Towards a New Eviction Jurisprudence

Gerald S. Dickinson

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ARTICLES

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Gerald S. Dickinson

ABSTRACT

The One-Strike Rule, contemplated in a model lease provision, has been the primary mechanism employed by Congress to eliminate the "scourge of drugs" in public housing projects. The rule gives public housing authorities (PHA) discretion to evict tenants engaged in drug-related criminal activity and hold the tenant equally liable if a guest or family member engaged in the criminal activity, even if the tenant had no knowledge of the offense. The Supreme Court most notably upheld this policy in 2002 in United States Department of Housing and Urban Development v. Rucker.

Today the wisdom of that rule, which has served as the foundation for PHAs' eviction policies, has come under attack by recent court decisions in Pennsylvania and North Carolina. In Housing Authority of Pittsburgh v. Somerville, the trial court disrupted the normal state of affairs by denying the eviction of a young, unemployed, single woman, expecting her first child, notwithstanding a prior drug-related conviction, holding that eviction would result in a "serious injustice." While in Eastern Carolina Regional Housing Authority v. Lofton, a state appellate court found that the eviction of a single mother and her three young children, all innocent bystanders to drug-related criminal activity, would be excessive and shockingly unjust and that eviction would produce an "unconscionable" result.

This Article engages in a normative interpretation of the statutes the courts in Pennsylvania and North Carolina relied upon in denying the eviction of poor tenants, specifically 35 P.S. § 780-157(b) of the Pennsylvania Expedited Eviction of Drug Traffickers Act and § 42-26(a)(2) of the North Carolina General Statutes. The statutes implicitly attack Rucker by authorizing trial courts to deny

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the eviction of the tenant if the courts are convinced the eviction would result in
serious injustices or unconscionable consequences, thus running afoul of the
post-Rucker normal state of affairs. This Article argues that the Pennsylvania
and North Carolina eviction statutes, and the recent rulings relying on the
serious injustice exemption and unconscionability rule, serve as the foundation
for what I coin a “new eviction jurisprudence” that gives special consideration
to the constitutional protections of property afforded to groups most vulnerable
to the One-Strike Rule: households headed by poor women with children.

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INTRODUCTION

Until today, the One-Strike Rule was the *in statu quo res erant ante bellum*, the normal state of affairs for a public housing authority (PHA) to effectuate a drug-related eviction. The process to evict was quite simple. A PHA would learn of a drug-related incident on or near the premises of a subsidized unit. The PHA would investigate the incident to determine whether the culprit was the leaseholder, a guest, or a family member. Upon gathering the relevant information, the PHA would swiftly apply the One-Strike Rule by serving a notice to quit to effectively start an eviction proceeding to remove the tenant and household members, even if the tenant was not the offending party, had no knowledge of the criminal activity, nor foresaw the activity. The rule, drafted in a model lease provision, authorized PHAs to impose a strict-liability eviction policy on the grounds of, among other things, drug-related activity. Eviction resulted in the termination of the tenant’s housing benefits and in some circumstances led to temporary or permanent homelessness.

Congress, quixotically, convinced itself that a strict-liability One-Strike Rule mandated in a model lease provision inscribed under federal regulations would restore public safety by protecting tenants from the “reign of terror” of drugs in public housing projects. The Supreme Court most notably upheld the One-Strike Rule in *United States Department of Housing and Urban Development v. Rucker*, holding that 42 U.S.C. § 1437d(1) entrusted the decision to evict a tenant to PHAs—which the Court said were in the best position to determine the extent of drugs in a public housing project—and that “no fault” evictions were appropriate where a PHA deemed it necessary.

1. In Latin, *in statu quo res erant ante bellum* means “in the state in which things were before the war.”
3. See U.S. Dep’t of Hous. and Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002). The premise of this “no-fault” eviction policy is that public housing residents deserve a safe and secure place to live. In 1988, Congress passed the Anti-Drug Abuse Act, under 42 U.S.C. § 1437, in an effort to address the concern of drug dealers’ “reign of terror on public and other federally assisted low-income housing tenants.” The Act, later amended, stated that, “[P]ublic housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” Id. Indeed, this Act and the applicable federal regulations requiring public housing leases to have terms authorizing the eviction of tenants for drug-related criminal activity was the central issue in the United States Supreme Court ruling in *Rucker*.
4. See *Rucker*, 535 U.S. at 130. The Court explained its reasoning most vividly when discussing the public policy consequences that public housing authorities faced with the perceived influx of drug-related crime: “The statute does not require the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities who are in the best position to take account of, among other things, the degree to which the housing project suffers from ‘rampant drug-related or violent crime’ (citation omitted) the ‘seriousness of the offending action’ (citation omitted) and ‘the
Many PHAs have, as a result of the ruling, complied with the One-Strike policy as the solution to drug-related crime in the projects. Today, some PHAs appear to be embarking upon a policy strategy of zero tolerance, nonsensically believing that each eviction will rid the projects of drugs, or delude taxpayers into thinking federal and state agencies have control over the War on Drugs in public housing. Nonetheless, the hope, presumably, is that the problem will simply cease to exist—until, of course, the next non-resident drug offender, who operates within an entrenched system of institutionalized poverty that contributes to mass incarceration of the poor, returns to the public housing complex for the next fix or big deal. Like the War on Drugs, excessive abuse and over-enforcement of a strict-liability rule by some PHAs, unsurprisingly, has failed to deter the growth and scourge of drugs in public housing projects. The irony is that public housing projects were purposely built “bleak, sterile, cheap—expressive of patronizing condescension” in locations that contributed to the “ghettoization” of cities that have been the target of the War on Drugs for decades.

5. Shortly after the new “normal state of affairs” was established by the Supreme Court, Michael M. Liu, Assistant Secretary for the United Department of Housing and Urban Development, published a letter that called for caution and reasonableness from PHAs pursuing evictions on the grounds of drug-related criminal activity. Liu wrote that “[t]he Rucker decision upholds HUD regulations that, since 1991, have made it clear both that the lease provision gives PHAs such authority and that PHAs are not required to evict an entire household—or, for that matter, anyone—every time a violation of the lease clause occurs. Therefore, after Rucker, PHAs remain free, as they deem appropriate, to consider a wide range of factors in deciding whether, and whom, to evict as a consequence of such a lease violation. Those factors include, among many other things, the 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. The Secretary and I urge you to consider such factors and to balance them against the competing policy interests that support the eviction of the entire household.” See Letter from Michael M. Liu, Assistant Secretary of HUD to Public Housing Directors (June 6, 2002), http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf.

6. See generally BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006) (investigating the scope and consequences of growth in the America penal population and explaining how prisons and jails in America have come to form part of social inequality and poverty); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that mass incarceration in the United States emerged as a comprehensive and well-disguised system of racialized social control that functions in a manner similar to Jim Crow laws of the South).

7. See generally BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS (2012) (exploring decades of penal expansion coupled with the concentration of incarceration among blacks and illustrating the exclusionary effects of mass incarceration).


9. See Rucker v. Davis, 237 F.3d 1113, 1115–16 (9th Cir. 2001) (en banc). The Ninth Circuit described the deteriorating environment of public housing projects in its decision: “Many of our nation’s poor live in public housing projects that, by many accounts, are little more than war zones. Innocent
However, a new war is being waged in the post-Rucker era. Rucker’s normal state of affairs is under attack and faces formidable opposition in Pennsylvania and North Carolina after recent court rulings denied subsidized evictions by relying upon rare statutory provisions.

In *Housing Authority of the City of Pittsburgh v. Somerville*, a Pennsylvania trial court ruled in favor of the tenant, deciding that her eviction would lead to a serious injustice, the prevention of which overrode the health and safety of the other residents. After taking into consideration the circumstances of the criminal activity and the condition of the tenant, the court was clearly convinced that the eviction of a young, unemployed, single woman expecting her first child—on the basis of a drug-related conviction that occurred two and a half years earlier and in light of a record of adequate rehabilitation—would result in such an injustice. The court also took into consideration after-discovered evidence that was admitted into the record indicating that the tenant’s Section 8 application had been approved by a neutral arbitrator, notwithstanding her prior drug-related conviction. In concluding the eviction would result in a serious injustice, the court expressly invoked a little-known, but useful, statutory exemption under 35 P.S. § 780-157(b) of the Pennsylvania Expedited Evictions of Drug Traffickers Act. The exemption was drafted into the Act to provide alternative safety valves upon which courts could rely to avoid unjust evictions.

In *Eastern Carolina Regional Housing Authority v. Lofton*, a North Carolina appellate court found that the eviction of a single mother and her three young children, all innocent bystanders to drug-related criminal activity, would be excessive and shockingly unjust, and that the landlord failed to establish that tenants live barricaded behind doors, in fear of their safety... What these tenants may not realize is that, under existing policies of [HUD], they should add another fear to their list: becoming homeless if a household member or guest engages in criminal drug activity on or off the tenant’s property, even if the tenant did not know or have any reason to know of such activity or took all reasonable steps to prevent the activity...”

10. No. GD 14-7207, 2014 WL 7734105 (Pa. Ct. Com. Pl. Dec. 8, 2014). The case was appealed by the Plaintiff to the Pennsylvania Superior Court, but was later discontinued by the HACP after the Defendant prematurely terminated her public housing lease upon finding alternative housing using a Section 8 voucher and subsequently moved out. See Superior Court of Pennsylvania Notice of Discontinuation, 55 WDA 2015 (Feb. 11, 2015).

11. 42 U.S.C. § 1437(f) (2000). The Section 8 program provides subsidy assistance for eligible recipients who may qualify for project-based housing or a voucher. The voucher is a portable, in-kind subsidy that allows the recipient to traverse the private rental market and lease-up with participating landlords. The project-based scheme is a subsidy that is attached to the physical apartment unit and does not remain with the tenant if the tenant terminates the lease or if the tenant is evicted.

12. “If the grounds for a complete eviction have been established, the court shall order the eviction of the tenant unless, having regard to the circumstances of the criminal activity and the condition of the tenant, the court is clearly convinced that the immediate eviction or removal would effect a serious injustice the prevention of which overrides the need to protect the rights, safety and health of the other tenants and residents of the leased residential premises.” 35 PA. STAT. ANN. § 780-157(b) (West 2015) (emphasis added).

13. See *infra* Part IV (discussing the legislative intent behind the drafting and enactment of the statutory exemption under the Act).
eviction would not produce an “unconscionable” result. The court relied on the four-pronged Morris Test created by the North Carolina Supreme Court that permits courts to consider whether an eviction would be unconscionable when reviewing a summary ejectment under N.C. Gen. Stat. 42-26(a)(2).

Under § 42-26(a)(2), a tenant may be evicted when the tenant has “done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.” North Carolina courts, however, “do not look with favor on lease forfeitures” and require PHAs to comply with the requirements of § 42–26(a)(2) in order to evict. As a result, PHAs in North Carolina have been put in a precarious position. According to the appellate court, an authority now risks having a request for eviction on the grounds of drug-related criminal activity denied if the PHA fails to prove more than mere criminal activity on or near the premises. Instead, they must show the eviction does not lead to an unconscionable result. Indeed, the decision is quite the anomaly and threatens the sanctity of the strict-liability One-Strike Rule. At the time of writing, Lofton awaits final judgment at the North Carolina Supreme Court.

The Somerville and Lofton decisions are novelties in the post-Rucker era because the rulings rely on rarely invoked statutory provisions that do not explicitly incite the “innocent tenant” defense, which was gutted by the Rucker Court in 2002. The provisions, when juxtaposed, provide a rare glimpse of post-Rucker legislation offering tenants unique substantive statutory protections. 35 P.S. § 780-157(b) of the Pennsylvania Expedited Eviction of Drug Traffickers Act states:

If the grounds for a complete eviction have been established, the court shall order the eviction of the tenant unless, having regard to the circumstances of the criminal activity and the condition of the tenant, the court is clearly convinced that the immediate eviction or removal would effect a serious injustice the prevention of which overrides the need to protect the rights,

15. “In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable.” Charlotte Hous. Auth. v. Fleming, 473 S.E.2d 373, 375 (1996) (citing Morris v. Austraw, 269 N.C. 218, 223 (1967)).
17. Lincoln Terrace Assocs., Ltd. v. Kelly, 635 S.E.2d 434, 436 (2006); see also Fleming, 473 S.E.2d at 375.
18. At the time of writing of this Article, the case is pending review. E. Carolina Reg’l Hous. Auth. v. Lofton, 772 S.E.2d 708 (June 10, 2015) (upon consideration of the petition filed on Jan. 20, 2015 by Plaintiff in this matter, the Supreme Court granted discretionary review of the decision of the North Carolina Court of Appeals pursuant to N.C. GEN. STAT. § 7A-31 (2015)).
safety and health of the other tenants and residents of the leased residential premises.  

The four-prong *Morris* test, applied by courts when reviewing evictions under §42-26(a)(2) of the North Carolina General Statutes, states:

In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable.  

Under these statutory schemes, the innocent tenant defense, although not explicit, is just one part of a carefully calibrated matrix of factors that trial courts are authorized to consider when determining whether to permit an eviction of a tenant. Indeed, the rulings in Pennsylvania and North Carolina, which give substance to these statutes, provide new avenues for deciding subsidized eviction cases humanely and fairly by incorporating principles of substantive statutory fairness into the decision-making process.

What the recent rulings have done, in essence, is give tenants additional layers of substantive protections by permitting courts to replace administrative agencies’ discretion with judicial discretion over subsidized evictions. This departure upends the normal state of affairs, which has, since the *Rucker* decision, positioned the One-Strike Rule as a strict-liability, no-fault policy that favors a PHA’s uncontested discretion, absent a finding of bad faith, capricious acts, or abuse of discretion. This Article takes several steps to unpack and reveal the potential for a new jurisprudence.

Part I surveys the sociological literature on how evictions have been a primary cause of residential mobility and increased concentration of the urban poor. This Part frames the problem of evictions from a sociological lens to better understand the relationship between eviction and the plight of the urban poor. Further, this Part links the root cause of social disadvantage for poor tenants with the rise of third-party policing tactics, which has contributed to eviction and resulted in increased residential mobility of the urban poor. The sociological themes of eviction discussed in this Part, such as housing instability and material
hardship, serve as important social contexts behind developing the new eviction jurisprudence proposed in this Article.

Part II analyzes the language of the One-Strike Rule enumerated under 42 U.S.C. § 1437d(1), which authorizes PHAs to evict for drug-related activity; and the Rucker decision upholding PHAs’ wide-ranging discretion, which subsequently set off controversy and confusion as to the meaning of the federal regulations and the proper exercise of PHAs’ discretion to evict. Part III then analyzes the issue of whether 42 U.S.C. § 1437d(1), and by extension the Rucker decision, preempt state landlord-tenant laws that conflict with the purpose of the federal regulation. Here, case law is pulled from throughout the United States showing that state courts are relatively divided on the question of preemption.

Part IV focuses on two recent and important developments in eviction law—the “unconscionability” rule and the “serious injustice” exemption—which serve as the crux of this Article’s argument. Until now, the provisions have sat relatively dormant, rarely invoked and somewhat inconspicuous to many practitioners and legal scholars. To shed light on the provisions, this Part first introduces the Pennsylvania Expedited Eviction of Drug Traffickers Act and unveils the legislature’s intent to provide additional safeguards to protect tenants from unfair and unjust evictions through the serious injustice exemption.

This Part then turns to North Carolina, where the state supreme court created the Morris Four-Prong Test to review landlords’ attempt to forfeit lease agreements under N.C. Gen. Stat. § 42-26(a)(2). The fourth prong of the test, specifically, has recently caused considerable controversy because it appears to require landlords to prove that the eviction would not result in unconscionable consequences, i.e. prove a negative. Without any precedent to rely on, the North Carolina courts, particularly in Lofton, are being asked to define a term that—like the serious injustice exemption in Pennsylvania—is a subjective anomaly in statutory interpretation. However, the unconscionability prong is nonetheless a novel breakthrough in eviction law because it gives tenants, particularly innocent tenants, an additional substantive layer of protection that runs afoul of the Rucker decision, laying the groundwork for a potential new jurisprudence.

Part V unpacks the new eviction jurisprudence, arguing that the Pennsylvania and North Carolina statutes, and the recent rulings giving effect to the statutes,

implicitly attack *Rucker* and the fundamental unfairness of the One-Strike Rule. Here, the Article suggests the statutes are powerful assertions of substantive rights and protections for subsidized tenants. Under each statute, equitable considerations are confined within a matrix of substantive statutory deliberation, affording fairness as one of many factors into the decision-making process. Relying upon the concepts extracted from the sociological literature on concentrated poverty and evictions, a jurisprudence may develop that adds substance to the definitions of “serious injustice” and “unconscionability” and gives context to the statutory defences. With these two cases, a body of work is available as a basis for future advocacy and litigation. A “new eviction jurisprudence” indeed.

