic to public housing.

<sup>41</sup> In *Thorpe v. Housing Authority of the City of Durham*, the Supreme Court held that a HUD circular requiring that local PHAs provide terminated tenants with the reasons for their eviction along with an opportunity to reply was mandatory and not merely advisory. 393 U.S. 268, 274 (1969). Soon after, in response to two circuit court decisions which held that due process requires grievance hearings, HUD instituted an administrative hearing policy for lease terminations with the right to discovery, witness cross-examination, and assistance of private counsel. U.S. Dep’t of Hous. & Urban Dev. Circular RHM 7465.9 (Feb. 22, 1971) (citing the recent decisions in *Escalera v. New York City Hous. Auth.*, 425 F.2d 853, 863 (2d Cir. 1970), and *Caulder v. Durham Hous. Auth.*, 433 F.2d 998 (4th Cir. 1970)).

<sup>42</sup> 397 U.S. at 268.

<sup>43</sup> *Id.* at 270.

<sup>44</sup> *Id.* at 261.

<sup>45</sup> Smyers, *supra* note 13, at 598.

<sup>46</sup> In Chicago, for example, the violent crime rate (per 1,000 residents) in some public housing projects was nearly fifteen times the national average. *Drugs in Federally Assisted Housing: Hearing on S. 566 Before the Subcomm. on Housing and Urban Affairs of the Sen. Comm. on Banking, Housing, and Urban Affairs*, 101st Cong. 118 (1989) (statement of Vincent Lane).

<sup>47</sup> *Id.* at 108.

<sup>48</sup> Von Hoffman, *supra* note 27, at 319–20.

<sup>49</sup> For example, in 1982, Chicago Mayor Jane Byrne moved into the infamous Cabrini-Green Homes promising to get tough on crime and clean up public housing in the city. Critics perceived the move as a publicity stunt for Byrne, who was looking to pick up black voters in an upcoming election. Douglas E. Kneeland, *Chicago’s Mayor Spends ‘Lovely’ Night at Project*, N.Y. TIMES, Apr. 2, 1981, at A18.

By the 1980s, the perceived crisis prompted government action. On the local level, police stations were placed in close proximity to public housing facilities,<sup>50</sup> and in some cases police units were brought “in-house.”<sup>51</sup> Community crime prevention programs were instituted<sup>52</sup> and PHAs improved building security with video surveillance and electronic key cards.<sup>53</sup> Alongside these local crime prevention programs, the U.S. Congress passed a comprehensive bill to address drug crime.

#### D. *The Anti-Drug Abuse Act of 1988*

In “a time of high budget deficits and low tolerance for drugs,” Congress passed the Anti-Drug Abuse Act of 1988.<sup>54</sup> As a comprehensive bill aimed at addressing all sides of the drug problem, the Act facilitated coordination between local law enforcement and federal agencies,<sup>55</sup> and even envisioned an international anti-drug task force.<sup>56</sup> Further, the Act sought to curb domestic drug abuse and trafficking through measures targeted at government benefits, including public housing.

Lamenting the “reign of terror” imposed by drug dealers on America’s public housing,<sup>57</sup> the Act provided block grants and other discretionary funding to local PHAs to fight drug trafficking and drug production in housing projects.<sup>58</sup> These funds were primarily earmarked for increasing building security<sup>59</sup> and hiring security personnel.<sup>60</sup> Apart from this new

<sup>50</sup> POPKIN ET AL., *supra* note 31, at 29.

<sup>51</sup> *Id.* at 34.

<sup>52</sup> *Id.* at 30.

<sup>53</sup> *Id.* at 27–28.

<sup>54</sup> Lisa Weil, *Drug-Related Evictions in Public Housing: Congress’s Addiction to a Quick Fix*, 9 YALE L. & POL’Y REV. 161, 161 (1991).

<sup>55</sup> Anti-Drug Abuse Act of 1988, Pub L. No. 100-690, § 1002, 102 Stat. 4181, 4181 (establishing an Executive level office to be managed by a Director of National Drug Control Policy, the so-called Drug Czar); *id.* § 1004(a)(2)(B), 102 Stat. 4181, 4185 (“The Director of Central Intelligence shall, to the fullest extent possible . . . render full assistance and support to the Office of National Drug Control Policy and its Director.”); *id.* § 6163(a), 102 Stat. 4181, 4350 (“The President of the United States shall direct the Office of National Drug Control Policy . . . to develop a comprehensive plan for utilizing no fewer than eight existing facilities of the Department of Defense, the Department of Justice, the Department of Energy, National Security Agency, and the Central Intelligence Agency, to develop technologies for application to Federal law enforcement agency missions, and to provide research, development, technology, and evaluation support to the law enforcement agencies of the Federal Government.”).

<sup>56</sup> *See id.* § 4103, 102 Stat. 4181, 4265; *see also id.* § 4204, 102 Stat. 4181, 4268 (earmarking funds for international narcotics control activity training); *id.* § 4205, 102 Stat. 4181, 4268–69 (providing funds for military anti-narcotics operations in drug producing countries).

<sup>57</sup> *See id.* § 5122, 102 Stat. 4181, 4301.

<sup>58</sup> *See id.* § 5123, 102 Stat. 4301 (granting HUD the power to give out grants to PHAs “for use in eliminating drug-related crime in public housing projects”); *id.* § 5104, 102 Stat. 4301 (making “addressing the problem of drug trafficking . . . in public housing” an acceptable purpose for Bureau of Justice block grants under the Omnibus Crime Control and Safe Streets Act of 1968).

<sup>59</sup> *See id.* § 5124(3), 102 Stat. 4181, 4302.

funding, the Act sought to strengthen the hand of PHAs in removing problem tenants. To this end, the bill mandated that PHAs include language in their leases providing that if a tenant or a member of her household or guest engaged in criminal activity, including “drug-related criminal activity” on or near the public housing property, the tenant would be subject to “termination of tenancy.”<sup>61</sup>

In the first years of the Act, the importance of the drug-related lease provision was largely unknown to PHAs.<sup>62</sup> Other required lease terms already gave PHAs the right to evict tenants whose illegal activity “impair[ed] the physical or social environment of the project.”<sup>63</sup> PHAs often used the drug-related lease provision to remove the worst criminal offenders, drug dealers, and gang members.<sup>64</sup> Few thought the Act expanded their discretionary reach any further, as they were still subject to the extensive grievance procedures required by *Goldberg v. Kelly*.<sup>65</sup>

HUD and Congress, however, continued to increase pressure on PHAs to get tough on crime through eviction procedures.<sup>66</sup> The pressure to evict was stepped up considerably in 1996 when President Bill Clinton introduced the One Strike policy.

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<sup>60</sup> See *id.* § 5124(1)–(2), 102 Stat. 4181, 4302 (allowing grants to be used to hire private security personnel and to compensate local police for the costs of heightened patrols near public housing).

<sup>61</sup> *Id.* § 5101, 102 Stat. 4181, 4300. Drug-related activity was defined as “the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance.” *Id.*

<sup>62</sup> See Weil, *supra* note 54, at 166 (“The degree to which the drug-related eviction provision changed the practices of local PHAs is somewhat unclear.”); John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects*, WASH. POST, Mar. 29, 1996, at A14 (“The one-strike policy has been permissible under federal law since 1988, but administration officials said many local housing project officials have not implemented the no-tolerance approach.”).

<sup>63</sup> 24 C.F.R. § 966.4(f)(12) (1990).

<sup>64</sup> See Weil, *supra* note 54, at 166.

<sup>65</sup> See *supra* notes 42–44 and accompanying text.

<sup>66</sup> For its part, HUD encouraged PHAs to utilize their discretion in drug-related evictions by waiving the grievance hearing procedures in forty states, finding that their housing court proceedings sufficiently satisfied due process requirements. Weil, *supra* note 54, at 166. Congress, in turn, passed the Cranston–Gonzalez National Affordable Housing Act in 1990, expanding the bases for eviction to include “any criminal activity that threatens the health, safety or right to peaceful enjoyment” of other tenants. Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990). It also required that HUD develop a performance evaluation system for PHAs, the Public Housing Assessment System, to measure their compliance with department priorities, including crime reduction. *Id.* § 502, 104 Stat. 4079, 4181–84. A PHA that failed to perform under these guidelines could be branded as “troubled,” a designation that could result in appointment of a receiver to take over management of the agency. *Id.* § 502(a), 104 Stat. 4079, 4182–83.

