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## Separating the Criminals from the Community: Procedural Remedies for “Innocent Owners” in Public Housing Authorities

Sarah N. Kelly  
*New York Law School*

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SARAH N. KELLY

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Housing Authorities

ABOUT THE AUTHOR: Sarah N. Kelly earned her J.D. from New York Law School in 2006.

## INTRODUCTION

Eastwood Homes is a public housing complex in upstate New York with 134 units operated by the Syracuse Housing Authority.<sup>1</sup> In May 1995, Ann Boule was living in the Eastwood Homes complex with her two young children.<sup>2</sup> She worked at a local bakery to support her family,<sup>3</sup> but a last-minute child-care emergency ended up costing Boule her home.<sup>4</sup> Instead of risking her job and missing work, Boule asked Marvin Troutman, the father of one of her children, to baby-sit.<sup>5</sup> He had watched her children on a number of other occasions without incident.<sup>6</sup> But this time Troutman, unknown to Boule, invited two acquaintances into her apartment.<sup>7</sup> The three men began selling illegal drugs from the apartment, and while Boule was still at work, they were arrested for possessing and selling drugs.<sup>8</sup> In 1999, after a three-year legal struggle, she was evicted from her home for allowing the drug-related activity to occur in her apartment.<sup>9</sup> The Fourth Department found that the Syracuse Housing Authority had “good cause” to evict, despite finding that Boule was unaware of the illegal drug activity occurring in her apartment and that she was ignorant of Troutman’s criminal record.<sup>10</sup>

Boule is representative of the average public housing tenant. The vast majority of families living in public housing are either single women or single women with children; almost half of public housing tenants are single parents.<sup>11</sup> The socio-economic realities of these women’s situations, where men float in and out of the family sphere and young children often grow up to be wayward teen-

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1. N.Y. STATE DIV. OF HOUS. & COMMUNITY RENEWAL, NEW YORK STATE ACTION PLAN PROGRAM YEAR 2005: AS APPROVED BY HUD DEC. 29, 2004, *available at* <http://www.dhcr.state.ny.us/pol/pubs/html/actplan05F.htm>.
  2. *Syracuse Hous. Auth. v. Boule*, 676 N.Y.S.2d 741, 741 (Sup. Ct. Onondaga County 1998), *rev'd*, 701 N.Y.S.2d 541 (4th Dep’t 1999); Jim O’Hara, *Syracuse Eviction is Federal Test Case as “One Strike and You’re Out” Policy Against Drug-Dealing in Public Housing Becomes the First Court Case of its Kind in the State*, POST-STANDARD, Apr. 16, 1998, at A1, *available at* <http://www.syracuse.com/poststandard.htm>.
  3. O’Hara, *supra* note 2.
  4. *See Boule*, 701 N.Y.S.2d at 541–42; *see also* O’Hara, *supra* note 2.
  5. *Boule*, 676 N.Y.S.2d at 741.
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *Boule*, 701 N.Y.S.2d at 541–42.
  10. *Boule*, 658 N.Y.S.2d 776, 777 (City Ct. 1996) (“The following further facts are stipulated: . . . respondent was unaware of the presence or sale of the drugs on the premises; respondent was not in any way involved in the possession or sale of the drugs; respondent was not criminally charged regarding this incident; respondent believed that Mr. Troutman did not have a criminal record.”).
  11. U.S. DEP’T OF HOUS. & URBAN DEV., A PICTURE OF SUBSIDIZED HOUSEHOLDS: GENERAL DESCRIPTION OF THE DATA AND BIBLIOGRAPHY (2006), *available at* <http://www.huduser.org/datasets/assthsq/statedata98/descript.html>. Forty-one percent of families living in public housing or some other form of federally subsidized housing are single parent households and seventy-nine percent of the families living in federally subsidized housing have females at the head of their households. *Id.*

agers, have informed the policy decisions of the public housing authorities and lawmakers as both groups have struggled to create safe housing for the poor.<sup>12</sup> For decades, public housing has been plagued by problems as seemingly benign as poor maintenance and repair records, to more life-threatening problems such as the explosion of drug use and drug trafficking.<sup>13</sup>

In an attempt to address the deteriorating conditions of public housing, Congress passed legislation that allowed local housing authorities to evict tenants if they, or anyone under their control, engaged in drug-related activity<sup>14</sup> on or off the premises.<sup>15</sup> The One Strike and You're Out policy ("One Strike policy")<sup>16</sup> explicitly encourages Public Housing Authorities ("PHAs") to evict any tenant who engaged in "drug-related activity" — i.e., anyone convicted or charged with manufacturing, selling, distributing, or possessing illegal drugs. The U.S. Department of Housing and Urban Development ("HUD") has gone one step further and tied the federal funding of PHAs to the number of One Strike evictions PHAs pursue each year.<sup>17</sup> In its effort to rid the public housing community of drugs, the federal government has given local PHAs an incentive to pursue evictions in any and all incidents involving drug-related activity, regardless of the circumstances. These policies have exacted an especially harsh toll on community members who, like Boule, unknowingly or unwittingly allow drugs into their homes. Housing authorities from across the country have repeatedly failed to use their discretion in favor of innocent tenants and have pursued evictions in numerous cases where the evidence showed that the tenant attempted to keep drugs and crime out of his or her home and community.<sup>18</sup>

The federal government has long had the power to confiscate property such as cars involved in drug-related crimes.<sup>19</sup> Previously, however, the statutory scheme concerning PHAs allowed an exception for those owners who did not have

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12. See generally ADRIAN NICOLE LEBLANC, *RANDOM FAMILY: LOVE, DRUGS, TROUBLE, AND COMING OF AGE IN THE BRONX* (2003) (providing a powerful illustration of the American ghetto).

13. *Id.*

14. 42 U.S.C. § 1437d(l)(9) (2000). "The term 'drug-related criminal activity' means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as such term is defined in section 802 of Title 21)."

15. See 42 U.S.C. § 1437d(k) (2000).

16. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF PUBLIC AND INDIAN HOUSING, "ONE STRIKE AND YOU'RE OUT" SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (HAs), NOTICE PIH 96-16 (HA) (1996), available at <http://www.hud.gov/utilities/intercept.cfm?/offices/pih/publications/notices/96/pih96-16.pdf>.

17. *Rucker v. Davis*, 237 F.3d 1113, 1117 (2001) (citing John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects*, WASH. POST, Mar. 29, 1996, at section A), *rev'd*, U.S. Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

18. See, e.g., Brief for the Coalition to Protect Public Housing et al. as Amici Curiae Supporting Respondents, U.S. Dep't of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781), 2001 WL 1684562.

19. See 21 U.S.C. § 881(a)(4) (2000).

knowledge of or did not consent to the illegal activity.<sup>20</sup> This exception is commonly called an “innocent owners” exception or an “innocent owners” defense.<sup>21</sup> Between 1988 and 2001, the defense was available to public housing tenants facing eviction for the drug-related activity of others. But over the last several years, HUD’s One Strike policy and the U.S. Supreme Court’s decision in *Department of Housing and Urban Development v. Rucker*<sup>22</sup> effectively eliminated the innocent owners exception for public housing tenants.<sup>23</sup> Without this defense, courts have struggled to separate law abiding tenants from drug dealers and users who make public housing a dangerous environment.

This Note proposes that there are three procedural devices that, if adopted, would honor the intent of the One Strike policy, but allow courts to separate the law abiding tenants from the drug users and dealers who pose a threat to the community. Part II of this Note provides an overview of public housing and the influence drugs have had on the institution. Part III discusses the *Rucker* decision, provides an overview of the eviction process, and discusses briefly the problems tenants face when attempting to challenge their evictions. Part IV argues that lawmakers and the courts should adopt three procedural devices to improve the eviction process. First, the courts and agencies should automatically provide pre-eviction hearings to tenants. Second, courts and agencies should employ a more exacting standard of review for eviction proceedings in the limited cases where drug-related activity is the basis for the termination. Third, lawmakers should allow tenants to recover reasonable attorneys’ fees if they successfully avoid eviction on the merits of their case.

## II. PUBLIC HOUSING, DRUGS, AND THE SHIFTING DRUG POLICY

### A. Public Housing

The United States has historically neglected and ghettoized its poorest citizens. Overcrowded tenements, deteriorating property, and increased criminal activity were a consistent problem for America’s growing cities during the first half of the twentieth century.<sup>24</sup> By 1949, the slums of America’s cities had become

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20. See 21 U.S.C. § 881(a)(6) (2000).

21. Beverly L. Jacklin, *Who is Exempt from Forfeiture of Drug Proceeds Under “Innocent Owner” Provision of 21 U.S.C.A. § 881(a)(6)*, 109 A.L.R. Fed. 322 (2004).

22. 535 U.S. 125 (2002).