It is far too early to tell the impact of these recent court rulings. However, they serve as important foundations for a new eviction jurisprudence that may level the playing field for indigent tenants in eviction proceedings; respond adequately to the interests of the poor; and, over time, lead to an equitable and substantial enhancement for the courts’ role in protecting constitutional and statutory property interests afforded to the most vulnerable populations in subsidized housing: households headed by poor women with children. 23

I. EVICTIONS AND THE PLIGHT OF THE URBAN POOR

A. Evicting the Poor

Plenty of scholarship has been published on evictions. However, most of the scholarship focuses on the One-Strike Rule24 or the importance of legal

23. The phrase “poor women with children” is used throughout this Article to encapsulate households headed by mothers with children and households headed by grandmothers living with both children and grandchildren. Although it is also frequent to have public housing households headed by older children caring for elderly grandparents. This particular demographic is disproportionately represented in public housing and is therefore, as argued throughout the Article, at increased risk of eviction under the One-Strike Rule.

representation in eviction proceedings. This Part refocuses eviction discourse on recent sociological research to add a new dimension to the conversation. This new dimension helps draw parallels between housing instability as a cause and not just a result of concentrated urban poverty. By drawing out several themes from the sociological literature, such as housing instability and material hardship,

25. See, e.g., Karl Monsma & Richard Lempert, The Value of Counsel: 20 Years of Representation before a Public Housing Eviction Board, 26 LAW AND SOC’Y REV. 627 (1992) (summarizing studies of the effects of lawyers); 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 AND SOC’Y REV. 419 (2001) (finding tenants represented by attorneys had a 21.5% probability of having judgment issued against them, whereas there was a 50.6% probability for unrepresented tenants); Chester Hartman & David Robinson, Evictions: The Hidden Housing Problem, 14 HOUSING POL’Y DEBATE 461 (2003) (describing large number of tenants who move out after receiving an eviction notice from their landlord).
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we can unpack what is useful and perhaps groundbreaking about the new eviction jurisprudence proposed in this Article.

Until recently, evictions were one of the most understudied legal processes that affect the urban poor’s residential mobility.26 Half of all households below the poverty line relocated between 2005 and 2010.27 And even though we “still know very little about evictions,”28 a greater emphasis on the sociological aspects of involuntary removal helps us to better understand “the root causes of social disadvantage and the development of effective policy initiatives.”29 Indeed, the fact is that “housing remains absolutely central to the lives of the poor.”30

Housing, at one time, was central to government policy. Until the 1980s, the United States Department of Housing and Urban Development’s (HUD) budget was second only to the United States Department of Defense.31 However, the poverty debate during Lyndon B. Johnson’s War on Poverty left housing as a secondary issue behind addressing the problems caused by deindustrialization and chronic joblessness.32 As some sociologists have argued, research on housing and poverty—two seemingly interrelated issues—is lagging behind the more advanced fields that study inequality and the family, employment, welfare and the criminal justice system.33 In fact, some sociologists believe that the poverty debate has not fully appreciated “how housing dynamics are deeply implicated in creating and deepening poverty in America.”34 The origin of today’s affordable housing crisis is arguably the soaring costs of housing, incomes of the poor falling or flat-lining, and federal assistance inadequately responding to the soaring housing costs and drop in household income.35 Indeed, the burdens associated with constrained housing supply among low-income households will continue to rise. The result being an increase in the number of households that experience acute residential instability related to eviction.36

29. Id. at 120.
31. Id. at 295.
32. Id.
34. See Desmond & Kimbro, supra note 30, at 296.
35. Id. at 297.
36. Id. at 296. Desmond and Kimbro state that the “[m]edian monthly rent for vacant units in the United States was $371 in 1990, $483 in 2000, and $633 in 2006 (all in current dollars)—an overall increase of 70 percent in 16 years” and that “from 2001 to 2010, median rents increased by roughly 21 percent in Midwestern and Western regions, by 26 percent in the South, and by fully 37.2 percent in the Northeast. These advances far outpaced modest gains in median incomes, which in the 2000s rose by 6
Sociologist Matthew Desmond has tipped the scale in the sociological debate on the structural forces that lead to the urban poor’s lack of decent housing and residential mobility. Residential mobility, in other words, is the process of moving from one neighborhood to another. Desmond and other sociologists set out to redefine a new body of work “that records the causes, dynamics, and consequences of forced removal from housing owing to the pedestrian workings of the low-income housing market in disadvantaged, segregated neighborhoods.” Desmond posits three structural forces that affect the residential mobility of today’s urban poor: neighborhood dissatisfaction, gentrification, and slum clearance. Three types of mobility among urban renters include forced mobility (evictions), immobility (remaining in home over time) and unforced mobility (voluntary movement). As would be expected, forced mobility is caused by financial insecurity.

Numerous studies show that residential mobility brings higher rates of adolescent violence, poor school performance, psychological costs, and the loss of neighborhood ties. It also places barriers around escaping disadvantaged neighborhoods. Desmond argues that structural explanations, in and of percent for households headed by people with a ninth-grade education or less, 7.3 percent for those headed by high school graduates, and 12 percent by those headed by college graduates.”


38. Id.

39. See Desmond & Kimbro, supra note 30, at 318.

40. See Desmond, supra note 28, at 89. Desmond notes “social scientists have amassed considerable evidence that poor families exhibit high levels of residential mobility, moving, in most cases, from one disadvantaged neighborhood to another.” Earlier studies have also been conducted on this topic. See Xavier de Souza Briggs, The Geography of Opportunity: Race and Housing Choice in Metropolitan America (2005); Karyn R. Lacy, Blue Chip Black: Race, Class and Status in the New Black Middle Class (2007) (focusing on the impact of differences in residential location on the construction of identity for middle-class African-Americans); Robert J. Sampson, Great American City: Chicago and the Enduring Neighborhood Effect 20–30 (2012) (theorizing that there is a social component to enduring neighborhood inequality in that people react to neighborhood difference); Scott South & Kyle Crowder, Escaping Distressed Neighborhoods: Individual, Community, and Metropolitan Influences, 102 AM. J. OF SOC. 1040–84 (1997); Scott South & Kyle Crowder, Avenues and Barriers to Residential Mobility among Single Mothers, 60 J. MARRIAGE AND FAM. 866–77 (1998); Robert Sampson & Patrick Sharkey, Neighborhood Selection and the Social Reproduction of Concentrated Racial Inequality, 45 DEMOGRAPHY 1–29 (2008).


42. Id.


44. See Desmond et al., supra note 26, at 303.
themselves, however, cannot fully explain the high levels of residential mobility among the urban poor.\footnote{45} Instead, he posits eviction as one of the lesser known, but leading causes, of concentrated poverty, segregation and racial isolation.\footnote{46} Eviction is, indeed, the “hidden housing problem.”\footnote{47,48}

Over two million Americans live in public housing with incomes far below the federal poverty line,\footnote{48} while the private rental market constitutes the bulk of housing for the ghetto poor.\footnote{49} Desmond’s research focuses on the latter group. But both groups, arguably, are similarly at heightened risk of eviction and the consequences associated with housing instability and material hardship.\footnote{50} Desmond’s research has narrowed the scope of attention on a population at extreme risk of eviction—low-income urban mothers.\footnote{51} Poor urban mothers who were evicted experienced more material hardship, worse health problems and were more likely to suffer from depression.\footnote{52} Material hardship, for example, is “a measure of the lived experience of scarcity” and assesses mothers who experienced hunger and sickness as a result of shortages, or lack of access, to food or medical care.\footnote{53}

The fallout from eviction can cause an abundance of collateral damage in the long-term.\footnote{54} Even at the outset, the events leading to eviction cause turmoil, such as conflict with the landlord, multiple court appearances, looming uncertainty of the outcome, and the stressful moments during physical removal (possessions

\footnote{45. See Desmond, supra note 28, at 89.}
\footnote{46. Id.}
\footnote{47. Chester Hartman & David Robinson, Evictions: The Hidden Housing Problem, 14 HOUSING POL’Y DEBATE 461 (2003) (describing large number of tenants who move out after receiving an eviction notice from their landlord).}
\footnote{48. NAT’L CTR. FOR HEALTH IN PUB. HOUS., DEMOGRAPHIC FACTS: RESIDENTS LIVING IN PUBLIC HOUSING 1 (2010).}
\footnote{49. See Desmond & Kimbro, supra note 30, at 317. Desmond notes that “[a]lthough most low-income families live unassisted in the private market, most research on housing dynamics has to do with housing policy and programs. We know much more about public housing (which serves less than 2 percent of the population) than about inner-city landlords and their properties (which constitute the bulk of housing for the ghetto poor).” Id. at 319.}
\footnote{50. It is important to note the difference between two distinct groups of renters in this Article. Desmond’s research focuses on eviction as a root cause of housing instability and material hardship for poor tenants in the private rental market. This Article, however, focuses on One-Strike Rule evictions that arguably cause similar housing instability and material hardship for poor public housing tenants, particularly poor women with children. Desmond's research is useful in the public housing context, nonetheless, because subsidized tenants facing eviction are some of the most disadvantaged and at-risk populations by virtue of the fact that they receive public assistance. It is conceivable that, once public assistance is terminated upon eviction, public housing tenants fall into an extremely vulnerable class of the homeless that lacks stable housing options. There are a multitude of reasons why evictees from public housing will have difficulty navigating private rental market. One plausible explanation is that such tenants may not be as market savvy as poor private sector tenants who have experienced years of housing instability and residential mobility in the private market and, presumably, have learned to navigate market forces accordingly.}
\footnote{51. See Desmond & Kimbro, supra note 30, at 296.}
\footnote{52. Id.}
\footnote{53. Id. at 318–19.}
\footnote{54. Id.}
Eviction often leads to a number of debilitating conditions that, as will be argued in this Article, result in serious injustices or unconscionable consequences, such as material hardship. This is likely a cause, not a condition, of poverty that also results in victimization, risk to health and safety, lack of shelter and food, and prolonged periods of homelessness. Residential instability is also accompanied by serious social and health disparities. Tenants evicted from housing usually "must accept conditions far worse than those of their previous dwelling." The result is a vicious cycle that starts at the bottom, because many landlords will reject applicants with a history of eviction, which pushes the evicted tenant to the bottom of the rental market. Eviction, ultimately, falls hardest on single mother heads of households. The very presence of children in a household increases the risk of eviction. A recent comprehensive study found striking results regarding the number of evictions that affected children. Over a third of the evicted tenants were single mothers and of the 353 children that lived with the tenants, 115 received actual eviction judgments. The average age of the children was seventeen and the youngest was four months. Thousands of tenants are ejected from their homes due to informal pressure from landlords. Two years after eviction, single mothers experienced higher rates of material hardship and depression than their peers as a result of eviction. The most devastating forms of material hardship include homelessness, loss of possessions and a record of eviction. This has led researchers to conclude that the increase in material hardship from eviction causes evicted mothers to experience higher levels of poverty.

Desmond eloquently puts the dire circumstances of poor single mothers facing eviction into perspective:

55. Id. at 299.
56. See infra Parts III–V (discussing the factors considered under Pennsylvania’s “serious injustice” exemption and North Carolina’s “unconscionability” rule).
59. See Desmond, supra note 28 at 118.
60. Id.
62. See Desmond, supra note 26, at 304.
63. Id. at 314.
64. Id.
65. Id.
66. Id.
67. See Desmond & Kimbro, supra note 30, at 300.
68. Id.
69. Id.
Towards a New Eviction Jurisprudence

On some measures, eviction may not simply drop poor mothers and their children into a dark valley, a trying yet relatively short section along life’s journey; it may fundamentally redirect their way, casting them onto a different, and much more difficult, path. If evicted mothers experience higher rates of depression several years after their forced removal, as our findings indicate, that suggests that eviction has lasting effects on mothers’ happiness and quality of life. This in turn could affect their relationships with their romantic partners and children, kin and neighbors; could cause them to withdraw from social institutions, dampening their civic engagement and level of community embeddedness; and could sap their energy, preventing them from seeking or keeping gainful employment or participating fully in their children’s development.70

What the research has revealed is that neighborhoods with more children may be more likely to have households who violate certain provisions in the lease agreement.71 The effect of eviction, which gives rise to residential mobility and instability, also has consequences on a child’s development, including poor performance on standardized tests, lower academic achievement, delayed literacy, and higher high school drop-out rates.72 Poor single mothers, in other words, belong to an extremely disadvantaged demographic in the United States merely because they are mothers.73

The One-Strike Rule, arguably, contributes to evictions that lead to material hardships for public housing tenants. The risk of eviction likely increases in public housing projects, because a disproportionate number of those receiving subsidized housing are households headed by poor single mothers who—due to housing projects located in concentrated, poverty-stricken areas—arguably live in close proximity to increased criminal activity.74 And for many, public housing

70. Id. at 317.
71. See Desmond, supra note 26, at 319.
73. See Desmond, supra note 26, at 321. Desmond explains that “[a]lthough the degree to which discrimination influences the processes of securing an apartment, job, or loan have been thoroughly studied, analysts largely have ignored how prejudice against minorities, women, or children may influence the consequential decision of whether to evict. Owing to the frequency of eviction in the lives of poor families as well as to the host of negative outcomes brought about by eviction, understanding who landlords put out is just as important as understanding who they let in.” Id.
74. Kari Lydersen, Out of Sight; In many cities, being homeless is against the law, IN THESE TIMES, June 12, 2000, at 21. Lydersen finds that “a statistical portrait of public housing tenants reflects a population that is overwhelmingly minority, female, and very poor: sixty-nine percent of public housing tenants are minorities, seventy-six percent of the heads of households are females, and the average household income is $8900. Roughly seventy-five percent of all non-elderly tenants live below the poverty level . . . Many public housing residents bear the significant burden of providing for their children thirty-nine percent of tenants are single parents.” Id.
is housing of last resort. Eviction is avoided at all costs, because its short-term and long-term consequences, particularly for poor urban women and children, are significant threats to material, physical and mental well-being. The long-term impact of eviction can be exacerbated by the specter of homelessness.

B. The Problem of Homelessness

Judge Stanton Wettick, Jr. from Pennsylvania once wrote in an opinion that “because an eviction from subsidized housing is likely to result in homelessness or living in substandard housing, the right of a low-income person to continue to live in subsidized housing is an important right protected by the constitutional protections afforded to property[].” Indeed, evictees resort to makeshift dwellings, slum conditions, or spaces that are uninhabitable upon eviction, leading to a cycle of homelessness that contributes to material hardships that last years after involuntary removal. Peering closely at the concept of homelessness helps unveil the multitude of hardships facing the evicted, especially single mothers.

Start with the basics of homelessness. There are two categories of homelessness that evictees fall into after being dispossessed. The first is “street homelessness.” The street homeless occupy space that is not designed or operated for residential occupation. The street homeless sleep on benches in parks, settle on public lots and urban open space, reside in vacant warehouses or alley ways or find refuge under a bridge. Street homelessness, in essence, is a serious form of rooflessness. Of course, without a roof for protection, human beings are subject to prolonged exposure to the cold and/or extreme heat. Street homelessness, and a natural desire to seek some form of solitude and protection, usually leads to “sheltered homelessness.” The sheltered homeless are those who obtain emergency or temporary shelters funded or subsidized by local governments or organized charities through local churches. It even includes crashing on neighbors’ or family members’ couches temporarily, if available. Ultimately,


79. Id.

however, members of both groups—street homeless and sheltered homeless—invariably lack permanent homes. The time between both destinations is where evidence of the most debilitating hardships may be found.

Homelessness in and of itself increases the risk of respiratory disease, alcohol and drug dependence, mental health problems, suicide, accidents, and violence. The sheltered homeless, although avoiding rooflessness, may not actually be much better off than the street homeless. For those who find refuge in hostels or other shelters, such facilities may lack basic necessities, pose threats to good hygiene and physical safety, and give rise to potential privacy issues. Women rendered homeless are more likely to report acute infectious conditions, chest infections, colds, coughs, and bronchitis and are more likely to report a lack of food for nourishment. Children are equally at risk and “vulnerable owing to the lack of appropriate play space.” The additional burden of caring for children as a result of homelessness falls disproportionately on women, who regularly “stay connected and maintain responsibility for children” while men have a tendency to separate. Victimization is another serious consequence of homelessness. Women often report higher rates of crime during a homeless spell, including higher rates of rape than men. Martha Burt explains:

Among the many hazards of being homeless, being victimized through criminal attack epitomizes the vulnerability inherent in not having four walls and a door. Needing to be constantly on guard contributes additional stress to circumstances that are already extremely stressful. Victimization is not a minor event; the evidence indicates that most homeless people have experienced it in one form or another during their current spell of homelessness.