### E. The One Strike Policy

In his 1996 State of the Union address, President Clinton introduced a “one strike and you’re out” policy for drug offenders in public housing.<sup>67</sup> Drawing on the authority granted HUD by the 1988 Anti-Drug Abuse Act, the One Strike policy promoted a zero-tolerance standard for drug-related activity by tenants on or off public housing premises.<sup>68</sup> The Housing Opportunity Program Extension Act of 1996 (HOPE) provided PHAs with new authority to screen out potential tenants with criminal and drug backgrounds, enforce lease terms strictly, and evict tenants suspected of drug or criminal activity.<sup>69</sup> It also required that local police give PHAs criminal background information about public housing applicants or tenants upon request.<sup>70</sup> Apart from this law, HUD added a new security indicator to the Public Housing Assessment System, monitoring whether PHAs were evicting residents who engaged in criminal activity on or near the public housing premises as well as those engaged in drug-related criminal activity *on or off* the premises.<sup>71</sup> This scheme further incentivized PHAs to take a tough stance on evictions related to drug or criminal activity.<sup>72</sup> In addition, many of the provisions of the policy were extended to other subsidized housing programs such as tenant-based and project-based Section 8.<sup>73</sup>

The extent to which the One Strike policy was carried out varied among PHAs.<sup>74</sup> More zealous execution, however, resulted in the eviction

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<sup>67</sup> President William J. Clinton, Address Before a Joint Session of Congress on the State of the Union (Jan. 23, 1996), in 1 PUB. PAPERS 79, 83. In President Clinton’s words, “[f]rom now on, the rule for residents who commit crime and peddle drugs should be one strike and you’re out.” *Id.*

<sup>68</sup> The “on or off [public housing] premises” language has engendered strong debate as this would seem to hold tenants responsible for the actions of their guests when the latter were potentially in another city. Responding to the issue, HUD modified the implementing regulations of the One Strike policy to read “on the premises” for the actions of “other persons under the tenant’s control.” Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 GEO. J. ON POVERTY L. & POL’Y 435, 447–48 (2004).

<sup>69</sup> Pub. L. No. 104-120, § 9, 110 Stat. 836–38.

<sup>70</sup> *Id.* § 9(b), 110 Stat. 836–37 (codified at 42 U.S.C. § 1437(d) (2006)).

<sup>71</sup> U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE: PUBLIC HOUSING MANAGEMENT ASSESSMENT PROGRAM—INDICATOR #8, SECURITY: “ONE STRIKE AND YOU’RE OUT” 5 (1996) (emphasis added), available at <http://www.hud.gov/offices/pih/publications/notices/96/pih96-52.pdf>.

<sup>72</sup> See Harris, *supra* note 62 (noting that the Public Housing Assessment System evaluation is “used in determining how much funding an authority gets”).

<sup>73</sup> U.S. DEP’T OF HOUS. & URBAN DEV., A PROMISE BEING FULFILLED: THE TRANSFORMATION OF AMERICA’S PUBLIC HOUSING 15, 31–32 (2000). For an explanation of the tenant-based Section 8 housing choice voucher programs, see *infra* notes 103–104 and accompanying text. For an explanation of the project-based Section 8 program, see *infra* note 102 and accompanying text.

<sup>74</sup> For example, in Boston the Housing Authority moved from a system that placed great discretion in individual project managers’ hands to a system of strict enforcement, exemplified by high profile evictions of families of juvenile offenders. Compare Pamela Ferdinand, *Tenant-Run Housing Takes a Hit in Boston*, WASH. POST, Nov. 24, 1998, at A3 (documenting the termination of a Boston project manager who presided over a tenant management group that “never enforced [the] federal ‘one strike

of Pearlie Rucker whose challenge to the One Strike policy would ultimately be heard by the Supreme Court.

## II. THE *RUCKER* CASE AND ITS AFTERMATH

This Part analyzes the *Rucker* case and the effects the decision had on tenant advocates, HUD, and courts. Section A recounts the factual background and holding of the case, which permitted no-fault evictions under the One Strike policy. Section B describes the shockwaves the holding sent through the public housing community, as tenants feared losing their leases due to the actions of third persons beyond their control. HUD, trying to allay these fears, instructed local PHAs to consider options short of eviction when dealing with sympathetic circumstances under the One Strike policy.<sup>75</sup> However, these advisory remarks did not temper the discretion provided to PHAs under *Rucker*. Section C will demonstrate how, in fact, *Rucker*'s holding has been expanded to reach other public housing programs and to provide PHAs with discretion to evict tenants for offenses less serious than drug crimes.

### A. Department of Housing and Urban Development v. Rucker

In *Department of Housing and Urban Development v. Rucker*,<sup>76</sup> the Supreme Court unanimously upheld no-fault evictions under the One Strike policy, rejecting the claim that Congress intended to provide a knowledge requirement for "innocent" tenants.<sup>77</sup> The case arose when the Oakland Housing Authority (OHA) sought to evict Pearlie Rucker, an elderly public housing tenant whose mentally retarded daughter was arrested on drug charges three blocks away from her unit.<sup>78</sup> Rucker was joined by three other defendants with similar experiences involving their grandchildren (or in the case of Herman Walker, his caretaker) and drug use that took place without their knowledge.<sup>79</sup> In three of the four cases, the drug use did not

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and you're out' policy" while police had documented over 100 drug buys during a two-year period), with Pamela Ferdinand, 'One Strike' in Boston's Public Housing May Mean Troublemakers' Kin Are Out, WASH. POST, Feb. 4, 1998, at A7 (noting that the Boston Housing Authority was invoking the One Strike policy for the first time to evict three teens who had attacked another tenant, and was proceeding with evictions of the teens' families). In contrast, the Housing Authority for Los Angeles promised to evaluate criminal and drug evictions on a "case by case" basis "with opportunities for appeal," expecting no "significant rise in the number of evictions." *Housing Authority OKs Stricter Leases*, L.A. TIMES, Aug. 16, 1998, at 7. *But see* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 73, at 31 ("By May 1997, 75 percent of 1,818 housing authorities responding to a survey had One Strike policies in place.").

<sup>75</sup> See *infra* notes 88–89 and accompanying text.

<sup>76</sup> 535 U.S. 125 (2002).

<sup>77</sup> *Id.* at 136.

<sup>78</sup> *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

<sup>79</sup> *Id.*

even take place within the confines of the defendant's residence.<sup>80</sup> These defendants argued that 42 U.S.C. § 1437d(1)(6), the law requiring lease terms for drug and crime-related evictions, did not authorize eviction of tenants who "did not know or have no reason to know" of a household member's or guest's illegal drug activity.<sup>81</sup>

The Court roundly rejected this argument. Writing for the Court, Chief Justice Rehnquist noted that the statute specifically used the word "any" to modify "drug-related criminal activity"<sup>82</sup> and that Congress's silence as to a knowledge requirement must have been intentional because knowledge had been explicitly written into a different section of the statute.<sup>83</sup> He concluded that this plain language reading precluded the four tenants' interpretation of an "innocent tenant" defense.<sup>84</sup> Since Congress had "directly spoken to the precise question at issue," there was no need to proceed further.<sup>85</sup> Once the Court issued its decision, HUD stepped in to calm the ensuing uproar from concerned tenants.

### B. *Tempering Alarm: HUD's Response to Rucker*

The decision in *Rucker* alarmed civil libertarians<sup>86</sup> and tenants wary of possible eviction.<sup>87</sup> HUD responded to these fears by corresponding with local PHAs, reminding them that their discretion to evict should be used carefully with consideration of alternative solutions such as barring the household member or guest responsible for illegal activity.<sup>88</sup> HUD Secre-

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1118.

<sup>82</sup> *Rucker*, 535 U.S. at 131.

<sup>83</sup> The knowledge requirement in the lease forfeiture provision of the Anti-Drug Abuse Act, Chief Justice Rehnquist wrote, "shows that Congress knew exactly how to provide an 'innocent owner defense.'" Chief Justice Rehnquist concluded, "It did not provide one in § 1437d(1)(6)." *Id.* at 132.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 136 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842).

<sup>86</sup> See, e.g., Jim Moyer, *Can't Stop the Hustle: The Department of Housing and Urban Development's "One Strike" Eviction Policy Fails to Get Drugs out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275, 286–89 (2003) (arguing that, as interpreted in *Rucker*, the language of the Anti-Drug Abuse Act was too vaguely worded, giving PHAs excessive discretion); Anne C. Fleming, Note, *Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Public Housing After HUD v. Rucker*, 40 HARV. C.R.-C.L. L. REV. 197, 211–13 (2005) (highlighting the insufficient protection from eviction for mentally disabled tenants who have reduced capacity to control other people who commit drug-related criminal activity in their units); Elizabeth J. Thomas, Note, *Building a Statutory Shelter for Victims of Domestic Violence: The United States Housing Act and Violence Against Women Act in Collaboration*, 16 WASH. U. J.L. & POL'Y 289, 305–06 (2004) (arguing that *Rucker* fails to protect abused women who may be evicted for the actions of their abuser).

<sup>87</sup> See Evelyn Nieves, *Drug Ruling Worries Some in Public Housing*, N.Y. TIMES, Mar. 28, 2002, at A18 (documenting the fears of Herman Walker, one of the *Rucker* respondents, after the ruling).