23. For purposes of this Note, “public housing tenant” is defined as an individual or family living in a building financed under the National Housing Act. Although much of the law overlaps, this Note does not purport to discuss the law as it applies to Section 8 leases or tenants.

24. In New York City for instance, the first “model tenements” were built in the mid-1800s in slums such as the Five Points by private individuals seeking to improve the lives of the city’s poor. Michael Markowitz, *Public Housing*, *GOHAM GAZETTE*, Feb. 17, 2003, available at <http://www.gothamgazette.com>. Jacob A. Riis’s *How the Other Half Lives*, published in 1890, states:

The situation was summed up by the Society for the Improvement of the Condition of the Poor in these words: “Crazy old buildings, crowded rear tenements in filthy yards, dark, damp basements,

such a problem that Congress was compelled to pass the Public Housing Act of 1949 (the “Act”).<sup>25</sup> In passing the Act, Congress’s stated purpose was to create jobs and to eliminate the growing slums.<sup>26</sup> Title I of the Act (“Title I”) created the Urban Renewal Program, also dubbed the Slum Clearance Program.<sup>27</sup> Cities such as New York, Philadelphia, Chicago, and St. Louis spent federal funds demolishing arguably vibrant neighborhoods and replaced them with generic high-rise apartment buildings.<sup>28</sup> These new buildings ghettoized families with a “naive reliance on physical dwellings to carry out social goals.”<sup>29</sup> “During the 1950s, some 588,000 units of public housing were started.”<sup>30</sup> But in the 1960s, Title I had been “discredited,” and by the 1970s the program had become viewed as an “anathema,” in part because the law concentrated only on providing shelter and not on solving the social or community problems associated with poverty.<sup>31</sup> “Many observers believed that [the housing units built as a result of Title I] were fostering the slums and blight they were meant to eradicate.”<sup>32</sup>

Today, public housing is made available to residents of the United States based primarily on family income relative to the size of the family, the age of the family members, and the immigrant status of the applicants.<sup>33</sup> HUD is the agency responsible for administering federal funding to state and local PHAs.<sup>34</sup> Across the country, HUD oversees 1.12 million housing units in 14,000 develop-

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leaking garrets, shops, outhouses, and stables converted into dwellings, though scarcely fit to shelter brutes, are habitations of thousands of our fellow-beings in the wealthy, Christian city.”

JACOB A. RIIS, *HOW THE OTHER HALF LIVES* 7 (1890). By 1936 New York — through the newly created New York City Housing Authority — built its first public housing units on East 3rd Street near Avenue A in the Lower East Side. Markowitz, *supra*. This public housing complex still exists in the same location today, even as the Lower East Side continues to take steps toward gentrification.

25. See Robert E. Lang & Rebecca R. Sohmer, *Editors' Introduction: Legacy of the Housing Act of 1949: The Past Present and Future of Federal Housing and Urban Policy*, 11 HOUSING POL'Y DEBATE 291 (2000).
26. Public Housing Act of 1949, Pub. L. No. 81-171, ch. 338, 63 Stat. 413 (1949) (“To establish a national housing objective and the policy to be followed in the attainment thereof, to provide Federal aid to assist slum-clearance projects and low-rent public housing projects initiated by local agencies, to provide for financial assistance by the Secretary of Agriculture for farm housing, and other purposes.”).
27. *Id.*; see also U.S. Dep’t of Hous. & Dev., HUD Historical Background, <http://www.hud.gov/offices/adm/about/admguid/history.cfm> (last visited Jan. 18, 2007).
28. Markowitz, *supra* note 24; Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1999*, 11 HOUSING POL'Y DEBATE 299, 312 (2000).
29. von Hoffman, *supra* note 28, at 312.
30. *Id.* (citing the U.S. Census Bureau).
31. *Id.* at 321–22.
32. *Id.* at 323.
33. U.S. Dep’t of Hous. & Urban Dev., HUD’s Public Housing Program, [www.hud.gov/renting/phprog.cfm](http://www.hud.gov/renting/phprog.cfm) (last visited Jan. 18, 2007).
34. 42 U.S.C. § 1437f (2000).

ments which are managed by approximately 3200 state and local PHAs.<sup>35</sup> Each PHA signs a contract with HUD agreeing to manage their properties or distribute their funds to owners who in turn agree to manage their property in a manner consistent with HUD policies.<sup>36</sup> Every PHA is responsible for ensuring that tenants comply with their lease,<sup>37</sup> determining an appropriate security deposit (if any),<sup>38</sup> establishing appropriate charges for excess utility use,<sup>39</sup> reexamining income according to HUD regulations,<sup>40</sup> transferring families among units,<sup>41</sup> terminating leases,<sup>42</sup> and maintaining their premises.<sup>43</sup>

### B. *Drugs and Public Housing*

Violent crime and drug trafficking has been an ongoing problem for public housing managers. “[D]uring the 1970s and 1980s, the focus of federal housing policy was on providing assistance only to the most distressed households; regulations required public housing authorities to adopt federal preferences in admission requirements so that they were serving only the poorest tenants.”<sup>44</sup> Policies were adopted that forced PHAs to select only the neediest individuals as tenants while, at the same time, other policies effectively drove any lower-middle income individuals out of the projects.<sup>45</sup> For instance, policy changes forced families to pay more in rent each month as their incomes rose.<sup>46</sup> Apartment complexes were often located in inner-city neighborhoods that were isolated, plagued by crime.<sup>47</sup> In other words, such dwellings were undesirable to pretty much anyone that had the means to live elsewhere.<sup>48</sup> To make matters worse, in many cities the hous-

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35. U.S. DEP’T OF HOUS. & URBAN DEV., IN *THE CROSSFIRE: THE IMPACT OF GUN VIOLENCE ON PUBLIC HOUSING COMMUNITIES* (2000), available at <http://www.hud.gov/library/bookshelf18/pressrel/crossfir.pdf>.

36. 42 U.S.C. § 1437b (2000) (setting forth the types of contribution contracts into which HUD is authorized to enter).

37. 24 C.F.R. § 966.4(e)(8) (2006).

38. 24 C.F.R. § 966.4(b)(5) (2006).

39. 24 C.F.R. § 966.4(b)(2) (2006).

40. 24 C.F.R. § 966.4(c) (2006).

41. See Dep’t of Hous. & Urban Dev., HUD’s Public Housing Program, [www.hud.gov/renting/phprog.cfm](http://www.hud.gov/renting/phprog.cfm) (last visited Jan. 18, 2007). Transfers can be for a variety of reasons, including overcrowding, repair and renovation, or requests for transfers. *Id.* See generally 24 C.F.R. § 966.4 (2006).

42. 24 C.F.R. § 966.4(e)(8)(i) (2006). Grounds for eviction are contained in 24 C.F.R. § 966.4(l) (2006).

43. 24 C.F.R. § 966.4(e) (2006).

44. Susan J. Popkin et al., *The Gautreaux Legacy: What Might Mixed-Income and Dispersal Strategies Mean for the Poorest Public Housing Tenants?* 11 HOUSING POL’Y DEBATE 911, 912 (2000).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

ing facilities were poorly managed, had inadequate security, poor maintenance, and problems with drugs and violent crime.<sup>49</sup>

Incidents of violent crime have been particularly vexing to residents and more broadly to the public whose tax dollars fund these residences. In a 1995 article for *Housing Policy Debate*, Vincent Lane discussed the correlation between the low-income housing population and the general population.

Crime rates in many large PHAs are up to three times the citywide average rate. . . . The Research Triangle Institute completed a survey for public housing residents for HUS . . . that revealed the following:

1. Three out of five public housing residents who lived in high-rise, high-density family buildings reported serious crime (e.g. gunfire, burglary, robbery, assault) and was twice the problem as that occurring in other types of housing. . . .
2. The presence of drug dealers was the problem most often reported (48 percent). Gunfire was reported by 42 percent of all residents, and assaults were reported by 39 percent.
3. The fear of crime is widespread in public housing communities. Of respondents living in high-density developments with more than 5,000 units, 41.8 percent are either very or somewhat fearful of being victimized . . . .<sup>50</sup>

Housing leaders, such as Lane, have suggested that PHAs should be able to “screen and promptly evict tenants involved in crime and drugs” as well as provide services targeted “directly at the causes of antisocial behavior.”<sup>51</sup> While prompt eviction of tenants involved in crime and drugs is an attractive solution, identifying who should and should not be allowed to live in public housing is a difficult sorting process because many offenders are dependants or care-givers of law-abiding public housing residents.<sup>52</sup> Unfortunately, the government has tried to do exactly that. The harsh standards that the government uses to separate community members from criminals has lead to the all too common scenario of innocent community members — the very people the government is attempting to protect — being evicted from their homes for the actions of other individuals.<sup>53</sup>

Young families, elderly individuals, and the mentally handicapped are being evicted despite family members’ best efforts to protect their homes and communi-

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49. *Id.*

50. Vincent Lane, *Best Management Practices in U.S. Public Housing*, 6 HOUSING POL’Y DEBATE 867, 882 (1995) (citation omitted).