These are not necessarily short spans of homelessness either. Women with children could have spells of homelessness lasting up to six months. There is evidence that eviction may be a contributory cause of extended homelessness. Dramatic and frequent moves may also completely sever important social ties that are “useful for the cognitive or social development of a child or young

81. See Shaw, supra note 67, at 407
82. See Victor, supra note 68, at 398–404.
83. Id.
84. See Burt, supra note 64, at 763.
85. See Shaw, supra note 67, at 407.
86. See Burt, supra note 64, at 745.
87. Id. at 753.
88. Id. Burt found that robbery and theft were common forms of victimization among the homeless, including violations of one’s person such as physical and sexual assault.
89. Id. at 747.
90. See Crane & Warnes, supra note 50, at 757.
person." Thus, a dramatic move caused by eviction can have debilitating effects on the children of families forced to relocate to shelters or the street. Indeed, the recent sociological literature on eviction helps rethink the usefulness and limitations of the third-party policing strategies that Congress implemented in response to the War on Drugs in public housing. As discussed in Parts II and III, some federal and state courts still rely upon outdated misconceptions of crime and poverty in America in upholding the One-Strike Rule and use such outdated modes of policy to find some state landlord tenant laws preempted by federal law. The problem is that rigorous policing of public housing behavior by PHAs may also be a contributing factor to the devastating fallout effects of eviction of poor urban mothers we see from recent sociological research, such as increased material hardship, residential mobility, and ultimately homelessness.

C. The Rise of Third-Party Policing

Third-party policing is a movement within the field of crime control to spread evenly the responsibility of deterring crime to non-police actors through the implementation of a variety of local mechanisms. Landlords, of course, have always had considerable discretion over whether to evict a tenant, particularly if a tenant defaults on rent payments. But the rise of third-party policing has added a new dimension to the discretion authorized to landlords.

The phenomenon of third-party policing creates a third “governmental” sector that plays the role of a non-police actor operating somewhere between the state and civil society. The goal, in essence, is to prevent crime by “activating non-offending persons who are thought to influence environments where offenses have occurred or may occur.” Given this movement towards shifting responsibility, landlords have been “coerced into making changes to their properties, or into controlling the people who live in their properties (through increased surveillance or evictions), in an effort to control crime.”

91. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY, 300 (1994).
92. To highlight the significance of allowing users of illegal drugs to avoid eviction, courts in Massachusetts, Wisconsin, and the District of Columbia, of recent, have consistently reviewed challenges to the One-Strike Rule by relying upon the findings that Congress made back in 1988 when adopting the Anti-Drug Abuse Act. See 42 U.S.C. § 11901(2) (“Public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime.”); id. at § 11901(3) (“Drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants.”); id. at § 11901(4) (“The increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures.”).
93. See Desmond & Valdez, supra note 26, at 118. (noting that police have increasingly been shifting the burden of law enforcement to landlords).
95. LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING 2, 118 (2005).
are not only capable of curtailing crime, but also responsible for the crime if it occurs.\textsuperscript{97} Under such a regime, landlords and tenants face “gatekeeper liability.”\textsuperscript{98}

This means that even though a landlord or a tenant may not be directly involved in or have knowledge of bad acts and misconduct, they are nonetheless presumed to have been able to prevent the commission of the crime.\textsuperscript{99} Indeed, local, state, and federal regulations directed at third-party policing have been enacted to coerce landlords and tenants into conforming to this new crime control scheme, thus altering the behavior of landlords and tenants. As a result, landlords are forced to regulate their properties and control tenants through increased surveillance and paternalistic apartment rules,\textsuperscript{100} while tenants are forced to investigate, ascertain, and literally peek over their neighbors’ fences or report alleged (even if unfounded) incidents. Many non-police actors with power to control and prevent crime are PHAs and Section 8 landlords. In fact, PHAs were specifically challenged to engage in third-party policing strategies by President Clinton in his State of the Union Address in 1996, directing PHAs and tenant associations to curtail the rise of drugs in public housing. He stated that “for [sic] now on, the rule for residents who commit crime and peddle drugs should be, one strike and you’re out.”\textsuperscript{101}

The responsibility to prevent and control (and in many cases to alleviate) crime has extended to imposing punitive measures—including eviction—when a public housing or Section 8 tenant, guest, family member, or visitor has engaged in drug-related criminal activity or other criminal activity on or near the premises. However, research suggests that third-party activities were not the most effective approaches to reducing crime in public housing.\textsuperscript{102} In fact, the research suggests that eviction did not seem to be a proximate and important factor in reducing drug problems in public housing.\textsuperscript{103} Nonetheless, the phenomenon of third-party policing was at the core of federal regulations giving PHAs the
authority to evict tenants for drug-related criminal activity and at the heart of the United States Supreme Court decision to uphold the policy in *United States Department of Housing and Urban Development v. Rucker.*

II. **RUCKER AND THE ONE-STRIKE RULE**

**A. Anti-Drug Abuse Act—42 U.S.C. § 1437**

In 1988, Congress passed the Anti-Drug Abuse Act, under 42 U.S.C. § 1437, in an effort to address the concern of drug dealers’ “reign of terror on public and other federally assisted low-income housing tenants.” The Act, later amended, stated that:

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

The One-Strike Rule lease provision has been the primary third-party policing mechanism to effectuate an eviction of a federally-subsidized tenant, his guest, or his family member who engages in drug-related criminal activity. The purpose of this “no-fault” strict-liability eviction policy is to extend third-party policing to PHAs and subsidized leaseholders, who are arguably in the best position to curtail crime and misconduct in neighborhoods prone to criminal activity, such as public housing projects.

HUD also instituted its own regulations that gave effect to 42 U.S.C. § 1437, requiring that the “lease must provide that drug-related criminal activity engaged in, on or off the premises by any tenant, member of the tenant’s household or guest, and any such activity engaged in on the premises by any other person under the tenant’s control, is grounds for the PHA to terminate tenancy.”

HUD, however, did not mandate immediate eviction. Instead it gave discretion to the PHA to consider all the circumstances of an eviction case and to take into account the “seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have

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105. Id.
on family members . . . and the extent to which the leaseholder has shown personal responsibility."

B. Ninth Circuit Finds One-Strike Rule “Absurd”

The Rucker case arose in California. The Oakland Housing Authority moved to evict Pearlie Rucker, a public housing tenant. Rucker’s daughter, who was mentally challenged, was arrested for drug possession three blocks from Rucker’s apartment unit. Rucker was not alone. Three other evictions were joined with Rucker’s lawsuit. The evictions involved circumstances where a family member or guest, not the leaseholder, was convicted of drug-related criminal activity committed off-premises.

The argument employed by the Plaintiff, Rucker, was that 42 U.S.C. § 1437d(1)(6) violated the leaseholders’ due process rights by holding them accountable even if they did not know of or have control over the person engaging in the drug-related criminal activity. In other words, if the tenant of record did not know or have reason to know of a family member, household member, or guest who was involved in drug-related criminal activity, then the tenant of record could not be subject to the One-Strike lease provision required under 42 U.S.C. § 1437d(1)(6). Prior to Rucker, some courts held that due process required evidence that the tenant have knowledge of the criminal activity.

The Ninth Circuit found in favor of the tenants, holding that the statute was ambiguous and would generate absurd results with regards to the innocent tenant if PHAs were to hold leaseholders strictly liable for any criminal activity of guests, family members, or household members, even if he or she did not have knowledge of the activity. Indeed, the court raised serious questions regarding the Due Process Clause of the Fourteenth Amendment, because the federal regulation permitted tenants to be deprived of their property interest without any relationship to individual wrongdoing. The “absurdity and unjustness of the

110. Id.
112. Some eviction cases before the Rucker decision denied evictions if the tenant had no knowledge. See United States v. 121 Nostrand Ave., 760 F. Supp. 1015, 1018 (E.D.N.Y. 1991). Judge Jack B. Weinstein stated in this opinion, “For the poor, the shortage of livable, low-priced housing is especially acute. Tenants—and especially their minor children—who are evicted are likely to become homeless, with whatever stability their lives afforded seriously jeopardized . . . the owner of the defendant leasehold is entitled to retain her home. Her children, grandchildren and great-grandchildren, who look to her for shelter as the family’s matriarch, may not be dispossessed because one of them has sold drugs from their apartment.” Id.
potential results,” according to the Ninth Circuit, showed that HUD missed the mark in discerning Congress's intent. The Supreme Court thought otherwise, finding that Congress had no intention to include the innocent tenant defense.

C. Supreme Court Upholds Strict-Liability Rule

The no-fault rule was at the epicenter of the Supreme Court ruling in Rucker. The Court narrowly reviewed the language set forth in the Anti-Drug Abuse Act of 1988, which was passed by Congress over concerns about the rise of drug dealers. The Court reversed the Ninth Circuit’s decision finding that 42 U.S.C. § 1437d(1)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests, whether or not the tenant knew, or should have known about the activity.

The Court further found that the “statute does not require the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local PHAs who are in the best position to take account of, among other things, the degree to which the housing project suffers from ‘rampant drug-related or violent crime.’” The Court also validated HUD’s definition of “control,” stating that a visitor, guest, or family member is under the control of the leaseholder when the leaseholder has permitted that person, even a one-time visitor, to access the premises. And HUD rejected regulations that created fault-based defenses to eviction, such as lack of knowledge or the absence of control over the guest or family member who engaged in criminal activity, to mitigate the reoccurrence of drug activity. The Court reiterated Congress’s intent to permit the PHA to determine the seriousness of the offending action and

114. See Rucker, 237 F.3d at 1124.
115. 42 U.S.C. §1437d(l)(5) (1988). (“[P]ublic housing agency shall utilize leases which provide that a public housing tenant, any member of the tenant’s household, or a guest or other person under the tenant’s control shall not engage in criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.”).
117. The Supreme Court concluded in Rucker that, “Section 1437d(l)(6) requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or guest engages in drug related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.” Id at 133–34.
118. In Rucker, four public housing tenants of the Oakland Housing Authority argued that they could not be evicted from their public housing residences since the tenants did not engage in drug-related criminal activity. Instead, the criminal activity was conducted by the grandsons of one tenant, the daughter of another tenant, the daughter of another tenant, and the caregiver of a third tenant. Rucker, 535 U.S. at 128.
119. The Supreme Court further noted the seriousness of the offending action and the extent to which the leaseholder has taken all reasonable steps to prevent or mitigate the offending action: “It is not ‘absurd’ that a local housing authority may sometimes evict a tenant who had no knowledge of the drug-related activity. Such “no-fault” eviction is a common incident of tenant responsibility under normal landlord-tenant law . . . . Strict liability maximizes deterrence and eases enforcement difficulties.” Id. at 133–34.
120. Id. at 131.
the extent to which the leaseholder has taken all reasonable steps to prevent or mitigate the offending action.

III. FEDERAL PREEMPTION IN THE POST-RUCKER ERA

A. Federal Preemption Question in State Landlord-Tenant Law

This Part explores an important issue that may control the fate of the One-Strike Rule: federal preemption. In the last several years, there have been few reported cases that have denied a subsidized eviction on One-Strike Rule grounds or found that such an eviction survives Rucker. The Rucker decision essentially gutted the fault requirement that many state courts had previously read into the federal regulations. But the Pennsylvania serious injustice exemption and North Carolina unconscionability rule, recently brought to light in Somerville and Lofton, beg the question of whether the statutes run afoul of Rucker and are preempted by federal regulations.

The preemption issue arises where there are questions concerning the express or implied federal preemption of state laws, particularly where Congress mandates a legal effect notwithstanding state law. Where the federal statute or regulation is not ambiguous, the court must give deference to the statutory language. Ordinarily, a court must find compelling evidence of a federal intention to preempt before ruling that a federal housing law will preempt a state housing law. There is a presumption “against finding preemption of state law in areas traditionally regulated by the States.” Indeed, landlord-tenant law is traditionally a local matter. When faced with preemption, courts are to assume

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123. See infra Parts IV-V.
124. An implied federal preemptive law is when the federal statute occupies a field of law leaving no room for state action. Preemption can arise, alternatively, when there is a direct and positive conflict between the federal and state law such that the two cannot be reconciled or consistently applied together. Lastly, there is the express intent of the federal law by Congress to override the state law that triggers federal preemption. There is a presumption, however, against federal preemption. In analyzing preemption issues, courts are to assume that the historic police powers of the states are not superseded unless that was the clear and manifest purpose of Congress. However, it is unclear how this is applied where state landlord-tenant law intervenes where federal provisions also apply. See California v. ARC Am. Corp., 490 U.S. 93, 101 (1989); Rucker, 535 U.S. at 130; Hous. Auth. of Everett v. Terry, 789 P.2d 745 (Wash. 1990); U.S. CONST. art. 6, cl. 1 et seq.; Kelly v. Washington ex. Re. Foss Co., 302 U.S. 10 (1937) (quoting Sinnot, 63 U.S. at 243). See generally State v. Williams, 617 P.2d 1012 (Wash. 1980); Kelly v. Washington ex. Re. Foss Co., 302 U.S. 1 (1937); Sinnot v. Davenport, 63 U.S. 227 (1859); Kelly, 302 U.S. at 9; State v. Williams, 617 P.2d 1012 (Wash. 1980).
125. Rucker, 535 U.S. at 133–34.
126. See Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41 (2d Cir. 1990) (stating that federal law will “not preempt state law in areas traditionally reserved for the states unless that was the “clear and manifest purpose of Congress”).
128. Jaffe v. Clarke, 566 F. Supp. 1500, 1502 (S.D.N.Y. 1983) (concluding that “[]landlord-tenant law, especially under elaborate municipal housing codes, is characteristically complex and of peculiarly
that the historic police powers of the states are not superseded unless that was the clear and manifest purpose of Congress.\textsuperscript{129}

Some areas of state housing law are expressly preempted by federal housing regulations. For instance, states may not charge monthly rent exceeding thirty-percent of a federally-subsidized tenant’s household income.\textsuperscript{130} Likewise, a federally-subsidized tenant’s right to inspect documents upon termination preempts state law.\textsuperscript{131} Tenants may also invoke state or local protections under 24 C.F.R. § 247.6(c)\textsuperscript{132} and can exercise their right to grievance hearings and other procedures.\textsuperscript{133}

There is still much consternation about whether the One-Strike Rule provisions under 42 U.S.C. § 1437d(1)(6) preempt state landlord-tenant laws. On the surface, the One-Strike Rule provisions do not expressly override state landlord-tenant law procedures. While the “no-fault” framework implies a strict-liability justification to evict for drug-related criminal activity, the “good cause” provisions show a strong intent to defer to local PHAs and state courts to work out eviction cases. Nowhere does 42 U.S.C. § 1437d(1)(6) or Rucker require or mandate an eviction when the grounds for complete eviction have been met.

The Court in Rucker seemed to give credence to the preemption issue, stating that the “government is not attempting to criminally punish or civilly regulate” the tenants, but is “acting as a landlord of property that it owns.”\textsuperscript{134} This suggests, arguably, that it would “be hard to find an area of law in which the states have a

\textsuperscript{129} See Abrams, 897 F.2d at 41; U.S. CONST. art. 6, cl. 1 et seq.


\textsuperscript{131} See 42 U.S.C. § 1437d(1X6) (West 1994 & Supp. 2000); see also 24 C.F.R. § 966.4(m) (2000). Under 42 U.S.C. § 1437d(1X6), federally mandated procedures require local housing authorities to permit a tenant to review documents of record prior to and during eviction proceedings. State law is not permitted to deny federally subsidized tenants that right.

\textsuperscript{132} "A tenant may rely on State and local law governing eviction procedures where such law provides the tenant procedural rights which are in addition to those provided by this subpart, except where such State or local law has been preempted under part 246 of this chapter or by other action of the United States." 24 C.F.R. § 247.6(c).