<sup>88</sup> Letter from Michael M. Liu, Assistant Sec'y of U.S. Dep't of Hous. & Urban Dev., to Public Housing Directors (June 6, 2002), available at <http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf> (urging PHAs to take a "wide range of factors" into account when considering eviction, including the

tary Mel Martinez urged “compassion and common sense” in dealing with cases involving drugs, suggesting that “eviction should be the last option explored, after all others have been exhausted.”<sup>89</sup> These alternatives, particularly barring and no-trespass lists, have since been implemented in many local PHAs,<sup>90</sup> including the Oakland Housing Authority, which modified its eviction policy in the wake of *Rucker* to reflect its commitment to providing housing to those “who may not have any other place to go.”<sup>91</sup> Thus, PHAs sought to balance the discretion *Rucker* provided them against their administrative duty to provide housing to those who could not afford it privately. Housing courts interpreting *Rucker*, however, have not been so kind.

### C. Judicial Expansion of *Rucker*

In state and local courts where eviction proceedings under the One Strike policy have taken place, *Rucker* has been relied on to expand the scope and reach of no-fault evictions.<sup>92</sup> Further, a separate line of state court cases has cited *Rucker* for the proposition that the lease provisions in 42 U.S.C. § 1437d(1)(6) preempt defenses provided by local landlord-tenant laws.<sup>93</sup> Finally, a number of cases applied the holding in *Rucker* to

“seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy”).

<sup>89</sup> Letter from Mel Martinez, U.S. Sec’y for Hous. & Urban Dev., to Public Housing Directors (Apr. 16, 2002), available at <http://web.archive.org/web/20070717052642/http://www.nhlp.org/html/pubhsg/Martinez+4-16-02+ltr.pdf>.

<sup>90</sup> See Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES, Oct. 1, 2007, at A1 (citing exclusion or bar policies for the public housing authorities of New York, Philadelphia, Chicago, and Portland, Oregon).

<sup>91</sup> See Stinson, *supra* note 68, at 477 (quoting Timothy Jones, Director of the Oakland Housing Authority).

<sup>92</sup> For example, in *Allegheny County Housing Authority v. Johnson*, the Superior Court of Pennsylvania relied on *Rucker* to overturn a jury verdict that allowed a disruptive tenant suffering from alcoholism to continue to reside in his public housing unit so long as he attended Alcoholics Anonymous meetings and submitted to verification checks by the local housing authority. The court, citing *Rucker*’s strict no-fault interpretation, held that once a factfinder had found that the material terms of the lease had been seriously and repeatedly violated, the court was entitled to evict regardless of jury determinations otherwise. 908 A.2d 336, 344 (Pa. Super. Ct. 2006). Similar extensions of the no-fault standard have been made for any criminal activity consistent with HUD’s interpretation of § 1437d(1)(6). For an extreme example of criminal activity deemed to threaten “the health, safety, or right to peaceful enjoyment of the premises,” see *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113, 120 (Tenn. Ct. App. 2006), *cert. denied*, 128 S.Ct. 543 (2007) (finding that the five-year-old forgery conviction of a caretaker in a subsidized building for the elderly constituted a permissible basis for eviction under *Rucker*). *But see* *Lowery v. Hous. Auth. of Terre Haute*, 826 N.E.2d 685, 690 (Ind. Ct. App. 2005) (suggesting that the “strict liability implications” of *Rucker* apply narrowly to “drug-related” problems).

<sup>93</sup> For example, in *Boston Housing Authority v. Figueroa* and then in *Boston Housing Authority v. Garcia*, Massachusetts courts held that the state’s “special circumstances” or “innocent tenant” defense, under which a public housing tenant could defeat an eviction based upon the unlawful conduct of a household member if he could show that he could not have foreseen and prevented the conduct, was im-

federally subsidized housing owned and managed by private landlords, including housing covered by the Section 8 housing choice voucher program.<sup>94</sup> Given the breadth of activity that can trigger *Rucker* evictions, as well as the preemptive effect of its holding on local law, the extension to Section 8 is an alarming trend that implicates due process rights in a way unanticipated by the *Rucker* Court.

### III. THE EFFECT OF *RUCKER* ON THE SECTION 8 PROGRAM

This Part will discuss how, in the aftermath of *Rucker*, courts have shown great willingness to apply its holding to tenants participating in the Section 8 housing choice voucher program. Section A will briefly examine the Section 8 program, in which private landlords accept a government subsidy covering a portion of the rent of eligible tenants, highlighting its current and likely future importance to federal public housing schemes. Section B will then explore application of the no-fault eviction standard to the Section 8 program, noting how after some initial hesitance, courts have, by and large, applied the *Rucker* holding strictly to Section 8 proceedings.

#### A. *The Section 8 Program*

Established in the wake of failing public housing and urban renewal programs, the Section 8 voucher program subsidizes low-income families who find a qualifying unit in the private rental market.<sup>95</sup> Under the Section 8 program, an eligible family receives a subsidized voucher which they can use to rent any apartment provided that it passes inspection by the PHA and the landlord is willing to accept the subsidy.<sup>96</sup> The voucher is guaranteed by the local PHA for the difference between the family's contribution, set at thirty percent of income,<sup>97</sup> and the total rent plus utilities, provided that it

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plicitly preempted by *Rucker*. *Boston Hous. Auth. v. Garcia*, 871 N.E.2d 1073, 1078 (Mass. 2007); *Boston Hous. Auth. v. Figueroa*, No. 02-SP-03297, 2003 WL 24029487, at \*5 (Mass. Hous. Ct. Oct. 10, 2003). For another instance of a local court holding *Rucker* to similarly preempt an equitable defense, see *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments*, 890 A.2d 249, 258–59 (D.C. 2006) (holding a “cure” provision, under which a tenant could correct his violation within thirty days of notice to evict, inapplicable to public housing tenants).

<sup>94</sup> See, e.g., *infra* notes 123, 125–130.

<sup>95</sup> Indeed, the Section 8 program was established as part of the Housing and Community Development Act of 1974, a bill pushed by President Richard Nixon in the weeks immediately preceding his resignation. President Nixon was eager to offer a Democratic Congress a housing program and turn the national discussion away from Watergate. HAYS, *supra* note 16, at 148. Democrats were clamoring for some kind of program after the President had declared a moratorium on all public housing programs in 1973, in the aftermath of several high-profile corruption scandals involving HUD. *Id.* at 134–38.

<sup>96</sup> 42 U.S.C. §§ 1437f(o)(6)(B), (8)(A) (2006); see also Sean Zielenbach, *Moving Beyond the Rhetoric: Section 8 Housing Choice Voucher Program and Lower-Income Urban Neighborhoods*, 16 FALL J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 9–10 (2007) (summarizing the basic structure and rules behind the Section 8 program).

<sup>97</sup> 42 U.S.C. § 1437f(o)(2)(A)(i).

falls within the fair market rent ranges set by the PHA and HUD.<sup>98</sup> The family must submit to a yearly recertification inquiry by the PHA during which changes in income and household size are accounted for and the subsidy is adjusted accordingly.<sup>99</sup>

Broadly speaking, there are two types of Section 8 vouchers: project-based and tenant-based.<sup>100</sup> Under the project-based scheme, a building that has received a subsidy for construction or redevelopment under a host of federal public housing programs must designate a certain percentage of its units for Section 8 voucher holders.<sup>101</sup> The vouchers held by these Section 8 tenants are then tied to that project.<sup>102</sup> Under the tenant-based scheme, the voucher is completely mobile and the tenant may apply it toward any qualifying unit she can find.<sup>103</sup> The Section 8 applicant may be put on the same waiting list for both programs and may be offered a project-based voucher if she is interested.<sup>104</sup> Given that the waiting list for Section 8 vouchers can be years long (if the list is not closed already),<sup>105</sup> the project-based option is not one that many applicants can afford to turn down.

Section 8 is arguably the most important federally subsidized housing program.<sup>106</sup> Presently, it is larger in terms of households served than the

<sup>98</sup> 42 U.S.C. § 1437f(c)(1).

<sup>99</sup> *Id.*; U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER GUIDEBOOK, Ch. 12, 7 (2001), available at <http://www.hud.gov/offices/adm/hudclips/guidebooks/7420.10G/7420g12GUID.pdf> (describing the procedure for the annual reexamination).

<sup>100</sup> There are a few other types of housing choice vouchers such as those used towards home ownership and those specifically designated for people with disabilities, but these programs don't differ substantially in form and in all cases are operated by local PHAs. See Dep't of Hous. & Urban Dev., *Housing Choice Vouchers List*, <http://www.hud.gov/offices/pih/programs/hcv/about/list.cfm> (last visited July 5, 2009).

<sup>101</sup> U.S. Dep't of Hous. & Urban Dev., Project Based Vouchers, <http://www.hud.gov/offices/pih/programs/hcv/project.cfm> (last visited Dec. 20, 2009).

<sup>102</sup> The tenant who moves voluntarily from the project-based unit is not entitled to continuing housing assistance. *Id.* The voucher, however, may become "mobile" again if the project building goes into foreclosure or is considered "distressed public housing," prompting rehabilitation or razing by HUD. The project-based voucher is then released to the tenant as a conversion voucher. U.S. Dep't of Hous. & Urban Dev., Conversion Vouchers, <http://www.hud.gov/offices/pih/programs/hcv/conversion.cfm> (last visited Dec. 20, 2009).