51. *Id.*

52. See, e.g., *Rucker*, 203 F.3d at 634; Janelle Brown, *Evicting Grandma*, SALON.COM, Apr. 10, 2002, [http://archive.salon.com/mwt/feature/2002/04/10/eviction\\_risk/index.html](http://archive.salon.com/mwt/feature/2002/04/10/eviction_risk/index.html); Shawn G. Kennedy, *Tenants Press for Easier Eviction of Drug Dealers*, N.Y. TIMES, Aug. 15, 1994, at B1.

53. See, e.g., Brief for the Coalition to Protect Public Housing et al. as Amici Curiae Supporting Respondents, *supra* note 18, at 7–27.

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ties from crime.<sup>54</sup> Housing advocates can cite many examples where housing authorities and agency officials have chosen to vigorously pursue the eviction of individuals who are innocent members of the community and as much the victim as any other tenant living in public housing.<sup>55</sup> The situation is not limited to a handful of isolated cases; HUD and local PHAs have made a conscious policy choice to evict members of the public housing community who have even the remotest connection with illegal drug dealing or use. These policies did not come into force overnight, but rather, over the last twenty years, HUD and local housing authorities have slowly increased their crackdown on any and all drug-related activity with seemingly little regard for the circumstances surrounding each family's plight.

### III. ANTI-DRUG ACT, INNOCENT OWNER DEFENSE, AND EVICTION

#### A. *The Anti-Drug Abuse Act of 1988 and the One Strike Policy*

The Anti-Drug Abuse Act of 1988<sup>56</sup> was Congress's earliest attempt to ferret out violent, drug-related criminals living in federally subsidized public housing through legislation.<sup>57</sup> With the passage of the Anti-Drug Abuse Act, Congress required each PHA to include in its lease a provision that allowed the PHA to terminate the tenancy if a tenant, any member of the tenant's household, or a guest engaged in drug-related criminal activity on or off the PHA's premises, or if any other person under the tenant's control engaged in drug-related criminal activity on the premises.<sup>58</sup>

HUD notices from the early 1990s made it clear that the agency interpreted the statute as giving individual PHAs significant discretion when deciding whether to evict a tenant whose household members or guests were involved in drug-related activity.<sup>59</sup> On paper, PHAs were encouraged to use their discretion in deciding whether to evict; HUD regulations suggested that PHAs consider the seriousness of the drug-related activity, the extent of family members' involve-

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54. *Id.* at 3–5.

55. *Id.* For examples of cases where an eviction from public housing was based on the criminal activity of an adult family member despite the best efforts of the family to exclude the family member from the premises at the first sign of criminal activity, see *Heard v. Atlanta Hous. Auth. et al.*, Civ. Act. 1:01-CV-2029-JTC (N.D. Ga. filed Jul. 18, 2001); *Ann Arbor Hous. Comm'n v. Wells*, 618 N.W.2d 43 (Mich. Ct. App. 2000); *Ypsilanti Hous. Comm'n v. O'Day*, 618 N.W.2d 18 (Mich. Ct. App. 2000).

56. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 8 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 21 U.S.C., 22 U.S.C., 27 U.S.C., 28 U.S.C., 31 U.S.C., 39 U.S.C. and 42 U.S.C.).

57. Since 1989 Congress has tweaked the language and redesigned the subsections a couple of times, but the essence of the statute has remained the same. *See* 42 U.S.C. § 1437d(l) (2000) (see United States Code Annotated Historical Notes).

58. 42 U.S.C. § 1437d(l)(6) (2000).

59. *Rucker*, 237 F.3d at 1128 (Sneed, J., dissenting) (citing Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991)).

ment (if any) in the activity, and the effect that an eviction would have on family members not involved in the criminal activity.<sup>60</sup> Further, HUD rules provided that a “PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit.”<sup>61</sup>

On April 12, 1996, President Bill Clinton announced his One Strike policy, which drastically changed HUD’s policy on drug-related evictions.<sup>62</sup> The One Strike policy reiterated HUD’s requirement that PHAs include a provision in their leases that allowed the PHA to evict tenants for drug-related activity engaged in, on, or off the premises by tenants, or members of the tenant’s household or guests, and any such activity engaged in on the premises by any other person under the tenant’s control.<sup>63</sup> More importantly, the One Strike policy encouraged evictions regardless of the circumstances and tied federal funding to increased crime-related evictions.<sup>64</sup> Local housing authorities reacted almost immediately to the announcement of the One Strike policy. According to the ACLU, evictions jumped from 9835 to 19,405 in the six months after the One Strike guidelines were adopted.<sup>65</sup>

### B. *Rejection of Innocent Owner Substantive Defense*

Civil forfeiture has its roots in criminal law and allows the government to confiscate any property — including leaseholds and other real property — which was used or intended to be used in the commission of a drug crime punishable by more than one year in prison.<sup>66</sup> To protect property owners who had no involvement with the commission of drug crimes, Congress statutorily created the “innocent owner” defense which allowed an innocent owner — those individuals with

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60. 24 C.F.R. § 966.4(l)(5)(vii) (2006).

61. 24 C.F.R. § 966.4 (1996).

62. U.S. Dep’t of Hous. & Urban Dev., “*One Strike and You’re Out*” *Screening and Eviction Guidelines for Public Housing Authorities*, Notice PIH 96-16 (Apr. 12, 1996) (“Public housing is a place to live, not a place to deal drugs or to terrorize neighbors. Yet today, some of Americans [sic] public housing communities are under siege by gangs, violent criminals and drug dealers who threaten the safety and welfare of decent responsible tenants.”). For more information on welfare reform, see Gary Burtless & Kent Weaver, *Reinventing Welfare . . . Again; The Latest Version of Reform Needs a Tune-up*, 15 BROOKINGS REV. 26 (1997); Joe Feuerherd, *War on Poverty: New Consensus Promotes Work and ‘Safety Net’ to Help Nation’s Poor*, NAT’L CATH. REP., Aug. 12, 2005, at 4A.

63. 24 C.F.R. §§ 966.4(f)(12)(i)(B), 966.4(l)(5)(i)(B) (2005).

64. See John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects*, WASH. POST, Mar. 29, 1996, at A14. In 1996, Clinton’s One Strike policy added eviction policies to the criteria for evaluating local public housing authorities. PHAs are evaluated on a 100-point scale. High-scoring PHAs are eligible for bonus funds and low-scoring PHAs risk having HUD take over management of the property. See *id.*

65. AM. CIVIL LIBERTIES UNION, COLLATERAL CONSEQUENCES OF THE WAR ON DRUGS 2 (2003), available at <http://www.aclu.org/FilesPDFs/final%20brochure.pdf>.

66. 21 U.S.C. § 881(a)(7) (2000).

no involvement or knowledge of the commission of the crime — to keep property that otherwise would have been confiscated.<sup>67</sup> Creative lawyers for tenants who were threatened with eviction under the One Strike policy used the innocent owner defense to prevent local housing authorities from evicting tenants whose family members or guests were involved in drug-related activity.<sup>68</sup> Tenant lawyers argued that the evictions in these cases were analogous to more traditional civil forfeiture actions, and thus, tenants should be given at least the same protections provided for under the civil forfeiture statute.<sup>69</sup>

This argument was substantially based on the legislative history of the Anti-Drug Abuse Act. When Congress passed the Anti-Drug Abuse Act, which originally required PHAs to include the “drug-related activity” provision in their lease,<sup>70</sup> it also amended the pre-existing civil forfeiture provision that was in the same chapter and subtitle as the Anti-Drug Abuse Act.<sup>71</sup> Tenant lawyers argued that the two statutes were enacted as part of the same statutory scheme to “combat drug abuse in public housing,”<sup>72</sup> and that the revisions amended the civil forfeiture statute to expressly exempt tenants who have no knowledge of the drug-related activity.<sup>73</sup>

For many years, courts across the country held that the required federal lease provision, which PHAs based their evictions on, did not give housing authorities the right to evict innocent owners.<sup>74</sup> In 1998, the Oakland Housing Authority (“OHA”) sought the eviction of four individuals — Pearlie Rucker, Willie Lee, Barbara Hill, and Herman Walker — for the alleged drug-related activity of persons under their control.<sup>75</sup> The OHA sought the eviction of Rucker, 63, because her mentally disabled granddaughter was found in possession of cocaine

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67. Pub. L. No. 106-185, § 2(c)(2) (2000) deleted the language which read “except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owners to have been committed or omitted without the knowledge or consent of that owner.” However, courts have still recognized the innocent owners’ defense as an affirmative defense to civil forfeiture under 42 U.S.C. § 1437(d). See *United States v. 16328 South 43rd East Ave., Bixby, Tulsa County, Okla.*, 275 F.3d 1281 (2002) (holding that an innocent owner defense is an affirmative defense and the burden is on the party raising the defense, and not the government, to prove that the owner had no knowledge of the illegal activity).