\textsuperscript{133} Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,257 (Aug. 30, 1988) (codified at 24 C.F.R. §§ 904, 905, 913, 960, 966). ("State law may not override rights under Federal law or regulation, but may give a tenant the right to additional protections. Federal statute and regulation governing lease rights and termination of tenancy in the public housing program is not a comprehensive scheme that precludes other State regulation concerning this subject. To the contrary, it is assumed that the procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law. State laws are binding without incorporation in a Federal rule, or in the Federally-required lease requirements. State tenant protections may be enforced through the State courts or other procedures available under State law, without any need to create a Federal right to State law protections.").

\textsuperscript{134} See Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. at 125, 135.
greater interest or have had greater involvement than in the legal area of landlord-tenant. It is probably the case that "state courts have been and should continue to be" the venue where landlord-tenant disputes, including subsidized evictions on the grounds of drug-related criminal activity, are resolved. If so, federal preemption of state landlord-tenant law would be difficult to conceive.

The issues presented in Rucker have not returned to the Supreme Court for review, although the Court denied certiorari on a case that would have brought the One-Strike Rule back into the limelight, this time under the scope of federal preemption. Time will tell whether the issue comes before the Court again. There are plenty of signs, however, that it will. Many state courts wrestle with the preemption issue at the trial level and increasingly state appellate courts are faced with some rendition of a conflict between a state landlord-tenant statute and the federal regulations.

B. State Courts Divided on Preemption

The Court in Rucker pointed to the fact that public housing tenants have a property interest in their leasehold interest. Such leasehold interest disputes, on the facts, are invariably resolved first at the state level eviction proceeding. Thus, state law governs and regulates the administration of public housing leases by PHAs, and, by implication, the federal regulations would not displace or replace the traditional relationship between landlords and tenants at the state level. But some state courts have found otherwise.

In Boston Housing Authority v. Garcia, the tenant employed a "special circumstances" defense to show that he could not have foreseen or prevented the

137. Ross v. Broadway Towers Inc., 228 S.W.3d 113, 121–24 (Tenn. Ct. App. 2006), cert. denied, 128 S.Ct. 543 (2007). The U.S. Supreme Court denied certiorari in this case that would have reviewed the central issues in Rucker regarding whether equitable defenses are preempted by the Anti-Drug Abuse Act. In Ross, the Tennessee Supreme Court held that the waiver provision of a state landlord-tenant law was preempted by federal law as interpreted under Rucker. The lesseeholder had signed an authorization for Broadway Towers to conduct a criminal background check using a slightly different iteration of the tenant’s name. The tenant and her boyfriend were subsequently approved to live on the premises. However, the landlord later discovered that the tenant had a felony forgery conviction under a slightly different name. After learning of the conviction, Broadway Towers served a notice of non-compliance on the tenant. The Tennessee court upheld the eviction, finding that federal regulations guided such evictions. In light of case law leaning towards federal preemption of Rucker One-Strike evictions, there is case law that provides some guidance on circumstances where federal preemption fails.
138. Rucker, 535 U.S. at 135; accord Greene v. Lindsey, 456 U.S. 444, 444 (1982) (holding that an effort to deprive a tenant of such a right without proper notice violated the Due Process Clause of the Fourteenth Amendment).
139. 871 N.E.2d 1073, 1080 (2007) (holding that a “special circumstances” defense was implicitly preempted by Rucker). The tenant’s son was arrested after a police officer stopped the motor vehicle he was driving without a driver’s license. The officer discovered a bag containing marijuana. At the time of arrest, the tenant’s son gave his mother’s address and the son was subsequently charged with possession of a class D substance. A state landlord-tenant law in Massachusetts provides for a “special
criminal activity from occurring on the premises. The court, however, held that such a defense was preempted by 42 U.S.C. § 1437d(1)(6) by iterating (1) that the special circumstances defense stood as an obstacle to the accomplishment and execution of the purposes of 42 U.S.C. § 1437d(1)(6), and (2) that the PHA has the discretion, regardless of whether or not the tenant knew or should have known about the activity and regardless of whether the tenant was even capable of stopping the activity. The court stated that if it had found in favor of the tenant and upheld the state law, the special circumstances defense would permit a public housing tenant to defeat a lease termination based on the acts of a household member by establishing that he or she could not have foreseen or prevented the misconduct. The court further reasoned that giving a trial court such authority would override the use of the PHA’s discretion to evict and would run afoul of, and substantially interfere with, the congressional objective.

In Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments, the tenant argued that the notice was deficient by not correctly giving her the 30-day opportunity to cure the violation and the notice failed to adequately explain to her the grounds for eviction. Under D.C. Code § 42-3505.01(b), a discrete provision of the District's Rental Housing Act first adopted by the Council of the District of Columbia in 1985, “[a] housing provider may recover possession of a rental unit where the tenant is violating an obligation of tenancy and fails to correct the violation within 30 days after receiving from the housing provider a notice to correct the violation or vacate.”

The court found that the landlord was not required to provide the tenant with a cure notice before eviction proceedings, even if the cure provision in the state Rental Housing Act applied. The court also reasoned that enforcing D.C. Code § 42–3505.01(b), the Act’s cure provision, would frustrate the federal law under 42 U.S.C. § 1437f(d)(1)(B). The court further found that § 42-3505.01(b) does not necessarily require landlords to provide a notice to cure when there is evidence that a tenant committed a discrete criminal act in violation of the lease. Thus, while not directly an issue of preemption, the federal regulations supersede such circumstances” or “innocent tenant” defense to be raised in the face of an eviction on the grounds of unlawful conduct of a household member. Id. at 1074–75 (citing Mass. Gen. Laws ch. 121B, § 32).

140. Id. at 1075.
141. Id.
142. Id. at 1078.
143. 890 A.2d 249, 249–59 (D.C. 2006). The tenant’s cousin entered her apartment and began an altercation with her. The tenant’s boyfriend pulled out a shotgun and fatally shot the tenant’s cousin. The police found a loaded twelve-gauge semi-automatic shotgun next to the water heater in the furnace room, a loaded semi-automatic pistol under the seat cushion of a couch, a box of Remington shotgun ammunition containing twenty-three shotgun shells, and a box of cartridges for the semi-automatic pistol. The boyfriend was acquitted of murder, but was convicted of possession of an unregistered firearm and ammunition. The landlord proceeded to evict the tenant for the criminal activity on the premises. On February 15, 2003, a professional process servicer posted a notice on the tenant’s apartment door and then went to the post office and mailed copies of the notice to her and the District of Columbia Department of Regulatory Affairs.
144. See D.C. Code § 42-3505.01(b).
state laws. The Housing Authority further argued that, while the D.C. law provided the tenant an opportunity to correct the unlawful possession of a loaded shotgun, the enforcement of the requirement would frustrate the objectives of the federal program and would “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” A case in Kentucky, however, paves a path leaning toward finding no federal preemption.

In *Housing Authority of Covington v. Turner*, the court reviewed the issue of whether a public housing tenant has a right to remedy the breach of the lease pursuant to KRS § 383.6601(1) under the Uniform Residential Landlord and Tenant Act (URLTA) and whether the statute is preempted by federal law. In *Turner*, the tenant was being evicted for drug-related criminal activity. Cocaine was found in the room where the tenant’s nephew resided. At the time of the police search of the premises, the tenant was at work and testified at trial that she did not have knowledge of the drugs in her apartment, essentially relying on the innocent tenant defense.

Under KRS § 383.6601(1), “Evictions for Criminal Activity or Drug-Related Criminal Activity will be governed by the URLTA as adopted by the State of Kentucky and the City of Covington and will not be governed by the grievance procedure of the authority.” The statute essentially provides for an opportunity for the tenant to “remedy” a breach in the lease agreement. The PHA argued that 42 U.S.C. § 1437d(1)(6) preempted KRS § 383.660(1). However, the trial court found that the tenant’s action of barring her nephew from the apartment was sufficient to remedy the drug-related criminal activity, and thus denied the eviction of the tenant.

In its reasoning, the Kentucky Court of Appeals reiterated that “intrusions into the traditional powers of the states are not favored and, therefore, there is a presumption against preemption of state statutes and regulations.” Thus, the court found no prohibition under 42 U.S.C. § 1437d(1)(6) that precluded a tenant from remedying a violation of the lease agreement and that there was “no irreconcilable conflict between the statutes.” In arriving at its decision, the court, unanimously, found that the PHA had failed to adequately demonstrate that it had weighed the policy considerations behind the federal statute. The court disagreed with the notion that a remedy provision under KRS § 383.6601(1) defeated the purpose of 42 U.S.C. § 1437d(1)(6). The court eloquently reiterated the lower court’s decision, stating:

[R]ather than the provision of an opportunity to remedy being an obstacle to the purposes and objectives of the Anti–Drug Activity law, a tenant who has been served with notice of the

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146. *Id.* at 125.
147. *Id.* at 127.
148. See *id*.
149. *Id.* at 125, 128.
intent to evict has clear knowledge of the provision, and having been given the opportunity to remedy may be among the most likely of tenants to prevent the situation from recurring, thereby furthering the purposes of and objectives of the law.150

The court also seemed to turn the strict-liability, third-party policing strategy of the One-Strike Rule onto itself by arguing that the right to remedy illegal drug activity is, in and of itself, consistent with the Congressional objective of discouraging illegal drug use in public housing because a tenant who has “been given the opportunity to remedy may be among the most likely of tenants to prevent the situation from recurring, thereby furthering the purposes of and objectives of the [federal] law.”151 Indeed, “conferring the opportunity to remedy the violation is, in this court’s view, in conformity with the cautionary remarks of the United States Supreme Court and HUD.”152 Other courts have followed the same reasoning as to whether Rucker provides a basis for preempting or limiting a court’s equity powers.

In Cuyahoga Metropolitan Housing Authority v. Harris,153 the trial court denied the eviction of the tenant after the tenant testified that she was unaware that her guest was in possession of drugs. The court concluded that PHAs may, but are not required to, evict under Rucker or the federal regulation. The court’s reading of the federal regulations was consistent with the letter published by HUD shortly after the Rucker decision, which advised PHAs to consider the seriousness of the offense before pursuing eviction. Importantly, the court stated that, despite the existence of a lease violation, courts may “weigh all equitable considerations in determining whether a forfeiture is to be declared.”154 The court stated:

And the federal law on terminating a public housing tenancy for the criminal conduct of a guest does not preempt the equity authority of the court to exercise its discretion to enter judgment in favor of an innocent tenant and against the PHA in an eviction action. Rucker does not alter this conclusion and does not provide a basis for preempting or limiting this court’s equity powers.155

150. Id. at 123, 127.
151. Id. at 127.
152. Id.
153. 861 N.E.2d 179. The tenant’s guest was arrested on a federal warrant. The police searched the guest upon entering the premises and found crack cocaine in his pocket, however, the police did not find any other drugs or paraphernalia upon a sweep of the entire premises. The Cuyahoga Metropolitan Housing Authority sought to evict the tenant on the grounds of violating the criminal activity lease provisions, which prohibited any drug-related activity on or off the premises.
155. Harris, 861 N.E.2d at 181 (citations omitted).
Indeed, the court was satisfied that the innocent tenant defense permitted the magistrate court to utilize its discretion to deny the eviction on the principle of equity. When weighing positive and negative factors before eviction, courts have emphasized the importance of a fair and balanced evidentiary hearing in eviction proceedings. But in *Dayton Metro Housing Authority v. Kilgore*, the Ohio Court of Appeals focused its decision on Congress’s intent to permit no-fault evictions and held that a trial court erred by taking into account “equitable considerations” permitted under Ohio law to deny an eviction. The court stated, “By relying on the innocent-tenant defense . . . courts run the risk of preventing operation of the enforcement mechanism for which the statute provides, undermining the policy. That outcome would be inconsistent with the obligation of equity to follow the law.”137 The Court further elaborated on this point:

Kilgore was likewise actually innocent of the drug-related criminal activity of her two guests, and they apparently concealed from her their plans to engage in it. However, by making her apartment open and available to [other persons] as she did, Kilgore furthered her guests’ criminal purpose to use that location to engage in drug-related criminal activity. The federal statute makes no exception for inadvertence in relation to its purpose of protecting residents of federally financed housing from drug-related criminal activity. The result may appear draconian, but *Rucker* observed that ‘strict liability maximizes deterrence and eases enforcement difficulties.”158 And in *Milwaukee City Housing Authority v. Cobb*, a Wisconsin statute that provided a five-day right-to-cure period was held to be preempted by 42 U.S.C. § 1437d(1)(6). The tenant, who rented an apartment from the Housing Authority of the City of Milwaukee (HACM), violated his lease by engaging in drug-related criminal activity. The tenant’s lease, however, did not have the One-Strike Rule lease provision, and thus was subject to the state law under Wis. Stat. § 704.17(2)(b). The HACM argued that the right to remedy provision under Wis. Stat. § 704.17(2)(b) stood as an obstacle to the accomplishment and execution of Congress’s goal to give PHAs discretion to evict for drug-related criminal activity. The court decided that the federal regulations preempted the state statute.

Relying upon *Scarborough* and *Boston Housing Authority*, the court found that a right to remedy provision conflicts with the federal regulations in two related respects.‘160 First, the court stated that a right to cure past illegal drug

156. 958 N.E.2d 187, 192.
158. *Id.* at 192.
159. 860 N.W.2d 267, 279 (Wis. 2015).
160. *Id.* at 276.
activity is counter to Congress’s goal of providing drug-free public housing. Second, a right to cure past illegal drug activity is in conflict with Congress’s method of achieving that goal by allowing eviction of tenants who engage in drug-related criminal activity. Indeed, the court upheld the troubling third-party policing tactics set forth under federal regulations, even where tenants showed utmost effort to deter criminal activity. However, the abuse of discretion standard, as opposed to a right to remedy provision, has stood as another method for which subsidized tenants can fight the unrealistic third-party policing tactics that Congress has imposed.

In Bennington Housing Authority v. Bush, the Vermont Supreme Court ruled that a local PHA (the BHA) had abused its discretion by not considering alternatives to eviction after a background check discovered that a member of a tenant’s household had a felony conviction from ten years earlier, which was not disclosed on the tenant’s housing application. The tenant admitted she was aware of the prior criminal record, but did not know the specifics such as whether he had been convicted of a felony. The tenant offered to exclude the offender from the apartment as a remedy in order that the tenant could remain, but the property manager refused such an alternative.

In Vermont, the standard for civil disputes where an administrative agency is making a determination on eviction is the abuse of discretion standard. The standard, in other words, is whether another reasonable person acting under the same circumstance would have resorted to another course of action. The Vermont Supreme Court found that the trial court’s articulation of the abuse of discretion standard was in error and reversed the decision. The Supreme Court reviewed the abuse of discretion standard as to whether the BHA “failed to exercise . . . discretion altogether or exercised it for reasons that are clearly untenable or unreasonable.” The Court reasoned that the BHA may evict the entire family, but that it “need not do so” and “should not do so without considering all of the available options.” Evicting the entire family, the Court reasoned, was not the only option available, particularly because the tenant offered to remove her family member.

161. Id.
162. Id.
163. See Hornstein, supra note 21, at 2.
164. 933 A.2d 207, 220 (Vt. 2007). In April of 2000, the tenant and her daughter were homeless. The tenant filed an application for public housing. In her application, the tenant listed herself as head of household and provided the requisite information on her income, vehicles, previous landlord, and personal references. The application asked about criminal history and the tenant answered those questions in the negative. However, tenant did not disclose the criminal history of her household member, the father of the child. But the tenant testified that she did not think the child’s father’s criminal history was required on the form. The Bennington Housing Authority (BHA) ran a background check on the couple, which revealed no criminal history in Vermont. The BHA then approved the family for a subsidized unit and the family has lived there since May of 2000. In March of 2005, after the BHA conducted a subsequent background search, the tenant received a notice of termination on the grounds of giving false information and misrepresentation in the criminal background portion of the application.
boyfriend. The Court said that the federal regulations are not so “black and white” and “are not inflexible.” The BHA may overlook the drug history of the tenant or the household member if the person is no longer engaging in drug abuse or has been rehabilitated.

Further, the underlying community health and safety goals of the federal regulations are not met by removing the entire family, particularly when criminal activity has not occurred for five years. The federal advisory information counsels against PHAs following inflexible rules because debilitating hardships caused by eviction are very case-specific for poor tenants facing the loss of subsidized housing. As the Court in Bush stated:

[F]ederal advisory information counsels against the application of rigid rules in public housing because of the hardship that arises when tenants lose their housing. Thus, any reasonable approach to this problem should have included a balancing in this particular case of the current situation and tenant history against a failure to include information in the original application. In the end, it is still BHA's decision, but the decision must not be made arbitrarily or without an apparent consideration of the alternatives laid out in the regulations.