<sup>103</sup> U.S. Dep't of Hous. & Urban Dev., Tenant Based Vouchers, <http://www.hud.gov/offices/pih/programs/hcv/tenant.cfm> (last visited July 5, 2009).

<sup>104</sup> U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER GUIDEBOOK, Ch. 4, 9 (2001), available at <http://www.hud.gov/offices/adm/hudclips/guidebooks/7420.10G/7420g04GUID.pdf> ("[A] PHA can merge its housing choice voucher waiting list with its project-based voucher program.").

<sup>105</sup> *The Section 8 Program—Community Development Block Grant (CDBG) Programs, and Affordable Housing in Ohio, Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Serv.*, 108th Cong. 18 (2003) (statement of Fred Zawilinski, Executive Director, Lake Metropolitan Housing Authority, Painesville, Ohio) ("[W]e're operating a program in the Housing Choice Voucher which has extensive waiting lists in most communities, if the housing authority[] [is], indeed, even taking applications at all.").

<sup>106</sup> As a testament to Section 8's primacy in public housing, one need only refer to the nationwide uproar from PHAs that resulted when HUD cut its Section 8 budget by \$160 million in 2004. See David

conventional federal public housing program itself.<sup>107</sup> The program's significance is also likely to increase. The number of housing choice vouchers grew by forty percent from 1.5 million to 2.1 million between 1995 and 2003.<sup>108</sup> This growth will likely continue as many cities tear down public housing projects built one or two generations ago and offer vouchers to displaced residents.<sup>109</sup> Critics of Section 8 dislike the complexity of the program, noting that its extensive requirements sometimes dissuade landlords from accepting vouchers,<sup>110</sup> and that administrative support is insufficient in large urban areas.<sup>111</sup> In response, the Bush Administration repeatedly tried to end Section 8 and replace it with a state-administered voucher program.<sup>112</sup> These efforts failed, however,<sup>113</sup> and it is likely that Section 8 will remain the most important program for government subsidized low-income housing.<sup>114</sup> It is therefore crucial to evaluate the effect of the One Strike policy on Section 8 in the wake of *Rucker*, since any future anti-crime initiative in public housing will focus its attention on this program.

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W. Chen, *U.S. Restores Much of Cuts in Housing Aid*, N.Y. TIMES, Sept. 2, 2004, at B1. In New York City, the commissioner on Housing Preservation and Development put it plainly: "Section 8 is the most important housing program in the country, period . . ." *Id.* Responding to the protests and pressure from New York's housing agency, and 378 others, HUD decided to restore the funding it had cut. *Id.*

<sup>107</sup> VALE, *supra* note 24, at 18.

<sup>108</sup> Zielenbach, *supra* note 96, at 11.

<sup>109</sup> See, e.g., FELDMAN & STALL, *supra* note 13, at 56 (citing the Chicago Housing Authority's plan to tear down many of its high-rise projects and give displaced tenants vouchers, despite tenant misgivings); Larry Bennett, *Transforming Public Housing*, in THE NEW CHICAGO: A SOCIAL AND CULTURAL ANALYSIS 276 (John P. Koval ed., 2006) (referring to the "national trend" of scaling back "public bureaucratic program implementation" to replace it with "market-based solutions").

<sup>110</sup> Manny Fernandez, *Bias Is Seen as Landlords Bar Vouchers*, N.Y. TIMES, Oct. 30, 2007, at A1 (describing the Section 8 process for landlords as "overly cumbersome").

<sup>111</sup> See MAGGIE McCARTY, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: THE SECTION 8 HOUSING VOUCHER PROGRAM: REFORM PROPOSALS 1 (2006) (noting that some PHAs administer as few as ten vouchers while the New York City Housing Authority, in contrast, administers "almost 90,000").

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Though it is difficult to gauge Section 8's centrality in serving low-income families seeking public housing in the future, one can infer from the long waiting lists maintained by urban PHAs that the demand for vouchers will not decrease in the near future. See, e.g., *Housing Aid to Increase by \$50,000, Section 8 List Also to Be Reopened*, BALTIMORE SUN, Feb. 10, 2008, at 3U (noting the reopening of Baltimore County's Section 8 waiting list, closed in 2003 after reaching 2,800); Jenny Jarvie, *Atlanta Rethinks Housing Changes*, L.A. TIMES, Jan. 21, 2008, at A10 (noting that Atlanta's Section 8 waiting list was closed years before at 20,000); Traci Shurley, *Some 13,500 Families Wait for Housing Help*, FORT WORTH STAR-TELEGRAM, Nov. 10, 2007, at B5 (describing the closing of the Arlington, Texas Section 8 waitlist for the second time within two years, at 13,500 applicants). Further, once reopened, these waiting lists are almost instantly inundated with new applicants. Jennifer Bjorhus, *11,000 Cram Onto Rent Aid Wait List: St. Paul Housing Agency Stunned by Demand as It Takes First New Names in 5 Years*, ST. PAUL PIONEER PRESS, Apr. 21, 2007, at A1 (noting that St. Paul, Minnesota's PHA received 11,000 requests within two days of reopening its Section 8 wait list).

### B. *One Strike Under Section 8*

In implementing the One Strike policy, HUD gave PHAs much the same discretion in screening and evicting Section 8 tenants as it had for those in public housing projects. In 1990, the Cranston–Gonzalez National Affordable Housing Act (Cranston–Gonzalez Act) added a clause to 42 U.S.C. § 1437(f) providing that “criminal activity” that “threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants” as well as drug-related criminal activity occurring “on or near” the premises was grounds for termination of Section 8 vouchers.<sup>115</sup> With the exception of the more benign “on or near the premises” standard, the mandated lease language was identical to the required language for public housing project leases.<sup>116</sup> In furtherance of the One Strike policy, HUD permitted Section 8 landlords to request that PHAs obtain and provide criminal background information on their tenants.<sup>117</sup> Finally, giving PHAs new leverage over landlords, HUD encouraged PHAs to deny landlords Section 8 participation if they refused to evict tenants for drug-related or criminal activity.<sup>118</sup>

Under the One Strike policy, there are two ways in which eviction may be carried out against Section 8 tenants. First, the PHA, upon learning of criminal activity committed by the tenant—or by a member of his or her household or a person under his or her control—may choose to terminate the housing choice voucher, thereby cutting the needed rent subsidy.<sup>119</sup> Second, the private landlord of either a Section 8 tenant or a project-based Section 8 building may pursue legal action in a state or local court to evict the tenant.<sup>120</sup> Before doing so, however, the landlord must notify the tenant and PHA administering the voucher and provide a “good cause” reason for

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<sup>115</sup> Pub. L. No. 101-625, § 546, 104 Stat. 4079, 4220–21 (1990) (amending 42 U.S.C. § 1437f(d)(1)(B)).

<sup>116</sup> See *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) (discussing changes to 42 U.S.C. § 1437d(l)(5) (1991)).

<sup>117</sup> U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 73, at 32–33.

<sup>118</sup> *Id.*

<sup>119</sup> U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER GUIDEBOOK, Ch. 15, 7–8 (2001), available at <http://www.hud.gov/offices/adm/hudclips/guidebooks/7420.10G/7420g15GUID.pdf> (providing that the PHA may terminate assistance if it determines that any household member has engaged in “drug-related criminal activity” or “violent criminal activity” as well as a “pattern of abusing alcohol” that threatens the “right to peaceful enjoyment” by other tenants).

<sup>120</sup> *Id.* at 12 (allowing the owner or landlord to terminate the lease for “[s]erious or repeated violations of the terms and conditions of the lease . . . [v]iolations of federal, state, or local law that directly relate to the occupancy or use of the unit . . . [c]riminal activity or alcohol abuse . . . [or] [o]ther good cause”).

the eviction.<sup>121</sup> Drug-related and other criminal activity qualify as “good cause” for purposes of these rules.<sup>122</sup>

In spite of differing circumstances, courts have applied *Rucker*’s no-fault eviction standard to the Section 8 program. At first blush, *Rucker* did not seem applicable when eviction was sought by a private landlord. In the first major case to test this proposition, *Oakwood Plaza Apartments v. Smith*, a New Jersey appellate court remanded a private landlord’s eviction of a project-based Section 8 tenant for illegal drug use to the trial court with instructions to determine if the landlord had employed his discretion properly, taking into account the criteria laid out by HUD.<sup>123</sup>

Some commentators interpreted this remand to mean that *Rucker*’s no-fault standard did not apply to Section 8 landlords,<sup>124</sup> particularly as Judge Payne noted in *Oakwood Plaza Apartments* that the lease language was required by a different section of the U.S. Code and was “therefore not directly governed by *Rucker*.”<sup>125</sup>

However, *Oakwood Plaza Apartments* has proven to be the exception, not the rule. Three years after *Oakwood Plaza Apartments*, an appeals court in Illinois decided *Camco, Inc. v. Lowery*, which held that the property manager of a project-based Section 8 building could evict a tenant for the drug-related activity of her grandsons under the *Rucker* standard.<sup>126</sup> In reaching this determination, the court found that the termination language in the lease tracked the language of the lease provision upheld in *Rucker*.<sup>127</sup> Moreover, the fact that *Camco* involved private housing was deemed immaterial, since the lease was approved by HUD and rent was subsidized with federal funds, thereby subjecting it to *Rucker*’s dicta on Congress’s intent to “provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs.”<sup>128</sup> The *Camco* court concluded that *Rucker* held that “landlords of federally assisted low-income housing,” in-

<sup>121</sup> *Id.* at 3 (requiring that the owner or landlord provide the household with written notice of intent to terminate and reasons for the termination). For “good cause” reasons, see *id.* at 2–3.