68. Answer Brief for Plaintiff–Appellees at 34–35, *Rucker v. Davis*, Nos., 98-16322, 98-16542 (9th Cir. 1998), 1998 WL 34082321.

69. *Id.* at 34.

70. See discussion *supra* Part III.A.

71. *Rucker*, 535 U.S. at 132.

72. *Rucker*, 237 F.3d at 1121.

73. *Id.* at 1132.

74. See, e.g., *Rucker*, 237 F.3d at 1113; *Boule*, 701 N.Y.S. 2d at 541.

75. *Rucker*, 237 F.3d at 1117. None of the persons under the control of these tenants were convicted of drug-related criminal activity. Brief for Plaintiff–Appellees at 1, *Rucker v. Davis*, Nos., 98-16322, 98-16542 (9th Cir. 1998), 1998 WL 34082321.

three blocks from the apartment they shared.<sup>76</sup> Lee, 71, had been a public housing tenant for over twenty-five years and Hill, 63, had been a public housing tenant for over thirty years.<sup>77</sup> Each of them lived with their respective grandsons in the same apartment complex.<sup>78</sup> The OHA sought to evict them because their grandsons were caught smoking marijuana in the parking lot of the apartment complex together.<sup>79</sup> Walker, 75, was disabled, incapable of living alone, and required an in-home caregiver.<sup>80</sup> On three separate instances, OHA found Walker's caregiver and two guests with cocaine in Walker's apartment; each time OHA notified Walker that he was in violation of his lease.<sup>81</sup> In addition, with the third notice, OHA terminated Walker's lease and started an unlawful detainer action, after which Walker fired his caregiver.<sup>82</sup> Like many tenants facing eviction, their lawyers argued that their clients had no knowledge of the drug-related activity and asked that they be spared from eviction based on the innocent owner defense.<sup>83</sup>

In the lower courts, their cases were consolidated into *Rucker v. Davis*.<sup>84</sup> In 2001, the Ninth Circuit Court of Appeals found in favor of the tenants, holding that the civil-forfeiture provision should be a permissible affirmative defense available to public housing tenants facing eviction for drug-related activity.<sup>85</sup> The Ninth Circuit found the plain language of the statute was ambiguous as to whether Congress intended to allow public housing tenants to raise the innocent owner defense.<sup>86</sup> Following established rules of interpretation, the court turned to legislative history to interpret the statute.<sup>87</sup> Based on the legislative history of the Anti-Drug Abuse Act, the Ninth Circuit found that Congress intended the innocent owner defense to apply to public housing tenants.<sup>88</sup>

HUD appealed to the Supreme Court. In 2002, in a unanimous 8-0 decision<sup>89</sup> the Court found that the four elderly tenants, none of whom used or were

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76. *Rucker*, 237 F.3d at 1117.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Brief for Plaintiff-Appellees at 1, *Rucker v. Davis*, Nos., 98-16322, 98-16542 (9th Cir. 1998), 1998 WL 34082321.

84. *Rucker*, 237 F.3d at 1113.

85. *Id.*

86. *Id.* at 1119-20.

87. *Id.* at 1119, 1123; *see* *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

88. *Rucker*, 237 F.3d at 1121-22.

89. Justice Stephen G. Breyer did not participate in this case because his brother, Judge Charles R. Breyer of the Federal District Court in San Francisco, granted an injunction to the plaintiffs in 1998 as the case

## SEPARATING THE CRIMINALS FROM THE COMMUNITY

personally involved in any drug-related activity, should be evicted under the so-called One Strike statute which was codified at 42 U.S.C. § 1437(d)(1)(6).<sup>90</sup> The Court, applying the “*Chevron* Two Step,”<sup>91</sup> held that the One Strike statute was an unambiguous statute that granted the PHAs the power to evict tenants from their properties for drug-related activity.<sup>92</sup> The Court wrote that the statute:

unambiguously requires lease terms that vest local public housing authorities with discretion to evict tenants for drug related activity of household members and guests whether or not the tenant knew, or should have known about the activity . . . *any* drug related activity engaged in by the specified persons is grounds for termination not just drug related activity that the tenant knew, or should have known about.<sup>93</sup>

The Court found that the inclusion of an innocent owner defense in the civil forfeiture statute illustrated that Congress was aware of how to include an innocent owner defense if it wished.<sup>94</sup> The fact that Congress amended the civil forfeiture portion of the statute to explicitly include leaseholds led the Court to give greater weight to the fact that Congress did not include an innocent owner defense for public housing tenants.<sup>95</sup>

The full effect of the Court’s decisions still remains to be seen. Federal regulations permit local housing authorities to use their discretion when considering whether to evict a tenant.<sup>96</sup> In *Rucker*, the late Chief Justice Rehnquist placed a

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was making its way to the Supreme Court. Linda Greenhouse, *Justices Rule Drug-Eviction Law Is Fair*, N.Y. TIMES, Mar. 27, 2002, at A20.

90. *Rucker*, 535 U.S. at 125.

91. Prof. Michael Sinclair explains that *Chevron* requires a court to first decide whether the statute as promulgated by Congress is ambiguous. If the statute is unambiguous, both the agency and the court must apply the statute in accordance with its unambiguous meaning. If the statute is ambiguous, then the court may look to congressional intent and legislative history and must defer to the agency interpretation unless “arbitrary and capricious.” In this case, the Court found that the statute was not ambiguous and thus had no reason to proceed to Step Two.

92. *Rucker*, 535 U.S. at 125.

93. *Id.* at 130–31. Under the “*Chevron* Two-Step,” if a statute’s meaning is clear on the face of the statute, then the agency and the court is bound by the “plain meaning” of the statute. *Chevron*, 467 U.S. at 842–43.

94. *Rucker*, 535 U.S. at 130–31.

It is entirely reasonable to think that the government, when seeking to transfer private property to itself in a forfeiture proceeding should be subject to an “innocent owner defense” while it should not be when acting as a landlord in a public housing project. The forfeiture provision shows that Congress knew exactly how to provide an “innocent owner” defense. It did not provide one in § 1437d(1)(6).

*Id.*

95. *See id.* The Court also made a point to distinguish between the government’s role as a landlord of a public housing project and the government’s role when it was confiscating property pursuant to a civil forfeiture statute. *Id.*

96. Public Housing Lease and Grievance Procedure, 24 C.F.R. §§ 966.4(1)(5)(vii)(B)–(D) (2004).

significant amount of weight on PHAs' discretion in eviction proceedings to justify the Court's decision. He found that the Court's interpretation of the One Strike statute was permissible because the local housing authorities are not *required* to evict anyone.<sup>97</sup> Rehnquist emphasized the PHAs' discretionary power and ability to take into account mitigating and exacerbating circumstances, stating that PHAs should consider the amount of criminal drug related violent crime, the seriousness of the underlying criminal activity, and the extent to which, if any, the tenant has taken steps to prevent or mitigate the criminal activity.<sup>98</sup> Since *Rucker* was decided, HUD has not taken a clear position on the extent to which local housing authorities should exercise their discretionary powers. On one hand, HUD has encouraged PHAs to take into account the potentially mitigating factors outlined by Rehnquist in *Rucker* and to make full use of their discretionary powers.<sup>99</sup> On the other hand, HUD has also authorized PHAs to "adopt blanket, no-exception policies pursuing all possible criminal activity-related evictions and termination without considering any mitigating circumstances."<sup>100</sup> Further, recent amendments to HUD regulations provides that the "PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines that the covered person has engaged in the criminal activity regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction."<sup>101</sup>

Prior to *Rucker*, housing advocates argued that many PHAs did not use their discretionary power in all appropriate circumstances and the financial incentives, which encourage PHAs to pursue One Strike evictions, are still in place.<sup>102</sup> Housing regulations, however, do prohibit a PHA from acting arbi-

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97. *Rucker*, 535 U.S. at 133–34.

98. *Id.*

99. See Anne C. Fleming, Note, *Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing After HUD v. Rucker*, 40 HARV. C.R.-C.L. L. REV. 197, 206 n.59 (2005). Fleming cites to a Letter from Michael M. Liu, Assistant Secretary of HUD to Public Housing Directors (June 6, 2002), available at <http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf> ("The Secretary and I urge you to consider such [mitigating] factors and to balance them against the competing policy interests that support the eviction of the entire household.") and a Letter from Mel Martinez, HUD Secretary, to Public Housing Directors (Apr. 6, 2002), available at <http://www.nhlp.org/html/pub>.