Indeed, when determining whether to evict an entire family, PHAs should include an “opportunity [for the tenant] to present evidence and arguments about the circumstances that might move the decision maker to impose a penalty less severe than termination.” A New Jersey appellate court in Oakwood Plaza Apartments v. Smith extended the abuse of discretion standard to Section 8 landlords. There, the court found that the Rucker decision did not mandate eviction, but instead permits eviction only after weighing the “positive and negative factors” and the circumstances leading to the eviction, as outlined in the federal regulations. The court also stated that the ultimate decision should not be “arbitrary or capricious.” Thus, the New Jersey court concluded that it was the trial court, not the PHA, which has the responsibility to determine whether the landlord appropriately exercised its discretion in a manner consistent with the federal regulations.

166. See Bush, 933 A.2d at 213.
167. See 24 C.F.R. § 960.202(a)(2)(iii); 24 C.F.R. § 960.203(c)(3); 24 C.F.R. § 960.204(a)(1).
168. See Bush, 933 A.2d at 213.
171. Id.
172. Id.
173. Id.; see also Jersey City Hous. Auth. v. Ford, No. A-5657-08T3, 2010 N.J. Super. Unpub. LEXIS 3118 (N.J. Super. Ct. App. Div. 2010) (extending the Oakwood Plaza decision by finding that trial courts must review the discretion exercised by PHAs under the abuse of discretion standard, thus affirming PHAs’ requirements to weigh all the relevant circumstances prior to evicting).
The post-\textit{Rucker} era of evictions is unremarkable to say the least: a tenant, guest or family engages in a “bad act” that violates the lease; the landlord discovers the activity, then pursues eviction and finally removes the tenant with the authorization of the court. It’s quite simple. As mentioned in Parts II and III, rulings, such as \textit{Scarborough, Boston Housing Authority} and \textit{Cobb}, still continue to highlight the significance of allowing users of illegal drugs to avoid eviction by relying upon the findings that Congress made, back in 1988, when adopting the Anti–Drug Abuse Act when reviewing challenges to the One-Strike Rule and holding federal law preempts state landlord tenant law.\footnote{See 42 U.S.C. § 11901(2) ("[P]ublic and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime."); \textit{id.} at § 11901(3) ("[D]rug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants."); \textit{id.} at § 11901(4) ("[T]he increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures.").}

There are, however, principles of law and equity available in Pennsylvania and North Carolina that serve as a different approach for tenants seeking to fight evictions. These principles of law and equity serve as an important foundation for a new eviction jurisprudence that attacks \textit{Rucker} and the federal regulations. As proposed in Parts IV and V, recent sociological research on evictions and urban poverty may help substantiate the need for trial courts to use more, not less, discretion to deny evictions that result in serious injustices or unconscionable results.

\section*{IV. EVICTION IN PENNSYLVANIA AND NORTH CAROLINA}

Prior to \textit{Rucker}, Pennsylvania courts, like other state courts, were less likely to presume that the tenant had knowledge of criminal activity. For example, Judge Wettick, in \textit{Allegheny County Housing Authority v. Arminthia},\footnote{20 Pa. D. & C. 4th 233, 237 (Com. Pl. 1993).} did not review an eviction matter with the presumption that a tenant was aware of her son’s drug-related criminal activities simply because her son lived with her. Although Pennsylvania still provides for an abuse of discretion standard,\footnote{See, e.g., \textit{Allegheny Cty. Hous. Auth. v. Liddell, 722 A.2d 750, 753 (Pa. Commw. Ct. 1998).} Trial courts ordinarily will not override the decisions by governmental bodies or administrative tribunals involving acts of discretion “in the absence of bad faith, fraud, capricious action or abuse of power,” further, “they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution.” \textit{Id.} \textit{Liddell} furthered this standard in the context of evictions, stating that “the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency’s duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; judicial discretion may not be substituted for administrative discretion.” \textit{Id.}} prior to \textit{Rucker} Wettick was aware of and instituted a fault-based approach to subsidized evictions, stating “federal law may not create a presumption that every tenant has knowledge of any drug-related criminal activities of each member of
the tenant’s household conducted on the property of the housing complex.”

In *Housing Authority of York v. Ismond*, the court determined that the language contained within the Federal Register indicated that a mere conviction is not the only factor to be considered by the PHA when deciding whether to terminate public housing assistance. The court held that a family in public housing could not be evicted solely on the basis of a juvenile’s drug-related criminal activity without reviewing all of the circumstances of the eviction. In *Delaware County Housing Authority v. Bishop*, the court found that a PHA does not have complete discretion to evict a tenant who was unaware of the criminal activity of her son.

In *Woodland Manor Apartments v. Flowers*, the tenant’s brother was convicted of drug-related criminal activity inside the tenant’s unit. The tenant did not know of the presence of drugs or the paraphernalia in her apartment. In fact, a testifying officer also had no reason to believe the tenant was part of the illegal activity. The tenant lived in Section 8 project-based “new construction” housing, requiring the lease agreement between the tenant and owner of the unit provide “any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, 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.” The court found that where a public housing tenant is not personally at fault, by commission or omission, for the drug-related activity of a member of her household or guest, no good cause exists for termination of the lease and eviction. However, leading up to the *Rucker* decision, some Pennsylvania courts leaned toward giving full deference to the PHA in evictions.

In *Liddell*, the PHA started eviction proceedings against a tenant when his visitor was arrested for drug-related activity. The visitor maintained the tenant’s apartment as his mailing address. The trial court ruled in favor of the PHA, finding any drug-related criminal activity on or near the premises was grounds for eviction. The appellate court affirmed the trial court decision, stating that the court would not second-guess the actions of administrative agencies unless the actions were in bad faith, fraudulent, capricious or an abuse of power.

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177. *Arminthia*, 20 Pa. D. & C. 4th at 237. Wettick goes on to state that “[c]onsequently, the issue in this case is whether the Constitution bars a public housing agency from terminating this lease of a tenant for criminal drug-related activity of a minor child where there is no evidence that the tenant knew of the activity.” *Id.* at 238.


179. *Id.*


183. 42 U.S.C. § 1437d(c)(5).


185. See *Liddell*, A.2d at 753. The court in *Liddell* stated that “courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith.
The tides changed drastically after the Rucker decision. The Pennsylvania Supreme Court was quick to rely on the Supreme Court’s Rucker ruling to permit PHAs to evict even if the tenant did not know or had no reason to know of the drug-related criminal activity. In Housing Authority of Pittsburgh v. Fields, the Court reversed a Commonwealth Court decision that found that a tenant should not be evicted for his son’s arrest on public housing property for possession of a controlled substance, given that the son was merely listed on the lease as a household member. Therefore, the Authority did not meet its burden of proving that the tenant’s son was under the tenant’s control. In reversing, the PA Supreme Court declined to write an opinion, merely stating that the Rucker ruling influenced the reversal. And in Allegheny County Housing Authority v. Johnson, the court ruled that the trial court abused its discretion and erred as a matter of law in not evicting the defendant from a public housing unit even though he repeatedly violated the lease.

A. Pennsylvania’s Expedited Eviction of Drug Traffickers Act

Several years before the Rucker decision was handed down, the Pennsylvania Legislature enacted the Expedited Eviction of Drug Traffickers Act, creating an entirely new framework for a cause of action regarding evictions and providing an expedited route for landlords to evict drug offenders. The Act was arguably an extension and ultimately an expansion of the third-party policing movement. However, the Act also provided tenants with two important defenses, the latter which is the focus of what this Article argues as the foundation for a “new eviction jurisprudence.”

The Act was drafted in direct response to President Clinton’s “Community Stabilization” papers published by the Commission on Model State Drug Laws. Prior to the drafting of the Model State Drug Laws and the Rucker ruling, PHAs did not strictly adhere to the One-Strike Rule and often used leniency in evicting tenants who had no knowledge of the activity. However, an Executive Order signed by President Clinton in 1996 encouraged PHAs to impose the One-Strike policy more often and incentivized PHAs that did so with increased funding. The Rucker decision, as discussed in Part II, only further exacerbated no-fault evictions.

fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency’s duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; judicial discretion may not be substituted for administrative discretion.”

The Act was drafted and deliberated between June and December 1995 before a final vote. It was the quintessential third-party policing legislation for controlling and preventing misconduct and crimes in residential housing. The purpose of the Act was to empower prosecutors, neighborhood associations, tenants and landlords, including PHAs, with the power to take civil action against those known to engage in drug-related criminal activity. The legislation sought to empower "tenants to help themselves when it comes to dealing with drugs and to try to root out some of [the] antisocial behavior that goes on in some of [the] housing establishments." The police community also convinced legislators to enact laws to shift the burden of policing crime and misconduct, while District Attorneys in Pennsylvania have been pushing for increased third-party policing since the legislation was enacted in 1995.

State Senator Joseph Uliana of the 18th District preferred for the legislation to "go beyond the remedies which [were] presently found in the law . . . to allow and empower tenants and people who live in public housing to get people out of public housing who [were] . . . creating a menace and get them out of all public housing units." The legislative intent seemed to suggest that legislators wanted to "quicken the pace for drug evictions [because] public housing authorities [were] unable to get evictions of individuals who [were] indicted for drug trafficking and drug-related activities." In other words, while the statute applied to private landlord-tenant disputes, its primary target was public housing.

The Act enabled landlords, tenant organizations and neighbors to file complaints directly to the Court of Common Pleas civil trial division and have an eviction hearing scheduled fifteen days later. Today, a bench trial ordinarily determines whether the landlord has met his burden of proving that drug-related criminal activity occurred on or within the apartment, whether the apartment was used for drug-related criminal activity or the tenant or a guest engaged in the activity on or in the immediate vicinity of the apartment. Quite simply, evidence of drug-related activity may be enough to satisfy a complete eviction under the Act.

Enumerated under 35 P.S. § 780-152, there are three primary sections of the Act that serve as the legislative tools for PHAs to effectuate the One-Strike Rule. In addition, the PHA’s model lease holds the tenant liable by prohibiting

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189. See Desmond & Valdez, supra note 26, at 119 (quoting Michael Buerger & Lorraine Mazerolle, Third Party Policing: A Theoretical Analysis of an Emerging Trend, 15 JUSTICE QUARTERLY 301, 303 (1998)).
190. See S. 41, 1st Sess., at 228 (Pa. 1995).
192. Andrew Conte, Local landlords find it’s not easy to evict drug dealers, PITTSBURGH TRIBUNE-REVIEW, (Aug. 20, 2010), http://triblive.com/x/pittsburghtrib/news/s_695693.html#axzz3fTJLOXr; see Desmond & Valdez, supra note 26, at 118.
193. See S. 41, supra note 187, at 231.
194. See S. 41, supra note 187, at 230.
195. 35 PA. STAT. ANN. § 780-164(a) (West 2015).
196. See 35 PA. STAT. ANN. § 780-152 (West 2015) ("(2) Persons who commit drug distribution offenses on or in the immediate vicinity of leased residential premises or who permit or tolerate such
the tenant’s household members, including guests, from engaging in “any drug-related criminal activity on or off the Premises or in the Unit.” Further, the PHA model lease buttresses the Act and the federal regulations by stating that no covered person, including a guest or family member, may engage in “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the Premises.” In fact, several provisions, including the innocent tenant defense, were “taken right out of” the papers published by the Commission on Model State Drug Laws. Two important tenant defenses feature in the legislation: (1) innocent tenant defense and (2) serious injustice exemption.

1. Innocent Tenant Defense—35 P.S. § 780-157(a)

The Pennsylvania Legislature drafted an innocent tenant defense into the Expedited Eviction of Drug Traffickers Act in 1995, in light of the unresolved issues over whether Congress intended for the federal regulations to permit a no-fault, strict-liability rule. On the Pennsylvania House Floor during the drafting of the Act, State Senator Jeffrey Piccola stated, “If [leaseholders] can persuade the judge by a preponderance of the evidence that they are innocent, the court has within its power under this proposed act the discretion to order a partial or total eviction of the drug trafficker.”


198. Id.

199. See H.R. 57, supra note 188, at 381; see also PRESIDENT’S COMM’N ON MODEL STATE DRUG LAWS, MODEL EXPEDITED EVICTION OF DRUG TRAFFICKERS ACT A-32 (1993) (“Thus, for example, where the tenant can establish by a preponderance of the evidence that he or she was innocent of the drug-related criminal activity proven by the plaintiff, and that the person who actually committed the activity no longer resides in his or her individual rental unit, then the appropriate relief would be the issuance of the removal order directed against the specific drug-trafficker, and the establishment of a ‘conditional tenancy’ wherein the tenant would thereafter be required to reuse permission for re-entry to the drug trafficker, and notify law enforcement or public housing authorities if the person does not return to or re-enter the tenant’s individual rental unit.”).

200. S. Rep. No. 101-316, at 179 (1990), as reprinted in 1990 U.S.C.C.A.N. 5763, 5941. Congressional intent regarding no-fault evictions was, arguably, to permit an innocent tenant defense. The Senate report explained: “The committee anticipates that each case [eviction proceeding] will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.” Id.
conditional tenancy or partial eviction so that the tenant is safeguarded from eviction...201

The Pennsylvania Legislature wanted to allow a tenant to raise a defense that would provide “adequate safeguards for an innocent tenant who is the victim of their own co-tenant.”202 The innocent tenant defense, drafted into the Act, permits a court to refrain from evicting a tenant if the tenant can show (1) that she did not know or have reason to know that drug-related criminal activity was occurring on or within the individual rental unit and (2) that she had done everything that could reasonably be expected in the circumstances to prevent the commission of the drug-related criminal activity.203 But, while making a strong innocent victim defense available, few cases have come before Pennsylvania appellate courts that rely on the Act’s innocent tenant defense.

In Philadelphia Housing Authority v. Snyder,204 the tenant’s son was arrested outside the premises for drug-related criminal activity. The Philadelphia Housing Authority (PHA) filed a complaint and petition for a preliminary injunction, requesting the trial court evict Snyder, alleging that the tenant’s action of knowingly permitting her son to deal drugs violated the Expedited Eviction of Drug Traffickers Act. The tenant asserted the affirmative defense under 35 P.S. § 780-157(a) arguing that she did not have knowledge of the criminal activity of her son. But the Commonwealth Court reasoned that, even though the tenant testified she did not know of the criminal activity, there was evidence that might support a different conclusion, and thus remanded the case back to the trial court.205 Indeed, the court reiterated that, “[i]t is not the province of this court to...
make credibility determinations, resolve conflicts in the evidence or make findings of fact." In other words, had the court found the testimony of the tenant’s lack of knowledge credible and made a determination based on the innocent tenant defense, the appellate court would presumably not disturb the trial court’s determination, even if the court overturned a PHA’s decision to evict.

While 35 P.S. § 780-157(a) provided for an innocent tenant defense, House Representative Allen Kukovich of the 56th District cautioned that the Legislature would “be very sorry someday if all this legislation is signed into law” without adequate safeguards from “undue hardships on innocent people.” The Legislature, thus persuaded, incorporated a second, little-known, defense under the Act to provide additional eviction safeguards and to alleviate fears that serious injustices would result as a consequence of giving landlords too much third-party policing power to evict. Arguably, the statutory exemption was inserted as a secondary safeguard if the innocent tenant defense failed on state substantive law grounds.