<sup>122</sup> See *id.* at 2.

<sup>123</sup> 800 A.2d 265 (N.J. Super. Ct. App. Div. 2002). HUD laid out its criteria in a June 6, 2002 letter to PHAs. *Id.* at 270 (referring to the letter from HUD to PHAs asserting that “suitable weighing of positive and negative factors” is required).

<sup>124</sup> See Amy R. Bowers, Comment, *One Strike and You’re Out—Or Are You?: Rucker’s Influence on Future Eviction Proceedings for Section 8 and Public Housing*, 108 PENN ST. L. REV. 611, 613 (2003) (arguing that *Rucker* does not apply to Section 8 evictions because evictions are undertaken by private landlords, and not the PHA as the Supreme Court held in *Rucker*).

<sup>125</sup> *Oakwood Plaza Apartments*, 800 A.2d at 268. However, the court in *Oakwood Plaza Apartments* did hold that because the language mandated by the U.S. Code was virtually identical to the lease language in question in *Rucker*, the “reasoning of *Rucker* is applicable to this Section 8 case.” *Id.* at 269.

<sup>126</sup> 839 N.E.2d 655 (Ill. App. Ct. 2005).

<sup>127</sup> *Id.* at 668.

<sup>128</sup> *Id.* at 670 (quoting *Dept. of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002) (emphasis added)).

cluding Section 8 landlords, “may evict tenants for drug-related criminal activity . . . even if the tenant has no knowledge of the illegal activity.”<sup>129</sup>

One year later, the D.C. Court of Appeals similarly held that a Section 8 landlord had the same discretion to evict as PHAs under *Rucker*.<sup>130</sup> In *Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apartments*, the court rejected the premise that courts should review a landlord’s use of discretion for consideration of “all of the circumstances,” as was recommended in *Oak Plaza Apartments*, finding that the statute “authorizes eviction based on specified criminal activity, without limitation by, or balancing or consideration of, any other factors.”<sup>131</sup> Other courts have applied the *Rucker* standard to Section 8 tenants in cases where a PHA sought to terminate voucher assistance.<sup>132</sup>

Thus, the extension of *Rucker*’s no-fault standard for criminal-activity evictions to Section 8 tenancy is most likely a *fait accompli*, a fact underscored by HUD’s own declaration that *Rucker* stands for the “[f]inal validation of . . . [the] Section 8 owner position through . . . One Strike.”<sup>133</sup> This application of *Rucker*, however, demands closer scrutiny, particularly as to its implications for a tenant’s due process rights.

#### IV. DUE PROCESS PROBLEMS WITH *RUCKER* EVICTIONS BY SECTION 8 LANDLORDS

This Part addresses the due process concerns with giving Section 8 landlords the same discretion as the local public housing authority to evict tenants allegedly selling or using drugs. Section A explores how PHAs and private landlords do not operate under the same motives. It also shows how a private landlord may have unfettered discretion as he is subject to less administrative and public oversight. Section B explains how the minimal scrutiny a private landlord faces through the judicial process—either through a housing discrimination claim or an eviction proceeding—leaves him with more discretion than is warranted. Finally, section C demonstrates how Section 8 tenants who challenge eviction by a private landlord may be denied the right to rely upon equitable defenses under the *Rucker*

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<sup>129</sup> *Id.*

<sup>130</sup> 890 A.2d 249, 259 (D.C. 2006).

<sup>131</sup> *Id.*

<sup>132</sup> *See, e.g.*, *Powell v. Hous. Auth. of Pittsburgh*, 812 A.2d 1201, 1216 (Pa. 2002) (holding that the public housing authority could “terminate Section 8 benefits for the violent criminal activity of a family member without having to prove that the violent criminal activity threatened the health, safety, or right to peaceful enjoyment of the premises by other residents . . .”); *B&L Assocs. v. Wakefield*, 785 N.Y.S.2d 681, 683 (N.Y. Civ. Ct. 2004) (holding that the terms of a Section 8 lease bound a tenant to *Rucker*’s “no-fault” standard, which forecloses any knowledge requirement).

<sup>133</sup> U.S. Dep’t of Hous. & Urban Dev., *In the Wake of Rucker: An Unfinished Tension*, <http://www.hud.gov/webcasts/archives/2006-05-24slides1.pdf> (last visited Dec. 20, 2009).

holding. These tenants are therefore effectively stripped of the rights provided to private renters and left with no recourse in eviction proceedings.

#### A. Comparison of Motives of PHAs and Section 8 Landlords

The incentives governing a PHA and a Section 8 landlord differ substantially. PHAs are potentially *more* motivated to evict tenants who demonstrate an inability to control drug-related activity than landlords, given the financial incentives tied to One Strike compliance under the Public Housing Assessment System.<sup>134</sup> This is, however, a narrow view of how PHAs operate, particularly PHAs in larger cities that administer thousands of vouchers.<sup>135</sup> Implementation of One Strike is not merely measured by the number of evictions pursued through termination of benefits but rather by other factors indicating the seriousness with which the PHA is implementing the policy.<sup>136</sup>

As HUD has continuously stressed PHAs' *discretion* to evict, successful policy implementation by a PHA might be measured by uniform application of a set of One Strike guidelines for project managers.<sup>137</sup> These guidelines, like those adopted by the Oakland Housing Authority, could include an evaluation of the particular circumstances surrounding the drug-related activity, as recommended by HUD itself, and may possibly include recommended alternatives to eviction under set protocols.<sup>138</sup> Thus, success as measured by the PHAs' protocol does not necessarily have to correlate with an increase in evictions under One Strike. In fact, HUD's and PHAs' larger mission—providing adequate housing for those who truly need it—favors careful individual case evaluation. A household whose Section 8 benefits are terminated by a PHA is ineligible to receive these benefits for a period of three years.<sup>139</sup> This is a significant hardship for families who rely

<sup>134</sup> See *supra* note 72 and accompanying text.

<sup>135</sup> See *supra* notes 110–111 and accompanying text.

<sup>136</sup> See U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING ASSESSMENT SYSTEM (PHAS) MANAGEMENT, OPERATIONS CERTIFICATION 3 (2000), available at [http://www.hud.gov/offices/reac/pdf/mass\\_form\\_may00.pdf](http://www.hud.gov/offices/reac/pdf/mass_form_may00.pdf) (last visited Dec. 20, 2009) (including such evaluation markers as “[t]he date the [PHA board] adopted current eviction procedures that reflect the One-Strike criteria” and “[t]he date the PHA implemented current eviction procedures that reflect the One-Strike criteria”).

<sup>137</sup> See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 71.

Component #3, lease enforcement, will examine whether the PHA Board, by resolution, has adopted policies and the PHA has implemented procedures and can document that it appropriately evicts a public housing resident who: (1) engages in any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents . . . . The term “appropriately” refers to a PHA’s ability to act consistently with the provisions of 24 CFR § 966.4(l)(5)—Eviction for criminal activity—(i) PHA discretion to consider circumstances.

*Id.*

<sup>138</sup> See Stinson, *supra* note 68, at 476–77 (describing the Oakland Housing Authority guidelines, which include an objective to “[p]reserve the tenancy and provide residents an opportunity to learn from mistakes that can be remediated”).

<sup>139</sup> 42 U.S.C. § 13661(a) (2006). The statute provides an exception to this bar if “the evicted tenant successfully completes a rehabilitation program approved by the public housing agency.” However, 24

on Section 8 as housing of last resort, a factor considered by PHAs in determining whether to terminate benefits.<sup>140</sup>

In contrast, a Section 8 landlord has little incentive to protect the housing interest of the tenant receiving this benefit. One could argue that a Section 8 landlord benefits from the Section 8 program and is therefore motivated to ensure that the tenant stays in the building. A landlord receives a virtually guaranteed portion of rent each month from the PHA,<sup>141</sup> and unlike private tenants the PHA is rarely late with the rent. For an offsite landlord, the benefit of this steady income could outweigh the cost of time-consuming paperwork that must be completed at the outset of Section 8 tenancy. However, once again, this view fails to take into account the larger rental market within which the landlord operates. In order to continue participation in Section 8, the landlord must keep his rents within a fair market rental range.<sup>142</sup> In low rent areas, where many Section 8 tenants apply their vouchers, this poses no problem. However, as neighborhoods gentrify and the rental market improves, landlords will have a strong incentive to raise rents, thus forcing removal of Section 8 tenants.<sup>143</sup>

Further, Section 8 tenants are often stigmatized as “project” people, discouraging landlords from accepting their vouchers for fear of decreasing property values. In Baltimore, a program entitled “Moving to Opportunity” planned to disperse Section 8 voucher holders to Baltimore County suburbs. The program received widespread, largely negative attention from the sub-

C.F.R. § 966.4(l)(5)(vii)(E) (2008) allows a PHA to retain the discretion to prohibit admission even after three years: “If a statute requires that the PHA prohibit admission of persons for a prescribed period of time after some disqualifying behavior or event, the PHA may apply that prohibition for a longer period of time.”