100. See Fleming, *supra* note 99, at 207 (citing a letter from Carole W. Wilson, Associate General Counsel for Litigation, HUD, to Charles J. Macellaro, Attorney for Yonkers, N.Y. Housing Authority 5 (Aug. 15, 2002), available at <http://www.hud.gov/offices/pih/regs/rucker15aug2002.pdf> ("There is no legal authority for the proposition that a PHA cannot adopt a policy of maximum deterrence pursuant to which every violation of the lease provision required by Section 6(1)(6) results in lease termination and household-wide eviction.")). As Fleming points out in her Note, the *Rucker* Court did not address the permissibility of a PHA adopting a blanket policy. *Id.*

101. 24 C.F.R. § 966.4(l)(5)(iii)(A) (2006).

102. Brief for the Coalition to Protect Public Housing et al. as Amici Curiae Supporting Respondents, *supra* note 18.

trarily when terminating leases; in most cases it cannot evict public housing tenants simply by giving notice of its desire to terminate a lease but must advise tenants of their rights.<sup>103</sup> The government cannot constitutionally deprive a tenant of his or her tenancy without affording the tenant adequate procedural safeguards.<sup>104</sup>

*C. Eviction from Public Housing*<sup>105</sup>

When a PHA seeks the eviction of a tenant for the drug-related activity of the tenant or those under his or her control, the PHA can proceed either judicially or through an administrative process.<sup>106</sup> As a general matter, HUD requires that before a PHA can pursue an eviction, a tenant must be given access to the PHA's grievance process.<sup>107</sup> In most circumstances, PHAs cannot "waive" the extensive administrative grievance procedures required by 42 U.S.C. § 1437d(k) and HUD regulations.<sup>108</sup> However, in certain jurisdictions HUD has issued a "due process determination," stating that the laws of that jurisdiction provide tenants with the essential elements of due process.<sup>109</sup> In these jurisdictions, PHAs may pursue certain types of evictions — including drug-related evictions — without giving the tenant access to agency grievance procedures.<sup>110</sup> Where HUD has *not* issued a due process determination, a PHA must first pursue eviction via the administrative process, which includes the opportunity for a pre-eviction administrative hearing before pursuing an eviction in court.<sup>111</sup> On the other hand, if HUD has issued a due process determination, the eviction process is accelerated and a PHA may evict a tenant by following the state's judicial eviction process.

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103. 24 C.F.R. § 966.4(l)(3) (2006); *see also* Mary Babb Morris, *Public Housing and Urban Renewal*, 87 N.Y. JUR. 2D *Public Housing and Urban Renewal* § 44 (2005).

104. Martin J. McMahon, *Tenants' Procedural Rights Prior to Eviction or Termination of Benefits Under § 8 of Housing Act of 1937*, 81 A.L.R. FED. 844 § 2 (1987).

105. While some of the law discussed herein is applicable to the eviction or termination of benefits under Section 8 of the Housing Act of 1937, 42 U.S.C. § 1437f (2000), I have limited my discussion to actions against or by tenants in federally funded housing projects administered by city or state housing authorities.

106. 24 C.F.R. § 966.51(a) (2006).

107. *Id.*

108. 42 U.S.C. § 1437d(k) (2000); 24 C.F.R. § 966.51(a) (2006).

109. 42 U.S.C. § 1437d(k); 24 C.F.R. § 966.51(a)(2)(i) (2006); *see also* Hous. Auth. of Jersey City v. Jackson, 749 F. Supp. 622 (1990); Skinner v. Boston Hous. Auth., 690 F. Supp. 109 (1988), *rev'd*, 873 F.2d 1433 (1st Cir. 1989).

110. 24 C.F.R. § 966.51(a)(2)(i) (2006).

111. 24 C.F.R. § 966.51 (2006); *see also* 24 C.F.R. § 966.55 (2006) (describing grievance procedures).

1. *Eviction under HUD's Grievance  
Procedures and Requirements*

HUD regulations require each PHA to have grievance policies and procedures in place clearly delineating what must be included in each PHA's grievance policy.<sup>112</sup> HUD regulations permit local housing authorities to adopt an expedited procedure for any "grievance"<sup>113</sup> concerning the eviction or termination of a tenancy based on drug-related criminal activity on or near the housing premises.<sup>114</sup> The expedited grievance process may include a hearing if the tenant submits a request for a hearing within the time specified by the PHA.<sup>115</sup> The request must be submitted in writing and must specify the reason(s) for the grievance as well as the action or relief sought.<sup>116</sup> If a tenant does not submit such a request for a hearing, the agency can go ahead and proceed with a default determination without holding a hearing or otherwise hearing the tenant's side of the story and that determination may be final.<sup>117</sup> The tenant may file a request to vacate the determination of the agency, but if the tenant fails to take this action, he or she can be evicted from public housing without ever participating, appearing, or discussing the determination with agency officials.<sup>118</sup>

This does not mean that state court eviction proceedings can be completely circumvented. If the tenant chooses to appeal the PHA's decision, it is reviewed by the courts.<sup>119</sup> The courts generally defer to the PHA's decision unless the termination process was arbitrary and capricious, an abuse of discretion, or un-

112. 24 C.F.R. § 966.51 (2006) ("The purpose of this subpart is to set forth the requirements, standards and criteria for a grievance procedure to be established and implemented by public housing agencies (PHAs) to assure that a PHA tenant is afforded an opportunity for a hearing if the tenant disputes within a reasonable time any PHA action or failure to act involving the tenant's lease with the PHA or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status."). As one may imagine, actual public housing grievance procedures can vary. For the purposes of this Note, I will only focus on HUD's rules and regulations as they represent the minimum due process that a PHA is required to provide under federal law.

113. 24 C.F.R. § 966.53(a) (2006) ("Grievance shall mean any dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status.").

114. 24 C.F.R. § 966.55(g) (2006). The regulations provide that:

- (1) The PHA may establish an expedited grievance procedure for any grievance concerning a termination of tenancy or eviction that involves:
  - (i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
  - (ii) Any drug-related criminal activity on or near such premises.
- (2) In the case of a grievance under the expedited grievance procedure, § 966.54 (informal settlement of grievances) is not applicable.

115. 24 C.F.R. § 966.55(a) (2006).

116. *Id.*

117. 24 C.F.R. § 966.55(c) (2006).

118. *Id.*; *see, e.g.*, *Yarbough v. Franco*, 95 N.Y.2d 342 (2000).

119. *See, e.g.*, *Escalera v. N. Y. Hous. Auth.*, 924 F. Supp. 1323 (1996).

ported by substantial evidence.<sup>120</sup> Furthermore, the standard of proof that a tenant must meet in order to overturn a PHA's decision is exacting. Courts will only find a decision to be arbitrary and capricious if it is irrational.<sup>121</sup> An agency's burden is almost ludicrously low; for an agency decision to be supported by substantial evidence, the agency is only required to show that the decision is supported by "some reasoned explanation."<sup>122</sup> As the Supreme Court explained in *Consolidated Edison v. National Labor Relations Board*,<sup>123</sup> substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>124</sup> And while the Court in *Con Edison* stated that substantial evidence is "more than a mere scintilla," the Supreme Court went on to uphold the Court of Appeal's finding on only the slightest record: "In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the [C]ourt [of Appeals] referred to substantial evidence."<sup>125</sup> In sum, the agency must make only the most minimal evidentiary showing, while the tenant must meet the substantial burden of showing that the housing authority acted unreasonably.

## 2. Eviction under a Judicial Grievance Procedure

In the Second Circuit's decision in *Holiday v. Martinez*, the court held that state court eviction proceedings provide tenants with sufficient due process protection, even in the absence of pre-eviction administrative proceedings.<sup>126</sup> As part of its holding, the Second Circuit noted that a number of other circuit courts agreed with its position, having held that pre-eviction agency hearings are not necessary when state eviction proceedings provide sufficient due process protection.<sup>127</sup> HUD has formally recognized the sufficiency of most states' eviction proceedings by issuing "due process determinations" for states which offer adequate protections as part of the landlord-tenant law already in place.<sup>128</sup> A due process determination is issued to a state when that state requires the following: notice to

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120. See, e.g., *Galeas v. Chelsea Hous. Auth.*, 18 Mass. L. Rep. 149 (Super. 2004); *Robinson v. Finkel*, 748 N.Y.S.2d 448 (Sup. Ct. N.Y. County 2002), *aff'd*, *Robinson v. Martinez*, 764 N.Y.S.2d 94 (1st Dep't 2003).

121. See, e.g., *Galeas*, 18 Mass. L. Rep. 149; *Oakwood Plaza Apartments v. Smith*, 800 A.2d 265 (N.J. Super. Ct. App. Div. 2002).

122. *Id.*; *Union Oil Co. of Cal. v. Fed. Power Comm'n*, 542 F.2d 1036 (1976).