2. The Statutory Exemption—35 P.S. § 780-157(b)

The statutory exemption is an alternative eviction defense for a tenant under the Act. The exemption was drafted into the Act to provide “adequate safety valves in which to avoid injustices if such a case [could] be made out.” The intent of the Pennsylvania Legislature was to ensure that debilitating hardships caused by unjust evictions would be “more than adequately taken care of under the exemption section of [the] statute” giving sufficient discretion to trial courts to avoid injustices. The statutory exemption, under 35 P.S. § 780-157(b), states:

If the grounds for a complete eviction have been established, the court shall order the eviction of the tenant unless, having regard to the circumstances of the criminal activity and the condition of the tenant, the court is clearly convinced that immediate eviction or removal would effect a serious injustice the prevention of which overrides the need to protect the rights, safety and health

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206. Id.
207. See H.R. 57, supra note 188, at 384
208. Id. at 381.
209. Id. at 385.
210. Id. at 382.
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of the other tenants and residents of the leased residential premises.\textsuperscript{211}

Indeed, the legislators, and in particular the drafters, of the Act were well aware that it was necessary for the legislation to equip trial courts with discretion to review eviction matters because each tenant’s individual circumstance in an eviction proceeding is different and that each case has its own unique peculiarities.\textsuperscript{212} On the House Floor in September 1995, House Representative William R. Lloyd, Jr. of the 69th District voiced his concern about the extent to which landlords could evict under the statute, posing the following hypothetical to the House Speaker, Matthew Ryan:

A child 16 years old lives with his parents in an apartment complex and is doing drugs. The parents do not want to call the police; they want to help their child get well. They try over the course of a year or so to get that child into a proper drug treatment program, without success. Ultimately, the child gets arrested and gets convicted or gets probation, but gets into a drug-treatment program; now 2 or 3 years later is pronounced by the system to be cured; wants to come back home and live at the parents’ apartment. Under your explanation and reading of the comments on the model code, would that be permitted?\textsuperscript{213}

Senator Piccola responded to Representative Lloyd, redirecting him to the serious injustice exemption, saying “Clearly, the scenario you have painted, a drug-free life where rehabilitation has been sought and successfully obtained, would fall under that section and allow the court not to order either partial or complete eviction or immediate eviction under the statute.”\textsuperscript{214} But Representative Allen Kukovich of the 56th District voiced his concern that the “bill is silent as to what would happen after [tenants] would be removed” and that certain provisions would “tear families apart.”\textsuperscript{215} While this was not the “intention” of the Legislature, Representatives Kukovich and Lloyd were rightly concerned that “in the rush to pass some of [the] legislation” the members of the Legislature needed to be thoughtful in drafting the provisions that would guard against unjust evictions.\textsuperscript{216}

Nonetheless, the intent of the Legislature was to provide a statutory exemption that authorized trial courts to exercise broad discretion when deciding an eviction matter and to take into account, among other things, the offender’s

\begin{itemize}
  \item 35 P.S. § 780-157(b) (emphasis added).
  \item See S. 41, supra note 187, at 230.
  \item See H.R. 57, supra note 188, at 382.
  \item Id.
  \item Id. at 384.
  \item Id.
\end{itemize}
efforts to rehabilitate himself and consider the lapse of time between the offense and the eviction. This seems to be buttressed by Representative Lloyd’s inquiry as to whether there was a requirement that the eviction action begin within some specified period of time after the drug-related activity occurred, to which Senator Piccola affirmed that the intent of the legislation was not to incorporate a sunset provision for when a landlord can bring an eviction action after the drug-related criminal activity has occurred.

In other words, the legislative history reveals that the Legislature, perhaps unknowingly, had carved out an exemption that indirectly attacks 42 U.S.C. § 1437d(1)(6) and the Rucker ruling. It is clear that the exemption statute, by legislative design, was intentionally placed into the statute to safeguard tenants from landlords, such as PHAs, who may abuse third-party policing power and fail to take into account all the circumstances of the criminal activity and the condition of the tenant when moving to evict a tenant on grounds of drug-related criminal activity. It is less clear, however, how courts interpret and treat the exemption statute since only one case is available that makes short shrift of the provision.

In Housing Authority of Pittsburgh v. Underwood, the tenant’s son, who was a named person on the lease, was arrested for drug-related criminal activity in 2011. The Housing Authority of the City of Pittsburgh moved to evict under the statute, asserting that the tenant violated her lease agreement because a member of her household engaged in drug-related criminal activity in the immediate vicinity of her residence. The tenant had attempted to remove her son from the premises multiple times prior to the criminal conviction, but had failed to remove his name from the lease. The tenant argued, on appeal, that the trial court abused its discretion in rejecting the affirmative defense under 35 P.S. § 780-157(a)(1). She argued she did not have knowledge of the drug-related criminal activity, that she no longer permitted her son on the premises, and that she had attempted to remove him.

The tenant also argued, in conjunction with the innocent tenant defense, that the trial court erred in failing to find that the tenant fell within the exemption under 35 P.S. § 780-157(b). The tenant argued that there was nothing in the record showing that she or her other two children could have posed a threat to the rights, safety, and health of the other tenants and residents of the leased residential property, because it was her other son—over whom she had no control—who had engaged in the criminal activity. Further, the tenant argued that a 26-year tenure as a public housing resident, along with the fact that the tenant and her children did not pose a threat, was sufficient for the court to find

217. Id. at 382.
218. Id.
220. Id. at *2.
221. Id. at *1.
that eviction would result in a serious injustice overriding the rights, safety, and health of the other tenants.\footnote{Id. at \*3.}

The Commonwealth Court affirmed the trial court’s ruling, awarding the Housing Authority of the City Pittsburgh (HACP) possession of the housing unit pursuant to the Act.\footnote{Id. at \*4.} The court, although sympathetic, found that there was no evidence establishing that the tenant’s eviction would result in a serious injustice overriding the need to protect others; and the tenant’s testimony lacked credibility. Importantly, however, the ruling was based on a trial decision that was adverse to the tenant. It is likely that an appellate court would uphold a trial court decision to deny the eviction if the court was clearly convinced the eviction would cause a serious injustice. But no such case has come before an appellate court in Pennsylvania; thus, the statutory exemption sits in a legal vacuum at the appellate level.

\subsection*{B. North Carolina’s Morris Four-Prong Test}

The evolution towards a “new eviction jurisprudence” in North Carolina has its origins in a decision by the North Carolina Supreme Court, \textit{Morris v. Austraw}.\footnote{152 S.E.2d 155 (1967).} In \textit{Morris}, the court decided that the particular lease in dispute did not have sufficient language to support forfeiture when applied to the facts.\footnote{See \textit{Morris}, 152 S.E.2d at 158–59.} The court, peculiarly, pulled an influential quote from \textit{American Jurisprudence} to create an unconscionability factor, which stated the “right to declare a forfeiture of a lease must be distinctly reserved; the proof of the happening of the event on which the right is to be exercised must be clear; the party entitled to do so must exercise his right promptly; and the result of enforcing the forfeiture must not be unconscionable.”\footnote{152 S.E.2d at 159 (quoting 32 Am. Jur. Landlord and Tenant, § 848, at 720–21 (1941)) (“Generally, unless there is an express stipulation for a forfeiture, the breach of a covenant in a lease does not work a forfeiture of the term. Moreover, the settled principle of both law and equity that contractual provisions for forfeitures are looked upon with disfavor applies with full force to stipulations for forfeitures found in leases; such stipulations are not looked upon with favor by the court, but on the contrary are strictly construed against the party seeking to invoke them. As has been said, the right to declare a forfeiture of a lease must be distinctly reserved; the proof of the happening of the event on which the right is to be exercised must be clear; the party entitled to do so must exercise his right promptly; and the result of enforcing the forfeiture must not be unconscionable.”).} This seemingly harmless reference to \textit{American Jurisprudence} has evolved into a major point of contestation amongst landlords and tenants in contemporary eviction law.

\subsubsection*{1. The Unconscionability Rule}

The quote seems to assert a general principle of law. But it also, arguably, can be interpreted as dicta. Of course, dicta is not binding precedent and courts...
have the discretion to apply the language used by prior court rulings in present matters, but it does give a fuller understanding of the court’s reasoning and logic in making a determination. North Carolina courts have followed suit with the *Morris* ruling, creating a four-prong test for evictions that is today probably considered a general principle of law. Most notably, a state appellate court in *Charlotte Housing Authority v. Fleming* laid out the four-prong test, citing *Morris*:

In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable.\(^{227}\)

After reviewing eviction cases under the four-prong test, the North Carolina General Assembly amended N.C. Gen. Stat. § 42-26 to state that the “plaintiff proves his case by a preponderance of the evidence,”\(^{228}\) But other rulings, such as that in *Durham Hosiery Mill Ltd. Partnership v. Morris*,\(^ {229}\) found that the language in *Morris* was “clearly dicta because it was unnecessary to the resolution of the case” and that neither “Austraw nor Fleming created a heightened burden of persuasion for plaintiffs in summary ejectment cases.”\(^{230}\) The Court in *Durham Hosiery* concluded that “[T]he Supreme Court did not purport to adopt this language and announce it as the law of North Carolina with this quotation.”\(^ {231}\) Instead, the Court reasoned that the Supreme Court introduced the quotation by stating, “This is said in 32 Am.Jur., Landlord and Tenant § 848 . . . .”\(^ {232}\) Thus, the Court in *Durham Hosiery* concluded the Supreme Court’s decision in *Austraw* [Morris] “did not modify the burden of persuasion for establishing a breach of a lease provision in summary ejectment actions.”\(^ {233}\)

The confusion over the reach of the *Morris* test goes further, particularly regarding the unconscionability rule. In *Maxton Housing Authority v. McLean*,\(^ {234}\) the North Carolina Supreme Court extended the *Patterson* decision by stating that there was no “good cause” for terminating a public housing tenant’s lease agreement because the tenant was not at fault for the nonpayment of rent. The


\(^{228}\) See Ch. 10, sec. 1, 1973 N.C. Sess. Laws 5.

\(^{229}\) 720 S.E.2d 426, 429 (N.C. App. 2011).

\(^{230}\) Durham Hosiery Mill Ltd. Partnership, 720 S.E.2d at 429.

\(^{231}\) Id. at 429.

\(^{232}\) Id. (internal quotation marks omitted).

\(^{233}\) Id.

\(^{234}\) 328 S.E.2d 290 (1985).
Maxton Court stated “[t]here is no causal nexus between the eviction of [tenant] and her own conduct . . . . To eject [tenant] and her two children from their humble abode upon this evidence would indeed shock one’s sense of fairness.”235 However, since the decision, the North Carolina Legislature has restricted the Maxton decision only to evictions regarding non-payment of rent.236 Until recently in Lofton, discussed below, there was no precedent dealing specifically with a subsidized eviction where the issue in question was whether the landlord proved that eviction on the grounds of drug-related criminal activity would not be unconscionable as set forth under the fourth prong. The application of the serious injustice exemption in Somerville and the unconscionability rule of the four-prong test in Lofton has upended the post-Rucker normal state of affairs.

V. TOWARDS A NEW EVICTION JURISPRUDENCE

By drawing out several themes and concepts from the sociological literature on evictions, material hardship, and housing instability, we can unpack what is useful and perhaps groundbreaking about the new eviction jurisprudence proposed in this Article. Indeed, by narrowing the scope of attention of evictions and housing on a population at heightened risk of eviction—low-income mothers living in public housing—we can more forcefully argue the necessity for trial courts to be equipped with more, not less, discretion to deny a One-Strike Rule eviction that leads to serious injustices or unconscionable consequences.

A. Housing Authority of Pittsburgh v. Somerville

The tenant in Housing Authority of Pittsburgh v. Somerville237 had longed to move out of Arlington Heights, a neighborhood in the southern area of the City of Pittsburgh. The neighborhood, like many others in midsize American cities, had been dealt the blow of deindustrialization and poverty associated with the growth of the urban underclass over the last half-Century.238 Arlington Heights, historically, has had relatively high rates of poverty and is home to one of the city’s many public housing projects.239 The history of the neighborhood could

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235. Maxton, 328 S.E.2d at 294.
236. N.C. GEN. STAT. ANN. § 157-29 (West).
238. William Haller, Industrial Restructuring and Urban Change in the Pittsburgh Region: Developmental, Ecological, and Socioeconomic Tradeoffs, 10.1 ECOLOGY. & SOC’Y. 13 (2005) (examining structural changes and transitions of the steel industry with other industries and focusing on the socioeconomic and structural changes on increases in persistent joblessness and poverty associated with growth of the urban underclass).
239. Id. Arlington Heights has a history of being an area of extreme poverty. In Pittsburgh, the areas of extreme poverty ran from downtown, through the Hill District and into West Oakland, which includes parts of the downtown, Crawford-Roberts, Terrace Village, and West Oakland and Arlington Heights. Id. at 18. These areas also exhibited increases in the other manifestations of the underclass, including unemployment, crime, deviant behavior, out-of-wedlock births, etc. Id.
arguably be described as an example of the deep spatial isolation and concentration of the “ghetto poor.”

In Somerville, the tenant was convicted of felony drug offenses in March 2012 for activity that occurred outside of the public housing unit. The Housing Authority of the City of Pittsburgh (HACP) did not learn of the conviction until almost three years later, in April 2014, while reviewing the tenant’s Section 8 application. The PHA was required to conduct a criminal background check as part of the review of the application. As a result, the tenant was denied Section 8 assistance based on the criminal conviction. Only six days later, the PHA filed a complaint under the Expedited Eviction of Drug Traffickers Act to terminate the tenant’s public housing assistance.

At trial, the tenant offered evidence that two and a half years lapsed since the prior conviction and was buttressed by evidence of rehabilitation. The trial record was also supplemented with after-discovered evidence prior to the post-trial relief argument to show that the tenant had become pregnant sometime in late-May or early-June. An eviction after two and a half years of rehabilitation would render an unfair result and pose a risk to increased material hardship, particularly if the tenant was rendered homeless with no shelter while simultaneously attempting to care for her unborn child.


241. See 24 C.F.R. 960.204(a)(4). The tenant had applied for Section 8 housing two years prior to her drug arrest in 2010. Her application awaited review in the notoriously lengthy waitlist until April 2014 when the PHA pulled her application from the waitlist for review. See Somerville, 2014 WL 7734105, at *1

242. Somerville, 2014 WL 7734105, at *1. At the same time, the tenant exercised her right to a grievance hearing, under federal regulations, to have her Section 8 application reviewed by a third-party arbitrator in late-April and was scheduled for a grievance hearing in late May 2014. Id.

243. The trial court relied, in part, on the testimony of the tenant at trial. Judge O’Reilly deemed “worthy of consideration” the tenant’s own statement: “As far as the person who wasn’t allowed to be staying with me, he was my boyfriend, and he would come up from time to time. Once I was made aware that he wasn’t allowed to be on Housing Authority property, that’s when I started getting into it with him about him coming to my house. That’s where other trouble came from. So it was more so me trying to prevent anything further from happening, him not being allowed or whatever. So I would say I responsibly handled that. But as far as the eviction, due to my record, it’s been two years and I’ve been out of trouble. I haven’t been in any trouble. I haven’t dealt with any drugs. I’ve worked. Well, I did two unpaid internships last summer, and I’m currently waiting to start my Wal-Mart training. So, you know, I’m trying to get back on the right path. I’ve been trying to get back on the right path, and I just would like an actual opportunity to do so.” Somerville, 2014 WL 7734105, at *2.
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Further, the record was supplemented with additional after-discovered evidence of the PHA’s denial of the tenant’s Section 8 application, and subsequent overruling of the denial, on the grounds of the tenant’s prior criminal activity. Under federal regulations, a public assistance applicant may request a grievance hearing when a Section 8 application has been denied. At the informal grievance hearing, an officer (attorney) assigned by the PHA heard testimony and took evidence from the tenant that was the same, or substantially the same, as that proffered at the bench trial.

The hearing officer overruled the PHA’s denial and instead approved the tenant’s Section 8 subsidy notwithstanding the prior criminal conviction, concluding that enough time had lapsed and that the tenant’s good standing and progress showed adequate rehabilitation. The hearing officer’s decision showed that a separate, neutral tribunal had exercised nearly the identical reasoning to approve the tenant’s Section 8 public assistance notwithstanding the prior criminal conviction. Thus, the inclusion of the Section 8 approval in the trial records, notwithstanding the conviction, had the effect of strengthening the court’s reliance on the exemption statute, leading the court to determine that the same evidence was sufficient to deny eviction and termination of the tenant’s public assistance. The PHA action to evict amounted to trying for a second bite at the apple.


245. Recent case law in Pennsylvania has strengthened the grievance hearing process, including appeals from adverse decisions that deny applicants subsidized housing. In Bray v. McKeensport Hous. Auth., 114 A.3d 442, 453 (Pa. Commw. Ct. 2015), the Commonwealth Court held that a PHA’s determination to deny or approve a public housing applicant is akin to having tenant’s property rights and thus was an “adjudication” subject to judicial review. The case overruled longstanding precedent in Cope v. Bethlehem Hous. Auth., 514 A.2d 295 (Pa. Commw. Ct. 1986). Indeed, the court acknowledged that applicants for public housing have a legitimate expectation that their applications will be fully considered and not unfairly denied. Therefore, the applicants have a cognizable property interest in having their applications considered in accordance with guidelines set forth under local and federal regulations, and such decisions are subject to appellate review pursuant to 2 PA. STAT. ANN. § 752 (West 2015).