<sup>140</sup> See Letter from Michael M. Liu, *supra* note 88 (urging PHAs to consider the “effect that eviction of the entire household would have on household members not involved in the criminal activity”).

<sup>141</sup> See Zielenbach, *supra* note 96, at 10 (describing the mechanics of Section 8 payments).

<sup>142</sup> See *supra* note 98 and accompanying text.

<sup>143</sup> See, e.g., Fernandez, *supra* note 110 (citing property owners who claim that in a “hot rental market” they don’t need to “take on a Section 8 tenant”). For an example of this dynamic in action, take the case of the Pleasant East apartment buildings in East Harlem, New York. In 2000, HUD took over these buildings from the private landlord, judging them unsafe. Jake Mooney, *Pleasantness is Fleeting in a Changing Neighborhood*, N.Y. TIMES CITY ROOM BLOG, (Feb. 8, 2008, 11:29 AM), <http://cityroom.blogs.nytimes.com/2008/02/08/pleasantness-is-fleeting-in-a-changing-neighborhood/>. HUD then planned to tear down the structure, but tenants managed to induce a developer, Acorn Housing, to buy and renovate the property. *Id.* Once renovated, Acorn Housing continued to accept Section 8 vouchers, but received persistent complaints from tenants about insufficient security, which was particularly troublesome in light of a spate of violent crime in the neighborhood. *Id.* Concurrently, however, surrounding buildings began attracting condominium development, raising the specter of imminent gentrification. *Id.* Thus, the tenants of Pleasant East are stuck, fearful of the dangerous and neglected conditions of their building and potentially concerned that management will sell the property to someone who will no longer accept their vouchers. *Id.* Although this threat has been diminished in light of the severe downturn in the real-estate market nationwide, the underlying dilemma remains and may produce the same undesirable consequences once the economy recovers and real estate values in major urban centers rise again.

urban communities that feared property devaluation and increased crime.<sup>144</sup> The resulting public pressure forced politicians to drastically cut back the program.<sup>145</sup> A landlord accepting Section 8 tenants may be cognizant of these community prejudices and might consider removing Section 8 tenants to ensure that property values rise so he may collect higher rents in the future.

Apart from the divergent incentives, PHAs are also subject to greater public scrutiny than Section 8 landlords. As centralized public agencies, PHAs attract the attention of public housing advocates, legal aid attorneys, journalists, and politicians responding to the concerns of local communities.<sup>146</sup> The Oakland Housing Authority, in fact, modified its One Strike guidelines in response to concerns voiced by these groups.<sup>147</sup> Thus, a housing authority that regularly evicts tenants under One Strike with no consideration of even the most sympathetic cases would likely face organized protests, legal challenges, negative press attention, and even political repercussions. These efforts proved effective in the civil rights era, prompting desegregation orders and massive due process reform.<sup>148</sup>

In contrast, a Section 8 landlord is almost never the subject of public scrutiny. An ordinary private landlord renting to unsubsidized as well as Section 8 tenants will rarely attract the attention of local politicians or the news media. Though the possibility of organized tenant protest is greater in the case of project-based Section 8 landlords,<sup>149</sup> the decentralized nature of Section 8 and the sheer volume of housing vouchers in a city ensure that there is little focus on the isolated operations of one landlord. In fact, the only public pressure on the Section 8 landlord may come from the PHA it-

<sup>144</sup> See GEORGE C. GALSTER ET AL., *WHY NOT IN MY BACKYARD?* 168 (2003) (noting that suburban, working class residents of Dundalk, Maryland, expressed in a poll their “concern about an influx of owners and tenants who . . . attracted or committed crimes” and negatively impacted property value).

<sup>145</sup> *Id.* at 70.

<sup>146</sup> As an example of this dynamic in action, one need only look to the creation of tenant-elected committees or councils in the late 1960s and early 1970s. These councils function as liaisons between tenants and the local PHA management. There are no analogues to these building-based advocates for tenant-based Section 8 voucher holders. See SUDHIR ALLADI VENKATESH, *AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO* 23–24, 29–32, 63 (2000).

<sup>147</sup> See Stinson, *supra* note 68, at 475–76 (describing “the strident opposition from a local legal community” faced by the Oakland Housing Authority and its decision to ultimately work alongside them in implementing its new guidelines).

<sup>148</sup> See *supra* Part I.C.

<sup>149</sup> See, e.g., Norm Parish, *Rent Plan Angers Complex Residents; St. Charles Landlord Wants to Remove Complex from Federally Funded Status; Renters Would Pay Much More*, ST. LOUIS POST-DISPATCH, May 18, 2001, at C6 (reporting on an organized protest at a project-based Section 8 building by housing advocates demanding that Congress provide incentives for Section 8 landlords not to drop out of the program).

self, which may deny continued participation in the program if the landlord fails to evince *maximum* commitment to One Strike.<sup>150</sup>

Finally, a Section 8 landlord's actions are subject to less searching oversight than those of the PHA. While the Section 8 landlord is subject to some scrutiny by the courts, the private landlord still retains disproportionate discretion to evict under the One Strike policy. Judicial scrutiny of Section 8 landlords may arise in one of two ways. First, in eviction proceedings, the landlord's "good cause" reason for termination—such as criminal activity—will be examined to ensure that there is some evidentiary support.<sup>151</sup> Under One Strike, however, the evidentiary standard is low: Under current HUD regulations governing Section 8, criminal activity does not need to be proven by conviction or even arrest, but only by a "preponderance of the evidence."<sup>152</sup> Indeed, the testimony of a neighbor who may relate thirdhand information about offsite drug activity could be sufficient.<sup>153</sup> A court may give this evidence the probative weight it feels it deserves, but there is also ample persuasive and binding case law instructing the court to permit the landlord to draw his own conclusions and invoke his discretion to evict.<sup>154</sup>

Second, a landlord's actions may be the subject of a fair housing discrimination suit. Notably, discrimination against Section 8 voucher holders is not covered by the Fair Housing Act of 1968.<sup>155</sup> A tenant may invoke several municipal anti-housing discrimination statutes if he can prove that the landlord evicted him out of animus towards his status as a Section 8 voucher holder.<sup>156</sup> However, such cases are difficult to prove, particularly if

<sup>150</sup> See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 73, at 32 (discussing the authority of PHAs under One Strike to exclude landlords).

<sup>151</sup> See, e.g., *Boston Hous. Auth. v. Garcia*, 871 N.E.2d 1073, 1080 (Mass. 2007) ("Massachusetts law still requires 'cause' before a public housing tenancy may be terminated . . .").

<sup>152</sup> 24 C.F.R. § 982.553(c) (2008).

<sup>153</sup> Unlike most courtroom proceedings in both the criminal and civil context, administrative hearings such as those provided by PHAs do not adhere to the Federal Rules of Evidence. See Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353, 368-69, 372 (1991). As a result, hearsay evidence is generally admissible. *Id.* However, administrative agencies and local PHAs are free to promulgate their own rules of evidence, and may choose to adopt a hearsay rule on their own initiative. *Id.*

<sup>154</sup> See, e.g., *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments*, 890 A.2d 249, 258-59 (D.C. 2006) ("We reject the premise . . . that even when criminal activity has been found to provide a sufficient basis for eviction, a court may nonetheless review the landlord's exercise of discretion to seek lease termination."); *Camco, Inc. v. Lowery*, 839 N.E.2d 655, 670 (Ill. App. Ct. 2005).

<sup>155</sup> This is because housing choice vouchers are considered a source of income, and the Fair Housing Act of 1968 does not provide protection for this kind of discrimination. See 42 U.S.C. § 3604(a) (2006) (prohibiting the refusal to rent or sell housing only on the basis of "race, color, religion, sex, familial status, or national origin"). Cf. Laura Bacon, Note, *Godinez v. Sullivan-Lackey: Creating a Meaningful Choice for Housing Choice Voucher Holders*, 55 DEPAUL L. REV. 1273, 1281 (2006) (discussing "source of income as a protected class").

<sup>156</sup> See Fernandez, *supra* note 110 (noting that Chicago, Washington, D.C., and other cities have such antidiscrimination statutes); Manny Fernandez, *Judge Upholds City Ban on Section 8 Rent Bias*,

the landlord can marshal any evidence of criminal activity that would trigger *Rucker*'s no-fault standard.