123. 305 U.S. 197 (1938).

124. *Id.* at 229 (citing *Appalachian Elec. Power Co. v. NLRB*, 93 F.2d 985, 989 (1938); *NLRB v. Thompson Products*, 97 F.2d 13, 15 (1938); *Ballston-Stillwater Co. v. NLRB*, 98 F.2d 758, 760 (1938)).

125. *Consol. Edison*, 305 U.S. at 229.

126. 68 Fed. App'x 219 (2003).

127. *Id.* at 221 (citing *Colvin v. Hous. Auth. of Sarasota*, 71 F.3d 864, 866 (11th Cir. 1996) (per curiam); *Perry v. Royal Arms Apartments*, 729 F.2d 1081, 1082 (6th Cir. 1984) (per curiam); *Swann v. Gastonia Hous. Auth.*, 675 F.2d 1342, 1347 (4th Cir. 1982).

128. See 61 Fed. Reg. 13,276 (Mar. 26, 1996) (listing states having received due process determinations).

the tenant of the grounds for termination and eviction; the right to counsel at a hearing; and the opportunity for the tenant to refute the PHAs' evidence presented against him or her, including the opportunity to confront and cross-examine witnesses as well as the opportunity to present affirmative legal and equitable defenses.<sup>129</sup>

HUD has issued a due process determination to most states;<sup>130</sup> thus, most PHAs have the option of proceeding directly to court to pursue eviction in drug related eviction cases. When this is the case, the typical state judicial eviction process can have as many as eleven steps:<sup>131</sup> (1) Notice to Quit;<sup>132</sup> (2) Summons and Complaint;<sup>133</sup> (3) Tenant Appearance;<sup>134</sup> (4) Tenant Pleading;<sup>135</sup> (5) Procedural Motions and Hearing;<sup>136</sup> (6) Discovery;<sup>137</sup> (7) Motion for Use and Occupancy;<sup>138</sup> (8) Answers, Special Defenses and Trial;<sup>139</sup> (9) Settlement;<sup>140</sup> (10)

129. 24 C.F.R. § 966.53(c) (2006).

130. *See supra* note 128 and accompanying text.

131. This overview of the judicial eviction process is based on Steven Gunn's longer summary of Connecticut's expedited eviction process which was presented in Gunn's article, *Eviction for Poor Tenants: Costly Compassion or Justice Served?*. Connecticut's "summary process" allows landlords to evict tenants that have breached their lease agreements in an expedited judicial proceeding, where the time allowed for pleadings and discovery is significantly shortened to allow courts to quickly dispose of eviction actions. Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385 (1995).

132. A notice to quit must be served on a tenant before a landlord can begin eviction proceedings. The notice terminates the lease agreement — if any exists — and requests that the tenant voluntarily vacate the premises by a specific date, which can be no less than five days after the notice is served. The landlord must also provide a reason for the request. *Id.* at 423–24.

133. If a tenant does not voluntarily leave the premises by the specified date, the landlord must file a summons and complaint with the Superior Court's Housing Session and serve a copy on the tenant in order to evict the tenant. The filing of these documents with the court begins the eviction process. As in any civil action, the complaint must set forth the facts and basis for the action. The court clerk will assign the complaint a "return date" from which the tenant's time to respond is tolled. *Id.* at 424.

134. If the tenant wants to contest the eviction, the tenant must file an appearance in court. If the tenant fails to file an appearance, the landlord can file a default judgment which will award possession of the premises to the landlord. The tenant has two days after the return date to respond requesting an appearance in court. *Id.* at 424.

135. The tenant has three days from the return date to file a responsive pleading. Again, if the tenant fails to file the pleading, the landlord can file for a default judgment. The tenant may file either a procedural motion (typically a motion to dismiss, request to revise, and a motion to strike are considered procedural motions) or a substantive response (an answer which denies or admits some or all of the landlord's allegations or special defense). *Id.* at 424–25.

136. If the tenant files a procedural motion, the court will schedule a hearing. If that motion is granted, the tenant is reinstated in the apartment as a tenant in good standing. The landlord must file another notice to quit if the landlord wishes to respond to the procedural motion with another eviction action. *Id.* at 425.

137. Both parties are allowed to file discovery motions, although because eviction proceedings are "summary process actions," the time requirements for pleading are expedited. *Id.* at 426.

138. After a tenant has filed an appearance, a landlord may file a motion for "use and occupancy" which requires the tenant to pay use and occupancy payments to the court in an amount equal to the last agreed-upon rent while the action is proceeding. *Id.* at 426.

Judgment and Stays of Execution;<sup>141</sup> and (11) Execution.<sup>142</sup> Of course, if at any step in the process, the tenant fails to respond or raise timely objections to the landlord's (i.e., the PHAs') allegations, a default judgment can be entered against the tenant and he or she can be promptly evicted. If the case does go to trial, the landlord will have the burden of proving that the tenant breached the lease agreement by either substantial evidence or by a preponderance of evidence, depending on the jurisdiction.<sup>143</sup>

### 3. Access to Justice

All of the procedures discussed this far are of little to no value to the tenant facing eviction who lacks the ability or will to navigate complicated agency protocols. To challenge an eviction, a tenant must be literate, have the ability to communicate his or her thoughts clearly in writing, or have the help of someone who is able to do this.<sup>144</sup> Furthermore, a tenant must be able to make timely requests for hearings and schedule meetings with the appropriate housing authority personnel.<sup>145</sup> All of this takes time, organization, patience, and the presence of mind to request help where and when help is available. Many of the tenants in public housing are single mothers, working full time at jobs which pay minimum wages, many have only a high school diploma or a GED, and they have a limited ability to understand and navigate the agency and judicial systems.<sup>146</sup> Further-

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139. Once the tenant has exhausted his or her procedural motions or has failed to make court ordered use and occupancy payments, the tenant must file an answer to the landlord's complaint and include any special defenses. *Id.* at 426.

140. In many cases the parties enter into a settlement agreement before trial. If the parties make a request, the settlement agreement may be entered by the court as a stipulated judgment. *Id.* at 427.

141. *Id.* at 428.

142. If the tenant remains in possession of the apartment in violation of a stay, the landlord may seek an execution order from the court. An execution order allows the landlord to request that a sheriff remove the tenant and his or her belongings from the premises. *Id.* at 428.

143. *See* *Brown v. Popolizio*, 569 N.Y.S.2d 615, 619 (1st Dep't 1991) (holding that the Hearing Officer must find that there is a continued occupancy of the person engaged in the drug related activity by substantial evidence); *see also* *Woodruff Village v. Bowers*, 1996 Ohio App. LEXIS 2491 at \*14 (Ct. App. June 21, 1996) (holding that while a tenant, guest, or other individual under the tenant's control need not be charged or convicted of a crime to sustain an eviction based such illegal activity, admissible evidence must be presented); *Lowery v. Hous. Auth. of Terre Haute*, 826 N.E.2d 685 (Ind. Ct. App. 2005) (upholding an eviction when tenant did not timely pursue administrative remedies and eviction was for good cause where the preponderance of evidence showed he allowed his stepson to reside with him despite notice of lease violation).

144. *See generally* Nancy Cook, *Looking for Justice on a Two-Way Street*, 20 WASH. U. J.L. & POL'Y 169 (2006).

145. *See generally supra* notes 132-42 and accompanying text for a discussion of filing requirements.

146. Raisa Bahchieva & Amy Hosier, *Determinants of Tenure Duration in Public Housing: The Case of New York City*, 12 J. HOUSING RES. 307, 320 (2001) (noting that the most frequent "model" of working age tenant found in NYCHA's tenant population was a black, U.S.-born family with a single parent (often a woman) with a child over 5 years old). There is also a large population of elderly individuals (over 62 years old) in the public housing population. *See* U.S. DEP'T OF HOUS. & URBAN DEV., A

more, if they have to take time off work to meet with housing authority officials or for a court date, they may risk being fired from their job.<sup>147</sup> The procedures in place have little to no value for those individuals facing eviction if they cannot take advantage of them.

Knowledge of the system, the ability to navigate complicated agency protocols and make timely requests for hearings and meetings are key to taking advantage of the procedural protections that are in place. Attorneys, of course, are the best situated to navigate the system. They are repeat players in the justice system and the presence (or absence) of these experts in eviction proceedings fundamentally changes the balance of power.<sup>148</sup> In order to increase access to legal services, Congress created the Legal Services Corporation (“LSC”)<sup>149</sup> which provides “financial support for legal assistance in non-criminal proceedings or matters to persons financially unable to afford legal assistance.”<sup>150</sup> The number of people that are able to obtain legal services through this program, however, is limited. LSC grantees include only 138 organizations nationwide.<sup>151</sup> In its 2003-2004 Annual Report, the LSC reported having a budget of \$335.3 million: “LSC funding supports approximately 3,700 full time attorneys who staff 143 programs that annually handle approximately one million cases and four million ‘matters.’”<sup>152</sup> Legal service providers regularly acknowledge that the most difficult part of their jobs is often deciding which cases not to take.<sup>153</sup>

Yet the restrictions on legal services providers are not only monetary. Since its inception, Congress has limited how LSC funds could be spent.<sup>154</sup> In 1996, HUD regulations expressly prohibited LSC organizations from defending certain

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PICTURE OF SUBSIDIZED HOUSEHOLDS: 1998 (2005), *available at* <http://www.huduser.org/datasets/assthsg/statedata98/index.html>. These individuals have their own set of problems in terms of mobility and health that may prevent them from accessing the system.