246. See Defendant’s Brief in Response at 9, Hous. Auth. of Pittsburgh v. Somerville, No. GD 14-7207, 2014 WL 7734105 (Pa. Com. Pl. Dec. 8, 2014). At the Section 8 grievance hearing, held May 28, 2014, the officer reviewed the tenant’s application, and notwithstanding the criminal conviction, overturned PHA’s Section 8 application denial and, instead, approved the Section 8 application. Significantly, the hearing officer’s reasons for approving the Section 8 application at the grievance hearing were nearly identical in substance as the trial court’s decision to deny the eviction of the tenant a few weeks earlier. The hearing officer stated that (1) the tenant completed two internships at the Student Conservation Association; (2) completed probation for the 2012 criminal conviction; (3) acknowledged that the criminal conviction was an isolated conviction that occurred two and half years ago; and (4) Defendant had otherwise rehabilitated herself. An argument for collateral estoppel was made in the Defendant’s Brief in Response because the housing authority, arguably, was re-litigating the same issue that had already been decided in a prior action; that is, the Section 8 grievance hearing office approved the Section 8 public assistance in light of the prior criminal activity and the trial court had denied the termination of public housing assistance in light of the prior criminal activity. However, the trial court only mentioned, but did not elaborate on, the collateral estoppel.

The trial court’s opinion unveils an eloquent application of the exemption statute that significantly strengthens and further clarifies the discretion entrusted to the judiciary by the Pennsylvania Legislature. Indeed, the trial court reviewed “the circumstances of the criminal activity” and holistically considered the “condition of the tenant” when determining whether it was “clearly convinced” that the immediate eviction or removal would “[a]ffect a serious injustice.” Somerville was a qualified candidate for the above consideration [statutory exemption]. The record shows that she had acknowledged her crime, pled guilty and successfully served her 18-month probation. Further, she had concluded her probation well before HACP did anything to evict her. Indeed over 6 months had elapsed since completion of the probation and over 2 years from the date of the actual crime and her guilty plea. I find this delay to be indicative of her nonthreatening character and life style . . . . In my judgment, however, it would be a serious injustice to her to evict her when significant time has elapsed and she appears to be on the right track. This is buttressed by the after-discovered evidence that she is pregnant and had been certified for Section 8 housing notwithstanding her conviction. Counsel for HACP also argued that the standard for me to have done what I did requires clear and convincing evidence. Evidence of what? Presumably it is evidence that I am clearly convinced that her eviction would result in a serious injustice as set out in the statute.

The exemption was inserted into the legislation to protect tenants from unjust evictions where “such a case can be made out.” Indeed, the Somerville ruling is an example of precisely the type of eviction case that the Legislature hoped the exemption would protect. The burden of proof for the affirmative defense of a serious injustice was clear and convincing evidence. The trial court stated that its standard of review is whether the court is “clearly convinced that her eviction would result in a serious injustice as set out in the statute.”

The “clear and convincing evidence” standard thus falls somewhere between the “preponderance of the evidence” and “beyond a reasonable doubt” standards. The court did not adhere to the traditional abuse of discretion standard. The Somerville case lays the groundwork for what will inevitably be a clash between

249. Id. at *1–2.
250. See H.R. 57, supra note 188 at 375.
251. 35 PA. STAT. ANN. § 780-157(c) (West 2015) (“The burden of proof for the affirmative defense set forth in subsection (b) shall be by clear and convincing evidence.”).
the statutory exemption under 35 P.S. § 780-157(b) and the federal regulation under 42 U.S.C. § 1437d(1). This clash is inevitable because the HACP, in response to the ruling, appealed the decision to the Pennsylvania Superior Court. The case was later discontinued by the HACP when the tenant preempted the terminated lease agreement once she found alternative housing using, ironically, her Section 8 voucher. On appeal, the HACP had raised two legal issues that hint at a forthcoming preemption argument the next time the statutory exemption is raised by a tenant and relied upon by a trial court. At the post-trial relief hearing, the HACP’s reply brief responding to the defendant’s brief in response concluded that “even the most liberal reading of this requirement [that there must be compelling evidence of a federal intention to preempt a state law], it is obvious that a federal program on housing (HUD) and federal tax dollars, are compelling evidence of the intention to preempt.” The Somerville ruling, nonetheless, has provided some much needed judicial interpretation of the statute.

The material hardship facing the tenant in Somerville is worth noting. The fallout of eviction for the tenant, who was expecting her first child, would have likely thrown her into a downward spiral of homelessness, contributing to health problems during prenatal care and throughout the course of her pregnancy, thereby threatening the health of her child. Further, an eviction on her record would likely make her Section 8 voucher superfluous when participating Section 8 landlords found not only her conviction, but her eviction record, upon conducting a background check. As sociologists have predicted, the year following eviction can prove difficult for poor women with children. The statutory exemption helped avoid such consequences.

### B. Eastern Carolina Regional Housing Authority v. Lofton

In *Eastern Carolina Regional Housing Authority v. Lofton*, the tenant was a mother with three minor children. The tenant was a habilitation technician

253. See Superior Court of Pennsylvania Civil Docketing Statement, 55 WDA 2015 (Jan. 3, 2015). The HACP raised the issues (1) The trial court erred in not evicting the tenant under 35 PA. STAT. ANN. § 780-157(b) (West 2015) when the HACP had proven that the tenant had engaged in drug-related criminal activity and there was no applicable exception; and (2) the trial court erred by finding evidence of a serious injustice overriding the need to protect the rights, safety and health of the other residents. The appeal was later discontinued when it was discovered that the tenant had successfully leased an alternative apartment using her Section 8 voucher that had been approved and distributed to the tenant months earlier while eviction proceedings were ongoing. See Superior Court of Pennsylvania Notice of Discontinuation, 55 WDA 2015 (Feb. 11, 2015).


255. 767 S.E.2d 63 (N.C. Ct. App. 2014). The tenant’s boyfriend regularly baby-sat the tenant’s children. In April 2013, while caring for the children, the tenant’s friend was arrested on the premises for drug possession. The tenant was home at the time, but was sleeping upstairs to get rest before her work shift started later that evening. The tenant subsequently authorized the officers to search the entire apartment, and the police found more drugs in the kitchen. The drugs belonged to the tenant’s friend and the tenant was not charged with any crime.
working with persons with mental illnesses. The tenant’s mother and niece periodically served as babysitters for her children when she went to work. However, after the tenant moved to public housing, her mother and niece were no longer available to babysit. As a result, the tenant relied upon her boyfriend, who started to baby-sit the tenant’s children regularly.

In April 2013, while caring for the children, the tenant’s boyfriend was arrested on the premises for drug possession. The tenant was home at the time, but was sleeping upstairs before her work shift started later that evening. The tenant subsequently authorized the officers to search the entire apartment, and the police found more drugs in the kitchen. The drugs belonged to the tenant’s boyfriend and the tenant was not charged with any crime.

The PHA commenced eviction proceedings on the grounds of drug-related criminal activity. The district magistrate court found in favor of the PHA and ordered possession. The tenant appealed, arguing that the magistrate failed to consider her lack of control over her friend and lack of knowledge of his activities. The tenant primarily argued the fourth prong of the Morris test. The court in Lofton found that the PHA did not meet the fourth prong by failing to show eviction would not be unconscionable. The court acknowledged “neither this Court nor the Supreme Court have defined the circumstances under which it would or would not be unconscionable for a landlord to summarily eject a tenant who was otherwise subject to eviction.” In an effort to arrive at a rational interpretation of the language, the court defined unconscionability to mean “‘excessive, unreasonable’ or ‘shockingly unfair and unjust.’” The court reasoned that, since the tenant was not charged with a crime and the police accepted her denial of involvement, it would be “unconscionable” to evict her and her young children when the evidence was clear that she had no involvement whatsoever in the events that transpired the day her boyfriend was arrested. By not giving “any consideration to any of the surrounding facts and circumstances that tended to mitigate, if not completely excuse, her conduct in allowing [the boyfriend] to enter the premises,” the magistrate court erred in ordering the ejectment and affirmed the trial courts denial of summary judgment and denial of the landlord’s request to summarily

256. Id. at 65.
257. Id.
258. Lofton, 767 S.E.2d at 65.
259. Id. at 65–66.
260. Id. at 66.
261. Id.
262. Id.
263. Id. at 67 (citing Charlotte Hous. Auth. v. Fleming, 473 S.E.2d 373, 375 (1996)).
264. Lofton, 767 S.E. 2d at 68.
265. Id.
266. Id.
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Indeed, the court eloquently applied the unconscionable provision of N.C. Gen. Stat. 42-26(a)(2):

After analyzing the totality of the surrounding facts and circumstances, we have no hesitation in concluding that evicting Defendant based solely upon the actions of Mr. Smith, of which Defendant had no knowledge and which she had done nothing to encourage or even tolerate when doing so would put Defendant and her three small children “on the street,” would be “excessive” and “shockingly unfair or unjust” and that Plaintiff has not, for that reason, established that summarily ejecting Defendant from the apartment would not produce an unconscionable result.

The court further set aside the PHA’s preemption argument. The PHA argued that existence of a strict liability rule could not be reconciled with a prohibition against unconscionable evictions and that by relying on the provision the trial court made it impossible to comply with 42 U.S.C. § 1437d(1)(6) because there was little distinction between the innocent tenant defense rejected in Rucker and N.C. Gen. Stat. 42-26(a)(2). Further, the court pointed out that the facts in Lofton went beyond the typical “innocent tenant” situation and that, given all the circumstances of the criminal incident and the condition of the tenant—losing her job because she lacked a babysitter and having three young children—the court, like the Somerville court, was convinced that the landlord had not shown how the eviction would not be unconscionable.

The court reasoned that awareness, or lack thereof, of the criminal activity ongoing on the premises is “one aspect of a broader unconscionability analysis that would not, in each and every instance, preclude the eviction of an ‘innocent’ tenant.” Thus, the statute gave discretion, particularly where the tenant was unaware of criminal activity, for a court to deny an eviction and did not stand as an obstacle to the goals set forth in the federal regulations. In other words, the North Carolina court upheld the discretion authorized to the trial court under N.C. Gen. Stat. 42-26(a)(2) to apply the unconscionability prong, even if the decision overrules the decision of an administrative agency. Indeed, North Carolina courts, and other state courts, “do not look with favor on lease forfeitures.” The sociological literature finding grave consequences for poor, single mother heads of household upon eviction, similarly, does not look favorably on lease terminations as well.

267. See Lofton, 767 S.E.2d at 68.
268. Lofton, 767 S.E.2d at 68.
269. Id. at 70.
270. Id.
271. Id.
C. Charting a Course for a New Eviction Jurisprudence

I. The Doctrine

Under a new eviction doctrine, contributing to a new eviction jurisprudence, trial courts would apply a heightened standard of review to summary proceedings against subsidized tenants on the grounds of drug-related activity. The evictor would have to show, by clear and convincing evidence, that eviction would not lead to serious injustices or unconscionable results, such as material hardships, housing instability or other aspects of a broader analysis. This new doctrine would not bar One-Strike evictions; it would effectively restrict them when involuntary removal would clearly be unjust as determined by the trial court. Currently, the civil burden of proof—preponderance of the evidence—is not adequately responding to rapidly changing private and public housing instability for the poor in light of the sociological research evidencing disproportionate impacts on low-income single mothers. The current standard is simply ill-equipped to handle One-Strike eviction proceedings that, inherently, involve criminal conduct.

It is not difficult to conceive a heightened standard of review in eviction proceedings. The Supreme Court has engaged the clear and convincing standard of proof in other similarly situated proceedings, including termination of parents’ custody of children and involuntary commitments of those to mental hospitals. 273 This approach, informed by recent sociological literature of the fallout of eviction, may help convey to trial courts reviewing summary evictions the level of subjective certainty about the courts conclusions. It also strikes a fair and balanced approach to the rights of the tenant and her household and the legitimate concerns of the proliferation of drugs in public housing.

The clear and convincing standard could be overcome where the PHA takes into consideration the nature of the criminal offense, the condition of the tenant, and the consequences the tenant faces upon forced removal. A doctrine that requires heightened review of PHA’s eviction decisions is justified and may go a long way in preventing increased material hardship and housing instability for an extremely vulnerable class of public assistance recipients. PHAs would need to show that the eviction would not lead to injustices and would be required to provide more thorough and compelling justification for removal than simply a finding of drug-related activity.

A new eviction jurisprudence requires more than empathy and understanding from the bench. This jurisprudence will require trial court rulings to fill the gaps

273. Santosky v. Kramer 102 S. Ct. 1388, 1391 (1982) (holding that due process requires a state to prove “its allegations by at least clear and convincing evidence” when initiating an action to terminate parental rights); Addington v. Texas, 441 U.S. 418, 433 (1979) (holding standard in commitment for mental illness must inform the fact finder that proof must be greater than the preponderance of evidence standard applicable to other categories of civil cases, and that clear and convincing evidence is an adequate standard of review).
in statutory provisions with rulings that strengthen and further conceptualize what a “serious injustice” and “unconscionability” means. It is arguably the role of courts to read further into a piece of legislation where such legislation lacks jurisprudential precedent and its terms lack definitional guidance. 274

2. Subsidized Households Headed by Poor Women with Children

The Somerville and Lofton courts strengthened the notion that PHAs have to prove more than just criminal activity. And when they do not, courts will intervene to deny summary ejectments or evictions. With clearly delineated constitutional protection of property rights in public housing tenancies, tenants most directly impacted by unjust evictions need a heightened eviction standard. Indeed, this new eviction jurisprudence gives special considerations for the constitutional protections of property afforded to groups most vulnerable to the One-Strike Rule: households headed by poor women with children.

It is not difficult to see such special considerations being implicitly invoked under the serious injustice exemption and the unconscionability rule because those most impacted by the One-Strike Rule campaign are “poor single minority female heads of households, often senior citizens, who are living with their actual or adopted offspring . . . .”275 Indeed, mothers and grandmothers are generally innocent and often even ignorant of any criminal activity.276 However, they are nonetheless held responsible and, ultimately, disproportionately burdened with the fallout effects of eviction, pushing them into extreme social and economic vulnerability. Poor single female heads of households, often senior citizens or younger women, become embattled in an eviction proceeding that usually starts with an arrest or conviction of an adolescent or young adult male child or grandchild who is selling or possessing drugs.277

The tenants in Somerville and Lofton were no exceptions. Beyond being an unfair punitive policy for public housing tenants, the One-Strike Rule has been viewed by some scholars as an “assault” on the values of women who ordinarily take a protectionist approach to caring for their children, including using the home as a safeguard from contact with drugs.278 Lofton lost her job and subsequently lost access to childcare once she found a new job. Of course, her

274. Edward Lazarus, Overall, The Miers Nomination Is Troubling But It Does Have One Virtue, FINDLaw (Oct. 13, 2005), http://writ.news.findlaw.com/lazarus/20051013.html (“All significant legislation is riddled with gaps that need to be filled in by courts. While judges are guided in their “interstitial” lawmaking function by what they perceive to be the intent of the legislature, it is disingenuous to suggest that judges do not add content to the frameworks provided by legislatures. Judges, of course, don’t write new law on a blank page, but they do write important law between the lines of what legislatures have already written.”).
276. Id.
277. Id. at 275.
278. Id. at 286.
main priority was to keep her children safe by seeking a babysitter. Thankfully, her boyfriend was able and willing to do the job. Stereotypical biases, however, all too often “keep PHAs from exercising their discretion in favor of these tenants even when they are clearly innocent.”

Indeed, the standards placed upon leaseholders by PHAs to take control of the home and to reinforce non-drug-related activity disproportionately penalizes single, particularly African American, women. PHAs often “fail to take into consideration the reasons why a woman may remain silent or fall short of a courts’ standard for assertiveness in the face of a partner or family member’s drug-related criminal activity.” The courts’ standard of assertiveness imposed on the tenant, of course, is tantamount to a request to engage in the third-party policing tactics that have unfairly targeted the urban poor. The PHAs’ solution, when households headed by women fail to successfully third-party police her home, is to resort to the easy and efficient no-fault, One-Strike, eviction policy.

There are many factors that contribute to a single mother remaining in public housing, such as domestic violence, economic dependence, or a disability that, by nature, requires support from others in the neighborhood or family to assess medical care and to help out with other responsibilities. PHAs and courts, however, have long ignored the strong social and familial ties that public housing residents enjoy just to get by. Grandmothers have even been drafted as the culprit class of victims of the One-Strike Rule.

Among those most vulnerable to eviction are innocent grandmothers. Recall the Rucker decision, where three of the four plaintiffs were either elderly or grandmothers caring for grandchildren, one of whom was disabled. The One-Strike rule makes innocent tenants, particularly elderly residents, fearful and anxious and potentially threatens their lives.