The wide disparity between the motives of PHAs and landlords in Section 8 evictions reveals that these landlords may seek to use their discretion under *Rucker* in a prejudicial manner, not unlike project managers and PHAs prior to the due process revolution.<sup>157</sup> Just as those entities once carved out blanket rules to screen out traits they believed correlated with problem tenants, a private landlord may evict a Section 8 tenant whom he believes demonstrates bad associations with individuals merely suspected of drug use.

### *B. Inferior Due Process Under Eviction by Section 8 Landlords*

Eviction undertaken by private landlords provides Section 8 tenants with inferior procedural due process rights compared with PHA evictions. Under One Strike, it is true that HUD authorized PHAs to implement expedited eviction procedures for cases involving drug-related criminal activity.<sup>158</sup> As a result, PHAs evicting tenants from their own public housing projects were able to bypass the grievance hearing procedure and use local eviction procedures instead. Importantly, however, many PHAs have continued to rely on the grievance hearing process when terminating Section 8 benefits.<sup>159</sup> In some instances, the availability of formal grievance proceedings is required by PHA guidelines.<sup>160</sup> For many tenants, the informal grievance hearing is the only opportunity they will have to tell their side of the story. At the hearing, they are able to confront the witnesses against them and scrutinize evidentiary documents for errors.<sup>161</sup>

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N.Y. TIMES, Feb. 19, 2009, at A24 (describing the judicial affirmation of a 2009 New York City law that prohibited landlords from discriminating against tenants who receive Section 8 vouchers and the application of that law to current tenants already applying those vouchers).

<sup>157</sup> See *supra* Part I.B.

<sup>158</sup> See Weil, *supra* note 54, at 166 (discussing the approval of waivers of grievance hearing procedures in these cases).

<sup>159</sup> See, e.g., *Blumer v. Dakota County Cmty. Dev. Agency*, No. A03-1702, 2005 WL 353986, at \*\*1-2 (Minn. Ct. App. Feb. 15, 2005) (reviewing the determination of a hearing officer to terminate Section 8 benefits); *Alich v. Dakota County Cmty. Dev. Auth.*, No. C4-02-818, 2003 WL 230726, at \*1 (Minn. Ct. App. Feb. 4, 2003) (reviewing the decision of a public housing authority hearing officer to terminate Section 8 voucher); *Powell v. Hous. Auth. of Pittsburgh*, 812 A.2d 1201, 1206-07 (Pa. 2002) (reviewing an administrative grievance hearing decision to terminate Section 8 housing assistance).

<sup>160</sup> See, e.g., Barbara Mule & Michael Yavinsky, *Saving One's Home: Collateral Consequences for Innocent Family Members*, 30 N.Y.U. REV. L. & SOC. CHANGE 689, 694-96 (2006) (describing the administrative procedures employed by the New York City Housing Authority for terminations in cases of criminal drug activity). The article also notes, however, that in some cases, notably those in which the tenant uses the property for illegal trade or business, New York's housing authority and private landlords have initiated eviction in state court. These expedited "Bawdy House" cases have applied the no-fault standard in Section 8 cases. *Id.* at 696-97.

<sup>161</sup> 24 C.F.R. §§ 982.555(e)(2), (e)(5) (2008).

By comparison, formal eviction proceedings initiated by a Section 8 landlord in state or local court are more difficult for public housing tenants to navigate. Often appearing *pro se*, public housing tenants must contend with complicated motions, rules of evidence, and procedural protocols.<sup>162</sup> A 2001 study of New York's housing court highlighted the importance of legal counsel in eviction hearings, finding a twenty-nine percent reduction in the tenant's likelihood of having a final judgment rendered against her if she had an attorney present.<sup>163</sup>

Beyond these procedural differences, PHA policies might offer alternatives to eviction, such as barring the offending household member or guest from the home or mandating participation in an alcohol or drug treatment program.<sup>164</sup> A Section 8 landlord is less likely to provide such an alternative since PHA guidelines such as these are merely advisory for him.<sup>165</sup> Further, offsite landlords will be unable to enforce bars or no trespassing orders effectively and might not have the administrative capacity or the means to verify whether a tenant is continuing in a rehab program.

### C. Seeking Solace in Equitable Defenses

Given that a Section 8 landlord will be treated by courts post-*Rucker* as a private landlord with a greater discretion to evict, it would seem reasonable to permit a tenant to present defenses available under local landlord-tenant law. However, it is here that *Rucker*'s holding as applied to Section 8 may be the most unfair.

As demonstrated in cases such as *Boston Housing Authority v. Garcia*<sup>166</sup> and *Scarborough v. Winn Residential L.L.P.*,<sup>167</sup> *Rucker* has been interpreted to hold that the no-fault standard preempts any state-law-based "innocent tenant" defenses.<sup>168</sup> Section 8 tenants in a *Rucker* eviction

<sup>162</sup> See Mule & Yavinsky, *supra* note 160, at 696 (describing the complexity of New York court practice and procedure for the "self-represented litigant" and highlighting the difficulty in understanding the law, civil procedure, and the pleading process).

<sup>163</sup> Carroll Seron et al., *The Impact of Legal Counsel On Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001).

<sup>164</sup> See 24 C.F.R. § 982.552(c)(2) (2008) (permitting PHAs to consider "all relevant circumstances;" providing for the option of imposing a bar on an offending household member; and in cases of drug and alcohol abuse considering whether the offending household member has completed a "supervised drug or alcohol rehabilitation program").

<sup>165</sup> *Id.* (advising PHAs to consider a tenant's circumstances but imposing no such obligation on the Section 8 landlord).

<sup>166</sup> 871 N.E.2d 1073 (Mass. 2007). See discussion *supra* at note 93.

<sup>167</sup> 890 A.2d 249 (D.C. 2006). See discussion *supra* at note 93.

<sup>168</sup> *Garcia*, 871 N.E.2d at 1078 (holding that as a result of *Rucker* a local "special circumstances" defense provided by local landlord-tenant law was preempted by federal law); *Scarborough*, 890 A.2d at 258 (holding that a "cure" provision provided under local law was preempted by federal law); see also *Ross v. Broadway Towers*, 228 S.W.3d 113, 121-24 (Tenn. Ct. App. 2006), *cert. denied*, 128 S.Ct. 543 (2007) (holding that the waiver provision of a state landlord-tenant law was preempted by federal law as interpreted in *Rucker*).

brought by a landlord may thus be placed in an intolerable situation, falling into a due process void. As public housing tenants, Section 8 holders are afforded fewer procedural rights than tenants of public housing projects, while the incentives for eviction may prompt a stricter zero-tolerance standard than this latter group would receive. As tenants in a mixed-income rental, they may be denied the same substantive rights as their neighbors since they are unable to call upon the equitable defenses guaranteed by local landlord-tenant law.

## V. CLOSING THE GAP: REMEDIES FOR THE DUE PROCESS VOID

### A. Congressional Action

Given the breadth of the problem, the due process void for Section 8 tenants may best be remedied on the national level through congressional action. The required lease language permitting termination for criminal activity, already modified under the Cranston-Gonzalez Act and then the HOPE Act,<sup>169</sup> could be further changed to include mandatory evaluation of a tenant's individual circumstances as well as alternatives to eviction.

This type of legislative reform has already been advocated in order to standardize evictions brought by PHAs under the One Strike policy and reduce arbitrary and capricious enforcement.<sup>170</sup> There are, however, significant problems with implementing these reforms in the Section 8 program. As noted, the Section 8 program already requires landlords to fill out complex paperwork and submit to yearly inspections.<sup>171</sup> These "cumbersome" requirements have produced a chilling effect on landlord participation in Section 8.<sup>172</sup> Adding more procedural hurdles for evictions may amplify this chilling effect, hurting the viability of the Section 8 program itself.

Still, even if such a balance of considerations were taken into effect, there is no guarantee that a landlord's preference would not skew the results

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<sup>169</sup> See notes 66 and 69 and accompanying text.

<sup>170</sup> See Bryon Cho, Note, *Getting Evicted for the Actions of Others: A Proposed Amendment to the Anti-Drug Abuse Act*, 44 B.C. L. REV. 1229, 1232 (2003) (proposing that Congress amend § 1437d(l)(6) to require that public housing tenants receive "actual or constructive notice" based on objective standards of a non-household member's criminal activities before being evicted); Stinson, *supra* note 68, at 478 (recommending that Congress amend this statute to acknowledge the unique circumstances present in each development and encourage PHAs to tailor "crime-reduction solutions" accordingly).

<sup>171</sup> Before a unit can be approved for lease under Section 8, it must undergo a thorough inspection by the local PHA to ensure that it meets the required "Housing Quality Standards." Once the unit is approved for the program, annual inspections continue for the entirety of the landlord's participation period. If a landlord fails to meet the standards and does not correct the problem within an allotted timeframe, housing assistance payments are promptly terminated. U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER GUIDEBOOK, Ch. 10, 32-34, available at <http://www.hud.gov/offices/adm/hudclips/guidebooks/7420.10G/7420g10GUID.pdf>.