147. *See, e.g., Boule*, 676 N.Y.S.2d 541.

148. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974), *reprinted in* SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES AND LAW (Martha R. Mahoney et al. eds., 2003). Galanter actually argues that it is the repeat client, as opposed to the one-time litigant, and the expertise and guidance of the *client* that affects the outcome in the courtroom.

149. 42 U.S.C. § 2996b(a) (2000).

150. *Id.*

151. Legal Services Corp., Welcome to Legal Services, Message from President Helaine M. Barnett, <http://www.lsc.gov/welcome/welcome.htm> (last visited Oct. 8, 2006).

152. LEGAL SERVICES CORP., 2003-2004 ANNUAL REPORT 6 (2004), *available at* <http://www.lsc.gov/about/pdfs/AnnualReport2003-2004.pdf>.

153. In my experience interning at Brooklyn Legal Services Corp. “A” and speaking with Legal Services attorneys, public interest attorneys are approached by far more individuals than they can help. Deciding who they will represent and who they must turn away is often a difficult decision.

154. *See* 42 U.S.C. § 2996e(d)(4) (2000). For instance, LSC funds cannot be used or made available to any political party, campaign, or be used in advocating for or against any ballot measure. *See* 45 C.F.R. § 1608.3(b) (2006).

individuals in public housing evictions.<sup>155</sup> Specifically, the regulations state that LSC grantees may not defend persons in public housing eviction proceedings if the defendant in the eviction proceeding had been charged with or convicted of illegal drug activities.<sup>156</sup>

#### IV. DECIDING WHO LIVES IN PUBLIC HOUSING

Community is, by its very definition, made up of a smorgasbord of people. Of course, just as no one community is exactly the same, neither is any public housing complex or family-unit within the public housing system. The project in the East Village area of Manhattan is surrounded by night-clubs, bars, restaurants, and apartments which rent for over \$2000 a month,<sup>157</sup> while the public housing complexes in East New York or Red Hook sections of Brooklyn are located in a traditionally working class neighborhood but lack easy access to basic services like grocery stores, laundromats, and banking services.<sup>158</sup> Defining who is entitled to live within these federally subsidized communities and what the rules are within the community is a policy decision that has been made by Congress. However, when it comes to applying and interpreting the laws passed by Congress, it is the role of HUD, PHAs, and the state courts to make sure that Congress's policy choices are implemented in a fair manner. In order to force PHAs and courts to make more calculated decisions and avoid blanket policies which fail to take into account mitigating circumstances, this Note contends that PHAs should adopt three procedural devices. First, local housing authorities should automatically provide a hearing to tenants in drug related evictions. Second, PHAs should be required to prove by clear and convincing evidence that their tenant or someone under the tenant's control engaged in drug-related crimi-

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155. 45 C.F.R. § 1633 (2006).

156. Pursuant to 45 C.F.R. § 1633.3 (2006).

Recipients [Legal Services Corporation Organizations] are prohibited from defending any person in a proceeding to evict that person from a public housing project if: (a) The person has been charged with or has been convicted of the illegal sale, distribution, or manufacture of a controlled substance, or possession of a controlled substance with the intent to sell or distribute; and (b) The eviction proceeding is brought by a public housing agency on the basis that the illegal drug activity for which the person has been charged or for which the person has been convicted threatens the health or safety of other tenants residing in the public housing project or employees of the public housing agency.

157. *See, e.g.*, Citi-Habitats, New York, Licensed Real Estate Broker, <http://www.citi-habitats.com>; Corcoran Group Real Estate, <http://www.corcoran.com>.

158. The author has visited the facilities in East New York as part of a volunteer program through NY Cares. These areas frequently have a surplus of 99 Cent Stores, corner "bodegas" where residents can buy cigarettes and junk-food, and fast-food restaurants. Access to grocery stores and especially banking services is a larger problem. The author lived at the cusp of the Red Hook area of Brooklyn where there is a large public housing complex; when taking a cab, drivers have often asked if the author was going to the housing projects, indicating that they were unwilling to drive in that area.

nal activity. Third, PHAs should be required to pay reasonable attorney's fees to tenants who successfully win their cases on the merits and avoid eviction.

### A. Automatic Hearing

Before an individual is evicted from public housing for drug-related activity, this Note contends that he or she should automatically be given a hearing either before an administrative law judge or hearing officer or in state court before a judge or jury, depending on the laws of that jurisdiction. A hearing or trial should be held in all eviction proceedings involving drug-related offenses and default judgment should only be entered against the tenants if either 1) the tenant does not appear at the scheduled date and time or 2) the tenant waives his or her right in writing. At the hearing, the PHA should be required to prove the underlying facts of the eviction by clear and convincing evidence.

A discussion of due process rights in the context of federally subsidized benefits necessarily must be framed by the seminal case of *Goldberg v. Kelly*.<sup>159</sup> In *Goldberg*, the Supreme Court decided that there were some government benefits that were a matter of statutory entitlement and could not be terminated without procedural safeguards.<sup>160</sup> Specifically, the Court found that New York State could not terminate public assistance payments under the Aid to Families with Dependent Children or the New York State General Home Relief program without a pre-termination evidentiary due process hearing.<sup>161</sup> The Court held that welfare benefits were a matter of statutory entitlement and analogized such benefits to property:

It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property [ . . . ] "Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space and education; social security pensions for individuals."<sup>162</sup>

Since *Goldberg*, the Court has generally defined property as an entitlement "which people rely on in their daily lives, reliance that must not be arbitrarily

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159. 397 U.S. 254 (1970).

160. *Id.*

161. *Id.* at 261.

162. *Id.* at 254, n.8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965)).

undermined.<sup>163</sup> Current laws and regulations require some sort of pre-eviction termination process for public housing tenants.<sup>164</sup>

PHAs certainly meet their legal obligations by offering tenants the opportunity to request a pre-eviction hearing.<sup>165</sup> If a hearing were required, however, regardless of a tenant's request or lack thereof, PHAs would necessarily have to prepare a well developed record and basis for eviction. By forcing PHAs to prepare for oral arguments, the PHAs' attorneys would have to review and prepare the case in the same way a prosecutor might have to before an arraignment, hearing, or trial. The pressure and analysis required to prepare for an impending hearing is much greater than preparing a Notice to Quit. A hearing heightens the significance of the PHAs' actions and requires more preparation and analysis regarding the facts and circumstances of case. Furthermore, as all of the evictions in these cases are based on criminal activity, the basis of the eviction is not necessarily related to the tenancy or the lease, especially where the criminal activity does not occur on the premises.<sup>166</sup> A defendant in the federal criminal justice system cannot plead guilty without attending a hearing where the charges that he or she is admitting to are read and a judge questions the defendant as to his or her understanding of that crime.<sup>167</sup> In that context, of course, the defendant's personal liberty is at stake. While imprisonment is not the result of an eviction proceeding, the individuals in these proceedings necessarily have precarious financial situations and the very real result of an eviction action can be homelessness. By providing a hearing, decision makers would be able to question the tenant to be certain that the tenant understands the basis of the eviction and timetable in which he or she must vacate the premises.

### *B. Heightened Standard of Review*

Raising the standard of review at pre-eviction proceedings will have much the same effect as requiring a hearing under all circumstances. PHAs will be required to prove the underlying facts of the drug-related activity with a level of

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163. *Roth v. Bd. of Regents*, 408 U.S. 564, 577 (1972); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 537 (2d ed. 2002). Note that courts also sometimes define property solely by the importance of the benefit. *Id.* Under either definition, an individuals' tenancy and right to remain in his or her home pursuant to his or her leasehold would be consider a property right.

164. 24 C.F.R. § 966.53; *see also* 42 U.S.C. § 1437d(k).

165. Martin J. McMahon, Annotation, *Procedural Rights Prior to Eviction or Termination of Benefits Under § 8 of Housing Act of 1937*, 81 A.L.R. FED. 844 § 2 (2005).

166. *See* 42 U.S.C. § 1437d(l)(6) (stating that "any drug related-criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy").