279. See Melissa Cohen, Vindicating the Matriarch: A Fair Housing Act Challenge to Federal No-Fault Evictions from Public Housing, 16 MICH. J. GENDER & L. 299, 306 (2009–10). Regina Austin argues that the policy is motivated by a desire to “control the behavior of the stereotypical welfare mother who is full of excuses for her progeny and always ready to overlook their shortcomings where drugs are concerned, out of an abundance of misguided materialism.” See Austin, supra note 94, at 286. Main N. Morrison argues that an explicit motive to stereotype black mothers is a primary reason for imposing the One-Strike Rule and that two competing stereotypes drive this policy. First, black women are presumed to have knowledge of their children’s drug use and are powerless to fix it. Second, black women are presumed to be strong matriarchs who have knowledge of and are intimately involved in the drug-related activity. See Main N. Morrison, The Knowledge/Power Dilemma and the Myth of the Supermother: A Critique of the Innocent Owner Defense in Narcotics Forfeiture of the Family Home, 7 COLUM. J. GENDER & L. 55, 59 (1997).


281. Id.


283. See Austin, supra note 195, at 278.

284. Id. at 280.
of [their] household[s].”

PHAs and courts also impose a worldview of self-determination: that the head of household, grandmothers in particular, must somehow foresee and forestall bad acts by refusing any and all suspicious guests or family members from entering the premises.

In many circumstances, there is often a clear lack of knowledge that grandmothers have of their grandchildren’s criminal activity. Arguably, many elderly heads of household express antipathy to drugs. But, the grandchildren usually attempt to keep the proscribed illegal drug activity secret. Further, grandmothers in public housing have become romanticized as the bedrock of the traditional black community and valorized for taking care of grandchildren, which leaves the elderly with no choice but to risk caring for the kids in the face of having no knowledge or a lack of knowledge of potential criminal activity.

In other words, the One-Strike Rule requires mothers and grandmothers to live according to a state-imposed, paternalistic rationality that subjugates maternal senses of authority. The unusually harsh punitive measures imposed by the One-Strike Rule impacts women and children the most. Thus, scholars and practitioners have for some time argued that the “inclusion in the law of a fault requirement that takes into account [mothers’] best efforts to mitigate the harm to their neighbors while trying to salvage their children’s lives” is necessary to ameliorate the debilitating hardships created by evictions. The inclusion of a fault requirement is a step in the right direction, but more substantive statutory protections are necessary to fully equip tenants with the tools to fight unjust evictions.

3. Rationalizing Trial Court Discretion over PHA Determinations

What makes the serious injustice exemption and the unconscionability rule truly novel in the public housing context is that the statutes codify trial court discretion to take into consideration not only mitigation efforts or innocence, but a variety of other circumstances surrounding the incident of criminal activity and the condition of the tenant at the time the incident occurred. This carefully calibrated matrix of factors is what sets the statutes apart from the traditional...
defenses employed for tenants in eviction proceedings. Thus, when faced with evictions of subsidized tenants, who live disproportionately in households headed by women with children, the judicial discretion authorized by the serious injustice exemption and the unconscionability rule recognize that the needs and vulnerabilities of those groups should be considered, irrespective of the strict-liability policy permitted by the Court in Rucker. The value of this “new eviction jurisprudence” is that it is a litigation road less traveled than the road so frequently taken on mitigation and innocence.

One way to rationalize the importance of giving trial courts discretion in civil proceedings to consider the extent of the criminal activity and the condition of the tenant at the time of eviction, is to compare such discretion to criminal sentencing guidelines and criminal proceedings. The comparison is apt. It provides a different perspective on the necessity of trial court discretion over matters where a person’s property interests in subsidized housing, like a person’s liberty when facing imprisonment, is at stake.

The standard required in most criminal proceedings is proof beyond a reasonable doubt. Pennsylvania law, for example, permits trial courts to deviate from sentencing guidelines under the Pennsylvania Sentencing Code when determining an offender’s sentence.\(^289\) Sentencing judges may take into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community, as long as the trial court also states on the record “the factual basis and specific reasons which compelled him to deviate from the guideline range.”\(^290\)

Pennsylvania appellate courts, likewise, are guided by certain rules regarding review of a criminal sentence. They may have regard for the *nature and circumstances of the offense* and the history and characteristics of the defendant.

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\(^{289}\) 42 PA. STAT. AND CONS. STAT. ANN. § 9721 (West 2015).

\(^{290}\) See Commonwealth v. Eby, 784 A.2d 204, 206 (Pa. Super. 2001) (quoting Commonwealth v. Davis, 737 A.2d 792, 798 (Pa. Super. 1999)) (emphasis added). In Commonwealth v. Johnson, 666 A.2d 690, 693 (Pa. Super. Ct. 1995), the Court stated that the trial judge may deviate from the guidelines after considering “the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense . . . so long as he also states of record the ‘factual basis and specific reasons which compelled him to deviate from the guideline range.’” In 1974, the Pennsylvania General Assembly passed the Code for trial judges to use in determining sentences. In 1978, the Pennsylvania Commission on Sentencing was created to establish the Sentencing Guidelines, which trial courts were to follow. Then, in 1982, the Assembly approved the Guidelines created by the Commission and later amended. See Sentencing Guidelines, 204 Pa. Code § 303.1(c)(2) (2010). However, in Commonwealth v. Walls, 926 A.2d 957, 964–65 (Pa. 2007), the Court reaffirmed that the Guidelines were not binding and that they did not predominate over other sentencing considerations. 42 PA. STAT. AND CONS. STAT. ANN. § 9721 (West 2015) states that “the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 . . . . In every case where the court imposes a sentence or resentence outside the guidelines adopted by the Pennsylvania Commission on Sentencing . . . the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines to the commission . . . .”
when reviewing an appeal of a sentence.\textsuperscript{291} This requirement is most vivid in \textit{Commonwealth v. Mouzon}, where the Pennsylvania Supreme Court reviewed a challenge to the discretionary aspects of a sentence imposed within the statutory limits.\textsuperscript{292} The Court recognized that the guidelines were put in place to address disparities in sentencing, that the guidelines are not mandatory and trial courts “retain broad discretion in sentencing matters.”\textsuperscript{293} The Pennsylvania Superior Court, likewise, has asserted in \textit{Commonwealth v. Minott} that “[a]lthough the sentencing guidelines specify definitive ranges of minimum sentences, the adoption of the guidelines was not intended to preclude judicial discretion.”\textsuperscript{294} Thus, before overriding or refusing to review the decision of trial courts, appellate courts must determine whether the sentence is so \textit{manifestly excessive} that it constitutes too severe a punishment.\textsuperscript{295}

In \textit{Commonwealth v. Vanderhorst}, the court found that “considering all of the circumstances particular to this case . . . the lower court in Vanderhorst did not abuse its discretion by imposing an unreasonably lenient sentence.”\textsuperscript{296} The Superior Court in \textit{Vanderhorst} overturned the Commonwealth Court, which previously had overruled the trial court’s decision to deviate from the sentencing guidelines by imposing a lenient sentence. The Superior Court found that the trial court did not abuse its discretion when it looked at the offender’s past criminal record in conjunction with the fact that he had a “good employment history and a supportive family and that he had rehabilitated himself following his bout of criminal activity during his late teens and early twenties.”\textsuperscript{297} Such considerations, the Court noted, were specifically permitted by the Legislature.\textsuperscript{298}

Whether it is an eviction for drug-related criminal activity or imprisonment for drug-related offenses, authorizing trial court discretion and appellate oversight of that discretion where necessary may go a long way to reducing unnecessary material hardship and increased housing stability contributing to concentrated urban poverty. The tenant in \textit{Somerville} showed adequate rehabilitation and had led a life of positive progress after enduring the

\textsuperscript{291} See 42 PA. STAT. AND CONS. STAT. ANN. § 9781(d)(1) (West 2015) (emphasis added).
\textsuperscript{292} 812 A.2d 617, 620 (Pa. 2002). See also \textit{Commonwealth v. Frazier}, 500 A.2d 158, 161 (Pa. Super. Ct. 1985). Further, the sentencing guidelines are advisory only. See In re J.M.P., 863 A.2d 17, 19 n.4 (Pa. Super. Ct. 2004) (“We recognize that the Sentencing Guidelines are merely advisory and sentencing judges may sentence outside of the guidelines if they deem it appropriate to do so and offer good reasons.”). In \textit{Commonwealth v. Chesson}, 509 A.2d 875 (Pa. Super. Ct. 1986), the Court emphasized the importance of the procedural aspects of the sentencing Code and guidelines, stating that the “sentencing code, however, mandates that sentencing courts consider the guidelines before sentencing. Manifestation of such consideration is statutorily required when the court deviates. And, of course, the reasons for deviation must be ‘adequate.’” \textit{Id.} at 876–77.
\textsuperscript{293} \textit{Id.}
\textsuperscript{297} \textit{Id.}
\textsuperscript{298} \textit{Id.}
punishment of probation, court costs and other punitive measures resulting from her conviction almost three years earlier. The discretion exercised by the Somerville court—substituting its judgment, based on the facts, for the PHA’s—resulted in a decision that helped forestall the prospect of yet another young mother and child being rendered homeless.

4. Avoiding the Fallout Effects of Eviction

The definitions of “serious injustice” and “unconscionable” are perhaps the most complicated aspects of the statutes. Where a PHA has ignored or refused to consider certain facts of the case that would lead a reasonable person to a different conclusion, the trial court should be authorized to supplement its judgment in place of the PHA’s to safeguard against a serious injustice or unconscionable result. A new eviction jurisprudence would amalgamate serious injustice and unconscionable consequence to mean an event or an act that causes profoundly unjust treatment that is likely to expose the defendant (tenant) to a heightened degree of danger if the event or act (eviction) is commenced. Indeed, this requires a heightened standard of review.

As Desmond’s research shows, an eviction that causes unconscionable results is one where homelessness looms, contributing to higher rates of adolescent violence, material hardship, poor school performance, mental health problems, victimization, respiratory disease, and delayed literacy in children. An eviction that results in a serious injustice occurs when a poor tenant is subject to having an eviction on her record due to circumstances she could not have controlled, foreseen or prevented. A serious injustice is falling further to the bottom of the rental market and resorting to dilapidated and uninhabitable shelter upon eviction. A serious injustice of unconscionable proportions is the specter of prolonged periods of homelessness that results in a vicious cycle of street and sheltered homelessness.

Indeed, a carefully calibrated consideration of a matrix of factors under the unconscionability rule and serious injustice exemption is essential for PHAs and courts to follow when deciding the fate of a tenant. Courts cannot, and are not required to, sit back as mere observers of the One-Strike Rule and permit PHAs to exercise abusive discretion over who stays and who goes from public housing or Section 8 housing. Such passiveness, without due regard for the welfare of those affected by the eviction, would be contrary to the basic values of human dignity.

Over 15 years after the Rucker decision was handed down by the United States Supreme Court, it is interesting to see how the “absurdity” discussion between the Ninth Circuit and the Supreme Court has now been resurrected, particularly in the Lofton case. The Eastern Carolina Regional Housing

299. See supra Part I.
Authority’s conviction that a statute requiring a landlord to prove a negative\textsuperscript{300}—
that the eviction would not be unconscionable—would create “absurd”
consequences is precisely the opposite conclusion that the Ninth Circuit found by
permitting a strict-liability One-Strike policy. A counterfactual helps understand
why the housing authority is probably on the losing end of this battle.

If it would be absurd to evict a single mother with three young children
whose boyfriend was a last resort babysitter simply because the tenant permitted
her boyfriend into the apartment, unaware of his drug activity, then it surely
would not be absurd to require the landlord to show affirmatively that the
removal of the tenant would not create unconscionable consequences. If
anything, the additional burden imposed on the landlord evens the playing field
for tenants. Critics of the unconscionability rule run the risk of basing
counterarguments on weak conceptual foundations of fundamental fairness.

The counterargument—that the rule will give rise to tenants invoking the
unconscionability prong for non-payment of rent evictions or any other default
by which the landowner becomes financially insolvent—is probably the most
absurd of conclusions. The tenant who is unable, or unwilling, to pay rent; or the
tenant who knowingly permits a drunk guest to enter the premises who
subsequently damages property; or the tenant who, as a last resort, pleads
homelessness just to forestall proceedings will likely be given curt treatment by
the trial courts. The very design of the serious injustice exemption and the
unconscionability rule guide trial courts to assertively ascertain the facts to make
a reasonable determination.

The language of the statutes also goes a long way in rationalizing
fundamental concepts of fairness, particularly where sympathy for a victim is
naturally of concern in the decision-making process. PHAs and pro-tenant
advocates are guilty of the “sympathy ploy.” Those in opposition to courts
substituting judicial discretion over administrative discretion often invoke
sympathy, or at least acknowledge as much, as a tactic to tacitly veer courts away
from considering factors that require subjective reasoning. Moreover, they may
argue that this subjective reasoning will invariably have discriminatory effects.

For example, PHAs often acknowledge, and agree, that subsidized tenants
facing eviction, such as Somerville or Lofton, are sympathetic due to their
personal and financial situations, but when it comes to evicting for drug-related
criminal activity, even if innocent or rehabilitated, the PHA argues that its hands
are tied by federal regulations enacted to ease enforcement difficulties.\textsuperscript{301} This is
a clever tactic because it creates a perception—one that judges often want to
avoid—of patience, sympathy, and empathy. Tenant advocates employ notions of
sympathy for a different reason: to keep the tenant in the apartment and offer a
more humane resolution. This also has its drawbacks. It is of no use to the tenant

\textsuperscript{300} See Clark v. Western North Carolina R. Co., 360 N.C. 109, 111 (1863) (“They are put by the
law under the heavy burden of proving affirmatively, a negative.”) (emphasis added).

in subsidized evictions, or when facing a One-Strike eviction, to create a perception that denying the eviction is tantamount to a “plea for charity rather than an assertion of rights.” Such a perception, arguably, does more harm than good even when pro-tenant litigants employ these litigation tactics.

With the advent of the serious injustice exemption and unconscionability rule, the statutes help guide courts in substantive and procedural principles of law and equity, not patience and empathy. For example, both the serious injustice exemption and the unconscionability rule require a landlord, to some extent, to prove a negative—to show that eviction would not lead to unconscionable results or serious injustices. Of course, such a requirement is a heavy burden for landlords. However, when the issue facing the court is the loss of constitutional protections of property afforded to some of the nation’s poorest populations—subsidized households headed by poor women with children—such heightened burdens of proof are necessary.

This “new eviction jurisprudence” balances the rights of the tenant, who undeniably hold property interests in a subsidized unit, with the property rights of the PHA and its responsibility to protect the health and safety of the other residents. It is a balancing act, indeed, but a balance that is necessary, because one party to a proceeding is a subsidized tenant who inevitably faces some form of homelessness—sheltered or street—upon eviction. Thus, the right of a poor tenant to continue to live in subsidized housing and the protections that give effect to that right under the serious injustice exemption and the unconscionability rule are important for the constitutional protections afforded to property interests held by those most vulnerable to the One-Strike Rule.

CONCLUSION

Providing courts with more discretion to deny an eviction by way of statutory exemptions and rules is an important step toward fully embracing the notion that the plight of the urban poor is malleable, not static. A One-Strike eviction should not be viewed as black and white and inflexible when analyzed by state courts. Indeed, the statutory provisions discussed in this Article are novelties in the post-
Rucker era and ensure that the opportunity for the poor and vulnerable to be heard is tailored to the capacities and circumstances of their lives. The unconscionability rule creates new avenues for substantively protecting the property interests of subsidized tenants who are innocent and who endure other factors and conditions that make eviction unreasonable. State courts should follow the examples of the Somerville and Lofton rulings, which give trial courts wide-ranging discretion to overrule an administrative agency’s decision to evict if the eviction is unjust or unfair.

There are several other alternatives to advance this “new eviction jurisprudence,” all of which are beyond the scope of this Article and would require further investigation into both the regulatory and administrative requirements to change the normal state of affairs. One option is for HUD to amend its regulations to include some rendition of the serious injustice exemption and unconscionability rule under 42 U.S.C. § 1437. This may ease the contentious preemption debates rumbling today in state courts throughout the country regarding the One-Strike Rule. Further, such an amendment would essentially remove the One-Strike Rule and serve as one more step toward dismantling the failed policies of the War on Drugs. State legislatures elsewhere could also amend and/or enact new legislation giving effect to the serious injustice exemption and unconscionability rule. A normative interpretation of the Pennsylvania and North Carolina statutes serve as the foundation for a “new eviction jurisprudence” that gives special consideration to the constitutional protections of property afforded to groups most vulnerable to the One-Strike Rule: households headed by poor women with children.