<sup>172</sup> See Fernandez, *supra* note 110 (discussing landlords who find the program "overly cumbersome").

in favor of eviction. Without an impartial officer to evaluate each case, as used by PHAs in grievance hearings, such a procedural change might be meaningless. If the due process problems for Section 8 tenants cannot be addressed on the national level, perhaps they should be remedied at the most local level—by the PHAs themselves.

### *B. Action by Local PHAs*

Local PHAs are entitled to supplement HUD-mandated eviction guidelines and could, in theory, require that Section 8 landlords in their jurisdiction weigh a tenant's circumstances and explore alternatives before initiating eviction proceedings.<sup>173</sup> In the alternative, a PHA could require that a landlord first refer terminations to its own grievance hearing officers so that they may consider individual circumstances and explore alternatives to eviction. There are several problems with either approach.

Turning to the first approach, the balance of circumstances test has been rejected by some state courts and may therefore be overruled by these decisions.<sup>174</sup> Further, it would be difficult to appraise the merits of any evaluation undertaken by a biased landlord. Turning to the second approach, requiring that all Section 8 evictions first go through this procedure might clog the PHA grievance panels, particularly in large cities. This could result in hurried proceedings or long waits for eviction. It would be understandable if a landlord who was justified in his eviction found this process robs *him* of his due process right to a timely hearing, particularly given the alternative to evict through local court proceedings. Either approach might also conflict with HUD's guidelines, which vest ultimate authority to evict in the landlord's hands, thus potentially precluding any attempt by a PHA to hamper his efforts.

Yet, where carrots have failed, sticks may prevail. Just as HUD gave PHAs discretion to disfavor Section 8 landlords who failed to implement One Strike evictions,<sup>175</sup> a local PHA could deny participation to Section 8 landlords who fail to properly evaluate individual circumstances or explore alternatives to eviction. Such a proposal would be best implemented by the local PHA, which can interact readily with the surrounding community to determine whether a landlord is acting fairly or in an arbitrary or capricious fashion.

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<sup>173</sup> See *supra* note 164 and accompanying text.

<sup>174</sup> See, e.g., *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments*, 890 A.2d 249, 259 (D.C. 2006) (rejecting any requirement that a landlord consider "any particular factors before instituting eviction proceedings").

<sup>175</sup> See *supra* note 118 and accompanying text.

### C. Judicial Intervention

The best and most immediate solution to the due process void may lie with the judiciary. Legislative and administrative reforms are difficult to effect, requiring years of lobbying and the right configuration of political parties in power.<sup>176</sup> Therefore, current Section 8 tenants faced with imminent eviction might have no choice but to fight eviction in court. However, several state courts have given these tenants some reason to be optimistic.

While courts applying *Rucker* have taken away innocent tenant defenses, they have left open the possibility that an evicting party asserting *Rucker*'s no-fault standard may face heightened judicial scrutiny. In *Boston Housing Authority v. Garcia*, Massachusetts's highest court reserved the possibility of evaluating a PHA's "cause" determination.<sup>177</sup> The court analogized to *Wojcik v. Lynn Housing Authority*, a Section 8 eviction case brought by a PHA, which held that termination must include an opportunity for the tenant to present evidence "that might move the decision maker to impose a penalty less severe than termination."<sup>178</sup> *Garcia* also relied on the Ninth Circuit's dicta in *Rucker v. Davis* on the discretion under which PHAs "should undertake a case-by-case analysis before proceeding with eviction."<sup>179</sup> Altogether, the *Garcia* holding suggests that any judicial review of a no-fault eviction in Massachusetts must scrutinize the decision-making process of the party seeking eviction, presumably including landlords.

A similar approach was adopted in *Bennington Housing Authority v. Bush*.<sup>180</sup> There, the Vermont Supreme Court found that a local PHA had abused its discretion by failing to consider alternatives to eviction after a background check revealed that one of its tenant's household members had a criminal record which was not disclosed on the tenant's housing application.<sup>181</sup> The court stressed that the housing regulations were "not so black and white" as to necessarily warrant eviction, noting that the PHA could have given consideration to the offending household member's own offer to leave the residence permanently, or could have simply "overlook[ed]" the offending household member's drug history if he was rehabilitated.<sup>182</sup> The court then concluded that "any reasonable approach" to a One Strike evic-

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<sup>176</sup> The One Strike policy itself is a good example. Though the tools for no-fault evictions for drug activity had been given to PHAs in the Anti-Drug Abuse Act of 1988, it took another eight years before no-fault evictions became preferred HUD policy in those cases. See Harris, *supra* note 62.

<sup>177</sup> 871 N.E.2d 1073, 1080 (Mass. 2007) (observing that "Massachusetts law still requires 'cause' before a public housing tenancy may be terminated, and a housing authority's decision to terminate a tenant's lease is not beyond challenge in the Housing Court").

<sup>178</sup> *Id.* (quoting *Wojcik v. Lynn Hous. Auth.*, 845 N.E.2d 1160, 1167 (Mass. App. Ct. 2006)).

<sup>179</sup> *Id.* at 1079 n.14 (quoting *Rucker v. Davis*, 203 F.3d 627, 639-640 (9th Cir. 2000), *rev'd sub nom.* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002)).

<sup>180</sup> 933 A.2d 207 (Vt. 2007).

<sup>181</sup> *Id.* at 213.

<sup>182</sup> *Id.*

tion “should have included a balancing . . . of the current situation and tenant history against a failure to include information in the original application.”<sup>183</sup>

If adopted widely, the approach of the Massachusetts and Vermont courts could significantly reduce abuse of discretion by landlords by ensuring that “the opportunity to be heard [is] tailored to the capacities and *circumstances* of those who are to be heard.”<sup>184</sup> This due process standard enunciated in *Goldberg v. Kelly* still applies to cases involving the termination of essential welfare benefits such as housing under Section 8.<sup>185</sup> A modern interpretation of the standard would consider the circumstances, not just of the tenant and her reduced opportunity for a fair hearing post-*Rucker*, but also those of the evicting party who may have ulterior motives.

## VI. CONCLUSION

The *Rucker* decision has proven controversial, sparking intense debate and enduring confusion. No-fault evictions from public housing projects for criminal activity—particularly drug-related criminal activity—have been consistently enforced, but more interestingly, One Strike evictions have also been upheld in the context of other federally subsidized housing programs, such as the Section 8 housing choice voucher program. Few courts, however, have considered the differences between the position of a private landlord and a public housing authority invoking *Rucker*. These differences are significant. Public housing authorities are subject to public oversight both from the communities they serve and the government agency that regulates them. The private landlord, on the other hand, may not have the subsidized tenant’s interest in mind and is relatively unencumbered when applying *Rucker*’s no-fault standard. Extending *Rucker*’s discretion to Section 8 landlords becomes especially dangerous when another holding from *Rucker* has been applied to prevent Section 8 tenants from asserting certain state-law defenses otherwise available to private renters in the lan-

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<sup>183</sup> *Id.* This view, however, was vigorously opposed in two dissenting opinions arguing that the level of inquiry into PHA decisionmaking was “just second-guessing” that was not required by federal regulations enacting the One Strike policy. *Id.* at 214 (Burgess, J., dissenting). See also *id.* at 221–24 (Dooley, J., dissenting) (“The majority is essentially warring with BHA’s adoption of a national policy to make public housing projects safe and secure for residents by screening out those with criminal backgrounds.”).

<sup>184</sup> *Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970) (emphasis added). There remains, however, the distinct possibility that the holdings in Massachusetts and Vermont could be overturned. Alternatively, if other states adopt contrary positions, the Supreme Court might take notice of a split and potentially further entrench the hard-line *Rucker* position. The Supreme Court, for its part, recently turned down an opportunity to reexamine its holding in *Rucker*, denying certiorari in *Ross v. Broadway Towers, Inc.* as to the question of whether equitable defenses are preempted by the Anti-Drug Abuse Act of 1988. See 228 S.W.3d 113 (Tenn. Ct. App. 2006), *cert. denied*, 128 S.Ct. 543 (2007).

<sup>185</sup> See, e.g., *Brantley v. W. Valley City Hous. Auth.*, No. 2:08CV573DAK, 2009 WL 301820, at \*3 (D. Utah Feb. 04, 2009) (applying *Goldberg v. Kelly*’s holding as to the requirements of due process in the Section 8 housing context).

dlord–tenant disputes. These tenants are thereby denied both the procedural due process rights promised public housing residents and the substantive rights afforded private renters.

Though legislative reform on the national level and piecemeal reform efforts from local public housing authorities might be the best long-term solution, the hard blow of *Rucker* should first be softened by the courts. Close scrutiny of the precise circumstances behind a landlord’s eviction of a Section 8 tenant would help curb potential abuse of discretion by landlords and ensure that tenants are not unnecessarily evicted because of unforeseeable or unpreventable third party misconduct. If a landlord has abused his discretion, a court should reinstate the tenant, just as it can when a PHA abuses its discretion to evict.

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