167. *See* Fed. R. Crim. P. R. 11(a)(c); *see also* F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 223–26 (2002) for a discussion on the procedures governing a criminal plea agreement.

accuracy and persuasiveness that is not currently required. Currently, they have pursued and achieved evictions based on arrest records and based on incidents where charges were later dropped.<sup>168</sup> In fact, HUD specifically mentions the lower standard of review in its rules and regulations stating that, “with respect to eviction for criminal activity, neither an arrest nor a conviction is necessary, and the responsible entity need not satisfy the standard of proof used for a criminal conviction.”<sup>169</sup>

To understand why PHAs should bear a higher burden of proof in these limited number of cases, it is important to understand that this Note does not address drug-related activity which is threatening the health or safety of any tenants. If the activity poses such a threat, PHAs can evict under the health and safety provision of its regulations.<sup>170</sup> This Note contends that prompt eviction is always warranted where the immediate health and safety of fellow tenants is at stake. Instead, this Note focuses on those cases where either the drug-related activity no longer threatens the health and safety of the tenants because the individual engaged in the activity has been arrested, convicted, and sentenced to jail or the occurrence of the drug activity is in dispute. In the former cases, the individuals who are being evicted are often family members of the person who engaged in the underlying drug activity.<sup>171</sup> A hearing and heightened standard of review would better allow such individuals to present mitigating factors. Whereas in the latter cases, where the occurrence of the drug activity is in dispute — perhaps there was an arrest but no charges were filed or perhaps charges were dropped — the hearing and heightened standard of review would allow tenants to present evidence that the drug activity never occurred or present an affirmative defense.

PHAs should meet a heightened standard in these cases, particularly because Congress and HUD have not passed a bright line rule. In other parts of the public housing law, Congress has drawn clear lines. For instance, 42 U.S.C. § 1347(f) requires that any individual *convicted* of manufacturing or producing methamphetamine must be immediately evicted and 24 U.S.C. § 1347(n) prohibits a PHA from accepting a new tenant that has been convicted of manufac-

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168. *See, e.g.*, Lakota Cmty. Homes v. Randall, 2004 S.D. LEXIS 16 (2004) (upholding an eviction of a family where a member of the tenant’s household was charged on drug related criminal activity). *But see, e.g.*, Welston Hous. Auth. v. Murphy, 131 S.W.3d 378 (2004) (finding that a PHA could not terminate a tenant’s lease because a person with a criminal record had been visiting the tenant); Cuyahoga Metro Hous. Auth. v. Hairston, 124 Ohio Misc.2d 1 (2003) (finding that a public housing authority waived its right to evict when it accepted rent for seven months after finding marijuana in a tenant’s unit).

169. Dep’t. of Housing & Urban Dev. Regulations for Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28776, 28785 (May 24, 2001) (codified as 24 C.F.R. § 5.861).

170. 42 U.S.C. § 1437f(d)(1)(B)(iii) (2000); 24 C.F.R. § 966.4(f)(12)(i)(A) (2006).

171. *See, e.g.*, Brief for the Coalition to Protect Public Housing et al. as Amici Curiae Supporting Respondents, *supra* note 18.

turing or producing methamphetamine.<sup>172</sup> In contrast, HUD regulations and the statute guiding those regulations give PHAs much more discretion as to which individuals should be evicted for drug-related activity.<sup>173</sup> Housing authorities *may* evict anyone who has personally engaged in drug-related activity or who has control over someone that has engaged in drug-related activity, on or off the premises.<sup>174</sup> While it could be argued that an automatic ban based on a conviction is harsher, the rule is more easily implemented in a fair and consistent manner. In contrast, the “drug-related activity” provision of the Anti-Drug Abuse Act<sup>175</sup> is open to discretion and an inconsistent application has the potential for abuse.

In light of the economic position, education level, and resources available to the individuals that are being evicted, it is especially important for the decision makers to be certain that the criminal activity which the eviction is based on actually occurred. The basic principle of fairness dictates that the government should prove the criminal activity actually occurred and that it is not punishing individuals for crimes which they or those under their control never actually committed.

*C. Securing Counsel: The right to recover legal fees in evictions proceeding when the PHA is unsuccessful*

The absence or presence of legal counsel can make the difference between eviction and possession.<sup>176</sup> There are often defenses, mitigating circumstances and extenuating circumstances which, if raised properly, can save a tenant from eviction.<sup>177</sup>

In private sector leases, it is common for landlords to include a provision in leases that allows landlords to collect attorneys’ fees from tenants if there is litigation over the leasehold and the landlord wins.<sup>178</sup> Sometimes this provision is explicitly reciprocal, and provides reasonable attorneys’ fees to the winning party. New York, by statute, interprets all legal fee clauses in residential leases to be reciprocal, that is, a provision that allows a landlord to collect reasonable legal fees will be read to allow the tenant to do the same.<sup>179</sup>

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172. See 42 U.S.C. § 1347f(d)(1)(B)(iii) (2000); 42 U.S.C. § 1347(n) (2000).

173. See 42 U.S.C. § 1437f(d)(1)(B)(iii); 24 C.F.R. § 966.4(f)(12)(i)(B) (2006).

174. See 24 C.F.R. § 966.4(f)(12)(i)(B).

175. 42 U.S.C. § 1437f(d)(1)(B)(iii); 24 C.F.R. § 966.4(f)(12)(i)(B).

176. See discussion *infra* Part III.C.3.

177. See, e.g., Gunn, *supra* note 131, at 402–09 (discussing various non-drug-related defenses).

178. See, e.g., Solow Mgmt Corp. v. Tanger, 797 N.Y.S.2d 456, 457 (1st Dep’t 2005); David Z. Inc. v. Timur on Fifth Ave., Inc., 776 N.Y.S.2d 242, 243 (1st Dep’t 2004).

179. Landlord and Tenant, 7 N.Y. REAL PROP. LAW § 234 (Consol. 2005).

Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys’ fees and/or expenses incurred as the result of the failure of the

Like punitive damages and other monetary damages to parties in cases against the government, courts have been reluctant to grant legal fees.<sup>180</sup> The doctrine of sovereign immunity has long protected government agencies from paying out large sums of taxpayer money to individuals in all but the most extreme circumstances.<sup>181</sup> However, in cases like these, the local, state, and federal governments are acting in their capacity as landlord, not in their traditional government capacity.<sup>182</sup> Further, Congress has by statute limited the ability of many of these individuals to take advantage of LSC grantees. Legal service organizations are one of the only readily available resources that low-income tenants can turn to when they are facing eviction. While the rules and regulations grant tenants a right to counsel, the opportunity to cross-examine and raise affirmative defenses in eviction proceedings, given the economic position of the tenant and the resources available, these are hollow rights without the ability to recoup legal fees.

There would be potentially two benefits if Congress or HUD were to require PHAs to include a lease provision that granted reasonable legal fees to the tenant if he succeeded in retaining possession based on the merits of his case. First, as with the heightened standard of review, the potential of having to pay attorneys fees out of an already tight budget would force PHAs to bring only those cases which it believed that it would win. PHAs would be less likely to pursue eviction cases unless there was a strong basis in fact and sufficient evidence to support its case. Second, the potential of reasonable legal fees at the end of a case may encourage some private attorneys to take a tenant's case on a contingent basis or on some other favorable payment schedule when that attorney thought that the tenant's case had merit. This would have the twofold effect of first providing an incentive to private attorneys to take on cases with merit, and second, discouraging lawyers from taking on cases with little or no merit. Thus, the overall effect would be a weeding out process whereby housing authorities brought fewer cases and when cases without merit were brought, tenants had a better chance of securing counsel.

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tenant to perform any covenant or agreement contained in such lease . . . there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord . . . .

180. See generally Heath Oberloh, Note, *Calvello v. Yankton Sioux Tribe: Shoring Up Tribal Sovereign Immunity Against the Flood of Commercial Transactions Involving Tribally Owned Businesses*, 44 S.D. L. REV. 746, 750-52 (1999); David P. Donovan, Statutory Commentary, *Retroactive Awards of Attorneys' Fees: Finding a Fair Interpretation of the Equal Access to Justice Act*, 71 GEO. L.J. 1279, 1279-80 (1983).

181. See Donovan, *supra* note 180.

182. *Rucker*, 535 U.S. at 132.

**V. CONCLUSION**

In the end, adding procedural protections will only carry justice so far because it is judges and juries who must make the difficult factual determinations on which most cases turn. But by adding more process and more rules to the system, parties can be forced to think more carefully about the decisions that they make in bringing an action and pursuing an eviction. By implementing a higher standard of review, or allowing some parties to recover reasonable legal fees, agents for PHAs must necessarily re-examine the cost benefit analysis to the community and to the agency as a whole. Of course, PHAs should pursue those cases where there are facts and circumstances which merit eviction, but PHAs should also fully embrace their discretion and use it carefully and thoughtfully.